
BY

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Master of Social Work

Department of Social Work
University of Manitoba
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Abstract

This is a study of the issues arising from the implementation of the split jurisdiction of the Young Offenders Act in Ontario. Although the federal government established the YOA, the provinces are responsible for its implementation and administration. In response, the province of Ontario has made minimal changes to the administrative structure in existence before the introduction of the YOA. At that time, 12 to 15 year olds were considered to be juveniles and came under the jurisdiction of the Ministry of Community and Social Services. Persons who were 16 years of age and older were considered to be adults and came under the jurisdiction of the Ministry of Correctional Services. Ontario’s continued reluctance to conform to the intent of the Act can be seen in the two-tiered system it has developed for young offenders which is based primarily on the system previously intact.

Caputo and Bracken (1988) assert as follows: "Since one Ministry has a rehabilitative orientation and the other a corrections orientation, there is some question about how this affects the programs offered by the two" (p. 135). There is a lack of legislative and jurisprudential guidance for youth court judges and the ministries involved relative to the application of sentencing principles, dispositions, reviews, custody, supervision and treatment.
This research evaluates these inconsistencies in dealing with young persons from within the two-tiers of this system of split jurisdiction. Both an empirical and an historical focus are used to build a case for the argument that the implementation of the YOA by a two-tiered system of courts and service delivery results in young persons being adjudicated and treated differently dependent upon their age. Furthermore, the two-tiered system results in young persons receiving differential and inappropriate treatment with respect to their needs for rehabilitation.
Glossary

YOA: Young Offenders Act
JDA: Juvenile Delinquents Act
MCS: Ministry of Correctional Services
COMSOC: Ministry of Community and Social Services
MCSS: Ministry of Community and Social Services
CFSA: Child and Family Services Act
Doli Incapax: age of incapacity
Mens Rea: the guilty mind; the criminal term used for intent to commit a crime
in-camera: in private
voir dire: trial within a trial: a hearing where evidence is heard by a judge to determine whether an accused's statement given to a person in authority was voluntary
laying an information: process whereby a criminal charge is commenced
BPI: Basic Personality Inventory psychological test
caveat: a notice to other
parsens patriae: the state as parent
IPS: Intensive Probation Supervision
TA: temporary absence
1.0 Overview of Thesis

On July 7, 1982, the Young Offenders Act was given Royal Assent. It was to be proclaimed for effective implementation April 1, 1983. However, in September 1982, the Honourable Robert Kaplan, Solicitor General of Canada, acceded to the strong requests of several provinces, in particular, Ontario, and deferred the federal government's proclamation until October, 1983 (Michaelis & Lowery 1982).

This new legislation (hereinafter to be referred to as the YOA) was the culmination of the two decades of effort by the federal government to reform the juvenile justice system in Canada. Previously it had been governed by the Juvenile Delinquents Act (hereinafter to be referred to as the JDA) which had been in force without substantial revision since 1908. The YOA reflects some of the fundamental changes in the conception of, and reaction to, juvenile deviance which have occurred over the previous seventy-four years in Canada (Michaelis & Lowery 1982).

The JDA was characterized by the philosophy of benign paternalism known as parens patriae whereby the courts could act as a wise though stern parent dedicated to "saving" children. The JDA helped to foster a discretionary system that did not always practise a welfare model of youth justice but fostered a system that was often arbitrary, harmful to young persons and violative of their basic rights under the guise of rehabilitation.
When a court determined that a young person be sent to a training school, the sentence was for an indeterminate period. Those responsible for administering the training school, not the courts, would determine the length of stay for a young person transferred to one of the provincial facilities.

... A young person might be transferred to a training school for a relatively minor offence or indeed for behaviour, for which an adult would not even constitute an offense, and be kept at such a facility for lengthy periods of time. The training school ward issue created concerns that young persons were being denied "due process" as a result of these indeterminate sentencings (Wright, 1991, p. 5).

The replacement of the JDA by the YOA provided a totally new legal framework to deal with that part of our population who are not children and who are not adults, otherwise referred to as adolescents. It applies to youthful individuals who are between 12 years of age and 17 years of age inclusive. The federal government intent is that the YOA apply uniformly across Canada.

Proclamation on October 1, 1983, was complete except with respect to the provision referring to maximum age. The establishment of a uniform age across the country came into force, mandatorily, in April 1985. This coincided with the provision of the Canadian Charter of Rights and Freedoms guaranteeing against discrimination based on age, which also came into force in April 1985. Until that time, in Ontario, the JDA applied to youthful individuals having a maximum age of 16 years (Canadian Bar Association, 1983).
The development of the YOA was welcomed in Ontario, and across Canada, as a new and potentially progressive response to young persons in conflict with the law. Under the Act, young persons would be held responsible for their behaviour but their special needs as adolescents would be recognized and they would be ensured rights and freedoms equal to those of adults. It was believed that the philosophical shift from rehabilitation to accountability (or responsibility) and the right of society to be protected held promise for both young people and society. However, there have been serious concerns raised about certain provisions of the Act throughout Canada. Since its full implementation in 1985, the Act has been much maligned by the police, politicians, and the media in Ontario, and this criticism has left the public of this province feeling unprotected and insecure. The real root of this public and professional concern lies less with the Act itself and more with the manner in which it is being implemented in Ontario (Lowery, 1987).

Although the federal government established the Act, the provinces are responsible for its implementation and administration. In response, the province of Ontario has made minimal changes to the administrative structure in existence before the introduction of the YOA, even though this new Act represents a significant change in the tenets and application of the juvenile justice system.

Prior to the introduction of the YOA, 12 to 15 year
olds were considered to be juveniles and were handled under the jurisdiction of the Ministry of Community and Social Services (hereinafter to be referred to as COMSOC). Persons who were 16 years of age or older were considered to be adults and came under the jurisdiction of the Ministry of Correctional Services (hereinafter to be referred to as MCS). Ontario's continued reluctance to conform to the intent of the Act can be seen in the two-tiered system it has developed for young offenders which is based primarily on the system previously intact. Under this scheme, 12 to 15 year olds, now known as Phase I, are seen in Provincial Court (Family Division) and their sentences are implemented by COMSOC. On the other hand, 16 to 17 year olds, now known as Phase II, appear in Provincial Court (Criminal Division) and still serve their sentences under MCS. The system of implementing juvenile justice remains basically the same as it was under the JDA.

The split not only offends the spirit and intent of the Act as it is intended to apply uniformly across Canada, but it is also contrary to the current thinking on how these youths can best be served. For the older adolescent, an overburdened criminal court may seem hurried and impersonal. In contrast, the Family Court is generally considered to be less hurried and more oriented toward the special needs of the young person. As well, young offenders 16 to 17 years of age are, as a group, treated more severely and afforded
fewer resources at the post-dispositional stage than their 12 to 15 year old counterparts (Ontario Social Development Council, 1987).

The two-tiered system for young offenders cannot be justified on the grounds of efficiency or economy. In point of fact, it has resulted in the duplication of services and in administrative delays in the co-ordination of information between systems. There also appears to be a serious problem with lack of communication. As well, there has been an expressed concern by major social organizations in Ontario that the two-tiered system is neither efficient nor responsive to the needs of the young people in the province (Lowery, 1987).

1.1 Overview of the Political Decision for a Two-tiered System

As stated earlier, Ontario strongly requested (July 1982) a delay in the start-up of the Young Offenders Act. The two major reasons were that the Ministries involved were described as "at war" (Globe & Mail, October 14, 1985, p. A14) and a lack of integration in the federal-provincial relationship was causing problems for Ontario.

It would appear that the federal government, in the period prior to the passage of the YOA, did not accurately project, in co-operation with the province, the realistic costs of implementing the bill.

As of the fall of 1982, the federal government still did not have a comprehensive estimate of the
likely transfer payments required to implement the Young Offenders Act nationwide. Nor had it made clear the basic approach to cost sharing that would prevail - if sharing could be anticipated at all (Michaelis & Lowery 1982, p. 48).

Politicians and planners contemplating the implementation of the YOA in Ontario were stalled in their task by the prospect of huge requirements for new money in a time of serious economic restraint. In June 1982, the Provincial Secretary for Justice presented an estimate of a $60 million (annually) juvenile justice system, growing to a $240 million system for young offenders in order to meet all the requirements of the new Act. He also presented an estimate of $150 million in possible capital costs for new courts and new institutions. Minimal offset savings were anticipated due to the transfer of 16 and 17 year olds to COMSOC (Sterling, 1982).

The fact remained that Ontario's ability to meet the full requirements of the Act did not depend entirely on cost sharing agreements with the federal government. Negotiations were expected to stretch well beyond the implementation date because of the lack of specific federal commitments, their own lagging cost estimating procedure for the YOA and the federal budget cuts (Michaelis & Lowery 1982).

The people working in the service system, at both senior and line levels felt that:

Policy development is being deferred while awaiting guidance from cabinet; cost sharing is
stalling the politicians; correctional services are at odds with social services about a dual system and the service mandate; police see no one working on the key policies they need to operate; and private service agencies know little about the Act and are unprepared. (Michaelis & Lowery 1982, p.53)

Government representatives, at this time, were beginning to infer that the inclusion of 16 and 17 year olds into the system would force a dual system of services for young offenders in Ontario.

This province in particular had opposed 16 and 17 year olds coming under the purview of the YOA. Ontario wanted these individuals to continue to be under the jurisdiction of the Criminal Code as had been the practice under the JDA.

Ontario’s reason for taking this position was that it would mean "major changes in the structure of services, and accompanying costs." (Ontario Inter-Ministry Implementation Project, 1981, p. 4).

Therefore the Province of Ontario chose to maintain a "two-tier level" justice system for young persons aged 12 to 17 inclusive. (Wright, 1991)

Bala (1986) commented:

There was a belief in Ontario that 16 year olds should not be dealt with as "children" but rather as adults. Much of the concern, however, was financial. The youth system is generally more resource intensive, and expensive to operate than the adult system. The effect of the action of the Federal Parliament in raising the maximum age of juvenile jurisdiction was to increase costs for provincial governments. Further, the Young Offenders Act clearly added features to the system which made it more costly for provincial governments to operate. . . . A minimal compliance
... approach to the Young Offenders Act seems most evident in Ontario (quoted in Wright, 1991, p. 10).

Bala and Lilles (1992b) offered a further possible explanation for the decision by Ontario to implement the Act on a two-tiered system.

When it became clear that the entry of 16 and 17 year old young persons into the youth system was inevitable, Nova Scotia and Ontario were faced with the prospect of massive relocation of judicial and correctional resources. To manage the impending increase in the youth court’s caseload it would almost certainly be necessary to allocate more judges and court facilities at the disposal of the existing youth court, likely at the expense of the ordinary criminal courts whose caseload could expect a corresponding decrease in volume. The idea did not please some judges, staff and the administration serving the ordinary criminal courts. Additionally, the government department... would have to, but preferred not to, surrender a sizeable portion of its staff and resources to the other government department that provided and administered dispositional services for the youth court. In Ontario, the two departments actually competed for control of the entirety of the services and programmes connected with the youth court. In the end the most expedient solution for the two governments was to do nothing at all or as little as possible (p. 2:8).

Reid and Reitsma-Street (1984) in referring specifically to the Ontario situation postulated:

The Ministry of Correctional Services wanted to maintain its authority over the sixteen and seventeen year old offenders and extend its jurisdiction to all young offenders while the Ministry of Community and Social Services wanted to maintain the integrated programmes for youth which had been developed and extend the programmes to the older age group. ... It appears that this compromise (split jurisdiction) is more a case of organization necessity and budgetary constraints than a delicate balancing of the principles of the Young Offenders Act (p. 12-13).
Workers in the corrections and social services fields say the question of which ministry obtained jurisdiction over all young offenders degenerated into a war between the ministers. Mr. Keyes, the Minister of Correctional Services and the Solicitor General of Ontario and Mr. Sweeney, the Minister of Community and Social Services, both insisted their respective ministries were the appropriate ones to handle young offenders (Globe & Mail, 1985, Oct. 14, p. A14).

Mr. Sweeney stressed that:

His ministry is community-oriented, whereas the thrust of Corrections is institutional . . . of the 10 provinces and two territories, eight have placed jurisdiction over young offenders in the social field. So there is obviously a tendency across the country to see it as a social kind of service rather than a justice kind of service. . . . It just doesn’t make sense to me to break it up the way it is now or, as the counter-proposal is, to move all of it over to Correctional Services (Globe & Mail, 1985, Oct. 14, p. A14).

Mr. Keyes countered with:

This ministry is a victim of false perceptions. It’s true that, in the distant past, the predominant role of Corrections was custodial, but Corrections today is not a jail-minded ministry . . . 75 percent (of young offenders) are in community programs. . . . If one ministry is given over-all responsibility for young offenders, Corrections would be appropriate because the Young Offenders Act emphasizes justice rather than social service (Globe & Mail, 1985, Oct. 14, p. A14).

Attorney General Ian Scott commented only that, "It’s up to Cabinet to decide. There is much to be said on both sides of that question" (Globe & Mail, 1985, Oct. 14, p. A14).
From the implementation of the Act until the present, Cabinet has not altered the decision to maintain a two-tiered system. The reasons being the same as those for the original decision; i.e. departmental pressure, expediency, organizational necessity and budgetary constraints (see Bala and Lilles 1992 (b) and Reid and Reitsma Street, 1984).

1.2 Description of Study

The research project described herein is an attempt to provide a closer examination of selected aspects of the two-tiered system of split jurisdiction on specific areas of the YOA. Both an empirical and an historical focus will be used to build a case for the argument that the implementation of the YOA by a two-tiered system of courts and service delivery results in young people being adjudicated and treated differently dependent upon their age. Furthermore, the two-tiered system results in young persons receiving differential and inappropriate treatment with respect to their needs for rehabilitation.

1.2.1 Philosophy.

To demonstrate the above, the history of the JDA will be presented, in order to examine the philosophy leading to its inception. This is considered to be important to an understanding of the change in juvenile justice philosophy which led to the implementation of the YOA. A summary of the major reports, legislative bills and proposals which preceded the YOA at the federal level of government and
which finally culminated in the passage of the new Act will also be considered.

The change in philosophical orientation will be characterized by a discussion of the Declaration of Principle and its interpretation for service principles by the two Ministries involved. A presentation of the history of juvenile justice in Ontario will be considered to explain the origins of split jurisdiction in this Province.

1.2.2 Policy and procedure.

The effects of split jurisdiction will then be considered as it impacts on certain aspects of the Act.

1. Dispositions and Principles of Sentencing. The federal YOA does provide for a wide range of dispositions in the youth court. The differences in dispositions between Phase I and Phase II Courts will be examined to determine whether the split jurisdiction is resulting in unequal treatment between Phase I and Phase II offenders in Ontario. The emphasis on different principles in the YOA, such as protection of the public as opposed to special needs of the young offender will also be examined in relation to the split jurisdictional aspects.

2. Court Proceedings. Instead of one integrated youth court in Ontario, there are two courts with varying degrees of differences in their approaches to the adjudication and disposition of young offenders. The two courts exhibit certain differences which will be examined in a discussion
of the Phase I and Phase II court systems.

3. Reviews. Reviews are an important part of youth justice under the YOA, as they were not provided for under the JDA. Since there are no provisions for parole or earned remission of sentences imposed, reviews are the only method of securing early release. How the split jurisdictions administer the review provisions will be examined to illustrate differences in the two jurisdictions.

4. Open and Secure Custody. Under the YOA the youth court is empowered to order different classifications of custody, i.e., open or secure. Under the split jurisdiction each ministry has its own facilities, with different programs and services offered, to provide appropriate placement for the aforementioned court ordered dispositions. The differences in the secure and open custody facilities of the respective ministries will be examined, with particular emphasis on how they are administered.

5. Probation. Probation is a disposition that is widely used by both Phase I and Phase II Courts. Each ministry employs its own probation officers to administer the probation orders made against young offenders. The area of probation services will be examined to illustrate the differences resulting from each ministry administering its own probation services.

1.2.3 Treatment issues.

This disposition under the Act requires the consent of
the young person, his or her parents and the treatment centre, prior to a committal by the court. This severely restricts the court's ability to order treatment. MCS has recently tried to force treatment upon young offenders by making treatment provisions as part of a probation order. The effects of split jurisdiction and the many other issues with regard to treatment will be examined.

1.3 Objectives of Study

The objectives of this study will be to examine the current operations of the Youth Justice System in Ontario. Evident is the inconsistency of the approaches by COMSOC and MCS to the implementation of the Act involved with youth justice in this Province. It has become a top-down model of discretionary administration with negative implications and unequal treatment for the youth of the Province (Ham & Hill, 1984).

It is the intent of this research to evaluate these inconsistencies in dealing with young persons from within the two-tiers of the system and to make recommendations for improvements to the system based on the findings.
2.0 Chapter 1: The Establishment of a Juvenile Justice System in Canada

2.1 Childhood

In the history of Western Civilization, the concept of juvenile delinquency is a relatively recent phenomenon. It was not developed until the 19th Century. Accordingly, it is a social creation that has been employed for a small amount of time during the past 2,000 years.

It is a concept designed to focus our attention upon forms of youthful behaviour, which, though they have been common throughout history, have become of increasing concern in recent centuries (Empey, 1982, p. 5).

European children, prior to the 19th century, were allowed to bear and use arms. Children were also able to consume alcohol without limitation and were able to engage in sexual relations without restraint. In fact, marriages between children 12 years and older were not uncommon (Empey, 1982, pp. 3-6).

It was not until 1899 that the first formal juvenile court was created in the State of Illinois. It was not until the first decade of the twentieth century that the juvenile court system was created throughout North America.

It was in the 19th Century that a few moralists began to question the customary treatment of children. These moral philosophers promoted a genuine concern for the moral welfare of the children, rather than the traditional treatment of benign neglect or sheer ignorance. As a result
the period of childhood became accepted to be a transitional period in which children were to be protected from the moral turpitude of adult activities (Empey, 1982, p. 8).

As a result of this moral suasion, the modern concept of childhood evolved. This concept focused on the premise that children should be valued as a nation's most precious resource and should be provided with instruction in order to be prepared for the harsh realities of the adult world (Empey, 1982, p. 8).

Empey (1982) felt that the concept of delinquency evolved from the incremental creation of a labyrinth set of complex social rules or mores implemented to control the lives of children. The genesis consisted of a set of informal rules or customs, which, prior to being written into law, assisted in creating "an ideal image of childhood toward which parents were expected to strive in raising their children" (p. 8). The meaning of delinquency is premised on certain identifiable features of rules. Undesirable and desirable behaviour were defined by these features. They also played a prominent role in setting the standards by which behaviour was perceived as either acceptable or unacceptable. Reformers regarded the adult customs that children had previously engaged in as being immoral. Therefore, they set their goal to try to instill certain morals in the children and to defend them from being taken advantage of and from being introduced to the
perceived immorality of the adult world (Empey, 1982, p. 9).

In the late 19th Century, a social reform movement was influential in changing society's views towards children in North America. People involved in this movement were called the Child Savers (Leschied, 1987c). The essential objective of this movement was the identification and control of youthful deviant behaviour (Platt, 1969). The Child Savers had two primary goals in mind. The first was to convince and educate society to accept the concept of childhood, "That children were more than 'miniature adults' and that there was a fundamental uniqueness to the stage of childhood in human growth" (Leschied, 1987c, p. 8).

The second goal was to codify in legislation, society's care and compassion for young persons by ensuring that the special needs of vulnerable children were met through resources provided within the community (Leschied, 1987c, p. 8).

The legislation which followed focused on the perceived needs of children and the need to protect adults and other children from offenders. Unfortunately, the legislation, in this writer's opinion, generally failed to make a broad distinction between the delinquent child and the neglected one.

The Child Savers by and large subscribed to the deterministic theory that crime and delinquency were diseases susceptible to treatment. They fastened on the creation of a separate juvenile justice system, whose primary objective was rehabilitation rather than punishment. It was their belief that exposing a child to the arbitrary brutality of the criminal justice system merely aggravated what was essentially a social problem. Such exposure, rather than discouraging juvenile crime, was seen to encourage misguided and

This separate juvenile justice system was perceived as a panacea for sheltering the child from the evils inherent in the adult criminal justice system. It was also perceived as a method by which troubled children could be identified and isolated within the context of a rehabilitative, treatment-oriented environment (Thomson et al., 1981).

The child savers' approach to juvenile delinquency was also premised on the belief that children were dependent upon caring parents to achieve a proper upbringing.

Traditionally, the philosophy of the modern juvenile court has been traced to the 'parens patriae' jurisdiction of the English Chancery Court. It was there that the law placed 'the care of individuals who cannot take care of themselves'. Whether this power is viewed as the original legal basis for the development of delinquency legislation (Langley, 1975; Wang, 1972) . . . or as a rationalization for such development (Fox, 1970, p. 1192; Lemert, 1970) . . . is less significant than the subsequent implications. The imposition of a dependent status on children has meant that children have been denied, or have relinquished, certain substantive rights and procedural safeguards in order to expedite their special treatment (Leon, 1978, p. 36).

Leon (1978) has also postulated that the reform movement of the child savers motivated the enactment of a considerable amount of social welfare legislation that attempted to separate the treatment of children from adults. This activity was consistent with the social and legal principles prominent at the time (p. 37).

From this stated evolutionary process of formulating
new rules to govern childhood, the concept of delinquency was created. Formal rules were laid down in legislation and the juvenile justice system was created to enforce them. The ideal image of childhood from which the legal structures developed and grew was a caucasian middle class image.

2.2 The Origins of Delinquency Legislation

Prior to Canada becoming a nation in 1867, with passage of the British North America Act, Canada was merely a colony of Great Britain. Therefore, it was understandable that the English laws would have a major impact on laws set up in Canada.

According to Archambault (1983)

The separate legal status in law for children as distinct from adults probably originated with the common law rule of Doli Incapax, which had its origin in Roman and Ecclesiastical law. This rule, as part of the broader doctrine of mens rea, . . . concerned the relationship between the age of an individual and capacity to form the intent to commit a criminal act. . . . a child between the ages of seven and fourteen years was presumed to lack such capacity, although this was a rebuttable presumption (p. 1).

Once capacity was proven early criminal law subjected a child to the same punishment as an adult.

By the 1850's and afterwards, there were some positive signs that children were to be granted a status separate from adults. This was evidenced by "isolated acts to help children, to improve their welfare, and to control their unacceptable behaviour" (Archambault, 1983, p. 1).

In 1857, the legislature of Ontario passed two significant Acts. The first Act was for the Establishment
of Prisons for Young Offenders. This Act authorized the construction of "reformatory prisons" in Upper and Lower Canada to separate juvenile orders from adult offenders. The second Act was for the Speedy Trial and Punishment of Young Offenders. This Act provided for summary procedures designed to eliminate long periods of pre-trial detention. (Griffiths, Klein, & Verdun-Jones, 1980; also see Hagan & Leon, 1977) The impact of this legislation was significant. The construction of separate reformatory prisons often resulted in dependant and neglected juveniles being incarcerated along with juvenile offenders (Leon, 1977).

Houston (1972) observed, "The distinction in states between neglected and criminal in effect translated as potentially vs. actually criminal" (p. 263).

The judiciary of the time tended to pay little heed to the legislation passed to reduce pre-trial detention. Magistrates paid little attention to the provisions aimed at changing trial procedures and treatment of juvenile offenders.

In this writer's opinion, this non-adherence to the provisions of the Act by magistrates was an example of the resistance of the status quo to changes imposed upon them by other bodies. It is important to note that these Acts were not championed by the judiciary, but by the moral philosophers who were able to pressure elected politicians to change existing law.
Parker (1968) noted that the lack of distinction between delinquent juveniles and neglected children contributed to the lack of procedural rights and safeguards. Since the legislation was predicated to serving the best interests of the child, the reformers and legislators felt that they were adopting the correct approach to dealing with juvenile offenders.

For example, in the late 1700's, child offenders, when sentenced to periods of incarceration, were often confined to institutions in Halifax and Kingston with no regard for their age, prior record, or severity of their crimes (Shoom, 1972, p. 260). However, the practice of confining children was resoundly criticized as being unduly harsh and improper as a means of treatment for children. Griffiths and Verdun-Jones (1989), with respect to the Kingston correctional facility, quoted the second report of the 1949 Brown Commission, "All are consigned together to the unutterable contamination of the common gaol and by the lessons there learnt, soon became inmates of the penitentiary" (p. 502).

After years of legislative inactivity, Ontario passed an Act respecting Industrial Schools in 1874. In effect, this Act provided for the establishment of treatment centred residential training schools. Caputo and Bracken (1988) argue that within this Act seemed the "implicit goal of rehabilitation" while the stated purpose was to confine young persons (p. 25).
The emphasis on industrial schools however was extended only as a complement to a family who could not control their youth. Beyond this however, the belief was that industrial schools should be used as little as possible as a means to reform children. Leon (1977) argues that "the industrial school was viewed as being supplementary to the family which lacked adequate control. Nevertheless, the view that if a child can be saved from the industrial school it should be done" (p.81). However, these facilities soon replaced reformatories as the primary method to control delinquent children and youth.

In 1888, the Child Protection Act was passed in Ontario. In essence, this legislation reinforced the government’s right to situate neglected children in industrial schools and created the new options of children’s homes. This Act provided for separate trials for these children under 16 years of age charged with provincial offences. Further, the Child Protection Act allowed for cases of those under the age of 21 to be tried separately from adults (Griffiths & Verdun-Jones, 1989). This legislation was not immediately acted upon, but "the legislation was an important step toward the development of the juvenile court" (Griffiths & Verdun-Jones, 1989, p. 504-505).

In the late 1800’s, a Commission of Inquiry into the Prison and Reformatory System of Ontario issued a report
that set the foundations for future correctional practices.

In effect, the commission recommended:

- the construction of industrial schools in each city and large town;
- the confinement of children in separate pre-trial detention facilities;
- the use of *in-camera* court proceedings for children under the age of 14;
- that confinement of children be used only as a last resort;
- the increased use of the dispositions of warning, suspended sentence, and probation;
- the use of industrial schools for confinement whenever possible;
- the use of indeterminate sentences for youths sent to reformatories; and
- the creation of a system of past-release apprenticeship or supervision (Griffiths & Verdun-Jones, 1989, p. 505).

2.3 The Effects of Schools of Criminology

Circa 1770, a reform movement known as classical criminology was formed in reaction to the existing criminal justice system.

The main pillars of this school of criminology were: concern for equity in court matters, the reduction and regularization of criminal punishments, and reliance on the utilitarian assumptions of free will and hedonistic behaviour. This combination of principles allowed classical criminology to have a major impact on the development of criminal law from that date to the present. Classical criminology was responsible for the development of the principles of general deterrence (punishment used to deter future criminals and prevent future crime) (Faust & Brantingham, 1974).
Archambault (1983) postulated that "classical criminology had a very substantial impact on reform of the ordinary criminal process" (p. 2). However, since positivist criminology was a more recent development than classical criminology, it is not surprising that this more recent school of criminology had greater influence on development of the original juvenile court system.

It is interesting to note that in the more recent reform of the juvenile court system, reflected by the YOA, the classical school of criminology has impacted on this reform, through its principles of emphasis on legal rights, procedural regularity, and responsibility for one's actions (Archambault, 1983, p. 2).

Around 1870, the aforementioned positivist school of criminology came into prominence, "as a reaction to the perceived failures of the classical model" (Archambault, 1983, p. 2). This school of thought stressed protection of the individual. According to the positivists, the objective of the criminal law system was to protect society and reform the criminal. They advocated for indefinite criminal sentences which allowed for substantial individual discretion based on the circumstances of each individual case, as opposed to the definite sentences and strict definitions of crime of the classical criminology school. To put it succinctly, the positivist focused on the offender, not the offence (Jeffrey, 1974).
As a result the positivist school focused on the offender's personality and the procedures required to rehabilitate the offender. They did not view the criminal law process as a means of social control or as a means of guaranteeing the offender certain rights when enmeshed in the criminal law process. They also advocated for an activist approach of intervention for apprehended offenders and for potential offenders as well, consisting of diagnosis and treatment. According to Archambault (1983) under the positivist school the state could subject an individual to treatment, regardless as to whether that individual had transgressed the criminal law, provided that there was a determination that the individual's personality and condition was a predictor of future lawlessness. It was assumed that the state had the right to make such determinations because it had "a natural right and duty to protect itself and its members from dangerous behaviour" (p. 2).

Based on the views expressed by Archambault (1983), this writer feels that the positivist school placed too much faith on the ability of criminal justice personnel to adequately decide which individuals were potential offenders. The concern for potential offenders in the JDA is reflected by the fact that the definition of juvenile delinquency was expanded in 1924 to include "sexual immorality or any similar form of vice" (An Act to amend the
JDA, 1924, s.1.). This, then would come to be the focus of the calls for reform to the JDA. The positivist philosophy was reflected in the JDA, which set up the formal juvenile justice system in Canada. One only has to look at the preamble to the Act to realize the influence of the positivists:

Whereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts (Preamble to the Juvenile Delinquents Act 1908).

2.4 An Overview of the Juvenile Delinquents Act and its Philosophy

The first legislation in Canada which was a precursor to the preamble found in the JDA was an amendment to the Criminal Code of 1892. A Section of the Code provided that children were to be tried separately from adults and without publicity, through in-camera proceedings. Following the lead in the United States, where the first JDA was passed in 1899, in 1908 the JDA became law in Canada. Although it was amended in 1924, it remained virtually unchanged from its enactment in 1908 until its repeal in 1984, a period of more than three quarters of a century.

Earlier attempts to create separate courts for children had required federal/provincial coordination. The British North America Act of 1867 (hereinafter referred to as BNA),
which created Canada, also provided for clear areas of jurisdiction between the federal government and the provinces. Criminal law and procedure were the sole jurisdiction of the federal parliament. The BNA also prohibited the federal parliament from enacting legislation in areas that fell under provincial jurisdiction (Griffiths & Verdun-Jones, 1989, p. 507).

Such areas as property and civil rights, local and private affairs, the administration of justice and child welfare were within the exclusive jurisdiction of the provinces (Maxim, 1980, p. 39).

In 1907, W. L. Scott, local Master at Ottawa for the Supreme Court of Ontario, as well as President of the Ottawa Children's Aid Society, along with Senator Beique, Recorder Weir of Montreal, and J. J. Kelso were responsible for drafting the JDA. (Leon, 1977, p. 92-94)

According to Maxim (1980) it became a complicated matter for these drafters of the JDA to draft a law that took into account the concerns of a criminal nature which were within the exclusive jurisdiction of the Federal Parliament and the concerns of a child welfare nature which were within the exclusive jurisdiction of the provincial legislatures, while at the same time not impinging upon the aforementioned exclusive provincial jurisdiction. The Department of Justice Committee of 1961, commissioned to review the JDA, succinctly identified this juxtaposition
Clearly the 'parens patriae' of children in any province is the Crown in right of that province and not the Crown in right of the Federal Government. Moreover, parliament lacks the power to enact legislation in relation to welfare matters, and is thereby precluded from taking a non-criminal approach to delinquency (Government of Canada, Department of Justice, 1965, p. 12).

In order for Scott and his co-drafters to ameliorate the juveniles interaction with stringent criminal proceedings, they expanded the parameters of the JDA by providing an all-inclusive definition of delinquency which included both "criminal" as well as "non-criminal" behaviour (Maxim, 1980, p. 40). Therefore, the JDA defined a juvenile delinquent as follows:

Any child who violates any provision of the Criminal Code or any dominion or provincial statute, or of any by-law or ordinance of any municipality, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provision of any dominion or provincial statute. The commission by a child of any of these acts constitutes an offence to be known as delinquency (The Juvenile Delinquents Act, 1908 s.1(1)).

By the definition used of delinquency in the Act to include any form of juvenile misbehaviour, the federal government was actually allowed to intercede in welfare matters. In order to express the non-punitive philosophy, the JDA provided in Section 38 as follows:

This Act shall be liberally construed to the end that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile
delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance (The Juvenile Delinquents Act, 1908, s.38).

This "liberal" construction of the Act was contingent upon the tacit cooperation of the various provincial governments. The administration of juvenile justice in Canada was characterized by the fact that the different provincial and territorial systems operated at different levels of sophistication (Tasse, 1975, p. 6).

As the Department of Justice Government Commission noted, there was a great difference in the facilities available throughout the country:

It can be stated with confidence, however, that no province has available a sufficient quantity or quality of needed services. The problem appears to be either an inadequate number of skilled personnel or a lack of financial resources in the service agencies because of the politics of various levels of government (Government of Canada, Department of Justice, 1965, p. 31).

Although the JDA was viewed by many experts as the best in the world it was slow to be implemented across Canada. Its adoption by the various provincial legislatures was not evenly administered. "The Act had to be proclaimed in force in each municipality and province, separately, by federal order-in-council" (Griffiths & Verdun-Jones, 1989, p. 509). This uneven adoption was exacerbated by the facts that many provinces, through their child welfare legislation, maintained control over delinquents by relying on the definitions of "child in need of protection" as contained in
the aforesaid child welfare provincial legislation. Furthermore, the JDA allowed for the upper age limit of application of the Act to vary from 16 to 18, depending on the preference of each province and territory (Griffiths & Verdun-Jones, 1989, p. 510).

The JDA was further characterized by trials that were conducted in-camera, or in private, before special juvenile court judges. Procedural rules were minimal and the irregularity or informality of proceedings was specifically sanctioned by the Act. Furthermore, trials and dispositions could be as informal as circumstances would permit. Accordingly, hearsay evidence, which was strictly disallowed in ordinary criminal court, except for a few well-defined exceptions, was regularly allowed in juvenile court trials. (Juvenile Delinquents Act, 1908, s.17(1)17(2)).

To further compound the allowance of irregularities and informality in juvenile court proceedings, the Act did not provide for an automatic right of appeal from trials, but required the juvenile to obtain special permission or special leave to appeal, which permission was only granted on special grounds. (Juvenile Delinquents Act, 1908, s.37). Dispositions were allowed over a wide spectrum, ranging from adjourning a case sine die (without a set date) and warnings, to imposing an indeterminate sentence wherein the juvenile remained under the jurisdiction of the court until age 21 (even though the age of majority became 18 in the
1970's). Sentencing was often disparate and not uniform because dispositions were not linked to the seriousness of the offence, but were tailored to the needs of the child. These sentence disparities were to a large extent a result of the influence of the positivists on the original drafting of the JDA. The positivists stressed the exercise of state power over an individual, compulsory treatment, whether a criminal act had been committed or not, indeterminate sentences, and focusing on the offender (Archambault, 1983, p. 2). This lack of due process and wide dispositional powers left the treatment of juveniles open to administrative arbitrariness.

Leon (1978) succinctly stated:

Because in theory the juvenile justice system is (and was) totally committed to rehabilitation and to ‘the best interest of the child’, yet at the same time is concerned with the prevention of delinquent/criminal behaviour, there was considerably less concern with the rights of children at the adjudication stage of the trial then with the ‘treatment’ of children at the dispositional stage. In effect, the trial process was to be part of the treatment process (p. 37).

Leon (1977) believed that the beginning of delinquency legislation in Canada could be traced to the desire to protect children and also prevent crime. This was to be accomplished through a probation system, along with special court procedures and personnel.

The primary emphasis of this system was on treatment, with only minimal attention paid to accountability. In the course of efforts to secure implementation of preferred methods of treatment, conflicts emerged between two competing
groups, those favouring existing police methods, and those advocating the expansion of probation and the creation of separate courts. Only minor and largely ineffectual concern was expressed for the 'legal rights' of children (p. 104).

Since the trial was perceived as part of the treatment process, there was a failure to demarcate the adjudication process from the treatment process. As a consequence, this writer feels that this resulted in only minimal attention being given to the legal rights of children involved in the juvenile court system. If children were being treated, for their own good, why worry about technical legal rights normally employed in adult criminal courts?

Leon (1977) further states that there was:

... a notable absence of organized support for such recognition, and children remained vulnerable to the protective intrusions of others.

A basic implication of the historical development of delinquency legislation for the prospects of reform is that the dependent status of children has rendered them open to a variety of measures imposed by parties with personal and professional interest. Such measures may have been viewed by their proponents as necessary for the protection of children in society. Nevertheless, the 'child saving' process in Canada has been guided primarily by individuals and organizations seeking to legitimize and finance their own preferred plans for protecting and controlling children.

... In the context of juvenile justice, critics argue that injustices result from the failure to accord children substantive legal rights and procedural safeguards (p. 105).

Since troubled young people became the focus of the legislation, the intervention of the juvenile justice system was not restricted to those children who had broken the law.
The main objectives of the Act were perceived as being "helping" and "treating" children. These objectives were not perceived as being met through requiring procedures which met the standards for "due process" or natural justice. This writer feels that the draftees of the Act believed these objectives could be met by applying certain treatment to delinquent children.

This is confirmed by W. L. Scott, one of the main drafters of the JDA, who commented on the underlying principles of the Act as follows:

1. That children are children even when they break the law and should be treated as such and not as adult criminals. As a child can not deal with its property, so it should be held incapable of committing a crime, strictly so called.

2. That juvenile delinquents can be reformed through probation officers, and

3. That adults should be held criminally liable for bringing about delinquency in children. (Scott, as quoted in Kelso, 1907, p. 109).

By the 1960's, not everyone was convinced as to the JDA being the panacea for delinquent children. (Lovekin 1961; McGrath 1962). The Children's Rights Movement formed in the early 1960's argued that the treatment of juveniles under the objective of "helping" them, resulted in many instances of discretionary intervention which was open to abuse by various persons involved in the juvenile justice system. Treatment involved the state of intervening in the lives of those adjudged delinquent.

Because of the inadequate supply of trained staff,
inadequate facilities, lack of significant funding in the province for juvenile justice, and lack of individualized treatment programs (Palmer 1976; Gendreau & Ross 1979) most institutional placements, regardless of their formal names, were in the end nothing more than jails for children, albeit separate from adult criminals. As a result of the aforementioned view, advocates of the Children's Rights Movement began to forcefully argue that the Juvenile Court should implement procedures to ensure that the juvenile offender's legal rights were guaranteed and respected (Thomson, Lilles, & Bala, 1981). In spite of this writer's agreement with the views of the Children's Rights Movement, it must be conceded that the feat accomplished by Scott, Kelso and the other draftees of the JDA was significant from a humanitarian point of view. The major philosophical and ideological underpinnings of the 1908 JDA have been summarized by Scott himself who wrote:

The rights of parents are sacred and ought not to be lightly interfered with, but they may be forfeited by abuse. Paramount to the rights of parents is the right of every child to a fair chance of growing up to be an honest, respectable citizen (Quoted in Stuart, 1974, p. 12).

Therefore, the JDA was clearly based on the welfare model of justice, despite its inadequacies. Along with the advent of a juvenile court, Kelso and Scott advocated the creation of a juvenile probation system in order to create an alternative to industrial schools (Leon, 1978, p. 44). As MacGill (1925) observed:
Probation is the very essence of the juvenile courts claim to rehabilitation of the juvenile delinquent. In all but the most serious cases the delinquents disposition should be on probation or under supervision in his own home or be placed out in a private home, a special detention home . . . (Quoted in Maxim, 1980, p. 43-44).

With respect to the above views, this writer feels that although the emergence of the probation system was generally a benefit to children, it also made it easier to have the state intervene in the life of a child, who may have been adjudged delinquent, although he or she had not transgressed any law. As a consequence, the child would be placed on probation, not incarcerated. However, the child would have been labelled with the appellation "juvenile delinquent", which, in itself, could cause many problems for the child, such as stigmatization, which would be counterproductive and make recidivism more likely (Berlin and Allard, 1980, p. 449).

Platt (1969) has observed that the juvenile court had been under continuous question since its origin and that the underlining philosophy and structure have come under broad criticism. He states:

To the 'legal moralists', the juvenile court is a politically ineffective and morally improper means of controlling juvenile crime. To the 'constitutionalist', the juvenile court is arbitrary, unconstitutional and violates the principles of fair trial. The former view concerns the protection of society, the latter addresses the safeguarding of individual rights (pp. 152-153).

Maxim (1980) postulates that there is a counter
argument to both of these aforementioned views of the court. Since it was assumed that the court was always taking the best interest of the child into consideration in determining a disposition, it was deemed not necessary to worry about protecting the child's formal legal rights. In fact, according to this argument, the court was protecting the child's civil rights by its disposition, "that is, the child's right not to be neglected, not to be exposed to criminogenic environment, and to be provided with proper help, care and guidance so he will not be forced into a life of adult criminality" (Maxim, 1980, p. 45). He also felt that the expressed purpose of the juvenile court was actually to act as a social welfare agency (Maxim, 1980, p. 45).

For a large part of the seventy-four year history of the JDA, the paternalistic, condescending approach was highly favoured as the best method of dealing with juvenile deviance. However, as the years advanced, treatment as a principle and effective method of rehabilitation for delinquents began to be questioned. Some of the available literature (Shamsie, 1979; Martinson, 1974) concluded that there was no convincing empirical evidence to support the belief that there was any one effective treatment technique to reform offensive juvenile behaviour. Ultimately critics began to question and openly attack the massive and open-ended interventions in the lives of juvenile offenders.
Juveniles were being denied basic rights in exchange for unfulfilled promises of treatment (Michaelis & Lowery, 1982, p. 3-4).

Labelling theorists also echoed the demand for reduced intervention. They argued that treatment did not reduce delinquency. In addition, they argued that the mere fact of contact was so stigmatizing, and had many negative consequences which would greatly increase the chances of recidivism. They concluded that it was in the child's best interest to be diverted away from the juvenile justice system. (Empey, 1982; Michaelis & Lowery, 1982, p. 3-4).

The labelling theorists had support from the legal profession to a large extent. They began referring to the Canadian Bill of Rights and the Canada Evidence Act as potential weapons in support of more rights for juveniles in court proceedings.

In 1961, a Department of Justice Committee was appointed to review the existing juvenile justice system and make recommendations for a new approach. Four years later their report recommended 100 revisions to the JDA. Unfortunately a draft bill entitled an Act Respecting Children and Young Persons, which was based on these recommendations, died on the order paper because of strong provincial opposition. The provincial governments felt that, on constitutional grounds, the federal legislation's definition of delinquency should not include provincial
statutes and municipal by-laws. They argued strenuously that offences other than criminal offences and offences of other federal statutes, should be dealt with under provincial child welfare legislation. This writer feels that it is significant that this massive provincial opposition coincided with large increases in the budgets of provincial Children Aid societies that occurred in the late 1950's and early 1960's. It is clear that divisions for administering to the welfare of children had begun by the time of the 1965 report (Michaelis & Lowery, 1982, p. 4).

Two subsequent federal attempts at juvenile law reform - the YOA (Bill C.192, 1970) and the Young Person in Conflict with the Law Proposals of 1977 - did have provisions limiting the jurisdiction of the federal legislation to juveniles who violated the Criminal Code or other federal statutes. These proposals also had provisions raising the age of criminal responsibility.

The Young Persons in Conflict with the Law Proposal (1977) raised substantial opposition from almost all sectors interested in juvenile justice, though it did gain support from the Canadian Bar Association. The main opposition was around making 14 the minimum age of criminal responsibility and 18 as the maximum age, along with standardized procedures for screening and diversion. Furthermore, the provinces, especially Ontario, with its large juvenile population, were alarmed by the severe financial costs for
services under the proposed Act, and by the cost sharing
formula proposed by the federal government (Michaelis &
Lowery, 1982).

One of the main stumbling blocks was that the Canada
Assistance Plan, implemented in 1966 as the major vehicle
for 50 percent sharing by the federal government of a wide
range of provincial social programs, did not include funding
of correctional services.

In 1979, the federal Conservative government drafted a
new Bill concerning juvenile justice. However, this Bill
died on the Order Paper when the Conservatives were defeated
in the 1980 federal election by the Liberals. In 1981, a
new proposal for juvenile justice reform, Bill C-61, had its
first reading. On July 7, 1982, the YOA was given Royal
Assent and it was proclaimed in force on April 1, 1984.

2.5 An Overview of the Young Offenders Act - A New
Philosophy

In contrast to the JDA which provided for no
distinctions between a child who had committed a serious
criminal offence, and one who had breached a municipal by-
law; and where dispositions were open-ended and subject to
whims of correctional personnel as to their release date,
the YOA contained a "Declaration of Principle" that was
incorporated into the body of the Act, not in its preamble.
This Declaration of Principle, contained in section 3, was a
guide to interpreting the provisions of the Act; and it
stated the philosophical position that was the foundation of
the substantive and procedural provisions of the Act. Bala
and Lilles (1984) noted:

Rather than simply having a preamble, as some
pieces of legislation have to assist in explaining
their purpose, a policy section is included in the
body of the Young Offenders Act; Such a section
is an integral part of the Act, while a Preamble
is not (p. 13).

According to Moyer (1983) the Declaration of Principle
took a three-pronged approach. It emphasized the rights of
young persons; their special needs as a result of their
youth and degree of maturity; and their accountability and
responsibility (although not to the same degree as adults)
intertwined with protection of society.

It is clear that a young offender is no longer to be
treated as a "misdirected and misguided child" (Juvenile
Delinquents Act, 1908, s.38) under the YOA. To a great
extent this parens patriae approach is discarded in the YOA
in favour of a greater orientation to due process and
responsibility.

The Declaration of Principle presents four somewhat
competing variables that service providers must grapple with
when providing assistance to young offenders. They are
1. protection of society;
2. special needs of youth;
3. rights and responsibilities of the young person; and
4. rights and responsibilities of parents.

This writer believes that these variables are at times
inter-related and at other times in apparent conflict. It is clear that principles of protection of society and special needs of youth would be in conflict especially in the disposition process and in such procedures as transfers to adult court.

In section 3 there are seven principles which are to be liberally construed. These principles were placed in the Act to govern the interpretation and application of the various provisions. Paragraph 3(1)(a):

While a young person should not in all instances, be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions (Young Offenders Act, 1980-81-82-83, s.3(1)(a)).

This principle accentuated the young offender’s responsibility for his/her offence, while at the same time recognizing that it was not necessary for the young offender to suffer the same consequence or punishment as an adult. In some circumstances, the consequence of the young offender would be the same as an adult. However, section 20(7) of the Act prevented that punishment from being greater than that for an adult, which was not always the case under the JDA. Maximum fines ($1,000.00) and maximum secure custody committal times are less severe than those imposed under the Criminal Code for adults. The Act also recognized that in certain situations the more severe dispositions for adults which might also be appropriate for a young offender 14 years of age or over would not be appropriate for a 12 or 13
year old. Paragraph 3(1)(b):

Society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by a young person, be afforded the necessary protection from illegal behaviour (Young Offenders Act, 1980-81-82-83, s.3(1)(b)).

This principle emphasizes the right of society to be protected. This is evident in several sections of the Act such as section 16(1), section 24(5) and section 29(1). It is also the main consideration in cases involving transfer and secure custody. It is relevant to note that the "protection or safety" of the public is also a primary consideration under section 457 of the Criminal Code which now applies to applications for bail or judicial interim release in youth court. Paragraph 3(1)(c) provides that:

Young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance (Young Offenders Act, 1980-81-82-83, s.3(1)(c)).

This principle is more consistent with the philosophy of the JDA. A main concern is whether "special needs" can be reconciled with "accountability" and "protection of the public".

Orders of assessment under section 13 and predisposition reports under section 14 of the Act are sections that incorporate this principle in their respective provisions. The notice provisions to parents at the commencement of proceedings and on reviews also reflect this principle to a certain extent. Paragraph 3(1)(d) states:
Where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences (Young Offenders Act, 1980-81-82-83, s.3(1)(d)).

The YOA includes provisions for the establishment of alternative measure programs. The writer notes that the Supreme Court of Canada has decided that the use of the word "should" in this principle does not make it a mandatory duty for alternative measure programs to be provided but denotes simply a desire or request to provide such measures. (R v. Sheldon, S. (1990)).

The next three principles under section 3 read as follows: Paragraph 3(1)(e):

Young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular a right to be heard in the course of, and participate in, the process that leads to decisions that affect them, and young persons should have special guarantees of their rights and freedoms (Young Offenders Act, 1980-81-82-83, s.3(1)(e)).

Paragraph 3(1)(f):

In the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons, and the interest of their families (Young Offenders Act, 1980-81-82-83, s.3(1)(f)).

Paragraph 3(a)(g):

Young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are (Young Offenders Act, 1980-81-82-83, s.3(1)(g)).
The Act gives to young persons extended rights and guarantees beyond those which would be found in the Charter of Rights. For example, the right to counsel at every stage of the proceedings is explicitly provided for. That right includes not only the adult right to retain and instruct counsel without delay, but also allows for counsel to be appointed by the Attorney-General upon the request of the young person. Furthermore, Section 56 of the Act expands considerably on the rules regarding admissibility of a statement in a voir dire beyond those found at common law or by statute. The Act also allows for a review of a disposition as a right upon application by a young person, where the sentence is either secure or open custody.

The Act also recognizes the need to have legal rights explained to young offenders by Youth Court Judges and Peace Officers.

The last principle, Paragraph 3(1)(h) states:

Parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate (Young Offenders Act, 1980-81-82-83, s.3(1)(h)).

This principle is reflected in section 16, which refers to transfer hearings, and to section 20, which encompasses disposition and reviews in situations where the Court shall hear representations by the parents. This Principle gives special status to parents, entitling them to receive copies
of reports prepared for the youth court, as well as notice of any adjudicative proceedings to be commenced. The youth court also recognizes the parental responsibility with respect to pre-disposition detention, disposition and disposition reviews (Bala & Lilles, 1984, p. 20).

Having given parents certain rights, the legislation also allows the court the power to order the parents' attendance in court under section 10.

The YOA relieved a substantial burden to parents when it specifically restricted the concept of vicarious liability and did not oblige parents to pay any support for the young offender.

Many groups and organizations argued for the retention of the parens patriae or child welfare philosophy of the JDA. Other groups, such as the Canadian Bar Association (1983) argued that the YOA should be based on the due process or justice model which would extend the use of procedural protections and rights accorded adults. On the other hand, other groups, such as the Canadian Police Association, argued that the new legislation should emphasize the maintenance of law and order (Michaelis & Lowery, 1982, p. 19).

The "Declaration of Principle" while suggesting one overall philosophy, contained reference to all three. The statements that young persons should not be as accountable or suffer the same consequences as adults and that they had
special needs and required guidance and assistance, reflect the parens patriae orientation of the child welfare model. However, the final draft reflected a heavy emphasis on the justice, or due process, model.

The YOA introduced a number of other changes in addition to the Declaration of Principle:

It raised the lower age of criminal responsibility to 12 years from 7; it dictated a uniform upper age limit of youth court jurisdiction of 18 years; it defined criteria and procedures for diversion from court; it mandated increased involvement of legal counsel; it permitted the youth court to issue only determinate dispositions; it eliminated status offences (e.g., sexual immorality) (Griffiths & Verdun-Jones, 1989, p. 512).

Bala (1988b) commented on the difference between the YOA and JDA as follows:

The Young Offenders Act is unmistakably criminal law, not child welfare legislation. The discretion of police, judges and correctional staff is clearly circumscribed by the Young Offenders Act. The only justification for state intervention under the Young Offenders Act is the violation of criminal legislation, and this must be established by due process of law. Society is entitled to protection from young offenders, and young offenders are to be held accountable for their acts. However, the Young Offenders Act is not simply a "kiddies' criminal code." It establishes a justice and corrections system separate and distinct from the adult system, and it recognizes that young persons have special needs as compared with adults, require special legal protection, and are not to be held as fully accountable as adults for their violations of the criminal law (p. 13-14).

One youth court judge commented that section three reflects, if not "... inconsistency, (then) at least ambivalence about (what) approaches should be taken with

Bala (1988b) concurs that there is ambivalence to the provisions of the YOA by the Canadian public. He observes that some of the public believe that punishment and control are the appropriate responses to young persons who violate the law; while other members of the public believe that providing assistance and guidance is the appropriate response.

Bala (1988b) concludes that the Declaration of Principle is a reasoned effort to balance these conflicting public views concerning young offenders and also ensures that these views are given some consideration in the YOA.

There is no single, simple philosophy that can deal with all situations in which young persons violate the criminal law. When contrasted with the child welfare oriented philosophy of the Juvenile Delinquents Act, the Young Offenders Act emphasizes due process, the protection of society, and limited discretion. In comparison to the adult Criminal Code, however, the Young Offenders Act emphasizes special needs and the limited accountability of young persons. There is a fundamental tension in the Young Offenders Act between such competing ideals as due process and treatment; In some situations the act gives precedence to due process, while in others treatment is emphasized at the expense of due process. The underlying philosophical inconsistencies and tensions in the Young Offenders Act reflect the very complex nature of youthful criminality. There is no single, simple philosophy and no single type of program that will "solve" the "problem". Judges and the other professionals who work with young persons who violate the criminal law require a complex and balanced set of principles like those found in the Young Offenders Act (Bala, 1988b, p. 15).

This writer believes that the Declaration of Principle
is incorporated into the YOA as a reflection of the contemporary attitudes and mores of society towards the misconduct of young offenders. Archambault (1983), commenting on the ambivalence in Canada concerning the YOA has stated:

The Young Offenders Act, 1982 is parliament's response to this evolution of cultural values and attitudes towards criminal justice. The legislation is based on a new set of fundamental assumptions reflecting this evolution and inspired, as well by extensive research and a more sophisticated knowledge of human behaviour generally, and the moral and psychological development of children in particular . . . (p. 3)

The JDA did not place adequate emphasis on the protection of society and personal responsibility. By contrast, the YOA specifically emphasized these two principles while also acknowledging the special needs of young offenders and their accountability for their actions, although not to the same degree as adult offenders.
Chapter 2: Methodology

3.1 Ministerial History

Historically there were some significant changes in the manner which the Ministries held responsibility for the implementation of the Children's Correctional Services. Until 1977 MCS had the responsibility of implementing Children's Correctional Services, after which it was transferred to COMSOC. At the same time other children's services were also transferred to COMSOC. Correctional programs for children under the ages of 16 were dealt with by COMSOC and usually involved the implementation of the JDA in Ontario. However, with the introduction of the YOA, Ontario fully faced the problem of having a Federal Act of Parliament which demarcated the responsibilities of MCS and COMSOC since the Federal legislation applied to young offenders between the ages of 12 and 18, whereas the previous legislation had only applied to children 15 years of age and under in Ontario. COMSOC, in a memo entitled "YOA Operational Policies and Procedures", stated that the fundamental principles that their Ministry brings to the implementation of the YOA is basically four fold. These principles include:

Firstly, any service or intervention by Ministry staff is regarded as one aspect of a large system of continual care resulting in ongoing assessment, classification and program planning. Secondly, services are provided in a positive climate to engender positive personal and social adjustment by young offenders through on-going staff training and development. Thirdly, the least interference...
as possible and the quality of the service provided to the young offenders is monitored through on-going program reviews and evaluations, the intent being to provide service and assistance to young offenders. And fourthly, incarceration is a last resort in terms of punitive measures against a young offender (Ontario Ministry of Community and Social Services, 1993, p. 2)

Under the Child and Family Services Act (1990), the primary importance of COMSOC would be integration of strategies that would help ensure that children and families receive the services they need. Moreover the concern was that they could help provide better assistance to children and families already receiving necessary services from various service providers. The intention was to keep track of the children and families in the attempt to keep them from falling through the "cracks" of the system. The expectations of the Ministry were that identified stakeholders such as government service providers and community members within local areas would integrate the efforts, services, resources and information available at the level of the clients. Short term strategies for the Policy Direction of Integration is basically that local planning capacity recognizes the need for linkages with other partners or sectors in government offices and various Ministries throughout the community. For example, COMSOC continues to work with other Ministries to coordinate policies and programs such as the Ministry of Health regarding children's mental health services (COMSOC, 1993, p. 8).
Interestingly, COMSOC cites one of their short term objectives as moving towards better coordination of policies and programs at the inter-ministerial level. The fact that they are able to identify this objective clearly shows the extent to which the two Ministries are not working as a cohesive unit in order to implement the YOA. This conclusion is also supported by the findings of the Children's Services Task Group (1988) which noted that COMSOC and MCS do not have adequate data collection mechanisms and furthermore recommended that all relevant data should be collected and shared where appropriate so impacts of programs could be accurately assessed (p. 19). Mid-term objectives support the notion that COMSOC should actively become involved with partner Ministries to remove the barriers to create coordination of services under the Child and Family Services Act with other children's services. These strategies may be employed, for example by coordination of protocol, service delivery integration, and local children's planning processes in each community, as well as having review boards that will address the needs of the community including social, health, education and housing, etc. (COMSOC, 1993, p. 8).

Long term strategies for COMSOC are basically similar to what has been described and thus there are coordinated support systems across the Ministries for children and families. Through these strategies they plan to form a
partnership with other ministries and the Inter-Ministry Committee on Services for Children and Youth. It is clear that the objective is to maintain greater cohesion and some kind of augmentation of cooperation between Ministries so that the YOA and its implementation become a coordinated effort (Ontario Ministry of Community and Social Services, 1993, p. 8).

COMSOC argues that accessibility to services continues to be probably one of the most persistent problems to the child services system. It is often difficult for families to identify appropriate services and to manage their way through the system that now exists, primarily due to its fragmentation. It is very diverse. The difficulty is further augmented when a family needs supports and services from more than one agency and often across different services such as education or health (Ontario Ministry of Community and Social Services, 1993, p. 9).

COMSOC has recently been making an attempt, even with fewer financial resources available to them, to become more streamlined in those service access functions, such as referrals, assessment and intake, become more focused upon service delivery (Ontario Ministry of Community and Social Services, 1993, p. 9). Moreover COMSOC acknowledges that accountability for the achievement of established expectations occurs at several levels. Specifically, service providers are accountable to their clients for the
provisions of the agreed upon services and also to the Ministry for their achievement of service and financial expectations as defined or outlined in legislation policies and basic contractual agreements. The Ministry is accountable to both the legislature and to the public for allocating resources to meet the client needs in the most appropriate, efficient and effective means possible. This premise has become particularly important in considering the severe limitations of provincial dollars available to support services through budget cuts and various cutbacks on programs and policies.

The Children’s Funding and Accountability Project has found that despite the previous Ministry’s efforts to have some kind of accountability framework, accountability processes do not adequately address whether clients benefit from services provided and accountability processes are not necessarily consistently utilized (Ontario Ministry of Community and Social Services, 1993, p. 16). This clearly illustrates the extent to which the two Ministries do not often work on a mutual plane of agreement. Furthermore, the study concluded that there was a need to shift the focus of accountability from how services are delivered to the client to benefits that result from services, as well as to provide consistency in monitoring of Ministry prescribed standards. From this it was recommended that accountability should address such following questions as: "What are the costs
for achieving various client benefits? Are services affected in achieving the expected client benefits?" (Ontario Ministry of Community and Social Services, 1993, p. 18). Actions required in order to improve some kind of accountability across the ministries are, first and foremost, clear definitions of expected benefits and their outcome indicators. Second, research is needed to advance knowledge about what interventions work best. Thirdly, funding links need to be specified according to client benefits. Fourthly, improving and developing upon management information systems to provide data necessary to assess problems, and fifthly, the consistent utilization of current processes for monitoring compliance with COMSOC prescribed standards. In their future outlook, in 1993-94 COMSOC will work with service providers and other stakeholders including consumers to define client benefits and identify outcome indicators. The research at this point in time is not available. However, it is in the process of being reviewed to reform this process (COMSOC, 1993, p. 18-19). A letter from the Ministry states:

For the past many months our Ministry . . . discussed and worked on ideas for reform of services to children and families in this province. . . . Together we have come a long way, but we still will have some way to go to achieve our common goals. The directions we will take are set out in the Policy Framework for Services funded under the Child and Family Services Act. . . . The framework will guide all of our area offices, in partnership with their communities, towards refocussing current services for children and families. It will also provide
direction for greater co-ordination between COMSOC Child and Family Services and services of other Ministries (Proctor, personal communication, 1993).

However, it is not specified what is meant by "greater coordination" nor does the letter say what other Ministries will be involved in order to effectively plan and achieve further direction for the implementation of the YOA.

The Ontario Ministry of Correctional Service was established by provincial legislature in 1946 initially as the Department of Reform Institutions which operated facilities for male and female adult and juvenile offenders under 18 governing acts and regulations. The province took over responsibility for all county and city jails in the province in 1968. The name accordingly was changed to The Department of Correctional Services in 1968 with the passing of The Department of Correctional Services Act and in 1972 was changed to the Ministry of Correctional Services. In 1972 the Ministry took over Probation Services from the Ministry of the Attorney General and in 1977 the responsibility for juvenile offenders was transferred to the Ministry of Community and Social Services. The Ministry became the Ministry of the Solicitor General and Correctional Services in February of 1993 as part of Premier Rae's expenditure control programs.

The passage of the Federal Young Offenders Act in the early 1980's signalled a new era in the Ontario juvenile justice system. This law recognized that while young
offenders should be held accountable for their actions in breaking the law they should not be held accountable in the same way as that of an adult court. Provisions in the legislation calling for institutional facilities both separate and apart from adult facilities have necessitated some reorganization of the Ministry's institutional make-up. The construction and remodelling are in the advanced planning stages in several areas of the province to accommodate these special needs. As of 1993, though, a substantial amount of information is inaccessible by the fact of its confidential nature before being addressed by the legislature. Nonetheless, many of the community based programs offered to MCS's adult clients will be adapted for young offenders. Some of these that are most notable are probation supervision, community services or personal service, restitution, informal programs and alternative measures. Community involvement in correctional programs for young offenders is held to be of the most paramount importance and the highest priority and will continue to be encouraged and supported as a major game plan within the Ministry. In the operating budget of 1985-86, it was estimated that the administration program of the facilities for young offenders would require an operating budget of $22,100,000.00 by the Ministry of Correctional Services in 1985 (Communications Division, Ministry of Correctional Services, personal communication, 1993).
3.2 The Implementation of the YOA in Ontario

When the YOA came into effect on April 2, 1984, it raised the minimum age for youths to be charged under the Act from 7 under the JDA to 12. It also raised the upper limit from the sixteenth birthday to the eighteenth birthday. Despite these changes, the Ontario Government decided to retain the system under which it had been operating under the JDA.

Under this system, youths aged 12 to 15 continued to be tried in Provincial Court (Family Division) known as Phase I courts and were the responsibility of COMSOC. Youths 16 and 17 continued to be tried in the Provincial Court (Criminal Division) known as Phase II courts and were the responsibility of MCS.

Under the JDA, all juvenile delinquents had been administered by COMSOC, since Ontario had determined that a young person’s sixteenth birthday was the maximum age of jurisdiction of the JDA. Accordingly, young persons aged 16 and 17 were dealt with as adults under the criminal justice system, and dispositions were dealt with by the Ministry of Correctional Services, which was responsible for all adult dispositions and sentences.

The arguments in favour of retaining this split jurisdiction in Ontario after the YOA came into effect were as follows:

1. Transfer and responsibility for all young persons under
one ministry and in one court would have resulted in a substantial transfer of personnel and resources;

2. MCS had expertise in dealing with older youths, i.e. 16 and 17 year olds under the former system as young adults, while COMSOC had expertise in administering youth in the group 7 to 15;

3. The negative influence of the older youth age group (i.e. 16 and 17) on the younger age group (12 to 15) would be minimized by dealing with these groups in separate ministries;

4. The significant cost of new facilities could be avoided by maintaining the split jurisdictions. (Ontario Ministry of Community and Social Services and Ministry of Correctional Services, 1990, p. 54)

The arguments against retaining the split jurisdiction were as follows:

1. The two-tiered system prevents the development of a coordinated and consistent approach to dealing with young offenders. For example, a 15 year old offender would be dealt with under COMSOC policies and facilities, but upon his sixteenth birthday, any new offences would be dealt with under the more adult-oriented punitive MCS.

This leads to a variety of problems such as incarceration in different types of facilities where the same level of custody is imposed, differences in allowance and conditions of release, and disparity in types of
treatment programs available.

2. 16 and 17 year old youths might be receiving harsher treatment from judges in the Provincial Court (Criminal Division). The reasoning behind this criticism was that these judges usually dealt with adult offenders and might not be that cognizant of the dispositional principles of the YOA. One dispositional study concluded that a young offender in the 12 to 15 age group was at least 10 times more likely than a 16 to 17 year old to receive a court order for a medical/psychological predisposition assessment to access emotional and/or learning problems (Leschied & Jaffe, 1988). This finding tells us that COMSOC is more rehabilitative oriented than MCS. It also tells us that the Provincial Court (Family Division) judges responsible for Phase 1 offenders are more sensitive to the needs of young offenders that the Provincial Court (Criminal Division) judges. In the case of R v C. (R) (1987), the two-tiered system was challenged in court on the grounds that trying the two age groups in different courts was a violation of the equality rights section of the Canadian Charter of Rights and Freedoms. This challenge was not accepted by the Ontario Court of Appeal, the province's highest court.

The Charter Challenge pursuant to the Section 15 equality rights provisions was not accepted as the Ontario Court of Appeal held that proof of distinctive treatment was not of itself sufficient to demonstrate discriminatory,
(i.e., "harsher", treatment (R. v. C. (R.), 1987).

The Appeal Court also held that the onus was on the young offender, not on the Crown to demonstrate harsher treatment resulting in inequality. This imposed a heavy burden on the young offender which the Court then determined had not been met. Bala (1988a), in commenting on this decision, states: "If the court had accepted that proof of distinctive treatment shifted the onus to the Crown to prove an absence of discrimination (or justification under s.1), the outcome might have been different" (p. 7565).

3. Certain programs and facilities available to one age group were not available to the other age group.

4. In many locations in Ontario, 16 and 17 year old youths were kept in a separate part of an adult correctional facility. This was due to the failure of MCS to establish separate facilities for young offenders due to the substantial cost (McNaught, 1993, p. 2-5).

Bala (1988a) has surmised that the main reason for the split jurisdiction is intense inter-ministry rivalry. The present system created the least disruption in both ministries. One reason for the present system is that it allows the respective ministries to design and implement programs and facilities for different age groups.

Bala (1988a) states:

The two-tier model has, however, been severely criticized, at least in Ontario. In that province, the scheme was apparently established in response to inter-ministerial rivalry as much as
anything else. In Ontario - the YOA brought about an increase in the age jurisdiction from 16 to 18. The Ministry of Community and Social Services and Ministry of Corrections each vie for responsibility for the entire 12 to 18 range. Giving one Ministry complete responsibility would have been a substantial reallocation of resources and staff. Similarly, giving responsibility for all young offenders to either the Provincial Court (Family Division), which dealt with 12 to 15 year olds under the JDA, or to the Provincial Court (Criminal Division) which dealt with 16 and 17 year olds prior to the YOA would have involved a substantial shift in Court case load. This too might have involved a reallocation of judicial resources, and was apparently met by some judicial opposition. Ultimately, the Provincial Government chose not to make a decision about giving one Court System or Ministry complete responsibility and left the pre-YOA age divisions in place (p. 7561).

According to Moyer (1991) in addition to youth responsibilities, the MCS has jurisdiction over adult offenders, both male and female, sentenced to terms of two years less a day and released on parole; all adult offenders on remand awaiting trial or sentencing; all adult offenders waiting transfer to federal institutions; and awaiting immigration hearings or deportation.

The Ministry operations include the administration of Ontario’s 53 correctional institutions, 18 young offenders secure detention and secure custody facilities, and a network of probation services in 129 locations.

A youth services unit was established in 1988 - 89 to assist in the coordination of services for young offenders. In July 1991, this unit was renamed Young Offender Policy and Program Development.
The Ministry of the Attorney General is responsible for the administration of all courts in the province, including the youth court. COMSOC provides community and custodial services for Phase I young offenders, as well as a wide array of social services including: income maintenance, child protection, vocational rehabilitation, and services to developmentally or physically disadvantaged persons.

Other ministries involved in the application of dispositions for young persons are the Ministry of Health and the Ministry of Education. The Health Ministry funds facilities that may make assessments of young offenders, and is responsible for the Mental Health Act. The Ministry of Education provides funds and standards for school programs in all secure detention facilities, and a number of open custody facilities.

In addition, there are many private agencies and individuals contracted by MCS to provide dispositional programs to Phase II young offenders. Agencies include the John Howard Society, the Salvation Army, and St. Leonard Society.

COMSOC provides dispositional programs directly to young offenders through private non-profit agencies, private for profit agencies, and individuals contracted by the Ministry. They use the same agencies as MCS as well as a number of smaller unaffiliated organizations. There is no central provincial agency or structure which provides co-
ordination or information exchange/support services to these various non-governmental agencies.

Within MCS the operations division is directly responsible for the delivery and management of contracted programs. Based on the chain of command, the Assistant Deputy Minister of Operations reports to the Deputy Minister. Moreover, the Assistant Deputy is further responsible for the supervising of five regional operations as well as the two main office support branches, youth and community corrections and offender programming. In respect of the five regions, each office is responsible for administering all correctional services. It is apparent that lines of authority for adults and young offender services are integrated.

Relative to the MCS, COMSOC’s youth services range of operations, extend to management of contracted programs, childrens services, and policy development for most childrens issues. However, these services have separate reporting lines within the Ministry. Specifically, the Regional Directors and Director of Operational Coordination report to the Assistant Deputy Minister of Operations, while the Director of Childrens Services reports directly to the Assistant Deputy Minister of Community Services.

3.3 Research Design

The design of the research for this thesis was descriptive and exploratory. It was based on independent
study and research. It was guided by the use of qualitative methodology, though quantitative methodology was used to present some correlations.

The argument presented was that a "two-tiered" system of juvenile justice has resulted in unequal treatment between 12 and 15 year olds as opposed to 16 and 17 year olds. This was shown with respect to specific provisions of the YOA. An expected result was that the lack of legislative and jurisprudential guidance for youth court judges, COMSOC, and MCS has resulted in a model of discretionary administration with negative implications for the administration of the juvenile justice system in the Province of Ontario. Recommendations based on the findings were presented.

It was decided that qualitative analysis would be the most appropriate for this research as its purpose is very specific: that of building theory or the case for an argument. Strauss and Corbin (1990) have referred to this as a "grounded theory" approach.

Patton (1987) has devised a list under which qualitative research strategies can be useful. This list appeared directly related to the research presented in this thesis as follows:

1. Individualized outcomes are emphasized. Phase I and Phase II young offenders were expected to be affected in qualitatively different ways.
2. Program strengths and program weaknesses are elucidated. This was shown with respect to the manner in which the YOA has been implemented in Ontario in specific areas.

3. In-depth information is needed about certain client cases. This information was necessary to the argument of unequal treatment.

4. There is an interest in focusing on the diversity among programs. This related to the central focus of the research in that MCS and COMSOC each implement the Act to their own specifications.

5. Information is needed about the details of program implementation. This was definitely a requirement in order to build a case for the aforementioned argument.

6. Data-gathering through open-ended interview is preferable. It was felt this method would provide the most relevant data and would be the most flexible.

7. There is the possibility that the program may be affecting clients in unanticipated ways. This was directly related to the premise of the argument of unequal treatment under a two-tiered system.

8. The research is exploratory. As stated above, the research set out to explore the effects of the split in jurisdiction of the YOA in Ontario (pp. 40-42).

The strength of qualitative studies for research that is exploratory or descriptive has been expanded on by
Marshall (1985a, 1987). He emphasized that a researcher should expand on the value of qualitative studies for the following types of research.

1) Research that cannot be done experimentally for practical or ethical reasons
2) Research that delves in depth into complexities and processes
3) Research for which relevant variables have yet to be identified
4) Research that seeks to explore where and why policy, folk wisdom, and practice do not work
5) Research on unknown societies or innovative systems
6) Research on informal and unstructured linkages and processes in organizations
7) Research on real, as opposed to stated, organizational goals (quoted in Marshall & Rossman, 1989, p. 46).

The research presented herein related to Marshall's frame of reference. For practical purposes, this study could not be done experimentally. It explored in depth the complexities of the implementation of the YOA in Ontario by a system of split jurisdiction as well as identifying the policy processes related to governmental conflicts and divisions. All of the relevant variables were not identified before the research was begun and emerged as the interview process progressed. At that point, the research sought to explore why the policy as stated was not always the actual practice and why the practice itself was not effective in the new and innovative juvenile justice system. The informal processes within MCS and COMSOC were central to the focus of the research as well as the real, as opposed to stated, goals of the Ministries.

According to Strauss and Corbin (1990) a grounded
theory of qualitative analysis is one that is:

Inductively derived from the study of the phenomenon it represents. That is, it is discovered, developed, and provisionally verified through systematic data collection and analysis of data pertaining to that phenomenon. Therefore, data collection, analysis, and theory stand in reciprocal relationship with each other. One does not begin with a theory, then prove it. Rather, one begins with an area of study and what is relevant to that area is allowed to emerge (p. 23).

This was the manner in which the present research was conducted with the area of study being the split jurisdiction of the YOA in Ontario. What emerged through the data collection and analysis was an argument of unequal treatment between Phase I and Phase II young offenders.

A study design may be strengthened through triangulation which is the use of a combination of methodologies in the study. Denzin (1978b) has identified different types of triangulation. By the use of quantitative data to provide correlations this study has used data triangulation. It is the use of "as many different data sources as possible which bear upon the events under analysis" (p. 295).

3.4 Data Gathering

Data gathering consisted of field research conducted by semi-structured interviews and personal communications. It was felt that using a qualitative approach such as this would provide flexibility and greater depth to responses as well as enlightening this researcher to new areas which need to be examined and possible modifications to the research
design dependent upon findings.

As the study progressed and the research became more focused with clearer concepts to be examined, the strategy changed exclusively to personal communication with more specific questions. The questions asked were relevant to the position of the person being interviewed in relation to the area of study.

Quantitative data was also used to substantiate the argument that a two-tiered system of juvenile justice has unequal and discriminatory implications for the service receivers. The available statistical data was gathered from MCS in North Bay and from COMSOC in Toronto. A limitation must be noted in that there has been a lack of a systematic data collection system for the purpose of research and evaluation of the Youth Justice System in Ontario until recent years. MCS data is deemed to be more accurate than COMSOC data by officials interviewed (Fleury, personal communication, 1993). Keeping in mind the limitations of the statistics presented (and these will be noted wherever possible), the quantitative data is also used to back up the qualitative data wherever possible and applicable.

3.5 Nature and Number of Respondents

Twenty-six interviews were held. For the names and positions of respondents see Appendix A. Some respondents were employees of COMSOC and MCS in Kenora and Thunder Bay. This included the District Directors as well as front line
workers. Employees and directors of custody facilities were also interviewed. Some of these facilities (open) were run by private companies, while others came under government jurisdiction. Workers in the treatment oriented Kenora-Patricia Child Development Centre were also interviewed.

In addition, interviews were held with persons directly associated with policy development in Toronto, North Bay and Kingston, which in total, contributed to making this an extremely interesting and informative research project for this writer. (For a list of the facilities and organizations taken into consideration for interviews, see Appendix A).

3.6 Data Analysis

Once the data was gathered, the interviews and notes were transcribed and analyzed. The naturalistic approach of Denzin (1978b) was followed. This involved the principles of symbolic interactionism whereby symbols or attitudes are linked to interaction with respect to the sampling and recording (pp. 78-79).

The sampling and recording activities of the researcher should be based on a soundly thought-out theoretical format that carefully guides the investigator to those situations where the processes he or she is concerned with are most likely to appear. . . . Recording activity may be continuous . . . or it may be discontinuous. . . . Theoretical flexibility is called for in such investigations (Denzin, 1978, p. 87).

Recording activity was discontinuous in nature and modifications were made as data was coded. A combination of open coding and axial coding was used. In axial coding the focus is on "specifying a category (phenomenon) in terms of
the conditions that give rise to it" (Strauss & Corbin, 1990, p. 97). In this manner, the flexibility of the method led to the means to prove the argument. Statements of relationship were made and validated with empirical evidence.

Marshall and Rossman (1989) feel that in qualitative studies "data collection and analysis go hand in hand to promote the emergence of substantive theory grounded in empirical data" (p. 113).

This method was followed in this research and the process of qualitative data collection and analysis used has been portrayed by Strauss (1973):

Our . . . researcher starts analyzing very early in the research process. For him, the option represents an analytic strategy; he needs to analyze as he goes along both to adjust his observations strategies, shifting some emphasis towards those experiences which bear upon the development of his understanding and generally to exercise control over his emerging ideas by virtually simultaneous "checking" or "testing" of these ideas. . . . (quoted in Marshall & Rossman, 1989, p. 113).
Chapter 3: Literature Review

4.1 Social Administration Policy

The implementation of the YOA in Ontario through a two-tiered system involving COMSOC and MCS has magnified the importance of the social administration policy exercised by these two government departments. Laframboise (1982) has commented on a process he has entitled "interdepartmental diplomacy." He has labelled it as such because:

The blurring of departmental boundaries, coupled with the spread of collegial decision making, the proliferation of watch dog agencies and the creeping extension of mandates, has made necessary an emphasis on interdepartmental negotiations, and this emphasis has been translated into a corps of interdepartmental diplomats of considerable dimensions (quoted in Aucoin & Bakvis, 1988, p. 63).

However, the relative lack of success of these efforts to provide centralized direction and coordination means that the quality of management in the field, in any bureaucratic structure and any government where there is some policy making that has to be done, often leaves much to be desired.

Aucoin and Bakvis (1988) argue that under different divisions, with respect to the power of cabinet and its position and duties, two developments need to be considered. The first deals with the division of duties for an escalating number of specific and specialized positions. For example, it can be argued that more Ministers means more Ministerial time for activities. However, Ministerial time is the most scarce resource in government and is not a
benefit to public administration, primarily because the more ministerial tasks or ministerial portfolios there are in Canadian government, the more decentralized the public process is. If you apply this development to the YOA and to the implementation of the YOA in Ontario, the two Ministries, because of their wide variety of tasks, often do not centralize and coordinate their activities in order to gain some kind of uniform policy regarding the implementation of the YOA as well as the structure of programs and policies related to the legislation. Centralization of activities would also provide for information and resource sharing.

Secondly, and related to the first development, the two authors have illustrated that there is a division in the cabinet in terms of its delegation practices. This division with the principle sectors of public policy, i.e., economic and regional development, social development and foreign and defence policy. Such divisions have enveloped a full range of program duties in an attempt to provide for some policy coordination and consolidation within each of these three policy areas. While this does represent a structure that has evolved over time, it does not necessarily fit with most of the structures of Canadian public policy (Aucoin & Bakvis, 1988, p. 118-119).

With regard to the aspects of power that push in the direction of decentralization, it is most often evident in
ministers strategizing to get their own way; that is, ministers avoiding conflict by circumventing the centralizing dimensions of corporate management. In this sense then the pecking order in the cabinet does represent a very real power struggle in that whichever ministry is given the power at that point in time, has more power to wield than other ministries that do not have the same degree of power afforded to them by the Premier or Prime Minister. The capacity, however, of the department to oppose centralized power and coordination is mostly a function of their policy expertise, especially as it relates to policy implementation and program delivery. This directly relates to the specialization concept that those ministries that are highly specialized, such as COMSOC and MCS have. These two ministries have substantial policy expertise, therefore they are able to have more centralization within their own structures. As a result, in Ontario, ministries such as COMSOC and MCS are able to operate their own Phases relating to young offenders without having constraints imposed upon them by a centralized power, i.e., the Cabinet (Aucoin & Bakvis, 1988, p. 96-100).

Adie and Thomas (1982) argue that in a democracy, accountability is important because of the need for the governed to be protected. This means that citizens of a democracy try to control their elected representatives, because the representatives are supposed to control the
bureaucracy. But, if accountability is lacking or poorly enforced in the relationship between the representatives and the bureaucracy, ultimately, the administrative actions will not be governed by popular, democratic control. While this is ultimately a basic constitutional right, past a certain point, political interference in actual administrative functions is considered undesirable by the authors.

More specifically these two authors argue that ministers must be aware of the administrative operations of their departments, however they should not interfere with the daily duties of the officials. It is somewhat of a 'Catch 22' situation in the sense that we are arguing that we do want our ministers to be aware, however, we do not want them to interfere (Adie & Thomas, 1982, p. 261-262). For example, there are at present widely presented news media reports stating that the public is dissatisfied with the perceived lenient treatment of young offenders. However, the Minister responsible for COMSOC has for the most part, not been able to change the policies and program delivery of COMSOC towards Phase I offenders.

Adie and Thomas (1982) argue that we can no longer believe that a minister can possibly be cognizant of all the actions taken in his or her name by department officials. Because of the schedule a minister must keep, he/she is often only able to see a few of the most significant matters handled by his officials. Therefore the minister must
appoint a management authority over his department officials, namely the Deputy Minister. Because of this, and the fact that ministers cannot possibly possess detailed knowledge of all procedures, they are no longer willing to take entire responsibility for actions taken under their authority (Adie & Thomas, 1982, p. 265).

In most cases where there is definite public outcry based on the poor policy or bad implementation of a policy, the minister can avoid guilt by either denying personal knowledge or promising to correct the mistake and discipline the offending public servants. In this sense, the accountability is often eradicated for the minister himself and in turn shifts to some other subservient employee or servant who does not necessarily have a stronger role to play in the policy making structure.

However, the structure of Canadian public policy is such that Parliament does not really have the influence or the authority to make ministers accept responsibility, in terms of forcing the minister to resign if there is a bad policy implemented or enforced. In actual practice, the Prime Minister has the sole authority to decide if a minister should resign or stay. The political grounds of whether the minister represents a political asset or liability to the government is a key factor in the decision making process.

These comments also apply to the parliamentary system
within all provinces, including Ontario. They also illustrate why criticism of the operations of COMSOC and MCS in their administration of young offenders while having merit ultimately did not result in changes to the ministers of the respective ministries.

For example: In early February of 1989, a double tragedy occurred in Ontario where a 21 year old woman was murdered in a group home operated by COMSOC where she was working alone and where young offenders were placed. In the same week, five young offenders were killed in a stolen car after escaping from a secure custody facility. Concerning the murder, it was found that there had been some concerns a week earlier at the group home and staffing had been doubled for a week. The Opposition attacked the Minister for inadequate staffing guidelines and lack of financial support to the group home to hire enough staff. In spite of a special debate held in the legislature, there were no repercussions. The Minister of COMSOC did not resign because of this incident. (Sweeney, (1989), Hansard Official Report of Debates, Legislative Assembly of Ontario, pp. 7913-7920).

Also, as noted in this paper, for many years there has been constant criticism by various authors about COMSOC and MCS's involvement in the two-tiered system. Yet, over the years, neither the minister from COMSOC nor MCS has had to resign despite the intensity of the criticism.
Adie and Thomas (1982) note that most commentators argue that the situation described earlier does not necessarily mean that the concept of ministerial responsibility is now useless. They do agree, however, "that the emphasis has shifted from complete liability of the minister for departmental actions to complete answerability of both ministers and officials." (p. 267). This shift does not imply that the political significance of the doctrine of ministerial responsibility is weakening (Adie & Thomas, 1982, p. 266-267).

Osbaldeston (1992) argues that:

... what begins as a clear distinction between departmental and non-departmental organization -- the delegation of powers, duties and responsibilities directly to a minister in the former case in to a management body in the latter -- becomes muddied in practice by a wide spectrum of ministerial and prime ministerial powers and responsibilities related to policy, operations, financial management, funding and appointment of key personnel (p. 21).

For a variety of reasons, such as lack of knowledge, or shortage of time, or need for flexibility, legislatures have increasingly passed legislation in broad and general terms and delegated power to department and other governmental agencies giving them the authority to provide the actual content of policy. This is perhaps most evident and most paramount within the YOA. The Act specifically allows for power and broad discretion to be given to "provincial directors" who according to the YOA are designated by the Lieutenant Governor in Council (i.e., the provincial
Cabinets in each province). The fact that there is a split jurisdiction between the two ministries in Ontario illustrates the extent to which the delegation of power has obscured the actual content of policy.

Painter (1991) argues that in all federations, in order to deal with the inter-reliance created by overlapping authority, an intricate system of inter-governmental relations evolved. This happened by separating powers and by making available means for settling differences and reaching agreements. In essence, Painter argues that what distinguishes Canadians from, for example, West German federalism is the capacity of the Canadian government, the provincial and the federal government, to stand at arms length from their ministerial responsibilities and their inter-governmental arenas, which are frequently interrupted by very public outbreaks of hostility and confrontation. In this sense, provincial and federal governments appeal separately for support from the same individual and groups in the electorate. However, the regional and national political communities that concentrate on provincial and federal governments, are distinct, due to their regional differences highlighted by provincial politics.

The federal character of the Canadian policy system is thus characterized as conflict as opposed to collaboration. Although governments are encouraged to keep their distance and go it alone, provincial and federal governments of the
same party are not necessarily cooperative. This is because the party system is not highly integrated and the competitive nature of federal/provincial relations are often reinforced (Painter, 1991, p. 284).

Skogstad (1987) notes that the thesis regarding the capacity of public officials to act autonomously is not necessarily a true notion. In fact, she argues that there is an overstatement of autonomy of elected officials by failing to appreciate that dominant societal groups can deploy many of the same functions available to public officials. These functions are: "intellectual persuasion, communication, information about other societal actors, give assurances about their own motivation, emphasize the various ways in which they fulfil the societal actors' other interests and offer mutually advantageous exchanges" (Nordlinger, 1981).

The focus of her argument is on the autonomy of officials in two Canadian provinces, New Brunswick and Prince Edward Island. By using this example illustrating the potato market, she is arguing that governments and public officials cannot necessarily act autonomously. This concept reinforces the notion that ministers and often public officials cannot necessarily act in their own interests primarily because of a large body of bureaucratic decision making processes that they have to go through in order to gain support for a policy.
Adie and Thomas (1982) also note that the evolution of the cabinet committee system and the ascent of central agencies seem to have strengthened the cumulative control of ministers on the general direction of policy. However, it has also limited the extent to which individual ministers can and will be held accountable for the policies in their respective areas.

Moreover while the emphasis on combined cabinet decision making acknowledges the interdependence of departmental activities, it further inflicts additional demands on ministerial time. The authors note that barely a day per week can be given to department duties. They go on to argue that it is obvious, even to people who do not necessarily know the structure of politics themselves, that ministers can not accept anything more than indirect responsibility for actions which are not theirs (Adie & Thomas, 1982, p. 289). This is seen to impact on those who would like to effect meaningful change to the policy and procedures of COMSOC and MCS in relation to their respective responsibilities under the YOA.

At the present time, public policy, political public administration, and the enforcement of public policy seem to be at a crossroads. At best, what one can hope for is the sense that some ministers can assume responsibility for their roles. However when a department becomes too large or when departments have to share responsibility then
accountability is definitely hard to attach to one particular portfolio. When there is a problematic policy consideration with legislation, such as the JDA or the YOA, there is not necessarily a clear and concise centralization of power that one can directly relate to when there is conflict or controversy.

Theoretically, Blalock (1989) further argues that although it seems unwise to attempt to describe stages through which all conflict situations pass, it is perhaps more important to recognize that the processes will be at work and that, there will be many changes in each party's internal structure, as any controversy wages on. These changes will influence outwardly the general model itself. This is best illustrated in that members of a party rarely blame themselves or take the responsibility for initiating a conflict (Blalock, 1989, pp. 205-206).

Doerr (1981) argues that federal/provincial intergovernmental relations constitute a key element of policy making process at the federal level. What further hinders the policy making process in Canada is the extent to which the interdependence between the activities of the two higher orders of government in Canada has augmented them resulting in intricate and detailed structures and mechanisms (Doerr, 1981, p. 165).

When one considers the structure of inter-governmental liaison or inter-governmental communication, there usually
is an inherent formality and official "jargon" which inhibits meaningful communication.

As Doerr (1981) argues then,

As governments have expanded their activities, competition rather than cooperation has characterized the relations between them. As a consequence the effectiveness of the mechanisms has been increasingly questioned (p. 168).

The process leading to passage of the YOA and especially the position of Ontario illustrates this competitiveness to a certain extent. The Ontario provincial government, in its consultation paper on the YOA, argued strenuously for an upper age limit of 16, while the federal officials put forward the 18 year age limit (Ontario Inter-Ministry Implementation Project, 1981).

Like most other writers in the area of public policy and administration, Doerr (1981) takes somewhat of an optimistic outlook regarding the perspectives on responsive government and argues that a steady progression of mutual involvement between the two ministries and between federal policy matters and provincial government matters is most likely apparent. In the process she argues governments have moved from exchanging information as a basic function to harmonizing programs and activities and jointly determining policies. She argues that although there have been many pressures which have supported this inter-dependence, there is perhaps the most significant one which is the expansion of government activities at both ends (Doerr, 1981, p. 173).
Although Doerr (1981) does not necessarily debunk the myths that extensive bureaucratic structure has further served to perpetuate the decentralization of government structures, it does seem apparent to her that the major efforts that are required to establish a better equilibrium between the mechanisms designed for executive consultation between governments and ministries has been improved. She cites that ministerial meetings can assist and facilitate collaborative efforts between and among governments, however, they should be viewed as flexible political mechanisms (Doerr, 1981, p. 175).

There is a central weakness in her argument, however, as it is based on an assumption about the flexibility of the political mechanisms. If you do have flexibility between political mechanisms, then accountability can be weakened, based on the extent that ministerial meetings do not necessarily evoke any stringent rule as to who will be responsible for policy implementation or collaboration.

Doerr further argues that federal/provincial collaboration at the administrative level often provides a strong support base for inter-governmental cooperation. In this sense she cites that officials working in the area share common professional values with their counterparts in other governments and they work easily together. However she does show that this is not always the case. In most situations professional perspectives can and often do differ
among officials working in both the provincial and federal governments. This clearly illustrates, as well, the lack of consensus that is often found between ministries and between the different levels of Canadian public policy making (Doerr, 1981, p. 177).

This line of argument can be further aligned when considering the YOA. When Doerr argues that administrative inter-dependence creates problems of accountability, she illustrates that while information exchange between governments has seldom caused problems, joint program development and administration has.

If you consider the YOA and the joint cooperation between the two ministries, this aligns with Doerr's (1981) argument wherein she stated that the administration of shared cost programs demonstrates the type of problem involved. For example, she states that agreement to establish a shared cost program would normally be obtained at a meeting of federal and provincial ministers following preliminary discussions. In this sense, the federal minister on behalf of his government would introduce legislation in the House of Commons and then the federal government would agree to support and/or establish a provincial program and require the program to meet certain standards (Doerr, 1981, p. 179).

Chandler and Chandler (1983) showed that the public service does not operate in a vacuum. They argue that it
has ties with both the cabinet and legislature to make up an intricate system of association. This is not new. What they argue, however, is that the increase of provincial powers and the resulting enlargement of departmental structures has had a direct impact on the method of organizing provincial duties.

Specifically, they argue that small portfolios promote clear levels of ministerial responsibility and thus promote intelligent program development. Given the fact that in Ontario COMSOC and MCS are large ministries responsible for thousands of young offenders, they are hindered in effective program development by their actual size. In addition, COMSOC is responsible for service to children under CFSA, while MCS is responsible for all adult offenders as well as Phase II offenders.

As most authors have alluded to earlier, the traditional solution for the problem of coordination has been the hierarchical structure within departments. Central agencies have acted mainly as control units determining whether departmental estimates were in keeping with governmental outlines, with individual ministers being able to appeal agency decisions to cabinet.

The new approaches to policy making have explicitly sought to make interrelationships more explicit and more pronounced and to increase respect across programs. Policy fields and the function of cabinet committees have provided
a structural basis for augmented coordination between line
departments. As such, inter and intra departmental
committees have become common in reaction to the concern for

Like other authors, Chandler and Chandler (1983) argue
that in the end the power, responsibility and accountability
throughout the bureaucratic structure has become
increasingly diluted because of this increase in
interdepartmental policy formulation. As administrators
cope with many different problems of coordination across
departments, larger responsibility increasingly becomes
blurred and further harder to maintain (Chandler & Chandler,

Chandler and Chandler (1983) point out the problems
that surface when officials are too sensitive to demand.
They argue that policy making can become too specific and
separate with insufficient attention being given to the
whole and the connections among the programs. This is
perhaps the chief problem in the implementation of the YOA
under the respective ministries in Ontario (p. 157).

Atkinson (1993) takes a theoretical perspective on the
new institutionalism and focuses solely on the institutions
that govern public policy. He questions whose interests are
being taken into account when one fashions policy and if
this can help to answer any of the key questions that policy
analysts do pose. In answering these questions, Atkinson
argues that some policy domains seem to be shielded from external political forces. In these domains he argues public officials are not forced to confer with or negotiate with other political actors. Policy choices seem to be a result of the distribution of power rather than the ability of public groups to express their viewpoint. For example, the policy decision in Ontario to have a split jurisdiction wherein two different ministries implemented the YOA to two different age groups could be viewed as a result of the distribution of power among two strong ministries.

As Bala and Lilles (1992b) and Reid and Reitsma-Street (1984) noted earlier, there was strong pressure exerted by both ministries to have total power over the YOA. Atkinson implies that most actors within the political structure of bureaucracy act within their own interests and not necessarily in response to societal needs.

Atkinson (1993) states:

For the most part problems, solutions and decision makers develop independently from one another. The dismal truth is that often they never combine. Solutions may seek problems, decision makers seek solutions and problems seek decision makers, all without success. Under these circumstances problems are recognized but ignored, solutions are shelved for want of the right problem, and decision makers grow tired of sifting through the existing agenda (p. 25).

Applying this analysis, the YOA as implemented in Ontario will not function properly primarily because it is structured in such a way that neither ministry will take responsibility for the final functioning of the YOA itself.
When a problem arises, it is not necessarily addressed by any of the ministries, and when there is a solution that does exist, the structure of the large bureaucracy itself is such that it is not possible to have a quick fix solution. Instead it takes considerable time, devoted action and trying patience in order to propose some kind of solution. Often a solution that neither Ministry is willing to invest time in.

4.2 Policy Process in the Young Offenders Act

Schneider (1980) (quoted in Ossenberg, 1980) argues that the youth problem, and delinquency in particular, is governed by population demographics, the labour market crises, the fiscal crisis of the state forcing delinquency programming cutbacks and the universal failure of liberal means of control.

Solomon (1981) argues that in many areas of public policy, the policies that are addressed by politicians and used in legislation are often instrumental in setting the course of action for officials at lower levels of government. Criminal policy however is not necessarily always one of the policy areas that follows this path. Especially in Canada, law enforcement and criminal justice are shaped not only by decisions made in the centre of power, but also by policy issuing through other levels of government. There are two reasons for fragmentation of criminal policy among the multiple levels of government in
Canada. First, Solomon argues that in Canada, the formal responsibility for crime control is divided between the federal systems and the province. Secondly, he argues that because much of the actual regulation of courts and police has stayed in the hands of the local officials, it is often beyond the reach of federal/provincial governments (Solomon, 1981, pp. 6-7).

Solomon cites as one of the main obstacles to effective public policy, the problem of innovation in policy. Basically he argues that placing the proposal on to the political agenda is usually very difficult or requires a change in thinking which is not often possible in a bureaucratic structure. He argues that once an innovative policy idea becomes sufficiently acceptable to receive consideration, it still must face the hurdles associated with being adopted.

Increasingly, policies of governments are becoming interrelated so that the changes in one area require changes in another or possibly even cooperation from the latter. With reference to the YOA, basically these professionals do not necessarily coordinate their own agendas in order to overcome the structural obstacle of changing a program to become more innovative.

Solomon also argued that another structural obstacle to innovation, with particular relevance to Canada, is its effects on inter-governmental relations. More specifically,
he argues that in most unitary systems, a policy may disturb divisions of responsibility among levels of government and in the general area of accountability. This responsibility among the levels of government is often dispersed into other areas where there is no clear concise delegation of authority. Thus, when it threatens to change the power and sharing of functions or resources, there is opposition in a highly conflicting manner (Solomon, 1981, p. 8-9).

This was aptly demonstrated when COMSOC initially proposed to be responsible for the YOA in Ontario. The judges and court officials who had administered 16 and 17 year olds as adults under MCS did not want to give up this responsibility to COMSOC and the Phase I courts under the Family Division. (Bala & Lilles (1992b) p. 2:8)

Howland et al. (1990), illustrates the extent to which public policy and political processes interfere. They argue that a restructuring of the justice delivery system has been a major topic of concern, study and speculation throughout the professions. However, it is clear that the forthcoming combination of the criminal and family divisions of the provincial courts with the family division taking over responsibility for young offenders will reduce the holdups in the criminal division to a certain extent but will at the same time increase the holdups in the family divisions (Howland et al., 1990, p. 40).

Specifically, they argue that the hearing of matters in
the youth court continues to occupy substantial amounts of court time with transfers, trials, dispositions and reviews. The family division is currently in the process of beginning to assist in a number of areas by assuming responsibility for all young offenders. However, this assumption of responsibility does not further serve to perpetuate or strengthen the policy itself. Instead, it just serves to further complicate the ministerial responsibility as pertaining to who should take ultimate control of the YOA and its functioning.

Baar (1988) argues that the proposed court structures combines both an elite superior court with an intermediate appellate court derived from the more decentralized American organization. He is arguing for more decentralization than centralization in order to have some kind of coherent court reform in Ontario. He focuses on court reform and the judicial structure itself, the management, the mismanagement and the creation of it. He also examines the proposals for structural change that tend to come from the judges and clientele of limited and special jurisdiction courts. Baar calls for a court reorganization to mesh with the larger institutional building objectives of provincial political leaders. In particular, he comments that the heightened jurisdiction of provincial courts and heightened prestige of provincially appointed judges has been particularly important in the evolution of Quebec's courts.
Overall, from the general theoretical perspective, it appears that Canadian public policy or any modern developed political administration in a democratic nation is often a victim of the bureaucratic structures and political accountability of its ministers and political actors. Where there is consensus, there is often a lack of interest and where there is no consensus, there is often a high degree of apathy between the ministers themselves.

The accountability that each minister has or is victim of, is solely a subject of the role that they play in a bureaucracy. That is the larger the bureaucratic structure, the less accountability each minister has. When having to deal with social policy or basic public policy in many of the Canadian fields, the jurisdictional split between many areas is very vague and often one that creates many conflicts. These conflicts are not easily reconciled. This is perhaps most evident in the implementation of the YOA. Most of the authors that have been surveyed take most of the external political controls discussed previously through ministerial accountability, etc., as emphasizing retrospective accountability for negative actions by the bureaucracy. The development of the cabinet committee system in the rise of central agencies does seem to have strengthened the collective control of ministers in the general direction of policy. However, it has also served to demonstrate the extent to which individual ministers can and
will be held responsible for the policies in their respective domains.

This meaning is more aligned with identification and loyalty rather than with accountability and answerability. Overall then, one must distinguish the political responsibility of elected politicians from the administrative responsibility of appointed public servants. In the federal and provincial public policy, given the size and spectrum of many bureaucratic structures, the lines are often blurred and indistinct. Once these lines become blurred, many of the policies and social processes involved in public administration often do not lead directly to some political person who can take responsibility for the actions or policies that have been implemented. This, to a certain extent, is the situation with the large bureaucracies of COMSOC and MCS in Ontario concerning the implementation of the YOA.

4.3 Models of Juvenile Justice

Reid and Reitsma-Street (1984) argued that there are four fundamental models of juvenile justice. In essence the options regarding policies and programs for young offenders are predicated on a basic set of assumptions which can be usually used as a model. These models are identified as: crime control; secondly, justice; thirdly, welfare; and fourthly, community change.

The four models can be summarized in the following way.
Crime control is basically focused upon the order of the state and the responsibility of the state to maintain order for society. Secondly, justice is generally focused on the procedures for interference with freedoms with specific limitations. Thirdly, welfare is society's responsibility to attend to the needs of the youth and family, and fourthly, community change is society's responsibility to protect welfare and prevent youthful crime (Renwick, personal communication). These four models of juvenile justice briefly illustrate the framework within the Declaration of Principle concerning the principles and assumptions about youth, society, crime and law in the YOA.

4.4 Dispositions and Principles of Sentencing

There has been considerable literature concerning the change in custodial dispositions under the YOA as opposed to the JDA. Trepanier (1989) has suggested that the YOA is more "offence orientated" than the JDA (p. 36).

Doob (1989) has suggested that the length of custodial sentences is longer under the YOA even though a higher portion of young offenders may have been given custodial sentences in recent years.

A recent study conducted by Doob and Meen (1993) concerning dispositions handed out to a group of young offenders over the past eight years in the Toronto courts concluded that more custodial sentences are now being handed down than in the past. There are recent studies that
confirm the findings of Doob (1989) in that the increase in custodial sentences was accompanied by a dramatic increase in their average length. Doob and Mean (1993) also concurred with the findings of Trepanier (1989) that dispositions are becoming more closely associated with the offences.

Markwart and Corrado (1989) have also concluded that the YOA has proved to be more punitive than the JDA in most provinces (p. 26).

"The YOA has introduced new sentencing considerations that did not prevail under the JDA and it has strongly reinforced what were only latent considerations under the former act" (Markwart & Corrado, 1988, p.17). In this regard these authors are referring to the principle of deterrence, which is now considered to be a legitimate sentencing consideration under the YOA. Bala (1988b) has argued that the YOA strives for a balance of considerations. The reality is that deterrence is a new element introduced into the sentencing equation and it is an element that can invite harsher sentencing practices. A survey reported by Markwart and Corrado (1989) of youth court judges found that about half of the judges have changed their emphasis on sentences to reflect a small amount of young offenders taking responsibility for their own actions. Seventy-five percent of the judges indicated that punishment or accountability was more important than under the JDA and 98 percent of the judges considered deterrence to be a very
important consideration in sentencing (Markwart & Corrado, 1989, p. 17). This reflects on custodial dispositions in that there are now more considerations by which custody may be justified. "The influence of the deterrent sentencing considerations of the YOA, in conjunction with the discretion of youth court judges, could easily result in harsher sentencing patterns, particularly in these cases of marginal decision making" (Markwart & Corrado, 1988, p. 19). An example of marginal decision making is the repeat offender, who is generally to be found under the Phase II court system based on his age and the length of time he has had to come in contact with the courts. This is the general consensus of interview respondents. One relevant response was that "16 and 17 year olds would have had a good chance to receive lenient sentences as first-time offenders in adult court. Under the new system, they are coming to court as three time losers" (Anonymous, personal communication, 1993). Therefore, it is felt that harsher sentencing patterns would be reflected in the dispositions handed down by the provincial court (Criminal Division). Whereas the Act specified that young persons have special needs by virtue of their adolescence, MacAskill and Andrews (1985) feel that judges in the Provincial Court (Criminal Division) are:

Long accustomed to the ordinary sentencing principles of the adult system and unfamiliar with the practices of the juvenile courts and are less likely to govern themselves according to the
treatment-oriented goals of their colleagues (p. 82).

Young (1989) also reports that custodial sentences are substantially increasing in length. The response to youthful crime has become increasingly punitive and even though by virtue of the Act the young offender is to be treated differently or distinctly from the adult offender the gap in disposition between the adult and young offender has become very narrow (p. 76).

In fact, one prominent Ontario lawyer, Edward Greenspan, has commented that:

A young offender may actually spend more time in custody than an adult who was charged with the same offence and received the same sentence. The adult may earn remission and obtain parole, whereas the young offender (unless a review reduces the length of sentence) must serve the full term imposed by the court (Ontario Social Development Council, 1987, p.14).

The Ontario Social Development Council (1987) examined the differences in the overall approach of judges to young offenders. It was found that Phase I judges who had particular experience with the JDA and youth court work also handled family matters such as custody and child welfare. Phase II judges had experience handling criminal cases only and mostly those of adults. It was found that Phase I judges, due to their background, were generally sensitive to the particular needs of young offenders and their families and knowledgeable about the available resources. On the other hand, Phase II judges viewed the YOA as a criminal
sanction statute with less child welfare overtones. As a criticism towards Phase I judges it was noted that as the judges had experience dealing with the JDA, they at times made intrusive orders for relatively minor offences. In dealing with the severity of dispositions under the YOA, the Council reported that there had been a 20 percent decline in secure care requirements for 12 to 15 year olds since the YOA came in to effect. Unfortunately the Council did not have any corresponding numbers for Phase II judges who dealt with 16 and 17 year olds. They did note, though, that in June of 1987 there were 488 young offenders in secure custody (pp. 100-101).

In terms of the time available for the court to deal with each individual young offender, it was found that there was more time available in Phase I court for each individual young offender whereas the Provincial Judges Court (Criminal Division) where Phase II young offenders were dealt with, was a more intimidating court where the judges had a heavy work load.

Bala (1988a) concurred with the Ontario Social Development Council and stated that most observers "believe that criminal division judges are harsher and less in tune with the Young Offenders Act philosophy" (p. 7564). These judges are, after all, used to dealing with "adult criminals" and not family problems.

Bala (1988a) also commented on the views that were made
by an Ottawa provincial court judge. Bala stated that this judge admitted to finding it very difficult to "change gears" when sentencing young offenders. However, Bala also stated that the disparity in courts was very difficult to prove (p. 7564).

In another article, Trepanier (1989) makes some very lucid comments. He noted that the YOA placed the offence as the basis for the decision to be made, as opposed to "the offender" under the JDA. Accordingly, the YOA created a new balance between the offender and his act as decision targets. He then refers to section 3(1)(e) of the Declaration of Principle, which indicates that "young persons who committed offences should nonetheless bear responsibility for their contraventions" (p. 56). Trepanier comments that this principle introduces the essential basis of an intervention focused on the offence; which is the responsibility of the offender. He also states that one of the considerations that must guide the judge in his choice of a measure is the principle of proportionality which also has the effect of increasing the importance of the offence in making a decision.

On the question of proportionality, Edward Greenspan has commented that:

The higher courts have recognized that the Young Offenders Act emphasizes the accountability of young offenders for their actions and that there should, therefore, be greater adherence to adult sentencing principles, especially the principle of proportionality. In most instances the punishment
should fit the crime (Ontario Social Development Council, 1987, p. 14).

Bala and Lilles (1984) commented on some significant changes in the YOA concerning disposition provisions. In contrast to the JDA, all dispositions under the YOA must be of fixed duration. Furthermore they note that the YOA removes some of the judicial discretion in the earlier dispositions that existed under the JDA. They also note that the YOA clarifies certain areas under the JDA, for example, whether in fact a juvenile could receive an absolute discharge. It is clear now that under the YOA, absolute discharges can in fact be granted. Furthermore, the YOA provides for a clear review process of dispositions (p. 173).

Platt (1989) notes that young offenders can only have imposed on them those dispositions specifically indicated in section 20(1) of the YOA. Accordingly, "suspended sentences and conditional discharges are not available as a dispositional option" (Platt, 1989, pp. 17-22). Platt also observed that dispositions listed under section 20 such as absolute discharges, fines, probation orders, community service orders, and restitution can be imposed alone or in combination where they are not inconsistent with one another. In addition, all dispositions can be imposed independent of each other (pp. 17-22).

With regard to imposition of dispositions, Platt (1989) has observed that the youth court judge has discretion to
postpone the actual date in which the disposition comes into effect. Finally it is noted that the combined duration of dispositions except for prohibition and custodial orders for the same offence cannot exceed two years (pp. 15-17).

Bala and Lilles (1984) indicate that in addition to absolute discharges, probation or restitution, the young offender may be obliged to reimburse an innocent purchaser and provide community service work, have an order of prohibition, seizure or forfeiture against them and may be committed to terms of either open or secure custody (pp. 174-175).

4.5 Transfers

Bala and Lilles (1989) concur with Young (1989) that transferring a youth to adult court is the most serious decision a youth court judge can make. The authors state that there are enormous consequences on the young person who is transferred ranging from a trial in adult court, possible incarceration in an adult correctional facility, and being subjected to the penalties imposed by the Criminal Code rather than the elements of dispositions found in section 20 of the YOA (Bala & Lilles, 1989, p. 141).

Platt (1989) points out that it must be remembered that the purpose of the transfer hearing is not to determine guilt or innocence of the young offender but rather to determine the appropriate forum for the trial of the charge which the young person is facing. The author notes that
whereas a predisposition report prepared by youth court workers is mandatory, a Section 13 report prepared by a psychiatrist or psychologist may be requested by either party or may be ordered by the youth court judge (pp. 12-13). Bala and Lilles (1989) note that the lawyer's concern for the young person comes into play regarding decisions concerning advice given to their young client as to whether the young person should discuss circumstances relating to their alleged offence with the psychiatrist or the person preparing a Section 13 report. The authors note that although discussing the offence may result in a more complete report and perhaps a more favourable one, there is no statutory protection concerning statements made by youth in connection with the preparation of a Section 13 report.

Young (1989) states that, unlike the JDA, the YOA lists a number of factors that the transfer court must consider. These include the seriousness of the offence, the availability of treatment or correctional resources and the age, maturity and background of the youths, plus the past history of offences. Whereas the JDA stated that a transfer should only be made "where the court is of the opinion that the good of the child and the interests of the community demand it" (Juvenile Delinquents Act, 1908, s.9, subs.1), (s.16, subs.1) of the YOA provides that transfers shall be made if the court "is of the opinion that in the interests of society and having regard to the needs of the person, the
young person should be proceeded against in the ordinary courts" (Bala & Lilles, 1984, p. 150). Young (1989) comments that some appellate courts have responded to the change in wording by suggesting that this demonstrates a clear shift of emphasis in favour of the interests of society. However, he also concedes that some appellate courts have not placed as much significance on the change in wording, relying on the fact that the Declaration of Principle, Section 3 of the YOA, specifically provides that the court consider the special needs of the young offender. Young (1989) further notes that "virtually all the reported appellate decisions and waiver to adult court concerned charges of murder" (p. 77).

4.5 Reviews

Both Kenwell, Bala and Colfer (1991) and Platt (1989) have observed that young offenders are not eligible for parole or mandatory supervision, at least not in the way that adults are. However, the YOA establishes a system of judicially controlled reviews of the original dispositions. On review, the court can lessen the severity of the original sentence by transferring the youth from secure to open custody. However, the court does not have the power to increase the length or severity of the sentence.

The Ontario Social Development Council (1987) provides an analysis of the reasons for review procedures in the YOA. They note that under the former JDA, committals made by
juvenile court judges were indefinite and both the length of sentence and the level of custody were left to the discretion of non-judicial Ministry officials. As this discretion was one of the main criticisms of the former JDA, it was logical that the YOA has transferred the power to determine the length of sentencing at the custodial level from the Ministry to the court (p. 39).

The Council also provides an analysis as to the rationale for having a review process in the legislation. Its reasons are as follows:

To provide an incentive to young offenders to improve their behaviour and outlook; to ensure that the treatment or other assistance assumed by the sentencing judge was, in fact, provided by the correctional authorities; to introduce in the absence of parole in the youth justice system an element of flexibility that would not otherwise exist. In some ways a review hearing is a trial of the correctional system's ability to meet the needs of the young person. It also offers both the judicial and correctional systems an opportunity to account publicly for the administration of justice (p. 39).

They also postulated that because of the existence of the review provisions in the Act, the youth court might be tempted to give longer periods of custody in certain situations initially, with the knowledge that the sentence might be subsequently reviewed and then reduced. They also emphasized that the review was not subject to appeal which would by nature consider the validity of the original sentence. The main consideration of the review was the degree of progress made by the youth since disposition.
Concerning the concept of "progress", the Council observed progress was a somewhat ambiguous concept which involved the subjective standards of the professional involved, be it the probation officer or youth worker, psychologist and/or psychiatrist (pp. 40-41).

Furthermore, under COMSOC, every young offender has a probation officer assigned to him/her (Ontario Ministry of Community and Social Services, 1991, pp. 0302-06).

Under MCS the young offender in custody has a residential liaison officer assigned with major probation officer responsibility. The liaison officer facilitates continuity of care through communication with the assigned probation officer. Although the liaison officer is to prepare progress reports, the manual also allows the probation officer to prepare reports. However, this split in responsibility may affect the progress report used for review, since there may be a certain diffusion because of the dual roles of the liaison officer and probation officer (Ontario Ministry of Correctional Services, 1993, p. 1).

Moyer (1989) has postulated that MCS does not have an explicit policy on the nature of recommendations made in progress reports and mandatory reviews. Therefore, a report for a change in status is said to depend on the youth's progress while in custody and this is based on his or her conduct, program participation, and the degree of success of temporary releases.
In a study of MCS policies about reviews, Moyer (1991) noted that young persons were informally discouraged from making application during their custodial sentence for an optional review as it was noted that it was not worthwhile for sentences less than six months. This opinion of the youth workers which was passed on to the young persons was based on the fact that a plan of care normally took up to four weeks to prepare, the young person required at least two or three months of custody to show that he was progressing, there were several weeks necessary for the review paperwork to be completed and there was an additional several week period to obtain a court date.

Moyer (1991) also observed that the youth courts had a tendency to "cascade" young offenders from secure to open custody and then to probation. She held that this approach may not always be in the best interests of the young offender.

For example, a young offender who would have a considerable number of successful weekend temporary releases while in secure custody would have to adjust to all sets of new rules when he was cascaded from secure to open custody.

Bala and Lilles (1984) commented on the Section 33 review which "must be based on wilful failure or refusal to comply with a disposition or an escape or attempted escape from custody" (p. 270). The authors indicate that prison breach and escape from lawful custody are punishable under
the Criminal Code. Accordingly, in circumstances where the young offender has escaped from lawful custody, "the Crown must elect whether to prosecute a person under the Code or to proceed with a review under Section 33". The young person may not be subject to both provisions because that amounts to "double jeopardy" (p. 271).

The authors also note that a young offender who fails to comply with a non-custodial disposition can only be dealt with under the YOA by means of the review provisions (p. 271).

Bala and Lilles (1984) have also commented on the provisions of the Code dealing with progress reports. Generally, the report must be in writing except with the permission of the court. Furthermore, all parties to the proceeding which normally would involve the young offender, his Counsel, the prosecutor and a parent are entitled to receive a copy of the report. The parties also have the right to cross-examine the maker of the report which in most cases would be the youth worker. An important point is that "statements made by a young person in the course of the preparation" of a progress report are 'not-admissible' in evidence against him in any civil or criminal proceedings" (p. 267). Bala and Lilles postulate that the purpose of this provision would appear to attempt to ensure the cooperation of the young person in the process of preparing the progress report (p. 268).
The Consultation Document on the Custody and Review provisions of the YOA prepared by the Department of Justice (1991) criticizes the mandatory review and optional reviews provided for in Section 28 of the YOA on the grounds that reviews are not fair enough with respect to the rehabilitative success of the young person. The document also criticizes the grounds for granting a review in that new services and programs may be available which were not available at the time of the disposition, stating these grounds are too restrictive in scope. There would obviously be situations where certain services or programs were inappropriate or unavailable to the young offender at the time of disposition but may now be available or appropriate at the time of the review.

The question arises as to whether the youth court, in determining the needs of the young person and interests of society, should make that determination beforehand, or on the day of the review. Platt (1989) suggests that "if the young offender can meet the test on the day of the review, the review ought to be successful" (pp. 18-12). She also points out that "since there is no limit to the number of custodial reviews that can be brought" by a young offender, there is no obligation on the youth court judge to attempt to predict what the future might be for the applicant (pp. 18-12).

In reviewing the Operation, Policy and Procedures of
MCS for 1993, it is noted that in reference to reviews, "all efforts should be made to conduct the review before the original sentencing judge" (p. 04-04-01). This reinforces the point made by Moyer (1991) concerning Phase II young offenders, sentenced to secure custody, with particular emphasis on those offenders who may have been sentenced by a youth court judge in a northern part of Ontario and find themselves a considerable distance farther south in a secure facility. They may have a substantial problem in having the review before the original sentencing judge. Although there is clearly no malicious intent, the effect of such a direction may inadvertently be to restrict availability of reviews.

4.6 Custody

Under the various dispositions available to a youth court judge, the most serious dispositions are those of open and secure custody. There has been considerable literature on these two dispositions since 1984.

Bala and Lilles (1984) provided a brief, concise difference between the terms open and secure custody.

Examples of 'open custody' listed in paragraph 24(i)(a) include a community residential centre, a group home, a child care institution and a forest or wilderness camp. . . . The definition of 'secure custody' is a place or facility 'for the secure containment or restraint of young persons' (p. 209).

They noted that open facilities did not devote resources to prevent the young person from leaving, while on
the other hand, secure facilities are designed to restrain or contain the young person. They also note that security is not the only consideration, and accordingly, a facility with a high staff to young person ratio might be classified as secure without physical control over the young person.

Caputo and Bracken (1988) have commented that open custody facilities, such as group homes, may be operated by private non-profit agencies under contract or by government ministries. However, they note that secure facilities are operated by the provincial governments. In terms of personnel, therefore, in the province of Ontario, the open facilities are for the most part run by staff who are employed by non-profit agencies, while secure custody staff would be provincial government or territorial government employees (p. 134).

Subsection 24(2) of the YOA makes it mandatory for the youth court to specify which level of custody it is committing a young person to. However, both Bala and Kirvan (1991) and Bala and Lilles (1984) commented that the provincial governments still retain significant control over custody placements because they are given the discretion under the Act to designate the precise facility within the level of custody. The administration of these designations are governed by MCS and COMSOC provincial directors in Ontario.

Bala and Lilles (1984) speculate that the reason that
the provincial authorities were allowed to decide upon the precise facility within the level of custody was "to give the provinces flexibility to plan and implement effective programs and to use their resources most effectively" (p. 209).

As the most severe disposition is committal to secure custody, Young (1989) provides a number of objective criteria which must be satisfied before that disposition can be made. The young offender must have a prior criminal history, he/she must have previously been sentenced to open custody and should be close to the age of adulthood (p. 102). Bala and Lilles (1984) state that two objective elements are "age and seriousness of the offence" (p. 210). With respect to age, only those young offenders 14 years of age and older can be committed to secure custody and the offence for which they must be convicted of must be one for which an adult would be liable for imprisonment for five years or more or must be a conviction for prison escape or being at large without an excuse (p. 210).

Bala and Lilles (1984) also commented that:

Any young offenders between the ages of 12-14 can only be committed to secure custody in the most serious of circumstances which would be a conviction for an offence for which an adult would be liable for life imprisonment . . . or if a disposition is being made in regard to an offence for which an adult would be liable to imprisonment for five years or more and the young person has previously been convicted of such an offence (p. 210).

They also indicate that in addition to the objective
criteria of age and seriousness of the offence there is a subjective test which must be satisfied before a secure custody order can be made. This test is spelled out in Section 24(5) which reads that the disposition of secure custody must be "necessary for the protection of society, having regard for the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person" (Young Offenders Act quoted in Bala & Lilles, 1984, p. 210).

Platt (1989) has pointed out that s.24.2(1) of the YOA provides for the young offender to be placed in either open custody or secure custody when a committal to custody is made for one offense (pp. 17-40).

Platt (1984) concludes that the Act does "not contemplate the imposition of a combination of custody for one offence and in any case the review procedure is intended to address the change in level of formal custody at some future date" (pp. 17-40).

This view is also supported by the Consultation Document on the Custody and Review Provisions of the Young Offenders Act, by the Department of Justice Canada (1991). This document notes that a person who is subjected to a secure custody disposition may not be placed in open custody for a few days to determine his/her suitability for formal transfer to an open custody facility. To a certain extent this inhibits attempts to determine the suitability of the
facility for a young offender. The literature also deals with the increases in the proportion of young offender cases disposed of as custodial sentences.

Leschied and Thomas (1989) reported on 32 young persons who were in secure custody in one southwestern Ontario jurisdiction between April 1 and October 1, 1986. They concluded that there was "considerable discrepancy in the length of custody committals being made between rural and urban courts" (p. 677). In addition, there appeared to be a "wide variety of offences which may lead to committals" (p. 677).

They also noted that even though "70 percent of the young persons have been convicted of property crimes, 20 percent of the committals were accounted for by procedural offences such as failure to comply with a probation order" (p. 677).

Doob (1992) has indicated that in most of the literature there has been a lack of serious analysis as to the length of custodial dispositions made. He postulates that the reason that the rate of custodial dispositions has risen, is because judges now have control over the length of any dispositions they make. It is known that under the JDA, "the release of a young offender sent to a training school was outside the control of the judge" and was in the hands of the correctional authorities (p. 77). Accordingly, he concludes that there was, in fact, no mechanism for a judge
to hand down a "short custodial sentence", since whether the ultimate sentence was to be short or long was taken out of the hands of the judiciary (p. 78).

Doob (1992) focused on data from an arbitrary subset of provinces. He concluded that in many, but not all provinces, there had been an increase in the proportion of those cases getting to court and receiving custodial sentences (p. 79). He also found that judges appear to be giving "more short sentences and many fewer, very lengthy sentences" (p. 82). Markwart and Corrado (1989) reported on their findings concerning offenders in Ontario. There had been an increase in committals but they also noted that the average daily population in custody had not changed substantially since the first year of the YOA (p. 8).

Bala and Kirvan (1991) made reference to the 1989 Federal Department of Justice Consultation Document which suggested various options that could be used to ensure that custody was not being used inappropriately. One option that they focused on was the recommendation that there should no longer be the statutory distinction between open and secure custody. The rationale for this view was that if the statute mainly provided for custody in a number of situations, the judges who are currently imposing open custody terms would probably use other available forms of dispositions (p. 99). They also commented on another option in the Consultation Paper, which recommended that if open
custody was not to be eliminated, that it should also have "specific offence criteria", similar to the restrictions that were placed on the use of secure custody (p. 99).

Relevant documentation from COMSOC and MCS provide insights as to the differences in the two Ministries concerning the question of secure and open custody.

Moyer (1989) indicated that "in most areas Provincial Directors under COMSOC are probation supervisors" (p. 112). This is not the case under MCS where superintendents and regional managers are mostly designated as Provincial Directors.

The importance of this difference in the persons designated, is that the probation supervisor under COMSOC would be more orientated towards the need of the young person, as opposed to a superintendent of a secure facility under MCS who could be a Provincial Director under MCS guidelines. It is clear that COMSOC has a rehabilitative orientation and that MCS has a justice orientation. Caputo and Bracken (1988) have concluded that these are the correct orientations of the two respective Ministries (p. 135).

They have also concluded that these differences in orientations "seem to have resulted in a two-tiered system of juvenile justice, one for younger and one for older juveniles" (Caputo & Bracken, 1988, p. 135).

Moyer (1989) reported that COMSOC is presently in the process of setting up a secure custody network, which would
basically involve the use of small secure custody operations throughout the province. In order to facilitate this process COMSOC has transferred three large training schools under their jurisdiction to MCS. Moyer (1991) has stated that "all Phase II secure facilities can be characterized as institutional in design" (p. 81). It is clear that while COMSOC is attempting to provide secure custody settings which are moving away from the institutional design and more into the cottage design, MCS has made a determination to use the institutional design.

Moyer (1991) has also depicted a tacit admission by the two Ministries of their different orientations. She points out that when a young offender under the jurisdiction of COMSOC is held in an MCS facility, pursuant to an "agreement between the Ministries, the principles of the Child and Family Services Act are to apply to young persons held in MCS facilities" (p. 119). This becomes the case when secure setting is needed for a Phase I youth in an area where none is provided for.

Moyer (1989) commented on sec.24.2(9) of the YOA which permits the temporary placement by the provincial director or his delegate of a young offender serving an open custody sentence in secure custody for a period not exceeding 15 days, in cases of escape, attempted escape, or for the safety of the person or of others (p. 168).

Moyer (1989) commented that this section was amended in
September, 1986, where the ground of "serious misconduct" was removed as a reason for transfer to secure custody (p. 170).

She also noted that under COMSOC, probation supervisors are designated as the provincial director for the purpose of these transfers (Moyer, 1989, p. 168). Under MCS, probation supervisors are not designated provincial directors, but rather superintendents of the facilities are so designated. It is implicit in the wording of the section that this discretion to transfer to secure custody for up to 15 days is not to be used for disciplinary reasons. This is clear since the ground of "serious misconduct" has been removed and replaced by ground of "safety". MCS rarely uses the option to transfer under section 24.2(9) for more than 5 to 7 days. Their policy states that transfers are to be used as a last resort and in most cases, rather than transfer, youths are placed on a one to one supervision (Moyer, 1991, pp. 112-115). The guidelines from COMSOC instruct the provincial director to place the young offender in a medium security program in secure custody. However, within the medium security program, facility transfers under Section 24.2(9) generally are more restrictive in freedom (Moyer, 1989, pp. 168-169).

4.7 Probation Services

There is considerable literature that provides information concerning the area of probation in the juvenile justice
Renner (1977) conducted a study with the Planning and Research Branch of the Ministry of Correctional Services in Ontario. This study concerned the identification of characteristics and occurrences which differentiate the successful from the unsuccessful probationer.

Although this study predates the YOA, it provides a good overview of the area of probation and also provides relevant information and statistics concerning the needs of probation officers and problems and needs of young offenders.

In the study, probation officers were asked to identify the areas in young offenders' lives which represent problems. The most frequently cited problems were school work, relationships with parents and use of leisure time. In the study it was noted that the three most frequently mentioned conditions of probation required that the probationer keep the peace, attend school and reside at a specified residence. Renner also identified certain factors which were important predictors of probation success. These factors were as follows:

1. Living Conditions. The probationers who lived in upper middle class to lower class neighbourhoods enjoyed approximately a 53% success rate while the probationers who lived in a lower class or lower, lower class neighbourhoods enjoyed only approximately a 35% success rate. Tied in with
neighbourhood status was the level of household income. When the household income ranged between $18,000 to $25,000 the success rate was about average or above average. However, under $8000 the success rate dropped to 44%.

2. Social Agencies. Where social agencies were involved with the probationer the success rate dropped to 26.2%. However, where no social agencies were involved, the success rate was higher than average at 67%. Social agencies would normally intervene where the young offender was identified as "at risk" and would therefore have more major problems than young offenders not referred to social agencies. This would explain the low success rate when agencies were involved.

3. Family. Probationers who were moved to group homes, treatment centres, institutions or foster homes during the probation period were less likely to succeed on probation. Additionally, probationers who lived with both parents, or with their mother and another man, had above average success rates. However, those who lived with their father and another female, or with their father alone, had low success rates.

4. Family Relationships. Those probationers who had hostile feelings toward their father or mother had a success rate of less than 30%, while those who had positive feelings toward their father or their mother had approximately 70% success rates.
In his conclusion to this study Renner stated that data collected in his study would help identify the most relevant target groups for which programs could be specifically designed. In 1990 Byrne provided a study on the new program of intensive probation supervision which has been implemented in numerous U.S. states. He indicated that the key features of this program include any combination of the following: curfew/house arrest (without electronic monitoring); curfew/house arrest (with electronic monitoring); team supervision; drug and /or alcohol monitoring through urine analysis; community service orders; probation fees; community sponsors; and restitution. Byrne (1990) provided a critique of this new program wherein he stated: "If there is one common element in the current array of IPS Programs it is an emphasis on the surveillance and control of offenders rather than offender treatment" (p. 18).

Byrne (1990) summarized the effectiveness of this new program by stating that it will divert some offenders from prison, while simultaneously "widening the net" of social control over others. He expressed doubts as to this new program having any significant recidivism reduction effect. He noted that recidivism reduction among young offenders may be achieved by focusing limited correctional resources on improving informal social controls such as interactions with family, job, friends and community. He also noted that
these are traditional areas for probation officer interventions where they can utilize their various skills.

The following analysis indicates that IPS Programs may be important not because of the surveillance and control aspects but because the stress on surveillance and control results in much closer contact between the probationer and the probation officer.

May (1991) in a book concerning the probation services in England referred to a comment made by the National Association of Probation Officers wherein they noted that supervision should not be based on surveillance, containment or deterrence. The association, in a paper entitled The Provision of Alternatives to Custody in the Use of the Provision of Order, made the following statement:

"For the probation service to attempt to impose such control on individual offenders who are involved in probation is an unacceptable change in the principles and ethos of our work" (p. 124).

Krispino, Mulvihill and Rogers (1977) conducted a personal interview study for the Ministry of Correctional Services involving the concerns and attitudes of probation officers. This study involved personal interviews with 247 probation, parole and after care officers at all levels.

Although this study was conducted before the passage of the YOA and while the JDA was still in effect, nonetheless it reveals some perceptions of probation officers in
Ontario. This study showed that probation officers perceive themselves primarily in the role of social workers in contrast to the public's perception of their role as primarily a law enforcement officer (p. 9).

With regard to the court process, the probation officers indicated a concern about the amount of time spent in court waiting for their cases to be heard and also the majority reported that they were concerned about the attitude of the judges towards them (p. 36).

The probation officers also requested that they be required to spend less time on general administration and case administration and more time on counselling, especially on a one to one basis (p. 37).

In 1988 a Children's Services Task group was commissioned to look at a number of issues including young offenders. This report was prepared for the Ontario provincial-municipal social services review committee. This report noted that the Ontario Government:

In response to the enactment of the Young Offenders Act, passed Part 4 of the CFSA which enabled COMSOC to provide programs and services to young persons and to 12 and 15 year olds for the purposes of the Young Offenders Act and the Provincial Offences Act (p. 8).

Their report also stated that The Child and Family Services Act and its philosophy provided that the "well-being, best interests and protection of children must take precedence over any other consideration" (p. 9). They also noted that the CFSA philosophy was relevant to decisions
made by COMSOC authorities in the administration of the YOA. Their report also noted that the enactment of the YOA has increased the work load of probation officers of both COMSOC and MCS.

Also, the report noted that COMSOC and MCS do not appear to have adequate data available or adequate data collection mechanisms in order to analyze the effects of the administration of the YOA (Children's Services Task Group, 1988, p. 19).

In this regard, they recommended that all relevant data should be collected and shared where appropriate so impacts of programs could be accurately assessed (Children's Services Task Group, 1988, p. 19).

Bala and Lilles (1984) noted the fact that the YOA created a new classification of personnel within the juvenile justice system being "the youth worker". The authors noted that these youth workers would perform many of the functions that were previously carried out by juvenile probation officers under sections 30 and 31 of the JDA (p. 287).

In 1986 a corrections sector report was prepared by the Niagara Children's Service Committee. Among their recommendations, they referred to the situation under Section 23 of the YOA where the issue of a probation order with the condition that the young person reside in such a place as a provincial director or his provincial delegate
may specify. This is commonly referred to as a probation with an order to reside (p. 7). The committee noted:

That in some cases, the social services department had been requested to pay general welfare assistance to the young offender 16 to 17 years of age who had been placed outside his or her home under a probation order with order to reside. Yet the general Welfare Assistance Act did not give any special consideration to such cases (p. 7).

and also recommended that this matter be reviewed. Further concerns noted for an order to reside were the interpretation by certain child and welfare services that this particular order required services to the young person while he or she was in a facility. It was therefore recommended by the committee that the Solicitor General of Canada be asked to clarify the intent of this type of probation order with condition. It was also recommended that COMSOC clarify its roles with respect to child welfare and probation services in regard to this disposition (p. 8).

Polonski (1979) did an extensive personal interview study of the views of probationers concerning community service orders. This study was done before the YOA with regard to adult probationers. However, it did include 16 and 17 year olds in the study. The 16 and 17 year olds made up 40.3% of the persons interviewed.

The persons interviewed were asked to assess their experiences where they were required to do community service work as part of the probation order. Ninety percent of the respondents said that they had not been treated either
differently or unfairly at the agencies where they were doing their community service. Almost a third of the sample indicated that they intend to provide their services as volunteers once they had completed their required hours of service. Twenty percent indicated that working on a community service order had improved their self esteem, their general outlook of life and their overall attitude. 41.7% said that a community service order was definitely preferable to a jail sentence, which might have been the alternative. 29.2% said that a community service order was a better disposition than a fine, which would have been the alternative in their case (p. 25).

McFarlane, Coughlan and Sumpter (1966) concluded that: "a probation officer who is forced to carry an excessive case load cannot provide a probation service to his clients in the community. He is forced to provide merely limited surveillance functions" (p. 81).

4.8 Treatment Issues

The literature on treatment in the juvenile justice system covers a wide range. Because of the unusual influence of his work, any review of the literature must start with that of Martinson (1974), wherein he concluded: "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism" (p. 25).

When rehabilitative treatment took place in the
community rather than in an institutional setting, positive findings were reported from both individual psychotherapy and probation and parole supervision. Martinson (1974) agreed that it was possible to rehabilitate an offender once he is released and in the community.

In 1981, one year prior to the passage of the YOA, Annis (1981) conducted a critical examination of Martinson’s (1974) work. Annis (1981) interpreted Martinson’s research to support the premise that no treatment method had reliably reduced recidivism. She further agreed with Martinson’s conclusion that the body of scientific evidence relating to various treatment strategies was too weak to form broad policy decisions on the adoption of treatment programs within corrections. However, she did suggest that the development of a client specific treatment model may hold some promise. This would entail "differential treatment models" in the matching of clients to intervention strategies.

Martinson’s (1974) conclusions were supported to a certain extent by Shamsie (1979) and by Khanna (1975) who compiled a book of studies on treatment and rehabilitation and concluded that: "a sad, simple fact is that treatment failed to rehabilitate, and in failure, made its victims of far too many innocents" (p. 132).

The conclusion that he reached was that society can either risk intervention or rely on traditional approaches
in caring for anti-social youths. Khanna (1975) suggested that to create a more humane environment which improved the offender's self-esteem would result in the termination of institutional reform schools and implementation of half-way house facilities (p. 132).

It is clear from the literature that there was by no means unanimity with the position taken by Martinson in 1974. For example, Palmer (1976) feels that there were certain positive findings and relative optimistic observations in Martinson's 1974 research and their significance calls for a reassessment of his conclusions of the ineffectiveness of treatment.

Palmer's (1976) position was that an individualized treatment format, according to the circumstances of the offender, would be most appropriate, rather than Martinson's (1974) focus on treatment at a broad social policy level in the field of penology (p. 42).

Contrary to the conclusions of Martinson (1974) and Annis (1981), Gendreau and Ross (1979) concluded that: "there are several types of programs that have proved successful with offender populations" (p. 448).

Gendreau and Ross (1980) reviewed the literature between 1973 and 1978 and they found that there were a substantial number of correctional treatment programs whose effectiveness has been demonstrated through studies and through quasi experimental designs and statistical analysis.
of outcome data. In commenting on these studies, the authors noted: "There is convincing evidence that some treatment programs, when they are applied with integrity by competent practitioners to appropriate target populations, can be effective in preventing crime or reducing recidivism" (p. iii).

Farrington (1987) concurred with Gendreau and Ross (1979) that the "nothing works" view of Martinson (1974) was incorrect. He states that "it would have been fairer if Martinson . . . had argued that counselling did not affect recidivism" (p. 176).

4.9 Treatment Issues Under the YOA

Leschied and Hyatt (1986) commented on the Gendreau and Ross (1979) study which found that the "nothing works" doctrine allowed the correctional system a built-in excuse to avoid accountability. Once the offender was labelled untreatable, the system could not be responsible for his deterioration or improvement (p. 75).

Leschied and Thomas (1985), in a study on young offenders in residential programming, reported that "positive treatment results were observed when individual differences among young offenders are accounted for and treatment programs meet these needs through differential programming" (p. 177).

Jaffe, Leschied and Farthing (1987) conducted a study to examine the knowledge and attitudes of the YOA among a
group of young persons who, by their age (13-18), are affected by the legislation. Results showed that two-thirds of the respondents thought offenders should receive treatment. However, an obvious conclusion was that those studied had only minimal accurate knowledge of the legislation (p. 315).

Hackler (1987) commented on what society should do about problem children. He defined the problem that even though resources concerned with determining the guilt or innocence of young offenders have increased (referring to the due process aspect), resources for offering services to problem young persons have decreased. Knowing what to do with troubled and troublesome youth is a major problem. In his study he posed the rhetorical question:

How does one make children who have been abused by their families or society more responsible? . . . they are youths in need of help. Any enlightened justice system for youth must be able to recognize the difference (p. 207).

As part of his critique on the YOA, Hackler (1987) states: "It may not have been the intent of the Young Offenders Act to focus on legal issues to the detriment of social services, but it certainly is a consequence" (p. 208).

Leschied and Gendreau (1988) support the position postulated by Hackler (1987). They conclude that the philosophy underlying the YOA is based on punishment, not rehabilitation. They further conclude that the justice
model or due process components have fallen prey to ultra conservatives who believe in the overriding goal of the justice system as social protection and safety, to the exclusion of the concerns of the offender. They conclude that although the YOA refers to special needs and assistance, it is more of an afterthought and depends on whether the young offender wants it (p. 318).

At the time this article was published, the above authors noted that only five treatment orders had been given in Ontario and, of the five, two were terminated at the request of the young persons who withdrew their consent (p. 318).

Leschied and Jaffe (1988) also confirmed that at the time of the writing of their article the YOA had given preference to the correctional response over the needs based rehabilitative approach by the court. The authors also noted that the requests for clinical assessments had shown a 50 percent decrease (p. 71). It was noted that judges were reluctant to order assessments without a request from defense counsel since their "parens patriae" role is no longer appropriate in a court that now emphasizes due process.

Leschied (1987c) comments that: "The 'special needs' aspect of the Young Offenders Act despite holding some promise, seems to have proven to be an empty vessel" (p. 6).

Bala (1988b) in summarizing the orientation and
philosophy of the YOA remarked on the "fundamental tension" between the "concepts of due process and treatment" with each concept being given preference over the other in different sections (p. 15).

Several authors have written concerning use of a classification system to assist in and provide proper rehabilitation/treatment programs for young offenders. One such model that has received considerable attention is the conceptual level matching model commented on by Reitsma-Street and Leschied (1988), Lesowied, Hallberg and Raphael (1985) and Leschied, Jaffe and Stone (1985).

Leschied, Hallberg and Raphael (1986) determined that "conceptual level assesses two aspects of development: information processing and interpersonal maturity" (p. 1). Their study confirmed that the optimum match between environment and young offenders was low conceptual level young offenders in high structure environments and high conceptual level young offenders in low structured environments.

Leschied et al. (1986) further found that:

high conceptual level young offenders had better problem solving abilities, than low conceptual level young offenders, who had higher degrees of impulsivity, and tended to react more aggressively because of poor problem solving skills (p. 9).

Leschied, Jaffe and Stone (1985) used the conceptual level matching model and in their study concluded that "mismatched high conceptual level young offenders had the
greatest difficulty coping with high level of structure in secure detention homes" (p. 1).

Reitsma-Street and Leschied (1988) in reviewing the Conceptual level matching model determined that the model could be beneficial as a tool in "organizing young offender treatment programs to obtain the greatest effectiveness from resources available" (p. 92).

Jaffe, Leschied, Sas, Austin, and Smiley (1985) studied the utility of the Basic Personality Inventory (BPI) in understanding young offenders behaviour within a court related clinical service. The study demonstrated the "ability of BPI subscales to differentiate psychological variables related to delinquent behaviour" (p. 8).

Austin, Leschied, Jaffe, and Sas (1986) conducted an extensive study involving over 1000 young offenders who had completed the BPI as a part of their court ordered clinical assessment.

In this study the three factors identified as Psychiatric Symptomatology, Depression and Social Symptomatology, present in the population validated the existence of these factors in the studies. However, there was a null relationship between the factors and type of charge which was contra indicated. It was expected that expression of certain psychiatric symptoms, forms of depressions, and social pathologies would be related to the commission of certain offences.
There is in the literature significant studies on the effectiveness of treatment. Gendreau and Ross (1980) concluded that there is extensive evidence that juvenile crime can be substantially reduced by a wide variety of individual treatment programs.

Andrews, Leschied, and Hoge (1992) argue that the evidence to date suggests that the delivery of clinically appropriate treatment is a promising route to reduce recidivism. They argue that "the promise of reduced recidivism by delivering appropriate service to young people at risk may be accomplished in ethical and humane ways under a variety of conditions of just processing" (p. 5-6).

Andrews et al. (1992) reflect a broad perspective on treatment and program evaluation and development. In their reviews of offender profile and treatment literature they suggest:

... there is a degree of intellectual maturity within the general personality and social psychology of criminal conduct that will facilitate the reasoned and humane pursuit of reduced re-offending within the legal and fair management of Young Offenders Act dispositions. For all intents and purposes, we think that the nothing works debate is over (p. 147).
5.0 Chapter 4: The Effects of Split Jurisdiction

5.1 Policy and Procedures

The two-tiered model of YOA implementation has been widely criticized in Ontario. The intention of the Federal Government was to have one integrated system of juvenile justice for all young offenders, not two systems within one province which show tremendous disparities for similar crimes and custodial facilities, as well as other provisions set out in the act (Moyer, 1989; 1991). Information derived from interviews conducted have led this writer to believe that there is a lack of cooperation, a lack of integration, a lack of information sharing and a lack of continuity between the ministries. The ministries do not share data on dispositions or new programs, causing the lack of collaboration between COMSOC and MCS to be a major problem underlying the problems caused by the method of implementation (Ontario Social Development Council, 1987, p. 101). Therefore, internal problems tend to exacerbate the problems caused by split jurisdiction. But the reality at this time is that the split will not change. Each respective political party has been opposed to it while in opposition but has done nothing to change it while in power. The area became very sensitive because of social contract negotiations being conducted at the time many of the personal interviews for this research were being conducted. Many of the government personnel contacted refused to
comment on the situation of split jurisdiction saying "I could lose my job" (Anonymous, personal communication, 1993). This is an indication of the sensitivity of the issue within the respective Ministries. There is also a scarcity of available literature related to the split as that which is considered to be of importance has been designated as confidential, pending its consideration by Cabinet in the coming year. Research in this chapter has been based on qualitative data collected from interviews and the literature that is available. It is intended to show that the implementation of the YOA by two separate ministries causes a number of serious problems and has negative implications for those young offenders affected by the legislation and the split jurisdiction.

5.2 Disposition & Principles of Sentencing

Many problems in youth criminal justice relate to what are perceived to be extreme differences in dispositions and principles of sentencing concerning the implementation of the YOA in Ontario. The fact that the responsibility for a 12 to 15 year old has remained with COMSOC (as it had under the JDA) and parallel responsibility for a 16 and 17 year old has been assigned to MCS, the same age group for which they had prior responsibility, has led to the complication that different Ministries are being asked to deal with the same legislation; something quite different than had been the case in the past. As a result, in certain instances the
Phase I young offenders (12 to 15 year olds) are treated differently and less harshly than the Phase II offenders (16 to 17 year olds); on other occasions the Phase II offenders (16 to 17 year olds) are treated differently and less harshly than the Phase I offenders.

Section 20 of the YOA deals with various kinds of dispositions covering the spectrum from absolute discharge to three years secure custody. In between these two extremes are the following:

- An absolute discharge;
- A fine of up to $1000;
- A payment to the victim of the offence, in compensation for loss or damage to property, loss of income or special damages that arose because of personal injury to the victim;
- An order of compensation in-kind or by way of personal service to the victim of the offence;
- A community service order, which would require the young offender to perform a specified amount of work in the community;
- Detainment for treatment in a hospital or other facility (as long as the offender agrees), if deemed warranted by a medical or psychological report;
- Probation for up to two years;
- Committal to intermittent or continuous custody for a specified period, generally not to exceed two years;
- Any conditions that the youth court judge considers in the best interest of the youth or the community;
- Any combination of the above, provided such dispositions do not exceed the general two year limit for supervision or custody (Solicitor General of Canada, 1986, p. 11).

Therefore, it can be seen there is a wide range of dispositions. If custody is sought, a Predisposition Report must be ordered by the judge, unless waived on consent of
the accused and the Crown Attorney.

Subsections 12(1) and 11(3) of the YOA provide that, where a young person is not represented by counsel, the court must inform him of his/her right to counsel and give the young person a reasonable opportunity to consult with counsel at first appearance, a bail hearing, a transfer hearing, trial or a review of disposition. At other stages of the court proceedings, including dispositions, this information is not explicitly required. Respondents suggest that court practices differ with regard to informing the young person of his right to counsel at the other stages of the proceedings, with Phase II offenders being informed more often than Phase I. It has been reported that the degree to which young persons are represented has increased since the inception of the YOA. (Moyer, 1989). Phase II young offenders are almost always represented at disposition according to Moyer (1991). The reasons for this may be that older young offenders have a better understanding of their rights under the new legislation due to their level of maturity or that they may be trying to better protect themselves against the harshness of the penalties in the adult court, even though its designation is as a youth court. The possible effect of this increased representation for Phase II young offenders may be more lenient dispositions in certain circumstances than Phase I offenders: As Phase I offenders may not always be
represented by counsel, who would normally be advocating for the least restrictive alternative. This is the consensus based on interviews conducted by this writer. One interview respondent commented that "in many instances, 13 and 14 year olds are charged and read their rights by the police. Lots of times they waive their right to a lawyer or an adult being present and proceed to give a detailed incriminating statement. In dealing with 16 and 17 year olds, I have rarely seen them waive their rights" (Anonymous, personal communication, 1993).

Based on interviews with MCS staff, most respondents indicated that the legal rights of young persons were stressed in the orientation process of their Ministry. This was not the experience indicated by COMSOC staff who were interviewed. Based on these interviews, this writer is of the opinion that MCS staff are more oriented towards due process and therefore encourage young offenders to seek counsel, whereas COMSOC staff are more rehabilitatively orientated and do not therefore encourage the use of legal counsel to the same extent. More research on this point would be beneficial.

Three forms of monetary dispositions are provided for by the YOA. These are fines, either alone or in combination with a probation order; compensation to the victim, which is generally known as "restitution", also possibly in combination with probation; and payment to an innocent
purchaser (Moyer, 1989, p. 63). Neither COMSOC probation personnel or MCS personnel take any role in administering, monitoring or enforcing fines ordered by the youth court when they are not in conjunction with the probation order. This becomes the responsibility of the court administrators in all locations. While MCS has taken the position that the investigation enforcement of fines default is not the responsibility of its staff, in a number of areas Phase I probation officers become involved at the conclusion of the time to pay. If proof is available that the young person was capable of paying the fine but failed to do so, then the police enforce "wilful failure" by way of a charge under section 26 of the YOA. Occasionally, the probation officer lays a charge of wilful noncompliance (Moyer, 1989, p. 64).

Some Phase I courts have started putting the young offender on probation with the sole condition being the monetary disposition, but in order to avoid this, the worker from a transfer payment agency (an agency allotted funds for social programs by either the federal or provincial governments) is now assigned to monitor the stand-alone monetary dispositions. If the young offender appears unable to pay, a s.32 review is requested, usually by the young person, with the assistance of a volunteer from the agency. This review allows for the changing of a non-custodial disposition. This practice was developed in order to reinforce the responsibility of the young person for the
completion of his disposition (Moyer, 1989, 1991, p. 64). This illustrates the effect of COMSOC's rehabilitative approach.

Judges rarely make orders for restoration of property for Phase II offenders. These orders are made on occasion for Phase I young offenders but COMSOC has declined to be responsible for monitoring their compliance and considers this to be the responsibility of the court. There is no data available from either Ministry on the frequency with which the court makes orders concerning prohibitions, seizures and forfeiture. Orders under this section given to Phase II young offenders are enforced by the police, while orders under this section given to Phase I young offenders are monitored by the probation officer (Moyer, 1989, 1991, p. 74). In this writer's opinion, this different method of enforcement suggests that the orders made under Phase II would be more strictly enforced, taking into account the orientation of police officers who deal mainly with adults, as opposed to the probation officers under Phase I who would be dealing exclusively with young offenders aged 12 to 15 years. This opinion is reinforced by the comment of a Phase I probation officer who stated:

We encourage the offender to comply with all court orders, so that he understands that he has a responsibility to follow the authority of the court. However, we do not take a "hard-ass" attitude and demand strict, prompt compliance.

I've heard of Phase II offenders who have been charged by the police for breaches of prohibition orders.
Since the Young Offenders Act came into effect I personally only know of 2 Phase I offenders who have been charged with failure to comply with prohibition orders . . . (Anonymous, personal communication, 1993).

Community Service Orders have been available for many years to COMSOC and to MCS for their adult clients, which of course, included the 16 and 17 year olds before the implementation of the YOA in Ontario (Moyer 1989, 1991).

The Ontario Social Development Council (1987) notes that:

Under the Juvenile Delinquents Act and now in Phase I of the Young Offenders Act, CSO's are regarded as serving a treatment function (e.g. a disposition whereby the juvenile could learn new skills). Prior to the Young Offenders Act community service orders were often used as an alternative to incarceration for the 16 to 17 year olds, because judges were often reluctant to imprison this age group. Now, under the Young Offenders Act some of these individuals are going to open custody (p. 51).

Personal Service Orders may be requested by the court wherein the young person may be ordered to compensate the victim, upon consent of the victim, in kind or by way of personal service (Moyer, 1989, 1991, p. 74). The interview respondents from both phases seldom heard the personal service order being ordered by the youth court. They theorized that most victims are reluctant to become involved with the young offenders who had victimized them, whether they were Phase I or Phase II offenders.

As is the case in most Canadian jurisdictions, probation is the most common non-custodial disposition imposed by the youth court for both Phase I and Phase II
young offenders (Moyer, 1989, p. 75). This disposition will be expanded upon in a further section.

Graphs 1, 2, 3, as well as Chart 1 represent the non-custodial dispositions handed down by Phase II courts as opposed to Phase I courts for the years 1985 through 1987. The two courts show consistency in their dispositions over the three years with probation being the most common disposition. More probation orders were handed down by MCS than by COMSOC. Due to the fact that data is not available in the province of Ontario for the total number of dispositions in the young offender population, and that the number of dispositions are represented as percentages of the total population of 12 to 15 year olds as compared to 16 and 17 year olds, the differences represented may be considered weak.

In Ontario, we find two separate provincial Ministries operating under two different statutes dealing with the sentencing and custodial results of a federally defined young offenders disposition under the YOA. This cannot help but contribute to differences between the sentencing and
custodial practices between the two phases.

According to Wilson (1990), totally different philosophies and treatment strategies have been created for the two groups of young offenders by the courts and government Ministries. As an illustration of this, in the case of R. v. Richard B. (1986), a Phase II court found the young offenders' equality rights were violated because COMSOC operated an open custody facility within the jurisdiction of the court while MCS only had a secure custody facility available when open custody was the disposition (R. v. Richard B., 1986).

The most serious disposition with respect to a young person charged with an offence is transfer to the adult system. The YOA lists a number of factors that the transfer court must consider, these include:

(a) The seriousness of the offence;
(b) The age, maturity and background of the youth, including the past history of offences;
(c) The adequacy of the Young Offenders Act and the Criminal Code;
(d) The availability of treatment or correctional resources (Young, 1989, p. 77).

The decision to transfer is most prevalent in those provinces that tend to emphasize the interests of society (Young, 1989). Most charges transferred to ordinary court are charges of murder or serious sexual assault. When the charge is murder, the youth then becomes subject to a minimum sentence of life imprisonment, whereas, if he was tried in youth court the maximum sentence would be three
years. Young (1989) relates that:

The youth court system is reserved for those offenders for whom we still have a glimmer of rehabilitative hope. Implicit in this search for positive future prospects is the assumption that juvenile justice is particularly well suited for the adoption of a rehabilitative model of sentencing; other penal objectives are better served in the adult system (p. 81).

There is definitely a need for a consistent interpretive approach of section 16 (1) of the YOA which is the transfer section.

Because of the lack of priority in the Declaration of Principle section of the YOA, there is a good deal of discretion available and rationalization for acts by individuals in the Ministries which are responsible for the everyday implementation of the Act. These also impact on disposition and sentencing.

Since the principles offer rationale or justification for every possible direction, it is highly likely that factors other than the "best interests" of either the young offender or society will take precedence. Rather, such factors as bureaucracies' access to funding and resources as well as the individual ideologies of the practising professional are more likely to be given a higher priority than is the implementation of the theoretical premise of the principles of the act (Reid-MacNevin, 1991, p. 29).

Evidence of this statement can be seen in the practices which are taking place in the province of Ontario. A variety of theoretical approaches have served to promote ambiguity and contradictions within the juvenile justice system which in many cases have led to challenges under The Charter of Rights and Freedoms.
Reid and Reitsma-Street (1984) state that: "the flexibility of the several sets of assumptions can be useful in developing a creative response to individual cases which come before the youth court" (p. 12). They further allude to the fact that this would be an optimistic interpretation regarding the compromise and the flexibility of the YOA and it clearly underestimates the problems inherent in the lack of priority in the assumptions in the new act. First, there are no new points of resolution for the people in the bureaucracies responsible for implementing the YOA, which ten years after its creation has many problematic aspects for split jurisdiction. Secondly, they concur with the conclusions of Parker, Casburn and Turnbull (1980) where they reviewed "discretion" in an English law on young offenders and stated: "diversity and dissonance prevail since the police, magistrates and social workers vie for influence and tilt decisions towards their own ideological and organizational preference" (p. 236).

This writer is of the opinion that the conclusions of Parker, Casburn, and Turnbull (1980) may be applied to the officials of COMSOC and MCS, such as the provincial directors, who wield considerable discretion, and do "tilt" decisions towards their own "ideological and organizational preference" when dealing with young offenders in their respective Ministries.

According to Wilson (1990), the operation of the two-
tiered system in Ontario is extremely controversial. The orientation for the younger group is generally described as rehabilitative, while the orientation for the older young offenders is generally described as a correction model.

The major concern is that the Phase II young offenders may be receiving harsher treatment. At the same time, they may be denied access to programs and other opportunities available to the younger offenders. For example, one study shows that compared to a Phase II young offender, a Phase I young offender is at least 10 times more likely to receive a medical/psychological predisposition assessment because of emotional or learning problems. Another common criticism is that the duplication of facilities and programs is both costly and inefficient (Wilson, 1990, p. 326).

This writer would submit that an analysis of empirical data obtained from statistical information of COMSOC and MCS support the concern of Wilson that Phase II young offenders may be receiving harsher treatment.

Data from studies indicates that the relationship between offence and a custodial disposition is much higher since the inception of the YOA than it was during the period of the JDA. Doob and Meen (1993) studied what was happening to youth under the age of sixteen in the Toronto courts. They found that dispositions handed out to this younger group of young offenders had changed during the past eight years in that there were now more sentences involving custody than there were in the past. However, there does appear to be a decrease in the average length of a custody sentence for a Phase I young offender. Leschied and Jaffe (1987) also investigated dispositions given to a group of
young offenders under 16 years of age in southwest and central west Ontario. Their results indicated that twice as many custody committals were being made under the present act as compared to the JDA. Bala (1988b) states:

This trend can in part be attributed to the attitudes of many Youth Court judges who initially emphasized the protection of society and the youth's responsibility over recognition of special needs and limited accountability. It also seems that in those provinces where the age jurisdiction was raised, older youths who had been appearing in adult court as 'first time offenders' (their juvenile records being ignored), were appearing in youth court with long records of prior offences. Further it seems that some youth court judges were making extensive use of open custody as a 'middle option' for youths who had not committed serious offences but who 'needed some help'. Prior to the enactment of the YOA, many of these youths had been helped through the child welfare system (p. 29).

There have been a number of controversies before the courts viewing that the two-tiered system in Ontario violates the guarantee to equality before the law in s.15(1) of the Canadian Charter of Rights and Freedoms (1982). This section states in part:

Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination, and in particular without discrimination based on . . . age. . .

(Constitution Act, 1982).

In R. v. Gary Neil W. (1985), a Phase II young offender brought a challenge under s.15(1) of the Charter of Rights and Freedoms, but this challenge was dismissed with the Provincial Court judge, who held that there was 'no evidence before the court that any young person had actually suffered an adverse effect by reason of the division of
responsibilities between the two Ministries' (Wilson, 1990, p. 327).

Wilson (1990) in commenting on this case stated: "The parallel systems of the two Ministries did not of themselves prove a violation of s.15. An onus was placed on the accused to demonstrate actual harm such as harsher treatment or less adequate facilities" (p. 327).

In the case of R. v. Richard B. (1986), the accused was a sixteen year old youth from Pembroke who, due to the gravity of his offence, was given what was considered to be a proper disposition of three months open custody. Merredew, Ontario Provincial court judge (Criminal Division) felt that since it was the youth's first offence, consideration should be given to a balance between the supervisory affect of a custodial term and the hope of rehabilitation that continued, uninterrupted education, in his own school, would provide. With his sentence of open custody it was recommended that he continue as a student at his high school. The only problem with this disposition was that there was no open custody facility available for the young offender in Pembroke or near his high school for Phase II young offenders. In that particular area COMSOC provided open custody facilities for Phase I offenders but MCS did not provide similar or parallel facilities for its Phase II offenders. Commenting on this gap in service, Merredew, Provincial judge, stated:
In the case of this young offender, it is not a question of geography or equal application of rules which apply to all the relevant groups. Richard B. cannot be sentenced to what I deem to be the appropriate sentence, not because open custody facilities are not available in this local area; they are; but solely because of a policy decision by the Ministry of Correctional Services, no open custody facilities available here for any 16 year old young offender, whereas open custody facilities are available here for any 15 year old. This is not the equal application of rules which apply to all, this is a policy of discrimination based solely on a further arbitrary subdivision by age.

In the particular case before this court we have evidence of a vivid and exact example of such a difference in treatment, as a result of different Ministries policies.

This is an example of discrimination which is prohibited by s.15. I do not find such discrimination to be justified in a free and democratic society; ... (R. v. B. Richard, (1986), quoted in AvRuskin, 1987, p. 11).

The case of R.v.D.G. was a challenge to s.20(1)(k) of the YOA. This section authorizes the court to sentence the youth to intermittent custody but it was found that such a place was not available and this sentence could not be imposed. The fact that such a disposition was not available to the accused because of his age did amount to discrimination on the basis of age in violation of s.15. The fact that young offenders were: "a special group with special needs did not warrant the denial of intermittent custody and the very fact that s.20(1)(k) included intermittent custody confirmed that" (Collin, quoted in AvRuskin, 1987, p. 6). This writer is of the opinion that the decision and comments in the above noted cases support...
the writer’s contention as to the deleterious effects of split jurisdiction.

To quote from the parliamentary speech of the Solicitor General of Canada on February 9, 1982:

. . . The full benefit of the resources of the juvenile justice system with its greater emphasis on individual needs than the adult system should be extended to young persons up to age 18 because they are, until then, generally speaking in their formative years and that at an age-level where they can be favourably influenced by positive actions and guidance. We must be particularly sensitive to the special needs and requirements of young persons and provide them with every opportunity for reformation in order to prevent them from graduating into adult offenders (Merridew, quoted in AvRuskin, 1987, p. 6).

His Honour, Judge Ted Collins, concerning the question of the two different Ministries dealing with the different age groups has argued:

At first blush one might conclude that the province tried to graph the existing administrative division onto the new statute . . . The defence argues that the pith and substance of these two statutes is criminal law and accordingly ultra vires the Ontario legislature. The Crown counters that these statutes are in the nature of administration of justice and are intra vires the province . . . the second objection is that two classes of young persons have been created each receiving a different method of treatment . . . the defence argues the effect of these statutes, on their face, make it clear that the younger group will receive a more favourable treatment. The defence maintains that this is not merely contrary to the intent of the Young Offenders Act but amounts to the violation of s.15 of the charter . . . the defence says that if the charter is being violated routinely in this way that this court’s remedy under s.24 should be a refusal to hear such cases (Merridew, quoted in AvRuskin, 1987, p. 7).

Should this become the case that certain courts start to refuse to hear cases which may eventually amount to
challenges against the charter, the implementation of the act by a split jurisdiction could not possibly be allowed to continue. Although the province has the authority to legislate in this field, the parliament of Canada provided a three year phase in period, in order to create an equal system for all young offenders. By a substantial degree, Ontario has not conformed, as there are still two separate Ministries operating under two different statutes while dealing with the sentencing and custodial results of a federally defined act.

As was held in R. v. Richard B. (1986):

The thrust of the Young Offenders Act is clearly to require young persons to be responsible for their delicts; it provides that they are to be dealt with pursuant to the Criminal Code, with the protection of the Young Offenders Act. It would seem, on the face of it, that the officials and workers in COMSOC would, by their training and previous experience, be expected to treat the youngest of the young persons with special tenderness and care. This would, on the face of it, be contrasted with the previous training and experience of the officials and workers in corrections who have experience only in dealing with criminals. Even if the statutes were couched in identical terms (which they are not), I would have thought there would be a large question, without any evidence at all, that the two Ministries cannot possibly be expected to be treating their respective charges equally (quoted in AvRuskin, 1987, p. 9).

Commenting on the decision handed down in R.v. Robert C. Judge Merridew commented:

To allow the continuation of unequal treatment by rendering a decision that does other than focus and highlight this court’s belief that such an unequal treatment exists in this particular case and, undoubtedly, in other cases, by reason of the unequal system which has been created, does an injustice to us all (quoted in AvRuskin, 1987, p. 11).
In being handled by the same Ministry as adult offenders, 16 and 17 year olds are treated as adults. In custody they have the same correctional officers. They are also kept in the same detention centres as adults and handled in the same way as the adult prisoners. An example of the differences between the approaches taken in the different phases is shown in an editorial by AvRuskin 1987:

I had an old Young Offender client and young Young Offender client, both of whom were suicide risks, both in custody. The young Young Offender was given a constant companion. At first, this companion was a staff member, when the risk had lessened, some of the more reliable residents were asked to assist. The key to treating the problem was not to isolate, alienate or abandon the adolescent but rather to make him believe that he was a valued member of society despite his present difficulties.

The old Young Offender was locked in an administrative segregation, he was left alone in a cell. He was allowed out of the cell once per day. Anything he could hang himself with was removed from his clothing (AvRuskin, 1987, p. 13).

Bala and Lilles (1992b) in commenting on this example stated: "It is hard to think of a more blatant example of unequal treatment based on age" (p. 2:11).

Even though it would not be unusual for older offenders to receive more severe dispositions, this appears to be of marginal value in determining inequality, at least according to judges. It is also felt that challenges to the Charter on the basis of disposition would be appropriate. The two Ministries have formed what this writer considers to be an ineffective and hastily created model of justice for young offenders based on "unjustifiable, political, monetary and
administrative" considerations rather than the needs of youth. This writer's opinion is consistent with the opinion expressed by Stuart (1987) as an annotation in the case R. v. Robert C. (1987). Furthermore, in Bala and Lilles (1992b) the authors in commenting on the split jurisdiction in Ontario stated: "... the multi-court structures were born out of the politics of compromise, perhaps even of timidity, and out of a concern for economy" (p. 2:7). It has been suggested by one respondent that the jurisdiction over Phase II offenders by MCS gives the Ministry a reason to exist but priorities must be established and the main priority is an equal system of juvenile justice. It is the opinion of this writer that one Ministry should be responsible for the dispositions of the YOA and that there should only be one court to dispense dispositions for the YOA as opposed to the split jurisdiction, based on the preceding evidence presented.

5.3 Court Proceedings

The Provincial Court (Family Division) and the Provincial Court (Criminal Division) and the Unified Family Court are the three divisions of the Provincial Court established by the Courts of Justice Act, 1984. Under the YOA, the prosecution of young persons under the age of sixteen are tried by the Provincial Court (Family Division), which is the first tier. The prosecution of young persons age sixteen and seventeen are tried by the Provincial Court
(Criminal Division), which is the second tier. There is only one Unified Family Court in Ontario, in the judicial district of Hamilton-Wentworth. It deals with all aspects of family law in one court. This is an experimental court which sits as a youth court for Phase I young offenders. In 1989 the Courts of Justice Amendment Act (1989) (No. 1) was passed to deal with the two-tiers of correctional services by an amalgamation of the court system. The result was one court called the Ontario Court (Provincial Division). But as of this writing, the new court has not been implemented in most towns and cities in Ontario other than the major centres. Accordingly, it might affect approximately 30% of the population. Therefore, the emphasis will be on Phase I young offenders being adjudicated in Provincial Court (Family Division) and Phase II young offenders being adjudicated in Provincial Court (Criminal Division).

The Provincial Court (Family Division) hears approximately 46% of the cases of young persons charged with federal or provincial offences and who are under 18 years of age. The remainder of the cases are dealt with by the Provincial Court (Criminal Division) sitting as a Youth Court, that is, the Phase II Court dealing with young offenders 16 or 17 years of age at the time of their offence. There is an overlap of some services in that a number of young persons who are clients of COMSOC may have charges dealt with by the Phase II system. For example: a
16 or 17 year old client of a COMSOC probation officer or a resident in a Phase I custodial institution may commit another offence such as an escape from custody or a breach of probation; or, an (over age) COMSOC client serving a community disposition might be charged with wilful failure to comply with that disposition (Moyer, 1989, 1991). Based on the case of R. v. Richard B. (1986), it is the opinion of this writer that the split jurisdiction in effect in Ontario is discriminatory towards Phase II young offenders. A majority of interview respondents appeared to be in agreement. Leschied and Jaffe (1988), have stated:

The differential treatment based on age has seemed ripe for a clear, legal challenge ever since the two-tiered system was implemented on April 1, 1986, with full implementation of the Young Offenders Act in Ontario. Only one challenge has resulted, however. This challenge cited Section 15 of the Canadian Charter of Rights and Freedoms (1982), and argued discrimination on the basis of age, when co-accused 15 - and 16 - year olds appeared in different courts (R. v. C. (R.), 1987). However, the Ontario Court of Appeal ruled in February 1987 that no meaningful basis of discrimination could be demonstrated in these circumstances. Although the two-tiered system was seen by the court as based on "unjustifiable political, monetary and administrative considerations," and "contrary to the spirit of the aim of the (YOA) of uniformity for young offenders across Canada" the court concluded that "given the enormousness and complexity of demonstrating unevenness between separate court systems, the accused had a near - impossible burden" (R. v. C. (R.), 1987, p.186) (pp. 69-70).

This writer is in agreement with the views expressed in the above quote, but would point out that comments that the two-tiered system was seen by the court as based on
"unjustifiable political, monetary and administrative considerations" were not in fact, made by the Court of Appeal but were contained in an annotation to the case by Stuart (1987). Stuart in his comment stated that the two-tiered system is contrary to the spirit and aim of the YOA with respect to uniformity for young offenders across Canada.

In this case the court was acknowledging that in terms of evidentiary burdens and in terms of proving a Section 15 charge or challenge, it was necessary to provide demonstrable evidence which the court itself acknowledged would place the young offender challenging in a "near impossible burden" (R. v. Robert C., 1986).

The two courts have varying degrees of differences in their approaches to the sentencing of young offenders. Many Provincial Court (Family Division) judges had previously worked under the JDA and still follow a parens patriae model of justice with a rehabilitative approach in their work. As well as youth court work they often handle family matters, for example, custody and child welfare. The overall approach of Phase I judges, due to their background, is that they are generally sensitive to the particular needs of youth and their families. They also have more knowledge of the resources available to meet these needs. A major drawback would appear to be that due to the child welfare approach carried over from the JDA, in some cases more
intrusive Orders than are necessary have been handed down for relatively minor offences (Ontario Social Development Council, 1987).

This writer refers specifically to the Ontario decision in the case of R. v. R.I. et al. (1985) wherein the Ontario Court of Appeal implicitly approved use of the YOA for wardship purposes for young offenders where there was a "need to remove him from an unhappy or hostile home environment" (R. v. R.I. et al., 1985, p. 530).

Graph 4 represents a comparison of the admissions to open custody for Phase I young offenders as opposed to Phase II young offenders for the years 1985 to 1989. The graph shows consistently higher admissions by MCS courts for 1986 and 1987. Since the total number of charges disposed of is not available and the young offender population in open custody is expressed as a percentage of the total population of young offenders in the province of Ontario, the differences between the number of youths in open custody in the two Ministries are weak.

Graph 5 represents the average population of young offenders in open custody per day. Represented as a percentage of the total population of youths in Ontario, the differences derived from the graph are weak but show consistency at .05% of the population of youths 12 to 15 as being in custody each day. The data for MCS begins in 1986, rises in 1987, stays consistent for 1988 and rises to .16%
of the total population in 1989.

Graph 6 represents a comparison of the number of young persons sentenced to secure custody between Phase I and Phase II youths for the years 1985 to 1988. Again, the numbers depicted are representative of the number of youth in the total population making it impossible to predict the percentage of youths in secure custody as a measurement of the total number of youths charged. However, the graph does show a consistently higher number of youths from MCS are sentenced to secure custody.

Graph 7 is representative of the average daily population of young offenders in secure custody for the years 1985 to 1989. Again, there are limitations to the interpretation of the data with respect to the fact that data is not available to represent the total number of youths charged but is based on the total population of young persons in Ontario. MCS consistently has a higher daily population which would appear to be on the rise.

Insert graphs 4, 5, 6, & 7
about here

Dispositions by Phase II judges are generally more severe under the YOA. This may largely be due to the fact
that many of the young offenders have a previous juvenile record before the court and that this record is available to the judge, who would see the young offender as having been an offender over a period of time. In addition, figures from MCS listing the number of youths in secure custody indicate that large numbers are being incarcerated (Ontario Social Development Council, 1987). One caveat is that it is possible that Phase II offenders would be appearing before the courts on more serious offences than Phase I offenders; thereby justifying a harsher sentence since the YOA results in greater focus on the offence (Ontario Social Development Council, 1987).

If the needs of the young offender were being considered they would be on probation with supervision rather than in custody. The goal of treatment within the community is the altering of the attitudes and behaviour of the offender in order to reduce recidivism (Bartollas, 1985). This ethic is considerably different from the punishment model geared more to deterrence.

Leschied (1987a) feels that programs for young offenders should focus on: "the problem; discovering the relationship between the causes of crime and potential underlying disorders; understanding the context of the person's functioning (i.e. in school, family etc.); and tailoring a program to meet individual needs" (p. 313).

Gendreau and Ross (1979) report that findings of
studies in delinquency related areas have demonstrated that:

Our ability to predict behaviour is enhanced considerably when we take into account how individual personality traits and treatment settings interact. In the literature . . . that was reviewed, the planned interaction of individual differences, types of treatment and settings in diversion, behavioral contracts, family interventions, contingency management, probation and counselling increased success dramatically (p. 486).

According to the Ontario Social Development Council (1987), due to the nature of Phase II courts themselves, they are generally more intimidating than the Phase I family courts. The heavy workload of the judges with all of the adult criminal cases they also must deal with means that they have less time for each young offender case thereby possibly neglecting to give special consideration to the needs of the young offender (pp. 100-101).

Although both courts are assuming responsibility for young offender functions, there is usually no interaction between them. With the different orientation of the judges, exchange of information is minimal. While many Ontario judges use sentencing as a balancing of the different principles as set out in the YOA, it is apparent from a review of the dispositions that some judges have placed more emphasis on one or another principles. This tends to result at times in the imposition of more severe or intrusive sanctions than an adult would receive for the same offence. This is confirmed by the comment by Edward Greenspan that "the young offender may actually spend more time in custody
than an adult who was charged with the same offence and received the same sentence. The adult may earn a remission and obtain parole, whereas the young offender (unless a review reduces the length of sentence) must serve the full term imposed by the court" (Ontario Social Development Counsel, 1987, p. 14).

Many respondents appear to feel that due to the way the courts are set up in Ontario, and to the orientation of the judges, that there are many areas which would be ripe for challenges to the Charter. One such area under the jurisdiction of the court process is the Judicial Interim Release Bail hearings. There are issues and problems encountered in their implementation for young offenders and philosophical inconsistencies in the YOA are played out in the decisions of the judges and justices of the peace who preside at the hearings (Gandy, 1992). There are also differences in the resources available to the court as alternatives to the detention of young offenders awaiting trial as a result of the two-tiered implementation of the YOA in Ontario.

In the inter-ministerial report prepared jointly by COMSOC and MCS, it was found that there was a difference in resources and programs available to the two different phases (Ontario Ministry of Community and Social Services and Ministry of Correctional Services, 1990b, p. 102).

There is little statistical data available on young
offenders processed under the YOA, and the outcomes at different stages of the process. The reality, however, of the differences experienced by Phase I and Phase II young offenders are nevertheless very apparent, as noted in the graphs appended to this study. Leschied et al., (1991), has stated, "The paucity of empirical research on the impact of the YOA on young offenders processed under the legislation is due, in large measure, to the "quality of information systems at the provincial and federal government levels" (p. 298). In order to provide some empirical data Gandy (1992) designed research on interim release bail hearings and the resources available to the court as alternatives to the detention of young offenders awaiting trial. A major consideration for this research was that "although one possible outcome is the imposition of the most intrusive sanction for young offenders, very little attention has been given the Hearings" (p. 2). This lack of attention persists despite the fact that there has been a 35 percent increase between 1985 and 1989 in young offenders in pre-trial detention (Child, Youth and Family Research Centre, 1991, p. 16). A number of issues have been raised regarding the Hearings. Some of these are allegations that the Hearings are being improperly used "to keep youths in custody who should have been processed as protection cases under the Child and Family Services Act, 1984 as well as suggestions that the anti-social, but not criminal, behaviour of youths
is inappropriately considered in decisions not to grant bail.

In Phase I courts, because of the manner in which the court itself operates and because it has remained essentially unchanged since the JDA, more time is made available to deal with each young offender as an individual and to determine a disposition based on the special needs of that individual (Ontario Social Development Council, 1987, p. 100). One interview respondent, who has worked as a probation officer in both Phase I and Phase II courts, has the following comment on the attitudes of the respective judges in general:

The family division Phase I judges seemed to take a genuine interest in the young offenders and were prepared to spend considerable time in dispositions. For the most part, the criminal division Phase II judges seemed less concerned about hearing all the facts about a young offender and more concerned with moving the docket along. Some would periodically look at the clock and comment that it was almost noon and only half the docket had been disposed of. It was all business to them (Anonymous, personal communication).

In Phase II courts, being criminal in nature, the background of the judges is generally oriented towards a justice model of dealing with criminal offences as they are used to having adults appear before them. The YOA is viewed as criminal sanction statute and child welfare is given less consideration. This may be due at least in part to the nature of their workload in that they are generally less aware of the particular needs and problems of young people as well as the considerable resources available to their
Phase I counterparts which are not available to them

(Ontario Social Development Counsel, 1987).

Gandy (1992) states:

The division of responsibility between the Ministry of Correctional Services and the Ministry of Community and Social Services for the implementation of the decisions of the Hearings in Ontario is seen by some critics as resulting in unequal dispositions based on the age of the young offender. It is true that there is a range of services available for youth under 16 that are not available for those youths 16 and 17 years of age which may be reflected in decisions regarding bail by the judge, or justice of the peace. In this regard, the division of responsibility has meant that the weighing of factors considered by the judge in reaching a decision may be different based on the involvement, or lack of it of the two ministries in the proceedings (p. 2).

There is also a widely held view that there is an,

... undue emphasis placed on public protection over the needs and treatment of young offenders (which) has undoubtedly contributed to the overuse of incarceration (Leschied et al., 1991, p. 10).

More and more offenders are being held in pre-trial custody and there have been changes in the type of cases before the courts. The Child, Youth and Family Policy Research Centre, (1991) feels that these shifts are happening more or less in the absence of policy or discussions of policy (p. 17). Without policy it is impossible to have an informed discussion about the process that provides for some young offenders to remain in custody while others are released under one of several provisions for release without conditions while both are awaiting
trial. It is the opinion of this writer and substantiated by Gandy (1992) that, "If the experience of young offenders is similar to that of adult offenders, we can predict that those not released on bail will probably be more likely to receive a custodial sentence following their trial". Bala and Corrado (1985) have determined that although bail hearings were conducted under the JDA, they were:

... so informal and conducted so quickly that it was not possible to tell from observation what legal standards were being applied to determine whether a juvenile should be released (p. 87).

Section 51 of the YOA changed the informality of the bail hearings for young offenders and provides that:

Except to the extent that they are inconsistent with or excluded by this Act (YOA) all the provisions of the Criminal Code apply with such modifications as the circumstances required in respect of offences alleged to have been committed by young persons (Gandy, 1992, p. 5).

Section 51 makes the law applicable for hearings for youth essentially the same as that for adults. It must be kept in mind, however, that modifications in the hearings for young offenders must be consistent with Section 11(e) of the Canadian Charter of Rights and Freedoms which states that: "Every person is not to be denied reasonable bail without cause" (quoted in Gandy, 1992, p. 8). If an Order of Detention is made at a hearing then a young offender is held in temporary custody. Under Section 7(3) of the YOA,
young offenders may not be detained in "any part of a place in which an adult who has been charged with or convicted of an offence . . . is detained or held in custody" (quoted in Gandy, 1992, p. 9). Exceptions to this restriction exists only if the judge is satisfied that one of the two following situations are in affect:

A) The young person cannot, having regard to his own safety or the safety of others, be detained in a place of detention for young persons; or

B) No place of detention for young persons is available within a reasonable distance (Gandy, 1992, p. 9).

In Ontario, Phase II young offenders are assessed by a provincial director and placed in either open or secure custody. Phase I young offenders are allowed only to be placed in open custody. This fact would definitely seem to have discriminatory overtones. It could be argued that a defence attorney would have more success in arguing for a lenient disposition or community disposition if the temporary detention in open custody was successful. Therefore, Phase I young offenders, by the very nature of their pre-trial detention, are better candidates for community dispositions than for incarceration. However, it is also apparent that the judicial interim release provisions of the YOA can be a detriment to Phase I offenders as opposed to Phase II offenders.

One outcome of the split responsibility is the existence of two parallel and different sets of practices, programs, and services for young offenders according to age. One example of a
difference is the availability of services that is particularly relevant to young offenders who appear before the hearings is the bail program for Phase II young offenders. A defence lawyer in Toronto with considerable experience defending Phase I offenders places the blame for this discrepancy in service on the Ontario Government. He writes: "The bail program of Toronto which offers a service of substitute sureties where none exist is not legislatively available for Phase I applicants. It is funded through the department of corrections which assists only Phase II young persons... the Ontario split Jurisdiction effectively deprives the younger group of facilities which are available for the older group and which assists the older group for early pre-trial release. Very occasionally help may occur. But the bail project has no authority, no funding, no mandate and no insurance to act and will, if does so, have immediate union and legal problems" (Avruskin, (N.D.), p.7, quoted in Gandy, 1992, p. 10).

Included in the YOA is the disposition in the bail hearings for young offenders that gives the judge power to release a young offender from detention into the care of a "responsible person". The following comment by Platt (1989) indicates that this disposition is really a different form of detention:

Section 7.1 (Placement of young person in care of a responsible person) does not appear to contemplate the release of a youth in the traditional sense but rather provides that the young person may be placed in the care of a responsible person instead of being detained in custody. This form of release from custody is essentially a different form of detention requiring a higher standard of care from the responsible person than is otherwise required from a surety (p. 10 - 3).

Platt (1989) also notes that for young offenders the tone of the hearing is different. There appears to be an expressed concern about the life of the young person upon
his release and his relationship with his family. This may be a result of the fact that the courts are often concerned with whether the parent has control of the youth. Another important difference in the hearings is that the court is concerned with the availability of an acceptable residence for the young offender. In Ontario, there are primary and secondary grounds for detention in Section 515 (10) of the Criminal Code. These are sometimes joined by a third ground for detention - a ground which is commonly known as "no residence - no release". This will become an issue before the courts if the young person is a Phase I offender; the young person is not allowed to return home by his parents; the Children’s Aid Society is either not involved with the family or is not present at the S.515 hearing; the child does not have a valid residence to provide the court and/or a surety or responsible person to ensure that bail terms would be carried out; and, there are no primary or secondary grounds under S.515 (10) to detain the young person. (Canadian Bar Association, 1989). Once the above factors are present, the Provincial Court (Family Division) judge is faced with a dilemma. The Children’s Aid Society may be seen as the most logical alternative to detention but any of the following problems may arise. If there is no prior involvement with the Children’s Aid Society in the family, it becomes a question of whether the court should order the Children’s Aid Society to assist or whether they even have
the jurisdiction to make such an order. COMSOC has forbidden all Children's Aid Societies from acting as a surety or responsible person, so even if prior involvement should exist there is little that the Children's Aid Society can do. Although the child should not be held under the primary or the secondary grounds, there may be concerns by the Children's Aid Society in placing the child due to the nature of his offence. (The Canadian Bar Association, 1989). Therefore, to increase the mandate of the bail program, either through COMSOC as the new funder for Phase I, or by adding an appropriate amount from MCS, who are the present funders of the program, to include the service of substitute sureties for Phase I offenders would greatly assist in obtaining early pre-trial release. Such a facilitator is very effective in assisting Phase II offenders at the present time and would be invaluable at the Phase I level. There do not appear to be any reasons why the extension downwards to the Phase I young persons could not be made to work.

The principles of the CFSA are set out in Section 1. This states that "the least restrictive or disruptive course of action that is available and is appropriate in a particular case to help a child or family should be followed" (The Child and Family Services Act, s.1). If an order of detention is made following a bail hearing, the detention is effective until the completion of the trial or
other order of the court even though it is a temporary
detention. The least restrictive alternative will then
pertain to part four of the C.S.F.A. which governs
activities of COMSOC towards young offenders. At this
point, release from detention is not the issue but the level
of detention becomes an issue. Detention under the YOA in a
place of temporary detention means a place of open temporary
detention. But the provincial director, under the authority
of COMSOC, may order the child into secure temporary
detention under certain circumstances which are set out in
Section 89 (2) of the CFSA. Before making his decision and
in an effort to follow the provincial law, the provincial
director must first be satisfied that such secure temporary
detention is necessary both to ensure that the young person
attends court and to protect the public interest or safety.
According to the Canadian Bar Association (1989):

Given the "least restrictive" principles set out in Section 1(c) of the Child and Family Services
Act, the failure of the Ministry of Community and Social Services to provide an appropriate range of
residential facilities has proved to be less than helpful in resolving the problems set out above
(p. 5).

Also, a different, but important concern is the
authority of the provincial director for MCS with respect to
Phase II young offenders awaiting hearings. According to
Gandy (1992) it is a fact that most of the Phase II young
offenders are held in secure custody; despite the fact that
open detention may be used before a bail hearing unless it
is contra-indicated. He states: "The use of secure custody at this stage of the juvenile justice proceedings is questionable for those young offenders who, if found guilty, would only be placed in open custody" (p. 26).

Another problem is that there is an optimum of 24 hours for pre-trial detention. In his research Gandy (1992) found that one out of five young offenders denied bail had been in custody for seven days or more. These findings are a major concern because they are definitely in variance with the provisions of the Criminal Code. Komar and Platt (1984), offer this possible explanation:

The increased pre-trial detention appears to be tied to the increased application of such due process measures as obtaining legal counsel and notifying parents which have prolonged the court process (p. 18).

Another important consideration is that when the court process is prolonged it loses its meaning for the young offender. His Honour, C.R. Merridew has proclaimed:

... with respect to alleged inequality, it is logical and fair that people should be dealt with in accordance and with the law in effect at the time of their acts. In broad terms, the purpose of this section (YOA) is to require that those who are similarly situated be treated similarly. As to the different treatment arising as a result of a province in which the accused is tried, it is apparent that certain provinces, including Ontario, did not have the facilities, programs and services to administer adequately the Young Offenders Act provisions with respect to persons who were 16 or 17 years of age at the time of the commission of the offences and that the cost of such facilities was substantial. In the face of these considerations, the Young Offenders Act was enacted to provide for uniform maximum age of
under 18 years, subject to a phase in period. The
intention of parliament was to have the phasing
period end before this section came into effect.
... having regard to the absence of provincial
resources and facilities to cope with the
undoubtedly substantial increase in the caseload
which would result from the extension and coverage
to include 16 and 17 year olds, and of the fact
that the provincial differences were to be
transitory, there was a reasonable justification
for the differences in the phase in period (Quoted
in AvRuskin, 1987, p. 5).

It is apparent that Ontario still does not have the
facilities, programs and services to adequately administer
the YOA to persons 16 or 17 years of age to a greater extent
and also to persons 12 to 15 years of age to a lesser extent
at the time of the commission of their offence. Challenges
to the Charter on the basis of discrimination could be made
by young offenders from either phase for many of the reasons
previously given.

5.4 Reviews

The YOA provides a detailed set of provisions that can
almost be characterized as a mini code for review of
dispositions. Before this writer looks at how the review of
dispositions section impacts on the split jurisdiction in
Ontario, it would be prudent to review the basic features of
the review provisions.

Section 28 of the Act provides for a mandatory review
for a young offender that has been committed to custody for
more than one year. Upon this review, the youth court has
three options available, namely: confirming the disposition;
ordering the young person be removed from secure to open
custody; or releasing the young person from secure or open custody and placing him on probation for a period not to exceed the remainder of the original disposition (Bala & Lilles, 1984, p. 230).

In addition to these mandatory reviews, either the provincial director, the young person, his parent or the attorney general or his agent, may seek a review at any time after six months or before the youth court at an earlier time. In this type of review the applicant must satisfy the court of one of the following grounds:

(1) either that the young person has made sufficient progress to justify a change in disposition; (2) that there has been a material change in circumstances that led to the committal; (3) that new services and programs are available that were not available at the time of disposition; or (4) on any such grounds that the youth court considers appropriate. Whatever the result, the new disposition cannot be more onerous than the original one (Young Offenders Act quoted in Bala & Lilles, 1984, p. 228).

Section 29 of the Act virtually places the power of early release in the hands of the provincial director. Bala and Lilles (1984) analyze this section as follows:

Section 29 provides that the provincial director may initiate a young person's release from custody to probation by making a recommendation for release to the youth court. The provincial director may thus play a major part in bringing about early release. The granting of the power to the provincial director to initiate early release without going so far as to prevent him to alter unilaterally a custodial disposition is consistent with the complimentary roles of the probationary and juvenile correctional services and recognizes that ultimate control over dispositions rests with the judiciary (p. 241).
The difference between this section in the YOA and the "power of provincial directors" in the JDA to grant early release in juvenile delinquents is that under the YOA the provincial director's decision to release must be approved by the court. The authority given to the provincial directors has a bearing when one compares the split jurisdiction in Ontario. As noted earlier, COMSOC and MCS each have their own provincial directors dealing with Phase I and Phase II offenders.

Section 32 review becomes relevant where the young offender realizes that he can not comply with the original non-custodial disposition and therefore initiates a review to alter the conditions. This review is available as a right after six months from the date of the original disposition. However, an earlier review is available provided that the young offender can show a material change of circumstances, or a serious difficulty in complying with the original disposition or that the disposition adversely affects the opportunities available to the young person to obtain services, education or employment (Bala & Lilles, 1984, p. 253).

The final major review, commonly referred to as the "punitive review" allows the Attorney General or his agent, or the provincial director or his agent, to bring the young offender back before the court any time before the expiration of the disposition or within six months
thereafter. This applies to any young offender who has wilfully failed or refused to comply with the disposition or escaped or attempted to escape from custody. This section governs both custodial and non-custodial dispositions and is the only review section which allows for the imposition of a more onerous disposition than the original one, provided the breach is proved beyond a reasonable doubt (Platt, 1989, p. 18-15). It is important to note that once again the provincial director has the right to make this application along with the Crown Attorney. It is the opinion of this writer based on the interview data, that young offenders may be treated differently depending on whether they are Phase I under COMSOC or Phase II under MCS, taking into account the different orientations of the provincial directors from the respective ministries.

This writer had interviewed several respondents who had worked in both Phase I and Phase II facilities and were familiar with punitive reviews instituted by provincial directors. The general opinion was that provincial directors of Phase II secure facilities had a "hard-nosed" and "no-nonsense" approach concerning punitive reviews and were "less likely" than Phase I provincial directors to exercise their discretion in favour of the offender.

It is also noted that progress reports are normally prepared by the probation officers or the youth workers in both ministries. Therefore, the orientation of the
probation officers would be an important factor to take into account in determining how they prepared the progress report. It is the opinion of this writer, based on the interview data, that probation officers who are employed by COMSOC would be prepared to give the young offender the benefit of the doubt in situations where it is a toss up as to whether the progress report should be satisfactory or not.

The consensus from the interviews conducted by this writer supports this opinion. One comment from a probation officer in Thunder Bay, which was representative of the views expressed, was as follows:

Generally, Phase I Probation Officers view the young offenders in most cases as wayward children who should be given the benefit of the doubt on progress reports that will support reduction of sentences on reviews (Anonymous, personal communication, 1993).

On the other hand, probation officers or youth workers working under MCS and dealing with Phase II offenders might not look to supporting the reduced sentence in terms of open custody from secure custody, or probation from open custody. One relevant comment from an MCS probation officer concerning the reduced sentences on reviews was: "Sentences are short enough as they are. If a kid gets secure, that is probably where he belongs" (Anonymous, personal communication, 1993).

In considering the matter of reviews of dispositions, it is important to note that area managers and
superintendents are designated provincial directors for the purposes of open, secure custody reviews. This applies to both COMSOC and MCS (Moyer, 1991).

Concerning the preparation of progress reports by probation officers for MCS, Moyer (1991) states as follows:

The ministry does not have an explicit policy on the nature of recommendations made in progress reports and mandatory reviews. Support for a change in status will depend on the youth’s progress while in custody - conduct, program participation, and degree of success of temporary releases. Some facilities make no recommendations regarding the outcomes desired (p. 152).

The progress report deals with how the young offender performs while in a secure custody setting and his conduct on temporary releases. It is the opinion of this writer that the criteria expressed by Moyer does not take into account the larger picture and attempt to anticipate what may in fact be in the young offender’s best interest. This might well be a change to open custody or even probation.

Platt (1989) observes that since young offenders do not have the advantage of parole and earned remission which is available to adult offenders,

One can think of the review procedure as an enlarged parole like system with decisions made by youth court judges in open court and after a hearing. However, unlike the granting of parole, once a disposition is changed on the review, the benefit to the young person of the less severe disposition cannot subsequently be revoked (p. 18-1).

The downside is that if after a year in secure custody, a young offender is not successful in having the custody
changed, he would in many instances serve more "custody" time for the same offence and the same sentence that was granted to an adult because the adult would have the possibility of parole after serving one-third of his sentence and might be released after two-thirds of his sentence if he did not lose his one-third earned remission (Ontario Social Development Council).

Non-revocation of a change in custody is an important feature because studies done with adult offenders on parole show that in a significant number of cases, paroles are revoked through either breaches of parole conditions or commission of new offences while on parole. In the adult system, once parole is revoked, the adult offender is re-incarcerated and must serve the remainder of his original sentence. In the case of R. v. M. (1985) application was made on behalf of a young offender that the exclusion of young persons from earned remission that was available to adults was a violation of Section 15, equality rights, under the Charter of Rights and Freedoms. However, the court held that this was not a violation (Platt, 1989).

In a Consultation Document on the custody and review provisions of the YOA prepared by the Department of Justice for the Federal Government of Canada in 1991, the following concern was expressed concerning the review provisions of the YOA:

Some youth courts have ruled that they have no authority to assume jurisdictions for a case dealt
with by a court in another jurisdiction. As sections 28, 29, 31 and 32 involve review of the disposition by "the youth court", this has been interpreted to mean the youth court sitting where the original disposition was made. One result is that youth sentenced in one region of the province and incarcerated in another may not apply for, or provincial director's initiate, optional reviews for such reasons as transportation and accommodation of the youth (Department of Justice, 1989, p. 114).

This writer notes that MCS has opted to provide secure facilities in a number of larger centres throughout the province while COMSOC has opted to provide smaller units throughout the province. As a result of this decision by MCS, 16 and 17 year olds who receive dispositions of secure custody are more likely to end up in an institutional setting that is removed from their original residence. This is especially true for young offenders age 16 and 17 from Northern regions of Ontario.

Since, as it has been earlier indicated, provincial directors are usually designated by the ministries and are usually the area managers or superintendents of facilities, it may be that optional reviews for 16 and 17 year olds in secure facilities may not occur as often as for the 12 to 15 year old Phase I offenders.

This would be due to the corrections orientation of MCS provincial directors. Several interview respondents were critical of the approach taken by their own Phase II provincial directors regarding optional reviews. These provincial directors were superintendents of secure custody
facilities. They indicated to the interview respondents on more than one occasion that "they were not about to be operating a 'short term revolving door' policy." If the offence was serious enough to warrant a secure custody disposition, then application for optional review initiated by these provincial directors would be "few and far between" (Anonymous, personal communication).

Moyer (1989) noted that in 1987 COMSOC transferred three of its larger institutions to MCS while at the same time it opened smaller facilities (p. 15).

The Department of Justice (1989) Consultation Document also recommends that the Section 29 administrative initiated review process commenced by provincial directors be expedited by removing the involvement of a judge where there is no application to review the recommendation. At present, any recommendation of the provincial director must still be approved by the court. It is argued that this early release process would facilitate more timely releases and more timely access to alternative resources and increase the likelihood of youths who are serving shorter sentences in obtaining an early release. On the other hand, it could be argued that a court appearance may be helpful in reinforcing to the young person that the court retains control over the disposition and is keeping a watchful eye over the young person. In the final analysis, it appears that the review provisions concerning dispositions under the
YOA are, by and large, a fair and equitable means of allowing young offenders the right to be released from secure or open custody prior to completion of the original term of disposition.

Moyer (1989) confirms that COMSOC is moving from large custodial facilities, which were all training schools under the Juvenile Delinquents Act, to small community based facilities across Ontario, thus enabling young people to have access to family and community resources. On the other hand, MCS has seven secure custody facilities, the largest with 120 places. In addition, she reports that facilities, particularly in the northern parts of the province, have wide attachment areas so the young offenders are often far from family and friends (p. 115).

Platt (1989) commented on the importance of temporary absences and the role they play in the review disposition. She stated that:

In many instances, young persons are allowed temporary absences, under s.35(1) prior to the review hearing. In this way progress in the community, albeit for them to time, can be assessed. However, where this option has not been provided to a young person, the court may feel that there is insufficient data to determine the needs of the young person and the interests of society (p. 18-7).

In this writer's opinion, to a large extent Phase I young offenders, those 12 to 15 years of age, would be more likely to obtain temporary releases than the Phase II offenders. The reason behind this is the section of the YOA which allows temporary release. This section, s.35(1),
states that the Provincial Director or his delegate may, subject to any terms and conditions that he considers desirable, authorize a young person who has been committed to custody in the province to be temporarily released. The more rehabilitative approach of the COMSOC Provincial directors would normally result in them being more inclined to readily allow temporary absences or early release.

Bala and Lilles (1984) in their summary of this procedure stated:

There is no right to temporary absence; it is an administrative matter, and there is no recourse to the courts if it is not granted. Temporary release includes a release of up to 15 days, without the young person returning to custody at night. Day release may be for such part of a day as the circumstances require (pp. 277-278).

In this writer’s opinion the use of temporary releases and day releases would be a major consideration by the court which was reviewing the original disposition. For example, if a young offender had been allowed several temporary releases and had been away for up to 15 days at a time; and had complied with all conditions or had been on numerous day releases, and had always returned without any problems, then these would be substantial, positive factors in favour of reducing the disposition. This opinion is substantiated by Moyer (1991) "The degree of success of temporary releases" was a criteria used by MCS probation officers in making recommendations of progress reports re: reviews of dispositions (p. 152).
The majority of respondents interviewed concur that successful completion of several or more temporary releases was a major factor in reduced sentences, either to open custody or probation. In the words of one interview respondent: "If the young offender is given enough rope to hang himself and manages to return on time, without attempting to bring back drugs, that always goes to his credit" (Anonymous, personal communication, 1993). Therefore, if Phase II offenders were granted TA’s more readily, that would logically improve their chances of a review hearing, provided they completed the TA’s successfully.

It is also important to note that the YOA does not provide any legislative provision for providing an escort for a young person on a day release, although, theoretically, an escort might be provided. Bala and Lilles (1984) believe that a young person "who requires an escort is not ready for day release" (p. 277).

5.5 Custody

In examining the impact of Ontario’s two-tiered bifurcated system on young offenders in Ontario, this writer believes that how the separate Ministries handle the custody provisions of the YOA illustrates, to a certain extent, the inherent flaws in the split jurisdiction approach.

As defined by s.24.1(1) of the YOA, secure custody is a place or facility designated for the secure containment or
restraint of young offenders. Secure custody in COMSOC is designated individually by the Lieutenant Governor by an Order in Council. Section 85(5) of the CFSA indicates that a place of secure custody may be locked for the detention of the young offender. The provincial director - which in most areas is the probation supervisor - specifies the place within the range of designated settings in which the young person is to be placed (Ministry of Community & Social Services, 1991, p. 302-05).

COMSOC directly operates six secure facilities. Three MCS facilities are being used on a temporary basis, until the secure custody network of COMSOC is fully developed. Two of these are in the north, one in Kenora and one in Thunder Bay. Another six secure custody settings are operated by private agencies. Except for two facilities, all institutions are dually designed for both custody and detention, with no fixed allocation of beds to custody or detention. The two exceptions to this rule are Syl Apps, where 12 of the 42 beds are allocated for detention, and York Observation and Detention Home, where 29 of the 39 beds are allocated for detention. In the first six months of 1988, approximately 4/5 of the secure average daily count involved secure custody rather than secure detention (Moyer, 1989, p. 112-115).

It is the policy of COMSOC to encourage the development of a network of smaller and more numerous secure custody
facilities across the province. Therefore, three training schools were transferred to MCS in 1987. As the new "secure network" is developed in these regions, the use of these facilities by COMSOC will be phased out. The province allocated 16.6 million dollars for the new settings in the secure network. There will soon be 17 smaller secure facilities, serving both custodial and detention populations. Of these, 12 will have 20 or fewer beds, and four will accommodate between 22 and 30 young persons (Moyer, 1989, p. 115). The reasons for the new secure custody network are to facilitate the young offender staying close to his/her family, and to provide specialized programming with an emphasis on community-based services.

MCS directly operates all of its own secure custody and detention facilities for Phase II young offenders in Ontario. There are 18 secure facilities in the province, four of which are youth centres; the remainder are functionally separate young offender units and adult correctional institutions. The operational capacity of the system is 872 beds. Approximately 1/3 of the bed space is used for detention and 2/3 of the bed space is used for custody (Moyer, 1991, p. 78). The fact that 14 of the secure facilities are operated in adult correctional institutions, ranging in classification from medium to maximum security, is an indication of the different kinds of settings experienced by Phase I and Phase II young offenders.
who have been ordered into secure custody.

At present, three of the youth centres — Cecil Facer in the north, Brookside in the east, and Sprucedale in the west — are regularly used by COMSOC for custody committals. The number of bed space set aside for COMSOC is basically dependent upon availability but according to interviews, when a Phase I young offender is in need of a secure custody bed, the space is automatically made available in a Phase II facility, particularly in the North. Young offender units in Kenora, which are in a maximum security prison, and in Thunder Bay, a medium security prison, are used on a regular basis for Phase II custody cases 16 years or over. According to interviews with staff from the facilities, younger persons, between the ages of 12 and 15, have been put into secure custody in the young offender units of the adult facilities. Factors influencing the placement of a young offender in the facilities in Kenora and Thunder Bay are supposed to include the age of the young offender and the age composition of the current population, i.e., the younger persons would not be placed if the majority were 17 years or older. This is not what is happening. Regardless of the age of the young offender and regardless of the age of the majority of the population in the facility, the young offender is placed if his disposition is one of secure custody. Even if the Act was handled by one Ministry, those under the age of 14 are not
to be placed in secure custody.

Transfers between the two Ministries also occur on a case-by-case basis as a result of special needs or security problems identified by the Ministry responsible for the young person. Those charged between the ages of 12 and 15 and under the jurisdiction of COMSOC, but who during the length of their sentence have passed the age of 15, may be transferred from Phase I to Phase II for several reasons, including an escalation of dispositions or parallel dispositions. Most often, in the experience of interview respondents, more mature, physically well developed young persons with a history of violence are transferred from the Phase I system to MCS.

Based on the interview data referred to above, the writer is of the opinion that in certain instances, Phase I young offenders often do not receive any more lenient treatment in custody than do Phase II offenders. However, these instances represent a minority of actual cases.

When COMSOC young offenders are transferred to MCS secure facilities, they then become the responsibility of MCS personnel in the receiving facility with respect to temporary release and reviews of disposition, etc. The case management responsibilities for these young offenders serving their terms in MCS facilities formally remain with the COMSOC probation officer. But, in practice, Phase I offenders in MCS institutions, particularly in situations
where distance precludes monitoring and personal visits, tend to become primarily the responsibility of MCS (Moyer, 1989, p. 80; 1991, p. 119). The two Ministries have an agreement whereby the principles of the CFSA are to apply to young persons from Phase I who are held in MCS facilities. Whether this actually happens this writer has been unable to ascertain. It is expected it would be dependent upon the particular staff working in the facilities at the time. However, this may be shown to be a direct result of the split jurisdiction of the implementation of the act that all young offenders, even though held in the same facilities are not to be treated in the same manner.

All Phase II secure facilities can be categorized as institutional in design. The young offender units in adult institutions employ more static security measures and have greater staff supervision of resident movement than do the four youth centres. These units are either converted wings or sections on the grounds of adult institutions. They are physically secure — that is, they have concrete walls, unbreakable windows, cellular accommodation, lockable rooms and perimeter doors and perimeter fencing which may be 14 to 16 foot high barbed wire fencing or walls. Correctional officers carry portable radios and emergency buttons are placed around the facilities. The young offenders may only move around the facility under staff escort. Entrances to the facilities are controlled by staff presence and security
hardware. All of these examples serve to show that there is no differentiation between the adult section of the facility and the young offender section of the same facility. The most glaring example is that the young offender secure facilities have secure isolation cells --- variously termed "behaviour management" or "segregation units" --- for young persons who commit disciplinary infractions or whose behaviour means that they cannot be managed in the regular living units (Moyer, 1991).

COMSOC'S secure custody facilities differ from setting to setting in their physical type. The wilderness camps primarily maintain security by their isolation and staff supervision. The three correctional services facilities which are used on an interim basis by COMSOC and Syl Apps fall into a category of "closed institutional" in that the room doors are lockable and there is perimeter fencing. Staff escorts are used and bedroom doors are locked at night (Moyer, 1989, p. 121). It must be remembered that these facilities are MCS facilities and therefore retain the same nature as secure MCS facilities.

The other directly operated COMSOC facilities differ greatly in physical terms. They are "semi-closed" or "institutional" in nature. They are kept locked and have other physical barriers to prevent escape but there is no secure fencing surrounding the perimeter of the facility. The practice is to leave bedroom doors unlocked at night.
Some Phase I secure custody facilities allow young offenders some access to the community, unlike MCS secure custody with their wire fencing and locked doors. It is notable though, that in some COMSOC secure facilities there are what are considered isolation rooms, but these are established under the guidelines in the CFSA (sections 120-122) and can be used for brief periods by "acting out" young persons.

Phase II secure custody institutions have a minimum of core programs, basically counselling services, recreation and work. They do not necessarily provide any educational facilities, though some institutions do so. COMSOC secure custody facilities all provide educational/vocational programs, recreation, life-skills, religious, medical, and psychiatric or psychological counselling. If the resources are absent within the institution, the local community is accessed. Emphasis is on education rather than work programs.

A sizeable, though unknown, proportion of young offenders committed to secure custody in Ontario require psychological or psychiatric treatment or other specialized services, such as substance abuse treatment. MCS offers treatment services both on and off-site, but primarily on-site. Of course, any young offender can refuse treatment.

COMSOC has a strong orientation towards providing
treatment services to young offenders in order to try to meet their individual needs, including needs related to psychiatric and psychological services as they are identified. They generally use community resources for counselling and other services, such as crisis intervention, usually on a contractual basis. Consulting psychiatrists are often available to come to the facility on an "as needed" basis, though this is much more prevalent in southern and eastern Ontario than in north and northwestern Ontario. The Syl Apps centre is a COMSOC treatment facility dually designed for secure custody and secure treatment under the CFSA. With the approval of the superintendent, Phase II young offenders with major psychiatric disturbances can be referred to Syl Apps.

Open custody facilities under MCS are privately operated and the large majority are fully funded by the Ministry. Many resemble large older homes and often facilities in rural areas cannot be easily distinguished from neighbouring farms. Ten to 12 beds are the norm in terms of bed capacity but some residences have fewer beds (as low as 4) and some have as high as 24 beds. Open custody bed space for Phase I offenders in Ontario is provided by group homes, that is, the settings are indistinguishable in appearance from other large homes in the adjacent neighbourhood. All wilderness camps are designated for both open and secure custody and one northern
setting is reserved specifically for native offenders. Under both MCS and COMSOC, physical and security measures differ from residence to residence, with the physical security measured by means of staff-resident ratios. Security precautions are primarily for the protection of staff and residents, not for the prevention of escapes. The problem encountered by open custody facilities is the number of AWOL’s; many young offenders try to run away. Whether they are charged with escaping or merely placed back into the custody facility is at the discretion of the provincial director.

The MCS YOA manual states that the provincial director is to consider the best interests of young persons in determining open custody placement. Consideration must be given to proximity of family, community and court (if outstanding charges exist), their program needs, and their continuity of care. This manual suggests using this criteria in other discretionary decisions, though what is considered to be policy is not always what is practised, according to interview respondents (Ontario Ministry of Correctional Services, 1993, p. 0404-02). According to interviews, the primary criteria used in making the placement decision are the availability of beds and the proximity of the residence to the person’s home. COMSOC’S YOA manual notes that the choice of a specific open custody setting is based on the degree of risks to the community,
whether the young person can attend a community school or requires a s.16 classroom within the facility, the proximity to the young person's home and consideration as to where the youth will be returning after the completion of his sentence, as well as the length of sentence and the existence of treatment or other specialized needs (Ontario Ministry of Community & Social Services, 1991, p. 0302-06).

Although the criteria of "degree of risk to the community" would seem to be more appropriate in a MCS manual, a review of the over-all criteria in this manual is consistent with a CFSA orientation and with a rehabilitative orientation.

In many cases within COMSOC, mental health institutions are used as open custody facilities, though the north has no mental health facilities available. Custody placements are also made to foster homes and group homes run under CFSA standards.

MCS open custody facilities utilize community resources to a much greater extent than they do in their secure facilities. Most of the programming takes place off-site. Residents are encouraged to attend school or seek job skills training or to find work. If they refuse, they are assigned chores around the facility.

COMSOC relies on community resources for much of the programming in their open custody facilities. Some facilities have access to a special education classroom in a
nearby school and may be allocated a specific number of spaces. The young offender may also attend a regular community school. This is done under the guise of a temporary release (Moyer, 1991, p. 105; 1989, p. 154). Programs available under both Ministries depend not only on staff interests and abilities, but also on community size and the willingness of local resources to accept open custody residents.

Caputo and Bracken (1988) have noted that in 1989 MCS had 490 open custody spaces available for Phase II clients with an estimate of 617 open custody spaces planned for April of 1989. The number of government sponsored residences was approximately 61. COMSOC offered open custody facilities to Phase I young offenders through 200 privately run, government supported group homes. The group homes were generally small, averaging five to ten beds, with some exceptions of as many as 25 residents (p. 134).

It has been shown that the custodial system for young offenders is comprised of numerous and varied facilities that serve young people under the jurisdiction of the courts. Under the YOA, a young person may enter custodial care only through a court order following a finding of guilt, or while being detained awaiting court. The possible dispositions involving custodial care are:

1. Secure custody (in a locked setting);
2. Secure treatment (in a locked setting and requiring the
consent of the youth;
3. Open custody (in a locked setting, but with controlled access to the community);
4. Open and secure detention; and,
5. Probation with a condition to reside (a condition requiring the youth to live in a designated unlocked setting) (Ontario Ministry of Community & Social Services & Correctional Services, 1990).

The court determines the type of setting and the length of the sentence. The provincial director for the Ministry responsible for the particular youth chooses the location.

Phase I and Phase II staff have different legacies from their histories with their clients. Under the JDA, staff working with young persons saw themselves as friends and helpers. Accordingly, the Phase I YOA programs continue to encourage active staff involvement with the residents. In contrast, people who worked for adult corrections under MCS, prior to the YOA, perceive themselves as social control agents and protectors of the public. Therefore, Phase II secure custody programs tend to be more focused on carrying out a court order disposition.

In theory, under the dual mandate of the YOA to protect the public and meet the special needs of young persons, the two groups of young offenders were to be treated the same by different Ministries. Although each Ministry may have made efforts to adopt successful policies of the other Ministry,
there are still substantial differences. Cooperation occurs when custody spaces are needed but it is not the norm.

Current differences in approach may be found between MCS and COMSOC young offenders programs in case management, program management, staff recruitment and training as well as detention centre operation.

In a 1990 report of COMSOC and MCS the following observations were made:

Program management structures are similar, but the focus differs. When the YOA was introduced, MCSS used the CFSA with its "best interests of the child" philosophy to implement Phase I services. MCS used the Ministry of Correctional Services Act with its criminal justice philosophy to implement Phase II, and developed the Young Offenders Act policies and procedures. In both Ministries, field managers report through regional structures that are responsible for all programs. Both also have corporate managers with specific young offender system responsibilities. The reviewers found that despite these similarities of structure, a difference in focus of the two Ministries seems to be evident at all levels, in part due to differences in their overall intent and philosophy. The major thrust in MCSS is to small, community based residential programs even for secure custody . . . based on "cottage" units of 15 youths. MCS relies on large institutions of up to 150 beds for secure programs, with subdivision. MCSS staff do not wear uniforms, while some MCS staff in young offenders programs attached to adult facilities do. Also, some of these MCS programs still utilize adult correctional terms such as "sergeant" instead of "unit supervisor", which is the new title.

In MCSS, unlike MCS, case management provides continuity of service. In Phase I, the young offender is assigned a probation officer who manages his or her case from the start to the finish of various dispositions (custody, probation, etc.). This provides for the development of a trusting relationship and increased the likelihood that youth would report abuse or assault. In Phase II, the young offender's case is managed while in custody by an institutional liaison officer, and when the youth in on probation by a
different probation officer. Phase II offenders did not report similar trusting relationships.

**MCSS recruits and trains staff specifically for YOA secure services, but MCS does not.** All MCS correctional officers attend the same basic training program which has an adult focus; if they choose to work in YOA facilities, they are provided with further training in the YOA. MCS policy does not preclude the use of adult correctional officers in YOA programs. . . . If the adult staff deployed in the young offender program do not have a clear understanding of YOA legislation, philosophy, policy and procedures, there is more opportunity for confusion and differential treatment, and youth may be at increased risk.

**MCS training is standardized, but MCSS training is not.** MCS’s adult focused staff training is uniform and compulsory for every new staff member. . . .

**MCSS dedicates secure facilities to young offenders while MCS does not.** In Phase I, all YOA secure facilities are self contained . . . In some MCS Phase II detention programs sections of adult institutions were converted for young offenders, maintaining separate populations and programming. The managers of these units report to the superintendents of the adult institutions, which do not operate under the YOA philosophy.

**MCSS detention promotes counteractive intervention, but MCS detention may not.** For both Phase I and Phase II, the centres for detention and short term custody present a programming challenge. (Ontario Ministry of Community and Social Services and Ministry of Correction Services, 1990, pp. 55-57).

It is the opinion of this writer based on the documentary evidence of the aforementioned review that young offenders are not equally served under the current split jurisdiction. Further consideration needs to be given to whether the goal of equal treatment can actually be attained within the current structures. This opinion concurs with the findings of the report.

This writer’s view is buttressed by the findings of a
1990 Report of the Advisory Committee on Children’s Services, who examined COMSOC and MCS services for children.

They concluded:

There are fundamental differences, however, between the facilities and support services provided by each. The Ministry of Community and Social Services is more attentive to the needs of children. The major job of the Ministry of Correctional Services is the incarceration and supervision of adult offenders. MCS separates young offenders from the adult population, but the facilities, staff and services have a more "correctional" orientation, arguably more appropriate for offenders over 18. MCSS deploys child development workers and group homes (Ontario Ministry of Community and Social Services, 1990b, p. 102).

The report recommended that the system should be "reorganized so that it can operate as a single system, under a common philosophy, integrated judicially and administratively" (p. 102); and furthermore, that responsibility for Phase II offenders be transferred to COMSOC.

Even the Ministers of COMSOC and MCS, by their comments in the Provincial legislature, during an emergency debate on the YOA, reflected a clear divergence. For example, on the question of custody, the respective ministers on the same day in the legislature made the following comments:

Mr. Sweeney (Minister of COMSOC):

The other clear thing that the YOA points out is that, by opening up the process there is the possibility of open custody that would take place in communities, not in institutions. We recognized that if we were going to help these young people, if we were going to help their families, then it was going to take place in the communities. It was not going to take place somewhere far away where we simply sent them and forgot them (p. 7935).
On the other hand, Mr Ramsay, Minister of MCS stated:

We need a single level of custody. Currently youth courts determine whether young persons are placed in secure custody or open custody. This results in a system of placement that is inflexible and at times inappropriate (p. 7940).

It is recognized that the sentencing of young offenders is a very complex task. It is also recognized that as a group they are less mature than their adult counterparts therefore they should not suffer the same consequences for their criminal behaviour as do adults. There is still a greater potential for rehabilitation for a young person who is still in the formative stage of his value system and personality.

The Declaration of Principle is inconsistent with respect to a particular model of sentencing. Adult sentencing principles are apparent in the s.3 principles of accountability and protection of society consistent with the "least possible interference with freedom". The principle declaring that youths have special needs and require guidance and assistance appears to be consistent with the juvenile model of sentencing under the JDA. Respondents working in custody facilities have all agreed that there is a definite inequality in the sentencing between Phase I and Phase II young offenders. Phase II young offenders are sentenced under adult principles and treated by the ministry as though they were adults. The sentencing of Phase I offenders still follows a rehabilitative model of justice
where special needs and guidance are given consideration. This inequality is definitely a result of split jurisdiction and is, in the opinion of this writer, discriminatory towards the older young offenders in this province. One respondent who worked in a Phase I custodial facility said that she found the work extremely difficult as you could treat the young offenders as your own sons and daughters. She now feels much more comfortable in a Phase II secure facility where the principle is based on accountability and there is virtually no rapport with the young offenders. She does not now feel "that she would like to take them home" (Anonymous, personal communication, 1993).

Even though COMSOC is following a rehabilitative model of justice and MCS is following a justice model, many observers believe that the protection of society principle in the YOA is being emphasized over other principles and is leading to harsh custodial dispositions for youth throughout the province (Leschied & Jaffe, 1987). There is no doubt that youth court judges are imposing more custodial sentences on young people than were imposed under the JDA. The Act was designed to impose limitations on the decisions of the court and to limit discretion of the judges that was so apparent under the JDA. It does not allow the most restrictive measure of secure custody except in cases where the gravity of the offence is considered extremely serious, taking into account the young offender's previous
conviction. The general rule is that probation and custody do not exceed two years and that the maximum duration, three years is to be used for only very serious or multiple offences. The principle that requires that no disposition result "in a punishment that is greater than the maximum punishment that would be applicable to an adult who has committed the same offence" (YOA, s.20(7)) introduces another limit based on the gravity of the offence (Trepanier, 1988, p. 28).

One example of the discretion used by judges is in the case of R.v Joseph F. (1985), in which a 15 year old first-time offender had committed a minor break and enter and three unconsummated conspiracies to steal. He was handed an eight month custodial sentence based on the rationalization of the paramountcy of the protection of society and general deterrence. The Ontario Court of Appeal stated its disapproval of placing such stress on the protection of society to the exclusion of other s.3 principles in the YOA. Mr. Justice Morden of the Ontario Court of Appeal reduced the youth's disposition to probation, stating:

While undoubtedly the protection of society is a central principle of the Act (see for example s.3(1)(b),(d)(f), 16(1), 24(5), 29(1)). It is one that has to be reconciled with other considerations, such as the needs of young persons and, in any event, it is not a principle which must inevitably be reflected in a severe disposition. In many cases, unless the degree of seriousness of the offence and the circumstances in which it was committed mitigate otherwise, it is best given affect to by a disposition which gives emphasis to the factors of individual
deterrence and rehabilitation. We do not agree that it puts the matter correctly to say the whole purpose of the Act is to give a degree of paramountcy to the protection of society - with the implication that this is to overbear the needs and interests of the young person and must result in a severe disposition (R. v. Joseph F., 1985, p. 558).

Other judges, particularly those in Phase I, are using the "special needs principle" as a justification for more severe dispositions based on a concept of rehabilitation. Some appear to be reverting back to the long ago discarded s.8 of the JDA which provided for the control of unmanageable juvenile delinquents in order to justify imposing custodial dispositions. The use of the YOA for wardship purposes has been approved by the Ontario Court of Appeal. Mr. Justice Thorson of the Ontario Court of Appeal states:

... where a first custodial disposition is being made, it may well be that the public interest is adequately served by a short custodial term, and if so, that will obviously be the most desirable disposition. Again, however, it cannot be the rule in all cases, regardless of the nature of the offence or the circumstances of its commission. Moreover, the reasoning which has led our courts to favour, wherever possible, a short first custodial sentence for a youthful adult offender may lose some of its force when sought to be applied to someone of lesser maturity, as, for example, where a young offender's committal to custody reflects an adjudged need to remove him from an unhappy or hostile home environment. In this case, whatever ultimate success the custodial order may expect to enjoy may have to be more directly linked to its duration than will generally need to be the case where a youthful adult offender, facing for the first time a term of incarceration in a prison or reformatory, is the subject of such an order (R. v. Richard I. et al., 1985, pp. 530-531).
Despite the fact that the YOA in effect abolished the wardship and foster home dispositions of the JDA, probationary as well as custodial terms are still being used for wardship purposes. This was very evident in interviews conducted in Phase I custodial facilities. Beds within children’s aid society group or foster homes and children’s mental health centres have been designated by COMSOC as custodial beds for Phase I young offenders. This is a matter of serious concern in that many young offenders presently in open custody facilities are there on probation with orders to reside. This, in effect, means that the Provincial Director has the authority to use a custodial setting as a dispositional alternative, which, in effect, allows for a harsher penalty than was imposed by the court. Custodial dispositions imposed in this respect are definitely not the intent of the Act. Even though it is an effect of split jurisdiction, it is encouraging to see that MCS does not follow this course of action with orders to reside.

5.6 Probation Services

In order to assess the impact that the split jurisdiction in Ontario concerning young offenders has had on probation services, it is necessary to review the sections of the YOA that bring probation concepts into focus.

Section 37 of the YOA provides that there is a new
classification of personnel within the juvenile justice system, the "youth worker". Bala and Lilles (1984) have commented that the intent is for these workers to perform many of the functions carried out by juvenile probation officers under sections 30 and 31 of the JDA. This section provides for four specific tasks that may be performed by the youth worker. These are:

Supervising the young person in complying with the conditions of the probation order; assisting the young offender until his disposition has been completed; attending court proceedings with the young offender (when he considers it advisable or when required by the youth court to be present); and preparing predisposition and progress reports" (p. 287).

Section 23 of the YOA provides for conditions that can be attached to any probation order made in the youth court. This section indicates that there are certain mandatory conditions that apply with every probation order, they are: keeping the peace and being of good behaviour; appearing before the court when required; notifying the provincial director or youth worker with a change of address, place of employment, education or training (Bala & Lilles, 1982, p. 184). Bala and Lilles further commented:

In addition, there are other conditions that may be attached to the order at the discretion of the youth court judge. These briefly provide for the following: (a) reporting to and being under the supervision of the provincial director or person designated; (b) the requirement that the young offender remains in the territorial jurisdiction of the court; (c) using more efforts to obtain and maintain employment; (d) attend school or other educational programs; (e) residing with a parent or other adult who is willing to provide for the care and maintenance; and (f) reside in such a
place as the provincial director or a delegate may specify (Bala & Lilles, 1982, p. 192).

This section also provides that any probation order once granted must be read by or to the young person, be explained to the young person when given to the young person and his or her parent (Bala & Lilles, 1984, p. 193).

With regard to the provision that a young person is to reside in such a place as the provincial director or his delegate may specify, Bala and Lilles (1984) have commented that this provision "allows the placement of a young person in a facility operated by provincial child welfare authorities, a private agency or by an individual" (p. 196).

Bala and Lilles (1984) also comment that this provision:

Would seem fair enough to allow the provincial director to specify that the young person reside at a wilderness camp or at some residential educational facility (p. 196).

Based on the comments of Bala and Lilles, it is the opinion of this writer that under the terms of making a probation order the judge can give broad discretion to the Provincial Director as to where the young person will have to reside during the terms of that order. When one notes that a probation order can be for up to two years under section 20 of the Act, the effect is that the Provincial Director has control over where the young offender may reside.

It is also the opinion of this writer, based on the
above provisions, that the attitudes and the perceptions of the Provincial Director, which are then delegated down through employees under him, would have a bearing on his dealings with young offenders, especially in regard to placement.

As noted earlier, COMSOC is responsible for the CFSA which is recent legislation detailing all services provided to children under former separate acts. The main points stated in the declaration of principle of this Act are that "the well being, best interests and protection of children must take precedence over any other consideration" (Child and Family Services Act, 1990). Another principle is that the least restrictive or disruptive course of action as available and appropriate should be followed in dealing with children (Child and Family Services Act, 1990).

The Children's Services Task Group, (1988) had the following comments on the CFSA philosophy. They stated:

The CFSA philosophy is relevant to several decisions made by provincial authorities in the administration of the YOA including: the range and type of programs available to courts and young persons; the manner in which services are provided; the circumstances under which certain services are provided; recommendations to courts containing predisposition reports and post-disposition progress reports and decision relating to early release from custody (cited in Childrens Services Task Group, 1988, p. 91).

The situation in Ontario provides for different provincial directors from different ministries. Therefore, the result is that the Provincial Director for COMSOC makes
decisions concerning young persons aged 12 to 15 as to where they should reside with respect to probation orders, based on his appreciation of the CFSA philosophy as well as the philosophy of the YOA. On the other hand, the provincial director and delegates who are responsible for administering MCS's services under the YOA follow their own mandate. The end result may be that the provincial director under COMSOC may place a young offender between the ages of 12 and 15 into a facility based on his interpretation of the well being, best interests and protection of the child. Whereas the Provincial Director under MCS may place a child in a facility, using as his main consideration, the protection of the public. Such placements can be for a period of up to two years.

It is acknowledged that the MCS 1993 YOA Operations Policy and Procedure Manual directs the Provincial Director to consider the best interest of the child when making placements. Although this policy may also apply to probation orders with orders to reside, this does not necessarily mean that the "best interests of the child" will be given priority. Previously, interview respondents have commented on the orientation of some Phase II provincial directors.

When one looks at the specific duties of probation officers or youth court workers as detailed earlier under Section 37 of the Act, this writer is of the opinion that
there may be differential treatment provided to young offenders due to the influence of the CFSA philosophy and principles of COMSOC probation officers as opposed to MCS probation officers. With relation to a probation officer supervising the young offender, interview respondents consider counselling to be a high priority within COMSOC probation services. On the other hand, interview respondents felt probation officers under MCS gave a higher priority to surveillance and control.

The Children's Services Task Group (1988) further concluded that the YOA has increased the work load of probation officers of both ministries. They recommended that "MCSS (COMSOC) and MCS should examine the impact on probation services to ensure their continued viability" (p. 19). This writer would agree with this recommendation and is of the opinion that if the answer is the spending of additional provincial monies for the hiring of additional probation staff, this would be money well spent as more intensive counselling would be a means of preventing further criminal involvement.

This is based on the conclusions reached by Palmer (1976), Gendreau and Ross (1979), and Ross and Gendreau (1980), who suggest that far from being ineffective, programs which address individualized needs with individual clients within the correctional system do demonstrate effectiveness. In order to do so they must be well
developed and evaluated to meet the needs of the correctional population.

With respect to the criminal justice literature, Gendreau and Ross (1980) ascertain:

Certainly the evidence we have reviewed would argue . . . along the lines of the current studies attesting to the fruitful intervention, in particular with young offenders in community settings and diversion related programs and probation (p. 36).

Another key component of probation services is the use of community service orders as a condition of probation.

Graphs 8 and 9 and Chart 2 are relevant only to youth in the Phase II system as data on admissions to community supervision by offense is not available from COMSOC. Again, there are limitations to the interpretation of the data due to the lack of data for total charges against Phase II youth and only limited conclusions may be drawn from the graphs and the chart. It may be said though that all offences against persons accounted for 10.2% of charges laid. Property offences accounted for 75.7% of all charges with break and enter being the most common charge. All other Criminal Code offences were accounted for in 8.1% of the charges, with drug offences being the most prevalent.
Section 29 of the YOA provides that the provincial director, if satisfied that the needs of the young person and interests of society would be better served, gives notice to the young offender, his parents and the Attorney General, that he recommends the young person either be transferred from secure custody to open custody, or be released from custody and placed on probation. In a case where the Provincial Director recommends the young offender be placed on probation, the Provincial Director is authorized to recommend conditions that would be attached to any probation order made (Bala & Lilles, 1982, p. 238).

It is the opinion of the writer, based on the findings of the Children's Services Task Group (1988), that this section of the Act again places special emphasis on the powers of the provincial directors, especially in the Province of Ontario where two separate ministries, COMSOC and MCS, have respective jurisdiction for 12 to 15 year olds and 16 and 17 year olds.

Studies have shown that the personal orientation of the probation officer has an effect on the exercising of his duties. Jackson (1982) reported that the probation
officer's decision to revoke probation was influenced by his personal style and orientation.

Although this study dealt with probation officers dealing with adult offenders, it is submitted that their conclusions can be applied to probation officers dealing with young offenders, especially since MCS probation officers deal with both adults and young offenders. In particular, these conclusions, along with the comments of interview respondents, support the contention of this writer that the split jurisdiction in Ontario, with its two separate ministries, has resulted in differential treatment by the probation officers from each ministry.

One problem that relates to how probation is carried out is the fact that the MCS has taken the position that youth workers under Section 37 of the YOA who would perform the functions of probation officers, do not have to be employed full time in assisting young offenders alone.

In a 1984 orientation training manual re the YOA prepared by MCS, it was noted as follows:

Persons not appointed or designated by an act of provincial legislature or by the Lieutenant Governor in Counsel may also qualify as a youth worker if they are carrying out any of the duties or functions of the youth worker. The exact nature of their duties will be decided by provincial directives and it is not-essential, according to the Act, that a youth worker be employed full time in assisting young offenders (Ontario Ministry of Correctional Services, 1984, p. 98)
The orientation training manual further provides:

Ministry policy will allow for local managers to make appropriate decisions regarding the designation of staff to work with young offenders. In some areas it will be necessary for community staff to work with a mixed case load due to staffing limits. Also, community offices might be able to delegate one person as 'youth worker' (Ontario Ministry of Correction Services, 1984, p. 99).

Ontario Social Development Council (1987) commented that the task of probation officers in general was complicated by different perceptions of their role.

The young offender may see the probation officer as a representative of a punitive system. The parents may see probation as providing the opportunity for rehabilitation. Others may see probation as 'letting the offender off'. Agencies sometimes misperceive probation regarding it as having unlimited resources.

Based on the findings of the joint MCS and COMSOC review team report, this writer believes that the young offenders under COMSOC might have a different view of the probation officers than the Phase II offenders under MCS. If one takes into account that the orientation of the probation officers themselves would be different and that the probation officers in the Phase II would be more authoritative and play more of a supervisor or surveillance role, then it is fair to assume that those young offenders would view the probation officer as part of the penal system. It would appear difficult to establish a trusting relationship as long as that perception continued to exist.

On the other hand, Phase I offenders would be dealing with the probation officer whose orientation was
rehabilitative. It would therefore seem possible that those young offenders would not view the probation officer as harshly as Phase II young offenders would. A Phase I probation officer stated "Most kids we see have a chip on their shoulder, but if you treat them with respect, and show some concern, they usually come around". Whereas a Phase II probation officer actually stated "Most of the time they just lie to you. I don’t have time for that so I make them report every day for a month" (Anonymous, personal communication, 1993). The opportunity to develop a close trusting relationship could be available, although there are obviously no guarantees that it would occur in every case, due to factors that might mitigate against such a relationship developing.

The above observations were confirmed in the joint MCS and COMSOC Review Team Report dealing with safeguards in children’s residential homes, wherein they found that in COMSOC, case management provides "continuity of service", since the Phase I young offender has the same probation officer from start to finish, from entering custody to probation. On the other hand, in MCS there is diffusion of service, whereby a Phase II young offender in custody has an institutional or residential liaison officer as case manager until he leaves the facility, and at the same time has a probation officer who takes total responsibility once the offender is released. The review team concluded that the MCS
probation structure made it difficult to establish trusting relationships between the probation officer and the young offender (Ontario Ministry of Community and Social Services and Ministry of Correction Services, 1990, p. 56).

A further problem resulting from the split jurisdiction might be the issue of non-compliance with probation orders. If one were to follow through the previous arguments concerning the relationships of the young offenders in the different phases to probation officers, it would be fair to assume that there would be stricter compliance required of Phase II offenders. If the Phase II offender perceived the probation officer as part of the punitive system and more of a controller than a helper, there might be the temptation to not comply with certain probation conditions. On the other hand, one would assume that Phase I offenders, if they are able to develop a somewhat trusting relationship with the probation officer, would attempt to comply with all aspects of probation. One interview respondent from COMSOC stated; "Most kids will attempt to comply with their order if they feel you are on the same wavelength with them. This doesn’t mean that they won’t mess up, but at least they make an effort" (Anonymous personal communication, 1993). The same respondent also stated; "If a kid meets you halfway, it is really difficult to breach him." Based on these interviews, this writer is of the opinion that probation officers under COMSOC would be more reluctant than those in MCS to bring a
probation violator back to court for noncompliance without perhaps giving that offender several chances or, at the very least, speaking to him or giving him several warnings.

This writer is in agreement on the joint review study of MCS and COMSOC which commented on the probability of better trusting relationships being developed with Phase I offenders. On a balance of probabilities the Phase I offender would have a better opportunity of receiving the benefit of the doubt or a second chance re non-compliance than a Phase II offender.

5.7 Treatment

Prior to the YOA, the provinces had failed to agree upon the age at which adolescence and adulthood began. In Ontario the limited access to Family Courts for young offenders under the age of 16 years, and the increase in age jurisdiction for the young offenders system to 17 years inclusive was not well received because it was believed that 16 and 17 year olds could not be dealt with effectively in the same systems as 12 year olds. Moreover, the province felt that the overall cost of providing the necessary court and dispositional services would be prohibitive. However, since the enactment of the YOA, Ontario has perpetuated the two-tiered system of split jurisdiction in dealing with young offenders, making this a contentious and controversial issue. Moreover, critics have claimed that this split jurisdiction is not a well-conceived long term plan but
rather a "neglectful plan based on minimal compliance with the spirit of the YOA" (Leschied & Jaffee, 1989, p. 69).

According to Moyer (1989), COMSOC funds a range of children's services including day care, children's aid societies, children's mental health centres, young offender correctional facilities, vocational rehabilitation, services for physically handicapped and income maintenance (p. 1). MCS, conversely, is responsible for all young offenders serving two years less a day in provincial jails and for community programs operated through probation offices. Many of the correctional resources are available only after incarceration (Leschied & Jaffee 1989, p. 69).

Accordingly, the results of this split jurisdiction is that 15 and 16 year old young offenders with the same needs may be treated very differently, primarily because each has access to a different court and each comes under the authority of a different Ministry. Leschied and Jaffee (1987) provide an example that compared to a 16 or 17 year old young offender, a 12 to 15 year old young offender is at least 10 times as likely to receive a medical or psychological predisposition assessment because of an emotional or learning problem.

The London Family Court Clinic has a mandate from COMSOC to deal with 12 to 15 year olds. In this sense, they are cutting out Phase II of the YOA and treating solely the 12 to 15 year olds. This disparity of treatment, in that
they only deal with some 16 and 17-year-olds cleared by their Board of Directors, clearly reflects the fact that not all young offenders are treated equally or in a similar fashion. This inequality in treatment is a result of split jurisdiction because MCS will not provide monies to private Mental Health facilities in order to include Phase II young offenders under their mandates (Willis, personal communication, 1993).

In dealing with treatment, the London Family Court Clinic provides assessment and brokerage services to juvenile courts. Specifically, The London Family Court Clinic is a Children's Mental Health centre whose major goal is to provide assessments of children and families who are before the court. The majority of clients do have charges and, as a result, are referred for comprehensive assessments of their emotional, social and educational needs. The service provided to the court focuses not only on identification of the child and his/her family's area of strength and weakness, but also on the appropriate interventions and community resources that can be utilized to improve the child's adjustment (Jaffe, Leschied, Sas, and Austin, 1985, p. 55).

In terms of treatment, the description of the London Family Court Clinic in its briefest sense is seen as providing unique evaluation of a clinical service to juvenile courts.
In Ontario there are four formal Court clinics—two in Toronto, Ottawa, Kingston and London. Assessment services are offered to juvenile courts in other areas but these tend to be on an ad hoc basis as part of other services provided by children’s mental health centres. The London Clinic applies a psychological model with a strong psychosocial bias. Moreover, the clinic emphasizes routine evaluation and accountability of the service as a whole (Jaffe et al., 1985, p. 60).

From this, it is evident that the treatment they do implement is based primarily on the psychological assessment of the individual himself. This is determined after an extensive battery of personality tests is conducted.

The drafters of the YOA seem to have had an almost utopian belief in the compatibility of treatment with the justice model of sentencing and civil rights protection. In most cases, the dispositions for most jurisdictions in Canada have illustrated that the YOA has been interpreted as a punishment focused piece of legislation, resulting in alarming increases in the youth in custody. As a direct result, as illustrated on a number of occasions, the accountability and responsibility provisions of the YOA have been almost synonymous with punishment, which has in turn manifested itself in increasing custodial rates (Leschied & Jaffe, 1986, p. 29).

As a direct result the concept of deterrence is a simplistic premise of criminal justice philosophy. In essence, it promotes the belief that a sentence from the court, that is often aligned with the offender’s criminal behaviour, will have the effect of producing within the
offender the prevalent belief that increasing punishment will follow if his/her behaviour does not change and, therefore, it is less likely that further crimes will be committed. This is due to the fact that the Declaration of Principle section of the YOA also stipulates that the special needs of the young person and the protection of society be taken into consideration.

Clearly, COMSOC follows a multi-tiered process by which to evaluate and treat the young offender. The focus on mental health issues and practical needs and risks assessments based on personality inventory tests allows the clinician to develop and assess evaluation protocols with respect to treatment. Correctional services, conversely, does not necessarily follow a basic inventory model of assessment.

Wayne Willis (personal communication, 1993), comments on the fact that within the London Family Court Clinic they do not necessarily buy into the punitive aspects of the YOA nor do they approach the problem in a fashion similar to MCS. Rather, they base their service on a functionalist approach in which they try to integrate not only the social needs but also the psychological needs of the young offender and his/her family.

For example, COMSOC utilizes mental health facilities for open custody offenders. However, within the Phase II process of the YOA, correctional services does not put
Youths into treatment facilities and call it open custody. Therefore, there is a clear disparity of treatment in which the older young offenders do not necessarily have the same rehabilitative benefits as those of their younger counterparts. Indeed, the fact that the London Family Court Clinic does not necessarily focus on young offenders in the field in the Phase II stage clearly indicates the extent to which treatment is, at best, precariously based on the age of the individual and the severity of crime.

COMSOC focuses on what is known as "a clinically appropriate" service. By summarizing the studies reviewed by Andrews, Leschied, and Hoge (1992) clinically appropriate services are defined commonly as the programs consistent with the principles of effective service that include several replications of short termed behavioural and systems family counselling. Moreover, they are structured on a one to one paraprofessional program in which the helpers are encouraged to be of active and direct assistance and specialized in academic programming; intensive, structured skill training, and even behaviourally oriented individual counselling; as well as group counselling and structured milieu (token economy) systems (p. 364).

Coupled with this definition, one must take into consideration the analyses of Caputo and Bracken (1988), who commented on the split jurisdiction in Ontario as follows: "Since one Ministry has a rehabilitative orientation and the
other a corrections orientation, there is some question about how this affects the programs offered by the two" (p.135). Of the two Ministries, COMSOC's rehabilitative orientation towards the YOA, coupled with its "child well-being" philosophy under CFSA, provides the impetus for delivering some, if not all, of the above treatment services to Phase I young offenders.

One important point to remember is that whatever treatment service is utilized it must be individually focused. Leschied, Jaffe, Suderman, Austin and Willis (1988) state:

The recent review by Gendreau and Ross (1980) points out that to be effective, treatment programs for antisocial groups must target specific types of behaviour. Programs with a general focus may miss the mark - or not be aware of the mark being missed and hence fail to change attitudes and behaviour (p. 60).

In summary, then, evidence to date and the various literature, suggest that the delivery of clinically relevant treatment service is a promising route to reduce re-offending. Whatever the social world of punishment, there is clearly no evidence that a reliance on "just desserts" or deterrence based sanctioning will be rewarded by meaningful reductions in re-offending. In fact, the opposite may be true. "... the effect of sanctions was negative, with more processing associated with slightly increased recidivism rates. This finding is mildly consistent with labelling theory and inconsistent with deterrence theory" (Leschied, Jaffe, Andrews & Gendreau, 1992, p. 363). From this
perspective then, COMSOC's mandate to the London Family Court Clinic is based on a functional and therapeutic means in order to rehabilitate the young offender. MCS, conversely, does not employ the same method. Not only do they base it on a "just desserts" form of modelling but in a recent interview, Marilyn Renwick of the Department of Justice felt that because MCS deals with young offenders that are in the Phase II stage of Criminal Policy, they in turn, dictate a more adversarial and deterrent based model of justice as opposed to their COMSOC counterparts. The fact that 16 and 17 year olds chances for rehabilitation are seen as less possible, clearly illustrates the extent to which COMSOC and MCS differ in their approaches to rehabilitative treatment (Renwick personal communication, 1993).

Because the YOA pays special attention to the rights of young people before the court, it provides no opportunity for the court to comment or question the ability of a young offender to make a reasonable decision regarding consent to treatment. Specifically, the assumption under s.22(2) appears to be that first of all, a young person must be voluntarily involved in the provision of treatment, and that secondly, with an involuntary involvement when motivation is absent, this in turn reduces any potential benefit from treatment.

Leschied and Hyatt (1986) commented that:
The management of the consent issue under the YOA, appears to be inconsistent with the recognized principles of other legislation related to a young person’s testimony in court. In criminal and civil matters a youth can and frequently does appear as a witness. Section 19 of the Ontario Evidence Act and Section 16 of the Canada Evidence Act outline specific factors to be used by the court in weighing a young person’s evidence. Under both Acts a "child of tender years" may give evidence under oath only if he in fact understands the nature of the oath. If the youth does not understand the oath, unsworn evidence can still be taken if it can be demonstrated: (1) that the youth is possessed of sufficient intelligence to justify the reception of the evidence; and (2) that the youth understands the duty of speaking the truth (p. 72).

In contrast to this procedure, Leschied and Hyatt point out that: "A young person in youth court of any age can refuse consent without giving reasons; judicial scrutiny is entirely absent" (p. 73). Leschied and Hyatt further argue that:

Examination of a youth is for the protection of the litigants in the proceeding in which the youth is asked to testify. Justice and fairness are clearly seen to be done. In youth court, however, refusal of consent to treatment serves only the interests of the young person and potentially those of his counsel whose fortunes ride on the number of young persons 'gotten off'" (p. 73).

If the philosophy of the YOA is to place the responsibility for a youth’s actions in the youth’s own hands s.21(1) is a feasible way of doing so. However, justice is not fairly administered. Specifically, Leschied and Hyatt feel that:

Neither the youth in need of the treatment which has been carefully and not arbitrarily designed to fit the young person’s needs as required under a Section 13, nor the community at large, can
benefit. The authority to administer justice is taken from the control of the presiding judge and given to the young offender (p. 73).

Likewise, a youth of 17 who is convicted of an offence but refuses treatment, can then complete whatever other terms of the disposition have been imposed and then is free, literally, to act out again with this behaviour undeterred and undisciplined. However, the moment the same youth of 17 turns 18 and finds his way to adult criminal court this choice does not exist. Instead, under the Criminal Code, a condition of probation is made possible for adults which require the accused to seek counselling or to obtain psychiatric or other medical treatment. Nadin - Davis (1982), in commenting on the section in the Criminal Code that allows the sentencing judge to impose reasonable conditions to a probation order, states: "A not infrequent condition is that the offender participate in a treatment program for a psychiatric problem or drug dependency" (p. 465). Clearly then, it is evident that a young person is given the adult freedom and choices, but once they turn 18 their freedom is taken away. It must be noted though, that some jurisdictions are making an effort to circumvent the issue of consent by making treatment a provision of a probation order. Willis (personal communication, 1993) confided that in Southern Ontario this is the case, but if the young offender failed to comply, he/she was not breached for fear of a Charter Challenge. However, Green (personal
communication, 1993) states that in Northern Ontario, young offenders are breached and brought back to court for failure to comply with a treatment provision.

The reason for including this consent issue in the YOA is based on the lack of confidence in the efficacy of treatment itself. Specifically, the popularized opinion in the area of criminal justice regarding rehabilitation is that clearly, it does not work. Gendreau and Ross (1979) have argued that the "nothing works" doctrine encourages the correctional system to avoid responsibility by labelling the offender as untreatable.

Because MCS does not necessarily have any large complaint against this consent to treatment premise, they are effectively conceding to the fact that accountability and treatment of the young offender rests solely in the individual's own right to want or recommend treatment for his or herself. This approach to rehabilitation, according to MCS, coincides with the Declaration of Principle of the YOA, making the individual responsible for his/her own acts. Therefore, it is felt that the individual must want to obtain treatment in order to rectify their offensive acts.

Thus, the differences between these two Ministries with respect to their philosophies based on differing models of justice are paramount to their approaches. This is permitted through the legislation. Specifically, Leschied and Gendreau (1986) feel that the legislation in its present
form has created difficulties for proponents of rehabilitation and they hope that some constructive alternatives will be found to the present predicament.

For COMSOC, the primary goal of treatment is to alter the offender's attitude and behaviour so that he or she is less inclined to commit the crime again (Bartollas, 1985, p. 11). Consequently, in the treatment program of COMSOC, the focus is not only on identifying the problem and discovering the relationship between the causes of crime and potential underlying disorders, but on making the effort to understand the context of the person's functioning, which entails a program to meet their individual needs. In COMSOC, the assumption is paramount that not all offenders are alike; thus, there are no uniform treatments that will work equally well for all people. For COMSOC then, there is a definite focus on child welfare and rehabilitation. Because MCS does not necessarily focus on this idea, they do not stress that support and assistance is of paramount importance, inasmuch as the individual must realize his or her own wrong doings within the crimes that they commit.

As mentioned earlier, in the Phase II process where MCS deals with 16 to 17 year olds, they do not put young offenders into treatment facilities and call it open custody. Whereas, within the Phase I realm in COMSOC they do have the mandate to put kids into treatment facilities and call it open custody. Moreover, treatment under Phase
II has been termed "locked van therapy" (Andrews et al. 1992), meaning that treatment of Phase II young offenders with criminal charges and mental illnesses consists of being simply shuttled around from court to custody beds, to treatment centres on a crisis basis. Thus, because there is a definite shortage of resources and, of the two Ministries, only COMSOC focuses on mental health intervention, the treatment facilities that have been provided under the YOA have serious implications for youth court in prioritizing those children with the greatest levels of needs.

Thus, through the comparisons of a split jurisdiction between COMSOC and MCS, it is clear that the London Family Court Clinic serves as a directional focus for COMSOC in that city. Conversely, within Phase II structuring, MCS does not have such a clear mandate. The London Family Court Clinic and COMSOC's focus on treatment is heavily serviced by The Children's Aid Society, probation, group homes and family counselling centres. Statistically, they illustrate that one in four have been residing in residential treatment centres. Statistics illustrate that approximately half of young offenders reside in places other than their parental home (Leschied et al., 1988, p. 11).

The fact that Phase II offenders do not have the same treatment facilities as Phase I illustrates the extent to which most treatments are not uniform and are not carried across through both Ministries.
Thus, to summarize, Leschied (1989) states:

Such a consolidation with one Ministry could work against the often fractured and inconsistent approaches that result from youths being dealt with from several different Ministries, jurisdictions and social service agencies (p. 24).

The London Family Court Clinic has been focused on with respect to treatment because of its visibility and the number of treatment focused articles authored by its main practitioners. This focus can be extended to all of Ontario even though treatment facilities of this nature are not available everywhere. Based on interview data, it is evident that in Northern Ontario, COMSOC and MCS do not provide facilities specifically designated for treatment. The Kenora-Patricia Child Development Centre does offer treatment to "high risk" young offenders when it is included as part of a probation order, but this service is only included as a small part of their broader mandate (Green, personal communication, 1993). The implications of the treatment provisions in the YOA are that across the Province, treatment is offered on an unequal basis to the clients of COMSOC and MCS.

Clearly then, the means chosen by the government to control youth crime dictates society's measure of commitment to assist those persons disadvantaged by whatever circumstances placed them at risk. However, subsequent reformulations of juvenile justice policy need to be aware that in coming to terms with youth crime, the complex nature
of young offenders and the new form of social policy for Canada’s young offenders do not necessarily coincide. The need to have parallel developments across both Ministries is crucial in order to have effective treatment and rehabilitation processes within the rubric of the YOA.
6.0 Chapter 5: RECOMMENDATIONS

The foregoing analysis of the split jurisdiction system in Ontario has noted the problems of differential treatment between the two phases of young offenders. To ameliorate the consequences of Ontario’s two-tiered implementation of the YOA the following recommendations are presented as reasoned solutions to the identified problems. The recommendations are presented with the expectation that they would allow all young offenders in Ontario to be dealt with in an effective, efficient and equitable manner.

1. It is recommended that the Attorney General should put into place the amalgamation of one court system, that being Ontario Court (Provincial Division), wherein all youths ages 12-18 may be dealt with by one set of youth court judges with the same philosophical background.

2. It is recommended that the Young Offender’s System should be integrated judicially, administratively and philosophically. Responsibility for 16 and 17 year old offenders should be transferred from the Ministry of Correctional Services to the Ministry of Community and Social Services with its more rehabilitative approach.

3. It is recommended that bail directives for young offenders should be re-examined to ensure that they are not more stringent than the ones applied to adults.

4. It is recommended that MCS train probation officers to work strictly as youth workers.
5. It is recommended that treatment facilities be provided for Phase II youth to the same extent as Phase I youth.

6. It is recommended that provincial directors appointed by both COMSOC and MCS under the YOA not be superintendents of custodial facilities, but wherever possible be probation supervisors.

7. It is recommended that more psychiatric facilities for adolescents be provided, especially in Northern Ontario.

8. It is recommended that case loads of probation officers both Phase I and II be reduced and that probation officers, especially those in MCS, receive training from mental health professionals to develop more effective skills and techniques, such as behavioral contracting. Taking into account the fiscal restraints and obstacles, the Province of Ontario should reprioritize its expenditures in the youth justice system to provide for more probation personnel with specialized training to meet this objective.

9. It is recommended that a centralized service to assist providers with high risk young offenders be developed along the lines of a centre for the prevention of child abuse.

10. It is recommended that all secure custody facilities in Ontario, both COMSOC and MCS, have available a wide range of appropriate treatment programs and services.

11. It is recommended that MCS discontinue the use of adult correction officers in YOA programs, unless they have received specialized training.
12. It is recommended that MCS discontinue the practice of having two persons, a residential liaison officer and a probation officer, responsible for the young offender's case management.

13. It is recommended that the managers of YOA units within adult institutions not report to the superintendents of said adult institutions but to an external authority. It is recognized that there would be a substantial problem implementing this controversial recommendation such as clarifying the lines of authority. As well, the interrelationship between the external authority and the superintendent of the adult institution with respect to policy development may be problematic. Nevertheless, this recommendation should be a priority following from the evidence presented.
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Interview Guide

Interviews were open-ended and the questions asked, though based on a specific format, were modified to reflect the position of the person being interviewed.

The basic format was as follows but often deviated to areas of interest indicated by the respondents.

- What is the purpose of your position (or the facility you are operating)?
  - What programs do you offer and to which age group?
  - Do you feel a two-tiered system of service delivery means that young people are adjudicated and treated differently according to their age?
  - If so, in what areas are differences apparent to you?
  - If one ministry had complete jurisdiction, which ministry do you feel would be the most appropriate?
  - Has there been an increase in custodial dispositions in your area?
  - Do you feel the concept of open custody leads to the institutionalization of young persons who would otherwise be candidates for probation?
  - Is probation still an effective alternative?
  - Do you feel that young persons should be institutionalized in the same facilities as adults under the secure custody provision?
- What is your perception of the court system for youth as it now exists?
- Do you feel the provision for reviews is being adequately used?
- Would you like to see a system of alternative measures implemented?
- Are they being implemented in your area?
- What are your feelings about the provisions for treatment in the Y.O.A.?
- How do you try to initiate treatment?
- Do you consider the Y.O.A. to be progressive legislation?
- Do you feel young people are benefitting from the change in philosophy?
- How do you feel the changes in the juvenile justice system could be improved upon?

The fact that the interviews were open-ended and discussion on areas of interest of the respondents was welcomed led to a more complete understanding of the areas of concern than strict adherence to an interview schedule would have. Much more information was gained than the question format would indicate.
Nature and Number of Respondents:

N. Bala, Law Professor, Queen’s University
J. Kenewell, Policy Division, COMSOC
P. Fleury, Policy Division, MCS
P. Colfer, Policy Division, COMSOC
G. Lowry, Policy Committee for YOA
B. Weagant, Lawyer, Justice for Children
B. Scully, Lawyer
M. Cushing, Director, Niagara Children’s Services Committee
M. Renwick, Department of Justice
D. Mandell, Ontario Social Development Council
V. Cashaback, District Director, COMSOC, Thunder Bay
P. Dickman, Provincial Director, COMSOC, Keewatin
J. Wyber, Provincial Director, MCS, Kenora
D. Bevilaqua, District Director, MCS, Thunder Bay
W. Brinkman, Probation Officer, MCS
B. Laud, Probation Officer, COMSOC
A. MacDonald, Director, C. D. Group Home
S. Butts, Director, S.T.E.P.
S. Seitler, Director, Homestake House
R. Krocker, Director, Northern Youth Centre
B. Johnson, Superintendent, Kenora Jail
J. Hall, Director, YO Unit, Kenora Jail
F. Gault, Director, YO Unit, Thunder Bay Correctional Centre
D. Ratuski, Kenora Jail
Judge Little, Provincial Court (Family Division)
C. Rodgers, Community Resource Team Member, Kenora Patricia Child Development Centre

**Agencies and Facilities Interviewed**

1) The Ministry of Community and Social Services
2) The Ministry of Correctional Services
3) Justice Review Board
4) Justice for Children
5) Kenora - Patricia Child Development Centre
6) STEP - COMSOC
7) C.D. Group Home - COMSOC
8) Birchcliff Group Home - CAS
9) Homestake House - COMSOC
10) Northern Youth Centre - MCS
11) Kenora Jail
12) Thunder Bay Correctional Centre
13) Kairos - MCS
14) Young Star Group Home - COMSOC
15) Wm. W. Creighton Centre - COMSOC
APPENDIX B
Graph 1
Non-Custodial Dispositions: MCS vs COMSOC: 1985

Percent of Population

Abs. Discharge
Fine
Restitution
Commun. Service
Probation
Other

Disposition

1985-MCS
1985-COMSOC
Graph 2
Non-Custodial Dispositions: MCS vs COMSOC: 1986

Percent of Population

Abs. Discharge  Fine  Restitution  Commun. Service  Probation  Other

Disposition

Graph 2
Non-Custodial Dispositions: MCS vs COMSOC: 1986

Percent of Population

Abs. Discharge  Fine  Restitution  Commun. Service  Probation  Other

Disposition
Graph 3

Non-Custodial Dispositions: MCS vs COMSOC: 1987

Percent of Population

Abs. Discharge  Fine  Restitution  Commun. Service  Probation  Other

Disposition

1987-MCS  1987-COMSOC
Chart 1

Non-Custodial Dispositions: 1985 - 1987: MCS vs COMSOC

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Graph 4

Admissions to Open Custody: Ages 12 - 15 vs. Ages 16 - 17: 1985 - 1989

Percent of Population

Years: 1985 - 1989
Graph 5
Average Population of Young Offenders in Open Custody: 1985 - 1989

% of Pop'n: Age 12-15  % of Pop'n: Age 16-17

Percent of Population

0.16
0.14
0.12
0.1
0.08
0.06
0.04
0.02
0

Years: 1985 - 1989
Graph 6
Comparison of Numbers of Persons Sentenced to Secure Custody in Ontario Between COMSOC and MCS: 1985 - 1988

% of Pop'n: Age 12-15  % of Pop'n: Age 16-17

Percent of Population

 Years: 1985 - 1988

Graph 7
Average Population of Young Offenders in Secure Custody: 1985 - 1989

% of Pop'n: Age 12-15  % of Pop'n: Age 16-17

Percent of Population

Years: 1985 - 1989
Graph 8
Admissions To Community Supervision (MCS): All Property Offenses

- Break & Enter & Fraud & Related
- Theft-Possession
- Property Damage/Arson

Percent of Population

Years

Fercent of 3o Population 40 30 20 10 0
Graph 9
Admissions To Community Supervision (MCS): All Other Criminal Code

Offenses

- Mis vs moral
- Crim Code Traffic
- Drinking & Driving
- Mis. vs public order
- Breach crt order/escape
- Obstruct Justice

Percent of Population
### Chart 2

**Characteristics of Admissions to Community Supervision**

Comparison:  
% of Total Number of Offences
% of Total Population (aged 16 & 17)

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**TOTAL PERCENT**

100.0

**TOTAL NUMBER**

4435

**TOTAL POPULATION**

270400