

The Youth Criminal Justice Act: New Directions and Implementation Issues

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This article explains some of the Youth Criminal Justice Act's key provisions and policy directions. It also identifies implementation issues that can significantly influence how the youth justice system operates under the YCJA. Major objectives of the act include reducing the use of the youth court and reducing the use of incarceration.

The YCJA emphasizes restraint, accountability, proportionality, and greater structuring of the discretion of decision makers. It contains provisions to encourage the use of extrajudicial measures, including a presumption that non-violent first offenders should be dealt with through extrajudicial measures. Conferences are recognized as a potentially useful means of improving decision making. Pre-trial detention is prohibited for child welfare purposes and presumed to be unnecessary if the youth could not be sentenced to custody. The sentencing principles set out a new approach to sentencing. Sentences must be proportionate to the seriousness of the offence and, within the limits of proportionality, must promote rehabilitation. The sentencing provisions also place specific restrictions on the use of custody.

Implementation issues include appropriate use of available funding, the risk of net-widening, the adequacy of provincial policies and guidelines for police and prosecutors, conditions of release, and the interpretation of provisions related to proportionality, rehabilitation, and restrictions on custody.

Dans cet article, l'auteur explique certaines dispositions et orientations politiques clés de la Loi sur le système de justice pénale pour les adolescents. Il définit en outre certains enjeux de mise en oeuvre de la nouvelle loi qui risquent d'exercer une influence sensible sur le fonctionnement du système de justice pour les adolescents. Or, parmi les objectifs principaux de la Loi figure la diminution du recours aux tribunaux pour adolescents et à l'incarcération.

Par ailleurs, la loi met l'accent sur la modération, la responsabilité et la proportionnalité, ainsi que sur un meilleur encadrement du pouvoir discrétionnaire des décideurs. Ainsi, elle comporte des dispositions destinées à favoriser l'application de mesures extrajudiciaires, dont il est présumé qu'elles suffisent,

entre autres, dans le cas des auteurs d'une première infraction sans violence, et elle reconnaît le groupe de consultation en tant que moyen pouvant rehausser la qualité des prises de décision. Elle interdit en outre, aux fins de protection de l'enfance, la détention avant procès, laquelle est présumée être inutile si le tribunal n'a pu imposer une peine de garde. Enfin, les principes de détermination de la peine sous-tendent une nouvelle orientation en la matière. La peine doit dorénavant être proportionnelle à la gravité de l'infraction et favoriser la réinsertion sociale, compte tenu des limites du principe de la proportionnalité. Ajoutons que les dispositions concernant la détermination de la peine imposent des restrictions sur le recours au placement sous garde.

Parmi les enjeux de mise en oeuvre figurent l'exploitation judiciaire ou non des fonds disponibles, le risque d'un « élargissement du filet », l'adéquation des politiques et directives provinciales aux besoins des services policiers et des procureurs de la Couronne, les conditions de mise en liberté, et l'interprétation des dispositions concernant la proportionnalité, la réinsertion sociale, et les restrictions imposées sur le placement sous garde.

In passing the Youth Criminal Justice Act (YCJA), Parliament addressed fundamental issues of youth justice policy that have been the subject of controversy for decades. Parliament's response to some of these issues was to make no change in the law. For example, despite considerable pressure to "get tough" from some political parties and provincial governments, the minimum age of criminal responsibility was not lowered to 10 and remains 12; the age at which a person is considered an adult under criminal law was not lowered to 16 and remains 18; the maximum lengths of youth sentences were not increased; and the proposal of automatic adult sentences for some offences was rejected. Parliament made significant legislative changes in addressing other fundamental matters that, in its view, had not been adequately addressed in the Young Offenders Act (YOA). It rejected the position, expressed particularly by witnesses from Quebec, that the YOA was not flawed and that any difficulties were the result of inappropriate implementation. The YCJA contains new policy directions in several areas, including the philosophical underpinnings of the youth justice system; the use of the court versus less formal responses to youth crime; conferencing; restrictions on pre-trial detention; sentencing principles; sentencing options; elimination of transfer of cases to the adult court; and custody and the reintegration of youth into society.

This article will briefly explain some of the act's key provisions and policy directions and contrast them with the approach under the YOA.¹ Early indications are that two of the major objectives of the act – reduc-

tion in the use of the youth court and reduction in custody – are being achieved but it will take more time and information to determine whether these apparent early trends are real and long-lasting. The article will also discuss some of the implementation issues that can have a significant impact on how the youth justice system operates under the act. The use of new federal funding that has been made available to the provinces and the re-allocation of existing funding are obviously important issues that can affect the availability of programs and the effective implementation of the act. However, the focus of this article with respect to implementation will be on some of the equally significant policy, practice, and interpretation issues that often receive less attention.

Youth justice philosophy

The Declaration of Principle of the YOA contained general principles that lacked clarity and coherence and failed to provide sufficient guidance to decision makers. This problem was particularly significant under the YOA because the Declaration was the primary source of principles to guide all decisions under the YOA. One result was that decision makers – police, prosecutors, judges, and provincial governments – could justify almost any decision under one or more of the principles. The absence of clear legislative direction in the general principles was an important factor, although not the only factor, that contributed to the youth justice system's problems that were of concern to Parliament. These problems included the high rate of incarceration, over-use of courts for minor cases, and sentencing disparities.

The new act's youth justice philosophy is contained in a Preamble, a Declaration of Principle, and specific principles at key decision points in the youth justice process. Main components of the philosophy can be summarized as follows:

Restraint

The theme of exercising restraint in the use of the youth justice system is reflected throughout the act. The Preamble states that the youth justice system should reserve its most serious interventions for the most serious crimes. Restraint is to be exercised not only in sentencing but also in deciding whether to use the formal court process at all, as well as in the measures that may be used outside the formal court process. The act makes clear in various provisions that custody is to be reserved for the most serious offences and offenders. In an unusually blunt and

specific statement of the need for restraint, the Preamble provides that the youth justice system should reduce its overreliance on incarceration for non-violent youths.

Accountability

The act provides that the primary task or objective of the youth justice system is to hold a youth accountable in a fair way for the offence s/he committed. Holding a youth accountable for the current offence is the focus in deciding whether to use extrajudicial (non-court) measures and in determining what those measures should be. In sentencing, the act requires the court to impose just sanctions that will hold the youth accountable for the offence committed. Accountability is to occur through the imposition of meaningful consequences and measures that will promote the rehabilitation and reintegration of the youth into society. Accountability must be fair and proportionate, and it must be consistent with the greater dependency and reduced maturity of youths.

Proportionality

In addressing how a youth is to be held accountable, the act requires that consequences be proportionate to the seriousness of the offence and the degree of responsibility of the youth. This principle sets the degree of intervention that is required in holding the youth accountable for the offence. Exceeding a proportionate response is prohibited by the act. This basic principle of fairness was not stated in the YOA, and the Supreme Court of Canada interpreted the YOA as authorizing disproportionate sentences (*R. v. M. (J.J.)*).

Protection of the public

The act addresses the issue of how the youth justice system may be able to have an impact on the protection of the public. The act provides that if the system can achieve the objective of holding youths accountable in a fair and proportionate manner, it can make a contribution to the protection of the public in the long-term. Parliament's references to protection of the public indicate that such protection is a desired longer-term *outcome* or *result* of the activities of the youth justice system. The system can "contribute" to such protection, which reflects that there are many factors outside the youth justice system that can have as much effect, or greater effect, on public protection than the activities of the youth justice system.

Rehabilitation and addressing needs

The youth justice system has a long history of using criminal justice interventions as a means of addressing social or other problems of youths. A recurring issue has been the tendency to over-intervene in the lives of youths in order to attempt to address such needs, regardless of the seriousness of the offence that the youths committed. Parliament has made clear in the YCJA that measures (extrajudicial measures and sentences) taken with youths should address the rehabilitative needs of youths within the limit of a proportionate response to the offence. Parliament has concluded that it is unfair for the youth justice system to impose an intervention that is disproportionate to the seriousness of the offence in order to address a youth's needs, no matter how well intentioned the system may be. The seriousness of the offence sets the degree of intervention, and efforts to address the rehabilitative needs of the youth must fit within the proportionate response. The Preamble to the act recognizes that addressing the needs of youths and preventing youth crime is a broad societal responsibility; the youth justice system has a role in these areas as well, but the role is limited.

Structured discretion

The YCJA reflects Parliament's view that officials in the youth justice system need to be given more legislative direction in making decisions that are consistent with the act's objectives. Although the act leaves considerable room for discretion, the act structures the discretion of decision makers to a much greater extent than the YOA and the Criminal Code. At each stage of the youth justice process – extrajudicial measures, pre-trial detention, sentencing, and custody and reintegration – specific provisions guide how decisions are to be made. These provisions include basic principles, specific criteria and considerations, and presumed responses to certain situations, such as the presumption that non-violent first offenders should be dealt with through extrajudicial measures. In some areas, the act includes prohibitions, such as the prohibition on the use of pre-trial detention for child welfare or mental health purposes.

Use of the court

Parliament has made clear that, in its view, the youth justice system under the YOA relied too heavily on court processing as the response to youth crime. A major objective of the YCJA is to reduce the use of court, particularly for less serious offences.

Approximately 50% of youth court cases under the YOA consisted of relatively minor offences (Canadian Centre for Justice Statistics 2000). Parliament has concluded that many of these types of cases could be dealt with effectively through extrajudicial measures. Greater use of extrajudicial measures also appears to have the support of judges. A national survey of youth court judges found that 54% of judges believed that half or more of the cases coming before them could have been dealt with as adequately or more adequately outside the youth court (Doob 2001). Although the YOA permitted the use of alternative measures, it provided little guidance regarding their use. In general, alternative measures were applied conservatively – limited primarily to first-time, minor offenders.

The YCJA is significantly different from the YOA with respect to non-court responses to offences by youths. The act sets out a range of options for police and prosecutors for holding youths accountable outside the court process. These extrajudicial measures include taking no further action, informal warnings, police cautions, Crown cautions, referrals to a community program or agency, and extrajudicial sanctions. Extrajudicial sanctions, which are similar to alternative measures under the YOA, are the most serious and intrusive extrajudicial measure. Unlike other extrajudicial measures, they require the youth to accept responsibility for the offending behaviour and to comply with terms and conditions. Section 10 of the YCJA provides that they are not to be used unless a warning, caution, or referral would not be adequate to hold the youth accountable.

Section 4(d) provides that extrajudicial measures should be used if they are adequate to hold the youth accountable for her/his offending behaviour. This requires officials in the youth justice system to reorient their general approach to responding to youth crime. Rather than assume that the normal response is to charge the youth and proceed to court, police officers and prosecutors must in all cases first assess whether an extrajudicial measure would be adequate to hold the youth accountable. If it would be adequate, it should be used. This is not a matter of leniency in the exercise of discretion or giving the young person "a break." Parliament has said that this is simply the appropriate action to take under the act.

Section 4(d) also provides that extrajudicial measures may be used if a youth has previously been dealt with by extrajudicial measures or has previously been found guilty of an offence. This principle is intended to counter the tendency under the YOA to restrict alternative measures

to youths who had no youth court record and no previous involvement with alternative measures. Under the YCJA, the commission of another offence after being found guilty or dealt with by extrajudicial measures does not mean that the previous responses were a failure or that an extrajudicial measure would not be adequate to hold the youth accountable for the current offence. Parliament's implicit message to police and prosecutors is that less serious offences are still less serious even though the youth has committed previous offences, and that it is likely that an extrajudicial measure would be adequate to hold her/him accountable.

Section 4(c) creates a presumption that extrajudicial measures are adequate to hold a youth accountable if the youth has committed a non-violent offence and has not previously been found guilty of an offence. This presumption is a strong direction from Parliament that it expects first-time, non-violent offenders generally to be held accountable outside the youth court. A non-violent offender who has a previous offence that was dealt with by an extrajudicial measure continues to have the benefit of the presumption. The prosecutor may find that there are circumstances that rebut the presumption but, in general, it should be exceptional for first-time, non-violent offenders to be taken through the court process. If the youth has complied with previous extrajudicial measures, then it is less likely that the presumption should be rebutted.

Section 5 requires that an extrajudicial measure be proportionate to the seriousness of the offence, thus reinforcing the proportionality principle in the Declaration of Principle. Concerns were raised under the YOA that youths were subjected to alternative measures that were disproportionate to the seriousness of the offence and more onerous than sentences that they would have received in court.

Implementation of extrajudicial measures

In addition to whether the objective of reducing the use of the court is achieved, there are related areas that need to be monitored to determine whether extrajudicial measures are being implemented in accordance with the act.

Net-widening

One issue is whether the explicit recognition in the act of the range of extrajudicial measure options may result in more, not less, interven-

tion than would have occurred in the past. For example, police may be inclined to use formal cautions and referrals with youths with whom, in the past, police would have taken no further action. Interim evaluation results of a pilot referral program operated by the Toronto Police Service suggest that there has been a substantial use of referrals by the police but little, if any, reduction in the number of charges (Doob, Sprott, and Greene 2003). Another net-widening concern, as noted above, is that extrajudicial sanctions may be used that are disproportionate to the seriousness of the offence and more severe than sentences that would have been imposed in court.

Conditional referrals

The act provides that police may, instead of charging a youth, refer the youth, if the youth consents, to a program or agency in the community that may assist the young person in avoiding criminal behaviour. A referral may be particularly appropriate in less serious cases in which it is clear that the youth needs help, such as substance abuse treatment, that can best be provided outside the criminal justice system. Some police officers may be inclined to make a referral to a program only on the condition that the youth accepts responsibility for the offence and complies with whatever is required by the program. The police may indicate that if the youth fails to comply, then they will proceed with a charge. Although this practice is not explicitly prohibited by the act, it is not consistent with the act's overall approach to extrajudicial measures. The practice essentially amounts to a pre-charge extrajudicial sanctions program without the statutory prerequisites for the use of extrajudicial sanctions, such as the right to counsel and a determination by the prosecutor that there are sufficient grounds to prosecute the youth.

Provincial policies

Under the YOA, some provinces had very restrictive eligibility criteria for alternative measures. The extent to which provincial policies are changed to increase the use of extrajudicial sanctions for cases that otherwise would go to court can have a significant impact on the effective implementation of the act. It is also unclear to what extent provinces and police services have developed effective guidelines for police officers in making decisions regarding extrajudicial measures.

Conferences

Parliament introduced the concept of conferences in the YCJA. A con-

ference is defined in s. 2 as a group of people convened to give advice to a decision maker under the act. Decision makers are judges, prosecutors, police officers, the Provincial Director, youth workers, and justices of the peace. Conferences may be used to assist in decisions related to extrajudicial measures, judicial interim release, sentencing, and reintegration plans. The broad definition of conference encompasses a wide range of practices that involve members of a local community in the decision-making process. The rationale for the statutory recognition of conferences is that a conference may lead to a better decision by providing an opportunity for a wider range of perspectives, more creative solutions, better coordination of services, and increased involvement of the victim and other community members. One general type of conference is a "restorative" conference, which involves a discussion of how the youth can make reparation to the victim or the community. Frequently, but not necessarily, a restorative conference will include a meeting between the youth and the victim. Another general type of conference is a case management conference in which, typically, professionals provide advice about how rehabilitation may best be achieved, including how services in the community can be coordinated.

Implementation of conferences

Although conferences offer considerable potential to improve decision making under the act, implementation of conferences raises the possibility of practices that may not be consistent with the act, including:

Advisory v. decision-making

Some "restorative justice" practitioners believe strongly that a restorative conference is a process in which the youth and the victim decide what the youth will do as a result of the offence. Under the act, a conference is advisory, not decision making. When a decision maker refers a case to a conference, any agreement that is reached at the conference is simply a recommendation to the decision maker. The decision maker must assess the recommendation as to whether it is consistent with the act (e.g., proportionality) and determine whether it will be included in how s/he disposes of the case.

Overreaching

Some conferences, whether "restorative" or case management, have had a tendency to overreach in their discussion of issues or problems in the youth's life, or to recommend a degree of intervention with the

youth that is disproportionate to the seriousness of the offence committed. Restorative conferences may have a tendency to focus primarily on the needs of the victim. Although taking account of the interests of the victim is a requirement of the act, the main task of a conference at the extrajudicial measures stage or the sentencing stage is to provide advice to the decision maker regarding how the youth can be held accountable for the offence committed.

Procedural fairness

The act does not provide detailed rules on how conferences should be conducted. However, it does authorize provinces to establish rules to govern conferences called by police officers, prosecutors, the Provincial Director, and youth workers, but not conferences called by judges or justices of the peace. Basic issues, such as whether the youth's lawyer is entitled to be present at the conference and other issues that involve principles of fairness, must be addressed in the rules to govern conferences. If experience indicates that conferences are being implemented in unfair ways, it may be necessary to establish minimum requirements in regulations under the YCJA.

Pre-Trial Detention

Parliament's major objective of reducing the use of incarceration is reflected not only at the sentencing stage of the process but also at the pre-trial detention stage. The YCJA incorporates the Criminal Code provisions governing when pre-trial detention may be ordered, but includes additional provisions directed at restricting the use of detention with youths. Research indicates that there was a substantial increase in the use of pre-trial detention under the YOA (Federal-Provincial-Territorial Task Force 1996), due in part to the frequent use of detention for child welfare purposes rather than criminal justice purposes. Judges have indicated that the use of detention for child welfare purposes was a common practice under the YOA (Doob 2001) and police have reported that they frequently incarcerated youths "for the good of the youth" (Carrington and Schulenberg 2004).

Section 29(1) prohibits the use of pre-trial detention as a substitute for child welfare, mental health, or other social measures. This provision reflects a basic theme of the act to more clearly distinguish between the role of the youth justice system and the roles of other systems and programs that deal with the problems of youths and their families. The

underlying policy position of Parliament is that it is fundamentally unfair to use the criminal justice system to incarcerate youths for their non-criminal behaviour or needs, particularly when other youths who are accused of similar offences but do not have such needs would not be detained.

Section 29(2) creates a presumption that detention of a youth is not necessary for the protection of the public if the youth, on being found guilty, could not be sentenced to custody because of the restrictions on the use of custodial sentences in s. 39(1)(a)–(c). These restrictions prohibit the judge from imposing custody unless the offence is a violent offence, the youth has repeatedly failed to comply with non-custodial sentences, or the offence is relatively serious and the youth has a history of offending that indicates a pattern of findings of guilt. The rationale behind this presumption is that it is generally unfair to incarcerate a presumed-innocent youth on the ground of public safety at the pre-trial stage, if Parliament has determined that s/he cannot be incarcerated if found guilty of the alleged offence.

Implementation and pre-trial detention

Implementation issues related to pre-trial detention include the following.

Child welfare cases

Some of the most difficult pre-trial detention cases will continue to be those that involve child welfare concerns, such as a case of a youth who is charged with a minor offence but is living on the street, involved in prostitution and drugs, and considered a danger to herself/himself. How this type of case is handled is a test of the act's philosophy and specific provisions, including s. 35, which allows referral of such cases to a child welfare agency.

Conditions of release

An ongoing concern, which is indirectly addressed by the act, is the type and number of conditions of release imposed on youths who are not detained. Some research suggests that these conditions are frequently not directly related to the grounds in the Criminal Code, are vague and difficult for youths to comply with (Gandy 1992). In effect, they set up youths for failure, leading to breaches of conditions, new charges, detention, and custodial sentences.

Provincial policies and programs

Police and prosecutors are the gatekeepers to detention. Appropriate pre-trial detention policies for police and prosecutors can have a significant impact on the number of bail hearings and detention orders.

Sentencing

The lack of guidance and structure for sentencing in the YOA contributed to several problems, including disparity in sentences, a high rate of youth incarceration, and overuse of incarceration for less serious and non-violent offences. The sentencing provisions in the YCJA respond to these problems through a new approach to the sentencing of youths.

Purpose of sentencing

Unlike the YOA, s. 38 of the YCJA states what the purpose of youth sentencing is: to hold a young person accountable for the offence committed by imposing sanctions that are (1) just; (2) have meaningful consequences for the youth; and (3) promote the rehabilitation and reintegration of the youth into society. The act provides that a sentence that complies with these requirements can make a contribution to the long-term protection of the public. The statement of purpose of sentencing reinforces some key concepts introduced in the Declaration of Principle. In determining how this purpose is to be achieved, the court is directed by the sentencing principles in s. 38 and the restrictions on custody in s. 39.

Adult sentencing principles and objectives

The YCJA sets out sentencing provisions for youth sentences that are different from the sentencing provisions for adults in the Criminal Code. Denunciation, specific deterrence, general deterrence, and incapacitation, which are sentencing objectives for adults under the Criminal Code, are not sentencing objectives under the YCJA. Some may argue that deterrence can be "read into" the YCJA as a sentencing objective. However, s. 50 of the YCJA states clearly that the sections of the Criminal Code that contain the purpose, principles, and objectives of sentencing of adults (ss. 718, 718.1, and 718.2 of the code) do not apply to youth sentences under the YCJA, except for paragraph 718.2(e), which deals with Aboriginal offenders. Parliament chose to include some of the sentencing objectives of the code, such as rehabilitation and

repairing the harm done to victims and the community, but decided to omit others such as deterrence. Parliamentary committees heard submissions from some witnesses that deterrence should be included in the YCJA, but the committees rejected their recommendation. In rejecting the proposed inclusion of deterrence in the act, Parliament aligned itself with the large body of research that shows that increasing the severity or lengths of sentences has no effect on the commission of further crime by the individual offender or other offenders (Doob and Cesaroni 2004).

Proportionality

Proportionality is a fundamental principle of sentencing in the YCJA. Section 38 states that a sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the youth for that offence. This basic principle of fairness means that a sentence must be in proportion to the seriousness of the case – less serious cases should result in less severe sentences and more serious cases should result in more severe sentences. It is a principle that can be easily understood and accepted by members of the public, including youth. Proportionality was not a requirement under the YOA. According to the Supreme Court of Canada, proportionality was only one of many factors to consider in determining an appropriate sentence under the YOA (*R. v. M. (J.J.)*). The Supreme Court concluded that it was appropriate under the YOA to impose a sentence that was disproportionately severe or intrusive, if the youth had needs that required a greater degree of intervention than would be warranted by the seriousness of the offence. Thus, the requirement in the YCJA that the sentence *must* be proportionate to the seriousness of the offence is a significant change in youth sentencing law in Canada.

Paragraph 38(2)(a) may influence the application and meaning of the proportionality principle in a particular case. It provides that the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult convicted of the same offence committed in similar circumstances. Therefore, the sentence that an adult would receive sets an upper limit on a proportionate youth sentence. So, although the act sets a maximum sentence of two years for most offences, the actual maximum may be much less, depending on the sentence that an adult would receive for the offence. Determining what an adult would receive as a sentence may be difficult in some cases, but many prosecutors and defence counsel practice in both youth court and adult court and are well positioned to make submissions to the court on this issue.

Although proportionality is fundamental to sentencing under the act and an important departure from the provisions of the YOA, it is a general principle that is open to a variety of interpretations in a specific case. A key implementation issue is how courts will determine the relative severity of the wide range of possible sentences under the act. For example, is 30 days in custody more or less severe than a one-year probation order with several restrictive terms and conditions?

Proportionality and rehabilitation

The sentencing principles of the YCJA address the relationship between proportionality and rehabilitation. The principle of proportionality determines the degree of intervention of the sentence. Depending on the circumstances of a case, it is quite likely that more than one possible sentence would meet the requirement of proportionality. Paragraph 38(2)(e) requires the court to consider the range of possible proportionate sentences and choose the sentence that is most likely to promote the rehabilitation of the youth. Thus, rehabilitation is an important and required component of a sentence, but the measures that are directed at rehabilitation must not violate the proportionality principle. Proportionality is the primary or dominant requirement that addresses severity, and rehabilitation is a secondary requirement that addresses the types of measures to be used within a proportionate sentence. The plain wording of paragraph 38(2)(e) clearly indicates Parliament's intent: "subject to (c), (the principle that the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person), the sentence must be the one that is most likely to rehabilitate the young person and reintegrate him or her into society." The words "subject to" indicate a legislated limit to rehabilitative measures.

In contrast to sentencing based on proportionality, a treatment approach to sentencing (sometimes referred to as educative or needs-based or offender-based sentencing) considers the offence to be primarily a symptom of problems or needs in a youth's life that must be addressed through treatment. The seriousness of the offence is not viewed as a limiting factor. The offence, whether serious or not, is the "trigger" or justification for obtaining treatment to address the needs of the youth. This was essentially the approach of the JDA and it was carried over to the YOA. Some opponents of the YCJA who believe in this treatment approach argued against the proportionality limitation (as well as the restrictions on custody in s. 39) on the ground that limiting the degree of intervention by the seriousness of the offence would deprive youths of needed treatment. Parliament rejected the treatment

approach as fundamentally unfair and inconsistent with the objective of reducing the use of custody. Under the act, a youth who has committed a minor offence but has serious needs that seem to have contributed to the criminal behaviour must receive a sentence that is in proportion to the seriousness of the offence, not in proportion to the seriousness of her/his needs. The sentence should include measures to address the needs, but the sentence must not be longer or more intrusive than the offence warrants. Similarly, under the act, a youth who has committed the same offence as another youth should not receive a longer or more intrusive sentence because her/his needs appear to require more intensive rehabilitative measures. Such a sentence would amount to punishing the youth because of her/his needs. If a youth has needs that go beyond the authorized scope of a criminal justice intervention under the act, assistance should be sought outside the youth justice system. One mechanism to consider is a referral of the youth, under s. 35, by the court to an appropriate agency that could address the youth's needs.

In *Reference re Bill C-7*, the Quebec Court of Appeal interpreted the sentencing provisions of the YCJA in a manner that seems to be at odds with Parliamentary intent. In finding that the YCJA is consistent with the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, the court concluded that under the YCJA sentences should be in proportion to both the seriousness of the offence and the needs of the youth. The court stated that proportionality of the sentence to the seriousness of the offence is not a preponderant principle but rather one of several key principles that are to be balanced. Commentators have criticized the court's interpretation as inconsistent with Parliament's clear intent to make proportionality a dominant principle (Anand and Bala 2003). The court's interpretation could lead to a misuse of the criminal law power in that it invites longer sentences than warranted by the seriousness of the offence because of the youth's needs. Problems have also been recognized with the UN provision. As noted by Lode Walgrave, a youth justice expert from Belgium,

It is easy to state that the judicial reaction should be in proportion to both the offender and the offence but it is far from evident that it is actually possible to combine both proportionalities (in an actual case) ... These rules in fact appear to be some kind of what has been called in French a "mystification of language" ... a rhetoric which sounds good, but which in fact hides its lack of feasibility in practice. (quoted in Doob and Cesaroni 2004: 194)

Similarity of sentences

The act also provides that a sentence must be similar to other sentences in the region for the same offence committed in similar circumstances. This principle requires that there be a basic level of consistency in sentences for young persons found guilty of the same offence. This was not required under the YOA. It requires that sentences be similar, not the same or identical. It allows the individualization of sentences to take account of such factors as the availability of resources or programs in particular areas. Although "in the region" is not in the parallel provision of the Criminal Code, courts dealing with adult cases have interpreted the Code provision as allowing variance "across various communities and regions in this country" (*R. v. M.(C.A.)*). The various youth sentences in different regions must comply with the principles of sentencing in the YCJA, although they may differ in their particular characteristics. Thus, the inclusion of "in the region" does not permit disproportionate sentences in some regions, nor does it allow sentences in any region of the country to violate the requirement that rehabilitative measures of a sentence must be within the limit of proportionality.

Least restrictive alternative and acknowledgement of harm done

As noted above, when the court is considering possible proportionate sentences, it must choose the sentence that is most likely to rehabilitate the youth. In addition, the court must choose the proportionate sentence that is the least restrictive alternative and that will promote a sense of responsibility in the youth and an acknowledgement of the harm done to the victim and the community. Although there is the potential for conflict among these requirements, in general, the latter two requirements are likely to be compatible with a sentence that is most likely to rehabilitate the youth.

Restrictions on custody

Several new provisions are intended to contribute to a reduction in the use of custody. In addition to the principles of sentencing in s. 38 and the absence of adult sentencing objectives, such as incapacitation and deterrence, s. 39 of the act contains explicit restrictions on the use of custody. An implicit theme of the act is that for a large number of youths who were sentenced to custody under the previous legislation, there are community-based, non-custodial options that are fairer, more meaningful, and more effective than custody.

Section 39 prohibits custody unless certain threshold criteria are met. In general terms, custody is prohibited except for violent offenders and serious repeat offenders. More specifically, s. 39(1) provides that the court *shall not* commit a young person to custody unless one of the following criteria is met:

- The youth has committed a violent offence. The act does not define "violent offence." How courts interpret violent offence will be important to whether the objective of reducing incarceration is achieved. Some courts have interpreted violent offence as an offence in which a youth causes or attempts to cause bodily harm.
- The youth has failed to comply with two or more non-custodial sentences. This criterion excludes, for example, a repeat offender who is found guilty of a non-violent offence and has complied with three previous non-custodial sentences. Although a court may have been inclined under the YOA to "step up" the sentence for this repeat offender to custody, the court would not be allowed to do so under this criterion.
- The young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt. A key issue is what constitutes a pattern. It can be argued that this requires at least a total of three prior offences as well as a similarity in the types of prior offences that demonstrates a pattern in the substance of the offences committed.
- Exceptional cases, where the young person has committed an indictable offence and the aggravating circumstances of the offence make the imposition of a non-custodial sentence inconsistent with the purpose and principles of sentencing. This criterion addresses the possibility of a highly unusual case that is excluded by the first three criteria, but due to the aggravating circumstances of the offence, is so serious that it would be impossible to impose a non-custodial sentence that would be consistent with the purpose and principles of sentencing of the act. If the court relies on this exceptional case criterion, it is required to explain why the case is an exceptional case. This requirement reinforces that Parliament did not expect this criterion to be used very often and that the court must apply its mind very carefully to its justification for relying on it. One test of this provision will be how courts deal with drug offenders who do not fit any of the other criteria.

Meeting one of the threshold criteria in s. 39(1)(a)–(c) is not sufficient to justify a custodial sentence. If the court finds that one of the threshold criteria is met, the court must thoroughly explore alternatives to custody. In addition to the general requirement in s. 38(2)(d) that the court must *consider* alternatives to custody, with particular attention to the circumstances of Aboriginal offenders, s. 39(2) *prohibits* the court from imposing custody on any youth unless it has determined that there is no reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles of sentencing in s. 38. Alternatives to custody will often be viewed as in accordance with the sentencing principle that the sentence imposed must be the one that is most likely to promote the rehabilitation of the youth. Also, alternatives such as requiring the youth to repair the harm done to the victim will often be seen as providing more meaningful consequences than custody.

The court is also required to consider the likelihood that the youth will comply with a non-custodial sentence, taking into account her/his compliance with previous non-custodial sentences. This provision reflects a view that if a youth commits another offence, it does not necessarily mean that the previous non-custodial sentence was inappropriate or a failure. If the youth complied with the previous sentence, then the sentence was successful in achieving its purpose: holding the youth accountable for the offence committed. Parliament has taken the position that the commission of another offence after compliance with a non-custodial sentence can, and often should, result in another non-custodial sentence.

Conclusion

The YCJA has made significant changes to youth justice law in Canada. The act attempts to achieve greater fairness in decision making, more effective use of limited resources, a clearer and more restrained role for the youth justice system, and more reasonable expectations of what the system can accomplish. A major factor in whether the objectives of the act are achieved will be the extent to which there is a shift in thinking and practice by those involved in the day-to-day operation of the youth justice system. Some positive signs that the shift is taking place can be seen in some of the early court decisions, the implementation of innovative community programs, and reports of reduction in the use of the courts and custody. It will be important in the months and years ahead to monitor carefully how the act is being implemented and to encourage ongoing discussion of how the lofty objectives of the YCJA can be realized in practice.

Note

1. For a comprehensive and detailed discussion of the Act, see *YCJA Explained* (2003).

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