

RESPONding to adolescent offending in Canada's youth justice system: progress and problems

Prof. Nicholas Bala

Faculty of Law, Queen's University, Canada

Best Interests of the Child Conference
Johnson Shoyama School of Public Policy
at University of Saskatchewan in Saskatoon
May 8 , 2014

JOHNSON
SHOYAMA | GRADUATE SCHOOL OF
PUBLIC POLICY

Abstract: Prior to the coming into force of the Youth Criminal Justice Act (YCJA) in 2003, Canada had one of the highest rates in the world for use of courts and custody for adolescent offenders. The YCJA significantly structured the discretion of police, prosecutors and judges, restricting use of courts and custody. With the enactment of this law, there have been changes in approaches of professionals and youth corrections policies. There have been substantial reductions in the use of courts and custody for youth in Canada, though there is significant variation across the country. Despite the success of the YCJA in reducing youth incarceration rates and spending on custody facilities without increasing youth crime, conservative politicians have continued to criticize the law, and enacted amendments to the YCJA in 2012.

This presentation reviews the history of juvenile justice in Canada, and describes the major provisions of the present legal regime, including analysis of the leading Canadian precedents on youth justice and the 2012 amendments. Despite the law-and-order rhetoric of conservative politicians and changes to the criminal law that are resulting in increases in adult incarceration in Canada, the 2012 YCJA amendments do not change the fundamental approaches to youth justice, and actually narrow the scope of pre-trial detention. The presentation considers some of the major concerns with youth justice in Canada, including high rates of involvement of minority youth, especially aboriginal youth, in the justice system, and concludes with suggestions for addressing challenges that need to be faced to reduce rates of youth crime in Canada, notably by improving access to mental health services and reducing child maltreatment and poverty.

Concerns about decline of youth!

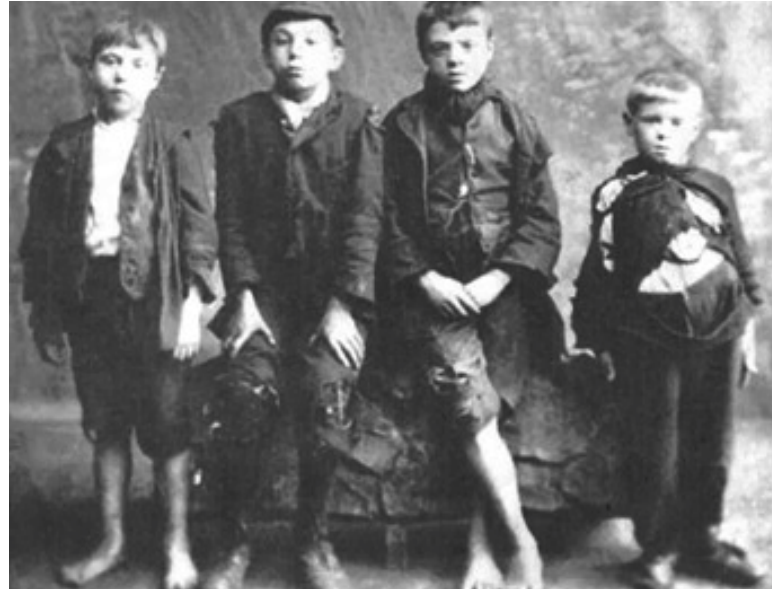
“Children now love luxury. They have bad manners and contempt for authority. They show disrespect for their elders and love chatter in place of exercise. Children today are tyrants. They contradict their parents, gobble their food, and tyrannize their teachers.”

Socrates 400 B.C.

Topics

1. Context of Youth Justice Law in Canada
 - History & Politics
 - Federal legislation & provincial implementation
2. Key Features of Youth Justice Law (YCJA, 2003)
3. 2012 Reforms
4. Conclusions – challenges in reducing youth crime

History of Youth Justice in Canada



History of Special Treatment of Youth in Canada

- Common law (doli incapax)
 - under 14 years presumption of incapacity
 - children as young as 8 yrs in 1800s in penitentiary
- **Juvenile Delinquent Act 1908-1984**
 - 7 yrs to 16 yrs
 - “best interests” philosophy
 - great discretion to police, judges & probation
 - indeterminate sentences (to 21 years)
 - child welfare & delinquency treated similarly
 - abuse in juvenile institutions
 - little regard for legal rights of juveniles

Young Offenders Act 1984 - 2003

- Enacted at time of introduction of *Charter of Rights* (Constitution)
 - recognition of legal rights of youth
 - uniform national age 12 to 18th birthday
- Recognition of accountability and protection of public, as well as special needs of youth
- Less discretion to police, judges & corrections than with JDA
 - Determinate sentences
 - No status offences
 - But lack of clear sentencing principles
- > variation by province in use of courts and custody, but under YCJA overall increase in use of courts & custody

YCJA: Context of Youth Justice Reform

- Youth crime peaked in 1992, but late 1990's
->70% of public lack confidence in YOA
- Demands for 'get tough' approach from conservative federal politicians
 - But more rehabilitative focus in Quebec
- Also concern as under YOA Canada had very high rates of use of court & custody for teens
- Custody important for accountability & protection BUT
 - often less effective than community programs in rehabilitating
 - may corrupt less serious offenders (gang influence)
 - expensive

Major features of YCJA (2003)

Liberal government enacts:

1. Emphasis on diversion from court
2. Restrictions on custody to violent or repeat offenders
3. For most serious violent offenders -> simplified process for adult sentences

Conservative politicians criticize YCJA:

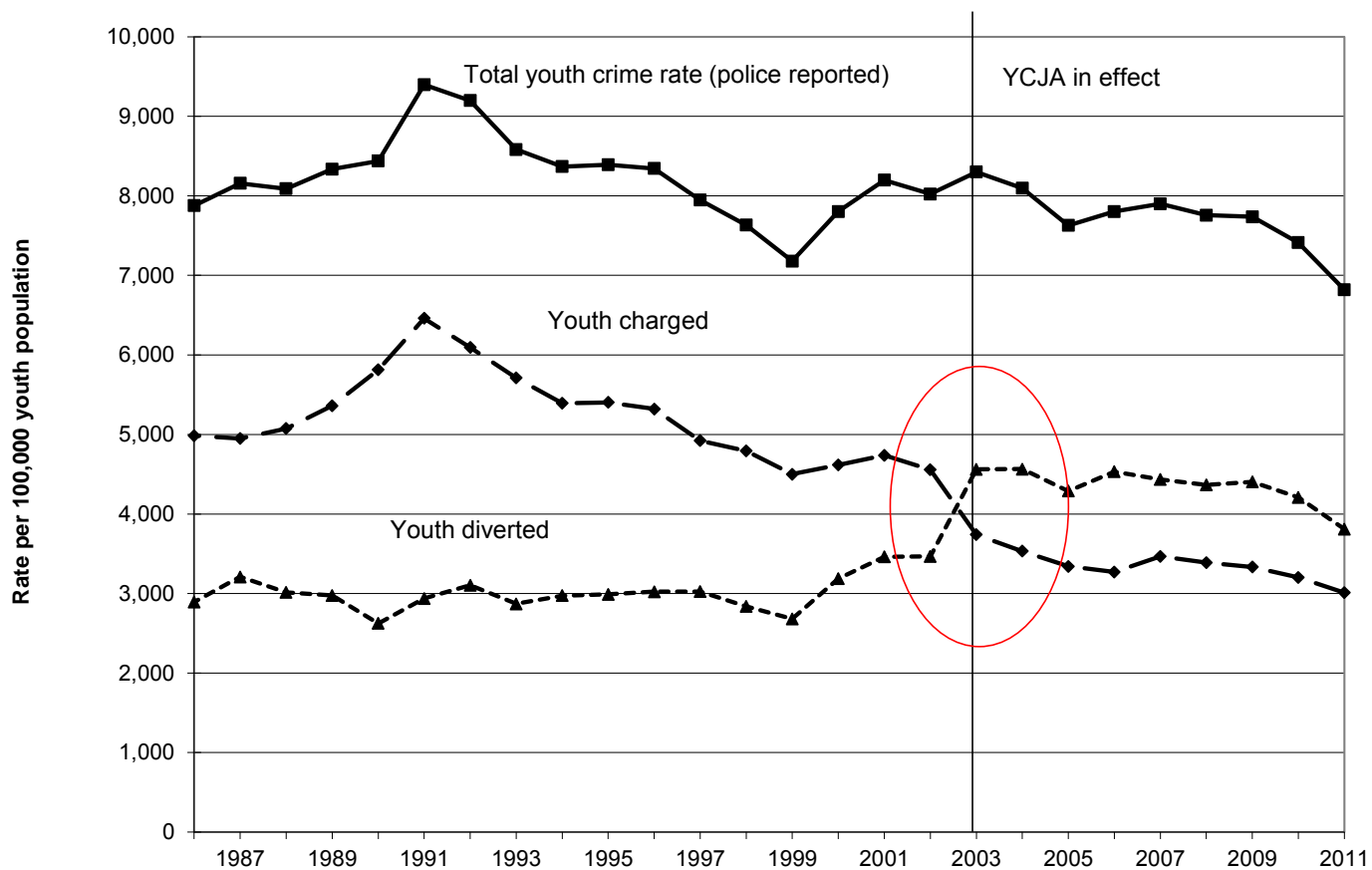
-> too soft on crime

e.g. "deterrence" & "denunciation" should be principles

Diversion: Extrajudicial Measures

- Background: Under YOA Canada had very high rate of use of court for adolescent offenders. Court is:
 - slow, expensive
 - frustrating for victims & parents
 - may not meaningfully engage youth
 - research from Australia & NZ suggests that informal responses may be more effective than court based in reducing recidivism
- YCJA encourages use of extrajudicial *measures*:
 - police cautioning
 - community-based diversion programs
 - no “youth court record” (but police have records)
 - restitution, apology & possible meeting with victim
 - community service
 - Counselling, mentoring

Youth crime, charges, and diversion: 1986 – 2011



Legal Rights

- Reflecting their vulnerability, youth have Charter rights of adults plus extra protections
- Youths have special rights upon arrest.
 - Right to consult parent
 - Right to have lawyer present
 - Waiver of rights to be signed
 - Most youths impressionable and confess to police
 - Serious issues with false confessions
- Youths have right to gov' t paid lawyer

Sentencing :YCJA (2003)

- Structuring of judicial discretion to reduce disparities & reduce use of custody
- Sentence is to be proportionate to the offence, and promote rehabilitation.
 - Accountability but lesser than for adults
- Rehabilitative and social objectives **cannot** justify more onerous sentence than offence warrants
- New community based sentence options
 - Deferred custody and supervision

Restrictions on Custody: s. 39(1)

“Gateways to Custody”

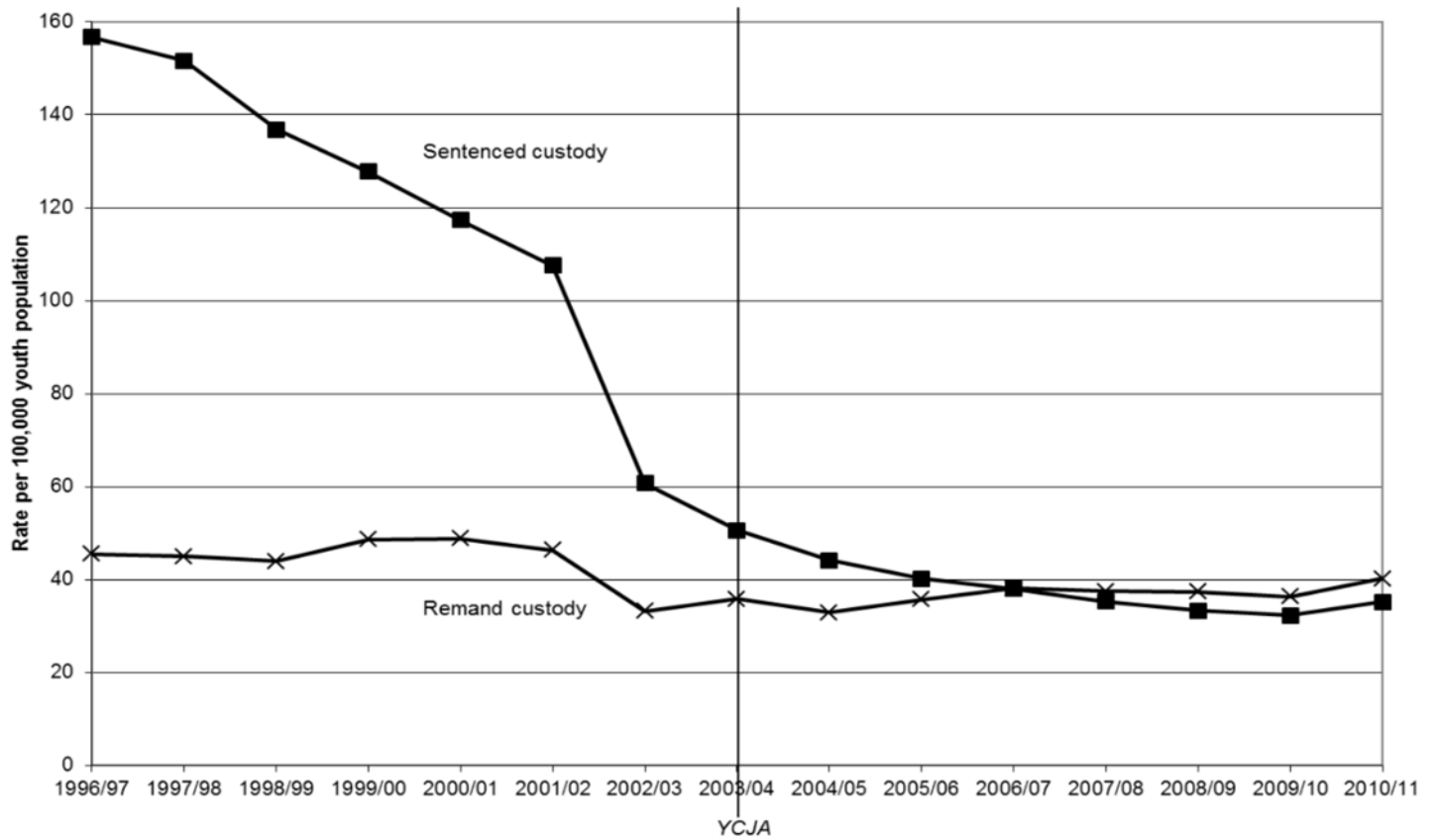
1. “violent offence”; or
 2. youth has failed to comply with non-custodial sentences s or
 3. “*pattern of findings of guilt*”; or
 4. “in *exceptional cases* where the young person has committed an indictable offence and the aggravating circumstances
- Supreme Court emphasizes “narrow interpretation” of gateways and restraint in use of custody

Pre-trial Detention:

- YCJA (2003) provisions intended to reduce pre-trial detention, but did not do so.
- Presumption against detention if no custody sentence possible
- In detention, programming is often limited & peer to peer abuse higher

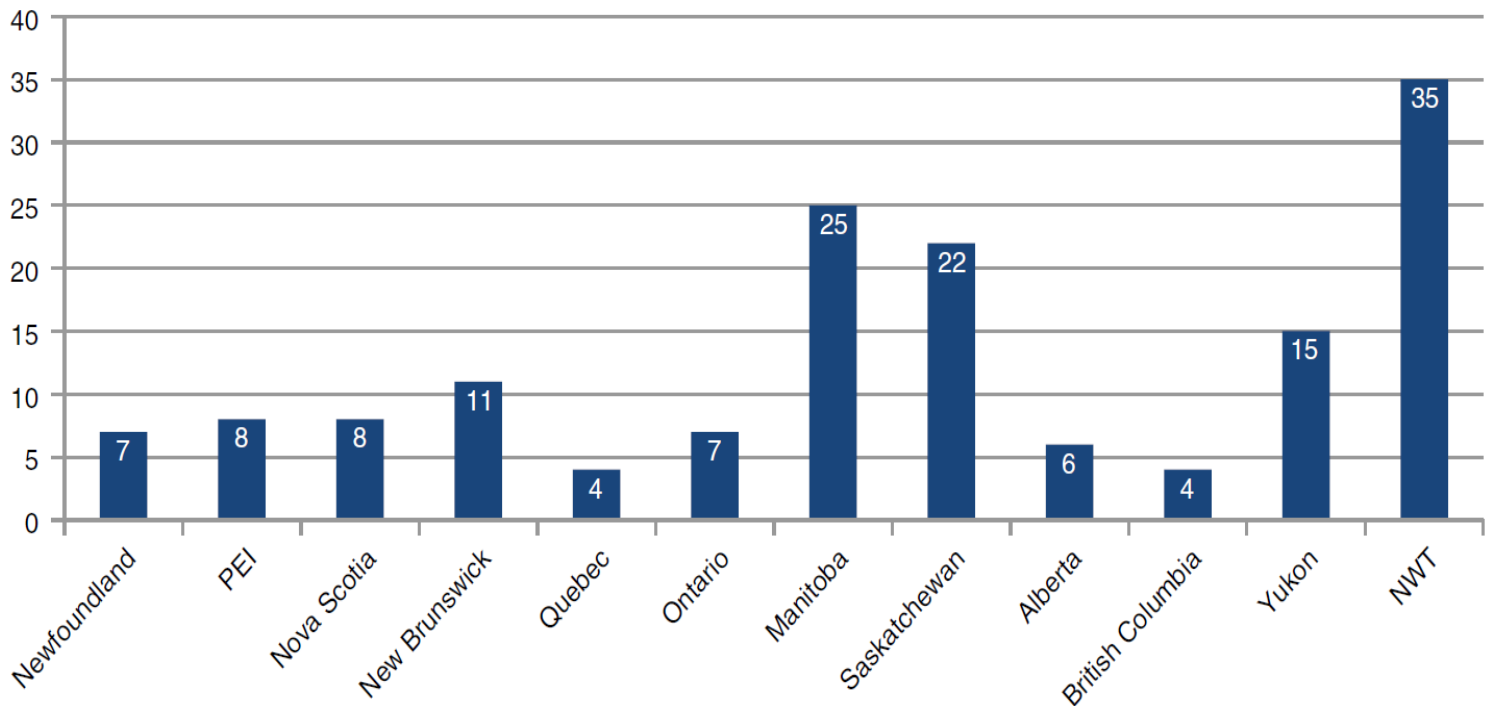


Fall in sentenced custody, but not remand



Variation in Youth Custody

Figure 4: Per Capita Rates of Youth in Custody by Province (2009/2010)



Rates are calculated per 10,000 youth population (12 to 17 years). Due to system changes in 1999/2000, British Columbia does not have historically comparable data before April 2000.

Source: Statistics Canada, Canadian Centre for Justice Statistics, Corrections Key Indicators Report.

Adult sanctioning

- Adult sanctioning
 - Exists in some form in most countries
 - Most serious offences & greatest risk
 - Recognizes limitations of treatment-oriented youth system
 - Need for long sentences for very small number of serious violent youth offenders

- Very different models between countries & over time in Canada
 - Variation in rates
 - Adult prison before 18?
 - Prosecutorial or court control?

Adult Sentences (2003)

- YCJA max. sentence is 3 yrs; except 10 yrs murder
- YCJA made judicial decision about longer adult sentence part of sentencing process-> faster
- Adult length sentence, but generally not in adult prison until 18 years and earlier parole eligibility than adults (eg for murder, life but if under 18 -->10 yrs parole eligibility vs. for adult, life + 25 yrs parole eligibility)
- Presumptive offence (2003): onus on youth to satisfy court why adult sentence should not be imposed (s. 72).**
 - if youth 14 or older
 - murder,
 - attempted murder,
 - manslaughter,
 - aggravated sexual assault, or
 - *third* “serious violent offence”

R. v D.B., 2008 SCC 25

- SCC finds “presumptive offence” provision of YCJA (2003) unconstitutional
Convention on Rights of Child cited and discussed
“because of their age, young people have heightened vulnerability less maturity and a reduced capacity for moral judgment.”
Thus, it is a “principle of fundamental justice” that there is a “**presumption of diminished moral culpability**”
-> **placing onus on youth violates Charter s. 7**
- Adult sentencing of youth acceptable, but onus must always be on prosecution to show that youth sentence inadequate
- R v D.B. “constitutionalized” requirement for different treatment for those under 18 yrs. (like *Roper v Simmons*)

Conservative Youth Crime Agenda

Conservative Party Rhetoric

- 2002 (Canadian Alliance):
Deterrence & denunciation should be in YCJA
- 2006: Conservative leader Harper said YCJA was “an unmitigated failure,” as it doesn’t “hold young lawbreakers responsible for their behaviour and... make them accountable to their victims and society.”
- 2007 Justice Minister Vic Toews proposed lowering age from 12 to 10 years
- 2008 Conservative election platform proposed “automatic, stiffer sentences for persons 14 and older convicted of serious and violent crimes.”

2012 : Omnibus Crime Bill (Bill C-10)

- For adults, new offences & new mandatory minimum sentences
- Rising adult incarceration rates
- Bill C-10: Clearly some YCJA changes had law & order appeal
 - “denunciation” & “*specific* deterrence” added as principles of youth sentencing
 - “violent offence” to include youth endangering others
 - – dangerous driving can result in custody
 - court may permit publication of identifying information about any “violent offence” committed by a youth, but judge to consider the effects on the rehabilitation of the youth, and publication only to be permitted if “necessary to protect the public safety” [s.75(3)]
 - -> Actually very narrow

2012 changes could have been more punitive

- No reduction in minimum age
- No presumptive adult sentences
 - 2008 Conservative platform limited by SCC R v DB
- Judicial discretion – no sentence minimums for youth
- Pre-trial detention rules clarified and narrowed
 - Gateways of violent offence or repeat offending
 - in all situations onus on Crown to justify detention
- “mellowing” of Conservative crime policy
 - some push back from provinces, or smart Tories ?
 - Query: rhetorical support for law & order votes but trying to limit impact on youth justice (and financial cost of more youth in custody?)

Conclusion: How to Reduce Costs of Youth Crime

- YCJA is a success
 - Less courts & custody, and no more youth crime
- Improvements needed to youth justice system
 - Inadequate resources for community-based responses
 - disproportionate Aboriginal and visible minority youth
 - more support for victims
 - > largely provincial responsibilities
- Reductions in youth crime require social responses
 - mental health services
 - reduction in child abuse & neglect
 - addressing FAS etc.

The End



bala@queensu.ca

References

- Bala & Anand, *Youth Criminal Justice Law*, 3rd edition, (Toronto: Irwin Law, 2012).
- Bala, "R v D.B.: The Constitutionalization Of Adolescence" (2009) 47 *Supreme Court Law Review* 211-234
- Bala, Carrington & Roberts, "Evaluating the Youth Criminal Justice Act After Five Years – A Qualified Success" (2009) 51(2) *Can. J. Criminology and Criminal Justice* 131-168.
- British Columbia Representative of Children & Youth, *Kids, Crime and Care: Youth Justice Experiences & Outcomes* (2009)
- Cesaroni & Bala, "Deterrence as a Principle of Youth Sentencing: No Effect on Youth, but a Significant Effect on Judges" (2008) 34 *Queens L.J.* 447-481.
- Sprott & Doob, "Gendered treatment: Girls and treatment orders in bail court" (2010), 52(4) *Can J Crim & Crim Justice* 427-441.
- Webster & Doob "Searching for Sasquatch: Deterrence of Crime Through Sentence Severity" in Petersilia & Reitz, *Oxford Handbook on Sentencing and Corrections* (New York: Oxford University Press, 2011).

YOUTH CRIMINAL JUSTICE LAW

SECOND EDITION

*Nicholas Bala
Sanjeev Anand*

ESSENTIALS OF CANADIAN LAW

\$54.00

IRWIN LAW

SUITE 206, 14 DUNCAN
STREET

TORONTO, ON M5H 3G8

TOLL FREE:

1.888.314.9014

~~WWW.IRWINLAW.COM~~