THE YOUNG OFFENDERS ACT: BETWEEN A ROCK AND A HARD PLACE

Mary Beth Beaton*

The *Young Offenders Act*[1] has been taking quite a beating from the public and press in recent years. Youth crime is presented as a phenomenon out of control, and the public is portrayed as unable to protect itself. Media stories foster the impression that violent crime is rampant, and that the *Young Offenders Act* is to blame for not putting an end to crime.

If our national newspapers are a reliable indicator, there is virtual moral panic concerning escalating juvenile crime. One popular portrayal is of Fagin-like characters who induce wayward children to commit crime. These critics insist that young people sneer at the *Young Offenders Act* for its leniency and boast about punishment as being little more than a "slap on the wrist." One particularly hysterical article in *The Toronto Globe and Mail*, suggested that organized crime has noted the leniency of the legislation and is using it to indoctrinate young people as its agents.[2] These types of incidents do occur. However, the media has generated an overall negative public perception of the youth justice system in a number of sensational cases.

This response is surprising when one considers that the *Young Offenders Act* represented a major, hard-line shift in orientation from the old welfare model of the *Juvenile Delinquents Act*[3] to a true justice model. The negative press coverage is also surprising in light of the international recognition of the *Young Offenders Act* as a model for youth justice reform.[4]

It is my submission that:

1. the public has an inaccurate perception of the incidence and nature of youth crime,
2. the public has unrealistic expectations of what the youth justice system can and should do about youth crime, and

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*Assistant Director of Public Prosecutions/Family Law, Department of Justice, Fredericton, New Brunswick. The opinions expressed in this paper are those of the author and do not necessarily reflect those of the New Brunswick Department of Justice.

[1]R.S.C. 1985, c. Y-1 [hereinafter *Young Offenders Act*].

[2]G.D. Elkin, "Youth, Crime and the Fagin Factor" *The [Toronto] Globe and Mail* (22 June 1992).

[3]R.S.C. 1970, c. J-3 [hereinafter *Juvenile Delinquents Act*].

[4]R.R. Corrado & A. Markwart, eds, *Juvenile Justice in Canada* (Toronto: Butterworths, 1992) c. 4, at 159.

3. the problem is not the *Young Offenders Act* itself but rather the application of the Act in particular cases.

First of all, society has always had an incredible ambivalence towards the treatment of its young people. On the one hand, a paternalistic approach to youth is adopted, whereby their misdemeanours are forgiven along with a healthy dose of discipline. Young people are *expected* to "mess up" at some point and society generally views their mistakes as a normal part of the rocky road to adulthood. Adolescence is often accompanied by rebellion, experimentation and a startling lack of caution, sometimes to the point of outright foolhardiness. Parents are pleasantly surprised that their children turn out so well when they move on into their twenties. And these are the normal kids.

Whether they are normal or deeply troubled, the law gives them until their eighteenth birthday to "smarten up." Most people consider this four year "period of grace" reasonable.

On the other hand, there is no question that society demands and deserves protection from all criminal conduct. A victim will take no comfort from the fact that a violent offence was committed by a person under the age of eighteen. The birth date of the offender is irrelevant to a property owner whose home has been ransacked, to a child who has been molested, or to a woman who has been robbed at knifepoint and stabbed or raped in the process. It is these cases, involving substantial damage or violence, that cause the greatest concern.

The *Young Offenders Act* reflects this philosophical struggle. It must, and does, mirror the ambivalence between protection of the public and protection of the young accused who may still be able to mend his or her ways. However, for attempting to strike this balance, the Act is criticized as having created confusion, when, by virtue of the very complex social and legal problems it is designed to address, it *must* be inherently flexible.

Parliament was between a rock and a hard place on this one. It had to address the foolish pranks and the violent murders, while at the same time acknowledging the possibility of rehabilitation at a young age and the demands of the public for safety. Thus, it is not surprising that many of the philosophical statements in the *Declaration of Principle*[5] contain internal conflicts. However, rather than being viewed as evidence of the legislation's weakness, they are actually evidence of its strength and flexibility. Parliament has beautifully articulated the breadth and balance which must be obtained in meeting both the public interest and the special needs of youth.

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[5]*Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 3 [hereinafter *Declaration of Principle*].

The language of the two leading principles exemplifies the struggle to obtain balance: Firstly, while young persons should not, in all instances, be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions.[6] Secondly, young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance.[7]

There is no problem in principle. Parliament had no choice but to embrace these objectives. The confusion has arisen in the *application* of these principles in individual cases. With respect, this confusion is not the fault of the *Young Offenders Act*. A perfect example of the confusion created by the application of the *Declaration of Principle* is found in the early rulings of the Courts of Appeal concerning the proper principles for sentencing young offenders.

Shortly after the proclamation of the *Young Offenders Act*, in the *R.C.S* case,[8] the New Brunswick Court of Appeal interpreted the *Declaration of Principle* as meaning that custody is to be ordered only when all else has failed. No objection can be taken to that conclusion. The confusion arose and continues to this day, as to what the Court meant when it added; "It follows that the traditional principles of sentencing ... are not to be considered ... ."[9] The court specifically referred to deterrence, punishment, retribution and denunciation as not to be considered. Since another principle of sentencing is rehabilitation, which the court implicitly embraced in its judgment, the blanket statement that the principles of sentencing are "not to be considered" left Youth Court judges, Crown prosecutors, and defence counsel with little guidance as to what *are* the proper considerations.

Leave to appeal to the Supreme Court of Canada was sought by the Crown on the basis that:

1. The issue of the proper principles of sentencing under the *Young Offenders Act* was of national importance, as the question was one of fundamental importance in the basic interpretation of a major and controversial piece of criminal legislation, and
2. There was already conflicting authority at most appellate court levels within the first year or two of the legislation's implementation.

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[6]*Ibid.* at s. 3(1)(a).

[7]*Ibid.* at s. 3(1)(c).

[8]*R.* v. *R.C.S.* (1986), 68 N.B.R. (2d) 361; leave to appeal dismissed in 69 N.B.R. (2d) 270 (S.C.C.). [hereinafter cited to 68 N.B.R.].

[9]*Ibid.* at 367.

The Saskatchewan Court of Appeal said that, in dealing with young persons who commit violent crimes, sentencing must emphasize the principles of deterrence and protection of the public.[10] The Ontario Court of Appeal interpreted the new *Young Offenders Act* as enshrining protection of society as a paramount consideration, though it could usually be attained by a sentence emphasizing individual deterrence and rehabilitation.[11] The Alberta Court of Appeal did not like to apply the principle of general deterrence to young offenders, but had no problem with applying the other principles of sentencing.[12] The British Columbia Court of Appeal specifically did not agree with the Alberta Court of Appeal. It said that references to the protection of society implicitly involved general deterrence although, within the limits of protecting society, it is necessary to attempt to rehabilitate the young offender.[13] The Nova Scotia Court of Appeal had no problem accepting that the ordinary principles of sentencing did apply to young offenders, albeit in a different way than for adult offenders.[14]

Despite these conflicting appellate authorities, the Supreme Court of Canada, in its wisdom, declined to grant leave to appeal. It is clear that ordinarily they decline to deal with sentence appeals, but it was argued that this issue was of such general application to the sentencing process that the opportunity should be used to clear up some of the confusion.

Fortunately, the Supreme Court of Canada has recently agreed to tackle the issue in the case of *R.* v. *J.J.M.*, a decision from the Manitoba Court of Appeal. Chief Justice Lamer, in dismissing the appeal by the young offender, said that reasons would follow in light of the "very important issues" and "the conflicting decisions of various courts of appeal as to the purpose of sentencing young offenders."[15] Finally, a uniform approach will soon be articulated by the highest court.

The greater controversy revolves around violent and recidivist youth. Minor offences are generally not a problem because alternative measures to deal with them are working well. Diversion programs can be implemented with some degree of imagination at rather little expense. Often a first court appearance and probation is sufficient to deter a large percentage of young people in trouble with the law.

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[10]*R.* v. *M.J.C.* (1985), 22 C.C.C. (3d) 95.

[11]*R.* v. *J.F.* (1985), 22 C.C.C. (3d) 555; *R.* v. *R.I.* and five other appeals; (1985), 17 C.C.C. (3d) 523.

[12]*R.* v. *G.K.* (1985), 21 C.C.C. (3d) 558.

[13]*R.* v. *M.Y.W.* (1986), 26 C.C.C. (3d) 328.

[14]*R.* v. *K.D.T.* (1987), 28 C.C.C. (3d) 110.

[15](23 February 1993) SCJ 14, 22790.

But what have we done with the repeat offenders who commit the more serious crimes? Most of them move on to the adult system. In 1992, the *Young Offenders Act* was amended so that the transfer of young offenders under the age of eighteen to adult court could be more easily obtained by the Crown. If transferred to adult court, there is earlier eligibility for parole. If an offender is not ordered to be transferred and the trial stays in Youth Court, the maximum disposition of custody for three years has been increased to five years less a day, with a combination of secure custody and conditional supervision. One of the previous obstacles to a transfer was the huge gap between a three year maximum sentence for first degree murder under the *Young Offenders Act*, and the twenty five year minimum eligibility for parole under the *Criminal Code*.[16] When faced with such a difference in penalty, many judges under the old regime chose to allow the youth to remain under the protection of the *Young Offenders Act*. This "narrowing of the gap" has been viewed as a much needed change.

But is it enough? Youth crime is reported to be on the rise. Even the statistics need to be put in perspective. Overall there is an increase in crime reporting in Canada. There is also a growing adolescent population. According to the Canadian Centre for Justice Statistics, in a report released the first week of November 1992, most youth crimes are committed by sixteen and seventeen year olds and the majority of their violent offences are committed against other young people, not adults. In 1988, violent crimes committed by young offenders were only 13½% of the total, while property offences constituted 60% of the total. Nevertheless, the *Young Offenders Act* must address explosive acts of violence when they occur. The provisions for transfer to adult court in difficult cases make that possible.

Nationwide, juveniles under eighteen accounted for only 9% of all homicides.[17] In New Brunswick, five young offenders have committed murder since the *Young Offenders Act* was proclaimed in 1984. Of those five, four were transferred to adult court. The other, a thirteen-year-old who stabbed his father on impulse, could not be transferred, as there is no jurisdiction to transfer an individual under the age of fourteen. Under the *Juvenile Delinquents Act*, in the early 1980s in New Brunswick, a fourteen-year-old boy who had shot both his parents was also not transferred. It is submitted that some youth murder cases involve such exceptional circumstances that public protection does not require incarceration in an adult penitentiary. There are some problems that the *Young Offenders Act* cannot be expected to cure.

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[16]R.S.C. 1985, c. C-46 [hereinafter the *Criminal Code*].

[17]"Homicide In Canada" (1989) 10:14 Juristat 9 at 13.

If youth crime is on the rise in Canada, the causes must be examined. Stress in any society causes youth crime to rise and community tolerance to decrease. There are problems with the economy and job creation, parental supervision is on the wane and there is a generation of "disposable children" who are flooding our streets. Divorce rates are up and many of these children feel angry, deserted and guilt-ridden. Domestic violence has increased or is simply being discovered. Children who witness household violence are affected by what they see and hear. The horrible spectre of child sexual abuse is just beginning to surface. How many victims are there? It was thought that little girls were the ones at risk. Now society is discovering what has been happening to young boys behind closed doors.

The answers do not lie with families, with the creation of more institutions or with the revolving door of the criminal justice system. The answers lie in spending our precious resources on prevention, treatment and community-based programs. The answers lie in teaching our young people to treat others with respect.

The focus must be on finding solutions, not on branding a piece of legislation as a failure. Yes, Parliament must continue to improve the *Young Offenders Act*. The federal government has launched another comprehensive initiative of proposed amendments, public education, research development and crime prevention. The object is to promote early and effective responses to children and youth to reduce the extent and seriousness of youth crime.

But make no mistake. No written law can solve the complex, social problem of troubled youth in this society. If the members of our society want to teach young people to have respect for others, they must treat them and each other with respect. We, the members of this society, are the teachers. We are the community. We are where the answers lie.