

CHAPTER TWO: YOUTH JUSTICE

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CHAPTER TWO: YOUTH JUSTICE

I. INTRODUCTION

A. *LSLAP and Youth Justice*

LSLAP students cannot represent persons less than 18 years of age. If the client is a young person, aged 12 to 17 years, the clinician should refer them immediately to the Legal Services Society. The Legal Services Society provides legal services for young persons, regardless of income. See **Section III.C: Right to Counsel** for more information.

Note that LSLAP students may only represent first-time offenders. However, clients who only have a juvenile record are considered first-time offenders for the purposes of this restriction.

B. *History of Legislative Changes*

Prior to the nineteenth century, there was little legal recognition of the special needs of children and youth. Criminal liability started at the age of seven. Children convicted of criminal offences were subjected to the same punishments as adults, including hanging for such offences as theft.

The nineteenth century saw a growing understanding of the nature and significance of childhood, with the beginnings of the modern disciplines of psychology and psychiatry. In 1857, the first Canadian legislation was enacted to separate child and adolescent offenders from adults, placing them in training schools or reformatories rather than adult penitentiaries.

In 1908, Parliament enacted the Juvenile Delinquents Act, S.C. 1908, c. 40 (subject to minor amendments over the years, finally as Juvenile Delinquents Act, R.S.C. 1970, c. J-3 [JDA]). The JDA created a juvenile justice and corrections system with a welfare-oriented philosophy based on positivist criminology and a distinct *parens patriae* philosophy. This approach reflected the belief that there was little need to distinguish between juveniles who were offenders and those who were abandoned or neglected by parents. Under the JDA, children could be subjected to “delinquency proceedings” for violating any federal, provincial, or municipal law, or for the status offence of “sexual immorality or any similar form of vice”. The original courts for juveniles operated very informally with the intention to ensure that “unnecessary technicalities” would not interfere with or delay the treatment considered to be in each child's best interests. Most of the judges in the original juvenile courts had no legal training and lawyers rarely appeared. While the JDA was an enormous improvement over the harsh treatment inflicted on children and adolescents in the nineteenth century, it must also be recognized that the Act was often applied in an arbitrary or discriminatory fashion, depending on the juvenile's race, class and gender.

By the 1960s, the JDA was coming under increasing public scrutiny. The informality and lack of legal rights for youths were being challenged, especially since the JDA created a highly discretionary regime which gave judges, police, and juvenile correctional officials broad powers to deal with individual youths in accordance with their own perceptions about each child's “best interests”. In response, Parliament enacted the Young Offenders Act, R.S.C. 1985, c. Y-1 [YOA]. From April 2, 1984 to April 1, 2003, juvenile criminal law was primarily governed by the YOA. The Act only applied to those young people charged with specific offences under the Criminal Code, R.S.C. 1984, c. C-46 and other federal statutes and regulations. The YOA provided much more recognition of juvenile legal rights than the JDA, as well as establishing a uniform national age jurisdiction. While the YOA considered the individual circumstances of young offenders, it also purported to better protect the interests of society against violent young people. Other important elements of the Act included: increased protection for young offenders by requiring notification of parents upon arrest; a right to legal representation at all stages of proceedings; and specific provisions for a defence of insanity. The YOA also expanded the range of dispositions open to the court and provided safeguards against the infringement of the basic rights guaranteed under the Canadian Charter of Rights and Freedoms (Part

I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11 [Charter].

As of April 1, 2003, the Youth Criminal Justice Act, S.C. 2002, c. 1 [YCJA] came into effect and replaced the previous YOA. The YCJA preserves many of the elements of the YOA; however, it focuses on three key objectives to better protect the public: preventing youth crime, meaningful consequences for offences, and increased focus on rehabilitation and reintegration for youth returning to the community. The YCJA also encourages judges to impose non-custodial sentences on young persons who are found guilty under the Act where it is consistent under the general principles. This does not mean that it seeks to prohibit custodial sentences, but rather to ensure that such measures are the last option resorted to.

The declaration of principle under s. 3 of the YCJA states that the purpose of the youth justice system is to promote long-term protection of the public by addressing the underlying causes of offending behaviour, rehabilitating young offenders and ensuring that there are meaningful consequences for offending.

A significant change to the declaration of principle is the inclusion of the role that victims play in the process. While victims have no rights per se as they are not a party to criminal proceedings, the YCJA holds that victims will be heard and treated with courtesy, compassion, and with respect for their privacy, and should suffer the minimum degree of inconvenience as a result of their involvement in the system. Moreover, consequences will be more meaningful and include educating the offender about the impact of the crime, and focusing on repairing the damage or paying back society in a constructive fashion. Parliament recognizes that victims *are* involved in the process, though not legally. In some respects, B.C. legislation dealing with victims of crime has already incorporated a number of these principles, particularly in the Victims of Crime Act, R.S.B.C. 1996, c. 478.

British Columbia has enacted complementary legislation for offences against provincial statutes or municipal bylaws. The Youth Justice Act, S.B.C. 2003, c. 85 came into force on April 1, 2004, replacing the Young Offenders (British Columbia) Act, R.S.B.C. 1996, c. 494.

II. GOVERNING LEGISLATION AND RESOURCES

A. *Legislation and Web Links*

Criminal Code, R.S.C. 1985, c. C-46.

Web site: www.canlii.ca/ca/sta/c-46

Youth Criminal Justice Act, S.C. 2002, c. 1.

Web site: www.canlii.ca/ca/sta/y-1.5

Youth Justice Act, S.B.C. 2003, c. 85.

Web site: www.qp.gov.bc.ca/statreg/stat/y/03085_01.htm

B. *Books*

Youth Justice Manual, Loose-leaf service. (Canada Law Book)

Youth Criminal Justice Law, Essentials of Canadian Law Series (Irwin Law 2003), Nicholas Bala.

C. *Web Sites*

Access to Justice Network: www.acjnet.org

Youth Criminal Justice Act FAQs: ww.law-faqs.org/wiki/index.php/Youth

Department of Justice [YCJA Explained](http://www.justice.gc.ca/eng/pi/yj-jj/repos-depot/index.html): www.justice.gc.ca/eng/pi/yj-jj/repos-depot/index.html

- The Department of Justice web site has a section on youth justice that includes information on the legislative changes to the youth criminal justice system.

III. FEDERAL OFFENCES: YOUTH CRIMINAL JUSTICE ACT

A. *Definition of Child and Young Person*

1. Minimum Age

“Child” is defined in the [YCJA](#) as a person who is, or in the absence of evidence to the contrary appears to be, under the age of 12 years (s. 2(1)). Section 13 of the [Criminal Code](#) forbids the conviction of any person under the age of 12 years of any criminal offence for any act or omission that child has committed.

“Young person” is defined in the [YCJA](#) as a person who is, or in the absence of evidence to the contrary appears to be, 12 years old or older, but less than 18 years old (s. 2(1)).

2. Young Person Turning 18 after the Offence

The [YCJA](#) applies to offences alleged to have been committed by a young person, even if he or she has subsequently turned 18 (s. 14(4) and (5)).

3. Where Age at Time of Offence is Uncertain

On finding the person guilty of an offence, the Youth Justice Court shall do one of the following:

- a) if it is proven that the offence was committed before the person attained the age of 18 or if it has not been proven that the offence was committed after the person attained the age of 18, impose a sentence under the [YCJA](#); or
- b) if it is proven the offence was committed after the person attained the age of 18, an adult sentence under the [Criminal Code](#) or any other Act shall be imposed (s. 16).

B. *Jurisdiction of the Courts*

1. Definition

Under s. 2(5) of the [Provincial Court Act](#), R.S.B.C. 1996, c. 379, the Provincial Court is designated as the Youth Court for purposes of the [YCJA](#). However, the [YCJA](#) provides that the superior court has concurrent jurisdiction and is also deemed a Youth Justice Court. This is to accommodate the election which is now available to a young person where the Crown is seeking an adult sentence (s. 13(2) and (3)).

2. Extrajudicial Measures

Sections 6 to 10 of the [YCJA](#) provide for the use of extrajudicial measures (alternatives to the formal court process), which are subject to the overall principles outlined in s. 4, and thus subject also to the principles set out in s. 3. There is a presumption that extrajudicial measures are adequate to hold first-time non-violent offenders accountable. These measures

are meant to provide an effective and timely response to the offence without resorting to judicial measures, to encourage reparation and acknowledgement of the harm caused, and to promote family, community and victim involvement in the extrajudicial process. All of the above objectives are to be implemented consistently with the rights and freedoms of young persons, and are required to be proportionate to the seriousness of the offence.

Under the YCJA, alternatives to the formal court process (i.e. extrajudicial measures) are a central focus, increasing the involvement of communities, offenders, victims, and families to instil a sense of responsibility in the offender.

Both summary and indictable offences (in exceptional circumstances) may be considered for extrajudicial measures. Such measures include:

- a) **Police caution/referral:** A peace officer must consider whether it would be sufficient to caution a young person or refer the young person to a program that may assist him or her not to commit offences (s. 6).
- b) **Crown cautions:** When reviewing charges Crown Counsel has the option of proceeding by way of a caution letter to the young person's parents (s. 8).
- c) **Extrajudicial sanctions:** Extrajudicial sanctions may be used when a young person cannot be adequately dealt with by a warning, caution or referral (s. 10). This procedure commonly involves an interview with a youth worker (through the local probation office), who will recommend a plan to the prosecutor that may include conditions such as counselling, restitution, community service, victim offender mediation, or an apology. The factors taken into account in determining the appropriateness of using extrajudicial sanctions for the young person in question include the seriousness of the offence, the attitude of the offender, and any previous court history.

Extrajudicial sanctions may be used only if:

- a) the person considering them believes the extrajudicial sanctions are appropriate having regard to the needs of the young person and the interests of society;
- b) they are part of a program of sanctions authorized by the Attorney General;
- c) the young person, having been advised of the right to counsel, fully and freely consents to participate in the extrajudicial sanction;
- d) the young person accepts responsibility for the act or omission allegedly committed; and
- e) there is sufficient evidence to proceed to court if the extrajudicial sanctions are not agreed on.

Section 10(3) precludes extrajudicial sanctions in circumstances where the young person denies culpability or expresses a desire to have the charges proceed against him or her in Youth Justice Court.

Statements accepting responsibility, made as a condition of being dealt with through extrajudicial sanctions, are not admissible in evidence in any subsequent civil or criminal proceedings (s. 10(4)).

C. Right to Counsel

Under s. 25 of the YCJA, a young person has the right to retain and instruct counsel, without delay, at any stage of the proceedings. The arresting officer, or the officer in charge, must inform young

persons of their right to counsel upon their arrest or detention. In British Columbia, the Legal Services Society provides legal services for young persons, regardless of their income.

D. Process

The procedure for compelling a young person to attend court is generally the same as the procedure that is specified for adults in the Criminal Code. For example, a young person arrested by a police officer may subsequently be given an appearance notice or released by an officer in charge on a promise to appear. If the police do not issue process, once an Information has been laid the registry may issue a warrant or a summons to compel the young person to appear in Youth Justice Court. A warrant will only be issued in those circumstances where the Crown is seeking the youth's detention or bail conditions on the young person's release from custody, or where the young person's whereabouts are unknown.

1. Time Limitations

The time limitations for commencing prosecutions of various offences are the same, regardless of whether the accused is an adult or a young person. The time limitation will vary, however, depending on the statute. For example, the Crown has six months to commence prosecution of a summary offence under the Criminal Code. See **Chapter 1: Criminal Law** for more information on limitation periods for criminal offences.

2. Notice to Parents

Notice must be given to the parents as soon as possible in any of the following circumstances: (i.) the young person is arrested and detained in custody; (ii.) a summons or appearance notice is issued to the young person; (iii.) the young person is released on giving a promise to appear; or (iv.) upon the young person entering into a recognizance (s. 26 (1) and (2)). When the whereabouts of the parents of a young person are unknown, notice may be given to an adult relative or to any other adult, who is known by the young person and who is likely to assist the young person (s. 26(4)).

When notice has not been given, the court may adjourn the proceedings until notice is given or may dispense with notice if the court thinks this would be appropriate (s. 26(11)). For the method of determining whether notice has been given, see **Section III.D.3: Proof of Age**, below.

No notice is required if the young person has since attained the age of 20 at the time of his or her first appearance before a Youth Justice Court in relation to that offence (s. 26(12)).

The court may, if necessary, order the attendance of a parent at proceedings against a young person. A parent who then fails to attend may be held in contempt of court (s. 27).

3. Proof of Age

Testimony of a parent or a birth or baptismal certificate is admissible as evidence of a young person's age (s. 148). Practically speaking, the Information is read to the young person, and the issues of age and notice are dealt with at the initial stages. These issues can be resolved by putting a parent or guardian on the witness stand to ask him or her whether he or she was notified of the charges, and to inquire as to the age of the young person. In some cases, counsel, or any other party to the proceedings, may attest to having spoken with the parents or guardian, and on this basis, may admit age and notice (s. 149). If the young person is under the care of a social worker, the social worker may prove age and notice.

In the absence of other evidence or corroboration, a court is entitled to infer the age of a child or young person from his or her appearance or from statements made by that person (s. 148(4)).

4. Pre-Trial Detention

The principles considered in making an order for the pre-trial detention of a young person prior to disposition are the same as those for adults, and are in s. 515(10) of the Criminal Code. The detention of an accused in custody is justified only on one or more of the following grounds:

- a) **Primary ground:** Where the detention is necessary to ensure his or her attendance in court.
- b) **Secondary ground:** Where detention is necessary for the protection and safety of the public.
- c) **Tertiary ground:** Where detention is necessary in order to maintain confidence in the administration of justice.

Although a young person's detention is justified on the same grounds as detention of an adult, there are three stipulations:

- a) if a young person is detained, he or she must be held separately from adult offenders (YCJA, s. 84);
- b) a young person must not be detained as a substitute for appropriate child protection, mental health or other social measures (YCJA, s. 29(1)); and
- c) YCJA ss. 29(2) and 39(1) (a) – (c) provide a presumption against detention on the secondary ground, where detention is necessary for the protection and safety of the public, unless certain preconditions are met. Only where the young person has committed a violent offence, has failed to comply with non-custodial sentences, or has committed an indictable offence for which an adult could receive more than 2 years of incarceration **and** has a history indicating a pattern of findings of guilt, a judge is permitted to detain a young person under the secondary ground. The courts have held that in certain circumstances the presumption created by s. 29(2) is rebuttable.

A youth court judge must consider whether there is someone to act as a responsible person in whose care the young person may be placed as an alternative to custody (s. 31(1)). Even if the judge is able to find a responsible person, however, he or she is not bound to place the young person in the care of that person. If both parties are willing to accept the proposed plan, they must undertake in writing to comply with the arrangement, and additional conditions may be imposed (s. 31(3)). Note that the court can only invoke the provisions of s. 31 if the judge decides that he or she would otherwise detain the offender were it not for the responsible person. A person who agrees to care for a young person under s. 31(3) adopts a very serious responsibility. Wilful failure to comply with the terms of care ordered by the court can result in the responsible person being charged with an offence punishable with up to two years imprisonment (s. 139).

5. Plea

The young person may plead guilty or not guilty (s. 36). Other special pleas, such as not guilty by reason of mental disorder and the issue of fitness to stand trial, are also available to young people. Section 34 allows for the court to order a psychiatric/psychological report for specific purposes, which include sentencing or bail.

6. The Trial Process

The principles considered in the trial process are the same for young persons as for adults. Generally, the law relating to the admissibility of statements made by an accused person also applies to young persons (s. 146(1)). However, specific provisions ensure that a young person both understands the consequences of making statements to a person in authority, and is given the opportunity to seek and/or consult counsel (s. 146(2)). The right to counsel may be waived but must be done either by a signed written statement or be recorded on video or audio tape (s. 146(4) and (5)). A judge may rule inadmissible any statement given by a young person if satisfied that it was given under duress (s. 146(7)).

Under the YCJA, voluntary statements can be admitted into evidence, even where there has been a technical irregularity in complying with a young person's statutory protection, provided that the Youth Justice Court is satisfied that the admission of the statement would not offend the principle that young persons are entitled to enhanced procedural protection to ensure that they are treated fairly and that their rights are protected (s. 146(6)).

The court may hear evidence from a witness who is a child or young person only after instructing the child on the duty of speaking the truth and the consequences of failing to do so (s. 151).

The Criminal Code has long recognized that testifying at a criminal proceeding may be even more stressful than usual for some particularly vulnerable witnesses (i.e. persons under 18 or those who have a disability). Bill C-2 (An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act) amended the Criminal Code to allow these witnesses the right to certain testimonial aids and accommodations. For example, judges now have broader authority to limit public attendance when young persons are testifying, including where he or she considers such an order to be in the interest of the "proper administration of justice" (s. 481(1)). Other changes allow the courts to permit witnesses under 14, or those with a mental or physical disability, to be accompanied by a support person while testifying in **any** proceedings (s. 481.1(1)), and to order that a witness who is under 18, or who may have difficulty communicating evidence by reason of a mental or physical disability, may testify from outside the courtroom or behind a screen, if the judge or justice considers it "necessary to obtain a full and candid account of the acts complained of" (s. 486.2(1)). The court must ensure that the child understands these rights and is aware that they have these opportunities available to them.

E. Sentences

1. Youth Sentences

The courts have found that the YCJA mandates an approach to sentencing that requires the primary focus to be directed towards the **circumstances of the young person**. Sentences should take the personal circumstances of the specific young person into consideration. The circumstances surrounding the offence should be a lesser consideration for young persons than they are for adult sentencing. The principles of sentencing under the YCJA are set out in ss. 3 and 38 of the Act. Section 3(1)(c) emphasizes that the sentencing of young offenders is to be based on "fair and proportionate accountability". Section 38 emphasizes that the central principle of sentencing for youth justice court is to hold a young person "accountable...through the imposition of just sanctions". Any sanctions imposed must have meaningful consequences for the young person, and must promote his or her rehabilitation and societal reintegration (s. 38(1)). Such rehabilitation is considered a means to achieve the long-term protection of the public.

Section 38(2) makes clear that any sentence must be the least restrictive sentence capable of achieving the objectives of accountability and rehabilitation. Custodial sentences should be

considered as a last resort and only after all other reasonable sanctions have been considered, with particular attention paid to the circumstances of young aboriginal persons. The Act requires that young persons not be subjected to a greater punishment than an adult would receive for a similar offence, and that sentences issued within a particular region for similar offences be comparable to one another. Any sentence given must be proportionate to the seriousness of the offence and to the responsibility of the young person for that offence.

Although general and specific deterrence were factors to be considered in sentencing under the YOA, they were given less weight than they would have been in sentencing an adult (for a discussion see *R. v. M. (J.J.)* [1993] 2 S.C.R. 421 (S.C.C.)). However, the court reversed the *M. (J.J.)* decision in 2006 when the issue re-emerged under the YCJA. In *R. v. N. (B.)* [2006] 1 S.C.R. 941 (S.C.C.), the court held that both general and specific deterrence are excluded as principles of sentencing under the YCJA.

Sentencing options are set out in s. 42(2). The options include:

- a reprimand;
- an absolute or conditional discharge;
- a fine;
- an order for restitution;
- compensation or reparation;
- community service;
- a probation order;
- an intensive supervision and support order (ISSP); and/or
- an order to attend a non-residential program (not available in B.C.).

Where a conditional discharge, probation or ISSP order is imposed, a court may include whatever reasonable conditions the court considers advisable in the interests of the young person and the public.

There are also a number of custodial options available to the court.

- a) **Deferred custody and supervision order:** A deferred custody and supervision order is similar to an adult Conditional Sentence. There is a maximum length of six months and it cannot be used for serious violent offences.
- b) **Custody and community supervision order:** A custody and community supervision order has a maximum term of three years. Two-thirds of the term must be spent in custody while the remaining one-third is served under a community supervision order.
- c) **Custody and conditional supervision order (Presumptive Offences):** A custody and conditional supervision order is used for the presumptive offences defined in s. 2(1). These orders have a maximum of three years. Under these orders, there is no minimum time period that must be spent in custody. Instead, the time spent in custody is left up to the judge's discretion.
- d) **Custody and conditional supervision orders (Murder):** Young persons convicted of murder are subject to longer custody and conditional supervision orders. Young persons

convicted of 1st degree murder may receive a maximum sentence of 10 years. A maximum of six years may be served in custody with the remainder under conditional supervision. Young persons convicted of 2nd degree murder may receive a maximum sentence of seven years. A maximum of four years may be served in custody with the remainder under conditional supervision.

- e) **Intensive rehabilitative custody and supervision order:** Intensive rehabilitative custody and supervision orders are a rarely used alternative for the most serious offences where a youth has mental health problems.

Sentencing options for a particular young person may also be determined at a sentencing conference, which can be convened by a Youth Justice Court for recommendations on the appropriate youth sentence (ss. 41, 19).

The YCJA has special provisions for youths found guilty of a “serious violent offence”. Under s. 42(9), the court may designate the offence for which the young person has been found guilty as a “serious violent offence”. This means that a youth may be presumptively sentenced as an adult for a third serious violent offence (see **Section III.E.3: Adult Sentences**).

Generally speaking, the YCJA places more emphasis on the concepts of supervision and rehabilitation than the YOA. As seen in s. 42 of the YCJA, the notion of reintegration of the young person is reflected in the many sentencing options available.

2. **Committal to Custody**

The sentencing provision in s. 42(2)(n) of the YCJA allows a Youth Justice Court to make a custody and supervision order with respect to the young person. However, under s. 39(1) of that Act, a youth cannot be committed to custody unless:

- a) the young person has committed a violent offence;
- b) the young person has failed to comply with non-custodial sentences;
- c) the young person has committed an indictable offence for which an adult would be liable to be imprisoned for more than two years and has a history that reveals a pattern of findings of guilt under the YCJA; or
- d) in exceptional cases, where aggravating circumstances of an indictable offence render a non-custodial sentence inconsistent with the sentencing principles in s. 38.

Even then, a Youth Justice Court must consider all alternatives to custody that are reasonable in the circumstances and, if custody is imposed, reasons must be given as to why the court found a non-custodial sentence inadequate to achieve the purpose of sentencing as set out in s. 38(1) (s. 39(9)).

Prior to committing a young person to custody, the judge must consider a pre-sentence report (s. 39(6)). The pre-sentence report may be waived, with the consent of the prosecutor and the young person if the Youth Justice Court is satisfied that it is unnecessary (s. 39(7)).

Under s. 42(2)(n)-(r), various custodial sentences are available. A custody and supervision order is statutorily split into two-thirds in custody and one-third in the community. A deferred custody and supervision order, of a maximum of six months, is served in the community and is available as an option for an offence not determined to be a “serious violent offence”. If the young person breaches a condition of his deferred custody order, a warrant may be issued and, after a hearing, his deferred custody order may be converted to a

custody and supervision order. Time limits for the various custodial sentences differ depending on the offence and are set out in s. 42(2).

During custody, the YCJA requires that the young person make plans about what to do after the end of custody. This is often done in collaboration with the youth worker, who is required to be designated as soon as a young person is sentenced to custody (s. 90(1)). The requirements as to what the young person will be expected to do following the end of the period of custody will likely follow these plans as part of the rehabilitation process.

Under s. 93, young persons who have attained the age of 20 at the time the custodial youth sentence is imposed will be committed to a provincial correctional facility for adults (s. 89(1)). Young persons serving a youth custodial sentence may also be transferred to such facilities after turning 18 on the application of the provincial director, provided that the young person has the opportunity to be heard and the Youth Justice Court is satisfied that it is in the best interests of the young person and the public (s. 92(1)). After serving some time in these provincial facilities, applications can be made by the provincial director to transfer the young person to a federal penitentiary to serve out the remainder of their sentence (s. 92(2)).

3. Adult Sentences

Adult sentences are possible for both presumptive and non-presumptive offences (s. 62). A presumptive offence is defined under s. 2(1) as either:

- a) murder, attempted murder, manslaughter or aggravated sexual assault committed, by a young person who has attained the age of 14 (in B.C.); or
- b) a “serious violent offence” for which an adult is liable to be imprisoned for over two years, committed by a young person who has attained the age of 14, and at the time of the offence at least two judicial determinations have been made under s. 42(9) at different proceedings, that the young person has committed “serious violent offences”.

For non-presumptive offences, Crown has the onus to show why an adult sentence should be imposed. An adult sentence can be sought for non-presumptive offences where a young person 14 or older is charged with an indictable offence for which an adult is liable to imprisonment for more than two years.

For presumptive offences, the YCJA places an onus on the young person to show why an adult sentence should **not** be imposed (ss. 63 and 72(2)). However, the constitutionality of this presumptive onus was challenged successfully in the Supreme Court of Canada where the court ruled that it violated s. 7 of the Charter (*R. v. D.B.*, [2008] S.C.C. 25)

The constitutionality of s. 63 and s. 72(2), which place the onus on a youth to show an adult sentence should not be imposed, remained a contentious issue in the lower courts before it was addressed by the Supreme Court of Canada in May 2008. In 2003, the Quebec Court of Appeal ruled that the presumption of adult sentences for youths violates the Charter, and the Federal Government decided not to appeal the decision to the Supreme Court of Canada (*Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003), 175 C.C.C. (3d) 321). Consequently, since that time, in Quebec the onus has rested with the Crown to justify the imposition of adult sentences on youths aged 14 and older who are convicted of serious offences. The Quebec decision was followed in Ontario (*R. v. D.B.*, [2006] O.J. No. 1112), but not in British Columbia (*R. v. K.D.T.*, [2006] B.C.J. No. 253 (B.C.C.A.)).

Ultimately, the Supreme Court of Canada agreed with the lower courts in Quebec and Ontario, ruling that the presumption of an adult sentence violated s. 7 of the Charter, and is therefore unconstitutional (*R. v. D.B.*, [2008] S.C.C. 25). The majority of the Supreme Court (in a five to four decision) decided that the presumption of an adult sentence was

inconsistent with the principle of diminished moral culpability for young persons. Accordingly, a young person that commits a presumptive offence should no longer automatically be presumed to attract an adult sentence.

The decision regarding whether a youth sentence or an adult sentence will be imposed is made after conviction.

Although youths can be sentenced as adults in British Columbia, the sentencing guidelines are not strictly the same as those that would be utilized in sentencing an adult (as per the Criminal Code). In *R. v. Pratt* [2007] B.C.J. 670 (C.A.), the British Columbia Court of Appeal recognized that the court must consider the principles of sentencing under s. 3 of the YCJA in sentencing any youth, including a youth who receives an adult sentence. These principles include, but are not limited to, a focus on rehabilitation and reintegration, accountability which is consistent with an increased level of dependency and a reduced level of maturity, and recognition of the particular circumstances of the convicted youth, including individual needs and level of development.

4. Reintegration Leave

For a young person committed to custody at a youth facility, the provincial director may authorize one of two types of reintegration leave subject to any terms or conditions that he or she considers desirable:

- a) reintegration leave for a period not exceeding 30 days, with or without escort, for medical, compassionate or humanitarian reasons or for the purpose of rehabilitating the young person or reintegrating the young person into the community (s. 91(1)(a)); or
- b) day release so that the young person can attend school, find or continue employment, perform familial duties, attend programs suitable for young person's needs, or attend out-patient treatment (s. 91(1)(b)).

A significant change under the YCJA is that reintegration leave is also possible for young persons serving an adult sentence in a youth facility.

5. DNA Sample

When a young person is found guilty of certain designated offences (see s.487.04 of the Criminal Code), an order may be made for the young person to provide samples of one or more bodily substances for the purpose of forensic DNA analysis, under ss. 487.051 and 487.052. The resulting DNA data is stored in a DNA databank, which is maintained by the RCMP.

The DNA Identifications Act, S.C. 1998, c. 37, has been amended so as to limit the retention of DNA samples taken from a young offender. DNA samples taken from young persons can be retained for shorter periods of time than those taken from adults (s. 9.1) and shall be promptly destroyed when the record relating to the offence is expunged (s.10.1).

F. Review of Sentences

1. Custodial Sentences

An annual review is mandatory for all custodial sentences over one year; this review is to take place without delay at the end of one year from the date of the earliest youth sentence imposed and the end of every subsequent year from that date (s. 94(1) and (2)).

Additionally, an optional review is possible where a young person has been placed in custody for less than one year after the youth has served 30 days or one-third of the sentence – whichever is greater. Where the custody exceeds one year, a sentence may be reviewed anytime after six months of the date of most recent disposition (s. 94(3)). In both cases, the review can be made at any time with leave of the Youth Justice Court judge (s. 94(4)).

An optional review can be made by the provincial director on his or her own initiative or on request from the young person, the young person's parent or the Attorney General. Possible grounds for review are as follows:

- the young person has made sufficient progress to justify a change in sentence;
- a material change has occurred in the circumstances that led to the sentence;
- new services or programs not previously available have become available;
- greater opportunities for rehabilitation exist in the community; or
- any other ground the Youth Justice Court considers appropriate (s. 94(6)).

On review, the original sentence may be confirmed or the young person may be released from custody and placed under conditional supervision in accordance with s. 105.

If an appeal is pending, neither the annual nor optional review can be made until all proceedings have been completed (s. 94(7)).

2. Non-Custodial Sentences

Non-custodial sentences can be reviewed within six months of imposition or earlier with the permission of the court, upon application of the provincial director, the young person, the young person's parent, or the Attorney General (s. 59(1)). Grounds for review include:

- a material change in circumstances;
- a young person's difficulty with or inability to comply with the sentence; and/or
- an adverse effect of the sentence on the young person's ability to obtain services, education, or employment (s. 59(2)).

On review, the original sentence may be confirmed, terminated, or the terms of the sentence may be varied (s. 59(7)). However, any variation cannot be more onerous than the original sentence unless the young person agrees (s. 59(8)). A community work service order, restitution order, and time to pay a fine may be extended for up to an additional 12 months, if the young person needs more time to comply.

G. Appeals

Under the YCJA, a young person and the Crown have the same rights of appeal as adults under the Criminal Code (s. 37(1) and (5)). However, a young person cannot appeal a sentence review decision, whether mandatory or optional (s. 37(11)).

H. Special Concerns

1. Public Hearings

Under the YCJA, Youth Justice Court hearings are open to the public to ensure public scrutiny and monitoring of the court system. However, a judge has the authority to exclude any or all members of the public if it is in the interest of public morality, the maintenance of order, the proper administration of justice, or when the evidence presented to the court would be “seriously injurious or prejudicial” to any young person or child present (s. 132).

2. Publication of a Young Person’s Identity

Section 110(1) of the YCJA states that no person is permitted to publish the name of a young person, or any other information related to that young person if it would identify him or her as a young person dealt with under the YCJA.

However, this ban on publication does not apply:

- a) where the young person has received an adult sentence; or
- b) where the publication of the information is made in the course of the administration of justice, and not for the purpose of making the information known in the community (s. 110(2)).

Once a young person has attained the age of 18 years and is no longer in custody under the Act, he or she may publish or cause to be published information that would identify him or her as having been dealt with under the YCJA. A young person may also apply to the court at any time for an order permitting the young person to publish information that would identify him or her as having been dealt with under the Act. The court may grant the order as long as it is satisfied that allowing publication would not be contrary to the young person’s interests or the public interest (s. 110(6)).

3. Fingerprints and Photographs

The Identification of Criminals Act, R.S. 1995, c. I-1, applies to young persons. Fingerprints and photographs of a young person can only be taken in circumstances in which an adult would be subject to the same procedures (YCJA, s. 113).

4. Records: Access and Disclosure

Sections 114 to 129 of the YCJA govern the records relating to young people which are kept in relation to the Youth Justice Court process. These provisions set out who may keep records in relation to a young person who is charged under the Act, and restrict access and control the disclosure of information contained within these records.

Sections 114 to 116 govern who may keep records that arise out of proceedings under the YCJA. Records of a young person may be kept by Youth Justice Courts, review boards, and other courts that deal with matters under the YCJA (s. 114). The police force responsible for participating in the investigation of the offence are also permitted to keep the young person’s records, and if the young person has been charged with committing an offence in respect of which an adult may be submitted to special procedures, the police force responsible for the investigation may provide the young person’s records to the R.C.M.P. (s. 115). Also, any department or agency of any government in Canada may keep records containing any information it has obtained for the following purposes: investigation, use in

proceedings against the young person, sentencing, and considering the young person for extrajudicial measures or as a result of the use of extrajudicial measures (s. 116(1)).

Sections 117 to 124 govern who may have access to records kept under ss. 114 - 116. Except as authorized under the Act, no access to these records, or any information therein, can be given to any person where doing so would identify the young person as having been dealt with under the Act (s. 118(1)).

Section 119(1) and (2) list the persons to whom access to records may be granted, and the time limits within which access can be granted. These time limits vary in length depending on the treatment of the young person by the court. After the applicable access period has ended, a person must apply to a Youth Justice Court judge to gain access to the records, and the application must meet the requirements set out in s. 123(1). The group of persons to whom access will be granted with respect to extrajudicial sanctions has special limitations (s. 119(4)).

Not all records concerning young persons are governed by the same rules with respect to access. Under s. 120, R.C.M.P. records, records for which access is sought for identification purposes, records of young persons who commit subsequent offences (as a young person or as an adult), and records which are required for research or statistical purposes are all subject to their own specific set of rules.

Sections 125 to 127 deal with the disclosure of the information in a record. These rules outline who may disclose information which is in their possession, to whom they may disclose the information, and when such disclosure will be permitted. Before any information is disclosed, the young person must have an opportunity to be heard unless reasonable, but unsuccessful, efforts have been made to locate the young person.

5. Victims

Amendments have been made to the Criminal Code to enhance the role of the victim in the criminal trial process.

The YCJA also aims to enhance the role of victims. This is demonstrated by the references to victim's rights in the general principles of s. 3 and the fact that consideration of the harm done to victims and reparations are relevant in youth sentencing (s. 38(3)).

British Columbia is at the forefront when it comes to victim rights' legislation, particularly in relation to the enactment of the Victims of Crime Act, which helps to ensure victims' views and concerns will not go unnoticed. Refer to **Chapter 4: Victims** for more information.

6. Sex Offenders Information Registration Act

In April, 2004, Parliament enacted the Sex Offenders Information Registration Act, S.C. 2004, c. 10 [SOIRA], to help police investigate sexual crimes by providing them with up-to-date information from convicted sex offenders. The Act imposes an ongoing reporting process for sex offenders to provide information regarding residence, telephone numbers, employment, education, and physical description.

Section 490.011 of the Criminal Code provides that the SOIRA applies to young persons only if they are given adult sentences. Section 7 of the SOIRA allows a sex offender who is under 18 years to choose an adult to be in attendance when they report to a registration centre where information is collected.

IV. PROVINCIAL OFFENCES: YOUTH JUSTICE (BRITISH COLUMBIA) ACT

The original Young Offenders (British Columbia) Act, R.S.B.C. 1996, c. 494 [YO(BC)A] was proclaimed on May, 1984 to complement the federal Young Offenders Act. In April, 2004, the YO(BC)A was replaced with the Youth Justice Act, S.B.C. 2003, c. 85 [YJA]. The YJA imposes tougher sentences on young persons for gang activity, driving offences, and contraband activity within youth custody facilities. The YJA updates the provisions of the YO(BC)A in order to reflect new practices within the youth criminal justice system, as well as to render the provincial legislation more consistent with the federal YCJA. The YJA acts to narrowly expand custodial sentence options within the province, as well as to create a small number of new offences. Under the previous YO(BC)A, probation was the harshest sentence imposed on young persons, but under the new YJA, young persons may face jail time for six different offences.

A. Definition of Young Person and the Effect of Age on Proceedings

Under the YJA, “young person” is defined as a person who has reached 12 years of age but is less than 18 years of age (s. 1).

1. Minimum Age

Proceedings cannot be commenced against a person, nor can a person be found guilty, for any offence that person committed while under the age of 12 (s. 2).

2. Proof of Age

The age of an accused can be proven by information recorded anywhere on a violation ticket (such as a traffic ticket) respecting the age of the person alleged to have committed an offence (s. 19).

3. Young Person Turning 18 After Offence Committed

The YJA applies to any offence alleged to have been committed by a young person, even if he or she turns 18 before or after proceedings have been commenced (s. 3(2)).

4. Effect of Incorrect Presumption of Age on Proceedings

Where proceedings are commenced against someone who is alleged to have been a young person at the time the offence was committed but it is later determined, prior to sentencing, that the person was not in fact a young person at the time of the alleged offence, the proceedings must either be dismissed if the person was under 12 at the relevant time, or continued if the person was over 18 at the relevant time (s. 20(1)). If proceedings are continued against an adult, they are valid regardless of the fact that the matter was dealt with under this Part of the YJA before the young person’s age was determined (s. 20(2)).

If proceedings are commenced against someone who was not alleged to be a young person at the time the offence was committed, and it is determined at any time prior to sentencing that the person was a young person at the time of the alleged offence, the proceedings must be continued under the YJA (s. 20(3)). Any proceedings continued under s. 20(3) are valid despite the fact that the matter was not dealt with under the YJA (s. 20(4)).

B. *Jurisdiction of the Court*

The YJA applies to all offences under provincial legislation. These are all summary in nature. In British Columbia, all youth offences are proceeded with in the Youth Justice Court.

C. *Judicial Proceedings - Excluded Provisions of the Offence Act*

Under the provisions of the YJA that govern proceedings, certain provisions of the Offence Act, R.S.B.C. 1996, c. 338 do not apply to proceedings under the YJA. These include: ss. 57(2) (appearance of the defendant), 68(a) (absence of the defendant), 79 (costs), 88(2) (mandatory minimum fine for offences under the Motor Vehicle Act, R.S.B.C. 1996, c.318), and 112 (costs upon dismissal or abandonment of appeal).

D. *Specific Provisions*

1. Notice to Parents

If a young person is charged with an offence and is required to appear in court, the person who issued the process must immediately give written notice of the charge against the young person and the time and place of that young person's court appearance to a parent of the young person, if a parent is available. This section does not apply where proceedings are commenced by way of a violation ticket (s. 5(1) and (2)).

If a young person is to be detained until his or her court appearance, the officer in charge at the time of the young person's detention must give written or oral notice of the arrest to a parent of the young person, if a parent is available. The notice must state the place of detention and the reason for the arrest of the young person (s. 5(3)).

If notice is not given under s. 5(1) or (3), the proceedings are still valid (s. 5(4)).

2. Pretrial Examination and Report

Before a trial commences, the prosecutor is permitted to request that a youth probation officer examine the facts and circumstances, including the background of the young person. The probation officer must then submit a report to the prosecutor. This person is not compellable as a witness at trial (s. 6(1) - (4)).

If it is the opinion of the youth probation officer that it is in the best interests of the young person, and not contrary to the public interest, that an action other than prosecution is taken, then the officer will recommend it to the prosecutor. Where measures other than prosecution are taken, the young person will enter into an agreement to help resolve his or her conflict with the law (s. 6(5) and (6)). These measures are similar to the extrajudicial sanctions under the YCJA.

3. Pre-Sentence Report

If a court considers it necessary, upon finding a young person guilty of an offence and before making a custody order, the court may require a youth probation officer to provide the court with the facts and circumstances of the offence and the background of the young person. Alternatively, the court may dispense with a pre-sentence report if it is deemed unnecessary (s. 7(1) and (2)).

A youth probation officer is not a compellable witness unless it is for sentencing, a sentence review, or a sentence appeal in the particular case (s. 7(5)).

E. Sentencing

1. Generally

Once a young person is found guilty of an offence, the court must impose one or more of the available sentences, and no others (s. 8(1)). The sentence is effective as of the date it is imposed by the court, unless the young person is already serving a custodial sentence, in which case the new sentence will be imposed on the date of expiry of the previous custodial sentence (s. 9(1), (2)).

The possible sentences available to the court are as follows:

- absolute or conditional discharge;
- a maximum fine of \$1,000;
- community work service hours;
- probation;
- custody of not more than 30 days for specified offences under s. 8(2)(e) (for example, trespassing on school grounds under s. 177(2) of the School Act);
- custody of not more than 90 days for other offences specified under s. 8(2)(f) (for example, driving while prohibited or suspended under ss. 95(1), 102, or 234(1) of the Motor Vehicle Act); and/or
- a driving prohibition for an offence under the Motor Vehicle Act.

The court must not impose a sentence that results in punishment being imposed on a young person that is greater than the maximum punishment that could be imposed on an adult who has been convicted of the same offence (s. 8(5)).

2. Sentence Review

A young person, a parent of the young person, or the Attorney General may apply for a review of the young person's sentence if the court deems it appropriate (s. 15(1)). The application may be made at any time after three months after the date the sentence was given, or with leave of the court at any time. In the case of custodial sentences under s. 8(2)(e) or (f), an application may be made once the greater of 15 days or 1/3 of the sentence has been served (s. 15(2)). Under a review, the court may vary, rescind, or confirm the sentence, or make an entirely new sentence, but the new or varied sentence must not be more onerous than the sentence under review (s. 15(8) and (9)).

The court may only review a driving prohibition made under s. 8(2)(g) or s. 8(3) if its terms are adversely affecting the young person's opportunities to obtain counselling, medical treatment, education, or employment (s. 15(3)).

If a sentence or finding of guilt is under appeal, the court must wait for the appeal to be disposed of before it may review the sentence (s. 15(10)).

3. Transfer of Sentence

Should the young person, or his or her parent, become a resident of a different province than the one in which a sentence was given, the Attorney General of that province may make an application to the court, upon which the court may transfer the sentence to the Attorney General of the reciprocating province (s. 16(1), (3) - (5)). A sentence cannot be transferred until the time for an appeal against the sentence, or any finding upon which that sentence was based, has expired, or until all proceedings in respect of any appeal that has been taken have been completed, or any appeal has been abandoned (s. 16(2)).

F. Appeals

Appeals under the YJA are governed by the appeal provisions of the Offence Act (s. 18).

G. Special Concerns

1. Publication of a Young Person's Identity

The provisions under Part 6 of the YCJA that ban the publication of a young person's identity apply to the YJA (s. 4(1)).

2. Records

The provisions of the YCJA governing the records of young persons dealt with under that Act are deemed to apply to the YJA (s. 4(1)). The sections of the YCJA which apply to the YJA are ss. 114 to 116, ss. 118 to 127 and s. 129.