CROWN DECISION-MAKING UNDER THE *YOUTH CRIMINAL JUSTICE ACT*

Sharon Moyer and Maryanna Basic

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The views presented here are those of the authors and do not necessarily represent the views of the Department of Justice or the Government of Canada.

EXECUTIVE SUMMARY

Crown decision-making was examined in five youth justice courts in two provinces in the summer of 2003, three to four months after the proclamation of the *Youth Criminal Justice Act*. The main decisions described in the research are

- the decision to approve charges in British Columbia (also known as pre-charge screening by the Crown);
- the decision to divert a young person from the court process to Extrajudicial Sanctions (EJS);
- whether to release a police-detained young person from pre-trial detention "on consent";
- the contents of the submission to sentence.

Crown prosecutors in Saskatchewan and British Columbia urban youth courts participated in the research after permission was obtained from provincial officials.

The research combined observation, interviews and review of case files. It was prospective in nature in that the field worker asked prosecutors about their decisions at the time that they were being made, or very soon thereafter. The main emphasis was on the collection of qualitative information, but statistical analysis of file data was also undertaken.

This research is intended to offer insight into the prosecution of youth court cases. The sample sizes in each court were small, and the generalizability of the findings beyond the court houses involved may be questionable. During the study the caseloads of the courts were remarkably low because of the recent proclamation of the *Youth Criminal Justice Act*. In addition, because of the recency of the new law, procedures and policies may have been in the course of being established. These factors combined suggest that the findings may not be representative of prosecution practices in general. Despite this, the study can be regarded as a first start in understanding how and why prosecutorial decisions are made.

The Study Sample

The study courts differed in a number of ways, such as the type of cases heard by the judiciary, the delivery of legal services to accused, the degree of specialization of Crown prosecutors and defence counsel and the characteristics of their caseloads. In terms of the social characteristics of the samples, Saskatchewan courts had many more youth of Aboriginal origin. Proportionately more British Columbia young persons were on probation, fewer had had been diverted in the past, and fewer had outstanding charges.

Charge Approval in British Columbia

British Columbia is one of two provinces in Canada where police do not lay charges. (Québec is the other.) Pre-charge screening by the Crown, or charge approval as the

procedure is termed in B.C., involves a review of police documentation and a Crown decision to charge or to take no further action, other than perhaps to send a Crown caution letter.

In the B.C. charge approval sample, a slight majority of cases submitted by police and probation were approved and therefore charged. Among the cases that were observed, pre-charge referral to EJS was rare. It was found that Crowns may approve charges with the intent of later diverting them post-charge; this delay appears to be done in order to impress upon the accused the seriousness of his/her behaviour. Most cases of no further action – where charges were not laid – were not approved because the Crown assessed the evidence as insufficient to meet the standard of substantial likelihood of conviction; a good number were dropped because of procedural flaws. About half of both approved and non-approved charges involved young persons with prior findings of guilt.

The primary source of information available to the prosecutor is the police report and the prior record of the young person. Only if the youth has had previous youth justice system experience may others become involved. As noted, the majority of cases screened out of the system did not meet the substantial likelihood of conviction standard found in British Columbia.

Post-charge Diversion to Extrajudicial Sanctions (EJS)

From observational and interview data, it is apparent that there were overlapping rationales for diverting cases to EJS. Prior record and offence type are major factors in the Crown's decision. Offences at the "low end of the spectrum" and those that are non-violent are most likely to result in diversion as long as the youth has no prior convictions, a very minor record or a record sufficiently old enough to suggest that there is no pattern of criminal behaviour. Common assaults (assault level one) were diverted if there were extenuating circumstances such as the youthful age of the alleged offender. An important interest of the Crown in making the diversion decision was that the young person be "held accountable".

Social circumstances play a much lesser role than offence and prior record. On occasion, the presence of specific programs in the community was influential in the Crown decision to divert.

Compared to Saskatchewan cases, a smaller proportion of B.C. cases were diverted a second time. This was attributed to the lack of variety in EJS programming, especially the lack of offence-specific programs. Crowns and defence in British Columbia were more concerned about the lack of variety in Extrajudicial Sanction programs than were those in Saskatchewan.

A multivariate analysis of the factors affecting the use of diversion by Crown counsel found that having no previous findings of guilt, having a current property charge and having few current and no outstanding charges were the factors that most influenced the Crown decision to refer a case to EJS. No social characteristics of the young person were associated with the referral to Extrajudicial Sanctions.

The Crown Decision to Release Young Persons at Bail Hearings

No provincial policies specifically on bail decision-making were located. All Crown prosecutors participating in this research were aware of the bail provisions in the *YCJA* although there was variation, and some confusion, in their interpretation.

In the bail decision sample as a whole, over 4 out of 10 cases were released on consent of the Crown. This is considerably lower than the estimates made by Crown counsel and defence interviewed during the study and also lower than the only other Canadian research on youth court decisions (Varma, 2002). The lower-than-expected release rate could be related to the recency of the new legislation and to the characteristics of the cases entering the youth courts participating in this research.

The child welfare and mental health status of young persons is closely intertwined with their offence history and it is difficult to determine what factors are operating in the prosecutor's decision to release on consent. Nine out of ten cases that were detained by police had some type of current involvement with the youth justice system (typically, they were on probation) and two-thirds had earlier findings of guilt. One-half of the cases were accused of offences against the administration of justice.

The multivariate analysis of the factors affecting the Crown's decision to release suggest that having fewer current charges, having no outstanding charges and no evidence of abuse of alcohol or drugs were influential in the decision to release on consent.

The Crown's Submissions to Sentence

The Crown's submissions to sentence tended to be accepted by the youth courts. This finding could mean that the Crown was attune to the sentencing practices of the sitting judge, that the youth court tends to be influenced by the Crown's perspective, and/or that the Crown and the court use the same criteria for sentencing. The submissions to sentence as well as the sentences themselves were in keeping with the provisions of the *YCJA*.

At sentencing youth prosecutors did not simply rely on the police report but consulted other system personnel, social services staff and sometimes parents or guardians for information on the young person. Social reports, especially pre-sentence reports, were found in about 40 percent of cases; in a substantial majority of cases where the Crown recommended a custody sentence, a PSR was available. In about two out of three cases in the sample, the Crown prosecutor had two or more sources of information, either verbal or written, in addition to the police report and prior record of the young person.

Both case characteristics and other factors appear to influence the contents of the submission to sentence by the Crown. Of the former, one feature of the young person's prior record – having an earlier custody sentence – was most influential. However, a large number of factors unrelated to the characteristics of the individual case were mentioned during case reviews and interviews with prosecutors.

In summary, the decisions examined in this exploratory research on key decisions made by Crown prosecutors in youth justice court were most influenced by legal factors especially the prior offence history of the youth, the presence of outstanding charges and the number of current charges.

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Introduction

> The discretionary process that produces a prosecutorial decision is often shrouded in mystery. It is indeed 'a practically invisible, unexamined and often ignored phenomenon'.[1]

The purpose of this research is to shed light on the factors associated with Crown decision-making in youth court cases. This multi-site project, which was conducted in two courts in Saskatchewan and three courts in British Columbia, is designed to contribute to our understanding of the exercise of prosecutorial discretion. Crown decisions not only affect the volume of cases dealt with by the youth courts and hence court workload but more importantly, affect the nature and degree of intervention experienced by young persons who come into contact with the justice system. This study was undertaken to describe the process taken by prosecutors to come to their decisions, the sources of their information, and the reasons for their decisions. Four main decision points are examined: charge approval in British Columbia, Crown prosecutors' referrals to Extrajudicial Sanctions (EJS), the decision to release the young person from pre-trial detention and the Crown's submission to sentence.

1. Research Questions

The following research questions were identified by the Department of Justice Canada.

1. What are the factors that are associated with Crown decisions to charge or to take no further action in British Columbia?
2. What are the factors that encourage Crown prosecutors to refer a youth to Extrajudicial Sanctions?
3. What factors are associated with the Crown decision to release young persons from pre-trial detention on consent?
4. At sentencing, what are the factors that encourage the Crown to recommend that the young person be sentenced to custody and supervision?

2. Methodology

This comparative study was done with the permission of senior officials in each jurisdiction who selected two youth courts in Saskatchewan and three in British Columbia for participation in the study. These provinces differ in a variety of ways, including their standards for prosecution, pre-charge screening practices, availability of programs for young offenders and custody rates.

In the summer of 2003, a field researcher spent four weeks in each province, undertaking interviews, collecting information on a sample of Crown decisions, observation and file data collection. The field worker had a unique opportunity to witness the behind the scenes discussions and negotiations between the Crown and other court actors.

[1] Cited by Ian Dobinson (2001).

Structured interviews were undertaken with seven youth prosecutors and eleven defence counsel, both counsel in private practice and those employed by the provincial legal aid plan and social services. On average, the semi-structured interviews lasted one and half hours. The interviews addressed court organization and workload, pre-trial detention and sentencing practices, programs in the community and in the correctional system, and community pressures on the youth court.

The bulk of the data collection involved collecting information on a sample of cases by means of interviewing Crown prosecutors. This component on the "how's and "why's" of Crown's decisions about specific cases was prospective in nature. The field worker sat with Crowns and asked for their reasoning for making their decisions at the same time as or soon after the decisions were made.

A checklist for administration to Crowns was developed, containing the social and legal characteristics of the case and the information available to the Crown at the time of decision-making. All case-specific comments by Crown prosecutors and other actors were recorded by the field worker on the form in an open-ended format.

At the outset of the project, we realized the necessity of developing good rapport with court personnel, especially the Crown prosecutors. The field worker attempted to obtain the cooperation and trust of Crowns in an impersonal, non-threatening manner. Crowns were assured of anonymity. The burden on the time of Crowns was minimized by asking questions at free moments. Courtroom observation was also conducted as many of the Crowns' interactions with others occurred in the courtroom immediately before court opens and at recesses. Most verbal exchanges are not found in paper files. Cases identified through observation were then followed up in Crown files in order to quantify socio-demographic, prior record, and offence characteristics.

In addition, informal conversations were held with a variety of court actors, including bail program staff, social services personnel, youth workers[2] and court administrative staff. Finally, Crown policy manuals were reviewed to determine the official standards, if any, for prosecution and EJS, bail and sentencing policies.

A search of the literature on the decisions made by prosecutors was undertaken. The literature review examined sources from Canada, United States, the United Kingdom and Australia. Overall, very little research has been done on the topic.

3. The Observation Sample

The total number of Crown decisions was 142:

- 28 charge approvals (only in British Columbia),
- 19 referrals to Extrajudicial Sanctions (EJS),
- 49 bail decisions, and
- 46 submissions to sentence.

[2] In this report, the terms youth worker and probation officer are used interchangeably.

Originally, we anticipated that information on 20 decisions per day could be collected, making a total of about 800 cases for eight weeks of data collection in high flow courts. The following factors explain the shortfall between expectations and reality.

1. The *Youth Criminal Justice Act* had been in effect for only a few months. As had occurred after the *Young Offenders Act* was proclaimed, the number of youth matters coming to court had dropped precipitously. Also, data collection was done in the summer, always a slower time for the courts. The sample was limited by the small number of cases being dealt with by the courts.
2. Most study courts were by no means high flow. At the time of the proposal, there had been no decision on the selection of court locations.
3. Two jurisdictions agreed to participate in the study and in both cases provincial officials strongly recommended that more than one court be sampled. Having to deal with Crown prosecutors and others at five youth courts meant that the field worker was required to spend more time to become familiar with the court and its procedures and personnel – as well as developing rapport.
4. We greatly underestimated the amount of time required to interact with Crowns,[3] defence and other court personnel as well as to conduct interviews and collect file data. It was impossible for the field worker to "shadow" more than one Crown prosecutor per day.

4. Analysis

The expectation in the proposal for the project was that both quantitative and qualitative analysis could be done. The small sample size has meant that a good part of the analysis must be qualitative. The value of qualitative data on the topic of Crown decisions should not be underestimated. Because the process of prosecutorial decision-making is not well understood, qualitative techniques are appropriate because the approach gives the researcher and participants the opportunity to raise issues that were not anticipated. Qualitative research is "best for exploratory and descriptive analyses which stress the importance of context, setting, and subjects' frames of reference" (Marshall & Rossman, 1994). This project is very much a "first step" in studying Crown discretion.

A number of the "harder" data elements were entered into SPSS, a software package for the social sciences. Three Crown decisions were analysed using regression: the differences between the Extrajudicial Sanctions referrals and the rest of the sample; the factors affecting the Crown decision to release a youth from detention; and the case characteristics associated with the decision to recommend a custody and supervision sentence. Because the sample sizes are small, few variables could be used as independent or explanatory factors. To a certain extent, this problem was resolved by undertaking preliminary multivariate analyses to exclude variables that were unrelated to the dependent variable when other factors were controlled.

[3] In particular, time was required to assure the Crowns of their anonymity and the purposes and importance of the research.

5. Methodological Issues

Because of the timing of this research – soon after the proclamation of the *Youth Criminal Justice Act* – many prosecutors were dubious about the actual intent of the study. Although the field worker emphasized that the purpose of the research was to investigate the process of Crown decision-making, many were concerned that the research was an audit to determine whether prosecutors were adhering to the new *Act*.

> Observational techniques are perhaps the most privacy-threatening data collection technique for staff ... Staff fear that the data may be included in their performance evaluations and may have effects on their careers (Frechtling & Westat, 1997: 4 (Chapter 3)).

The field worker spent considerable time in negotiating with and re-directing respondents towards the goal of the study. Despite her best efforts prosecutors in two of the five youth courts were reluctant to participate in the study. One Crown said that she and her colleagues participated only because they had been "ordered" to do so. In another province, a prosecutor appeared to be defending her colleagues.

> We all do youth court the same. We all exercise discretion in a very careful way….very mindful of the *Act*. We always would use the *Act* as a guidepost. The judges are very vigilant here, we have a very active defence bar. There's a lot of checks and balances in the defence bar in terms of their saying 'well, what about this part'. At the end of the day we all want to do the right thing. We all live in the community and we all want to make it safe.

A critical issue is whether the information on decision-making provided by the Crown respondents was reliable and valid. This question is not easily resolvable but it is possible that some prosecutors, particularly those who were hesitant about participating, may not have been entirely open in their responses to questions on the reasons for their decisions.

The cases included in the prospective observational sample that entered the youth courts in July and August 2003 may have been atypical because of the decrease in police charges that was occurring at that time.

Finally, the generalizability of the findings to the youth courts involved or to the jurisdiction as a whole is not known.

Description of the Courts

1. Court Caseloads

The caseloads of the courts were markedly below normal during data collection. Because of this factor, Crown and defence counsel were asked for the typical time lags *before* the proclamation of the *Youth Criminal Justice Act*. Undue delay attributable to high caseloads was not mentioned. Trials were being set well within the customary limits. Trial dates were being set three to four months ahead in one Saskatchewan court and in about four weeks for cases being held in pre-trial detention. In the second, trials were scheduled within two to three months. In the three British Columbia courts,[4] it was estimated that trial dates were set within two to three months, and within one month for in-detention matters. In one court, priority cases such as assaults could have a trial date within six to eight weeks.

With the exception of one court, respondents said that there were ample numbers of prosecutors and members of the bench to deal with caseloads even before the *Act*'s implementation. Only a few prosecutors cited heavy workload.

In most courts, therefore, court workload was manageable, backlog was non-existent, trial dates were being set in reasonable time frames, and court actors were not unduly stressed by case volume.

2. Charging Authority

In Saskatchewan, the police have the authority to lay charges,[5] although in complex matters the Crown may be consulted. The criteria used by Crown prosecutors to proceed with charges are "reasonable" likelihood of conviction and whether the prosecution is in the public interest.

In British Columbia, the police refer all cases to the Crown for a decision on charging.[6] The standard for prosecution in British Columbia is "substantial" likelihood of conviction, which is a higher standard than reasonable likelihood. Just as in Saskatchewan, public interest is the second criteria. For cases of high risk violent and/or dangerous offenders, the Crown may still proceed even though the above criteria are not met; in consultation with the Regional or Deputy Regional Crown Counsel, the Crown may proceed using the criterion of reasonable prospect of conviction.

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4 A defence lawyer in one court commented that "this is the most efficient court house that I have seen in the Lower Mainland".

5 Prince Albert has the only pre-charge screening program in the province (Saskatchewan Justice, 2003, 27).

6 Prosecutors in British Columbia are termed Crown Counsel. For the purposes of this report, the terms prosecutor or Crown prosecutor is also used.

3. The Key Actors

The Bench

Four of the five youth courts were physically located in buildings with adult courts and shared members of the bench with the adult criminal court. The fifth court, in downtown Vancouver, is a family court that also hears small claims and provincial traffic cases.

In Regina, one judge tended to hear most youth court cases. In Saskatoon, there were two judges who were responsible for two weeks of every month; other adult court judges rotated into the youth court for the rest of the time. About a dozen judges sat in the downtown Vancouver court. In Surrey, which has caseloads similar in size to Vancouver, two provincial court judges heard many of young offender matters although cases could be dealt with by any member of the bench. In Victoria, two judges generally sit youth court.

Crown Prosecutors

Short- and medium term assignment to youth court was the pattern in the youth courts studied, with the exception of downtown Vancouver and Victoria. That is, Crown prosecutors were not exclusively assigned to youth court, but when assigned – often for six to twelve months at a time – they spent most of their working day on young offender cases.

In Regina, one Crown was responsible for most routine activities such as bail hearings and sentencing on guilty pleas. The conduct of trials was rotated through the Crown's office; a variety of Crowns could be assigned to youth trials while also working on other matters. In Saskatoon, two prosecutors spent most of their time on youth matters and one courtroom was dedicated to youth cases. These prosecutors were often in the one courtroom – one prosecutor dealt with new arrests and the second handled adjournments and sentencing. In both Regina and Saskatoon, the Crowns were rotated through the youth court at reasonably lengthy intervals.

In the Vancouver Family Court, there are 12 Crown counsel who also prosecute provincial traffic offences; seven Crowns spend most of their time on youth and two others assist as needed. In Surrey, an administrative Crown counsel and one to two other Crowns deal with most youth cases with the other Crowns acting at trials. The administrative Crown rotates at annual (or longer) intervals. In Victoria, one Crown is mainly responsible for youth court unless there is a scheduling conflict.

On average, Crown prosecutors interviewed in the five communities had more than a dozen years of experience since being called to the bar and there was no difference between Saskatchewan and British Columbia.

Legal Representation

In the study courts, all or almost all young persons are represented either by retained or duty counsel at every stage of youth court proceedings, including bail hearings, sentencing and

trials. Crown and defence counsel estimated that 99 to 100 percent of young persons had representation. Several mentioned that judges would not proceed without the presence of defence counsel.

Most legal aid and retained counsel are criminal lawyers who divide their time between youth and adult criminal court. In Saskatchewan, most representation is by legal aid staff who also act as duty counsel.[7] Counsel in private practice appointed under section 25 of the *YCJA* act for young persons when legal aid staff lack the time. In British Columbia, most defence were lawyers in private practice retained on a legal aid certificate; duty counsel were contracted on a weekly basis from private firms. Wards of the child protection agency were represented by an experienced lawyer on contract to the Ministry of Children and Family Development of British Columbia (MCFD). In all courts, very few young persons were represented by defence who had been retained and paid privately. In one Saskatchewan court, a defence counsel in private practice estimated that no more than 5 to 10 percent of cases retained counsel privately and the estimates were similar elsewhere.

The years of professional experience among defence was lower in B.C. than in Saskatchewan. In British Columbia, defence lawyers had an average of eight years since they had been called to the bar. In Saskatchewan, defence counsel had an average of over 20 years. This is probably because most Saskatchewan defence interviewed were employees of the provincial legal aid plan whereas in B.C. defence lawyers were in private practice, usually working on a legal aid certificate. Typically, more experienced lawyers in private practice do not work on legal aid certificates.

Other System Actors

In Saskatchewan, probation officers/youth workers and judicial interim release (JIR) personnel are in or near the courtroom much of the time while youth court is in session. Crown prosecutors commented on the advantages of this practice – these workers often have personal knowledge of the accused. Some defence counsel were less enthusiastic because personal knowledge could work to the disadvantage of their clients.

In Vancouver, staff of the John Howard Society are available to explain court proceedings to young persons and their parents. In Surrey and Victoria, youth workers sit in youth court to monitor proceedings and assist the Crown with information about the youth, the programs in which they have been involved and the availability of other resources.

4. Information Sources Available to the Crown

This and the next section describe the total sample: 16 charge approvals (in B.C. courts only), 49 bail cases, 19 referrals to Extrajudicial Sanctions and 46 submissions to sentence. The sample is evenly divided between Saskatchewan and British Columbia, 66 decisions in the former and 64 decisions in the latter province.

[7] There is also an experienced paralegal who deals with most matters except trials.

To the best of her ability, the on-site researcher attempted to determine what information Crown prosecutors were using in making their decisions. It is likely, however, that the estimates of verbal exchanges are low since interaction may have occurred outside of the period of observation and/or some Crowns may have forgotten or not reported discussions with other system personnel and other actors.

Table 1 shows the written and verbal sources of information that were obtained during the field work. Social reports such as pre-sentence reports were about twice as likely to be available to the Crown in B.C. as in Saskatchewan. Exchanges between the Crown and defence, and the Crown and youth workers, were more common in British Columbia. Part of the reason for this finding may be the location of the Crown's offices: in the B.C. youth courts observed, the offices were in the same building as the court, thereby easing the opportunity for interaction. Bail program staff were more likely to have verbal exchanges with the Crown in Saskatchewan, presumably because they are routinely present in the youth court and the Crowns rely on them for bail assessments. Overall, there was no significant jurisdictional difference between the number of information sources available to prosecutors; just over one-half of the observation sample had two or more sources of information (other than the police report).

Table 1: Information Known to be Available to Crown Prosecutors, Saskatchewan and British Columbia

Estimated frequency of	Saskatchewan	B.C.	Total sample
Social reports			
Pre-sentence report available (earlier or current)*	15.4% (65)	31.9% (47)	22.3% (112)
Medical-psychological report available (earlier or current)	6.2% (65)	12.8% (47)	8.9% (112)
Interaction between Crown and			
Defence counsel*	46.8% (62)	66.0% (47)	55.0% (109)
Youth worker/probation officer**	18.0% (61)	41.7% (48)	28.4% (109)
Bail program workers**	17.7% (62)	2.1% (48)	10.9% (110)
Child protection workers	8.1% (62)	8.3% (48)	8.2% (110)
Parent or guardian e.g., foster parent	13.1% (61)	20.8% (48)	16.5% (109)
Other personnel e.g., other Crown prosecutor	6.3% (63)	6.3% (48)	6.3% (111)
% of cases where 2 or more persons had exchanges with the Crown	25.0% (64)	36.7% (49)	31.0% (113)
Total sources of information:	Column percentages		
None other than police report, prior record data	25.8	14.6	20.9
1 source	24.2	25.0	24.5
2 or more sources	50.0	60.4	54.5
Total percent	100.0%	100.0%	99.9%
Total number	62	48	110

Notes: * p<.05 ** p<.01

5. Case Characteristics

Demographic and Social Factors

Approximately one out of four cases was female and the average age was 15.5 years (Table 2). In the total sample, almost one-half of cases were of Aboriginal background. In Saskatchewan, almost two-thirds of cases were Aboriginal.

One-third to about one-half of the samples were termed out of control, substance abusers, neither attending school nor working, not living with a parent and said to have some involvement with the provincial child protection agency. The differences between Saskatchewan and B.C. should be viewed with great caution, however, because the prosecutors in B.C. had greater access to pre-sentence and medical-psychological reports than did those in Saskatchewan. In other words, the higher incidence of "problematic" behaviour or home situations in B.C. may be an artefact of the more detailed information available to Crown counsel in the B.C. courts.

Table 2: Characteristics of the Samples, Saskatchewan and British Columbia

	Saskatchewan	B.C.	Total sample
Social characteristics			
% female	25.8% (66)	21.9% (64)	23.8% (130)
% 16 or more years of age	50.8% (63)	54.8% (62)	52.8% (125)
Average age	15.4 years	15.5 years	15.5 years
% Aboriginal**	65.5% (58)	27.1% (48)	48.1% (106)
% labelled out of parental control	35.1% (37)	55.6% (36)	45.2% (73)
% alleged substance abuser*	25.8% (66)	47.9% (48)	35.1% (114)
% "inactive", neither attending school nor working	27.3% (44)	43.9% (41)	35.3% (85)
% not living with parent(s)*	37.7% (61)	58.3% (48)	46.8% (109)
% prior or current involvement with the child protection agency*	25.8% (66)	50.0% (48)	36.0% (114)
Legal characteristics			
% currently on probation*	22.7% (66)	46.0% (63)	34.1% (129)
% with 1 or more prior Alternative Measures**	37.7% (61)	6.3% (48)	23.9% (109)
% with 2 or more prior Alternative Measures	9.9% (61)	0	5.5% (109)
% with prior findings of guilt	59.1% (66)	60.3% (63)	59.7% (129)
Average number of prior findings of guilt	2.5 (65)	2.5 (57)	2.5 (122)
% with a prior custody sentence*	10.6% (66)	29.2% (48)	18.4% (114)
% with 1 or more outstanding charge**	43.8% (64)	16.4% (61)	30.4% (125)
Average number of outstanding charges*	2.1 (65)	0.7 (64)	1.4 (129)
Average number of current charges	2.7 (66)	2.0 (63)	2.4 (129)
Most serious charge at arrest:*	Column percentages		
Indictable person or property	30.3	23.5	27.0
Hybrid person	9.1	9.4	9.2
Hybrid property	27.3	15.6	21.5
Victimless e.g., weapons	3.0	9.4	6.2
Breach of probation	10.6	32.8	21.5
Other administration of justice e.g., non-compliance with bail	19.7	9.4	14.6
Total percent	100.0%	100.1%	100.0%
Total number	66	64	130

Notes: * p<.05 ** p<.01
In British Columbia, most violations of bail are dealt with by way of section 524 of the *Criminal Code*, not by a charge; for the purposes of this analysis, however, bail non-compliance has been treated as a "charge".

Legal Characteristics

Almost one-half of the B.C. cases were currently on probation compared to less than one-quarter of those from Saskatchewan. Saskatchewan cases were more than four times as likely to have had earlier Alternative Measures/Extrajudicial Sanctions. This difference may be partly due to the use of pre-charge diversion in British Columbia – diversion by police may not have been noted in the case files.[8] The samples were identical in their prior record: 60

[8] An unknown number of B.C. youth may have received police-based diversion (now termed Extrajudicial Measures) as a result of incidents that occurred before charges were referred to Crown counsel. Police-based EJM do not show up on CPIC or correctional records, although they are available on police information systems;

percent had findings in the past and the average number of convictions was 2.5 per case. There was one important difference in their offence histories: 29 percent of B.C. but only 11 percent of Saskatchewan cases had a previous custody sentence.

Saskatchewan cases were much more likely to have outstanding charges and to have more outstanding charges than were those in British Columbia. The number of current charges did not differ. In terms of the most serious charge at arrest, a larger proportion of Saskatchewan cases had a hybrid property offence. Indictable offences were roughly similar in the two jurisdictions.

In sum, there were a number of similarities between the samples – in terms of sex, age, presence of a prior record, the number of prior findings of guilt and number of current charges. More B.C. cases lacked experience with Alternative Measures, were currently on probation and had past custody experience.

6. The Court Environment

Most of the youth courts participating in this research are sufficiently small that Crown prosecutors, defence and other staff know each other. Many also know the accused from previous matters.

Crown and Defence Counsel Relationships

Collegial relationships among Crowns, defence and other court personnel were the norm. With the exception of one court, overall there was mutual give and take and even respect. Few defence complained about difficulties in engaging prosecutors in negotiations. A defence counsel remarked that prosecutors "know the accused better because they work with their files constantly". "I don't have to reinvent the wheel each time the same kid comes to court." When specifically asked, both Crown and defence respondents said that "incompetence" in their opposite numbers was relatively infrequent. However, a particularly opinionated defence lawyer said:

> Some of the prosecutors are conscious of the social and family conditions that these kids might be facing and are conscious of the resources that are available that would help stop their criminal patterns. Others do not know. Those are the incompetent ones (Saskatchewan defence).

In the youth court where relationships appeared somewhat strained, a Crown prosecutor said that defence counsel ranged from very to not very competent. To this prosecutor, some members of the defence bar lack knowledge of the legal issues, are unable to defend appropriately at trials, and were ignorant of the new legislation. A defence counsel in this court said, "this is the worst Crown's office we've ever had, there is no collegiality, there is a big wall". Another defence lawyer said that that there is an "occasional" prosecutor who is

sometimes, but not always, this diversion experience is mentioned in the background section of the Report to Crown Counsel.

not competent; those who fall into the latter group "take cases very personally, take sides and don't want to see the whole picture".

A Fine Balance

Proportionality, meaningful consequences, rehabilitation and the rights of the accused are considerations that youth justice personnel juggle with on a daily basis.

A substantial number of respondents said that the court, Crown counsel or defence counsel behaved in a paternalistic way towards young persons. Paternalism is associated with the pre-1984 Canadian juvenile court ("in parens patraie") with its emphasis on the best interests of the child and its lack of due process and proportionality.

In their discussions of court orders, respondents mentioned that bail and probation conditions were not always in proportion to the legal characteristics of the case and that they were more intrusive that the offence warranted. A British Columbia defence counsel said that some judges in his court were "more interventionist" than others and "load kids up with more legal expectations [conditions], not just to sanction but to rehabilitate." Other respondents said:

> We are way overusing remand. Judges are encouraged to make kids do things like go to school, don't drink. They don't do it to punish but rather as a wise parent. Breaches [of these conditions] are what cause the kids to be remanded (Saskatchewan defence counsel).
>
> When we put kids on probation and they screw up, they get a bigger probation order where they are able to screw up more. And we feed the cycle (B.C. defence counsel).
>
> The overuse of probation conditions inevitably results in breaches; then they get dragged back to court and then to jail. The new *Act* tries to address that, but judges are human and they still want to try to help the people that appear before them. In a lot of cases, it just sets the kids up to breach (B.C. defence counsel).

Defence counsel also said that some Crowns were paternalistic. "The charge does not always connect with the conditions being sought. [The prosecutors] are trying to be protective or paternalistic towards youth." The role of probation officers and other youth workers in establishing breach conditions should be examined in future research. One prosecutor told us that he agreed with the workers' recommendations "80 to 90 percent of the time". Another said "we ask for these conditions [11 of them!] so as to rehabilitate." Crowns may also rely on parents and other caregivers to find out how the young person behaves at home.

The distinction between paternalism and rehabilitation is not always clear. Is "wanting to try to help" paternalistic or rehabilitative? If the conditions are unrelated to the offence or disproportionate because the offence is not serious and prior record minimal or non-existent, then we might conclude that paternalism is operating.

Paternalism was also mentioned outside of the context of burdensome probation and bail conditions.

> Youth court is fairly paternalistic in its approach. The youth court tries to do much more than a criminal court. They get more into counselling and social work. That is both good and bad. Sometimes we may be fixing the problem with the wrong tool (B.C. defence counsel).

The philosophy of sentencing in a different B.C. court was described by a prosecutor as "social working and paternalistic, giving the [youth] guidance". In Saskatchewan, a Crown made a similar comment: "our judges in youth court really truly want to do the right thing. Sometimes they act more like social workers than like judges."

Defence lawyers were not immune from accusations of paternalism.

> Being factually guilty and the Crown being able to prove it are two different things. There are different models of being defence counsel: there are those who look at it as a fight and then there are others who take the paternalistic model. [To the latter] running a technical argument of improper search is not sending the right message to the kid (Vancouver defence counsel).

The following differences between the role of defence in adult and youth court also imply that defence counsel may be as subject to the fine balance as are Crowns and the judiciary. In the experience of a Saskatchewan prosecutor, defence lawyers

> recognize that youth court is a different animal than adult. In youth court the lawyer is a better able to control the client and be able to say 'listen, you don't have a defence'. In adult court they're more on equal footing. In youth court a lot of the lawyers who work with the youth are interested in helping their clients and are better able to control them [than adults] and suggest what the smarter thing to do is.

In two communities, the courts were categorized by Crown counsel as "soft" or "too lenient". For example, "the judges in our youth court don't sentence appropriately, they're too lenient". Later in the interview, this Crown said

> It's good to get into the reason [for a serious offence], but sometimes the judges bend over a little too far backwards and there's too much focus on 'poor Johnny' and not enough on 'yes, poor Johnny, but he has to be accountable for his actions'. There is a lack of holding youths responsible and accountable. ... I think there are certain judges who want to try and save the world. They want to be seen as politically correct and championing the right causes. They've lost touch with reality and the need for public protection (Saskatchewan Crown).

By no means all respondents termed the youth court paternalistic or excessively lenient. In a B.C. court, a defence lawyer said that the judges do not have paternalistic attitudes. "Here it is more a sense of a social problem ... closely aligned to the principles of the *YCJA*." Similarly, one Saskatchewan Crown said that in her court "rehabilitation is the primary goal, getting at the root cause of offending behaviour".

In conclusion, the fine balance may be difficult to achieve. Arguably,

> there is a real philosophical incongruity. The adult system is replicated in the youth court but there is still the paternal model there in the youth system. ... The two schools of thought make for difficulties (B.C. defence counsel).

7. Summary

During this study the caseloads were remarkably low because of the proclamation of the *Youth Criminal Justice Act*. Similar drops in caseloads were observed after the proclamation of the *Young Offenders Act* in 1984.

Each court is comprised of an intricate network of professionals who shape the way a courthouse is run. Each court has a different culture.

The study youth courts differed in a number of ways, such as the functions of the bench beyond youth matters, the delivery of legal services to accused, the degree of specialization of Crown and defence counsel and the characteristics of their clientele. In terms of social characteristics of the samples, Saskatchewan courts had many more youth of Aboriginal origin and lower percentages of the youth alleged to be out of control, substance abusers, living outside the parental home, and involved with the child protection agency. More British Columbia young persons were on probation, fewer had had been diverted in the past, and fewer had outstanding charges.

Respondents linked bail and probation conditions with both "paternalism" and "wanting to help". To several respondents, largely defence lawyers, in many cases the conditions imposed by the youth court were excessive, burdensome and unrelated to the offence. The conditions only increased the likelihood of breaches which in turn lead to more conditions and ultimately to custody for new breaches. The use of conditions that are unrelated to the offence should be explored in further research.

In two courts, some prosecutors saw the courts as too lenient at sentencing. In one court, Crown-defence counsel relationships were less collegial than may be desirable; however, there was little indication that the relationships were adversarial in nature.

Charge Approval, Proceeding with and Dropping Charges

1. The *YCJA*

In s. 4(8), the Extrajudicial Measures section of the *Act* states that prosecutors can administer cautions to young persons instead of starting or continuing judicial proceedings. As is the case for police warnings and cautions, prosecutorial cautions cannot be introduced in subsequent proceedings against the youth (s. 4(9)). Section 8 states that provincial governments can implement programs for prosecutorial cautions.

The Saskatchewan government decided against introducing a Crown caution program under s. 8 "at this time" (Saskatchewan Justice, 2003: 14). In British Columbia, the Attorney General has not designated a Crown caution program but there is a long established non-designated program that is covered by formal Crown policy. That is, Crown counsel are instructed to continue the practice of utilising prosecutorial discretion regarding caution letters to the parent/guardian of young persons alleged to have committed a criminal offence. No Crown caution letters were observed during this research.

Section 23 of the *Act* allows the provinces to establish programs for Crown screening before charges are laid. The young person might be referred to an EJS program or sent a caution letter or, indeed, no further action may be taken. The section is intended to encourage Crown screening. Bala (2002: 27) speculates, "the prosecutor may be more willing than a police officer to take responsibility for deciding not to have a case dealt with by the courts".

2. Charge Approval in British Columbia

> The Crown does not base charge approval on what a "reasonable person" can conclude but on substantial likelihood of conviction. At this point, this file does not meet this standard (B.C. Crown memorandum to a police officer, August 2003, emphasis in original).

Provincial Policy

The process by which Crown prosecutors screen cases forwarded to them by police is termed charge approval. There is a two-pronged test which the Crown's use to guide their discretion. The first is substantial likelihood of conviction and the second is public interest. To decide whether there is a substantial likelihood of conviction to proceed, the Crown examines the police report using the following evidentiary tests:

a) what material evidence is likely to be admissible;
b) the weight likely to be given to the admissible evidence; and
c) the likelihood that viable, not speculative, defences will succeed.

After the determination of substantial likelihood, Crown counsel determines whether it is in the public interest to proceed. Therefore, even though a case passes the evidentiary test, it may not proceed to court because of public interest.

Another pertinent Crown policy pertains to breach charges. Crowns are instructed not to approve a breach of probation charge where a charge for a substantive offence[9] arising from the same circumstances has been approved. If the accused is convicted of the substantive offence, the Crown counsel should provide evidence at sentencing that the offender was on probation when the substantive offence was committed and take the position that the sentence should reflect this situation.

Charge Approval Sample

In this study, discussions with the screening Crowns in three B.C. youth courts resulted in 28 charge approval cases. The majority of the cases were approved by the Crown. In total, 16 cases (involving 17 youth) were approved; 8 cases involving 10 young persons were deemed to require no further action, 2 cases were returned to police for additional information, 1 case was stayed,[10] and 1 case was referred to pre-charge Extrajudicial Sanctions. Taking the young person as the unit of count: combining approved and no further action youth and excluding other cases, 63 percent (17 of 27) of youth were charged and sent to court. If we take youth whose cases were approved as a percentage of the entire screening sample, the percentage approved was 55 percent (17 of 31). Information from the Ministry of the Attorney General indicates that charge approval rates were typically 75 to 80 percent prior to the *YCJA*.

Case Characteristics

Three cases considered at the charge approval stage involved females (all of whom had been charged with breach offences). The average age of the charge approval sample was 16. Eleven cases involved breach of bail or probation and no substantive offences. Five cases included offences against the person, which ranged from common assault to sexual assault. The remainder were mischief and other property offences, and so-called victimless offences. Slightly less than half the cases had no previous convictions or Alternative Measures according to data in the police reports.

Information Sources

The main information sources for charge approval Crowns are the "Report to Crown Counsel" prepared by the investigating officer and output from the court or correctional information system on the prior court contacts of the young person. Included in the reports are the outcomes of all hearings, court locations, referral to AM/EJS, disposition and sentence. On occasion, the Crown may speak to fellow Crowns or the police about a case and if the youth had a probation officer, he or she may be contacted. Defence counsel are rarely involved at the charge stage unless the young person is in pre-trial detention or has been dealt with by the youth court in the past.

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[9] By substantive offences, we mean charges that are not system generated; that is, not administration of justice offences such as breach of bail or probation.

[10] A 17 year old with psychiatric problems had broken into his father's house. After the youth agreed to attend counselling, his father agreed not to proceed with the matter. This case is anomalous because the charges (mischief and break and enter) had already been laid.

Cases that were Approved to Court

One-half of the approved cases involved first offenders. One-half included breaches of court orders. Only one probation breach also involved a substantive offence. Breaches of court orders appear to be viewed differently by different prosecutors. Some Crowns were ambivalent about the implication that probation breaches were used for social welfare purposes, especially for females. Commenting that "unfortunately we need to look at this situation like parents", the Crown charged a 15 year old prostitute with failing to reside where her probation order specified.

> Although the *YCJA* is not supposed to be used like this, they give us no resources to deal with the social ills – so what can we do? We need to get her stabilized. She can't make proper choices at 15. She is not 17 and I can't let her make her own choices.

Another Crown, in referring a case to court, commented that failure to report to probation and failure to complete a community service order are important, especially the latter because such orders "pay back society". In another instance, a Crown said that by not reporting, "he is blowing off his whole probation order".

The approved property charges were:

- Break and enter and mischief to a construction site involving a 16 year old first offender and an adult co-accused, perhaps $2,000 damage;
- A take auto without consent case involving a 16 year old probationer (he had three current probation orders and outstanding charges), and he was also charged with three probation breaches;
- A 17 year old probationer with six past convictions who was charged with break and enter.

Other approved charges were assault, two sexual assaults, uttering threats, weapons possession (a three foot machete) and two counts of very dangerous driving. In a sexual assault, the Crown said, "the substantial likelihood test is a bit difficult". There was no forensic evidence. "It will be a lot of 'she said, he said'". However, in this case, "public interest is high because it sends a message to teenage boys that you can't grab and fondle girls."[11] Although apparently the charge was approved, the Crown "put the case on hold" until she interviewed the victim's mother and explained the trial process to the victim.

[11] This is an indication that general deterrence remains despite its absence from the new legislation.

No Further Action

Both administration of justice and substantive offences were screened out of the system. The reasons for not proceeding with administration of justice offences were mainly procedural or legal.

- An incomplete Alternative Measures was not proceeded with because the original victim could not be located and it was "pointless" to proceed.
- No further action was taken because the accused was already in custody waiting sentencing to a residential facility. The Crown cited public interest.
- No action was taken against a youth who had failed to pay restitution because the limitation date had past.
- A 16 year old on an undertaking was found by police past his curfew. He had a relatively minor offence history, had a breach charge in another community, was apologetic and the police report was late. The Crown questioned whether the public interest criterion was met.

Examples of the other offences screened out of the system are as follows:

- The credibility of a sexual assault complainant was questionable.
- A sexual touching incident involving a 17 year old first offender was dropped because there were unanswered questions about the complainant's statement and her identification of the accused. This case had already been sent back to police for more investigation. The file indicated that the officer wanted the incident resolved by charge; the quote at the beginning of this section relates to this case.
- A 16 year old who broke a window while drunk had no prior convictions, had no criminal intent and there were no eye witnesses.
- The case involving a 13 year old alleged to have a restricted unregistered handgun was dropped because no fingerprints were on the weapon and there had been opportunity for others to have hidden the gun. An informant told police about the gun, the youth said that he had been "set up", and the Crown believed that the father's statement would raise reasonable doubt. The Crown wrote, "with no fingerprints and no observer to put [the youth's] hand on that gun, there is no way to prove it was ever in his possession".

Three-quarters of no further action cases did not meet the standard of substantial likelihood of conviction and the remainder of decisions were justified by the public interest criterion.

More Information Required: Return Case to Police

Two matters where the charges had not been approved were returned to police with a request for further investigation. In one, a 12 year old with an older co-accused had apparently tagged a building with an acid solution, causing $10,000 damage. The Crown wanted to see the videotape of the accused's statement before proceeding to court because the police report did not contain enough information to swear a charge. In the second, two 16 year olds

allegedly set a truck on fire, damaging the truck and nearby gravestones. Police had tried to get the two to acknowledge responsibility and pay for the damage ($2,500), but this did not occur. To the Crown, the case was circumstantial and wholly depended on the quality of the witness statements; she asked police to provide all statements.

In five of the 16 cases where charges were approved, police were asked for more information such as the current health of a driving offence victim, a diagram of the premises where the break-in occurred, and evidence linking the damage to the accused. In an approved case the Crown was dissatisfied with the police report. Police "had not included the basics" such as a copy of the probation order, witness statements, and identification of the accused as a passenger in the stolen car – identification was "not made out sufficiently for a substantial likelihood of conviction". For the most part, however, the approved cases referred back for more information were "solid".

Pre-charge Diversion to Extrajudicial Sanctions

One case was diverted by the Crown before a charge was laid – a male with no record stole a $60 jacket from a store. When asked why he had stolen, he said, "because we're so poor". The Crown referred the youth to EJS for assessment because he had no record and there were six months to lay a charge if he was non-compliant.

In two cases where the charges were approved, the screening Crown indicated that the case might be subsequently diverted (post-charge Extrajudicial Sanctions). In one of the two, the police had recommended diversion. Both Crown and police regard the laying of charges as helping to teach the youth a lesson. The court experience is believed to impress upon the young person the seriousness of his or her actions, "to get his attention", even though the matters will probably be stayed at a later date.

In another case, during an incident described as initially "horseplay", a 13 year old boy with a mental age of about 9 years masturbated a 16 year old male neighbour at the latter's request. "There's no videotape [of the victim's statement, which appears to be routine in B.C. sex cases] so I'm guessing that the police don't want me to charge. The grandmother and the father don't want the neighbour charged." As per provincial EJS policy, the Crown planned to ask the Regional Crown if he could divert the 16 year old; the Crown would also ask for an assessment. "The real public interest is to ensure that the kid is not pathological. If the forensic assessment says that he is likely to reoffend, then a charge will be laid to start building a record."

3. Proceeding with Charges: The Likelihood of Conviction and Public Interest

Disappointingly, Crown and defence counsel found it difficult to explain how the two tests, substantial and reasonable likelihood of conviction, were operationalized in practice. No respondent explained, for example, that reasonable likelihood meant "more than 50 percent likelihood" or substantial likelihood meant "70 percent likelihood". A Saskatchewan prosecutor remarked that the substantial likelihood standard sounded like the outcome is a foregone conclusion, i.e., that the accused would always be found guilty.

Respondents explained the test used in their courts by example, but their examples were not enlightening. The two following illustrations of substantial likelihood provided by British Columbia Crowns could as easily have been given by Saskatchewan Crowns working under the less rigorous reasonable likelihood criterion. First:

> Identification cases are a good example. Two persons are attacked at night by four persons. The two give descriptions and, four blocks away, the police arrest two people who match the description. So they arrest them. A witness picks out one and says 'that looks like the guy' or 'I'm not 100 percent sure, but that guy looks closest'. There is no positive evidence. It's not substantial likelihood (B.C. Crown).

A second B.C. prosecutor cited the example of a shoplifting incident where the police report failed to state which of two girls had possession of the stolen goods and failed to provide evidence that the goods were stolen.

With regard to the public interest criterion, a B.C. Crown said, "the public interest is something that impacts society generally", not an individual complainant.

> Public interest has a minor role compared to the substantial likelihood of conviction. It can play a role in resource management. For instance if it's a minor crime but to resource it, it would be a large financial commitment such as 15 witnesses for a mischief, then it is not in the public interest to proceed (B.C. Crown).

> Public interest is a matter of judgment. It gives you a broad discretion. You can say although it's a criminal matter, will public interest benefit from having [the case] in here? I use this for minor offences for young people when it looks like someone who's made a mistake and won't be in the system again (Saskatchewan Crown).

4. Dropping Charges

All other factors being equal – a situation that never seems to occur in youth justice research – the rate of cases being terminated prior to adjudication[12] should be lower in B.C. than in

[12] That is, *all* charges dealt with on the same sentencing date were stayed/withdrawn.

Saskatchewan because, on the surface at least, one would hypothesize that the charge approval process in B.C. should weed out weak cases. In addition, there is the higher standard required to proceed with the case in B.C. There is limited, inconclusive evidence that these factors may, in fact, affect the incidence of dropped cases. According to Youth Court Survey data for fiscal year 2001-02, 34 percent of B.C. cases were stayed or withdrawn compared to 44 percent of cases in Saskatchewan.[13] In the year before, the difference was even larger; 30 percent of B.C. and 44 percent of Saskatchewan cases were terminated. Because of the multitude of factors that can affect case terminations, this is an extremely rough indicator of the effects of the standards of substantial and reasonable likelihood on adjudication rates. Clearly, however, more research is required on the effects of pre-charge screening by proseuctors before the linkage between this review process and the dropping of charges can be confirmed.

A variety of explanations were offered as to why charges are dropped by the Crown.[14] We were interested here in the reasons why some charges were dropped rather than others and especially why all charges in the case were stayed or withdrawn.[15] Interviews suggest that in many instances, charges are particularly likely to be stayed after the accused has entered a not guilty plea. In Saskatchewan, one defence lawyer claimed that cases are dropped *only* if the accused pleads not guilty.[16]

Most respondents said that witness non-appearance or witnesses changing their evidence were the main reasons why cases were dropped at the trial date. The age of the charges undoubtedly affects the memory and availability of witnesses so that the likelihood of conviction decreases as time goes on.

Organizational factors may affect termination of charges. A Saskatchewan defence counsel explained that trial dates are set in docket court and the Crown counsel working there are usually unfamiliar with all of the details of the alleged offences. When the trial Crown gets the case, she or he may discover that there is no evidence and stay the charges. Similarly, the facts of the incident sometimes change with time – upon closer inspection, "the case is simply not there".

> We're more likely to stay a charge because of change in evidence as opposed to a lack of evidence. For instance, six kids in a robbery; initially it looks like they're all involved but subsequent investigation will lead us to see that two were not actually involved (B.C. Crown).

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13 YCS data on the termination of all charges by stay or withdrawal were only available for Saskatchewan and B.C.

14 Excluded in this discussion are the charges that are dropped because of redundancy – e.g., theft and possession under.

15 In Saskatchewan, no cases were totally dropped during observation and in B.C., one case was stayed because the accused had agreed to seek mental health treatment and the complainant (the father) no longer wanted to pursue the matter. However, the field worker did not "shadow" trial prosecutors and did not observe trials.

16 He added that Crowns liked to have 50 percent of charges resulting in a guilty plea and "some Crowns want more than 50 percent".

Arguably, this reason suggests that active or rigorous inquiry by defence counsel about the "facts" of the case may encourage charge terminations.

Another factor increasing the likelihood of dropped charges was the lack of police expertise in collecting suitable and sufficient evidence.

> We've got tons of cases where the police won't give me material evidence. For example, you have three kids and police catch them and they won't give you evidence how the two passengers knew the car was stolen. That's a glaring example. So I make the cops go get it and if they can't or won't, I won't be very patient with them. If someone is not a big risk, it is a small offence, and the police won't get me the evidence I want. I won't be patient and keep adjourning it [i.e., the charges will be stayed] (B.C. Crown).

With respect to the dropping of individual charges in a case, defence-Crown negotiations play a role. In addition, police often lay multiple charges in the expectation that some will be dropped.

> With breaches especially, the police will charge every possible breach they can think of and they often overlap, for example curfew and residency. When kids have 15 or 20 charges, we're a little more relaxed on dropping some of them. Generally, the police aren't very happy with us if we go crazy with dropping them (B.C. Crown).

Court backlog was never mentioned as a reason for terminating cases prior to adjudication and when asked directly, Crowns denied that this had ever been done – in the words of one Crown, "it is unethical".

5. Summary

British Columbia is one of two provinces in Canada where police do not lay charges. Pre-charge screening, or charge approval as the procedure is termed in B.C., involves a review of police documentation and a Crown decision to charge or to take no further action (other than perhaps a Crown caution letter).

In the B.C. charge approval sample, a slight majority were approved and therefore charged by the Crown. Among the cases that were observed, pre-charge referral to EJS was rare. Crowns may approve charges with the intent of later diverting them post-charge in order to impress upon the accused the seriousness of his/her behaviour. Most cases of no further action were not approved because the Crown assessed the evidence as insufficient to meet the standard of substantial likelihood of conviction; a good number were dropped because of procedural flaws. About half of both approved and non-approved charges involved young persons with prior findings of guilt.

Unlike other decisions described in this report, the primary source of information in charge approval is the police report and the prior record of the young person. Only if the youth has had previous youth justice system experience may others become involved.

In one of the charge approval cases, the Crown acknowledged that the decision to charge also involved the desire to protect a 15 year old, substance abusing prostitute from herself. Other decisions were more in keeping with the principles of the new legislation. A good majority of cases screened out of the system did not meet the substantial likelihood of conviction standard found in British Columbia. Interviews with Crown and defence counsel in both provinces were not helpful in determining the differences, in operational terms, between substantial and reasonable likelihood of conviction.

Why some cases end because all charges dropped was partly resolved in interviews with Crown and defence counsel. Respondents provided a number of reasons: witnesses did not appear or changed their evidence; the charges had aged so much that witness memory would be questionable; evidence had turned out less solid than it initially appeared; and police inability to obtain sufficient evidence to proceed. A plea of not guilty seemed to precipitate re-consideration of the likelihood of conviction.

Crown Referrals to Extrajudicial Sanctions

> There are a lot of things that we look at which would have never gone to court 10 or 15 years ago, but I don't think that's a police discretion problem. Rather it is a society-as-a-whole problem.[17] Generally, there are not many charges that we refer to [EJS] where we're suggesting to police that they should've done it before it got to us (Saskatchewan Crown).

1. The *YCJA*

Many of the provisions in the new *Act* are similar to those in the *Young Offenders Act*. There are, however, some important differences. The terminology has changed, from Alternative Measures to Extrajudicial Measures and Sanctions. Extrajudicial Measures are broader than Alternative Measures, including police warnings, cautions and referrals and Crown caution programs as well as traditional diversion programs. Extrajudicial Sanctions (EJS) are one type of Extrajudicial Measure. Section 4(c) establishes the presumption that police and the Crown should respond outside the courts to young persons with no records and are alleged to have committed non-violent offences. Section 4(d) emphasizes that Extrajudicial Measures can be used more than once and that youth who have earlier been found guilty of an offence can be eligible for EJS. "Encouraging use of extrajudicial measures for those with a prior record is very significant" because under the *YOA* very few referrals to Alternative Measures had a youth court record (Bala, 2002: 15).

2. Provincial Policies

The *Saskatchewan Diversion Program Policy* outlines the provincial policy for adults and young persons. The following types of incidents are ineligible for referral to Extrajudicial Sanctions: those involving the use or threatened use of a weapon; cases of violence against the person except common assault; child sexual abuse; perjury; driving while disqualified; all *Criminal Code* driving offences where alcohol or drugs are involved; any federal offences other than the *Criminal Code*; and family violence cases. Furthermore, if the young person has a history of "significant failure" on previous diversions or "other significant charges that call into question the appropriateness" of EJS, he or she is excluded from further consideration.

In British Columbia, *Criminal Code* offences are categorized into four groups, primarily by the degree of seriousness. Categories three and four are eligible for referral to EJS. Category four offences are minor and include theft, possession, false pretences/forgery etc. and mischief under $5,000. Category three offences include common assault, break and enter into a place other than a residence; theft, possession, false pretences/forgery etc. and mischief over $5,000, take automobile without consent, indecent acts other than those directed at children,

[17] The Crown is referring to schoolyard fights and other incidents that could be resolved by other means, but instead are referred to the police, due to zero-tolerance policies.

and communication for the purposes of prostitution. Category two offences such as uttering threats, break and enter into a dwelling, and possession of a concealed weapon can be referred for EJS if the Regional Crown Counsel or designate has approved the agreement. The Assistant Deputy Attorney General must authorize the diversion of category one offences, which include criminal harassment and obstructing justice as well as very serious crimes against the person.

The B.C. policy explicitly states that youth with prior police warnings, cautions and/or referrals to community-based programs, Crown cautions, Extrajudicial Sanction(s) and/or findings of guilt are eligible for subsequent referral.

Defence in both Saskatchewan and B.C. commented that the EJS policies were overly restrictive. For example:

> Schoolyard assaults should be able to be able to go to EJS and also robbery, which is really bullying, that could go. For whatever reason, the police are honing in on them and they're going through court. If they don't have a record or very much of a record, they could learn a lot more from a mediation type of method (Saskatchewan defence). [18]

Another defence lawyer also argued that the entry criteria were too limited: assaults are best dealt with by mediation "where there is an actual conversation going on" and property offences should be diverted because "the youth can do something about the economic losses incurred by victims".

In summary, the criteria for diversion in Saskatchewan and British Columbia are relatively broad for property offences but much less so for person offences; only common assault is eligible for referral. Young persons with prior justice system contacts, including convictions, are eligible for diversion in both provinces. It is also worth noting that breaches of probation and bail conditions are ineligible for diversion.

3. Information Sources Used by Crown Counsel

Compared to the bail and sentencing decisions observed, the Crown had access to, or sought out, less information and had contact with far fewer officials in diversion cases.[19] In over half of the EJS cases the Crown had no information source other than the police report and prior record; this can be compared to 15 percent for the bail and sentencing decisions. Youth workers and social workers were much less likely to be contacted (or to contact the Crown) in EJS matters because the young person was not usually involved with these personnel. About 25 percent of Crown prosecutors were observed or mentioned speaking to defence counsel

[18] A Saskatchewan Crown said that bullying and assaults at school were salient and sensitive in the community.

[19] In B.C., EJS decisions involve at least three steps. There is an initial referral for an assessment, which in this report is defined as a referral to EJS. An assessment report prepared by a youth worker then comes back to Crown. The Crown may accept or reject the recommendation. If it is accepted a contract is signed by the youth and the Crown. Formally, EJS is only considered a complete referral once the contract is signed.

about an EJS case compared to 60 percent in other cases. Positive statements about the youth made by the Crown – primarily that he or she had no prior record – outweighed negative statements by a considerable margin.

4. Characteristics of Diverted Cases

This study was able to collect data on Crown decisions on referrals to EJS for 13 cases in Saskatchewan and 6 in the British Columbia courts. Other than one case from British Columbia and two cases from Saskatchewan, the referrals to Extrajudicial Sanctions were made after charges had been laid. The total number of young persons referred to Extrajudicial Sanctions during the time period is not available.

The social and legal characteristics of youth sent to Extrajudicial Sanctions differ from the charge approval,[20] bail and sentencing components of the study sample: the EJS cases were significantly younger,[21] slightly more likely to be female, more likely to be living with a parent and to be going to school or working. A lower percentage of EJS cases were Aboriginal but this is probably because the Aboriginal youth were more likely to have prior contact with the youth justice system. In terms of legal factors, EJS cases had fewer current offences (p=.004), were more likely to be charged with property offences (p=.000), and much less likely to have had prior findings of guilt (p=.000). This profile does not greatly differ from the cases diverted under the *Young Offenders Act* (Moyer, 1996; Canadian Centre for Justice Statistics, 1999; 2000).

It is difficult to draw many conclusions on the differences between the provinces because of the low numbers but one factor stands out. Seven of the 13 Saskatchewan EJS cases had Alternative Measures in the past and two of the seven also had prior convictions. No B.C. case had prior system contact according to the records available to the Crown.[22]

5. Factors Related to Extrajudicial Sanctions

Social Characteristics of the Young Person

The social circumstances of the young person were mentioned several times:

- The behaviour of a 17 year old female found intoxicated on the street and in possession of 16 grams of crystal methamphetamine was explained by "her father states that she's been having difficulty since the death of her mother". The Crown in this case had not wanted to divert her before the charge was laid because "it's important that she goes to court".
- A 16 year old girl who assaulted her mother was diverted after the Crown spoke to the mother: the accused had been sexually abused when younger and had been hospitalized for psychiatric problems. In the conversation, the Crown asked questions

[20] Only cases that were approved by the Crown are included.

[21] EJS cases were on average a year younger than others (14.5 versus 15.6 years old); F=8.55, p=.004.

[22] It is possible that the young person had prior pre-charge diversions that were not recorded in the provincial correctional and court information systems.

> relating to her stability, associates and drug use. The Crown commented to the researcher, "I don't want to criminalize children who need support, not more problems". Crown notes showed that the Crown had involved a youth worker because of concerns about the young person.

Of the demographic characteristics, only ethnicity was mentioned as being related to diversion decisions. A Saskatchewan Crown said that Aboriginal youth may be diverted because of the availability of an Aboriginal-managed diversion program.

> There is the [x program] where we've all sent cases that we should've never sent in a million years, but their people tell us that they are really trying to help the youth. So we've all sent kids to [x] who would not have been diverted if they were not Native. It is almost a reverse discrimination thing (Saskatchewan Crown).

A Crown from B.C. acknowledged that social characteristics may come into play in the consideration of diversion. "Are they in school? Do they have parental control? Is their behaviour foolish youthful exuberance?" The exuberance comment suggests that "criminal" behaviour can be redefined as non-criminal by the Crown's assessment of the evidence and information on the background of the accused.

Legal Characteristics of the Case

More than 70 percent of diverted cases involved property offences such as possession of stolen property (automobiles), theft under $5,000 and mischief. There were two cases of break and enter and a third case of possession of burglary tools. The two boys who were diverted for break and enter were 13 and 14 years old, attended school and lived with their parents. The boys allegedly broke into a non-residential building but the damage was limited. Neither had prior contact with the system. The Crown had received a letter from defence counsel explaining why the youth were good candidates for diversion. Two youth were diverted for common assault; both were female, and one was 13 years old. The other two diverted charges were possession of cannabis.

As already mentioned, none of the British Columbia EJS cases had prior Alternative Measures or convictions whereas 7 of the 13 cases in Saskatchewan had either prior diversion or convictions or both. A Crown from British Columbia linked the small number of re-referrals to the lack of variety in EJS programs:

> If I had more offence-specific [EJS] programs, I would be more likely to refer them [a second time]. If I know all they're going to do is write a letter of apology and report, I'm not as likely. The *Act* directs me to make sure they are held accountable.

Interviews revealed that the length of time between incidents of diversion or conviction is an important factor in the decision to divert a second time. Before being considered for diversion, the Crown tries to ensure that the youth "is not someone who is a chronic

offender". Other considerations on re-diverting are whether the current offence is minor such as the amount of damage done and whether it is a different type from earlier offences.

Program Availability

The presence of specific programs influences diversion decisions:

- A 12 year old female first offender, although labelled as a bully by the Crown, is referred to mediation because the program is "a much better way of dealing with a schoolyard fight" than is the court. She had been charged with both common assault and uttering threats. The police report said that the case was unsuitable for EJS.
- A mischief case was diverted to mediation because it would allow the victims to confront the youth and show him how frightened they were and "it may do the youth some good".

All Crown prosecutors in Saskatchewan and British Columbia were familiar with the EJS programs in their community. All legal aid staff in Saskatchewan were aware of the programs, but only some of the B.C. defence counsel could describe what is available.

The Role of the Community

Offences that have brought community attention are not as likely to be diverted. For example, a defence lawyer in B.C. said that any violence in a group setting is "far less divertible" than other offences against the person. In addition, when "there was concern about graffiti, [prosecutors] were sending them to court and not diverting".

This is not always the case. In three of the communities where this research was undertaken, car theft and joyriding were in the public eye. However, automobile-related offences were diverted in Regina – probably because of the presence of HEAT (Help Eliminate Auto Theft).

6. Characteristics of EJS Programs

Several types of programs were available to the study courts. In the Saskatchewan cities where this research was done, there are programs for Aboriginal accused that include face to face conferencing, community service, counselling, and anger management. The John Howard Society manages anger management, restitution, and mediation (face to face meetings with victims) programs. Two offence-specific programs were available: an anti-shoplifting program (StopLifting) and a program for joy riders and others who are involved in auto theft (HEAT).

In British Columbia, victim-offender reconciliation (mediation), community service and letters of apology were the most common diversion sanctions, according to respondents. Several B.C. respondents, both Crown and defence counsel, wanted more variety in EJS programming.

> They need more programs. There are two options: Alternative Measures through youth probation – agreements with counselling and/or community service, and second, victim-offender reconciliation – but we need more than that (B.C. Crown counsel).

Another respondent said, "all we ever see is counselling, letter of apology, and CSW [community service] and I don't even think the CSW is tailored to their needs." This defence counsel said that the programming for Aboriginal young persons has more variety and the programs are more tailored to the individual. A third said, "because of the lack of funding everyone gets sent to community service. ... Now they tend to be much more regimented, there needs to be more flexibility [and variety]".

In Saskatchewan, most respondents remarked favourably on the EJS programs but a defence counsel said that the community needed "more of a variety of EJS programs and more of a commitment to working through problems with kids". He also said that the diversion programs tend to

> try to refer any difficult cases back to court. These kids are used to being rejected. And they end up being rejected. When the EJS guys can push them away, that confirms that is what they are supposed to be – 'pushed away'.

7. Multivariate Analysis of Factors Affecting Diversion Decisions

A regression analysis was done in order to determine how diverted cases differed from other sampled matters when key case characteristics were controlled (Table 3). The dependent variable was "not EJS cases" (i.e., bail and sentencing) versus "EJS cases". While related to EJS decisions at the bivariate level, age, Aboriginal status, and living arrangements of the young person were not associated with referral to EJS when other characteristics of the sample were controlled.

Table 3: Multivariate Analysis of Factors Affecting Crown Referral to Extrajudicial Sanctions

Variable	Unstandardized coefficients		t value	Significance
	B	Std. error		
Constant	.749	.287	2.612	.010
Age in years	-.030	.019	-1.607	.111
Any convictions (no/yes)	-.257	.056	-4.629	*.000*
Most serious current charge (other vs. all property)	.082	.028	2.964	*.004*
Number of current & outstanding charges	-.015	.006	-2.315	*.022*
Number of cases = 123 F=12.759 df=6 p=.000				

Note: The italicized p values in the last column are significant at p<.05 or below.

Three factors – having no prior convictions, being currently charged with a property offence, and having fewer current and outstanding charges – were statistically significant. All three variables increased the likelihood of the young person being diverted. Prior record and type of offence were the most strongly related to the Crown's decision to divert.

8. Summary

From observational and interview data, it is apparent that there were overlapping rationales for diverting cases. Prior record and offence type are major factors in the Crown's decision. Offences at the "low end of the spectrum" and those that are non-violent are most likely to result in diversion as long as the youth has no prior convictions, a very minor record or a record sufficiently old enough to suggest that there is no pattern of criminal behaviour. Offences against the person (common assaults) were diverted if there were extenuating circumstances such as the youthful age of the alleged offender.

Social circumstances play a much lesser role than offence and prior record. On occasion, the presence of specific programs in the community was influential in the Crown decision to divert.

An important interest of the Crowns in making the diversion decision was that the young person be "held accountable". Compared to Saskatchewan cases, a smaller proportion of B.C. cases were diverted a second time. One Crown attributed this decision to the lack of variety in EJS programming, especially the lack of offence-specific programs. In general, B.C. Crowns and defence were more concerned about the lack of variety in Extrajudicial Sanction programs than were those in Saskatchewan.

A multivariate analysis of the factors affecting the use of diversion found that having one or more previous findings of guilt, having a current property charge and having few current and outstanding charges were the factors that most influenced the Crown decision to refer a case to EJS. No social characteristics of the young person were associated with the referral to Extrajudicial Sanctions.

Bail Decision-making by Crown Counsel

> [T]he key decision-maker in youth bail court is the Crown Attorney. If the Crown Attorney did not contest release, every youth was released by the judge or the justice of the peace (Varma, 2002: 150).

1. The *YCJA*

One of principles in the *YCJA* is that detention is not to be used "as a substitute for appropriate child protection, mental health or other social measures" (s. 29(1)). In addition, when considering detention for public safety reasons –the probability of committing another offence – the court must presume that detention is not necessary unless the young person could receive a custody sentence on conviction. The *YCJA* permits the use of custody for violent offences, youth who have failed to comply with past community-based sentences, or youth with a previous pattern of indictable offences for which an adult would receive more than two years jail (s. 39(1)).

In s. 31, the *Act* specifies that the court must inquire about the availability of a responsible person and the youth's willingness to be placed with that person. The detained youth can be released to a responsible person if she or he would be detained in the absence of that person and if both the youth and the person agree.

2. Provincial Policies

No written provincial policies on youth bail and detention relevant to the new *Act* were obtained for Saskatchewan. However, Judicial Interim Release Programs were available in Saskatoon and Regina. Most referrals to the programs were made by the Crown prosecutor, usually after the first court appearance of the young person. The JIR programs are responsible for supervision and monitoring of the young persons while on bail; residential placements are not a component of the programs. The Crown prosecutor places a great deal of weight on the suitability assessments prepared by JIR staff.

In British Columbia, policies for pre-bail enquiries have been developed.[23] The enquiry is an investigation and report to the court on the factors, including alternatives to detention, relevant to the detention or release of a young person. It is conducted by probation officers. Information in the report includes previous responses to bail supervision and to community supervised sentences, the suitability of the young person's living situation, previous AWOLs, and the availability and suitability of alternatives to detention. Lack of a suitable home is insufficient grounds for detention so that, if the youth is in this situation, the probation officer is directed to refer the case to a social worker, financial assistance worker or a community-based residence such as a youth hostel. The probation officer's report is normally delivered

[23] Ministry of Children and Family Development, Youth Justice Policy and Program Support, Community Youth Justice Programs, *Community Pre-trial Services and Remand Custody, Pre-bail Enquiries*, 2003.

orally to the court but must be later placed in writing. One case was scheduled for a bail enquiry during study observation.

3. Rates of Release on Consent

There were 33 bail cases in Saskatchewan and 16 in British Columbia observed during field work. In one case, defence consented to continued detention.[24] In just over four out of ten cases (44 percent), Crown counsel consented to release, and there was no difference by province.[25] A recent study in a large Toronto youth court found that about 60 percent of young persons detained by police are released on consent by the Crown prosecutor (Varma, 2002).

In Saskatchewan and B.C., Crowns and defence counsel had various estimates of the proportions released by the Crown prosecutor. Most respondents said that the majority of cases, from two-thirds to more than three-quarters, are released upon Crown consent.[26] The discrepancy between the study data (44 percent) and respondent estimates (67 to 75 percent) could be because the estimates were based on pre-*YCJA* processing, which was only a few months before our interviews. Alternatively, the discrepancy may be due to the difficulty in estimating proportions.

In most courts, full scale show cause hearings were said to be relatively infrequent. A Crown prosecutor from B.C. noted that defence counsel were as aware as the Crown was of the background of the young person, the community resources available, and the likely outcome of the bail hearing: "so why waste time?"

4. Information Sources Used by Crown Counsel

Of key actors, discussions with defence counsel occurred most often, with B.C. bail cases almost twice as likely to involve defence-Crown communication as Saskatchewan cases (about 80 versus 45 percent, p=.02). This finding can be compared to that for exchanges between defence and Crown at sentencing, where the reverse was true: Saskatchewan cases were more likely to involve interaction than were those in British Columbia. This difference in Crown-defence interaction at bail matters could be related to the opportunities for such interaction. Moreover, there was a tendency for defence-Crown interaction to occur more often in cases when the youth had outstanding charges and other negative attributes and hence

[24] Defence consented to the remand of a 15 year old Aboriginal girl, who was charged with probation breaches (area restriction and contacting a no-contact person). She had about a dozen prior convictions and had received custody in the past. She had substance abuse problems. Ministry of Children and Family Development staff were looking for a residential treatment placement. It was not clear from observation if defence consent was given in order to finalize a release plan.

[25] During data collection, a Crown received a telephone call from "head office" suggesting that too many youth were being detained under the new legislation. The Crown angrily commented that if the law indicates that the youth should be remanded, they have to be remanded.

[26] For example, a Saskatchewan defence said, "the Crown is very good at releasing kids without a bail hearing. You really have to have committed a number of offences before they start saying 'enough is enough'".

was not released by the Crown. This indicates that the interaction is most likely to take place in more serious bail matters.

It was evident that Crown prosecutors and defence counsel in both provinces were often familiar with the detained young persons.

Other sources of verbal information were probation officers (23 percent), parents (24 percent), Judicial Interim Release Program staff (19 percent) and social services personnel (11 percent).

Over four out of ten bail cases involved written reports such as JIR reports, letters from placements or earlier PSRs and medical-psychological reports.

When verbal interactions and the availability of written material are combined, six out of ten cases involved two or more sources of information, i.e., one source in addition to the police report.

5. Characteristics of Bail Cases

Three out of ten cases involved females. Almost six out of ten of the bail decisions had accused young persons of 16 years or more and the average ages of the provincial samples were identical (16 years). Seven out of ten of Saskatchewan and four out of ten B.C. young persons were of Aboriginal origin. In terms of social characteristics, only one-third of B.C. cases lived with one or two parents; in contrast, almost 60 percent of Saskatchewan cases lived with a parent. B.C. youth were also much more likely to be "inactive" – not working or going to school – than were those from Saskatchewan (64 versus 25 percent). Therefore, police-detained youth in Saskatchewan had more stable or conventional lives than did those in British Columbia. This is probably partly because the downtown Vancouver youth court deals with young persons from the Downtown Eastside and other inner city areas.

With regard to the most serious current charge, there were large differences between Saskatchewan and British Columbia cases. Four out of ten B.C. cases had a probation breach as the most serious charge, compared to only one out of ten in Saskatchewan. The proportion of other administration of justice charges was similar in the two provinces, at about 31-33 percent. One-fifth of cases had a less serious (hybrid) property charge as the most serious charge. Six percent of cases involved an indictable offence against the person. By far the most serious incident in the bail sample was a home invasion (described below).

Three-quarters of the Saskatchewan but only one-quarter of the B.C. cases had outstanding charges (p=.001). Because of this factor, the average number of current and outstanding charges (combined) in Saskatchewan was 6.4 compared to 2.7 charges per person in British Columbia.[27]

Almost eight out of ten cases in Saskatchewan were reverse onus because of current or outstanding charges of failure to attend court or failure to abide by bail conditions. This can

[27] Anova F value = 7.104 p=.011

be compared to only one-quarter of British Columbia cases. As indicated above, in B.C. probation breaches were most common. The practice of not charging young persons who had failed to attend court or not complied with bail was observed in Vancouver; in that court, these cases were brought in for a bail review, but were not always charged with fail to comply or fail to attend court. For the purposes of this analysis, however, we have described these cases as having been "charged" with a bail violation.

Two-thirds of the sample had prior convictions and there was no difference by province. Only 10 percent had no current involvement with the justice system. No British Columbia bail case had prior Alternative Measures. Three out of ten Saskatchewan young persons had received Alternative Measures or Extrajudicial Sanctions in the past.

6. Factors Related to Consent Releases

Social Characteristics

There were few noticeable demographic or social differences between persons who the Crown released on consent and those where she or he recommended continued detention. Sex, age and Aboriginal status did not differ. Whether the young person was active (at school or working) showed no relationship to Crown consent. Curiously, youth who were living with one or two parents were slightly *less* likely to be released on consent than were young persons in less conventional living arrangements. There was an indication that a smaller percentage of youth labelled substance abusers were released (35 percent of abusers versus 48 percent of non-abusers were released by the Crown).

The Crown prosecutors observed in this research were aware of and for the most part complied with the prohibition against detention for social welfare and child protection reasons. For example, a 13 year old was charged with failure to comply with bail conditions – being out of the jurisdiction and associating with a no-contact. The original offence was a "serious" assault. The girl, who had been a ward since early childhood, allegedly had a serious anger management problem and psychological disorders. The Crown said, "in a regular family she would be grounded. I don't think she should be in court. This is not our policy, just what I feel". She was released on Crown consent.

Sometimes the extent of influence of social factors on the bail decision of the Crown is uncertain because of the accused's offence history: a substantial number of youth in troubled social situations also have an extensive history of administration of justice and other offences, which would make them liable for pre-trial detention. The difficulty of determining whether detention is being used for social measures can be illustrated by the following examples.

A young woman who had disappeared from her foster home thereby violating her residence condition of probation was deemed unsuitable for detention by the Crown. "Under the new *Act* she can't be held for breaching (sic); nor can I hold her for social services circumstances, so if this were to go to show cause, I wouldn't get it." A youth worker had initially told the Crown that the girl could not be released because there was no available residence. The girl

was referred to social services under s. 35;[28] the Crown recommended that she report to a youth worker immediately and abide by her residence condition.

A 16 year old was picked up by police because she was past her curfew and with her best friend with whom she was not supposed to be in contact (a condition of intensive supervision). The two had been co-accused in an earlier incident where they "had gone after some girls together". Her foster parent said she suffers from severe post-traumatic stress syndrome because she had been sexually abused. She had been in 41 placements. She taunted the police, "go ahead and arrest me", said she would continue seeing her best friend, the law is stupid, and it should not apply to her. Described as a "breach baby" and a "frequent flyer" by the Crown, she had received custody for her last four breaches. The Crown said that she fit both the primary and secondary grounds for detention. Defence argued that her best friend "was her support in life" and asked for her release. The court ordered her detained.

A sex worker, an intravenous drug user, was arrested for stealing $200 worth of goods from a department store when she was under the influence of morphine. The 17 year old had been treated for substance abuse twice as an inpatient, and she was currently on the caseload of a program that helps sex workers. She had no fixed address. Six months earlier she had been convicted of assault and mischief and placed on probation. Since then, she had accumulated four administration of justice convictions, including failure to attend court. The Crown recommended detention on the primary ground and the recommendation was accepted by the court.

Legal Characteristics

At the bivariate level of analysis, young persons with four or more current charges, those with outstanding charges, and those accused of property and victimless crimes were less likely to result in a consent release from pre-trial detention. The presence or number of prior convictions bore no relationship to release by the Crown prosecutor. However, interviews suggested that offence history and the presence of outstanding bail violations can affect decisions by the Crown. The dates of prior offences are examined to determine if the youth shows a pattern of criminal behaviour; the more recent the offence, the greater the likelihood that the Crown will draw negative conclusions (unless there are extenuating circumstances). A history of violence is also considered a warning signal. For example, a Crown counsel released a male with a "lot of offences but not a violent record"; "he can live safely in the community".

Because of low numbers and because more than one-half of the "most serious" current charges were administration of justice offences, it is difficult to characterize the relationships between substantive offences and Crown consent. Proportionately *fewer* property offences were released than were other offence categories, including violent offences. This relationship disappeared when other factors were introduced as controls (see section on multivariate analysis).

[28] Section 35 can be used to invoke child welfare services, although the youth court cannot order that child welfare services be provided. It is not clear if the Crown recommended that this section be used.

Other Legal Factors

The attitudes of community members were rarely mentioned as affecting consent releases. In one case, however, the Crown stated that, in a home invasion, "the public would be outraged if he were released". The youth had no prior record, ties to the community, a stable home life, a release plan, and an indication that his mother would sign a surety. In court, defence argued for "responsible person" provision, and the judge adjourned the case for a pre-bail conference and a bail enquiry by a probation officer.

The quality of the evidence against the accused can play a part. A Crown released a 13 year old charged with possession of burglary tools on consent saying that he did so because the youth had no record. He did have outstanding charges and bail violations and the case was reverse onus. The Crown said that the "charge was a little iffy", probably because the youth's bag had been illegally searched.

"Meaningful consequences" were cited in situations where the Crown believed the arrest and overnight stay in detention was sufficient to get "the attention" of the young person.

Alternatives to Detention

Homeless youth and those who cannot be returned to their home or placement present special problems to the youth justice system. The challenge is especially pronounced in Saskatchewan where the upper age limit for child protection intervention is 16 and referral to the child welfare authorities is not usually an option.

The typical pattern for the homeless in all age groups is that the bail hearing is adjourned until a workable release plan can be developed. Depending on the circumstances, the plan is arranged by child welfare, probation or defence counsel – or a combination thereof.

The responsible person provisions in s. 31 were not used for young persons in the study sample. A Crown in B.C. said

> I find that the *YCJA* is very clear on when it is or isn't appropriate to seek the detention of the youth. There is not a lot of negotiation with defence because by the time you're seeking detention you're on a solid ground. My practice is not to use a 31 as a negotiation. Infrequently, I say I am going for detention and then defence says 'I have this person who will sign for the kid'. Then I *might* sign over.

Program Availability

The opinions of probation officers and in Saskatchewan JIR Program staff[29] greatly influence Crown decisions. In every case, if these personnel recommended release, the Crown agreed to release. A Saskatchewan Crown said, "if JIR is willing to supervise, I will let him out for sure". In another case, the first Crown said he would not release a youth accused of robbery involving a bicycle; the next day a second Crown spoke to the JIR worker who said, "we haven't had any problems with him, he's doing good" and subsequently released the youth. Alternative to custody programs were rarely if ever mentioned by B.C. Crown prosecutors.

Concrete release plans carry considerable weight even in cases that are on the face of it, highly detainable. In British Columbia, probation arranged for treatment for a substance abuser who had been reported missing 60 times and had a dozen convictions for breach of probation. The probation officer stated that he would receive 24 hour supervision until he left for the treatment facility. The Crown had initially decided to request a detention order ("nothing will keep this kid from breaching except custody") but reversed the decision after speaking to the probation officer.

In another example, the Intensive Support and Supervision Program probation officer supported a consent release for a female who had breached her abstention and curfew conditions. Her staying out late and drinking "were in direct relation to her home life [with her mother]". Probation arranged a group home placement and an Aboriginal substance abuse program for her and the Crown agreed to release.

Interestingly, if the Crown had spoken to a parent or guardian, the young person was much less likely to be released on consent. An examination of the files shows that this is typically because the parent "wants the child locked up" or labels the youth as "out of control". About one-quarter of the bail cases involved Crown-parent (or guardian) contact.

Idiosyncratic Decision-making

Some apparently idiosyncratic decisions were observed. A Crown mentioned his own "third strike rule". A youth twice violated conditions of release on his theft auto charges, but when he was caught a third time, the Crown did not consent to release him.

A 17 year old Aboriginal youth was charged with failure to attend court and assault with a weapon against his sister. The two had fought over a pair of pants and the accused tried to cut the pants off, resulting in a very small cut. He had no prior record, although he did have an outstanding charge of uttering threats. The Crown recommended detention because the offence was violent and there were both primary and secondary grounds.

[29] We rarely had the opportunity to determine what police recommended, if anything, with regard to the remand decision.

There may be some confusion in the interpretation of the bail provisions in the *YCJA* and their relationship to those in the *Criminal Code*. An earlier quote referring to the inability to detain because a youth's charges were breach-related. Another Crown stated, "I don't think I can hold him because all he has is a lot of system generated charges". This young person had three current bail violations, two outstanding bail violations and an outstanding credit card fraud. This view was not held by other Crown counsel. In the sample overall, one-half of cases where the only charges were bail violations were *not* released on consent.

In summary, there may be confusion about the relationship between the *Criminal Code* bail provisions and those in the *YCJA*. As case law develops, this confusion should decrease.

Table 4: Multivariate Analysis of Factors Affecting Crown Consent to Release from Pre-trial Detention

Variable	Unstandardized coefficients		t value	Significance
	B	Std. error		
Constant	1.384	.220	6.301	.000
Any substance abuse (no/yes)	.311	.134	2.330	*.025*
Any outstanding charges (no/yes)	.332	.132	2.512	*.016*
Number of current charges (1-3 vs.4-12)	.528	.159	3.323	*.002*
Number of cases = 45 F=7.299 df=3 p=.000				

7. Multivariate Analysis of Factors Affecting Consent Release

Table 4, above, shows the results of the regression analysis of the Crown decision to release the detained youth on consent controlling for other factors. After initial analysis that found there was no relationship, living arrangements and the type of current offence – that is, property and victimless offences versus other offence types – were omitted from the regression equation. We found, too, that the presence and number of past and current administration of justice charges were not related to consent release. Other measures of offence history were also not statistically significant. These findings are puzzling and somewhat at odds with other research. They may result from the small sample size or its atypical nature (e.g., data collected in the first few months after the proclamation of the new legislation).

The statistically significant factors related to being released on consent were not being a substance abuser, having no outstanding charges and having one to three (fewer) current charges. It may be that substance abuse is an indicator of factors not captured by this research. On the other hand, substance abuse is an "important factor" in determining the likelihood of reoffending according to bail decision-makers in adult courts (Morgan and Henderson, 1998).

8. Summary

No provincial policies specifically on bail decision-making were located. All Crown counsel participating in this research were aware of the bail provisions in the *YCJA* although there was variation (and confusion) in their interpretation.

In the bail decision sample as a whole, over 4 out of 10 cases were released on consent of the Crown. This is considerably lower than the estimates made by Crown counsel and defence interviewed during the study and lower than the only other Canadian research on youth court decisions (Varma, 2002). The lower-than-expected release rate could be related to the recency of the proclamation of the new legislation and to jurisdictional differences in the cases entering youth court.

The child welfare and mental health status of young persons is closely intertwined with their offence history and it is difficult to determine what factors are operating in the decision to release on consent. Nine out of ten cases had some type of current involvement with the youth justice system and two-thirds had earlier findings of guilt. One-half of the cases were accused of offences against the administration of justice.

The multivariate analysis of the factors affecting the Crown's decision to release suggest that having fewer current charges, having no outstanding charges and no evidence of abuse of alcohol or drugs were influential.

Crown Submissions to Sentence

1. The *YCJA*

The new legislation made major changes to the sentencing regime for young persons. Sentences must be proportional to the harm done and within the limits of proportionality, must be the most rehabilitative and reintegrative as possible. The sentence must be the least restrictive and offer the least possible interference with freedom. The long term protection of society occurs as a consequence of imposing just and proportionate sanctions. The court must take into account the social context of the young person but personal background does not enter the determination of the severity of the sanction. The court must take into consideration the time spent in pre-trial detention, past convictions, reparations made and other aggravating or mitigating circumstances.

Custody and supervision cannot be imposed unless the offence was violent, or the youth has failed to comply with previous non-custodial sentences, or the youth has a pattern of findings of guilt for crimes for which an adult would receive more than two years in jail. There is also a provision for exceptional cases with aggravating circumstances. Custody and supervision cannot be imposed if there is an appropriate alternative to custody available.

Non-custodial sentences can be employed more than once "in an attempt to move away from an 'escalation' model of sentencing" (Doob, 2002:8). That is, a non-custodial sentence should be used for those who have previously received custody if the non-custodial sentence is proportional to the current offence.

Deterrence is not a part of the new legislation. "An apparent outbreak of crime in a community is probably irrelevant to the sentencing of 'this youth'" (Doob, 2002: 16).

Joint submissions that are inconsistent with sections 38 and 39 of the *Act* must be rejected by the youth court. (This had occurred in one case in one court participating in this research and was still mentioned several months after its occurrence.)

The following sentences have been added: reprimand, intensive support and supervision, non-residential program (attendance order) and deferred custody and supervision. Deferred custody and supervision cannot be imposed unless the matter qualifies for a custodial sentence.

No provincial policies on submissions to sentence in the youth court were located.

2. The Content of the Crown Submission to Sentence

Of the 46 cases sampled where the Crown made a sentencing recommendation to the youth court, probation was the most common submission (35 percent) but other non-custodial sentences also accounted for 35 percent of recommendations (Table 5). Although strictly speaking not a sentence, two cases or 4 percent of the total resulted in a Crown

recommendation for a peace bond. Despite Crowns' joking comments about their submissions being "custody, custody or custody", recommendations for community sentences predominated in both provinces. Thirty percent of cases involved a custody or a deferred custody and supervision recommendation by the Crown.

Table 5: Crown Submissions to Sentence by Province

Submission	Saskatchewan	B.C.	Total
	Column percentages		
Peace bond	0	7.7 (2)	4.3 (2)
Reprimand[30]	10.0 (2)	0	4.3 (2)
CSO, restitution	25.0 (5)	11.5 (3)	17.4 (8)
Conditional discharge	0	3.8 (1)	2.2 (1)
Probation	40.0 (8)	30.8 (8)	34.8 (16)
Intensive support & supervision (ISSP)	0	11.5 (3)	6.5 (3)
Deferred custody & supervision (DCSO)	5.0 (1)	7.7 (2)	6.5 (3)
Custody & supervision	20.0 (4)	26.9 (7)	23.9 (11)
Total percent	100.0%	99.9%	99.9%
Total number of submissions	20	26	46

Notes: If the table is collapsed into custody/deferred custody and supervision compared to other sentences, the chi-square = 0.355, df=1, p=not significant.

The subsequent analysis collapses the two sentences of deferred custody and supervision order (DCSO) and custody and supervision.

3. Information Sources Used by Crown Counsel

Social Reports

Several respondents mentioned the importance of social reports in their decision-making. The Crown had a pre-sentence report (PSR) available in four out of ten submissions to sentence cases. A PSR was available in two-thirds of cases where the Crown recommended deferred custody or custody and supervision. There was no difference between the provinces in the availability of a PSR at sentencing. Medical-psychological reports were much less common; only about one out of six cases involved this type of report. In total, the Crown had one or more reports available in over one-half of the sample, and two or more reports in about three out of ten cases.

There was a strong association between the number of social reports and a custody and supervision recommendation: cases with two or more reports were twice as likely as those

[30] In one case, a reprimand was recommended to the court because the Crown believed that he could not suggest "time served" under the *YCJA*.

with only one report to result in a recommendation for custody and supervision, and five times as likely as cases with no reports. This finding is the result of the legislative injunction to have a PSR prepared (in most cases) before a custody and supervision sentence is imposed. The frequency also shows that the more severe the sentence, the more "fact finding" is done.

Verbal Interaction

Verbal exchanges between Crown prosecutors and other personnel were frequently observed or mentioned in researcher discussions with Crown prosecutors. In eight out of ten cases the Crown spoke to at least one person about the case. In about three out of ten cases, the Crown spoke to two or more persons.

As might be expected, the most frequent interaction was with defence: in more than 60 percent of the cases there was defence-Crown interaction. There was more interaction in Saskatchewan than in B.C. Many of these discussions would involve negotiations about the sentence. There was no difference in the likelihood of the Crown recommending custody and supervision, regardless of whether there was Crown-defence communication. This does not necessarily mean that negotiations were fruitless from a defence perspective. It is also possible that the discussion centred on the quantum of sentence or the content of the non-custodial order – details that are not captured in this analysis.

The second most common Crown interaction was with a probation officer, in about four of ten cases. There is a slight indication that the severity of the sentencing recommendation increased when Crowns and probation personnel discussed the case.

In summary, in almost every sentencing case (86 percent) the Crown had an information source other than the police report on the incident and prior record of the accused. In almost two-thirds of sentencing matters, the Crown had two or more sources of information.

Defence-Crown Negotiations

Interviews with Crown and defence counsel suggested that there was a large difference between Saskatchewan and B.C. Crown practices: respondents in Saskatchewan were much more likely to "negotiate" or at least discuss the sentence than were those in British Columbia. Crowns and defence were asked how frequently they negotiated with the Crown or made a joint submission to sentence: in three-quarters of Saskatchewan interviews the response was "often" compared to one-third of interviews in B.C. In this context, the joint submissions need not be formal; "we talk about it and we agree". In one court in B.C., both Crowns and defence acknowledged that the Crowns will *not* negotiate on sentencing.

> I don't make joint submissions. There are times where counsel and I agree on things but it is not a joint submission. I don't think it's appropriate. We may agree but we may not.

In Saskatchewan, one defence lawyer said he seldom negotiates with the Crown: "the Crown bangs his drum and I play my violin." However, most defence lawyers in the study courts said they "almost always try to negotiate a sentence".

According to the observations made by the researcher while in the courts involved,[31] more Saskatchewan sentencing matters involved Crown-defence exchanges but the difference was not as great as suggested by the interview comments – about half of B.C. Crown counsel communicated with defence counsel.

The reasons why there is less negotiation on sentences in British Columbia than in Saskatchewan probably include both "courthouse cultures" and the differences in organizational affiliations of defence counsel. The apparent reluctance of B.C. Crown prosecutors to discuss or negotiate sentences was said to be a long term practice. In Saskatchewan, defence are full-time legal aid staff who are regularly in youth and criminal court whereas in B.C., defence are in private practice and in most cases only intermittently in youth court. The legal aid lawyers may be more confident in approaching their Crown colleagues because of their well established, long term relationships.

4. Case Characteristics

Of the observed cases, females made up about one-quarter of sentencing cases in Saskatchewan – this was about twice as high as the percentage in British Columbia. As expected, over one-half of Saskatchewan sentencing cases had Aboriginal accused; in B.C., about one-quarter of cases were Aboriginal and one-fifth had other racial backgrounds. Involvement with the child protection agency, either currently or in the past, was far higher in Saskatchewan than in B.C., about seven out of ten cases compared to three out of ten cases. In Saskatchewan, young persons were more likely to be living with one or more parent (70 versus about 40 percent in British Columbia). In both provinces, about 40 percent of cases were "inactive", neither working nor attending school.

Almost one-quarter of cases had an indictable offence as the most serious current offence (on which convicted). Indictable offences against the person were more likely to be found in Saskatchewan. Both provinces had similar percentages of system-generated charges[32] as the most serious offence at sentencing, at 33 percent. When we look at all charges in the sentencing sample, not only the most serious, we find that Saskatchewan cases were four times as likely as B.C. cases to involve failure to attend court or failure to comply with bail conditions.[33] The incidence of probation breaches was almost identical (about one-half of cases in both provinces involved this type of breach).

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31 Not all Crown-defence exchanges may have been available to the researcher.

32 Most often breach of bail and breach of probation.

33 As noted elsewhere, this is because in some youth courts in British Columbia, young persons who violate bail conditions are brought to court on a warrant and have a bail review pursuant to section 524 of the *Criminal Code*. They are not usually charged with failure to attend court or failure to comply with bail conditions.

As was reported in earlier sections, previous diversion experience was much more common in Saskatchewan (almost four out of ten cases versus about one out of ten cases). The percentage of cases with prior convictions, however, was identical in the two jurisdictions, at about 70 percent. The average and median numbers of prior convictions were also the same in the two jurisdictions (3.3 was the overall mean, 2 prior findings of guilt was the overall median).

5. Factors Related to Submissions to Sentence

The dependent variable is the Crown submission at sentencing: did the Crown recommend a non-custodial sentence or deferred custody or custody or supervision?

Social Characteristics of the Young Person

Three socio-demographic factors are related to the Crown's sentencing recommendation. These significant relationships should be viewed with caution, however, since many disappear when multivariate analysis is done. The Crown was more likely to recommend custody and supervision for those who are 16 years of age or more, neither working nor going to school and those living outside the parental home.

The mental status of a young person may affect decisions. In one case, for example, the Crown asked for more probation for a male drug addict who panhandled and often lived on the street – "he is not all there". In another, the Crown recommended a period of intensive supervision and support for a young person with FASD. The Crown had had a long talk with the youth worker who said he was doing well in his residential placement, but they needed some "assistance" with him. The Crown described the sentence of ISSP as "purely rehabilitative".

While the pre-sentence report is important in Crown decision-making, the Crown may not always follow the implicit or explicit recommendation in the report. Even though the youth had a "negative peer group" and the PSR stated that he had a poor response to supervision in community, the Crown asked for more probation and community service. "You look to see if you can take him away from his peers" and "what conditions of probation will help him to get on with his life". "We ask for those conditions so as to rehabilitate."

Legal Characteristics of the Young Person

The most serious offence upon which the youth was convicted was associated with a custody and supervision submission: indictable person and all administration of justice offences were significantly more likely to result in a custody and supervision recommendation than were other categories of charges.

When the number of prior findings of guilt was categorized as none to two versus three or more prior convictions, two-thirds of those with three or more convictions had a custody and supervision recommendation compared to less then 10 percent of those with two or fewer offences in their prior history. Another factor strongly related to the nature of the Crown's

submission is whether the accused had received custody in the past: 80 percent of youth with an earlier custodial sentence but only 20 percent of those with no such sentence had a custody and supervision recommendation.

A Crown asked for probation with attendance at a youth violence program for a youth in possession of a machete and alleged to be a member of gang called Surrey Thugs Incorporated. "The program will hopefully rehabilitate and protect society" and "I could not justify jail with his record".

In another B.C. case, the Crown argued that the "only meaningful consequence would be further incarceration" for a male with a history of breach of probation and supervision orders. In discussion with the researcher, he said that the record was "aggravating because he breached another condition. He ignored his last probation; he sabotaged the program that he was supposed to go to; it wasn't a single breach, it was complete sabotage." The youth was sentenced to 30 days secure custody.

In another breach case, the young person was on the thirteenth month of a fifteen month probation order. Although he had been charged with probation breaches in the past, all had been stayed. The Crown requested a period of community service "to hold him accountable". He had contemplated another term of probation "but this would be better" because another probation order, with more conditions, could lead to more breaches. Notably, defence had argued that the youth was a "good kid" simply lacking in structure because it was summer.

Program Availability

In British Columbia especially, program arrangements made by youth workers are influential. (Saskatchewan has far fewer programs.) For example, charged with two breaches of probation, a male with a drug problem had been discharged from a treatment program because he was selling drugs (marijuana) to other persons in the substance abuse program. The Crown said he "would normally ask for custody but will ask for probation with the condition of being sent to Camp [x]".

Other Factors

A variety of other considerations affect the recommendations to sentence of Crown prosecutors.

- The contents of the pre-sentence report – and less often, of a medical psychological report – tend to be extremely influential in the decisions made by the Crown counsel in the study courts. For example, "I could not ask for custody because of the positive PSR." A PSR was available in two-thirds of the cases where the Crown suggested custody.
- The contents of a victim impact statement may affect the Crown's perspective on the case although "we can't rely on the victim's wishes for punishment and will sometimes edit them out".

- The comments of the youth worker (for those who are on probation) affect decisions. "My position will be 10 to 15 hours of community service, unless the probation officer says otherwise."
- An "early guilty plea" was often cited by Crown and defence counsel as a mitigating circumstance in sentencing.
- The Crown may view a case more seriously if the accused minimizes the facts and/or does not accept responsibility.
- The young person may have already received "meaningful consequences". For example, a young person breached his probation by entering the Skytrain and the Crown determined that the arrest and being kicked out of the station were adequate consequences. The youth received an additional period of probation.
- A dangerous driving offence elicited the comment that "this offence is an epidemic on the Lower Mainland" and there should be "something of consequence", although general deterrence is not mentioned in the *YCJA*. In another court, the Crown said, "the *Act* says nothing about deterrence – but there are many robberies in the city, more than one a night". It seems that some prosecutors have difficulty in letting go of familiar sentencing objectives.
- For dual conviction offences, an earlier decision to proceed summarily limits the Crown's ability to ask for custody.
- The Crown may be considering the future involvement of the young person in the system. A Crown who recommended intensive supervision said that "the next offence will result in jail because of the ISSP; quite often we're just establishing record" when making submissions. In other words, Crowns may be laying the ground for later more severe sentences.

6. Multivariate Analysis of Factors Affecting Submissions to Sentence

When legal variables were introduced into the regression equation, age, race, activity status and living arrangements did not influence Crowns' recommendation for custody.[34] Whether the accused had received custody in the past was statistically associated with the decision to recommend custody. Both the nature of the current offence and the number of past convictions approached statistical significance. See Table 6.

[34] Not shown in table form.

Table 6: Multivariate Analysis of Factors Affecting Submissions to Sentence

Variable	Unstandardized coefficients		t value	Significance
	B	Std. error		
Constant	-.023	.069	.337	.739
Most serious current conviction (other vs. indictable person & administration of justice offences)	.191	.104	1.839	.073
No prior convictions/other sentences vs. prior custody sentence	.481	.165	2.921	*.006*
Number of past convictions	.028	.014	1.925	.061
Number of cases = 44 F=15.068 df=3 p=.000				

8. Relationships between Actual and Recommended Sentence

Table 7 shows the sentencing submission by the Crown in relation to the actual sentence imposed by the youth court on the most serious conviction in the case. In three cases, the recommendation by the Crown counsel was not followed by the youth court: in one case, the Crown recommended a non-custodial sentence (intensive support and supervision) because of the length of time the youth had spent in detention but the court gave the youth person a deferred custody order on the recommendation of the probation officer. In the other two cases, the court ordered less severe sentences: in one instance, the Crown recommended deferred custody and the court ordered probation; in the second, the Crown recommended deferred custody and the court asked for a s. 35 assessment and a conference and made it clear that the youth would not receive custody.

Table 7: Crown Submission to Sentence and the Sentence Actually Imposed

	Crown submission to sentence			
Actual court sentence	Other non-custodial outcome	Probation or ISSP	Custody or deferred custody & supervision	Total
Court did NOT order custody or deferred custody & supervision	100.0 (13)	94.7 (18)	14.3 (2)	71.7 (33)
Court ordered custody or deferred custody & supervision	0	5.3 (1)	85.7 (12)	28.3 (13)
Total percent	100.0%	100.0%	100.0%	100.0%
Total number	13	19	14	46

Notes: Two peace bonds and one conference are included in the "other non-custodial outcome" category. It is reasonably certain that the conference did not result in custody sentence because the court rejected the initial submission by the Crown of deferred custody.

7. Cases Where the Crown Recommended Custody and Supervision

So far as could be determined, the submissions to sentence made by Crown counsel were in keeping with the criteria in the *Act*. Only three cases did not have previous guilty findings and in each case, the current offence was violent. None of the Saskatchewan custody cases had a breach of a court order as the "most serious" offence compared to five cases in British Columbia where custody was the Crowns' submission to sentence. As a Crown counsel in the latter province said:

> Breaching court orders is very serious. It's undermining the authority of the court and very common for people to get jail.

8. Summary

In gross terms, the Crown's submission to sentence tended to be accepted by the youth courts. This finding could mean that the Crown was attune to the sentencing practices of the sitting judge, that the youth court tends to be influenced by the Crown's perspective, or that the Crown and the court use the same criteria for sentencing. The submissions to sentence were in keeping with the provisions of the *YCJA*.

Youth prosecutors did not simply rely on the police report but consulted other system personnel, social services staff and sometimes parents or guardians for information on the young person. Social reports, especially pre-sentence reports, were found in about 40 percent of cases and in a substantial majority of cases where the Crown recommended a custody sentence, a PSR was available. In about two out of three cases in the sample, the Crown prosecutor had two or more sources of information, either verbal or written, in addition to the police report and prior record.

Both case characteristics and other factors appear to influence the content of the submission to sentence by the Crown. Of the former, one feature of the young person's prior record – having an earlier custody sentence – was most influential. However, a large number of factors unrelated to the characteristics of the individual case were mentioned during case reviews and interviews with prosecutors.

Discussion and Conclusions

Crown counsel in five youth courts, two in Saskatchewan and three courts in British Columbia, participated in this prospective study of Crown decision-making in charge approval cases (B.C. only), referrals to Extrajudicial Sanctions, bail decisions and submissions to sentence. The research was prospective in that Crown prosecutors were asked to describe the reasons for their decisions at the time they made them. Other case-related data were coded from Crown files. The study was conducted in the summer of 2003, a few months after the start-up of the *Youth Criminal Justice Act*.

1. Similarities and Differences among the Youth Courts

Youth courts differed both within the same jurisdiction and compared to the other province participating in the study.

- In three courts, the judiciary either never or rarely dealt with adult criminal cases.
- Specialized Crown prosecutors (i.e., counsel whose work day was primarily devoted to youth matters) were found in two courts, with rotation of Crown counsel into the youth court found elsewhere.
- Legal aid staff lawyers represented Saskatchewan young persons and lawyers in private practice acted as defence counsel in British Columbia. In two of the five courts, therefore, defence were very familiar with youth and adult justice issues.

There were substantial differences between the two provinces in the case characteristics of the samples. Notably, the B.C. cases were more troubled – in terms of the ability of their parents to control them, substance abuse, living arrangements and involvement with the child protection agency – than were Saskatchewan cases. A much higher percentage of Saskatchewan cases were of Aboriginal origin. Saskatchewan cases were less likely to be charged with a breach of probation but more likely to have outstanding charges. The proportion of the sample with past findings of guilt was identical, at 60 percent. Another important difference is that the Saskatchewan cases were much more likely to have had diversion experience in the past than were cases from British Columbia.

Most courts were sufficiently small that most court actors knew each other and often the youth as well. Relationships among Crown counsel, defence lawyers and the bench were collegial in four courts. There was some tension between Crown and defence counsel in one court and in two courts, the bench was viewed as too "soft" by some of the Crown prosecutors.

There is a fine balance between paternalism and rehabilitation according to a number of Crown and defence counsel interviewed. Bail and probation conditions – that so often end in the young person being sentenced to custody – were associated with both paternalism and "trying to help". It is clear however that many of the supervisory and lifestyle conditions (Kellough and Wortley, 2003) were imposed in order to control or restrain the youth in the community.

2. Decision-making

Many decisions made by Crown prosecutors are what they term "no brainers" – that is, the facts speak for themselves – for example, a charge approval case in B.C. is beyond the limitation period, the first offender shoplifter is diverted to EJS; the detained youth with only one prior conviction is released from pre-trial detention on consent of the prosecutor.

Crown counsel did not discuss the moral character of the young persons they dealt with, according to study observations. That is, unlike some police (Kellough and Wortley, 2002), few if any Crowns expressed moral outrage at the behaviour or personality of young persons. (Of course, this could have been an effect of being observed by the field worker.) In all cases, the Crowns' decisions were within legal parameters given the prior record and current offences of the accused. Many of the young persons that had troubled backgrounds were also recidivists, often with numerous findings of guilt and with prior convictions for failure to comply with community sentences.

3. The Research Questions

Charge Approval in British Columbia

A small sample of charge approval (Crown screening) cases was available for analysis. About six out of ten young persons were charged and sent to court. The reasons for "no further action" included procedural reasons (e.g., the limitation date for proceeding had passed), questionable credibility of complainants, and insufficient or unconvincing evidence. Three-quarters of the cases where no further action was taken did not meet the standard of substantial likelihood of conviction, and the remainder of decisions were justified by the public interest criterion.

Extrajudicial Sanctions

According to the multivariate analysis of cases observed during this study, the factors that were most influential in the Crown prosecutor's decision to refer a young person to EJS were: having no prior record, having a current property offence and having fewer current and outstanding charges. Although social factors were associated with being diverted – living with parents, going to school or working, being non-Aboriginal – these relationships were not sustained when legal factors were introduced.

In both Saskatchewan and B.C., diversion policies indicated that young persons could be diverted more than once. Multiple referrals to diversion were found only in Saskatchewan. Interviews suggest that the Crowns look carefully at the record of the young when considering re-referral to EJS: the age of the previous offences, their similarity to the current charge and the nature of the current charge (minor). In B.C., the absence of offence-specific EJS programs may affect Crown decision-making – that is, Crowns may be reluctant to refer "second offenders" to diversion because of the lack of variety in diversion programming.

The characteristics of cases referred to Extrajudicial Sanctions are as follows:

- diverted cases had an average age of 14.5 years, which was younger than the rest of the observational sample
- about three out of ten were female
- one-third were of Aboriginal origin
- three-quarters lived with their parents as opposed to being in a group or foster home, or transience
- few diverted cases were alleged to abuse alcohol or drugs
- only one out of ten were not going to school or working
- roughly three out of ten diverted persons had prior or current contact with the child protection agency, a much lower percentage than other cases in the sample
- two diverted persons had prior convictions but the remainder had no prior findings
- four out of ten diverted youth had been diverted in the past (all of these cases were in Saskatchewan)
- only one diversion case had three or more current charges
- about three-quarters of diversion cases involved property charges including indictable property charges; 10 percent had a person offence; the remainder were "victimless" such as possession of cannabis.

Pre-trial Detention

The Crown released police-detained young persons "on consent" in just over four out of ten cases. At the bivariate level, few demographic or social characteristics were associated with consent release. While no characteristics of the accused's prior record were related to release by the Crown, the number of current charges, having outstanding charges, and being accused of a property of victimless crime were related to release. The multivariate analysis found that having four or more current charges, having one or more outstanding charge and being an alleged substance abuser significantly reduced the likelihood that the accused would be released.

Submissions to Sentence

In thirty percent of the cases observed in this study, the Crown made a recommendation to the court for a deferred custody and supervision order or a custody and supervision order. According to interviews, an array of factors affected sentencing recommendations, from victim impact statements to the need for general deterrence. The contents of pre-sentence and medical-psychological reports and the opinions of probation officers were said to be especially influential. An early guilty plea and acceptance of responsibility by the accused are viewed as important. Although the multivariate analysis was hampered by the small number of cases, the factor that was most influential was whether the young person had received custody in the past. The number of prior findings of guilt and the most serious current conviction (indictable person or administration of justice offences) approached statistical significance. Age, whether the young person was going to school, living outside the parental

home – while related to the submission at the bivariate level – were no longer relevant when the legal factors were introduced.

The Crown's recommendation for custody was accepted in 12 of the 14 cases and in another case the Crown recommended six months consecutive whereas the court ordered six months concurrent. Legal justification – i.e., the criteria for custody in the *YCJA* – was available in all cases where the Crown recommended custody. Four of the five Saskatchewan custody cases involved a violent current offence such as robbery or sexual assault; only two of the ten B.C. cases involved a violent offence. In fact, in B.C., six cases involved breach of probation and no substantive offences.

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