Canada's Approach to Minor Offences, Behavioural Problems and Administrative Detention

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I. Introduction

In the past few years, the Government of China has been reviewing and revising various forms of administrative detention that continue to be used in parallel to the criminal justice system.[1] The "Re-education Through Labor" (laodong jiaoyang) permits the detention for up to four years of people who are not formally regarded as "criminals".[2] This form of administrative detention applies to people who are accused of minor offences which are not considered to amount to "crime" in China. For example, this can include people who are deemed to disturb public order, such as prostitutes and people who engage in fights and petty theft. Detention for these groups of people is usually decided by the public security alone, without much judicial supervision or review, without charge or trial, with no right to counsel and no opportunity to defend themselves. The re-education through labour process does not proceed under the Chinese criminal justice system, however people receiving such a term can be detained for one to three years, which can be further extended by one year. With the signing of the *International Covenant on Civil and Political Rights*[3], China is preparing to change the Re-education Through Labour system to ensure the compatibility of the Chinese legal system with the provisions in the Covenant.

This paper is meant to assist our Chinese partners in such a review by providing some information on the Canadian approach to minor crime and problem behaviour as well as the use of detention outside the criminal justice system. In Canada, a crime involves socially proscribed wrongdoing that have been "agreed" by society as conduct that goes against not only the victim but also the community.[4] Even "minor offences" are dealt with in the criminal justice system, whether this is through the traditional or community based approach. The

[1] For example, when the Criminal Procedure Law was revised in 1996, one form of administrative detention known as "Custody and Investigation" was abolished. This is discussed in the Amnesty International report entitled *"People's Republic of China: Establishing the Rule of Law and Respect for Human Rights: The Need for Institutional and Legal Reforms"* Memorandum to the State Council and National People's Congress of the People's Republic of China (September 2002) found at www.amnesty.org/library/index/engasa170522002. The history of this procedure is also discussed in Human Rights in China *"Re-education through Labour (RTL): A Summary of Regulatory Issues and Concerns"* February 2001, found at www.HRIChina.org.

[2] The system of re-education through labour is based on a State Council Decision approved by the National People's Congress in 1957 and was later updated with new regulations. See Amnesty International report *supra* note 1.

[3] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS, 171, entered into force 23 March 1976. China signed the Covenant on 05 October 1998.

[4] Patricia Hughes and Mary Jane Mossman *"Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives"* (March 2001) Department of Justice Research and Statistics Division at page 5.

traditional criminal model puts the State in charge; the case is investigated by the police, the charge is brought by the prosecution and it is up to the State as to how far it will proceed. With the recent concern of the overburden in and cost of the justice system[5], as well as the shifting emphasis on restorative justice principles, many countries including Canada, are introducing various measures or alternatives to deal with minor offences. Such alternatives may be based on the restorative justice model which creates greater opportunities for involvement by the victims and more substantial connection between victim and offender.

Our criminal justice system focuses on specific acts defined as crimes in the *Canadian Criminal Code*. Of course these specific acts may be manifestations of underlying behavioural issues. Our system does not criminalise "behavior" *per se*, nor do we generally detain people who are seen as exhibiting problem behaviour that does not amount to a specific criminal act. There are other State mechanisms that address social ills, such as drug addiction, poverty, child neglect, but these do not generally include detention. However, administrative detention, or the use of forcible confinement for non-criminal matters, is used in a number of situations such as immigration and refugee claims, mental health issues and youth protection.

Part II of this paper serves as a review of the Canadian criminal justice system and the international norms pertaining to restorative justice and administrative detention. The importance of ensuring adequate safeguards, fairness and due process in administrative detention proceedings provided by international law is reflected in the Canadian laws on administrative detention. In addressing detention within the criminal justice system, Canada has played a significant role in promoting the importance of restorative justice around the world. The recent United Nations recommendations reflect the growing tendency by countries to seek alternatives to the traditional punishment discourse. Part III examines the history and evolution of the various forms of punishment and incarceration in Canada particularly dealing with minor offences and problem behaviour.

[5] In Canada between 1999-2000, approximately $2.4 billion was spent on the adult federal and provincial correctional system. The cost of keeping an offender in a federal penitentiary is about $67,000 per year. This compares to approximately $29,900 for a halfway house and $14,500 to supervise an inmate on parole. At 123 per 100,000, Canada's incarceration rate is higher than most other Western democracies. See Backgrounders: Alternatives to Incarceration on the Correctional Services Canada web cite at www.csc-scc.gc.ca/text/pubed/feuilles/alts_e.shtml. In 1990, Canada was experiencing 10% per year growth of its prison population, as compared to the long-term annual growth rate of under 2.5%. In 1995 the federal penitentiary population stood at 14,386, 5 years later, in 2000 it had dropped to 13,092, a decrease of 9%. One reason cited by the Director General of Corrections is the utilisation of community-based alternatives to imprisonment.

Part IV provides an overview of non-custodial measures currently in place in Canada to deal with minor offences. Underlying many of these measures are the principles of restorative justice, providing the victims and the community the opportunity to have a voice while holding the offender accountable for his or her actions. Part V looks specifically at how the Canadian system deals with vagrancy, prostitution, drug addiction, and child abuse or neglect. Part VI examines the procedural fairness that applies to administrative detention situations in Canada. Lastly, Part VII introduces some interesting alternatives to incarceration being undertaken by other countries. While each of these topics could easily be the subject of lengthy discussion, the modest purpose of this paper is to provide an introductory exploration of the legal framework relating to each.

II. The Canadian Laws and International Norms

i. A Review of the Canadian Criminal Justice System

The Canadian criminal justice and correctional systems are multi-layered and complex. The federal level of government is responsible for establishing the criminal law, while provinces are assigned responsibility for the administration of justice within their boundaries, including police and court administrations. Responsibilities for corrections are also divided between the federal and provincial governments. The federal government has responsibility to administer prisons holding prisoners sentenced to two years or more whereas provinces cover those prisoners sentenced up to two years. The federal *Corrections and Conditional Release Act* is the primary piece of legislation guiding adult corrections in Canada and covers matters pertaining to Correctional Services of Canada, the operations of the National Parole Board as well as a federal ombudsman for official complaints.[6]

Canadian literature on criminal justice reveals various perspectives about the goals of criminal justice and different theories of punishment and sentencing. There are those who perceive the

[6] *Corrections and Conditional Release Act*, RS 1992 c.20 found at http://laws.justice.gc.ca/en/C-44.6/.

criminal justice system as a "battle" in which the interests of accused individuals are seen to be opposed to those of the State.[7] It was Herbert Packer back in 1964 that formulated two competing models to describe different criminal procedure regimes, the crime control model and the due process model.[8] The crime control model protects the rights of law abiding citizens by stressing efficient apprehension and punishment of criminals. The regimes that follow this model try to minimize procedural restraints that get in the way of the goal of repressing crime. The due process model protects the rights of the accused. The regimes that follow this model are committed to other values in addition to truth finding and enforcement, such as fairness and individual liberty. Procedural regimes could adopt one model or the other or could be a compromise between the two.[9]

Darryl Brown points out a critical assumption:

> One model inevitably compromises the primary objective of the other. To protect due process values, we trade off crime-fighting effectiveness. To effectively control crime, we must sacrifice the autonomy and liberty values that enliven due process commitments.[10]

These models rely on the premises that the State has a monopoly on controlling crime and the assumption that criminal law deters crime. While these premises remain significant, they are not so dominant in today's discourse.[11]

Others have articulated a "family model" which presupposes that the State and the individual have a common interest "if only because they continue to live together after punishment".[12] As summarised by Hughes and Mossman:

> According to Griffiths, the "family model" recognised explicitly that criminal activity means that an individual has violated a community-defined norm, but that the violation should not therefore result in demonising the individual as a "criminal"; rather, a family model of criminal justice focuses on "what the *nature* of the process accomplishes as well as with the process' fitness to achieve its *object*".[13]

The family model has been most often used in cases dealing with juveniles. The reluctance to expand it was primarily due to concerns about due process and crime control. However, recent developments in restorative justice reflect more of the family model, such as the use of family

[7] Patricia Hughes and Mary Jane Mossman, *supra* note 4 at page 7.
[8] Darryl Brown *"The Warren Court, Criminal Procedure Reform and Retributive Punishment"* (2002) 59 Wash & Lee L. Rev. 1411.
[9] *ibid* at page 1419.
[10] *ibid* at page 1420.
[11] *ibid* at page 1420.
[12] Kent Roach's analysis on the family model as quoted in Patricia Hughes and Mary Jane Mossman, *supra* note 4 at page 8.

conferencing and mediation. It is noted that the current increased concern about victims' rights can be seen in both the traditional (battle model) and the restorative justice (family model).[14]

The literature also reveals different theories of punishment and sentencing. Rehabilitation and deterrence are sometimes seen as forward thinking theories of punishment as there is an element of crime prevention as a consequence of implementation.[15] Other theories include that of "just deserts" which means that the seriousness of the crime should be the chief element for the determination of the length and type of punishment, on the grounds of justice.[16] This theory looks at past conduct and not on the possibility of rehabilitation or deterrence in the future, focusing on the criminal action rather than the needs and situation of the offender. The above theories remain rooted in the traditional concept of criminal justice. As one study finds:

> …the current criminal justice system in Canada is still premised on the idea of punishment for wrongdoing, and a variety of justifications have been suggested: deterrence, maintenance of the social order, reinforcement of state or societal values, denunciation, the promotion of public safety, the need to remove the individual from society for a period of time, rehabilitation, social control, retribution, and ensuring that the offender knows that he or she has done wrong.[17]

This traditional approach to criminal justice is being challenged by the development of the restorative justice concept which "assumes that wrongdoing reflects disassociation with the community, and that the appropriate response is to try to reintegrate the offender into the community by re-establishing a positive relationship".[18] In other words, imprisonment could potentially have a negative effect on those individuals who are not career criminals but are introduced to such an "education" in prison. This in turn does not benefit the society when eventually they are released into the community.

The restorative justice model emphasises justice that "restores" offenders, victims and communities. Mediation and negotiation are used with the consent of all the parties involved to resolve disputes, rather than traditional criminal law processes which is through adversarial and

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[13] Patricia Hughes and Mary Jane Mossman, *supra* note 4 at page 8.
[14] *ibid* at page 8.
[15] Von Hirsch articulated this theory as cited in Patricia Hughes and Mary Jane Mossman, *supra* note 4 at page 9.
[16] *ibid* at page 9.
[17] Cooper and Chatterjee in *Canadian Institute for the Administration of Justice* as cited by Patricia Hughes and Mary Jane Mossman, *supra* note 4 at page 12.
[18] *ibid*.

coercive methods. It is more likely to be an effective strategy in crime prevention than the persistent use of imprisonment as an instrument to deal with criminal behaviour.

The evolution of the role of incarceration and punishment will be discussed in more detail in the next part of this paper. However, a brief word on the *Canadian Charter of Rights and Freedoms* (the *Charter*) is warranted due to the significant impact it has had on recent legislation, policies and procedures related to corrections.[19] The *Charter* codified certain rights long established under British Common Law and principles of natural justice, as well as contemporary Canadian human rights jurisprudence. The *Charter* focuses on the appropriate balance between individual rights and collective interests and the need for appropriate constraints on the powers of the State. This has lead to the growing pressure within the criminal justice system to operate fairly and transparently.

As part of a number of changes, in the mid-1990s, the government of Canada passed a package of sentencing and corrections reforms, which included tough new measures to deal with high risk, violent offenders but also encouraged the use of community alternatives for offenders convicted of less serious crimes.[20] Both the *Corrections and Conditional Release Act* in 1992 and the amendments to the *Criminal Code* in 1996 contain a statement of purpose and principle of sentencing. This statement provides direction to the courts on the fundamental purpose of sentencing: to contribute to the maintenance of a just, peaceful and safe society. The statement describes the objectives of sentencing as follows:

> Helping in the rehabilitation of offenders;
>
> Separating offenders from society where necessary;
>
> Providing restitution to individual victims or the community;
>
> Promoting a sense of responsibility on the part of offenders, such as acknowledging the harm they have done to victims or to the community;
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> Denouncing unlawful conduct; and deterring the offender and other people from committing offences.

In Canada, individuals can also be detained by the State for reasons unrelated to criminal activities and through procedures outside the criminal justice system. Such situations include

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[19] *Canadian Charter of Rights and Freedoms*, Schedule B, Constitution Act, 1982 found at http://laws.justice.gc.ca/en/const/annex_e.html.
[20] *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*, RS 1995 c.22 (Bill C-41) found at www.canlii.org/ca/as/1995/c22/ and the *Corrections and Conditional Release Act*, *supra* note 6.

asylum and refugee detentions, mental health detentions and educational or youth detentions, as discussed later in more detail. The *Charter* has had an impact on legislation and procedures dealing with administrative detention thus ensuring greater transparency and fairness in the deprivation of anyone's liberty. Cases have consistently recognised the need for fundamental procedural safeguards guaranteeing fairness, such as the right to challenge the lawfulness of the deprivation of liberty before a competent authority.

ii. Recent United Nations Recommendations on Restorative Justice

In recent years, the United Nations, particularly the Commission on Crime Prevention and Criminal Justice, has been turning its attention to the development and implementation of mediation and restorative justice measures in criminal justice.[21] In 2000, at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, restorative justice issues took a prominent position in the workshop on offenders and victims which focused on accountability and fairness in the justice process.[22] With the significant growth of restorative justice initiatives around the world, along with a report by a Group of Experts on Restorative Justice submitted to the United Nations in 2001, the momentum culminated in the development of the *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (the *Basic Principles*) in 2002.[23]

The *Basic Principles* recognise that the concept of restorative justice is evolving and seeks to respond to crime while respecting the dignity and equality of each person. It defines the term "restorative justice" to mean any process where the victim and offender, and possibly, other individuals or community members affected by the crime, participate actively in the resolution of the criminal matter, generally with the help of a facilitator. Restorative justice provides:

> an opportunity for victims to obtain reparation, feel safe and seek closure; allows offenders to gain insight into the causes and affects of their behaviour and to take responsibility in a meaningful way; and enables

[21] *"Development and Implementation of mediation and restorative justice measures in criminal justice"* ECOSOC Res. 1999/26 of 28 July 1999 and *"Basic principles on the use of restorative justice programmes in criminal matters"* ECOSOC Res. 2000/14 of 27 July 2000.
[22] *Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000: Report prepared by the Secretariat* (United Nations publication, Sales No. E.00.IV.8) chap. V, sect E.
[23] *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, ECOSOC Res. 2002/12 of 24 July 2002, E/2002/INF/2/Add.2.

communities to understand the underlying causes of crime, to promote community well-being and to prevent crime.[24]

There are a number of basic principles regarding restorative justice. Some of these include[25]:

i) restorative justice programmes can be used at any stage of the criminal justice system;

ii) should only be used where there is sufficient evidence to charge the offender;

iii) the victim and the offender must consent freely and voluntarily to this process;

iv) the victim and the offender should normally agree on the basic facts of the case as the basis for their participation;

v) such participation should not be used as evidence of admission of guilt of the offender in subsequent legal proceedings;

vi) disparities leading to power imbalances and cultural differences among the parties need to be considered.

An important aspect of the *Basic Principles* is the recognition of the fundamental procedural safeguards guaranteeing fairness.[26] Both the victim and the offender should have the right to consult legal counsel, access to full information about their rights, the nature of the process and the possible consequences of their decision. The process should be dealt with by an impartial facilitator. Furthermore, the results of the agreement should be judicially supervised or incorporated into judicial decisions or judgements.

The *Principles* call on States to establish guidelines and standards to govern the use of restorative justice.[27] Such guidelines should cover the issues of conditions for the referral of cases to restorative justice programmes; how to handle these cases; the qualifications and training of facilitators; administrative issues; and rules of conduct.

Restorative justice remains on the agenda of the United Nations. One of the workshops planned for the Eleventh Congress on the Prevention of Crime and the Treatment of Offenders which will take place in Bangkok in April 2005 is on enhancing criminal justice reform, including restorative justice. The prominence that restorative justice holds on the international criminal justice agenda is evidenced by the fact that there will be at least five ancillary meetings related to restorative justice at the Congress.

[24] *ibid*.
[25] *ibid*, see Principles 6-11.
[26] *ibid*, Principle 13.

iii. Administrative Detention under International Law

Administrative detention is defined as detention ordered by the Executive for reasons unrelated to criminal activities, such as detention or educational supervision, reasons of mental health, for asylum seekers, or for the purpose of deportation and extradition.[28] The power of administrative and ministerial authorities to order detentions has always been highly controversial and there have been many calls for its abolishment.[29] However, administrative detention does not violate international human rights law, but the law does set out some important safeguards, such as the remedy to challenge the lawfulness of the deprivation of liberty before the courts.[30]

The Human Rights Committee, the treaty-based body that monitors States' obligations under the *International Covenant on Civil and Political Rights* (the *ICCPR*), has expanded on the concept of administrative detention in its General Comment No. 8.[31] Article 9(1) of the *ICCPR* that deals with the right to liberty and security is held by the Human Rights Committee to apply to "all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc".[32] It follows that article 9(1) covers all cases of administrative detention. The basic legal rules regulating arrest and detention of articles 9 and 14 therefore also apply to administrative detention.

The Human Rights Committee has examined a number of cases relating to administrative detention. In one case dealing with deprivation of liberty for reasons of mental health, the Committee held that a nine-year detention under the New Zealand *Mental Health Act* did not

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[27] *ibid*, Principle 12.
[28] UN publication "*Chapter 5 - Human Rights and Arrest, Pre-Trial Detention and Administrative Detention*" in Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers (UN, Geneva).
[29] This is the view expressed by Mr. Louis Joinet in his report "*Report on the practice of administrative detention*" as cited in the UN report, *ibid*.
[30] *ibid*.
[31] Human Rights Committee, *General Comment 8, Article 9* (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 8 (1994) found at www1.umn.edu/humanrts/gencomm/hrcom8.htm.
[32] The quote is from the General Comment 8, *ibid*.
Article 9(1) of the ICCPR: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

violate the *ICCPR,* as it was neither unlawful nor arbitrary.[33] The person was detained under a committal order issued according to the law, based on an opinion of three psychiatrists, with continued regular review by both a panel of psychiatrists and the court.

In another case dealing with deprivation of liberty of asylum seekers, the Committee held that "there is no basis for the claim that it is *per se* arbitrary to detain individuals requesting asylum, although every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed".[34] It further held that "detention should not continue beyond the period for which the State can provide appropriate justification". For example, detention for a period may be justified in cases where the fact of illegal entry may indicate a need for investigation or the facts may indicate a likelihood of absconding if released. Without such factors, detention may be considered arbitrary, even if entry was illegal.

The European Court of Human Rights has also examined a number of cases involving administration detention. In one case dealing with deprivation of liberty for the purpose of educational supervision, the European Court held that a Belgium law that allowed detention of children and young persons for up to 15 days in a remand prison did not necessarily violate the *European Convention on Human Rights and Fundamental Freedoms (ECHR)*.[35] However in that case the circumstances of detention, which included conditions of virtual isolation without any educational training could not be regarded as furthering any educational aim and therefore the Court found a violation of the Convention.

In another case dealing with deprivation of liberty for reasons of mental health, the European Court held that the State must meet three minimum conditions before lawfully detaining a person due to reason of mental health: first, the mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; and lastly the validity of continued confinement depends upon the persistence of such a disorder. In another case dealing

[33] *A v New Zealand*, cited in the UN report, *supra* note 28.
[34] *A v Australia*, cited in the UN report, *supra* note 28 at page 179.
[35] *Bouamar Case*, cited in the UN report, *ibid* at page 176.

with deprivation of liberty for the purpose of extradition, the European Court held that such deprivation "will be justified only for as long as extradition proceedings are being conducted" and consequently "if such proceedings are not being prosecuted with due diligence, the detention will cease to be justified under the *ECHR*".[36]

Administrative detention or preventative detention has been used increasingly in situations of investigating terrorist activities and to prevent terrorism, particularly after September 11, 2001. The Human Rights Committee has examined preventative detention for reasons of *ordre public* or public security. In General Comment No. 8, the Committee states "if so-called preventative detention is used, for reasons of public security, it must be controlled by these same provisions, for example it must not be arbitrary and must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available as well as compensation in the case of a breach. And if, in addition, criminal charges are brought in such cases, the full protection of articles 9 and 14 must also be granted".[37] In the past, administrative detention was mainly used for minor offences or behaviour that did not necessarily amount to crimes. However, more countries are using administrative detention as part of their efforts to prevent and punish terrorism, considered one of the more serious crimes.

III. Punishment and Incarceration

Before examining the current policies and procedures for dealing with minor offences in Canada, this next section provides a quick history lesson. It examines the evolution of various forms of punishment and incarceration within the criminal justice system that was imported to Canada from England. This section also briefly explores the different theories on punishment that have been articulated over time in the Canadian system.

[36] *X v the United Kingdom* and *Quinn v France*, cited in the UN report, *supra* note 28 at pages 177 and 180.

i. Capital and Corporal Punishment

In the ancient world life was cheap: death was the punishment for almost every crime.[38] Reformers in the 13th century England, where the death penalty was imposed for all felonies except mayhem and petty larceny, started to question the extensive use of the death penalty. They argued that capital punishment for minor offences was not just cruel but also useless, as there was no evidence that such a penalty was a deterrent.[39] For misdemeanours, the practise of fines and corporal punishment became the norm, which included branding on the face with the initial letter of their offence, such as T for thief and V for vagrants.[40] Other types of corporal punishment included whipping, exposure in the pillory for a few hours, or public humiliation with badges, crosses or other marks of shame.[41] During this period, jails were mainly used as holding cells for offenders awaiting punishment. The focus of the criminal justice system at this time was on punishment and deterrence. The imposition of the form of punishment, whether the death penalty or corporal punishment, was conducted in the view of the public.

Imprisonment itself as a punishment was rarely used. Although as early as 1272, a number of statutes authorized imprisonment as punishment for certain offences.[42] It was the Church that encouraged the use of imprisonment as an alternative to corporal and capital punishment, believing that solitude and austerity could inspire remorse and rehabilitation. This evolution in philosophy reflected the Christian principle that sinners could redeem themselves through contemplation and penance. This "moral treatment" could be achieved through strict isolation, silence, hard work and austere conditions to promote reflection and repentance.[43]

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[37] General Comment 8, *supra* note 31.
[38] The oldest surviving criminal code, the laws of Hammurabi of Babylon (1700 BC), prescribed death sentences for almost everything. The Hebrews were more restrained: there were only 15 capital offences in the Mosaic Code, including murder, adultery, unchastity, bestiality, blasphemy, cursing parents and practising witchcraft. Under Roman law, death sentences were carried out for treason, adultery, sodomy, murder, forgery by slaves, corruption, certain kinds of kidnapping, seduction and rape. The term "capital" punishment comes from the Latin caput, meaning head, as decapitation was the most common method of execution. For further discussion please see Cecilia Blanchfield *"A Pictorial History: Part I of VI"* in Crime and Punishment newspaper of Correctional Service Canada Vol. 10, No. 7, 15 April 1985 at page 1.
[39] *ibid* at page 1.
[40] After 1699, the brands were applied to less conspicuous parts of the body, *supra* note 38 at page 2.
[41] For example a dishonest baker who short-weighted his customers would have to wear a mouldy loaf around his neck or a dishonest fishmonger would wear some rotten fish around his neck. See *supra* note 38 at page 3.
[42] For example, in 1285 the punishment for a lawyer who perjured himself before the court was one year in the gaol, see Linda Zupan, *Jails: Reform and the New Generation Philosophy* (1991 Anderson Publishing Co., Ohio) at page 9.
[43] Working Group of the Correctional Law Review *"Correctional Philosophy: Correctional Law Review, Working Paper No. 1* (June 1986, Solicitor General Canada) at page 7.

The 15th century saw an increase in crime with many farmers forced off their land and heading into cities. Jobless men were treated like criminals, flogged, branded and crowded into the first kinds of correctional institutions called bridewells and workhouses, the purpose of which was to give "honest work" to vagrants and petty criminals.[44] In the 18th century the population exploded along with a dramatic increase in the crime rate. Without a strong police force, it was felt that the only deterrent was capital punishment and the number of capital crimes increased to include a number of petty crimes.[45] Under such circumstances, many victims did not want to prosecute and many juries refused to convict. The court had the option to commute sentences to transportation, meaning indentured servitude in the colonies, such as America or Australia.

ii. The Emergence of Prisons

By the late 18th and early 19th centuries the new philosophy of liberty, dignity and equality of man emerged which led to the realisation of the barbaric nature of capital and corporal punishment. Prisons were believed by many to be the best avenue to improve criminals. However, by the early 1700s, most English jails were nightmarish. Prisoners were forced to pay exorbitant amounts for food and other services, cruel punishment was frequently used to ensure order, and prisoners could be held indefinitely. In 1777, John Howard published a report entitled "The State of the Prisons" after investigating a number of jails across England and Europe. He made a number of recommendations which were incorporated into the British *Penitentiary Act of 1778*, such as ensuring safe and sanitary structures, systematic inspections and abolition of the fee system.[46]

With the emergence of the penitentiary system, the use of corporal punishment decreased. However, social discipline was still enforced to some degree by corporal punishment: "children were strapped at home, boys birched at school, servants thrashed on the job and soldiers flogged in the barracks".[47] Petty criminals were also flogged. The severity of the whipping depending on the nature of the crime and the type of whip used.

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[44] Bridewells derived their name from the old royal palace of Bridewell in London, which was converted into a "house of correction" in 1557, see *supra* note 38 at page 3.
[45] Crimes punishable by death included thefts over 40 shillings, pick-pocketing, crippling cattle, stealing linen, cutting down trees, letting fish out of ponds, and included children as young as 7, as described in *supra* note 38 at page 4.
[46] *ibid*.
[47] *ibid* at page 5.

Canada inherited the British "bloody code" which relied almost exclusively on whipping and hanging as punishment for crime at a time when these methods were being challenged in England.[48] However, by the mid 18th century, only murder and treason were punishable by death in Canada. This reform was considered possible because of the development of hard labour in the penitentiaries as the form of punishment of choice.[49] It was not until 1976 that the government abolished capital punishment for murder from the Canadian *Criminal Code* and replaced it with a mandatory life sentence without the possibility of parole for twenty-five years for all first degree murders. Then finally in 1998 the last vestiges of the death penalty which was allowed for a number of military offences, such as treason and mutiny, was abolished.

The first penitentiary in Canada was opened in 1835. It was based on the Auburn model established in Auburn, New York, which featured the goals of punishment and reform through communal work in order to lead to a self-sufficient penitentiary.[50] Discipline and regimentation were deemed essential to reform offenders, which became increasingly harsh and inhumane.

Over the years there have been numerous Canadian Commissions and reports on the state of prisons reflecting the change of philosophy on punishment. The Brown Commission in 1849 investigated the cruelties of the first warden of the Kingston Penitentiary and reflected the philosophy of moral re-education replacing intimidation. Following this Commission, aspects of the Irish or Crofton system were introduced in the Canadian corrections system. This included a system of inmate grades, earned remission, gradual release, open institutions and parole.[51] These measures reflected a tendency to rely on individualised case by case assessments.

A Royal Commission in the 20th century reflected the new philosophy that the criminal was no longer seen as a sinner who needed to be redeemed but as a sick person who needed to be cured. This led to the development of "treatment" orientation and individualisation of treatment

[48] Cecilia Blanchfield *"A Pictorial History: Part II of VI"* in Crime and Punishment newspaper of Correctional Service Canada Vol. 10, No. 8, 15 May 1985 at page 3. These laws were introduced in 1763 in Lower Canada and 1793 in Upper Canada.
[49] *ibid* at page 4.
[50] Working Group of the Correctional Law Review, *supra* note 43 at page 7.
[51] *ibid* at page 8.

programmes.[52] The Archambault Commission of 1938 was considered a watershed of modern Canadian correctional reform which listed 88 recommendations on almost every aspect of the system.[53] The report reflected the new philosophy that the goals of the correctional system was to prevent crime, then to rehabilitate offenders and then to discourage habitual criminals. The Ouimet Committee in 1969 acknowledged that there was a problem in defining the appropriate aims of the correctional system in Canada. The Committee stressed the importance of the dual function of prisons, to provide security but also to provide long term protection through rehabilitation. The focus was still on trying to make the prison system work, rather than looking for alternatives to prison. However, in the 1970s, there was a growing scepticism about seeing offenders as suffering from a disease. The emphasis shifting to encouraging offenders to accept responsibility and to provide an environment as close as possible to that in the community.[54]

iii. Alternatives to Prison

The founder of the modern probation system was an American philanthropist who assisted a number of people in having the judge delay the pronouncement of a sentence for a few weeks during which time he would provide support in finding jobs, shelter, food and clothing.[55] He called the system "probation" from the Latin word probate meaning to prove. While probation was introduced into the Canadian system in 1889, it took a while before authorities and others started to see prison as a sanction of the last resort.[56] It was not until 1973 that a Canadian government paper recommended diversion for non-violent offenders.[57] One of the first official diversion projects was the Victim-Offender Reconciliation Program in Ontario established in the 1970s. Community service orders began to replace prison sentences in some cases and also restitution was being used as an alternative sentence.

Most recent reforms resulted when the resource-rich 1970s and 1980s suddenly ended and the criminal justice system was faced with backlogs of cases, severe cutbacks and questions on

[52] *ibid* at page 9.
[53] Cecilia Blanchfield, *supra* note 48.
[54] Working Group of the Correctional Law Review, supra note 43 at pages 10-11.
[55] Augustus John assisted approximately 1500 people avoid prison between 1841 and 1856. For more discussion, see Cecilia Blanchfield, *"A Pictorial History: Part VI of VI"* in Crime and Punishment newspaper of Correctional Service Canada Vol. 10, No. 15, 15 September 1985 at page 4.
[56] The Canadian Sentencing Commission, *"Chapter 12 Community Sanctions"* in Sentencing Reform: A Canadian Approach: A Report of the Canadian Sentencing Commission (February 1987: Canadian Government Publishing Centre).

how best to use the decreasing resources.[58] As part of these reforms, questions were raised about the traditional punitive responses to crime. Incarceration is the most expensive penalty in Canada.[59] More emphasis was paid to development of alternatives to the traditional criminal justice response, such as diversion, restitution and restorative justice models, particularly for minor offences.

In 1994, it was estimated that if the current rate of growth were to continue, the penitentiary population would double its size in 10 years. In the first Population Growth Report in 1996 a set of principles were recommended to Federal, Provincial and Territorial Ministers at an annual meeting. One of these principles was that:

> incarceration should be used primarily for the most serious offenders and offences where the sentencing objectives are public safety, security, deterrence or denunciation and alternatives to incarceration should be sought if safe and more effective community sanctions are appropriate and available [60]

The first Population Growth Report made 11 recommendations to the Ministers to promote non-carceral measures such as: making greater use of diversion programme; develop charge-screening policies to move appropriate cases into diversion programme; use risk prediction techniques more widely; develop aboriginal community pilot projects; and de-incarcerate low risk offenders. By the time of the fourth Report in 2000, there had been significant changes in the criminal justice environment. By 2000, the balance between community and custodial sentence had begun to shift.

While today the corrections system reflects the complexity of goals and philosophies of the past (security, punishment, deterrence, rehabilitation), another philosophy is influencing the evolution of the system, namely reconciliation. Reconciliation of the offender with the individual victim and with society has gained greater legitimacy in recent years along with the increasing recognition of victim's rights.[61] Reconciliation emphasizes the responsibility of the offender for his or her actions, the opportunity for the victim to obtain reparations and a feeling of safety; and for the community to understand the underlying nature of crime. This is reflected

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[57] Solicitor General's "Perspectives" paper of 1973, as cited in Cecilia Blanchfield, *supra* note 48 at page 6.
[58] Tammy Landau *"An Evaluation of Post-Charge Diversion: Final Report"* (February 2002, Research and Statistic Division, Department of Justice Canada) found at http://canada.justice.gc.ca/en/ps/rs/rep/rr01-7a-e.pdf at page 1.
[59] For example, in 1999-2000, approximately $2.4 billion was spent on the adult federal and provincial correctional systems in Canada. See Correctional Services Canada, *Backgrounder: Alternatives to Incarceration* found at www.csc-scc.gc.ca/text/pubed/feuilles/alts_e.shtml.
[60] This discussion taken from Richard Zubrycki *"Community-based alternative to incarceration in Canada"*, a Visiting Experts' Paper delivered at the 121st International Training Course as reprinted in UNAFEI Annual Report for 2002 at page 98.

in the increasing uses of alternatives to incarceration, particularly for minor offences, which will be discussed in the next section.

IV. Non-Custodial Measures for Minor Offences

Alternatives to incarceration can take many forms, some more closely linked to the traditional criminal justice system while others reflect more of a community-based approach. The traditional approaches to crime focus more on the offender and the harm done to the State and punishing the offender; whereas the community approach looks at the victim and the harm done to the community and tries to restore some justice to the victim. The following provides a summary of the various alternatives to incarceration in Canada. Some measures may avoid formal involvement in the criminal justice system all together, such as diversion and mediation. Other measures are incorporated into the traditional criminal justice system, such as probation, conditional sentence, fines, restitution and community service. There are a number of characteristics in the Canadian correctional framework that make the system conducive to alternatives to incarceration: a principles-based sentencing system, a research and risk-based correctional system, an active voluntary sector and community corrections professions and an acceptance by the community.[62]

Evaluation and research of the various alternatives is still "in its infancy" focusing not only on recidivism as the criteria to determine whether the alternatives are "working" but also exploring victim satisfaction, perceptions of fairness and restitution completion rates.[63] Traditionally, crime statistics are primarily collected through official court surveys and police charge data. As more criminal behaviour is dealt with outside the traditional system, the accuracy of the official data becomes questionable. Latimer and Kleinknecht note that to date, evaluations on recidivism have been insufficient to form any definitive conclusions. However, they observe that so far the available findings tend to indicate slight reductions in the recidivism rates of

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[61] Working Group of the Correctional Law Review, *supra* note 43 at page 23.
[62] Richard Zubrycki, *supra* note 60 at page 108. See also the note in the Backgrounder, supra note --- which provides that in 1997, a public opinion survey conducted by the Angus Reid Group shows that 85% of Canadians, regardless of their demographics, support alternatives to incarceration.
[63] Jeff Latimer and Steven Kleinknecht *"The Effects of Restorative Justice Programming: A Review of the Empirical"* (2000: Research and Statistics Division of the Department of Justice Canada).

offenders within restorative justice programs compared to the traditional system.[64] Research shows that providing offenders with a more satisfying experience within the justice system may help to lower recidivism rates. Victims tend to be satisfied following their involvement in restorative justice programs.[65] Furthermore, offenders are more likely to comply with the agreements negotiated in a restorative justice setting than with court-ordered restitution.[66]

A concern frequently mentioned about alternative measures is the potential for net widening, meaning that because these options are seen as soft, some offenders who would not otherwise have received any type of sentence would now come under these various alternative measures. Alternatives should be used only as alternatives and not as an additional form of punishment. The benefit is that they free up limited resources for more serious offences and reduce the workload for the courts. They are generally directed at people who have committed relatively minor, usually non-violent offences, and who can be more effectively dealt with outside of the traditional court system.

i. Diversion

The main goal of diversion is to reduce the number of minor offences which come before the courts while still holding the offender accountable for his or her actions. Diversion can take many forms, but it always involves admission of guilt by the offenders and the willingness to participate by both offenders and victims. Offenders sign contracts with the diversion authority, agreeing either to compensate their victims directly, through restitution, or to pay their debt to society by doing community service.

In Canada, informal diversion is nothing new, however formal diversion programmes, dating back to 1970s, really took hold in the early 1990s across the country. Diversion can be introduced as early as at the police investigative stage. Police can be involved in identifying candidates for diversion and may directly operate diversion programmes. Two examples of

[64] *ibid* at page 9-10.
[65] Umbreit, Coates and Kalanj found that 79% of mediated victims were satisfied with the processing of their case compared to 57% of the victims within a court sample. The mediated victims were also more likely to perceive their case to be handled fairly by the justice system (83% vs 62%) as summarised in *ibid* at page11.
[66] Umbreit, Coates and Kalanj found that restitution completion rate of 81% for mediated cases and 58% for court cases, as discussed in *ibid* at page 14.

these are the First Offender Classes and John Schools.[67] There is also court-based diversion programmes which are usually coordinated by the prosecution office and involve the probation service and community groups. As Richard Zubrycki notes:

> Such programmes were first developed by innovative Crown Attorney and Judges who recognised that programmes did not exist to deal with minor offenders who were often basically pro-social and considered a low risk to re-offend but who might be driven further toward a criminal life style by formal processing by the criminal justice system.[68]

Recent amendments in the *Criminal Code* provide for alternative measures for youths and adults.[69] Section 717 of the *Criminal Code* provides for pre-trial diversion to be used instead of judicial processing where a number of conditions are met, including an admission of responsibility for the offences and a consideration by the prosecutor that the measures are appropriate, having regard to the need of the person alleged to have committed the offence and the interests of society and of the victim.[70] This section prohibits such an admission from being used as evidence in court should the case eventually go to trial. Also this section ensures that the person participates freely having been advised of his or her right to counsel.

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[67] First Offender Classes are open to first time offenders who attend classes that deal with the law and the consequences of breaking the law. John Schools are designed for men who attempt to solicit a prostitute in an unlawful manner. Richard Zubrycki, *supra* note 60 at page 104.
[68] *ibid*.
[69] Bill C-41 in 1996 to amend the Criminal Code to introduce sentencing reforms.
[70] *Criminal Code*, R.S., C C-46 from David Watt and Michelle Fuerst, Tremeear's Criminal Code: The 2002 Annotated (2002: Carswell).
section 717.1(1) Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:
(a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney general's delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of a province;
(b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;
(c) the person, having been informed of the alternative measures, fully and freely consents to participate therein;
(d) the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;
(e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have been committed;
(f) there is, in the opinion of the Attorney general or the Attorney general's agent, sufficient evidence to proceed with the prosecution of the offence; and
(g) the prosecution of the offence is not in any way barred at law.
(2) Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person
(a) denies participation or involvement in the commission of the offence; or
(b) expresses the wish to have the charge against the person dealt with by the court.
(3) No admission, confession or statement accepting responsibility for a given act or omission made by the person alleged to have committed an offence as a condition of the person being dealt with by alternative measures is admissible in evidence against that person in any civil or criminal proceedings.
(4) The use of alternative measures in respect of a person alleged to have committed an offence is not a bar to proceedings against the person under this Act, but if a charge is laid against that person in respect of that offence,
(a) where the court is satisfied on a balance of probabilities that the person has totally complied with the terms and conditions of the alternative measures, the court shall dismiss the charge; and
(b) where the court is satisfied on a balance of probabilities that the person has partially complied with the terms and conditions of the alternative measures, the court may dismiss the charge if, in the opinion of the court, the prosecution of the charge would be unfair, having regard to the circumstances and that person's performance with respect to the alternative measures.
(5) Subject to subsection (4), nothing in this section shall be construed as preventing any person from laying an information, obtaining the issue or confirmation of any process, or proceeding with the prosecution of any offence, in accordance with law.

Examples of pilot projects provide a good illustration of how diversion programmes work. In Toronto in 1998 a post-charge diversion programme was introduced designed to screen more minor offenders from the prosecution process and have them fulfil alternative sanctions in the community.[71] The programme covered first-time offenders and was limited to minor property offences, although prostitution-related offences are also eligible. Another diversion programme was designed to divert first-time cannabis offenders. In these cases, the potential participant must "accept responsibility" for his or her actions, rather than "admit guilt". The prosecutor has discretion and can look at the broader context in deciding whether the potential participant is eligible for diversion. The administration of these programmes is done by a community-based agency that has experience in providing services to youth and adult offenders. If the accused is referred to diversion, this agency will interview the individual to ascertain whether he or she accepts responsibility for the actions which led to the charge and explains diversion. The range of possible alternative sanctions in a diversion agreement can include: making restitution or compensation to the victim; making a charitable donation; performing community service; attending counselling; and / or issuing an apology.

In a recent evaluation of specific diversion programmes in Canada, Tammy Landau reviewed two diversion programmes in Ontario.[72] This evaluation involved 670 individuals in provincial diversion and 664 individuals in federal diversion from May 1998 to December 1999.

> Provincial group: almost 90% were charged with property-related offences with the victim as a corporation in 80% of the cases. 7% were involved prostitution-related offences. 5% had a previous criminal record. 2/3 made a donation to a charitable organisation, 7% made restitution or compensation tot he victim, 40% attended a "Shoptheft Program" on the effects of shoplifting on the community and 25% performed community service. 10 individuals wrote an essay.
>
> Federal group: 97% were charged with possession of marijuana/hashish. 9% had previous criminal convictions. 96% performed community service.
>
> Completion of diversion: provincial group: 94% successfully completed their diversion sanction and had criminal charges withdrawn. Federal group: 91% successfully completed diversion. In both groups the conviction rate for subsequent offences within a 6-month follow-up period was low (4% of provincial group and 5% of federal group).[73]

[71] The information in this paragraph regarding the 1998 Toronto pilot project is summarised from Tammy Landau's report, *supra* note 58 at pages 1-2.
[72] Tammy Landau's report, *supra* note 58 at page 19.
[73] *ibid*.

Landau concludes that there is strong support to demonstrate that the programmes have been "successful". The goals of diversion in keeping minor offenders out of court, holding them responsible for their actions and providing meaningful resolutions to crime, have been met. However, she points out the possible conflict in shifting the diversion programme away from the formal traditional criminal justice system to a more community-based approach. Some argue that there are advantages of maintaining the system within the court structure, to ensure a consistent and fair manner in making the decisions.[74] However, others argue that the traditional approach focuses on the offender and harm done to the State and marginalizes the victim and the community.

Others list the benefits of diversion as including the fact that individuals do not get a criminal record, preventing "criminalization" of first offenders, which could increase the chances that they will not offend again. There are also cost savings to the court system, freeing up scarce justice resources for the trial of serious offences. There is also a reduction of social stigma of passing through the courts. It gives the community a chance to help in rehabilitation and it satisfies their desire for justice. Many people believe that reconciling victim and violator is more sensible and humane than ignoring one and degrading the other.[75] Some criticism of diversion programmes include the concern that such programmes may lead, but not always, to more cumbersome procedures or increased coverage of persons subject to this sanction. There is also the concern that these programmes may even be the focus of more intense social control.[76]

ii. Mediation Services and Restorative Justice Measures

The earliest restorative justice programme in Canada is generally recognised to have begun in 1974 when victim-offender reconciliation was introduced in the courts in Kitchener-Waterloo, Ontario.[77] Many other programmes are based on this victim-offender reconciliation or

[74] *ibid*.
[75] The Church Council on Justice and Corrections *"Satisfying Justice: Safe Community Options that attempt to repair harm from crime and reduce the use or length of imprisonment"* (1996: The Church Council on Justice and Corrections) at page 88.
[76] *ibid* at page 88.
[77] Cecilia Blanchfield, *supra* note 55 at page 4.

mediation model. Aboriginal variations are based on "the circle", a traditional aboriginal method of group deliberation, decision-making, conflict resolution and community healing.

Mediation service works in cooperation with the prosecution service to provide victim and offender mediation. Together they agree on a resolution that they feel is fair. It may involve restitution, community service or perhaps another option. It is seen to provide a chance for the victims to express their views directly to the offender and offenders then have the opportunity to learn about the consequences of their actions, to apologise and make amends directly to the victim.

The Royal Canadian Mounted Police (RCMP) operate diversion / mediation programmes called Community Justice Forums.[78] In these forums, a trained facilitator will convene a group of family members, victims and their support group and other relevant community members to meet the offender. As a group, they consider the appropriate course of action to satisfy the victim, the community and ensure appropriate sanction of the offender. Where the offender follows the agreed course of action, charges usually do not proceed. An example is the Sparwood's Youth Assistance Programme, where young offenders are diverted before charges are laid and brought into a resolution conference with the victim, families, friends and the community.[79] The RCMP officer will determine at the time of an incident whether diversion is appropriate. To be eligible, the offender has to meet certain criteria, for instance, no criminal record or outstanding charges; the incident must involve a minor, usually non-violent offence; the offender must never have been diverted in the past; and the offender must admit responsibility for the offence.

Sentencing Circles and Elder Panels were born out of traditional aboriginal methods of dealing with members of the community who broke traditional values. In the case of elder panels, elders or clan leaders sit with judges and provide advice about the appropriate sentence. This advice may be given in open court or in private. In sentencing circles, individuals are invited to

[78] Richard Zubrycki, *supra* note 60 at page 111.
[79] This example is described in Correctional Services Canada, "Speakers Kit Module 2 Pre-Charge Programs", see www.csc-scc.gc.ca/text/pblct/guideorateur/toc_e.shtml.

sit in a circle with the accused and other members of the community to discuss what sentence should be imposed. In both cases, the ultimate decision about the sentence rests with the judge.

A sentencing circle's aim is to shift the process of sentencing from punishment to rehabilitation and responsibility, providing an alternative for courts to incarceration.[80] The offender is presented with the impact of their actions in front of respected community members, elders, peers, family, the victim and their family. There are a number of guidelines and criteria as to when a sentencing circle would be appropriate, as set out in case law.[81] For example, the accused must have deep roots in the community in which the sentencing is held. Also the court must determine beforehand if the victim is subject to battered women's syndrome because if so she should have counselling and be accompanied by a support team.

In any of these programmes, the participants must provide fully informed consent, feel free to withdraw any time, must be fully informed about the process and its consequences. Both the victim and offender can have legal advice at any point during the process. An admission of responsibility cannot be used as evidence in any later legal proceedings.

One of the strengths of victim-offender mediation programmes is that it provides a unique opportunity for offenders to meet their victims in the presence of a trained mediator, providing them the chance to talk about the crime and express their feelings. Participants often view mediation as a positive experience, victims feel more empowered being given a voice in the process.[82] Successful mediation may result in reduced recidivism, however this is usually cited as a consequence of mediation rather than as a goal.[83] One concern by advocates of mediation is that it may be promoted due to reasons of expediency and cost rather than creating a higher quality of justice.[84] Any mediation programmes must avoid any elements of re-victimisation of victims.

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[80] Saskatchewan Native Law Centre *"Sentencing Circle: General Overview and Guidelines"* found at www.usask.ca/nativelaw/publications/jab/circle.html.
[81] Saskatchewan Provincial Court *R. v. Joseyounen* [1995] W.W.R. 438 at 442-46 or Ross Green's *Justice in Aboriginal Communities* at page 76.
[82] The Church Council on Justice and Corrections, *supra* note 75 at page 39.
[83] *ibid* at page 40.

iii. Probation and Conditional Sentence

Probation is one of the most valuable tools used to prevent offenders from being further drawn into the criminal justice process. Probation started in Canada in 1889 as conditional release for first time offenders who had committed relatively minor offences. It was in 1892 that the *Criminal Code* provided that first offenders convicted of offences punishable by not more than two years imprisonment could be released "on probation of good conduct" pursuant to a recognisance. Subsequent legislation in 1921 provided supervision within the community.[85]

Currently, Section 721 of the *Criminal Code* provides for pre-sentence reports to be prepared by probation officers.[86] This provides the courts to get a good sense of the behaviour dynamics of the offenders and to consider the appropriateness and feasibility of a community sentence. Sections 731 and 732.2 provide for probation orders of up to three years to be given as a sentence in and of themselves or in addition to a fine or sentence of imprisonment of two years or less. Section 732.1(3)(f) specifies that a condition of probation may be to perform up to 240 hours of work in the community, known as a community service order, under the supervision of a probation officer. Section 732.1(3)(g) authorises an enforceable condition of probation to require the probationer to attend a specified treatment programme in the community, known as treatment orders.

Section 742, introduced in 1996, created a new form of sanction, the "conditional sentence". It is similar to a suspended sentence or a probation order but is considered the equivalent of a custodial sentence although it is served in the community. It is therefore appropriate for more serious offences where there is no greater risk to the community than if the person were in custody. If an offender does not pose a danger to the community, courts can use conditional sentences when the jail term otherwise imposed would be less than two years. Judges place certain conditions on an offender such as community service or requesting that treatment be obtained. Conditional sentences are seen to be more punitive to other community sentences, and commonly contain conditions that amount to house arrest with strict curfews, limited

[84] *ibid* at page 42.
[85] The Canadian Sentencing Commission, *supra* note 56.
[86] Section 721 of Criminal Code.

reasons to be out of one's residence and restrictions of association.[87] Since the creation of conditional sentences, over 50,000 were imposed by the court in the first four years.[88]

One of the original rationales for probation was to reduce the number of offenders incarcerated, thereby addressing the problem of overcrowding in prison. Some studies have shown that this does not appear to be the case.[89] However, if we are not linking probation to imprisonment, the strengths include the emphasis on accountability rather than punishment, promoting a sense of responsibility on the part of the offender and providing for opportunities to assist in their rehabilitation. Some concerns regarding the conditions attached to a probation order are that if they are too strict, they may be setting up the offender for failure and keep him or her within the criminal justice system.

iv. Fines

Fines are a very ancient and widely used penalty in many criminal justice systems around the world. More recently, fines have been incorporated into non-incarcerative sentences, such as community service, probation, house arrest and electronic monitoring.[90] The purpose of a fine is punitive and deterrent. Fines reflect offender accountability as well as being used to compensate victims of crime, even where the specific offender has not been apprehended.

Fines can provide a graduated level of punishment, permitting the authorities to order amounts that reflect the gravity of the offence across a wide range of criminal behaviour, while adjusting to the offender's means. This allows equal punishment across a range of offenders who have different economic situations but are convicted of crimes of similar gravity.

Section 736 of the *Criminal Code* allows provinces to establish fine option programmes so that offenders may work to discharge fines owed to the court, including work while in custody to shorten time being served in default of payment of a fine. While fines are one of the most

[87] Two Supreme Court of Canada decisions have provided more clarity on the appropriate use of conditional sentences: *R v Gladue* (1999) and *R v Proulx*, cited in Richard Zubrycki, *supra* note 60 at page 110.
[88] As of August 2001, the courts have imposed 52,309 conditional sentences, permitting offenders to serve their sentence under supervised conditions within the community. See Correctional Services Canada web cite at www.csc-scc.gc.ca/text/pubed/skit/skit2_e.shtml.
[89] The Canadian Sentencing Commission, *supra* note 56 at page 359.

common sanctions used by the justice system, fines are often imposed on people who have no means of paying them and who end up in jail for non-payment. To correct this problem, new sentencing reforms require the courts to determine whether an offender is able to pay the fine. This should result in fewer persons being ordered to pay fines they cannot afford. Offenders who cannot pay may instead be subject to other options, such as community service or probation.

v. Restitution and Community Service Orders

Restitution is available for the judge to order at the post-charge stage during the time of sentencing. These orders require offenders to compensate victims for property loss and personal injury. This alternative recognises the financial impact that crime can have on victims and ensures that compensation will be considered as part of the normal process of sentencing. The restitution order can simply be filed as a civil judgement and enforced as such. Restitution has common law origins in feudal England.[91]

Section 738 and 739 of the *Criminal Code* provide for restitution orders to be made by the courts and administered by probation officers where it is so ordered. Section 738 provides that the offender may be ordered to make restitution to another person for the cost of property damage, pecuniary damages, including loss of income and reasonable living expenses in the case of bodily harm. The Attorney General or the court on its own motion can apply for such an order. It can be imposed in addition to any other measures. Section 739 provides that where property obtained by the offender's offence has been conveyed to a person acting in good faith or the offender has borrowed money from a third person on the security of that property and the property has been returned to the lawful owner, the offender may be ordered to pay restitution to the third person.

Community service orders emerged during the late 1970s and early 1980s as a "solution to the problem of jail overcrowding and a response to the concern that offenders should be subject to

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[90] Sally Hillsman *"Best Practice along the Criminal Justice Process: Criminal Fines as an Intermediate Sanction"* Speech delivered at Beyond Prisons Symposium, Kingston, Ontario, found at www.csc-scc.gc.ca/text/forum/bprisons/speeches/11_e.shtml.
[91] Canadian Sentencing Commission, *supra* note 56 at page 353.

better reintegration into the community".[92] These orders were at first seen as an alternative disposition for fines. However they are now seen to be *in lieu* of custodial sentences. A community service order can be considered as part of the normal sentencing process which requires that an offender do a certain number of hours of work in the community. It has been seen to be more meaningful, effective and less costly than a jail sentence.

vi. Electronic Monitoring

Electronic monitoring is a form of surveillance being used as a correctional measure. Offenders wear an electronic bracelet, usually around the ankle or wrist. If they stray too far from a receiver unit attached to a telephone when they are suppose to be home, an alarm sounds at the monitoring centre. This was developed in the United States as a method of enforcing home detention. It has been introduced in many Canadian provinces dating back from 1987.[93]

The objectives of electronic monitoring are to reduce the prison population and to protect society effectively with minimal social and economic costs. There are concerns that the technology and methods are not at a high enough standard to ensure public safety. This alternative fails to address many of the economic-social issues underlying the nature of crime, as many electronic monitoring orders do not have a rehabilitative component. Poor offenders may not posses a telephone or have access to decent housing, thereby raising the concern that there is not equal access for all to this sentencing alternative. However, while perhaps adding to the stress in families, many offenders feel that it is a more humane form of sentencing. The literature reviews show a very minimal recidivism rate.[94]

However many sentences which use electronic monitoring include a rehabilitative component such as community service order and / or treatment order. This device allows the offenders to remain integrated into the community and reduces the prison population.

[92] The Law Reform Commission of Canada recommended provisions for community service orders in a report dated 1977 as cited in Canadian Sentencing Commission, *supra* note 56.
[93] Church Council on Justice and Corrections, *supra* note 75 at page 173.
[94] *ibid* at page 174.

V. Control and Treatment of Behavioural Problems

There are a number of "social ills" in our society that the State addresses using a variety of measures. Sometimes these measures include criminal justice sanctions when a specific act, a reflection of the social ill, has been defined as a crime in our *Criminal Code*. However, action or behaviour that is not defined as criminal can remain of concern by the State. This section explores a number of "anti-social" behaviours and examines how our Canadian system approaches these issues.

The means of controlling and treating behaviour problems in Canada has undergone periodic transformation over the past years. As one commentator writes, the rapid urbanisation and industrialisation in the late 19th century resulted in the growth of middle class "values" which emphasised social order to address the perceived chaos brought about by rapid urbanisation.[95] This led to the introduction of a number of laws dealing with social issues, such as child protection, prostitution, delinquency and vagrancy, in an attempt to enforce through legislation middle class conceptions of childhood, family and society. Over the years, the original jurisdiction of police and law enforcement over issues of social order was shifted more to socialised tribunals, such as family courts or to the public health domain. However, as a review of this section will show, criminal or quasi-criminal law or some sort of forcible confinement may still play a part in controlling social behaviour.

i. Vagrancy

Homelessness is on the increase in Canada. It is difficult to arrive at the number of homelessness as census counts assume that everyone has an address. One study concludes that there were approximately 35,000 to 40,000 homeless people in Canada in the year 2000, using the narrow definition of those people living on the streets or in emergency shelter.[96] Canada has received a strong rebuke by the United Nations Committee on Economic, Social and Cultural Rights in 1998 when the Committee declared that Canada's failure to implement policies for

[95] Dorothy Chunn *"Regulating the Poor in Ontario: From Police Courts to Family Courts"* (1987) 6 Can. J. Fam. L. 85.
[96] Barbara Murphy, On the Street: How We Created Homelessness (2000: J. Gordon Shillingford Publishing Inc).

the poorest members of the population in the previous five years had exacerbated homelessness among vulnerable groups during a time of strong economic growth and increasing influence.[97]

In Canada, the use of vagrancy laws for the policing of the poor began in the mid-19th century. Canada's notoriously vague vagrancy law allowed the police to arrest anyone who had no "apparent means of support" and who was "found wandering abroad or trespassing" and could not "when required, justify his presence in the place where he is found".[98] In other words, vagrancy laws criminalized being able-bodied but unemployed. The law remained until the mid-20th century when it was repealed in the 1970s, cancelling the police's fairly broad and sweeping mandate to target the unemployed. Following the 1969 Manitoba Court of Appeal case which attacked the vague language, Parliament repealed the laws in 1972 citing that there had been "selective and discriminatory enforcement" and that the provisions had proven "abusive in application".[99]

With the concern in the perceived increase numbers of homelessness and the reduction of financial support by the government to mental health and social programs, people are turning to the police to manage the tensions created by those who are increasingly competing for the use of public space, such as the homeless, the chronically addicted and the mentally ill. Police are seeing their role shift, especially in urban centres throughout Canada, from that of investigators of crime to maintaining public order.[100] With the repeal of the vagrancy offence, the police argue that there is little that can be legally done to respond to complaints regarding street-level nuisances, such as aggressive panhandling or windshield squeegeeing.[101]

Some believe that there is a recent trend in laws and policies to resurrect the criminalization of vagrancy and poverty.[102] They cite fingerprinting welfare recipients and the deployment of

[97] Committee on Economic, Social and Culutral Rights, *Concluding Observations: Canada* (1999).
[98] Section 164(1) of the Criminal Code before it was repealed in 1972: "Everyone commits vagrancy who not having any apparent means of support is found wandering abroad or trespassing and does not, when required, justify his presence in the place of where he is found".
[99] *R v Heffer* (1969) 71 W.W.R. 615 (Man C.A.) as discussed in Justice Robert Sharpe *"Access to Justice Lecture – 2002: Brian Dickson, the Supreme Court of Canada and the Charter of Rights: A Biographical Sketch"* (2002) 21 Windsor Y.B. Access Just. 603 and House of Commons debate, vol 6 (11 June 1971 at 6646-47).
[100] James Stribopoulos *"Unchecked Power: The Constitutional Regulation of Arrest Reconsidered"* (2003) 48 McGill L. J. 225 at 247.
[101] Squeegeeing is done by mostly young people who approach cars stopped in the street and clean windows, sometimes without the consent of the driver or owner.
[102] Stribopoulos, *supra* note 100 at 247.

resources to police welfare fraud as just some examples.[103] Also, there appears that due to a number of new measures, vagrancy laws are being *de facto* re-established outside the *Criminal Code*.[104] These measures include the creation of municipal by-laws, zero tolerance policing policies and provincial laws like the Ontario's *Safe Streets Act.*[105]

The city of Winnipeg in Manitoba passed the first by-law in 1995 restricting public begging and setting fines of up to $1000 or up to 6 months in jail for such an offence.[106] This by-law became the general model for other Canadian cities. Ontario decided to enact the *Safe Streets Act* of 1999 to effectively make it an offence to aggressively panhandle, beg, solicit near a vehicle or in front of an automated teller machine or wash car windows in a road way.[107] While the Act does not use the terms squeegee or panhandler or even beggar, the central provision provides "no person shall solicit in an aggressive manner, while on a roadway, solicit a person who is in or on a stopped, standing or parked vehicle" as well as prohibit "solicitation of captive audiences".[108] For a first offence there is a fine of up to $500 and for subsequent offences a fine of up to $1000 and jail term of up to 6 months.

This Act has been subject to a constitutional challenge, with the lawyers for the accused arguing that sections of the Act are outside of the jurisdiction of the Province of Ontario as the power to enact criminal law is exclusively reserved for the Federal government. They also argue that sections of the Act contravene section 7 of the Canadian *Charter of Rights and Freedoms*, the right to life, liberty and security of the person, section 2(b) right to freedom of expression, section 15 non-discrimination clause and that the vagueness and overbreadth of the sections are contrary to the principles of fundamental justice guaranteed by section 7. The Ontario Court of Justice upheld the constitutionality of the law.[109] The court held that:

> Poverty in itself is not an analogous ground of discrimination under s. 15. Poverty is not immutable, like race, or constructively immutable, like religion. The defendants failed to establish that the Act discriminates against the extremely poor. The restrictions in the Act do not apply only to the poor.[110]

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[103] D.L. Martin *"Passing the Buck: Prosecution of Welfare Fraud: Preservation of Stereotypes"* (1992) 12 Windsor Y.B. Access Just, 52.
[104] Todd Gordon *"The New Vagrancy Laws and the Politics of Poverty in Canada"* Paper delivered at the Canadian Political Science Association Annual Conference (2004).
[105] *Safe Streets Act*, 1999 S.O. 1999, Chapter 8.
[106] Rudy Pohl *"Homelessness in Canada: Part I – An Introduction"* (2001: Ottawa Innercity Ministries).
[107] *Safe Streets Act*, *supra* note 105.
[108] *Safe Streets Act*, s. 3(f).
[109] *R v Banks* (Ontario Court of Justice, 2001).
[110] *ibid*.

An impact study of the Ontario *Safe Streets Act* was conducted three years after the Act came into force.[111] This study concluded that there is no solid evidence to support the viewpoint that the Act has made the streets any safer. However this study presented empirical evidence suggesting that the enactment and enforcement of the Act is associated with a reduction in the number of income generating opportunities available for homeless youth and is linked with a noticeable decline in the quality of shelter for these people.[112] Furthermore while the numbers of squeegee kids have reduced in certain areas, this activity has simply been displaced to locations not populated by tourists and upscale businesses.

Most recently the province of British Columbia passed a *Safe Streets Act* which makes it an offence to solicit in an aggressive manner or solicit to a captive audience.[113] It further amends the *Motor Vehicle Act* to make it an offence to walk on a roadway if the roadway has a sidewalk; to walk on the right side of a roadway that has no sidewalk; and to stop or approach a motor vehicle for the purpose of offering, selling or providing a commodity or service. One of the main criticisms of this Act is that it criminalizes behaviour that is a result of poverty, homelessness and mental health issues rather than addressing the underlying cause of those issues and thus unfairly targeting vulnerable groups.[114] This criticism further argues that there are already laws that address aggressive and intimidating acts in the *Criminal Code*.

Different levels of government, including the municipalities have introduced social strategies to address the problems of homelessness, including creating more emergency houses; focusing on social assistance reforms and the establishment of multi-disciplinary task forces.

[111] Bill O'Grady and Carolyn Greene *"A Social and Economic Impact Study of the Ontario Safe Streets Act on Toronto Squeegee Workers"* Online Journal of Justice Studies, Vol 1, No 1 (January) 2003.
[112] The conclusion in the study states: "not only has the Ontario Safe Streets Act created more conflict between the police and the homeless, but the effects of this legislation (unintended or otherwise) have also punished these youth by placing added limits on what were already constrained and limited economic opportunities. Be removing a relatively lucrative form of money making, the real punishment that has been imposed on these youth is further economic and social exclusion, particularly in the form of lower quality and riskier shelter", see *ibid*.
[113] *Safe Streets Act*, SBC 2004 Chapter 75, in force January 27, 2005.

ii. Prostitution

In recent years, prostitution-related activities have become an increasingly serious concern for many in Canada, especially the problems of youth involved in prostitution and violence in street prostitution. A Working Group on Prostitution was established in 1992 by the government of Canada with a mandate to review legislation, policy and practices concerning prostitution.[115] This working group found that:

> despite a series of *Criminal Code* amendments made over the last 25 years, there is compelling evidence that the current law is not working.[116]

The current legal framework does not criminalize prostitution *per se;* that is, the law does not prohibit the exchange of sex acts for consideration between consenting adults. Instead it criminalizes the activities necessary to carry out prostitution. Section 210 of the *Criminal Code* makes it an offence to work in, be present in, or own or live in a "common bawdy house". Section 211 makes it an offence to transport or direct anyone to a bawdy house. Section 212 prohibits procuring, soliciting, or "living off the avails" of prostitution. In addition, section 213 makes it an offence to communicate for the purpose of prostitution in a public place.

From reviewing the various *Criminal Code* provisions, the overall goal of the laws is not so clear. While there is no prohibition of the buying and selling of sexual services and therefore the avenue of prostitution is still accessible, the set of provisions created make it very difficult for a person to prostitute without violating the laws. Perhaps the purpose of the government could be seen as keeping prostitution off the streets and out of the public eye. As the Fraser Committee concluded, the main problem is that the prostitution law "is at odds with itself".[117] Basically, the sex industry is widely tolerated however underground.

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[114] BC Civil Liberties Association "Safe Streets Bill Attacks Civil Liberties and Poor Says Civil Rights Group" (12 May 2004) found at www.bccla.org/pressrelease/04safestreets.htm.

[115] Department of Justice "Federal/Provincial/Territorial Working Group on Prostitution: Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities" (1998: Department of Justice) found at http://canada.justice.gc.ca/en/news/nr/1998/toc.html. The Working Group consulted broadly with key stakeholders. Participants in the consultations included representatives of citizens' groups, justice officials, current and former prostitutes, municipal and provincial officials, community service providers, educators, clergy, aboriginal groups, child welfare and health workers and women's advocates.

[116] Quote taken from the Government of Canada, *"Response by Canada to the Advancement Written Questions of the Committee on the Elimination of Discrimination Against Women – Part I"* (2002: Government of Canada, Ottawa).

[117] The Fraser Committee Report, the Special Committee on Pornography and Prostitution (Fraser Institute: 1983).

While the Criminal Code makes it an offence for both prostitutes and clients to communicate for the purpose of prostitution (s. 213), studies show that this section is enforced against prostitutes much more often than it is against the male clients.[118] While this may be in part explained by the practicalities of law enforcement, one commentator is of the opinion that it is also based on assumptions that prostitutes being female are less worthy and valuable as members of society and are more entrenched in this lifestyle than the clients are.[119]

In responding to youth involved in prostitution, the government recognises that this must include both social intervention strategies, to assist and protect youth and also more effective measures to apprehend and prosecute those that exploit youth. Recent amendments to the *Criminal Code* in 1997 aim at protecting youth from adult predators who seek children for sexual services or exploit youth involved in prostitution for economic gain.[120] These amendments are intended to make it easier to apprehend and prosecute Canadians involved in sexual offence against children, whether in or outside Canada. A new offence of "aggravated procuring" was created for those who live of the avails of a child, use violence against that child and force that child to carry out prostitution.

The most effective programmes reviewed by the Working Group on Prostitution where those that involved police, prosecutors and child welfare officials working together to ensure the safety of the young victim and to provide the supports necessary to promote a successful transition away from prostitution. In addition to the *Criminal Code* provisions, some provinces have passed legislation focusing on protecting children involved in prostitution, which includes the use of administrative detention of these children, as discussed in Part VI. The Working Group felt that the most effective strategies for addressing the involvement of youth in prostitution are those that would prevent them from engaging in this dangerous and damaging activity, such as early intervention and educational awareness strategies, including the development of educational tools and resources.

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[118] Jennifer Koshan *"Alberta (Dis)Advantage: The Protection of Children Involved in Prostitution Act and the Equality Rights of Young Women"* (2003) 2 L.J. & Equality 210.
[119] *ibid*.
[120] Bill C-27, *An Act to Amend the Criminal Code (Child Prostitut9on, Child Sex Tourism, Criminal Harassment and Female Genital Mutilation)*, proclaimed into force 26 May 1997.

Street prostitution used to be considered more of a nuisance than anything else. However, recent studies show that this problem is beyond nuisance.[121] There is a strong relationship between violence against prostitutes and those working on the street. The strategies relating to street prostitution have as objectives of reducing harm to communities and the prevention of violence against prostitutes. In parallel with the criminal justice system, there are a number of social interventions, such as provisions of accessible services, including substance abuse programming and safe houses. There have been campaigns of "shaming the johns". As discussed in a previous section, there are diversion programmes, such as john schools for those accused who have procured prostitution services.

There is a debate within Canada whether the current laws should be rigorously enforced and enhanced or actually decriminalised and regulated. The arguments for criminalising prostitution may be influenced by the Judeo-Christian beliefs regarding morality. No one wants to enact laws that seemingly condones prostitution. However others argue that prostitution is more a reflection of social disorder than social morality and by regulating it may be the most effective way to control it. The debate also reflects the tensions from a feminist perspective. For some, the very practice of sexual service is a form of exploitation, reflective of the lack of choices for women and their low status in society. For others, they argue that women have the right to control over their bodies and to choose to work in whatever trade is most profitable to them. They see these women not as victims but in the same light as other workers. They argue that legislation against practices in the sex industry only increases their stigmatization and their vulnerability.

[121] Department of Justice report, *supra* note 115.

iii. Drug Addiction

Drug addiction and crimes resulting from such an addiction are serious problems that need to be addressed in new and various ways.[122] Drug abuse and addiction are chronic problems often associated with persistent criminal behaviour, violence, family conflict and health problems. Without proper addiction treatment, the rate of criminal recidivism is typically very high. The Government of Canada continues to work with provincial, territorial and municipal governments, addictions agencies, non-governmental organisations, professional associations, law enforcement agencies, the private sector and community groups to reduce the harm to individuals and to society from the abuse of drugs, as well as alcohol and other substances.

The Canadian government has developed a Drug Strategy which is said to take a balanced approach to reducing both the demand for and supply of drugs.[123] It also addresses a range of prevention, health promotion, treatment and rehabilitation issues and discusses the proposed legislative reforms regarding marijuana. The Strategy also creates and supports a strong and sustainable enforcement response to those who use or are involved in production and trafficking of illegal drugs. The recent proposed cannabis legislative reforms introduced in parliament would modernise the way Canada enforces the law, providing for alternative penalties against possession of small amounts of cannabis, and create new, tougher penalties to target large marijuana grow operations. These proposed reforms modify the penalties for marijuana possession to offer a range that ensures that the punishment available is appropriate to the seriousness of the crime and to avoid the complications and expense of the criminal process for minor offences, resulting in more effective use of justice system resources.

One innovating response to this problem has been the establishment of the Drug Treatment Courts. The Drug Treatment Court of Vancouver and Toronto are pilot projects that aim to reduce the number of crimes committed to support a drug dependence by reducing drug addiction through treatment services. The projects target prostitutes, youth and visible

[122] For example, by 1998, there were an estimated 11,700 injection drug users in Greater Vancouver, with a large percentage living on the streets or in temporary housing in a few square blocks in the city. According to a 2000 report by the city of Vancouver, the total number of overdose deaths in British Columbia had risen from 39 in 1988 to 331 in 1993. The information contained in this section is summarised from Public Safety and Emergency Preparedness Canada *"Governments of Canada and British Columbia Launch Drug Treatment Court of Vancouver"* (4 December 2001) News Release found at www.prevention.gc.ca/en/whatsnew/news/.

minorities, although other offenders with drug related offences are eligible to enter the programme. While many of the US drug courts have adopted an abstinence model, the Canadian Drug Treatment Courts has integrated a harm reduction treatment module of methadone maintenance within the programme. As a consequence, while the court requires that participants work towards abstinence from all illegal drugs, use of drugs while in the programme will not attract sanctions.

These projects operate a two-track eligibility system. Track 1 targets those offenders who have little or no criminal record and are charged with simple possession of crack/cocaine or heroin. They will be eligible to enter Drug Treatment Court prior to plea. If they complete the programme the charge will be withdrawn or stayed. Offenders precluded from Track 1 may be eligible for track 2. Track 2 incorporates those offenders with more serious records or who are charged with trafficking and are required to plead guilty to the charges as a condition of entering the programme.[124] As the Drug Court has only been in operation for less than 3 years success factors are still in initial stages. However, early evaluation reports conclude that the retention rate in treatment programmes where there is no judicial supervision are lower than corresponding rates in the Drug Courts.

These responses connect people receiving treatment with community services that are best able to deal with their related social, health and economic needs. This project is an example of how the criminal justice system, the police, the judiciary, and the defence lawyers, and the broader community can come together to deal with the underlying causes of criminal behaviour, and help break the cycle of drug addiction, crime and victimisation. These courts aim to reduce the

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[123] This paragraph is summarised from Health Canada *"Renewal of Canada's Drug Strategy to help reduce the supply and demand for drugs"* (27 May 2003) News Release found at www.hc-sc.gc.ca/english/media/releases/2003/2003_34.htm.

[124] The court in Toronto sits twice weekly and involves a pre court team meeting, lasting between 12 – 2pm. At 2pm new DTC candidates come before the court and the main court runs between 3 – 4.30pm. A typical session will involve between 25 and 40 drug court participants. Pre-court team meetings involve the judge, crown, probation, court liaison worker, treatment team member and court clerk. Initially pre-court meetings did not directly involve all the aforementioned. However, the drug court judge changed this and has since felt that the current system is much more effective. The procedure for a person appearing before the DTC for the first time will involve an assessment on eligibility. Between acceptance for drug treatment and appearance before the DTC, there will be a pre-court meeting to discuss every new application that wishes to enter the DTC. Prior to entering DTC, the participant signs a contract, confirming their wish to waive certain rights, and abide with relevant rules and regulation governing the programme. This is done in the presence of counsel. In discussing particular problems the one area which the judge felt would be a key advantage to develop would be an integrated management information system like those which have been recently developed in some of the larger US courts. Such systems of computer based drug court data have dramatically reduced time involved in the management of caseload information. The systems are designed to allow members of the drug court team, including judges, case managers, drug assessors etc to have instant up-to-date information on areas such as clients appointments, court dates, drug test result, programme requirements. This description of the workings of the Toronto Court is taken from Scottish Executive "Overview of the Implementation of Drug Courts in Countries Outside the US" Chapter Four in International Experience of Drug Courts at www.scotland.gov.uk/cru/kd01/green/courts08.htm.

burden on the justice system caused by repeat drug offenders. This aim underlines the main objective which is to enhance public safety.

In the last decade there has been a number of court decisions on the extent to which the government can control women who are pregnant, addicted to drugs and may be placing the fetus at risk. In one case an action was brought to impose detention and treatment on a pregnant substance abusing women in the absence of her consent.[125] Earlier legislation which had provided for a supervision order in such situations was held to violate s. 7 of the *Charter*.[126] The government in this case relied on provisions in the *Mental Health Act* as well as the doctrine of *parens patriae*.

The Supreme Court of Canada held that the provisions of the *Mental Health Act* which allows for detention and assessment where an individual acts in a manner that places either herself or another person at risk, did not apply as there was no evidence of mental incompetence. The Court further held that the doctrine of *parens patriae* could not support an order of involuntary detention and treatment. *Parens patriae* is a traditional doctrine that has allowed a court to step into the parent's shoes to assume jurisdiction to protect a child or another dependent person. It was held that such doctrine could not apply to the unborn child. The dissenting opinion, however, argued that the common law *parens patriae* jurisdiction should be expanded to allow for detention in the interest of fetal health, but only where the women has decided to carry the pregnancy to term, where there is proof on a balance of probabilities that the abusive activity will cause serious and irreparable harm to the fetus, where the remedy is the least intrusive option and where the process is procedurally fair.

Criticisms to this dissenting opinion include the concern that it creates "a sex-specific burden on Canadian women based on cultural stereotypes which entrench rather than address existing inequality".[127] Least intrusive options would seem to include assistance and support rather than

[125] *Winnipeg Child and Family Services v D.F.G.* as discussed in Sanda Rogers *"Case Comment and note: Winnipeg Child and Family Services v D.F.G.: Juridical Interference with Pregnant Women in the Alleged Interest of the Fetus"* (1998) 36 Alberta L. Rev. 711.
[126] 1984 Yukon Territory amendment to the Children's Act in *Joe v Director of Family and Children's Services* (Yukon) as discussed in Sanda Rogers article, *ibid*.
[127] *ibid*.

the invasive and draconian measure of detention and forced treatment. Women should feel free to seek medical treatment without fear of incarceration.

iv. Control of Venereal Disease

The concern about controlling venereal disease started with the fear of the return of infected men from World War II and the effect that the spread of venereal disease would have on the birth rate in Canada. Some provinces, such as Saskatchewan, passed a *Venereal Disease Protection Act* in the 1940s.[128] These pieces of legislation re-characterised venereal disease as a social, as opposed to individual problem, and allowed for governmental intervention. Such intervention included forced exams, mandatory testing and permitting detention until the results were known. The court could make an order requiring a person who resisted examination to be apprehended and placed and held in custody until the examination had been made. The release of the person would have to be authorized by a magistrate. These provisions were criticised for being exceptionally broad and providing authorities with a vast amount of discretion.[129]

These acts were eventually replaced by public health acts which repealed the provisions of detention and forcible treatment. The main focus shifted to education, awareness rising and public health.[130] This was one area of social behaviour that saw a shift from coercive sanctions to a social public health perspective.

v. Child Abuse and Neglect

The government recognises that given the extent of child abuse in Canada and the complexity of this issue any response needs to be multi-disciplinary. The Canadian Incidence Study of Reported Abuse and Neglect estimates that the incidence rate into child maltreatment investigations in Canada are 21.52 investigations per 1000 children.[131] Therefore various government departments work with other partners, including non-governmental organisations,

[128] The Saskatchewan *Venereal Disease Protection Act, 1946*, now repealed.
[129] Lindsay Ferguson *"A Moral Emergency and a Medical Problem: Negotiating the Control of Venereal Disease – The Saskatchewan Venereal Disease Protection Act, 1946"* (2004) 67 Sask. L. Rev. 137.
[130] In Saskatchewan the *Public Health Act 1994* replaced the *Venereal Disease Protection, 1946*.

to address child abuse issues through legal reform, public and professional education, research and support for programs and services.

Child welfare laws require that all cases of suspected child abuse must be investigated to determine if a child is in need of protection. If a child is determined to be in need of protection, the child welfare authorities may respond by, for example, providing counselling and support for the family, removing the child (temporarily or permanently) from the home, or removing the abusers from the home. At the provincial/ territorial level, child protection legislation permits intervention to ensure children's safety and welfare. For example, British Columbia's *Child, Family and Community Service Act* defines child welfare, provides for reporting laws and outlines investigation procedures.[132] The Ministry of Children and Family Development is responsible for training social workers in order for them to be able to determine whether a child is safe to continue to reside in his or her home or should be apprehended by the State for protection. At any and all court hearings regarding the plan of care for the apprehended child, the parents and the child have a right to counsel and to be heard.

Criminal sanctions may also apply in cases of sexual or physical abuse of children.[133] For example, offenders may be charged under the *Criminal Code* for assaulting children. In recent years, the *Criminal Code* has been amended to create new criminal offences relating to child sexual assault, to specifically include female genital mutilation in the aggravated assault provision, and to amend the provisions on child sex tourism as well as protect children from being lured on the Internet. Also the Criminal Code criminalizes failure to provide necessities of life.

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[131] Wolfe Trocme *Child Maltreatment in Canada: Selected Results from the Canadian Incidence Study of Reported Child Abuse and Neglect* (2001: Ottawa: Minister of Public Works and Government Services Canada) 135 573 child maltreatment investigations were conducted in Canada in 1998.
[132] *Child, Family and Community Service Act*, RSBC 1996, Chapter 46.
[133] Department of Justice Canada *"Child Abuse: A Fact Sheet from the Department of Justice Canada"* (2003) found at canada.justice.gc.ca/en/ps/fm/childafs.htm#preventing.

VI. Administrative Detention

Outside the criminal justice system, there are a number of situations that allow for the Canadian government authorities to impose administrative detention. The main situations of asylum and refugee detentions; mental health detentions and educational or youth detentions are discussed below. These situations are provided for by legislation which contains procedural requirements that have been scrutinised by the Canadian *Charter of Rights and Freedoms*.

i) Asylum and Refugee Provisions

The *Immigration and Refugee Protection Act* (IRPA) became law on June 28, 2002. This legislation replaced the former *Immigration Act.*[134] The objectives of the IRPA include the protection of the health and safety of Canadians, the maintenance of security of Canadian society and the promotion of international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks.[135]

The power to detain permanent residents and foreign nationals is said to meet the objectives of protecting Canadian society and support the enforcement of the IRPA. Section 55 identifies the grounds on which an officer may detain a permanent resident or foreign national, with or without a warrant: danger to the public, flight risk, identity or inadmissible on grounds of security or for violating human or international rights.[136] Specific factors that are to be considered before ordering detention, or during detention reviews by a member of the Immigration Division of the Immigration and Refugee Board (IRB), include whether the foreign national is involved with, or is under the influence of criminally organised smuggling or trafficking operations; is a fugitive from justice in another jurisdiction; has convictions in Canada or abroad or outstanding charges for serious offences; is affiliated with organised crime; length of time spent in detention; and alternatives to detention.

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[134] *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, Statutes of Canada 2001, Chapter 27 (Bill C-11, assented to 1 November 2001) found at www.cic.gc.ca.
[135] The description of the new provisions of the Act contained in the following paragraphs are summarised from Citizenship and Immigration Canada, *Bill C-11 Immigration and Refugee Protection Act Overview* found at www.cic.gc.ca.
[136] IRPA, section 55.

The mere presence of a factor or factors should not lead to automatic detention.[137] Regulation 248 stipulates that if an officer or the Immigration Division determines that there are grounds for detention, they shall consider: the reasons for detention; the length of time in detention; whether there are any elements that can assist in determining the length of time that detention is likely to continue; any unexplained delays or unexplained lack of diligence caused by the Department or the persons concerned; and the existence of alternatives to detention.

Detention reviews before the IRB must be within 48 hours or without delay afterward, once during the 7 days following and at least once during each 30 days thereafter.[138] In security certificate cases, where it is decided to detain a permanent resident, a Federal Court judge will be required to review the decision to detain within 48 hours, at least once in every six month period thereafter, and at other times as decided by a judge.[139] All persons detained on security certificates can apply to the Minister for release to permit departure from Canada. They can also apply for release to a Federal Court judge if they have not been removed within 120 days of the finding by the court that the security certificate is reasonable.

The government has created a departmental policy which sets out principles that they are guided by in situations of detention.[140] All persons detained must be treated with dignity and respect at all times; in an environment that is safe and secure; complying with international standards. Detainees must be informed of their legal rights and be given an opportunity to exercise their rights and be informed of the status of their cases. Detention operations are to be conducted in a transparent manner while also respecting the privacy of the detained person. Detainees must have access to a feedback process and there should be external monitoring of these facilities.

Since the Immigration Division is an administrative tribunal and it exercises quasi-judicial powers, the principles of natural justice apply to their proceedings. The term "principles of natural justice" is understood to mean the right to a fair hearing by an independent tribunal.

[137] Citizenship and Immigration Canada *"Manual on Detention"* (ENF 20, January 2004).
[138] IRPA s. 57.
[139] IRPA s. 77.
[140] Manual on Detention, *supra* note 137.

This includes the right to be informed of the facts of the case; the right to know the possible consequences of the hearing; and the right to respond to the case made against them. The courts have classified immigration proceedings as civil not criminal since the purpose of the hearing is to determine the person's status in Canada. This means that the standard of proof on the Ministry is that of a balance of probabilities rather than beyond a reasonable doubt. Also there is no privilege against self-incrimination within these hearings and therefore individuals can be compelled to give testimony. Although the applicant may seek protection to prevent use in any criminal proceeding.

The governmental policy requires that officers be aware that alternatives to detention exist. As an alternative, the officer can impose conditions, require a deposit of money or direct that a person participate in a third party risk management program. Conditions can include reporting requirements specifying specific times and agencies to report to. The officer can also release a person to a guarantor who is prepared to take responsibility for the person concerned. The policy provides that where safety or security is not an issue, detention should be considered a last resort for certain vulnerable groups, such as elderly persons, pregnant women, persons who are ill or handicapped.

The Act and regulations provide that special considerations should apply to the detention of minor children. Minor children shall be detained only as a measure of last resort and that the principle of the best interests of the child will be taken into account in all detention decisions involving minors.[141] The Act does not allow a minor child to be detained for their protection. Child protection is the responsibility of the provincial youth protection agencies.

The Federal Court of Canada has ruled that persons cannot be held indefinitely under the Immigration Act.[142] As set out in the government's Manual on Detention, the *Sahin* case sets out a four part test regarding detention:

> The first is that there is a stronger case for justifying a longer detention for someone considered a danger to the public. The second concerns the length of future detention: if it cannot be ascertained, the facts would favour release. The third is a question of who is responsible for any delay: unexplained delay or

[141] IRPA s. 60 "For the purposes of this Division, it is affirmed as a principle that a minor child shall be detained only as a measure of last resort, taking into account the other applicable grounds and criteria including the best interests of the child".
[142] *Sahin v Ministry of Citizenship and Immigration* (Federal Court of Canada) as cited in the Manual on Detention, *supra* note 137.

> even unexplained lack of diligence should count against the offending party. The fourth is the availability, effectiveness and appropriateness of alternatives to detention such as outright release, bail bond, periodic reporting, etc.[143]

The Federal Court in another case determined that when the individual was a danger to the public, that he was to a large extent responsible for the procedural delays that had prolonged his detention and that there were no real alternatives to detention, then prolonged detention did not violate his *Charter* rights. [144]

ii) Mental Health Provisions

In Canada, the planning and delivery of mental health services is an area in which the provincial and territorial governments have primary jurisdiction. The federal government, chiefly through Health Canada, collaborates with the provinces and territories in a variety of ways as they seek to develop responsive, co-ordinated and efficient mental health service systems.

Provincial mental health legislation balances two competing interests: self determination and personal liberty versus the need for treatment and public safety.[145] In making this balance, the legal framework contains both substantive and procedural protection for the individual. The substantive protections include detailed involuntary admission criteria whereas the procedural protections include such mechanisms as requiring two independent physicians to authorize involuntary admissions, tribunal review and court appeal procedures. Rather than reviewing the various different provincial laws, the *Uniform Mental Health Act* drafted by the Uniform Law Conference of Canada provides a good example to examine these protections.[146]

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[143] *ibid.*
[144] *Kidane v Ministry of Citizenship and Immigration* (Federal Court of Canada) as cited in the Manual on Detention, *supra* note 137.
[145] Aaron Dhir *"The Maelstrom of Civil Commitment in Ontario: Using Examinations Conducted During Periods of Unlawful Detention to Form the Basis of Subsequent Involuntary Detention Under Ontario's Mental Health Act"* (2003) 24 Health Law in Canada 9 and J.E. Gray and R.L. O'Reilly *"Protecting the Rights of People with Mental Illness: Can We Achieve Both Good Legal Process and Good Clinical Outcomes?*" (2002) 23 Health Law in Canada 25.
[146] *Uniform Mental Health Act* adopted at the Uniform Law Conference of Canada found at www.ulcc.ca/en/us/index.cfm?sec=/&sub=1m1. The purposes of this Act are, (a) to protect persons from dangerous behaviour caused by mental disorder; (b) to provide treatment for persons suffering from a mental disorder that is likely to result in dangerous behaviour; and (c) to provide when necessary for such involuntary examination, custody, care, treatment and restraint as are the least restrictive and intrusive for the achievement of the purposes set out in clauses (a) and (b).

The *Uniform Mental Health Act* highlights a number of procedural guarantees and safeguards for detaining individuals for involuntary mental health assessment and treatment. A physician or designated health professional who has examined a person may recommend involuntary psychiatric assessment of the person, if they are of the opinion that the person is apparently suffering from mental disorder and if they have reasonable cause to believe that the person is threatening or attempting to cause bodily harm to himself or herself, or is behaving violently towards another person, or is causing another person to fear bodily harm, and will likely cause serious bodily harm to himself or herself or to another person or due to the mental impairment cannot look after him or herself and as such is likely to suffer impending serious physical impairment.[147] Such recommendations must be recorded following specific regulations. Anyone can make a request to a judge for an order for an involuntary examination of another person, but must file a written statement under oath. The judge can issue an order if he has reasonable cause to believe that the person is apparently suffering from mental disorder and will not consent to undergo such an examination.[148] Such an order, which is valid for seven days, will direct the police or other authorized persons to detain such person.

If a decision is made by the health professional that the person should become a patient of the psychiatric facility, there are certain regulations they must follow, such as filing a certificate in a prescribed manner. If after 48 hours there is no certificate, the detainee must be informed of the right to leave the facility. The term of the certificate that allows detention, restraint, observation and examination is two weeks. The certificate is to be re-assessed on a continual basis by the chief administrative officer and can be renewed.

The patient must be informed in writing of his or her status and has a right to apply to the Review Board to review that status and has a right to retain and instruct counsel without delay.[149] This person can appoint, in writing, a substitute decision maker who is entitled to disclosure of all information in the person's file or the government may appoint a patient advisor to assist the detained person.[150] The Review Board must review the status at least every 6 months. The Board can order a second opinion by another physician. Any party to a

[147] Uniform Mental Health Act, *ibid* section 3(1).
[148] *ibid*, section 4.
[149] *ibid*, section 18.
[150] *ibid*, sections 19-20.

proceeding before the Review Board may appeal from the final decision or order of the Review Board to the appropriate court.

Critics of the mental health laws are concerned with how some of the mental health boards characterise the mental health law as remedial legislation thus ignoring the intrusive and coercive provisions contained therein. They argue that jurisprudence in this area has not evolved in a manner that afford the same level of procedural protection to individuals accused of crimes.[151] Canadian courts have been criticised as being overly reliant on a paternalistic model of mental health law which has resulted in an under-development of procedural protections for those subject to involuntary committal.[152]

However, some courts have recognised this dilemma between liberty and protection and the application of the *Charter* when implementing mental health procedures. As one judge stated:

> mentally ill persons are not to be stigmatised because of the nature of their illness or disability; nor should they be treated as persons of lesser status or dignity. Their right to personal autonomy and self-determination is no less significant, and is entitled to no less protection, than that of competent persons suffering from physical ailments.[153]

Some commentators believe that overall the protective mechanisms have been improved, some in response to the *Charter*.[154] Any procedure must conform to the *Charter* and the principles of natural justice and fairness.

iii) Educational or Youth Provisions

In one province in Canada, legislation was enacted in 1999, the *Protection of Children Involved in Prostitution Act*, which recognised that children involved in prostitution are victims of sexual abuse and need protection.[155] A child involved in prostitution can be apprehended by police or social services, with or without a court order, and taken to a protective safe house, where he or she can be confined for up to five days. At this secured facility, the child receives emergency

[151] Aaron Dhir, *supra* note 145.
[152] This quote is acknowledged to be from I Grant, found in Aaron Dhir, *supra* note 145.
[153] Justice Robins in *Fleming v Reid* as discussed in Aaron Dhir, *supra* note 145.
[154] Gray, supra note 145.
[155] *Protection of Children Involved in Prostitution Act*, .S.A. 1998, c. P-19.3, with amendments made March 18, 2001. This Act was introduced by the Government of Alberta in February 1999 and was the first of its kind world-wide which significantly changed how this social issue was viewed by recognising that children involved in prostitution are victims of sexual abuse.

care, treatment and an assessment. There is a possibility of extension for two additional confinement periods of up to 21 days. It is stated that this additional time enables child protection workers to stabilise the child, help the child break the cycle of abuse and begin the recovery process in a safe and secure environment. During this confinement period, the child is offered a number of services including drug and alcohol counselling, medical supports, counselling and psychological services, educational and life skills support.[156] These services are tailored to meet the individual needs of each child.

This Act was subject to a constitutional challenge which was successful at the first level of court, largely on grounds that the legislation did not meet standards of procedural justice, but this decision was overturned on judicial review.[157] Between the dates of these two decisions, a number of amendments were made to the Act which ensures protection of the child's legal rights and provides for procedural safeguards.[158] Since then, a number of other provinces in Canada have passed similar legislation which contain certain safeguards in attempts to *Charter* proof the legislation.[159]

In Alberta, the first case of challenging the original act, the lower court held that the Act was unconstitutional as it violated the right to liberty of the complainants. The children, when apprehended, may not have an opportunity to refute the reasons for the apprehension or to refute the reasonable and probable grounds for apprehension and confinement.[160] The right not to be arbitrarily detained or imprisoned under section 9 of the *Charter* was also held to be violated.[161] These children, who are meant to be protected, appeared to have less procedural safeguards than those that are guaranteed to an accused in the criminal court.

However on judicial review, the judge found that the detention was not arbitrary as the legislation sets out appropriate criteria for the police and child welfare authorities. He also

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[156] Alberta Children and Youth Initiative Fact Sheet: Protection of Children Involved in Prostitution, February 2004, found at www.child.gov.ab.ca.
[157] *Alberta (Director of Child Welfare) v K.B.* (2000) 268 A.R. 248 [2000] A.J. No. 876 (Prov. Ct. (Fam. Div.)) and at the next level 279 A.R. 328 [2000] A.J. No. 1570 (Q.B.).
[158] *Protection of Children Involved in Prostitution Amendment Act, S.A. 2000*, c. 22. The amendments are now consolidated in the *Protection of Children Involved in Prostitution Act*, R.S.A. 2000, c. P-28.
[159] In British Columbia, *Secure Care Act*, S.B.C. 2000, c.28 (assented to 6 July 2000, but not yet in force). In Ontario, *Rescuing Children from Sexual Exploitation Act, 2002*, S.O. 2002, c. 5 (assented to 27 June 2002, but not yet in force). In Saskatchewan, *Emergency Protection for Victim of Child Sexual Abuse and Exploitation Act*, S.S. 2002, c. E-8.2 (proclaimed in force 1 October 2002).
[160] K.B. (Prov. Ct.) *supra* note 157 at para 47.

found that legislation which attempts to assist children involved in sexual exploitation addresses a pressing and substantial concern and the measures of confinement are reasonable under section 1 of the *Charter*.[162] However, as stated above, the government of Alberta amended the original Act to cure the defects of lack of procedural guarantees.[163]

Some commentators question the Alberta government's claim that the existing child welfare legislation was not sufficient to respond to the problem of youth prostitution.[164] There was no empirical evidence to support the need for this coercive control over youth. The move to enact forced confinement legislation was felt to be premature as there had been no exploration of the recommendations for voluntary programming or social and economic reforms.[165] Others criticised the law and order approach as denying the complexity of the problem which has social and economic underpinnings which not only has the government ignored but has helped to create and maintain.

Despite these criticisms, other provinces have followed Alberta's led and enacted similar legislation. For example Ontario's *Rescuing Children from Sexual Exploitation Act, 2001* permits police and Children's Aid Society workers to remove children under 18 years of age from a range of dangerous situations, including street prostitution, massage parlours, adult entertainment facilities, Internet sex lines and pornography industry.[166] The child can be placed in a safe location for up to 30 days as determined by a judge or justice of the peace. The Saskatchewan *Emergency Protection for Victims of Child Sexual Abuse and Exploitation Act,2002* allows for police, social workers and outreach workers to obtain emergency intervention orders to keep offenders away from these children and expands police powers to search vehicles and seize evidence of child abuse found in these vehicles.[167]

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[161] *ibid*, para 94.
[162] K.B. (Q.B) *supra* note 157 at para 113.
[163] A good analysis of the history and the law and order approach to a social and economic problem is found in Jennifer Koshan, *supra* note 118.
[164] Dianne Martin as discussed in Koshan, *supra* note 118.
[165] The Prostitution Policy, Service and Research Committee for the Calgary Community recommended that youth prostitutes be treated as victims of sexual abuse rather than criminals, that they be dealt with under child welfare legislation, that there be coordinated services for prevention, crisis intervention and treatment established and that safe housing, financial support for independent living, information and education program be provided. The Committee did not recommend forced confinement, as discussed in Koshan, supra note….
[166] *Rescuing Children from Sexual Exploitation Act, 2001,* (Ontario: S.O. 2000 Chapter 5).
[167] *Emergency Protection for Victims of Child Sexual Abuse and Exploitation Act,2002* (Saskatchewan: S.S. 2002 c E 8.2).

VII. Lessons Learned from Other Countries

In a number of jurisdictions around the world, out of court settlements that remove cases from the criminal justice process, are being introduced as a means to provide alternative forms of disposal for certain types of cases. Some jurisdictions have introduced simplified streamlined procedures to deal with crimes outside the traditional criminal justice system. Types of out of court settlements include diversion, waiver of prosecution, deferred prosecution, and dismissal of prosecution. They do not engage the entire criminal justice process and do not lead to a conviction.

i. New Zealand's Model of Family Group Conferences

The Family Group Conference enables restorative justice principles to be implemented through domestic legislation, supervised by the courts and applicable to all young offenders in New Zealand.[168] It has expanded in recent years, on a small scale, to include adult offenders. It is used both as a diversion approach, that is before adjudication of the charges as well as after adjudication but before sentencing. In its emphasis of community-based solutions, it has managed to reduce the number of young persons in state prisons and institutions.

A trained social worker usually serves as a conference coordinator, working with the victim, the offender and their families to get a deeper understanding of the underlying social conditions related to the crime. The conference can only be conducted if the youth admits to the offence. There are three stages to the family group conference. First involves the introduction and greetings with the police describing the offence. During the first phase the victim can ask questions to the offender. The second stage involves private deliberation by the offender's own supporters to propose a plan. The last and final stage involves the discussion of the plan by all parties in order to reach some consensus.[169]

[168] Judge McElrea *"The New Zealand Model of Family Group Conferences"* Speeches delivered at Beyond Prisons Symposium, Kingston, Ontario found at www.csc-scc.gc.ca/text/forum/bprisons/speeches/6_e.shtml.
[169] Church Council on Justice and Corrections, *supra* note 75 at page 67-68.

ii. Belgium's Penal Mediation Model

Mediation in the Belgian criminal justice process is considered the most recent innovative alternative to the use of prison sentences as punishment. It emphasis dialogue between the victim and offender where the mediator assists in working toward a common solution, focusing on reparation, redress and reconciliation.[170] It has only been since 1991, when the Belgian Prosecutor-General set up an experiment, that penal mediation was introduced as a more simple and faster reaction to crime. Penal mediation has now been formalised in a 1994 law which allows the public prosecutor to dismiss a case under certain conditions.[171]

As Tony Peters and Ivo Aertsen neatly summarise:

> Penal mediation applies to criminal offences, committed by adults, when in the opinion of the public prosecutor a penalty of over two years of imprisonment does not seem to be necessary. In these cases, the law offers the prosecutor the possibility of proposing to the suspect one or more of the following conditions or measures in order to obtain an extinction of the public action:
>
> (i) reparation or restitution of the damages caused to the victim. The prosecutor may convoke victim and offender for a mediation to settle the case;
>
> (ii) a referral to a medical treatment program or any suitable therapy if the offender attributes the offence to a disease or an alcohol or drug addiction;
>
> (iii) a referral to a training program of up to 120 hours;
>
> (iv) the acceptance of a community service of up to 120 hours.
>
> The maximum time to carry out the proposed condition or conditions is six months for measures (ii-iv) and unlimited for measure (i).[172]

Cases selected for mediation are mainly small property crimes and some violent crimes, such as assault and threatening and some drug cases.

In each case there will be a formal mediation session led by a mediation magistrate. This is done after the mediation assistants and mediation advisors in the public prosecution office have identified suitable cases, contacted the parties, prepared the conditions and made a report for

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[170] Tony Peters and Ivo Aertsen *"Restorative Approaches of Crime in Belgium"* Speeches delivered at Beyond Prisons Symposium, Kingston, Ontario, found at www.csc-scc.gc.ca/text/forum/bprisons/speeches/8_e.shtml.

[171] Law passed in 1994 "Law holding the regulation of a procedure for mediation in penal matters", which introduced in the Code of Criminal Procedure a new article 216ter) which allows the public prosecutor to dismiss a case under certain conditions. See discussion in Tony Peters and Ivo Aertsen, *ibid*.

[172] *ibid*.

the mediation magistrate. Both the offender and the victim have the right to be assisted by a lawyer. Mediation is therefore conducted within the criminal justice system.

Recently, there are mediation programs set up at the police level in some Belgian cities. These programs focus on minor offences and try to arrange as soon as possible a financial settlement between the offender and the victim. These projects are based on an agreement with the prosecution service. The prosecutor is informed about the settlement and subsequently will close the file with a prosecution waiver.

iii. South Africa's Correctional Supervision

The *Criminal Procedure Act* allows for the prosecutor to suspend a prosecution while placing the accused under "correctional supervision". This process does not lead to the conviction of the accused and successful completion of the correctional supervision ends the matter. The process requires only the consent of the accused, not an admission of guilt.[173]

iv. Germany and Austria - Prosecutorial Discretion

The German *Procedural Code* provides that a prosecutor may unconditionally dismiss a case "if the guilt of the suspect is marginal" and the offender complied with conditions set by the prosecutor, for example, compensation or maintenance orders. In serious cases the decision must be affirmed by the court.[174]

In Austria, since 2000, the Austrian *Criminal Code* has provided that the prosecutor is obliged to dismiss charges where the following conditions apply: the offence is punishable by less than three years imprisonment, deterrence is not required, the offence resulted in minor loss or damage, and a serious effort to compensate the victim has been made by the offender.[175]

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[173] In South African Law Commission, Discussion Paper 96, Project 73: *Simplification of Criminal Procedure (A More Inquisitorial Approach to Criminal procedure – Police Questioning, Defence Disclosure, The Role of Judicial Officers and Judicial management of Trials)*(2001) ISBN: 0-621 30683-5.
[174] Max Plank Institute for Foreign International Criminal Law, comparative research report as cited in the South African Law Commission Report, *ibid*.
[175] *ibid*.

VIII. Conclusion

A quote from Albreacht sums up the changing philosophies regarding sanctions:

> Socio-economic and political change has affected sanction systems and their implementation ever since modern criminal law has emerged as a central element of the modern state in the middle ages. The transition from the ubiquitous use of corporal punishment and the death penalty to the modern prison and the transition from prison as the regular approach to punishment to alternatives like the fine, probation, suspended sentence and other types of intermediate penalties replacing immediate physical control through supervision and various types of non-custodial control, and most recently the attempts to shift the focus from punishment to mediation and reparation demonstrates the enormous changes sanction systems and underlying philosophies have undergone so far in history and points towards the potential for change actually available for criminal law reform.[176]

Canada is not alone in seeking alternatives to incarceration. These alternatives have been introduced not only to reduce the overcrowding and cost of prisons and the overburden of the criminal justice system, but such alternatives seek to address the community's concerns and provide a voice to victims.

In parallel to the criminal justice system, the government addresses anti-social behavior and other situations through a variety of measures, including administrative detention as well as social, economic and cultural measures. In the use of administrative detention or forcible confinement, the Canadian legal framework provides for a number of procedural safeguards to balance the interests of society with the rights of individuals to liberty and dignity.

[176] Albreacht, 1996 as cited in Uglijesa Zvekic *"International Trends in Non-custodial sanctions"* UNICRI and Commonwealth Secretariat, Promoting Probation Internationally: Proceedings of the International training Workshop on Probation (2-5 July 1997, Malta).