REPRESENTATIVE FOR
CHILDREN AND YOUTH

Submission to the House of Commons Standing Committee on Justice and Human Rights

respecting

An Act to Amend the *Youth Criminal Justice Act* (Bill C-4)

December 2010

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Why the B.C. Representative for Children and Youth submits a brief on the *Youth Criminal Justice Act (YCJ Act)*

The mandate of the British Columbia Representative for Children and Youth, as described in the *Representative for Children and Youth Act,* is to improve services and outcomes for all children in B.C. through advocacy, accountability and review. This means I must consider the interests of all kinds of children and youth – those who have committed offences, those who have been the victims of offences committed by either adults or other youths, and those who have been victimized and have also harmed others. Whatever their other experiences, and whatever labels might be affixed to them, they are, first and foremost... children. They are human works in progress; bundles of vulnerability and potential. In my work I find this a helpful foundation on which to ground our response to the myriad adolescent behaviours, some harmful, some hopeful, we encounter.

As adults, we are the custodians of federal and provincial systems of support for our children. Collectively, we have a responsibility to create and sustain reinforcing systems in which each child can grow, learn and assume increasing responsibility for their behaviour. It is a responsibility most parents take very seriously. We need no less patience and determination, and perhaps even more, when the state is required to exercise parental duties of support, guidance and discipline, either partially or entirely.

I approach these proposed *YCJ Act* amendments as a mother of four children, an advocate for children and youth, and an experienced Youth Court judge. My appointment to the Saskatchewan Provincial Court in 1998 required me to interpret and apply the Act on a regular basis. In 2006 I was appointed the first Representative for Children and Youth in British Columbia, affording me the opportunity to compare the youth justice systems in two Canadian jurisdictions. My office also has a vigorous program of research on the needs of children and youth, and outcomes in terms of health, education, safety, and economic well-being. I believe that good legislation and policy is grounded on solid research, evaluation of current systems, and careful deliberation.

Of particular and recent interest to me is the overlap of youth in the care of child protection authorities, youth living in the home of a relative, Aboriginal youth, youth with developmental disabilities and youth in conflict with the law. In 2009, the Provincial Health Officer and I released a joint special report entitled *Kids, Crime and Care:Health and Well-Being of Children in Care: Youth Justice Experiences and Outcomes*, which studied 50,551 children born in 1986. It is the largest study of its kind ever undertaken in Canada, tracking an entire birth cohort and how it moved through to adulthood. While fewer than five per cent of the total study population appeared in a youth court, 36 per cent of the youth in care did.

One in six youth in care spent time in custody. Tragically, youth in care are more likely to attend a youth court hearing than they are to attend their high school graduation ceremony.

On October 19, 2010, again in conjunction with the Provincial Health Officer, I released

another report, *Growing Up in B.C.* It provides extensive documentation on a wide range of measurable outcomes for children and youth, including important issues not frequently examined, such as youth connections to family, peers and community. Whether the issue is teenage pregnancy or youth justice, we need to continually ask "how are we doing" and "what can we do better"? We need to build our policies and programs on the answers. We must also understand the connection between what is happening in the lives of young people and the incidents which bring them to the attention of youth justice officials. Involvement in youth justice may point to failures in other systems of support, especially for vulnerable populations who may not have enjoyed the same life circumstances as the majority of children and youth in a province. Those with developmental disabilities, such as Fetal Alcohol Spectrum Disorders, come readily to mind.

I believe we all share the goal of improving safety, educational and health outcomes for all youth, including Aboriginal and non-Aboriginal youth, and irrespective of whether they live at home, with relatives, or in the care of the government. And I am convinced that doing our best for these youth, drawing on our experience and the research evidence, will make our nation safer and our communities stronger, more cohesive, and fairer.

Reconciling Public Safety and Child Development Objectives

Citizens have a right to be concerned about their safety, just as a child has a right to be safe from harm. However, answering that concern does not require the sacrifice of sound child development policies and insights. In fact, enhanced public safety cannot be achieved without the contributions of both pure and social sciences, and the child-serving professions. These disciplines provide compelling evidence about preventing youth crime in the first instance, and responding intelligently to manage and reduce risk when youth have offended. Getting "smart" on youth crime really transcends the conventional continuum of "lenient" to "tough" responses, where "tough" is usually equated with better protection of society.

A recent Scottish study noted the "irreconcilable tension between tackling the broader needs of young offenders and delivering justice for communities and for victims of crime", but concluded "these are not alternative strategies." (McAra and McVie 2010) I believe the tensions are not irreconcilable, and that child development and public safety strategies can and must proceed in tandem. Whether a child is at home under probation supervision, in hospital recovering from victimization, in a foster home or a youth custody centre, we can apply a "family model" of care which demonstrates concern for their complete well-being and understands the "ages and stages" of child and youth development. This should be our Canadian approach, based on respect for the rights of children, and our obligations under the *United Nations Convention on the Rights of the Child.*

Our understanding of the developmental circumstances of adolescents has advanced rapidly in recent years, based on research in both neuroscience and the behavioural sciences. (Steinberg 2010) Public policy which acknowledges this evidence and invests in interventions based upon it will produce significant returns, both in terms of enhanced safety and cost-effectiveness. (Vancouver Board of Trade 2010) Money invested in sound child development programs and practices delivers good value. While there might be some quibbling about the details, there is substantial consensus in criminology and child development fields about how youth crime might be further reduced:

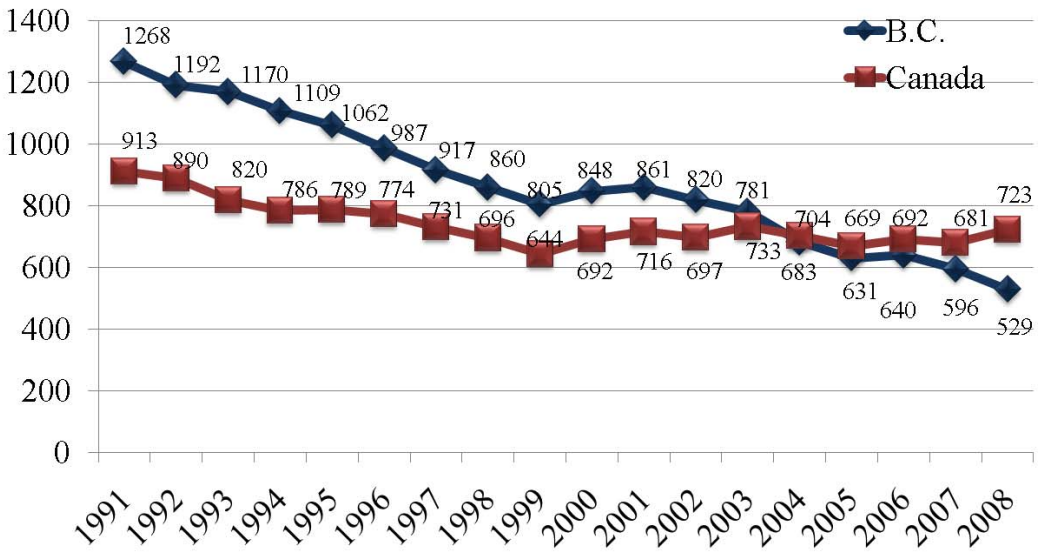
- strong supports for mothers-to-be and young children, to develop healthy, resilient and responsible children and youth;
- measured responses for early and first offenders, requiring accountability and nurturing pro-social relationships and behaviour; and
- robust interventions with high risk youth offenders, to assertively manage their risk, in secure settings if necessary, while providing treatment with the best prospects of success.

The use of custody as the remedy of last resort is wise policy in terms of community safety, child development and good stewardship of public funds. In British Columbia a good program of community supervision and intervention with a youth offender costs about $20,000 per year, compared with about $215,000 for a year in custody. Custody cost avoidance makes resources available for community programming, which is demonstrably more effective for the large majority of offenders. (Andrews and Bonta 2010)

The Province of Quebec has already been identified in an earlier submission to you as a model of a successful, child -centred approach, operating within the legislative framework of the current *YCJ Act*. The Committee may not be aware that British Columbia shares many youth justice attributes with Quebec, and enjoys similar results. B.C. has a supportive youth court culture and a strong and capably led system of youth justice programs and services, well integrated with the larger child and youth development system. Programming, evaluation and ongoing staff training are all founded on child development principles. This approach pre-dates the *YCJ Act* and B.C. adapted readily to the new legislation, under which even better outcomes have been experienced. Much of the British Columbia experience illustrates positive trends and outcomes for children, such as significant and consistent declines in youth crime.

Youth Crime Rates[1]: Young Persons Dealt with by Police, (Charged and Not Charged), Total Criminal Code Offences, B.C. and Canada

Rate per 10,000 Population



"Charged" in B.C. means a Report to Crown Counsel has been filed

British Columbia now has the second-lowest youth crime rate in the country, after Quebec, and the second-lowest rate of youth in custody, barely trailing Quebec. (See Appendices "Per Capita Rates of Youth in Custody by Province 2008") It is not simply a case that fewer youth committing crime results in fewer youth in custody. British Columbia's modest use of custody is a long-standing practice and prevailed even when British Columbia's youth crime rate was above the national average. Efforts to tackle this unacceptable crime rate did not include increased use of custody, and the youth crime rate decreased even as youth custody rates fell further. The relationship between crime rates and incarceration levels is complex and indirect, and conclusions should be tendered cautiously. However, Quebec and British Columbia clearly demonstrate that a low rate of youth custody is not an impediment to achieving lower youth crime rates.

The youth justice system in British Columbia is firmly anchored in a child development culture. It features a comprehensive scheme of diversion, (both extra-judicial measures and sanctions) which is readily embraced by police and prosecutors. (See Appendices "Youth Court Cases B.C. and Canada") For those youth who are adjudicated by a court, there is a

[1] Ministry of Children and Family Development, Youth Justice Policy and Program Support (2010). *The Impact of the YCJA* (Powerpoint presentation, based on data from Canadian Centre for Justice Statistics). Victoria: Province of British Columbia.

range of residential and non-residential community interventions, including professionally facilitated restorative justice conferences and an active Intensive Support and Supervision Program.

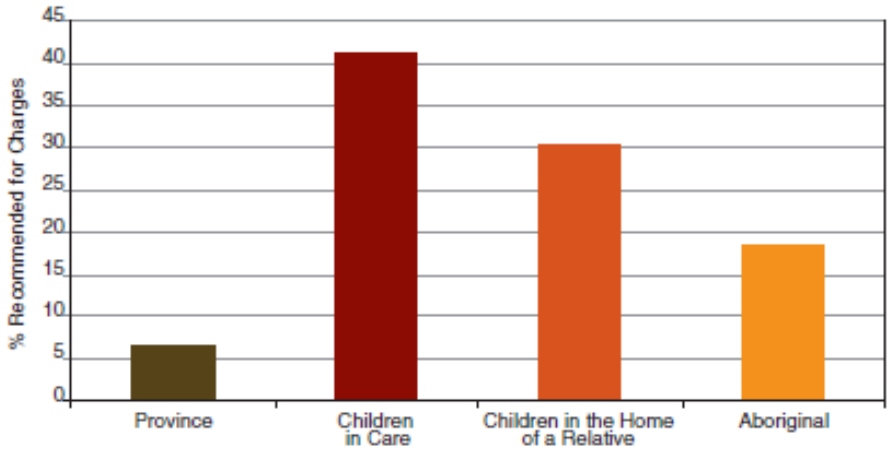
When incarceration cannot be avoided, B.C. youth justice staff work hard to care for youth in modern, well programmed centres. Advocacy is available for those in the youth justice system, both through the independent services of my office and also through a variety of non-governmental agencies who speak to youth or operate support programs at custody centres. I have visited these centres and been impressed by the small number of youth in them (typically, about 130 in the entire province) and the variety of educational and pro-social activities in which the residents are engaged. British Columbia is the first jurisdiction in North America to have its youth custody centres accredited by the international Council on Accreditation, an achievement which deserves commendation.

My experience in Saskatchewan provides an instructive comparison with the British Columbia and Quebec situations. Saskatchewan is my home; my own First Nation is there – the Muskeg Lake Cree Nation, and my children are also members of the Band. Youth justice in Saskatchewan is nearly overwhelmed by the numbers and needs of Aboriginal youth raised in environments of poverty and intergenerational trauma. The massive overrepresentation of Aboriginal youth in the Saskatchewan justice system and the child welfare system is a significant justice issue, as other systems of support appear to not support many of these children adequately prior to age 12 years. It provokes a compelling question – how can the circumstances of Canadian children and youth be so different merely because of the accident of birthplace?

Do we have a national responsibility to ensure good outcomes for youth, including youth justice outcomes, regardless of their province or territory of residence? I encourage the Committee to take a broader view at the federal level. What is the duty to account for and ameliorate inter-provincial differences in the well-being of children and youth? Youth justice systems should not be the default social service system when education, health and child-serving systems have not adequately intervened to support youth before the age of 12.

While circumstances are measurably better in British Columbia, even in a relatively progressive jurisdiction, significant challenges remain. While absolute numbers of Aboriginal youth in custody have declined, the decarceration effect of the *YCJ Act* has disproportionately benefited non-Aboriginal youth. The proportion of Aboriginal youth in custody in B.C. has actually grown from 29 per cent in 2000/01 to nearly 50 per cent in 2009/10. (Ministry of Children and Family Development, Youth Justice Branch) Aboriginal youth were five times more likely to face custody than the general study population in our report *Kids, Crime and Care* (Figure 1).

Figure 1: Vulnerable youth recommended for charges in B.C.[2] (12-17)*



* (Aboriginal number includes Aboriginal Children in Care (CIC)/Children in the Home of Relative (CIHR) and Aboriginal non-CIC/CIHR)

While many youth from stable situations get into trouble (usually a short-lived phase) there is a clear pattern of connection between living outside the family home, educational problems, and poverty and extended involvement with youth justice. (See Appendices "Percentage of involvement with the justice system" and "Characteristics of youth involved with the youth justice system") These disturbing patterns are found across the country, arguably with greater gaps in many areas in other provinces.

If we are to make any progress in tackling these interrelated clusters of vulnerability, a supportive legislative framework for youth justice is vital. Does our youth justice legislation reflect the value we place on our children and adopt the stance of a "good parent" in dealing with a troubled youth who has, in turn, created trouble for others? Does it facilitate the integrated, evidence-based work which offers the best hope for safer communities and healthier, more responsible young citizens? I believe a mistaken association between public safety and more severe sentencing of youth will damage the often fragile progress being made in many jurisdictions, and will disproportionately impact Aboriginal youth and youth in care.

A Tale of Three Tragedies: Linking Legislative Change with Notable Cases

Reports by the B.C. Representative for Children and Youth frequently employ case studies to

[2] Representative for Children and Youth and Office of the Provincial Health Officer (2009). *Kids, Crime and Care, Health and Wellbeing of Children in Care: Youth Justice Experiences and Outcomes* Victoria: Province of British Columbia , Figure 5, pg 26

illustrate issues faced by youth, and by those responsible for serving them. These stories naturally evoke strong emotions. I believe it is entirely appropriate and important that we recognize and are moved by the stories of people who have experienced serious challenges, injuries and loss. It is equally important that the stories illustrate a definite defect in the law, policies or the delivery of a program or service, and that any proposed remedies, had they been implemented earlier, would have had a reasonable prospect of altering the outcome of the case. In reading both the Sebastien Lacasse[3] case and the proposed *YCJ Act* amendments, I have been unable to discern the connection.

A more instructive case, perhaps, is the tragedy of Ashley Smith, the young woman who took her own life while in federal custody, following a long and tumultuous sojourn in provincial youth and adult custody systems, as related by my colleague in New Brunswick. (Ombudsman and Child and Youth Advocate, Province of New Brunswick, 2008) This case demonstrates that even under a relatively enlightened legislative regime (the current *YCJ Act*) and within an ostensibly progressive provincial youth justice system, a youth with a highly complex mental health diagnosis and extremely challenging behaviours can be left vulnerable and unprotected from her own destructive impulses. Do the recommendations of the New Brunswick Child and Youth Advocate for a more integrated, community-based and therapeutic approach to disturbed adolescents find any resonance in the proposed changes to the philosophy of the *YCJ Act*, as enunciated in the Declaration of Principles, and elsewhere?

In neighbouring Nova Scotia, another woman, Carol McEvoy, died when she was hit by a car driven by a youth who was “spiralling out of control” as described by the Enquiry Commissioner, Mr. Justice Nunn. Some of the *YCJ Act* amendments proposed do address the legislative defects noted by Mr. Justice Nunn, but he has subsequently observed that they go well beyond his recommendations, and not in a positive way. What has not received equal attention on the national stage are Mr. Justice Nunn's extensive recommendations (28 of his 34 recommendations) about the administration of youth justice and the provision of educational, psychological and other support services for youth at risk.

Both the Ashley Smith and Carol McEvoy cases remind us of the critical role of the provinces and territories in implementing the national youth justice scheme. The culture of the provincial systems, and the range and quality of the services deployed, profoundly impact the outcomes achieved in each jurisdiction. The Federal/Provincial/Territorial cost-sharing agreement provides much appreciated support to these services. The other vital contribution the federal government can make to ensure an appropriate youth justice culture and associated services is to provide a defining legislative framework, which communicates unequivocal expectations about the primacy of child development practices in achieving public safety. The current disparity in services and practices in youth justice across the

[3] Nunn, M. (2006) *Spiralling out of Control: Lessons learned from a boy in trouble.* Halifax: Government of Nova Scotia.

country is unacceptable.

Welcome Changes

Diminished Moral Blameworthiness, Section 3(1)(b)

The inclusion of this concept is an important improvement in Section 3(1)(b), resonating well with the *Convention on the Rights of the Child* and also recognizing the science of adolescent brain development.

Pre-trial Detention Section 29(2)

The amendments bring much needed clarity to this section, inasmuch as they create a "self-contained" detention section in which all the relevant rules can be located. The combination of the amended Pre-trial Detention section with the proposed new definitions of "serious" and "violent" offences does cause some concern however, as it will widen the net of pre-trial detention to an extent not required to remedy the defects noted by Mr. Justice Nunn. The; proposed amendment also precludes a judge from detaining a youth charged with failing to comply with non-custodial sentences. I will discuss these aspects later in this submission.

Place of Detention 76(2)

This prohibition on placing a youth under 18 years of age in an adult facility is a commendable change. It has not been the practice in British Columbia to place anyone under 18 in an adult facility, and it is appropriate that this becomes a national practice.

Changes which Cause Concern

"Hardening" the Language of the *YCJ Act*

Taken together, several proposed language shifts in the *YCJ Act* signal a "getting tough on youth crime" ideology. These include the replacement of "long-term protection of the public" with simply "protecting the public" as the purpose of the youth justice system (Section 3(1)(a), and the addition of "to denounce unlawful conduct" and "to deter the young person" in Section 38 (2), the Sentencing section. These minor changes may have limited impact in most cases, but could "tip the balance" in marginal cases, leading to custodial sentences where they might not otherwise have been imposed, or to longer custodial sentences. Research on judicial behaviour indicates that the language employed in the *YCJ Act* does make a difference in the sentencing process. (Cesaroni and Bala 2008)

Where the current *YCJ Act* articulates three equal objectives (prevent crime, rehabilitate young persons, ensure meaningful consequences) which all work together to "promote the

long-term protection of the public", the proposed amendment places "protecting the public" at the beginning, and qualifies all that follows. As well as the significant loss of "long-term" protection, it may limit the role of "the parents, extended family, the community and social or other agencies" as set out in Section 3(1)(c)(iii).

The proposed Section 3(1)(a)(iii) is ambiguous. It is not clear if "supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their behaviour" refers to community interventions generally, or to extra-judicial measures specifically. A clearer option would simply read "supporting the prevention of crime."

The introduction of the term "denunciation" in Section 38(2) is an unhelpful import from the adult criminal justice system, from which the youth system takes pains to separate itself in Section 3(1)(b). It would also be redundant if the reference to "meaningful consequences" currently in Section 3(1)(a) were retained. While conveying roughly the same intent, "meaningful consequences" more appropriate language for young people.

Other commentators have already noted that the concept of specific deterrence is not supported in the research literature, and this additional import from the adult system is particularly unsuited to impulsive youth who have underdeveloped executive functions (judgement) and a heightened sensitivity to the often miscalculated rewards of bad conduct. (Steinberg 2010)

New definitions of "serious" and "violent" offences. Section 2(1)

While intended to address the legitimate concerns of Mr. Justice Nunn about the court's ability to detain a youth recklessly driving a stolen car and placing the community at risk, the proposed amendments as drafted cast the detention net more widely than necessary.

The proposed new definition of a "serious offence" would capture, among others, *Criminal Code* Section 252 (failing to stop at the scene of an accident) and Sections 322/332/334(a) Theft Over $5,000. As well, this definition is not congruent with the sentencing limitations in Section 39(1) which do not permit a custodial sentence for a serious offence. Thus, youths could be remanded in custody for offences for which they could not ultimately be sentenced to custody. It is difficult to calculate the full effect of this change, but the potential impact on vulnerable youth, increasing the risk of a custodial sentence, is worrisome.

The proposed definition of "violent offence" may capture *Criminal Code* Section 249(1) and (2) (dangerous driving without injury) and Section 266 (common assault, which can include behaviour as minor as spitting or shoving). The need to account for the "endangerment" factor is understood, but the definition as proposed leads us down a path of "what ifs" which will be potentially very problematic at the bail hearing, when alleged facts can appear more convincing than the facts found later at trial.

Both Professor Nick Bala and the Canadian Bar Association have suggested adding either a "mental element" or a "knowledge element" to ensure the youth could or should have anticipated the dangerous nature of the conduct, and I endorse the suggested approach.

Pre-trial Detention, Section 29(2)

As referenced earlier, the renovation of this section is welcomed, but an important tool may have been inadvertently discarded during construction. The current Section 29(2) contains no presumption against detention if the offence is one which could ultimately attract a custody sentence. And the sentencing provisions in Section 39 specifically authorize the imposition of a custody sentence where the young person has failed to comply with non-custodial sentence*s.* (Note the plural) If Section 29 is "detached" from Section 39 as proposed, the authority to detain for non-compliance is lost.

As Representative for Children and Youth, I have expressed concern about at-risk youth who are living in the care of the government, or in the home of a relative, who plunge deeper into the justice system, not on the basis of any substantive offence, but solely because they lack the personal strengths and social supports to comply with court orders. These are often highly vulnerable youth with tenuous connections to caregivers, a great deal of anger, and poor problem-solving skills. They frequently break foster home rules, run away when encountering adversity, or fail to attend school or probation appointments. Our report, *Kids, Crime and Care*, documents that children in care constituted nearly half the youth charged with administration of justice offences in British Columbia.

There is some attraction in depriving judges of the ability to detain these youth in custody on a simple breach charge. Other more creative means of enlisting the co-operation of challenging youth would have to be sought. However, the reality is that some breaches represent a risk to public safety, including the safety of other children and youth. This occurs when conditions protecting other persons are involved or when the breach represents a dangerous step in an established pattern (a crime cycle) likely leading to a serious offence. While I would welcome some language which discourages judges from detaining where public safety is not compromised, I believe discretion to detain for non-compliance is required in the *YCJ Act.*

Application of Adult Sentences, Sections 64(1) and (2) and Section 72(1)(a)

While it was necessary to amend this section to comply with the Supreme Court of Canada decision in *R. v. D.B.,* the status quo, where Crown brings an application for an adult sentence, at their discretion, is perfectly workable and appropriate. The proposed amendment is unfortunate on two fronts: it places an unnecessary emphasis on adult sentencing; and it places an unprecedented obligation on the prosecution to tell the court they have considered the application and decided not to pursue it. As the Canadian Bar Association has noted, "this suggests a basic mistrust of Crown Counsel and their ability to

properly use prosecutorial discretion." (Canadian Bar Association 2010)

The proposed requirement to rebut the presumption of diminished moral blameworthiness in Section 72(1)(a) is a potentially helpful measure. It could help to prevent the imposition of adult sentences on young people who may actually suffer from a developmental disability or whose limited insight and faulty judgement may simply be commensurate with their age. However, as a judge, I have difficulty conceiving the evidentiary requirements to rebut the presumption. The proposed amendment makes no reference to psychiatric or neuropsychological assessments or evidence of cognitive functioning, decision making, or behaviour. In the absence of any guidance in the *YCJ Act*, one is left to fear prolonged peregrinations in uncharted territory, until some definitive case law is produced.

Lifting Ban on Publication, Section 75

The proposed amendments represent an unnecessary and onerous burden on the court. If a "violent offence" is redefined as proposed, hearings on the lifting of the publication ban will be required in a very large number of cases, including every case of common assault. Furthermore, the threshold for lifting the ban appears to be both very low and rather ambiguous. Again, lengthy hearings to try to determine if lifting a publication ban would enhance public safety can be anticipated.

Publication is already permitted in specified circumstances – the imposition of an adult sentence, and the escape from custody of a dangerous youth. More frequently employed, and more effective, are the provisions in Section 119 and in 125 (6) which permit targeted information sharing with victims, those involved in the supervision of the youth and specified professionals, such as school authorities. Section 127 provides for application to the court for permission to disclose information to persons who may be at specific risk from a youth. Together, these provisions allow sharing with the people who are potentially most impacted by the risk, or who are best situated to help manage the youth's risk as part of the supervision "team".

There is no evidence that general publication of youths' names brings any greater protection to the public. Names and particulars of adult offenders are routinely published. Does anyone clip these items from the newspaper or keep a list on their refrigerator, and then take some course of action which would guard against these individuals?

Police advice about securing one's home against break-ins, or avoiding particular fraud schemes may well be helpful, but this advice does not need to have offender names attached to it to be effective.

If publication is intended to have some kind of specific deterrence effect, this again is without empirical evidence, and experience with youth offenders suggests there is a risk of the opposite impact. Some youth, sadly, seek notoriety.

What is clear to all who work with youth offenders is the potential damage to "the rehabilitation and reintegration of young people", words retained in the amendments proposed for the Declaration of Principle. It is difficult to conceive how the publication of a youth's identity will assist parents, caregivers and professionals in normalizing the youth's life and engaging them in the pro-social activities which are associated with reduced offending. Furthermore, there will be "collateral damage" to the youth's siblings and others in the family circle. Youths and their family members could be devastated for years by the stigma, exacerbating the social exclusion and rejection which many already endure.

Finally, these proposed amendments do not reflect the concerns expressed in the Quebec Court of Appeal's Reference re: Bill C-7, (2003) Q.J. No. 2850, paragraph 278.

In summary, the amendments regarding publication are particularly unhelpful, and without legal or social science backing. One is left to conclude that the impetus to reveal offenders' names is more about retribution than balanced justice or public safety.

Extra – judicial Sanctions, Section 39(1)(c) and Police Record Keeping, Section 115

The proposed amendments are a matter of concern in terms of potential impact on the administration of justice. They may place youth at greater risk of custodial sentences because in the past they accepted responsibility for an act and were subject to extra-judicial sanctions. This is highly problematic because there has been no judicial finding of guilt, and the acceptance of responsibility was likely made in the absence of legal advice. In fact, the Ontario court of Appeal in *R. v. S. (LO(2006)215 C.C.C.(3d) 246, 218) O.A.C. 49 (C.A.)* specifically denied youth counsel where extra-judicial sanctions were being contemplated by the Crown.

If enacted, this provision will trigger changes in the practice of extra-judicial sanctions. Youth will need to be cautioned in every instance about the potential use of the sanction in future sentencing hearings. This in turn could have a "chilling" effect on the use of these sanctions. This would be most unfortunate, as the growth in pre-court diversion has been one of the important achievements of the *YCJ Act*.

In terms of police record keeping, it may well be good practice for police agencies to keep records and determine if an extra-judicial measure has been previously employed with a particular youth. But the leap from good practice to statutory requirement must spring from some compelling argument, which appears absent in this case. The risk that some undeserving minor offender may inadvertently be afforded a second or third chance may occasion some moral indignation, but there is hardly a major threat to public safety. In fact, a second or third chance may well be appropriate for a youth with developmental disabilities or other challenges. As well, this provision may require the creation of complex and costly systems.Taken together, the proposed 39(1)(c) and 115 blur the distinction between diversion

and court proceedings. They create what is tantamount to an "enhanced" youth court record, thus damaging a highly successful scheme of alternatives to court, and potentially increasing the youth court workload.

Other Recommendations for *YCJ Act* Amendment

Deferred Custody and Supervision Orders, Section 42(2)(p)

Deferred Custody and Supervision Orders, an innovation of the *YCJ Act*, have proven very effective in the community supervision of youth who might otherwise be incarcerated. If the proposed amendment to the definition of "serious violent offence" were to be enacted, it would make the Deferred Custody and Supervision Order available to a greater range of offences. However, it would be appropriate to raise the current six month limit on these orders to one year.

Youth with Developmental Disabilities

The experience of both adults and youth with developmental disabilities, such as Fetal Alcohol Spectrum Disorders (FASD), in the criminal justice system has been a subject of increasing concern in recent years. "Developmental disabilities" are defined here as severe, chronic intellectual or cognitive disabilities that manifest at birth or during childhood, are expect to continue indefinitely and substantially restrict the individual's functioning.

The Public Health Agency of Canada hosted a National Roundtable on FASD for youth justice officials and service providers in Vancouver in 2008. There was also a conference in Whitehorse in 2008 which produced *The Path to Justice: Access to Justice for Individuals with FASD. (*Fraser 2008) This national event gathered justice official, experts and community representatives and concluded that much more work was required on the criminal law to appropriately reflect the circumstances of victims and offenders with FASD. This past August the Canadian Bar Association passed a resolution entitled *Fetal Alcohol Spectrum Disorder in the Criminal Justice System.* In a October 15, 2010 News Release, the Federal/Provincial/ Territorial Ministers Responsible for Justice recognized that FASD affects many offenders and victims, committed to making this a priority item, and promised to engage with the CBA about FASD as an "access to justice issue". There are, of course, many other advocates, health professionals and service providers who should also be consulted.

FASD is only one of a number of impairments which would not generally achieve the threshold for a finding of 'not criminally responsible on account of mental disorder', but which may limit the ability of an adult or youth to participate meaningfully in a criminal justice proceeding, and to respond appropriately to any resulting decision or sentence. Our inability to accurately document the prevalence of FASD and other developmental disabilities among the youth justice population is embarrassing. Incomplete data and inconsistent approaches to charging, diversion, fitness to stand trial and sentencing, all contribute to this. However, there

is little doubt that our youth custody centres are coping with large numbers of disabled youth, who with proper diagnosis and intervention might have avoided the behaviour which propelled them into custody, or who might be more productively managed in other environments.

Some specific provision in the *YCJ Act* for youth with developmental disabilities would be a strong step in a helpful and just direction. At minimum, we must consider how these proposed amendments will impact this vulnerable population.

A Plea for Simplicity

Mr. Justice Nunn, in his report, made references to "hasty legislative drafting" and "lack of clarity and undue complexity". He was referring to the pre-trial detention provisions, but the same might be observed about large parts of the *YCJ Act.* While the principles and the innovations in the current *YCJ Act* are commendable, it is largely impenetrable to anyone save experienced youth court judges and counsel, and youth specialists in police and corrections. It is certainly not understandable to young people, their parents, victims, or the general public.

Recent research suggests that while the *YCJ Act* encourages parental involvement, there is no evidence that this aspect has improved since 2003. (Peterson-Badali and Broeking 2010) Many key players cite a lack of understanding of the system as one of the causes of this parental disengagement. This is of great concern to me as the Representative for Children and Youth, because youth particularly need the informed participation of their parents and caregivers when they are going through the tribulations of a court case. We do not even know how often they speak directly to the court. This was a worthy concept to add to the *YCJ Act,* but we know little of its administration at a practical level.

Although it would take a major effort, a thoughtful and skilled attempt to streamline the *YCJ Act* and make it more readily comprehensible to all who are affected by it would yield important rewards in terms of public and family support and engagement. Such an effort may well prove more helpful than many of the even more complex changes currently proposed.

Conclusion

I was pleased to participate in Roundtable discussions on the *YCJ Act* in 2007 with the federal Minister of Justice, provincial Attorney General, and a range of other officials engaged in the youth justice system. However, I am perplexed as to why the results of this and other Roundtables have never been shared with the participants or public.

I also recall a commitment to a specific Aboriginal forum on the *YCJ Act,* given the significant and disproportionate impact the legislation has on Aboriginal youth. I would have welcomed this and attended if invited, or worked to ensure that Aboriginal youth from British Columbia

were able to participate and be heard. I do not believe any such forum was held to ensure consultation prior to these amendments being proposed. This is certainly a missed opportunity to hear from an important constituency of youth affected by the system.

I want to reiterate the importance, not just of complying with the *United Nations Convention on the Rights of the Child*, but of defining and measuring the outcomes which will tell us how well we are complying. We need national standards for reporting on youth justice and the factors connected to adolescent well-being. Adolescent safety, health, education, peer connections and other outcomes are significantly related to preventing criminal behaviour. Canada needs a rigorous and comprehensive set of measures if we are to promote the best outcomes for our children and youth.

Children and youth who are victims, offenders, witnesses or otherwise involved in the youth criminal justice system in Canada deserve a strong and effective system that responds to their circumstances and recognizes that this response contributes to public safety. British Columbia has witnessed some very encouraging trends under the largely beneficial rule of the current *YCJ Act* and predecessor *YO Act*. These successes may be placed in some jeopardy should the proposed amendments be enacted.

In conclusion it is my observation that the evidence is not clear in support of many of the amendments before you. I recommend that changes be made to make these amendments consistent with the evidence on crime prevention, reduction and improving the lives of Canadian adolescents, especially those from vulnerable populations.

Summary of Recommendations (by YCJA Section)

Section 2(1) The proposed "serious offence" definition should **not** be added to the Definitions.

Section 2(1) The proposed "violent offence" definition should be amended to read "young person knows or ought to know would endanger the life or safety etc." as suggested by Professor Bala.

Section 3(1) The current wording of the Declaration of Principle should be retained. If the proposed new wording proceeds, at minimum proposed Section 3(1)(a)(iii) should be simplified to read **"**supporting the prevention of crime."

Section 3(1)(b) The subsection should be amended as proposed to include the "principle of diminished moral blameworthiness."

Section 29(2) The "justification for detention in custody" Section should be amended along the lines proposed, but should substitute "violent offence" for "serious offence" and include

accusations of non-compliance with "conditions of non-custodial sentences or other court orders related to the protection of the public" as a justification for pre-trial detention. (Proposal from Representative)

Section 38(2) The Sentencing Principles should **not** be amended to include "denounce unlawful conduct" and "deter the young person from committing offences."

Section 39(1)(c) The Committal to Custody Section should **not** be amended to include the words "either extrajudicial sanctions or of findings of guilt or of both" as proposed.

Section 42(2)(p) The Youth Sentences Section should be amended by specifying that the period of a deferred custody and supervision order would not exceed "one year." (Proposal from Representative)

Section 64(1) The Adult Sentence Section should **not** be amended by the addition of Subsection 1.1 (Obligation) requiring the Attorney General to consider an application for an adult sentence.

Section 72(1)(a) The proposed "Order of adult sentence" subsection should be amended to provide guidance about the evidence which would suffice to rebut the "presumption of diminished culpability." At minimum, the subsection should require psychiatric or other medical assessments which document a maturity or capacity for judgement which exceeds that normally associated with a youth aged between fourteen and seventeen. (Proposal from Representative)

Section 75 The existing "Inquiry by the court to the young person" section should **not** be replaced by the proposed "Decision regarding lifting of publication ban" section. ***(NOTE: I am wondering if the section needs to be amended otherwise to reflect R.v.D.B.?)***

Section 76(2) The Section should be amended as proposed to prohibit young persons under 18 years serving any portion of a sentence in an adult facility.

Section 115(1) The Extrajudicial Measures Section should **not** be amended by adding subsection 1.1 "The police force shall keep a record of any extrajudicial measures that they use to deal with young persons."

New: The Act should be amended to make specific provision for youth with developmental disabilities. (Proposal from Representative)

New: The Act should be reviewed and amended as required to make it easily understood by victims, youth, their parents or guardians and members of the public. (Proposal from Representative)

REPRESENTATIVE FOR CHILDREN AND YOUTH

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Appendices

Figure 1: Percentage of Involvement with the Justice System in B.C.[4]

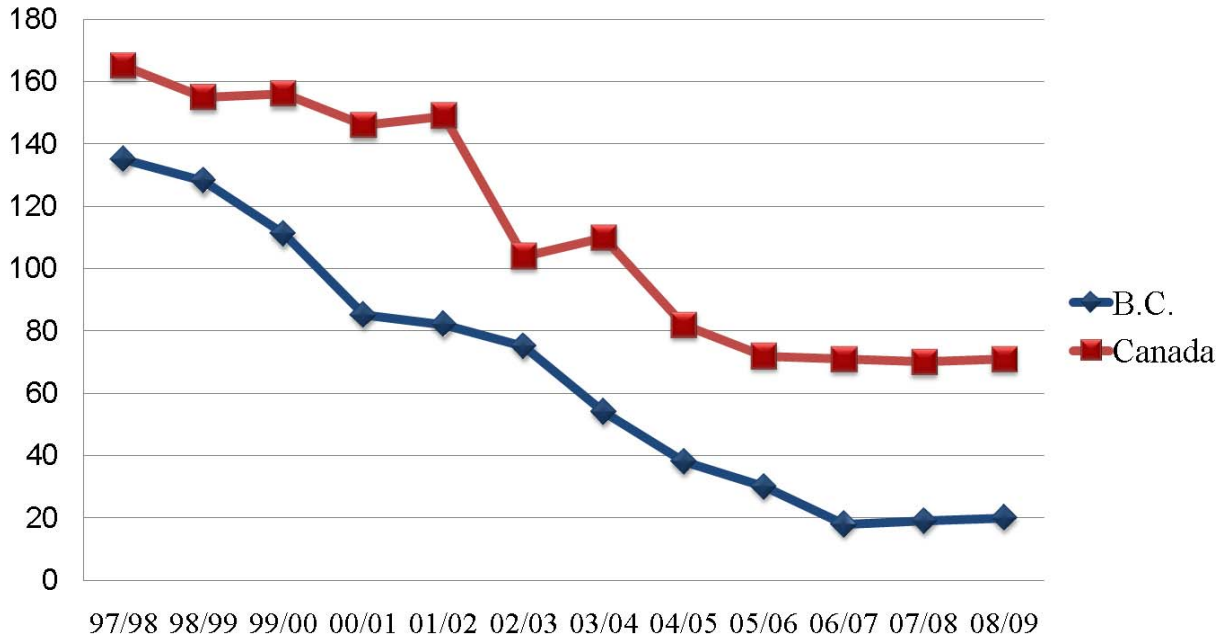
	Total	Youth Justice (age 12–17)	Justice (age 12–21)
Province	50,551	4.4%	6.6%
Male	25,886	5.8%	9.2%
Female	24,665	2.9%	3.9%
Children in Care	1,683	35.5%	40.8%
Male	827	44.1%	51.0%
Female	856	27.2%	30.8%
Continuing Custody	548	39.2%	44.9%
Male	279	47.3%	54.1%
Female	269	30.9%	35.3%
Temporary Care	1,135	33.7%	38.8%
Male	548	42.5%	49.5%
Female	587	25.6%	28.8%
Child in the Home of a Relative	1,177	22.6%	30.6%
Male	568	30.1%	40.1%
Female	609	15.6%	21.7%
Aboriginal	4,947	14.0%	19.5%
Male	2,469	17.4%	24.8%
Female	2,478	10.7%	14.2%

[4] Representative for Children and Youth and Office of the Provincial Health Officer (2009). *Kids, Crime and Care, Health and Wellbeing of Children in Care: Youth Justice Experiences and Outcomes* Victoria: Province of British Columbia , Figure 8, pg 29.

Figure 2: Characteristics of Youth Involved with the Youth Justice System in B.C.[5]

	Population		Male		Female	
	n	%	n	%	n	%
Cohort Size	50,551	—	25,886	51%	24,665	49%
Involvement with YJ (12–17)	2,212	4.4%	1508	5.8%	704	2.9%
Aboriginal	694	31.4%	429	28.4%	265	37.6%
Educational Special Needs	1367	61.8%	966	64.1%	401	57.0%
Children in care	598	27.0%	365	24.2%	233	33.1%
CIHR	266	12.0%	171	11.3%	95	13.5%
On income assistance by age 19	1467	66.3%	970	64.3%	497	70.6%
High School Graduation Rate	664	30.0%	435	28.9%	229	32.5%
History of Violence	533	24.1%	431	28.6%	101	14.3%

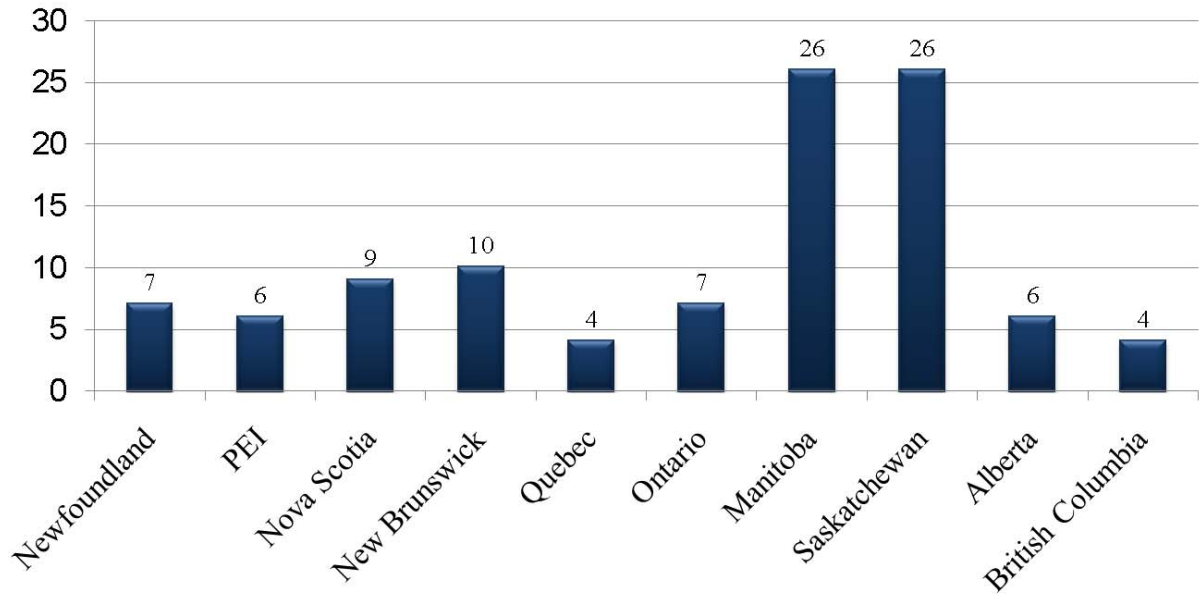
Figure 3: Youth Court Cases B.C. and Canada[6]



[5] Representative for Children and Youth and Office of the Provincial Health Officer (2009). *Kids, Crime and Care, Health and Wellbeing of Children in Care: Youth Justice Experiences and Outcomes* Victoria: Province of British Columbia, Figure 4, pg 25.

[6] Ministry of Children and Family Development, Youth Justice Policy and Program Support (2010). *The Impact of the YCJA* (Powerpoint presentation, based on data from Canadian Centre for Justice Statistics). Victoria: Province of British Columbia.

Figure 4: Per Capita Rates of Youth in Custody by Province 2008[7]



Rate per 10,000 Population

[7] Ministry of Children and Family Development, Youth Justice Policy and Program Support (2010). *The Impact of the YCJA* (Powerpoint presentation, based on data from Canadian Centre for Justice Statistics). Victoria: Province of British Columbia.