

## The *Young Offenders Act* in review: A more than modest proposal for change

The new apology from some critics of the *Young Offenders Act* goes something like this: *the impact of law is greatly exaggerated and we need to have modest expectations of how laws can affect the course of events. These apologists argue that much of the criticism of the Act is based on unrealistic expectations of what can be achieved or caused by any piece of legislation.*<sup>(2)</sup>

However, there are many who suggest that the *Young Offenders Act* has greatly influenced the course of youth justice in Canada. This article attempts to resolve this question by charting the impact of the Act's policies in specific areas (justice, crime control and rehabilitation) within the context of how the Act came about. The *Juvenile Delinquents Act* The *Juvenile Delinquents Act* was proclaimed in 1908 as one of Canada's first child-focused pieces of legislation. The hallmarks of the Act were the establishment of a "childhood age" (7-16), and of an ethic for applying the law to children. This ethic (called *parents patriae*) essentially gave the judge the power to act in a child's best interest. For example, court decisions were not to be measured against the seriousness of the offence, but against the needs of the young offender.

A variety of sentences were available under the Act, ranging from an absolute discharge to being made a ward of the state (and being placed in training school) until age 21. Sentences were also often of an indeterminate length.

Clearly, the Act's intent was to provide a broad net to capture a wide variety of youth and family problems. The challenge for the judges was to create a resolution that responded to the needs and circumstances of the young person in front of them.

The following two scenarios illustrate how the process unfolded. In one case, a 15-year-old chronic property offender was placed under the guardianship of a fishing trawler captain off the coast of Newfoundland. The rationale was that "Bill"<sup>(3)</sup> was too involved in a delinquent peer group in his

Ontario community and that this work placement would provide a challenge and, hopefully, a sense of competency through achievement. Bill was already a training school ward, so the judge was empowered to designate any person in authority as his legal guardian (until Bill's 21st birthday).

In another case, 15-year-old "Steven" accidentally shot his younger brother. The incident was unintentional (the boys had been practising their marksmanship by shooting at the rear window of their house) and Steven was extremely remorseful about his brother's death. The judge determined that the youth required the protection of the state until his 21st birthday. But, rather than spend the time in a training school, Steven was placed in a foster home in a nearby community to remain close to home and to take advantage of local counselling.

How could a property offender be placed literally thousands of miles away from home while a convicted killer was placed in a foster home close to his home community and directed to take counselling? Under the *Juvenile Delinquents Act*, judges were to respond primarily to the circumstances of the offender, and only to a lesser extent to the offence. Any apparent inequity between decisions was irrelevant. It may

seem extraordinary, but the cases cited occurred as recently as 1978 and 1979. Demands for change In the early 1960s, demands for change to the *Juvenile Delinquents Act* began an odyssey that required almost 25 years to complete. Numerous revisions, royal commissions and discussion papers later, the *Young Offenders Act* began to take shape. Two major irritants in the *Juvenile Delinquents Act* fuelled the development of the new Act:

- increasing doubt that needs-based intervention could adequately respond to "out-of-control" young offenders; and
- unlimited judicial discretion was seen as compromising the rights of young people. Family court judges had come to be viewed as "untrustworthy" without the benefits of a formal court process.

As a result, Canada followed the lead of the United States in largely abandoning the special status conferred on the youth justice system.<sup>(4)</sup> Conservative cries for tougher crime control measures were "married" with civil libertarian demands for increased sensitivity to the rights of young people to form the basic principles underlying the *Young Offenders Act*. The principles of the *Young Offenders Act* Unique in Canadian legislation, the *Young Offenders Act* begins with a statement of purpose (or, more formally, a declaration of principle) that advocates the following concepts:<sup>(5)</sup>

- young persons should be held accountable and responsible for their behaviour, though not to the same degree as adults;
- young persons who commit offences require supervision, discipline and control... Yet, they also have special needs that require guidance and assistance; and
- young persons have rights and freedoms, including those stated in the *Charter of Rights and Freedoms*, and young persons should have a special guarantee of their rights and freedoms.

These principles resulted in certain practical guarantees. The concept of proportional sentencing now applies to young offenders. Sentences must also be of a fixed length, and be specified by the judge when the sentence is handed down. Sentences range from an absolute discharge to a maximum length of five years. Within this time frame, judges can order probation, or secure or open custody, for specified lengths of time.

Further, only youths aged 12-17 fall under the jurisdiction of the court. Young offenders are also guaranteed access to lawyers during court proceedings (and during instances of police contact), and judges cannot place youths under the care of child welfare authorities or treatment centres without the consent of the young person.

The following scenarios illustrate the resulting dramatic shift from the days of the *Juvenile Delinquents Act*. In one case, a 14-year-old girl was facing her third charge of theft under \$1,000. "Kim" was assessed as being chronically depressed and, at times, actively suicidal. Her mother was a major drug dealer. However, Kim had to give permission to allow herself to be sentenced to participation in a treatment program. She refused. Kim was eventually sentenced to three months probation that restricted her access to the department store where she did her shoplifting.

In another case, a 14-year-old girl was convicted of a minor theft charge. The judge learned that the young woman had been involved in a high-risk lifestyle, including prostitution and drug dealing. The judge, therefore, placed her in open custody for six months - largely for her own protection. This decision was overturned on appeal because the sentence was viewed as too severe for the offence.

These cases illustrate the new trends charted by the *Young Offenders Act*:

- treatment orders depend on the consent of the young person in question;
- the circumstances of the offence take precedence over the nature and circumstances of the offender; and
- the appropriateness of sentences are judged against the severity of the offences.

Responses The *Young Offenders Act* declaration of principle can be viewed as reflecting three primary approaches to youth justice: justice (access to due process), crime control (through deterrence)<sup>(6)</sup> and rehabilitation. Considerable debate has occurred over the past decade as to the Act's impact on each of these three considerations.

For example, it is widely believed that young offender access to due process has now been ensured across all provincial jurisdictions.<sup>(7)</sup>

As for crime control, the use of custody has escalated dramatically under the *Young Offenders Act* to the point where Canada now has one of the leading rates (per capita) of young offender incarceration. However, although the use of custody has increased dramatically, the length of young offender custody sentences has actually decreased and continues to vary considerably across provincial jurisdictions.<sup>(8)</sup>

Finally, the rehabilitation of young offenders has suffered as the focus on offender special needs has become largely secondary to ensuring that the case law ultimately provides direction for future court rulings.<sup>(9)</sup>

What hasn't changed is that the *Young Offenders Act* still serves as a lightning rod for society's concern about young offenders, who are increasingly perceived as "out of control." The Canadian Centre for Justice Statistics, while reporting a 6% drop in overall youth (12-17) crime in 1994, also reported a 2% increase in violent youth crime since 1992, and a 6% increase since 1986.<sup>(10)</sup> Looking to the future Response to demands for change to the *Young Offenders Act* came in the spring of 1994. Proposed changes to the Act were aimed at stiffening penalties for violent young offenders,<sup>(11)</sup> as well as (perhaps ironically) redrafting the declaration of principle to enhance rehabilitation as a goal for youth justice and abandoning the offender consent requirement for a treatment participation sentence. How significant are these suggested changes? It is apparent that stiffer penalties, if not necessarily meeting the needs of the young offender, may meet the needs of a public constantly bombarded by media accounts of youth crime.

More generally, many in the youth justice community have urged that Canada's policy on youth justice reflect **current** knowledge in developing a direction for a more effective juvenile justice system.<sup>(12)</sup> Therefore, we depart from apologist warnings to expect only modest results from legislation.

To date, the *Young Offenders Act* has greatly enhanced young offender access to lawyers in both youth court and custody. We anticipate that the forthcoming amendments, particularly those directed at rehabilitation, will also greatly enhance youth access to appropriate rehabilitative services within the youth justice system.

Youth justice's public and professional communities look forward to more than modest change in the *Young Offenders Act*. We expect **considerable** change that, while meeting the rehabilitative needs of young offenders, will also be effective in promoting the safety of our communities.

---

(1) London Family Court Clinic, 254 Pall Mall Street, Suite 200, London, Ontario N6A 5P6.

(2) N. Bala, "What's Wrong with YOA Bashing? What's Wrong with the YOA? - Recognizing the Limits of the Law," *Canadian Journal of Criminology*, 36, 3 (1994): 247-270.

(3) All names used in this article are fictional.

(4) See A. W. Leschied and P. Gendreau, "The Declining Role of Rehabilitation in Canadian Juvenile Justice: Implications of Underlying Theory in the YOA," *Canadian Journal of Criminology*, 28 (1986): 303-314.

(5) A. W. Leschied, "Evaluating Conflicts Between Intention and Outcome Within Changing Canadian Juvenile Justice Policy: Just Listen to What the Data Says!" *The State as Parent: International Perspectives on Interventions with Young Persons*, 1 Hudson and B. Galaway, eds. (Dordrecht: Kluwer Academic Publishers, 1989).

(6) See S. A. Reid and M. Reitsma-Street, "Assumptions and Implications of New Canadian Legislation for Young Offenders," *Canadian Criminology Forum*, 7 (1984): 1-9. See also S. Reid-MacNevin, "A Theoretical Understanding of Current Canadian Juvenile Justice Policy," *The Young Offenders Act: A Revolution in Canadian Juvenile Justice*, A. W. Leschied, P. G. Jaffe and W. Willis, eds. (University of Toronto Press: Toronto/Buffalo/London, 1991).

(7) P.J. Carrington and S. Moyer, "The Effect of Defence Counsel on Plea and Outcome in Juvenile Court," *Canadian Journal of Criminology*, 32, 3 (1990): 621-638.

(8) A. W. Leschied and P. G. Jaffe, "Impact of the *Young Offenders Act* on Court Dispositions: A Comparative Analysis," *Canadian Journal of Criminology*, 29, 4 (1987): 421-430. See also Leschied and Gendreau, "The Declining Role of Rehabilitation in Canadian Juvenile Justice: Implications of Underlying Theory in the YOA." And see A. W. Leschied and P. Gendreau, "Doing Justice in Canada: YOA Policies That Can Promote Community Safety," *Canadian Journal of Criminology*, 36, 3 (1994): 291-304. And see R. Corrado and A. Markwart, "The Prices of Rights and Responsibilities: An Examination of the *Young Offenders Act* in British Columbia," *Canadian Journal of Family Law*, 7, 1 (1988): 93-115. And see R. Corrado and A. Markwart, "The Need to Reform the YOA in Response to Violent Young Offenders: Confusion, Reality or Myth?" *Canadian Journal of Criminology*, 36, 3 (1994): 343-378. And see *Towards Safer Communities: Proposals for Change to the Young Offenders Act* (Ottawa: Department of Justice, 1993). And see A. N. Doob, "Trends in the Use of Custodial Dispositions for Young Offenders," *Canadian Journal of Criminology*, 34 (1992): 75-84. And see P.J. Carrington and S. Moyer, "Interprovincial Variations in the Use of Custody for Young Offenders: A Funnel Analysis," *Canadian Journal of Criminology*, 36, 3 (1994): 271-290.

(9)A. W. Leschied and C. H. Hyatt, "Perspective: Section 22<sup>(1)</sup>, Consent to Treatment Order Under the *Young Offenders Act*," *Canadian Journal of Criminology*, 28, 3 (1986): 315-322. See also Leschied and Gendreau, "The Declining Role of Rehabilitation in Canadian Juvenile Justice: Implications of Underlying Theory in the YOA." And see Leschied and Gendreau, "Doing Justice in Canada: YOA Policies That Can Promote Community Safety." And see 1. R. Archambault, "Foreword," *The Young Offenders Act: A Revolution in Canadian Juvenile Justice*, A. W. Leschied, P. G. Jaffe and W. Willis, eds.

(10)Uniform Crime Reporting Survey (Ottawa: Canadian Centre for Justice Statistics, 1994).

(11)A. Rock, *Proposals for Amendments to the Young Offenders Act*. (Ottawa: Ministry of Justice, 1994).

(12)A. W. Leschied, J. G. Jaffe, D. A. Andrews and P. Gendreau, "Treatment Issues and Young Offenders: An Empirically Derived Vision of Juvenile Justice Policy," *Juvenile Justice in Canada: A Theoretical and Analytical Perspective*, R. R. Corrado, N. Bala, R. Linden and M. LeBlanc, eds. (Toronto: Butterworths, 1992). See also Leschied and Gendreau, "Doing Justice in Canada: YOA Policies That Can Promote Community Safety."