

(YOA)



crime Violent



adult sentences for youths



Public demand for a crackdown on young offenders has been driven by a stunning increase in youth crime, highlighted by a series of extraordinarily brutal killings of juveniles in recent years. From 1986 to 1997, violent youth crime rose 135%. Homicide by young offenders increased 31%, assault and robbery 150%, sexual assault 43%, and the number of girls charged with violent crimes rose by 300%.

1997

hard times for youth crime

Critics argue we're too soft on young offenders, but more youths than ever are being transferred to the adult system.

The fresh-faced brothers are led into Courtroom 102 by a police officer with an earphone and shaved head. The two are dressed identically in navy pants and shirts; their hair is neatly trimmed. At one end of the small courtroom their mother sits beside an interpreter. No formal arrangements for translation exist in Youth Court, so the interpreter whispers to the mother in Spanish throughout the proceedings.

This is the continuation of a transfer hearing begun some weeks previously. It is a high-profile case. The brothers are accused of fatally stabbing Clayton McGloan on October 31, 1998. The older boy, who was 17 at the time of the crime—

19 on this day—was automatically transferred to adult court because of his age and the nature of the crime. His lawyer is arguing that he be tried in Youth Court.

The case for his brother is the opposite: he was 15 at the time of the crime, 16 now, and the Crown is arguing that he be transferred to adult court.

Two groups of spectators attend this hearing: friends and family of the accused; friends and family of the victim. To the extent possible in the crowded space, they sit apart. We know—because we see them on TV, hear them on radio, read their comments in the paper—that the victim's supporters want both of the accused to be tried in adult court.

story by sandy kalef • illustration by hugo dubon

“Adult crime, adult time,” blare the headlines whenever a violent crime (newsworthy only because it *is* a violent crime) is committed or alleged to have been committed by a young offender. But the public may be misled, according to experts in the criminal justice system. Highly publicized cases, they say, cause increased concern among



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Canadians, even though violent crimes are a small percentage—less than 15 per cent—of offences committed by youth. According to a 1998-99 Statistics Canada study, the rate of violent crime has actually declined over the past three years in most large metropolitan areas, although the rate of youths charged with violent crimes is higher than a decade ago.

Barry McLaren, Assistant Senior Counsel for the Youth Office of the Alberta Legal Aid Society, says, “Seventy-five to 80 per cent of kids who get to the point of being charged never again become involved in the criminal justice system.” And those charges are for shoplifting, fights at school and the like.

McLaren points to a Youth Court case list for a given morning. Most of the offences deal with loitering, intoxication, failing to comply with an order or condition, trespassing and so on—not exactly one’s idea of violent crime. But even the few, more serious offences—theft, fraud, assault, robbery—do not tell the whole story. McLaren tells of a particular case where a high school student “from a good home” pleaded guilty to robbery. What was stolen was a bus pass. There may have been a comment or threat about a knife. The young offender was sentenced to probation. But if you look at the list of cases, you see only that he was charged with robbery. That type of offence—a stolen bus pass—is common, according to McLaren. “But guys going into grocery stores with sawed-off shotguns—as a charge of robbery might imply—just does not happen.”

Not surprisingly, however, it is the high profile cases that are publicized: “Teen convicted of manslaughter,” “Stabbed teen dies in hospital,” “Crown wants three murder suspects tried as adults,” “Court delay angers slain youth’s father.” Yet, while those headlines are a big reason why youth crime seems so prevalent, there may be other reasons as well.

Says Allan Fay, a criminal defence lawyer and former Crown prosecutor, “Crime seems out of control these days because the system becomes involved far more frequently than it did 15 or 20 years ago.” In those days, if a young person got involved in a schoolyard fight and the authorities found out, the youth might be expelled, but there would be no police involvement. “Now,” says Fay, “if there’s a schoolyard scuffle the police are called. If someone says ‘He hit me first,’ a charge is laid. In the past, the police would say ‘The fight’s over, no big deal, we’re not going to lay charges.’ Now they have no choice.”

Similarly, in the case of minor thefts, the police would find the culprit and recover the property. “They’d give the young person a good talking to,” says Fay, “take him home to his parents, who would also give him a good talking to, and that would be the end of it. But today the police lay charges.”

Retired Judge Herbert A. Allard, who served as Senior Judge of the Provincial Court of Alberta, Family and Youth Divisions, echoes that sentiment. “A schoolyard fight now becomes a criminal charge,” he says. Adds André Ouellette, another criminal defence lawyer, “Kids in primary school who touch each other are charged with sexual assault. We used to call that playing doctor.”

We are driven by a formal accountability, according to Ouellette and Fay, where the minute there’s a complaint, a charge must be laid. “The police have less and less discretion,” says Ouellette, “and they would rather charge in a case that should not go to court than not charge and be blamed for it.”

Fay believes that Crown prosecutors are under pressure to prosecute cases they know are unlikely to result in convictions, not because of any written policy, but because of a concern that if they don’t, public pressure will be brought to bear. “They have no choice,” Fay explains. “They’ll be pilloried if they don’t lay charges.”

Until recently the police would not be blamed and the prosecutors would not be pilloried, because few people knew anything about these matters. Most of us are dependent on the media for information about crime and the criminal justice system, and in the past reporters tended not to attend Youth Court, because, due to publication bans, there wasn’t much to report.

That seems to have changed. According to some observers, the press and other media are realizing there are “some fairly juicy cases” and are prepared to test the limits of publication bans. Allard says the media “have pushed the envelope to its ugliest.” He refers to pretrial publicity engendered by victims’ families. “That used to be contempt of court,” he says. “Victims are saying [the accused young offender] ought to get life—without even having the guy convicted yet!” He is upset about the “hysteria orchestrated by these events,” adding, “The modern daily paper is not in business to inform; it’s in business to sell papers.” According to those close to the action, families of the victims have begun to “go public,” and, well, “blood sells.”

Ouellette suggests the media attention leads to the misguided notion that Crown prosecutors represent victims. “Crown prosecutors represent the state,” says Ouellette, “but there’s this huge pressure on these prosecutors to somehow advocate exclusively for the victim.” Allard feels strongly that we have done victims a disservice and misled them about their role in the justice system. “Out of concern for victims,” he avers, “we’ve suggested they play a major role and I think that’s dead wrong. Their only real right is to complain and then to expect the police to investigate and the Crown to prosecute vigorously and fairly.”

Ongoing publicity has also led to the perception, voiced by some, that “we’re too soft on these criminals, these thugs. They’re just mollycoddled. They just thumb their noses at us.” Ouellette says otherwise, noting that there are kids who try to give the impression of bravado but are in fact terrified. “I’ve watched these kids cry like a baby,” he says. “They are scared little kids.” Allard says it’s not true that young offenders just get a slap on the wrist and nothing more. “They don’t get off,” he asserts. “It’s a lie to say so.” He also contends there’s no such thing as adult crime or youth crime, but crimes committed by youths or crimes committed by adults: “Because you’re a youth who committed a crime, that doesn’t make you an adult,” he states. If you’re 14, you’re still 14, no matter what you’ve done. You’re still a kid. And if you’re 12, you’re still a little kid.”

As to whether they are “mollycoddled,” it turns out they may be treated more harshly than adults. The adult system, except in the case of life sentences with restricted parole eligibility, provides for automatic release from custody. The prisoner accumulates time off and, in most cases, is released after serving one-third of the sentence. With youths, nothing is automatic. They must serve the full sentence. The only way it can be changed is in court,

where an application is made before a Youth Court judge.

As well, charged adults are usually released—on bail or other conditions—pending trial. They can go home, go to their jobs, carry on with their lives. But young people may have no home or life to be released to. Their parents may have thrown them out, their only “home” may be the street—which caused them to offend in the first place. So they end up incarcerated until trial. And if they are the subject of a transfer hearing, their pretrial incarceration can be longer than the sentence they ultimately receive.

Transfer hearings are a hot topic these days. In 1995, the Young Offenders Act was amended so that 16- and 17-year-olds charged with murder and certain other crimes would automatically be raised to adult court unless a Youth Court ordered the trial held there. Some believe that not only these older teens but the 14- and 15-year olds as well should be tried in adult court. But being tried in adult court does not mean doing adult time—especially the maximum adult time, which many of these proponents seem to want. A young offender convicted of murder in adult court is sentenced to life. But his parole eligibility period is not the same as an adult’s. An adult cannot apply for parole until 10 years have passed in the case of second-degree murder, and 25 years in the case of first-degree. Youths under 16 are eligible for parole in five to seven years, depending on the judge’s decision, and those 16 and 17 are eligible after seven or 10 years, depending on whether it is second-degree or first-degree murder. Being tried as an adult does affect the place of custody, however: young offenders convicted in adult court are transferred to an adult facility when they turn 18, giving them, according to some, a real education in crime.

If found guilty in Youth Court, the maximum penalty a youth could receive for second-degree murder is seven years (four years custody and three years supervision); for first-degree murder, the maximum is 10 years (six years custody and four years supervision). For other offences, such as robbery, that warrant a life sentence for an adult, Youth

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Court provides for a maximum of three years in custody. Otherwise, the maximum penalty under the Young Offenders Act is two years in custody. The Young Offenders Act provides only for maximum sentences, whereas the Criminal Code provides for minimum adult sentences in certain cases.

The story of the youth who was charged and ultimately convicted in the Dylan Lestage case, in which the teen died after allegedly being set on fire, is instructive in terms of the system, the media and public perception. It is a case that upsets defence lawyers, Crown prosecutors and judges alike. In mid-1999, a headline read, "Probation granted to teen in fire death." To some, that sounded like "mollycoddling," but what they probably did not know is that the young offender, who was 15 at the time and never charged with murder, had already spent two years in custody before ever going to trial; he was in

jail from the day the event happened—July 17, 1997—until he was sentenced—June 30, 1999.

He could not get bail because he had nowhere to go. "His family structure was not supportive enough," says McLaren, "and Child Welfare indicated they had no placement for him." He was subject to a transfer hearing; the transfer was rejected by a Youth Court judge. The Crown appealed; the Alberta Court of Appeal upheld the decision. "Only at that stage," says McLaren, "was he even eligible to enter a plea. Until the decision about jurisdiction is made, the person charged can't plead." Indeed, the young offender ultimately pleaded guilty in Youth

Court to criminal negligence causing death. His sentence was probation, but he had already been incarcerated for two years.

Allard is particularly upset about this case. "It was three kids playing with matches," he says. "There was no animosity, no anger, no motive; they were playing with a highly volatile substance. But the community had people walking up and down with signs saying, 'Death to child killers.'"

McLaren says the actual story, including that the

Crown would not be proceeding with a murder charge, became known within a week of the offender's arrest. "But that was never reported in the media," he says. "Right up to the end the media maintained the position that the public was being confronted with a boy who had set fire to another boy." Ouellette says he did his best to get the facts across when interviewed, but it's easier for the media to sell "blood and gore and moral outrage."

As for the accused in the McGloan case, by the time the judge would render her decision on the transfer issues, the brothers had been incarcerated for almost a year and a half without being able to enter a plea. For some, their guilt was established the day they were arrested.

Alberta may be more punitive than other provinces in its administration of the Young Offenders Act. Fay thinks there may be an Alberta culture—"a frontier mentality, an old-fashioned lock 'em up and throw away the key mentality"—in the youth and adult systems that leads to jailing more offenders and jailing them for longer periods. Ouellette fears that Alberta is in "a very retributive, vengeful mode," and that more kids are transferred to adult court than in other provinces. McLaren agrees: "Alberta tends to transfer young people to the adult system more frequently than most other provinces."

With all the headlines and protests, is it possible that judges are affected and become responsive to public pressure for more severe treatment of young offenders? Sitting judges, of course, cannot speak publicly on these matters, but judges read the papers like everybody else.

New legislation, the Youth Criminal Justice Act, is currently before Parliament. For some it's not tough enough, for some it's too harsh, and for others it is unnecessary. The latter say the current Act hasn't been given a chance.

Allard, for one, contends the same attacks being made on the current Act were made on the Juvenile Delinquents Act (which was replaced by the Young Offenders Act in 1984). These attacks, he asserts, "can be summed up as a philosophical belief that if you get tough with kids you will reform them as adults; that by demeaning them and locking them up you will rescue them. The problem is, there's ample evidence that it doesn't work."

The old Juvenile Delinquents Act spoke of treating a "delinquent" as a misguided child who needed re-education and reformation. It was geared to those under 16, but a 15-year-old could be transferred to adult court. Juveniles could be sentenced to industrial schools or reformatories. The current Young



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Offenders Act speaks of addressing the “underlying causes of crime by young persons” and of considering what approaches to take. It is geared to those under 18 and, as noted earlier, 14- and 15-year-olds may be transferred to adult court; 16- and 17-year olds are automatically transferred in certain cases.

The proposed Youth Criminal Justice Act speaks of guiding principles to direct the work of judges and others in the youth justice system, the principal goal being the protection of society. It cracks down on repeat violent offenders while at the same time providing for extrajudicial solutions for first-time offenders.

In response to certain critics who say the Young Offenders Act doesn’t work, Allard wonders how they can know. “I never saw one of them in my court. I was a judge for 36 years and I never saw one of them, ever, in my court.” He refers also to parents whose children have been victims of youth violence who then become vocal critics of the legislation: “Until they were a parent of a victim, they were never in court. And they’ve never been in any court except the one affecting their case.”

As for those who argue there is consensus that harsher measures are warranted, Allard says: “They think if you have consensus it becomes fact. But consensus isn’t fact. If it were, the world would be flat.”

When it comes to the proposed Act, Ontario and Quebec sit on opposite sides of the fence. Ontario thinks it is not tough enough, Quebec says it’s too harsh. The Canadian Alliance finds it too flexible and with too much discretion, the Bloc Québécois wants more discretion and also the ability to treat different young offenders differently.

Statistics Canada studies show that Quebec, with 24 per cent of the Canadian youth population, has only 10 per cent of Youth Court cases. Ontario has 37 per cent of the population and 40 per cent of the cases. Alberta has 10 per cent and 15 per cent respectively. When it comes to violent crime committed by youth, Saskatchewan, Manitoba and the north have the highest rates, Prince Edward Island and Quebec the lowest. Alberta sits squarely in the middle. But Calgary ranks third out of nine metropolitan areas (populations over 500,000), after Winnipeg and Toronto.

Is the rate of youth crime a reflection of the type of treatment provided? Allard would say so, that treating young offenders harshly turns them into harsher young offenders. Is it a reflection of how quickly the police will lay a charge? Ouellette and Fay have noted that local police often feel compelled to lay charges. Does Alberta’s rate of youth offences give ammunition to those who want stiffer penal-

ties? Victims’ families would say so. Statistics can be used to support various positions, but the charging and reporting practices of different jurisdictions may not always allow proper comparisons.

Certain jurisdictions, however, Quebec in particular, do seem to take a different approach to the treatment of young offenders. According to a 1996 Canadian Journal of Criminology study, Quebec had implemented programs whereby young people were diverted from the youth justice system long before the Young Offenders Act became law. The Youth Protection Act, according to the study’s authors, was passed in order “to protect children from their abusers and from the Juvenile Delinquents Act and, subsequently, from the Young Offenders Act.” Quebec, the authors note, “appears to have policies or procedures that reflect the view that courts are not the best place to deal with all youthful offenders.” So although all provinces have some type of diversion or alternative measures program, the point at which the diversion occurs differs. Quebec brings fewer cases to Youth Court, the variation being greatest for less serious offences. As well, the number and types of cases reaching Youth Court may be influenced by differences in provincial policy regarding Crown discretion.

The decision on the transfer issues in the McGloan case was handed down by Youth Court Judge Nancy Flatters on March 10, 2000, in Courtroom 102. As the brothers sat motionless, Judge Flatters reviewed all matters to be taken into account in a transfer decision, including protection of the public, the seriousness of the offence, the age and maturity of the accused and the rehabilitation of the accused, among others.

But protection of the public is paramount, said the judge, as she pronounced that both accused would be tried in adult court.

Should they be found guilty, she continued, the first part of their sentence would be served at the Calgary Young Offender Centre. This would allow them “time to mature and to better handle the adult system,” where they would be subject to “unsavoury influences and possible abuse.”

One has to wonder: is there a better way?

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