

CROWN SELECTED YOUTH DIVERSION

Prosecutor Selected Youth Diversion:  
Identifying the Circumstances and Conceptualizing the Cases

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**List of Abbreviations**

EJS	Extra-judicial sanction
GTC	Gateway to custody
GTM	Grounded theory method
NTP	Notice to parent
XXXXX	Redacted content
<i>YCJA</i>	<i>Youth Criminal Justice Act</i>
YP	Young person

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### **Abstract**

Crown selected youth diversion has received little academic attention in Canada. As a process that channels offenders out of the formal legal system, diversion purports to achieve contradictory self-serving system and offender-based goals. Using 50 randomly selected prosecution files – half of which the Crown diverted and half of which the Crown prosecuted – a mixed method investigation of diversion assesses cases through quantitative content analysis and grounded theory method. Based on the quantitative analysis, it is argued that there is an emerging patterned nature of Crown selected diversion that is not completely benign. This patterned nature of diversion unearths a distinctive discourse of diversion/non-diversion. Qualitatively, it is argued that the cases are organized around three temporal moments that create an area for distinctions to be made in terms of threat, responsibility, (in)tolerableness and recourse. Seemingly, there is a persistent paradoxical existence of the diversion process that emerges from the case files.

*Keywords:* youth diversion, extra-judicial sanction, discretion, Crown prosecutor, Luhmann, systems theory, autopoiesis

**Prosecutor Selected Youth Diversion:  
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**Chapter I – Introduction**

In April of 2003 the Liberal government enacted the *Youth Criminal Justice Act (YCJA)* and reaffirmed the use of a systematic approach to deal with young offenders. Preceded by the *Young Offenders Act* (1985) and the *Juvenile Delinquents Act* (1929), the catalyst for the *YCJA* is found in: ambiguity in historical legislative mandates; the overuse of courts; heavy reliance on incarceration as a response to youth transgressions; and questions of system fairness (Bala, 2003; Bala & Anand, 2009; Bala, Carrington & Roberts, 2009; Doob & Sprott, 2006; Endres, 2004; Roberts, 2003).

In attempting to overcome historical problems, the *YCJA* legislatively articulates a system of enhanced procedural safeguards for youth who are involved in the Canadian legal system (Bala, 2003; *Youth Criminal Justice Act (YCJA)*, 2002). The systematic approach of the *YCJA* solidifies the longstanding use of diversion and establishes the framework through which diversion is used to address a young person's wrongful act or omission. To this end, diversion is the process of removing or channeling out offenders from the formal legal system towards an alternative informal process or response (Brakel, 1972; Clear & Dammer, 2000). In official terms, diversion is a statutory response to crime that is effective, meaningful, timely and appropriate (*YCJA*, 2002, s. 3 – s. 10).

The *YCJA* has increased the use of diversion and acts as the substantive guide in the discretionary decision-making associated with the process (Barnhorst, 2004; Taylor-Butts & Bressan, 2008; *YCJA*, 2002). Despite the fact that multiple legal system actors can mobilize diversion, this research has explored the case circumstances through actual cases when a

Crown diverts or prosecutes. This project has identified communicable case circumstances<sup>1</sup>, specifically alleged case specific and individual characteristics<sup>2</sup> of diverted and prosecuted cases. Quantitatively, I examined persistent circumstances among prosecutor selected candidates of diversion. Additionally, I qualitatively assessed the cases, inspired by grounded theory, in an attempt to move beyond the mere identification and quantification of factors. To this end, I have attempted to construct a theoretical model and theorize prosecutor selected diversion by conceptualizing elements of the cases. In doing so, I focus not only on a subset of the phenomenon of the youth justice system (Doob & Cesaroni, 2004, p. 273) but I respond to Thomas and Fitch's (1976) call to evaluate decisions made under the law.

This study falls within a policy discussion regarding the use and application of diversion within the legal system. Doob, Marinos and Varma (1995) note that little is known of the prosecutor selected diversion process in Canada. Focusing on the process, I am concerned with the front-end of diversion when cases are selected by the Crown which differs from the back-end focus, which would concentrate on outcomes of diversion. The selection processes must be investigated to paint a complete picture of the diversion scheme in Canada and guide future research by addressing the current silence. Further, the selection process must be investigated as there is the possibility – theoretically and practically speaking – that the life trajectory of young people can be changed, affected or in some way influenced by the

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<sup>1</sup> At this point, consider communicable case circumstances in the sense of all possible content that can be communicated in a legal file, ranging from the facts of the case to descriptive qualities of the offender and the offence. The idea of communicable case characteristics highlights the source of content in the case file – in that it comes from legal cases – and it highlights the mode of message transmission of the characteristics – in that it is a function of communication. Nuanced additions will be made to this phrase in Chapter IV when I begin conceptualizing the actual categories used for analytical and explication purposes.

<sup>2</sup> Alleged case specific and individual factors are discussed in the methodology. Alleged case specific factors will be defined as any assertions made by police, victims, witnesses or experts that speak to the matter or criminal incident before the court. Take for instance the offence, type of offence, type of release, number of charges and offence location. An individual factor is any static or dynamic characteristic of the accused party in the case file. This may include assertions made by police, victims, witnesses or experts but the key element is the fact that the declaration pertains to something of the accused. These factors include age, criminal record, sex and notice to parent.

decision to divert or prosecute – for the better or to the detriment of the young person subject to the adjudicative or non-adjudicative system (see Anand, 1999; Antonowicz & Ross, 1994; Becker, 1963; Campbell & Retzlaff, 2000; Clough, Sanlee & Conigraue, 2008; Dembo, Wareham, Poythress, Cook, & Schmeidler, 2006; Lemert, 1951; Tannenbaum, 1938).

There has been much written on the concept of diversion and the ideal application of the scheme (see Bala, 2003; Cowell, Lattimore & Krebs; 2010; Harding & Dingwall, 1998; Jehle, Smit & Zila, 2008). While I am theoretically inspired by Luhmann's systems theory, when diversion within the legal system is presented by academics as achieving something beneficial for the institution of the criminal legal system, it is autopoietic.<sup>3</sup> It also seeks to achieve something for the offender. In terms of achieving ulterior, multiple and contrastable ends, Moyer (1980, p. 81) asserts that the defining feature of diversion is the myriad of goals it purports to achieve. These competing discourses are important to illustrate the operational context of the process. In this vein, this investigation is an attempt to understand an everyday practice in the criminal legal system. This is a step away from the general trend of assessing diversion in terms of the adequacy of the program for participants and the efficacy of outcomes (see Anand, 1999; Antonowicz & Ross, 1994; Campbell & Retzlaff, 2000; Clough, Sanlee & Conigraue, 2008; Dembo, Wareham, Poythress, Cook, & Schmeidler, 2006).

In this project, I have sought to understand the application of diversion in the Canadian legal system by identifying circumstances surrounding candidacy and explaining the process through the cases. The decision-making process<sup>4</sup> regarding candidate suitability or referral to

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<sup>3</sup> I momentarily forgo a detailed explanation of autopoiesis and the autopoietic nature of diversion. It is sufficient to note here that autopoiesis refers to the reproduction of the system by the system itself, by the system's structures. For the system, autopoiesis provides an alternative way of reproducing itself, for the process of autopoiesis "constitutes the elements of which it consists through the elements of which it consists" (Luhmann, 1988, p. 14).

<sup>4</sup> The literature regarding decision-making is relevant despite the fact that I am not getting at the actual decision-making process and the cognitions of the Crown. Firstly, literature on decision-making often

diversion has not received much attention by Canadian researchers but there has been work in the United States on the topic (see Alarid & Montemayor, 2010; Naples, Morris & Steadman, 2007; Potter & Kakar, 2002; Steadman, Redlich, Griffin, Pettila & Monahan, 2005). This exploratory research will open a discussion in the area and illuminate this *in camera* process. As such, this closer look at prosecutor selected youth diversion calls for several research questions:

- Q1) What communicable case circumstances should be included in a model of Crown selected diversion of young offenders?
- Q2) Under what communicable case circumstances is a young person referred to diversion by the Crown?
  - Q2a) What communicable case circumstances are prevalent among diverted cases?
  - Q2b) What communicable case circumstances are prevalent among non-diverted cases?
- Q3) Are current explanatory models of diversion decision-making adequate in explicating the process, providing meaning to the process and promoting understanding in diversion decision-making?
- Q4) How can the cases and the prosecutorial system be conceptualized to account for those cases that are diverted and those cases that are not diverted?
- Q5) What is communicated in Crown cases files of young people?

Shedding light on the process, Crown prosecutor's decisions are "the single most unreviewed exercise of power of the criminal law" (Gottfredson & Gottfredson, 1988, p. 114). This research responds to this sentiment by examining the discretionary selection of a

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highlights the factors that are prevalent when the decision to divert is made. Thus, the literature is a source of factors that are pertinent to the process. In the context of this research, these are factors that are discernible from the case files. As such, using the decision-making literature as a tool to identify factors and circumstances that are pertinent to the selection of diversion candidacy is logical and needed for this research to be informed by previous knowledge to foster the creation of new knowledge. Secondly, short of talking to prosecutors, the use of case files may be seen as an unobtrusive source of information on the case circumstances related to the decision-making process. However, I make no attempt in this research to claim to explore the actual decision-making process. I merely assert the importance of the decision-making literature with respect to diversion and the need to add to this body of literature.

candidate for diversion and the factors associated with candidacy. The discretionary nature of diversion grounds the need for this research and recognizes the legal context of decisions.

In Chapter II, I review the pertinent literature in the area. I begin with a short overview of the concept and practice of diversion. I follow with a discussion of the tension of diversion as an autopoietic and offender-based means to an end. Thereinafter, I provide a brief discussion of the concept of discretion and competing camps on the use of discretion. I conclude with a presentation of the factors pertinent to offender candidacy in diversion.

In Chapter III, I outline my theoretical approach by illustrating the deficiencies in current explanatory models and establishing the groundwork for Luhmannian inspired work. I argue that a distinctive discourse of diversion and prosecution can be theoretically constructed. I also explore structural components of which a system consists.

In Chapter IV, I outline my methodological approach. I discuss my method of data collection and data analysis. In doing this, I provide a detailed description of how the law was used to sustain access to an empirical data set and how I used mixed methods through quantitative content analysis and grounded theory method. I conclude with an outline of key terms and core distinctions which can be considered a preliminary conceptualization of the categories required in the study and discussion of diversion.

In Chapter V, I present the findings of my quantitative content analysis. It is clear that the selection of diversion candidates is not completely benign and there are emerging patterns of selecting candidates. Theoretically, I argue that there is a distinctive discourse of diversion that is organized around a binary code of divert and not divert with an articulable conditional program. Inspired by Luhmann, I advance this theoretical discussion by organizing the content of the cases in the form of “if-then” statements. The cases, with the binary code of divert/not divert and the constructed conditional program cumulatively

highlights what it is that the Crown may consider relevant for deciding, what constitutes the “if” so that the “then” leads to diversion or else to non-diversion.

In Chapter VI, I construct a model of Crown selected youth diversion, inspired by grounded theory, that is rooted empirically in the cases of diverted and prosecuted young people. It is found that threat, (in)tolerableness, recourse and responsibility are present in all of the case files but differ in thematic/dimensional and temporal content. I argue that a perpetual paradox emerges out of these core elements in the case files and the process of Crown selected diversion through the creation of differences from/and similarities on temporal and thematic dimensions. With these four elements, there is not the creation of a certain type of offender, or that which is in nature, rather, I identify the elements of the system that exist, are meaningful and used by the system in the creation of distinctions.

In Chapter VII, I briefly review the core conclusions of this work and the limitations, implications and directions for future research. I follow with a strong call to use legislation to secure access to meaningful empirical data sets.

## Chapter II – Literature Review

### Painting the Contextual Picture

In this chapter I explore the concept and process of diversion. I am interested in the fact that diversion is shaped by law and serves different goals, all of which embody the practice of diversion when mobilized by the prosecutor. I discuss: the concept of diversion; the statutory provisions behind diversion; the rationale for the use of the scheme; and diversion as a means to contradictory ends. Secondly, the concept and role of discretion will be discussed. I close with an examination of prosecutorial decision-making in the context of diversion by discussing the factors pertinent to offender candidacy.

### Diversion as a Means to an End

Lemert (1981, p. 36) succinctly defines diversion as a “process whereby problems otherwise dealt with in a context of delinquency and official action will be defined and handled by other means.” This process is rooted in the principle of *de minimis non curat lex* (Harding & Dingwall, 1998, p. 2). This implies that there is not a strict requirement that all transgressions must proceed by formal prosecution and reflects a concomitant desire to keep minor cases out of the courts (Jehle, Smit, & Zila, 2008).

Diversion can be initiated by a number of actors within the legal system including the police, prosecutors and judges at different temporal moments such as pre-charge, post-charge or during sentencing. However, diversion is most often associated with a pre-adjudicative process (Griffiths, 2011, p. 244). This project focused on Crown Attorneys who divert young offenders before trial. As such, this is pre-adjudicative diversion that occurs after charges have been formally laid by the police and carriage of the legal file lies with the Crown. This type of diversion is formally an extra-judicial sanction (EJS) pursuant to the *YCJA* (2002).

Beyond the narrow focus of the application or timing of diversion, diversion practices may include no further action, a formal warning, or a referral to a specific program. Thus, there may be differences in: who activates; the timing of activation; the components, programs or practices; and the mode of processing (Hamilton, Sullivan, Veysey & Grillo, 2007; Lemert, 1981). Further, there is variance in the activities or targets of diversion programs. Diversion programs have been created for specific types of offenders or populations, such as young offenders and persons suffering from mental health problems, and different types of crimes, such as prostitution and drug related crimes (see Fischer, Wortley, Webster, & Kirst, 2002; James, 2006; Wahab, 2006). Some diversion programs may seek to promote employment and vocational training (Campbell & Retzlaff, 2000) whereas others may be tailored and focus on drug treatment and education surrounding prostitution (Bull, 2005; Sung & Belenko, 2006; Wahab, 2006).

#### **Diversion at law.**

Explicit legislative declarations are a formal source of diversionary practices in Canada (Bala, 2003; *Criminal Code of Canada*, 1985; *YCJA*, 2002), but diversion does not need legislation to exist. Nevertheless, specific requirements for diversion have been set out in the *YCJA* (2002) and the *Criminal Code of Canada* (1985). Focusing on youth law, there is a statutory promotion and presumption of adequacy with the use of diversion (see *YCJA*, 2002) which allows for flexibility in legal system responses to youth transgressions. The legislative approval of diversion speaks to a desire to selectively discard or pause<sup>5</sup> the conventional legal system when the circumstances are appropriate. Appropriate

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<sup>5</sup> With extra-judicial sanctions, the notion of pausing the conventional legal system in appropriate circumstances is apparent in that the charges are stayed while the young offender engages in diversion programming. The stay allows for the prosecution to be reactivated in the event that the diversion candidate is not successful.

circumstances on a legislative level require consideration of and/or the decision to be in line with: the interest of the public, offender and victim; the ability to formally and legally prosecute; the accused representation by legal counsel; the accused taking responsibility; voluntary participation or consent; the ability to hold the offender accountable; the allocation of meaningful consequences; fair and proportionate accountability; previous findings of guilt; the nature of the offence; the rehabilitative and reintegrative potential of the offender; timely intervention, the reinforcement of societal values, the encouragement of the repair of harm; and respect for gender, ethnic and cultural differences (see *Criminal Code of Canada*, 1985, s.717; *YCJA*, 2002, s. 1-10).

According to the *YCJA* (2002, s.10), the “extrajudicial sanction may be used to deal with a young person... [when] a warning, caution or referral... [is not adequate] because of the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances.” As such, it seems that offences of increased severity and repeat young offenders are not precluded from diversion; however, the timing is altered when diversion occurs post-charge.

It is clear on a legislative level that multiple factors and considerations must be made. Largely, the assessment lies with the ability of the legal system to identify the abovementioned considerations and ensure legislative congruency. Interestingly, the search for aggravating circumstances can potentially disqualify candidates. As such, there is the simultaneous call for rehabilitative, reintegrative and meaningful consequences and a search for the more egregious qualities of the offence (see *YCJA*, 2002). Thus, the search for potentially conflicting criteria for eligibility merely bolsters the importance of the quality of the case file upon which this information is discerned.

Due to the myriad of factors at law, diversion at law represents a people-based end, either serving the public or the offender. This statutory declaration is important to this research as it represents an official voice of the legislature which empowers diversion. The law is also important as the replication and explication of these legal factors in diversion cases may allude to the degree in which legislation guides and legitimizes decisions. Further, these factors can facilitate the reproduction of systematic processes within the organization that relies on the process of diversion – thereby entrenching the process and considerations/reasons for the process within the system.

### **Diversion and competing ends.**

Diversion in Canada is an instrument of the legal system and is presented in academic literature as a means to an end on both an institutional and a personal/offender level. The salient tension is clear as:

[t]reating youth in the community diversion is seen as a way to reduce further involvement with the juvenile justice system. The idea has been particularly intriguing because of its added benefit of relieving an overburdened judicial system (Whitaker, Severy, & Morton, 1984, p. 175-176).

This is a rationale and practice that the Crown engages in when diverting. Most importantly, the means to an end nature of diversion represents the operational context and possible consequences of Crown selected diversion.

In an effort to illuminate the means to an end nature of diversion one can turn to declarations made by a parliamentary committee on the issue. In the 1993 Martin Committee Report it was said that:

[t]he criminal law is a blunt instrument of social policy that ought to be used with restraint. The criminal law aims to achieve rehabilitation, specific deterrence, general deterrence, and the protection of society. However, there is no reason to think that the criminal law is the only method of achieving these socially desirable goals. Accordingly, it is clear

in the public interest to consider the... alternatives to any given prosecution, and their efficacy, remembering that these alternatives may be able to deal more sensitively and comprehensively with the particular problem at hand, while at the same time meeting the goals of the criminal justice system (Ministry of the Attorney General Ontario, 1993, p. 96 as cited in Bala & Anand, 2009, p. 237).

This declaration places value on alternatives to formal case processing to achieve the same macro legal system objectives. Seemingly, the means to an end orientation ensures that informal actions can achieve legal system objectives while simultaneously seeking to reform the offender.

Exploring the abovementioned statement, it must be noted that alternatives to criminal law are endorsed and presumed adequate but, prosecutor selected diversion is clearly embedded in the criminal law (*YCJA*, 2002). Thus, diversion as primarily a non-adjudicative process that takes place outside of the formal legal system – as outlined above – is thereby paradoxically crystallized within formal statutory provisions to be used by the prosecutor in the legal system. As such, an illusionary alternative to criminal law ensures a role for the Crown when the illusionary alternative exists in statutory declarations and the practices of the formal legal system. This continued role for the Crown can allow for the autopoiesis of the prosecution system. Following Luhmann's theory, we can qualify systems as autopoietic when "systems produce the elementary units they consist of through the very network of these elementary units" (Luhmann, 2003, p. 32).

Given the paradoxical presence of diversion, there is a clear example of the system pursuing a stated objective, namely the use of alternatives to criminal law. But, the objective is achieved by formal endorsement and activation in the system in which it attempts to avoid. Puzzlingly, the institution of the criminal legal system pursues alternatives to the legal system to achieve the goals of the system while simultaneously entrenching alternatives to

criminal law within the criminal law. The autopoietic tendency of diversion seemingly secures a role for the prosecutor and the legal system within a process that is to avoid the use of the legal system.

There are a number of institutional goals of diversion, thereby reflecting the self-serving or autopoietic nature of diversion. The autopoietic institutional ends are present when diversion is presented in the literature as a mechanism for penal effectiveness. In the legal context, legal systems lack a strict mandate which requires all offences be prosecuted. Specific to the prosecutor is the discretion to elect the way in which to proceed with a case (see *R. v. Beare*, [1988] 2 S.C.R. 387), options of which include diversion. In that diversion is a process activated at the decisional level, it can impact the caseload for a number of legal system players (Moyer, 1980). Jehle, Smit and Zila (2008) report that prosecutors typically decide not to prosecute when an offence is relatively minor in nature as not to bring a trivial case before the courts.<sup>6</sup> The self-serving institutional ends also prosper in that diversion is an effective mode of social control that occurs outside of the traditional legal system, but it is still a process that is instigated or initiated by the system. This relocation of social control allows for reduced legal system workloads (Moyer, 1980, p. 81) and the calculated allocation of scarce resources which contributes to an efficient legal system (Harding & Dingwall, 1998, p. 12-18; Moyer, 1980).

It is in the pursuit of efficiency that Cowell, Lattimore & Krebs (2010) assert that the long term use of diversion will equate to a reduction in costs. Refining this point, Moyer (1980, p. 81) maintains that a goal (or at least a consequence) of diversion is to use the

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<sup>6</sup> This, Luhmann would call reducing complexity through the increase of complexity: creating a diversion program increases complexity within the system, with it, the system is structurally more complex than without it, but in the meantime, this increase in complexity allows the reduction of complexity in terms of case load. To quote Luhmann: "As so often elsewhere, it is also true here: reducing complexity is the means to generate complexity" (Luhmann, 1998, p. 48).

resources of the community over the resources of the legal system. Furthermore, diversion provides the means through which to benefit from engrained discretionary action within the system (Moyer, 1980). In sum, penal efficiency speaks of an autopoietic characteristic of diversion.

Noting the perpetual autopoiesis with diversion, a clear autopoietic institutional goal is created and pursued with the reliance on diversion as an alternative to decriminalization, a source of inter-legal system cooperation with inclusion of the public and, an instrument for resolving non-criminal disputes (Moyer, 1980). As such, it is a mechanism that ensures there is a role for legal players in the process. With these autopoietic notions that support diversion, the involvement of the legal system is secured through diversion as a mode of case processing within a process that would otherwise not need the legal system. Diversion is a legal system process that ensures cases for the legal system. It is clear that there is an extension of the overarching principles of *de minimis non curat lex* and the potential adequacy of informal responses to crime (Bala & Anand, 2009; Harding & Dingwall, 1998; Jehle, Smit & Zila, 2008) with the pursuit of efficiency and the securement of a prosecutorial role.

Focusing on the youth system, diversion by the prosecutor aims to achieve autopoietic institutional ends of informally addressing a transgression unobtrusively and expediently (Bala & Anand, 2009; Bala, 2003; *YCJA*, 2002). However, diversion is also rationalized by the general trivial nature of youth offending and the need for a quick informal response (Bala & Anand, 2009, p. 327; Bala, 2003; Harding & Dingwall, 1998, p. 12-18; Moyer, 1989; *R. v. D.B.*, [2008] 2 S.C.R. 3, 2008 SCC 25). There is a distinction to be made here as youth diversion discussions parallel the presentation of diversion *vis-à-vis* the legislative roots. Legislation is echoed in terms of the adequacy of diversion in light of the

nature of offending and the need for a short time between the offence and consequences (*YCJA*, 2002, s. 1-4). With young offenders, the legislation is not completely substituted for broad institutional goals. Nor, is there an explicit legislatively endorsed gateway to promote and pursue institutional goals with the use of diversion. However, there are still autopoietic tendencies when youthful offending is deemed trivial and worthy of quick informal responses, but still needs the force of the legal system to mobilize such responses. Seemingly, there is a reduced activation of the legal system which in effect reduces activities of the system at the dispositional level – but still maintains the presence of the legal system – which merely displaces involvement.

As diversion is autopoietic, diversion embodies a wide set of practices that move beyond legislative declarations. While diversion is rooted in legislation, the mobilization of diversion extends the underlying rationale and reveals the inherent tension – I would like to employ the analogy of a living tree. The legislative provisions are the roots of the living tree but institutional self-serving ends grow or branch out of the roots in the use of diversion. It is worth noting that personal ends seem more dominant in legislative roots in that offender accountability, rehabilitation and reintegration are explicitly declared (see *Criminal Code of Canada*, 1985, s. 717; *YCJA*, 2002, s. 1-10). These competing ends are important in light of this research as the degree to which the legislative roots and associated autopoietic self-centered ends are unknown at the decisional level.

In furthering the ends-based nature of diversion, diversion is presented by academics as achieving personal or offender-centric ends. The offender-centric ends that diversion purports to achieve were first presented in the legislative scheme (see *Criminal Code of Canada*, 1985, s. 717; *YCJA*, 2002, s. 1-10). Apart from legislative declarations, offender-based ends represent another branch on the living tree of the diversion scheme. This branch

of the living tree is altruistic. The offender-based ends coexist within a scheme which is able to achieve institutional ends – the result of which places diversion as a means to two perhaps inconsistent ends with an unknown prioritization.

The diversion process is altruistic and offender-centric when described by academics as a rehabilitative and reintegrative approach to justice (Anand, 1999; Bala, 2003; Bala, Carrington & Roberts, 2009; Barnhorst, 2004; Moyer, 1980). Further, a diversion program is offender-centric in that diversion in youth matters is a tailored response that intends to reflect the general trivial and non-violent nature of youth criminal conduct (Bala, 2003; Bala & Anand, 2009, p. 327; Patrick & Marsh, 2005). There is specificity in programing as it can not only reflect the nature of the offender but also the nature of the offence (see Fischer, Wortley, Webster, & Kirst, 2002; James, 2006; Wahab, 2006). This tailored response mobilizes diversion as a forum through which to address the unique needs of a young person and avoid potential negative effects associated with a court proceeding (Cocozza, Veysey, Chapin, Dembo, Walters, & Farina, 2005; Hamilton, Sullivan, Veysey & Grillo, 2007; Palmer, 1979). It also pursues something for the offender while at the same time avoids the evils and injustices of the formal system or formal case processing (Griffiths, 2011; Moyer, 1980, p. 81). This marks the altruistic end in which diversion purports to achieve; there is something good for the offender be it rehabilitation, reintegration or avoiding the harsh legal system.

Diversion in the youth context achieves altruistic personal ends in that diversionary programs can decrease recidivism (Latimer, Dowden & Muisie, 2005; Palmer, 1979; Patrick & Marsh, 2005). As such, the branch of altruism extends a social end with the proliferation of diversion in practice. Further, the altruistic personal end is illustrated in diversion as a

forum for intervention, which is a tailored non-adjudicative proxy for reform (Dembo, Wareham & Schmeidler, 2005; Gottfredson & Barton, 1993; Moyer, 1980).

In further noting the altruistic nature of diversion, James (2006) argues that diversion from the legal system can address the deficiency of other institutional systems, specifically the lack of mental health services. It thereby seems that the tailored nature of diversion (see Fischer, Wortley, Webster, & Kirst, 2002; James, 2006; Wahab, 2006) can be used to address broader social issues. Further, providing services outside of the conventional legal system is cost-effective by avoiding incarceration (Wahab, 2006). Thus penal effectiveness through diversion may be used to rectify shortcomings of other institutions while producing an efficient legal system.

In addition to the pursued outcomes of diversion, there are theoretical underpinnings that indicate the altruistic purpose of diversion. Rooted in the labeling perspective, there is a salient concern that formal legal intervention may perpetuate delinquency (Gomme, 2007). As such, informal intervention can be used to avoid the negative labeling effects of formal case processing. The theoretical statements of Tannenbaum's (1938) dramatization of evil and Lemert's (1951) secondary deviance speak to an orientation of protecting the accused person from the negative effects of the system. Additionally, Becker's (1963) attestation of the creation of deviant groups and outsiders by other social groups speaks of the potential ramifications of formal case processing.

There is a theoretical distinction that I must make between two targets of altruism; there is altruism that purports to achieve something for the offender and there is altruism that seeks to achieve something for society. The latter of the altruistic focus, namely the focus on society, speaks to a focus on others. In that others become a point of focus, the legal system

opens itself to consideration of non-legal system involved actors. It must be noted that the targets of altruistic ends are a function of the outcomes of the process of diversion.

The explanation of diversion above is framed in a constructive light. The source of the optimistic aura emanates from mere reflection upon the legislative scheme and the potential institutional and offender-centric outcomes of the use of diversion. However, it should be clear that there is tension as diversion is altruistic and self-centered or autopoietic – the result is a potentially contradictory orientation of the scheme. The lexical priority of institutional and personal ends is ambiguous and unknown.

Further, much of the diversion discussions are utopian. In outlining offender and institutional benefits of diversion, the optimum application of diversion is presented. There is debate but empirical and broad policy discussions expend a tremendous amount of effort justifying and inflating the diversion process. The utopian language keeps the discussion at a superficial level and masks the underlying tensions between goals. Empirical investigation of the cases and communicable case circumstances associated with Crown selected diversion is needed to move beyond the superficial declaration and interrogate the process(es) of the scheme.

### **Painting the contextual picture – The problem with diversion.**

Diversion as a legal tool may be seen as a source of problems and injustices. This dissent in the literature informs this research of the problems of diversion and persistent criticisms in academic conversations. The criticism of diversion may be synthesized as a result of a critical analysis of the practical implementation of diversion and possible outcomes compared to non-intervention, not the general ideological implementation of the process with a purpose rooted in institutional and personal ends. As such, the multiple ends of diversion are often lost and surmounted by a problematization of diversion in a context-

free environment. What remains is the view that diversion is an unwarranted extension of social control. Inasmuch, it is clear that this criticism does not distinguish between autopoietic and altruistic ends outlined above. Accordingly, diversion does more than extend the gamut of social control and for this reason, a new conceptualization of net-widening through altruistic and autopoietic goals must be considered.

Central to the extension of social control is the fact that diversion is a net-widening tool. First presented by Austin and Krisberg (1981, p. 170), net-widening through diversion is illustrated in the fact that “diversion programs have been transformed into a means for extending the net, making it stronger and creating new nets.” This speaks to the process where a historical informal practice becomes formalized which results in people being pulled into the legal system, albeit the informal part of the legal system (Austin & Krisberg, 1981). Berg (1986) argues that net-widening is present as without diversion, there would probably not be a criminal justice response to certain transgressions. Maclure, Campbell and Dufresne (2003) make a comparable net-widening claim in that diversion selection in Canada with youth creates a two tier system – there is a system of diversion for a first time offender which occurs through pre-charge diversion and there is a system of diversion for repeat offenders that occurs through post-charge diversion.

Diversion may also be criticized for its lack of due process, the exchange of expediency for fairness, disparity in application and questions regarding the calibration of diversion (Harding & Dingwall, 1998; Leigh, 2007; Sanders, 1988). Central to the thrust of criticisms is the fact that diversion may lack safeguards present in the formal legal system. In this vein, Moyer (1980) asserts that there is the potential to ignore rights of young people in that the process is not visible, it has vague and ambiguous criteria, it is non-reviewable, and it is paternalistic over universalistic. To this end, the process of selecting candidates for

diversion must be the highlight of academic inquiry. Solidifying the need to look at youth legal system processes and the way in which decisions are made, one must remain cognizant of the nature of the youth system. Barton (1976, p. 471) reminds us that “the social selectivity of the juvenile justice system is not in itself a moral indictment of that system. The juvenile court was expressly designed to concern itself more with the offender rather than the offence to afford benign paternalism rather than legalistic vengeance.”

It is worth noting that net-widening is debatable as some have argued that the hypothesis cannot be supported (see Prichard, 2010; Schulenberg & Warren, 2009). Further, there is a dichotomy here, procedural safeguards are questioned (Harding & Dingwall, 1998; Leigh, 2007; Sanders, 1988) but the implementation of diversion in the youth context is to take place in a system of enhanced procedural safeguards (*YCJA*, 2002). Seemingly, the criticism occurs in a sphere that does not reflect upon the potential ends in which diversion can achieve, specifically offender-centric ends. However, the liabilities of diversion have the possibility of diluting positive ramifications of diversion if the process is seen as unfair. A solution may be found in structuring the diversion process through clear guidelines (Baird & Wagner, 1990) but such is arguably a dominant characteristic of diversion pursuant to the *YCJA* (Barnhorst, 2004; *YCJA*, 2002).

In an attempt to account for the competing ends of diversion, the autopoietic and altruistic distinction clearly applies to the elements of the net-widening hypothesis. The extension of the net and the creation of new nets secure the autopoiesis of the system through the creation of cases for the system. Conversely, the imposition of social control through extended and new nets echoes the altruistic notions of diversion by protecting society. Further, concerns of fairness maintain the altruistic focus with system processing through diversion. Thus, not only is the tension between autopoietic and altruistic goals of diversion

masked but the persistent problem of diversion as net-widening seemingly fits within the instrumental nature of diversion.

In this research, there is a need to be aware of the net-widening hypothesis and problems with diversion. The criticisms briefly outlined are not unresolvable, transparency in the actual process and transparency in the policy and legislation that guides the decisions can address concerns regarding the use and fairness of diversion. In this light, a useful starting point for investigating diversion rests in recognizing the pursuit of altruistic and autopoietic goals.

### **Combatting criticisms with structure.**

Whereas structuring diversion legislatively is a method of controlling the process, organizational policy can provide structure and guidance for diversion. On this note, the Crown Policy Manual (Attorney General of Ontario, 2005) and the Federal Prosecution Service Deskbook (Federal Prosecution Service of Canada, 2000) presents organizational imperatives in all prosecutorial business. Both provincial and federal policy documents are clear on Crown selected diversion as precedence is given to the legislative principles and priorities. Furthermore, offences that are eligible for diversion are outlined and a clear check-list-like series of considerations in provincial policy. The Federal Crown Policy does not list offences rather lists factors to consider. As such, a two-fold system of structuring emanates from statutory declarations and prosecutorial policy.

### **The Need for Discretion**

Diversion is inherently linked to the exercise of discretion (Brakel, 1972) because the law gives decision-makers discretion, which extends to the application of diversion (see *Criminal Code of Canada*, 1985, s.717; *YCJA*, 2002, s. 1-7). In Canada, informal decisions have always been a characteristic of legal system responses to the transgressions of young

people (Moyer, 1980). This extends to all legal systems (Davis, 1970, p. 58) among various players across numerous dimensions with differing implications. I briefly review the nature, context and reoccurring debates in the study of discretion.

Following the contextualization of discretion of Gelsthorpe and Padfield, (2003, p. 3), the concern with discretion lies in the ability for a single prosecutor to use their own judgment on a given set of facts with respect to a young offender offence, as to take formal action and prosecute or to take informal action and elect to proceed by way of extra-judicial sanction. Gelsthorpe and Padfield (2003, p. 22) call for immersion in day-to-day decision-making to elucidate discretion of agencies and systems and to “evaluate both the role and regulation of discretion.”

Discretion may broadly be defined as a “freedom, power, authority, decision or leniency of an official, organization or individual to decide, discern or determine to make a judgment, choice or decision about alternative course of action [and]<sup>7</sup>/or inaction” (Gelsthorpe & Padfield, 2003, p. 3). In exercising discretion, there is a concern about individual judgment in decision-making (Gelsthorpe & Padfield, 2003) and the tension between formality and latitude (Atkins & Pogrebin, 1982). The tension may be reframed as the contradiction between individualization versus uniformity and predictability in the application of the law (Ohlin, 1993). A vexing conundrum emerges with the “allocation, use, and control of discretion” in light of addressing crime problems (Ohlin, 1993, p. 4). In spite of the tension, American legal scholar Roscoe Pound (1960, p. 927-928) reminds us that “[a] balance between rules of law and discretion which will give effect with the least impairment

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<sup>7</sup> Note the addition of and – and/or is important in that there is not inaction or action. It is more correct to say that there is inaction in one vein but action in another. To illustrate, consider the prosecutor election to divert a young offender. As a discretionary decision, there is inaction with respect to formal prosecution. However, combined with this inaction is the action of making a referral to a diversion program in the community. Thus, it would be incorrect to say that diversion is a product of prosecutor inaction. More correctly, there is inaction with respect to prosecution but action as it pertains to referral to diversion.

of either is perhaps the most difficult problem in the science of law.” Given the unswerving complication with discretion in the legal system, a middle course that operates on a principle of balance is perhaps the most palatable course of action.

Generally, the law avails a wide range of discretion with little guidance in exercising this power (Moran & Cooper, 1983). In exercising discretion a decision-maker will rely on institutional beliefs, intuitions and personal opinions to ratiocinate upon the purpose of the criminal law; this assessment has an impact in the application of the law in discretionary decision-making (Gottfredson & Gottfredson, 1988, p. 115).<sup>8</sup> The centrality of the decision-maker and the consequences of the process have long been problematized in that:

[a] society that holds, as we do, to belief in law cannot regard with unconcern the fact that prosecuting agencies can exercise so large an influence on dispositions that involve the penal sanction, without reference to any norms but those that they may create for themselves. Whatever one would hold as to the need for discretion of this order in a proper system or the wisdom of attempting regulation of its exercise, it is quite clear that its existence cannot be accepted as a substitute for a sufficient law (Wechsler, 1952, p. 1102).

Whereas the solution to discretion may be to provide additional legislation, one cannot overlook the fact that discretion comes from law. Nevertheless, in controlling this discretion, the system takes a foremost role in guiding discretionary action, as seen in prosecutorial policy. Sidestepping a consideration of solutions, there is a need to be aware of the longstanding debates with the use of discretion.

There are two clear positions that can be articulated with the presence of discretion: first, discretion is needed in the legal system; and second, discretion is a source of disparity

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<sup>8</sup> Digressing for a moment, there is an important distinction to be made between discretion and discrimination as well as between discretion and disparity. The former speaks of a consideration of some improper ground that is the basis upon which unfavorable treatment is made. The latter, disparity, speaks of differential treatment which may elucidate some type unfair treatment. With disparity however, the focus is on the outcome not the process (Gelsthorpe & Padfield, 2003).

and possible discrimination. The former position has been advanced by the Supreme Court of Canada (*Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372; *R. v. Beare*, [1988] 2 S.C.R. 387), legal scholars (Barnhorst, 2004; Bibas, 2010; Carter, 2004; Cates, 1961; Code, 2009; Dworkin, 1977; Groman, 2001; Krug, 2002; Melilli, 1992; Mitchell, 2001; Rosenberg, 2009; Williams, 2010) and it is implicit given the nature of legislative drafting (see *Criminal Code of Canada*, 1985; *YCJA*, 2002). In this view, the most one can do is limit, not eliminate discretion (Lexak & Leonard, 1984) and note that it seems to operate as a humanitarian tool with an ideology of accommodation and compromise (Moran & Cooper, 1983). The latter position seems to be advanced by those scholars who examine the system with a foremost orientation towards social justice (Davis, 1999; Dicey, 1959; Groman, 2001; Hart, 1961; Harding & Dingwall, 1998; Leigh, 2007; Mitchell, 2001; Neddo, 1997; Sanders, 1988). This is especially true with prosecutorial discretion which is “the single most unreviewed exercise of power of the criminal law available to an individual in the... system of justice” (Gottfredson & Gottfredson, 1988, p. 114).

Given these positions, openness and transparency at the decisional level is desired and explored in this project. Davis (1969 as cited in Gelsthorpe & Padfield 2003) notes the importance of openness and the fact that the natural enemy of openness is arbitrariness. There is not a need to see the process in the event that it is *in camera* as an examination of the product of the process (or *de facto* decisions) can bring about transparency. As such, regardless of the position one takes *vis-à-vis* the nature of discretion, the role of discretion, and the legitimacy of discretion, there is a striking requirement to recognize discretionary processes and question the decisions made with an orientation towards social justice and the fairness of criminal justice processes. As such, I follow the call of Lacey (1992, p. 388) to

investigate discretionary processes within context to understand the process and ensure the legitimate and effective exercise of the power.

### **The Prosecutor**

The prosecutor is seldom the focus of academic investigation, especially when it comes to the powers and influence of the prosecutor (Grosman, 1969) despite the plethora of official legal declarations, policy documents and legislated powers. Stenning (1986), in his comprehensive review of prosecutorial authority, notes the overabundance of discretionary actions of the Crown throughout a criminal prosecution. Regardless of the state of academic attention, discretion is vital for the prosecutor in that it is a mechanism of dispositional convenience and a means of case disposal (Grosman, 1969, p. 100-101). These operational realities must be the subject of academics inquiry as to elucidate the function of legal systems (Grosman, 1969, p. 107).

Prosecutorial discretion is rarely visible to outsiders, especially in the context of diversion. As such, transparency at the decisional level and in the administration of justice (Davis, 1970) is due. Historically, the broad and unfettered nature of prosecutorial discretion has been noted (Law Reform Commission of Canada, 1990; Remington, 1993). Solidifying the need to examine the process, Atkins and Pogrebin (1982) call for visibility, reviewability and clear institutional procedures on discretion. This research heightens the visibility of the practices of the prosecutor within the context of youth diversion referrals.

A brief examination of prosecutorial policy of Ontario (Attorney General of Ontario, 2005) and the federal jurisdiction (Federal Prosecution Service of Canada, 2000) reveals two broad considerations for a Crown when considering the mode of processing with a case. In conducting a prosecution – according to policy – there must be a reasonable prospect of conviction and the prosecution (or prosecutor engaged processing) must be in the public's

interest.<sup>9</sup> The reasonable prospect of conviction (threshold test or sufficiency of evidence test) is an objective test that assesses how strong the case is when presented at trial and is a higher standard than a *prima facie* case whereby a reasonable jury could convict. In considering reasonable prospect of conviction, there is a consideration of: the availability of evidence; admissibility of evidence; and the credibility of witness(es). This standard, in both jurisdictions, is a continued assessment that takes place throughout the entire prosecution process (Attorney General of Ontario, 2005; Federal Prosecution Service of Canada, 2000).

The second consideration assesses whether or not it is in the public's interest to prosecute. The important point here is that no public interest can warrant prosecution in the absence of a reasonable prospect of conviction while simultaneously, the presence of a reasonable prospect of conviction cannot warrant a prosecution in the interest of the public. As a case-by-case assessment, it seems that the more serious the case, the more likely it will be in the public's interest to pursue a prosecution. However, it is clear that all of the circumstances of the case must be considered and policy outlines some circumstances worthy of consideration and circumstances that must not impact decision-making (see Attorney General of Ontario, 2005; Federal Prosecution Service of Canada, 2000).

When considering these two overarching criteria, it is clear the facts of the case and the composition of the case files are of utmost importance.<sup>10</sup> It is also clear that the two core

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<sup>9</sup> I use the term quasi-legal factors to describe the two abovementioned considerations in that prosecutor policy is not law, but nevertheless has profound implications for the application of the law given the operational requirement of policy. Interestingly, these policy considerations are not present in the above consideration of diversion and discretion. It is clear that the discussion on diversion is missing a vital component. The quasi-legal factors that are salient in all decisions must therefore become a part of the discussion. In the absence of talking to prosecutors and exploring the presence of a reasonable prospect of conviction and the public's interest in each case, it is apparent that it would be overwhelmingly difficult to identify these elements. However, the idea quasi-legal factors must be added to a model of prosecutor selected diversion.

<sup>10</sup> There is an inability to explore quasi-legal factors given the nature of the data. Nevertheless, this is an important conceptual addition to the investigation of diversion that may be explored in future empirical work.

considerations of the prosecutor continue the reduction of complexity through the increase of complexity (Luhmann, 1998). The creation of the reasonable prospect of conviction and public interest considerations increases the complexity within the system, as with it, the system is structurally more complex than without it. Seemingly, the increase in complexity reduces complexity by organizing the cases whereby prosecution can be sought.

### **Diversion Decision-Making – Factors of Candidacy**

The discussion of diversion and discretion has illuminated broad components and debates of prosecutor selected youth diversion. I will now discuss investigations concerning diversion decision-making.<sup>11</sup> It is important to remember that there is a dearth of research in the area, especially as it pertains to diversion of young offenders in Canada. Nevertheless, American academic investigations have sought to determine the legal and extra-legal<sup>12</sup> factors among diversion candidates (see Alarid & Montemayor, 2010; Naples, Morris & Steadman, 2007; Nuffield, 1997; Steadman, Redlich, Griffin, Petrila & Monahan, 2005).

#### **Factors of diversion candidacy.**

Potter and Kakar (2002) assert that a prior criminal record, severity of the crime, severity of the injury and the presence of a premeditated action are pertinent to diversion candidacy in the Kentucky. McCarter (2009) argues that crime severity is the only predictive factor of diversion in Virginia whereas Coccozza and colleagues (2005) argue that diversion is for the first time non-violent offender in Miami, Florida. Based on surveys, prosecutors in Kentucky rely on extra-legal factors such as offender's appearance, the offender's attitude towards the offence, the offender's attitude towards treatment and the local political

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<sup>11</sup> As noted above, whereas I am unable to explore the actual decision-making process, the literature on decision-making is pertinent given the focus on factors that are related to diversion candidacy. This literature identifies factors that I searched for in my interrogation of case files. Additionally, I am contributing to this area of the literature given that I am taking an unobtrusive route to exploring the products (decisions and cases) of the process.

<sup>12</sup> This distinction is explained in Chapter IV.

environment (Potter & Kakar, 2002) and in some cases race based on extensive case file review in Iowa (Leiber & Johnson, 2008). On the other hand, severity of the crime, the presence of a criminal record, race and grade repeated is predictive of incarceration (McCarter, 2009).

In the Canadian context, a Department of Justice report asserted that Crown decision-making *vis-à-vis* youth diversion is dependent upon an ethos of accountability, the presence of a criminal record and the assessment of offence severity (Moyer & Basic, 2005). Accountability speaks to a general rationale for diversion (Bala, 2003; *YCJA*, 2002) whereas the latter of the pertinent factors mirror the general importance of legal factors in diversion decision-making. There has been a commencement of discourse in the Canadian context but Moyer and Basic (2005) are silent on extra-legal factors identified in US research such as age, sex, community ties, and political climate (see Alarid & Montemayor, 2010; McCarter, 2009; Naples et al., 2007; Potter & Kakar, 2002).

Factors of diversion decision-making may be associated with the specific program or type of offender. Attributes among diverted offenders with mental illness in a multi-site US study included being a female, being thirty-five years of age or older and having committed a minor offence (Naples et al., 2007). However, the presence of a violent offence was sufficient to negate diversion eligibility (Naples et al., 2007). Luskin (2001) makes comparable findings in an Oregon based study as a history of felony convictions, a current charge of a crime against a person and being male significantly reduces an offender's chance of being offered diversion. Unique to Luskin's (2001) work however is that all legal factors are subordinate to the consideration of age and gender.

However, findings are mixed as a multi-site US study of mental health diversion did not identify predictive elements but suggest the process is an individualized procedure

(Steadman, et al., 2005). In individualizing the procedure, Mears (2000) argues that attorney perception influences decision-making. Conceptually, it is difficult to advance the argument that individual perception does not play a role in decision-making (Maclure, Campbell & Dufresne, 2003; Mears, 2000).

Focusing on adult diversion, Alarid and Montemayor (2010) assert that prosecutors in a mid-west US city engage in patterned responses and use all available information to reduce uncertainty in diversion decisions. Legally relevant factors include a criminal record and the nature of the offence whereas extra-legal factors such as mental health status, drug history and community ties are influential in diversion candidacy (Alarid & Montemayor, 2010). Comparably, a Canadian government report noted that diversion is a probable response for a first time offender, a young person and a minor offence (Nuffield, 1997). Unique here is the notion that the diverted offender is seen as worthy of a break, or worthy of leniency and is perceived as low risk (Nuffield, 1997). Most interestingly, Nuffield (1997) suggests that prosecutors may intrinsically screen out an offender and offer diversion if there is a low possibility of conviction or a conviction would merit an insignificant sentence, therein reflecting the idea of *de minimis non curat lex*. In the end, the results are mixed as to the legal and extra-legal factors that contribute to a decision to divert an adult, an individual with mental health problems or a young person.

Whereas there is a qualitative component in this research, there is an important point to be made on research that takes this factor-based inquiry and analysis. Due to the legal and extra-legal factor analysis, a reductionist approach is pursued. Implicitly, whereas there is an orientation towards fairness and social justice – through the identification of these factors and the presentation of problems that are associated with factors – there is seldom an account of the contextual and nuanced factors of the process. As such, there is a focus on process,

but, the focus on process is limited to identifying factors. Thus, research does not paint a full contextual picture of organizational forces and factors; rather, research merely relies on discernible factors based on (hypothetical) cases or self-reports. As such, a deep examination of real cases is needed to move beyond a perpetual factor identification exercise.

### **Synthesis**

There is tension in diversion which may impact and inform decision-making. I have argued that the tension lies in the simultaneous pursuit of self-serving autopoietic institutional ends and altruistic offender-centric ends. The tension continues in light of the longstanding debates regarding the presence of discretion. Nevertheless, discretion is needed for the existence of diversion in the current legislative framework. Further, I have illustrated that diversion decision-making is a function of assessing the presence of legal and extra-legal factors. However, these factors are unexplored in Canada. As such, young offender diversion in Canada will be a platform to explore the process in the Canadian context.

### **Chapter III – Theoretical Framework**

#### **Explaining the Explanatory Framework(s) – The Factors and Autopoiesis**

Autopoietic theory forces us to ask new questions and teaches us that the questions traditionally posed are not the only ones, while concurrently not side-stepping the questions of non-autopoiesis scholarship (King, 1993, p. 233). Enthused by the skepticism, explication and inquiry of autopoiesis, I attempt to move out of current rigid thinking about prosecutor selected diversion. While I am inspired by multiple explanatory models of prosecutorial and discretionary decision-making, these process oriented models are of limited applicability and as such, the process of Crown selected diversion must be (re)conceptualized. On a macro level, I work within a broader framework of Luhmannian systems theory to uncover and explicate the processes of the prosecutorial system. Holistically, I use persistent problems of current explanatory models as a springboard to use systems theory to inform my research in an attempt to bring greater understanding to the phenomenon.

#### **Existing Explanatory Frameworks and the Problems**

Existing explanatory models have attempted to explain the process of prosecutor selected diversion with a particular focus on the presence of factors related to the decision. The explanatory endeavors are primarily rooted in quantitative methodology from surveys (see Alarid & Montemayer, 2010; Potter & Kakar, 2002) but ethnographic, phenomenological and case review studies have also provided factor-based assessments (see Maclure, Campbell, & Dufresne, 2003; Moyer & Basic, 2005; Steffensmeier, Ulmer, & Kramer, 1998). Also, most of these models are constructed with official input from the actual decision-maker. While there is a source of data that is unattainable in this research, the explanatory models provide a fruitful starting point in exploring Crown selected diversion.

#### **Problematizing explanations of the problematic.**

Upon examining existing explanations, there are explanatory deficiencies in models of diversion decision-making which results in an inability to reach full descriptive potential. The deficiencies lie in the fact that the source (where the factors come from) and ascribed relevance (why the factors are relied upon or are important) of factors<sup>13</sup> pertaining to diversion are not explicated in conjunction with one another; rather, there is a one-or-the-other conceptualization activity. As such, explanations of the phenomenon have not fully developed in the literature as the source and ascribed relevance of factors must be explored together to give a complete account of empirically accessible factors. There is a need to take on this dual role in conceptualizing to: provide a holistic account of the process; provide different methodological insight to the process; stimulate complementary questions; and advance knowledge in the field.

Highlighting the explanatory deficiency, consider the explanatory model whereby factors paired with diversion candidacy are produced by professional practice wisdoms or subjective professional assessments (Maclure, Campbell & Dufrense, 2003; see also Gottfredson & Gottfredson, 1988, p. 115). A similar explanation classifies decisions as reflecting professional ideology or trends in the institution making the decision (Potter & Kakar, 2002). Seemingly, the source of factors is rooted in an institution and is only illuminated when examining the process of diversion through the decision-maker. Insofar as the institution creates the standards, the institution may be able to fulfill the autopoietic goal allowed by diversion. Nevertheless, the model is shortsighted with the mere articulation of the source of the factors as a product of the institution. As such, there is a failure to consider the ascribed relevance of the factors or why the factors are relied upon and therein does not

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<sup>13</sup> Whereas factors are classified holistically as communicable case characteristics in my model (see discussion of key terms below in Chapter IV), I use the term factor to remain consistent with the way in which the literature explains the phenomenon.

reflect the entire nature of the scheme. Practically speaking, the institutional source of factors may allow for a mode of discretion that lacks transparency and is a potential avenue for abuse (Davis, 1999; Sarat & Clarke, 2008).

Another explanatory model of decision-making in criminal law stipulates that decisions are explained by the uncertainty avoidance perspective. It is argued in this perspective that patterned responses are made to avoid uncertainty. With increased uncertainty, there is a decreased probability of conviction – the goal therefore is to increase probability of conviction and decrease uncertainty (Albonetti, 1987, p. 295). To avoid uncertainty, legal and extra-legal factors facilitate the consideration of all available information (Albonetti, 1991; Albonetti & Hepburn, 1996; Alarid & Montemayer, 2010). Patterned responses are used to reduce uncertainty, control risk, pursue success and allow prosecutors to make decisions based on stereotypes (Albonetti & Hepburn, 1996). This perspective merely reflects upon the ascribed relevance of factors in diversion decision-making to reduce uncertainty; there is a failure to account for the source of the factors, apart from the fact that they are linked with success. The fundamental weakness of this explanatory model however lies in the lack of specificity and explanation. The model can legitimize every factor considered as that which attempts to avoid uncertainty.

A tertiary theoretical account, although not related to diversionary decision-making, is the focal concern theory. Focal concern theory was introduced by Steffensmeier, Ulmer and Kramer (1998) to account for the outcome of judicial decision-making given the race, age and gender of an accused.<sup>14</sup> In an attempt to account for decision outcomes, it is postulated that judges and other legal system actors rely on three focal concerns. These focal concerns

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<sup>14</sup> This model is still important in that it reflects the nature of discretionary decisions and factors associated with these decisions.

include “the offender's blameworthiness and the degree of harm caused to the victim, protection of the community, and practical implications of sentencing decisions” (Steffensmeier et al., 1998, p. 766).

Accounting for blameworthiness, the seriousness of the offence is of utmost importance (Steffensmeier et al., 1998, p. 766). Contributing to blameworthiness are biographical factors which include criminal history and the offender's role in the offence (Steffensmeier et al., 1998, p. 767). Protection of the community draws on the same elements described with blameworthiness but it has a heightened focus on incapacitation. Given the uncertainty of future behaviour, predictions on dangerousness are made based on: the nature of the offence; criminal history; case information; facts of the crime; and characteristics of the offender which include drug dependency, education, employment, and/or family history (Steffensmeier et al., 1998, p. 767). Finally, the practical implications, constraints and consequences of a decision, are considered. At the organizational level, there is a need to maintain working relationships, enable the case flow and be cognizant of correctional resources and crowding (Steffensmeier et al., 1998, p. 767). Practical considerations speak of offender specific elements that the judge or decision-maker may be cognizant of in rendering a decision – particularly those which pertain to the offender's ability to fulfill the prescribed task (Steffensmeier et al., 1998, p. 767).

Given the components of focal concern, there is rarely comprehensive and complete case information which leads to the use of “perceptual shorthand” and the consideration of age, race and gender (Steffensmeier et al., 1998, p. 768). As such, the focal concerns and the complex interplay between focal concerns are able to circulate due to the nature of the system which requires the creation of schemes/concerns to make sense of information and render a decision. Granted the three focal concerns and the competing dynamics, the priority

of the focal concerns remains an open question. However, the focal concern theory is the only model that does speak to both dynamics of the source and ascribed relevance of factors.

The final theoretical account of diversionary (discretionary) decision-making is the court community perspective. A product of ethnographic research, the grounded theoretical court community perspective focuses on case processing dynamics over the *de facto* case outcomes (Ulmer, 1997; Wooldredge & Thistlewaite, 2004, p. 419). Ulmer (1997, p. 13) outlines salient features of this perspective which includes: the notion of community that is rooted in legal culture; shared workspace and interdependency between agencies; attention to “going rates” or informal norms; interorganizational relations that are formal and informal which contribute/influence regular processes and outcomes; and the sentence and guilty plea as a core activity that requires careful attention. Most important here is the notion of “going rates”. When exploring this aspect, legal system players are able to process large numbers of cases – as encouraged by organizational and political influences – with a rough consensus on a sanction or position that is warranted in the circumstances (Eisenstein & Jacob, 1977; Sudnow, 1965). As such, there is a clear institutional impetus behind practices that involve the notion of “going rates”. With this being said however, the court community perspective is unable to fulfill the two-part role of an ideal explanatory model. The source of factors is clearly cultural, but, the ascribed relevance of factors is limited in the analysis.

In short, there is an inability of existing explanatory models to simultaneously assess the source and the ascribed relevance of the factors of decision-making. Whereas some explanatory models expand to judicial discretionary decision-making, explanatory models of similar processes are beneficial because: different explanatory models relate to the diversion context as the nature of the process is the same but, the timing and actor responsible for the process changes; and expanding the context of explanatory models and noting the common-

thread of deficiency solidifies the need to explore the two-fold level of description. A dualistic explanation is required to fully understand the nature of diversion decision-making. The lack of investigation in the youth context makes youth diversion a suitable canvas to construct an explanatory model of diversion.

### **A Complementary Cognitive Tool – Luhmannian Systems Theory**

Conceptually, I aspire to address or at least ameliorate the pitfalls of the current models in terms of the *either-or* refined content of diversion. I use systems theory in an attempt to (re)conceptualize prosecutor selected diversion. Working with Luhmann's theory, I am therefore concerned with autonomy, autopoiesis and communications of the prosecutorial system (see Banakar, 2003; Delanty, 2005; Hagen, 2000). Broadly, I follow the call to think outside of one paradigm, shift towards an interpretative framework and be "an interpreter" not the authority on a phenomenon (Bryant & Charmaz, 2010b, p. 52).

In Luhmann's terms, I focus on the secondary observation, which is the "observation of the making of distinctions" (Luhmann, 2004, p. 34), or "observing the observers" (Luhmann, 2004, p. 101). This second order observation is achieved through an examination of communications available to the prosecutors as decision-makers. Luhmann tells us that in order "to make sense of systems from the outside, we can only observe the operations performed by the system, such as in the case of organizations. We may choose to select the aspects of decisions and communications about decisions as indicators of the operations of a system" (Hernes & Bakken, 2003, p. 11). Accordingly, I focus on the creation of distinctions in those cases that are diverted and cases that are prosecuted by the Crown. Whereas these distinctions and associated communications apply the legal/illegal code within the prosecutorial system (Arnoldi, 2001; King, 1993; Luhmann, 1988), there is an added level of communication that is pertinent in the diversion context after the legal/illegal code. There is

the introduction of a divert/not divert code, a code that will be empirically explored. Below, I explore the idea of autopoiesis, distinction and decision-making and communication.

Given my Luhmannian inspirations, I argue that diversion may be conceptualized as a distinctive discourse of diversion/non-diversion.<sup>15</sup> This distinctive discourse secures the autopoiesis of the prosecutorial service through systems of meaning (King, 1993) that are associated with the distinctive discourse. I suggest that there are meaningful answers that are unraveled with a Luhmann inspired (re)conceptualization of diversion. Seemingly, there can be new answers to the vexing theoretical problems through the application of Luhmann to the problematic by surpassing explanatory stalemate. I am encouraged to move to an examination of the legal system, through the use of scientific methods, to construct an analysis of the legal system (more precisely the organization of a diversion program) to sociologically identify the elements of which it consists.

By looking at the case files, I can ascertain components of the system and the product of diversion decision-making by the system. Following Luhmann's sociology, I question the "elements of which the system consists" (Luhmann, 1988, p. 14) not the existence of the system. Accordingly, communicable case characteristics are elements of the system. One must keep in mind, as noted in Chapter I, an autopoietic system "constitutes the elements of which it consists through the elements of which it consists" (Luhmann, 1988, p. 14).

### **Luhmann's Systems Theory**

Following Luhmann's systems theory, I identify the prosecutorial service as a self-referential/autopoietic system. This system constitutes an entity determined not by the

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<sup>15</sup> I do not explore the legal/illegal code. However, the process of diversion takes place in the legal system with the thrust of law behind it, I assume the presence of legal and illegal distinctions. As a matter of fact, in all cases that are diverted thereafter being charged by the police, the legal/illegal code and associated distinction has been made. It is beyond the scope of this project to problematize the legal/ illegal code from the outset as to suggest that the cases that are in the system are potentially not illegal and in effect legal.

environment but by the structure of that system. The systems perspective allows for the interrogation of young offender diversion as that which is created by the system, for the system, that ensures reproduction of the system. Whereas a Luhmannian position would note that at the center of the prosecutorial system is the determination of legal/illegal (Arnoldi, 2001; King, 1993) this research has a nuanced addition through the determination of divert versus not divert criminal incident based on the communications of the system. Methodologically, my task is to identify the diversionary operations that secure unity and self-reference of the prosecutorial system (Luhmann, 1994, p. 628). This task is achieved quantitatively through the creation of the code of a distinctive discourse of diversion and non-diversion. My empirical task rooted within the qualitative paradigm is to identify structures of the system in relation to the diversion process based on distinctions and communications – which can be conceptualized as a reduction of complexity of systems communications.

Given the functional imperative that decisions are made, I use Luhmann's systems theory in an effort to: mobilize an often overlooked and underused and arguably impenetrable theoretical framework (Cotterrell, 2006; Deflem, 2008; Hernes & Bakken, 2003); use an organizational sociological approach to explore Crown selected diversion; and focus on decisions in prosecutor selected diversion. Additionally, I turn to Luhmann to give me a loose interpretive framework when examining communication, explanatory tools and a language to use when explicating trends in communication. I use Luhmann's system theory which is generically inductive by remaining true to the theoretical roots of elucidation and illustration, not testing hypotheses (Luhmann, 1993, p. 547 as cited in Wandall, 2008, p. 19).

**The central elements of autopoietic systems in Luhmann's theory.**

There are three types of social systems distinguished by Luhmann: society, organization and interaction (Luhmann, 2008; Seidl, 2005, p. 145). According to Luhmann, modern society is comprised of a “functionally differentiated system whose subsystems have become autonomous of each other and of the social system as a whole” (Delanty, 2005, p. 84). In this vein of autonomy, the autopoietic framework of systems is advanced by two fundamental assumptions: (1) social systems are real and exist as without existence there is an inability to assess the system; (2) systems are autopoietic in that they are self-reproducing and need to reproduce (Hernes & Bakken, 2003). On autopoiesis, the system constructs and reproduces the structures and elements in which it needs to survive (Jonhill, 2003, p. 23). Stated differently, Deflem (2008, p.167) asserts that systems operate autonomously<sup>16</sup> on the basis of their own – self-defined – code. As such, systems are not creatures of the environment but self-reproducing or autopoietic within (or against) the environment (Hagen, 2000; Luhmann, 2008, p. 85; Seidl, 2005). Citing Maturana’s (1981, p. 21 as cited in Luhmann, 2008, p. 85) work, Luhmann asserts that “autopoietic systems are systems that are defined as unities, as networks of productions of components, that recursively, through their interactions, generate and realized the network that produces them and constitute, in the space in which they exist, the boundaries of the ‘network as components that participate in the realization of the network’”.

Further exploring the nature of social systems, Luhmann (2008, p. 85-86) highlights three central elements of systems. Firstly, systems are self-organizing; this pertains to organizing in the most intuitive sense of the word and organizing in terms of producing structures and changing structures. On a global level, everything that is produced by the system is used by the system and everything that is used by the system is produced by the

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<sup>16</sup> The system does not operate independently but autonomously, as the system still needs the environment upon which to make distinctions and cannot exist without it.

system. Secondly, autopoietic systems are sovereign. In this vein, there are no importation of identities and differences; these are distinctions that must be made by the system for the system. Thirdly, communication is the pivotal process or component involved in autopoietic procreation of social systems. This last component will be explored in greater detail below.

While there are different systems in society, Luhmann amalgamates the components of a social system by explaining:

A social system comes into being whenever an autopoietic connection of communications occurs and distinguishes itself from the environment by restricting the appropriate communications. Accordingly, social systems are not comprised of persons and actions but of communication (Luhmann, 1989, p. 145).

For example, whenever a Crown attorney makes a reference to Crown policy or the *Youth Criminal Justice Act* or in the case of the empirical object, the prosecution file, the prosecutorial system comes into being by guiding the appropriate communications (see Wandall, 2008). The communication of diversion eligibility through the restriction of communication creates a distinction between diversion and non-diversion with the communicable case content. Framed differently, there are two possible options explored as a mode of case processing, divert the young person or prosecute the young person. Knowing the decision that is made and the communicable case content, an exploration of the communicable case content allows for the (re)construction of the cases that allow for the communication of diversion to succeed; this is achieved through the illustration of the distinctive discourse and the construction and conceptualization of the structure or elements of communication for the system.

The central focus point for Luhmann is the system (Deflem, 2008; Delanty, 2005). When speaking of systems, Luhmann refers to “concrete existing entities” that exist because of differing perspectives of the world and the deterioration of social cohesion as found in traditional societies (Deflem, 2008, p. 167). The dilution of social cohesion and weakening

of a central worldview is a function of the increased complexity and number of “actionable alternatives” (Deflem, 2008, p. 167). In the vein of actionable alternatives, Crown selected young offender diversion provides alternative modes of case processing through diversion – the process is simplified with a divert versus not divert code. The imputations and the functions of the system are to decrease the complexity with the formation of specialized systems. Accordingly, when I highlight the elements and the structure of the system, I too provide an account of decreased complexity through the scientific method. The system however uses autopoiesis to manage complexity (Cotterrell, 2006; Hernes & Bakken, 2003) and is concretely “the process characteristic of life by which systems organize themselves out of disorder, forming a responsive, self-referring, self-maintaining network” (Banakar, 2003, p. 109). Autopoiesis explains the retention of a distinctive character and stability in the complex society given the increasing complexity of social systems (Cotterrell, 2006, p. 21).

#### **Differences and distinctions.**

Focusing on the system, the foremost importance lies in the differentiation among systems. The reproduction of a system is enabled by the system being able to distinguish itself from other systems (Delanty, 2005, p. 284). Social systems thereby produce differences and exist because of differences (Moeller, 2006). The establishment of differences is more than what a system does for it also constitutes the system through the creation of differences or distinctions (Arnoldi, 2001, p. 5). For the sake of clarity, the notion of differentiation is based on distinctions that are made through differences between social systems and within the social system (Arnoldi, 2001; Deflem, 2008; Delanty, 2005).

Differences are required at an analytical focal point in that it is through differences that social change occurs (Delanty, 2005). Differences ensure that the system is focused around its own codes or criteria or its own codes of information (Delanty, 2005, p. 284; Hagen, 2000, p. 346). All codes have a preference structure with positive and negative

sides<sup>17</sup> (Hagen, 2000, p. 346; Moeller, 2006). Given the codes with a specific preference structure, each system is able to have a special function in society. These codes serve a special function for the systems in securing functional differences for the system through autonomous operations of the system (Hagen, 2000, p. 346).

Further, making distinctions and differentiations simplifies communication and creates stability as it streamlines processes of the system (Hagen, 2000, p. 348). Hagen (2000, p. 349) illustrates this stability with the teacher who grades exams; social differences are not considered in evaluations as the content of an evaluation is measured against the requirements detailed in the syllabus. As such, conundrums occurring in other systems are exclusive to that system in decision-making and do not impact other systems. Applying this to Crown selected youth diversion, youth are diverted according to the standards deemed to be important by the organization<sup>18</sup> when making this decision. Empirically, I construct a standard of evaluation based on communicable codes and system elements knowing the outcome of the case – thus, I know the final grade and the student’s submission but the syllabus as the evaluative criteria is constructed in this work. The prosecutor that refers a young offender to diversion or elects to proceed with prosecution makes these decisions based on standards, rules and laws created by the legal system and prosecutorial system. Therefore, I search for the structures of this system that influence the decisions and the criteria or communicable case characteristics that are dominant in the cases that are diverted or prosecuted. These communicable case characteristics constitute criteria created by the system for the system to mobilize in making decisions or further communication. As such,

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<sup>17</sup> For example, legal/illegal for the legal system, true/not true for the scientific system, having/not having for the system of the economy, and so on.

<sup>18</sup> Here, the organization pertaining to youth diversion is in itself the product of further differentiation operated within the differentiated legal system.

exploring the content of case files of diverted and not diverted young offenders allows access to the discourse of divert/not divert.

There is a clear function of the making of distinctions and decisions within Luhmann's systems theory – address complexity through simplification and contribute to autopoiesis. However, making distinctions and decisions are not without (potentially) conflicting effects on the reproduction of the system. Consider Seidl's (2003, p.143) assertion that from concrete situations that require a decision is the emergence of conflict based on the distinction made. The conflict emerges out of the pursuit of goals, whereby the pursuit of one goal has operational implications for another goal – more specifically, the disregard or dissolution of alternative goals. Consider diversion as a means to an end for the criminal legal system and then consider diversion as a means to an end for clients of the system. Operationally and strategically (Seidl, 2003), the client will suffer with the pursuit of legal system goals while alternatively, the system will suffer with the persistent pursuit of the goals of the client.

### **The relationship between the autopoietic system and the environment.**

The autopoietic state of organizations or systems highlights the relationship between and among an organization or system and the environment where the system is found (Dubé, 2010; Hagen, 2000, p. 351; King, 1993). Most broadly, autopoietic social systems relate themselves to the environment through communication but the system produces the structures and elements that are necessary for reproduction (Jonhill, 2003, p. 23). It is in exploring this relationship that there is an important distinction to be made between closed and opened systems. Outside of Luhmann's theory, systems that interact with their environment are thought to be open systems whereas closed systems do not interact or contact their environment (Hagen, 2000). Within the context of autopoietic systems however, the distinction between open and closed has a different meaning – the idea of self-referential

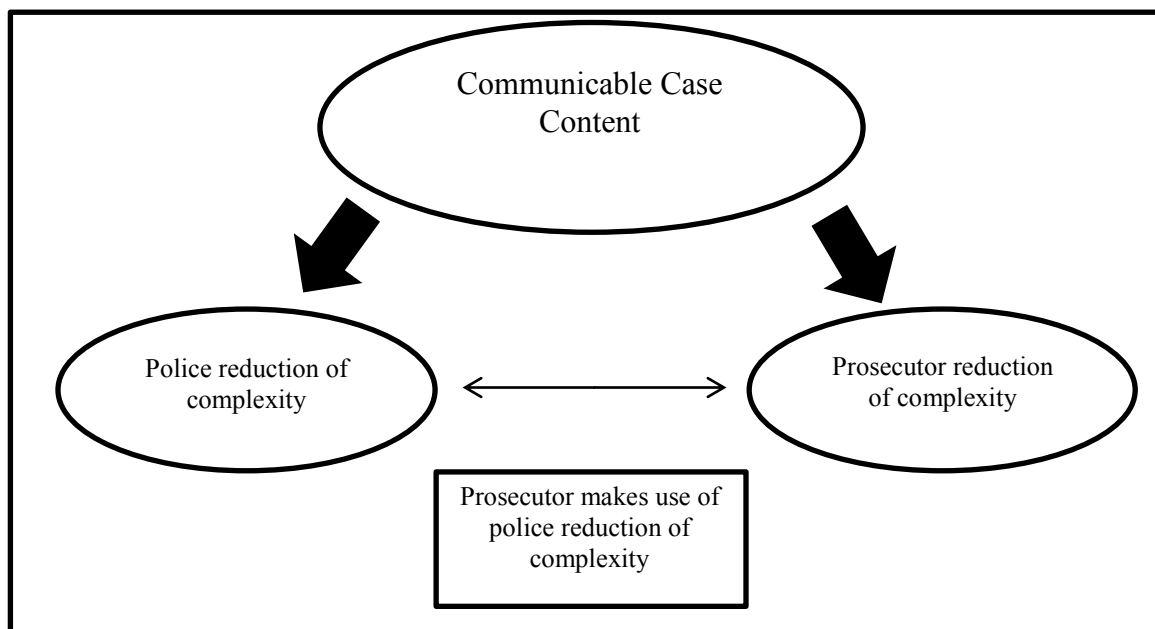
closure or operative closure and cognitive openness is important. The autopoietic systems are operationally closed systems as environmental influences are not directly admitted into the system; in other words, the environment does not produce decisions within the operational frontiers of the system. The closed system is characteristic of the autopoietic or self-referential closed system as system operations only operate within the scope of the operations of the system (Seidl, 2005). At the operational level, the system contains nothing but that which has been self-reproduced and therefore constitutes the unit that has been produced in the system (Hagen, 2000). Components of the environment must be distinguished by the system in maintaining its closed nature. The distinction allows a system to determine what belongs and what does not belong to its own network of communication – this is a function of an examination by the system of the system and the environment (Gershon, 2005; Hagen, 2000).

The process of Crown selected diversion relies on the distinction between diversion and non-diversion. The influx of cases from the environment (the police) allows the prosecutorial system to make distinctions based on their own decision codes and is therefore autopoietic in the production and reproduction of its own processes. These observable activities take place within the system, not the environment (Gershon, 2005, p. 101). Due to the application of the diversion code, the system is able to distinguish itself from its environment. The cognitive exercise in determining what is the environment and what is part of the system establishes a boundary between the system and environment. It is important to note that the application of the code is not to predict outcomes or actions but to create the preconditions for diversion (Gershon, 2005, p. 102; Luhmann, 1995, p. 374), nothing more.

In that the closed character of the system has been explained, the environment still plays a role on/in the system which connotes a degree of cognitive openness within a closed system. This dependence is compatible with autopoiesis and operational closure. In this

research, dependence is vital given the influx of cases from the environment (the police) that allows diversion to take place. The term *structural coupling* is used to account for environmental impact and dependence within a closed system (Hagen, p. 352 & p. 347; Moeller, 2006; King & Thornhill, 2003). As an in-between of two systems, structural coupling “is a state in which the system shape[s] the environment of the other in such a way that both depend on the other for continuing their autopoiesis and increasing their structural complexity” (Moeller, 2006, p. 19). Moeller (2006) asserts that systems can share language and increase their complexity thereby accounting for environmental impact and dependence within a closed system. In diversion, structural coupling is active in the police provision of a case file to the Crown and the Crown’s use of the file. What goes on in communication is not anything, “but any communication [that] goes on, [however] it goes on if and when it is able to establish some kind of order” to secure mutual understanding of both systems and to ensure the communication continues (Moeller, 2006, p. 22). While the description of the cases can reveal these meaningful components, empirical examination is needed to explore the contents of the communication and the distinctions created among diverted and prosecuted cases. The model of structural coupling is presented below in Figure 1.

**Figure 1**  
**Structural Coupling**



Accounting for the complex open/closed relationship through structural coupling, it must be noted that structural coupling is not a causal influence on the system. Rather, structural couplings are “highly selective connections between systems and environments” (Luhmann, 1994, p. 632). Accordingly, the police do not contribute to the operations of the reproduction of the Crown, but it is a state in which the Crown presupposes changes in the environment and relies on these changes (Luhmann, 1994, p. 632). Said differently, structural coupling allows for the interpretation of the environmental output of other systems but allows the system to operate on its own terms on a continuous basis (King & Thornhill, 2003, p. 33). The environment does not contribute to the operations of the system, but it can disturb, irritate, or perturb the operations of the system (Deflem, 2008; Hagen, 2000; Moeller, 2006). While there is no system and environment intervention, this does “not preclude an observer seeing how the system is [selectively] affected by the environment, or how it systematically affects other systems in the environment” (Hagen, 2000, p. 352). Deflem (2008, p. 167) asserts that there is also a relationship between systems as the collection of systems that make up society. These systems then in turn, as entities of the environment, take-up information from one another and the subsequent uptake of information from the environment. Succinctly, the idea of structural coupling is an attempt to account for the influence of different systems on different systems through inter-and intra-relations amongst systems.

The open and closed dynamics can be summarized by Luhmann’s assertion that systems are *cognitively* open but *operationally* or normatively closed (Cotterrell, 2006; Deflem, 2008; Jonhill, 2003). This means that the system is open to information from the environment but it is not a sponge and inasmuch it does not discursively read and uptake information (Cotterrell, 2003, p. 22). In being open, the autopoietic, self-observing, self-reproducing and self-referencing systems of communications prevail (Cotterrell, 2006).

**Communication.**

Given the autopoietic nature of social systems and the importance of differences and distinctions, the idea of communication must be outlined. Communication is a “purely observable act that consists in the synthesis of information, utterance and understanding or misunderstanding. Communication has no subject; it merely happens” (Deflem, 2008, p. 168). For Luhmann, there is no sociological concern of the components that make up society or integration (Banakar, 2003; Hagen, 2000, p. 347). Accordingly and most radically, communication is central in that society does not exist as a collection of human beings (Banakar, 2003; Hagen, 2000, p. 347; Luhmann, 2008), but as communication between social systems (Delanty, 2005). Social systems are structures of communication that are related to the environment from which they exist (Jonhill, 2003; see Delanty, 2005) thereby speaking of the intra-relations of the system. Communication facilitates self-reproduction and unity of an organization in that communication is an element of the social system that is recursively produced and reproduced (Seidl, 2003, p. 128).

The centrality of communication is based on the assertion by Luhmann that there are inadequate conceptual discussions of the relationship between communication and action (Luhmann, 1986b as cited in Hagen, 2000, p. 352). Addressing the communication component of this relationship, only communication is that which consists of a social system – in Luhmann’s view, within society, nothing exists outside of communication and the process of communication. As such, everything of a system is conceptualized as communication (Hagen, 2000, p. 352-354).

**Decisions.**

Shifting from communication to a related process within systems, decision-making by the organization is essential to Luhmann. This is important given my focus on decisions that are made within the prosecutorial system. This function is the final of the four forms of

organization which include membership, programs, places and stuff, and decisions (Jonhill, 2003, p. 25-26). In organizations, decisions establish the organization, decisions are the function of an organization (both to make and implement decisions) and decisions are always based on other decisions (Jonhill, 2003, p. 25-26; Seidl, 2005, p. 146). The autopoietic nature of systems is secured as systems “consist of decision[s] and that themselves produce the decisions of which they consist, through the decisions of which they consist” (Luhmann, 1992, p. 166 as cited in Seidl, 2005, p. 146). The primacy of decisions in systems theory is further held in that a failure to make decisions nullifies the existence of an organization (Jonhill, 2003, p. 27-28; Seidl, 2005). Jonhill (2003, p. 26-27) notes that decisions are made within an organization become paradoxical as making and implementing decisions becomes an exercise in limiting possibilities and controlling decisions within a frame of reference. As such, there is a shift from open to closed in decision possibilities that fosters the creation of decision criterion to control further decisions. Controlling future decisions reduces uncertainty and secures the presentation of the system to the environment (Jonhill, 2003, p. 28).

Amalgamating assertions of communication and decision-making, consider the law as an autopoietic system. According to Deflem (2008, p. 168), the law as an autopoietic system produces and reproduces behavioral expectations and provides a systematic approach to resolve situations that come into conflict with expectations. Luhmann refines law to a binary code or a distinction between lawful and unlawful (Cotterrell, 2006; Deflem, 2008). This is the criteria of the system upon which decisions are based, but other systems rely on other criteria – in the case of diversion selection by the Crown, the system mobilizes a diversion/non-diversion code. As a cognitive matter, the structure of law and the application of law can be phrased as an “if-then” statement; if conditions prescribed by law are not met, then a legal decision will follow. The “either” and “or” in the application of binary codes

(Luhmann, 2008) results in a “self-founding discourse unfazed by circularity” (Cotterrell, 2006, p. 23). Important here are the considerations of conditions that impact other conditions, outcomes or processes. Thus, when looking at diversion decision-making, the conditions as presented in the literature become important in Luhmannian inspired work.

In sum, I turn to Luhmann to provide me with conceptual tools that allow me to focus on communication, the creation of distinctions and elements of the prosecutorial system. Scientifically speaking, I relied on Luhmann to mobilize one of the most complex, rich and complete sociological accounts of organizations available in sociological and socio-legal theory (see Deflem, 2008; King & Thornhill, 2003; Moeller, 2006). More specifically, I use Luhmann to conceptualize and theoretically account for the prosecutorial system. This feat is especially accessible using Luhmann’s position of a secondary observer, where as a researcher, I observe the creation of distinctions by the system. I observe at a distance as a secondary observer with an orientation of wonder and a goal to describe, explore and distinguish the complexities of Crown selected diversion without taking a political position.

## **Chapter IV – Methodology**

In this chapter, I review pertinent methodological literature. Firstly, I disclose my research assumptions and outline my research design. I will follow with a brief discussion of the characteristics of the research object and the observable phenomenon. Thereinafter, I will describe the data set and the process of data collection. I then outline my data analysis procedures.

### **Research Design – The Starting Point**

My research approach parallels the call to think outside of the use of one paradigm, shift towards the interpretative framework and consider the role of the researcher not as the authority but as “an interpreter” of a phenomenon (Bryant & Charmaz, 2010b, p. 52). I attempt to describe and explain the circumstances associated with the Crown’s decision to divert by adopting a pragmatist approach that incorporates both quantitative – illuminating circumstances associated with candidacy – and qualitative – (re)conceptualizing case circumstances to understand the communicated components of the cases. As such, I shift away from one-sided paradigmatic advocacy (Patton, 2002, p. 71) with the foremost goal of mobilizing practical and pertinent methodological tools to support topical discovery and confirmation. I attempt to bring methodological flexibility and sensitivity to this project that transgresses orthodoxy for what Patton (2002, p.72) calls “methodological appropriateness”. As such, I mix approaches to provide and mobilize a comprehensive opportunity to answer research questions (Johnson & Onwuegbuzie, 2004). It is this embracement of pragmatism that allows me to undertake multiple projects “without the need to identify invariant prior knowledge’s, laws, or rules governing what is recognized as ‘true’ or ‘valid’ as the results are of importance” (Maxcy, 2003, p. 85). I therefore accept: that knowledge is constructed and based on the reality of the world; that fallibilism exists in beliefs and conclusions; and

that knowledge is changing and tentative (Johnson & Onwuegbuzie, 2004, p. 18). Inasmuch, I follow McCall and Bobko's (1990, p. 412) call to do "whatever needs to be done to enhance discovery."

### **Quantitative and Qualitative Approaches in a Nutshell**

Quantitative research is based in positivism and relies on the strict adherence to a research design (Adams, Khan, Raeside, & White, 2007) but may be inductively and deductively inspired (Patton, 2002). The quantification of variables and the mobilization of statistical tests permit numerical analysis on nominal, ordinal, interval or ratio scales (Howell, 2010). With quantitative data, there is a foremost goal of establishing reliability and validity (Hagan, 2006; Howell, 2010; Neuman, 2011).

Qualitative research may be succinctly defined as "...an examination and interpretation of... [a phenomenon] expressed by the researcher's words rather than numerical assignments" (Dantzer & Hunter, 2006, p. 67). This design is concerned with the identification and explication of meanings, concepts, definitions, characteristics, metaphors, symbols, stereotypes, typifications, labels and descriptions of things or individuals (Berg, 2009, p. 3; Jupp, 1989, p. 119) among various dimensions including argumentative, discursive, emotional, spatial, spiritual and temporal (Frost et al., 2010, p. 442; Manson, 2006). Additionally, qualitative inquiry deeply considers social setting (Berg, 2009; Neuman, Wiegand, & Winterdyk, 2004) to produce "meaningful patterns descriptive of a particular phenomenon" (Auerbach & Silverman, 2003, p. 3).

The selection of a qualitative design is pragmatic (Berg, 2009; Creswell, 1998; Patton, 2002) and is appropriate for this study given the exploratory orientation and the unreceptiveness of data parts to quantification. It also allows for a consideration of the complete case file. Thus, the depth and detail that qualitative methods provide (Patton, 2002)

makes it an appropriate research approach and permits deep understanding and exploration of the phenomenon (Creswell, 1998; Tewksbury, 2009). Additionally, qualitative methodology provides an alternative yet complementary lens to quantification with a unique and difficult to secure data set. The complementary process is achieved through the use and identification of: analytical description; reoccurring thematic content; and the context in which the phenomenon occurs (Tewksbury, 2009). On the other hand, the quantitative method is appropriate due to the clear presentation of quantifiable categories in each case as presented in a fill-in-the-blank-typed form.

I begin my research following the assertion that the quantitative and qualitative traditions are best when used to complement each other, formally known as mixed-methods or triangulation (Berg, 2009; Dantzer & Hunter, 2006; Neuman, Wiegand, & Winterdyk, 2004; Sale, Lohfeld, & Brazil, 2002). As complementary tools (Sale, Lohfeld, & Brazil, 2002), mixed-method is not an instrument in validating findings made in one approach by mobilizing findings in the other as a different phenomenon as different parts of the data are being studied based on the different methodological approaches (Denzin, 1978; Guba, 1990; Sale, Lohfeld & Brazil, 2002). In this research, triangulation is analytically couched as I combined approaches to provide “breadth and depth of understanding and corroboration” (Johnson, Onwuegbuzie, & Turner, 2007, p. 123). The methods advantageously unite through a desire to understand and improve the social world, recognize the complexity of a social phenomenon (Clarke & Yaros, 1988; Sale, Lohfeld & Brazil, 2002, p. 46) and address and mitigate methodological pitfalls springing from each approach (Collins, Onwuegbuzie & Sutton, 2006; Currall, Hammer, Baggett, & Doniger, 1999). Further, the combination of methods overcomes methodological persistence in the study of diversion.

### **General Characteristics of the Study Population and Observable Phenomenon**

This investigation was concerned with Crown selected diversion whereby the Crown's decision to prosecute or to divert is known. As such, communicable case circumstances are assessed through their presence in the case files.

In this study, the provincial Crown prosecutor in Ontario is a state appointed agent who works for the Ontario Ministry of the Attorney General and is in charge of prosecuting *Criminal Code of Canada* (1985) offences committed in the province. Federal prosecutions are accordingly the jurisdiction of the federal prosecutor, a state appointed agent that is employed by Public Prosecution Service of Canada.

The young offender, as the individual subject to the decision of the prosecutor, is between the ages of 12 and 18<sup>19</sup> at the time of the offence, as defined by legislation (*YCJA*, 2002). The young person in this study is an individual charged with an offence pursuant to the *Criminal Code of Canada* (1985) or the *Controlled Drugs and Substances Act* (1996).<sup>20</sup> The young offender is subject to the Crown's decision and alleged to have committed a criminal offence within the jurisdiction of the Crown's office.

### **Empirical Data - Type of Data, Sampling & Collection Procedures**

The Crown prosecution files or case files are composed by the police, given to the Crown and serve as the source of information to substantiate a criminal charge and pursue prosecution. On a theoretical level, the case files are communications of the system that are composed by the police. These communications are composed in such a fashion as to make the communications meaningful and useful in the continuation of system communication and

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<sup>19</sup> More specifically, the young offender is older than 11 but younger than 18.

<sup>20</sup> Whereas I originally wanted only consider *Criminal Code of Canada* (1985) offences, some of the diverted cases were *Controlled Drugs and Substances Act* (1996) charges. As such, I expanded the scope to include federal offences. Despite the difference in the source of criminal charges, similarity lies in the fact that a criminal charge has been laid by the police, carriage of the file lies with the Crown and the Crown has elected to divert or proceed with prosecution.

the formulation of distinctions between those cases – or communication of cases – that are worthy of diversion and those that are not and are thereby prosecuted.<sup>21</sup>

### **Case Files – Type of data.**

Using Crown files constitutes a secondary use of data as there will be a “reanalysis of data that were gathered or compiled for other purposes” (Hagan, 2006, p. 251). Hakim (1993, p. 134) asserts that when looking at organizational policy or decision-making, organizational records are an important source of data when assessing organizational practices. The case files reflect an unobtrusive measure, characterized by access to a social setting or the inhabitants thereof through indirect means, including the use of data collected for other means (Berg, 2009; Hagan, 2006; Hakim, 1993). Such records can: illuminate processes and meanings about or within the organization (Berg, 2009); provide an intellectually interesting and novel source of data that is often overlooked (Hakim, 1993); reflect values and beliefs of people (Marshall & Rossman, 2011, p. 160) or in my case, values and beliefs that are articulable within the communication of the system.

### **Case files – Purpose & content.**

The prosecution file contained all of the state’s evidence against the accused compiled by the police<sup>22</sup> in an effort to sustain a conviction. The file included a formal information<sup>23</sup> and a synopsis of the case whereby the general sequence of events provide a storyline of the alleged offence. Statements from police, victim(s) and witness(es) were

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<sup>21</sup> Whereas I use theoretical language to discuss the empirical data set, I outline a model of terms at the end of this chapter that amalgamates the use of theoretical and project-specific language.

<sup>22</sup> Whereas the police are information gatherers, their role is not to direct criminal prosecutions. The role of the police is to transfer carriage of the legal file to the Crown whereby this independent state agent will thereafter decide on the way to proceed with the case.

<sup>23</sup> An information is the technical term for a document that includes the formal declaration sworn by a peace officer of an alleged offence.

included or specified in the file. There was also information regarding the accused in the file including in-house police records and criminal/youth record where applicable.<sup>24</sup>

### **Access to case files.**

Formally, the request for access and the decision to allow access to prosecution files rests with the judiciary (*YCJA*, 2002). To obtain access, I made a formal application to a youth court judge pursuant to s. 119 (1)(s) of the *YCJA* (2002). In this application, I argued before a youth court judge in open court that this research is in the public's interest. I provided the court with a brief synopsis of my research and affidavits from the Ethics Board and my supervisor, Professor Dubé. I also prepared and provided to all parties a brief written submission which I expanded upon in my oral submissions and a list of the case law that I relied upon in my submissions.<sup>25</sup> The application was contested by the Crown on the basis of privacy and the police took no position but asserted that there are privacy and resource issues. I was successful in November of 2011 after six court appearances since May 2011. A copy of the court order and the scope of permissible access can be found at Appendix A.<sup>26</sup>

### **Case file sampling.**

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<sup>24</sup> A subtle distinction must be made here. In that I refer to the files as Crown prosecution files, I refer to them as such in outlining the purpose of the file or the substantive use of the file *vis-à-vis* the Crown. However, considering the discourse used by practitioners, the files are police files in that the police are the creator and contributor of the substantive content of the file.

<sup>25</sup> I was advised by a generous and helpful defense counsel to provide this information to both parties to prevent any further delay for the purposes of consulting the common law that I was using to make my arguments.

<sup>26</sup> A few subtle points must be made to reflect the application. While in court, the judge expressed concern regarding police officer's notes and their legibility, which in effect would be overwhelming to redact. Feeling like it would add minimal value, I opted to consent to not have the police notes present in the file. Furthermore, as for the criminal record, I did not pursue having the actual criminal record but the presence of such is noted in the file. Insofar as the criminal record is created and maintained by the RCMP, an application to the RCMP would have had to have been made to obtain access. In the interest of time and the fact that the presence of a criminal record is noted in the case, I opted not to pursue access to the criminal record. Future research may be interested in seeking such records. In short, the content of the case file included: police officer(s) investigative action(s); police officer(s) will states; a case synopsis; civilian witness(es) will state(s); civilian witness(es) statement(s); and the information. Additionally, in most negative/non-diverted cases, a disposition sheet was included whereby the sentence of the young person was disclosed. Further, in all positive cases, the case file cover sheet was included which – among noteworthy indices – outlined: accused year of birth; court appearances; the presence of a guilty plea; and the investigative officer.

In an attempt to be transparent and present a rigorous and public sampling framework (Onwuegbuzie & Leech, 2007), this research mobilized purposive sampling, where cases were strategically and purposefully selected as pertinent to the investigation (Berg, 2009; Morse, 2010; Patton, 2002). The purposefully constructed groups were subject to random sampling. Specifically, I used a parallel sampling design of subgroups (Onwuegbuzie & Leech, 2007) with random selection of the subgroups whereby diverted and non-diverted cases have been processed through the local Crown's office. For the non-diverted sample of cases, a list of prosecuted and convicted cases was compiled within the applicable access period pursuant to the *YCJA* (2002) and the court order. There were 601 cases upon which I used a random numbers table to select a sample of 25 cases to be retrieved, vetted and otherwise prepared for me to use. As for the diverted cases, a sample of 25 cases were retrieved, vetted and otherwise prepared by police station administrative staff. After advising and discussing the retrieval process with staff, the cases were selected at random. To summarize, multiple positive and negative cases were selected over a period of time to facilitate extensive description and comparison (Onwuegbuzie & Leech, 2007).

### **Data Collection – Quantitative and Qualitative Data**

Data was collected through a series of readings and note-takings. After the first read of all files, I made notes of the cases in point form. My goal in note taking was to maintain factual elements of the case, maintain the substantive narrative and note the factors that are present in the diversion literature. The case and the factual elements constitute communicable case content that is necessary for a Crown to make their decision related to diversion. I created an opening form to fill out based on the consistent information that was presented in each case. I refined this form as I read through the data, adding new elements that emerged, never taking away or ignoring elements. After reading through the data and

making my first set of notes, I went through all the cases and looked for missing elements. I then returned to the original files to add details by reading through the files, comparing the notes to the files, and adding points to the notes that seemed to be missing from my original transcription. I followed this procedure three times. I also kept a running document of memos that noted topical and theoretical points of interest that emerged during data storage/transcription.

### **Quantitative data collection and data coding.**

Data coding was conducted after compiling a list of categories derived from the literature and based on exposure to the data being mindful of my theoretical position(s) and past research in the area. Thus, I have taken a blended inductive and deductive approach. It is not a best practice model *per se*, but it is able to reflect multiple characteristics and relationships of a phenomenon, allow for the systematic emergence of novel findings and permit the construction of a more coherent picture of diversion (Berg, 2009; Ezzy, 2002a; Fereday & Muir-Coochrane, 2006; Ryan & Bernard, 2003). Exploring the role of deduction, legal and extra-legal factors play a role in a decision to divert and are thereby considered in the content analysis (see Appendix B; see Literature Review – Chapter II). An exhaustive coding frame of inductively and deductively derived codes was tabulated (see Appendix C – Coding Frame).<sup>27</sup> All categories abide by the principles of good measurement as they are mutually exclusive, sufficiently narrow as to ensure clear direction during coding, exhaustive and one-dimensional (Neuman, 2011, p. 221). I list the categories below as a function of the origins of the categories, inductive or deductive (see Appendix D). Each category was coded

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<sup>27</sup> Three methodological steps facilitated the creation of the coding frame and were expressed within the coding frame. Firstly, I consider the way in which each category is presented in the case file. This provides the reader with a glimpse into how these facets are communicated – this is a description of the file. Secondly, the meaning of the category that was articulated in the case file is described. This illuminates the context of the data recorded and the nature of the data that constitutes the quantifiable category. Thirdly, I describe how I quantify each category.

in Microsoft Excel and later in SPSS for the diverted and non-diverted cases. A series of data checks were performed including cross-checks with other categories and random checks back to the original notes made on the files.

### **Data Analysis**

The data analysis included grounded theory method and quantitative content analysis. Grounded theory method broadly involves a systematic inductive approach to the analysis of data which results in the generation of a hypothesis or theory using constructs from the data (Bryant & Charmaz, 2010a; Corbin & Strauss, 1990; Floersch, Longhofer, Kranke, & Townsend, 2010). Specific procedures must be used when one refers to the use of grounded theory, some of which include the analysis and collection of data at the same time and theoretical sampling (Corbin & Strauss, 1990). Differently, the content analysis is a “systematic, objective, quantitative analysis of message characteristics” (Neuendorf, 2002, p. 1). Each method is analytically distinct and mobilized through specific procedures on specific portions of the data set.

### **Quantitative Content Analysis**

Content analysis is “a research methodology that utilizes a set of procedures to make valid inferences from text. These inferences are about the sender(s) of messages, the message itself or the audience of the message” (Weber, 1985, p. 9). Neuendorf (2002, p. 10) notes distinct components of content analysis with an orientation towards summarizing messages, applying scientific methods and standards, and expanding the measurement of variables and contexts. The foremost goal of the method in this research is to describe trends in communicated content. Thus, I use it as a means to: systematically yet selectively classify (Hagan, 2006, p.262) case content; assess, describe and present case trends; and evaluate differences in cases for those who are diverted and those who are prosecuted by the Crown in

numerical terms (Manganello & Blake, 2010; Neuendorf, 2002). This allows for a presentation of a picture of what is in the file (Adams, Khan, Raeside, & White, 2007; Manganello & Blake, 2010), it does not outline why contents are in the file.

I recorded each case in SPSS following the coding frame that was created. Descriptive statistics were used to understand and summarize the coded data (Adams, Khan, Raeside, & White, 2007, p. 171). When comparing groups on categorical variables, I used crosstabulations compiled in SPSS. I do not explore the direction of relationships or employ inferential statistics due to: the relatively small number of cases; the dominance of nominal level measurement of the data; and the research focus on description and identifying patterns, not prediction. The use of inferential statistics in this context would increase type I and II errors.<sup>28</sup> I elect to not pursue inferential statistics in that I would have limited confidence in the findings and all inferential results would have to be articulated with a strong cautionary note on their interpretive power.

#### **Merits & limitations of content analysis.**

According to Neuendorf (2002, p. 52) content analysis has three uses: descriptive, hypothesis testing; and *facilitating* inference. I take a descriptive approach to describe the messages within a data set (Neuendorf, 2002, p. 52-54) particularly providing a synopsis of the cases through quantification. Given my purpose, Weber (1985, p. 10) outlines a number of advantages of content analysis, including: the ability to deal directly with communication; the receptiveness to use both quantitative and qualitative methodology; the ability to explore relationships; and the unobtrusive nature of this method. Critiques of content analysis lie in

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<sup>28</sup> Type I and type II errors note the nature of a problem in hypothesis testing. A type I error is when the null hypothesis is rejected when in fact it is true. A type II error occurs when the null hypothesis is not rejected when in fact the research hypothesis is true (and therefore the null hypothesis should have been rejected) (Howell, 2010, p. 96).

the reduction of data to a few categories (Weber, 1985). On this note, transparency – as presented in the coding manual – is required to assess the quality of the research and the findings (see Appendix C).

### **Validity and reliability in quantitative content analysis.**

Given the quantitative roots with content analysis, assessments of the analysis focus on reliability and validity. Reliability speaks of dependability or consistency (Neuman, 2011). Validity speaks of truthfulness or the “fit with actual reality” (Neuman, 2011, p. 208). In the instance of the case files, coded items are derived from the literature and the case files. These items fit with reality as they are dominant and manifest characteristics used in communication of criminal incidents. Additionally, the coded items are used in the explanation of the criminal event after a charge has been laid.

Different measures aided in assuring objectivity, validity and reliability and thereby combat criticism of content analysis as a subjective coding process (Guthrie, Petty, Yongvanich, & Ricceri, 2004; Spens, & Kovacs, 2005). Following Spens and Kovacs (2005, p. 380) I have provided clear categorization schemes and rules for making coding decisions, I used predefined categories and theoretical framework(s), and I ensured mutually exclusive, independent and exhaustive categories.

### **Grounded Theory**

The grounded theory portion<sup>29</sup> of this research served two functions: it provided a secondary and distinct analytical method through which to examine the data; and it brought

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<sup>29</sup> I take a moment to stress my frustration as I find the method appealing, but I continue to grapple with how to present what I have done when the literature tells me: that it is difficult; it is a challenge for novice researchers; there is beauty in the flexibility of the approach; and there are differences in approaches (see Bruce, 2007; Bryant & Charmaz, 2010a; Holton, 2009; Patton, 2002). Given this, I stress the importance of my use of the notion of “freely inspired” by grounded theory. I therefore trust the process that is creatively and rigorously applied. I rely on emergence over strict adherence to procedures and in doing this, I conduct research using a less purist approach of grounded theory (Pidgeon & Henwood, 2004, p. 643). Whereas this approach may bring

pluralism by way of mixed methods to this study (see Bryant & Charmaz, 2010a; Bryant & Charmaz, 2010b; Ezzy, 2002; Floersch, Longhofer, Kranke, & Townsend, 2010). Further, grounded theory included the construction of an abstract theoretical model or hypothesis that is grounded in the data (Charmaz, 2007; Floersch, Longhofer, Kranke, & Townsend, 2010; Pidgeon & Henwood, 2004). The function of grounded theory is complemented with the conduciveness of the approach in this inquiry as there is: a desire to explain and examine a phenomenon qualitatively; a desire to add to existing theoretical explanations; and an attempt to explicate my use of grounded theory (Bruce, 2007).

At the outset, when I speak of grounded theory, I speak of the product of the application of the method of grounded theory. This is the general explanatory model or product that a researcher develops from the systematic inductive processes of grounded theory method. When I speak of grounded theory method (GTM), I speak of the process and I adopt the explanation of Bryant and Charmaz (2010a, p. 1) in that it is “a systematic, inductive and comparative approach for conducting inquiry for the purpose of constructing a theory.” However, this approach is not unduly formalistic as methodological flexibility during the research process retains an eye for change and preserves a non-deterministic orientation (Strauss & Corbin, 1990, p. 419; Strauss & Corbin, 1994). Finally, grounded theory methodology includes a consideration of epistemology. In sum, grounded theory must be seen as a flexible process (grounded theory method), that aids in the creation of some end result (grounded theory), which simultaneously informs the source of knowledge (methodology/epistemology) (Bryant & Charmaz, 2010b).

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criticism through an erroneous assumption that the researcher is unclear on the process (Pidgeon & Henwood, 2004, p. 643) of grounded theory, it does allow for the novel and productive use of grounded theory.

Grounded theory methodology springs from the general idea that researchers can and should rigorously and inductively analyze data that emerges from an empirical investigation to produce a theory of the phenomenon (Charmaz, 2007; Creswell, 1998; Patton, 2002). The construction of a theory is a product of being “faithful to the everyday reality of the phenomenon under investigation” (Frost et al., 2010, p. 443). Theory and the role thereof in social inquiry are central to grounded theory and provide the impetus for grounded theory methodology. Glaser and Strauss (1978 & 1967) assert that there are never enough theories of social life, thereby fostering the need for theory building. Theory is beneficial and useful as it can: predict and explain; advance the theoretical roots of a discipline; provide practical understanding and control of a situation; provide a perspective on behaviour; and guide and provide a style of research (Glaser & Strauss, 1978 & 1967).

Whereas I have presented grounded theory methodology as a unified approach, there is much debate that surrounds Glaser and, Strauss and Corbin on grounded theory methodology. For Glaser, theory is a product of that which is in the data and no additional framework is required (Floersch et al., 2010). As such, the researcher is required to set aside preconceived theoretical ideas and approach the field as a blank slate, without research problems or questions (Floersch et al., 2010; Hallberg, 2006; Titscher, Meyer, Wodak, & Vetter, 2000).

The Strauss and Corbin approach differs as they assert that there is a need to approach the investigation with open questions and review pertinent literature (Titscher et al., 2000). Further, Strauss and Corbin (1990 as cited in Floersch et al., 2010) note that the explanation of a phenomenon is twofold; it is grounded in data and is a product of interpretations rendered by the researcher. Corbin and Strauss (1990) submit that there are simple guidelines to follow in the grounded theory approach and as such they provide a

flexible structure to the process of which Glaser is reluctant to accept. The criteria includes rules for data collection and analysis, the formation of concepts, the development of categories, the approach to sampling and the determination of relationships (Corbin & Strauss, 1990). The flexibility in criteria is where I ground a freely inspired use of grounded theory method.

Most recently, Bryant and Charmaz (2010a) affirm that the competing discussions of Glaser and Strauss evolved grounded theory methodology and strengthened the approach. For Charmaz (2003 as cited in Bruce, 2007) the researcher must understand and ensure that the study is grounded in the data but must not make a claim to complete inductivity. Charmaz is concerned with the context in which grounded theory emerges, the construction of grounded theory and the role of the researcher in the process (Mills, Bonner & Francis, 2006). As such, there is no complete inductivity as a researcher is informed of a phenomenon by existing theoretical frameworks and literature.

Given the aforementioned debate, I embrace the latter two approaches to GTM when considering the role of the researcher in theory construction, interrogating the literature before embarking in the grounded theory process and considering the context in which a social phenomenon takes place (see Strauss & Corbin, 1990 as cited in Floersch, 2010).

Key ideas of grounded theory method (GTM) include: the production of a theory of which is grounded in the data; a consideration of the context associated with the phenomenon; the generation of concepts and categories; and the generation of applicable and useful analytic explanations (Bryant & Charmaz, 2010a, p. 6; Titischer et al., 2000). Central to GTM is the systematic approach where one will use a general set of procedures or guidelines (Creswell, 1998; Charmaz, 2007; Covan, 2010; Ezzy, 2002a). There is debate as to the nature of procedures and the degree to which the procedures are prescriptive (Bryant &

Charmaz, 2010a) as the more prescriptive the procedures, the more difficult it is to assert inductivity. When grappling with procedures, Covan (2010) asserts the procedures are a list of what not to do versus what to do. As such, I present the procedures as a loose prescription, at an advisory level that need not be strictly followed<sup>30</sup> but nevertheless inductive and iterative analytical processes. This allows emergence and avoids dangers of formalism (Corbin & Strauss, 1990).

The literature as presented above informed my simultaneous data collection and analysis, but I approached the data openly, initially not looking for specific elements, concepts or factors.<sup>31</sup> The process of grounded theory commenced with sampling. I noted above that data collection is distinct with grounded theory in that analysis takes place at the same time as collection and in conjunction with theoretical sampling (Morse, 2010; Patton, 2002; Titischer, 2000). I made memos while collecting data on theoretical and thematic points. There is an iterative link between coding, analysis and data collection – the collection process is only complete with a full theoretical account of the phenomenon (Floersch et al., 2010; Morse, 2010).

Coding began with the collection of the first piece of data. This coding informed the analysis of future data but it is iterative in that the analysis of new data (re)shaped the analysis of prior data (Morse, 2010). I coded for themes and theory during data collection

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<sup>30</sup> I feel that it is important to give myself a loose prescription from which I am freely inspired in that I am a novice researcher and need some guidance through the process. However, I use the idea of a loose prescription so I can explore the flexibility and creativity that are often echoed in discussions of grounded theory.

<sup>31</sup> Whereas I was cognizant of the existing literature as I commenced my grounded theory inspired analytical portion, I was deliberate in not looking for specific elements in the data at this stage. I was not looking for specific elements because: this would be redundant as I would have been conducting a *de facto* content analysis; this would transgress the inductive nature of grounded theory method as I would transport deductive logic to the process; and this would counter my attempt to maintain distinct yet clear analytical approaches. This is not to say that the process is was not iterative as occasionally yet analytically referred back to the content analysis and the concrete pre-identified factors. As such, for the purposes of explication and application, grounded theory method and content analysis remain distinct.

and the substantive analysis. Throughout the entire process until saturation, I asked multiple questions to the data. I asked: who, what, where, when, why, and how? I also asked: What is going on? What does this problem, situation, event, or factor mean? What is similar and where is this similar? What is different and where is this different? Is there an exception? Why is this present? How is this different but also the same? What does all of this mean? What is all of this about? This allowed for the creation of themes and concepts grounded in the data. These are happenings, events or instances of a phenomenon (Frost et al., 2010, p. 443) and “abstract entit[ies] that brings meaning and identity to a recurrent experience [or phenomenon] and its variant manifestations” by capturing and unifying the meaningful nature of existence (DeSantis & Ugarriza, 2000, p. 362).

In the writing, coding and data collection processes I wrote memos. These were topical and theoretical points that emerged from the data. On theoretical sampling, the emergence of categories in the data guide sampling; there is deliberate selection of specific responses, characteristics, categories or interpretations (Morse, 2010). At this point, I developed categories based on what is taking place in the data and grappled with abstraction and creativity by amalgamating developed concepts and discarding others. I constantly compared data with data inductively to move to abstract descriptions of the phenomenon and its components. As such, I continuously compared similarities and differences in the data paying special attention to where distinctions are made within cases and across cases. This process of sampling continued until saturation. Saturation is where/when the researcher: discovers nothing new; understands what they see; can explicate the chain of events and an abstract account of the phenomenon; can identify variations of the phenomenon; and can present culturally consistent findings (Berg, 2009; Bryant & Charmaz, 2010a, p. 12-13; Morse, 2010).

**Validity and reliability with qualitative data analysis.**

At the heart of qualitative inquires is the constant need to explicate. This study clearly responds with explications of data collection methods, data characteristics, result dissemination, analytical processes, and methodological issues (Baldwin, 2008; Bruce, 2007; Onwuegbuzie & Leech, 2004, p. 777).<sup>32</sup>

**Key Terms – Communicable Case Characteristics**

Whereas terms and concepts have been defined as they were presented in a review of the literature, there is a need to make some fundamental distinctions, refinements and additions. This exercise is necessary as there is not enough specificity and descriptive power of terms that are currently used in the literature to describe attributes, characteristics, stimuli or features of diversion. As such, I provide deeper theoretical distinctions and greater specificity with the goal of precise categorization and classification of empirical data. In that I discuss key terms, these terms are also actual categories used for analytical and descriptive purposes throughout the paper.<sup>33</sup>

**Communicable case characteristics.**

In an attempt to classify all content that is in the case files, I use the term communicable case characteristics. This broad, all encapsulating term is informed by Luhmann as I maintain the anti-humanist notion of the environment, communication and events over the social actor. The idea of communicable case characteristics highlights the source of the factor – in that it comes from legal cases – and it highlights the mode of message transmission of the characteristics – in that it is a function of communication. The

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<sup>33</sup> What has been done in a discussion of key terms is two-fold. There has been: 1) an outline of terms that I use in the explication of findings; 2) and a deep consideration and construction of actual categories used for analytical purposes.

idea of communicable case characteristics allows me to shift away from a mere discussion of factors that are associated with prosecutor selected diversion. A factor, while it is a useful descriptive term, does not highlight the contextual elements, the source and the method of transmission of the factor in the case. Rather, the identification of the legal or extra-legal factors (see Alarid & Montemayer, 2010; Potter & Kakar, 2002) merely assesses relationship between the factor and the law.

Moving beyond factor identification inspires the search for additional contextual case characteristics that are communicable in the cases (see Appendix D). Thus, I use the concept of communicable case characteristic to: abstractly classify all case content; inspire new ways of thinking about the cases; provide precision and descriptive power of the data; and highlight the contextual elements of case content. Furthermore, I use the communicable case characteristic to be a transitional concept that provides a conceptual gateway to move back-and-forth between normative and theoretical levels of conceptualization. Accordingly, the communicable case characteristic is theoretically inspired, abstract and grounded in communication but at the same time is normative through concrete, intuitive, precise and tangible state of being. As a transitional concept, the communicable case characteristic is a meaningful explanatory and heuristic device that allows and encourages a flip-flop between the normative and theoretical contexts.

### **Securing the Two Levels of Conceptualization: Normative and Theoretical**

The normative context consists of academic discussions on the influence of characteristics or factors on decisions and case outcomes. For example, on the normative level, much of the current literature discusses the presence of legal and extra-legal factors associated with diversion candidacy. As such, the legal and extra-legal factor identification is central to the inquiry – this is especially true in illustrating the relationship between factors

that impact diversion selection and the law. Additionally, at the normative level, there is predominance towards descriptive characterizations. Such characterizations are not theoretically sensitive, rather, concrete states of being that mobilize precise descriptions that are intuitive and have substantive and tangible qualities. I keep this normative orientation in my discussion of alleged case specific and individual characteristics as well as legal and extra-legal factors. In brief, the normative level is an explanatory tool for pertinent characteristics or elements of Crown selected diversion, especially as presented in the literature or when I uncover and present concrete, precise, tangible and intuitive descriptions or substantive qualities.

The normative discussion has limits. There is a limited ability to speak of the function of these factors or where these factors come from; this is why the Luhmannian theoretical framework is useful in this account. This limited ability is found in the one-sided discussion of the ascribed relevance or the source of the factors. While a purely descriptive function is fulfilled, there is a simultaneous desire to advance conceptualization. As such, due to the limits of the normative level, a desire to comprehensively discuss the phenomenon and an aspiration to be theoretically sensitive, there must be a theoretical level of articulation and conceptualization.

On the theoretical level, I speak of a Luhmannian based articulation of that which can be discerned from the case files. As such, the self-reproducing and self-referential characteristics are activated. When theoretically sensitive, there is an additional level of complexity that holistically informs the project by illuminating the contextual background. At the same time, the theoretical level is required as it adds the nuanced additions to the normative level as it can speak of the source, the function and perhaps their simultaneous articulation.

Thus, theoretically all of the communicable case content constitutes communicable legal factors in the sense that they are communicable content used by the Crown while fulfilling their prosecutorial role in the legal system, created by the system, for the reproduction of the prosecutorial system. Just like the classification of communicable case characteristics, the theoretically rooted legal factor classification provides an all-encompassing classificatory and explanatory scheme. As such, I am able to answer the broader questions that were unidentifiable within the normative model that relies on precise intuitive and tangible concrete states of being of the characteristics. Moreover, I am able to move towards abstraction and theoretically account for all possible content in the case files.

Nevertheless, this holistic theoretically grounded classification of all case content as communicable legal factors has problems. More specifically, the overarching position of all case content as communicable legal factors does not allow for sufficient specificity to highlight and articulate the content of cases in a tangible fashion. As such, there is a need to go back to the normative level and describe the elements to fulfill this purpose. Seemingly, there is a need for a constant flip-flop between the normative and theoretical positions. This cognitive task and essential sociological distinction allows for a precise description of what is meant when describing case characteristics along with the substantive and tangible quantities and what is going on in the articulation of case content in the findings. The back-and-forth nature is made possible as communicable legal factors constitute communicable case characteristics, which constitute alleged case specific and individual characteristics, which constitute legal and extra-legal factors. Without this distinction, there is a wrongful attribution of legal and extra-legal factors as the sole quantifiable and qualitative content worthy of explication in the Crown selected diversion process. As such, the theoretical function is to categorize the data, group it together and move towards analytical abstraction.

However, movement is not unidirectional; in fact it is bidirectional as there is the constant flip-flop between theoretical and normative positions. I present an illustrative model in Appendix E that highlights the theoretical and normative distinctions articulated above as well as the bidirectional nature of the distinctions.

### **Introducing New Terms: Alleged Case Specific & Individual Characteristics**

I move to a discussion of a concrete, intuitive, precise and tangible state of being of the characteristics that are presented, analyzed, and questioned within the empirical data set. This is a shift away from the all-encompassing communicable case characteristic that I use to describe all possible case file content. The discussion is threefold in that I use it to: make sense of the data; describe the data; and normatively position data.

There is a needed exploration of the components of the communicable case characteristics associated with diversion. These new terms include alleged case specific and individual characteristics. When informed by prior literature, there are legal and extra-legal factors but these factors are regrouped into ascribed case specific characteristics and individual characteristics as components of these characteristics. These four aforementioned distinctions are all elements of the communicable case characteristics, which are theoretically communicable legal factors.

#### **Explaining the terms.**

At the normative end of the spectrum, legal factors are those elements or considerations made by a decision-maker or otherwise identifiable in cases that are pertinent at law as they are expressly declared in statute or common law. Extra-legal factors are the opposite of legal factors; they include those elements or considerations made by a decision-maker that are not expressly declared in statute or the common-law (see Potter & Kakar, 2002). Whereas these are useful terms, I attempt to address the inherent weaknesses outlined

above by adding a new facet which attempts to supplement this contextualization with a nuanced account of the process. I introduce the idea of quasi-legal factors. While these factors are beyond the scope of this project, they provide an additional contextual element that must be considered in future research. Quasi-legal factors are organization specific and administrative specialties that are present in communication within a legal system organization. As such, I rely on the theoretical centrality of communication and make this important theoretical distinction that is normatively grounded to add to the legal and extra-legal dichotomy. These quasi-legal factors are found in prosecutor policy and are illustrated with the constant reference to reasonable prospect of conviction and public interest.

While the literature provides me with the typifications of legal and extra-legal factors – I refer to the terms, alleged case specific circumstances and individual circumstances. I use the terms as classifications of content in the investigation (see Appendix E). Likewise, I use the terms as an indication of the source of the circumstances that are communicable in the case file. Consider the terms on a spectrum, from abstraction to concrete attributes, there are the alleged case specific and individual factors followed by the legal and extra-legal factors that comprise two components of the alleged case specific and individual factors. All of the terms have ascribed concrete attributes including but not limited to age, sex, race, offence severity and number of victims. At the risk of redundancy, the alleged case specific and individual factors are made up of legal and extra-legal factors. The inclusion of alleged case specific and individual factors allows me to: refine the origin of the legal and extra-legal factors; contextualize the nature of factors; categorize the consideration of factors; and conceptualize when and why factors affect decision-making.

In defining terms unique to this study, the alleged case specific factors are defined as any assertions made by police, victims, witnesses or experts that speak to the matter or

criminal incident before the court. Take for instance the offence, the number of charges, the type of release and the type of offence. An individual factor is any static or dynamic characteristic of the accused party in the case file. This may include assertions made by police, victims, witnesses or experts but the key element is the fact that the declaration pertains to something of the accused. I borrow from the literature on criminological risk factors in mobilizing the terms static and dynamic factors. A static factor is generally that which is inherent to the individual, not amenable to change and does not fluctuate over time. Take for instance age, race, prior criminal record and prior criminal conduct. A dynamic factor is something that is amenable, subject or capable of change and as such can fluctuate over time (see Pozzulo, Bennell & Forth, 2006). Take for instance community ties, mental illness, attitude towards treatment and attitude towards the offence.

## Chapter V – Quantitative Findings

The results of the quantitative content analysis are presented below. I present key findings according to individual and alleged case specific characteristics, identifying and then immediately interpreting similarities and differences among the diverted and prosecuted young people.

The discussion below must be read in two ways: firstly, it must be read as a description of emerging patterns of the Crown prosecutor selected diversion process in a single jurisdiction in Ontario. Secondly, it must be read theoretically as a discussion of patterned communicable case content that solidifies a distinctive discourse of diversion and non-diversion. Holistically, I argue that there seems to be emerging patterns of select communicable case content in diverted and prosecuted cases. While these patterns start to illuminate the nature of Crown selected diversion, it is clear that the process is not completely benign. The differentiation in communicable case content highlights the patterned nature of diversion and unearths a distinctive discourse of diversion in the prosecutorial system.

Whereas I excavate the differences and patterns that are "real" within the cases, my discussion of the meaning that transgresses a mere comparison to historical work is hypothetical in tone. The hypothetical tone is used to move beyond pure description, present and interpret potential meanings of the system that are associated with the differences and the subsequent patterned use of diversion, and advance knowledge.

### **Describing the Collection of Case Files**

A list of the descriptive statistics of the communicable case characteristics can be found in Appendix F. Among the fifty randomly selected cases, the average age of the accused person is 16 years of age ( $SD = .96$ ). The youngest person was approximately 13

while the oldest was 17. On average there were 2.7 charges per file with a minimum of one charge and a maximum of 13 charges ( $SD = 2.90$ ). There was an average of 2.86 police officers activated per file with at least one police officer and never more than 13 ( $SD = 2.40$ ). There were not always civilian witnesses to the alleged offence(s) but among all 50 cases, there was an average of 1.78 civilian witnesses but never any more than 10 ( $SD = 1.60$ ). Highlighting the gamut of alleged criminal offences, select charges included: possession of property obtained by crime under \$5000; theft under \$5000; theft over \$5000; operation of a motor vehicle while prohibited; take motor vehicle without consent; cause a disturbance; assault; assault with a weapon; and break and enter (See Appendix G for Full List of Offences).

### **Individual Characteristics – Describing Individual Characteristics & Comparing the Diverted and Prosecuted**

The individual characteristics that were quantified include: age; presumed sex; notice to parent; criminal record/youth record; outstanding charges; previous warnings; previous pre-charge diversion; and on conditions at time of offence. Table 1 (page 74) presents group differences on the nominally measured abovementioned characteristics.

When it comes to the sex of the young offender, there are almost equal numbers of males diverted ( $n = 18$ ) and prosecuted ( $n = 19$ ) and equal number of females diverted ( $n = 6$ ) and prosecuted ( $n = 6$ ). However, there are more males in the sample than females. As a subtle note, among cases whereby there were co-accused, the co-accused was always the same sex. Thus in this small sample, there is no indication of within case sex differences.

Unlike historical findings (Luskin, 2001; Steffensmeier et al., 1998), the gender of the young person does not seem to have an influence in Crown selected diversion. Nevertheless, seems that more males are charged with an offence which is consistent with

official statistics whereby 72% of all cases were male accused in the 2008/2009 reporting year (Milligan, 2010). It may be that gender should be explored in police charging practices rather than the decision to divert.

Table 1

*Diverted and Prosecuted Young People on Individual Characteristics*

		Prosecuted	Diverted
		% (n)	% (n)
Sex	Male	51% (19)	49% (18)
	Female	50% (6)	50% (6)
Criminal Record	Yes	83% (15)	16% (3)
	No	32% (10)	68% (21)
	Yes	93% (14)	8% (1)
	No	32% (10)	68% (21)
	No/Yes or Yes/No - Co-accused	33% (1)	68% (2)
Outstanding Charges	Yes	85% (11)	15% (2)
	No	35% (7)	65% (13)
Previous Warnings	Yes	58% (19)	42% (14)
	No	33% (3)	67% (6)
Previous Pre-Charge Diversion	Yes	54% (6)	46% (5)
	No	45% (10)	56% (12)
On Conditions	Yes	100% (14)	
	No	31% (11)	69% (25)

Note. Percentages may equal more than 100% as a result of rounding.

There are missing values for outstanding charges, previous warnings, and previous pre-charge diversion.

The average age of the prosecuted youth is 15.77 and 16 among diverted youth, with comparable standard deviations ( $SD = .92$  and  $SD = 1.00$ ). For diverted and prosecuted young people, 80% ( $n = 40$ ) are between the ages of 15.50 and 17, thus, they are at the older

end of the young offender spectrum. There were no 12 year old young people in the sample and only three young people in the 13-14 age range.

Age seemed to remain similar despite historical research that would suggest that the younger offender is more likely to be diverted or there is an age effect (Luskin, 2001; Moyer & Basic, 2005; Naples et al., 2007; Nuffield, 1997). Rather, the older offender, on the spectrum of young offenders, seems to be charged whereby thereafter they may become worthy of diversion. This is comparable with dated and limited official statistics where the young person that is 15 or older is diverted (Kowalski, 1999) and older young accused people tend to be charged (Milligan, 2010). The trend in age may be due to strong police-based diversion tactics and an abetment to the *YCJA* mandate which requires that alternatives other than formal charges, the nature of the offence, culpability of the young person and degree of blameworthiness (*YCJA*, 2002) be considered before laying a charge. Thus, police may be actively using diversionary practices for younger offenders and charging the older offender which allows diversion to be used by the Crown.

While the younger offenders may be subject to diversion by the police, police are therefore charging older young people knowing that the decision to proceed with charges can be changed by the Crown. In this vein, it may be that the older offenders need (at least some) exposure to the legal system due to impending adulthood whereby differential legal system treatment does not take place. Accordingly, minimal exposure<sup>34</sup> to the legal system through diversion is a symbolic place where the offender does not want to return. This symbolic place is available to the older young offenders given the age trend in Crown selected diverted

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<sup>34</sup> The idea of minimal or reduced exposure to the legal system is discussed below and alluded to in the literature review. It is important to note that there is still some exposure to the conventional legal system with the use of post-charge diversion insofar as the young person must still: have fingerprints taken; have a photo taken for police records; and appear for the first court appearance.

young people. With impending adulthood, it seems clear that the young person is getting a break through differential treatment. This differential treatment is not a foremost mandate of the adult legal system, which is approaching for the (older) young person.

A strong majority of cases with a criminal record are prosecuted (83%,  $n = 15$ ) whereas a majority of those who do not have a criminal record are diverted (68%,  $n = 21$ ). Accounting for differences with co-accused, the co-accused without the criminal record is diverted. The one case where the young person has a criminal record and is diverted, the young person was between the age of 16 and 17, was male, allegedly committed a single criminal act, which was a property crime or type I offence and was charged with one count of theft under \$5000 (case 48). This young person did not have a co-accused, had six previous warnings, had a previous pre-charge diversion, was released on an appearance notice when a single non-specialized police officer responded to the incident, and there was a single civilian witness which was a loss prevention officer. In this incident, the \$5.00 worth of property was recovered, and a notice to parent was served to the mother of the young person.

A strong majority of young people with outstanding charges are prosecuted (85%,  $n = 11$ ) while those without pending charges are mostly diverted (65%,  $n = 13$ ). In the two cases where there were outstanding charges and the young person was diverted, a single count of an administration of justice charge was alleged (case 26 & 32). Both cases had no co-accused, no civilian witnesses, no notice to parent, and the young person was not released on conditions and a single constable responded to the incident. In one case there was a male without a criminal record; in the other the criminal record was unknown.

Considering legal conditions at the time of the offence, there seems to be a trend with a young person being on conditions at the time of the offence as all ( $n = 14$ ) were prosecuted.

Exploring the type of conditions, the young people were subject to a youth court sentence ( $n = 7$ ), a recognizance and an undertaking ( $n = 1$ ), a recognizance ( $n = 5$ ) or an undertaking ( $n = 1$ ).

The emerging patterned nature of Crown selected diversion is seen with the absence of the criminal record, outstanding charges and conditions on the young person at the time of the offence. By implication, the inverse suggests that the presence of these individual characteristics is seen with prosecution. These three components cumulatively speak of the young person's prior contact(s) with the law, particularly when prior contact(s) results in official action through conviction, charges and/or the type of release post-charge whereby it is seen that public safety requires that the person be released on conditions. Consistent with past research, historical conduct is important in the decision to divert (Moyer & Basic, 2005; Nuffield, 1997; Potter & Kakar, 2002) especially when it comes to the presence of a criminal record (Kowalski, 1999). Historical conduct solidifies the need for a response by the legal system to ensure that there is management of the wrongful actions of the young person. Thus, historical conduct may act as a bar to Crown selected diversion when such conduct resulted in official legal action from the courts or the police. Thus, the need for official legal action in the past may not merit the use of a non-adjudicative response of diversion in the current case. It may be more suitable to follow official legal system response in the past with a continued official legal system response and allow non-adjudicative responses to thrive when there has been no historical need for use of the legal system. This seemingly creates a matching of the response of the prosecutor with historical modes of case processing.

The absence of historical criminal conduct is a basis for diversion. Following the idea of matching responses, the lack or limited need for official legal intervention in the past reduces the rigidity of a response either in terms of severity or in terms of control through the

use of diversionary measures. Thus, no historical need to use the official legal system can spark the usage of the non-adjudicative response of diversion. Nevertheless, it must be noted that Crown selected diversion still (partially) activates official system processes and minimally exposes the young person to the system. This exposure occurs through primary court appearances but foregoes adjudication. This is coupled with the ability to reactivate adjudication should diversion not be successful. Thus more specifically, minimal contact with the legal system may merit the use of a non-adjudicative response but reduced adjudicative exposure does occur.

Beyond matching responses, the presence of historical conduct can provide the articulable and legally justifiable use of the legal system. Official documentation begins to be accumulated when the youth faces a criminal conviction, pending charges and/or legal conditions governing behaviour. The past use of the legal system demonstrates the need to control the behaviour of the young person compounded with the potential need for a more severe response and intervention-based use of the system. Further, this historical behaviour may merit the need to protect the public and ensure that the young person does not reoffend with the use of judicial sanctions. This historical behaviour may also be an active indicator of future behaviour, suggesting that a legal system response is required to manage the risk of future behaviour. Thus, prosecution may be a strategy to respond to further criminal conduct in the wake of historical conduct; the young person who is at risk of further offending fortifies the need to pursue a conviction. However, this is a non-actuarial mode<sup>35</sup> of controlling risk whereby vast differences can prevail between similar cases.

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<sup>35</sup> The non-actuarial nature of case processing highlights the inherent discretion in the process and the absence of rigid check-list type guidelines or criteria for selecting diversion candidates and or electing to prosecute.

A slight majority of young people who had previous warnings were prosecuted (58%,  $n = 19$ ) while a majority of those who did not have previous warnings were diverted (67%,  $n = 6$ ). Overall, there were more previous warnings for prosecuted young people ( $M = 4.04$ ,  $SD = 6.57$ ) than diverted young people ( $M = 1.62$ ,  $SD = 1.45$ ). Dealing with previous pre-charge diversion, similar numbers of diverted ( $n = 5$ ) and prosecuted ( $n = 6$ ) had previous pre-charge diversion while similar numbers of diverted ( $n = 12$ ) young people and prosecuted ( $n = 10$ ) young people did not. In the three cases where there were no previous warnings and the young people were prosecuted (cases 7, 22 & 25), there are multiple charges (10, 5 & 2), two of which are for property crime and the other is a violent crime. There is not a criminal record, and in one case, the young person is released on an appearance notice while the other two cases the young people are released on a promise to appear (PTA) with undertaking. Furthermore, in two of the cases, there was a detective and a breath technician activated in the case.

The lack of a discernible trend with previous pre-charge diversion and previous warning(s) suggests that historical conduct of the young person that merited non-adjudicative responses is not detrimental to being selected for diversion. However, context is important as a warning and pre-charge diversion legislatively suggests a minor criminal offence. When there have been previous warning(s) and previous pre-charge diversion, the use of Crown prosecutor selected diversion is consistent with the continued escalation of severity of responses and impending control by the legal system (see Tustin & Lutes, 2010) whereby severity and control increase with post-charge diversion.

Furthermore, case law maintains that information on historical conduct that has been dealt with through informal police action is inherently unreliable (see *R. v. R.L.*, 2008 ONCJ 29) as it has not met the established standards of proof. Rather, informal police action springs

from mere allegations that have not been tested. As such, these responses may not be particularly useful to the Crown that operates within a legal system and is cognizant of these standards. Or else, they may only useful to track historical police contact.

The final individual level circumstance consists of the determination of whether or not the notice to parent (NTP) was served. There were 38 cases where the notice to parent was served and there were 12 cases where it was not. Sixty-one percent ( $n = 23$ ) of cases where the notice to parent was served were diverted. A majority ( $n = 10$ , 83%) of youth cases where the NTP was not served were prosecuted.

The NTP is perhaps the most interesting and novel finding. When the notice to parent is served – thereby fulfilling a statutory obligation – the young offender is more likely to be diverted. Thus, there must be an adult or parental figure in the young person's life whereby the notice to parent can be served close to the timing of the offence and thereby noted within the file. When a notice to parent is served, the police may be able to explore the sentiment of the parent(s) about the offence. Accordingly, in informal discussions with the Crown, the police can transmit the position of the parents and what the parents plan to do with respect to the young person's offending. Furthermore, the act of serving a notice to parent may be able to secure a mode of informal social control through increased and sustained parental direction. Accordingly, there is a Cohen (1985, p. 3) inspired notion of social control which equates to the pursuit of conformity to (legal) expectations through the operation of parent-child relations. Conversely and according to the systems perspective, the inability to serve a notice to parent may speak of the lack of informal social control. Nevertheless, the presence of informal social control and/or the presence of a parent may satisfy the Crown's use of diversion as there is informal social control through parents or parental figures within the community. As alluded to above, there may be a matching of responses to the context of the

case; when there is informal social control, the spirit of informality can continue with the use of post-charge diversion and non-adjudicative processing.

In further exploring the NTP, there is a nuanced addition to the net-widening debate.<sup>36</sup> Whereas there is concern with net-widening due to the extension of the legal system and social control, the NTP can be conceptualized as a part of the colloquial net that increases social control from the legal system and informal social control in the home. A police officer may instigate parental declarations of this form of social control in the home which may impact diversion candidacy. Thus in the spirit of net-widening and reacting to conduct that historically has not provoked a response, there is conduct of a young person that traditionally may not have been granted a response from the prosecutorial system and a combined response from family. Especially important is the (potential) ability to spark involvement of the parents by drawing attention to the problem.

Diversion seems to not only be an instrument of the legal system but it foregoes the traditional route while potentially activating the home and the family at the point the NTP is served. Hence, there are traces of Rose's (1996) activation of the community as a specialization of government (or the legal system) that is able to link individuals. Accordingly, the NTP may be seen, in Rose's (1996, p. 350) terms, as a legal mechanism that is put in place to address problems through the "shadow of law". With the youth system, the application of the law is pending as diversion may be a suitable option. It is this pending nature that may provide the impetus for the community or parents, to curb criminal conduct. A link between the parent and the child within the home is seemingly able to emerge.

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<sup>36</sup> I refer to net-widening here following the logic and the spirit of a response that has traditionally not been present but is seemingly activated with the use of diversion or in this case the NTP. I do not refer to net-widening in the truest form as an extension of social control that was traditionally not a part of the system but as a result of current strategies, like diversion, the response by the system brings the client into the system.

### **Alleged Case Specific Characteristics**

This section presents the alleged case specific characteristics found in the files.<sup>37</sup> I first present the details and the interpretive discussion surrounding the alleged wrongful act or omission followed by those categories that relate to the police. I close with Crown prosecutor considerations.

#### **The offence & the accused.**

The gamut of alleged *Criminal Code of Canada* and *Controlled Drugs and Substances Act* (1996) offences can be reviewed in Appendix G.<sup>38</sup> The most common offence among diverted was theft under \$5000 with 15 counts between the 25 cases. The most common offence among prosecuted files included: break and enter and commit an indictable offence with 12 counts, and possess or use credit card obtained in the commission of an offence with 10 counts.<sup>39</sup> The average number of criminal charges differs between diverted ( $M = 1.24$ ,  $SD = .66$ ) and prosecuted ( $M = 4.16$ ,  $SD = 3.50$ ) cases. It seems that diverted files have fewer cumulative charges than prosecuted files.

Table 2 presents case differences for offence type. Classifying the type of the offence based on Crown Policy, it is clear that a majority of Class I (61%,  $n = 17$ ) and Federal (100%,  $n = 3$ ) offences are diverted while most Class II (74%,  $n = 14$ ) offences are

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<sup>37</sup> For the sake of clarity in the presentation of multiple alleged case specific characteristics, I use a narrative-based organizing technique. I am concerned with who is participating in the case file and the timing of the participation and present this as a story.

<sup>38</sup> I recognize that in the absence of a detailed explanation of the circumstances of the case, listing a charge encapsulates a wide range of behaviour. Nevertheless, I list the charges to provide a general feel for the crimes that are alleged.

<sup>39</sup> Some of the more severe alleged offences in prosecuted files included: possession of a weapon dangerous to the public peace; possession of prohibited weapon; operate motor vehicle while impaired; assault causing bodily harm or with a weapon; robbery; and conspiracy to commit an indictable offence. The more severe alleged offences in diverted files included: break and enter with intent to commit an indictable offence; and utter a threat to cause bodily harm.

prosecuted. As for the Statistics Canada-based categorization, most alleged offences were either property crime, violent crime or an administration of justice charge.<sup>40</sup>

Table 2

*Diverted and Prosecuted Young People on Crown Policy Offence Type and Statistics Canada Offence Type.*

	Prosecuted	Diverted
	% (n)	% (n)
Crown Policy Type of Offence		
Type I	39% (11)	61% (17)
Type II	74% (14)	26% (5)
Type III		
Federal		100% (3)
Statistics Canada Type of Offence		
Violent	80% (4)	20% (1)
Property	49% (17)	51% (18)
Drug		100% (3)
Traffic		100% (1)
Weapons	100% (1)	
Administration of Justice	60% (3)	40% (2)

Consistent with previous findings (see Alarid & Montemayor, 2010; Cocozza et al., 2005; McCarter, 2009; Moyer & Basic, 2005), the nature of the offence is important as it is most often the minor non-violent offence that is diverted, particularly Type I offences and Federal Offences consisting of simple possession of marijuana. Severity is implied and a worthy consideration given the *YCJA* and prosecutorial policy declarations of minor offences, like theft under \$5000, that are diversion worthy (Attorney General of Ontario, 2005; Federal Prosecution Service of Canada, 2000; see Appendix C). Despite the clear presence of nonviolent (less serious) offences, this finding challenges the notion that nonviolent but serious offences are diverted, but they are only serious because of the

<sup>40</sup> See Appendix C – Coding Frame for a discussion of Crown Policy types of offences and Statistics Canada typifications.

nomenclature used to describe the offence (Béchar, Ireland, Berg, & Vogel, 2011). Accordingly, it seems that Crown selected diversion is often used for the non-violent and less serious offences in terms of nomenclature and the alleged wrongful act. This is clear as there is minimal seriousness associated with detected simple possession of marijuana and theft under \$5000. With the prosecuted young people, the more serious or possibility of violence is clear in the alleged offences. This solidifies seriousness in terms of the offence and the associated nomenclature, be it through break and enters to commit an indictable offence, possess or use credit cards, robberies, assaults, and assaults causing bodily harm.

There are comparable numbers of accused in diverted ( $M = 1.56$ ,  $SD = .65$ ) and prosecuted ( $M = 1.28$ ,  $SD = .54$ ) cases. Noting the presence of a co-accused dichotomously, 64% ( $n = 32$ ) of all files did not have a co-accused whereas 36% ( $n = 18$ ) did have a co-accused. In those cases where there was a co-accused, 67% ( $n = 12$ ) were diverted while in cases where there is not a co-accused, 41% ( $n = 13$ ) were diverted. Exploring the use of diversion with the presence of co-accused, two of the cases where there was a co-accused, both were diverted. However, in the remaining cases, it is unknown which of the co-accused were diverted or if both were diverted. As such, there are within case differences in Crown selected diversion due to the increased use of diversion with co-accused with a combined greater use of prosecution without co-accused.

The use of diversion in the presence of co-accused must be noted as a possible source of within case disparity. The same case can be a source of differential modes of case processing. There are at least two possible explanations. There may be within case differences based on accused involvement that cannot be assessed in the data. Or, there are within case similarities in case processing which lead to comparable elections by the Crown. The possible within case difference is important in light of the fact that when there were

differences between co-accused in terms of diversion, the accused without the criminal record was always diverted. Nevertheless, within case disparity may take place based on the same criminal act which highlights potential differential treatment based on the offender.

The mean value of the property was greater for prosecuted young people ( $M = \$790.88$ ,  $SD = \$2098.82$ ) than diverted young people ( $M = \$98.55$ ,  $SD = \$254.05$ ). When it comes to the value of recovered property, the value was greater for the diverted young people ( $M = \$2399.30$ ,  $SD = \$7999.44$ ) compared to prosecuted young people ( $M = \$916.17$ ,  $SD = \$2390.09$ ). Finally, the value of damage was much greater for diverted young people ( $M = \$8922.68$ ,  $SD = \$17387.66$ ) over prosecuted young people ( $M = \$1659.38$ ,  $SD = \$3387.63$ ). Accordingly, there seems to be a greater monetary value of damaged and recovered property for diverted young people and a greater overall value of property for prosecuted young people.<sup>41</sup> It must be noted that while the numbers are high, it can be deceptive in that vehicles of high value constituted the property stolen, damaged or recovered.

The damage to property as a result of an alleged offence highlights material loss, of which there was more loss among diverted than prosecuted cases. Despite the greater cumulative damage, diversion eligibility is still granted which suggests an orientation towards the offender and not only the offence. The high value associated with the value of recovered property speaks of the negation of harm, through the recovery of property, which can dilute the assessment of offence severity. This is coupled with the tendency that diversion is associated with crimes against property and not those crimes against the person. Accordingly, this negation of harm through recovery may instigate diversion eligibility.

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<sup>41</sup> All 25 cases are not presented in the values above when it comes to value of recovered property (17 non-diverted and 13 diverted) and value of damage to property (8 non-diverted and 4 diverted).

Finally, when it comes to the overall value of property, the greater value in the prosecuted cases collectively speaks of the harm to property that has resulted from the wrongful act of a young person. In sum, the value, recovered and damage to property provides a monetary description of the consequences of an alleged offence.

**Responding to the offence – Police and witnesses.**

The police may be initiated in a case through a complaint or self-initiation. Forty-four of the cases were initiated by a complainant whereas six cases were initiated by the police. In cases that were initiated by a complainant, 55% ( $n = 24$ ) were prosecuted and the remaining 45% ( $n = 20$ ) were diverted. When the police initiated the case, 83% ( $n = 5$ ) were diverted and 17% ( $n = 1$ ) were prosecuted. The majority of cases are complaint-driven, a greater percentage of police initiated cases are diverted compared to prosecuted, and complaint driven police action is comparable among the diverted and prosecuted.

Whereas the police may not be the primary mode of case initiation, the police provide vital information through the collection of evidence. In prosecuted cases, there was an average of 4.04 police officers per file ( $SD = 2.61$ ) and 1.68 officers per file for diverted young people ( $SD = 1.44$ ). Additionally, prosecuted cases had an average of 1.08 ( $SD = 1.15$ ) specialized police officers per file while diverted cases had an average of .08 ( $SD = .28$ ). Noting the presence of a specialized police officer dichotomously, 16 cases had a specialized police officer and 34 cases did not have a specialized police officer. When there was a specialized police officer, a strong majority were prosecuted (88%,  $n = 14$ ). When there was no specialized police officer(s), slightly more than two-thirds were diverted (68%,  $n = 23$ ) and approximately one third were prosecuted (32%,  $n = 11$ ). Accordingly, there seems to be more police officers and specialized police officers in prosecuted cases.

The different specialized police officers that attend a criminal incident are explored in Table 3 (page 88). It must be noted that these specialized officers are almost exclusively activated in prosecuted cases, as seen with a forensic police officer and a detective. Despite the few cases, prosecution ensues when the scenes of crime officer (SOCO), scenes of crime and forensic officer, the K9 officer, the sergeant, and the breath technician are present.

In the one case where there was a detective and the young person was diverted, there were three 17 year old males charged with occupying a motor vehicle without consent (case 30). The one young person that was diverted did not have a criminal record, did not have outstanding charges, but had at least one previous warning. The young person was released on a promise to appear, and had a NTP served. The offence was complaint driven and the value of the property was \$29000, which was recovered.

Examining the quantity of alleged case specific characteristics, the number of charges, the number of police officers, and the number of special police officers are different between diverted and prosecuted groups. More charges ( $M = 1.24$ ,  $SD = .66$  versus  $M = 4.16$ ,  $SD = 3.50$ ), police and specialized police were present in prosecuted files. With the number of charges, the Crown can assess the number of alleged criminal acts and the magnitude of those criminal acts when there are different charges.

Table 3  
*Diverted and Prosecuted Young People on the Type of Specialized Police Officer*

		Prosecuted	Diverted
		% (n)	% (n)
SOCO			
	Yes	100% (2)	
	No	48% (23)	52% (25)
SOCO & Forensic Police Officer			
	Yes	100% (1)	
	No	49% (24)	51% (25)
Forensic			
	Yes	100% (5)	
	No	44% (20)	56% (25)
K9			
	Yes	100% (1)	
	No	49% (24)	51% (25)
Detective			
	Yes	92% (12)	8% (1)
	No	35% (13)	65% (24)
Staff Sergeant			
	Yes	100% (1)	
	No	49% (24)	51% (25)
Breath Technician			
	Yes	100% (1)	
	No	49% (24)	51% (25)

Given the involvement of the police, consider diversion as an autopoietic tool that promotes efficiency (see Bala & Anand, 2009; Harding & Dingwall, 1998; Moyer, 1980).<sup>42</sup> This succinctly renders diversion as a mode of case disposal (see Grosman, 1969, p. 100-101) for autopoietic concerns of the Crown. With the pattern between the number of charges and diversion, multiple charges may spark alternative modes of case disposal outside of the use of diversion (like guilty pleas) and few charges can allow for modes of case processing within the diversionary scheme. The number of charges can therefore be an indicator of

<sup>42</sup> See Chapter II – Literature Review.

available alternatives for a Crown when processing a youth prosecution file. Accordingly, when there is one or few charge(s), the use of diversion can allow the conservation of prosecutorial and legal system resources. Diversion may be a more suitable option with a single charge in that the mode of case processing can be altered in the pursuit of efficiency. With multiple charges and the pursuit of efficiency, there are alternatives that can be exercised beyond changing the mode of case processing and pursuing a non-adjudicative alternative. It would seem that with multiple charges, diversion is not needed to save resources as dropping charges and maintaining a position on a guilty plea provides the Crown with a mode of case disposal. Thus, the Crown can still conserve resources with a plea bargain as an alternative to going to trial. In cases that are prosecuted, more charges can become an important negotiating chip through which to process cases expediently, without going to trial, in an effort to save resources. Accordingly, if saving resources and processing cases expediently is the goal, the fewer number of charges can be processed through diversion and an increased number of charges can be processed albeit formally, through the use of plea bargains. In both instances there are available (and lesser) alternatives, of which the number of charges can impact.

As for police officers, the number of police officers and the number of specialized police officers differs between groups whereby there are more officers involved in prosecuted cases. As a direct result of the increased number of police officers, there is the simultaneous increase of multiple collaborating accounts of the alleged offence. This accumulation of communicable case content is able to satisfy evidentiary standards. This may be refined to the strength of an argument that can be advanced in court from multiple police officers. At the same time, the number of police officers may speak of the perceived severity of an offence by the police. It may be that multiple police officers were required to

ensure public safety, to collect evidence, to apprehend the young person(s), and pursue a conviction of the young person. Cumulatively, a stronger case has been built with more police officers and the corresponding legal accounts can contribute to success at trial.

Furthermore, when considering diversion as an autopoietic tool, the number of police officers alludes to the degree of resource investment/commitment. With elevated numbers of police officers and specialized police officers, the resources invested within a case exceed the resources invested in a case when a single officer responds. In being cognizant of the foremost role of the police to build a case through being collectors of evidence to ensure a conviction (Epp, 1997), substituting the pursuit of a conviction for diversion results in the resources that were invested in the case to surpass the amount of resources needed to match the mode of case processing (divert or prosecute). In view of this, there is less need for detective work and forensic work to ensure a young person can be diverted. Rather, detective and forensic work solidifies the ability to sustain a conviction. Certainly, the Crown Policy mandate that requires a reasonable prospect of conviction is present, at least ideally, but there would be a salient lack of parity between resources committed and resources needed to sustain a mode of case processing.

The challenge of maintaining parity is coupled with the potential for unhappy police officers. Officers may be unhappy when there is an investment of (vast and specialized) resources and the case is ultimately disposed of through diversion. It would seem that the investment of specialized resources is potentially considered not strong enough in spite of the resources mobilized to build the case. An implied discourse and reciprocal conversation can emerge between the police and the Crown whereby the quality of work of the police is assessed by the Crown through the mode of case processing that is selected. On the other

hand, prosecution may be used to address potential unhappiness with diversion and maintain working relationships within the criminal legal system (Steffensmeier et al., 1998, p. 767).

### **Release.**

Post-charge, the police make a determination for release. The five different types of release which the offenders could have been granted include:<sup>43</sup> an appearance notice ( $n = 17$ ); a promise to appear (PTA) ( $n = 4$ ); a PTA with undertaking ( $n = 10$ ); a recognizance ( $n = 17$ ); or not released and held in custody ( $n = 1$ ). A strong majority of young people that were released on an appearance notice (94%,  $n = 16$ ) or on a PTA (75%,  $n = 3$ ) were diverted. A majority of offenders that were released on a PTA with undertaking (60%,  $n = 6$ ), recognizance (94%,  $n = 16$ ) or held in custody (100%,  $n = 1$ ) were prosecuted. It seems that the imposition of conditions upon release is most often present among the prosecuted.

The differences in the type of release are important for assessing police responses and concerns in the wake of the alleged offence. A strong majority of diverted offenders were released on an appearance notice or a promise to appear. Thus in most instances, the young person is released from the scene, with no conditions, and merely has to sign a form declaring that he or she will show up for court and attend the police station for fingerprints. The prosecuted offenders, however, are released into the community on conditions given by a police officer or held for bail. Implicitly, it is clear in the prosecuted cases there was a concern – from a police officer or a justice of the peace – for public safety, ensuring the young person does not abscond and that public confidence is maintained in the administration of justice. It may be that the initial perceived severity of the offence and associated responses render a clear position of the nature of the alleged criminal act and appropriate systemic responses. This initial position and the appropriate means to respond

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<sup>43</sup> One missing value.

continues when the Crown has carriage of the file. The responses of the police and prosecutor are matched through formality, control and rigidity.

Whereas those who are prosecuted seem to be more likely to be released into the community on conditions, those who are diverted while not on conditions still have legal obligations to fulfill. Thus, there is a minimization of exposure to the legal system when foregoing adjudication. These legal obligations are important as diversion is an offender-based means to an end that protects the young person(s) from the harshness of the legal system and seeks to reduce recidivism (see Fischer, Wortley, Webster, & Kirst, 2002; James, 2006; Latimer, Dowden & Muisie, 2005; Moyer, 1980; Palmer, 1979; Patrick & Marsh, 2005; Wahab, 2006). However, the post-charge diversion process still exposes the young person to the legal system – the young person still has to attend the police station for fingerprints and photographs and the young person must attend court for first appearance and subsequent appearances until referred to diversion. Accordingly, the theoretical logic of minimal exposure to the criminal legal system for the benefit of the young person (Becker, 1963; Gomme, 2007; Lemert, 1951) is minimally attained. The minimization of exposure to the legal system pertains to the exposure to adjudication through a trial and conviction, which is substituted for the need to accept responsibility and expose the young person to preliminary procedural aspects of the legal system. Thus, this operational reality does not allow for the purest conservation of scarce legal system resources and the pursuit of offender-based goals – it merely allows for the conservation of adjudication and open court time by minimizing exposure to parts of the system. As a consequence, the utopian goals of the prosecutorial system and the offender are diluted with the use of diversion. In short, the level of system exposure through Crown selected diversion is consequentially relative to the timing of diversion, it is most accurately minimized exposure to the legal system.

**Crown considerations.**

Finally, I explore categories that relate to the Crown through the election of the Crown and the gateways to custody. In the 49 cases where Crown election was known, the Crown proceeded by summary conviction in 42 cases and by indictment in seven cases. In the cases where the Crown proceeded by indictment, 100% ( $n = 7$ ) were prosecuted. In the cases where the Crown proceeded summarily, 60% ( $n = 25$ )<sup>44</sup> were diverted and 41% ( $n = 17$ ) were prosecuted. As for the gateways to custody, Table 4 (page 94) reports diverted and prosecuted offenders that satisfy the gateways to custody. Almost always when a gateway to custody has been fulfilled, the young person is prosecuted, especially when there is a failure to comply with a non-custodial sentence, a violent offence or a pattern of finding of guilt. Finally, the similarity of indictable offences is not a contradiction of this trend but a reflection of the fact that most criminal charges are indictable, and can proceed by summary conviction or by indictment. There were no exceptional cases in the sample. Exploring the outlier of this trend, the diverted young person of a violent offence was 13-14 years of age, was a male and was charged with two counts of utter threats to cause bodily harm to classmates (case 41). The young person did not have a criminal record, had three previous warnings, and was released on a PTA with an undertaking. The incident took place at school and a NTP was served to the mother of the young person and the police officer explicitly recommended post-charge diversion in the file.

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<sup>44</sup> It must be noted that all of the diverted cases proceeded summarily as proceeding by way of indictment would have implicitly nullified the ability for the young offender to be diverted. Thus, the difference is not meaningful in this context, it merely outlines what is expected due to procedure.

Table 4  
*Diverted and Prosecuted Young People on Gateways to Custody*

		Prosecuted	Diverted
		% (n)	% (n)
Gateways to Custody			
Fail to comply with non custodial sentence			
	Yes	100% (5)	
	No	44% (20)	56% (25)
Pattern of finding of guilt			
	Yes	100% (16)	
	No	26% (9)	74% (25)
Commit indictable offence			
	Yes	52% (25)	48% (23)
	No		100% (2)
Commit a violent offence			
	Yes	83% (10)	17% (1)
	No	40% (15)	61% (24)
Exceptional cases			
	Yes	NA	NA
	No	NA	NA

Note. Percentages may equal more than 100% as a result of rounding.

The gateways to custody (GTC), as a statutory guideline for the imposition of custody in youth cases, are unexplored in the youth diversion process.<sup>45</sup> Greater percentages of prosecuted offenders possess the gateways to custody which include: the failure to comply with noncustodial sentences; a pattern of findings of guilt; and a violent offence. Consequently, it may be that securing these gateways to custody insures the possible use of the most severe sanction in youth law should offending continue. It may be that there is a

<sup>45</sup> Whereas I explore the gateways to custody and the components of the gateways to custody that are present among diverted and non-diverted cases, it is important to note that these gateways to custody also speak to the severity of the offence and historical conduct of the young person. Accordingly, it may be inaccurate to suggest that it is the gateways to custody and the potential application of a custodial sentence that impacts young offender diversion, however I am not looking at this as a causal claim. I merely described the trends in the data and provide the impetus for future research. In examining the gateways to custody, I consider culturally relevant meaning of coded content. On this note, I am cautious in advancing a potentially contentious claim, however, I maintained my speculative explanatory tone. The most contentious position to advance with respect to the gateways to custody would be to suggest that there is a persistent pursuit of custody for the Crown. As such, when elements of the gateways to custody can be fulfilled, diversion will not be used.

need to avoid diversion to ensure that there are noncustodial sanctions that can be breached, there is a need to not divert based on the mere presence of violence, there is a need to avoid diversion, prosecute, and have a conviction registered, to create the pattern of finding of guilt – all of which fill the GTC requirements. As for the indictable offence, while there seems to be a limited difference between cases, the operative term here lies in the ability to indict not proceeding by way of indictment. Many *Criminal Code* offences are hybrid offences and can therefore proceed by way of indictment or by way of summary conviction.

Finally, for all of the exceptional cases that deviate from the patterned nature of a case characteristic and diversion, it is clear that there is a difference of a single or few communicable case characteristics. For instance, the diverted young person may have a criminal record but the young person committed a single property offence, whereby the \$5.00 item was recovered after a single police officer responded to the complaint of a loss prevention officer (case 48). This young person was released on an appearance notice and the NTP was served to his mother. Other cases with one or few differences exist with outstanding charges, previous warnings, the specialized police officer that attended, and the presence of a violent offence. As such, the substantive pattern of communicable case content remains the same, however subtle differences may emerge. Thus, the communicable case characteristics theoretically and practically exist as preconditions for diversion, not deterministic elements.

### **Synthesis**

Crown diversion candidates vary in select individual and alleged case specific characteristics. This unearths a patterned nature of diversion which must be conceived as patterned characteristics (alleged case specific or individual) with a matched patterned response of diversion or prosecution. Even when there are no discernible differences,

similarities in communicable case content can illuminate the nature of the offences of young people and case processing selected by the Crown

It has been argued that historical conduct of a young person where there is an official response from the criminal legal system seems to be associated with prosecution. This continues the use of official responses to a young person's transgression(s) by matching the past response(s) and controlling risk through the use of prosecution as a non-actuarial tactic available to the Crown. When diversion is granted, it would seem that there would be limited risk for the system with the use of diversion as there is historically nothing to suggest that something would go wrong. The absence of historical transgressions seems to be relevant in understanding the diversion process as it allows the safe use of non-adjudicative responses. This safe use is at no risk of discrediting the public's respect of the administration of justice. Furthermore, the potential presence of informal social control increases the safe use of diversion and thereby matches the potential presence of informal social control with an informal response through post-charge diversion.

In unearthing the facets of Crown selected diversion in a single jurisdiction, it is clear that a concern for the young person can give way to non-benign system operation. The non-benign components emerge out of: historical matching through non-actuarial modes of case selection; the extension of informal social control and net-widening; differential treatment among co-accused; alternative modes of case disposal; protection of police resources and attitude; minimal exposure to the legal system; and the possible pursuit of GTC. More generally, the combined differences on an alleged case specific and individual level of communicable case content make it clear that the prosecutorial system is not only concerned with the offender but also with the alleged offence. While past research suggests that the offence is important (Moyer & Basic, 2005) it counters the more utopian orientation of the

youth legal system that is fore mostly concerned with the offender rather than the offence (Barton, 1976, p. 471; *YCJA*, 2002). Thus, it would seem that both axis's (offender and offence) must be explored.

### **Applying the Model of Communicable Case Characteristics**

Considering the normative legal and extra-legal dichotomy to individual level characteristics, legal factors selectively play an important role in the patterned nature of diversion as seen in a criminal record, outstanding charges and current conditions. However, there is an important extra-legal factor here with the presence of the notice to parent. While the notice to parent is a legal requirement of procedure, by implication, as an indicator of informal social control it is extra-legal. Similarly, the alleged case specific characteristics that seem to differ between diverted and prosecuted offenders are predominantly legal factors. The alleged case specific characteristics are legal factors as they constitute responses by legal system players, or classifications of the type of offence that has been alleged. It should be of no surprise that these legal factors are dominant as the case file is the source of data, a source of data that is the factual communication by the police to the Crown about an alleged offence.

From the systems theory perspective, it is clear that legal communications are salient in the communicable case content. All communicable case content constitutes that which the legal system is able to attach meaning in making a distinction and selecting a suitable candidate for diversion. Thus, the normative claim that a notice to parent is an extra-legal factor must be abandoned in that the NTP is theoretically a legal factor of the systems perspective given that it is a legal indicator of non-legal social control. This non-legal social control is a circumstance to which the legal system can attach meaning. Similarly, the presence of Type I offences are legal communications in that they are deemed presumptively

eligible for diversion through Crown Policy which therein accounts for the presence of the offences in diversion cases. In totality, the communicable case content, particularly through legal communications, provides substance upon which the legal system can attach meaning and proceed to make distinctions for diversion candidacy.

It is in discussing select normative and theoretical underpinnings of the communicable case content, that the value of the conceptualization of communicable case content becomes apparent. Firstly, the theoretical and normative dimensions can be discussed through the classification of case content. Further, the idea of communicable case content allows the reader to acknowledge the source and potential purpose of communications. In this vein, communicable case content is as an anchor point for discussions that must continue in the study of prosecutor selected diversion. It may also be useful to extend the use of the term to other phenomena where the legal and extra-legal stalemate persists.

### **Theoretical Relevance**

Based on the discussion above, it is a difficult endeavour to solve the problem that exists within current explanatory models – particularly the simultaneous discussion of ascribed relevance and the source of factors that relate to diversion candidacy. The source of data and the sole ability to interrogate the communicable case characteristics does not allow for the mobilization of existing theoretical models. Accordingly, a Crown must be asked about the relevance and source of the abovementioned communicable characteristics where the case characteristics may be relied upon: to reduce uncertainty and encourage the consideration of all relevant case information (uncertainty avoidance perspective); to respect experience of the culture of the Crown and the legal system (professional practice wisdoms and court community perspective); and to assess blameworthiness, harm and community protection (focal concerns theory). In this research, continued use of these models follows an

inability to surmount the explanatory stalemate and perpetuates the rigid conceptualization of the problematic. Thus, an alternative conceptualization is due.

### **A Theoretical Alternative**

In that I am unable to understand the “whole” prosecutorial basis upon which decisions are made, I combine the quantified characteristics and Luhmann’s systems theory. I advance the alternative account given that I am able to know the decisions that are made, identify characteristics that are different among cases and suggest the relative importance/meaning of these characteristics. Accordingly, I start to construct an understanding of the whole prosecutorial basis for diversion. To make sense of what is present in the case files, I assert that a distinctive discourse of diversion and non-diversion is communicated. Inasmuch, I turn to a code and conditional program based analysis of communicable cases characteristics whereby communicable “if’s” help highlight what the Crown may consider relevant so that “then” there can be diversion or else non-diversion.

#### **Codes & programs.**

I begin with the assertion that a divert/not divert code is constructed within the case files, not within the mind of the prosecutor. As with all codes, the diversion/non-diversion code has a preference structure (Hagen, 2000, p. 346; King & Thornhill, 2003) with positive and negative sides – the positive and negative sides are constituted in the election to divert or not divert. The application of this code is informed by conditional programming which “exist as organisers of information which allow the application by the system of its binary code” (King & Thornhill, 2003, p. 23).

Luhmann notes codes and programs collectively are “the two pillars of the unity of an autopoietic system” (Luhmann, 1993, p. 194 as cited in King & Thornhill, 2003, p. 23). It is overly simplified and erroneous to suggest that a simple binary distinction is created with the

reduction of complexity. Rather, considering the function of programs there is an influence on the operations of the system and a nuanced consideration in the decision to divert. The programs move outside of the rigidity of a single binary code and allow for the malleability of input to foster the creation of the binary distinction (King & Thornhill, 2003, p. 25-26 & p. 59) through the production of differentiation (Luhmann, 2004, p. 196). Conditional programs introduce a semantic rationality which is used to give orientation in the application of the binary code. Through the semantic rationality, conditional programs “construct the continuous linkage of self-reference and its external reference; only conditional programs provide the systems orientation to and from its environment with the form which is cognitive and at the same time what can be evaluated deductively in the system” (Luhmann, 2004, p. 196).

The creation of the distinctive discourse through the code and conditional programming presentation of diversion rests on the Luhmannian assertion that structural components are required for the system to make sense of what is going on in the system (Lee, 2000, p. 327). To make sense of diversion as a binary code between divert and not divert, conditional programming compliments the binary distinction by giving it the content needed to make the distinction (King & Thornhill, 2003, p. 23). In this project, the binary code of divert versus not divert is clear in the files but the identification of the myriad of communicable case content must be amalgamated to construct a conditional program of diversion whereby the program informs the binary code. The code needs the conditional program to tell the system what is to be considered diversion/non-diversion. The code, divert versus not divert, is imperative for the identity of the system (King & Thornhill, 2003) and it therefore does not fluctuate. Hence, this starts to establish the importance of the code and conditional program in the Luhmannian framework.

The conditional program informs the code through framing content in the form of “if-then”, “if” a condition is fulfilled (the elements of the conditional program constitutes all of the possible communicable case content) “then” the diversion/non-diversion can be activated (the binary code) (see Deflem, 2008, p. 168). Empirically speaking, all of the quantified categories constitute the available “if” for the system. The identity of the system created through the code “generates the programs and gives them the appearance of continuity and rationality” (King & Thornhill, 2003, p 25-26). Accordingly, the code remains the same as the code is essential to the identity of the system. However unlike the constructed code, the conditional program can and must be changeable when circumstances require “adaptation” of the system in relation to its environment. As such, the conditional program can show flexibility in providing and organizing information for the code.

#### **Function.**

This distinctive discourse or code of diversion secures the autopoiesis of the prosecutorial service through systems of meaning (King, 1993) that are associated with the distinctive discourse. Cumulatively, the binary code and conditional program reduce and organize the communicable case content (King & Thornhill, 2003, p. 23). Given that “[e]ach sphere of social activity sees the world on its own terms” (King & Thornhill, 2003, p. 23) the code and programming model gives an account of the terms that the system may use to make sense of the world. In the form of “if-then”, the “if” portion is outlined through the conditional programs and the “then” portion is constituted in the binary code.

#### **Crown selected diversion, the code and the program.**

The presentation of the distinctive discourse of diversion is an attempt to make the reader aware of the code of the system and the meaning associated with the code. There is a conditional operationally different code of communication (Leydesdorff, 2000) that has been

identified and operates as the communication of autopoiesis. The system is able to stabilize with the application of the same code, diversion/non-diversion. With the creation of the code, the prosecutorial system is creating, using and understanding the distinctions that the system makes as there is only understanding of the distinctions that the system makes (Lee, 2000, p. 328). The stabilization of the system comes from the conditional program and the relationship to the code through the declaration of the “if-then” formula.

All of the communicable case content and the descriptive patterns articulated above play a role in the diversion process; communication allows for the transmission of information and makes it understandable (King & Thornhill, 2003). More precisely, communicable case content is what constitutes the “if” in the “if-then” statement. As such, what has been outlined here in the model of the conditional program and binary code is the “if” part of the Crown’s decision to divert. The cases, with the binary code and the constructed conditional program cumulatively highlights what it is that the Crown may consider relevant for deciding, what constitutes the “if” so that there can “then” be diversion or else to non-diversion.

This code, in conjunction with the conditional program, allows for the prosecutorial service to make sense of the environment, namely, the communicable case content that is articulated by the police. This is apparent in the (possible) meaning associated with each “if” or quantified category. Accordingly, the environment provides information to create the diversion code but the code is created by the prosecutorial system based on the patterned use of diversion. As operators of the code, through conditional programming, the prosecutorial service maintains guidelines (Moeller, 2006) in communicating diversion eligibility. This eligibility is exemplified in quantifiable trends that were discerned from the case files. To illustrate, the communicative code of divert or not divert is informed by conditional

programs, these programs attribute meaning to: criminal record, no criminal record; outstanding charges, no outstanding charges; NTP; no NTP and so on. The communicable case content that comprise the code and the conditional program of diversion are presented in Figure 2.

**Figure 2**  
**The Distinctive Discourse of Diversion and Non-Diversion**

<b>BINARY CODE</b>	<b>Communication of Diversion</b>		<b>Communication of Prosecution</b>
Conditional Programming	No	<b>Criminal Record</b>	Yes
	No	<b>Outstanding Charges</b>	Yes
	No	<b>On Conditions at Time of Offence</b>	Yes
	Yes	<b>Notice to Parent</b>	No
	Yes	<b>Co- Accused</b>	No
	Less (Few)	<b>Number of Charges</b>	More (Many)
	Class I or Federal (Minor)	<b>Offence Type</b>	Class II ([More] Serious)
	Less (Few)	<b>Number of Police Officer</b>	More (Many)
	No	<b>Special Police Officers</b>	Yes
	No Conditions (Appearance Notice or PTA)	<b>Release</b>	Conditions (PTA with Undertaking, Undertaking, Recognizance)
	No	<b>Gateways to Custody</b>	Yes

The code and program analysis above must not be read as a causal calculus of diverted young people. Rather, a framework of a communicative code (divert versus not divert) is presented whereby there are systems of meaning associated with the conditional programming that informs organizational decisions as to how the code should be applied in different cases. I attempt to construct a distinctive discourse in the presentation of the

communicable code (divert/not divert), the illustration of the conditional program that informs the code, all of which are cumulatively important in the creation of the code, and the presentation of associated meanings that are exhumed from the program.

The potential meanings associated with the conditional program are described above when discussing each communicable case characteristic. The communication of possible meanings globally provides an orientation for the system in the creation of a distinction between divert or not divert. To illustrate, the meaning associated with the distinctive discourse of diversion suggests that “if” there is an absence of historical conduct whereby official legal action from the criminal legal system was not required “then” there can be the communication of diversion. Further, there may be the communication of diversion “if” there is the communicated presence of informal social control, a co-accused and current conduct that did not require the investment of a large amount of legal system resources. Conversely, the meaning associated with the distinctive discourse may suggest that the communication of prosecution is the negative side of the diverted meaning, highlighting the positive and negative nature of the distinctive discourse. As such, “if” there is the presence of historical conduct whereby official legal action from the criminal legal system was required “then” non-diversion can be communicated. Further, “if” there is the communicated absence of informal social control, no co-accused and current conduct that did require the investment of a large amount of legal system resources, which cannot be followed with the use of minimal legal system resources, “then” non-diversion can be communicated.

Framing the findings as the emergence of a distinctive discourse with regard to programming of diversion and using a code and program based analysis simplifies and organizes communication. As an observer of the phenomenon, it allows the secondary observer (which here observes from a sociological point of view the organization) to make

sense of what is going on when outlining the codes, the meaning associated with the codes, and the simplification/organizational basis for the use of the codes.

In the end, the communication of a decision is procedurally legitimized through the system's autopoiesis – in Luhmann's terms the legitimization of communication “exists to ensure the making of legal decisions” (Luhmann, 2004, p. 114). A twofold distinction can be made here that establishes the legitimacy of the code and the conditional programming. The process is legitimized by making distinctions based on the information provided (Luhmann, 2004, p. 63) and the use of the procedure to learn about the situation (Luhmann, 2004, p. 310) of which the code and the conditional program are based.

## Chapter VI – Qualitative Findings

In framing this introduction and the overview of the grounded formal theory, I mobilize theoretical concepts and a framework that emerged from the data. I identify and qualitatively assess new differences and similarities among and within cases.<sup>46</sup> While the concepts, themes and trends emerged from the data, existing literature has informed the emergent analysis through loose contextualization of the components. The interrogation, inspection, and excavation of the cases ground the production of the theoretical model – Paradoxical existence: A fourfold emergence of differences from/and similarities. For the sake of clarity, I sketch a theoretical overview followed by a discussion of the theoretical components.

In constructing a theoretical model of Crown diversion, I have attempted to demystify the process of Crown selected diversion. I do this by noting common temporal moments in Crown selected diversion. I also note a perpetual paradox that is found in the cases through the formation of distinctions, as accounted for through second-order observations, with the creation of differences from/and<sup>47</sup> similarities. The similarities are rooted in the presence of four key themes in all of the cases. These four common themes rooted within each case from which differences and similarities emerge include: threat; (in)tolerableness; responsibility; and recourse. These four key themes are not a reflection of reality but an analytical abstraction of the unraveled and exposed elements of the system. The emergence of differences from/and similarities is not an assessment of valid or invalid referrals to diversion. Rather, there is a qualitative identification and assessment of new differences (and

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<sup>46</sup> I have neither presented nor have I conducted an *a priori* selection of theory and categories based on existing knowledge.

<sup>47</sup> I note that there are differences from similarities as well as differences and similarities in the presentation of the theoretical model. Hence, I use the differences from/and similarities to account for this two-fold dynamic.

similarities) through induction. The perpetual paradox is a result of discovery and constant comparison with the goal of constructing a theoretical account.

### **Structure of the Case Files: Three Temporal Moments**

There are three temporal moments which collectively establish the prosecution file. These three moments are organized around an articulation of: the past; the present; and the future. These moments abstractly classify the (potential) purpose and source of the communicable case content for the system. Accordingly, the function and meaning associated with the three temporal moments are readily available for construction by the system. These moments provide uniform organizational roots for communication while simultaneously allowing for the creation of distinctions.

Each temporal moment answers a single core question. In some instances, especially when it comes to discussions of the past and the future, sub-questions emerge. These sub-questions account for the instrumental orientation of the criminal legal system, and in the context of diversion, the pursuit of both institutional and offender-based goals. The contents or the substantive answer to the question(s) will be discussed outside of the presentation of these moments to avoid repetition and ensure coherency in the core analysis. In discussing the three moments, I provide examples of the content that is in the file that fits into the moments for illustration purposes. However, the temporal location of the four categories is most important for substantive analysis below.<sup>48</sup> Succinctly, the temporal moments are organizational structures of communication where core categories fluctuate.

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<sup>48</sup> In that I apply the inductively produced categories or key themes to the temporal moments, I move away for a mere classification of all of the content of the quantitative analysis. In the overview of the temporal moments, I present the case content as it appears in the files for illustrative purposes given the quantitative discussion above. However, I move towards abstraction in the presentation of core categories below.

**The Past**

All of the case files have a clear presentation of the past. Historical discussions are organized around the question: what has happened and what was needed in the past so the future is not the past? There is a probing for historical conduct of a young person and historical action of the criminal legal system as a response to this conduct. That which has been needed in the past may be: for the offender by the system; for the system by the system; or for society by the system. There is accordingly a threefold target of the needs of a young person could have been addressed so the future does not become the past for this system, for the offender, and for society.<sup>49</sup>

To illustrate, distinctions can be created in this moment. Most clear is the presence versus the absence of historical contact with the legal system by the young person. Accordingly, the emergence of distinctions in the question highlights the importance of posing the question. Additional case content rooted in the past includes: a criminal record; outstanding charge; on conditions at time of offence; previous pre-charge diversion; previous post-charge diversion; and previous warning(s).

**The Present**

The temporal moment of the present pertains to the file of which the Crown has carriage. The present is most accurately a history of the present in the sense that it is historically rooted content but it pertains to the current case that is before the court. The

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<sup>49</sup> It is neither my goal nor is it within the scope of this project for me to definitively outline that which has been done for the offender by the system, the system by the system, or for society by the system. Rather, I merely account for the instrumental nature of the diversion process and attempt to account for this instrumental nature within the communications of the Crown prosecution file. This provides a comprehensive account of the file and ensures a full account of the three temporal moments that are articulated in every file. Based on the review of the literature provided in Chapter II, it is clear that there are altruistic goals of diversion and system-based goals. Based on these goals, something, through the election to divert can be done for the system by the system (system-based goals), for the offender by the system (altruistic goals) and/or for society by the system (altruistic goals).

alleged offence has happened in the past but the content pertains directly to the present by sustaining and providing the material elements of a case before the courts. Accounting for the history of the present, a succinct question can be posed: what has gone on in the past that creates the current legal file of which the Crown has carriage? Case content rooted in the present includes, but is not limited to: the alleged criminal offence; the facts of the case; amount of harm; and type of release.

### **The Future**

The final temporal moment is the future. The future is a consideration of: what is needed now in this case so the future is not the past (or so that the past is not reproduced in the future)? Accordingly, there is the gateway for the instrumental nature of the legal system. Just like the past, what is needed for the future may be: for the offender by the system; for the system by the system; or for society by the system. A threefold target emerges so the future does not become the past for the system, for the offender, and for society. When it comes to the future, it may be that what is needed now is: diversion; a community program; a withdrawal of charges and a position on a guilty plea on other charges; the imposition of custody; a period of probation; community service; and/or restitution. In sum, there are three temporal moments that constitute the case files.

### **Discussion: Three Temporal Moments**

The three moments are needed for the creation of distinctions; however, I illustrate the distinctions when outlining the key categories, not the three moments. The three moments are an important organizational tool or heuristic device for the presentation of key themes. These moments are important in the qualitative sense of unearthing meaning, trends and themes across and within temporal moments. Further, these moments are an anchor point that has emerged from the case files that informs additional emergence from the files. As an

organizational tool, the moments allow for a threefold analytical process through: the creation of distinctions within a moment; the creation of distinctions between moments; and the creation of distinctions both within and between moments. As organizational tools, they create order out of chaos (King & Thornhill, 2003, p. 9-10) and ground the data.<sup>50</sup> I illustrate these moments with concrete examples from the cases, but the task in the model is not about pegging communications into moments. Rather the task and the model is rooted in identifying and locating inductively generated concepts or categories while simultaneously moving towards analytical abstraction, within and among the time-based schema.

The temporal moments also account for the breadth of information that is communicated and deemed to have been historically established when discussing offenders – there is a presentation of what is known about the criminal through the current crime, the appraisal of the criminal in the past and what can be expected from the criminal in the future (Foucault, 1977, p. 18). In this vein, the persistence of the three temporal moments are found in the data, it is not that the moments are applied to the data. Further, the goal-oriented nature of diversion can be explored within these moments which allows for the broad consideration of context as the content of the temporal moments been deliberately kept broad.

The three central moments maintain a Luhmannian position in being organized around events in the context of youth diversion, not members or actors of the moments (Moeller, 2006). The continued presence of the temporal moments solidifies these moments

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<sup>50</sup> Recall, autopoiesis is used to manage complexity (Cotterrell, 2006; Hernes & Bakken, 2003) and is concretely “the process characteristic of life by which systems organize themselves out of disorder, forming a responsive, self-referring, self-maintaining network” (Banakar, 2003, p. 109). The presence of complexity creates chaos as there is a lot of information and a lot of details that could possibly be considered in the selection a diversion candidate. However, in making distinctions, order is created out of selection and the limiting of some considerations whereby a candidate is selected for diversion. The temporal moments help establish this order to facilitate distinctions and dilute chaos. When these temporal moments are communicated, communication is not anything, “but any communication [that] goes on, [however] it goes on if and when it is able to establish some kind of order” to ensure the communication continues (Moeller, 2006, p. 22).

and the organization of internal operations of the system around these indicators of time. Further, these moments are important in the later discussion of paradoxes as they help conceal the paradoxical existence of the diversion process.

**The Emergence of Differences and/from Similarities: The Persistent Paradox(es) with Crown Selected Diversion.**

Through induction, four categories were constructed. Concepts were developed and coded through open coding and refined and reorganized in more focused and theoretical coding. The concepts generated early in the process constitute elements of the four categories and inspired regrouping and conceptualizing the construction of these categories (see Appendix H). Distinctions are made with the core categories across temporal and thematic dimensions. Constant theoretical and topical memos facilitated the emergence of striking similarities throughout the analysis of diverted and non-diverted cases. Further, constant comparison of memos, thematic dimensions and temporal moments informed the emergence of differences. Hence, there is a paradoxical existence that emerges as a result of the fourfold emergence of differences from/and similarities. Three theoretical propositions are advanced: first threat, (in)tolerableness, recourse, and responsibility are present in all of the case files but vary in thematic/dimensional and temporal content; second, diversion is an option for the prosecutorial system when there is a present threat that is not historically rooted, which allows for future tolerableness when intolerableness has not been an element of the past, this tolerableness exists with and when there is a short-term recourse and responsibility of the offender in the present and future. Finally, there is a perpetual paradox in all of the cases with the creation of distinctions of the same core categories.<sup>51</sup>

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<sup>51</sup> There are two conceptualizations of paradox that apply to this study. There is a paradox in the common use of the term, as a circular or contradictory reasoning. There is also a paradox in the more Luhmannian sense of

**Threat**

Threat, or more specifically, communicable threat is an event in all case files, and primarily relates to the commission and (possible) negative result of the criminal offence. Threat is therefore a communicable “reality” for the system – it is that which the system will communicate based on the conduct of a young person. In all of the cases threat exists but the temporal location of the threat and the dimensions or thematic content of the threat change.

**Threat in prosecuted cases.**

In prosecuted cases, an amalgamation of the past and the present solidifies the existence of a threat through persistence, through persistence despite neutralization attempts, and through complexity. Accordingly, these are three elements which constitute threat in the case files. With persistence, there is continued communication of illicit conduct of the young person. The persistence of the threat is exemplified in the dominance of historical charges/cases, outstanding charges (cases 1, 5, 8, 9, 13-16, 20, 21, 23) and convictions on charges that results in a criminal record (cases 1, 3, 4, 8, 9, 10, 12-15, 17, 19, 20 & 22). Temporally existing in the past and present, persistence of the criminal conduct continues as there is a current legal matter before the courts. In light of persistence, there is a persistent negative consequence through a threat to property due to mischief, theft, and break and enter (cases 1, 3, 4, 6, 7, 8, 10, 11, 13-21, 23), a threat to personal wellbeing due to robbery, assault, possession of a weapon and assault with a weapon (cases 12, 14, 22, 24, 25) and a threat to the administration of justice through breach charges (cases 2, 5, 8, 9, 13, 16, 18, 20, 21).

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the term. In this instance, every time a decision is made, there is a paradox which is only observable from the second-order point of view. For instance, the prosecutorial system is producing a valid decision of divert and not divert but it determines the criteria of what constitutes a valid decision to divert or not divert – hence the paradox (see King & Thornhill, 2003).

Further, threat exists through behavioural persistence despite historical attempts to curb the threat, whereby the threat has been addressed through: a criminal record (cases 1, 3, 4, 8, 9, 10, 12-15, 17, 19, 20 & 22); legal conditions (cases 1, 8, 9, 10, 16, 19 & 21); and non-adjudicative measures (cases 1-6, 8, 10-13, 16, 17, 19 & 21-24). The substantive point being that there is the persistent threat, there has been a response to the persistent threat and the threat continues through the existence of the current legal file.

Finally the threat exists through complexity or sophistication of the conduct that has been alleged. Collectively, this complexity or sophistication is clear in planning, forethought and a series of wrongful acts and the near evasion of detection. Planning is present when there is a mastermind (case 1) to an alleged offence whereby there are a series of wrongful acts. A series of wrongs are apparent in the multiple charges facing the young person. It is clear that there is not simply: a break and enter but it is a break and enter, commit mischief, commit theft and injure or kill an animal (case 15) or commit theft, take a motor vehicle without consent and breach youth sentences and recognizances; possession of stolen property but it is break and enter, commit theft, commit mischief and possess stolen property (case 6) or commit theft, fraudulently use a credit card and obstruct police (case 7). Near evasion of detection is apparent when a single fingerprint allowed for the identification of a suspect (case 15 & 19), a single cigarette butt permitted apprehension after DNA analysis (case 18), a blood sample from a broken window allowed for apprehension (case 23), and surveillance footage allowed for the post-offence identification of a suspect (case 1, 10, 23 & 24). In all instances, complexity of the criminal event delays detection or exacerbates the extent of the wrongful act(s).

The threat in prosecuted cases is solidified with the result of the detected threat. In these cases, there is often a measurable, tangible and sustained loss that is associated with the

criminal offence which is primarily focused around financial loss. This loss is unaffected by detection, but detection brings to light the scope of loss. It seems then that the detected threat is in need of a response. The sustained loss of the complainant is clear in the: lost \$800 as a result of theft and forgery of cheques (case 1); lost electronic equipment (in-dash CD player, GPS systems, iPods), tools, and loose change that resulted from numerous break and enters of vehicles (cases 4 & 6); lost money from the fraudulent use of a credit card at restaurants, gas stations and retail stores (cases 7 & 10); lost value and quality of personal vehicles from the theft of a vehicle or the occupying of a motor vehicle without consent (cases 8, 11 & 17); repaired the home from mischief that resulted in broken windows, broken security system, paint strewn in a hallway, and broken televisions (cases 12, 13 & 23); replaced stolen items from a break and enter into the home (cases 13 & 18); and replaced of \$1000 cash, jewelry and prescription pills (case 24) or an iPod (case 25) that were taken during a robbery. In sum, threat is detected and the associated extent of financial loss solidifies the threat.

#### **Threat in diverted cases.**

In diverted cases, threat exists as an element of the case but it is thematically different and temporally exists in the present. The threat, as an element of the present communicates behavioural newness. In presenting newness, there is a consideration of the absence of threat in the past and the manifestation of threat – as something new but that which needs to be communicated – in the present. The need to respond to something new does not possess the elements of persistence or persistence despite neutralization attempts that exist in the prosecuted cases. Rather, newness amalgamates the past and present existence of threat with a new need to respond. As newness, threat is relatively absent in the temporal moment of the past where this marginal declaration eludes to historical conformity or at least historical conduct whereby the communication of threat has not been needed. That which has

happened, as something new for that young person, emerges in the current legal matter. It emerges as the first time that the young person: dangerously operated a motor vehicle (case 27); stole a product the value of which was under \$5000 (cases 28, 29, 31, 33; 36, 38, 40, 42-46, 48, 49, 50); occupied a motor vehicle without the consent of the owner (case 30); committed the act of mischief by engaging in graffiti (case 34); broke into a store (cases 30 & 39); possessed marijuana (cases 37 & 47); or uttered threats to cause bodily harm to a classmate (case 41). In some instances, there may be occurrences whereby non-adjudicative responses have been needed with the diverted young people through warnings (cases 28-31, 35, 38-41, 43, 44, 47-49) or pre-charge diversion (case 34). However, threat is still new as it is the primary instance which instigated detection and a response (through a formal charge) in the wake of the threat.

Assessing the result of the threat in diverted cases, the detection of the threat predominately allows for the negation of loss associated with the threat through return of a material object, which is much different from the sustained loss in prosecuted cases. Loss is merely hypothetical and negated with the return of a bracelet and a dress (case 28), \$16 in earrings (case 29), a \$29000 vehicle without damage (case 30), an iPod and loose change (case 33), two boxes of condoms (case 38), two GPS units (case 40), \$679.00 in movies (case 42), a bag of chips (case 43), a \$200 pair of jeans and a \$24 pair of shorts (case 44), a \$5.00 roast beef wrap (case 48), hair dye and cosmetics (case 49), and a vacuum cleaner (case 50). In sum, in diverted cases, threat is present whereby it is solidified by the potential loss that was detected. This loss is qualitatively different from the prosecuted cases as it is potential loss that would have occurred in the absence of detection, entrenching the presence of threat. Due to the ability to detect the threat, it is not particularly complex as it is often a single wrong with limited planning and forethought which did not evade detection.

**(In)tolerableness**

(In)tolerableness, as an element or event of the case file has a binary nature and therein refers to intolerableness or tolerableness.<sup>52</sup> The use of the term tolerable is important to reflect the non-deterministic nature of an event through the capacity or ability for tolerance as an essential and consistent element of the files. Further, I avoid the use of the word tolerance as it implies intent; an element which is not explored. Accordingly, tolerableness is an assessment of the rigidity of a decision or response. Decisions are articulated at every point in the case file, when there is a response to a stimulus, be it through charging, releasing, diverting or prosecuting. In assessing the rigidity of a response or event that precedes the crime, there may be: free rein given to some and pressures put on others; use of a statutory provision in one instance and the exclusion of the same section in another; diversion of one individual and conviction of another (Foucault, 1977, p. 272). It is this fluctuation which constitutes (in)tolerableness as an element of the system and cases.

**(In)tolerableness in diverted cases.**

In diverted cases, (in)tolerableness temporally fluctuates and seemingly results in the presence of tolerableness in the future. This fluctuation is especially important as it emerges when the carriage of the case file has been passed to the Crown. It is the shift in the carriage of the file and the associated shift from intolerableness to tolerableness demonstrates the reduced rigidity of a response through giving free rein with the use of the non-adjudicative statutory provisions of diversion.

In the present, it is clear in all diverted (and all prosecuted cases for that matter) that intolerableness exists towards the event that sparked involvement of the legal system. This

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<sup>52</sup> When I speak of tolerableness, I do not speak of the criminal event. Rather, I speak of the event that follows the crime, it is therefore conceptually similar to the response of the crime.

clear intolerableness is found in the fact that criminal charges have sprung from the alleged criminal act, or threat. The pressure of the legal system through formal charges is used. There is not a fluctuation in the application of the criminal law through the use and simultaneous exclusion of provisions at this temporal moment. All young people are held to the standard of the *Criminal Code of Canada* (1985) or the *Controlled Drugs and Substances Act* (1996). The application of the statutes in a uniform manner for all of the diverted and prosecuted cases solidifies the general intolerableness of the event that instigated the legal matter. In other words, with regard to the system's own normative expectations, it signifies through legal communication the unacceptable character of what happened. More precisely, it signifies the existence of a communicable threat and the associated intolerableness when formal charges are laid.

In the moment of the future and the query of what is needed now so the future is not the past, elements of tolerableness emerge. The selection of a diversion candidate clearly gives free rein to those who are selected for diversion through pausing formal legal proceedings. As the alternative mode of case processing, diversion is of reduced rigidity in that it is non-adversarial, takes place in the private sphere, and could have an orientation towards the pursuit of offender-based goals. In further establishing the presence of tolerableness, the variability in the use of legislative provisions is clear with the use of diversion. With diversion, the ability to prosecute and pursue a conviction for a criminal offence is provisionally excluded to allow for diversion (*YCJA*, 2002, s. 10). As such, tolerableness as the use of a statutory provision in one instance and the exclusion of the same section in another is seen with diversion.<sup>53</sup>

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<sup>53</sup> Whereas it should be clear that tolerableness exists at this moment in all diverted cases, it is worth commenting on the distinction between free rein and pressure. It is through this distinction that the term

Finally, when it comes to the past and the assessment of (in)tolerableness in the files, tolerableness seems to exist. Tolerableness is exemplified in the warnings (cases 28-31, 35, 38 -41, 43, 44, 47-49) or pre-charge diversion (case 34) as that which was needed in the past so the future does not reflect the past in diverted cases. In these instances, free rein is given through foregoing a criminal charge and using the pre-charge diversionary provisions of the *YCJA* (2002, 1-10). Seemingly, this historical tolerableness does not bar the re-emergence of tolerableness at a different temporal moment when the Crown selects a case for diversion.<sup>54</sup>

**(In)tolerableness in prosecuted cases.**

(In)tolerableness is clearly found in the prosecuted cases. The appraisal of the rigidity of a response follows a clear path of intolerableness throughout the three temporal moments. Interestingly however, there are traces of tolerableness despite the persistent intolerableness. Tolerableness is seen in the past with the historical use of warnings and/or pre-charge diversion in most cases (cases 1-6, 8, 10-13, 16, 18, 19, 21-24). Thus, there is the historical presence of free rein and non-activation of adjudicative proceedings with the use of pre-charge diversion. In spite of the presence of tolerableness in prosecuted cases, intolerableness thrives in the same temporal moment. This is apparent with the abundance of prosecuted files that already have a criminal record (cases 1, 3, 4, 8, 9, 10, 12-15, 17, 19, 20 & 22) and outstanding charges (cases 1, 5, 8, 9, 13-16, 20, 21, 23). With criminal records and/or outstanding charges, there has been intolerableness in the past through the pressure of the legal system as mobilised through the use of adjudicative statutory provisions by the system. These two indicators constitute a response of increased rigidity *vis-à-vis* pre-charge

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tolerableness is important in that it is less deterministic than tolerable, and is still able to accurately account for the (minimized) pressure that exists with the use of diversion (see Chapter III & Chapter IV).

<sup>54</sup> It is worth noting that in many of the diverted cases, assessing tolerableness in the past is a meaningless exercise as the young person has minimal or no exposure to the criminal legal system, so the rigidity of a response cannot be assessed due to the lack of a response.

and post-charge diversion measures. In sum, in the temporal moment of the past, the prosecuted cases are comprised of (in)tolerableness.

In the present, intolerableness exists within all of the prosecuted cases. Just like in diversion cases, there is no free rein, differential use of legal provisions or modes of processing whereby the rigidity of the response varies. Rather, uniform intolerableness exists with the use of adjudicative processing. Nevertheless, when comparing prosecuted cases to diverted cases, it seems that the level of intolerableness is greater in prosecuted cases. The differing degrees of intolerableness are apparent in the need to release the young person on conditions (case 2-6, 8, 9, 11-19, 21-25) or the need to hold the young person in custody (case 20). This increased intolerableness as an element of the cases is unique to the prosecuted cases. The greater degree of intolerableness is accordingly an increase in pressure, rigidity, and adjudicative statutory provisions.

Finally, and unlike diversion cases, intolerableness thrives with the pursuit of a conviction through pressure of the system and use of adjudicative statutory provisions. This intolerableness follows the present and historical intolerableness which cumulatively creates a uniform level of decisional rigidity at all three of the temporal moments. The prosecuted cases are a testament of continued intolerances whereby the decision to prosecute continues intolerableness. Despite the persistent intolerableness and just like the temporal moment of the past with prosecuted cases, traces of tolerableness seem to emerge in the wake of the guilty pleas. When there is a guilty plea (cases 1-7, 10, 11, 13-15, 17-19, 21, 23-25) there is a matched withdrawal of charges. Resulting from the dropped charges, there is minimized free rein on some of the criminal conduct and selective use of adjudication. With this dynamic, there is the emergence of similarities and differences between diverted and prosecuted cases through continued intolerableness with traces of tolerableness.

**Responsibility**

Responsibility is the ownership of a detected threat that is ascribed or voluntarily communicated. Thus, responsibility may be that which is applied to a young person and conversely that which is communicated by the young person; I articulate this distinction as responsibility *of* the young person and responsibility *on* the young person. Responsibility is a core element communicated in all cases but qualitative differences emerge in the presentation of responsibility along temporal and dimensional plains.

**Responsibility in diverted cases.**

In diverted cases, responsibility is temporally located within the present and the future. In both instances, responsibility is something *of* the young person; it is never ascribed *on* the young person. Responsibility is overt and forthwith as it is not delayed and the detection of the threat is sufficient to spark the voluntary communication(s) of responsibility of the young person. It exists in forthwith declarations of culpability, cooperation and remorse.

Responsibility in the present is seen through quick declarations of culpability that allows for the detection of a threat. A corroborating account of the wrongful act or omission is given by the young person, early in the process, that establishes the wrong and solidifies the young person as the wrongdoer and the source of the threat. For instance, in the case of dangerous operation of a motor vehicle and mischief to property whereby a young person flipped his parent's vehicle and damaged a fence, he forthwithly declares "I pulled the e-brake, it's not supposed to flip. It is a four wheel drive" (case 27). Consider the case of young people breaking into cars, when asked what happened, the young person secures responsibility by saying "we were car hopping" which is when "we see which car is unlocked and then take [the] valuables" (case 40). There is this continued affirmation of

wrongdoing in: the case of uttering threats to cause bodily harm, the young person did say that he was “going to beat up [the complainants] and did call them several times over the weekend” (case 41); the case of mischief to property, the young person admitted to tagging a payphone with a silver marker (case 34); the case of possession of stolen property, the young person admitted to being in the [stolen car] (case 30); and the case of theft under \$5000, where the young person admitted to stealing from the store on at least six occasions and thereafter pawned the stolen property (case 42).

The notion of cooperation as a vague declaration comprises an element of responsibility. Cooperation is part of responsibility through the absence of hostility and deception. As seen in the prosecuted cases, it seems that when present, a lack of cooperation is worthy of discussion. When cooperation is present, the young person has been very cooperative (case 50), cooperative at the point of apprehension (case 49), and cooperative and attempted to provide an explanation for the alleged criminal offence (case 28). While these are vague elements of the case, they constitute responsibility as an event of the young person that secures their presence in the detected threat.

Responsibility is also articulated through remorse of the young person in the wake of the detection of the threat. Remorse secures the young person’s involvement in the threat through the presentation of apologetic ethos. In most cases, what it means to be remorseful and the event that is remorseful is not detailed at length, it is merely noted. Remorse seemingly goes beyond acknowledging the role in the threat. To illustrate, the remorse as an element of the case file is highlighted when a young person missed his fingerprint date, the young person “appeared to be remorseful and sincere in [the] message and was very concerned about missing it” (case 48). Further, remorse is shown when a young person, in the wake of the alleged offence declares, that was “the biggest mistake of my life” (case 30).

Add to these illustrations the young person who “after a few questions [broke down and] started crying, saying he did threaten both XXXXXX and XXXXXX... and that he used to be good and needs some help” (case 41).

Remorse remains an important element of the case file with the lack of remorse is worthy of communication and documentation. It might be that due to a lack of remorse, the young person is charged (cases 46 & 28); it may be merely noted that the young person showed no remorse during contact with police (case 44); finally, the young person may have shown no remorse for the theft, despite being provided every opportunity to show remorse (case 43). Accordingly, the presence and absence of remorse is communicated thereby solidifying this component of responsibility. In sum, responsibility in diversion cases is established through clear, quick and noteworthy declarations of the young person, cooperation and the presence or absence of remorse.

When it comes to responsibility in the future, that which is needed so the future is not the past is young person acknowledgement of the wrongful act and an associated consensual declaration to participate in the extra-judicial sanction. In diverted cases, responsibility in the future is most accurately free and informed consensual responsibility that is the gateway for participation in diversion. This form of responsibility is established in all diversion cases when the young person formally acknowledges in writing:

I acknowledge that (initial each):

- 1) I have been advised of my right to be represented by counsel.
- 2) I have been given reasonable opportunity to consult with counsel.
- 3) *I accept responsibility for the acts or omissions as set out in the attached synopsis that form the basis of the offence(s) stated above in respect of which I request EJS.*
- 4) *I have been informed of the EJS available.*
- 5) *I fully and freely consent to participate in the EJS (my emphasis).*

The free and informed consensual communication of responsibility has a young person take ownership of the detected threat. With the future, the centrality and continued presence of responsibility of the young person is important as responsibility is not affixed to the young person. As an element of the case, it precedes an event that could be used to place responsibility on the person for the alleged criminal act, or in this theoretical model, threat. In sum, responsibility is a persistent element of the file and it exists at two temporal moments.

### **Responsibility in prosecuted cases.**

In prosecuted cases, responsibility is also temporally located within the present and the future. However, in prosecuted cases, responsibility can be something *of* the young person and *on* the young person. Further, it is mixed as it may be overt and forthwith or blatantly absent. Additionally, responsibility, when present, is often temporally delayed. The presence or absence of responsibility entrenches it as a core event of the cases.

Responsibility in the present is seen through quick declarations of the event that has allowed for the detection of a threat. Just as in the diverted cases, a corroborating account of the wrong is established which positions the young person as the wrongdoer and the source of the threat. For instance, the young person that has taken the family vehicle without permission is asked by police for a driver's license and declares "I'll be honest with you, I don't have one" (case 11). Again, when confronted about a fingerprint in a stolen car, the young person admitted to attending a local church, stealing car keys from a coat pocket on the coat rack and later stealing the car. This is not before asking, upon arrest, "was that the Hyundai [that I stole]?" (case 19). The establishment of responsibility is also clear in concrete admissions by young people, such as when: the young person confessed to knowing the car that he was driving was stolen but did not want to get anyone else in trouble (case 6);

the young person admitted to breaching conditions of a non-attendance zone (case 5); the young person admitted to taking and concealing white shorts and pink underwear on her person (case 3); and the young person admitted to the consumption of alcohol at the time of the offence (case 2). Responsibility is also found in a robbery investigation when the accused asserts: “I’ve never been investigated for any type of crime, [it was a] bad night, stupid night, can’t remember anything, I was too drunk. I don’t know [what happened], it is my fault, I shouldn’t drink like that. I don’t drink that much. I don’t usually do that either” (case 22). Interestingly and just like diversion, it is clear that responsibility *of* the young person is developed in the prosecuted cases.

Unlike in the diversion cases, instances of cooperation and remorse as a component of responsibility are rare occurrences in prosecuted cases. Rather, a lack of cooperation through hostility and deception emerges. The presence of the inverse of responsibility is important as it highlights the binary nature of the core theme in the case, and establishes a clear difference between diverted and prosecuted cases. Further, the lack of responsibility through hostility and deception solidifies the need to consider responsibility of the young person in the case. The lack of cooperation constitutes a flagrant denial of the criminal act and/or a general hostility to detection. It is clear that the presence of responsibility in prosecuted cases is mixed as responsibility of the young person is present in some cases but completely absent in others.

The lack of cooperation through hostility of the young person is present in many of the prosecuted cases. This hostility encapsulates a range of activities as it may merely be shouting, yelling and interrupting throughout the duration of contact (case 2) or threatening police upon response to a threat by yelling “I’m not going, I’ll kick you in the face, wait until you see what I do to your house... I don’t care [about the offence]” (case 8). At the more

hostile end of the spectrum, non-cooperation is clear when a young person becomes angry with the police, attempts to spit in the face of a police officer and later warns “I’m going to knockout the first police officer that walks up the stairs (while holding a vase)” (case 12). This hostility continued when the young person yelled “I’m going to kill you, you are fucking pigs. I could make two phone calls and have you and your fucking kids killed” (case 12). Another young person, upon arrest for impaired driving, consistently refuses to go to the breath testing area and concludes with “[I will not go] until I get a cigarette... fuck you” (case 17).

The dearth of responsibility is also illustrated with deception in the presence of clear culpability. When a young person is arrested for breaking into cars and has a large collection of loose change, the young person lies and tells the police officer that he hustles for money in the downtown core. This is followed with arrogance and implicit superiority when saying, “I don't mean to sound like a smartass, but you don't have evidence on me (case 4). Further, the impaired young driver denies having consumed alcohol and the presence of alcohol despite open alcohol being in the back seat of the vehicle (case 17). Also, deception enables an exercise in creative storytelling when confronted with allegations of possessing stolen property; firstly the young person paid cash, and did not keep the receipt as 15-year-old youth do not keep receipts. Shortly thereafter, the property became a gift from a generous passerby in a very nice neighborhood (case 7). In actuality, the property was purchased with a stolen credit card.

In prosecuted cases, responsibility can also be seen temporally in the future. In these cases, responsibility may be *of* the young person and responsibility *on* the young person. When the decision to maintain a position on a guilty plea is taken, responsibility is created by the system.

In prosecuted cases, responsibility in the future is mostly consensual. However, it is different from future based consensual responsibility in diverted cases. The strong presence of responsibility in the future speaks of delayed responsibility. In such cases, responsibility is most often seen in the plea of guilt which took place in 19 of the 25 cases.<sup>55</sup> As part of the plea, the young person must, in open court after being arraigned, verbally announce the wrongdoing and concede guilt in the commission of the wrongful act(s). This formal declaration in court is paired with a judicial sanction. In diversion, a signature *in camera* is paired with the extra-judicial sanction. Whereas the setting changes and the mode of articulating responsibility slightly changes, responsibility is still articulated in both cases as something *of* the young person with differing results. The point being, differences (in case processing) emerge out of comparable declarations of responsibility in both types of cases.

In the few cases whereby responsibility *of* the young person is not present, responsibility *on* the young person is maintained through a conviction. Thus, responsibility is applied to the young person in the finding of guilt and the imposition of a judicial sanction. It is in the finding of guilt that the ownership for the offence can be ascribed.

### **Recourse**

Recourse is the securing of an available alternative and possible mode of processing for the prosecutorial system in the absence of success. Expressed differently, recourse is something that is available to the Crown in the event that prosecution or diversion is unsuccessful. Recourse is the abstract event that is mobilized and monitored through returnability and supervision. Returnability is the possible (re)use of the adjudicative legal system. It can be exemplified through the reuse of adjudication after a stay of proceedings

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<sup>55</sup> Of the 25 cases, the disposition is unknown in three. Cases that plead guilty: 1-7, 10, 11, 13-15, 17-19, 21, 23, 24 and 25.

has been entered or it can constitute the adjudication of new charges that are linked in part to the current legal file. Supervision is persistent oversight that ensures success. It may be exemplified with the presence of legal conditions, conditions which may be tailored to address unique needs of the clientele. The availability of recourse is associated with success as the presence of success bars the need for recourse. Success is the securement of the future by not following the path of the past, which temporally pegs recourse exclusively in the future. Consequently, success is secured with the absence of failure when an offence has not been committed or diversion is completed. In sum, recourse is the securement of a mode of processing for the prosecutorial system in the absence of success that is mobilized through returnability and monitored through supervision.

**Recourse in diverted cases.**

In diverted cases, recourse is temporally located within the future. It coexists with all decisions to divert. Seemingly, what is needed now so the future is not the past is diversion and a recourse in the event that diversion is not successful. Recourse is secured procedurally in all diverted cases when the decision to divert is paired with a stay of proceedings. This pauses the legal matter and allows it to be recommenced within one year.<sup>56</sup> The recourse secured is adjudicative processing of the legal matter that has been foregone (yet seemingly available for reuse) to allow for diversion.

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<sup>56</sup> *Criminal Code of Canada*, R.S.C. 1985, c. C-46.

579. (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated

Recommencement of proceedings

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced

Recourse in diverted cases is established on consent through the review and signing of the EJS form by all candidates. It is consensual as all cases of diversion proceed after the Crown's decision is accompanied with free and informed willingness to participate from the young person. The consensual component is formally established through an acknowledgement of all of the Crown selected diversion participants of the conditions for participation, requirements of the participant for participation in the program and the requirements of the system for participation in the program through the review and signatory declaration.<sup>57</sup> Thus, a future oriented act of the young person secures their involvement in diversion but simultaneously secures recourse.

Recourse, as an available event that is pending or otherwise awaiting activation in the absence of success is dependent on returnability and supervision. The possible reuse of the legal system is exemplified in reactivating charges and not continuing with diversion, hence a return to the formal and adjudicative legal system. Supervision as an oversight to ensure success is minimal in diversion cases. There is only a query as to the completion of the program, not a continued query of all conduct as seen in prosecuted cases with the imposition of legal conditions. In sum, returnability gives the place for recourse whereas supervision assesses the need for recourse.

Recourse in diversion is the short-term securement of an available alternative that is contingent on the success of the diversion participant. As such, when success through program completion emerges, recourse in the case is nullified. However, when recourse is activated due to the absence of success in the diversion program, success for the system can be pursued when adjudicative processing is reactivated.

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<sup>57</sup> As a consensual component, there are traces of responsibility and it is seemingly a product of responsibility that continues in the element of recourse.

**Recourse in prosecuted cases.**

In prosecuted cases, recourse is also temporally couched in the future and coexists in the implications of prosecution and conviction. In all prosecuted cases, what is needed now so the future is not the past includes prosecution and conviction, which sustains recourse. Recourse is securely rooted in all prosecuted cases where a conviction is always matched with judicial conditions. The recourse is twofold as it embodies a (possible) criminal record and conditions.

Recourse in prosecuted cases is a consequence of a finding of guilt and judicial conditions. Instead of relying on consent and an act of the young person like in diversion, recourse is established by acting on the young person through the imposition of a period of probation with conditions, a period of custody and supervision, restitution, a community service order, weapons prohibitions and/or DNA orders. Whereas the substantive sanction may differ among cases, all cases have a period of conditions ranging from six months to two years. Further, the (possible) criminal record also establishes the recourse as it is contingent upon success for those with conditional discharges and inevitable with all others who are convicted.

Similar to diversion, recourse is pending or otherwise awaiting activation in the absence of success and is thereby dependent on returnability and supervision. In making use of the recourse, returnability is the possible (re)use of the adjudicative legal system. It is exemplified in initiating new charges when the young person reoffends while on conditions or seemingly breaches the ascribed conditions. Supervision as an oversight to ensure success is more long-term than in diverted cases as it exists over a period of probation (6 months – 2 years) or over a period of incarceration. With the prosecuted cases, supervision embodies the need for behavioural conformity over a period of time with clear conditions such as: keep the

peace and be of good behaviour; reside at XXXXX; maintain the discipline and rules of the home; attend counselling; and so on. In sum, returnability gives the place for recourse whereas supervision assesses the need for recourse.

Thus, recourse is contingent upon overall success through non-offending and the nullification of threat through behavioural success over a period of time (6 months – 2 years). As such, in the wake of behavioural success over a period of time, recourse within the case is nullified.

### **Synthesis.**

In sum, threat, (in)tolerableness, responsibility and recourse are consistent elements in all of the cases. The presence of threat in all cases entrenches the commission of the offence and seemingly elucidates the (possible) negative results of criminal conduct. (In)tolerableness in all cases provides a key position on the rigidity of a decision through free rein or pressure and the use or non-use of adjudicative statutory provisions. The persistent presence of responsibility in prosecuted and diverted cases creates ownership of the threat as that which is ascribed and that which is voluntary. Finally, recourse in the cases provides a mode of case processing in the absence of success.

When it comes to threat, there is temporal fluctuation when it exists in the present and the past in prosecuted cases but only in the present in diverted cases. Additional distinctions are thematically couched as threat exists through complexity, persistence and persistence despite neutralization attempts in prosecuted cases but through behavioural newness in diverted cases. As for (in)tolerableness, there is a fluctuation between tolerableness and intolerableness between moments in diverted cases but in prosecuted cases, the fluctuation occurs between and within the moments. Exploring responsibility, it exists in prosecuted cases in the present and the future through responsibility *on* and responsibility *of*

the young person. It varies thematically as it is both overt and forthwith but also limitedly exists as the absence of responsibility through the lack of cooperation and deception. Nevertheless, a delayed responsibility *of* the young person is seemingly able to emerge through an orientation towards the future. The diverted cases offer a clear distinction by the system through continued responsibility *of* the young person that is temporally located in the future and the present. Finally, recourse in all cases is secured through returnability and supervision. Accordingly, the need for recourse is assessed and there is an avenue through which to activate the recourse when needed in the absence of success. With prosecuted cases, recourse is a long-term inquiry into behavioural conformity but with diverted cases, there is a short-term query of success at diversion. The persistent existence of threat, (in)tolerableness, responsibility and recourse solidifies and ensures the creation of thematic, dimensional and temporal distinctions for the system on these four core elements.

### **Discussion: Threat, (In)Tolerableness, Recourse and Responsibility**

Granted the emergence of four categories from the cases, the temporal location of the categories in light of the discussion above allows three key questions to be answered. Thus, what has happened and what is needed in the past so the future is not the past is threat and (in)tolerableness. When it comes to the present, what has gone on in the past that creates the current legal file of which the Crown has carriage includes threat, (in)tolerableness and responsibility. Finally, what is needed now so the future is not the past is (in)tolerableness, responsibility and recourse. Accordingly, threat, (in)tolerableness, recourse, and responsibility are present in all of the case files but vary in thematic/dimensional and temporal content. These are important in that diversion is an option for the prosecutorial system in the wake of a present and non-historical threat, whereby only future and sometimes historical tolerableness can exist with the pairing of short-term recourse and responsibility of

the offender. Not only are elements of the system outlined but the function of these elements in answering core questions that spring from the temporal moments have been unearthed.

The centrality of these four core elements, as shown above, allow for the creation of thematic distinctions within and across temporal moments. As such, these four elements are common threads in all of the cases, of which differences and distinctions can emerge, hence the paradox of differences from/and similarities. While I momentarily forego a discussion of the paradox, the four elements of the cases theoretically and according to the systems perspective, constitute elements of which the system consists. With these four elements, there is not the creation of a certain type of offender, or that which is in nature, rather, I merely draw attention to the forces and factors at play that are meaningful and used by the system in the creation of distinctions and in the wake of contact with a young person. Considering the gamut of communicable content, I have reduced the inherent complexity in prosecution files, as a communication of the system, through the identification and discussion of the four elements of which the system consists (see Luhmann, 1988, p. 14). Without these components, the system cannot exist as it will not be able to make distinctions, which is the foremost element of a system (Deflem, 2008; Jonhill, 2003; Moeller, 2006; Seidl, 2005).

I have argued that the four components are elements of which the system consists. In light of this assertion, consider the disappearance of a single element in the creation of distinctions and the formation of a decision to divert. With the lack of threat, there would hypothetically be an inability for the system to ascertain criminal conduct and the result of this conduct that has sparked involvement in the legal system and fostered the need to make a decision to divert or prosecute. Without recourse, the system is unable to monitor success through an inability to assess the need for success and have a means through which to secure

further system processing in the wake of failure. As elements of which the system consists, threat, (in)tolerableness, responsibility and recourse are needed for the continued existence of the system. By virtue of the persistent presence in the cases, the elements are needed for the construction of the case, the presentation and organization of information from the environment and the distinction between diverted and prosecuted cases by the Crown. Diversion and prosecution is communicated with the same core elements and therefore in the same way, is a complex interplay of threat, (in)tolerableness, responsibility and recourse across temporal moments. The prosecutorial system's determination of diversion ceases to exist and ceases to perform its foremost function of making distinctions between cases in the absence of this information. Theoretically, this assertion is supported in that systems exist because of distinctions and need these distinctions to exist (see Delanty, 2005, p. 284; Moeller, 2006).

In light of the identification of elements of which the system consists, it is worth briefly considering these elements in light of existing knowledge. When it comes to threat, there is a nuanced addition that has been made in that I surpass merely identifying the offence (Moyer & Basic, 2005; Steffensmeier et al., 1998). In accounting for the act and the negative results, the concept of threat holistically grounds the wrong and result that is communicated in the file.

When it comes to the idea of tolerableness, there is an implicit consideration of the discretionary nature of the diversion selection process. However, in shifting the historical discussion of discretion, the idea of tolerableness differs as it is an element of which the case consists, not a general tool for an actor. Nevertheless, in using the concept of tolerableness, there is an ability to not only reflect the discretionary nature of the process but also reflect the realities of legal system processing in terms of fluctuation, variance and the capacity for

individual assessments. Accordingly, differential processing by the system acknowledges the inability and non-intention of the system to prosecute all (see Foucault, 1977, p. 283-284) sources of threat.

With recourse, system security and the maintenance of a continued function is established in the event of failure. By establishing recourse in all cases, in the event of failure, the election made by the prosecutor is peripheral as the system is still able to activate their traditional function. As such, both courses of case processing secure their own remedy and secure their own existence. The system is needed to make the decision to divert or to prosecute, and the system is also needed to deal with those incorrect decisions to divert or prosecute when there is the absence of success. In a similar line of argument to Foucault (1977, p. 280-285) on prisons, the creation of recourse as an element of the system ensures that there will be offenders (or threat) for the system. Thus, diversion is strategically useful for helping establish and consolidate the system and the autopoiesis of the system. Finally, recourse is also particularly interesting beyond securing a function for the system as it implies doubt on behalf of the system through securing recourse. In the need to secure recourse, conceptually there is the possibility that the course of action taken may not be correct.

Finally, the idea of responsibility is legislatively important for the youth legal system. The *YCJA* (2002) is clear as an EJS candidate is to accept responsibility for the offence. As outlined, responsibility, as an element of the system, exists empirically as something *of* the offender. As such, it may not be that the system secures responsibility but responsibility is an element for the system whereby responsibility exists as something of the offender. This must be problematized as responsibility of the offender is not always different between diverted

and prosecuted cases. Responsibility *of* the young person is a core element of the cases but, differences in case processing are made by the Crown.

### **Redundancy & the Perpetual Paradox**

In light of the qualitative discussion, I use two ideas from systems theory to add to the theoretical model articulated above. The idea of redundancy and paradox are used as illustrative tools that fit the data and couch the grounded formal theory in a body of substantive theory (Glaser & Strauss, 1967, p. 79).

#### **Redundancy.**

In light of the assertion that all cases focused around the communication of threat, (in)tolerableness, responsibility and recourse, there is a clear communicated redundancy in the files. Redundancy is that which is not new in communication or that which stays the same (Luhmann, 2004, p. 35) and serves as a starting point, a guarantee which will always exist within the system (Luhmann, 1995, p. 60). It helps to stabilize communications of the system and allows for the detection of distinctions within the redundancy (Luhmann, 2004, p. 35). The creation of distinctions within redundancy is seemingly part of the analytical task that has been articulated above. In this vein, redundancy is seen with the presence of the four core categories and distinctions are seen in the thematic and temporal variations as they exist as elements of the four core themes.

Redundancy is important in that organizations have difficulty dealing with change and when confronted with change, they tend to deal with the event through “more of the same” (Watzlawick, 1985, p. 366 as cited in Ahlemeyer, 2001, p. 62). Given the idea of more of the same with the *YCJA*, the 2003 statutory change may seem important for the prosecutorial system but this change is met with more of the same – threat, (in)tolerableness,

responsibility and recourse.<sup>58</sup> This “more of the same” is especially important when it comes to recourse as it secures an option for the prosecutorial system in the event of failure of diversion. In the wake of statutory change, the difficulty that may result from change is manageable through the use of the same structural components. This solidifies the longstanding assertion of organizational reluctance to change (Ahlemeyer, 2001, p. 62) as there is the continued communication of four core elements. Accordingly, there are limited structural elements of the system, which limits the production of elements of the system – the system is thereby limited to that which can be communicated as threat, (in)tolerableness, responsibility and recourse.

**The perpetual paradox.**

The perpetual paradox in the case files was noted at the outset. This paradox is a function of the creation of distinctions from the four core elements of the cases which therein allow for alternative modes of case processing – there is the paradoxical emergence of (temporal and thematic) differences from (core category or structural) similarities. This paradox also exists with the common organization of the case files around similar temporal moments and core structures which allow for further distinctions. The paradox is therefore the multi-level eruption of differences from/and similarities.

The idea of a paradox in systems theory is important for understanding the function of social systems as it is the “blind spot that makes distinctions and thus observations observable in the first place” (King & Thornhill, 2003, p. 19). The paradox arises when making a distinction, as an observer is unable to simultaneously view both sides of the distinction (King & Thornhill, 2003, p. 19). Hence, the position of the second-order observer

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<sup>58</sup> This is not comparative work but in identifying and addressing persistent elements of the cases, the problem of redundancy is conceptually problematic in the wake of legislative changes and the push to use non-adjudicative measures.

is needed to observe and disseminate the distinctions and to unfold the paradox. In the case of the diverted or prosecuted offenders, the paradox exists for it is a distinction made based on threat, (in)tolerableness, responsibility and recourse. These are uniform elements of all cases but distinctions help establish the preconditions for the appropriate mode of case processing. The paradox exists through the differences that erupt from the same core considerations. Further the paradox exists when the prosecutor produces a decision on diversion, a decision that is presumed to be appropriate in the totality of circumstances. The system therefore produces the appropriate decision but at the same time it determines what is appropriate based on the assessment of threat, (in)tolerableness, responsibility and recourse – therein lays the paradox. This paradox has been unfolded through second-order observations through the determination of the core elements where distinctions are made.

Finally, the implication of the state of existence must be noted. Firstly, it should be clear that the paradoxical existence is concealed (King & Thornhill, 2003, p. 21) temporally and thematically with the creation of distinctions. The paradoxical existence needs to remain invisible for the system to function (King & Thornhill, 2003, p. 21) so as not to question the validity of the distinctions that are made. Not only does the system cease to acknowledge the paradoxical existence, the concealing of the paradox continues the legitimization of the distinctions made by the system. Further, the concealing of paradoxes makes it seem as though operations and communications of the system are not based on self-reference (King & Thornhill, 2003). The continued concealing of paradoxes solidifies the state of self-reference and allows for the proliferation of autopoiesis through diversion.

## Chapter VII – Conclusions, Limitations & Directions for the Future

In conclusion, there are a number of key categories that can be isolated and quantified from an examination of case files. The quantified categories seem to differ between diverted and non-diverted young people. This allows a distinct discourse of diversion and prosecution to emerge whereby a core code is constructed – divert/not divert – not to establish the causal conditions for diversion but to illustrate the gamut of identifiable preconditions that are persistent in the distinction between diversion and prosecution. Qualitatively, I assert that Crown selected diversion paradoxically exists through the creation of differences and/from similarities. A paradox is able to thrive every time a distinction is made by the system, whereby the distinction limits decision possibilities and does so based on the structures of the system. Seemingly, the process of Crown selected diversion is organized around threat, (in)tolerableness, responsibility and recourse which are elements of which the system consists. The redundancy of these structures facilitates further distinctions.

In light of the core findings of this research, the paradoxical existence and the distinctive discourse of diversion allows for *success in success* and *success in failure*. In the absence of the outlined elements, prosecutorial communications and distinctions cannot take place. Seemingly, the identified elements of which the system consists secure the structures that allow for the communication of diversion. When diversion eligibility of a young person is communicated, diversion can serve autopoietic and offender-centric goals. While my goal has not been to assess whether or not these goals can be or are obtained, these are the longstanding but conflicting goals in which diversion purports to achieve (see Chapter II – Literature Review). Accordingly, the communication of diversion eligibility also purports to achieve these goals. Thus, there is success for the prosecutorial system in the presence of successful communication of diversion eligibility, as the autopoietic and offender centric

goals are pursued – hence, there is *success in success*. However, success is paradoxically found in failure for the prosecutorial system. There is *success in failure* when diversion eligibility is communicated but there is a failure in the diversion process. Success emerges out of failure as failure in Crown selected diversion allows for the prosecution of the young person and the pursuit of a conviction. As such, even with diversion eligibility whereby a candidate is not successful in diversion, the prosecutorial system can pursue a successful outcome through prosecution and conviction. Furthermore, there is *success in failure* with a failure to have the communicable case content of diversion. In this instance, the prosecutorial system can pursue success through prosecution and conviction. In conclusion, the distinctive discourse of diversion and the conceptualization of the elements of which the system consists secure the presence of the necessary structures to secure *success in success* and *success in failure*. Holistically, success for the system is guaranteed. Not only does communication continue but the paradox also continues.

### **Theoretical and Practical Significance**

In reviewing the core assertions advanced in this research, the theoretical and practical significance of these findings must be discussed. Practically speaking, the findings of this research make it clear that Crown selected diversion is not completely benign due in part to the patterned nature of the process. More specifically, the non-benign components emerge out of: historical matching of case processing; informal social control and net-widening; differential treatment among co-accused; alternative modes of case disposal; protection of police resources and attitude; minimal exposure to the legal system; and the possible pursuit of GTC. Looking at the cases structurally, there is not an enormous difference between diverted and prosecuted cases. Rather, there is a concealed paradoxical existence which is perpetuated through the temporal and thematic fluctuation of threat,

(in)tolerableness, responsibility and recourse. Thus, theoretically, three temporal moments and four core elements exist in all of the cases which allow for the creation of thematic and temporal distinctions. Seemingly, there may be the illusion of differences among cases but in outlining the distinctions on the same core elements, the concealed paradoxical existence of diversion is clear.

The secured success for the system must not be downplayed. Not only does Crown selected youth diversion provide cases to the prosecutorial system by ensuring there is a role for the Crown in the non-adjudicative process, but once the Crown is instigated, the Crown always succeeds. Thus, not only is there a constant influx of cases from the environment, but the system has been shown to make distinctions that will always ensure success for the system and a favorable appraisal of the system by uncritical observer. Thus, there is a function for the prosecutorial system in case selection and initial administrative case processing.

Finally, I call attention to the language used to describe Crown prosecutor selected diversion and the complexities of the process. When discussing and illustrating select normative and theoretical underpinnings of the communicable case content, the value of the conceptualization of communicable case content becomes apparent. The language not only offers multiple complementary dimensions for discussion but it enables the reader and researcher to acknowledge the source and potential purpose of communications. In this vein, the language of communicable case content must continue in the study of prosecutor selected diversion. It may also be useful to extend the use of the term to other areas of discretionary decision-making where the legal and extra-legal stalemate persists.

Theoretically speaking, I have mobilized Luhmannian logic and concepts to add to the literature on youth diversion and Crown selected diversion. Such a feat has been

exemplified in my focus on communications, decisions, distinctions and autopoietic tendencies of the prosecutorial system. It should be clear that the focus on system communications has allowed for an identification of the elements of the system and the functional differentiation of these elements. In doing this, there has been the identification of the structures of the system and simultaneous need for the environment to provide information and perturb the system to foster continued autonomous differentiation.

Using the Luhmannian theoretical frame, the usefulness of the point of view must be noted. As a secondary observer, keeping a distance, maintaining a sense of wonder and identifying where distinctions have been made by the system has allowed me as a researcher to make sense of what is going on in the code of diversion and non-diversion and the qualitatively identified elements of the system. Without the position of a secondary observer, the distinctions created by the system would not have been observable. Simply in terms of observing and identifying the distinctions makes the position fruitful in this study and useful in other studies of organizations. Further, in terms of change, the identification of distinctions informs and provides a normative basis for further investigation or change as it outlines the other possibilities. To illustrate, consider every instance when non-diversion was selected over diversion. The position of secondary observer established that non-diversion was selected over diversion and inasmuch, identified the other decision possibility that was not selected. As a basis for normative influence, this Luhmann identified distinction then calls for justification by the system that makes the distinction. In sum, the point of view of the secondary observer not only identifies distinctions but simultaneously identifies the alternative decision possibility.

Further, in using Luhmann, his theoretical logic has allowed me to introduce a binary distinction between diversion and non-diversion and outline the communicable content of the

system that may inform the prosecutorial system in creating, maintaining and informing this distinction. In doing this, I have been able to move beyond current explanatory models, account for the myriad of communicable content, and consider the meaning of all possible content that is and can be communicated in a prosecution file.

In the future, if Luhmannian inspired research is to add to Luhmann's systems theory and not just add to a body of literature by using Luhmann, concepts will have to move towards abstraction and ensure that they can provide explanatory power to multiple phenomena in all systems. As I have not mobilized concepts that can help explain systems in general, it must be clear that I have not added to Luhmann's theory but I have used Luhmann to add to the discussion on diversion.

### **Limitations**

Methodologically, the number of cases limited the scope of the quantitative analysis but the hypothetically toned interpretive work ensures that claims do not extend the power of the data. Further, this weakness is mitigated with the use of mixed-methods and the pursuit of new knowledge in the field. There is also limit in this research as some Crown selected diversion cases were not accessible. In these cases, the Crown may elect to divert but the young person does not consent to participate. While these cases exist, the rate at which young people reject participation is unknown.

Topically, there are additional facets of Crown selected diversion that were unexplored. These unexplored areas include: the legislative framework; prosecutorial policy; and the official voice of the Crown. However, I write not as the authority on the issue but an interpreter of the phenomenon with a strong interest to speak to Crowns in the future. Thus, there is still value in the work through: exploring and attempting to explain trends in current prosecutor selected youth diversion; advancing knowledge by finding new quantifiable

materials to assess when reviewing the files; and being the catalyst for future research by providing the starting point for an interview.

### **Implications**

This research has raised more questions than answers and must be a catalyst for future research. It is with hope that this project will not only spark interest in youth criminal legal processes and discretion but also the role of the prosecutor. Methodologically, this research has been successful in establishing a precedent for other researchers who want to secure a similar data set and investigate the criminal legal system. While this precedent did not exist, it is however problematic that it is an unpublished report. It is clear that I have a continued role upon completion of this project to disseminate the *how-to* of collecting this type of data through an application for access to records. Further, in terms of guiding future research, the importance of the offence and the offender must foster a two-fold analysis of both elements.

### **Directions for Future Research**

Topically, I conclude with a call to continue to investigate the Crown selected diversion process with the goal of bringing transparency to the process. For that matter, I call for the investigation of discretionary and *in camera* processes. Future research must mobilize legislation to engage rarely assessed empirical data sets. Using the law, research can expand topically to explore youth processing in the Youth Mental Health Court, the drug courts and other specialized courts or processes across jurisdictions. Also, research may expand to similar adult processes. Future research may also wish to consider the findings from this research to spark in-depth interviews with decision-makers. This would allow for testing and refinement of the assertions made here in an attempt to further academic knowledge. Further,

the scope of this project can be quantitatively expanded and multiple hypotheses can be tested.

In terms of data, I alluded to the idea of quasi-legal factors in the literature review. As such, there is a need to consider the role of Crown Policy in the analysis of this problematic. The analysis of Crown Policy can highlight organizational priorities and events that are created by the system for the reproduction of the system. Moreover, as a source of empirical data, it is an official declaration of the system, which has been created by the system for the benefit of the system and the promotion of transparency of the system. The concept and creation of transparency in the context of the prosecutor is a needed discussion in criminological and socio-legal discourse.

Theoretically, Luhmann must continue to be challenged and expanded in the analysis of Crown selected diversion. Keeping with the macro-sociological account, Luhmann's distinctions between closed and open systems, the notion of inside and outside the law and structural coupling (see King & Thornhill, 2003; Luhmann, 2004) can theoretically account for a broader consideration of law and context. In doing so, theoretical considerations can be open beyond the analysis of case files to a consideration of law and context. When it comes to law, exploring Crown selected youth diversion can be informed from youth law, the common law related to youth processing, the nature of discretion at law, and the common law related to discretion. When it comes to context, Crown selected youth diversion can be informed by prosecutorial policy, interviews with Crowns, case files and Hansard.

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**Appendices**

**Appendix A – Court Order**

**ONTARIO COURT OF JUSTICE**

**Order**


**On the Application of Kyle Coady pursuant to s. 119(1)(s)  
Youth Criminal Justice Act (YCJA)**

**The Application is granted on the following terms:**

1. Between December 15, 2011 and March 15, 2012, the Ottawa Police Service shall provide the Applicant, Kyle Coady, access to 25 records of young persons subject to extrajudicial sanctions and 25 records of young persons not subject to extrajudicial sanctions in accordance with the period of access provided for in s. 119(2) of the YCJA;
2. A record to which access is provided is limited to a copy of the information, the synopsis of the evidence, will say statements of police officers and witnesses and the investigative action reports of police officers;
3. The Ottawa Police Service shall be allowed to redact confidential information from the records and <sup>all</sup> information that would reasonably be expected to identify the young person to whom it relates prior to providing access to the Applicant but shall provide the year of birth of the young person;
4. The Ottawa Police Service shall provide the Applicant access to the records in an appropriate Ottawa Police Service location for a total of twenty-five (25) business days during normal business hours for a period of six (6) hours per day;
5. The Applicant cannot photocopy or photograph the records or take possession of the records outside Ottawa Police Service premises, but is permitted to take notes of the records' content for the purpose of his research;

- 
6. The Applicant shall take all reasonable precautions to safeguard the content of the records. All notes taken by the Applicant of the contents of the records must remain in his possession in accordance with the University of Ottawa Social Sciences and Humanities Research Ethics Board requirements;
  7. All notes taken by the Applicant of the content of the records must be destroyed prior to <sup>Sept 4, 2012</sup> ~~May 26, 2012~~ and the Applicant must provide written confirmation of their destruction to the Freedom of Information department of the Ottawa Police Service within seven (7) days of their destruction;
  8. The Applicant has the personal obligation to deal with the contents of the record strictly in accordance with all provisions of the YCJA;
  9. As provided for by s. 119(8) of the YCJA, the Applicant shall not disclose information in any form that would reasonably be expected to identify the young person to whom it relates.

Dated this 15<sup>th</sup> day of November 2011.

  
Justice Jean Legault  
Ontario Court of Justice  
Ottawa, Ontario

### Appendix B – List of Legal & Extra-Legal Factors

Select key ideas from the literature on youth diversion or prosecutor selected diversion are tabled below. General findings and legal (L) and extra-legal (EL) factors are outlined in adult and young person (YP) diversion.

Potter & Kakar, 2002	Alarid & Montemayor, 2010	Moyer & Basic, 2005
<p>-YP diversion is restricted to minor offences</p> <p>-education level seems important</p> <p>L factors – prior criminal record, severity of the crime, severity of injury/damage, premeditated action</p> <p>EL factors – appearance, attitude towards the offence, local political environment, and attitude towards treatment</p>	<p>-prosecutor selection/ranking of important factors in adult diversion</p> <p>-general prosecutorial support for the diversion of X offences</p> <p>-certain types of offences are worthy</p> <p>L factors – record, version of offence, probation/parole history, agency recommendations, plea bargaining, custody status, PO documentary evidence</p> <p>EL factors – gang affiliation, pending cases, background, ties to community, SA history, evaluation/needs summary, MH, employment history, education, financial circumstances, physical health, marital history, military history, VIS</p>	<p>-YP are typically diverted when the offence is at the lower end of the spectrum, it is non-violent, the offender has a minor record or old record, no pattern of criminal behaviour, and/or there are extenuating circumstances ie young age.</p> <p>-prosecutors still want to hold YP accountable</p> <p>-social circumstances are of decreased importance for prosecutors</p> <p>-multivariate stats findings – no previous findings of guilt, a current property offence/charge and few current or no outstanding charges.</p>

#### Alleged Case Specific Circumstances

1. offence timing
2. offence(s)/charge(s)
3. number of charges
4. offence type
5. criminal record/youth record
6. outstanding charges
7. number of co-accused
8. co-accused
9. previous warnings
10. previous pre-charge diversion
11. extra-judicial measures considered

12. type of release
13. number of police officers involved
14. specialized police officers involved
15. number of specialized police officers involved
16. constable(s) only involved
17. number of civilian witnesses
18. type of civilian witness(es)
19. offence location
20. property details
21. Crown election
22. gateways to custody
23. mode of initiation

Individual Circumstances

1. Age
2. presumed sex
3. notice to parent
4. criminal record/youth record
5. On conditions at time of offence

Table of Coded Factors

<b>Type</b>	<b>Type &amp; Source</b>	<b>Factor</b>
Alleged Case Specific	Legal	<ol style="list-style-type: none"> <li>1. offence(s)/charge(s)</li> <li>2. number of charges</li> <li>3. offence type</li> <li>4. criminal record/youth record</li> <li>5. outstanding charges</li> <li>6. number of co-accused</li> <li>7. co-accused</li> <li>8. previous warnings</li> <li>9. previous pre-charge diversion</li> <li>10. extra-judicial measures considered</li> <li>11. type of release</li> <li>12. property details</li> <li>13. Crown election</li> <li>14. gateways to custody</li> </ol>
Alleged Case Specific	Extra-Legal	<ol style="list-style-type: none"> <li>1. offence timing</li> <li>2. number of police officers involved</li> <li>3. specialized police officers involved</li> <li>4. number of specialized police officers involved</li> <li>5. constable(s) only involved</li> <li>6. number of civilian witnesses</li> <li>7. type of civilian witness(es)</li> <li>8. offence location</li> <li>9. mode of initiation</li> </ol> <p>NB. Categories in the normative sense are extra-legal, but if cognitively used as an indicator of offence severity, they may be construed as legal factors. However, this is a dynamic that cannot be explored by looking at the factors, I would have to talk with decision-makers.</p>
Individual Factors	Legal	<ol style="list-style-type: none"> <li>1. Age</li> </ol>
Individual Factors	Extra-Legal	<ol style="list-style-type: none"> <li>1. presumed sex</li> <li>2. notice to parent</li> </ol>

List of coded factors/circumstances in order as discussed above:

1. Age
2. presumed sex
3. offence timing
4. offence(s)/charge(s)
5. number of charges
6. offence type
7. criminal record/youth record
8. outstanding charges
9. number of co-accused
10. co-accused
11. previous warnings
12. previous pre-charge diversion
13. extra-judicial measures considered
14. type of release
15. number of police officers involved
16. specialized police officers involved
17. number of specialized police officers involved
18. constable(s) only involved
19. number of civilian witnesses
20. type of civilian witness(es)
21. offence location
22. property details
23. notice to parent
24. On conditions at time of offence
25. Crown election
26. gateways to custody
27. mode of initiation

## Appendix C – Coding Frame

### List of categories

The categories below constitute manifest content of the file. Below, I explain each category that has been systematically recorded for each case file. Additionally, I outline the scheme that I used to note the presence of each category. Thereinafter, I describe how the factor appears in the case file. Cumulatively, I account for three methodological steps in my coding frame when I: describe the file; outline what I extract from the file and what that means in the context of the file; and describe what I am counting.

1. Age Range – is the numerical determination of accumulated years from date of birth to the date of the offence. I account for the age range because I can only calculate the approximate age of the young person at the time of the offence. Accordingly, the date of the offence and the year of birth are noted in the files. The age range is necessary due to the fact that files were redacted of all identifying characteristics except for year of birth. As such, the exact age at the time of the offence can only be ascertained within a range as the offence date is known. It is important to note that pursuant to the *Youth Criminal Justice Act (YCJA)*, all offenders dealt with pursuant to the Act are between the ages of 12 and the day up until their 18th birthday. Thus, all young offenders dealt with pursuant to the *Youth Criminal Justice Act* and subject to the Crown's election to divert are between the ages of 12 and the day before the 18<sup>th</sup> birthday. When coding, an age range is calculated for the offenders in the files by subtracting the year of birth from the date of the offence.
2. Presumed sex – is the gender of the accused person in the file. When coding, presumed sex is recorded as either male or female. This category is deemed presumed sex in that all identifiers of sex were vetted in the case files. However, following the court order, sex is not an attribute that could be used to reasonably identify the young person of which the file pertains. A close read of the files has allowed the researcher to determine the sex of the accused person in the file. This was achievable by noting the pronouns used in the file. Additionally, when sex and pronouns related to sex were vetted I was able to perform additional checks on the presumed sex of the young offender paying close attention to the size of the vetted words in some cases. To illustrate, the size of the vetted material is greater when the word female (female) or her (her) is used compared to he (he) and male. (male). In most cases, the consideration of the size of the vetted material is used only as a check on the presumed sex that I determined from readable content in the file.
3. Offence timing – is the moment in time when the offence was committed which includes the day, month, year and time. The day, month, year and time of the offence are all noted in the file. When coding, month was noted as the abbreviated version of the month of the offence, and the year was noted using two numbers associated with the last two numbers for the year. The day of the offence was noted as an abbreviated

version of that day with three letters and the time of the offence was noted using a 24-hour clock.

4. Offence(s)/charge(s) – is a list of the criminal law violations that have been alleged in the case file. All charges were noted in the form of the *Criminal Code of Canada* section or the *Controlled Drugs and Substances Act* section in the file. In the event that there were multiple charges for the same offence, the total number of charges for those offences was recorded. When there were multiple charges of different offences, these charges are recorded and separated in the list with a semi-colon.
5. Number of charges – number of charges is the sum of the charges that have been laid in the file. I count the number of alleged offences/charges and the number of counts of each charge. When coding, the sum of charges are expressed in numerical form.
6. Offence type – is an externally inspired classificatory scheme used to make sense of the alleged offence(s) in the case file. There are two classification schemes used for offence type. Firstly, offence type was recorded in a form inspired by the scheme used by Statistics Canada (see for example recent crime rate data). Additionally, I use a typification used by Crown prosecutor policy to classify the offences. In noting the offence type, offences were able to be categorized on the basis of that which has been targeted by the offence and that which brings meaning to the type of offence for the Crown. More specifically, I explore this meaning couched in the discourse used by the Crown or Statistics Canada.
  - a. Offence Type (Statistics Canada) – following a statistics Canada inspired classificatory scheme, I classified the offences according to six broad targets. These targets include: violent crime; property crime; drug crime; *Criminal Code of Canada* traffic violations; weapons violations; and administration of justice charges. Violent crime includes offences such as homicide, attempted murder, sexual assault, assault, assault police officer, firearms offences, robbery, abduction, utter threats, criminal harassment, threatening or harassing phone calls, or extortion. Property crime includes: breaking and entering, possession of stolen property, theft of a motor vehicle, theft over \$5000, theft under \$5000, fraud, mischief or arson. Drug crime includes: possession of cannabis, cocaine, or other drugs; and trafficking of the aforementioned substances. *Criminal Code of Canada* traffic violations includes: impaired driving; and other *Criminal Code of Canada* traffic violations. Weapons violations, although classified as a distinct category by Statistics Canada, includes: possession of weapon dangerous for public peace; and possession of a prohibited weapon. Just like weapons violations, administration of justice violations is a distinct category according to Statistics Canada, these violations include: failure to attend court; breach conditions of use sentence; breach conditions of recognizance; breach conditions of undertaking; or failure to attend for prints.

When coding, crimes/offences are classified as: violent crime; property crime; drug crime; *Criminal Code of Canada* traffic violations; weapons violations; and administration of justice charges.

- b. Offence Type (Prosecutor Policy) – is a classificatory scheme applied to the case files that comes from Provincial and Federal Crown Policy. Pursuant to the Ontario Crown Policy Manual (Attorney General of Ontario, 2005), *Criminal Code of Canada* offences are divided into three classes of offences: class III offences are never appropriate for extra-judicial sanctions because of their seriousness or because they form part of a government policy of criminalization; class I offences are the least serious and they are presumptively appropriate for extra-judicial sanctions; other offences are class II offences (Attorney General of Ontario, 2005, No. 24, p. 8-11). Unless otherwise noted, I cite prosecutor policy verbatim in the explanation below.

Class III offences are not appropriate for extra-judicial sanctions and Crown counsel shall not consider or refer any application for extra-judicial sanctions were the offence falls within this class. Class III offences include: murder, manslaughter, infanticide, criminal negligence causing death; causing death or bodily harm by dangerous or impaired driving; any offence causing serious bodily harm; simple impaired driving or driving with a prohibited blood alcohol concentration; offences involving firearms; kidnapping; spouse/partner offences; child abuse; sexual offences, including sexual assault, interference and exploitation, invitation for sexual touching and incest; offences involving child pornography. Offences that are presumptively eligible are class I offences. Class I offences are less serious offences. They are presumptively eligible for extra-judicial sanctions consideration, depending on the circumstances of the offence and the offender. Class I offences that are presumptively eligible include: theft and possession under \$5000; joyriding; mischief under \$5000; fraud and false pretenses under \$5000; food, travel and accommodation frauds; causing a disturbance. First offenders will usually qualify, as extra-judicial measures are presumed to be adequate to hold a young person accountable for his or her offending behavior, the young person has committed a non-violent offence and has not previously been found guilty of an offence

(*YCJA*, s.4(c)). Note, however, the young persons who have been previously diverted to extra-judicial measures or who previously have been found guilty of an offence are not necessarily precluded from referral to extrajudicial sanctions. Other offences, class II offences are other *Criminal Code* offences, not considered in either class I or class III, are eligible for consideration for extra-judicial sanctions in the discretion of Crown counsel. While Crown counsel retains discretion to refer or decline to refer any particular case for extra-judicial sanctions in all prosecutions involving class I and or class II offences, Crown counsel must exercise this discretion having regard to the needs of the young person and the interest of society. Crown counsel must consider the conditions in section 10(2) and the principles found in section 4, in particular section 4(d), which provide the extra-judicial measures should be used if: they are adequate to hold a young person accountable for his or her offending behavior and; their use is consistent with the principles set out in section 4. As class II offences embraced a wide range of conduct, the decision about eligibility for extra-judicial sanctions will depend on Crown counsel's assessment of: the circumstances of the offence; the circumstances of the young person and; the interest of the particular community, including the needs of the victim, if any. The more that a class II offence resembles a class III offence the less likely it is the Crown counsel should exercise discretion to refer the case for extra-judicial sanctions. The more that a class II offence resembles a class I offence, in terms of its gravity, the more likely it is that Crown counsel should exercise discretion in favor of referring the case for extra-judicial sanctions. In making the determination of whether the interests of society and the needs of the young person will be served by extra-judicial sanctions, Crown counsel should be mindful of the distinction between the range of behavior encompassed by the definition of the offence and the actual manner in which the offence was committed by the young person. For example, a person may commit

the offence a break and enter by removing a bicycle from a neighbor's garage. After consultation with the victim and the return of the bicycle, Crown counsel might view the matter is appropriate for extra-judicial sanctions. Other examples of types of class II charges that may prove acceptable for extra-judicial sanctions include: minor non-spousal partner assaults between young people (example, schoolyard fights without injury or weapons); property offences where the value exceeds \$5000; minor justice related offences for example, giving a false name when arrested. In addition, other charges that may appear serious, because of their range of behavior encompassed by the definition of the offence may nonetheless be appropriate for extra-judicial sanctions if *the actual manner in which the offence was committed* is such that the needs of the young person and the interest of society are met by extra-judicial sanctions. Offences involving injury, greater violence than the very minor assault referred to above or those in which a weapon was used, will not usually be suitable for extra-judicial sanctions (CPM, 2005, No. 24, p. 8-11).

Pursuant to federal prosecutor policy when it comes to youth diversion, there is not an articulation of offence types. Rather, the federal policy outlines pertinent parts of the *YCJA* and notes the Crown's role in ensuring that parliament is able to achieve the objectives sought with the *YCJA*. On this note, legislative and case considerations are listed. More specifically, there is a call for the federal Crown to consider: the seriousness of the offence; and the nature and number of previous convictions; or any other aggravating circumstances. Additionally, there is a call to consider sections 3-5 of the *YCJA* (Public Prosecution Service of Canada, 2002, ch. 14.6.4). Accordingly, the overarching Declaration of Principle and the Extra-judicial Declaration of Principle are called to attention. When coding and it is a federal case, the class of offence does not apply – I merely note the fact that it is a federal case.

Holistically, when coding, offences are classified as type I, type II, or type III offences. All federal cases are coded as federal. In the event that there are multiple offences that can be categorized, the core offence of the file is noted.

7. Criminal record/youth record – the presence of criminal record was noted in the files in the form of yes or no. The presence of a youth record or criminal record means that the accused person has been convicted and sentenced to a sanction other than an absolute or conditional discharge. The details of the criminal record were not noted in

the case files; just the presence of the record was noted in the file. As such, I am only able to code the presence of a criminal record, not the details of a record if present. When coding, I note the presence of a criminal record in the form of yes or no.

8. Outstanding charges – outstanding charge is a simple notation made in the files in the form of yes or no. The presence of outstanding charges means that prior to the charges of which the file pertains, there are additional charges that have not yet been resolved in court and as such, charges are still before the courts. When coding, outstanding charges were noted as yes or no.
9. Number of Co-Accused – number of co-accused is the sum of co-accused in each case. When coding, the number of number of co-accused are expressed in numerical form.
10. Co-accused – co-accused is a notation made in the file in the form of yes or no. Additionally, whether or not the young offender has a co-accused that is another young offender or adult is noted. The presence of a co-accused means that there was more than one party to the offence. When coding, co-accused are noted in the form of yes or no and as an adult or young offender.
11. Previous warnings – previous warnings are notations made in the form of yes or no followed by an indication of the year in which the warning was made. The number of previous warnings is calculable through the sum of previous warnings. Previous warnings are an indication of historical contact between the young person and the police whereby the police have taken informal action, and issued a formal warning pursuant to the *Youth Criminal Justice Act*. This is a form of pre-charge diversion that is selected by a police officer. Whereas it is formally a form of pre-charge diversion, this formally documents recorded instances of verbal communication between a police officer and a young person. As such, it is a formal record of informal action by a police officer who issues a formal warning to a young person pursuant to the *Youth Criminal Justice Act*. When coding, previous warnings are recorded in the form of yes or no. Additionally, the number of previous warnings are noted.
12. Previous pre-charge diversion – previous pre-charge diversion is a notation made in the file in the form of yes or no. This is an indication of past police selected diversion whereby some type of community referral has been made by the police officer upon the young person and charge(s) were not laid, rather, the alleged offence(s) has been dealt with informally. Accordingly, this is a form of police selected diversion that moves beyond a formal warning and refers the offender into a community program. When coding, previous pre-charge diversion is noted in the form of yes or no.
13. Extra-judicial measure considered – extra-judicial measure considered is a notation made in the file in the form of yes or no. This is an indication as to whether or not the charging police officer has considered police selected diversion prior to laying a criminal charge. As such, it documents a cognitive process of the charging officer in relation to the *YCJA* mandate to consider informal action prior to formal action

through the laying of a criminal charge. When coding, the consideration of an extra-judicial measure is recorded in the form of yes or no.

14. Type of release – type of release notes whether or not the offender was released back into the community, and the circumstances of this release and whether or not any conditions have been attached. This is a pre-adjudication but post-charge determination of the type of release. There are six possible types of release. Each type of release is different in terms of timing, which legal player decides to release the accused and/or the conditions that are placed on the offender upon release. The six types of release include: appearance notice; a promise to appear; a promise to appear with undertaking; an undertaking; recognizance issued by a judge or justice of the peace; or held in custody. Each of these types of release is noted in the file.

An appearance notice is issued by police officer. Here, the offender is released without conditions into the community and must attend court on the date specified on the appearance notice and must attend for fingerprints at the police station on the date specified on the appearance notice.

A promise to appear, like in appearance notice, is issued by a police officer but the young offender typically has to sign a promise to appear. Promise to appear is usually issued at the police station whereby the young person promises to appear for court but is released without conditions. As such, the accused person has already been brought to the police station to be fingerprinted.

The undertaking is issued by an officer in charge, whereby the offender is taken to the police station and released from the police station on conditions.

A promise to appear with undertaking – is a combination of a promise to appear and undertaking.

The recognizance is issued by a judge or justice and peace, and the offender is released from custody back into the community on conditions. For the recognizance, the young offender would have been held for a bail hearing.

Held in custody, is where the young offender has been given a bail hearing, and the offender has not been successful during this hearing. The young person is subsequently remanded into custody until trial.

When coding, one of the six types of release is recorded.

15. Number of police officers involved – the number of police officers involved is the sum of sworn police officers that are involved in the offence(s) related to the file. More specifically, it is the number of police officers that have filed a report that is pertinent to the file. This allows for determination of the number police officers that responded or were otherwise initiated in a different capacity as a result of the alleged offence. In the event that there were outstanding charges, the substantive police officer was not counted in this determination of the number of police officers involved. Generally, the purpose of the substantive police officer is to attest to the fact that there are outstanding charges and/or the accused person is subject to conditions at the time of the current offence. For this reason, substantive officers are

excluded from the tally. When coding, the number of police officers involved are recorded as total frequency.

16. Specialized police officers involved – specialized or high ranking police officer involvement notes the role of select police officers, if engaged in the file, beyond those who are Constables. As such, differing roles of police officers and the (possible) value that they bring to the investigation is noted. There are eight possible specialized or high ranking police officer involvement categories outlined that are categorized in the files. When coding, specialized or high ranking officer is noted when he or she is activated in some capacity in the file. Thereinafter, I account for the presence of each specialized police officer by dichotomously tracking each officer in each file.

SOCO – refers to a scenes of crime officer. This officer will attend or has been summoned to attend an incident to collect evidence by way of fingerprints and/or photographs and/or exhibits/physical evidence.

SOCO & Forensics – a SOCO & forensics officer is a scenes of crime officer as outlined above but, this officer is also assigned to the forensics section of the police department.

Forensics -a forensics officer is a police officer that is part of the forensics section of police service.

K9 – K9 is a police officer that works with a dog that has been activated in the file.

Detective – the detective is an officer that has been assigned this label and takes an investigatory function within the file. He or she typically works within some specialized section, for example, the break and enter unit, the robbery unit, etc.

Staff Sergeant – the staff sergeant is a high ranking police officer typically in charge of the number of police officers on that shift.

Sergeant – a sergeant is a high ranking police officer, not as highly ranked as a staff sergeant, but is nevertheless a superior officer on that shift.

Breath Technician – the breath technician is a specially trained police officer in charge of collecting samples of the breath of the accused person who may be under the influence of alcohol. This police officer is present for the determination of intoxication and whether or not the accused person is over the legal limit of blood alcohol content.

17. Number of specialized police officers involved – the number of specialized police officers involved is the sum of police officers other than constables, as described above, that are activated in the case file. The number of specialized police officers involved is expressed in numerical form when present.
18. Constable only involved – constable(s) only involved is the reading of the file while paying attention to the ranks of officers involved. When coding, I note when only a constable or constables are in the file as a function of yes or no.

19. Number of civilian witnesses – number of civilian witnesses is the sum of the total number of non-police officer witnesses. The number of witnesses is recorded so long as a civilian witness provides a will state or some type of written statement in the file.
20. Type of civilian witness(es) – the type of civilian witness is noted in an attempt to bring specificity to the civilian witnesses that provided a statement in the case. Based on a review of the files, there are seven possible types of civilian witnesses that are dominant through the cases. These civilian witnesses include: a property owner or agent; employee of the store; a loss prevention officer; a probation officer; a parent or guardian; a special Constable; a bylaw officer; and a bystander.

The property owner or agent is the person who has been subject to some type of loss in a property offence. I also use the term agent here to note the fact that the property owner may not be an accurate characterization of the witness. For example, after a mischief complaint, the principal of the school that notes the damage is an agent of the property owner more than the owner of the property. In using the term agent, I am still able to note those civilian witnesses that have a vested interest in the property. This does not include a loss prevention officer.

An employee of the store or service is a staff member of the store or provides a service for an agency, and was employed in this capacity at the time of the offence. This does not include a loss prevention officer.

Loss prevention officer is a security guard employed by the store where the offence took place.

A parent or guardian or relative, is the person who has legal custody over the young offender or is an adult figure in the young offenders life. This category notes the relationship between the witness and the accused, not the general status of the witness irrespective of the accused. As such, just because the witness is a parent does not mean that they are coded as such. However, when the witness is a guardian, parent or relative of the accused, then they are coded as such.

A special Constable is an officer who is not a regular member of the police force but nevertheless has select jurisdiction to enforce laws within the province.

A bylaw officer is an agent appointed by the city, town or municipality to enforce bylaws within the jurisdiction of the city, town or municipality.

A bystander, is a third-party who witnessed some element of the offence and was not engaged in any of the above-mentioned capacities.

The other complainant is a person who is not one of the abovementioned types of civilian witnesses. Accordingly, this is an all encompassing category that allows additional civilian witnesses to be counted when they do not fit into the categories above.
21. Offence location – offence location outlines the general geographic area where the offence(s) took place. There are four possible options where the offence took place, they include: private residence(s); shopping center or retail store; school; or street. It must be noted that this category speaks of where the offence took place. This is

distinguished from where the arrest was made in some instances. Consider a young person that has defrauded a credit card and an arrest is made on the sidewalk. The offence did not take place on the street by virtue of the fact that the accused was arrested on the street, the offence of fraud took place at the point of transaction, which would have been in a shopping centre or retail store. Similarly, when a motor vehicle is stopped and it is determined that the vehicle is stolen, the possession of stolen property charge took place on the street, not in a private residence.

Private residence(s) – includes all property and structures on that property that are not public and is not available to the public for the purposes of consumption. Examples of a private residence includes: a dwelling house; a driveway; a shed; and/or an apartment.

Shopping center or retail store – includes all property, areas and services that are available to the public for consumption. Examples may include: Sears stores; Best Buy; Zellers; or Future Shop. The specific location of the offence will not be recorded to ensure that no identification can be made of the accused person, witness(es) and/or victim(s).

School – a learning institution and the property that is lawfully owned by the institution. Thus, a school involves that which happens inside the walls of the school and that which happens on school property.

Street – a public space that otherwise does not fall into the abovementioned categories. Examples of a public space may include: a parking lot; a sidewalk, a public transit bus; or a park.

22. Property details – when there is a property offence, property details are noted within the file. The details are noted in terms of the value of the property, the value of the property recovered, and the value of the property damaged. Each of these values are presented in dollars. These three values are noted for each file where a property offence has taken place and the values have been recorded in the file.
23. Notice to parent – the notice to parent is a procedural requirement prescribed by the *Youth Criminal Justice Act* that requires that parents be notified when a young person is charged with an offence. In most instances, there is a notation of yes or no in the file as to whether or not the notice to parent requirement has been fulfilled. It is worth noting that the notice to parent may have been served after-the-fact, but, what is available here is whether or not the notice to parent has been served at the time when the file was transferred to the Crown.

When coding, yes or no is noted for the NTP category.

24. On conditions at time of offence – on conditions at time of offence speaks of whether or not the young person has been released into the community on conditions and/or is currently subject to a youth sentence with conditions. As such, the young person may have been released into the community on the undertaking or recognizance or the young person may have been given a youth sentence with conditions. When an offender is on conditions and is charged with a subsequent offence, the conditions are

typically placed within the file to substantiate the breach of condition charges. However, there need not be breach charges for there to be outstanding conditions. There are three types of conditions upon which the offender may be subject to at the time of the offence. They include: an undertaking; a recognizance; and a Youth Court sentence. This is a more detailed addition beyond whether or not there were outstanding charges. Additionally, it adds to the fact of whether or not there has been a conviction in the event that the offender is subject to Youth Court sentence at the time of the offence. When coding, the origin of the conditions are noted: undertaking, recognizance; or youth court sentence.

The undertaking is when a young offender has been charged with an offence and is released back into the community on conditions by a police officer.

The recognizance is when the young offender has been charged with an offence and is released into the community with conditions given by a judge or justice of the peace.

The Youth Court sentence is when the young offender has been released in the community, post-conviction, and subject to conditions prescribed by Youth Court judge.

25. Crown election – Crown election is the way in which the Crown elects to proceed with the prosecution, either by summary conviction or by indictment. In all of the files whereby the offender was convicted, this determination is noted on the disposition sheet and is available for recording. In the event that the young offender has been diverted, it is implicit that the Crown elects to proceed summarily. When coding, proceeding by indictment or by summary conviction is noted.
26. Gateways to custody-gateways to custody speak to elements of the *Youth Criminal Justice Act* that outline when a young offender is eligible for custody. Noting that the *Youth Criminal Justice Act* was a response to over incarceration of young offenders, the gateways to custody act as explicit bars to seeking custody or sentencing to custody in the absence specific elements outlined by the statutory provisions. As outlined by section 39 of the *Youth Criminal Justice Act*, a Youth Court Judge shall not commit a young person to custody under section 42 unless
  - a) the young person has committed a violent offence;
  - b) the young person has failed to comply with noncustodial sentences;
  - c) the young person has committed and indictable offence for which an adult be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt under this act or the of *Young Offenders Act*; or
  - d) in exceptional cases where the person has committed indictable offence, the aggravating circumstances of the offence are such that the imposition of a noncustodial sentence would be inconsistent with the purpose and principles setting section 38.

In outlining the components of the abovementioned gateways to custody, a violent offence leads one to the definition of a serious violent offences outlined in the *Youth Criminal Justice Act*, which is an offence in the commission of which a young person causes or attempts to cause serious bodily harm. The Supreme Court of Canada in *R. v. C.D. and R. v. C.D.K.*, [2005] S.C.J. No. 79, 2005 SCC 78 defined a violent offence by deleting the word serious and said it is the “threats to cause bodily harm”. In context, it is “an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm” (para 17 & 70). Some violent offences established at common law include: arson; aggravated assault; dangerous driving; sexual assault; robbery; break and enter and commit theft; criminal negligence causing death (see Tustin & Lutes, 2010).

In terms of noncustodial sentences, this is twofold and that there have been previous findings of guilt and there have been breaches of the noncustodial sentence of which the offender was subject.

With a pattern of a finding of guilt, there is a search for multiple charges. This can spring from the same instance; it does not spring from the number of court appearances. As such, a pattern of a finding of guilt can come from multiple charges from the same instance.

The indictable offence and patterns of finding of guilt are two separate questions. The first of which is the determination of whether or not the offence is a hybrid offence, a straight indictable offence, or a summary offence. The former two options mean that the Crown can elect to proceed by indictment and it is therefore an indictable offence. Thus, the question can be answered as yes or no as to the fact that it can proceed by indictment.

The latter part of this gateway to custody notes that there have been breaches of noncustodial sentences. The key here lies in plurality, as such, I note yes when there have been two or more breaches and no when this requirement has not been met. In *R. v. W.S.C.*, [2003] S.J. No 810, Justice Whelan held that the failure must be a failure to comply with two separate non-custodial sentences. Thus, multiple breaches of one non-custodial sentence does not make the young person eligible.

Finally, exceptional cases present much difficulty in making this determination. As such, I rely on case law to describe those cases which are exceptional. It must be noted that these cases invoke subjective assessments of decision-makers, I present the case law as a descriptive tool to guide my coding of exceptional cases.

*R. v. R.E.W.*, 2006 CanLII 1761 (ON CA), 79 OR (3d) 1, 205 CCC (3d) 183, 36 CR (6th) 134, 207 OAC 184

[30] Parliament rarely uses the term “exceptional” in criminal legislation. I have found the term used only six times in the *Criminal Code*. The term “exceptional” is used only twice in the *YCJA*: first, it appears in s. 39(1)(d) and second, it appears in s. 39(9) which requires the judge to explain in the reasons why the case is an exceptional case under para. (d).

[31] The theme that runs through use of the term “exceptional” in both criminal case law and legislation, is that it is intended to describe the clearest of cases. Such cases include those where applying the normal rules would undermine the purpose of the legislation, where the exercise of the unusual power is necessary or required, and where the exercise of the unusual jurisdiction is capable of explanation. The wording of s. 39(1)(d) is consistent with this approach. The exceptional power to commit a young person to custody is reserved for those circumstances where, in effect, any other order would undermine the purpose and principles of sentencing set out in s. 38. The analysis of s. 39(1)(d) must be set against the background of s. 38, which stresses the importance of interfering with a young person’s liberty as little as possible. For example, s. 38(2)(d) states that youth justice courts should consider “all available sanctions other than custody that are reasonable in the circumstances”. Section 39(2)(e) further directs that youth court justices should apply the “least restrictive sentence” and “the [sentence] most likely to rehabilitate the young person”.

**(vi) Conclusion on the interpretation of s. 39(1)(d)**

[44] I draw the following conclusions respecting the interpretation of s. 39(1)(d):

- The object and scheme of the *YCJA* and Parliament’s intention indicate that the Act was designed to reduce the over-reliance on custodial sentences that was the experience under the *YOA*. See *R. v. C.D.*; *R. v. C.D.K.*, *supra*, at para. 50.
- An expansive definition of “exceptional cases” would frustrate Parliament’s intention to reduce the over-reliance on custodial sentences.
- Section 39(1)(d) can be invoked only because of the circumstances of the offence, not the circumstances of the offender, or the offender’s history.
- Exceptional cases are those where any order other than custody would undermine the purposes and principles of sentencing set out in s. 38. Put another way, s. 39(1)(d) is intended to describe the

rare non-violent cases where applying the general rule against a custodial disposition would undermine the purpose of the *YCJA*.

- Exceptional cases are limited to the clearest of cases where a custodial disposition is obviously the only disposition that can be justified.
- One example, of an exceptional case is a case where the circumstances are so shocking as to threaten widely-shared community values.

[45] In general, I agree with Harris J.'s commentary in the *Youth Criminal Justice Act Manual*, looseleaf (Aurora, ON: Canada Law Book Inc., 2005) at 4-17:

Presumably the offence that would trigger the use of custody under this subsection would be so exceptionally aggravated that custody was the only proportionate consequence that would hold the youth accountable through the imposition of just sanctions, thereby contributing to the long-term protection of the public.

I would also endorse the comments of Taylor J. in *R. v. J.E.C. supra*, at para. 64, describing the function of s. 39(1)(d):

Subsection (d) seeks to introduce a sense of proportionality in exceptional cases where the circumstances of the offence are so aggravating that they outweigh what otherwise would be relevant considerations, such as the offender's background or other forms of disposition.

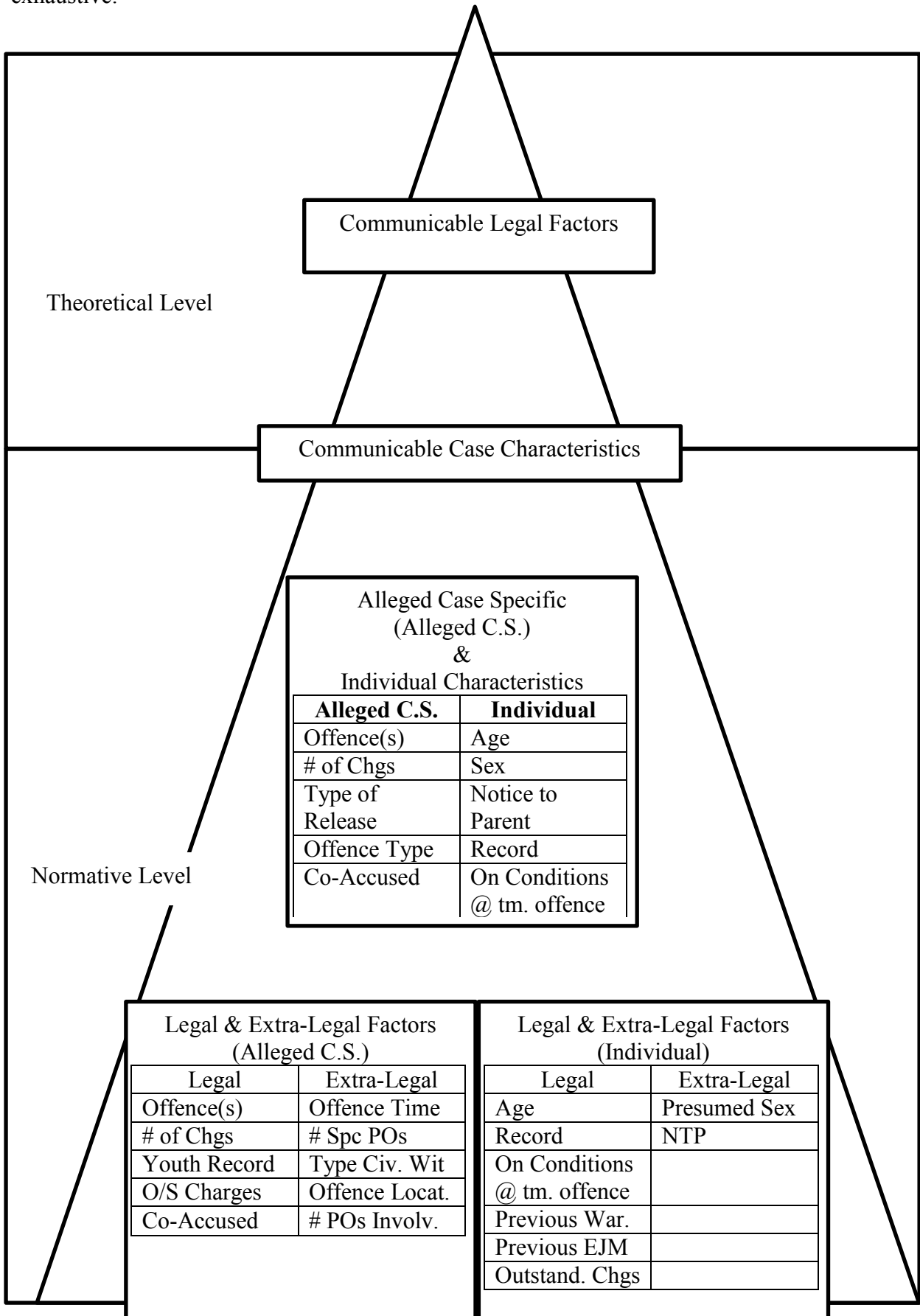
27. Mode of initiation – the mode of initiation notes whether the charge was initiated from a complainant or a police investigated/proactive charge. As such there are two types of initiation, complainant initiated or police initiated. Complaint initiated arises from a member of the public contacting the police service to report a criminal offence or some other suspicious activity. A charge that is police initiated does not have public engagement in the capacity of calling for assistance of the police service. Said differently, a police initiated charge springs from actions of the police and not a call for service from the public.

**Appendix D – Inductive and Deductive Case Characteristics**

<b>Deductive</b>	<b>Inductive</b>
Age	Offence timing
Presumed Sex	Number of offence(s)/charge(s)
Offence(s)/Charge(s)	Number of co-accused
Offence type	Co-accused
Criminal record/youth record	Extra-judicial measures considered
On conditions at time of offence	Type of release
Outstanding charge(s)	Number of police officers involved
Previous warnings	Specialized police officers involved
Previous pre-charge diversion	Constables only involved
Property details	Number of civilian witness(es)
Crown election	Type of civilian witness(es)
	Offence location
	Gateway to custody
	Mode of initiation
	Notice to parent
	Number of special police officers

**Appendix E – Model of Terms**

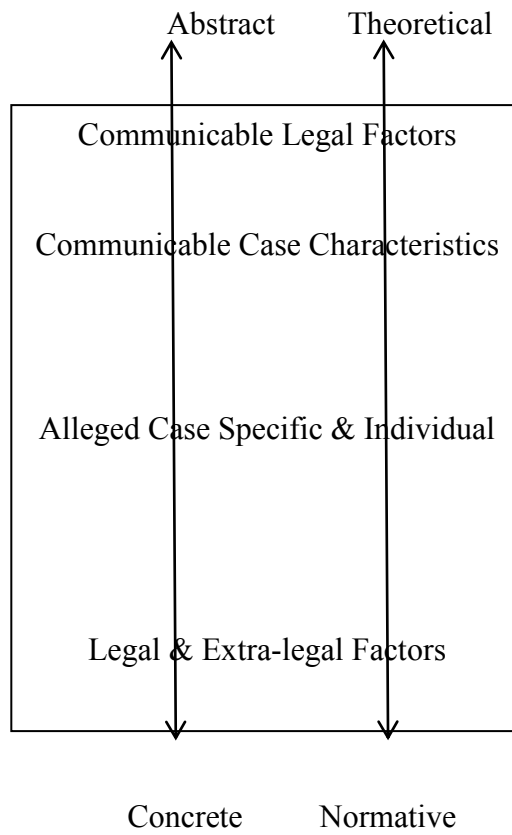
N.B.: Examples are for illustration purposes, the communicable case characteristics are not exhaustive.



Refined Model of Key Terms

**Refined Model of Key Terms**

**The Bi-directional Distinctions: Theoretical and Normative**



**Appendix F – Descriptive Statistics of Communicable Case Content**

Processing & Category	N	Minimum	Maximum	Mean	Std. Deviation
Prosecuted Average age of all accused	25	13.50	17.00	15.77	.92
Average Number of Charges	25	1.0	13.0	4.16	3.50
Single Value Number of Previous Warnings	17	1	28	4.71	6.57
Number of Police Officers	25	1	11	4.04	2.61
Number of Special Police Officers	25	0	3	1.08	1.15
Number of Civilian Witnesses	25	0	10	2.20	1.98
Property Details - Value	25	.00	10000.00	790.88	2098.82
Property Details - Recovered	17	.00	10000.00	916.17	2390.091
Property Details - Damaged	8	.00	10000.00	1659.38	3387.63
Diverted Average age of all accused	25	13.50	17.00	16.00	1.00
Average Number of Charges	25	1.0	4.0	1.240	.6633
Single Value Number of Previous Warnings	13	1	6	1.62	1.446
Number of Police Officers	25	1	7	1.68	1.435
Number of Special Police Officers	25	0	1	.08	.277
Number of Civilian Witnesses	25	0	3	1.36	.995
Property Details - Value	25	.00	1100.00	98.55	254.05
Property Details - Recovered	13	2.00	29000.00	2399.30	7999.44
Property Details - Damaged	4	10.36	35000.00	8922.68	17387.66

Processing & Category	N	Minimum	Maximum	Mean	Std. Deviation
Prosecuted Average age of all accused	25	13.50	17.00	15.77	.92
Average Number of Charges	25	1.0	13.0	4.16	3.50
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Property Details - Damaged	8	.00	10000.00	1659.38	3387.63
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Property Details - Recovered	13	2.00	29000.00	2399.30	7999.44
Property Details - Damaged	4	10.36	35000.00	8922.68	17387.66

**Descriptive Statistics of All Cases**

	N	Minimum	Maximum	Mean	Std. Deviation
Average age of all accused	50	13.50	17.00	15.89	.96
Average Number of Charges	50	1.0	13.0	2.70	2.90
Single Value Number of Previous Warnings	30	1	28	3.37	5.21
Number of Police Officers	50	1	11	2.86	2.40
Number of Special Police Officers	50	0	3	.58	.971
Number of Civilian Witnesses	50	0	10	1.78	1.607
Property Details – Value	50	.00	10000.00	444.71	1520.35
Property Details - Recovered	30	.00	29000.00	1558.86	5494.50
Property Details - Damaged	12	.00	35000.00	4080.48	10126.50

**Appendix G – Full List of Offences**

<b>Prosecuted Charge (Criminal Code or CDSA)</b>	<b>Frequency</b>	<b>Diverted Charge (Criminal Code or CDSA)</b>	<b>Frequency</b>
88(1) – possession of weapon dangerous to public purpose	2		
92(3) – possession of prohibited weapon	1		
91(3) – unauthorized possession of prohibited weapon	2		
117.1(3) -	1		
129(a) – obstruct police officer	4		
137 – fail comply with YCJA sentence	30		
145(5.1) – fail comply with undertaking	2		
145(2) – fail to attend court	2		
145(3) – fail comply with undertaking or recognizance	10		
145(5) – fail to appear	1	145(5) – fail to appear	2
175(1)(a)(i) - cause disturbance	1		
		249(2) – dangerous operation of MV	1
252(1.1) – failure to stop at scene of accident	1		
253(a) – operate motor vehicle while impaired	1		
254(5) – refuse sample of breath	1		
259(4) – operate motor vehicle while prohibited	1		

		264.1(2) – utter threat to cause bodily harm	2
266 – assault	1		
267(a) – assault cause bodily harm or assault with a weapon	1		
334(a) - theft over \$5000	1		
335(1) – take MV without consent	4	335(1) – occupy MV without consent	1
342(1)(b) – forge or falsify credit card	2		
342(1)(c)(i) – possess or use credit card obtained in the commission of an offence	10		
344(1) – robbery	3		
344(b) – theft under \$5000	6	344(b) – theft under \$5000	15
348(1)(b) – break and enter and commit indictable offence	12	348(1)(b) – break and enter and commit indictable offence	1
349(1) – unlawfully in dwelling house	1		
351(2) – disguise with intent	2		
		354 – possession of property obtained by crime	4
355(b) – possession property obtained by crime < \$5000	7		
430 – mischief	3	430(1)(d) – mischief to property under \$5000	2
446(1)(a) – injure and/or kill animal	1		
465(1)(c) – conspiracy to commit an indictable offence	1		
		4.4 CDSA –	2

		possession of marijuana	
		4.5 <i>CDSA</i> – possession marijuana	1
TOTAL	115		31

**Appendix H – Refinement of Coding in Grounded Theory**

<b>Core Category</b>	<b>Categories</b>	<b>Sub-Categories/Initial Codes</b>
Perpetual Paradox	Threat	Persistence versus newness
		Persistence despite neutralization attempt(s)
		Complexity
		Result (negative result)
	Tolerableness	Legal application, law vs. non-legal, formal vs. informal
		Free reign/pressure
	Responsibility	Forthwith
		Cooperation & Remorse
		Hostile & Deception
	Recourse	Supervision
		Returnability