Youth Criminal Justice Act

Training Materials

Policy, Planning and Evaluation Branch,

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Introduction to Youth Justice Reform

1. The Federal Youth Justice Renewal Strategy

1.1 Background

In response to the demand for reform of the youth justice system, the Federal government has embarked on the Youth Justice Renewal Strategy, which is based on three key components: prevention, meaningful consequences for youth crime, and intensified rehabilitation and reintegration to help youth safely return to their communities. Ultimately, the Youth Justice Renewal Strategy seeks the long-term protection of society through the reduction of youth crime. The *Youth Criminal Justice Act* (*YCJA*) is a major component of this Strategy.

1.2 Goals and Objectives of the Federal Youth Justice Renewal Strategy

The Government of Canada recognizes that the formal court process must be available for more serious offences and repeat offenders when it is appropriate. However, the federal government has noted that young people are often dealt with by the formal justice system for minor offences that, in many cases, could be meaningfully addressed within the community in less formal ways that focus on repairing the harm done. Or they may face a custody solution where a community solution could be used.

The objectives of the Federal Youth Justice Renewal Strategy are to:

- increase the use of measures, outside the formal court process, that may be more effective in addressing some types of youth misconduct;
- establish a more targeted approach to the use of custody for young people for serious offences or repeated offences;
- improve the system's ability to rehabilitate and reintegrate young offenders through case management and community-based interventions and sentences whenever possible;
- increase the use of community-based sentences for non-violent youth crime;
- establish special measures for violent and mentally disordered offenders that focus on intensive supervision and treatment; and
- increase public confidence in the youth justice system.

1.3 The Federal Youth Justice Renewal Strategy and Aboriginal Youth

The issue of Aboriginal youth who commit offences is addressed by the *YCJA*.

Section 3 of the *YCJA* stipulates:

> Within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should respect gender, ethnic, cultural and linguistic differences and respond to the needs of Aboriginal young persons and of young persons with special requirements.

The sentencing principle in clause 38(2)(d) provides that all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of Aboriginal young persons.

The sentencing principles for aboriginal offenders contained in clause 718.2(e) of the *Criminal Code* of Canada also apply to young persons pursuant to clause 50(1) of the *YCJA*. The court shall take into account all available sanctions other than imprisonment that are reasonable in the circumstances with particular attention to the circumstances of aboriginal offenders.

Exercise 1

Choose the best answer:

The Youth Justice Renewal Strategy is designed to do the following EXCEPT _____.

a. increase the use of community-based sentences for non-violent youth crime
b. establish a more targeted approach to the use of custody for young people
c. increase the use of formal court process for youth crime
d. improve the system's ability to rehabilitate and reintegrate young offenders

2. The Saskatchewan Youth Services Model (YSM)

2.1 Introduction

In Saskatchewan, implementation of *the Youth Criminal Justice Act* is guided by the Saskatchewan Youth Services Model. Developed by the Departments of Justice, Corrections and Public Safety (formerly Social Services), Learning, and Health, the Saskatchewan Youth Services Model became provincial policy upon its approval in May 2000. This Model provides a framework for a renewed and more focused youth justice system, and aims to improve the way we deal with youth involved in misconduct and offending. The Model builds on existing services in Saskatchewan that have been proven effective. It provides direction to all agencies that work with these youth in the province.

The focus of implementation activities and program development is to align mandatory and optional provisions of the *YCJA* with the directions articulated in the Youth Services Model policy framework.

2.2 Goals and Objectives

The Youth Service Model aims to ensure that services and practices will result in more positive outcomes for youth, their families, victims and communities.

Tested in two pilot sites – Regina and Prince Albert, the Youth Services Model strives to promote earlier intervention and to contain or reduce the number of youth who come into contact with the justice system. Specifically, it is intended to:

- bring all levels of government, Aboriginal organizations and community-based groups together to develop programs and services to help these young people make good future choices, and to prevent or reduce further offending;
- support at-risk youth to complete school, get jobs, and take part in community life;
- emphasize treatment so that youth can live healthier lives;
- have more youth taking responsibility for their actions in the community instead of going through the court system;
- contain or reduce the number of youth in custody.

Exercise 2

Choose the correct answer:

The Saskatchewan Youth Services Model provides a policy framework for implementing _____.

a. a renewed and more focused justice system
b. the existing youth justice system
c. the Youth Justice Renewal Strategy
d. the Youth Criminal Justice Act

2.3 Saskatchewan Case Management Overview

As part of developing services and procedures to support positive outcomes for youth in conflict with the law, and as part of the *YCJA* implementation, departments will be working to implement and facilitate case management approaches.

Case Management is defined as:

- The process of risk management and reduction through systematic assessment emphasizing factors relevant to criminal behaviour, and intervention which appropriately targets criminogenic needs as well as ensuring fair and proportionate accountability of the young person for their criminal behaviour.

Philosophical Tenets and Guiding Principles include:

- ***Practice that is integrated*** – recognizes an overarching seamless case planning process between custody and community, inclusive of family, community and other stakeholders.
- ***Family centred*** – recognizes that factors within family can influence the success of the young person completing the order. Family participation and inclusion is encouraged to bring about family ownership and participation in the intervention.
- ***Community based*** – (for community dispositions) – recognizes the need for community based intervention that sees the youth worker dealing with the young person in the community and in their environment.
- ***Case planning sensitive to victims needs*** – recognizes where possible restitution may be part of the plan, or inclusion of victims in conferencing, or other restorative interventions.
- ***Strength-based*** – recognizes that working from a strength-based perspective creates greater youth involvement and also creates an atmosphere for success.

- ***Evidence based practice*** – recognizes that practice should be based on research and programs which have been shown to work.

Case Management contains 3 elements:
1) Assessment
2) Risk Management
3) Risk Reduction

1) Assessment
- Uses a risk assessment tool – Level of Service Inventory (LSI-SK) - (Criminal History; Family; Peer; Substance Use; Recreation, School);
- Considers individual, family and community;
- Contributes to the overall systems management of cases – so cases are assigned, based on the level of supervision required. (i.e., high risk youth will received high levels of supervision and intervention; and low risk youth will receive lower levels of supervision)

2) Risk Management
- Provides community-based support and supervision with a range of controls and reintegration opportunities to encourage reintegration and to assist, where possible, the young person to repair the harm done to the victim.
- Uses standards for supervision policy, such as development of guidelines around frequency and type of contact with young persons (i.e., daily contact with youth who are deemed very high risk and who are newly released on 1/3 early release)
- Establishes a community safety plan.
- Creates a support network – with a range of different programs/services/stakeholders (i.e., community team) to assist in management of the risk level.

3) Risk Reduction
- Uses integrated custody and community processes with common strategies based on the criminogenic needs
- Supports treatment and rehabilitation planning and process
- Facilitates programs and services to address particular youth needs (i.e., substance intervention; family intervention around supervision; school) and interventions that employ Cognitive Skills methodology – i.e., examining the thinking errors and developing self-management based on thinking, feeling and behaving.

Discussion

What is Saskatchewan case management? What elements does it contain?

3. Provincial Response to *YCJA* Implementation

The *YCJA* contains a number of optional provisions that allow provinces to decide elements of how the Act will be implemented. Saskatchewan has made the following decisions in relation to these options:

1) Presumptive Age for Adult Sentences

- Under the *YOA,* youth, 16 years of age and over, who committed certain serious offences would be presumed to be dealt with in adult court.
- Under the *YCJA*, the presumptive age for liability to an adult sentence was lowered from 16 years of age and over to 14 years of age and over.
- Saskatchewan is given the option of setting this age between 14 and 16 years of age (section 61).
- Saskatchewan will retain the *YCJA* legislated standard for liability to an adult sentence at 14 years of age.
- Young persons, 14 years of age and over, committing presumptive offences (murder, attempted murder, manslaughter, aggravated sexual assault and their third serious violent offence) are presumed to receive an adult sentence.
- Youth can apply for a youth sentence, if subject to the adult sentence presumption.
- The presumption merely creates a liability to adult sentence. An adult sentence can only be imposed after a finding of guilt and a sentencing hearing or if the young person has applied to receive a youth sentence. All *YCJA* due process protections apply to the youth until sentenced as adult.
- Youth sentenced as adults are presumed to serve their time in youth facilities if under 18.
- Very few youth were dealt with under these provisions in the *YOA* and this is not expected to change under the *YCJA*.

2) Level of Custody

- Sections 85 to 88 –Province can choose judicial decision-making, or new administrative model where a provincial director determines the level of custody and placement but subject to review board.
- Saskatchewan will continue with judicially determined levels of custody (open or secure).
- Section 88 incorporates the current *YOA* provisions.

3) Intensive support and supervision sentence

- Under clause 42(2)(l), this type of program must be “approved by the provincial director” and will only be available “if provincial director has determined a program to enforce the order is available” under subsection 42(3).
- Saskatchewan will not offer this new sentence at this time. The level of supervision will be determined by the new case management model being adopted by Corrections and Public Safety.

4) Non-residential attendance program

- Clause 42(2)(m) requires any program be “approved by the provincial director”, limited to 240 hours, and not exceed 6 months. Under subsection 42(3), the provincial director must then determine that a program to enforce the order is available. The court then decides whether a young person is a “suitable candidate”.
- Saskatchewan will not offer this program as a stand-alone sentence, as it is currently available through probation orders.

5) Intermittent sentences

- The *YCJA*, like the *YOA*, allows provinces the option of offering intermittent sentences.
- Saskatchewan does not currently offer intermittent sentences and does not plan to do so under the *YCJA*.

6) Intensive Rehabilitative Custody and Supervision Order (IRCS)
- Clause 42(2)(r) allows this as an alternative to adult sentence where a youth is convicted of one of the presumptive offenses such as murder or manslaughter, or a serious violent offence, and he/she is suffering from a treatable mental illness or disorder, a psychological disorder or an emotional disturbance.
- Subsection 42(8) makes it clear the youth retains the right to consent to treatment or care.
- Saskatchewan will be offering IRCS sentence capacity.

7) Victim Surcharge
- Subsection 53(1) enables the province to establish a fixed rate surcharge on fines against youth to provide funding for victim assistance programs. If the province does not establish a fixed rate surcharge, the court may order a surcharge not exceeding 15% of any fine.
- Very few youth have been ordered to pay fines.
- Saskatchewan will monitor the impact of the *YCJA* provisions, but will not establish a provincial surcharge at this time.
- Judges will set the amount of the victim fine surcharge, not to exceed 15% of the fine.

8) Police and Crown cautioning programs and Crown pre-charge screening program
- Sections 7 and 8 allow the Province to establish police or Crown caution programs. Section 23 allows the Province to establish a Crown pre-charge screening program.
- Saskatchewan will not implement such programs at this time.

General Workings of the Youth Criminal Justice Act

The *Youth Criminal Justice Act*, which will replace the *Young Offenders Act*, is a key part of the Government of Canada's Youth Justice Renewal Strategy.

Key Elements of the Act

The key elements of the *YCJA* include: a preamble and a declaration of principle, extrajudicial measures, sentencing, custody and reintegration, and publication and records.

1. Preamble and Declaration of Principle

The *YCJA* contains both a Preamble and a Declaration of Principle that set out the objectives of the youth justice system.

The Preamble contains important statements from Parliament about the underlying values of the legislation. These statements can be used to help interpret the legislation and include the following:

- Society has a responsibility to address the developmental challenges and needs of young persons.
- Communities and families should work in partnership to prevent youth crime by addressing its underlying causes, responding to the needs of young persons and providing guidance and support.
- Accurate information about youth crime, the youth justice system and effective measures should be publicly available.
- Young persons have rights and freedoms, including those set out in the United Nations Convention on the Rights of the Child.
- The youth justice system should take account of the interests of victims and ensure accountability of offenders through meaningful consequences and rehabilitation and reintegration.
- The youth justice system should reserve its most serious interventions for the most serious crimes and reduce the over-reliance on incarceration.

The Declaration of Principle in section 3 provides that:

Clause 3(1)(a)
The youth criminal justice system is intended to
- ***prevent crime by addressing the circumstances underlying a young person's offending behaviour,***
- ***rehabilitate young persons who commit offences and reintegrate them into society, and***
- ***ensure that a young person is subject to meaningful consequences for his or her offence***

in order to promote the long-term protection of the public.

- The youth justice system must reflect the fact that the youth system is different from the adult system and should emphasize (clause 3(1)(b)):
  - Rehabilitation and reintegration;

  - Measures of accountability consistent with young persons' reduced level of maturity;
  - Procedural protections;
  - Timely intervention to reinforce the link between offending and consequences
  - Prompt action.
- Within the limits of fair and proportionate accountability, interventions should reinforce respect for societal values, encourage the repair of harm done, be meaningful to the young person, respect gender, ethnic, cultural and linguistic differences and respond to the needs of Aboriginal young persons and of young persons with special requirements (clause 3(1)(c)).
- Youth justice proceedings require special considerations and in particular (clause 3(1)(d)),
  - young persons have rights to be heard in their own right;
  - victims should be treated with courtesy, compassion and respect; and provided information and allowed to participate;
  - parents be informed and encouraged to participate in addressing the young person's offending behaviour.

Exercise 1

Choose the correct answer:

1. The *Youth Criminal Justice Act* contains _____.
   a. only a declaration of principles
   b. only preamble
   c. both a preamble and a declaration of principle
   d. neither a preamble nor a declaration of principle

2. The Declaration of Principle states that the most important objectives of the youth criminal justice system are to _____.
   a. prevent crime
   b. rehabilitate and reintegrate offenders into society
   c. ensure meaningful consequences for offences committed by young people
   d. all of the above

2. Extrajudicial Measures

Experience in Canada and other countries has shown that measures outside the court process can provide effective responses to less serious youth crime. One of the key objectives of the *YCJA* is to increase the use of effective and timely non-court responses to less serious offences by youth. This may include warnings, cautions, referral to community programs, apologies to victims, acknowledgement and reparation of damage, and community service work.

Under the *YCJA*, these non-court responses are called "extrajudicial measures". The *YCJA* introduces a set of principles and objectives specific to extrajudicial measures and separates these measures into two types. The first type contains warnings, cautions, and referrals, while the second type, referred to as extrajudicial sanctions, includes the formal measures that were called

alternative measures under the *YOA*. Extrajudicial sanctions may be used if the matter cannot be dealt with by the first type of extrajudicial measures because of the seriousness of the offence or the nature and number of previous offences by the young person or because of other aggravating circumstances (subsection 10(1)).

Extrajudicial measures provide meaningful consequences for youth misconduct, allowing early intervention with young people, and allowing the broader community to play an important role in developing community-based responses to youth crime.

More cases can be dealt with effectively outside the court process. Most cases in youth court are non-violent. Minor assault makes up nearly half of the violent offences.

Detailed descriptions and explanations of extrajudicial measures are provided later in this manual under the heading Extrajudicial Measures.

3. Sentencing

The *YCJA* states that the purpose of youth sentences is to hold young people accountable through interventions that are just, ensure meaningful consequences and promote rehabilitation and reintegration. Provisions in the *YCJA* intend to:

- establish a range of minimal interventions from reprimand to absolute discharge and conditional discharge;
- encourage community-based sentences, where appropriate, such as compensation for victims, community service, and supervision in the community;
- encourage community reintegration through sentencing for even serious offending youth, through deferred custody, custody and supervision requiring final 1/3 to be served in the community under conditions;
- restrict the use of custody
- allow courts to impose adult sentences upon conviction for youth 14 and over when certain criteria are met for the more serious offences;
- create a new intensive rehabilitative custody and supervision sentence for the most violent, high-risk youth so that they get the treatment they need.

4. Custody and Reintegration

An important principle in the *YCJA* is that while young people must be held accountable for their crimes, they are also considered to be able to be rehabilitated and reintegrated into society as law-abiding citizens. The new law intends to:

- require, in general, that youth be held separately from adults to reduce the risk that they will be exposed to adult criminals;
- require all periods of custody to be followed by a period of supervision and support in the community, which allows authorities to closely monitor and control the young person and to ensure that he or she receives the necessary treatment and programs to return safely and successfully to the community;
- require conditions to be imposed on periods of community supervision.

5. Publication and Disclosure

The *YCJA* balances public desire for transparency in the justice system with the need to protect young people whose rehabilitation could be hampered by the negative effect of publicity. The new legislation allows publication of names:

- when a youth receives an adult sentence;
- in some cases, when a youth receives a youth sentence for murder, attempted murder, manslaughter, aggravated sexual assault, or has a pattern of convictions for serious violent offences; or
- under court order, when a youth is at large and a danger to others and publication is necessary to protect society.

Exercise 2

Choose the correct answer:

The *YCJA* stipulates that all periods of custody be followed by _____.

a. a period of supervision and support in the community
b. an order of intensive support and supervision program
c. a period of release to their families
d. none of the above

Changes in Terminology

Section 2 of the *Youth Criminal Justice Act* contains a number of definitions essential to the application of the Act. Although many key terms and their definitions remain the same as in the *YOA*, some new definitions or terms are added and some of the current terms are redefined.

Under the *YCJA*, changes in terminology can be classified in two groups: adding of new definitions or terms, and redefinition of current terms.

1. New Definitions or Terms Added

"**attendance order**" or "**order to attend a non-residential program**" is an order that requires the young person to attend a program at specified times and on conditions set by the judge. It can be crafted to address the particular circumstances of the young person.

"**adult sentence**", in the case of a young person who is found guilty of a serious offence, means any sentence that could be imposed on an adult who has been convicted of the same offence.

"**conference**" means a group of persons who are convened to give advice to a police officer, judge, justice of the peace, prosecutor, provincial director, or youth worker who is required to make a decision under the *YCJA*. In general, the term refers to various types of processes in which affected or interested parties come together to formulate plans to address the circumstances and needs involved in youth justice cases.

"**confirmed delivery service**" means certified or registered mail or any other method of service that provides proof of delivery.

"**Crown cautions**" are similar to police cautions but are given by prosecutors after the police refer the case to them.

"**custodial portion**", with respect to a youth sentence imposed on a young person under clauses 42 (2) (n), (o), (q), or (r), means the period of time, or the portion of the young person's youth sentence, that must be served in custody before he or she begins to serve the remainder under supervision in the community subject to conditions under clause 42(2)(n) or under conditional supervision under clauses 42(2)(o), (q) or (r).

"**deferred custody and supervision**" is a sentencing option that allows a young person who would otherwise be sentenced to custody to serve the sentence in the community under conditions. This order is not available to the court if the young person has been found guilty of a serious violent offence.

"**disclosure**" means the communication of information other than by way of publication.

"**extrajudicial measures**" means measures other than judicial proceedings under the *YCJA* used to deal with a young person alleged to have committed an offence, and includes extrajudicial sanctions.

"**extrajudicial sanctions"** are more formal extrajudicial measures, currently known as alternative measures under the *Young Offenders Act*.

"**intensive rehabilitative custody and supervision order**" is a special sentence for serious violent offences committed by mentally disordered offenders.

"intensive support and supervision order" or "**order of intensive support and supervision program"** is a sentencing option which provides closer monitoring and more support than a probation order to assist the young person in changing his or her behavior.

"police cautions" are more formal warnings by the police. It is expected that these cautions are issued in the form of a letter from the police to the young person and the parents, or the cautions may involve a process in which the young person and the parents are requested to appear at a police station to talk to a senior police officer.

"presumptive offence" refers to offences of violence when committed by a young person who is 14 or over, for which the youth is presumed to be liable to an adult sentence: first or second degree murder, attempted murder, manslaughter, and aggravated sexual assault. The *YCJA* also includes repeat, serious violent offences when an adult could be sentenced to a term of imprisonment in excess of two years if, prior to the commission of that offence, at least two different judicial determinations under the *YCJA* had been made that the young person had committed a serious violent offence.

"**publication**" means the communication of information by making it known or accessible to the general public through any means, including print, radio or television broadcast, telecommunication or electronic means.

"**record**" includes any thing containing information, regardless of its physical form or characteristics, including microform, sound recording, videotape, machine-readable record, and any copy of any of those things, that is created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act.

"**referrals**" are referrals of young persons by police officers to community programs or agencies that may help them to not commit offences. The referrals may be to a wide range of community resources, including recreation programs and counseling agencies.

"**reprimand**" is essentially a stern lecture or warning from a judge in minor cases in which the experience of being apprehended, taken through the court process and reprimanded appears to be sufficient to hold the young person accountable for the offence.

"**serious violent offence"** means an offence in the commission of which a young person causes or attempts to cause serious bodily harm.

"**youth custody facility**" means a facility designated under subsection 85(2) for the placement of young persons and, if so designated, includes a facility for the secure restraint of young persons, a community residential centre, a group home, a child care institution and a forest or wilderness camp.

2. Current Terms Redefined

"**pre-sentence report**", replacing "pre-disposition report", means a report on the personal and family history and present environment of a young person made in accordance with section 40 of the *YCJA*.

"**reintegration leave**", replacing "temporary release from custody", means up to 30 days leave granted by the provincial director to any young person committed to a youth custody facility in the province in respect of a youth sentence or an adult sentence on any terms and conditions that the provincial director considers desirable. (Refer to section 91 of the *YCJA*)

"**youth justice court**", replacing "youth court", is any court that may be established or designated by or under an Act of the legislature of a province, or designated by the Governor in Council or the lieutenant governor in council of a province, as a youth justice court for the purposes of the *YCJA*. A youth justice court is a court of record (section 13).

"**youth justice court judge**", replacing "youth court judge", is a person who may be appointed or designated as a judge of the youth justice court or a judge sitting in a court established or designated as a youth justice court.

"**youth sentence**", replacing the term "disposition", means a sentence imposed under sections 42, 51, 59, or 94 to 96, and includes a confirmation or a variation of that sentence.

The term "ordinary court" and its definition are not found in the *YCJA*.

Exercise

Match the words in Column A (*YCJA*) with the proper words in Column B (*YOA*):

Column A	Column B
1. extrajudicial sanctions	a. youth court
2. sentence	b. pre-disposition report
3. youth justice court	c. temporary absence
4. pre-sentence report	d. disposition
5. reintegration leave	e. alternative measures

Extrajudicial Measures (Part 1 of the *YCJA*)

1. Introduction

Part 1 of the *Youth Criminal Justice Act* (*YCJA*) sets out a framework for using a range of measures other than youth court proceedings for responding to youth crime. The changes in this area are not major. The new Act changes the terminology, provides a presumption that extra-judicial measures should be used for first time non-violent offenders, and structures the use of police discretion.

Extrajudicial measures include:

- measures based on police discretion, such as warnings, cautions and referrals to community programs;
- cautions by Crown prosecutors; and
- extrajudicial sanctions, which are more formal extrajudicial measures, currently known as alternative measures under the *YOA*.

Saskatchewan will not be implementing police or Crown cautioning programs at this time. Resources will instead be directed at strengthening the delivery of extra-judicial sanctions (alternative measures), as it is expected that the number of referrals will increase with the introduction of the new Act. During training for the new Act, the use of police discretion will be encouraged along with greater use of precharge referrals to alternative measure programs. The government of Saskatchewan, the RCMP and municipal police forces all support the use of measures outside the court process to respond to less serious youth crime.

The provisions in the *YOA* governing the use of alternative measures (now called extrajudicial sanctions) have been adopted into section 10 of the *YCJA*. The current provincial guidelines will also continue to apply.

Discussion

How are extrajudicial measures of the *YCJA* different from alternative measures of the *YOA*?

2. Principles and Objectives

Sections 4 and 5 of the *YCJA* provide principles and objectives that govern the use of extrajudicial measures. The principles and objectives are specific to this part of the *YCJA*, and apply to it in conjunction with the overarching principles set out in section 3, which apply to the entire legislation.

2.1 Principles

Section 4—Declaration of Principles

a) Extrajudicial measures are often the most appropriate and effective way to address youth crime.

b) Extrajudicial measures allow for effective and timely interventions focused on correcting offending behaviour.

c) Extrajudicial measures are presumed to be adequate to hold a young person accountable for his or her offending behaviour if the young person has committed a non-violent offence and has not previously been

found guilty of an offence.

d) Extrajudicial measures should be used if they are adequate to hold a young person accountable for his or her offending behaviour and, if the use of extrajudicial measures is consistent with the principles set out in this section, nothing in this Act precludes their use in respect of a young person who

(i) has previously been dealt with by the use of extrajudicial measures, or

(ii) has previously been found guilty of an offence.

Section 4 of the *YCJA* sets out principles to guide the use of extrajudicial measures:

- Extrajudicial measures are often the most appropriate and effective way to address youth crime.
- Extrajudicial measures allow for effective and timely interventions focused on correcting offending behaviour.

Extrajudicial measures are presumed to be adequate to hold a young person accountable if the young person has committed a non-violent offence and has not previously been found guilty of an offence.

This presumption is a strong direction from Parliament that it expects first-time, non-violent offenders generally to be dealt with outside the youth court. It reflects the Act's theme of restraint in the use of the formal criminal justice process and the Act's objective of reserving the most serious interventions for the most serious crimes.

- Extrajudicial measures should be used if they are adequate to hold a young person accountable, and they may be used even if the young person has previously been dealt with by extrajudicial measures or has previously been found guilty of an offence.

2.2 Objectives

Section 5 sets out the objectives of extrajudicial measures:

- provide an effective and timely non-judicial response to offending behaviour;
- encourage young persons to acknowledge and repair the harm caused to the victim and the community;
- encourage families of young persons and the community to be involved in the design and implementation of the measures;
- provide an opportunity for victim participation in decisions on the measures selected and to receive reparation; and
- respect the rights and freedoms of young persons, and be proportionate to the seriousness of the offence.

Exercise 1

Choose the best answer:

1. Extrajudicial measures are presumed to be adequate to hold a young person accountable for his or her actions in the case of _____.
   a. a violent offender with no previous convictions
   b. a non-violent offender with no previous convictions
   c. any non-violent offender
   d. a violent offender

2. Extrajudicial measures should be used whenever they are sufficient to hold the young person _____.
   a. in a place that is safe to the public
   b. at the police station
   c. in a community program
   d. accountable for offending behaviour

3. Extrajudicial measures should encourage young persons to _____.
   a. acknowledge and repair the harm caused to the victim and the community
   b. encourage families of young persons be involved in the use of the measures
   c. encourage the community to be involved in the use of the measures
   d. all of the above

4. Extrajudicial measures should provide an opportunity for victim participation in decisions on the measures selected and to receive reparation.
   a. True
   b. False

5. The seriousness of the offence is not a concern of extrajudicial measures.
   a. True
   b. False

Scenario:

Tom is a boy of 15 years old. He broke into a house last week and stole a camera worth five hundred dollars. Three months ago, he stole a disk worth 20 dollars from a shop. He was charged and referred to an alternative measures program, and successfully completed the program. Are extrajudicial measures suitable to Tom's case? Why or why not?

3. Types of Extrajudicial Measures

Sections 6, 7, 8 and 10 identify types of measures that can be used instead of court proceedings. The following extrajudicial measures may be used:

- take no further action;
- give the young person an informal warning;

- give the young person a formal police caution;
- refer the young person to a community program or agency to assist the young person in not committing offences;
- refer the young person to an extrajudicial sanctions program; or
- give the young person a Crown caution.

As stated previously, Saskatchewan will not implement formal police and Crown cautioning programs. The use of extrajudicial measures in Saskatchewan will consist of an increased emphasis on the use of police discretion and informal warnings and a reliance on our existing alternative measures programs.

3.1 Taking No Further Action

For many minor offences, a decision by the police officer to take no further action may be the most sensible thing to do. For example, the parents of the young person, the victim or others may have already taken sufficient steps to hold the young person accountable. There would be no need to expend limited police resources and other youth justice system resources on such a case (section 6).

3.2 Warning the Young Person

Warnings by police officers are intended to be informal warnings (section 6). They are an example of a traditional exercise of police discretion. Experience under the *YOA* has caused concern that police may have decreased their use of this type of informal police discretion and replaced it with charges or referrals to alternative measures programs.

In many minor cases, a warning by a police officer is a sufficient response from the justice system, just as it was for the parents and grandparents of today's youth. It lets a youth know the limits of acceptable behaviour. There is also evidence that, in terms of recidivism, a warning or taking no further action may be as effective as charging the youth or referring him or her to an alternative measures program in some circumstances.

3.3 Police and Crown Cautions (not being offered in Saskatchewan)

A Police and/or Crown cautioning program is one of the options under the *YCJA*. In such a program, the police or Crown prosecutors would give more formal warnings, or "cautions", to youth in appropriate cases. Such programs operating in other provinces require the police or Crown prosecutor to issue a written warning to the youth. The advantage is that there is a written record of these decisions. However, it is not clear how a formal police-cautioning program would fit with the use of police discretion, existing police referrals and alternative measures programs (sections 7 and 8).

3.4 Referrals to Community Programs

Police officers may, instead of charging a young person, refer the young person to a community program or agency that may help him or her not to commit offences. The consent of the young person is required. The referral may be to a wide range of community resources, including

recreation programs, counseling agencies, child welfare agencies and mental health programs (section 6).

3.5 Extrajudicial Sanctions

The **Saskatchewan Diversion Program Policy** (1997) guidelines and section 10 of the new Act govern the use of extrajudicial sanctions. Conditions and restrictions on the use of extrajudicial sanctions are set out in subsection 10(2) of the *YCJA* and are similar to conditions provided on the use of alternative measures under *YOA*. Conditions include:

- **Other extrajudicial measures would not be adequate**.
- **A program is authorized by the AG in that jurisdiction**. Saskatchewan has authorized adult and young offender diversion programs.
- **Appropriateness.** The person considering using the sanction must believe that it would be appropriate, given the needs of the young person and the interests of society.
- **Informed consent.** The young person must have been advised of his or her right to counsel and have been given an opportunity to consult counsel before consenting to participation of the program.
- **Acceptance of responsibility.** The young person must have accepted responsibility for the act or omission that forms the basis of the offence. An extrajudicial sanction cannot be used if the young person denies involvement in the offence or wishes to have the charge dealt with by the youth court.
- **Sufficient evidence to proceed.** The Crown must believe there is sufficient evidence to proceed with a charge and the prosecution must not be barred by law.

Extrajudicial sanctions can involve a variety of options, including community service work, participation in victim/offender mediations and family group conferencing. Unlike warnings, cautions and referrals, there is a record kept for any sanction a youth receives and, if the youth fails to follow through with the sanctions agreement, there are formal consequences.

Exercise 2

Write “True” or “False” for each of the following statement:

1. Warnings, cautions, and referrals to community-based programs are extrajudicial measures used for more serious cases.
2. Warnings, cautions, and referrals to community-based programs are extrajudicial measures that the police or Crown counsel must consider before a charge is laid.
3. Extrajudicial sanctions represent a more serious and formal response than the other extrajudicial measures.
4. Extrajudicial sanctions may include community work service, participation in community accountability panels, judicial proceedings, and participation in family group conferencing.
5. Unlike other extrajudicial measures, a record may be kept for any sanction a youth receives.

Questions for discussion:

1. What is the difference between extrajudicial sanctions and the other extrajudicial measures?
2. When should extrajudicial measures be used?

4. Duty of Police Officer

Section 6 of the Act requires a police officer, before charging a young person, to take account of the principles in section 4 and consider whether it would be sufficient to:

- take no further action;
- warn the young person;
- give the young person a formal caution; or
- with the consent of a young person refer him or her to a community program.

The police officer must consider section 6 of the *YCJA* in all cases in which a charge could be laid. The police officer must believe on reasonable grounds that the young person has committed an offence. Extrajudicial measures are intended as an alternative to proceeding with charges. If the grounds for a charge are not present, the police officer should not use a warning, caution or referral as a means of dealing with the matter.

Key provisions in section 4 that a police officer must take into account include: the principle that extrajudicial measures rather than court proceedings should be used if they would be adequate to hold the young person accountable; the presumption that non-violent first offenders should be dealt with by extrajudicial measures; and the principle that young persons can be dealt with by extrajudicial measures even though they have previously committed offences.

Subsection 6(2) provides that the failure of a police officer to carry out his or her duty to consider these non-court options before charging a young person does not invalidate the charge.

Discussion

Under the *YCJA*, what shall a police officer consider before charging a young person?

5. Saskatchewan Young Offender Diversion Program Policy

The Saskatchewan policy will govern the use of extrajudicial sanctions for young persons under the new Act (subsection 165(5)). A copy of these policy guidelines is attached. The policy sets out similar restrictions on the use of diversion as set out in subsection 10(2) of the new Act. Most offences are eligible but the following list of offences is excluded:

- Incidents involving the use of or threatened use of a weapon;
- Violence against the person cases (adult or child), (where the Crown elects to proceed by way of indictment), including offences such as aggravated assault and sexual assault (common assault cases can be dealt with by alternative measures);
- Child sexual abuse cases;

- Perjury;
- Driving while disqualified;
- All Criminal Code driving offenses with alcohol or drugs a contributing factor;
- Any federal offence other than the Criminal Code (a/m may be available, consult federal Department of Justice);
- All family violence cases.

Some other exclusionary criteria include a significant failure to complete previous diversions, or the existence of other significant charges that call into question the appropriateness of alternative measures. The agency administering the program can also exclude if they think the offender or the offence is not suitable.

The policy also sets out eligibility and exclusionary criteria governing the use of mediation and family group conferencing.

5.1 Notice to Parents (new)

The parent of the young person must be notified if the young person is dealt with by an extrajudicial sanction. The person administering the program is responsible for notifying the parent. The requirement to notify a parent reflects the policy in the Declaration of Principle (section 3) that parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

5.2 Informing Victims (new)

The victim of an offence is entitled, on request, to be informed of the identity of the young person who has been dealt with by an extrajudicial sanction as well as the manner of dealing with the offence. This entitlement of victims is consistent with the provisions in the Declaration of Principle (section 3) that victims should be treated with courtesy and respect and that they should be provided with information about proceedings against young persons. It is again expected that the agency dealing with the young person will handle these requests.

Discussion

1. What offences are excluded from the current Saskatchewan Young Offender Diversion Program Policy?
2. Who should be informed or have the right to the information if a young person is dealt with by extrajudicial sanctions?

6. Consequences of Participating in Extrajudicial Measures

Subsection 10(4) provides that any admission of responsibility for an offence made by a young person as a condition of being dealt with by extrajudicial measures is inadmissible in evidence against any young person in civil or criminal proceedings. This provision applies to:

- extrajudicial sanctions;

- police decision to take no further action;
- police warning;
- police caution;
- Crown caution; and
- referral to a community program.

Evidence that a young person has been dealt with by a warning, caution or referral is inadmissible in any court proceedings for the purpose of proving prior offending behaviour. Unlike extrajudicial sanctions, the use of one of these other extrajudicial measures does not require a finding of guilt or an admission of responsibility by the young person. In such cases it would be unfair to use such evidence against the young person, for example, to increase the severity of a sentence for a subsequent offence.

In contrast, evidence that a young person has been dealt with previously by an extrajudicial sanction can be used at sentencing for a subsequent offence. Section 40 requires that a pre-sentence report include the history of extrajudicial sanctions used to deal with the young person and the response of the young person to those sanctions. Subsection 119(2) limits access to a record of extrajudicial sanctions to two years.

7. Failure to Complete Extrajudicial Sanctions

As with the *YOA*, if a young person fails to complete the extrajudicial sanctions as agreed upon, a charge may be laid against the young person (subsection 10(5)).

Organization of the Youth Criminal Justice System (Part 2 of the *YCJA*)

1. Introduction

Part 2 of the *YCJA* retains the general approach of the *YOA* with minor changes:

- The "youth court" becomes the "youth justice court";
- Peace bond provisions of the *Criminal Code of Canada* will apply to young persons (**new**)(subsection 14(2));
- Provides guidance for dealing with youth/adults where age at time of offence uncertain (**new**);
- Continues Youth Justice Committees but expands the potential scope of these committees and deletes the requirement that such committees not be paid;
- Allows the convening of a conference outside the court process or as ordered by the court (**new**).

2. Youth Justice Court –Jurisdiction

A Youth Court as designated under the *YOA* is now called the Youth Justice Court. The transitional provisions (subsection 165(1)) deem current youth courts and youth court judges to have been designated or established as youth justice courts and judges of the youth justice court under this Act.

The Act indicates that a youth justice court judge is a justice and provincial court judge and has the jurisdiction and powers of a summary conviction court under the *Criminal Code* (subsection 14(6)).

In cases where a youth elects or is deemed to have elected judge and jury, then the Court of Queen's Bench is deemed to be a youth court for the purpose of the trial and proceedings and the Queen's Bench judge is deemed to be a youth justice court judge (subsection 13(3)).

A judge of the Court of Queen's Bench when deemed to be a youth justice court judge retains the jurisdiction of a superior court of criminal jurisdiction (subsection 14(7)).

Generally a youth justice court has exclusive jurisdiction for any offence alleged to have been committed by a young person (subsection 14(1)).

2.1 Time Limitations

Proceedings against a youth cannot be taken after the end of the time limit set out in the applicable Act, whether through extrajudicial measures or judicial proceedings, unless the AG and the young person agree (subsection 14(3)).

2.2 Rules of Court

The youth court can establish rules of court to regulate the duties of officers of the youth justice court, the practice before the court, and forms – if not otherwise designated. These rules must be approved by the province (subsections 17(1) and (2)).

3. Peace Bonds (new)

The Peace Bond provisions relating to adults in the Criminal Code now apply to young persons. Subsection 14(2) provides the youth justice court with the jurisdiction to make peace bond orders under sections 810, 810.01, and 810.2 of the *Criminal Code*. If a young person refuses to enter into a recognizance under these sections, then the court can impose any sentence that can be imposed under section 42(2). If a custody and supervision order is imposed, it cannot exceed 30 days.

4. Application of the Act to those 18 and Over or where Age at Time of Offence Uncertain

When a young person is alleged to have committed an offence during a period of time in which he/she turns 18, the youth justice court retains jurisdiction but can sentence the person as a youth, if the justice finds they were a youth at the time of the offence, or as an adult, if the justice finds the youth was an adult at the time of the offence. If it is still not clear what age the young person was at the time of the offence, he/she is to be sentenced as a youth (subsections 16(1) and (2)).

Discussion:

1. If a person turns 18 while awaiting trial under the *YCJA*, does the *YCJA* still apply?
2. If the person's age at time of the offence is unclear as to whether they were an adult or youth, does the *YCJA* apply?

5. Contempt of Court Powers

There is specific recognition of youth justice court authority, the same as superior courts, to deal with and impose punishment for contempt (subsection 15(1)). This includes youth contempt whether or not in the face of the court or committed against another court outside the face of the court. The contempt authority also applies to acts of adults (subsections 15(2) and (3)). If a young person is found guilty of contempt then the court may impose any youth sentence available under subsection 42(2).

Section 708 of the *Criminal Code* applies to proceedings against adults in the youth justice court (subsection 15(5)).

6. Youth Justice Committees

Youth Justice Committees are continued from the *YOA* to the *YCJA*, but the potential scope of responsibilities and potential structure are different.

Youth Justice Committees must still be designated by the provincial or federal AG and can be established to assist in any aspect of the administration of the Act or programs or services for young persons.

Functions of youth justice committees may include:

- advice on extrajudicial measures;
- supporting the victim;
- arranging community support services for the youth;
- helping to coordinate interactions between agencies serving the youth;
- advising the government on whether the Act is being complied with;
- advising the government on policies and procedures related to youth justice;
- providing information to the public on the Act and the youth criminal justice system;
- acting as a conference; and
- any other function assigned by the AG.

6.1 The Provincial Approach to Establishment of Youth Justice Committees

While the *YCJA* addresses **Youth** Justice Committees (YJC), the Department of CPS (formerly DSS) and Justice worked together on the development of a **Community** Justice Committee (CJC) strategy/approach/model to serve both youth and adults throughout the province in off reserve locations. This approach compliments the development of joint adult and youth alternative measures (extrajudicial measures) programming in the province.

A series of written materials was developed to support the introduction of CJC's. The materials were prepared in consultation with Justice, Social Services, RCMP and community agencies. Designated staff from CPS, Justice and RCMP were provided with an orientation on the materials and were prepared to provide information and support to communities expressing an interest in learning about/developing a Youth Justice Committee. Community groups expressing an interest in establishing a YJC should contact their local RCMP detachment or CPS office.

To date, Saskatchewan has not used a Youth Justice Committee model, but rather has relied upon a mix of paid service providers, community-based organizations and Corrections and Public Safety staff to deliver youth alternative measures. CJC's may assist the province to expand the use of alternative measures by having less complicated cases handled by citizen volunteers, leaving more challenging cases to paid service providers.

7. Conferencing

The *YCJA* endorses and promotes the use of conferencing for the purpose of making a decision under the *YCJA*. The Act recognizes the authority to convene a conference but does not stipulate responsibility for arranging, facilitating or funding these conferences.

Conferencing is defined in subsection 2(1) of the *YCJA* as "a group of persons who are convened to give advice in accordance with section 19. Section 19 lists persons that may convene a conference:

- a youth justice court judge;
- the provincial director;
- a police officer;
- a justice of the peace;
- a prosecutor;
- a youth worker.

Subsection 19(2) states that the mandate of a conference may be to give advice on:

- appropriate extrajudicial measures;
- conditions for judicial interim release;
- sentences;
- review of sentences;
- reintegration plans.

Subsection 19(3) allows the Attorney General or Province to establish rules for conducting conferences, **other than those convened by a youth justice court or Justice of the Peace.**

Section 41 gives express power to the court to call a sentencing conference. "When a youth justice court finds a young person guilty of an offence, the court may convene or cause to be convened a conference under section 19 for recommendations to the court on an appropriate sentence."

7.1 Current Situation in Saskatchewan

Conferencing is not new to Saskatchewan and currently takes place throughout the judicial process. At the alternative measure stage, formal restorative justice conferences take place in the form of victim/offender mediations or community justice forums. This form of conferencing service will remain unchanged under the new Act.

During the court process, informal case management conferences are routinely held between counsel, police, youth workers and family members or variations of this group, when a decision needs to be made. This form of conferencing will continue.

Discussion

1. Who may convene a conference?
2. What is the purpose of a conference?

8. Powers of Clerks

The clerks of the youth justice court have the powers conferred on a clerk of a court by the *Criminal Code* and in particular can administer oaths and, in the absence of the judge, can adjourn proceedings (section 21).

9. Provincial Directors

Section 22 authorizes the provincial director – which is defined in section 2 as "a person or a body.. designated… by the province… either generally or in a specific case" – to authorize others to exercise the powers or perform the duties of the provincial director and when the designated person acts they are deemed to have been exercising the duties of the provincial director (section 22).

The province will be designating or continuing the designation of officials to carry out provincial director duties as the Act deems those designated under *YOA* to be appointed under the Act (subsection 165(3)).

Judicial Measures (Part 3 of the *YCJA*)

1. Introduction

Part 3 of the *Youth Criminal Justice Act* deals with the conduct of judicial proceedings against young persons. This part sets out the rights, protections and obligations unique to young persons throughout the judicial process, beginning with the decision to charge the young person through to the point at which a finding of guilt is made or the charge is dismissed, withdrawn or stayed.

The following measures are included in this part of the *YCJA*: pre-charge screening, right to counsel, notices to parents, pre-trial detention, appearances, medical and psychological reports, referral to child welfare agencies, adjudication and appeals. Most of the related provisions of the *YOA* have been incorporated into the *YCJA* (notice to parents, rights to counsel, medical and psychological reports, and appeals).

New areas include:

- Referral to Child Welfare Agency (section 35);
- Prohibition on the use of detention as a substitute for child welfare, mental health or other social measures (subsection 29(1));
- A presumption against the use of detention if the young person could not be sentenced to custody if found guilty of the offence (subsection 29(2)); and
- If a young person would otherwise be detained in custody, the judge is required to inquire as to whether a responsible adult is available who would be willing to take care of the young person as an alternative to pretrial detention (subsection 31(2)).

2. Pre-charge Screening

Subsection 23(1) of the *YCJA* authorizes the Attorney General in a province or territory to establish a pre-charge screening program. The purpose of such programs is to review cases before they proceed through the formal court process to ensure there is sufficient evidence to proceed, the appropriate charges are laid, or whether the case should be handled through extrajudicial sanctions. Jurisdictions will determine the form of programs for pre-charge screening, which would set out the circumstances in which an official requires the approval of the Attorney General before charging a young person. Subsection 23(2) permits the continuance of programs for pre-charge screening that have already been established by jurisdictions and are in place when the legislation comes into force.

In Saskatchewan, Prince Albert has the only pre-charge screening program. Saskatchewan does not plan to expand this pilot program to other locations in the province at this time.

3. Right to Counsel

The provisions of the *YOA* are essentially incorporated into the provisions of section 25 of the *YCJA*:

- Statement of Right to Counsel;

- Obligation to Advise Young Person of Right;
- Obligation to Assist Young Person to Exercise Right;
- Assistance by an Adult;
- Counsel Independent of Parent;
- Notices Must Include Statement About Right to Counsel;
- Age Restrictions;
- Cost of Counsel.

3.1 Statement of Right to Counsel

Section 10(*b*) of the *Canadian Charter of Rights and Freedoms* guarantees to every person who is "arrested or detained 'the right' to retain and instruct counsel without delay and to be informed of that right." Section 25 of the *YCJA* expands upon this basic guarantee by specifying in greater detail young persons' right to counsel in the youth criminal justice system, and how that system is to give effect to that right.

Throughout the *YCJA* are provisions ensuring that young persons have effective representation by counsel in line with the emphasis placed on their need for enhanced procedural protections. Under the *YCJA* the young person has the right to retain and instruct counsel at any stage of proceedings, including the stage of extrajudicial sanction. The Act imposes obligations on officials throughout the process to advise the young person of these rights and to ensure access to counsel.

Subsection 25(1) of the *YCJA* contains a clear statement of the youth's right to retain and instruct counsel without delay. He or she is guaranteed that right on a personal basis, without requiring the involvement of a parent. The young person may exercise this right at any stage of the proceeding, including before or during any consideration as to the appropriateness of an extrajudicial sanction.

3.2 Obligation to Advise Young Person of Right

3.2.1 Police Officers, on Arrest or Detention

Subsection 25(2) of the *YCJA* states that the arresting officer or the officer in charge must advise the young person without delay of the right to retain and instruct counsel and provide the young person with a reasonable opportunity to exercise that right. According to jurisprudence under the *Canadian Charter of Rights and Freedoms*, the young person must be provided with the opportunity to exercise his or her right to counsel in private. Subsection 25(2) requires the police to conform with this provision upon the arrest or detention of a young person.

As part of the information component, the police must inform the young person of the existence and availability of the applicable systems of duty counsel, free preliminary legal advice and legal aid in the jurisdiction.

The police have the duty to inform the young person of his or her rights in a manner which the young person can understand.

3.2.2 Youth Court Judge or Justice during Proceedings

In situations where the young person appears at a proceeding without counsel, the judge before whom the young person is appearing must advise the young person of the right to retain and instruct counsel, and provide the young person with a reasonable opportunity to obtain counsel (subsection 25(3)).

3.3 Obligation to Assist Young Person to Exercise Right

3.3.1 Youth Court Judge

In cases where the young person wishes to obtain counsel but is unable to do so, the court must refer the young person to a legal aid program. If the young person cannot obtain counsel through the program, the court may direct that the young person be represented by counsel and must direct representation if the young person requests it. The AG must then appoint counsel or arrange for counsel to be appointed (subsections 25(4), (5) and (6)).

3.3.2 By Justice (detention before sentencing hearings)

In hearings before justices relating to detention prior to sentencing young persons may wish to retain counsel but not have been able to do so. The justice must refer the young person to a legal aid program or refer the matter to be dealt with by a youth justice court. If the young person cannot obtain counsel through the program, then the justice shall refer the matter to be dealt with by a youth justice court (subsection 25(6)).

3.4 Assistance by an Adult

Subsection 25(7) permits a young person who is not represented by counsel to request a justice or youth court judge to allow an adult to assist at the proceeding.

3.5 Counsel Independent of Parent

Where it appears that the interests of the young person are in conflict with those of a parent or that it would be in the best interests of the young person, the youth court judge or the justice shall ensure that the young person is represented by a counsel independent of the parent (subsection 25(8)).

3.6 Notices Must Include Statement about Right to Counsel

Subsection 25(9) requires that statements about the right to counsel be included in notices, warrants, promises to appear, undertakings and recognizances.

3.7 Age Restrictions

Other than the requirements to be advised of the right to counsel and afforded a reasonable opportunity to retain counsel, these measures are not available to a young person who has turned 20 years old by the time of his or her first appearance (subsection 25(11)).

3.8 Cost of Counsel

Nothing prevents a province or territory from establishing a program for the recovery of the costs of the young person's counsel from the young person or the parents of the young person. However, such costs could be recovered only after all the proceedings in the case had been completed (subsection 25(10)). Saskatchewan is not planning on implementing a cost recovery program.

Exercise 1

Choose the correct answer:

1. A young person has the right to retain and instruct counsel _____.
   a. only before the young person is brought to the youth justice court
   b. at any stage of proceedings against the young person
   c. after all the court proceedings are completed
   d. when the young person is dealt with through judicial proceedings

2. Upon arrest, a young person shall be advised of his or her right to counsel by _____.
   a. the parents
   b. the community
   c. police officers
   d. courts

3. If a young person wishes to obtain legal counsel, but is unable to do so, he or she shall be referred to _____.
   a. the province's legal aid program
   b. an alternative measure program
   c. a review board
   d. risk assessment program

4. In documents issued in respect of the proceedings against the young person, a statement of the young person's right to be represented by counsel shall be included.
   a. True
   b. False

5. If there is a conflict of interest between the parent and the young person, a young person shall be represented by counsel independent of the young person's parent.
   a. True
   b. False

Questions for discussion:

1. When can a young person have the right to counsel?
2. What is the police's role in respect of a young person's right to counsel? What is the role of courts?

4. Notices to Parents

Parental involvement is a key component of the policy thrust of the *YCJA*. Requirements that parents be notified and involved, and, in some cases, ordered to attend youth court proceedings, are set out throughout the legislation and are particularly important during the judicial process.

There is no requirement to give notice to a parent if the young person turns 20 before his or her first appearance in court.

4.1 When Notice Must Be Given

- **Arrest or detention** (subsection 26(1)): The officer in charge must notify a parent, orally or in writing, that a youth has been arrested or detained. Notification must be given as soon as possible after arrest or detention and include the place of detention and the reason for the arrest.
- **Summons or Appearance Notice** (subsection 26(2)): The person issuing a summons or appearance notice to a young person must notify a parent as soon as possible.
- **Undertaking or Recognizance** (subsection 26(2)): The officer in charge releasing a youth on an undertaking or a promise to appear must ensure that a parent is notified in writing as soon as possible.

4.2 Notice to Other Adult

Where a parent is not available or cannot be located, the notice may be given to an adult relative known to and likely to assist the young person. In the absence of a relative, notice may be given to an appropriate adult. If there is confusion about who should be given notice, directions may be sought from a youth justice court judge or a justice (subsections 26(4) and (5)).

4.3 Contents of the Notice

The following must appear in the notice or be attached to it: name of the young person; the charge; time and place of appearance; a statement informing the young person of the right to counsel (subsection 26(6)).

4.4 Failure to Give Notice

Failing to give notice of a summons, appearance notice, promise to appear, undertaking or recognizance will invalidate proceedings unless a parent attends court with the young person. The judge or justice may, however, dispense with the notice requirement or adjourn the proceeding and order that notice be given.

4.5 When a Parent does not Attend

If a parent does not attend court with the young person, the court may order attendance if in its opinion the parent's attendance is necessary or in the best interests of the young person. These orders must be personally served on the parent. A parent who does not comply with one of these

orders "without reasonable excuse" could be guilty of contempt of court and liable to a fine of up to two thousand dollars or imprisonment for up to six months or both. A warrant to compel the parent's attendance could also be issued (subsection 27).

Exercise 2

Choose the correct answer:

1. If a young person is arrested or detained, the officer in charge is required to give a parent _____.
   a. written notice
   b. oral notice
   c. neither a nor b
   d. either a or b

2. If no parent appears to be available, any notice under section 26 may be given to any adult relative who _____.
   a. is known to the young person
   b. is likely to assist the young person
   c. is likely to know the court proceedings
   d. all of the above
   e. both a & b

Questions for discussion:

1. Who should be notified if no parent appears to be available?
2. What will be the result if there is failure to give notice?
3. If a parent commits a contempt of court by disobeying an order of the court to attend, would they be sentenced under the *YCJA* or *Criminal Code*?

5. Appearances

After an information or indictment is laid against a young person, he or she must appear before a youth court judge or a justice (subsection 32). At this first appearance, the judge or justice must:

- have the information or indictment read to the young person;
- inform the youth of his or her right to retain counsel, if not already represented by counsel;
- inform the young person, where appropriate, that there is a risk of adult penalty; and
- inform the young person, when charged with a presumptive "A" offence, that he or she will receive an adult sentence on conviction unless the court orders otherwise (subsection 32(1)).

The young person can waive these requirements if he or she is represented by counsel at the first appearance and counsel tells the court that the young person has been informed of these matters (subsection 32(2)).

If the young person is not represented by counsel, the court must meet further requirements to explain matters before it accepts a plea from the young person. The court must

- ensure that the young person understands the charge;
- explain to the youth the consequences and procedure, where applicable, associated with his or her liability to an adult sentence and ability to apply for a youth sentence; and
- explain that the young person may plead guilty or not guilty or, if liable to an adult sentence, elect his or her mode of trial (subsection 32(3)).

Where the court does not believe that the young person understands these matters, it must direct that the young person be represented by counsel (subsection 32(5)). Where the court is not satisfied that the youth understands the charge, it must enter a plea of not guilty for him or her and proceed to a trial. This requirement does not apply where the young person is required to elect his mode of trial (subsection 32(4)).

6. Medical and Psychological Assessments

A court may order a medical, psychiatric or psychological report be prepared on a young person and submitted to the court (section 34). Such reports may be ordered at any stage of the proceedings against the young person for the following purposes:

- considering release from pre-trial detention or an application for review of a bail decision;
- hearing on appropriateness of an adult sentence;
- making or reviewing a youth sentence;
- considering continuation of custody beyond the "custodial portion" of a sentence of custody and supervision;
- setting supervision conditions;
- authorizing disclosure of information contained in a youth record;

A youth justice court may order that a young person be assessed by a qualified person either on the consent of both the young person and the Crown, or otherwise, where the court believes that such assessment is necessary for one of the purposes listed above and where:

- the court has reasonable grounds to believe that the young person might be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, or a learning or mental disability;
- the young person has a history of repeated youth convictions; or
- the young person is alleged to have committed a serious violent offence.

The court may remand the youth to custody for the assessment for a period of up to thirty days. However, the court can only do this without the consent of the young person where it is satisfied that custody is necessary to conduct the assessment or the young person has to be detained in custody for other reasons (subsections 34(3) and 34(4)).

The report becomes part of the record of the case once it is received by the court. The young person, counsel, Crown or an adult assisting the youth may, with the approval of the court, cross-examine the person who prepared the report. Copies must be given to the youth, Crown, parents

in attendance and counsel of the young person. The provincial director or director of a correctional facility where the young person is serving a youth sentence may also receive a copy if withholding it would jeopardize safety. The report should be withheld from a private prosecutor, where its disclosure is not necessary for prosecution and may be prejudicial to the young person. The court may also withhold the report from the youth, parents or private prosecutor if it believes that disclosure would interfere with the treatment of the youth or be dangerous or harmful to another person, though it may release part or all of the report to any of them if it believes that release is essential in the interests of justice.

There is also a provision for a qualified person to advise the person having care of a youth if he or she believes the youth is a danger to himself or herself or others (subsection 39(13)).

Discussion:

1. In what circumstances and for what purposes may a medical or psychological report form part of a record?
2. Who can have access to a medical or psychological report?

7. Referral to Child Welfare Agency

Section 35 permits a youth justice court to refer a young person to a child welfare agency for an assessment of the youth's need for child welfare services. This referral may be done at any stage of the proceedings and is additional to any order that the court may make in relation to the young person. The provision does not require a report back to the court. The provinces have raised a number of issues surrounding this section, including the issue of defining a "child welfare agency" and this may be resolved by federal regulations.

8. Adjudication

Where a youth has pleaded guilty to an offence and the court is satisfied that the charge is supported by the facts, the court must find the youth guilty of the offence (subsection 36(1)). Where the youth pleads not guilty or where the youth pleads guilty but the court is not satisfied that the facts support the charge, by subsection 36(2), the court must proceed to trial and then find the youth guilty or not guilty, according to its consideration of the matter.

9. Appeals

Section 37 provides details of how decisions made by courts pursuant to the *YCJA* may be appealed. The provisions of the *YCJA* governing appeals of youth court decisions are similar to those contained in the *YOA*, more specifically section 27, subsections 47(6) and 10(4).

- Pursuant to subsection 37(1), appeals in respect of indictable offences or offences prosecuted by indictment are governed by Part XXI of the *Criminal Code*, subject to any modifications required in the circumstances. Subsection 37(5) similarly applies the provisions of Part XXVII of the *Criminal Code* to an offence punishable on summary conviction or that the Crown elects to proceed with as an offence punishable on summary conviction.

- Where a young person has been tried jointly for indictable and summary conviction offences, an appeal is governed by the provisions for appeals in indictable cases.
- A judicial determination under subsection 42(9) (judicial determination of serious violent offence), or an order under subsection 72(1) (court order — adult or youth sentence), 75(3) (ban on publication) or 76(1) (placement when subject to adult sentence), may be appealed as part of the sentence.
- No appeal is allowed from a youth sentence under section 59, or section 94, 95 or 96.

10. Pre-trial Detention

10.1 Introduction

One of the objectives of the *YCJA* is to reduce the use of incarceration of youth at the pre-trial stage of judicial proceedings.

Sections 28, 29, 30, 31 and 33 of the *YCJA* set out the rules that apply to pre-trial detention of young persons. In general, the provisions of *the Criminal Code* governing the arrest, release and detention of adults apply to young persons. However, the *Code* provisions do not apply if they are inconsistent with or excluded by specific *YCJA* provisions.

10.2 New Provisions

The *YCJA* provides new provisions that restrict the use of pre-trial detention and encourage the use of alternatives, including:

- a prohibition on the use of detention as a substitute for child welfare, mental health or other social measures;
- a presumption against the use of detention if the young person could not be sentenced to custody if found guilty of the offence; and
- a requirement that the judge inquire about the possible availability of a "responsible person" to provide an alternative to detaining the young person.

10.3 Need for Restraint

The general rule is that young persons who have been apprehended should be released without conditions unless release with conditions or detention can be justified under an exception set out in the *Code*. This basic policy on the use of pre-trial detention applies to decisions by:

- the arresting police officer;
- the officer in charge at the police lock-up; and
- the youth court judge or justice of the peace that must decide whether a young person who has been detained by the police should be released.

10.4 Pre-trial Release by Police

If a police officer arrests a young person, the general rule is that the young person must be released unless the police officer determines that the pre-trial detention of the young person is justified pursuant to the *Criminal Code*. Rather than detaining the young person, the arresting

police officer or officer in charge at the police lock-up can often use other options to achieve the objectives of detention. In exercising this discretion, the police officer should be guided by the *YCJA*'s policy of restraint in the use of the criminal law, the need to choose the least restrictive alternative and the *YCJA* objective of reducing the incarceration of youth.

The police do not have the authority to release the young person if the offence is a section 469 offence: murder, offences related to murder such as attempted murder, and other very rare offences such as treason and intimidating Parliament. For non-section 469 offences, which make up almost all youth court cases, the *Code* sets out rules on pre-trial release by the police that vary according to the type of offence involved and whether the arrest is with or without a warrant. If the young person is not released, the police officer must bring the young person before a youth court judge or justice of the peace:

- without unreasonable delay and within 24 hours where a youth court judge or justice of the peace is available; or
- as soon as possible where a youth court judge or justice of the peace is not available within 24 hours.

The initial decision by the police to detain a young person is obviously very significant because of its immediate impact on the young person's liberty. This initial police decision also sets in motion further justice system processing and the involvement of other decision-makers in the youth justice system. The Crown counsel must determine whether to consent to release of the young person or to seek continued detention. At a bail hearing, the youth court judge or justice of the peace must determine whether the young person will be released without conditions, released with conditions, or be detained.

10.4.1 Pre-trial Release when Arrest is Without a Warrant (CC, s. 497, 498)

Section 497 of the *Criminal Code* provides that, if a police officer arrests a young person without a warrant for

- an indictable offence listed in section 553 (certain less serious indictable offences such as theft of $5000 or less and breach of probation),
- a hybrid offence, or
- a summary conviction offence.

The police officer *must* release the young person as soon as is practicable unless the police officer believes on reasonable grounds that detention is necessary in the public interest, having regard to all the circumstances including the need to

- establish the identity of the young person,
- secure evidence relating to the offence,
- prevent the commission of an offence, or
- ensure the safety of a victim or witness.

In addition, the police officer is not to release the young person if there are reasonable grounds to believe that the young person will fail to attend court. Once there is no longer a basis for not releasing the young person (e.g., the identity of the young person has been established), the

police officer must release the young person. If the young person must be released, the police officer can obtain a summons or issue an appearance notice.
Most offences committed by young persons fall within the types of offences listed in section 497. Therefore, in most cases in which a young person is arrested without a warrant, the police are required to release the young person as soon as practicable, unless one of the grounds for detention specified in section 497 is met.

10.4.2 Release by Officer in Charge (CC, s. 498)

If the young person is not released by the police officer who has arrested the young person without a warrant, the officer in charge of the lock-up (or another police officer), *must* release the young person as soon as practicable unless the officer in charge believes on reasonable grounds that one of the exceptions mentioned in section 497 applies (e.g., detention is necessary to establish identity). In addition, the officer in charge *must* release the young person if the offence is one for which an adult would be liable to a maximum of five years imprisonment or less and none of the exceptions to release applies.

The officer in charge has a wider range of release options than the arresting officer. In addition to obtaining a summons, the officer in charge may release the young person on the basis of:

- the young person's promise to appear in court or
- a recognizance by which the young person agrees to pay an amount not greater than $500 on failing to appear in court.

If the young person is not ordinarily resident in the province or does not ordinarily reside within 200 kilometres of the place of detention, the officer in charge must release the person on a recognizance not greater than $500. In this situation, the officer in charge can also require the young person to deposit a sum not greater than $500 or other security not greater in value than $500.

10.4.3 Pre-trial Release when Arrest is with a Warrant (CC, s. 499)

Except in the case of an offence listed in section 469, a judge or justice of the peace who issues an arrest warrant may, by endorsing the warrant, authorize the officer in charge to release the accused young person. If the warrant has been endorsed, the officer in charge may release the young person on: a promise to appear; a recognizance not greater than $500; or, if the young person is not a resident of the province or does not ordinarily reside within 200 kilometres, on a recognizance not greater than $500 and the officer in charge may also require the young person to deposit a sum not greater than $500 or other security not greater in value than $500.

The officer in charge can also require the young person to enter an undertaking in which the young person undertakes to do one or more of the several things listed in subsection 499(2) of the *Criminal Code*, which include, among others, remaining within a specified territorial jurisdiction, abstaining from alcohol or drugs, reporting at specified times to a police officer or other designated person.

10.5 Judicial Interim Release (JIR or Bail)

Judicial Interim Release (JIR), or bail, is a judicial order releasing the accused from custody prior to trial. The release is unconditional unless the prosecutor shows cause to impose certain conditions. A judicial interim release cannot be granted for certain serious criminal offences such as murder.

For a young person to reach the point of judicial interim release, other measures authorized by the *YCJA* would have already been considered but found inappropriate. It should be stressed that the possibility of using extrajudicial measures continues throughout this stage of the process.

Once arrested, the young person would not have been released by the arresting officer or the officer in charge. As discussed above, this may have occurred for a variety of reasons, including identification difficulties, securing evidence, preventing further offending, ensuring the safety of others or preventing failure to attend court.

10.6 Appearance before a Judge or Justice of the Peace

If, despite the various provisions requiring or allowing release, the young person continues to be detained, the young person must be brought before a youth court judge or justice of the peace without unreasonable delay and within 24 hours of the arrest or as soon as possible if a judge or justice of the peace is not available within the 24 hour period. Within this time period, the peace officer or officer in charge may still release the young person under the *Code* provisions discussed above or "if satisfied that the young person should be released from custody" conditionally or unconditionally (*CC*, s. 503). This continuing authority of the police to release the young person may be particularly important for young persons who are facing delays in being brought before a youth court judge or justice of the peace.

In addition to the *Criminal Code* time requirements, the Declaration of Principle in section 3 of the *YCJA* requires that those responsible for enforcing the Act must act with promptness and speed.

In almost all cases, either a youth court judge or a justice of the peace may order the release or detention of a young person who has been charged with an offence. The exception is that only a youth court judge may order the release or detention of a young person who has been charged with an offence listed in section 469 of the *Criminal Code* (*YCJA* subsection 33(8)). Young persons are very rarely charged with these section 469 offences, which include murder, offences related to murder such as attempted murder, and other very rare offences such as treason and intimidating Parliament.

10.7 Presumption of Release or Detention at Show Cause Hearings

As a general rule, there is a presumption that a young person who is brought before a youth court judge or justice of the peace should be released without conditions. The judge or justice is required to order the release of the young person, unless the prosecutor shows cause why detention of the youth is justified under section 515 of the *Criminal Code*. If the judge or justice does not order the release of the young person without conditions he or she must, unless the

prosecutor shows cause why the detention of the young person is justified, order the release of the young person subject to:

- an undertaking with conditions;
- a recognizance with or without sureties in such amount and with such conditions as the judge or justice directs;
- a recognizance without sureties in such amount and with such conditions as the judge or justice directs and the deposit of a sum of money or other valuable security; or
- if the young person does not ordinarily reside in the province or within 200 kilometres of the place of detention, any one of the types of recognizances described above.

10.8 Conferences

Section 19 of the *YCJA* authorizes the youth court judge or justice of the peace to convene or cause to be convened a conference to provide advice on whether the young person should be released or detained and, if released, the conditions of release. A conference may be used to find community alternatives to detention and in proposing conditions that are likely to be successful with the young person.

10.9 Conditions of Release

Conditions that may be attached to a release order are provided in subsection 515(4) of the *Criminal Code*, including:

- report at specified times to a peace officer or other person designated in the order;
- remain within a specified territorial jurisdiction;
- abstain from communicating with any person or going to any place specified in the order; and
- comply with "other reasonable conditions" specified in the order.

Conditions of release are not punitive and they are not for rehabilitation or treatment. They are to be directly related to the ground for detention that is being addressed. For example, if the relevant ground is the protection or safety of the public, the condition that is imposed on the young person must be designed to neutralize the perceived danger to the public.

The potential scope and intrusiveness of conditions raises significant issues. There is evidence that under the *YOA* conditions that fall into the category of "other reasonable conditions" have had the effect of setting up youth for failure. Failure to comply with a condition of release is a criminal offence, which triggers a reverse onus situation that requires the youth to justify why he or she should not be detained. Typically, conditions of release pertain to behaviour that, outside the context of conditional release, is non-criminal behaviour. It is important to ensure that conditions are reasonable, not unnecessarily intrusive, directly related to one of the grounds for detention, and likely to be complied with by the youth.

In a study of bail hearings in three Ontario cities where release was denied, three-quarters of the hearings involved a reverse onus. More than one-third of the reverse onus cases were the result of non-compliance with previously imposed conditions of release. The author of the study, John Gandy, suggested that:

- the conditions that were violated often required a level of conformity with the expectations of parents and staff of institutions or group homes that made it extremely likely that the youths would breach the conditions;
- judges appeared to use a "shotgun" approach by imposing numerous restrictive conditions in order to cover all contingencies;
- judges tended to regard non-compliance with conditions as a serious challenge to their authority;
- the more restrictive the conditions, the greater the likelihood that the young person would be charged for breach of a condition; and
- judges do not appear to limit the conditions that they impose to the fewest conditions that are compatible with the protection of the public.

The *YCJA* requires that non-court, extrajudicial measures be considered, instead of court proceedings, when a young person is alleged to have committed an offence. Since many charges that result in a reverse onus situation are based on what would otherwise be non-criminal behaviour, it is important, where appropriate, to give serious consideration to extrajudicial measures authorized by the Act:

- taking no further action;
- warning;
- caution;
- referral to a community program;
- extrajudicial sanctions.

10.10 Reverse Onus

In the following circumstances identified in subsection 515(6) of the *Code*, the onus shifts to the young person to show cause why release is justified:

- a non-section 469 indictable offence committed while the youth was on release in respect of another indictable offence;
- a non-section 469 indictable offence that is an offence under section 467.1 committed for the benefit of, at the direction of or in association with a criminal organization for which the maximum punishment for an adult is imprisonment for five years or more;
- a non-section 469 indictable offence and the youth is not ordinarily resident in Canada;
- an offence under subsections 145(2) to (5) while the youth was on release in respect of another offence (These offences include failure to attend court and failure to comply with a condition of an undertaking or recognizance); or
- certain drug offences for which an adult could be imprisoned for life under the *Controlled Drugs and Substances Act.*

10.11 Grounds for Detention

- Detention Not To Be Substitute for Child Protection Measures
- Presumption against Detention

The grounds upon which detention may be justified are set out in subsection 515(10) of the *Criminal Code* and can be summarized as follows:

- where the detention is necessary to ensure the young person's attendance in court;
- where the detention is necessary for the protection or safety of the public, having regard to all the circumstances, including any substantial likelihood that the young person will commit a criminal offence or interfere with the administration of justice; and
- on "any other just cause" being shown, including where the detention is necessary to maintain confidence in the administration of justice.

Where a judge or justice is satisfied that one of the grounds is present, he or she may make an order under subsection 515(5) that the young person be detained in custody. Section 29 of the *YCJA* sets out additional limitations on the use of detention.

10.11.1 Detention Not To Be Substitute for Child Protection Measures

Subsection 29(1) states that judges may not use detention as a substitute for appropriate child protection, mental health or other social measures aimed at addressing the needs of the young person. This is designed to address concerns about the inappropriate use of detention for child welfare or mental health purposes — rather than criminal justice purposes.

10.11.2 Presumption against Detention

Subsection 29(2) creates a presumption that judges must apply in their consideration of whether detention of a young person is justified on the ground set out in clause 515(10)(*b*). The youth court judge or justice of the peace is required to presume that detention of a young person is not necessary for the protection of the public if the young person could not, on being found guilty, be sentenced to custody on the grounds set out in clauses 39(1)(*a*) to (*c*). This subsection sets out three minimum or threshold criteria for the use of custody as a sentence:

- the young person has committed a violent offence (clause 39(1)(*a*));
- the young person has failed to comply with two or more non-custodial sentences (clause 39(1)(*b*)); or
- the young person has committed an indictable offence for which an adult would be liable to imprisonment for more than two years and has a history that indicates a pattern of findings of guilt (clause 39(1)(*c*)).

If the young person, on being found guilty, would not meet any of these criteria, the judge or justice of the peace must presume that the detention of the young person is not necessary for the purpose of protection of the public. The rationale behind this provision is that it is generally unfair to incarcerate a presumed-innocent young person on the ground of public safety at the pre-trial stage if Parliament has determined that he or she cannot be incarcerated if found guilty of the alleged offence. This provision reflects the objective of the Act to reduce the youth justice system's reliance on incarceration of youth.

It is important to remember that the criteria in clauses 39(1)(*a*) to (*c*) are minimum criteria that must be met in order for a court to consider imposing a custody sentence. Meeting one of these criteria is not sufficient to sentence a young person to custody. The court must use an alternative

to custody if one is available that is in accordance with the purpose and principles of sentencing. Similarly, if the presumption against detention is rebutted because one of the criteria in clauses 39(1)(*a*) to (*c*) is met, the youth court judge or justice of the peace must use an alternative to pre-trial detention, if one is available that is in accordance with the provisions of the *Code* and the *YCJA* pertaining to judicial interim release.

10.12 Care of a Responsible Person

An alternative to detention before sentencing is continued in section 31 of the *YCJA*, where a young person who otherwise would be detained in custody may be placed in the care of a responsible person. Changes introduced in the *YCJA* are designed to support this measure.

- Certain criteria must be met before the young person can be placed with a responsible person. Both the responsible person and the young person must agree to the arrangement, which may only be considered if the judge is satisfied that the young person would, in the absence of the responsible person, be detained in custody under section 515 of the *Criminal Code*.
- Under subsection 31(2), a new provision created in the *YCJA*, the court **must** inquire whether a responsible person is available and the young person is willing to be placed with him or her. Experience under the *YOA* indicates that the responsible person provision is not used very often. Requiring the court to inquire as to whether a responsible person is available will ensure that the possibility of this alternative to detention is brought to the attention of the defence counsel, the young person, the parents, and the prosecutor. This requirement also highlights a major objective of the *YCJA* — the reduction in the incarceration of youth by using less restrictive alternatives.
- The responsible person must undertake in writing to take care of the young person, ensure that the young person attends court as required and comply with any other conditions set by the court. Willfully failing to comply with such an undertaking by the responsible person is an offence under section 139 of the *YCJA*. The maximum punishment is imprisonment for two years.
- A youth, responsible person or any one else may apply to the court for an order that the young person should not remain in the custody of the responsible person if the responsible person is no longer willing or able to care for the youth, or for any other reason, the responsible person is no longer appropriate (subsection 31(4)). If the order is made to relieve the responsible person, the judge must also issue a warrant for the arrest of the young person. If arrested, the young person must be brought before a judge and dealt with under sections 28, 29, 30 and 31 of the *YCJA*.
- There may be many reasons that a responsible person arrangement is not successful. Subsection 31(6) clarifies that the failure of a responsible person arrangement does not preclude the possibility of the young person being placed in the care of another responsible person.

10.13 Placement on Detention

Section 30 of the *YCJA* describes where young persons may be detained before trial and sets out rules relating to transferring them between facilities. It combines elements of the current law under section 7 of the *Young Offenders Act* with new provisions relating to the placement of

young persons on their reaching 18 and 20 years of age. Also new is the requirement that judges must take into account the best interests of the young person in considering whether his or her detention separate from adults is required.

Young persons who are detained prior to sentencing are to be housed in youth facilities that have been designated for temporary detention by the province. This requirement does not apply to the temporary restraint of a young person under the supervision of a peace officer after arrest, but a young person who is so restrained shall be transferred to a place of temporary detention as soon as practical and generally after the first appearance (subsection 30(7)). Youths may be transferred to and between facilities under the supervision of a peace officer and under the authority of the provincial director.

The basic rule is that young persons who are detained must be held separate from adults. However, there are two exceptional situations that are recognized in subsection 30(3) of the *YCJA*. Subsection 30(3) provides that a young person must be held separate and apart from detained adults unless a judge or justice of the peace is satisfied that, having regard to the best interests of the young person,

- the young person cannot, having regard to his or her own safety or the safety of others, be detained in a place of detention for young persons (clause 30(3)(*a*)); or
- no place of detention for young persons is available within a reasonable distance (clause 30(3)(*b*)).

The requirement that the best interests of the young person be taken into account applies to both exceptions to the rule that young persons be held separate from adults. Therefore, although the young person may be a threat to the safety of others if detained in a youth facility, the judge or justice of the peace must consider the possible negative impact on the young person's best interests if he or she is placed in a facility that detains adults. Similarly, although the nearest youth facility may be very far away, the consideration must go beyond the issue of practical difficulties of transporting the young person. The consideration must include a comparison of the impact on the young person of placement in a youth facility some distance away and placement in a facility with adults that is much closer.

Under subsection 30(4), the provincial director may apply to the court for authority to transfer a detained young person who is eighteen years of age or older to a provincial correctional facility for adults for temporary detention. This authority to transfer may be given if the court determines that the transfer is in the best interests of the young person or in the public interest.

Subsection 30(5) provides that young persons twenty years of age or older at the time the detention begins must be detained in a provincial correctional facility for adults.
A province may designate a person or group whose authorization is required before an arrested young person may be detained and who may determine the place of detention (subsection 30(8)).

10.14 Release from Detention in Custody

Section 33 of the *YCJA* deals with situations where an order of detention or release has been made and an application is made for review of the order or for the matter to be heard again as an original application. This section continues the law under section 8 of the *YOA*.

Exercise 3

Write "True" or "False" for each of the following statement:

1. Under the YCJA, pre-trial detention may be used as a substitute for mental health services.
2. A young person may be detained before sentencing as a substitute for appropriate child protection.
3. The police do not have the authority to release a young person if the offence is murder or related to murder.
4. Is the court required to inquire about the availability of a responsible person once the court has determined that detention is appropriate?

Discussion:

1. What are the conditions for a young person to be placed with a responsible person instead of being detained in custody?

Pre-Sentence Report

1. Definition

A pre-sentence report is a summary of an investigation into the background, current circumstances and behaviour of a young person who has been charged with a criminal offence.

2. Purpose

The purpose of a pre-sentence report is to provide a judge with an independent source of background information on an offender that would be useful in determining a sentence. Under the *YCJA*, as "disposition" becomes "youth sentence", the "pre-disposition reports" referred to in the YOA become "pre-sentence reports".

In Saskatchewan, a pre-sentence report is to

- inform the youth justice court of the circumstances underlying the young person's offending behavior;
- inform the youth justice court of the assessed level of risk to re-offend presented by the young person; and
- recommend to the youth justice court intervention(s) and/or services which might contribute to the young person's rehabilitation and reintegration into society.

3. Principles

Under subsection 40(1) of the *YCJA,* whenever the court orders a pre-sentence report, the provincial director shall cause such a report to be prepared and submitted to a youth justice court. Subsections 40(2-10), 72(3), and 76(3)(4) of the *YCJA* outline the required content, scope, and administrative procedures related to the pre-sentence report.

In Saskatchewan, pre-sentence reports are prepared by the Department of Corrections and Public Safety (CPS), and in accordance with the Declaration of Principle in section 3 of the *YCJA,* and section 2 of *Young Offenders Services Provincial Policy Manual* (Youth Justice Framework for Service).

4. Delegated Authority in Saskatchewan

The Department of Corrections and Public Safety (CPS) has designated **Community Youth Workers** as delegated authorities for the preparation of pre-sentence reports. A pre-sentence report is prepared at the request of a youth justice court judge and, where applicable, may contain recommendations based on the results of a comprehensive risk/needs assessment and the writer's professional opinion.

Where using case management policy, the Community Youth Worker plays the role of a CPS case manager. For cases where a CPS case manager is already in place, the case manager shall assume responsibility for preparation of the pre-sentence report.

5. When Pre-sentence Reports are Required

The provincial director is required to prepare a pre-sentence report when a court requests it.

The court must order a pre-sentence report:

- before imposing a custodial sentence on a young person (subsection 39(6)) unless the Crown or defence agree to dispense with it (subsection 39 (7));
- in making a decision to impose an adult sentence (subsection 72(3)); or
- determining the place of placement when the young person is subject to an adult sentence (subsection 76(4)).

6. Contents of Pre-sentence Reports

To the extent that it is relevant to the purpose and principles of sentencing set out in sections 38 and 39 of the *YCJA*, a pre-sentence report shall be in writing and include the following (subsection 40(2)):

- the results of an interview with the young person, the young person's parents, and, if appropriate, the young person's extended family;
- the results of an interview with the victim;
- **the recommendations from a conference to obtain advice on an appropriate sentence** (clause 40(2)(c))**;**
- any information that is applicable to the case, including:
  - the age, maturity, character, behaviour, and attitude of the young person, his or her willingness to make amends;
  - any plans suggested by the young person to change his or her conduct or to improve himself or herself ;
  - the history of previous findings of guilt for offences under federal, provincial, or municipal law, and of any resulting community or other services provided to the young person;
  - the response of the young person to previous sentences, dispositions or services provided;
  - the history of alternative measures under the *YOA*, or extrajudicial sanctions used to deal with the young person and the young person's response to those measures (NOTE: information on alternative measures and extrajudicial sanctions is included in the report **only during the period of access** under subsection 119(2));
  - the availability and appropriateness of community services and facilities for young persons, and the willingness of the young person to avail himself or herself of them;

  - the relationship between the young person and his or her parents, and, if appropriate, between the young person and his or her extended family, including the degree of control and influence that these family members have over the young person;
  - the young person's school attendance and performance record and employment record;
- **any information that may assist the court in determining whether there is a reasonable alternative to custody under sentencing principles** (clause 40(2)(e));
- any information that the provincial director considers relevant, including any recommendations that the provincial director considers appropriate.

Please note that the contents in **bold** are new requirements added by the *YCJA* for the pre-sentence report.

7. Contents of Saskatchewan's Pre-sentence Reports

In addition to what is set out in subsection 40(2) of the *YCJA*, the contents of Saskatchewan's pre-sentence reports will be based on a comprehensive Risk, Needs and Strengths Assessment that will include, but is not limited to the administration and interpretation of the Level of Service Inventory (LSI-SK). This assessment will identify the criminogenic risks/needs of the young person, and an intervention strategy to effectively manage and reduce the risk to re-offend presented by the young person.

8. Oral Reports with Leave

With leave of the youth justice court, an oral report may be provided to the court. A written summary of the oral report will be prepared within seven days and retained in the young person's file for use in the appropriate administration of any disposition (subsection 40(3)).

9. Obligations of Youth Worker

In Saskatchewan, the writer of the PSR will advise persons providing information that their names will appear as a source of information in the report and that the court may compel them to testify at a sentencing hearing.

The writer will provide the young person with a copy of the pre-sentence report and adequate opportunity to review and understand the report prior to sentencing.

10. Disclosure of Pre-sentence Reports

The *YCJA* requires a pre-sentence report to form part of the record of the case. Except in the case where an oral report is provided, pre-sentence reports are to be submitted in writing, to the clerk of the youth justice court, 48 hours prior to the time set for the

Sentencing Hearing. Copies of the report will be available, at that time, to all other persons entitled to receive a copy. A copy will be retained on the young person's file. Under subsection 40(5), copies of a pre-sentence report shall be given to:

- the young person and his or her counsel;
- any parent of the young person in attendance at court or who is otherwise taking an active interest in the case; and
- the prosecutor.

Any court dealing with matters relating to the young person, and any youth worker assigned to the young person's case shall, on request, receive copies of a pre-sentence report from the youth justice court that has received it. The court can also supply a copy of the report to any other person who, in the court's opinion, has a valid interest in the case (subsection 40(8)).

In addition, the provincial director or the youth worker who has prepared and submitted the pre-sentence report may also disclose all or part of it, in accordance to subsection 40(9), to:

- Any person in whose custody or under whose supervision the young person is placed or
- Any other person who is directly assisting in the care or treatment of the young person.

11. Cross-examination and Inadmissibility of Statements

On application to the court, the defence or the prosecution shall be entitled to cross-examine the author of the report (subsection (40(6)). But in the case of a private prosecution, all or part of the report may be kept from the prosecutor where the court considers that the information may be prejudicial to the young person and is not necessary for the conduct of the prosecution (subsection (40(7)).

According to subsection 40(10), no statement made by a young person in the course of the preparation of a pre-sentence report is admissible in evidence against him or her in any civil or criminal proceedings, except for those relating to:

- the imposition of a youth sentence (section 42);
- the review of a youth sentence (section 59);
- the decision on an application for or against the imposition of an adult sentence (section 71); or
- reviews and other proceedings related to custodial sentences (sections 54 to 56)

Discussion:

1. Why is a pre-sentence report needed? What should be included in such a report?
2. Who are the authors of pre-sentence reports? Who can get access to a pre-sentence report?
3. To whom can the provincial director make a pre-sentence report available?

Sentencing, Custody and Supervision (Parts 4 & 5 of the *YCJA*)

1. Youth Sentencing

1.1 Introduction

Part 4 of the *Youth Criminal Justice Act* (*YCJA*) (sections 38 to 82) sets out the sentencing scheme for young persons who have been found guilty of an offence. The part includes both youth sentences and adult sentences. The following discussion deals with youth sentences, as dealt with in sections 38 to 59 of the *YCJA*. These sections set out the principles that guide judges in determining an appropriate sentence, the range of sentencing options available as well as the process by which courts are to reach this determination.

Highlights of some of the significant changes in this area

- This part contains specific sentencing principles and states the purpose of sentencing (section 38) to assist judges in deciding on a fair and appropriate youth sentence.
- Section 39 restricts the use of custody to specific situations.
- There are a number of new sentences
  - Reprimand clause 42(2)(a);
  - Deferred custody and supervision clause 42(2)(p);
  - Intensive rehabilitative custody and supervision order clause 42(2)(r).
- Custodial sentences are replaced by custody and supervision orders that introduce presumptive release after two-thirds of sentence, last third of sentence served in community on conditions (clause 42(2)(n)).

1.2 Purpose of Sentencing (subsection 38(1))

Subsection 38(1):
The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

The purpose of sentencing is to hold a young person accountable for the offence committed. This is accomplished by imposing just sanctions that have meaningful consequences for the young person and promote the rehabilitation and reintegration of the young person into society. A sentence that complies with these requirements is expected to contribute to the long-term protection of the public.

Holding a young person accountable must reflect the fact that the young person is not an adult. The accountability must be consistent with the greater dependency of young persons and their reduced level of maturity (subclause 3(1)(b)(ii)).

The way to hold a young person accountable is through just sanctions that have two objectives: (a) meaningful consequences for the young person, and (b) promotion of the rehabilitation and reintegration of the young person. A sentence that is not directed at achieving both of these objectives is not a valid sentence. *Just* sanctions are those that are in accordance with the principles of sentencing in subsection 38(2) and the restrictions on custody in section 39. The specific sanctions that are available to the court are set out in section 42.

The *YCJA* sets out distinct sentencing provisions for young persons which are different in important respects from the sentencing provisions for adults in the *Criminal Code*. Denunciation, specific deterrence, general deterrence, and incapacitation, which are sentencing objectives for adults under the *Criminal Code*, are not specifically stated sentencing objectives under the *YCJA*. Section 50 of the *YCJA* states clearly that the purpose and principles of sentencing of adults under the *Criminal Code* which are contained in sections 718, 718.1 and 718.2 of the *Code* do not apply in proceedings under the *YCJA,* except for clause 718.2(e) which deals with Aboriginal offenders. Whether the courts will apply the adult sentencing principles to youth remains an issue for judicial interpretation.

1.3 Sentencing Principles (subsection 38(2))

Subsection 38(2):
A youth justice court that imposes a youth sentence on a young person shall determine the sentence in Accordance with the principles set in section 3 and the following principles:
(a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
(b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
(c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for the offence;
(d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons; and
(e) subject to clause (c), the sentence must
(i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
(ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
(iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community.

Subsection 38(2) sets out specific principles by which the court is to determine a youth sentence. It also provides that the sentence must be in accordance with the general principles in section 3 that apply to the whole Act. Principles in section 3 that are particularly relevant to the determination of a youth sentence include the principle that proportionate accountability of young persons must be consistent with their greater dependency and their reduced level of maturity. In addition, section 3 provides that, within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should:

- reinforce respect for social values;
- encourage the repair of harm done to victims and the community;
- be meaningful for the individual young person, given his or her needs and level of development;

- where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration;
- respect gender, ethnic, cultural and linguistic differences; and
- respond to the needs of Aboriginal young persons and of young persons with special requirements.

1.3.1 Proportionality

A fundamental principle in subsection 38(2) is that a sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence (clause 38(2)(c)). In brief, this basic principle of fairness means that less serious cases should result in less severe sentences and more serious cases should result in more severe sentences.

In determining the seriousness of the offence and the degree of responsibility of the young person, the court must consider some of the factors in subsection 38(3):

- the degree of participation of the young person in the commission of the offence;
- the harm done to victims and whether it was intentional or reasonably foreseeable;
- previous findings of guilt; and
- any other aggravating or mitigating circumstances related to the young person or the offence that are relevant.

1.3.2 Sentence Must Not Exceed the Sentence that an Adult Would Receive

Clause 38(2)(a) provides that the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult convicted of the same offence committed in similar circumstances. It addresses the unfairness that occurs under the *YOA* where young persons often receive sentences that are more severe than sentences imposed on adults for the same offence.

1.3.3 Similar Sentences in Similar Cases

Clause 38(2)(b) provides that the sentence must be similar to sentences imposed in the region on similar young persons found guilty of the same offence in similar circumstances. It requires that there be a basic level of consistency in sentences for young persons found guilty of the same offence. The principle addresses the issue of unreasonable disparity of youth sentences. It requires that the sentences be similar, not necessarily the same.

If a custodial sentence is one of the possible proportionate sentences that are consistent with the principles in clauses 38 (2)(a-c), the court must determine whether the case meets any of the criteria for custody in subsection 39(1) which, in keeping with the policy objectives of the *YCJA*, restrict custody primarily to violent offenders and serious repeat offenders. If the case does not meet any of the criteria in subsection 39(1), the court must eliminate a custodial sentence from the possible proportionate sentences under consideration.

1.3.4 Alternatives to Custody and Aboriginal Young Persons

Clause 38(2)(d) provides that all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of Aboriginal young persons.

1.3.5 Least Restrictive Alternative, Most Rehabilitative Alternative, and Acknowledgement of Harm Done

The court must assess the remaining possible proportionate sentences against clause 38(2)(e), which provides that the sentence imposed on the young person must:

- be the least restrictive sentence that can achieve the purpose of sentencing in subsection 38(1);
- be the sentence that is most likely to promote the rehabilitation and reintegration of the young person; and
- promote a sense of responsibility in the young person and an acknowledgement of the harm done to the victim and the community.

The first requirement — that the sentence be the least restrictive option — reflects the fundamental policy of the *YCJA* that the criminal law should be used with restraint. A young person should not be subject to an intervention that is more restrictive or intrusive than the minimum necessary to achieve the purpose of sentencing. This provision generally encourages the use of non-custodial sentences rather than custodial sentences because custody significantly restricts the liberty of the young person.

The second requirement — that the sentence be the one, among the possible proportionate sentences, that is most likely to promote rehabilitation and reintegration — encourages the use of non-custodial sentences rather than custodial sentences. The general conclusion from a large body of research is that community-based, non-custodial interventions are more effective than custody in reducing recidivism among young offenders.

The third requirement — that the sentence must promote a sense of responsibility and acknowledgement of the harm done — is consistent with the Act's emphasis on holding a young person accountable in a fair and proportionate manner. It also reflects the principle in section 3 that youth justice measures should encourage the repair of harm done and be meaningful to the young person. For many youths, sentences that involve them in repairing the harm done to the victim or the community are likely to be more meaningful than a period of custody would be. Sentencing options that require the young person to acknowledge and repair the harm done include community service, personal services for the victim, restitution, and compensation by paying an amount of money to the victim.

1.3.6 Relationship Between Proportionality and Rehabilitation (and needs of young person)

The sentencing principles clarify the relationship between proportionality and rehabilitation. As noted above, the principle of proportionality sets an upper limit on the severity of the sentence, based on the seriousness of the offence and the degree of responsibility of the young person. The

purpose of sentencing in subsection 38(1) and the rehabilitation principle in clause 38(2)(e) require that the sentence also promote the rehabilitation of the young person.

The measures or sanctions that are directed at rehabilitation, however, must not violate the proportionality principle. That is, the rehabilitative measures must not result in a sentence that exceeds a response that is proportionate to the seriousness of the offence and the degree of responsibility of the young person. For example, a young person who has committed a relatively minor offence but has serious psychological needs that seem to have contributed to the criminal behaviour should receive a sentence that reflects the seriousness of the offence, not the seriousness of his or her psychological needs. The sentence should, if possible, include measures to address the psychological problems, but the sentence must not be longer or more intrusive than the offence warrants.

The *YCJA* policy on proportionality and rehabilitation is based on fundamental fairness and the importance of restraint in the use of the criminal law. A young person who has committed the same offence as another young person should not receive a longer or more intrusive sentence because his or her needs appear to require more intensive rehabilitative measures. Such a sentence would amount to punishing the young person because of his or her needs, despite the fact that the judge is well intentioned, concerned about helping the young person, and does not perceive the greater degree of intervention as punishment.

If the young person has needs that go beyond the appropriate scope of a criminal justice intervention under the *YCJA*, assistance should be sought outside the youth justice system. One mechanism to consider is a referral of the young person by the court to a child welfare agency under section 35. Another approach is to convene a conference at the beginning of the youth justice process or at sentencing. The conference could provide advice not only about an appropriate intervention under the *YCJA*, but also benefit parents and others concerned about the young person as to appropriate psychological, social, recreational, educational or family support measures that could address the young person's needs.

Exercise 1

Choose the correct answer:

1. The most substantive changes made by the *YCJA* are in the area of _____.
   a. judicial measures
   b. general provisions
   c. sentencing
   d. extrajudicial measures

2. Under the *YCJA*, the youth justice courts shall be given more discretion in the sentencing of young persons.
   a. True
   b. False

3. The purpose and principles of youth sentencing are applicable _____.

a. only where the young person is given a youth sentence
b. whenever the young person receives a sentence
c. only where the young person is receives an adult sentence
d. all of the above

4. The purpose of youth sentencing is to contribute to _____.
   a. the punishment of young persons who break the law
   b. the long-term protection of society
   c. the imposition of sanctions
   d. the placement of young persons who often cause trouble

5. The principles of youth sentencing consider the following elements EXCEPT _____.
   a. seriousness of offence
   b. degree of responsibility
   c. rehabilitation
   d. harm to victim and community
   e. age of the young person

1.4 Sentencing Factors (subsection 38(3))

Subsection 38(3):
In determining a youth sentence, the youth justice court shall take into account
(a) the degree of participation by the young person in the commission of the offence;
(b) the harm done to victims and whether it was intentional or reasonably foreseeable;
(c) any reparation made by the young person to the victim or the community;
(d) the time spent in detention by the young person as a result of the offence;
(e) the previous findings of guilt of the young person; and
(f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

Subsection 38(3) provides factors to guide the court in determining an appropriate sentence. Some of the factors are relevant to the determination of the seriousness of the offence and the degree of responsibility of the young person for the offence. These are:

- The extent to which the youth participated in committing the offence (clause 38(3)(a)).

  A young person who is the leader of a group of youths who commit a break and enter, for example, has a greater degree of responsibility for the offence than another member of the group who is essentially a follower and plays a minor role in the commission of the crime. The court must take into account this difference in degree of responsibility as it determines a proportionate sentence for each of the offenders.

- The harm done to victims and whether the youth intended to cause it or could reasonably have foreseen that it might occur (clause 38(3)(b)).

  The harm to a victim is relevant to the seriousness of the offence but the full extent of the harm may not have been intended or could not reasonably have been foreseen. The young

person is not to be penalized for causing harm that he or she did not intend or could not have reasonably foreseen. In determining the seriousness of the offence and a proportionate sentence, the court is to take into account only the harm that was intended or could have been reasonably foreseen by the young person.

- Any previous findings of guilt relating to the young person (clause 38(3)(e)).

  The court is sentencing the young person for the current offence, not previous offences. The young person has already been held accountable for the previous offences and it would be unfair to hold him or her accountable again for those offences. A previous finding of guilt does not necessarily mean that a young person should receive a more severe sentence than would be appropriate if he or she were a first offender. However, previous findings of guilt may indicate a greater degree of responsibility for the current offence. An offender with previous findings of guilt obviously has had experience with the youth criminal justice system. This experience is likely to suggest that the young person was more aware of the seriousness of committing an offence and the impact of offences on victims or the community than a less experienced offender would be. However, this may have less weight if the offender has special circumstances, such as suffering from fetal alcohol syndrome. Section 3 of the Act provides that, within the limits of fair and proportionate accountability, sentences should respond to the needs of young persons with special requirements

Other factors listed in subsection 38(3) do not pertain to the seriousness of the offence or the degree of responsibility of the young person for the offence. They refer to circumstances that may have occurred before the imposition of the sentence that may decrease the severity of the sentence to be served by the young person:

- Any reparation made by the young person to the victim or the community (clause 38(3)(c)). If the young person has done something, prior to sentencing, to repair the harm caused by the offence, the court must take that into account in determining the sentence. Basic principles of the *YCJA* state that sentences should encourage the repair of harm done, and promote a sense of responsibility in the young person and an acknowledgement of the harm done to victims and the community. If the young person, prior to sentencing, has taken action that reflects these principles, the court must give serious consideration to giving the youth credit for his actions.
- If the young person has been held in detention prior to sentencing, the court must take into account the amount of time in detention (clause 38(3)(d)).
- Any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in clause 38(3)(f).

1.5 Restrictions on Custody (section 39)

Subsection 39(1):
A youth justice court shall not commit a young person to custody under section 42 (youth Sentences) unless
(a) the young person has committed a violent offence;
(b) the young person has failed to comply with non-custodial sentences;
(c) the young person has committed an indictable offence for which an adult would be

liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt under the Act or the Young Offenders Act; or
(d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent the purpose and principles set out in section 38.

Reducing the high rate of youth custody in Canada is a major objective of the *YCJA*. In addition to the purpose and principles of sentencing in section 38, the *YCJA* contains explicit restrictions and other provisions in section 39 to help achieve this objective. As noted above, an underlying theme of the *YCJA* is that for a large number of young persons sentenced to custody, there are community-based, non-custodial options that are fairer, more meaningful and more effective than custody.

1.5.1 Criteria Permitting Custody

The court must be satisfied that at least one of the criteria permitting custody set out in subsection 39(1) of the *YCJA* is present before imposing custody:

- The young person has committed a violent offence (clause 39(1)(a)).

  The *YCJA* does not define "violent offence". The *YCJA* defines "serious violent offence" as an offence in the commission of which a young person causes or attempts to cause serious bodily harm. "Bodily harm" is defined in the *Criminal Code* as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature".

- The young person has failed to comply with non-custodial sentences (clause 39(1)(b)).

  This criterion requires that the young person be a repeat offender who has failed to comply with two or more non-custodial sentences. This criterion is consistent with the emphasis on reducing the use of custody and encouraging the use of community-based sentences. A history of non-compliance may suggest that an alternative to custody may not be successful in dealing with the current offence.

- The young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt under the *YCJA* or the *YOA* (clause 39(1)(c)).

  This criterion addresses the offender who has committed a relatively serious offence, has committed previous offences and whose findings of guilt indicate a pattern.

  The *Criminal Code* provides, with one minor exception, five maximum lengths of imprisonment for offences: 6 months; 2 years; 5 years; 14 years; and life. Therefore, clause 39(1)(c) essentially requires that the young person has committed an indictable offence for which an adult would be liable to imprisonment of 5 years or more.

The requirement of a pattern of findings of guilt is open to judicial interpretation. Pattern is not defined in the *YCJA*. Whether having a history of offences is sufficient or whether there is a further requirement that the history of offences requires a pattern of committing similar property or violent offences will require judicial interpretation.

- Exceptional cases, where the young person has committed an indictable offence and the aggravating circumstances of the offence make the imposition of a non-custodial sentence inconsistent with the purpose and principles set out in section 38 (clause 39(1)(d)).

  This criterion addresses the possibility of a non-violent case that is excluded by the first three criteria but due to the aggravating circumstances of the offence, is so serious that it would be impossible to impose a non-custodial sentence that would be consistent with the purpose and principles in section 38.

1.5.2 Alternatives to Custody

In addition, all reasonable alternatives to custody must be considered under subsection 39(2) as to whether there is an alternative (or combination of alternatives) that would hold the young person accountable by:

- imposing meaningful consequences for the young person and promoting his or her rehabilitation and reintegration; and
- complying with the principles of sentencing in section 38 (e.g., proportionality; least restrictive alternative).

Only if the court determines that there is no such alternative to custody can the court impose a custodial sentence.

In determining whether there is a reasonable alternative to custody, the court must consider:

- Alternatives to custody that are available (clause 39(3)(a)).

  In most cases, alternatives to custody are more likely than custody to be in accordance with the purpose and principles of sentencing in section 38. Many of the non-custodial sentencing options - such as probation, attendance centres, community service, and intensive support and supervision - are very flexible. They allow a wide variety of creative and individualized sentences to be developed.

- The likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences (clause 38(3)(b)).

  A young person's performance under a previous non-custodial sentence may be helpful in assessing the appropriateness of a non-custodial sentence for a current offence. A young person's compliance with a previous non-custodial sentence may suggest the types of

approaches that will be most likely to be appropriate in holding the young person accountable for the current offence.

This provision reflects a view that the fact that a young person has committed another offence does not necessarily mean that the previous non-custodial sentence was inappropriate or a failure. If the young person complied with a previous sentence that was in accordance with the purpose and principles of sentencing, then the sentence was successful in achieving its purpose: holding the young person accountable for the offence. Ideally, a young person will not only comply with a sentence but he or she will also not commit other offences. However, the *YCJA* clearly assumes that the commission of another offence after compliance with a non-custodial sentence can, and often should, result in another non-custodial sentence

- Alternatives to custody that have been used for young persons for similar offences committed in similar circumstances (clause 39(3)(c)).

  This provision is consistent with the more general principle in clause 38(2)(b) which provides that sentences should be similar to sentences for similar offences committed in similar circumstances.

Subsection 39(5) makes it clear that custody may not be used as a substitute for child protection, mental health or other welfare measures. This provision reinforces the *YCJA* as a federal criminal law statute, not a provincial child welfare or mental health statute. It is, therefore, subject to the limitations on the appropriate use of the criminal law power. If the court has concerns about possible child welfare needs of the young person, the court may, under section 35, refer the young person to a child welfare agency for assessment.

This provision responds to the well intentioned but unfair practice of using criminal justice interventions that are more severe and intrusive than the offence warrants for the purpose of addressing the child welfare or mental health needs of a young person. Although the focus of this provision is on the inappropriate use of custody, it should be seen as part of the broader approach of the *YCJA*, which is to clearly distinguish between the role of the youth criminal justice system and the role of other systems and services that serve youth.

Exercise 2

Write “True” or “False” for each of the following statement:

1. If a young person has committed a violent offence, the court shall not sentence a young person to custody.
2. If a young person has failed to comply with previous community sentences, the court may or may not sentence a young person to custody.
3. If the court decides to impose a custodial sentence, it is required to explain why it makes such a decision.

Choose the correct answer:

1. The court must consider all reasonable alternatives to custody before it can impose _____.
   a. a community sentence
   b. a custodial sentence
   c. any youth sentence
   d. all of the above

2. Under the *YCJA*, custody may not be used as a substitute for _____.
   a. child protection
   b. mental health
   c. welfare measures
   d. all of the above

Discussion:

Please give examples of cases where the young person has committed an indictable offence, where the aggravating circumstances make community sentence inconsistent with the purpose and principles in clause 38 of the Act.

1.6 Sources of Information during Sentencing

The Act identifies several sources of information that may assist the court in determining a sentence that is in accordance with the purpose and principles of sentencing. These include:

- Pre-sentence Reports;
- Conferences;
- Victim Impact Statements;
- Medical or Psychological Reports;
- Submissions, Representations.

1.6.1 Pre-sentence Reports

Section 40 sets out the rules pertaining to pre-sentence reports. The court may require the provincial director to prepare a pre-sentence report regarding the young person. The court is required to consider a pre-sentence report before imposing a custodial sentence.

For detailed information on pre-sentence reports, please refer to Pre-sentence Report of this training package.

1.6.2 Conferences

The court has discretion to refer the matter to a conference for advice on appropriate youth sentences (section 41). If the matter is referred, the conference recommendations must be considered before a youth sentence is imposed. These provisions increase the opportunity for

community involvement in the youth justice system and for the development of innovative, community-based responses.

A conference may be composed of a variety of people depending on the situation. For example, it may include the parents of the young person, the victim, persons who are familiar with the young person and community agencies or professionals with expertise that is relevant to the development of a sentence that is most appropriate for the particular young person.

1.6.3 Victim Impact Statements

Section 50 of the Act provides that section 722 of the *Criminal Code*, which deals with victim impact statements, applies at the sentencing stage of youth court proceedings. In determining the sentence to be imposed, the court must consider any statement that may have been prepared describing the harm done to, or loss suffered by, the victim arising from the commission of the offence. Specific requirements pertaining to the statement are contained in section 722 of the *Code*.

1.6.4 Medical or Psychological Reports

At any stage in the proceedings, the court may require that a medical, psychological or psychiatric report be prepared on the young person. Such reports may be ordered for a range of purposes, including making a decision on sentencing (clause 34(2)(c)). Copies of the report are to be given to the young person, parents, counsel and the Crown.

1.6.5 Submissions, Representations

The court is also required, under subsection 42(1), to consider any representations made by the parties to the proceedings, their agents, counsel and the parents of the young person.
After the court has imposed the sentence, it must state its reasons for its decision in the record of the case, and make that record available to parties to the proceedings if they wish to see it. If the sentence is a custodial sentence, the court must state the reasons that it has determined that a non-custodial sentence is not adequate to achieve the purpose of sentencing set out in section 38. If the court has relied on the exceptional case provision in subsection 39(4), it must give reasons as to why it found the case to be exceptional.

1.7 Youth Sentencing Options

There is a broad range of possible sanctions that a court may consider in determining an appropriate sentence. A sentence must be in accordance with the purpose and principles of sentencing and may consist of one or more sanctions that are not inconsistent with each other. These various sanctions or sentencing options include several new options along with options that existed under the *YOA*.

The options include both non-custodial and custodial sentences. All custodial sentences include a portion that the young person is to serve under supervision in the community. Before imposing a sentence that involves custody, the court must satisfy itself that none of the restrictions on custody set out in the *YCJA* exist.

1.7.1 Non-custodial Sentencing Options (Community Sentences)

The majority of sentencing options provides alternatives to custody, consistent with the objective in the preamble to the *YCJA* of reducing the over-reliance on incarceration for non-violent young persons. The *YCJA* provides a range of alternatives that allow a sentencing response to be tailored to the individual case, including several new options.

Reprimand (clause 42(2)(a))

This **new** sentencing option is a formal rebuke by the judge in court. It is essentially a stern scolding or lecture from the judge and may be most appropriate in minor cases in which the experience of being apprehended, taken through the court process and reprimanded appears to be sufficient to hold the young person accountable for the offence. It can reinforce to the young person that his or her behaviour was wrong. It may be appropriate in cases in which the court has determined that reparation made by the offender to the victim, or time spent by the offender in detention, essentially satisfies the requirement of a proportionate sentence. The period of access to the record of a reprimand is two months (clause 119(2)(c)). This period is much shorter than the period of access that applies to the record of an absolute discharge (two years) or a conditional discharge (three years).

Absolute Discharge (clause 42(2)(b))

The court may order an absolute discharge of the young person if it is in the best interests of the youth and not contrary to the public interest.

Conditional Discharge (clause 42(2)(c))

The court may order a discharge of the young person on conditions. In addition, the court may require the young person to report to and be supervised by the provincial director.

Fine (clause 42(2)(d))

The court may impose a fine up to $1000 on the young person. The court must consider the youth’s ability to pay but has discretion in fixing time and terms for payment. A surcharge may be imposed on the fine and used, at the province's discretion, to provide assistance to victims' services.

Compensation (clause 42(2)(e))

The court may order a young person to compensate another person for loss, damage or injury, by paying an amount of money determined by the court. The court must consider the youth's ability to pay and has discretion in fixing the time and terms for payment. As with all of the sentencing options, the court must comply with the purpose and principles of sentencing in imposing this sanction. The principle of proportionality, for example, may restrict the amount of compensation that may be ordered. The amount of loss or damage caused by the offence may exceed the seriousness of the offence and the degree of responsibility of the young person. As discussed above, a relevant factor in determining the seriousness of the case and, therefore, a proportionate

sentence is whether the loss or damage was intended or could reasonably have been foreseen by the young person. In addition, accountability of young persons must be consistent with their greater dependency and reduced level of maturity.

Restitution (clauses 42(2)(f) and (g))

The court may order restitution of property to the person owning it at the time of the offence.

Reimbursement of Innocent Purchaser (clause 42(2)(g))

If the court has ordered restitution of property to its owner, the court may also order the reimbursement of an innocent purchaser of the property. The court may fix the time and terms for payment. As noted above with respect to compensation orders, the amount of money that the court may order as reimbursement is subject to the sentencing principles, including the principle of proportionality.

Personal Service (clause 42(2)(h))

The court may order the young person to compensate a person by way of personal service for a loss, damage or injury suffered. Alternatively, the court may order that the compensation be in kind. An order under clause 42(2)(h) requires the consent of the person to be compensated. In addition, the order must not interfere with the young person's normal hours of education or work. The order must not exceed 240 hours of service that can be completed within twelve months.

Community Service (clause 42(2)(i))

The court may order a young person to perform community service that does not exceed 240 hours of service that can be completed within twelve months. The community service must be part of a program approved by the provincial director or the person or organization for whom the service is to be performed must have consented to it.

Prohibition Order (clause 42(2)(j))

The court may impose on the young person an order of prohibition, seizure or forfeiture that is authorized under federal legislation. If a young person is found guilty of an offence referred to in subsection 109(1) of the *Criminal Code* (e.g., an indictable offence in which violence was used and is punishable by imprisonment for ten years or more), the court must make an order prohibiting the young person from possessing a firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance. This mandatory prohibition order ends not earlier than two years after the completion of the custodial portion of the sentence or, in the case of a non-custodial sentence, after the finding of guilt. Prohibition orders are not subject to the capping provisions.

Probation (clause 42(2)(k))

The young person may be placed on probation, with conditions, for a period of up to two years. Section 55 sets out mandatory and optional conditions of probation orders. The potential range of

conditions is very broad. The conditions may include requiring the young person to attend school, reside in a place that the provincial director may specify, and "any other conditions" that the court considers appropriate**.** Although the flexibility of a probation order permits creative, individualized sentences, it must be used with restraint because of the negative consequences of imposing unrealistic and "over-reaching" or intrusive conditions on a young person for a period of up to two years.

Conditions on probation:

A serious concern in the setting of probation conditions for a young person is that the conditions may set up the young person for failure and, therefore, a possible charge of breach of probation. The result may be that a young person is incarcerated for behaviour that would not justify a criminal charge if it were not related to a probation order.

Conditions of probation must be assessed as to whether or not they are in accordance with the purpose and principles of sentencing. Although a condition may be intended to "promote the rehabilitation" of the young person, it should be carefully scrutinized to determine whether there is a clear and direct relationship between the condition and a cause of the young person's criminal behaviour. A realistic assessment should be made as to whether the young person will be likely to comply with the condition. In addition, if a condition is essentially an attempt to address child welfare needs of the young person, it should not be imposed. A referral to a child welfare agency under section 35 should be made instead.

Although it is possible to charge the young person with breach of probation if he or she does not comply with a probation order, the *YCJA* does not require that a charge be laid. An alternative approach, which will often be more consistent with the objectives and principles of the *YCJA*, is to initiate a review of the probation order. Reviews provide an opportunity to make changes to the conditions that can be more effective in promoting the rehabilitation and reintegration of the young persons (clause 59(2)(c)).

Intensive Support and Supervision Program Order (clause 42(2)(l)) (not applicable in Saskatchewan)

Saskatchewan will not be offering this sentence option as this sentence is similar to intensive probation programs currently in place. An Intensive Supervision and Support Order is designed to place a young person on a higher level of support and supervision in the community to assist him or her to change his or her behaviour. It is intended to provide closer monitoring and more support than probation. It is intended to provide much smaller caseloads than probation and is particularly well suited for many offenders who under the *YOA* have been sentenced to custody.

The use of this sentencing option can occur only if the provincial director has determined that an intensive support and supervision program is available. Provinces and territories may decide not to make this option available to the court by deciding not to implement this provision of the Act.

Attendance Order (clause 42(2)(m)) (not applicable in Saskatchewan)

Saskatchewan will not be making this sentencing option available. Attendance orders are currently and will continue to be available in Saskatchewan as a condition of a probation order. It will not be available as a stand-alone sentence. This new sentencing option requires the young person to attend a program at specified times (up to a maximum of 240 hours over a six month period) and to abide by conditions set by the judge. It is a nonresidential program that, for many offenders, can provide an alternative to a custodial sentence. It can be designed to address the particular circumstances of the young person. For example, it could be focused on specific times and days when a young person is unsupervised and tends to violate the law. The use of this sentencing option with an offender can occur only if the provincial director has determined that an attendance order program is available. Provinces and territories are not required to make this option available to the court under the *YCJA*.

Exercise 3

Choose the correct answer:

1. As a sentence option, a reprimand is a formal rebuke or lecture from _____.
   a. the judge in court
   b. the police officer at the police station
   c. the Crown prosecutor in the office
   d. the teacher at school

2. The court may impose a fine up to _____ on the young person.
   a. $2000
   b. $1000
   c. $5000
   d. $500

3. A young person may be ordered to perform community service not exceeding 240 hours that can be completed within _____.
   a. six months
   b. ten months
   c. twenty-four months
   d. twelve months

4. A young person may be placed on probation, with conditions, for up to _____.
   a. three years
   b. twelve months
   c. two years
   d. eighteen months

1.7.2 Custodial Sentencing Options

The restrictions on custody in section 39 prohibit custody in many cases and require a thorough exploration of alternatives to custody in cases in which custody is not prohibited. If the court

decides to impose custody, the court must justify its decision by including in its reasons for decision an explanation of why a non-custodial sentence was not adequate to hold the young person accountable.

There are five sentencing options in the *YCJA* that allow the court to impose a sentence that includes custody:

Deferred Custody and Supervision (clause 42(2)(p))(new)

If a young person is found guilty of an offence that is not a serious violent offence, the court may impose the **new** sentencing option of deferred custody and supervision. There is some issue with this sentence being considered a custodial sentence in that it is considered an alternative to custody.

A deferred custody and supervision order may be for a specified period that is less than six months. During that time, the young person is in the community and must follow conditions set by the youth justice court judge. A breach of conditions may result in a modification of the conditions. It is also possible for a young person who breaches the conditions to be ordered to serve the remaining time as a custody and supervision order.

Custody and Supervision Orders (clause 42(2)(n), (o), (q) and (r)) (new)

Unlike the *YOA*, the *YCJA* provides that all custody orders include a period of supervision in the community. The purpose of the community supervision portion is to ensure appropriate supervision and support for the young person during the transition from custody back to his or her community.

The *YCJA* contains a list of mandatory conditions that apply to all young persons while under supervision in the community. Additional conditions can be imposed to support the young person and address his or her needs, as well as manage risk. If a young person breaches a condition while under supervision in the community, reviews will be held that can result in a change in conditions or in the young person being returned to custody.

It is also possible that a young person may not serve a portion of the sentence in the community following custody. Before the start of the community portion, the court can require the young person to remain in custody if the court is satisfied that there are reasonable grounds to believe that a young person will commit an offence causing death or serious harm before the end of the sentence.

Most offences: The maximum length of the custody and supervision order for most offences is two or three years, depending on the offence. The two-year maximum applies to all offences except offences for which an adult would be liable to life imprisonment. These latter offences, other than murder, can result in a maximum youth sentence of three years. The period of community supervision is one half the length of the custody period (clause 42(2)(n)).

Attempted murder, manslaughter, and aggravated sexual assault: The maximum overall length of the custody and supervision order for the offences of attempted murder, manslaughter, and aggravated sexual assault is three years because these are offences for which an adult would be liable to life imprisonment.

Under clause 42(2)(o), the period of conditional supervision is set by the court and, therefore, is not necessarily one half the length of the custody period. This provides the court added flexibility to tailor sentences imposed for these particularly serious offences. If the young person breaches a condition, the provincial director may bring the young person back into custody.

Murder: The maximum length of the order is ten years for first-degree murder and seven years for second-degree murder. As with other presumptive offences, the period of conditional supervision is set by the court and, therefore, is not necessarily one half the length of the custody period.

Intensive Rehabilitative Custody and Supervision Order (clause 42(2)(r))

The intensive rehabilitative custody and supervision order is a **new** youth sentence intended to provide treatment for serious violent offenders. The order may be made if the court determines that the following criteria are met:

- the young person has been found guilty of murder, attempted murder, manslaughter, aggravated sexual assault, or a third serious violent offence (clause 42(7)(a));
- the young person is suffering from a mental or psychological disorder (clause 42(2)(b));
- an individualized treatment plan for the young person has been developed (clause 42(2)(c)); and
- the provincial director has determined that an intensive rehabilitative custody and supervision program is available and the young person's participation is appropriate (clause 42(2)(d)).

Federal funding for provinces and territories has been set aside to ensure that this sentencing option can be available throughout the country. This special treatment sentence offers a significant new option in the youth justice system for serious violent young offenders who otherwise might receive an adult sentence. This order is not available if an adult sentence is ordered.

The order is not limited to young persons who are fourteen to seventeen years of age. The court may order a twelve or thirteen year-old into intensive rehabilitative custody and supervision, if the criteria are met.

The *YCJA* provides in subsection 42(8) that this order does not abrogate or derogate from the rights of a young person regarding consent to physical or mental health treatment or care. The young person's right to consent to or refuse such treatment under common law or provincial legislation must be respected.

The maximum length of the order depends on the offence committed. The overall maximum lengths for the offences listed in clause 42(7)(a) are the same as the overall maximum lengths for the ordinary custody and supervision order, discussed above.

1.8 Review of Non-custodial Sentences

An application to a youth justice court for a review of a non-custodial sentence may be made after six months from the date of the sentence or earlier if leave is granted by a youth justice court judge (subsection 59(1)).

A review may be made because there is a material change in the young person's circumstances, the young person is unable or struggling to comply with the terms of the sentence or the terms of the sentence have negative impacts on the young person's education, employment or access to services. In addition, the youth justice court has discretion to review a youth sentence on any ground that it considers appropriate (subsection 59(2)).

A review should be seriously considered in cases in which a young person has not complied with a condition of an order, such as a probation order or an intensive support and supervision order. Another option that has been frequently used in such cases under the *YOA* has been to charge the young person with the offence of failure to comply with a disposition. As noted earlier, about 20% of custody sentences under the *YOA* are the result of a "failure to comply" charge based on breach of a condition of a probation order. Typically, the violation of a condition of a probation order would not be considered a criminal offence if the behaviour occurred outside the context of a probation order.

Reviewing the order, instead of charging the young person with a new offence, is in keeping with the objective of reducing the over-reliance on incarceration, particularly for non-violent offences. For a large number of breaches, a review, rather than a charge, is the option that complies with the principle that measures taken against young persons must be fair and proportionate to the seriousness of the offending behaviour. In these cases, a review, rather than a charge, is also more consistent with the objective of reserving the system's most serious interventions for the most serious offences.

At a review hearing the young person, a parent of the young person, the Attorney General and the provincial director have an opportunity to appear. Additionally, a conference may be convened to give advice on the review (section 19). After hearing the information, the youth justice court may:

- confirm the sentence;
- terminate the sentence;
- vary the sentence; or
- impose a new non-custodial sentence.

If a new non-custodial sentence is imposed, it must not be more onerous than the remainder of the earlier sentence, unless the young person consents. Additionally, the new sentence cannot be for a period longer than the remainder of the earlier sentence.

Reviews of custodial sentences are discussed in Custody and Supervision in this part of the training package.

1.9 Saskatchewan Case Administration for Youth Sentences

1.9.1 For Non-custodial Sentences

Individualized case planning related to community-based supervision and support services begins as soon as the youth is sentenced.

The case plan is an action plan to address the young person's assessed criminogenic needs and any other factors relevant to risk management and reduction.

The assigned community youth worker/intensive services worker shall develop and document a comprehensive case plan within six weeks of the young person's date of sentencing.

The plan shall include:

- A summary of the young person's criminogenic needs/risk, and his or her risk to re-offend rating as identified by the Level of Service Inventory LSI-SK;
- A summary of the young person's total set of risks, needs, and associated circumstances, with particular attention to needs linked to the young person's social network (e.g., family, close friends, peers in general) and community (e.g., schools, workplace, training programs, specialized treatment programs);
- A *Community Safety Plan* which describes the intervention strategy to manage the young person's risk to re-offend in the community, based on risk/needs and the mandated conditions of court orders and the responsibility of the young person;
- The specific goals to be achieved over the course of the young person's sentence, with clear indication of how progress will be measured;
- A schedule for monitoring and, to the extent possible, time lines for the completion of each identified goal.

The caseworker shall review and revise the case plan at three-month intervals, or less where necessary. The review will include an assessment of risk to re-offend using LSI-SK. When reviewing the case plan, the caseworker shall involve the youth and where appropriate, the youth's family or caregiver(s).

As part of case management process, the community youth worker will review a community sentence on an ongoing basis to ensure the continuing appropriateness of the sentence.

1.9.2 For Custodial Sentences

Where a young person receives a custody and supervision sentence (s.42(2)(n)), the assigned facility youth worker will assume the role of primary caseworker during the custody portion of the sentence, and thereafter, will participate with the community youth worker (who will assume the role of primary caseworker upon release of the young person), until the expiry of this sentence. The primary caseworker shall coordinate case

management activities, and document the progress of the overarching case-management plan. He or she does **not** have sole authority, or responsibility for case management decision making.

The primary responsibility for the case management of a young person who receives a custody and supervision order (for presumptive offences or murder), or an intensive rehabilitative custody and supervision order under clauses 42(2)(o), (q) or (r) rests with the CPS community youth worker assigned. These youth will have an individual case plan to address the specific risk/need factors relevant to their offending behavior.

Exercise 4

Choose the correct answer:

1. If a deferred custody and supervision option is imposed, a breach of a condition can result in the young person serving the remainder of the sentence as _____.
   a. a community order
   b. an intensive support and supervision order
   c. a custody and supervision order
   d. none of the above

2. Under a deferred custody and supervision sentence, the young person is in the community and must follow conditions set by
   a. the youth justice court judge
   b. the youth worker who is in charge
   c. the provincial director
   d. the community program manager

3. If a young person is found guilty of an offence punishable by life imprisonment under the *Criminal Code*, the court may impose a custodial sentence _____.
   a. not to exceed one year
   b. up to two years
   c. for which the court must decide the length
   d. not to exceed three years

4. The intensive rehabilitative custody and supervision order is intended to provide treatment for _____.
   a. non-violent offenders
   b. serious violent offenders
   c. all young offenders
   d. young persons found guilty of murder

Discussion:

1. Why is a review necessary for non-custodial sentences?
2. When is a review for a non-custodial sentence conducted?

2. Adult Sentences

2.1 Introduction

For nearly 100 years the law allowed young persons who are 14 years of age or older to be transferred to the adult court under certain circumstances and, if convicted, receive an adult sentence. Under the *YOA*, if a 16 or 17-year-old was charged with murder, attempted murder, manslaughter or aggravated sexual assault, it was presumed that an adult sentence would be applied, unless the young person could persuade the court that it should not.

2.2 Guidance in Applying Adult Sentences

While youth still remain at risk, under certain limited circumstances, to the longer terms and the characteristics of adult sentences that are less appropriate to youth, new sentencing principles provide guidance to assist in ensuring that this exception to the youth sentencing regime is strictly focused on appropriate cases. The test for an adult sentence limits its use to cases where it can be demonstrated that a youth sentence would not be of sufficient length to hold the young person accountable, bearing in mind that the accountability of the young person must be consistent with the greater dependency of young persons and their reduced level of maturity. A young person under age 18 who receives an adult sentence is to be placed in a youth facility unless it would not be in the best interests of the young person or would jeopardize the safety of others.

2.3 Changes Relating to Adult Sentences

The *YCJA* does not lower the age at which a young person may be subject to an adult sentence. However, the Act does contain some significant changes regarding adult sentencing:

- The transfer process is eliminated. Instead, the youth court first determines whether or not the young person is guilty of the offence and then, under certain circumstances, the youth court may impose an adult sentence.
- A pattern of repeated, serious violent offences is added to the list of offences that give rise to the presumption of an adult sentence.
- The age at which the presumption of an adult sentence applies is lowered to 14. However, provinces have the authority to set the age at 15 or 16. Saskatchewan will adopt the provisions of the *YCJA* and set the age at 14.
- If the Crown notifies the youth court that it will not be seeking an adult sentence for a presumptive offence, the court must impose a youth sentence.
- The test for an adult sentence requires the court to determine whether a youth sentence would be of sufficient length to hold the young person accountable. The accountability of the young person must be consistent with the greater dependency of young persons and their reduced level of maturity. If a youth sentence would be of sufficient length to hold the young person accountable, the court must impose a youth sentence.
- A young person under age 18 who receives an adult sentence is to be placed in a youth facility unless it would not be in the best interests of the young person or would jeopardize the safety of others.

These changes in the *YCJA* set out two clear objectives with respect to decision-making surrounding a youth's liability to an adult sentence. First, it requires that the decision be based on the sufficiency of the length of the sentence to achieve a fair and proportionate accountability appropriate to a youthful offender. Second, the youth's potential liability to an adult sentence is subject to a full range of enhanced procedural protections.

Any departure from the youth sentencing regime, as in the limited case of adult sentences, must follow an examination of the necessity to extend sentence length–where the gravity of the conduct is so severe and the youth's responsibility for it so extensive that only an adult sentence would be sufficient to hold the youth accountable. When courts apply adult sentences to youth they must do so sparingly and fairly. Their application must observe the fullest procedural protections available and be strictly targeted to cases where it is demonstrably necessary. This is particularly important in approaching applications for adult sentences for non-presumptive offences, which are a manifest exception to the rule of separate youth penalties. It is equally important as an approach to the presumptive offences. While the onus of rebutting this presumption rests with the youth, the Crown should be ready to demonstrate why the presumption is justified in each particular case.

2.4 When an Adult Sentence May Be Considered

Sections 61 to 81 of the *YCJA* describe the circumstances in which a young person convicted of an offence may be subject to an adult penalty. An adult sentence will not apply automatically, even when it is an available sanction; the *YCJA* sets out the procedures to be followed in determining whether an adult sanction is appropriate and the test that must be met in applying this extraordinary measure.

Section 62 sets out the circumstances in which a court may consider an adult sentence:

- The youth must have been found guilty of an offence for which an adult could receive a sentence of more than two years and
- The young person must have been at least 14 years old at the time the offence was committed.

With respect to certain particularly serious offences, a presumption is created by the legislation that an adult sentence will result following a finding of guilt. Section 61 permits jurisdictions to determine the age (14, 15 or 16) at which this presumption will begin to arise. With respect to all other offences with a penalty of more than two years (for which no presumption arises), the Crown must apply to the court if it wishes an adult sentence to be considered. In either case, all trials of young persons take place in youth court and, following a finding of guilt, the court is required to determine whether an adult penalty is sought or opposed by the parties. The court will do so by holding a hearing to assess whether a youth sentence would be of sufficient length to hold the youth accountable for his or her conduct. Only if the court finds that a youth sentence would not be sufficiently long may it go on to consider imposing an adult sentence.

Discussion

1. Under the *YCJA*, what are the changes relating to adult sentences?
2. When can an adult sentence be considered?

2.5 Governing Principles

Informing the process are several statements of principle set out in the *YCJA*. Of particular relevance are the statements of principle in section 3, which applies to the *Act* as a whole, and section 38, which governs the imposition of youth sentences and is material to the consideration of whether adult sentences are necessary.

Clause 3(1)(b) makes it clear that the youth justice system must be separate from that for adults and emphasize a fair and proportionate accountability consistent with the greater dependency of young persons and their reduced level of maturity. It stresses the need for enhanced procedural protection to ensure fair treatment and the protection of youth's rights, the importance of rehabilitation and reintegration as well as the need for timeliness of intervention in order to reinforce the link between the offending behaviour and its consequences. Clause 3(1)(c) reinforces the requirement of fair and proportionate accountability and describes the goals to be achieved when taking measures against youth.

Section 38 principles set out guidelines for determining whether a youth sentence would be of sufficient length to hold a young person accountable.

2.6 Categories of Offences that May Attract an Adult Sentence

A youth could be liable for an adult sentence if convicted of an offence for which an adult could receive a sentence of more than two years. Within this offence range, the youth's liability and the process to be followed vary according to the nature or type of offence. These variations fall into three groups:

- **Presumptive "A" Offences:** Specified Offences (murder, attempted murder, manslaughter, aggravated sexual assault)

  In the case of young persons charged with one of the four presumptive offences named in subsection 2(1), "presumptive offence," clause (*a*) (murder, attempted murder, manslaughter or aggravated sexual assault), it is presumed that an adult sentence will apply. These offences are those that attracted an adult penalty under the *YOA*; no changes have been made to this list of **specified** offences.

- **Presumptive "B" Offences:** Repeat Serious Violent Offence

  When a youth with a history of violent activity is charged with an offence involving serious violence, a presumption of adult sentence may apply. This will happen in cases where on at least two prior occasions the youth has been found guilty of an offence involving violence and a court has made a judicial determination in each case that the offence is a serious violent offence (subsection 42(9)).

This is a new category of offences to which a presumption in favour of an adult sentence has been attached by the *YCJA*, subsection 2(1), "presumptive offence," clause (*b*). It is intended to permit the court to respond with a consideration of the necessity for a lengthier sentence in cases of repeated, serious violent offenders beyond those found guilty of an offence enumerated in subsection 2(1), "presumptive offence," clause (*a*).

- **Non-presumptive Offences**

In addition to offences that may qualify as presumptive offences, there is a range of offences for which no presumption arises but for which the Crown may apply to the court to consider an adult penalty. These are offences for which an adult could receive a sentence of more than two years that were committed by a youth when 14 years of age or older (subsection 64(1)).

Exercise 5

Choose the correct answer:

1. Presumptive "A" offences include specified offences such as _____.
   a. murder
   b. attempted murder
   c. manslaughter
   d. aggravated sexual assault
   e. all of the above

2. Presumptive "B" offences include _____.
   a. repeat offences
   b. repeat violent offences
   c. repeat serious violent offences
   d. all of the above

3. The Crown may apply to the court to consider _____ where offences for which an adult could receive a sentence of more than two years were committed by a youth when 14 years of age or older.
   a. an adult sentence
   b. a youth sentence
   c. a community sentence
   d. an extrajudicial measure

2.7 Process Prior to Trial

In cases where a youth is at risk for an adult sentence, the *YCJA* ensures that the youth has access to a range of procedural protections from the outset of the process. The youth is entitled to know what he or she may be liable to following a finding of guilt. Certain obligations arise on the part of the court and Crown to make sure this happens.

2.7.1 Presumptive "A" Offences

With respect to presumptive "a" offences, the Crown is not required to make an application to the court for an adult sentence nor give notice that it intends to seek one. However, the court is required, under clause 32(1)(d), to inform the youth at his or her first appearance, that an adult sentence will apply if the youth is found guilty, unless the court orders that a youth sentence should be imposed. This ensures that the youth is made aware as early as possible of the potential adult penalties.

When charged with a presumptive "a" offence, the youth has the option, under section 63, to apply to the court for an order that a youth sentence be imposed instead of an adult sentence. The youth may do this at any time prior to sentencing. The court will consider this application as it proceeds to determine sentence, unless the Crown has given notice that it will not oppose the youth's application under section 63, in which case the court is required to order that a youth sentence be imposed.

Even where a youth has not made an application for a youth sentence, under section 65, the Crown may choose not to pursue an adult sentence for a presumptive "a" offence. To do so, it gives notice to that effect to the court, which it may do at any stage of the proceedings. If this notice is unopposed by the youth, the court must order that a youth sentence will apply on conviction and that there will be a ban on publication of information about the youth.

2.7.2 Presumptive "B" Offences – "Serious Violent Offence Designations"

For a presumption to arise under subsection 2(1), "presumptive offence," clause (*b*), the Crown must apply to the court under subsection 42(9) for the opportunity to establish that the offence for which the youth has just been found guilty is a serious violent offence. A serious violent offence is defined in section 2 as an offence that causes or attempts to cause serious bodily harm. The serious violent offence designation is only applicable to offences which have occurred after the coming into force of the *YCJA*.

Where the youth already has at least two such prior judicial determinations relating to other serious violent offences, a presumption may arise under section 2(b). For an adult sentence to be possible, the third serious violent offence must have been committed when the youth was 14 years or older.

However, the court's ability to designate offences as serious violent offences under section 42(9) is not subject to this age restriction. As long as the offence was committed when the young person was at least twelve years of age or older, the Crown may request the offence be designated as a serious violent offence. If the court does so, this could then count as one of the prior designations needed to fulfill the requirements of a subsequent presumptive "b" application.

The Crown makes the application for a designation **after** there has been a finding of guilt. In order to have the court consider this request, the Crown must already have given notice, under subsection 64(2), to the youth and the court, prior to the youth's making a plea, that it intends to

seek an adult sentence. When the court receives this notice, it must inform the youth at his or her first appearance that an adult sentence may apply on conviction (clause 32(1)(c)).

The Crown must also give the youth, but not the court in this instance, notice under subsection 64(4), that it intends to ask the court to make a determination that the conduct constitutes a serious violent offence and it intends to establish that this is at least the third such determination made in respect of the youth's conduct.

As with presumptive "a" offences, a youth charged with an offence that may be found to be a presumptive "b" offence has the option, under section 63, to apply to the court for an order that a youth sentence be imposed on a finding of guilt instead of an adult sentence. The youth may do this at any time prior to sentencing. The Crown may decide not to oppose the youth's application, in which case the court is required to order that a youth sentence be imposed.

2.7.3 Non-presumptive Offences

The Crown must give notice under subsection 64(2) to the youth and the court, prior to the youth's making a plea, that it intends to seek an adult sentence. When it has received such a notice, the court is required, under clause 32(1)(c), at the youth's first appearance before it, to inform the youth that an adult sentence may apply on conviction. The youth may, under subsection 64(5), give notice that he or she does not oppose the Crown's application for an adult sentence. In this case, the court must order that an adult sentence be imposed.

Discussion

What offences are included in the presumptive offence category?

2.8 Trial Process

All trials of young people now take place in youth court, whether a youth or an adult penalty is sought. There is no transfer to adult court. Under the *YOA*, the process of transfer hearings to adult court led to unfairness and delay in the treatment of youth.

The *YCJA* provides for a more appropriate, fair and useful process for determining when an adult sentence is a necessary and justified option. All trials and sentencing are conducted separately from the adult process, with youth appropriate protections clearly set out and applicable to youth. The potential for timeliness in disposition is significantly increased. Unfairness resulting from a pre-adjudication consideration of sentence is relieved. The *YCJA* provides for full procedural protections and notices wherever a youth may be at risk for these extraordinary measures.

2.8.1 Electing Mode of Trial

Where an offence may attract a penalty, on conviction, of five years or more, the *YCJA* guarantees the youth's entitlement to elect his or her mode of trial, which is provided in the *Criminal Code*. This is a recognition of rights guaranteed the youth (and all other accused) under the *Charter of Rights*. The youth may choose between trial by judge or by judge and jury and may opt to have a preliminary inquiry. This arises in the case of offences that carry adult

penalties of five years or more and in the case of murder whether an adult or youth penalty may apply (sections 66 and 67). Whatever mode of trial the young person selects, all trials take place in youth court.

Where the Crown has indicated that it does not intend to seek an adult sentence and the court has ordered that an adult sentence shall not apply, an election is not necessary as any resulting youth sentence would be three years or less. There is one key exception to this rule, which arises in the case of first or second degree murder, for which the youth could be sentenced to 10 and 7 years, respectively. The court must put the youth to an election as to how he or she wishes to be tried (section 66).

Wherever entitled to elect mode of trial, the young person may elect between:

- Trial by youth justice court judge without a jury;
- Trial by judge without a jury following a preliminary inquiry;
- Trial by judge and jury following a preliminary inquiry.

The judge reads the election to the young person before he or she makes a plea, explaining the options for trial and asking the young person to select one. The judge may require co-accused young persons to be tried by a court composed of a judge and jury. The Crown may also require a young person to be tried before a jury despite his or her having elected another mode.
If the young person has elected trial before a judge or a judge and jury, the youth court judge must hold a preliminary inquiry, conducted in accordance with the procedure in Part XVIII of the *Criminal Code*. Otherwise procedure at trials before a judge or a judge and jury follow the *Criminal Code*, Parts XVIV and XX, except for special protections relating to privacy and entitlement to counsel.

Discussion

1. Under what circumstances is a youth entitled to elect his or her mode of trial?
2. When is the election of trial mode unnecessary?

2.9 Sentencing Stage: Features of the Process

Following a finding of guilt, the court must proceed to consider the question of an appropriate sentence. In so doing, it must ensure that the youth's procedural protections are safeguarded and that governing standards are applied to the question of sentence sufficiency. The court has access to various sources of information in making its consideration of sentence. These may include submissions from the parties, conference advice and various reports. The court is required, under subsection 72(3), to consider a pre-sentence report.

2.9.1 Presumptive "A" Offences

With respect to presumptive "a" offences, the court needs first to ensure that the young person is aware that an adult sentence will be imposed unless he or she makes an application for a youth sentence. Under subsection 70(1), the court must ask the young person if he or she, knowing that an adult sentence will apply, wishes to make an application for a youth sentence. If the young

person indicates that he or she does not want to make such an application, or fails to indicate either way, the court must order that an adult sentence will be imposed.

Where the young person indicates that he or she wishes to apply for a youth sentence, the court must hold a hearing to determine whether a youth or adult sentence should be imposed. With respect to presumptive offences (both "a" and "b"), the onus is on the young person to satisfy the court that a youth sentence, imposed in accordance with subclause 3(1)(b)(ii) and the purpose and principles of youth sentencing set out in section 38, would be of sufficient length to hold the young person accountable for the offending behaviour. If the court is satisfied of this, it must order that a youth sentence, determined in accordance with those principles, be imposed. If the court is not satisfied, it may order an adult sentence (section 72).

2.9.2 Presumptive "B" Offences

Following a finding of guilt, the Crown may apply to the court under subsection 42(9) for a determination that this is a serious violent offence. Before it may do so, the Crown must first satisfy the court that it gave the youth notice of its intention to establish to the court that the offence qualifies as a presumptive "b" offence.

If the court agrees that it is a serious violent offence, it will then ask the youth if he or she admits to previous judicial determinations of serious violence offences. If the youth does not, it is then up to the Crown to provide evidence that establishes them. If the youth admits to the prior designations or the Crown proves them, the court will then endorse the information or indictment and the presumption under subsection 2(1), "presumptive offence," clause (*b*) will arise. After that the proceedings continue as for presumptive "a" offences on the question of sentence. If the Crown fails to satisfy the court in any of these particulars, the presumption will not arise, and the Crown's only recourse is to consider making an application on the basis of this being a non-presumptive offence.

2.9.3 Non-presumptive Offences

Where the Crown has applied for an adult sentence and the young person has not indicated under section 64 that he or she does not oppose it, the court must hold a hearing to determine whether a youth or adult sentence should be imposed. The court must consider whether a youth sentence, imposed in accordance with the purpose and principles of youth sentencing, would be of sufficient length to hold the young person accountable for his/her offending behaviour (section 72).

2.10 Sentencing Stage: Determining the Sentence

Where the young person applies for a youth sentence with respect to a presumptive offence or the Crown applies for an adult sentence with respect to a non-presumptive offence, the court must hold a hearing to determine whether a youth or adult sentence should be imposed.

Provisions set out in the *YCJA* provide guidance for the decision relating to whether a youth or adult sentence should be imposed. These sections –3, 38, 39 and 72 –create a framework to govern the relationship between sentencing length and the youth's accountability for his or her

conduct. Measures such as pre-sentence and other reports as well as judicial conferencing will be helpful to the court and parties to the proceedings when focused, as the *YCJA* contemplates, directly on applying the statutory sentencing standards to the case. The *YCJA* makes it clear that the onus rests with applicant in each case; general and specific sentencing principles provide guidance for defence and Crown counsel in discharging that burden in terms of preparing argument and making submissions to court.

2.10.1 Sentencing Standards

Under section 72, the court must consider whether a youth sentence imposed in accordance with subclause 3(1)(b)(ii) and the purpose and principles of youth sentencing set out in section 38 would be of sufficient length to hold the young person accountable for offending behaviour. The court will also bear in mind the restrictions on custody set out in section 39.

The court may look at various factors, such as the seriousness and circumstances of the offence, the age, maturity, character, background and previous record of the young person and may also look at other factors that appear relevant to the court.

2.10.2 Test for an Adult Sentence: Sufficient Length

The process of applying for, considering and imposing adult sentences needs to be strictly focused so that it is targeted on appropriate cases where it is *clearly demonstrated* that a youth sentence, imposed in accordance with the *YCJA* is not sufficiently long to hold the youth accountable. The *YCJA* makes it clear, in section 42, that these are appropriate and useful *maximum* limits for youth sentences for these offences.

In considering an adult sentence, judges must ask themselves what factors render a youth sentence insufficiently long in the case before it to hold the youth accountable. Crown prosecutors must indicate the compelling circumstances that must exist before an adult sentence would be imposed. Defence counsel must be fully prepared to participate in the challenge process attaching to any such applications or presumptions. Subsection 72(1) sets out the conditions under which an adult sentence should be imposed.

Should an adult sentence be considered necessary, the application of these statutory principles in calculating its length should result, in a sentence that is lighter than a sentence imposed on an adult for the same offence — to acknowledge the youth's greater dependence and reduced maturity.

2.10.3 Imposing the Sentence

The court is to consider a pre-sentence report and to give the young person, his or her parents and the Crown an opportunity to be heard. Should the court determine that a youth sentence, imposed according to the youth sentencing principles set out in the *YCJA* is insufficiently long to hold the youth accountable, it may then consider imposing an adult sentence. The court is to state the reasons for its decision. The decision for a youth or adult sentence is considered part of the decision on the sentence for the purpose of an appeal.

2.11 Process Following Sentencing

2.11.1 Ban on Publication (section 75)

When a young person receives an adult sentence, there is no ban on publication of information that might identify him or her as having been dealt with under the *YCJA*. Where a young person has received a youth sentence for a presumptive offence, the court is required to inquire whether the youth or the Crown wants a ban on publication. If neither seeks a ban, publication will not be prohibited. If the young person or the Crown apply for a ban on publication, the court must decide whether it would be appropriate in the circumstances, taking into account the importance of rehabilitating the young person as well as the public interest.

For more information on publication, please refer to Publication and Information Sharing in this handbook.

2.11.2 Determining Placement (section 76)

A youth receiving an adult sentence may be ordered to serve a custodial sentence in the youth custody system, the adult provincial correctional system or the federal penitentiary system. There is a presumption that those under eighteen should serve their sentence in a youth custody system, whether it is a youth or an adult sentence. This presumption can be rebutted when the youth is serving an adult sentence if placement in another custody system is seen as being in the best interests of the young person or the safety of others. The presumptions are aimed at separating youth from more hardened adult offenders, and are more consistent with the approach of international conventions which call for youth to be held separate and apart from any adult who is detained or held in custody.

When a person is eighteen or older at the time of sentencing, there is a presumption that he or she will be placed in the provincial adult correctional system or, if the sentence is two years or more, in a federal penitentiary. While the court sets the proportion of the sentence to be served in the various systems, this is subject to a further presumption that no youth will remain in a youth custody facility past the age of 20. A placement decision made by a court is subject to review.

2.11.3 Conditional Release (section 77)

Rules governing adult conditional release apply to a young person who is serving an adult sentence whether in a youth custody facility or in an adult facility. These rules governing adult conditional release also apply to a young person who is serving a portion of an adult sentence in a youth custody facility. The placement provisions for youth serving adult sentences operate as an exception to the "two year rule" of section 743.1 of the *Criminal Code*. Youth with an adult sentence who are placed in youth custody facilities for a portion or the entire period of their adult sentence are treated in the same manner as adults with respect to conditional release.

Where a young person is serving an adult sentence in a youth custody facility it is important that the youth does not fall between the cracks as might happen if the parole board is not aware of the youth person. The provincial director is required to inform the appropriate parole board where a young person sentenced as an adult is placed in a youth custody facility. The appropriate parole

board is required to exercise its jurisdiction in accordance with the *Corrections and Conditional Release Act.* Which parole board has jurisdiction (either a provincial parole board or the National Parole Board), is identified in accordance with that Act.

Where a person who is serving an adult sentence for a crime committed as a youth is then given an adult sentence for a crime committed after reaching 18, the young person will serve the remainder of the sentence in the adult system, in accordance with section 743.1 of the *Criminal Code.*

A person serving an adult sentence who is then sentenced to an adult sentence under the *Youth Criminal Justice Act*, will serve the sentences in a correctional facility for adults or a penitentiary in accordance with section 743.1 of the *Criminal Code*.

Exercise 6

Write "True" or "False" for each of the following statements:

1. When a young person is given an adult sentence, there may be a ban on publication of information.
2. If the young person receives a youth sentence for a presumptive offence and seeks a ban, publication may be prohibited.
3. A young person receiving an adult sentence can only serve the sentence in the adult correctional system.
4. Youth under 18 years of age are presumed to serve a youth sentence in a youth custody system.

Discussion:

1. In what cases are rules governing adult conditional release applicable to a young person?
2. What does the provincial director need to do when a young person is serving an adult sentence in a youth custody facility?

3. Custody and Supervision

The *YCJA* sets out in part 5 (sections 83 to 109) the provisions that govern the youth custody and supervision system. They deal with the principles and procedures that determine how a young person is to be treated while in youth custody and in the community under supervision following custody.

3.1 Purpose and Principles

Section 83 of the *YCJA* states the purpose and principles specific to youth custody and supervision. The purpose is to contribute to the protection of society by

- carrying out youth custodial sentences in a safe, fair, and humane manner; and

- assisting young persons in their rehabilitation and reintegration into the community as law-abiding citizens, by providing effective programs both in custody and during supervision in the community.

Principles relevant to custody and supervision are found in section 3. The particular principle is that the youth criminal justice system must be separate from that of adults and emphasize rehabilitation and reintegration (clause 3(1)(b)). Section 3 also emphasizes that proportionate accountability of young persons must be consistent with their greater dependency and their reduced level of maturity (clause 3(1)(c)).

Section 83 sets out specific principles that include:

- the use of least restrictive measures which calls for a careful assessment while considering the need for protection of the public, personnel working with the young person, and the young persons themselves (clause 83(2)(a));
- Young persons sentenced to custody retain the rights of other young persons, except to the extent necessary to carry out the sentence of the court (clause 83(2)(b));
- Facilitating the involvement of the families of young persons and members of the public (clause 83(2)(c)), which can be achieved through visiting programs, reintegration leaves, conferences aimed at reintegration, or mentoring and other programs that ensure that a young person is not facing isolation while in custody, but is building on relationships that can assist in reintegration;
- Decisions are to be made in a forthright, fair and timely manner (clause 83(2)(d)), an example of which would be involvement in the development of a reintegration plan;
- Placements of young persons where they are treated as adults must not disadvantage them with respect to their eligibility for and conditions of release (clause 83(2)(e)).

3.2 Level of Custody

Under the *YCJA,* the provincial director determines the level of custody, both at the time of committal to custody and for any subsequent transfers. However, jurisdictions may still choose to have this administrative decision made by the youth court at the time of sentencing (section 88). In such a case, provisions of the current *YOA* would apply, with any necessary modifications.

Saskatchewan will retain the current judicially determined level of custody model. Accordingly, most parts of section 85, and all of sections 86 and 87 will not be applicable. Since section 88 incorporates the provisions of the *YOA*, copies of this Act will need to be retained for future reference.

3.3 Reintegration Plan

The *YCJA* sets out various types of custody and supervision orders in section 42:

- Regular custody and supervision order (clause 42(2)(n));
- Custody and supervision order for attempted murder, manslaughter or aggravated sexual assault (clause 42(2)(o));

- Custody and supervision order for murder (clause 42(2)(q));
- Intensive rehabilitative custody and supervision order (clause 42(2)(r)).

These orders require that the custodial portion be followed by a period of supervision and support in the community, to assist the young person in a successful transition, and to reduce re-offending.

Further re-integrative measures in the *YCJA* include the requirement that, as soon as the young person is sentenced to custody, the provincial director shall designate a youth worker to work with the young person to plan for his or her reintegration into the community (subsection 90(1)). This will include preparation of a reintegration plan that sets out key supports and the most effective programs for the young person, both in custody and in the community, in order to maximize his or her chances for successful reintegration into the community.

When the young person is serving the community supervision portion of the sentence, the youth worker will be responsible for case management, including supervision and providing support and assistance to the young person in respecting conditions and implementing the reintegration plan (subsection 90(2)).

3.4 Reintegration Leave

When a young person is serving the custody portion of a youth sentence, the provincial director may authorize reintegration leave for the young person for the purpose of his or her rehabilitation and preparation for eventual reintegration back into the community (section 91). The similar term for "reintegration leave" is "temporary release from custody" in section 35 of the *YOA*.

Reintegration leave is available on any terms or conditions that the provincial director considers desirable:

- for a period of up to thirty days for medical, compassionate or humanitarian reasons or for rehabilitation or reintegration into the community (clause 91(1)(a)); or
- on the days and during hours specified by the provincial director for (clause 91(1)(b))
  - attending school, an educational or training institution,
  - employment or domestic or other duties required by the young person's family,
  - participating in a program specified by the provincial director to carry out employment or improve his or her education or training, or
  - attending a treatment or other program aimed at addressing the young person's needs.

The provincial director can renew a reintegration leave on reassessment of the case. He or she can also revoke a leave and return the young person to custody.

Exercise 7

Choose the correct answer:

1. The primary purpose of the custodial portion being followed by supervision in the community is to _____.

a. assist the young person in a successful transition back to the community
b. reduce re-offending
c. reduce cost for keeping the young person in custody
d. both a & b
e. both b & c

2. The provincial director shall designate a youth worker to work with the youth as soon as the young person is _____.
   a. brought before the court
   b. sentenced to custody
   c. placed in the youth facility
   d. released from custody

3. Reintegration leave is available on terms or conditions set out by the _____.
   a. youth court
   b. Crown
   c. provincial director
   d. youth worker

Discussion

1. What is the purpose of a reintegration plan? What should be included in the plan?
2. What is the purpose of a reintegration leave?

3.5 Transfer/Placement into Adult Facility

Section 84 of the *YCJA* retains the general rule that a young person who is serving a youth custody sentence is to be held separate and apart from adults. Sections 92 and 93 address situations where young persons who serve custodial youth sentences are to be transferred to, or placed in, an adult facility to serve the remainder of the sentence:

- Where a youth becomes 18 years of age while serving a youth sentence in a youth facility, the provincial director **may** apply to a youth justice court for authority to transfer the youth to a provincial facility. In certain circumstances the provincial director may later apply to the youth justice court for authority to transfer the young person to a penitentiary if two or more years of the sentence remains (section 92).
- Where a youth becomes 20 years of age while serving a youth sentence in a youth facility, he or she **shall** be transferred to a provincial facility unless the provincial director decides that he or she should continue in a youth facility. If a youth is transferred to a provincial facility, the provincial director may apply to a youth justice court to have the youth transferred to a penitentiary (section 93).

The judge would base a decision in either of these situations on the best interests of the young person or the public interest.

When a youth is 20 years of age or older when the youth sentence is imposed, he or she must be committed to a provincial correctional facility. In certain circumstances the provincial director

may later apply to the youth justice court for authority to transfer the young person to a penitentiary if two or more years of the sentence remains (section 89).

When a young person is serving a youth sentence in the adult system, the adult rules regarding conditional release will apply, with some exceptions. Measures under the *YCJA*, such as custody reviews under section 94, do not apply to the young person, but privacy protections for youth sentences under the *YCJA* continue to apply. As a result of amendments made to the *Prisons and Reformatories Act*, a youth who is placed in a provincial adult facility is entitled to be released on the earlier of the remission date calculated under adult rules or the date set for supervision to begin under section 42 of the *YCJA*. When released, the youth will be supervised, subject to conditions being set under section 97 or section 104 of the *YCJA*.

The *YCJA* also contains new provisions relating to placement of a young person who receives an adult sentence. In such cases, the youth justice court must hold a hearing to determine in which custodial system - youth, adult provincial or federal penitentiary - the sentence will be served. The court makes this determination subject to the following presumptions:

- if the young person is under eighteen at the time of sentencing, the sentence should be served in the youth custody system (but not beyond the age of twenty); and
- if over eighteen, in either the adult provincial or federal system.

The judge is also to consider the best interests of the young person and the safety of others. Because the young person is serving an adult sentence, rules relating to conditional release of adults set out in the C*orrections and Conditional Release Act* generally apply, regardless of whether the sentence is being served in an adult or youth facility. The placement decision may be reviewed by the youth court following a hearing.

Exercise 8

Write “True” or “False” for each of the following statements:

1. If a youth becomes 18 years of age while serving a youth sentence in a youth facility, he or she must be transferred to a provincial facility.
2. If a youth is transferred to a provincial facility at the age of 20, he or she may be transferred to a penitentiary.
3. When a young person is serving a youth sentence in the adult system, the adult rules regarding conditional release will apply.

3.6 Review of Custodial Youth Sentences

A custodial youth sentence served in a youth facility is subject to review under sections 94 and 96 of the *YCJA*.

3.6.1 Annual Review

Where a young person is serving a youth sentence, or sentences in the case of more than one offence, of which the custody portion exceeds one year, the youth justice court will conduct a

review of the sentence on an annual basis. The provincial director must bring the young person before the court for this review at the end of one year from the date the sentence was imposed and annually after that (subsections 94(1) and (2)). If the provincial director fails to do so, the youth, parent or Crown may apply to the court for an order that the provincial director bring the young person before the court.

The provincial director should give notice of review to the young person, parent and the Attorney General. Notice to the parent must include a statement that the young person is entitled to legal representation.

The provincial director must provide the court with a progress report on the youth's performance while under sentence. The progress report may include information relating to the personal and family history and present environment of the young person.

Following its hearing and review, the court may 1) confirm the youth sentence, 2) release the youth on conditional supervision, or 3) convert a sentence imposed as an intensive rehabilitative custody and supervision order to a straightforward custody and supervision order or to an order under the murder regime. In making decisions, the judge shall consider the needs of the young person and the interests of society.

3.6.2 Optional Review

An optional review may occur for custodial youth sentences of any length: for a sentence under a year, it will be after either 30 days from the date of sentencing or one-third of the sentence, whichever is greater; where the sentence is more than a year, it will be any time after six months from the date of the last sentence imposed for the offence.

Optional reviews can be done upon application of the provincial director, the young person, the young person's parent or the Attorney General (subsection 94(3)). In addition, the court may give leave to review the sentence at any other time (subsection 94(4)).

The provincial director must bring the young person to court and if the director fails to do so, the youth, parent or the Attorney General may apply to the court for an order that the provincial director bring the young person before the court.

The provincial director must provide the court with a progress report on the youth's performance while under sentence. The progress report may include information relating to the personal and family history and present environment of the young person. Notice of review should be given by the person requesting the review to the young person, parent and the Attorney General. Notice to the parent must include advice that the youth is entitled to legal representation.

Before conducting an optional review, the court must first determine that there are grounds for a review. A list of these grounds is set out in the *YCJA* (subsection 94(6)):

- the young person has made sufficient progress to justify a change in the sentence;
- the circumstances that led to the sentence have changed significantly;
- new services or programs are now available;

- the opportunities for rehabilitation are now greater in the community; or
- any other ground that the youth justice court considers appropriate.

Following its review, the court may 1) confirm the youth sentence, 2) release the youth on conditional supervision, or 3) convert a sentence imposed as an intensive rehabilitative custody and supervision order to a straightforward custody and supervision order or to an order under the murder regime. In making decisions, the judge shall consider the needs of the young person and the interests of society.

A custody review may also occur in cases where the provincial director makes a recommendation to the youth justice court that a young person be released from custody and placed under conditional supervision (section 96). In such cases, the provincial director is to give the young person, parent and the Attorney General notice that he or she is doing so. The notice must include the reasons for his or her recommendation as well as any conditions that the director would recommend the court set on that supervision. The youth, parent or the Attorney General may then apply to the court for a review of the recommendation, following which the court must review the sentence. If no application is made for review of the recommendation, the court must decide whether to order the release of the youth on conditional supervision or not.

If a sentence is under appeal, there shall be no review of the sentence under section 94 or section 96 (subsections 94(7) and 96(4)).

Exercise 9

Write "True" or "False" after each of the following statements:

1. A custodial youth sentence served in a youth facility is subject to review.
2. The youth justice court can conduct an annual review of a youth sentence if the sentence exceeds one year.
3. A progress report is needed in both annual review and optional review of a custodial youth sentence.
4. While there is no restriction on sentence length in respect of optional reviews, there are some restrictions on the time periods within which optional reviews may be sought.
5. The young person whose sentence is under review may or may not appear before the court.
6. A youth sentence review may be annual, optional or occur in cases where the provincial director makes a recommendation to the youth justice court.

3.7 Supervision

All the custodial sentences set out by the *YCJA* contain a portion of supervision in the community. The portion that is to be served in the community will be subject to conditions. In the case where a young person breaches a condition while under supervision in the community, reviews will be held that can result in a change in conditions or in the young person being returned to custody.

3.7.1 Setting Conditions

Under the *YCJA*, supervision contained in the custodial sentences can fall into two types: community supervision and conditional supervision. Both involve supervision in the community subject to conditions. The key distinction between the two types relates to who is authorized by the *YCJA* to set the conditions:

- Community supervision forms part of "regular" custody and supervision orders issued under clause 42(2)(n). Mandatory conditions set out in subsection 97(1) are applicable and optional conditions may be set by **the provincial director** before release from custody.
- Conditional supervision forms part of the other three types of custody and supervision order under clauses 42(2)(o), (q) and (r). The young person shall be brought to the youth court at least one month before the end of the custodial portion of the sentence (subsection 105(1)). Mandatory conditions in subsection 105(2) are applicable and optional conditions may be set by **the youth court** before release from custody. This is also the form of supervision that applies where a custody review under section 94 leads to the early commencement of the supervision portion.

The *YCJA* sets out mandatory conditions for both types of supervision (subsections 97(1) and 105(2)). The mandatory conditions which apply to both types of supervision require the young person to

- keep the peace and be of good behaviour;
- inform the provincial director on being arrested or questioned by the police;
- report to the police;
- advise the provincial director of his or her residence address, and any change
  - in the address
  - in normal occupation
  - in the family or financial situation
  - that may reasonably be expected to affect his or her ability to comply with the conditions of the sentence.

In the case of community supervision, there are two more mandatory conditions that must appear in the order:

- report to the provincial director and then be under his or her supervision; and
- not own, possess or have the control of any weapon, ammunition, prohibited ammunition, prohibited device or explosive substance, except as authorized in writing by the provincial director for the purposes of the young person participating in a program specified in the authorization.

In addition, the provincial director may attach to the order other conditions aimed at addressing the needs or managing the risk of individual youth. When setting the conditions, the provincial director must take into account 1) the needs of the young person; 2) the most effective programs for the young person in order to maximize his or her chances for reintegration into the community; 3) the nature of the offence; and 4) the ability of the young person to comply with the conditions.

In the case of conditional supervision, there are four more mandatory conditions that must be included in the order:

- appear before the youth justice court when required;
- report to the provincial director immediately on release, and then be under his or her supervision or a person designated by the youth justice court;
- not own, possess or have the control of any weapon, ammunition, prohibited ammunition, prohibited device or explosive substance, except as authorized by the order; and
- comply with any reasonable instructions that the provincial director considers necessary in respect of any condition of the conditional supervision in order to prevent a breach of that condition or to protect society.

In addition, the court *may* include conditions from the following list:

- on release, travel directly to the young person's place of residence, or to any other place that is noted in the order;
- make reasonable efforts to obtain and maintain suitable employment;
- attend school or any other place of learning, training or recreation that is appropriate, if the court is satisfied that a suitable program is available for the young person at such a place;
- reside with a parent, or any other adult that the court considers appropriate, who is willing to provide for the care and maintenance of the young person;
- reside in any place that the provincial director may specify;
- remain within the territorial jurisdiction of one or more courts named in the order;
- comply with conditions set out in the order that support and address the needs of the young person and promote the reintegration of the young person into the community; and

- comply with any other conditions set out in the order that the court considers appropriate, including conditions for securing the young person's good conduct and for preventing the young person from repeating the offence or committing other offences.

At this stage, it may be appropriate to convene a conference, involving the youth and other key individuals, to determine what are reasonable conditions.

Conditions applicable to conditional supervision apply to a deferred custody and supervision order under clause 42(2)(p).

3.7.2 Breach of Conditions

Situations where young persons breach conditions while under supervision are dealt with in sections 102, 103 and 106 to 109 of the *YCJA*. As there are two types of supervision, the provisions in these sections cover two distinct scenarios: in the case where there is a breach of a condition of community supervision, and in the case where there is a breach of a condition of conditional supervisions.

- In the first case, if the provincial director believes a young person may have breached or is about to breach a condition in an order for custody and supervision where he or she has set the conditions, he or she may allow the youth to continue with supervision on the same or on different conditions or, if he or she believes the breach is serious and a risk to public safety, the youth may be ordered to be remanded in custody (section 102).
- In the second case, if the provincial director believes a young person may have breached or is about to breach a condition in an order for custody and supervision where the court has set the conditions, he or she may suspend supervision and order the youth to be remanded in custody until a review can be conducted of the case (section 106).

In either case, the provincial director may issue a warrant for the youth's apprehension. While the warrant is outstanding, the clock stops running on the youth's sentence. On execution of the warrant, the police officer must bring the young person before the director as soon as possible. The provincial director shall then review the case and, within 48 hours, cancel the suspension of the conditional supervision or refer the case to the youth justice court for review (section 108).

The court, after hearing from the youth, must first determine whether the young person has breached or was about to breach a condition of the conditional supervision. If the court is not satisfied of this, it must cancel the suspension of the conditional supervision; otherwise, it must review the decision of the provincial director to suspend the conditional supervision, and order

- the suspension of the conditional supervision to be cancelled, and when it does so, the court may vary the conditions of the conditional supervision or impose new conditions;
- in a case other than a deferred custody and supervision order made under clause 42(2)(p), the suspension of the conditional supervision be continued but not to exceed the remainder of the youth sentence;
- in the case of a deferred custody and supervision order made under clause 42(2)(p), that the young person serve the remainder of the order as if it were a regular custody and supervision order under clause 42(2)(n).

In making its decision, the court shall consider the length of time the young person has been subject to the order, whether the young person has previously contravened it and the nature of the contravention (subsection 109).

Exercise 10

Write "True" or "False" for each of the following statements:

1. Both community supervision and conditional supervision involve supervision in the community subject to conditions.
2. In respect of conditional supervision, the young person shall be brought to the youth court at least one month before the end of the sentence.
3. Mandatory conditions for both community supervision and conditional supervision can be found in the same section of the *YCJA*.
4. The provincial director sets conditions for a deferred custody and supervision order.
5. The court may convene a conference when setting conditions.

6. When setting conditions for community supervision, the needs of the young person are not a concern.

Discussion:

1. What shall the provincial director do if he or she believes a young person may have breached or is about to breach a condition in an order for custody and supervision where he or she has set the conditions?
2. What shall the provincial director do if he or she believes a young person may have breached or is about to breach a condition in an order for custody and supervision where the court has set the conditions?

3.8 Applications to Continue Custody

3.8.1 Continuation of Custody under Regular Custody and Supervision Orders (clause 42(2)(n))

A young person may be required to remain in custody and not serve the community supervision portion of the sentence where it is established that the young person will likely commit a serious violent offence before the expiry of the sentence. The Crown or the provincial director may apply to the youth justice court for an order that a youth remain in custody for some or all of the remainder of his sentence. This application must be made within a reasonable time before the end of the custodial portion of the sentence (subsection 98(1)).

The court is to hold a hearing at which the director, young person and parent may be heard. It may order the continuation of custody if it believes the youth is likely to commit a serious violent offence while on supervision and the conditions imposed during that supervision would not be adequate to prevent the commission of that offence (subsection 98(3)). The court is required to take into consideration any factor relevant to the case, including the following (subsection 98(4)):

- evidence of a pattern of persistent violent behaviour and, in particular: the number of offences causing physical or psychological harm to another person; difficulties in controlling violent impulses to the point of endangering others; the use of weapons in committing offences; explicit threats of violence; brutal behaviour associated with an offence; and, significant indifference by the youth to the foreseeable consequences for others of his or her behaviour;
- evidence that illness or mental disorder is of such a nature that the young person is likely to commit a serious violent offence before the expiry of the youth sentence;
- information satisfying the court that the young person is planning to commit a serious violent offence before the expiry of the sentence;
- supervision programs in the community that would protect the public from risks the young person might present until the expiry of the youth sentence;
- whether the young person is more likely to re-offend if he or she serves his or her youth sentence entirely in custody without the benefits of serving a portion of the youth sentence in the community under supervision; and

- evidence of a pattern of committing violent offences while he or she was serving a portion of a youth sentence in the community under supervision.

The provincial director is required to submit to the court a report setting out any information relating to the above factors that the director is aware of that may be of assistance to the court (section 99).

If the court orders the continuation of custody it must provide written reasons for doing so on the record and provide a copy of the order to the parties involved as well as a copy of its reasons, if the parties request them (section 100).

The young person and the provincial director have the right to ask the court of appeal to review the order of the youth justice court (section 101).

3.8.2 Continuation of Custody under Other Custody and Supervision Orders (clauses 42(2)(o), (q) and (r))

For the offences of murder, attempted murder, manslaughter or aggravated sexual assault and under intensive rehabilitative custody and supervision orders applications for continuation of custody follow slightly different procedures than for regular custody and supervision orders.

Following an application by the Crown, the provincial director must bring the young person to the court for a hearing in which the youth, Crown and parent are given an opportunity to be heard. The court may then order that the youth remain in custody for some or all of the remainder of the sentence if it believes the youth is likely to commit an offence causing death or serious harm to another person before the end of the sentence (subsection 104(1)).

The court is required to take into consideration any factor relevant to the case, including the following:

- evidence of a pattern of persistent violent behaviour and, in particular: the number of offences causing physical or psychological harm to another person; difficulties in controlling violent impulses to the point of endangering others; the use of weapons in committing offences; explicit threats of violence; brutal behaviour associated with an offence; and, significant indifference by the youth to the foreseeable consequences for others of his or her behaviour;
- evidence that illness or mental disorder indicates that the young person is likely, before the expiry of the youth sentence, to commit an offence causing death or serious harm to another;
- information satisfying the court that the young person is planning to commit, before the expiry of the youth sentence, an offence causing death or serious harm to another; and
- availability of supervision programs in the community that would protect the public from risks posed by the young person until the youth sentence expires.

4. General Rules of Sentence Management and Calculation

Sentence calculation under the *YCJA* determines two things:

1) the total length of a sentence a young person in custody will be required to serve; and
2) the point at which a young person in custody will be eligible for community supervision and other forms of release to the community.

Central to the *YCJA* custody provisions is the notion of re-integrative custody and supervision, which recognizes that from the time the young person enters custody, efforts are to be directed at eventual successful reintegration back into the community. Under the *YCJA*, all custodial sentences include a portion that the young person is to serve under supervision in the community. This implies that management of community supervision should receive more attention than before.

4.1 Overview

The *YCJA* requires that youth sentences be calculated and managed in accordance with a set of rules. These rules are found in the *YCJA*, as well as *Corrections and Conditional Release Act* (CCRA), the *Criminal Code* and the *Prisons and Reformatories Act*.

The general rules set out in the *YCJA* that apply to the sentence calculation and management can be summarized as follows:

- A sentence imposed on a young person should be carried out through safe, fair and humane custody and supervision (clause 83(1)(a)).
- A single sentence for a single offence is limited to two years, including the youth sentence that comprises more than one sanction at the same time in respect of the same offence (subsection 42(14)). The exceptions are the orders of Prohibition, Custody and Supervision, or Intensive Rehabilitative Custody and Supervision (clause 42(2)(j), (n), (o), (q), or (r)).
- Maximum custodial sentence lengths are two years, three years (if it is an offence for which an adult could be sentenced to life imprisonment), 7 years for second degree murder and 10 years for first degree murder
- If the youth justice court is imposing separate sentences for different offences committed by a young person, the combined duration of these sentences may not exceed three years, except in the case where one of the offences is first-degree or second-degree murder (subsection 42(15)).
- Where the order is ambiguous or more than one interpretation could apply, the interpretation in the best interests of the young person is adopted (common law).
- Sentences made by a youth justice court commence the day imposed or on any later date specified by the youth justice court (subsection 42(12)).
- Any portion of a day served is a full day served toward the running of a sentence (practice).
- Sentences are concurrent, unless the court makes a consecutive order (subsection 42(13) and clause 42(16)(b)), (common law)

4.2 Rules for Calculating and Managing Non-custodial Sentences

Non-custodial sentences can be combined with each other or with custodial sentences if not inconsistent. A single non-custodial sentence, except for an order of prohibition (clause 42(2)(j)),

cannot exceed two years in length. A violation of the terms of a non-custodial sentence may result in a new charge for failing to comply (section 137), or a review of the sentence pursuant to section 59.

Specifically, the rules that apply to calculating and managing non-custodial sentences are as follows:

- Non-custodial sentence orders come into force on the day on which they are made or on any date the youth justice court specifies (subsection 42(12) and section 56).
- Violations of these orders are managed by a new charge of breach stipulated in section 137 of the *YCJA*.
- These orders are subject to review, on the application of the young person, the young person's parent, the Crown prosecutor or the provincial director (subsection 59(1)).
- At the review the youth justice court may:
  - confirm the sentence;
  - terminate the order and discharge the young person from any further obligation;
  - vary the sentence;
  - impose a new non-custodial sentence that is no more onerous (unless with the consent of the young person) for the remainder of time on the order under review (subsections 59(7), (8) and (9)).
- Except for a probation order, non-custodial sentences run uninterrupted once they are in force. The running of a probation order (clauses 42(2)(k)) may be interrupted if the court delays the start of a custody and supervision order that is a part of the same sentence (section 56).
- A probation order starts at the end of the period of supervision if a sentence includes a period of custody and supervision, or if the young person is under a custody and supervision order at the time the order is made.

Exercise 11

Scenario #1: Compensation order

A young person is given a 12-month youth compensation order on July 20, 2004. The total sentence will be 365 days. When is the sentence to expire? What is the status of this sentence, that is, community or custodial portion? Answer the questions by filling the following table.

Calendar Dates (inclusive count)	Status	Credit Days	Expiry Date
July 20, 2004 to _____	_____	365	
	Total	**365**	_____

Discussion question:

If the order in the case above is satisfied early, is it possible to terminate the sentence early? If yes, what should be done in order to have this take place?

Scenario #2: Probation following a custody and supervision order.

A young person is given a 12-month (365 days) probation order and a 6-month custody and supervision order (4 months custody) imposed under section 42(2)(n). The order is made on June 10, 2003. The young person is admitted into custody directly from the youth justice court on June 10, 2003.

Fill in the blanks in the following table:

Calendar Dates (inclusive)	Status	Credit days	Expiry date
_____ to Oct. 9/03	Custodial portion	122	
Oct. 10/03 to _____	_____	61	_____
Dec. 10/03 to _____	_____	_____	_____

Scenario #3: Probation with custody and supervision with delayed start.

A young person receives a 12-month (365 days) probation order and a 6-month (4 months custody) custody and supervision order under section 42(2)(n). The order is made on June 10, 2004. The start date of the custody and supervision order is delayed to July 15, 2004.

Fill in the blanks in the following table.

Calendar dates (inclusive count)	Status	Credit days	Expiry date
June 10/04 to July 15/04	Probation	36	
July 15/04 to Nov. 13/04	Custodial portion	122	
Nov. 14/04 to Jan. 14/05	_____	62	Jan. 14/05
_____	_____	329	_____

Discussion question:

In the case above, is the probation order interrupted? If so, when?

4.3 Calculating and Managing Custodial Sentences

Under the *YCJA*, all custodial sentences include a portion that the young person is to serve under supervision in the community. Except deferred custody and supervision sentences, custodial sentences are composed of two parts: 1) the first is a period of custody, and 2) the second is a period of supervision in the community. Usually, the first two thirds of the sentence will be the custodial portion while the final third will be the period of supervision in the community. Under certain circumstances and for specific offences, the youth justice court may vary the two-third and one-third split.

4.3.1 Calculating and Managing a Deferred Custody and Supervision Sentence

The following rules are applicable to calculating a deferred custody and supervision sentence:

- The sentence shall not exceed six months and must be served in the community (clause 42(2)(p)).

- The sentence is enforced through a suspension process and a review by the provincial director, and if applicable, a review by a youth justice court (subsections 42(6)).
- Upon arrest for alleged violation, the provincial director must conduct a review to determine if the allegation will proceed to a youth justice court hearing (section 108).
- At the hearing, the court shall:
  - if alleged breach is not established, cancel the suspension of the conditional supervision (clause 109(1)(a));
  - if alleged breach is established, release on same or varied conditions (clause 109(2)(a)), or order the young person serve the remainder of the sentence as if it were a regular custody and supervision order (subsections 109(2) and (3)).
- The sentence is not merged. If two or more sentences of this type are concurrent or consecutive to each other, they continue to be enforced as separate sentences.
- When the sentence is breached and the youth justice court orders the remaining time served as a custody and supervision order, the new sentence can be merged as any other custody and supervision order under 42(2)(n).

4.3.2 Calculating and Managing Custodial Sentences

The general rules for these sentences include:

- When the custody portion of a youth sentence, or sentences in the case of more than one offence, is greater than one year, the sentences are subject to mandatory annual review by the youth justice court (subsection 94(1) and (2)).
- Upon application of the provincial director, the young person, the young person's parent or the Crown prosecutor, the custodial portion of these sentences is subject to optional review.
- At the review, the youth justice court may:
  - confirm the sentence;
  - release the young person from custody and place him or her in the community under conditional supervision for a period not exceeding the remainder of the youth sentence that is served; or
  - convert the sentence to a lower sentence (subsection 94(19)).

- The Attorney General or provincial director may apply to have the custody portion extended for a period not exceeding the expiry date of the sentence (section 98 and section 104).
- These sentences may be served in an adult facility when the youth attains eighteen years of age.

The special rules for sentence calculation and management are set out as follows:

In the case of a custody and supervision sentence (regular) under clause 42(2)(n), the following rules are applicable:

- The total length of the sentence shall not exceed **two years** unless the young person is found guilty of an offence punishable by life imprisonment under the *Criminal Code*, in which case the sentence cannot exceed **three years**.
- The sentence is two-thirds custody and one-third supervision in the community. The youth justice court states months and/or days to be served in custody and in the community.
- The provincial director can authorize reintegration leaves during the custodial portion of the sentence (clause 91(1)(a)).
- The community portion is suspended when there is a breach of conditions. Note that this is not a new charge. The issuance of a warrant of apprehension, which occurs after the suspension in writing, stops the running of the sentence during the community portion (s. 102(2) and s.107)
- Within 48 hours of apprehension, the provincial director shall conduct a review (sections 102 and 108), and can:
  - cancel the suspension; or
  - refer the matter to a youth justice court for review.

- Multiple custodial sentences are merged into one sentence (section 43).

In respect of custody and supervision sentences (for both presumptive offences and murder) under clauses 42(2)(o) and (q), the following rules apply:

- The sentences have a custody portion and a conditional supervision portion, and the length of each portion is determined by the youth justice court.
- The custodial portion is generally served in a youth facility.
- The maximum length of a single sentence is three years for presumptive offences, ten years for first-degree murder and seven years for second-degree murder.
- The exception is a new custodial sentence while serving an existing custody sentence and a new offence which occurred prior to commencement of existing sentence –then the maximum length is 6 years (section 46).

In respect of intensive rehabilitative custody & supervision orders (clause 42(2)(r)), the following rules are applicable:

- The sentence is only available if the four criteria of subsection 42(7) are met.
- The maximum length of the sentence is two years for most offences, three years where the adult penalty would be life imprisonment, ten years for first- degree murder, and seven years for second-degree murder.
- The youth justice court can determine the portion to be served in custody and the portion to be served in the community.

This type of sentence is calculated in the same way as custody and supervision sentences (for murder) under clause 42(2)(q).

Exercise 12

Scenario #1: An 18-month (548-day) custody and supervision order under clause 42(2)(n) is made on June 10/04. The order clearly directs 12 months to be served in custody. Fill in the blanks in the following table:

Calendar dates (inclusive count)	Status	Credit days	Expiry date
June 10/04 to _____	_____	_____	
June 10/05 to _____	Community portion	_____	_____
	Total	**548**	

In this case, what is the date of the release from custody?

Scenario #2: On July 15/04, a 12-month custody and supervision order (for presumptive offences) is imposed under clause 42(2)(o) directing that eight months be served in custody and four months be served under supervision in the community. The young person is released from custody and starts conditional supervision on March 14/05. The provincial director issues a warrant of apprehension on May 11/05 for an alleged violation of the conditions. The young person is returned to custody on May 20/05. On May 21, the provincial director, after review, cancels the suspension and releases the youth to continue conditional supervision. Draw a table to demonstrate the timeline for each period clearly (The credit days for custodial portion should be 243 days).

4.4 Merger of Custodial Sentences

When a youth is serving a custody and supervision sentence and receives a new custody and supervision sentence, the old and new sentences are merged and become one sentence. In other words, young persons convicted of multiple offences are subject to merged sentences.

The *YCJA* addresses the procedures to be used when working with merged sentences and is complementary to the *Prison and Reformatories Act* and the *Corrections and Conditional Release Act*. The following are general rules:

- Multiple custodial sentences are merged into one sentence.
- The merged sentence uses the earliest start date and the latest expiry date of the individual sentence (sections 43 and 44).
- When multiple custody and supervision orders under clause 42(2)(n) are merged, the provincial director establishes the optional conditions at the start of the community portion.
- When the merge involves a custody order made under clause 42(2)(o), (q) or (r), the youth justice court sets the conditions at the time of release.
- Mandatory annual reviews of youth sentences where the aggregate custodial portion exceeds one year, are to be held at the end of one year from the start date of the earliest sentence imposed and at the end of every subsequent year thereafter (subsection 94(2)).
- Custody and supervision orders do not expire until the last day of the community portion. Merging occurs when a new sentence is imposed before an existing sentence expires.
- Direction for merging any combination of sentences is either consecutive or concurrent as set out in section 44 of the *YCJA*.

- The total term of the sentence must be calculated in "days" so that the release from custody date can be determined.
- When the days to the warrant expiry date is not equally divisible by two-thirds, any fraction of a day is credited as a full day to the community portion of the sentence.

In addition, there are specific rules for specific cases:

- When merging any combination of sentences where the warrant expiry date is not extended, the release from custody date does not change.
- When sentences are merged and the latest warrant expiry date is greater than the warrant expiry date prior to the additional sentence being imposed, a new release from custody date will result.

4.5 Administratively Determined Caps on Combined/Multiple Sentences

- Usually, the combined duration of multiple custodial or community sentences is three years, unless one of the sentences is murder.

- A young person shall serve no more than six years in custody, where the youth receives a new custodial sentence while serving a custodial sentence and the new sentence is for an offence that was committed prior to the commencement of the existing sentence (section 46).

- There is no cap on the combined sentence length where the court orders a new sentence (custodial and/or non-custodial) and the new offence occurred while serving the existing sentence (subsection 42(16)).

Exercise 13

Scenario #1: A merged sentence with a concurrent direction
A youth receives a two-year custody and supervision sentence (regular) under clause 42(2)(n) which begins on June 10, 2004. One year later (June 10, 2005), this youth receives a two-year custody and supervision sentence to be served concurrently with the first. The two sentences are combined to form a merged sentence of three years. In this case, when does the merged sentence begin and end?

Scenario #2: A merged sentence with a consecutive direction
In the above scenario, the second two-year sentence is to be served consecutively to the first rather than concurrently. Then the first and second sentences are added to form a total sentence of four years. When does the merged sentence begin and end?

4.6 Calculation and Management of Adult Sentences

An adult sentence imposed on a young person is managed and calculated as any other adult sentence in the jurisdiction. The youth justice court may order that an adult sentence of

imprisonment be served in a youth custody facility, an adult correctional facility or a federal penitentiary.

Publication and Information Sharing (Part 6 of the *YCJA*)

1. Introduction

The basic *YCJA* approach to record disclosure, publication, keeping, access and destruction are similar to the provisions under the *YOA*.

The *YOA* contained provisions restricting publication of information regarding a youth as accused or victim/witness. The *YCJA* continues the protection of this information with some changes:

- The terms "publication" and "disclosure" are defined;
- Information can be published on a youth convicted of a presumptive offence as a youth or adult
- A youth can publish information about their own involvement in the youth justice system after they turn 18, if they are not in custody.
- The court may allow a youth 12 to 18 to publish information where the youth wishes to make the information about her/himself known and the court is satisfied that the publication would not be contrary to the youth's best interests or the public interest.
- A victim if over 18, or if the parents consent, or if the court approves, can publish information on his/her involvement with the youth justice system where such publication is not contrary to the victim's best interests or the public interest.
- Persons participating in a conference are allowed access to information.
- Information can be shared with any school board, school or other educational or training institution if the information is necessary to ensure compliance with reintegration leave from a custody sentence, or with an order of the youth justice court and to ensure safety or facilitate rehabilitation.
- Access periods for record disclosure are expanded to cover sentences of reprimand and to cover extrajudicial sanctions records.
- Special access rules are set out for extrajudicial measures other than extrajudicial sanctions.

The new term "publication" is now defined in section 2 of the *YCJA* as meaning "the communication of information by making it known or accessible to the general public through any means, including print, radio or television broadcast, telecommunication or electronic means".

This is distinct from the definition of "disclosure" under section 2 of the *YCJA* which means communication for purposes other than "publication".

Thus, the *YCJA* seeks to provide a clear distinction between information sharing to further the purposes of the Act amongst those dealing with the youth and release of information for the purpose of informing the general public.

Part 6 of the *YCJA* sets out a framework to protect information about young persons who have been dealt with under the legislation. This framework serves three purposes:

- It reinforces the basic rule protecting the privacy of young persons as offenders, witnesses or victims.
- It recognizes that publication of the names of young offenders may seriously impair rehabilitative goals of the youth justice system, handicap the youths' prospects for adjustment in society and acceptance by the public, and thus, jeopardize the long-term protection of the public.
- It provides for strict limitations on the publication of information about young persons, as offenders or as witnesses or victims of youth crime.

2. Publication

2.1 Purpose and Principle of Restrictions on Publication

As its basic rule, the *YCJA* prohibits the publication of the name of a young offender and of any information that could lead to the identification of a young person as someone being dealt with under the *YCJA*. In principle, the *YCJA* provides young persons and their families with protection of their privacy so as to avoid stigmatizing them so that their development and future success is not jeopardized. These provisions are similar to those found under the *YOA*.

2.2 General Rule Banning Publication and Exceptions

A general prohibition rule set out in subsection 110(1) states that "no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act". This provision includes a young person charged with or convicted of an offence, or under investigation.

The **exceptions** to the general rule are:

- Identity of a youth is not protected once they have received an adult sentence (section 110(2)(a));
- Identity of a youth can be released where the information relates to a young person who has received a youth sentence for a presumptive offence (clause 110(2)(b)). After conviction for a presumptive offence, the youth and the Crown will be asked if they want a ban on publication of identity. A ban can be instituted if the court "considers it appropriate in the circumstances, taking into account the importance of rehabilitating the young person and the public interest". This order is considered part of the sentence and can be appealed as part of sentence (subsections 75(3) and (4)).
- It is not publication if information is published in the course of the administration of justice, where it is not the purpose of the disclosure to make the information known in the community (clause 110(2)(c));
- A youth, once 18 years old, may publish information that would identify him/her as having been dealt with under the *YCJA* or *YOA*, provided he/she is not in custody pursuant to either Act at the time (subsection 110(3)). Once the information is published, further publication is no longer prohibited (section 112).

- A young person aged 12 to 18, dealt with under the *YCJA* or the *YOA*, who wishes to make public his/her involvement can ask the court for an order permitting publication. If satisfied that the publication would not be contrary either to the young person's best interests or the public interest, the court may make such an order (subsection 110(6)).
- A youth justice court shall, on the ex parte application of a police officer, make an order permitting any person to publish information that identifies a young person who has committed an indictable offence, if the judge is satisfied that
  - there is reason to believe that the young person is a danger to others; and
  - publication of the information is necessary to assist in apprehending the young person.
  - these orders cease to have effect after five days (subsection 110(4)).

These provisions provide for a broader range of publication than allowed for under the *YOA*.

Discussion

Under the *YCJA*, name some instances where the identity of a young person can be published.

2.3 Witnesses and Victims under Eighteen

A similar privacy protection scheme under the *YCJA* also covers children or young person victims and witnesses of crimes alleged to have been committed by a youth. Subsection 111(1) prohibits publishing the name or any information related to a child or young person if it would identify the child or young person as having been a victim or a witness in a case of an alleged offending by a young person.

There is again scope for the identity of a child or young person witness or victim to be released. Subsection 111(2) sets out two exceptions to the privacy protection that allow the identity of a child or young person victim or witness to be published:

- By the victim or witness after turning eighteen or before that age with the consent of his or her parents;
- By the parents of that child or young person victim or witness if he or she is deceased;
- A youth justice court judge, upon application of a child or young person (child is someone under 12 years of age and young person is someone 12 to 18 years of age), can allow publication, if the court is satisfied that the publication would not be contrary either to the young person's best interest or the public interest (subsection 111(3)). In this case, parental consent is not required.
- Again, once the information is published, the ban no longer applies (section 112).

Victims/Witnesses can only publish information about their having been a victim or a witness of a youth crime. They cannot reveal the identification of the offender.

Discussion

1. When can the identity of a child or young person witness or victim be published?
2. Can a child or young person victim or witness in a case involving an alleged young person crime reveal the identity of the young person who breaks the law?

2.4 Contravening the Ban on Publication

Publication of the identity of a young person dealt with under the *YCJA* as an alleged offender or as a child or young person victim or witness in contravention to sections 110 to 112 is a criminal offence. It is punishable by a maximum penalty of two years imprisonment or as an offence punishable on summary conviction (section 138).

3. Keeping and Accessing Records

3.1 Introduction

Youth records are protected to ensure the privacy of the young person and to assist youth to overcome their criminal behaviour. Records must be kept confidential and protected from inadvertent or inappropriate release.

The *YCJA* allows records to be kept by courts and by agencies involved with youth (sections 114, 115, and 116), but establishes a range of prohibitions against disclosure (sections 114 to 116).

There is clear recognition that the *Identification of Criminals Act* applies to young persons in the same manner as to adults in terms of the taking of fingerprints, palmprints, photograph, etc. (section 113).

Section 118 refers to information contained in any record that would identify the young person to whom it relates as "a young person dealt with under this Act" which could involve any of the following circumstances:

- There has been interaction between a young person and the authorities where any of the provisions of the *YCJA* have come into play.
- The young person had been under investigation but no charge has been laid.
- The young person has been arrested.
- Front-end measures (extrajudicial measures or extrajudicial sanctions) have been taken, whether or not a charge has been laid.
- The young person has been charged.
- The charges have been stayed or withdrawn
- The young person has been found guilty or acquitted
- The young person has been discharged, either absolutely or conditionally.
- The young person has or is serving a sentence.

The provision allowing access to records by designated persons or agencies must be interpreted in conjunction with the limitations and policy guidelines articulated in the Declaration of Principle in section 3.

3.2 Types of Records

The most common documents under the *YCJA* are "record" and "report". The term "record" is defined in the Act as including "anything containing information, regardless of its physical form or characteristics, including microform, sound recording, videotape, machine-readable record, and any copy of any of those things, that is created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act".

The expression "youth record" refers only to documents connecting a young person to proceedings under the *YCJA*, in relation to a criminal offence. Such records would usually include broad information about a young person such as:

- the individual's name, aliases, and
- other identifiers like
  - fingerprints and photographs;
  - arrest or charge dates;
  - identification of the criminal offence involved by reference to the specific section of the statute;
  - information provided to the court in a predisposition or medical report;
  - the disposition of the charge (finding of guilt, acquittal, stay of proceedings, withdrawal, etc.);
  - the sentence imposed if convicted;
  - sentence administration details on sentence calculation, breaches, etc. and
  - copies of courts transcripts.

Youth records may also contain information provided by family members, the youth, neighbours and former employers, school authorities and victims, as well as special reports prepared by the police, probation officers, youth workers, mental health professionals and others.

The term "disclosure" is also defined in the Act as meaning "the communication of information other than by way of publication".

However, the manner of disclosing a document could itself serve to identify an individual as a young person who has been dealt with under the Act, and therefore identify it as a record. For example, production of a copy of a driver's license, or an assessment report stamped as coming from a youth court registry, communicates the fact of the young person being dealt with under the Act. On the other hand, if the same licensing document is produced directly from a licensing official from their records, no criminal proceeding is identified.

3.3 Reports Forming Part of the Records

The term "report" refers to an assessment made, upon request of the court, by a professional for a specific purpose. These reports may form part of the record but are subject to specific disclosure rules, which can be even more restrictive than disclosure rules around "records".

The following are examples of reports that may form part of a record. For details about who could have access to medical or psychological report and pre-sentence report, in what circumstances and for what purposes, please refer to the sections on Judicial Measures and Pre-sentence Reports in this handbook.

- Medical or psychological report prepared, pursuant to subsection 34(2);
- Pre-sentence report prepared pursuant to subsection 40(2);
- Pre-decision report for lifting firearms order (subsection 51(8)) (this report is likely to form part of the record kept by the provincial director and the one kept by the court);
- Progress report on the performance of the young person since the youth sentence took effect for the purpose of reviewing the sentence (subsection 59(3) or 94(9)) (this report is likely to form part of the record kept by the provincial director and the one kept by the court);
- Setting out any information relevant to an application for continuation of custody (subsection 99(1)) (these reports are likely to form part of the record kept by the provincial director and the one kept by the court).

  Reasons stated by the court for the continuation of custody form part of the "court" record and are disclosable, on request, by the court to (section 100):
  - the young person and his counsel;
  - the young person's parent(s);
  - the prosecutor or
  - the provincial director.

- Special reports to assist the court in making its decision with respect to the conditions to be included in the conditional supervision order (subsection 105(6)) are likely to form part of the record.
- Special reports to assist the court in making a decision with respect to a young person remanded to custody after having breached a condition of his or her conditional supervision (subsection 109(6)) are likely to form part of the record.

3.4 Who may keep a Record

Under the *YCJA*, only the following entities can keep records of their intervention with a young person:

- Youth court and any other courts dealing with matters arising out of proceedings under the *YCJA* (section 114);
- Police –Any police force responsible for or participating in the investigation of the offence can have records on the investigation of an offence, including police notes, fingerprints, photographs and information related to front-end measures (subsection 115(1)).
- The **RCMP** can also retain records in a central repository known as the Canadian Police Information Center (CPIC) in relation to offences in which there has been a finding of guilt (subsections 115(2) and (3)). NOTE: Where a young person is charged with an indictable offence, to which the *Identification of Criminals Act* applies, the **investigating**

police force *may* provide a record relating to the offence to the **RCMP**. If the young person is found guilty of the offence, **the investigating police** force *shall* provide the record;

- Government departments or agencies may keep records for purposes of the investigation of an offence, for use in proceedings against a young person, for the purpose of administering a youth sentence, for considering whether to use extrajudicial measures or to record the use of extrajudicial measures (subsection 116(1));
- A person or organization (professional and community-based organizations) can keep records on young persons in relation to the use of extrajudicial measures (including extrajudicial sanctions) or for the purpose of participating in the administration of sentence (subsection 116(2)).

3.5 Who may have Access to Records

The basic approach to record accessibility under the *YCJA* is substantially similar to subsections 44(1) and 45(1) of the *YOA*. Access periods are a function of the verdict, the severity of the offence and the manner of prosecution, and whether other offences were committed during the period. If a new offence is committed during the access period, the period starts to run again, with the record of the first offence being accessible throughout the period in which the record of any subsequent offence was accessible.

The restrictions on use of or access to records do not apply to records of a youth sentenced as an adult once appeals are finished (section 117).

Access to records is not allowed except as permitted by the Act. Records can be shared between record keepers (subsections 118(1) and (2)), for example, a copy of a court order can be shared with police, youth workers, etc.

The *YCJA* lists those who must be given a court record on request and those who may be given access to a police or government record (subsection 119(1)):

- The young person to whom the record relates, his or her counsel, a representative of that counsel (paralegal), parents or adults whom the court has permitted to assist the young person during any of the proceedings (clauses *a, b, e,* and *f*);
- The Attorney General (Crown prosecutor) (clause *c*);
- The victim (clause *d*);
- Police officers for law enforcement purposes such as assisting in the investigation of any offence that the young person is suspected of or for administering the youth sentence such as reviewing the conditions of an order (clause *g*);
- Any judge, court or review board, for any purpose of proceedings in the allegations against the young person or offences committed while the person was a young person (clause *h*), but mere access does not mean it can be entered as evidence (subsection 119 (7));
- The provincial director or director of a correctional adult facility where the young person is serving a sentence (clause *i*);

- Any member or agent of any municipal, provincial or federal government, department or agency that administers extrajudicial measures or extrajudicial sanctions, prepares reports pursuant to the *YCJA*, prepares sentencing reports, administers a sentence—including prohibition orders, supervises or cares for a young person or considers applications for conditional release or pardon;
- A person participating in a conference, if required for the administration of the case (a caution to share only as needed) (clause *j*);
- A privacy or information commissioner or an ombudsman when investigating a complaint to which the record relates and as relevant to their mandate; or a coroner or child advocate acting under legislative mandate (clauses *k* and *l*);
- Government officials, agencies or government agents exercising duties under this Act, supervising or caring for a young person or investigating the young person re: child welfare, considering an application for conditional release or pardon, administering a prohibition under federal or provincial legislation, or administering a youth sentence in an adult facility (clause *n*);
- A person who carries out a criminal record check required by federal, provincial or municipal government for employment or service performance reasons (clause *o*);
- Officials or agents of the federal government who need access for statistical purposes pursuant to the *Statistics Act*, who may in turn disclose the information but not in a form which could identify the youth (clause *p*);
- An accused person or his or her counsel who swears an affidavit that the information is needed to make full answer and defense (clause *q*), but mere access does not make the record admissible in subsequent proceedings (subsection 119(7));
- Government officials or agents who need access for the purpose of determining whether to grant security clearances for purposes of government employment; or for the purposes of the *Firearms Act* (clause *m*);
- Persons designated by federal or provincial Order in Council (clause *r*);
- Persons granted access by a youth court for research and statistical purposes or in the interest of the proper administration of justice (clause *s*). NOTE: if access is given for research or statistical purposes, the information may be further disclosed but not in any way that would reasonably be expected to identify the young person involved (subsection 119 (8)).
- The National Archivist of Canada and the archivist of any province may at any time inspect any record (subsection 128(6)).

If a person is entitled or allowed access to a record, they are entitled to the information in the record and a copy of any part of the record (section 122).

Note that if a youth justice court has withheld all or part of a medical, psychological report from any person under sections 34 or 40, that person cannot get access to that material under section 119(1) (subsection 119(5)).

Also note that access to a medical report or DNA analysis report can only be given to the youth, their counsel, the Crown, the parents, the judge, an accused or his /her counsel where necessary to make full answer and defence, and where a judge finds a person has a valid interest in the

record and is satisfied it is in the interest of the proper administration of justice to allow access to the record.

3.6 Further Restrictions on Who may Access Records relating to Extrajudicial Measures

The *YCJA* circumscribes access to police, government or agency records relating to certain extrajudicial measures (warnings, cautions and referrals).

Subsection 119(4) restricts access to records on extrajudicial measures, other than extrajudicial sanctions. Access is given only to the following persons for the following purposes:

- Police officer or Crown prosecutor to assist in making a decision whether to again use the extrajudicial measures in respect of a young person;
- A person participating in a conference, in order to decide on the appropriate extrajudicial measure;
- Police officer, Crown prosecutor or a person participating in a conference, if access is required for the administration of the case to which the record relates;
- Police officer to assist in investigating an offence (subsection 119(4)).

3.7 Who May Access RCMP "special repositories":

Specific provisions set out in subsections 120(1) and (2) apply to regulating access to records kept in all RCMP "special repositories". These subsections set out who may seek access and for what purposes:

- The young person, his or her counsel or any representative of that counsel;
- An employee or agent of the Government of Canada, for statistical purposes under the *Statistics Act*;
- Any person that a youth justice court judge considers has a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that access is desirable in the public interest for research or statistical purposes;
- The Crown prosecutor or a police officer, when the young person is or has been charged with another offence set out in the schedule or the same offence more than once, for the purpose of investigating any offence that the young person is suspected of having committed, or in respect of which the young person has been arrested or charged, whether as a young person or as an adult;
- The Crown prosecutor or a police officer to establish the existence of an order in any offence involving a breach of the order; and
- Any person for the purposes of the *Firearms Act*.

3.8 Exception –Access to Records Following Adult Sentences

The *YCJA* provides an exception to records kept in respect of an offence for which an adult sentence has been imposed.

After the time for appeals has run out, or appeals have been completed, the record of an adult sentence delivered in youth justice court is treated the same as other adult records. The record provisions of the *YCJA* do not apply (section 117).

4. Information Use and Sharing

Section 125 of the *YCJA* sets out the circumstances in which certain information can be shared. The provisions include specific persons who can disclose certain records and the purposes for information sharing.

- A police officer may disclose to any person any information in a record kept under section 114 (court records) or 115 (police records) that is necessary in the conduct of the investigation of an offence (subsection 125(1)).
- The Crown prosecutor may disclose information in a record kept under section 114 (court records) or 115 (police records) (subsection 125(2)):
  - To a person who is a co-accused with the young person in respect of the offence for which the record is kept, any information contained in the record; and
  - To an accused in a proceeding, information that identifies the witness in the proceeding as a young person who has been dealt with under this Act.
- The Crown prosecutor or a police officer may disclose to the Minister of Justice of Canada information in a record that is kept under section 114 (court record) or 115 (police record) to the extent necessary to deal with a request to or by a foreign state under the *Mutual Legal Assistance in Criminal Matters Act*, or for the purposes of any extradition matter under the *Extradition Act* (subsection 125(3)).
- A police officer may disclose to an insurance company information in a record that is kept under section 114 (court record) or 115 (police record) for the purpose of investigating a claim arising out of an offence committed by a young person (subsection 125(4)).
- The provincial director or a youth worker may disclose information contained in a record if the disclosure is necessary for obtaining information that relates to the preparation of a report required by this Act (subsection 125(5)).

Schools

- The provincial director, a youth worker, the Crown prosecutor, a police officer or any other person engaged in the provision of services to young persons may disclose to any professional or other person engaged in the supervision or care of a young person – including a representative of any school board or school or any other educational or training institution – any information contained in a record kept under sections 114 to 116 (court records, police records or government records) if the disclosure is necessary to ensure compliance with reintegration leave from a custody sentence (section 91) or with an order of the youth justice court, to ensure safety of staff, students or other persons, or facilitate rehabilitation of the young person (subsection 125(6));

  NOTE: A person to whom information is disclosed under subsection 125(6) has an obligation to:

- keep the information separate from any other record of the young person to whom the information relates;
- to ensure there is no access to the information by any person unauthorized by the Act or to whom disclosure could not be made on the above basis; and
- to destroy their copy of the record when the information is no longer required for the purpose for which it was disclosed.

These requirements are more stringent than the requirements on the courts, police and government to restrict access. The Act actually requires that the record holder "destroy" the record and the time limit is not tied to "access periods under section 119", but to potentially earlier period of when the "information is no longer required".

There will be a need for persons receiving information under this provision to develop protocols on information management to meet the requirements of the Act (subsection 125(7)). That said, all information kept must respect the access periods in the legislation (subsection 125 (8)).

- Section 127 contains a specific "emergency" provision to enhance safety of individuals and permits the youth justice court, on application of the provincial director, the Crown or a peace officer, to disclose to the person or persons specified by the court any information about a young person that is necessary. The court must be satisfied that the disclosure is necessary where a youth has been found guilty of a serious personal injury offence, the youth poses a risk of serious harm to persons, and the disclosure of the information is relevant to avoidance of that risk. Before making this order, the youth, his parent and the Crown must be notified and given a chance to be heard. However, the Crown can apply *ex parte* where the youth justice court is satisfied that reasonable efforts have been made to locate the young person and those efforts have not been successful.

Discussion

1. For what purposes may a police officer disclose information? What type of information may be disclosed?
2. For what purposes and what type of information may the Crown prosecutor disclose?
3. What information are school authorities authorized to receive and how are they to treat such information?

5. Limitations on Access to Records

5.1 Restrictions on Further Disclosure

Anyone who is given access to a record, or to whom information is disclosed under the *YCJA*, may disclose that information to another person only when authorized to do so under the Act (section 129).

5.2 Periods of Access

A young person and his or her counsel may have access to the record at any time (section 124) without limitation as to access periods.

For other people who are allowed to have access to the record, there are time limits (subsection 119(2)). A youth record shall or may be made available for inspection until it is sealed (subsection 119(2).

If the time frames set out in subsection 119(2) have expired, and the youth record is "sealed", an application for disclosure is still possible (section 123). A youth justice court may order access be given to records of a particular young person or a class of young persons after the end of a statutory period of access if it is satisfied that (clause 123(1)(a)):

- the applicant has a valid and substantial interest in the record or part;
- it is necessary in the interest of the proper administration of justice; and
- disclosure is not prohibited under any other legislation.

Disclosure under 123 (1)(a) may relate to a particular young person or class of young persons only if the identity of persons in the class cannot be known at the time of the application and disclosure is necessary for the purposes of investigating an offence that may have been committed against a young person while they were serving their sentence (subsection 123(2)).

The youth court judge can also order access if satisfied that access to the record or part is desirable in the public interest for research or statistical reasons (clause 123(1)(b)). An application must be made before a youth court judge. At least five days notice in writing of the application shall be given to the young person to whom a record relates and the custodian of the record (subsection 123(3)), both of whom have a right to be heard at the hearing. However, a youth court may waive the requirement to give notice to a young person when it is of the opinion that

- to insist on giving the notice would frustrate the application, or
- the young person can not be found despite reasonable efforts

Discussion

1. Who may have access to the youth record at any time?
2. When the time frames set out in the YCJA expire, under what conditions is the disclosure of the youth record possible?

5.3 Access Periods and Record Destruction Rules

As discussed previously, under the record provisions of the *YCJA*, five different bodies may keep records:

- a youth court,
- the RCMP central repository,
- the police force responsible for the investigation of the offence,
- a department or agency of any government in Canada, and
- a person or organization involved in administering sentences or extrajudicial measures.

Only RCMP Central Registry records must be destroyed, generally, at the end of the access period (section 128).

The other record holders have the option whether to destroy records or not, but are still required not to disclose them after the end of the access period.

These new record provisions apply to records maintained under the *Young Offenders Act* and *Juvenile Delinquent Act* (*JDA*) with modifications as required (section 163).

The definition of "record" for the purposes of the *YCJA* covers anything created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act, and apply to all investigations, prosecutions and sentences commenced or continuing when the Act comes into force. Where a record applies to a person who has completed his involvement or disposition under the *JDA* or the *YOA*, then the provisions of those Acts apply to record retention or destruction. NOTE: this may require some readjustment of existing record keeping practices to capture records commenced under the *YOA* as well as creation of specific *YCJA* record regimes.

Subsection 119(2) of the *YCJA* prescribes the time periods that must elapse before a record can be destroyed or cannot be disclosed. These time periods are similar to subsections 44(1) and 45(1) of the *YOA*.

- In the case where *extrajudicial sanctions* are used to deal with the youth, a record is inaccessible on the expiration of two years after the young person consents to participate in an extrajudicial sanction program. NOTE: for the use of extrajudicial sanctions, dated and written consents are recommended to facilitate subsequent determination of the availability of the records. The period of access is not extended if there are subsequent charges or findings of guilt.
- In the case of *acquittal*, otherwise than by reason of a verdict of not criminally responsible on account of mental disorder, a record is inaccessible *two months* after the expiration of the time allowed for the taking of an appeal or, where an appeal is taken, three months after all proceedings in respect of that appeal have been completed. NOTE: where the finding is not guilty by reason of mental disorder, the record stays open indefinitely.
- In the case of *dismissal*, *withdrawal* or finding of guilt for which a *reprimand* is given, a record is inaccessible *two months* after the dismissal, withdrawal or finding of guilt.

- Where a charge is stayed, with no proceedings being taken against the youth for a period of *one year*, a record is inaccessible on the expiration of one year.
- In the case of absolute discharges, a record is inaccessible *one year* after the guilty verdict is rendered.
- In the case of conditional discharges, a record is inaccessible *three years* after the guilty verdict is rendered.
- In the case of a summary conviction offence, a record is inaccessible *three years* after the sentence is completed (unless another offence is committed during that three-year period).
- In the case of an indictable offence, a record is inaccessible *five years* after the sentence is completed (unless another offence is committed during that five-year period).
- In the case of a subsequent summary conviction offence, a record is inaccessible *three years* after all sentences made in respect of that offence have been completed.
- In the case of a subsequent indictable offence, a record is inaccessible *five years* after all sentences made in respect of that offence have been completed.
- In the case of presumptive offences (murder, manslaughter, attempted murder, aggravated sexual assault or repeated violent offences), the record may be retained *indefinitely* in the special records repository (clause 120(3)(b)).
- In the case of a violent offence, other than those mentioned above and set out in the schedule, the record will be kept in the special repository for an *additional five years* (clause 120(3)(a)). During that additional five year period, if the young person reoffends, access to the record may be given to a restricted list of individuals or agencies for specific purposes (subsection 120(4)), including research or statistical purposes (subsections 120(3) and (5)).
- If a person over 18 is found guilty of a subsequent offence before the requisite crime-free period for a youth record has expired, those youth records become part of the adult record and the rules applicable to adult records prevail (section 117 and subsection 120(6)).

In determining any time period, prohibition orders are not taken into account. The prohibition order may remain available long after other records are sealed. Information related to a prohibition order, however, can only be disclosed to establish its existence for purposes of law enforcement (to the police) and to establish the existence of the order in any offence involving a breach of the order (subsection 119(10)).

5.4 Subsequent Disclosure Prohibited

As a basic rule, the *YCJA* prohibits subsequent disclosure (section 129), with some exceptions:

- Records in the custody of researchers could be subsequently disclosed but only in a form that would not identify the young person (subsections 119(8) and 120(5));
- Records in the custody of the archivists, upon a youth court determination that the disclosure is desirable in the public interest for research or statistical purposes and the person to whom the information is disclosed undertakes not to disclose the information in any form that could reasonably be expected to identify the young person to whom it relates (section 126).

A person authorized to be given access to any record could be given a copy of any information contained in the record that is relevant to the request.

Discussion

1. What are some of the factors that influence how long a record is accessible?
2. What happens when a youth is convicted as an adult before the end of the access period?
3. Do all records have to be destroyed?
4. Can the court authorize release of records even after the access period has expired?

5.5 Offences Related to Contravening Record Protection Provisions

It is an offence to disclose records or information being part of a record after the time periods for access have expired or to a person who is not required or authorized to be given access to the record (section 138). The offence is punishable by indictment by imprisonment for not more than two years and by summary conviction. The provincial court has absolute jurisdiction to try an adult on these offences.

No application form for or relating to employment within government departments or related agencies shall contain any question that requires the applicant to disclose his or her involvement with the youth criminal justice system (subsection 82(3)). It is an offence punishable on summary conviction to contravene this provision (subsection 139(3)).

General Provisions (Part 7 of the *YCJA*)

1. Introduction

Part 7 (sections 130 to157) of the *YCJA* deals with a range of procedural issues (disqualification and substitutions of judges, exclusion from hearing, transfer of charges, forfeiture of recognizances, offences and punishment, application of the Criminal Code, evidence, forms, agreements with provinces, and programs). Most of Part 7 replicates provisions in the *YOA*.

Some of the more significant changes/sections to note include:

- Admissibility of statements – rules surrounding admissibility of statements broadened to recognize that technical irregularities should not bar admission of an otherwise voluntary statement (subsection 146(6));
- Breach of non-custodial court orders (section 137).

2. Exclusion from Hearings

The youth justice court is given specific authority to exclude the general public or persons not directly involved in the case as under the *YOA* for all or part of the proceedings. However, the prosecutor, the youth charged, and the provincial director or youth worker cannot be excluded except if there is an agreement to testify by video, or non disclosure of a medical or psychological report has been ordered (subsections 132(1) and (2)).

Following conviction, or on a review, the court can also exclude members of the public if information will be presented that in the court's opinion would be seriously injurious or seriously prejudicial to the young person (subsection132 (3)).

3. Transfer of Charges

Charges can be transferred between youth justice courts in different jurisdictions if the province where the offence is alleged to have occurred consents and the young person pleads guilty to the offence. If the youth pleads not guilty or pleads guilty, but the court is not satisfied with the evidence then the charge will be returned. This section is the same as section 18 of the *YOA* (section 133).

4. Forfeiture of Recognizances

These sections are the same as sections 48 to 49 of the *YOA*.

5. Offences and Punishment

The *YCJA* sets out a series of offences that apply to those interfering with youth justice processes and provides a penalty of up to two years imprisonment on indictment or summary conviction. It contains a provision (subsection 136(1)) similar to section 50 of the *YOA* to deal with persons who assist the youth or induce a breach of a *YOA* disposition.

The provincial court is said to have absolute jurisdiction over an adult charged with an indictable offence under this section.

It is a summary conviction offence if an offender willfully fails to comply with a sentence of conditional discharge, fine, restitution, personal service, community service, mandatory prohibition, probation, or victim fine surcharge, or similar dispositions under the *YOA*.

5.1 Failure to Comply with Youth Sentence

Section 137 is similar to section 26 of the *YOA*, but also covers conditional discharges, prohibition orders and the new sentences created in subsection 42(2). Failure to comply with a non-custodial sentence can result in charges under this section.

This section does not permit charges for a breach of a custody and supervision order during the community or conditional supervision portion of the sentence. There are special enforcement mechanisms contained in the Act for failure to comply with the supervision portion of a custody and supervision order that do not involve a separate charge but rather a review mechanism as set out in sections 102 and 105.

5.2 Offences

Anyone who contravenes the publication sections of the Act, being subsections 110(1) (identity of offender), 111(1) (identity of victim), 118(1) (no unauthorized access to records), 128(3)

(disposal of RCMP records), section 129 (no subsequent disclosure) or the equivalent provisions of the *YOA,* is liable on indictment to imprisonment for up to two years, or a summary conviction offence (section 138).

The jurisdiction of the provincial court to try an adult charged with the above offence is absolute (subsection 138).

Anyone who willfully fails to comply with section 30 (designated place of detention) or with an undertaking under subsection 31(3) (placement with a responsible person on conditions) can be subject to proceedings by indictment or summary conviction. The offence is similar to provisions under the *YOA*. As well, using or authorizing the use of an employment application form contrary to subsection 82(3) is a summary conviction offence (section 139).

6. Application of the *Criminal Code*

The *Criminal Code* applies except where inconsistent or excluded by this Act. This includes the provisions dealing with mental disorders and the defence of mental disorder with some exceptions (section 141).

The province is to designate a hospital for youth found mentally disordered (subsection 141(11)).

The summary conviction provisions of the *Criminal Code* apply to this Act except where inconsistent with peace bond applications, summary conviction offences, and to indictable offences. The six-month limitation period under section 786 of the *Criminal Code* applies. The court can order costs as under section 806 of the *Criminal Code* (section 142).

7. Procedure

Charges for indictable and summary offences can be contained in the same information (section 143).

A youth justice court can issue a subpoena for a witness, even if outside the province, but such a subpoena must be served personally (section 144).

A warrant issued by the youth justice court can be executed Canada-wide (section 145).

8. Statements to Police

8.1 Introduction

Subsection 146(1) of the *YCJA*, like section 56(1) of the *YOA*, provides that the general law on the admissibility of statements by accused persons applies with respect to young persons. The common law requires that, while a statement made by a suspect to a person in authority, such as a police officer, may be used in evidence against that suspect, the prosecution must first establish that the statement was voluntary. In other words, the statement was made without fear of

prejudice or hope of advantage, and was the product of an "operating mind" capable of understanding what was being said and appreciating the consequences of the statement.

8.2 Special Protections

Similar to section 56(2) of the *YOA*, subsection 146(2) of the *YCJA* goes beyond the common law to both codify and enhance the protections available to young persons in this area. However, the provision clarifies that these special protections apply only to young persons who are under 18 at the time of the statement, and they are not intended for the benefit of adults who may to be subject to the youth justice legislation because of their age at the time of offence.

The rules regarding the admissibility of statements are:

- The statement was voluntary (clause 146(2)(a)).
- The police officer or other person in authority to whom the statement is made shall first explain clearly to the young person, in language appropriate to his or her age and understanding, that:
  - the young person is under no obligation to make a statement;
  - any statement made by the young person may be used as evidence in proceedings against him or her;
  - the young person has the right to consult with counsel and a parent or other appropriate adult chosen by the young person;
  - unless the young person desires otherwise, any statement made by the young person is required to be made in the presence of counsel and/or the parent or other adult consulted by the young person before making the statement (clause 146(2)(b)).
- Before the statement is made, the young person has been given a reasonable opportunity to consult with counsel and with a parent or other appropriate adult (clause 146(2)(c)).
- A young person who consults with counsel and/or a parent or other adult has been given a reasonable opportunity to make the statement in the presence of the person or persons so consulted (clause 146(2)(d)).

The foregoing requirements under clauses 146(2)(b), (c) and (d) do not apply where the youth makes a spontaneous oral statement to a police officer or other person in authority before there is a reasonable opportunity to comply with those requirements.

Exercise 1

Choose the correct answer:

1. The special protections provided by subsection 146(2) of the *YCJA* apply only to young persons who are under 18 at the time of _____.
   a. the offence
   b. the statement
   c. their first appearance in the court
   d. all of the above

2. The language used before a young person makes a statement should be _____.
   a. appropriate to his or her age
   b. appropriate to his or her understanding
   c. in legal terms
   d. both a & b

3. Before the young person makes a statement, he or she has to understand that _____.
   a. he or she has no obligation to make a statement
   b. he or she has no right to consult
   c. the statement that is going to be made has nothing to do with the following proceedings
   d. all of the above

Discussion:

1. What are the special protections provided by the *YCJA* regarding a statement by a young person to a police officer? How can you apply them in your work?
2. In what case do the requirements set out in clauses 146(2)(b) to (d) of the *YCJA* not apply?

8.3 Steps before a Young Person Makes a Voluntary Statement

The following steps must occur before a young person makes a voluntary statement:

- The person to whom the statement is to be made must caution the young person that he or she has the right to consult counsel and a parent or other appropriate adult (subclause 146(2)(b)(iii));
- The person to whom the statement is to be made must caution the young person that any statement he or she makes must be made in the presence of counsel, a parent or other appropriate adult, unless the young person desires otherwise (subclause 146(2)(b)(iv));
- The young person must be given a reasonable opportunity to consult with counsel, a parent or other appropriate adult (clause 146(2)(c));
- If consultation with counsel, a parent or other adult occurs, the young person must be given a reasonable opportunity to give the statement in the presence of the person with whom he or she has consulted (clause 146(2)(d)).

8.4 Waiver of Right to Consult

Subsection 146(4) of the *YCJA* maintains the *YOA* subsection 56(4) procedure for waiver of:

- the right to consult counsel before making a statement to police; and
- the right to consult with a parent or other appropriate adult and to make their statement in the presence of any such persons consulted.

For the waiver of such rights to be effective, subsection 146(4) requires that the waiver be recorded on video tape or audio tape, or be in writing and contain a statement signed by the young person that he or she has been informed of the right being waived. The YCJA has added the new option of audiotaping a waiver.

Another new provision, subsection 146(5), permits courts to admit statements obtained without following the waiver procedure specified in subsection 146(4), provided they are satisfied that the young persons have been informed of their rights and have voluntarily waived them.

Exercise 2

Choose the correct answer:

1. A young person may waive the right to consult with _____ before making a statement to police.
   a. counsel
   b. a parent
   c. other appropriate adult
   d. any of the above

2. For the waiver of such rights to be effective, the waiver shall be any of the following EXCEPT _____.
   a. recorded on video tape
   b. recorded on audio tape
   c. oral
   d. in writing

3. If the waiver is in writing, it shall contain a statement signed by _____ that he or she has been informed of the right being waived.
   a. the young person
   b. the police
   c. the counsel
   d. the parent

4. Under the YCJA, the new option for the waiver to be effective is to have it _____.
   a. videotaped
   b. audiotaped
   c. in writing
   d. contain a statement signed by the young person

5. The YCJA permits courts to admit statements only when they are obtained following the waiver procedure specified in Clause 146(4).
   a. True
   b. False

6. If satisfied that the young persons have been informed of their rights and have waived them, the courts can admit statements made by the young persons.
   a. True
   b. False

8.5 Admissibility of Statements

A new provision, subsection 146(6), provides that a "technical irregularity" in complying with the requirements in clauses 146(2)(b), (c) and (d) does not necessarily render a young person's statement inadmissible. The court must be satisfied that the admission of the statement would not bring into disrepute the principle that young persons are entitled to enhanced procedural protection to ensure that they are treated fairly and their rights are protected.

Providing judicial discretion to admit statements obtained in violation of the requirements set out in clauses 146(2)(b) through (d) is intended to prevent the loss of otherwise legal evidence through technical or minor violations of these procedures.

Subsection 146(7) of the *YCJA* provides that a youth justice court can rule a statement inadmissible in the case where the young person satisfies the court that it has been made under duress applied by someone other than a person in authority.

Discussion

1. If there is minor technical irregularity, in what case might a young person's statement be considered admissible?
2. When can a youth justice court rule a statement inadmissible?

8.6 Misrepresentation of Age

In any proceedings under the *YCJA*, a youth justice court may, at the time of a young person's making of the statement or waiver, rule the statement or waiver admissible in the cases where (subsection 146(8)):

- the young person held himself or herself to be eighteen years or older;
- the person to whom the statement or waiver was made conducted reasonable inquiries as to the age of the young person and had reasonable grounds for believing that the young person was eighteen years old or older; and
- in all other circumstances the statement or waiver would otherwise be admissible.

Like subsection 56(5.1) of the *YOA*, subsection 146(8) of the *YCJA* prevents a young person from benefiting from a violation of the special procedures described above, where the young person has induced the violation by misrepresenting himself or herself to be an adult.

Discussion

1. What is the general law on the admissibility of statements by accused persons that applies with respect to young persons?
2. What steps are required before a young person makes a voluntary statement?

9. Statements made during the Course of a Medical or Psychological Assessment

Statements made during the course of a medical or psychological assessment are not admissible without the consent of the young person, except for the purposes of:

- Making a decision on an adult sentence;
- Determining whether the young person is unfit to stand trial,
- Determining whether a defence of infanticide applies
- Making or reviewing a sentence
- Determining whether the young person was suffering from automatism or a mental disorder at the time of the offence
- Challenging the credibility of a young person
- Establishing perjury of the young person
- Deciding an application for continuation of custody
- Setting the conditions under conditional supervision
- Conducting a review
- Deciding on an application for disclosure of information about a youth person (section 147).

10. Other Evidence Issues

The parties to proceedings under this Act can admit any relevant fact or matter (section 149). Parties can also, with consent, admit evidence otherwise inadmissible (section 150).

The court may instruct a child or youth in the duty to speak the truth before they can testify (section 151).

Service of documents can be proven by evidence under oath, affidavit, or statutory declaration (section 152).

No seal is required to validate documents (section 153).

11. Forms, Regulations and Rules of Court

Section 154 provides the authority to create or use prescribed forms. Forms may be taken from the *Criminal Code* or be prescribed by federal regulation (sections 154 and 155).

12. Relationships with Canada

Section 156 authorizes the federal government to enter into agreements with the provinces.

13. Community-based Program Authorization

Then Section 157 allows the federal Attorney General or a provincial minister to establish a range of programs from victim offender mediation to bail supervision, etc. It is not clear why this provision is needed given the authority to create programs within other sections of the Act or

under provincial legislation. It would appear to provide authority for the federal government to develop these programs rather than the province.

Transitional provisions (Part 8 of the *YCJA*)

The provisions governing the transition from the *YOA* to the *YCJA* are contained in Part 8 of the *YCJA*, sections 158 to 165. The following general rules apply:

- After April 1, 2003, no new proceedings can be commenced under the *YOA* or the *JDA* (section 158). Proceedings are commenced with the laying of an Information (section 162).

- However, where proceedings were commenced under the *YOA* (before April 1, 2003), they will continue to be governed by the *YOA* (section 159, subject to section 161) – except that:
  - Sentencing will occur under the provisions of the *YCJA* (section 161);
  - Publication of a youth's identity is not allowed if they receive a youth sentence for a presumptive offence; and
  - IRCS sentence may only apply if the young person consents.

- Where an offence is committed before the *YCJA* is in force, but proceedings were commenced after the *YCJA* is in force, the proceedings are governed by the *YCJA* (section 160) except:
  - Publication of youth's identity is not allowed if they receive a youth sentence for a presumptive offence;
  - The IRCS sentence may only apply if youth consents; and
  - The presumptive adult sentencing provisions of the *YCJA* apply, but the age remains at 16, and repeat "serious violent offence" designations not included in definition of presumptive offence.

  A number of existing designations under the *YOA* are deemed to continue to be applicable under the *YCJA* (section 165).

  - A youth court is deemed to be a youth justice court;
  - A judge of the youth court is deemed to have been appointed as a judge of the youth justice court;
  - Provincial director designations as well as youth workers designations are deemed to be designations under the *YCJA*;
  - Youth justice committees deemed to have been established under this Act;
  - Alternative measures programs deemed to continue in force as authorized extrajudicial sanction programs;
  - Temporary detention and open and secure custody designations are deemed to be youth custody facilities for the purposes of this Act (subsections 165(6)(7));
  - Designations of other persons who carry out specific functions and duties pursuant to the *YOA* are deemed to carry out the same duties and functions under this Act (court clerks).

- Where a young person is to be sentenced under the *YCJA* while still under a *YOA* custody sentence, the youth justice court shall convert the remaining portion of the *YOA* sentence to a custody and supervision sentence under the *YCJA* unless this would bring the administration of justice into disrepute (subsection 161(2)).

- The record provisions of the *YCJA* apply to records kept under the *YOA* or *JDA*, subject to modifications as circumstances require (section 163).

- Inter-provincial agreements under the *YOA* remain in force (section 164).

Consequential Amendments:

The amendments in Part 9 deal with changes in the *Criminal Code* and elsewhere to recognize new names and provisions in the *YCJA*.

The most noticeable changes are:

- Subsection 718.3(4) of the *Criminal Code* is amended so that the consecutive sentence provisions of the *Criminal Code* apply to sentences of the youth justice court.
- A new section 743.5 replaces sections 743.4 and 743.5 of the Criminal *Code* to deal with combined *Criminal Code, YOA,* or *YCJA* sentences. When there is a combination of youth and adult sentences, the youth sentences are treated as a sentence imposed under the *Criminal Code*.