

“Too Bad, So Sad”: Observations on Key Outstanding Policy Challenges of Twenty Years of Youth Justice Reform in Canada, 1995-2015

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ABSTRACT

In 1995, significant changes were made to the *Young Offenders Act* (YOA) to address mounting criticisms. However, by 2003 the legislation was repealed and replaced with the *Youth Criminal Justice Act* (YCJA) that was recognized from the outset as a much different and more complicated piece of youth justice legislation. Like its predecessor, after thirteen years in operation, the YCJA has also undergone significant amendments aimed at fixing some of its perceived weaknesses. This article addresses the question of to what extent long-recognized problems with administering youth justice in Canada are now being addressed more effectively with the enactment and amendment of the YCJA and corresponding changes in provincial and territorial youth justice policy and practice that have been introduced over the past two decades. As part of our analysis of outstanding policy challenges, specific attention is given to the findings of research on regional variations in the nature and use of young offender diversion programs,

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remand custody, case outcomes, sentencing practices, and the issue of the disproportionate incarceration of Indigenous youth. Drawing on a wide range of published and unpublished research on the enactment and implementation of the YCJA, we argue that while significant progress has been made on some fronts – including the substantial reduction in the use of custody sentences – other areas of youth justice administration are still sadly in need of repair in Manitoba and elsewhere across Canada.

I. INTRODUCTION

Although much has been made in recent years about needed changes in the way in which we deal with young offenders in Canada, insufficient attention has been given to investigating the changes that have been made and the effects they are having on society and the lives of troubled youth involved in provincial and territorial justice systems. Particularly disturbing in this context is the continued over-representation of Indigenous youth in both remand and sentenced custody despite Supreme Court decisions and explicit legislative provisions designed to reduce this long historical trend.¹ The primary focus of this article is to examine the evolution of and challenges facing youth justice reform in Canada primarily during the tumultuous period from 1995 to 2015. This includes a review of the intense political and policy-related controversies surrounding the demise of the *Young Offenders Act* (YOA),² its replacement with the *Youth Criminal Justice Act*³ in 2002, and more recent amendments of the YCJA. In addition, building on the work of legal scholars⁴ and

¹ In a recent critical analysis of the problem of over-incarceration, Ryan Newell highlights the contested nature of the term “Aboriginal” as “inherently assimilationist” even though the term continues to be used in many sources, including “judicial authorities, research by government commissions, and academic articles by Indigenous and non-Indigenous scholars.” See Ryan Newell, “Making Matters Worse: the Safe Streets and Communities Act and the Ongoing Crisis of Indigenous Over-Incarceration” (2013) 51:1 *Osgoode Hall LJ* 199 at 201, 202. Given this sensitive concern, we use the term Indigenous except when citing directly from sources that have made prior use of the term Aboriginal.

² *Young Offenders Act*, RSC 1985, c Y-1 [YOA].

³ *Youth Criminal Justice Act*, SC 2002, c 1.

⁴ Nicholas Bala, Peter Carrington & Julian Roberts, “Evaluating the Youth Criminal Justice Act After Five Years: A Qualified Success” (2009) 51:2 *Canadian J of Criminology & Criminal Justice* 131; Nicholas Bala & Sanjeev Anand, *Youth Criminal Justice Law*, 3rd ed (Toronto: Irwin, 2012); Sherri Davis-Barron, *Canadian Youth and the*

researchers from other disciplines,⁵ we further explore how much of an impact specific sections of the YCJA had on related provincial/territorial youth justice policies, as well as evidence related to the outcomes of policy changes in provinces/territories, with particular attention given to Manitoba. In order to address these concerns, we review research findings on five essential youth justice outcomes: levels of youth crime and youth charging; the use of young offender diversion programs; youth court processing and case outcomes; remand and sentenced custody; and the issue of the disproportionate incarceration of Indigenous youth. Before undertaking in this review, we first provide a needed discussion of previous historical shifts in youth justice discourse and practice concerning Canada's initial 1908 *Juvenile Delinquents Act (JDA)* and the subsequent lengthy period leading to the eventual enactment of the YOA in 1982.⁶ This historical context is required to contrast the complex defining features of the politics of contemporary youth justice reform with the earlier experience in Canada from the late-19th century to the 1980s. In particular, having knowledge of this historical background enables one to more adequately assess the extent to which long-recognized problems with administering youth justice in Canada are now being addressed more effectively through YCJA and corresponding changes in provincial and territorial youth justice policies and practices, which have been brought into effect over the past two decades. Collectively, our analysis of historical and contemporary Canadian youth justice reform outcomes leads to addressing the critical question of: "Can the system be improved further, and if so, what legal principles and policies need to be considered?"

Criminal Law: One Hundred Years of Youth Justice Legislation in Canada (Markham: LexisNexis Canada, 2009); Newell, *supra* note 1.

⁵ Marc Alain, Raymond R Corrado & Susan Reid, eds, *Implementing and Working with the Youth Criminal Justice Act Across Canada* (Toronto: University of Toronto Press, 2016); Peter J Carrington & Jennifer L Schulenberg, "Structuring Police Discretion: The Effect on Referrals to Youth Court" (2008) 19:3 *Criminal Justice Policy Review* 349; Raymond R Corrado, Sarah Kuehn & Irina Margaritescu, "Policy Issues Regarding the Overrepresentation of Incarcerated Aboriginal Young Offenders in the Canadian Context" (2014) 14:1 *Youth Justice* 40; Jane Sprott & Anthony N Doob, "Gendered Treatment: Girls and Treatment Orders in Bail Court" (2010) 52:4 *Canadian Journal of Criminology and Criminal Justice* 427 [Sprott & Doob, "Gendered Treatment"].

⁶ Enacted as *Juvenile Delinquents Act*, SC 1908, c 40; with minor amendments to the *Juvenile Delinquents Act*, RSC 1970, c J-3.

In addressing this question our analysis points at two enduring problems with youth justice reform across Canada; first, the ongoing challenge faced in balancing the interests and rights of children with the perceived need for criminal accountability and justice; and, second, perhaps the more intractable problem of the variations in the way federal youth justice legislation (from the *JDA* to the *YOA*, and *YCJA*) has been implemented in the provinces and territories, which has resulted in inconsistent and inequitable application of the law. We argue that while the enactment of the *YCJA* and its implementation succeeded in obtaining key policy objectives, mainly the substantial reduction in the use of custody sentences, other youth justice reform priorities have arguably not been achieved. This is reflected in particular in the still dire need of policy and program reform to address issues connected with mental health services, addiction, homelessness, youth gang-involvement, and grossly inadequate program resources in non-urban areas generally. These legal and policy challenges are especially acute in provinces such as Manitoba, in all of the territories, and in Indigenous rural and urban communities. In the concluding section of our article we reflect on the key challenges of striving to create a youth justice system that works for the benefit of all Canadian youth. While acknowledging the promising steps some provinces have taken toward this end, we argue that additional progressive youth justice reform in Canada will require both agreement by politicians to avoid promoting ideological-driven youth justice policy agendas, and more commitment on the part of policy makers and researchers to actively support and engage in evidence-based knowledge production and transfer based on a “best practices” in youth justice model.

II. A SHORT HISTORY OF CANADIAN JUVENILE/YOUTH JUSTICE REFORM TO 1982

The enactment of the *Juvenile Delinquents Act* in 1908 coincided with and was directly influenced by the movement toward enacting similar child-welfare model juvenile justice legislation in other countries, particularly the US.⁷ This radical and innovative movement was led by the Canadian

⁷ Russell Smandych, “From ‘Misguided Children’ to ‘Criminal Youth’: Exploring Historical and Contemporary Trends in Canadian Youth Justice” in John Winterdyk & Russell Smandych, eds, *Youth at Risk and Youth Justice: A Canadian Overview*, 2nd ed (Toronto: Oxford University Press, 2016) 4.

lobbyists J.J. Kelso and W.L. Scott, who travelled to the United States to study the initial state juvenile justice reforms especially in Illinois. They worked together first in Ontario to effectively influence legislators to introduce changes in provincial child welfare and protection legislation. Along with other ‘child savers’, they then shifted their reform efforts to lobbying at the federal level in Ottawa. The *JDA* initially incorporated a mix of Ontario’s policy approach to dependent and delinquent children and the child-welfare model imported from the US.⁸ In other words, the *JDA* represented a fundamental legal philosophical change in juvenile justice administration in Canada from a form of “generalized classical governance,”⁹ under which young offenders were treated more or less like adults, to a form of “modern legal governance,”¹⁰ in which delinquent and dependent children would be dealt with separately from adults and more often through non-custodial child welfare interventions put into place in the community. The *JDA* made the supervision of juvenile offenders in the community a central feature by way of probation and cast a wide jurisdictional net in defining the types of delinquent and dependent children. This unprecedented legal jurisdiction was expanded in the 1924 revision of the Act which introduced ‘status offences’; behaviours that were considered delinquent or criminal only because the person was not yet an adult.¹¹ The *JDA* also introduced other fundamental changes. Most importantly, it provided provincial probation officers, judges, and correctional officers extensive discretionary power. This resulted in considerable variations in provincial laws and policies related to the implementation of the *JDA*. These included: the discretion to sentence children to “indeterminate sentences” of incarceration (to the age of 21); the power to allow provinces to decide on the cut-off age, above 15, at which point a trial involving a young person would be held in adult court; the discretion given to provinces to determine both the timing of the initial

⁸ *Ibid.*

⁹ Bryan Hogeveen, “Winning Deviant Youth Over by Friendly Helpfulness’: Transformations in the Legal Governance of Deviant Children, 1857-1908” in Russell Smandych, ed, *Youth Justice: History, Legislation, and Reform* (Toronto: Harcourt, 2001) 43 at 45 [Hogeveen, “Friendly Helpfulness”].

¹⁰ *Ibid.*

¹¹ *Juvenile Delinquents Act*, RSC 1924, c 53; cited in Davis-Barron, *supra* note 4 at 41.

establishment of juvenile courts; and, the degree to which the *JDA* would be implemented uniformly across a province.¹²

Given these forms of discretionary power, it is not surprising that provincial juvenile courts' procedures and outcomes, including correctional services, varied substantially throughout most of the twentieth century. For example, many rural and remote areas did not have functioning juvenile justice systems well into the 20th century. These provincial/territorial differences, along with variations in the maximum jurisdiction age for juvenile offenders, also contributed to substantial inter-provincial and regional variations throughout the existence of the *JDA*.¹³ Variations in practice were further evident even within provinces. Legal and correctional program resources available in large metropolitan regions were simply less available in small towns and not at all in rural communities. As well, variations were further facilitated because the child-welfare model and legal principles of the *JDA* allowed for informal court proceedings that were closed to the public. Lawyers were discouraged from appearing on behalf of accused young offenders given the then prevailing theoretical assertions or 'accepted wisdom' concerning the need to avoid unnecessary technicalities¹⁴ that would interfere with or delay the treatment considered to be in the child's best interests.

By the 1960s precedent setting US Supreme Court decisions in cases such as in *Re Gault*,¹⁵ started the legal and political movement that

¹² Hogeveen, "Friendly Helpfulness," *supra* note 9; John Hagan & Jeffery Leon, "The Rehabilitation of Law: A Social-Historical Comparison of Probation in Canada and the United States" (1980) 5:3 *Canadian J of Sociology* 235; Alison J Hatch & Curt T Griffiths, "Child Saving Postponed: The Impact of the Juvenile Delinquents Act on the Processing of Youth Offenders in Vancouver" in Russell Smandych, Gordon Dodds & Alvin Esau, eds, *Dimensions of Childhood: Essays on the History of Children and Youth in Canada* (Winnipeg: Legal Research Institute of the University of Manitoba, 1991) 233.

¹³ Joan Sangster, *Regulating Girls and Women: Sexuality, Family, and the Law in Ontario, 1920-1960* (Toronto: Oxford University Press, 2001); Neil Sutherland, *Children in English-Canadian Society: Framing the Twentieth-Century Consensus* (Toronto: University of Toronto Press, 1976).

¹⁴ Nicholas Bala, *Young Offenders Law* (Toronto: Irwin Law, 1997) at 6 [Bala, *Young Offenders*].

¹⁵ *In re Gault*, 387 US 1 (1967); cited in David S Tanenhaus, "The Elusive Juvenile Court: Its Origins, Practices, and Re-inventions" in Barry C Feld & Donna M Bishop, eds, *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (New York: Oxford University Press, 2012) at 429. Tanenhaus discusses *In re Gault* alongside other US Supreme Court landmark juvenile justice cases of the period (at 429-433).

questioned key welfare model principles underlying all states' juvenile justice laws and the *JDA*. For example, defence lawyers began to increasingly appear in juvenile courts (usually in major cities) as legal counsel. As well the *JDA* began to be criticized on several of its fundamental legal principles including the informality of proceedings and the lack of due process legal rights for accused youth.¹⁶ Beginning in the mid-1960s and for almost the next two decades, politicians, child and youth advocacy interest groups, lawyers, judges, and criminologists both collaborated and debated several bills to replace the *JDA*. The earlier failure to enact three attempted legislative replacements of the *JDA* finally culminated in the introduction of Bill C-61 in the House of Commons in early 1981, and its subsequent enactment as the *Young Offenders Act* in 1982.¹⁷ In their later 1992 account of events leading to the enactment of the *YOA*, Corrado and Markwart, who were both active earlier in implementing the *YOA* in British Columbia, note that a wide "political consensus about the fundamental direction of juvenile justice reform"¹⁸ emerged both within and outside of Parliament at the time, and "the legal rights orientation of the Bill went virtually unchallenged";¹⁹ as the Bill "eventually passed with the unanimous approval of all three political parties."²⁰

¹⁶ Bala, *Young Offenders*, *supra* note 14.

¹⁷ Raymond R Corrado & Alan Markwart, "The Evolution and Implementation of a New Era of Juvenile Justice in Canada" in Raymond R Corrado et al, eds, *Juvenile Justice in Canada: A Theoretical and Analytical Assessment* (Toronto: Butterworths, 1992) 137 at 150 [Corrado & Markwart, "Evolution and Implementation"].

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.* More specifically, Corrado & Markwart, "Evolution and Implementation" (at 140) argue that: The key factors in juvenile justice reform in Canada during this period [were] not political ideology, public concerns or the media, but rather the dynamic interplay of federal and provincial politics arising from Canada's unique constitutional arrangements; the role of senior federal and provincial civil servants, who in turn were influenced by criminological/legal theory and research; and, to a lesser extent, professional interest groups.

III. THE SHORT AND TROUBLED LIFE OF THE *YOUNG OFFENDERS ACT (YOA)*

Despite the initial consensus backing the YOA, its relatively short 19-year existence – starting from its implementation in 1984 – was marked with controversy from the outset and it underwent several significant amendments before it was finally replaced in 2003. The YOA did introduce a number of fundamental philosophical procedural changes, many of which have since continued to provide the basis for youth justice in Canada.²¹ However, several of these YOA key principles came under intense scrutiny and attack by public, interest group, and media-based critics of the right (law and order constituency) and left (liberal/“best interests of the child”) orientation. For example, the YOA was criticized from its outset by ‘law and order’ proponents in the public and related ‘not tough enough on crime’ interest groups. These critics focused on the perceived leniency of the YOA, including its short sentences (of 3 to 5 years) for violent offenders and youth convicted of murder and not raised to adult court, along with the apparent lack of individual (convicted) and general deterrence of future serious and violent offenders.²² A competing perspective, which involved primarily lawyers and criminologists, focused on the YOA’s poorly articulated and conflicting principles.²³

²¹ These included: changes concerning *the definition of young offenders* (setting the age range of young offenders at 12 to 17 across the country, and by abolishing status offences); changes concerning *the legal rights of youth* (providing more due process safeguards for accused youth, including an absolute right to a lawyer and a strict prohibition against publicizing the names of accused and convicted young offenders); as well as changes concerning *the sentencing of young offenders* (setting the maximum sentence for a conviction under the YOA at three years, introducing “alternative measures” dispositions for less serious offenders, and making provision for the transfer of young offenders to adult court when it was seen to be in the “interests of society,” having regard to the “needs of the young offender.” YOA, *supra* note 2, s 16(1); see also, generally, Bala, *Young Offenders*, *supra* note 14.

²² Bala, *Young Offenders*, *supra* note 14.

²³ Paul Havemann, “From Child Saving to Child Blaming? The Political Economy of the *Young Offenders Act* 1908–1984” in Stephen Brickey & Elizabeth Comack, eds, *The Social Basis of Law* (Toronto: Garamond, 1986) 225; Paul Havemann, “Crisis Justice for Youth: Making the *Young Offenders Act* and the Discourse of Penalty” in Dawn Currie & Brian McLean, eds, *Rethinking the Administration of Justice* (Halifax: Fernwood, 1992) 86.

As early as 1986, amendments were introduced to address “concerns raised by police and provincial governments about difficulties with implementing the YOA,”²⁴ specifically sections involving “record keeping, breach of probation orders, and publication of identifying information about dangerous persons.”²⁵ These amendments marked the beginning of efforts to ‘add teeth’ to the legislation. It is clear the amendment concerning ‘breaching’ did have this effect. For instance, Doob and Sprott pointed out that by 2000, the new offence of “failure to comply with a disposition”²⁶ was responsible for 23 percent of custodial sentences handed down by judges in young offender cases across Canada. Later major amendments to the YOA followed in 1992 and 1995, which led to raising the maximum sentence for murder available in youth court from 3 to 10 years, making it progressively easier to transfer cases to adult court, and introducing “presumptive” offences for 16 and 17 year olds.²⁷ The latter had enormously controversial implications because it entailed that if a youth of this age was charged with murder, manslaughter, attempted murder, and aggravated sexual assault, they would be “presumptively” transferred to adult court unless legal counsel successfully argued that the transfer should not take place.²⁸ In addition, the length of sentence to parole eligibility was reduced for transferred young offenders who were convicted of homicide in adult court.²⁹ In response to the intense criticism concerning the YOA’s contradictory sentencing principles the newly elected Liberal federal government also introduced a revised and expanded “Declaration of Principle” in the 1995 amendment of the YOA.³⁰

²⁴ Bala, *Young Offenders*, *supra* note 14.

²⁵ *Ibid.*

²⁶ Anthony N Doob & Jane B Sprott, “Youth Justice in Canada” in Michael Tonry & Anthony N Doob, eds, *Youth Crime and Justice: Comparative and Cross-national Perspectives* (Chicago: University of Chicago Press, 2004) 185 at 216 (Table 3) [Doob & Sprott, “Youth Justice in Canada”].

²⁷ See generally, Bala, *Young Offenders*, *supra* note 14.

²⁸ Bala, *Young Offenders*, *supra* note 14.

²⁹ Whereas up to 1992 a youth convicted of first degree murder in adult court was required to serve a minimum of 25 years before being eligible for parole, the parole eligibility date was reduced to between 5 and 10 years from 1992 to 1995 and, in turn, after 1995, to 5 to 7 years for 14 and 15 year olds, and to 10 years for 16 and 17 year olds (Bala, *Young Offenders*, *supra* note 14 at 277, 287).

³⁰ Bala, *Young Offenders*, *supra* note 14 at 35-36.

In addition to the increase in custodial sentences partly brought about by the new offence of failure to comply with a disposition, the YOA and its later amendments had several other and often controversial impacts on the processing of youth through the justice system. Most notably, as discussed below, these included changes in youth apprehension and charging practices, the use of alternative measures, youth custody, and transfers to adult court. Moreover, it soon became unmistakably evident that despite all the philosophical principles designed to protect the rights of “vulnerable” youth that were embedded in the YOA, the overrepresentation of Indigenous youth in youth courts and custody, especially in western provinces, was morally and politically untenable.

A. Youth Apprehension and Charging Practices

From his study of changes in apprehension and charging practices before and after the introduction of the YOA, Peter Carrington showed that the per capita rate of young persons charged increased significantly with the enactment of the YOA until the mid-1990s.³¹ Specifically, he found that while the average rate of youth apprehended by police³² increased 7 percent in the period 1986-96 compared to 1980-83, the average charge rate in the period 1986-96 was 27 percent higher than during 1980-83.³³ However, Carrington also found significant provincial variations in rates of youth charging both before and after the introduction of the YOA.³⁴ He concluded from this that apart from a temporary slight increase in the early nineteen-nineties, the level of police-reported youth crime changed very little since 1980 and that the slight increase that did occur was not likely due to the YOA. However, he did find that with the implementation of the YOA, in four provinces and one territory that had previously low rates of charging youth under the *JDA*,³⁵ charge rates “increased suddenly and substantially, reaching levels similar to those already existing in the other jurisdictions.”³⁶ Police-reported youth crime and court processing data from 1996 to

³¹ Peter Carrington, “Trends in Youth Crime in Canada, 1977-1996” (1999) 41:1 *Canadian J of Criminology* 1.

³² That is, the average rate per 100,000 of police-reported youth crime.

³³ Carrington, *supra* note 31 at 16, 19 (Figures 2 and 3).

³⁴ *Ibid* at 19-20 (Figures 4, 5a, and 5b).

³⁵ Prince Edward Island, Saskatchewan, Nova Scotia, Northwest Territories, and Ontario.

³⁶ Carrington, *supra* note 31 at 2.

1999/2000 showed a continued decline in youth crime (apprehension) and charging rates, and the number of cases that came before youth courts in the last years of the YOA.³⁷ These decreases are particularly important to note in the context of researchers' later attempts to assess differences in charge and custodial sentences patterns between the YOA and the YCJA. Most crucially, they show retrospectively that youth court processing and custody rates already had declined substantially before the YCJA in most provinces, though this trend accelerated after its implementation. As shown in a study by Sprott and Doob,³⁸ in Quebec however, the rate of cases going to youth court remained stable but at a lower rate throughout the 1990s.³⁹

B. Alternative Measures

Under the YOA, "alternative measures" were formalized programs created by individual provinces that allowed young offender cases to be dealt with through non-judicial and community-based alternatives, instead of proceeding to court. Typical alternative sanctions for youth who took responsibility for their offences included community service, personal service or financial compensation to a victim, apologies, or educational

³⁷ Statistics Canada, "Youth Court Statistics, 1999/2000," by Mark Sudworth & Paul deSouza, in *Juristat*, Catalogue No 85-002-XPE (Ottawa: Statistics Canada, 2001) at 3 (Figure 2), online: <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2001003-eng.pdf>> [Statistics Canada, "Youth Court, 1999/2000"].

³⁸ Jane B Sprott & Anthony N Doob, "Two Solitudes or Just One? - Provincial Differences in Youth Court Judges and the Operation of Youth Courts" (2002) 44:2 *Canadian J of Criminology and Criminal Justice* 165 at 166 (Figure 1).

³⁹ Some Quebec scholars, including Jean Trépanier, "What Did Quebec Not Want? Opposition to the Adoption of the *Youth Criminal Justice Act* in Quebec" (2004) 46:3 *Canadian J of Criminology and Criminal Justice* 273, and Marc Alain & Sylvie Hamel, "The Situation in Quebec: 'Vive la Difference?'" in Alain, Reid & Corrado, *supra* note 5, 299, along with others such as Raymond Corrado & Alan Markwart, "Evolution of Juvenile Justice" in Robert A Silverman, James A Teevan & Vince R Sacco, eds, *Crime in Canadian Society* (Toronto: Harcourt, Brace & Janovich, 1997) at 25 [Corrado & Markwart, "Evolution of Juvenile Justice"], assert that since the enactment of the province's *Youth Protection Law* in 1977, the Quebec youth justice system has been based on corporatist model principles. In practice, this model is linked to procedures designed to facilitate the formal administrative diversion processing of nearly all youth apprehended by police other than the extremely few youth charged with the more violent offences and extreme prior charge records. In effect, Quebec constitutes an historical exception regarding the assessment of the impact federal youth justice laws on most of the controversial or unresolved provincial policies discussed above.

sessions. In many provinces, like Manitoba, alternative measures programs were administered primarily through volunteer ‘youth justice committees,’ with support from assigned youth justice and corrections personnel. In 1998-99, 33,173 youth cases reached agreement to participate in alternative measures, a rate of 135/10,000 youth across Canada.⁴⁰ Among provinces, Alberta had the highest rate of youth assigned to alternative measures (384/10,000), while British Columbia (63) and Ontario (66) had the lowest recorded participation rates.⁴¹ In the final few years of the YOA, the recorded use of alternative measures across the country declined by 18 percent from 120 per 10,000 youth in 1999/00 to 98 per youth 10,000 in 2000/01. Throughout the 1990s, Manitoba was one of the leading provinces in making use of alternative measures, ranking from first to fourth each year from 1997 to 2001.⁴²

To better understand both regional differences in the use of alternative measures under the YOA and how the later implementation of the YCJA would affect the use of youth diversion, it is helpful to compare Manitoba to other provinces. During the YOA, the Youth Corrections Branch of Manitoba provided substantial financial and other resources for the use of alternative measures through community-based volunteer youth justice committees.⁴³ In addition, both macro and unique micro (or disaggregated individual case and completion rate) data on the use of alternative across the province was collected and shared.⁴⁴ In 2003, during the transition year

⁴⁰ Statistics Canada, “Alternative Measures in Canada, 1998/99,” by Cheryl Engler & Shannon Crowe, in *Juristat*, Catalogue No 85-002-XIE (Ottawa: Statistics Canada, 2000) at 6 (Table 1), online: <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2000006-eng.pdf>> [Statistics Canada, “Alternative, 1998/99”].

⁴¹ *Ibid.*

⁴² It was third highest in the country, at 201 per 10,000 youth in the population in 1997/98, fourth highest in 1998/99 at 155/10,000, first in 1999/00 at 190/10,000, and fourth again in 2000/01 at 153/10,000. Statistics Canada, “Youth Custody and Community Services in Canada, 2000/2001,” by Julie Marinelli, in *Juristat*, Catalogue No 85-002-XIE (Ottawa: Statistics Canada, 2001) at 4 (see Table: “Youth Participation in Alternative Measures (AM), by jurisdiction, 1997/98 to 2000/2001”), online: <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2002008-eng.pdf>> [Statistics Canada, “Youth Custody, 2000/01”].

⁴³ Russell Smandych et al, “Youth Justice in Manitoba: Developments and Issues under the YCJA” in Alain, Corrado & Reid, *supra* note 5, 88 [Smandych et al, “Youth Justice in Manitoba”].

⁴⁴ In 1998–1999, Manitoba was the only jurisdiction in the country to submit disaggregated micro-data on youth alternative measures to the Canadian Centre for

from the YOA to the YCJA, 57 designated rural and urban-based provincial youth justice committees existed in Manitoba.⁴⁵ Unfortunately, there is now very little publically available information on how youth justice committees are constituted or how they have operated in Manitoba since the implementation of the YCJA. In its 2014-2015 annual report, Manitoba Justice claimed to offer support to 46 community-based “justice committees operating across the province”⁴⁶ with “more than 200”⁴⁷ members who were involved in administering “community justice (extra-judicial) measures”⁴⁸ and providing “crime prevention and community education services in their communities.”⁴⁹ In its 2015-2016 annual report, Manitoba Justice does not provide any information on the membership of justice committees; noting only that the number of committees dropped to 45.⁵⁰ In addition to this official source, data from a range of other sources examined in a preliminary study of the implementation of the YCJA in Manitoba suggests that community justice committees (CJCs) dealing specifically with youth justice cases in Manitoba were, and potentially still are, much less active today than in the past.⁵¹

C. Youth Custody Rates

The high rate of youth incarceration in Canada in the 1990s compared with other western countries was a key rationale of researchers and anti-‘get

Justice Statistics, which enabled more detailed data analysis and comparison. Manitoba data for 1998-1999 show that of the 1,760 alternative measures cases closed, 2,300 interventions were given, and that in these cases, 90 percent were closed as a result of the successful completion of the interventions (Statistics Canada, “Alternative, 1998/99,” *supra* note 41 at 11).

⁴⁵ Canada, Department of Justice, *National Survey of Youth Justice Committees in Canada* (Ottawa: Hann & Associates, 2003) at 5 (Table 1), online: <http://www.justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/rr03_yj7-rr03_jj7/rr03_yj7.pdf>.

⁴⁶ Manitoba Justice, *Annual Report 2014-2015* (Winnipeg: Manitoba Justice, 2015) at 30, online: <<http://www.gov.mb.ca/justice/publications/annualreports/pubs/annualreport1415.pdf>> [*Annual Report 2014-2015*].

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Manitoba Justice, *Annual Report 2015-2016* (Winnipeg: Manitoba Justice, 2016) at 35, online: <<https://www.gov.mb.ca/justice/publications/annualreports/pubs/annualreport1516.pdf>> [*Annual Report 2015-2016*].

⁵¹ Smandych et al, “Youth Justice in Manitoba,” *supra* note 43.

tough' proponents for the repeal of the YOA. Under the YOA, most cases in youth courts as well as youth sentenced to custody were relatively minor offences. Doob and Sprott's research on cases of youth sentenced to custody in 1999-2000⁵² indicated that three quarters were sentenced for eight less serious offences.⁵³ The *Juristat* data that Doob and Sprott relied on for their study also revealed very importantly that the use of custody sentences varied widely across Canada while at the same time custody sentences (including both open and secure custody) tended to be short, with 77 percent of sentences being three months or less.⁵⁴

In examining Canadian youth custody trend changes it is also important to consider data on the use of remand. In the final year, 2000-2001, in which Statistics Canada reported data on custody and community services under the YOA, sentenced and remand custody admission rates both declined by 6 percent from 1999/00 to 60 admissions per 10,000 youth for sentenced custody, and 65 per 10,000 for remand custody.⁵⁵ In addition, among the eleven reporting provincial jurisdictions, "remand admissions accounted for the largest share (39%) of custodial admissions...while 33% of admissions were to open custody and 29% were to secure custody."⁵⁶ Also, while approximately six in ten custody admissions were remand admissions in the reporting jurisdictions, there was a considerable variation across jurisdictions; i.e. with Manitoba the highest (at 82 percent) and the Northwest Territories the lowest (at 16 percent).⁵⁷ The overall youth incarceration rates in the eleven reporting jurisdictions in 2000/01 ranged from a high of 36 per 10,000 youth in Saskatchewan to a low of 9 per 10,000 youth in British Columbia.⁵⁸

D. Transfers to Adult Court

The 1992 amendment dealing with transfers to adult court had the effect of increasing the number of cases transferred, but with very significant

⁵² Doob & Sprott, "Youth Justice in Canada," *supra* note 26 at 216 (Table 3).

⁵³ *Ibid.* Theft under \$5,000, possession of stolen property, failure to appear, failure to comply with a disposition, other thefts, mischief/damage, breaking and entering, and minor assault.

⁵⁴ Statistics Canada, "Youth Court, 1999/2000," *supra* note 37.

⁵⁵ Statistics Canada, "Youth Custody, 2000/01," *supra* note 42 at 1.

⁵⁶ *Ibid* at 3, 5.

⁵⁷ *Ibid* at 6, 11 (Table 1).

⁵⁸ *Ibid* at 8 (Figure 6).

interprovincial variations. In “the last full year of the 1984 law, a total of 71 out of 116,397 cases were transferred (.06 percent), including 8 of 30 murder charges”;⁵⁹ whereas in the first year the amendment took effect “94 of 115,949 cases were transferred (.08 percent), including 6 of 30 murder charges.”⁶⁰ In subsequent years the number of transfers fluctuated somewhat, declining to 79 of 110,883 in 1997-98, from 92 of 110,065 in 1996-97, but increasing again in 1998-99 to 91 of 106,665.⁶¹ The extent of provincial variation in the use of transfers is quite glaring; most notably in the fact that Manitoba accounted for close to one-third of all transfers annually from 1996 to 1999.⁶² Besides highlighting the ongoing concern regarding the regional inequities in the legal processing and treatment of youth regarding YOA transfer cases to adult court, these data provide for a comparison to the new approach under the YCJA to the trial and sentencing of young persons.

E. Growing Concern with the Overrepresentation of Indigenous Youth

In their book entitled *Tough on Kids: Rethinking Approaches to Youth Justice*,⁶³ published in 2003 as the YCJA was being initially implemented, two Saskatchewan legal-aid lawyers Green⁶⁴ and Healey, lamented that in their experience “criminal justice has become our society’s default system, taking in all those youth that fall between the cracks of other systems and resources.”⁶⁵ In addition, Green and Healey drew attention to the growing crisis of Indigenous youth overrepresentation warning that: “[i]f the current high number of Aboriginal youth already in custody [increased] at the same

⁵⁹ Bala, *Young Offenders*, *supra* note 14 at 278–279; citing Statistics Canada, “Youth Court Statistics, 1991–92,” in *Juristat*, Catalogue No CS85-002 (Ottawa: Statistics Canada, 1993); Statistics Canada, “Youth Court Statistics, 1992/93,” Catalogue No CS85-522-PDF (Ottawa: Statistics Canada, 1994).

⁶⁰ *Ibid.*

⁶¹ Canada, Department of Justice, “Background for YCJA” (Ottawa: Department of Justice, 2016) at Table C1 and C2, online: <<http://www.justice.gc.ca/eng/tp-pr/cj-jp/yj-jj/back-hist/index.html>>.

⁶² *Ibid.*

⁶³ Ross Green & Kearney Healey, *Tough on Kids: Rethinking Approaches to Youth Justice* (Saskatoon: Purich Publishing, 2003) 54.

⁶⁴ Ross Green is now a provincial court judge in Saskatchewan.

⁶⁵ Green & Healey, *supra* note 63.

rate as the overall Aboriginal population, the resulting effect [would] be crippling, both within the youth justice system, and within Canadian society as a whole.”⁶⁶ On the eve of the implementation of the YCJA, in 2000-2001, Indigenous youth constituted 5 percent of the youth population across Canada, but accounted for 26 percent of admissions to remand and 24 percent of admissions to sentenced custody.⁶⁷ Even more disconcerting, among the disproportionately higher Indigenous youth involvement in youth justice across western provinces, “Manitoba showed the largest differences between the Aboriginal youth population (at 16%) and Aboriginal sentenced custody admissions (at 82%) as well as remand admissions (at 70%).”⁶⁸

While pointing to criminal justice as a default system that was often used to respond to the multi-serious needs of Indigenous youth (e.g. health, mental health, inadequate housing, insufficient educational assistance, and general poverty related issues), Green and Healey were hopeful that the implementation of the YCJA might approach these youth through a more constructive program approach. Specifically, they recognized that it formalized the range of possible new types of community-based and restorative-justice based approaches that could be developed based on its broad or inclusive definition of “conferencing.” Similarly encouraging, the YCJA contained provisions (in s. 38(2) (d)), modelled on the *Criminal Code* amendment of 1996 and the Supreme Court of Canada decision in *R v Gladue*⁶⁹ requiring that judges give “particular attention to the circumstances of Aboriginal young people”⁷⁰ in their decision making regarding dispositions and sentences. More broadly, this YCJA section appeared to reveal a federal/provincial/territorial policy consensus understanding of the need for the youth justice process to consider the fundamental structural and resources inequities experienced by many if not most Indigenous families and their children across generations, but especially since the introduction of the federal residential schools policies beginning in the late-19th century and ending formally in the last quarter of the 20th century.

⁶⁶ *Ibid* at 91.

⁶⁷ Statistics Canada, “Youth custody, 2000/01,” *supra* note 42 at 5 (Figure 3).

⁶⁸ *Ibid*.

⁶⁹ *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385 [*Gladue*].

⁷⁰ Green & Healey, *supra* note 63 at 99.

The question remains though whether there is an empirical basis for the early optimism concerning the potential positive impact of the YCJA on Indigenous youth?

IV. THE *YOUTH CRIMINAL JUSTICE ACT (YCJA)* AND THE NEW POLITICS OF YOUTH JUSTICE REFORM

Unlike in the case of its predecessors, the *JDA* and the *YOA*, the youth justice reform process leading to the enactment of the *YCJA* was markedly politically partisan and publically divisive. In addition to giving rise to the amendments made to the *YOA* in 1992 and 1995, the perceived increase in youth crime and growing disdain in the “get tough” section of the Canadian public for the *YOA* led both federal and provincial governments to appoint various task forces to come up with recommendations for further reforming the youth justice system. At the federal level, in 1997, the House of Commons Standing Committee on Justice and Legal Affairs issued a report on *Renewing Youth Justice*,⁷¹ which contained fourteen recommendations for overhauling the youth justice system, and in the spring of 1998 the government released its report, *A Strategy for the Renewal of Youth Justice*,⁷² recommending that *YOA* be repealed and replaced with a new Canadian *Youth Criminal Justice Act*.⁷³ While both reports recommended that the protection of society should be the main goal of youth justice legislation and that the legislation should be aimed at dealing more severely with violent young offenders, they also recommended strengthening legislative provisions that encouraged taking more preventive, restorative, and rehabilitative approaches to addressing the causes of youth crime and reducing recidivism among first-time and less-serious young offenders.⁷⁴ In

⁷¹ Canada, House of Commons, Thirteenth Report of the Standing Committee on Justice and Legal Affairs, *Renewing Youth Justice* (Ottawa: April 1997), online: <http://www.ourcommons.ca/Content/Archives/Committee/352/jula/reports/13_1997-04/jula-13-cove.html>.

⁷² Canada, Department of Justice, *A Strategy for Youth Justice Renewal* (Ottawa, Ministry of Supply and Services, 1998), cited in Nicholas C Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2003) at 22 [Bala, *Youth Criminal Justice Law*].

⁷³ Joanne Minaker & Bryan Hogeveen, *Youth, Crime, and Society: Issues of Power and Justice* (Toronto: Pearson Canada, 2009).

⁷⁴ In summary, key changes introduced in the *YCJA* included: (1) a new “Declaration of Principle” that recognized that the main goal of the *YCJA* was the *protection of the public*, and that this could best be achieved through applying a three-pronged approach, which

their later account of the politics of youth justice reform in Canada in the mid-1990s, Doob and Sprott point to the political expedience of the then federal Liberal government's decision to introduce new youth justice legislation that reflected this bifurcated or two-pronged approach.⁷⁵ Specifically, they argue that the intention of the Liberal government, when it introduced the YCJA, was not to create tougher legislation but simply to make it appear that it was doing so in order to deflect the criticism from political opposition parties that it was too soft on youth crime. According to Doob and Sprott, by formally creating a bifurcated youth justice system, federal government legislative drafters had quite astutely "crafted a law" that offered more opportunities than had existed before to "reduce the level of punitiveness"⁷⁶ of the youth criminal justice system. Thus, in April, 2003, after seven years of debate and planning, followed with three separate drafts and 160 amendments, the YCJA replaced the YOA.⁷⁷

Despite what might have been the intent of its legislative drafters, the introduction of the YCJA did not overcome criticisms from opposition political parties and certain provinces. Given the above discussed long history of Quebec developing its own unique corporatist model of youth justice, the vocal and ongoing opposition to the enactment the YCJA that came from the province of Quebec was not unexpected.⁷⁸ Similarly, the

included *crime prevention, meaningful consequences, and reintegration*; (2) greater official emphasis on diversion (or "extra-judicial measures"); (3) tougher sentences for "violent offenders"; (4) no more transfer hearings (youth courts would now have the power to impose adult sentences); and (5) greater emphasis on reintegration by requiring that every custody sentence include a period of post-custody supervision in the community.

⁷⁵ Anthony N Doob & Jane B Sprott, "Punishing Youth Crime in Canada: The Blind Men and the Elephant" (2006) 8:2 Punishment and Society 223 [Doob & Sprott, "The Blind Men"]. Doob and Sprott's analysis was developed in response to the opposing view argued by Bryan Hogeveen in "'If We Are Tough on Crime, if We Punish Crime, then People Get the Message': Constructing and Governing the Punishable Young Offender in Canada During the late 1990s" (2005) 7:1 Punishment and Society 73.

⁷⁶ Doob & Sprott, "The Blind Men," *supra* note 75 at 224. Despite Hogeveen's analysis to the contrary, it may well have been the case that during the period of reform leading to the enactment of the YCJA proponents and drafters of the legislation shared a sense of hope and optimism that the legislation would have this result.

⁷⁷ Minaker & Hogeveen, *supra* note 73; Bryan Hogeveen & Russell Smandych, "The Origins of the Newly Proposed Canadian Youth Criminal Justice Act: Political Discourse and the Perceived Crisis in Youth Crime in the 1990s" in Russell Smandych, ed, *Youth Justice: History, Legislation and Reform* (Toronto: Harcourt, 2001) 141.

⁷⁸ Trépanier, *supra* note 39; Alain & Hamel, *supra* note 39.

persistent criticism of the Act that came from the federal Conservative party, along with that of allied provincial conservative parties and governments, was also inevitable based on their long standing criticisms that, like the YOA, the YCJA did not go far enough in punishing and deterring the perceived 'out of control' level of youth crime. This philosophical crime control model perspective on youth justice was immediately evident when the Conservative party led by Stephen Harper was finally elected to power in 2011 with a majority government. One of its first legislative acts was to introduce amendments to the YCJA. The main theme was 'toughening up' the legislation; in part through changing the Act to make "deterrence" and "denunciation" sentencing principles in the legislation, and further by broadening the definition of what constituted a "violent offence."⁷⁹ In addition, even prior to the Conservatives winning a majority government, important, yet quite different, changes were made in the interpretation and application of the Act because of interventions from the province of Quebec and related court decisions.

From the outset, critics including criminologists in Quebec were opposed to the YCJA. First, they asserted that it was unnecessary since the YOA worked well in Quebec and second, the YCJA "would make the situation worse rather than better."⁸⁰ Even before the YCJA was enacted, the province of Quebec had already taken steps to challenge the legislation and minimize the extent to which it might negatively affect the operation of the province's closely integrated youth protection and youth justice systems.⁸¹ The key criticism emanating from Quebec was that the YCJA "was too punitive and insufficiently rehabilitative."⁸² In 2001 the government of Quebec sent a reference to the Quebec Court of Appeal asking it to rule on the constitutionality of the proposed presumptive offence sections of the YCJA which required that, in the case of youth 14 years or older charged with specific serious violent offences, it would be presumed that upon conviction that the youth would be sentenced as an adult. The Quebec Court of Appeal's conclusion in favour of the Quebec government in 2003

⁷⁹ These changes were introduced in Bill C-10, which was passed in April and implemented in October, 2012. See Lee Tustin & Robert E Lutes, *A Guide to the Youth Criminal Justice Act* (Markham: LexisNexis Canada, 2014) 87.

⁸⁰ Trépanier, *supra* note 39 at 283.

⁸¹ Louis-Georges Cournoyer et al, "Quebec's Experience Keeping Youth Out of Jail" in Winterdyk & Smandych, *supra* note 7, 409.

⁸² Alain & Hamel, *supra* note 39 at 313.

was reaffirmed in the 2008 Supreme Court of Canada decision on the case of *R v B(D)*,⁸³ in which it ruled that the reverse onus presumptive offence sections of the YCJA were unconstitutional.⁸⁴ In 2012, in Bill C-10, the Conservative government repealed the presumptive offence sections of the YCJA, and placed the onus on the “Attorney General” of the province, through Crown prosecutors, to make an application for an adult sentence and to justify why a more severe adult sentence is appropriate in each case.⁸⁵ However, the new adult sentencing sections of the YCJA retained the original clause; s. 61 of the YCJA (2002), which states: “the lieutenant governor in council of a province may by order fix an age greater than 14 years but not greater than 16 years”⁸⁶ for applying adult sentences. Although, with the exception of Quebec, most jurisdictions supported “lowering the age for an adult sentence to 14 years,” there is still the potential for youth to be sentenced differently as adults depending on where they live in Canada.⁸⁷

V. IMPLEMENTING AND WORKING WITH THE YCJA: WEIGHING “THE GOOD, THE BAD, AND THE UNADULTERATED”⁸⁸

Again, in order to assess the more current impact of the YCJA on Canadian provincial/territorial youth justice systems, it is necessary to

⁸³ *R v B(D)*, 2008 SCC 25, [2008] SCJ NO 25.

⁸⁴ Cournoyer et al, *supra* noted 81 at 427-428.

⁸⁵ Davis-Barron, *supra* note 4 at 415; Tustin & Lutes, *supra* note 79 at 133.

⁸⁶ YCJA, s 64(1.2), cited in Tustin and Lutes, *supra* note 79 at 133; Bala, *Youth Criminal Justice Law*, *supra* note 72 at 509. Including this clause in the much amended Bill C-68 was one of the concessions made to Quebec, represented in Parliament by the Bloc Quebecois, in response to its vehement opposition to the wording of the original Bill C-68, section 61. See House of Commons Debates, 36th Parl, 2nd Sess, No 121 (25 September 2000) and House of Commons Debates, 36th Parl, 2nd Sess, No 122 (26 September 2000), cited in Russell Smandych, “Canada: Re-penalisation and Young Offenders’ Rights” in John Muncie & Barry Goldson, eds, *Comparative Youth Justice: Critical Issues* (London: Sage, 2006) at 25-26 [Smandych, “Canada”].

⁸⁷ Tustin & Lutes, *supra* note 79 at 134.

⁸⁸ We would like to acknowledge Sanjeev Anand for our borrowing part of the title of his article on “The Good, the Bad, and the Unaltered: An Analysis of Bill C-68, the Youth Criminal Justice Act” (1999) 4 Can Crim L Rev 249. We apply the term “unaltered” here to contrast it with “adulteration,” a concept now used in critical

examine specific outcomes including: youth crime and youth charging; the use of young offender diversion programs; youth court processing and case outcomes; remand and sentenced custody; and the issue of the disproportionate incarceration of Indigenous youth. The empirical analysis undertaken in the remaining sections of this article utilizes aggregate cross-national and regional (provincial and territorial) data drawn from federal-level government reports (including Statistics Canada *Juristat*, and Department of Justice reports), along with research publications and other sources of publically-available data on the implementation of the YCJA. However, these data are not available in all the provinces and territories and consequently only certain provinces and territories are discussed and compared. In addition, given that some of the most intractable policy outcome issues are exemplified in Manitoba, our analysis will focus on this province.⁸⁹

A. Youth Crime and Youth Charging

Youth crime and youth charging rates across Canada generally have decreased uninterrupted steadily since the YCJA.⁹⁰ Police-reported crime

youth justice reform literature to refer to “[t]he dismantling of a distinct system of criminal justice for youth and the re-emerging with systems of justice for adults.” Smandych, “Canada,” *supra* note 86 at 23.

⁸⁹ Parts of the following discussion are drawn from the recently published study of developments and issues related to the implementation of the YCJA in Manitoba completed by Smandych et al, “Youth Justice in Manitoba,” *supra* note 43.

⁹⁰ It is important to note that Statistics Canada changed the method it used to measure and record “youth crime” when the YCJA was implemented. Specifically, as explained in its encompassing report on police-reported crime in 2014:

While overall [adult] crime statistics are based on the number of criminal incidents, police-reported youth crime is based on the number of youth, aged 12 to 17 years, accused in a criminal incident. The number of youth accused includes youth who were either charged, or recommended for charging, as well as those who were diverted from the formal criminal justice system through the use of warnings, cautions, referrals to community programs, etc. As such, the rate of youth accused – also referred to as the youth crime rate – and the youth Crime Severity Index are not directly comparable to overall trends in crime.

Statistics Canada, “Police-Reported Crime Statistics in Canada, 2014,” by Jillian Boyce, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2015) at 22, online: <<http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14211-eng.pdf>> [Statistics

data published in 2015 by Statistics Canada show that of the approximately 94,100 “youth accused of a criminal incident in 2014, 55% were dealt with by other means, while the remaining 45% were formally charge by the police.”⁹¹ In addition, since 2004 “the rate of youth dealt with by other means has continued to be higher than the rate of youth formally charged, although this difference has been narrowing since 2009.”⁹² During the same period, the severity of youth crime across the country, as measured with the Statistics Canada youth crime severity index (CSI), indicates a continuing decrease in the severity of youth crime since around 2009.⁹³

Typically, since 2004 rates of youth crime and youth charging have been higher in Manitoba than all other provinces except Saskatchewan. Consistent with earlier trends under the YOA, in the first year (2003/2004) under the YCJA, the Manitoba rate for youth brought to court was the second highest of the provinces.⁹⁴ Similarly, for the period 2004-2009, Manitoba had among the highest provincial rates of police-reported youth crime and youth charging under the YCJA. Despite the 2014 reported decreases in youth violent crime rates across the provinces, Manitoba still had the second highest youth rates for homicide, robbery, major assault, and property crime.⁹⁵ Very importantly, however, the most comprehensive measure of violence, the youth crime severity index scores reported by province and territory, indicated that, despite a 25 percent decrease from 2013, Manitoba (at 124.4) had the highest violent youth CSI score among all provinces in 2014.⁹⁶

While police-reported rates of youth crime and the severity of youth crime have decreased across Canada over the past decade, they decreased from a higher starting level in Manitoba along with decreasing more slowly, particularly with respect to property-related crimes. In other words, it appears that the media as well as research-based images of Manitoba’s

Canada, “Police-reported crime, 2014”].

⁹¹ *Ibid* at 22.

⁹² *Ibid* at 22-23 (Chart 15), 38 (Table 8b).

⁹³ Compared to 2004, the 2014 youth crime severity index was lower by 40 percent. *Ibid* at 24 (Chart 16), 38 (Table 8a).

⁹⁴ Statistics Canada, “Youth Court Statistics, 2003/2004,” by Jennifer Thomas, in *Juristat*, Catalogue No 85-002-XPE (Ottawa: Statistics Canada, 2005) at 17 (Table 7), online: <<http://www.statcan.gc.ca/pub/85-002-x/85-002-x2005004-eng.pdf>>.

⁹⁵ Statistics Canada, “Police-Reported Crime, 2014,” *supra* note 90 at 39 (Table 9).

⁹⁶ *Ibid* at 40 (Table 10).

ongoing youth crime policy challenges under the YCJA, while often exaggerated in the former's 'moral panic' depictions, are supported by the above analysis of youth crime data. Nonetheless, it is important to note that the number of youths involved in extreme and serious offending is very small compared to other provinces as well as national jurisdictions, most obviously, American states. Yet, we will argue that the Manitoba's youth crime severity index scores are indicative of the limited positive impact of the YCJA on the most complex pattern of youth offending. The related policy challenges are enormously complex because to a considerable extent potential solutions require the intensive coordination of a federal criminal law with a wide range of other federal laws (and programs) along with parallel provincial/territorial laws involving health care, mental health, housing, education, and employment. This extreme and historically difficult inter-ministerial and multi-level government coordination is essential because serious and sustained violent offending appears causally embedded in urbanization, rural isolation, discrimination, poverty, and the emergence of major substance abuse in urban as well as in rural contexts. In effect, these violent crime related variables fit virtually all the classic theoretical factors long associated empirically with the emergence of intergenerational gangs, the most enduring organizational basis for violent youth and adult offending.⁹⁷ In addition, Indigenous over-representation in criminal justice is further complicated largely related to the tragic legacy of the colonialization of Indigenous peoples in this province and the initial emergence of intergenerational Indigenous adult/youth gangs in the 1990s.⁹⁸

B. Diversion Programs and Practices

Despite this asserted intractability of the YCJA's limited impact on serious and violent offending, research on diversion programs and practices since 2003 indicate the Canada wide commitment to implement the YCJA provisions involving extra-judicial measures and sanctions. However, in

⁹⁷ Raymond R Corrado, Alan Leschied & Patrick Lussier, "An Overview of Theory, Research, and Policy Relevant to Serious and Violent Young Offenders in Canada" in Raymond R Corrado et al, eds, *Serious and Violent Young Offenders and Youth Criminal Justice: A Canadian Perspective* (Vancouver: SFU Publications, 2015) 1.

⁹⁸ Elizabeth Comack et al, *'Indians Wear Red': Colonialism, Resistance and Aboriginal Street Gangs* (Halifax: Fernwood, 2013).

Manitoba, preliminary document and interview-based data⁹⁹ has indicated a disconcerting trend; the level of community involvement in administering diversion programs, especially youth justice committees, decreased significantly since 2003.¹⁰⁰ While Manitoba youth justice committees still operated on a more limited scale in rural communities (compared to this practice under the YOA), in Winnipeg, youth justice professionals who were interviewed stated that the operation of the youth justice committees was discontinued after the introduction of the YCJA.¹⁰¹ One respondent, who had experience working in the Manitoba youth justice system both before and after 2003, stated that, although under the YOA “Manitoba had a pretty extensive Youth Justice Committee network,”¹⁰² since the enactment of the YCJA, YJCs have appeared to become “somewhat redundant.”¹⁰³

Although more research is needed to determine the extent of and reasons for the apparent general decline of youth-centred community justice committees across most of Manitoba, there are several factors that might explain this decline and their differential use in urban and rural communities. First, both Manitoba government documents and interviewed respondents consulted in the study carried out by Smandych and colleagues suggested a shift away from a community volunteer approach toward a more formal professional agency-based approach to administering extra-judicial measures. For example, in recent years, diversion programs run by prominent non-profit agencies in Winnipeg like Mediation Services, the Salvation Army, and Onashowewin have received funding from Manitoba Justice on a per case basis. In addition, more cases are referred to non-profit agencies directly by Manitoba Prosecution Services. Previously under the YOA, the police and probation officers frequently provided these

⁹⁹ Compiled for the preliminary study completed by Smandych et al, “Youth Justice in Manitoba,” *supra* note 43.

¹⁰⁰ In its annual report for 2014–2015, Manitoba Justice stated that there were 46 justice committees operating across the province with a combined total volunteer committee membership of “more than 200.” See *Annual Report 2014–2015*, *supra* note 49 at 30. In its annual report for 2015–2016, Manitoba Justice does not provide any information on the membership of justice committees, noting only that the number of committees dropped to 45. See *Annual Report 2015–2016*, *supra* note 50 at 35.

¹⁰¹ Smandych et al, “Youth Justice in Manitoba,” *supra* note 43 (information provided by interview respondents).

¹⁰² *Ibid* at 103.

¹⁰³ *Ibid*.

referrals.¹⁰⁴ This shift in practice likely is accounted for by a policy directive issued by Manitoba Prosecution Services in 2004 which stated, in relation to both adult and youth proceedings, “[t]he ultimate decision as to whether a case is referred to a community-based justice program rests with the Crown Attorney.”¹⁰⁵ In effect, like certain other provinces such as British Columbia, key decision making authority under the YCJA continued the YOA trend of moving to youth court related officials away from the community police and probation officers somewhat paradoxically, given traditional diversion models.¹⁰⁶ Nevertheless, in their evaluation of its first five years of operation, Bala, Carrington, and Roberts have concluded more generally that the YCJA “clearly resulted in a significant drop in the number of youth charged by police and an increase in the use of various methods of police diversion,”¹⁰⁷ and, in addition, that it “caused a considerable reduction in regional differences in the use of alternatives to charging.”¹⁰⁸

This conclusion appears to be supported in more recent research on the use of police diversion and extra-judicial measures programs across different provinces and territories. In her review of diversionary measures under the YCJA, Sandra Bell has pointed to similar trends across different provinces and territories in the use of “restorative interventions” that can include a variety of programs, ranging from community and family conferencing to healing circles.¹⁰⁹ Bell also notes the continuity in practice over time since the YOA, pointing out those provincial governments that “managed

¹⁰⁴ *Ibid.* Information provided by interview respondents.

¹⁰⁵ Manitoba, Department of Justice Prosecutions, “Policy Directive Subject: Extra-Judicial Community-Based Justice Programs,” Guideline No 5: COM:1.1 (Winnipeg, Department of Justice, 2004), online: <http://www.gov.mb.ca/justice/prosecutions/policy/pdf/extra_judicial_community_based_justice_alternatives.pdf>.

¹⁰⁶ Raymond R Corrado et al, “Youth Justice in Canada: Theoretical Perspectives of Youth Probation Officers” (2010) 52:4 *Can J of Criminology and Criminal Justice* 397 [Corrado et al, “Theoretical Perspectives”].

¹⁰⁷ Bala, Carrington & Roberts, *supra* note 4 at 139.

¹⁰⁸ *Ibid* at 141. See also Carrington & Schulenberg, *supra* note 5.

¹⁰⁹ Sandra Bell, *Young Offenders and Youth Justice: A Century After the Fact*, 4th ed (Toronto: Nelson, 2012) at 239-240. Specific programs she notes are the Valley Restorative Justice Society in Nova Scotia and Onashowewin in Winnipeg, and the key role played by the RCMP in the implementation of family group conferencing (under the label of “community justice forms”) across the country.

referrals to alternative measures programs”¹¹⁰ under the YOA through either social services or correctional services departments, “are continuing to do so for extrajudicial sanctions.”¹¹¹ She comments further that “[i]n most cases, the programs are implemented by social agencies or specially mandated agencies such as the Community Justice Society and John Howard Restorative Justice Society in Nova Scotia,”¹¹² or alternatively in some provinces, through shared administration between provincial justice and correctional departments and various community-based social service agencies and service providers.¹¹³ In her overview of restorative justice initiatives in Nova Scotia, Diane Crocker notes that it has the most comprehensive restorative justice program in Canada, which since 2007 has been implemented province-wide and operates through eight community-based agencies in different regions of the province and includes one organization that runs restorative justice programs across the province exclusively for Indigenous youth.¹¹⁴ In contrast several provinces, such as Prince Edward Island and Quebec, administer diversion programs through the government. In a recent more general discussion of the use of diversionary measures across different provinces and territories, Reid, Bromwich and Gilliss provide a balanced but largely favourable view of the extent to which police have embraced the concept of extrajudicial measures.¹¹⁵ Specifically, citing the findings of research by Marino and Innocente,¹¹⁶ they concurred that the “most positive finding in the research was that police officers have relatively affirmative opinions about extrajudicial measures and their effectiveness.”¹¹⁷ In turn, they optimistically concluded that “[s]ince the introduction of the YCJA, the use of extrajudicial measures has steadily increased, and with continued police

¹¹⁰ *Ibid* at 239.

¹¹¹ *Ibid* at 240.

¹¹² *Ibid*.

¹¹³ *Ibid*. Bell cites the examples of Alberta, Saskatchewan, British Columbia, Ontario, and Nova Scotia.

¹¹⁴ Diane Crocker, “Balancing Justice Goals: Restorative Justice Practitioner’s Views” (2016) 19:4 *Contemporary Justice Rev* 462 at 465–66.

¹¹⁵ Susan Reid et al, *Youth and the Law: New Approaches to Criminal Justice and Child Protection*, 3rd ed (Toronto: Emond Montgomery, 2015) at 121–123.

¹¹⁶ Voula Marinos & Nathan Innocente, “Factors Influencing Police Attitudes Towards Extrajudicial Measures Under the Youth Criminal Justice Act” (2008) 50:4 *Can J of Criminology and Criminal Justice* 469.

¹¹⁷ Reid et al, *supra* note 115 at 122.

training and beliefs of their effectiveness they will become even more widespread.”¹¹⁸

On the other hand, other researchers have raised significant concerns about the types of diversion programs and practices encouraged by the YCJA.¹¹⁹ Bryan Hogeveen was the first to raise concerns about the effects the implementation of the YCJA might have on Indigenous youth by questioning the “one-size fits all approach to the over-representation of Aboriginal youth in the justice system”¹²⁰ proposed in the legislation in its emphasis on re-involving “communities” in the task of dealing with young offenders.¹²¹ Hogeveen argued there were “compelling reasons to be skeptical”¹²² of this approach given how this obscured “the systemic inequalities and racism”¹²³ that has contributed to the marginalization of Indigenous communities and the disproportionate involvement of Indigenous youth in the criminal justice system. In a similar vein, Russell Smandych raised concerns regarding procedural and jurisdictional factors that could potentially undermine the essential restorative objectives of the YCJA.¹²⁴ The first of these involved the possibility that “volunteer youth justice committees and other community groups that are recruited to carry out ‘conferences’ and impose ‘extrajudicial’ sanctions”¹²⁵ might “become overwhelmed by large caseloads, and hindered by inadequate funding and

¹¹⁸ *Ibid.* For related research findings on police discretion and the role of police training in dealing with accused youth offenders, see Carrington & Schulenberg, *supra* note 5; Jennifer Schulenberg, “Patterns in Police Decision-Making with Youth: An Application of Black’s Theory of Law” (2010) 53:2 *Crime L & Soc Change* 109; Jennifer Schulenberg & Deirdre Warren, “Police Discretion with Apprehended Youth: Assessing the Impact of Juvenile Specialization” (2009) 10:1 *Police Practice and Research* 3.

¹¹⁹ Smandych, “Canada,” *supra* note 86; Bryan Hogeveen, “Toward ‘Safer’ and ‘Better’ Communities? Canada’s Youth Criminal Justice Act, Aboriginal Youth and the Processes of Exclusion” (2005) 13:3 *Critical Criminology* 287; Lorinda Stoneman, *Community-Based Responses to Youth Offending: Politics, Policy and Practice Under the Youth Criminal Justice Act* (PhD Thesis, University of Victoria, 2016) [unpublished]; Lorinda Stoneman & Sibylle Artz, “Canadian Girls and Crime in the Twenty-First Century” in Winterdyk & Russell, *supra* note 7, 171.

¹²⁰ Hogeveen, *supra* note 119 at 289.

¹²¹ *Ibid.*

¹²² *Ibid* at 288.

¹²³ *Ibid* at 289.

¹²⁴ Smandych, “Canada,” *supra* note 86 at 29.

¹²⁵ *Ibid* at 29.

training.”¹²⁶ Second, he asserted “that delegating the power to create guidelines for ‘non-judicial conferences’ to provincial and territorial governments,”¹²⁷ inevitably increased the likelihood “that there will be significant inter-provincial and even local community-by-community variation in the manner in which conferences are carried out.”¹²⁸ Third, he raised the concern that, often based on provincial budget restraints and priorities, there is the not uncommon reality that “resources may simply not be in place at the local level”¹²⁹ to support non-judicial alternatives, which can “lead to more young offenders coming back to court; possibility for the failure to comply with previous non-custodial sentences, or to face more serious charges.”¹³⁰ Like Hogeveen, he pointed out the example of many remote Indigenous communities, cautioning that:

...what we will most likely see is that under-resourced and overburdened ‘communities’, such as many of Canada’s remote Aboriginal communities, will eventually be seen to have failed at developing adequate community-based ‘restorative’ measures for dealing with ‘their’ youth. This in turn may well perpetuate the tragic damaging cycle of individual and institutional racism and recurrent law and-order ‘moral panics’ that have been directed historically at Aboriginal youth, as well as at other most often urban, and more frequently poor, visible minority youth in Canada.¹³¹

Despite the Supreme Court of Canada *Gladue*¹³² precedent and the explicit focus of the YCJA on culturally appropriate presentence alternative options, there is no quantitative evaluation information on the use and outcome of restorative-based extrajudicial measures in Indigenous communities across Canada. However, in a recent insightful qualitative study of community-based responses to youth offending, Stoneman has identified the lack of community-based services for accused and convicted young offenders in communities in British Columbia.¹³³ Drawing on both document-based data and findings from interviews carried out with youth justice and child care professionals, Stoneman analyzed the effects of the implementation of the YCJA on community-based responses to young

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Gladue*, *supra* note 69.

¹³³ Stoneman, *supra* note 119.

offending in British Columbia from 2003 to 2012.¹³⁴ Significantly, while her interview data, on the one hand, pointed out the strong ethos of caring and practices of personal charity reflected in the experiences of the professionals, on the other hand, it highlighted the many obstacles and challenges professionals faced in their efforts to develop effective community-based responses to caring for troubled youth in their communities.¹³⁵ For example, Stoneman found that in some communities “less serious offenders”¹³⁶ were “faced with trying to access non-existent or inappropriate programs in their communities, while more serious offenders were faced with incarceration further away from their families and home communities.”¹³⁷ Stoneman identified the resulting apparently unintended policy outcome phenomenon as “*net narrowing*,” which “occurs when youth who have been diverted, struggle to access adequate resources.”¹³⁸ The outcome of this paradoxical phenomenon was described by some of the youth justice and child care professionals interviewed by Stoneman who explained:

...before they were able to gain access to resources such as clinical assessments, programming, financial assistance, and one-to-one support for their clients, they had to show that these clients were seriously entrenched in the system. This is perhaps the most pressing disadvantage of diversion, since resource allocation only follows after system involvement and is not available if clients are diverted. Paradoxically, then, under these conditions, serious criminal behaviour is almost desirable because it has become one of the keys to unlock desperately needed resources.¹³⁹

With the exception of Stoneman’s study, much of the policy research literature including government-generated data and reports on the YCJA is largely devoid of discussion of the resource problems related to supporting diversion programs. However, one exception to this is the federal-government sponsored roundtable report on issues surrounding the implementation of the YCJA written in 2008.¹⁴⁰ This report summarized

¹³⁴ In her study, Stoneman carried out semi-structured interviews with 14 professionals in the field of youth justice, which included police, youth workers, restorative justice personnel, and probation officers in the regions of Greater Vancouver, the Fraser Valley, and Vancouver Island. *Ibid* at iii.

¹³⁵ *Ibid* at 248–256, 359.

¹³⁶ *Ibid* at 284; cited in Stoneman & Artz, *supra* note 119 at 178–79.

¹³⁷ *Ibid*.

¹³⁸ *Ibid* at 179.

¹³⁹ *Ibid*.

¹⁴⁰ Canada, Department of Justice, *Comprehensive Review of the Youth Criminal*

the outcome of consultations held with youth justice and child welfare professionals from across the country. A common refrain in the report was the concern about the lack of sustainable funding to support restorative justice and diversion programs. Roundtable participants consensually agreed in principle concerning “the need for systems... to be better resourced to support children and families as they enter the youth justice system,”¹⁴¹ while at the same time all of the provinces and territories “identified a lack of local resources, or sustainable resources to implement the programs and services necessary to fully embrace the YCJA.”¹⁴² Pointedly, in one session, “the YCJA was referred to as a Cadillac on a Volkswagen budget.”¹⁴³ The report on the outcome of provincial/territorial roundtables, included provincial/territorial summary statements all reflecting this resource inadequacy theme. The following cited examples illustrate this: in BC, “[t]he inequities of police practices for extrajudicial measures was raised as a serious concern as well as long lists for services and the fact that ‘kids in custody get better services’”;¹⁴⁴ in Manitoba, “[o]n paper the legislation has a lot of options and flexibility but in reality there are no resources on the front end or the back end; they are all in custody”;¹⁴⁵ and in Nunavut, “[r]estorative and rehabilitative aims cannot be realized due to chronic underfunding. The most respected community members are reluctant to participate in restorative justice as they are underfunded and people are embarrassed to be part of the process.”¹⁴⁶ In effect, this report’s key conclusions support Stoneman’s “net-narrowing” concept and point to the wider cross-jurisdictional (provincial/territorial) problem of the lack of adequate resource support primarily involving inadequate funding for front-

Justice Cross Country Roundtable Report (Ottawa: Department of Justice, 2008), online: <<http://www.loosehttp://www.loosefiles.ca/?p=191files.ca/?p=191>> [Roundtable Report]. This report was obtained through Access to Information and posted only by W Campbell, April 4, 2011. This roundtable was initiated by the minority Conservative federal government in 2007 when it announced that the YCJA would undergo a comprehensive review in 2008 following the introduction of Bill C-25. Bill C-25 was later reintroduced as part of Bill C-10 after the Conservative party was re-elected as a majority government in 2011.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

end restorative police diversion extra-judicial measures under the YCJA.¹⁴⁷ In the next section, on youth court processing and case outcomes, we show that Stoneman's "net-narrowing" concept is also helpful in providing a more constructive and critical perspective on the largely unintended policy problem associated with 'breaching' conditions linked to administrative offences or offences against the administration of justice. This problem has been particularly acute for Indigenous youth, especially concerning their frequent culturally inappropriate remand conditions, which may too often result in their being disproportionality remanded into custody.

C. Youth Court Processing and Case Outcomes

Consistent with the continuing decline in the number of youth accused of crime identified in police-reported data, trend data on court case completion rates to 2014-2015 showed an overall continued decline in the number of cases completed in youth court in every province and territory; with some slight variations by jurisdiction from year to year.¹⁴⁸ Notably, five *Criminal Code* offence types constituted 40 percent of all completed youth court cases in 2014-2015.¹⁴⁹ As well, there was a decrease in the number of cases for almost all offence types.¹⁵⁰ In addition, administration of justice

¹⁴⁷ This view is also empirically supported in a recent large-scale survey research study of the use by police of extra-judicial measures provisions of the YCJA in Newfoundland and Labrador (N = 201), which found that while police officers had a good knowledge of the YCJA, "the Act has not been fully implemented here because of resource limitations, which affect an officer's ability to adhere to the YCJA." Rose Ricciardelli et al, "From Knowledge to Action? The Youth Criminal Justice Act and use of Extrajudicial Measures in Youth Policing" (2017) 18:6 *Police Practice & Research* 599.

¹⁴⁸ Statistics Canada, "Youth Court Statistics, 2014/2015," by Zoran Miladinovic, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2016), at 4 (Chart 1), 15-16 (Tables 1 and 2), online: <<http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14656-eng.pdf>>. For example, in 2010/2011 Manitoba was the only province in which the number of completed youth court cases had increased, while in 2014-2015, Nova Scotia reported a 2 percent increase [Statistics Canada, "Youth Court Statistics 2014"]. Statistics Canada, "Youth Court Statistics, 2010/2011," by Shannon Brennan, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2012), online: <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11645-eng.pdf>>.

¹⁴⁹ Statistics Canada, "Youth Court Statistics 2014," *supra* note 148 at 4. Theft (11%), common assault (8%), break and enter (8%), failure to comply with an order (7%), and mischief (6%).

¹⁵⁰ The one exception is attempted murder. Statistics Canada, "Youth Court Statistics 2014," *supra* note 148 at 5 (Chart 2), 17 (Table 3).

offences decreased at approximately the same rates as other offences.¹⁵¹ By gender, although over the past fifteen years, slightly more than three quarters (77 percent) of accused youth were male, females have been more highly associated with non-violent offences, with prostitution (44 percent), and failure to appear (39 percent) the most common offence types.¹⁵² Again, however, a persistent YCJA policy concern is the greater likelihood that Indigenous females were disproportionately involved in self harming offences such as prostitution largely to finance self-medication with highly addictive substances and/or abuse escaping but high victimization “street” lifestyles.

This theme concerning the vulnerability of female youth more generally might be relevant for understanding that females were involved in nearly one third (29.6 percent or 867 of the 2,928) of cases in which the principle charge was an offence against the administration of justice in 2014-2015.¹⁵³ In addition there appears to be a wide consensus among youth justice officials and researchers that since 2003 cases coming before youth courts are “on average far more serious, complex and lengthier.”¹⁵⁴ However, before exploring further the key issues raised in the controversial policy area of offences against the administration of justice, it is important first to review the importantly related area of sentencing outcomes using recently updated youth court case outcomes trend data. Since the implementation of the YCJA the percentage of cases that ended with a guilty finding¹⁵⁵ has declined slightly; which continued a trend that began in the late 1990s.¹⁵⁶ Nonetheless, there are striking variations between provincial/territorial jurisdictions in the percentage of cases concluded with a finding of guilty;

¹⁵¹ *Ibid.*

¹⁵² *Ibid* at 5.

¹⁵³ Numbers obtained from Statistics Canada, “Youth Court Statistics 2014,” *supra* note 148 at 17 (Table 3).

¹⁵⁴ Ruth Mann, “A Specialized Criminal Justice System for Canadian Youth: Critical Overview of Historical and Contemporary Developments in Law and Procedures Governing Young Offending” in Kirsten Kramar, ed, *Criminology: Critical Canadian Perspectives* (Toronto: Pearson, 2011) 57 at 71.

¹⁵⁵ This includes both guilty pleas and findings of guilt by the court.

¹⁵⁶ The percentage of cases ending with guilty findings in 2014-2015 was 57 percent compared with 70 percent in the late 1990s. Statistics Canada, “Youth Court Statistics 2014,” *supra* note 148 at 7 (Chart 4).

with the Yukon being at the low end (40 percent) and New Brunswick at the high end (about 79 percent).¹⁵⁷

Regarding sentencing outcomes, the Statistics Canada *Juristat* report on youth court statistics for 2014-2015 indicated a consistent trend year-to-year with comparable data since 1991/1992. Not unexpectedly, probation was the most common sentence ranging from 43 percent of guilty cases in 1992/1993 to around 57 percent of guilty cases annually from 2003 to 2015.¹⁵⁸ In 2014-2015 as well, probation along with other types of non-custodial sentences were used in 85 percent of guilty cases. Custodial sentences were imposed in 15 percent of guilty youth court cases. Again, as expected under the YCJA, probation also was commonly ordered in conjunction with other sentences; in 2014-2015, it was ordered in 41 percent of guilty cases where youth were sentenced to custody.¹⁵⁹

As we asserted above, a persistent critical theme among youth justice professionals, Indigenous youth advocates, and researchers has been the inappropriate use of provisions of the YCJA dealing with offences against the administration of justice. A particularly disconcerting concern is the common practice of imposing custody sentences on youth found guilty of breaching their probation orders or failing to comply with other orders of the court.¹⁶⁰ This issue arose quickly after the introduction of the YOA when the offence of failure to comply with a disposition was originally introduced in the 1986 amendments. By 2000, this offence was responsible for 23 percent of custodial sentences in Canada.¹⁶¹ As mentioned, a high proportion of females were charged with administrative offences under the YOA and YCJA. In their comparative study of the treatment of girls in the

¹⁵⁷ The percentage of cases ending with guilty findings in 2014-2015 was 57 percent compared with 70 percent in the late 1990s. Statistics Canada, "Youth Court Statistics 2014," *supra* note 148 at 7 (Chart 5).

¹⁵⁸ Statistics Canada, "Youth Court Statistics 2014," *supra* note 148 at 11 (Chart 9).

¹⁵⁹ *Ibid.*

¹⁶⁰ Alain & Hamel, *supra* note 39; Sprrott & Doob, "Gendered Treatment," *supra* note 5; Stoneman & Artz, *supra* note 119; Jane B Sprrott & Anthony N Doob, *Justice for Girls? Stability and Change in the Youth Justice Systems of the United States and Canada* (Chicago: University of Chicago Press, 2009) [Doob & Sprrott, *Justice for Girls*]; Jane B Sprrott, "The Persistence of 'Status Offences' in the Youth Justice System" (2012) 54:3 *Can J of Criminology and Criminal Justice* 309 [Sprrott, "Status Offences"]; Jane B Sprrott & Nicole M Myers, "Set up to Fail: The Unintended Consequences of Multiple Bail Conditions" (2011) 53:4 *Can J Corr* 404.

¹⁶¹ Doob & Sprrott, "Youth Justice in Canada," *supra* note 26.

youth justice systems of the US and Canada, Sprott and Doob utilized Canadian data from the early 1900s to 2006, which indicated the proportion of girls charged and convicted for failing to comply with a disposition was consistently greater than that for boys.¹⁶² These data also showed that, of those convicted in cases where the failure to comply was the most serious offence, girls were considerably more likely to be sentenced to a custody sentence. For example, in 1999-2000, 23 percent of custody sentences involved failures to comply, yet “around 34 percent of girls’ custodial sentences were for failing to comply, whereas these cases accounted for around 17 percent of boys’ custodial sentences.”¹⁶³

The complex dynamic of administrative offences processing under the YCJA typically involves a revolving door metaphor i.e. once a history of administrative offences is evident, they then inevitably set the stage for more restrictive decision-making outcomes including remand, where highly troubled or multi-needs youth have extremely high likelihoods of failure to comply in most contexts whether community or custody. Sprott and Doob provided further evidence of the “gendered treatment” of youth in bail court.¹⁶⁴ Their data empirically supported the ‘revolving door’ decision-making process where youth courts under the YCJA had to cope with ‘status-type’ offences such as failing to comply with bail or probation conditions oriented to restricting often highly labile or unstable adolescent behaviours. While the YCJA sentencing sections clearly state that custody is most appropriate for more serious and violent offences and, more generally, that minor offences should be diverted “out of the youth justice system,”¹⁶⁵ the dilemma has been evident in the gendered decision-making trends. In their study of the treatment of girls in bail court, Sprott and Doob found that “girls were significantly more likely than boys to be given a bail condition of attending a ‘treatment program,’ especially if the offence was a minor non-violent offence.”¹⁶⁶ Although Sprott and Doob admitted that, given the lack

¹⁶² Doob & Sprott, *Justice for Girls*, *supra* note 160.

¹⁶³ *Ibid* at 144-45 (Figures 6.18, 6.19, 6.20).

¹⁶⁴ Sprott & Doob, “Gendered Treatment,” *supra* note 5; Sprott, “Status Offences,” *supra* note 160. See also Jane B Sprott & Allan Manson, “YCJA Bail Conditions: ‘Treating’ Girls and Boys Differently” (2017) 22:1 CCLR 77.

¹⁶⁵ Sprott, “Status Offences,” *supra* note 160 at 309.

¹⁶⁶ Sprott & Doob, “Gendered Treatment,” *supra* note 5 at 428. Of the 195 bail hearing files involving boys examined, 34 percent were ordered to attend some sort of treatment program, while of the 47 cases involving girls, 51 percent were order to attend a

of detailed information in the bail hearing files they examined, the exact reasons for this gendered differential treatment were unclear.¹⁶⁷ Nonetheless, they argued that bail hearings possibly allowed youth court officials to provide “therapeutic” interventions for girls who were traditionally viewed as needing this resource more often for their safety than boys.¹⁶⁸

Similarly, Sprott in her related study of the persistence of supposedly long abolished ‘status-type’ offences charges in the youth justice system, attributed the prior to 2010 high rate of guilty findings and custody sentences for failing to comply with bail and probation conditions to an informal policy carry-over from the YOA section on failing to comply.¹⁶⁹ This was utilized for a range of early-onset high-needs offenders. This policy focused on youths typically characterized by unfortunate if not tragic histories of biological and sociological ‘immaturity’ related needs including early onset substance abuse and peer influenced or survival involved minor property crimes. In effect, youth court judges, probation officers, Crown prosecutors, and even police utilized the failing to comply offence as a non-punitive opportunity for therapeutic interventions. However, Sprott and other researchers have asserted that a key contributing factor to the increase in girls being charged with failure to comply has been the practice of judges adding “more conditions to probation orders than before.”¹⁷⁰ These conditions have “included mandating girls’ attendance in drug use prevention and intervention programs, attending school, keeping unreasonable curfews, and not associating with certain peers.”¹⁷¹ According to Sprott, “subjecting youths to numerous conditions at bail or at probation may have the unintended consequence of setting youth up to accumulate further criminal charges of failing to comply,”¹⁷² and eventually custody sentences. This perspective also was supported by the Sprott and Myers’ (2011) study of a large youth court in Ontario, which found that “youths who were subjected to numerous bail conditions for an extended period were significantly more likely than those with fewer conditions [to take] less

treatment program (at 433 and 437).

¹⁶⁷ *Ibid* at 432 and 440.

¹⁶⁸ *Ibid* at 432.

¹⁶⁹ Sprott, “Status Offences,” *supra* note 160.

¹⁷⁰ Stoneman & Artz, *supra* note 119 at 178.

¹⁷¹ *Ibid*.

¹⁷² Sprott, “Status Offences,” *supra* note 160 at 321.

time to come back into court for failing to comply with one of the conditions.”¹⁷³ Sprrott concludes that given how “Canada continues to struggle with keeping status-type offences... out of the youth justice system”¹⁷⁴ and absence of any other obvious alternatives to remove these types of offences “from formal youth court processing,”¹⁷⁵ more “legislative change” may be required.¹⁷⁶ In effect, we agree with Sprrott an amendment to the YCJA is needed and suggest the use of a diversion treatment response for failing to comply charges involving vulnerable youth especially girls and Indigenous youth in general.

Youth justice officials in certain provinces such as Manitoba too have expressed concern about the inappropriate and unintended consequences of the application of the failure to comply provisions of the YCJA. Youth justice professionals interviewed for the study carried out in Manitoba by Smandych, Dyck, La Berge, and Koffman¹⁷⁷ stated that a key challenge they faced was that of how to interpret and apply sections of the Act dealing with the ‘breach of conditions’ of court orders and imposed sentences.¹⁷⁸ Interview respondents, for example, asserted that far too many youth were being “breached” for violating conditions attached to probation orders and other community-based sentences, which resulted in more youth in remand custody, and, eventually, sentenced custody.

Though a preliminary study, there appeared to be a consensus among the Manitoba respondents that the frequent ‘breaching’ of youth led to largely unintended criminalization, inappropriate incapacitation of highly vulnerable youth, and youth detention centres being used primarily for holding youth in remand custody. According to one respondent, “the YCJA sets youth up for onerous conditions – sets them up to fail – most kids are in custody for breaches”¹⁷⁹ for failing to meet the increasingly “strict

¹⁷³ Cited in Sprrott, “Status Offences,” *supra* note 160 at 321–22. See also Jane B Sprrott & Jessica Sutherland, “Unintended Consequences of Multiple Bail Conditions for Youth” (2015) 57:1 Can J Corr 59.

¹⁷⁴ Sprrott, “Status Offences,” *supra* note 160 at 309–10.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Smandych et al, “Youth Justice in Manitoba,” *supra* note 43.

¹⁷⁸ YCJA, ss 97(1)–(2), “Conditions to be included in custody and supervision order,” and “Other conditions.” Section 102(1), “Breach of conditions,” legislation cited in Tustin and Lutes, *supra* note 79 at 175–76, 181.

¹⁷⁹ Smandych et al, “Youth Justice in Manitoba,” *supra* note 43 at 110.

conditions”¹⁸⁰ imposed by judges – “of course they are going to breach.”¹⁸¹ Other respondents echoed these concerns, lamenting that “breaches are massive,”¹⁸² “every kid breaches,”¹⁸³ kids are doing “more community service hours,”¹⁸⁴ and some kids are even doing “community service hours while in custody.”¹⁸⁵ In addition, respondents involved in working in treatment programs noted how frustrating it was to see youth in treatment programs “going in and out of MYC [the Manitoba Youth Centre] for breaches,”¹⁸⁶ and “kids who have a multitude of problems and conditions,”¹⁸⁷ like addictions and FASD, “constantly being recriminalized”¹⁸⁸ and “lumped in”¹⁸⁹ with other youth who “don’t have the same issues.”¹⁹⁰ Smandych et al. noted one tragic case of this inappropriate policy phenomenon that involved a youth with a long history of breaching who was a client of a legal aid lawyer (and later Deputy Child Advocate for the Province of Manitoba) Corey La Berge.¹⁹¹ As reported in the *Winnipeg Free Press* in 2011, this case involved a young girl who suffered from serious mental health issues and was held in remand charged with “a weapons breach after cutting herself with a kitchen knife.”¹⁹² Prior to the weapons breach with the kitchen knife, the youth had been breached on several occasions for violating court conditions related to a conviction for being unlawfully in a dwelling house, as well as the failure to comply with previous court conditions. As her advocate, La Berge argued that his client’s treatment by the youth justice system was “akin to child abuse.”¹⁹³ He asserted further this case constituted another example of how Manitoba

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Gabrielle Giroday, “Girl Who Abuses Self Charged: Lawyer Says Approach Akin to Child Abuse,” *Winnipeg Free Press* (6 January 2011), online: <<https://www.winnipegfreepress.com/local/girl-who-abuses-self-charged-112995454.html>>.

¹⁹³ *Ibid.*

Justice in effect appeared “to be endorsing the criminalization of a young person, a young, vulnerable person for having a disability and mental-health problems.”¹⁹⁴ The problem of finding appropriate resources to help high needs young offenders is not isolated to Manitoba. Key Canadian studies by Cesaroni and Peterson-Badali¹⁹⁵ and Corrado and colleagues,¹⁹⁶ have outlined the array of challenges including complex mental health profiles, major substance use, and abusive family histories youth faced in remand and custody institutions. It simply should not be unexpected therefore that youth with such needs profiles in remand and/or serving custodial sentences then released with stringent conditions of probation have histories of failure to comply.

As is evident in the cross-jurisdictional data surveyed in the edited volume by Alain, Corrado, and Reid,¹⁹⁷ on the implementation of the YCJA, there was considerable variability among the provinces and territories. As has long been evident, Quebec has charted its own course. Not surprisingly, many youth justice professionals in Quebec including police, prosecutors, and judges, have openly criticized “the gradualist approach in responding to minor multiple offending”¹⁹⁸ required by the YCJA because of the restrictions it places on the use of custody sentences. Most eloquently, one of the Quebec judges interviewed by Alain and Hamel in their study, lamented that because the “federal government [in introducing the YCJA] wanted to introduce a much more rigid relationship between the seriousness of the offence and the sentence... it is now so rigid that we cannot pronounce a custody sentence even when we are deeply convinced that it would best serve the youth and his problems.”¹⁹⁹ Because prosecutors were being compelled to consider more severe probation conditions after repeated breaches, high needs youth who might have

¹⁹⁴ *Ibid.*

¹⁹⁵ Carla Cesaroni & Michele Peterson-Badali, “Understanding the Adjustment of Incarcerated Young Offenders: A Canadian Example” (2010) 10:2 Youth Justice 107; Carla Cesaroni & Michele Peterson-Badali, “The Role of Fairness in the Adjustment of Adolescent Boys to Pretrial Detention” (2016) 96:4 Prison J 534.

¹⁹⁶ Raymond R Corrado et al, “The YCJA in British Columbia” in Alain, Corrado & Reid, *supra* note 5, 64 [Corrado et al, “YCJA in BC”]; Adrienne Peters & Raymond R Corrado, “An Examination of the Early ‘Strains’ of Imprisonment among Young Offenders Incarcerated for Serious Crimes” (2013) 2:2 J of Juvenile Justice 76.

¹⁹⁷ Alain, Corrado & Reid, *supra* note 5.

¹⁹⁸ Alain & Hamel, *supra* note 39 at 313.

¹⁹⁹ *Ibid* at 315–16.

benefited from the programs offered in Quebec's rehabilitation-oriented youth detention centres became more deeply entrenched in criminal trajectories. This same judge explained further that:

It's a little like saying to the adolescent: "I cannot give you closed custody anymore, even if this is what you would really need. So I'll submit you to conditions that you will not be able to fulfil, you will fail, and then I'll be in a position to sentence you to the measure you really need."²⁰⁰

Alain and Hamel documented how the required rigid enforcement of the YCJA, along with the complexity of the legislation itself, has had many negative effects on Quebec's highly-integrated child protection and youth justice systems. Again, the central theme they highlighted was the subsequent difficulties encountered by the many agencies from different ministries in providing services to youth involved in youth justice. In other words, there appeared to be less flexibility in responding to the needs of the youth. This trend was seen to be exacerbated in 2012 when the Conservative federal government enacted Bill C-10 to introduce deterrence and denunciation as sentencing principles in the Act. According to Alain and Hamel, "there was a clear consensus in Quebec regarding Bill C-10 that, once again, the so-called 'rest of Canada' was working unanimously against what has been the foundation of the province's way of dealing with its delinquent youth."²⁰¹

D. Remand and Sentenced Custody

As discussed above in several places, youth justice professionals interviewed in Manitoba have expressed the concern that contrary to the restrictions placed on the use of custody (both remand and sentenced custody) by the YCJA, more youth were being remanded because of factors including that there is "nowhere [else] for some kids to go [when] CFS is overloaded,"²⁰² when CFS kids are being placed in hotels, and when kids "can't be let out on bail since they can't go home [and there are] no placements in the community."²⁰³ However, unlike most other provinces where substantial decreases in both youth remand and sentenced custody occurred, the overall youth custody rate increased 38 percent from 2005 to

²⁰⁰ *Ibid.*

²⁰¹ *Ibid* at 327.

²⁰² Smandych et al, "Youth Justice in Manitoba," *supra* note 43 at 110.

²⁰³ *Ibid.*

2011.²⁰⁴ Most disconcerting during this period, Manitoba's youth remand custody rate increased to almost five times the overall national rate.²⁰⁵ This has led to the anomalous situation in 2010-2011 where Manitoba has had by far the highest provincial rate of remand custody and the lowest provincial rate of sentenced youth custody.²⁰⁶

Youth justice professionals interviewed in Manitoba were also asked about this paradoxical policy outcome.²⁰⁷ A common response was that the increase in the use of remand custody was likely explained by the more frequent remanding of youth for 'breaching' previous court conditions received as part of earlier community-based sentences for less-serious offences. Several respondents described the process where young persons who failed to comply with court orders on a repeated basis typically were initially given more strict court-ordered conditions of release. Second, in the context of numerous breaches, each subsequent court order was stricter. Third, many of these youth eventually were remanded in accordance with enabling sections of the YCJA (Sections 39, 97 and 102). Fourth, the next set of breaches completed the cycle of youth being repeatedly remanded, sometimes for only a few days, but sometimes also for many months. A related fifth stage reported was more youth having served time in remand custody in lieu of sentenced custody and community-based court orders.²⁰⁸ Part of the latter dynamic was the acknowledgement among youth justice professionals in Manitoba, including sentencing judges, that the time a youth spend in remand custody awaiting trial and sentencing would be taken into account and deducted at the time of sentencing at a rate of 1.5 days of sentenced custody for every one day of remand custody.²⁰⁹ It was not

²⁰⁴ Statistics Canada, "Youth Correctional Statistics in Canada, 2010/2011," by Christopher Munch, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2012) at 3, online: <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11716-eng.pdf>> [Statistics Canada, "Youth Correctional Statistics 2010"] .

²⁰⁵ *Ibid.* More specifically, the rate of youth in remand in Manitoba in 2010-2011 was 19 youth per 10,000 of the youth population, which was almost five times higher than the overall rate of 4 per 10,000 youth.

²⁰⁶ Manitoba reported the lowest provincial youth sentenced custody rate in 2010-2011 at 7 per 10,000 youth in the population. Statistics Canada, "Youth Correctional Statistics 2010," *supra* note 204 at 13, 14 (Chart 7).

²⁰⁷ Smandych et al, "Youth Justice in Manitoba," *supra* note 43.

²⁰⁸ *Ibid* at 109.

²⁰⁹ *Ibid* at 110.

as surprising therefore that Manitoba had one of the lowest rates of youth sentenced custody in the country.

More recent data on youth remand and sentenced custody rates, as well as trends in the use of remand in Canada from 2004 to 2015, indicate that, while the number of youth in pre-trial detention is falling across the country, in 2015 Manitoba still had the highest youth remand custody rate among all reporting provinces.²¹⁰ The most recent Statistics Canada report on trends in the use of remand notes that, despite these overall declines, “the number of youth in pre-trial detention [still] accounted for a greater share of the total custody population in 2014/2015, than it did in 2004-2005 because the number of youth in sentenced custody fell more (or increased less).”²¹¹ The latest youth correctional statistics released by Statistics Canada in March, 2017, covering 2015-2016, provided more detailed data on rates of youth in correctional services across the country as well as data on the continued overrepresentation of Indigenous youth in the correctional system. In 2015-2016, the overall youth incarceration rate across the country (excluding Quebec) “was 5 per 10,000 youth, down 3 percent from the previous year and 27 per cent from 2011/2012,”²¹² while the rate of youth under community supervision was 43 per 10,000 youth, down 12 per cent from the previous year and 34 percent from 2011/2012.²¹³ Again,

²¹⁰ The latest Statistics Canada report on trends in the use of remand, prior to the publication of the current article, was released in January 2017, and in March 2017 it released its most recent report on youth correctional statistics. These reports indicate that the only jurisdiction that did not make available youth remand custody data for 2014-2015 was Quebec, and that the only jurisdiction that exceeded Manitoba in the use of youth remand custody in 2014-2015 was the Yukon. Statistics Canada, “Trends in the Use of Remand in Canada, 2004/2005 to 2014/2015,” by Correctional Services Program, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2017), online: <<http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14691-eng.pdf>> [Statistics Canada, “Trends 2004-2014”]; Statistics Canada, “Youth Correctional Statistics in Canada, 2015/2016,” by Jamil Malakieh, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2017), online: <<http://www.statcan.gc.ca/pub/85-002-x/2017001/article/14702-eng.pdf>> [Statistics Canada, “Youth Correctional Statistics 2015/2016”]. The latest pre-publication data reported in Manitoba indicate that the average daily youth custody population in the province (including remand and sentenced custody) decreased from 235 in 2014/2015 to 219 in 2015-2016. See *Annual Report 2015-2016*, *supra* note 50.

²¹¹ Statistics Canada, “Trends 2004-2014,” *supra* note 210 at 3, 9-10 (Chart 5).

²¹² Statistics Canada, “Youth Correctional Statistics 2015/2016,” *supra* note 210 at 3, 12 (Table 1).

²¹³ *Ibid.*

Manitoba, at 163 per 10,000 youth, had the highest rate of youth in correctional services among all reporting jurisdictions. More specifically, Manitoba had both the highest daily rate of youth in community supervision (at 139 per 10,000) and the second highest youth incarceration rate across the country (at 24 per 10,000), exceeded only by the Yukon (at 29 per 10,000).²¹⁴ The most recent data involving Indigenous youth in the youth justice system again found that while Indigenous youth constituted less than one tenth (7 percent) of the Canadian youth population in nine reporting jurisdictions in 2015-2016, they comprised more than one third (35 percent) of admissions to youth correctional services.²¹⁵ In addition, these data showed an increase of 6 percent for Indigenous youth from 2014-2015. As discussed above, a main theme of this article is the attempt to understand the impact of the explicit sentencing principle of the YCJA that mandates youth courts to consider alternatives to custody, with particular attention to the circumstances of Indigenous youth. Yet again, despite the concerted and targeted policy focused on reducing this long acknowledged historical disproportionality, in 2015-2016, 54 percent “of Aboriginal youth admitted to correctional services were admitted to custody whereas the comparable figure for non-Aboriginal youth was 44%.”²¹⁶ These figures represented an increase from 52 percent in 2014/2015, and 48 percent in 2011-2012. In addition, and even more troubling given their needs and vulnerability issues, Indigenous female youth were admitted to correctional services at an even higher rate than Indigenous male youth, and that this rate has also continued an upward climb in recent years.²¹⁷

²¹⁴ The exceedingly high rates of youth under community supervision and in custody in Manitoba are highlighted even more so when contrasted with British Columbia, which has the lowest rates of all reporting jurisdictions at 2 per 10,000 youth in the population (excluding Quebec). *Ibid* at 13 (Table 2).

²¹⁵ *Ibid* at 5.

²¹⁶ *Ibid*.

²¹⁷ In 2015-2016, Indigenous female youth accounted for 43 percent of all female youth admitted to correctional services, up from 38 percent in 2011-2012. Over the same years, the rate for Indigenous male youth increased from 26 percent to 31 percent. *Ibid* at 5.

E. The Issue of Indigenous Youth Overrepresentation: *Gladue* is Not Enough

The most recent Indigenous youth custody profile is obviously upsetting and discouraging especially in the prairie provinces of western Canada. Yet, the explanation or underlying causes of this disproportionality and, equally important, the potential changes in the YCJA and provincial/territorial laws/policies needed to mediate this trend, remain perplexing. More generally, Corrado, Leschied, and Lussier have relied mainly on Canadian research to identify potential changes in youth laws, youth justice models, and complex multi-ministerial policies to address this theme of disproportionately vulnerable youth minorities such as Indigenous youth.²¹⁸ Clearly, their research confirms the enormity of the law and policy challenges. This daunting set of challenges was also illustrated in Smandych and colleagues' Manitoba study which identified the child welfare to youth (and for many, adult) prison pipeline that exists in this province. Drawing on a range of Government of Manitoba data sources available to 2011,²¹⁹ the study showed that Indigenous children were vastly overrepresented in province's child welfare system. Specifically, data showed that the proportion of Indigenous versus non-Indigenous children in care of child welfare agencies increased from 81 per cent to 85 per between 2002 and 2011.²²⁰ Of the reported 9,432 children in care in Manitoba in 2011, 6,301 were "status Indian" (66.8 per cent), 877 were "Metis" (9.3 per cent), 32 were "Inuit" (0.3 per cent) and 837 were "non-status" (8.9 per cent).²²¹ Thus, according to the government of Manitoba's own reported data, "Aboriginal children, representing about 25 per cent of the child population in Manitoba, comprised 85 per cent of the children in care population."²²² In

²¹⁸ Corrado, Leschied & Lussier, *supra* note 97.

²¹⁹ Manitoba, Indigenous and Municipal Relations, *Aboriginal People in Manitoba* (2012), online: <<http://www.gov.mb.ca/imr/ir/pdf/pubs/abpeoplembweb.pdf>> [*Aboriginal People*]; Manitoba, Office of the Children's Advocate, "Strengthening Our Youth': Their Journey to Competence and Independence, a Progress Report on Youth Leaving Manitoba's Child Welfare System" (Winnipeg: Children's Advocate, 2012), online: <<http://digitalcollection.gov.mb.ca/awweb/pdfopener?smd=1&did=20935&md=1>> [Children's Advocate]; cited in Smandych et al, "Youth Justice in Manitoba," *supra* note 43 at 97-98.

²²⁰ *Aboriginal People*, *supra* note 219 at 55.

²²¹ *Ibid.*

²²² *Ibid.*

2008-2009, 87 percent of males admitted to sentenced youth custody in Manitoba were Aboriginal, while 91 percent of sentenced females were Aboriginal.²²³

In an article published in the *Canadian Medical Association Journal* in 2014 on the overrepresentation of First Nations children in the Canadian child welfare system, Barker et al. document statistics showing that children of Indigenous ancestry, who represent about 5 percent of the youth population, account for “nearly 50 percent of the children and youth under government care” across Canada.²²⁴ Significantly, Barker et al. argue that while “[a] large body of scientific evidence has documented the elevated risk for homelessness, mental health issues, substance use, incarceration and unplanned pregnancies among those previously maltreated and subsequently exposed to the child welfare system,”²²⁵ in Canada “policy-makers have failed to take action to address these outcomes among the children and youth they are obligated to protect”;²²⁶ which include children of Indigenous ancestry.²²⁷ Yet, they pointed out, “it is estimated that three times as many First Nations children are under government care today than during the height of the residential school era.”²²⁸ While the child welfare

²²³ Statistics Canada, “Youth Custody and Community Services, 2008/2009,” by Donna Calverley, Adam Cotter & Ed Halla, in *Juristat*, Catalogue No 850002-X (Ottawa: Statistics Canada, 2010) at 29 (Table 11), online: <<http://www.statcan.gc.ca/pub/85-002-x/2010001/article/11147-eng.pdf>>. This is the most recent data we have been able to find on the proportion of Indigenous youth admitted to correctional services by provincial/territorial jurisdiction, although it is unlikely the numbers have changed much since 2010.

²²⁴ Brittany Barker et al, “An Uncaring State? The Overrepresentation of First Nations Children in the Canadian Child Welfare System” (2014) 186:14 *Can Medical Association J* E533.

²²⁵ *Ibid* at E553.

²²⁶ *Ibid*.

²²⁷ *Ibid*. This concern is also echoed throughout the final report of Canada’s Aboriginal Truth and Reconciliation Commission, and the many public statements made over the years by its Chair, and now government Senator, Murray Sinclair, who has been cited as stating that “[o]ne of the central problems is the state of the child-welfare system,” and that “[I]ndigenous children continue to be apprehended on the basis that families cannot be trusted, but ... the system often fails to place children in safe environments”; cited in Kristy Kirkup, “Indigenous Youth Overrepresentation in Justice System: Figures from Justice Department Paint Dark Picture of State of Indigenous Incarceration,” *CBC News* (26 April 2016), online: <<http://www.cbc.ca/news/indigenous/indigenous-youth-overrepresented-justice-system-1.3554394>>.

²²⁸ Barker et al, *supra* note 224 at E534.

to prison pipeline phenomenon has been highlighted indirectly in a number of qualitative data based studies related to racialized policing and Indigenous gangs in Manitoba,²²⁹ there is only one Manitoba-based study, carried out before the enactment of the YCJA, that has examined the relationship between child welfare placement and later criminal behaviour.²³⁰ In this study, published in 2001, researchers found that 88 per cent of Indigenous inmates in the correctional system in Manitoba (compared with 63.3 per cent of non-Indigenous inmates) “were living outside their parental home at some point between the ages of 13 and 18 years,”²³¹ and that “Aboriginal inmates were not only more likely to be placed in foster care throughout their childhood years,”²³² but “they were also more likely to have been in a number of foster homes.”²³³

²²⁹ Comack et al, *supra* note 98; Elizabeth Comack, *Racialized Policing: Aboriginal People's Encounters with the Police* (Halifax: Fernwood, 2012); Kathleen Buddle, “Tagged and Turfless: Neo-liberal Justice and Youth Crime in Winnipeg” (2014) 37:2 MLJ 303; Lawrence Deane, Dennis Bracken & Larry Morrisette, “Desistance Within an Urban Aboriginal Gang” (2007) 54:2 Probation J 125; Jana Grekul & Patti LaBoucane-Benson, “Aboriginal Gangs and their (Dis)placement: Contextualizing Recruitment, Membership, and Status” (2008) 50:1 Can J Corr 59.

²³⁰ Douglas Skoog & Sharon Perrault, “Child Protection and Criminal Involvement: An Empirical Study” (2001) [unpublished report]; cited in Children’s Advocate, *supra* note 219 at 12.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ *Ibid.* However, more research on the child welfare to prison pipeline issue has been completed in other provinces. In a more recent large controlled study of 154 Indigenous and 250 Caucasian young offenders incarcerated in British Columbia, Corrado, Kuehn & Margaritescu, *supra* note 5 at 48, 52, found both that “higher foster care placements” were “strongly predictive of higher frequencies of prison sentences,” and that substantially more Indigenous young people who were later incarcerated lived “in government care (either in foster family care or group homes)”; 71 percent of Indigenous youth versus 57.3 percent of Caucasian youth. In addition, research undertaken in Ontario by Cooke and Findlay has shown that “the problems and hardships” faced in many “economically and socially marginalized families and communities” have “often been exacerbated by intrusive and ineffective child protection interventions,” which provide “a gateway into the youth justice system” (cited in Mann, *supra* note 154 at 71-72). Specifically, Cooke and Findlay found that a third of youth in custody facilities in Ontario had been “in care of the child welfare system,” and half “had child welfare involvement.” See Office of Child and Family Service Advocacy, *Review of Open Detention and Open Custody*, by Diane Cooke & Judy Finlay (Ontario: Child and Family Service, 2007) at 18, online: <<https://provincialadvocate.on.ca/documents/en/Open%20Custody-Open>

Arguably the net result is that, despite the best intentions of the YCJA, the Manitoba youth justice system “by default, exists primarily to deal with Aboriginal youth.”²³⁴ This can be seen in part in the above discussed intensified and exceptionally high disproportionate ratio of Indigenous to non-Indigenous youth in courts and custody in Manitoba since the introduction of the YCJA. The demands placed on youth justice-related professionals in Manitoba because of the overrepresentation of Indigenous youth in the criminal justice system have been acknowledged by Manitoba Justice officials. For example, several of these officials participated in the cross-country consultations on the proposed changes to the YCJA initiated by the minority-Conservative federal government in 2007.²³⁵ Nonetheless, despite this level of sensitivity to the special circumstances and needs of Indigenous youth the Manitoba Justice and government officials in more recent public policy statements on preventing and combating youth crime focus on the already overburdened police and the courts. The police historically have not been able to reconcile their primary public safety role with the added roles of coordinating with other agencies that are supposed to provide services to at-risk children and their families. Similarly, correctional and probation agencies typically have been under resourced especially in rural regions.

Regarding youth courts addressing the disproportionality challenges, the hope obviously occurred with *R v Gladue*. Despite the wide attention given to the *Gladue* decision (1999) and related *Criminal Code* amendments and precedent setting court decisions,²³⁶ youth justice professionals

Detention%20Review.pdf>. Similarly, in a recent critical study of Indigenous youth intervention policies and programs in Saskatchewan, Jaskiran Dhillon extensively documents the persistent and multi-faceted direct and indirect linkages connecting “child welfare apprehension” and “the criminalization of Indigenous youth.” See Jaskiran K Dhillon, *Prairie Rising: Indigenous Youth, Decolonization and the Politics of Intervention* (Toronto: University of Toronto Press, 2017) at 112–119. For a further review of research and recommendations made for improving outcomes for child welfare youth, see Nicholas Bala et al, “Child Welfare Adolescents & the Youth Justice System: Failing to Respond Effectively to Crossover Youth” (2015) 19:1 Can Crim L Rev 129.

²³⁴ Smandych et al, “Youth Justice in Manitoba,” *supra* note 43 at 97.

²³⁵ Roundtable Report, *supra* note 140.

²³⁶ Newell, *supra* note 1; Canada, Department of Justice, “*Gladue* Practices in the Provinces and Territories,” prepared by Sébastien April & Mylene Orsi (Ottawa: Department of Justice, 2013), online: <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr12_11/rr12_11.pdf>; Nate Jackson, “Aboriginal Youth Overrepresentation in

interviewed in Manitoba voiced skepticism about the extent to which the *Gladue* clause included in s. 38(2)(d) of the YCJA has led to significant positive changes in the manner in which Aboriginal youth are treated in the youth justice system.²³⁷ For example, when asked to provide views on the question of how the inclusion of the *Gladue* clause was taken into account by the court at the time of sentencing, one youth justice professional lamented that: “I don’t think it’s done anything. You can add a *Gladue* component to a sentence ... but it doesn’t make any difference ... It doesn’t speak directly to why kids are in the system,”²³⁸ and since almost all of the kids in the system are “Aboriginal,” “judges already know... so it doesn’t need to be spelled out”;²³⁹ while another said: “I haven’t seen it – I’ve heard of programs up North – sentencing circles.”²⁴⁰ In Winnipeg however, “none of the [Aboriginal] kids I’ve worked with have benefited from this part of the YCJA.”²⁴¹ It is also distressing that several interview respondents further pointed out that the *Gladue* component often had no effect except to lengthen the time Indigenous youth spend in remand custody, since it usually took a number of extra weeks for *Gladue* reports to be prepared.²⁴² More generally, and beyond Manitoba, in a recent critical review of case law and research on *Gladue*-related practices in the youth justice system, which bear mostly on sentencing and judicial discretion, Jackson concluded that *Gladue*-related changes have “failed to remedy” the profound crisis of Indigenous youth overrepresentation in the criminal justice system and that a remedy is unlikely to be found under the YCJA unless “special consideration of a youth’s indigeneity *before judicial discretion enters the equation.*”²⁴³ At a minimum, this research suggested that *Gladue* was not enough.

Canadian Correctional Services: Judicial and Non-judicial Actors and Influences” (2015) 52:4 Alta LR 927; Marie Manikis, “Towards Accountability and Fairness for Aboriginal People: The Recognition of *Gladue* as a Principle of Fundamental Justice that Applies to Prosecutors” (2016) 21 Can Crim L Rev 173; Kelsey L Sitar, “*Gladue* as a Sword: Incorporating Critical Race Perspectives into the Canadian Criminal Trial” (2016) 20:3 Can Crim L Rev 247.

²³⁷ Smandych et al, “Youth Justice in Manitoba,” *supra* note 43.

²³⁸ *Ibid* at 108.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

²⁴² *Ibid.*

²⁴³ Jackson, *supra* note 236 at 936 [emphasis in original]. The need for a mindful shift in

VI. CONCLUSION: THE FUTURE OF YOUTH JUSTICE RESEARCH AND REFORM IN CANADA

In this article, we began with a discussion of two enduring problems with Canadian youth justice reform: the first involved balancing the interests and rights of children with the perceived need for criminal accountability and justice; and the second was the intractable problems of variations in the manner in which youth justice legislation (from the *JDA* to the *YOA*, and *YCJA*) have been implemented inequitably across provinces/territories and within their geographic regions. Although through much of the 20th century under the *JDA* juvenile justice law and practice in Canada was clearly premised on a child welfare approach ideally emphasizing the ‘best interests of the child’ philosophical principle, while abrogating the procedural rights principle. The *YOA* and *YCJA* both effected an incremental shift in legislation and practice toward more legalistic ‘justice’ and ‘crime control’ models²⁴⁴ that have given greater priority to the protection of society and making punishment proportionate to the offence. Despite the perhaps credible claim made by some criminologists that the enactment of the *YCJA* in 2003 did not necessarily bring about an intentional ‘punitive turn’ in youth justice in Canada,²⁴⁵ it is clear that today accused and convicted young offenders across most of Canada are treated more like adults than they were in the past.²⁴⁶ Whether one considers this is to be a ‘good’ or ‘bad’ thing, however, very much depends on one’s own ideological stance, rather than on valid and reliable shared evidence about how youth justice is being administered across the many different regions of Canada.²⁴⁷ Similarly, in this context, perhaps

this direction is also advocated by Judah Oudshoorn, *Trauma-Informed Youth Justice in Canada: A New Framework Toward a Kinder Future* (Toronto: Canadian Scholars’ Press, 2015).

²⁴⁴ Corrado & Markwart, “Evolution of Juvenile Justice,” *supra* note 39; Corrado et al, “Theoretical Perspectives,” *supra* note 106.

²⁴⁵ Doob & Sprott, “The Blind Men,” *supra* note 75.

²⁴⁶ Perhaps with the exception of Quebec.

²⁴⁷ As Julian Tanner pointedly notes, “While the province of Quebec and left-wing academics represent the *YCJA* as an undesirable swing of the pendulum towards punishment and just deserts, others feel that the pendulum has not swung far enough in that direction.” See Julian Tanner, *Teenage Troubles: Youth and Deviance in Canada*, 4th ed (Toronto: Oxford University Press, 2015) at 256.

rather than simply pointing to ‘the problem’ of regional variation in the application of youth justice legislation across Canada, researchers, and policy makers might make better progress toward reforming youth justice in Canada by undertaking the research needed to answer questions like what are the various ways in which different provincial and territorial jurisdictions administer youth justice, and what might we be able to learn from one another. Indeed, it may well be the case that whether or not regional variation is perceived to be a problem depends on which side of the fence you view it from. For example, recent research published on the manner in which British Columbia and Quebec have adapted their youth protection and justice systems to formally align with the YCJA, suggested that these two provinces have taken quite different paths along the road to youth justice reform than other provinces and territories, and that in some areas the impacts of the YCJA may be “overstated.”²⁴⁸

In this light, it seems imperative that in order to effect genuine progress in the field of youth justice reform in Canada we must design a much better organized, transparent, and non-partisan entity or system, perhaps along the lines of an independent national research network or clearinghouse, that would have the mandate to foster cross-national and international knowledge sharing and transfer on youth crime and youth justice system developments and reform.²⁴⁹ Ideally, this collective venture would be guided by discussion among participants on how to implement changes based on a

²⁴⁸ Corrado et al, “YCJA in BC,” *supra* note 196; Alain and Hamel, *supra* note 39.

²⁴⁹ A small but significant step in this direction in the Canadian context is the recent book edited by Alain, Corrado & Reid, *supra* note 5, which contains chapters written on youth justice developments in eleven Canadian provinces and territories. However, there are also more developed models of youth justice knowledge sharing and policy transfer that can be drawn on from other countries. See, for example, Franklin E Zimring, Máximo Langer & David S Tanenhaus, eds, *Juvenile Justice in Global Perspective* (New York: New York University Press, 2015); Stephanie Rap & Ido Weijers, *The Effective Youth Court: Juvenile Justice Procedures in Europe* (The Hague: Eleven International Publishing, 2014); Scott H Decker & Nerea Marteache, eds, *International Handbook of Juvenile Justice*, 2nd ed (Cham, Switzerland: Springer International Publishing Switzerland, 2017); Ineke Pruin & Frieder Dünkel, *Better in Europe? European Responses to Young Adult Offending, Full Report* (Greifswald, Germany: University of Greifswald, Department of Criminology, 2015). Michael Tonry & Colleen Chambers, “Juvenile Justice Cross-Nationally Considered” in Barry C Feld & Donna M Bishop, eds, *The Oxford Handbook of Juvenile Crime and Juvenile Justice* (New York: Oxford University Press, 2012) at 871.

broadly agreed upon “best practices” in youth justice model.²⁵⁰ In the more short-term horizon, it is also imperative that Canadian criminologists and youth justice policy makers move on their own toward a more open and transparent evidence-based dialogue aimed at sorting out and dealing collectively with the obstacles that stand in the way of making youth justice in Canada work for the benefit of all Canadian youth.²⁵¹ Toward this end, it is our hope that the data and arguments we have presented here on the potential impact of the YCJA on key outstanding youth justice policy issues will contribute further to this needed cross-national discussion. Not surprisingly given our geographically vast country and diverse cultures, how this will unfold perhaps very much depends on the particular province/territory.

²⁵⁰ Admittedly, criminologists and youth justice policy-makers and reformers have a considerable amount of work ahead of them to reach wide agreement on how we can use evidence-based research to fairly evaluate and rank “best practices” in youth justice, especially in light of the currently frequent disagreement and debate among researchers on the utility of following more narrow risk assessment and statistical approaches to program implementation and evaluation. For different perspectives in this ongoing debate, see Michele Peterson-Badali, Tracey Skilling & Zohrah Haqanee, “Examining Implementation of Risk Assessment in Case Management for Youth in the Justice System” (2015) 42:3 *Criminal Justice and Behavior* 304; Stephen Case & Kevin Haines, “Risk Management and Early Intervention: A Critical Analysis” in Barry Goldson & John Muncie, eds, *Youth Crime and Justice*, 2nd ed (London: Sage, 2015) 100; Gavin Turnbull & Jean Spence, “What’s at Risk? The Proliferation of Risk Across Child and Youth Policy in England” (2011) 14:8 *Journal of Youth Studies* 939; Ross Fergusson, “Making Sense of the Melting Pot: Multiple Discourses in Youth Justice Policy” (2007) 7:3 *Youth Justice* 179; Jeffery A Butts and John K Roman, “Better Research for Better Policies” in Francine T Sherman & Francine H Jacobs, eds, *Juvenile Justice: Advancing Research, Policy, and Practice* (Hoboken, NJ: John Wiley & Sons, 2011) 505. For access to more comprehensive resources on evidence-based research, see Juvenile Justice Information Exchange, “Evidence-Based Practices,” online: <<http://jjie.org/hub/evidence-based-practices/>>.

²⁵¹ For a starting point for this endeavour, see the thoughtful discussions of youth justice reform in Corrado, Kuehn & Margaritescu, *supra* note 5; Dhillon, *supra* note 233; Jackson, *supra* note 236; Mann, *supra* note 154; Newell, *supra* note 1; Oudshoorn, *supra* note 243; Tanner, *supra* note 247.