# MORE CARE LESS COURT

## KEEPING YOUTH OUT OF THE CRIMINAL JUSTICE SYSTEM

*More Care Less Court: Keeping Youth out of the Criminal Justice System*

**Norman J. Bossé, Q.C., Child and Youth Advocate**

## Investigative Team

*Lead Investigator and Lead Writer*: Gavin Kotze, Director of Systemic Advocacy

*Project Manager and Contributing Writer*: Christian Whalen, Deputy Child and Youth Advocate and Legal Counsel

*Primary Reviewer*: Annette Bourque, Clinical Director

## Acknowledgements

We would like to acknowledge and thank the government reviewers from the Department of Public Safety, the Department of Social Development, the Department of Health, Integrated Service Delivery housed in the Department of Education and Early Childhood Development, the Department of Justice and the Office of the Attorney General. We would like to also thank the members of the New Brunswick Bar and Bench who provided input. Finally, we would like to offer special thanks to academic reviewers Dr. Susan Reid and Dr. Michael Boudreau.

Published by:

Office of the Child and Youth Advocate
Province of New Brunswick
P.O. Box 6000
Fredericton, NB
E3B 5H1
Canada

How to cite this document:

Office of the Child and Youth Advocate, More Care Less Court: Keeping Youth out of the Criminal Justice System, July, 2015.

ISBN 978-1-4605-0833-6

*To Ashley Smith.*

*To those not yet helped.*

*To the many who work hard to change the lives of our children and youth for the better.*

# Contents

# EXECUTIVE SUMMARY

## ***Background***

New Brunswick's rate of youth charged for criminal offences has been decreasing since the enactment of Canada's youth crime legislation, the *Youth Criminal Justice Act*, in 2002. Yet still nearly a decade passed in our Province without corresponding progress being made in regard to the number of youths being sent to pre-trial detention and secure custody. Far too often it is the most vulnerable youths who are caught in the system – youths with mental health disorders, youths with addictions issues, youths with backgrounds as victims of abuse and neglect; homeless youth; youth with intellectual disabilities; youths from marginalized or minority identity groups.

The good news is that New Brunswick has in the past few years begun to make real progress in youth criminal justice issues. The RCMP and their Community Program Officers, as well as municipal police forces, began to lead the way by increasingly diverting youth away from court and toward supports that can reduce their risk of further involvement in crime. However, it takes the work of many different stakeholders to address youth crime effectively, and it takes a system that is built to be responsive to the developmental needs of youth.

Very recently, government's Provincial Crime Prevention and Reduction Strategy has worked with police and civil society to produce a Youth Diversion Model that addresses some of the root causes of youth crime. The model is in line with a shift toward an evidence-based child-rights focus that reflects not just what is easiest but what works best. This work deserves praise and holds much promise, but we must bear in mind it is only the beginning of the necessary shift.

Much work is still to be done to keep youth from crime. Pre-trial detention rates and secure custody rates remain unduly high. Youth admissions to correction services as a whole in New Brunswick remain higher per capita than other provinces. Reaction must be in proportion to the gravity of the offence. Sentencing should be for the shortest time possible. Community-based sentences should be the usual route. Incarceration should be a last resort, normally reserved for serious violent offences. Only in the most serious cases should youth have to await trial while detained at the detention and secure custody facility. If New Brunswick can take a child-rights approach in all areas involving children and youth, we can lead the way in providing the means to allow children to develop positive senses of how they feel, think and act. This is what will keep youth out of the criminal justice system. The More Care Less Court report seeks to provide an overview of the youth criminal justice system in New Brunswick generally, and shed some light on some of the most apparent problems with the system. The report's recommendations intend to support the work of the Provincial Crime Prevention and Reduction Strategy, and suggest necessary improvements to the youth criminal justice system.

## *Extrajudicial Measures*

Children and youth are in a process of development of their personalities and their understanding of social norms. Impulsive behaviour and lack of consideration of consequences of actions are more common in children and youth than in adults. The fact that they are developing in maturity, and have less capacity for moral judgment than adults, has led the Supreme Court of Canada to recognize that youths should be presumed to be less morally blameworthy. The *Youth Criminal Justice Act* is founded on comprehensive research into the best means of providing youths the supports and opportunities that will keep them out of the criminal justice system.

Youths will always run afoul of the law, usually in ways that are not serious. The vast majority of youth crime involves non-violent, minor offences. It is imperative that society addresses the underlying causes for offending behaviour. To keep youth out of crime, the system needs to address their therapeutic, social, educational and vocational needs.

As a society we want to protect ourselves from crime by preventing it to the maximum extent possible. To achieve this we need our youth to grow feeling secure, confident and included. We must also ensure that when youth do commit crimes, they are diverted away from the pattern of arrest, prosecution, incarceration and repeat offending. When youth who have committed a non-violent crime are dealt with in a severe manner within the system, they develop a heightened risk of becoming repeat and potentially more serious offenders.

Under the *Youth Criminal Justice Act,* diversion away from prosecution comes in the form of what are called Extrajudicial Measures. These include all measures outside the formal criminal justice system of prosecution. For a youth not at risk of further criminality, diversion entails measures that are proportionate to the severity of the offence, without severe sanctions. For youth at risk of repeat offending, diversion is about community and family supports. Diversion from prosecution can be the most effective means of crime prevention we have.

A Provincial Diversion Steering Committee has now brought together police and seven youth-serving government Departments to oversee a community-based approach to diverting youth away from courts and into supports. A Youth Diversion Model has been developed that emulates some of the best practice nationally in youth criminal justice, and holds the potential to maximize community and family involvement. It is imperative that police and prosecutors fully embrace the principle of diversion in their practices.

Police and prosecutors play an essential role in diverting youth away from repeated crime and custody. Police can give verbal warnings, and this is often sufficient to stop a youth from repeated crime. They can also issue written police cautions to parents and youth. They can refer a youth to a program to address the underlying cause of the youth's behaviour. Prosecutors can also play a role in this less institutional approach, by administering written 'Crown cautions' to parents and youth, adding more weight without proceeding with charges. We see the beginnings

of appropriate use of Extrajudicial Measures, but it lacks consistency across the Province, leading to advantage or disadvantage depending on where a youth lives.

***Police forces across the Province should work collaboratively with the Attorney General and the newly established community-based Youth Justice Committees to produce standard and consistent practices and protocols for the use of these Extrajudicial Measures.***

## *Youth Justice Committees*

The Attorney General is sanctioned under the *Youth Criminal Justice Act* to officially designate community-based Youth Justice Committees. The Child and Youth Advocate has been advocating for the creation of these Committees for several years. Some have recently been sanctioned in communities across the Province. It remains to be seen whether these Youth Justice Committees will be utilized to their maximum potential. We have already heard stories about difficulties getting representatives from certain government Departments to participate, and some Committees have yet to convene. Conversations we have had with people involved in the newly created Youth Justice Committees have led us to have concerns that there is as yet a lack of understanding among all stakeholders regarding the full mandates of these Committees under the *Youth Criminal Justice Act*.

A Youth Justice Committee can hold a case conference about a particular youth. It can coordinate the work of community groups, government agencies and schools to ensure that support services, mentoring, supervision and rehabilitation are provided in ways that address a youth's particular circumstances. Youth Justice Committee can provide support to youths following their release from custody: assisting in securing volunteer work; helping youths become involved in extracurricular activities; helping youths transition effectively back into the classroom; and connecting youths to existing services and programs in communities. The system that is presently being formed under the Youth Diversion Model, in conjunction with school-based Integrated Service Delivery teams, should be able to realize the full potential of Youth Justice Committees, if there is sufficient buy-in and training.

However, Youth Justice Committees can have other important functions, and we have not yet seen movement toward institutionalizing all of the possible Committee roles. For example, Youth Justice Committees can give advice to Crown prosecutors on appropriate Extrajudicial Sanctions in a youth matter. They can monitor youth justice services and advise the government as to whether youths' rights are being respected. They can provide advice to government on youth criminal justice policy in general. And they can play an education and outreach role in providing information to the general public on youth criminal justice issues. We hope to see all of these roles being promoted and supported in the future.

***The Department of Public Safety and the Office of the Attorney General should promote the full use of Youth Justice Committee functions, including: advice to Crown prosecutors and police concerning Extrajudicial Sanctions; suggestions to Court regarding appropriate sentencing; and advising government on youth justice policy.***

## *Case Conferencing*

We have seen a lack of case conferencing in New Brunswick's youth criminal justice system. Case conferences provide an alternative process to the traditional criminal justice prosecutions function. They are aimed at providing better opportunities to youth for rehabilitation, victim-offender reconciliation, accountability and restitution. They also provide a mechanism for connecting youth with services that will enhance pro-social protective factors and further reduce risk of future offending.

We expect the new Youth Justice Committees to convene case conferences, in order to provide: opportunities for a wider range of perspectives; more creative solutions; better coordination of services; and increased involvement of young persons, the victim and other community members. Case conferences are especially important for repeat offenders who typically come from difficult backgrounds and have complex needs, often with mental health and addictions issues. They require structure, stability, and supports. Case conferences are a vital mechanism to ensure holistic approaches to individual situations.

It will be important for the Public Prosecutions branch to begin to embrace its role in case conferencing under the *Youth Criminal Justice Act* (and for Legal Aid and the defence bar generally to support these processes). Judges can also call for case conferences to be convened to provide advice on conditions for interim release or for sentencing.

Youth justice case conferences in other areas in Canada typically have an emphasis on restorative justice that involves the offender and his or her family members, the victim, and various community members in a process of discussion about the offence and its effects. Restorative justice is essentially about building relationships and reintegrating the offender back into being a responsible member of the community and of society at large. It is a powerful tool that can be utilized in New Brunswick as it is elsewhere in Canada and the world.

***The Department of Public Safety and the Office of the Attorney General should provide training on effective use of case conferencing for Crown prosecutors, Legal Aid, probation officers, police and judges, to provide for a fulsome application of case conferencing under section 19 of the Youth Criminal Justice Act. They should also provide the means for Youth Justice Committees to build capacity for Restorative Justice practices.***

## *Prosecutorial Screening of Youth Charges*

We are one of the few Provinces where prosecutors screen all charges before proceeding to court. This is a beneficial system. However, we believe that to be most effective, the screening of charges for youth should have a comprehensive youth focus. The *Youth Criminal Justice Act* is meant to create a separate justice system for youth. The *Act* provides for prosecutorial screening of youth charges to ensure that Extrajudicial Measures and Extrajudicial Sanctions are routinely used to divert youth away from the 'charge-prosecute-incarcerate' sequence.

All matters proceeding under the *YCJA* should be screened only by Crown prosecutors specially trained in respect to the principles and provisions of the *YCJA*. At the present time there is no regular measurement aspect of the charge screening program, and the discretion vested in prosecutors to determine whether it is in the public interest to proceed with charges can potentially lead to a lack of consistency.

***In order to ensure a distinct youth-focused process, we believe that the Attorney General should develop more detailed guidelines for pre-charge Crown screening of youth cases. This screening should incorporate national and international legal principles and standards. The charge screening process of youth cases should have a means of monitoring and measurement to ensure efficacy and consistency across the Province.***

## *Ending the Use of Criminal Prosecutions as a Means to Access Services for Youth in Need*

Criminalization of youth who suffer from mental health disorders has occurred in New Brunswick for too long. Without adequate diagnosis and treatment, mental health and addictions issues put youth at risk of being repeatedly caught in the criminal justice system.

New Brunswick has been using court as a surrogate measure to address its failings in providing services for mental health issues. Along with youth with mental health disorders, other disadvantaged youth are also disproportionately liable to fall easily into the trap of the criminal justice system and be unable to get out. These include youth with backgrounds as victims of abuse and neglect, homeless youth, youth with addictions issues, alienated youth, and other vulnerable groups. Everyone involved with these youth needs to understand the importance of social supports and health supports to keep them safe and free from criminal activity.

***Government should provide training in diversion, mental health and child development to all youth-serving workers, including social workers, probation officers, educators, group home staff, foster parents, correctional staff, police and others. Further, government should create strong processes to enforce the prohibition in section 29 of the YCJA against detention as a substitute for social or mental health measures. For those youth with high needs who do come to court, government should ensure that prosecutors and defence counsel are aware of the benefits of sections 34 and 35 of the YCJA, to recommend that judges order referrals for assessment of needs related to social services, physical health, learning disabilities and mental health issues.***

## *Creating a Youth-focused Youth Court System*

In New Brunswick, Provincial Courts sit at times as Youth Courts for *YCJA* matters. But in New Brunswick Youth Court is not, as one might expect, a distinct court with its own space. One day in a week is set aside to hear Youth Court matters in the regular court rooms. It is a public forum where sometimes youth are forced to wait while adult cases are 'cleared' first. Youths barely understand the process. It is indiscernible and frightening. The lack of a youth-centred system is apparent in the diverse functioning of Youth Courts across the Province. There appears to be a wide spectrum of levels of understanding of the *YCJA* among duty counsel, defence counsel and prosecutors.

When speaking with youth at the youth secure detention and custody facility, it is most common to hear that they did not have lawyers other than duty counsel when they were remanded into custody. The youth we speak to there generally tell us that if they spoke to duty counsel at all prior to being called at their first appearance in court, it was only for a couple of minutes at the courthouse.

Our Legal Aid defence system is grossly underfunded compared to other Provinces. Legal Aid staff lawyers and contracted counsel in New Brunswick are under intense time pressures. There is a particular knowledge set that is necessary for lawyers to have in youth justice matters. Lawyers representing youth must be knowledgeable about the psychological, educational, developmental and social issues facing these youths. It is imperative that lawyers who work in this field are cognizant of the various services available in their communities. They must also have the time to apply this knowledge. Defence counsel require time to communicate with youth clients to be effective and forceful advocates. Most importantly, they must understand and fully utilize the *YCJA*'s provisions.

Youth want to have counsel who represent them know what their situation is – and they have this right under Article 12 of the *Convention on the Rights of the Child*. New Brunswick has a long way to go to live up to its obligations under the *Convention*. Every aspect of the youth criminal justice system (and specifically the legislated right to counsel under section 25 of the *YCJA*) should take into account the opinions of youth.

Crown prosecutors have heavy caseloads and may sometimes feel that they lack adequate time to prepare for youth cases. There are also some Crown prosecutors who could benefit from more professional development opportunities relating to the *Youth Criminal Justice Act,* the UN *Convention on the Rights of the Child*, and various international juvenile justice instruments.

The current system in New Brunswick is not conducive to youths feeling they are being held accountable through a legitimate and fair process. We find more youth-centred and effective approaches elsewhere in the country. The law demands that there be a separate criminal justice system for youths from that for adults. We hope to see that distinction be made truly genuine in practice by applying more youth-focused processes to the youth criminal justice system. For youths who are arrested and prosecuted, rights must be respected. The process must be meaningful to youths in order for them to feel that the accountability measures imposed upon them are legitimate, and for them to accept responsibility for offences. For those who are incarcerated, there must be a focus on rehabilitation and reintegration back into their communities and into society generally.

***Government should develop youth court services with specialization in the unique needs and developmental circumstances of youth. Included in this system should be the appointment of an itinerant youth court judge, specially trained youth-specific duty counsel, Legal Aid counsel, and Crown prosecutors.***

## *Creation of Youth Court Worker Positions*

Youths can spend several weeks remanded to the youth closed-custody detention centre, awaiting trial or sentencing. This occurs for what are often, in our opinion, very minor offences. During this time they live in limbo. Their education is interrupted. There can be difficulties having necessary medications follow them to the detention centre. And they are torn away from any community supports they may have. They are also influenced by other youth there who have gone further down the path of crime, some of whom have committed serious violent offences.

It is more likely that a youth will be released to their homes or alternative safe place pending trial if a judge can be presented with viable options that protect the youth and society. Creating

Youth Court Worker positions could provide invaluable assistance. They could guide youths and parents through court processes and the maze of government services. They could connect youth with available community resources. And they could ensure that judges have the information they need in order to make the decision to release youth into community. Creation of Youth Court Worker positions would be uniquely important for First Nations youth, who are disproportionately represented in pre-trial detention in New Brunswick.

***In order to limit the use of pre-trial detention in New Brunswick and provide for a more youth-centred, efficient and effective court process, the Department of Social Development in conjunction with the Department of Public Safety should train and provide Youth Court Workers who can coordinate with family members, duty counsel, general counsel, and Youth Justice Committee coordinators. Crown prosecutors should connect Youth Court Workers with a youth's parents or legal guardian upon the laying of charges, before a first appearance in court. All actors in the youth criminal justice system should develop working protocols with Youth Court Workers.***

## *Separate Facilities for Youth and Adults in the Criminal Justice System*

The Office of the Child and Youth Advocate has witnessed very significant improvements in the functioning of New Brunswick's youth detention and secure custody facility (the New Brunswick Youth Centre). We have great respect for much of the work being done there. However, no matter how dedicated and skilled the New Brunswick Youth Centre staff is, this is not the appropriate place for most of these youths to be in. They need to be in their communities getting the help they require to ensure their maximum safe and healthy development.

It is inevitable that youth will be exposed to negative peer influences at a detention and secure custody facility. Detention and incarceration in such a facility can have serious psychological effects on youth. This is unsurprising given the fear, stress and stigma that accompany incarceration.

The New Brunswick Youth Centre and our provincial women's prison are co-located in the same facility. While there is no interaction between youths and the adult inmates, it is not a positive situation in several respects. Again, adult and youth criminal justice systems are meant to be separate, and New Brunswick's situation is a uniquely poor example in Canada. What is even more troubling is the practice of transporting youths to court, handcuffed and shackled (often for many hours) in vehicles that sometimes include adult inmates.

Youth-only detention and secure custody facilities in other Provinces are uniquely designed to help rehabilitate and reintegrate young offenders. Our Office has been calling for several years now for the creation of a new centre for youth in secure custody. This could be a small centre if the Province succeeds in bringing the number of youths in sentenced custody down to a reasonable level. This centre should be located closer to the Saint John–Moncton–Fredericton areas in order to provide greater family and community involvement with these youths.

***Government should give greater effect to the fundamental principle of the Youth Criminal Justice Act that youth justice be a separate system from the adult criminal system, by discontinuing the practice of housing adults and youth at the same facility, and by ensuring transportation that conforms to youths' developmental needs.***

---

## *Open Custody*

The open custody system in New Brunswick has undergone several changes in recent years and is currently in disarray. We realize that government is working to fix it, but we fear that again expediency will trump efficacy, to the detriment of youths' developmental needs. Open custody should be readily available to young persons in their own community, in order to ensure the least disruption possible to their development and rehabilitation.

Specialized group homes in communities have been closed and presently there are two options for open custody: (1) an addictions facility and; (2) an open unit at the secure detention and custody facility. The first option has had several difficulties, and the second option was created as an interim 'emergency' measure when the first option became very problematic for many of the youths sent there. This interim measure is now looking like it will become permanent. Youth sentenced to open custody being located at the secure detention and custody facility does not accord with the purposes of the *Youth Criminal Justice Act* or with the *Convention on the Rights of the Child*, and it is a terrible practice.

Neither of the two current open custody facilities is located close to the communities most youths come from. This makes reintegration into home communities and families much more challenging. The remoteness of services is a problem, as is the disruption to the youths' relationships, family life and education. There is also the matter of the disruption in the continuity of care for youths. Social workers, healthcare workers and mental health workers will not be following youth to these facilities during their time in open custody. There is also the very important matter of keeping an open custody option that is tailored to the needs of First Nations youth, which appears to have been lost in the shuffle.

The numbers of New Brunswick youth in open custody has been in steady decline, falling by nearly 70% between 2009 and 2014. As less than thirty youth are being sentenced to open custody per year presently, there is a perfect opportunity to provide community-based options such as specialized foster care that can truly address the needs of at-risk-youth. We see very different approaches to open custody being used in the provinces with the best results for preventing youth crime.

***Government should develop open custody options in accordance with the guiding principles of the Convention on the Rights of the Child and the principles of the Youth Criminal Justice Act. Such open custody options should be guided also by the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Guidelines for the Alternative Care of Children. All efforts should be aimed at reintegration of youth into community and family settings.***

## *A Lack of Data*

We do not have enough information to provide a comprehensive statistical picture of youth involved in crime. A great deal of information is simply not collected and analyzed. However, we know, from what youth themselves and professionals involved tell us, that many youth in the criminal justice system are affected by mental health issues, family breakdown, intellectual or learning disabilities, homelessness, school drop-out, and histories of being victims of abuse and neglect.

To have evidence-based decisions, we need comprehensive data and analysis. Youth crime prevention is an area that has incurred massive spending with very unimpressive results, and our Province still lacks an extensive statistical understanding of youth crime.

***Government should develop better data-monitoring, analysis and dissemination processes in order to ensure effective evidence-based decisions are being made in youth criminal justice matters, and to guide the work of the Provincial Diversion Steering Committee as part of the New Brunswick Crime Prevention and Reduction Strategy.***

# THE PRINCIPLES OF THE YOUTH CRIMINAL JUSTICE ACT[1]

(*a*) the youth criminal justice system is intended to protect the public by

(i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,

(ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and

(iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;

(*b*) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

(i) rehabilitation and reintegration,

(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

[1] *Youth Criminal Justice Act*, SC 2002, c 1, section 3(1).

(*c*) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

(i) reinforce respect for societal values,

(ii) encourage the repair of harm done to victims and the community,

(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

(*d*) special considerations apply in respect of proceedings against young persons and, in particular,

(i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,

(ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,

(iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and

(iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

# Foreword

**By Norman J. Bossé Q.C.**

**Child and Youth Advocate**

In the summer of 2013 as I took up new responsibilities as Child and Youth Advocate for New Brunswick, I came into an office that had already established a strong reputation for incisive report writing and rights-based advocacy for New Brunswick children and youth. This report, like the *Ashley Smith* and the *Connecting the Dots* reports before it, continues our advocacy for new and better approaches to dealing with youth crime, and with the disadvantaged youth in our province who often find themselves in conflict with the law.

This report is the product of many months of research, consultation with youth and those who work with them, and dialogue with service providers and policy-makers. We began with a collaborative search for solutions, across government Departments, looking together at best practices in the administration of youth criminal justice across the country and around the globe, and I was pleased last summer to be invited to sit as a member of the provincial Crime Prevention Round-table, to bring the voice of New Brunswick youth and the contributions of my Office to that commendable process.

Depriving a human being of their liberty is, in our justice system, the most intrusive use of State power permissible. Our constitution provides strict limits on the use of this kind of coercive force by government. The *Canadian Charter of Rights and Freedoms* and International legal instruments binding on Canada, such as the *UN Convention on the Rights of the Child,* place additional limits on how criminal laws should be applied to minors. In Canada twelve is the minimum age of criminal legal responsibility. In 2013-2014 a twelve year-old in New Brunswick was sent to the detention and secure custody facility for pre-trial detention. This occurs every year. Prison is no place for the positive development of a twelve year-old. Legal sanctions for infractions of the Canadian *Criminal Code* are applied uniquely to youth under the *Youth Criminal Justice Act*. This uniqueness is due to recognition of children's developing moral compass. As stated by the Supreme Court of Canada, "…the principle of a presumption of diminished moral culpability in young persons is fundamental to our notions of how a fair legal system ought to operate."[2]

Canada is regarded around the world as a democratic, peaceful, well-governed nation, in significant part because of the professionalism and fairness of our policing and corrections systems. However, we are also, historically, a nation which has seen very high rates of youth incarceration. Under the *Juvenile Delinquents Act*[3] of 1908 we would often detain and deprive children of their liberty and place them in correctional schools without any due process of law.[4] Too often these deprivations of liberty gave way to situations of abuse and institutional harm and put children onto a path of victimization and further misconduct. The *Young Offenders Act*[5] of 1984 was enacted by Parliament to change that: to give young Canadians accused of crime

[2] *R. v. D.B.*, [2008] 2 S.C.R. 3, at para. 68.
[3] *Juvenile Delinquents Act*, R.S., 1908, c. 40.
[4] Davis-Barron, Sherri. Canadian Youth & the Criminal Law: One Hundred Years of Youth Justice Legislation in Canada. Markham, Ont: LexisNexis Canada Inc., 2009.
[5] Young Offenders Act, R.S.C., 1985, c. Y-1.

meaningful guarantees of due process, while maintaining their right to a different system of criminal justice, in keeping with Constitutional norms. Unfortunately, that *Act* did not incorporate enough distinction between minor crimes and serious offences, and youth were too often sentenced to custody for minor offences. Canada soon therefore had the highest rate of youth incarceration among economically developed nations.[6]

While Canadians have a uniform *Criminal Code* applicable across the land, the administration of criminal justice is a matter of provincial responsibility. In this report you will find an account of what this has meant for New Brunswick youth, as, even with our low youth crime rates, New Brunswick has not as yet been a national leader in youth justice. We have been slow to adopt the progressive measures under the 2002 *Youth Criminal Justice Act* aimed at diverting youth from the traditional criminal justice approaches. Our rates of youth incarceration have seen recent improvement but remain relatively high in comparison to Canadian best standards. Our rates of pre-trial detention in secure custody remain much too high. Inexplicably, we find that we are continuing to incarcerate youth for minor crimes. We also have an overrepresentation of youth with mental health disorders behind bars. The same can be said of youth from the child protection system and from other disadvantaged social conditions.

And yet we know that 'correctional' measures of this kind are among the least effective in terms of rehabilitation, and the most costly to the public purse. As the present government embarks upon the task of righting the fiscal ship of the Province we urge that early and progressive measures be taken to reduce our rate of youth incarceration and redirect resources to community-based programming. This will be far more successful in keeping young people out of a life of crime and on a path of learning towards becoming productive and contributing members of their communities.

This report contains only ten formal recommendations. It contains many more suggested means of improvement, but we have decided to focus, in a priority fashion, on ten clear steps which in our view will produce the greatest return on investment and which will bring the Province into line as a leader in the field of youth criminal justice, in Canada and around the world.

In closing, I want to thank the many young people who contributed their expertise and experience to this report. I would similarly like to thank people in government Departments and the leaders within civil society who work daily with this vulnerable population of youth, for sharing their views and adding to the quality of this report.

I also want to thank all members of my staff who work daily with these same youth and in particular I salute the work of Gavin Kotze, our Director of Systemic Advocacy who has been the lead investigator on this report, and of Christian Whalen, our Deputy Advocate, whose vision

---

[6] Caputo, Tullio and Michel Vallée. "Review of the Roots of Youth Violence: Research Papers Volume 4: A Comparative Analysis of Youth Justice Approaches," Ministry of Children and Youth Services, Government of Ontario, 2008.

and continued advocacy on this file since the *Connecting the Dots* report has given rise to innovative reforms now underway and to some of the progress described in the following pages.

## *A GUIDE TO LAW AND POLICY*

**WHEREAS Canada is a party to the United Nations *Convention on the Rights of the Child* and recognizes that young persons have rights and freedoms, including those stated in the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*, and have special guarantees of their rights and freedoms…**

**Preamble to the *Youth Criminal Justice Act***

# INTRODUCTION


POLICE

**"What is happening to our young people? They disrespect their elders, they disobey their parents. They ignore the law. They riot in the streets, inflamed with wild notions."**

Plato, fourth century B.C.E.

**"Children now love luxury. They have bad manners and contempt for authority. They show disrespect for their elders and love chatter in place of exercise. Children today are tyrants. They contradict their parents, gobble their food, and tyrannize their teachers."**

Socrates, c. 400 B.C.E

**"These kids are out of control. They don't have any respect anymore, kids today, they're mostly a bunch of delinquents."**

A New Brunswick adult in conversation with a CYA Delegate, 2014

Adults today tend to believe that youth crime and misbehaviour is an out of control problem.[7] This misapprehension has been one of the common threads in Canadian society for several decades.[8]

Youth crime has not been increasing. It has in fact been consistently *decreasing* since the enactment of Canada's current youth crime legislation, the *Youth Criminal Justice Act*[9]. The general Canadian public, influenced by misleading news and entertainment media, is under an erroneous impression regarding youth crime statistics.[10] For example, in 2000, under Canada's previous youth crime legislation, the *Young Offenders Act*[11], Canada was incarcerating youth at unprecedentedly high rates. An opinion poll that year found that 60% of Canadians believed that the youth crime rate was rising.[12] It had in fact been dropping for several years. Canadians are not alone in this misconception. Although crime rates have been decreasing in Western countries for a number of years, polling continually shows that public perception mistakenly believes that rates have been increasing.[13]

The vast majority of youth crime involves non-violent offences. The *Youth Criminal Justice Act* makes a very clear distinction between violent offences and less serious offences. Incarceration should be reserved for the most serious crimes. There is no question that there are some youth who commit shockingly violent crimes, sometimes even without a care or a hint of remorse. What needs to be greatly stressed, though, is that those are a *tiny minority* of youth crimes. These are two important points: most youth crime does not involve serious violent offences, and the youth crime rate has not been increasing.

Nevertheless, juvenile misbehaviour will continue to exist. What is important is how we address it. Criminalizing it all is not the way to go. We hope that this Report helps to make that point.

---

[7] See: Department of Justice Canada. Latimer, J. & Norm Desjardins, "The 2008 National Justice Survey: The Youth Justice System in Canada and the *Youth Criminal Justice Act*," Government of Canada, 2008.

[8] See for example: Bell, Sandra J. Young Offenders and Youth Justice. Toronto: Nelson Education Ltd., 2012; Roberts, Julian V. "Public Opinion and Youth Justice," in Youth Crime and Youth Justice: Comparative and Cross-National Perspectives. Chicago: University of Chicago Press, 2004; Government of Canada, Department of Justice, "Public Perception of Crime and Justice in Canada: A Review of Opinion Polls," http://canada.justice.gc.ca/eng/rp-pr/csj-sjc/crime/rr01_1/p8_1.html

[9] Youth Criminal Justice Act, SC 2002, c 1.

[10] See, for example: Dorfman, Lori and Vincent Chilraldi. "Off-Balance: Media Coverage of Youth Crime," *Guild Practitioner*, Vol. 58, 2001; Carli, Vivien. "The Media, Crime Prevention and Urban Safety: A Brief Discussion on Media Influence and Areas for Further Exploration," International Centre for the Prevention of Crime, December 2008; and Denov, Myriam. "Youth Justice and Children's Rights," in A Question of Commitment: Children's Rights in Canada, Katherine Covell and R. Brian Howe, eds. Waterloo: Wilfred Laurier University Press, 2007.

[11] Young Offenders Act, RSC 1985, c Y-1.

[12] Denov, Myriam. "Youth Justice and Children's Rights," in A Question of Commitment: Children's Rights in Canada, Katherine Covell and R. Brian Howe, eds. Waterloo: Wilfred Laurier University Press, 2007, p. 160.

[13] UN Office of the High Commissioner for Human Rights. News and Events: Children and the Justice System, March 26th, 2012.

The Report is divided into four substantive sections. The first part describes the current situation in New Brunswick in the administration of youth criminal justice. We draw on the statistical data and make comparisons between approaches here and in other parts of the country, while pointing to some encouraging trends in the last few years due to dedicated efforts by the RCMP, government and civil society stakeholders. The second part of the report focuses in greater detail on the provisions of the *Youth Criminal Justice Act* and what New Brunswick could do to give better effect to each of its sections: by establishing Youth Justice Committees, by increasing the use of judicial conferencing, by developing better safeguards against a rush to prosecution, and by giving young people the benefit of the graduated response of warnings, cautions, Extrajudicial Measures and Extrajudicial Sanctions outlined as alternatives to prosecution. In the third section of the report we look at the need for more holistic approaches to youth criminal justice and explore strength-based and rights-based approaches to intervening with young people accused of crime. Finally in section four we discuss the need for all partners in services to children and youth to be part of the search for solutions in this field. We look at the role of child protection systems, of health systems and of educational systems as partners in the processes of diversion from prosecution toward rehabilitation and reintegration.

We often speak of the youth criminal justice *system* as if it were one distinct system, when it is in fact comprised of a number of systems that address various aspects of youth crime and its consequences. The main purposes of what we call the youth criminal justice system are as follows: (1) the prevention of juvenile delinquency; (2) the creation and use of measures to divert youth away from formal judicial proceedings and incarceration; (3) the establishment of and adherence to due process rights (dealing with arrest and a fair trial) that are specific to minors; (4) the rights of youths in pre-trial detention and incarceration; and (5) the successful rehabilitation of offending youths and their reintegration into communities.

This report seeks to offer recommended improvements to all five of these aspects of the youth criminal justice system in New Brunswick.

Before we begin, we offer a brief word on context and methodology. The Child and Youth Advocate's Office has existed in New Brunswick since 2006. From its establishment the Office has advocated for better services to the most vulnerable segments of the province's youth population. We have consistently advocated for better services for youth with complex needs, de-criminalization of youth with mental health disorders, improved services for youth in government care, and support for families of youth-at-risk. Part of that advocacy has come in the form of systemic reports from our office such as *Connecting the Dots* and the *Ashley Smith Report,* which addressed issues including those related to youth involved in the criminal justice system.

Following the publication of those reports, officials in the Youth Justice Branch of the Federal Department of Justice approached our office and asked us to partner with them in determining best practices in the administration of youth criminal justice in Canada. They were impressed

with the nature and quality of our advocacy work and were prepared to fund more research in this area. Eventually we received funding to conduct a review of the best practices across Canada in the implementation of sections 18, 19 and 23 of the *Youth Criminal Justice Act*. These are the provisions that: set out the role of Youth Justice Committees, granting the governance of youth criminal justice to local communities; establish the rules for judicial conferencing as an alternative route to prosecution in handling youth offences; and provide for Crown screening of all charges to ensure consistent best practice in youth prosecution.

Through the course of this work we partnered with all child and youth serving government Departments in New Brunswick and developed collaboratively a youth diversion model for New Brunswick, based upon Canadian best practices. The model developed through those efforts is available on the Child and Youth Advocate website. Unfortunately, although the model was jointly developed in consultation with many Departmental officials, at the eleventh hour the Department of Public Safety and the Office of the Attorney General withdrew their support for the model. They did so on the grounds that they felt New Brunswick could not afford two separate systems of diversion and alternative justice for youth and adult populations, and on the grounds that in their view the model proposed gave insufficient weight to the obligation to safeguard the impartiality of the prosecutorial and judicial functions in relation to youth criminal justice.

In the months that followed the Child and Youth Advocate's Office attempted to negotiate a solution to the impasse, but finding no success, we eventually gave notice of a formal review and launched the investigation giving rise to this report. This report was finalised following the release of the Provincial Crime Prevention and Reduction Strategy and the initial work of its Crime Prevention roundtable, which holds great potential for progress in taking an integrated approach in addressing the needs of youth and preventing youth crime. This report seeks to inform the implementation of that Strategy. It also reflects the voices of New Brunswick youth with lived experience of our criminal justice system.

Children and youth should be both seen and heard. That is the starting premise of our work at the Office of the Child and Youth Advocate. This report is informed by the voices of the youth for whom we advocate. Their words are found throughout these pages, and we hope we have accomplished our goal of taking the issues they have identified and providing advocacy for them. Some of their stories are also placed throughout the report. Their names and other potentially identifying information have been changed for this report, but their stories are theirs. The concerns voiced by individual youths in this report reflect what we hear from many more youths and from service providers in the course of our work.

# A Youth's Story from our Files

## A lot of Cost, a lack of Care

**Francis has Fetal Alcohol Spectrum Disorder and several related issues such as ADHD. At age 12 he began to go in and out of child protection services. Eventually the Department of Social development felt the situation was severe enough to seek a Guardianship Order. He thereby was taken into the permanent care of the Minister.**

**He had low reasoning skills and difficulty with people his own age, often leading to confrontation. When there was a lack of available beds for youths in group homes, the Department of Social Development, as Francis' legal parent, placed him in an adult homeless shelter. It was a terrible situation and it was no surprise when it went horribly wrong. Francis received threats from adults there and would often barricade himself in his room out of fear. Left without effective guidance and support he was racking up charges for breach of probation. His social worker was determined that he needed 24-hour care and independent housing during a transition to adulthood.**

**His lawyer contacted us. Our office convened a case conference focused on finding a more permanent placement, to get him set up in one area with community and educational support, and to create a transition plan of support for Francis into adult long-term care. He needed immediate support and intervention before charges accumulated to an unsustainable level and he became another youth with cognitive disabilities stuck in the criminal justice system.**

**Many stakeholders were brought together by the Department and an apartment was located, with wraparound 24-hour support. Francis was registered for an education program, and a therapeutic plan was developed. Everyone working with Francis was made aware of the dangers of him being charged again for breaches of probation and thereby entering the adult justice system.**

**In the end, Francis had supports and a plan in place to guide him into adulthood. It would have been less costly for taxpayers, less traumatic for Francis, and more effective if early on he had been provided the intensive supports he needed. Nevertheless, everyone involved wanted to do the best for Francis. It was the system that had failed to support him.**

# SECTION I

# THE ADMINISTRATION OF YOUTH CRIMINAL JUSTICE IN NEW BRUNSWICK TODAY

# Section I – Part One

# New Brunswick's history with youth justice

For many years under Canada's first two youth crime legal regimes, the *Juvenile Delinquents Act* (1908-1984) and the *Young Offenders Act* (1984-2003), it seemed, mistakenly, as though New Brunswick was at the forefront of interventions in youth criminal justice. The Provincial youth reformatory, the Kingsclear Youth Training Centre, was touted as a model in rehabilitation and educational approaches to the problem of youth delinquency. That was before the arrest of Kingsclear employee Karl Toft and resulting inquiries into the abuses of youth at Kingsclear. Today the word Kingsclear evokes a shadow of harm to children, just as the terms Mount Cashel or Residential Schools do in other contexts. The Kingsclear Youth Training Centre campus just outside Fredericton remains vacant thirty years later, untouched, its ghostly remains standing witness to memory of horrors past.

In the wake of the conviction of Toft in 1992 and the subsequent Miller Inquiry, the Government entered into a public-private partnership for the development of a new youth secure detention and custody facility, the New Brunswick Youth Centre (NBYC). Under the *Young Offenders Act*, the rate of youth incarceration seemed to justify a hundred bed facility. However, it no longer aligns with New Brunswick's needs for incarceration of the small number of youth committing serious offences.

When the Child and Youth Advocate's Office was established in 2006 and we began the work of regular visits to youth at NBYC, there would typically be a daily youth population count of approximately 40 youth, including those on pre-trial detention and those on a secure custody sentence.

The problem of excess capacity led to decisions to move adult male inmates to this facility, and subsequently to move out the adult males and move in adult female inmates. The fact that detaining youth and adult prisoners together in the same facility contravenes the basic tenets of Canadian law and international legal standards seems to be of little consequence.

The need for such a large facility for youths in secure custody continues to lessen. The average inmate count at NBYC in 2014-2015 was 23 youths.[14] We do not need 100 beds in our provincial youth detention and secure custody centre. We would need even fewer if New Brunswick were diverting appropriate numbers of youth away from the custodial system and into community supports. The impressive positive strides we have seen in youth crime statistics in the past three years make the existence of NBYC even more pointless. The total number of youth present at NBYC has been on a steady decline since 2010-2011.

As we began our review into these matters, senior officials within the Department of Public Safety came forward and told us that when the *Youth Criminal Justice Act* came into effect in 2002, Federal money was provided for training of Crown prosecutors but fewer than half of the prosecutors meant to attend sessions showed up. Prosecutors in the Province told us that since New Brunswick had universal pre-charge screening, screening of youth offences did not need a separate process for screening under section 23 of the *Youth Criminal Justice Act*. They told us also that judges could not take part in judicial conferences without tainting the hearing process, and that it was not for prosecutors to consider the mental health needs or child protection needs of young persons accused of crime. As one prosecutor put it: "We're prosecutors, not social workers, we prosecute people. It's what we do." Our office strongly disagrees with this statement, as this narrow view is counter to the purposes of the law and the role for prosecutors envisioned in the *Youth Criminal Justice Act*. We would very much hope that this statement is not reflective of Public Prosecutions as a whole, and we certainly meet many prosecutors who have deep understanding of youth-centred approaches under the *YCJA*. It remains to be said, though, that not even one prosecutor should be of this opinion.

At the invitation of the RCMP, we travelled the Province and took part in many training sessions for front-line officers and community partners on the application of the *Youth Criminal Justice Act*. We learned that most officers had never had a word of training on the *Youth Criminal Justice Act* in their formal police training. Most had never heard of a Crown caution, where prosecutors can send a warning letter to a youth, as another means of diversion from prosecution. One John Howard Society representative told us: "I've been running the Alternative measures program in my community for years, and this is the first time I've heard of the distinction between Extrajudicial Measures and Extrajudicial Sanctions." These two terms, Extrajudicial Measures and Extrajudicial Sanctions, described in more detail later in this report, are essential aspects of diversion of youth away from prosecution and toward community supports under the *Youth Criminal Justice Act*. This is not meant as a criticism of the vital and excellent work being done by police and community groups such as the John Howard Society. It is meant as a criticism of New Brunswick's criminal justice system that has not adapted to the *Youth Criminal Justice Act*.

[14] Source: Department of Public Safety, Daily Population Count – CIS, April 27, 2015.

During our review we have met with many young people in custody and others previously detained and held in custody. Their views are shared throughout this report. We were concerned however to learn that these young people often showed no understanding of their rights as an accused person. Some could not tell us if they had had access to a lawyer or had had the benefit of legal representation in court. It wasn't clear to them.

All of these views inform our report and urge us to the view that while our legal regime has changed to respect human rights, the fact remains that our culture and our handling of youth criminal justice matters has in too many respects remained very much the same as it was thirty years ago. The law has undergone a major shift, but the system has been slow to catch up.

Seven years after the enactment of the *Youth Criminal Justice Act* New Brunswick was still charging significantly more youths per capita than the majority of Canadian provinces.[15] In New Brunswick a great deal still remains to be done to give meaningful effect to the changes ushered in over ten years ago by the *Youth Criminal Justice Act*. However, the past few years have shown what is possible, as RCMP, municipal police forces and Community Program Officers have been increasingly working to divert youth away from court and toward supports that can reduce their risk of further involvement in crime. Very recently the Provincial Crime Prevention and Reduction Strategy has produced a Youth Diversion Model that reflects much of what our office has been advocating for. We are very hopeful that we will see even more progress in diversion away from the courts and toward supports for youth at risk of involvement in the criminal justice system.

[15] Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting Survey, 2010.

# Section I – Part Two

# New Brunswick's Performance in Youth Justice

Something quite astounding and long overdue has been occurring recently in New Brunswick in regard to diversion of youths from the court system. When we first contemplated undertaking this review the picture seemed to be moving from bleak to promising. Today it appears to be moving from promising to potentially leading the way nationally. If New Brunswick can take a child-rights approach in all areas involving children and youth, we can lead the way in providing the means to allow children to develop positive senses of how they feel, think and act. More than anything else, this can bring our youth crime rate down.

One of the most impressive areas of progress we have seen in the New Brunswick youth criminal justice system is in the rate of youth charged for offences. One of the cornerstones of an evidence-based youth criminal justice system is the need for processes wherein youth are directed to accountability measures outside of the courts and custody. Here we are seeing progress. New Brunswick cut the rate of youth charged by 38% between 2010 and 2013. This brought New Brunswick's rate in line with Newfoundland and PEI, and even ahead of Nova Scotia.[16]

Nevertheless, grave problems persist in many aspects of the youth criminal justice system.

New Brunswick's rate of youth charged for criminal offences has been decreasing since the enactment of Canada's youth crime legislation, the *Youth Criminal Justice Act*, in 2002. Yet still nearly a decade passed in our Province without corresponding progress being made in regard to the number of youths being sent to pre-trial detention and secure custody. Far too often it is the most vulnerable youths who are caught in the system – youths with mental health disorders, youths with addictions issues, youths with backgrounds as victims of abuse and neglect; homeless youth; youth with intellectual disabilities; youths from marginalized or minority identity groups.

[16] Statistics Canada, CANSIM Table 252-0075, Incident-based crime statistics, by detailed violations and police services, Atlantic Provinces.

## *A GUIDE TO LAW AND POLICY*

**… Mindful of the large number of young persons who may or may not be in conflict with the law but who are abandoned, neglected, abused, exposed to drug abuse, and are in marginal circumstances and in general at social risk…**

**United Nations Guidelines for the Prevention of Juvenile Delinquency**

The law in Canada under the *Youth Criminal Justice Act* provides that in the vast majority of cases (first time non-violent offenders with no risk of career criminality) youth should be diverted from the criminal justice system and toward supports that will keep them away from conflict with the law. This objective is reflected also in our office's advocacy, as well as in Article 40 of the *Convention on the Rights of the Child*, which states:

> Article 40
>
> A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

One of the reasons for the focus on diversion away from prosecution is that keeping youth out of incarceration prevents future crime. We have seen very good declines in numbers of youth in secure custody, with a sizeable drop since 2012-2013.[17] Nevertheless, New Brunswick is still more reliant upon secure custody as a youth corrections option than we would like to see in order for this Province to do justice to youths. British Columbia had only 59 youth in secure custody in 2013-2014, compared to New Brunswick's 51, while having a population more than six times the size of ours.[18] Ontario had six times as many youths in secure custody as New Brunswick, but it has a population eighteen times ours.[19] Newfoundland and Labrador's numbers of youth in secure custody have been low for many years and as of 2013-2014 they remained nearly half of New Brunswick's numbers while having a population only 30% smaller.[20] Our office has

---

[17] See: Statistics Canada, CANSIM Table 251-0011. Further recent statistics from the Department of Public Safety have confirmed that the lower level of secure custody achieved in 2013-2014 has been sustained and even improved upon in 2014-2015.

[18] Statistics Canada, CANSIM Table 251-0011.

[19] Statistics Canada. *Table 251-0014 - Youth custody and community services (YCCS), admissions to sentence custody, by sex and sentence length ordered,* CANSIM (database). (accessed: 2015-06-01)

[20] Statistics Canada, CANSIM Table 251-0011.

received 2014-2015 statistics from Newfoundland and Labrador, and comparing them to statistics we have received for 2014-2015 from New Brunswick's Department of Public Safety we see that Newfoundland now has an average number of youths in secure custody that is a third of New Brunswick's (3.5 compared to 11.5).[21]

The New Brunswick *Provincial Offences Procedure for Young Persons Act* has been in force since 1987, and it establishes that "where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings should be considered for dealing with young persons who have committed offences."[22] Yet New Brunswick for many following years remained one of the worst in Canada in regard to incarcerating youth instead of diverting them to supports. The recent progress in New Brunswick points to what we hope will be a continued trajectory.

One can argue that recent improvement is in large part because we were very much laggards in this area until very recently, and also due to the fact that youth crime rates continue to fall. However, we have also begun to see new focus on addressing root causes of youth crime and providing social supports to prevent it. This attention to what works in youth crime prevention should be fostered, as it will pay great dividends to our Province over the long term.

Charge rates are being impacted due to greater use of police diversion of youth to community supports. The RCMP's introduction of its Youth Intervention and Diversion Program, the screening out of youth exhibiting mental health challenges, and the recent establishment of Community Program Officers (civilian community members hired by the RCMP to run programs that address youth crime) are undoubtedly all factors contributing to these declines. If the newly established Youth Justice Committees (comprised of community and government stakeholders who have vital roles under section 18 of the *YCJA*) play the role they are capable of New Brunswick will see even more progress in diverting youth to needed supports to end criminality.

Data found in sources such as the New Brunswick Child and Youth Rights and Wellbeing Snapshot (found in the Child and Youth Advocate's State of the Child Report) also point to some positive progress in the use of reintegration leaves and escorted leaves for youth in secure custody, as well as in the use of community sentencing.[23]

However, there remain many worrying statistics. For example, New Brunswick has seen steady progress for five years in numbers of youth in pre-trial detention, but the numbers remain much too high compared to best national practices. Again, British Columbia is more than six times our size in population, but its pre-trial detention numbers for youth are less than four times ours. Even more striking are the numbers from Newfoundland and Labrador. With a population 30%

[21] Statistics received from Newfoundland & Labrador Youth Center May 28th, 2015, and statistics received from the New Brunswick Department of Public Safety from its daily Population Count, CIS, April 27, 2015.
[22] Provincial Offences Procedure for Young Persons Act, SNB 1987, c P-22.2, s. 3(1)(d)
[23] Office of the Child and Youth Advocate, State of the Child Report 2014: 25 Years of Children's Rights, November, 2014.

smaller than ours, its youth pre-trial detention numbers are 72% lower.[24] Newfoundland has a Pre-Trial Services Program in its Saint John's youth court. This program provides supervision of youths to ensure their release conditions are being met, which provides the confidence the court needs to release youths back into their communities with supports as opposed to sending them into detention in the youth secure detention and custody facility while they await trial. Not only has this led to much lower pre-trial detention numbers, it has led to more community-based sentences (such as deferred custody and supervision) when youth return to court; under the Pre-Trial Services Program the youth court has the benefit of seeing what youths can achieve under supervision in their home communities, and therefore the court is more inclined to keep youths in their communities.

This is one of the primary areas where we continually run into frustration with the system in our Province – we send youth to the closed-custody and detention facility because we do not provide other safe places for them to be while they are waiting for a court date. Mixing low-risk, often first-time offenders with youth who have committed serious offences is a recipe for disaster. It increases the likelihood of low-risk youth becoming high-risk and falling into a pattern of repeat crime.[25] The term 'crime school' that is used to describe youth secure custody facilities is not hyperbole; kids learn from kids.

When youth are sent to the secure detention and custody facility while awaiting trial, they face stigma and they develop a poor self-image. Family connections are broken. Education is interrupted. Community supports are severed.

**"If things were different I wouldn't be here, but I don't have anybody looking out for me. It's just me.**

**Martin, 17 year-old youth on pre-trial detention at the closed-custody detention facility**

[24] Statistics Canada, CANSIM Table 251-0011.

[25] Tustin, Lee and Robert Lutes. A Guide to the Youth Criminal Justice Act, 2012 Edition. Markham, Ont.: LexisNexis Canada, 2011.

Those working in the system often comment that youth are sent to the youth secure detention and custody facility (NBYC) for minor offences, because there are insufficient supports in their communities. We see that the numbers of youth in pre-trial detention are lowering in New Brunswick, but we still see very young children being sent to NBYC on pre-trial detention. The number of fourteen year-olds on pre-trial detention in 2013-2014 was the same as in 2009-2010 (21 fourteen year-olds). The number of fifteen year-olds in 2013-2014 was more than in 2010-2011 (65 fifteen year-olds in 2013-2014). The number of sixteen year-olds was more in 2013-2014 than in 2009-2010 (79 in 2009-2010). The bright light is that there has been a huge drop in the number of thirteen year-olds having to await trial while detained at NBYC (down to only 2 in 2013-2014, from a high of 29 in 2010-2011). But no thirteen year-old or twelve year old (there was 1 in 2013-2014) should have to be in the frightening environment of the youth secure detention and custody facility while awaiting court.[26] It is worth repeating the point that the vast majority of youth crime consists of minor, non-violent offences. The youth crime rate as a whole has been in decline since the *Youth Criminal Justice Act* came into effect in 2003, dropping by 40% during the first decade.[27] The youth violent crime rate has also been in decline during that time.[28] Total violent crime by youth in New Brunswick declined by 18% between 2012 and 2013, and total youth crime declined by 21%.[29] Nevertheless, the late teens are a precarious time for many Canadians – the national crime rate peaks at roughly age 18, and then begins to decline.[30] Most cases brought to youth court involve charges under the Criminal Code. However, the *Youth Criminal Justice Act* does contain some additional offences. These offences under the *YCJA* relate to the administration of justice. Administration of justice charges are among the most common charges against youth.

The most common example of this kind of charge is breach of a probation order. These are sometimes orders which, for many reasons, prove too difficult for some youths to adhere to, such as attending school. Youths who "breach" are charged and brought back to youth court to face these charges. The Office of the Child and Youth Advocate (and anyone working in the youth justice system) sees such charges far too often, especially involving youth who have found themselves in vulnerable positions, such as youth taken into the child protection system. Such youth often come from difficult situations. Sometimes such youth are given up to government care by parents who do not have the means to provide a safe environment for them. Sometimes such youth come from situations wherein they have suffered physical and mental abuse or neglect at the hands of their parents. For too many of these disadvantaged youth, the youth secure detention and custody facility becomes a second home. These youth deserve our highest attention and care. Social workers and group home workers need to be highly aware of their

---

[26] Statistics Canada. *Table 251-0011 - Youth custody and community services (YCCS), admissions to correctional services, by sex and age at time of admission, annual (number),* CANSIM (database). (accessed: 2015-06-01)
[27] Statistics Canada, Juristat Article, "Police-reported crime statistics in Canada, 2013," July 23rd, 2014.
[28] Statistics Canada, Juristat Article, "Police-reported crime statistics in Canada, 2013," July 23rd, 2014.
[29] Statistics Canada, Juristat Article, "Police-reported crime statistics in Canada, 2013," July 23rd, 2014.
[30] Statistics Canada, Canadian Centre for Justice Statistics, Uniform Crime Reporting (UCR2) Survey, 2011.

ethical and moral obligations toward these children and advocate for them the way good parents would, to keep them out of the criminal justice system.

**"If I wasn't in a group home I wouldn't be here [incarcerated]."**

**Nick, 16 year-old male youth sentenced to three months at the secure custody facility for breach of sentence (running away from his group home)**

Statistics show that New Brunswick has finally begun to make real efforts in implementing the principles of the *Youth Criminal Justice Act*. However, there is still a great need for improvement. Youth admissions to correction services (i.e. admissions to pre-trial detention, sentenced custody, and community supervision) remain high. There were 939 such admissions in New Brunswick in 2013-2014, but only 334 in Newfoundland and Labrador.[31] We hope that police and prosecutors recognize their ability to divert youth *repeatedly if necessary* through Extrajudicial Measures and Extrajudicial Sanctions – these measures can hold youth accountable and be meaningful to the youth and proportionate to the offence; incarceration is not usually the best answer.

This section of the report considers various statistics such as the charge rate, but it must be noted that although we have data that point to problems in the youth criminal justice system in New Brunswick, available statistics do not paint the entire picture. Anecdotal evidence suggests problems we are not yet effectively tracking with relevant data. We hear the stories of youth and we know that their development is not being sufficiently supported to keep them out of a criminal justice trap. Perhaps the biggest problem the data shows is that there is a statistical silence – a great deal of information is simply not collected and analyzed. We do not know, for example, the number of youths charged who have learning disabilities, or cognitive disabilities

[31] Statistics Canada. *Table 251-0010 - Youth custody and community services (YCCS), admissions and releases to correctional services, annual (number),* CANSIM (database). (accessed: 2015-06-01)

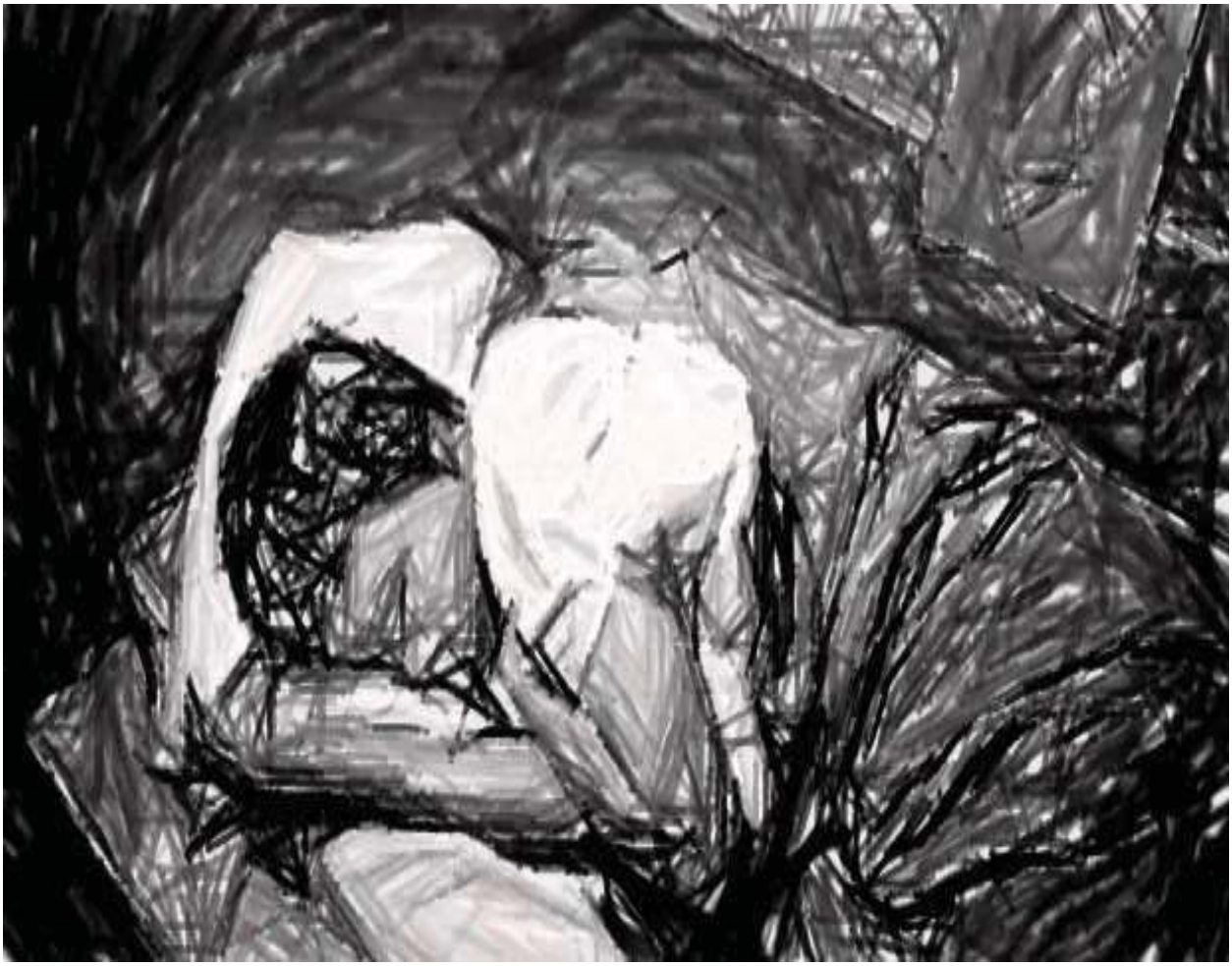
such as Fetal Alcohol Spectrum Disorder, or diagnosed mental health illnesses (nor undiagnosed, of course). We do not know how many youths are effectively homeless. We do not have enough information to provide a statistical picture of the root causes of youth crime. However, we know from what youth themselves and professionals involved tell us that many youth in the criminal justice system are affected by mental health issues, family breakdown, various disabilities, and histories of being victims of abuse. It is time to have all hands on deck and full Provincial commitment to creating a system that supports youth to stay out of jail.

The Provincial Diversion Steering Committee has become and we expect will continue to be an essential part of this commitment. We strongly urge government to ensure that the work of this Committee as well as that of the Roundtable on Crime and Public Safety as a whole translates into Departmental commitments.

# SECTION II

# FULLY IMPLEMENTING THE *YOUTH CRIMINAL JUSTICE ACT*

# (CREATING A YOUTH-FOCUSED JUSTICE SYSTEM)



# Section II – Part One

# Increasing Protective Factors and Diverting Youth away from the Criminal Justice System

## *A GUIDE TO LAW AND POLICY*

**Canadian society should have a youth criminal justice system that…reduces the over-reliance on incarceration for non-violent young persons…**

***Youth Criminal Justice Act*, Preamble**

Adolescents are in a stage of life characterized by rapid social, intellectual, neurological and psychological changes. The development of our brains continues into adulthood, and the prefrontal cortex, associated with rational decision-making and control of social behaviour, is the last part of the brain to develop. This process of development contributes to a lack of sophisticated discernment and less understanding of potential consequences of actions, and a certain impulsivity often associated with youth. In general, youths engage in risky behaviour to a greater extent than adults. They are neurobiologically wired to be more inclined to do so.[32]

The fact that youths are in this period of mental development provides the rationale as to why they are held to be less accountable morally in our society, and why we have a specialized justice

[32] See generally: Jetha, Michelle and Sidney Segalowitz. Adolescent Brain Development: Implications for Behavior. Oxford: Academic Press, 2012, esp. pp. 20-21.

system for youth. And this developmental uniqueness also points to why deterrence by punishment is less effective for youths than for adults.

## *A GUIDE TO LAW AND POLICY*

**"…[T]he principle of a presumption of diminished moral culpability in young persons is fundamental to our notions of how a fair legal system ought to operate."**

**Justice Abella, Supreme Court of Canada.**

***R. v. D.B.*, [2008] 2 S.C.R. 3, at para. 68.**

Most people working with youth inside and outside government understand the importance of provision of support rather than subjection to punishment. However, it must be said that there are some people (fortunately a minority) working with youth who believe that *not* charging a youth for illegal behavior will make the youth think that there are no consequences to his or her actions. Accountability is important, and indeed it is one of the principles of the *Youth Criminal Justice Act*. However, the *YCJA* is clear that "the youth criminal justice system is intended to protect the public by holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person."[33] Rehabilitation and reintegration into society, as well as addressing root causes of offending behavior, are also fundamental principles of the *YCJA*. Most often we meet with people in government working for youths who understand the issues. However, there are always those who succumb to simplistic and misguided approaches. As an example, the following is a quote to our office from a social worker assigned by the Department of Social Development to a youth with a tragic family background, now living in a government group home, who had repeated minor criminal behaviour (shoplifting and minor theft): "This is a youth we have worked with since the year of our Lord 2000, and my biggest concern has always been the police's failure to charge him."

[33] *Youth Criminal Justice Act* s. 3(1)(a)(i)

**"I knocked a dresser over at the group home, so that wasn't smart, but I was charged with an assault, and that's just not right."**

Michel, youth remanded to secure custody

As this report was being prepared for printing we heard from a judge who had a social worker suggest in court that a youth in her caseload should be sent to the secure custody facility to teach him a lesson. The judge would not hear of it and instead instructed defence and prosecution to come up with options other than custody. This is not the usual approach we see from social workers, the vast majority of whom are praiseworthy people working diligently for youths. It is also not an approach that the Department of Social Development's Child and Youth Services branch would support. We believe these are outlier situations, but we feel that such examples show the need for more training in youth criminal justice system issues. Youth in government care are already disproportionately overrepresented in youth detention and custody facilities nationally and have been for decades.[34]

There are unquestionably times when youth need the intervention of the criminal justice system and perhaps incarceration. However, these times are rare. The vast majority of youth who engage in crime should be diverted to support systems without court involvement. When people within government such as social workers who are meant to be working for youth do not understand the fundamental principles of the *YCJA*, nor the rights youth hold as reflected in the *Convention on the Rights of the Child*, they are not acting in the best interests of youth nor of our society.

The idea of punitive 'general deterrence' is appealing to some adults because it seems intuitively obvious that the threat of harsh penalties will lead to reduced offending. However, empirically-

[34] Corrado, Ray, Lauren F. Freedman and Catherine Blatier. "The Over-Representation of Children in Care in the Youth Criminal Justice System in British Columbia: Theory and Policy Issues," *International Journal of Child, Youth and Family Studies,* 2011.

based research studies in Canada have concluded that increasing the severity of penalties has no significant effect on reducing youth offending.[35]

Moreover, most youth crime does not warrant arrest, prosecution and incarceration because most youth crime involves non-violent offences, and these "correction" methods do not address the underlying root causes of the behavior.

The *Youth Criminal Justice Act* is very explicit about the importance of diversion away from courts and incarceration. So is the *Convention on the Rights of the Child*. A common complaint, though, is that there are insufficient support services to which to divert youth. Without support systems in community, youth will remain at-risk of falling into the trap of the criminal justice system.

## Youth are Uniquely Vulnerable

When youth are put on court-ordered conditions for bail or probation, they can be arrested and charged for breaching these orders by doing things that youth commonly do, such as skipping school, staying out past a court-appointed curfew, running away from a group home, and socializing with particular friends who may be negative peer influences. Obviously we would never suggest that these are good things for youth to be doing, but the question that has to be asked is whether these demands are setting youth up to fail.

Self-reporting studies of New Brunswick youth consistently find that a large proportion of them experiment with alcohol. Nearly a third of New Brunswick youths in grades six to twelve drink alcohol more than once a month.[36] Nearly a third of youths in those grades smoked marijuana within the last year.[37] Most youth are not caught or charged as a result of these behaviours, but for those that are, after one charge the charges of breaking conditions of the first charge begin to add up. If youth have been given up by or taken from their parents and placed under government care, probation orders become extra onerous. Group home workers sometimes call police when youth do things for which most children would be reprimanded or perhaps grounded by parents. Breaking furniture, swearing (not abiding by the rules of the home), and many more minor actions become reasons for a youth to be hauled back to court. In our experience, group homes are too often stricter and less forgiving than parental homes. However, it certainly also occurs that a group home worker will call the police when help is needed to de-escalate a situation, and

[35] See for example: Webster, Cheryl Marie and Anthony N. Doob, "Searching for Sasquatch: Deterrence of Crime Through Sentence Severity", in The Oxford Handbook on Sentencing and Corrections, Joan Petersilia and Kevin Reitz (eds.), Oxford, Oxford University Press, 2012, 173-195.

[36] Office of the Child and Youth Advocate, State of the Child Report 2014: 25 Years of Children's Rights, Appendix 1, The Children and Youth Rights and Wellbeing Snapshot 2014,, November 2014, .

[37] Office of the Child and Youth Advocate, State of the Child Report 2014: 25 Years of Children's Rights, Appendix 1, The Children and Youth Rights and Wellbeing Snapshot 2014,, November 2014.

the police visit ends up in charges to a youth when that was not the intention of the group home worker. Police need to work with group home staff while exercising restraint rather than proceeding with the heavy hand of the law.

Bail conditions can 'set youth up to fail' because youths rack up more and more criminal charges for breaching conditions. The more conditions and the longer the time being subject to conditions, the more likely a youth will accumulate more charges.[38]

**"We're kids. We shouldn't have to be treated like adults are…I don't understand how it works…It's not like I'm committing crimes 24/7, I'm just breaching over and over and over again."**

**Darlene, a fifteen year-old girl at NBYC**

All of this points to the need for early assessment of the risk of a youth falling into the youth criminal justice system, in order to provide needed interventions. There is no way to empirically predict criminal behavior, but risk factors and protective factors can be taken into account to assess the probability of criminal involvement. The goal of criminogenic risk assessment is not to label a youth as a future criminal, but to identify whether he or she requires some intervention to ensure he or she gets on the right track. Diversion away from the criminal justice system and toward supports that help a youth fully develop is imperative.

Early intervention can play an extremely effective part in crime prevention. Risk factors for involvement in crime include addictions, mental health issues, learning disabilities, poor attachment to school, lack of family attachment, and others. There also exist a wide range of 'protective factors' that help keep youth from committing crime.[39] For example, positive adult role models in family, school and community, pro-social peers groups, availability of support

[38] Sprott, Jane and Nicole Myers. "Set up to Fail: The Unintended Consequences of Multiple Bail Conditions," *Canadian Journal of Criminology and Criminal Justice*, 2011.

[39] McMurtry, the Honourable Roy and A. Curling. "The Review of the Roots of Youth Violence: Executive Summary," Government of Ontario, Queen's Printer, 2008.

services, and others.[40] We have seen much improvement in risk assessment in New Brunswick. As just one example, the RCMP (and its Community Program Officers) and probation officers use an excellent screening tool to assess criminogenic risk and aid in diverting youths to needed supports.[41] Successes seen in intervention approaches in recent years across Canada are to a significant degree attributable to the development of sophisticated risk assessment instruments.[42] As the Canadian Psychological Association has recommended, governments should invest in risk assessment and risk reduction programming to lower youth crime recidivism rates.[43] Accompanying such risk assessment, of course, must be supports and services that address the needs of these youths. It would be no surprise to those working in New Brunswick's youth criminal justice system that Canadian research has concluded that risk factors for youth reoffending "paint a picture of complex and disadvantaged youth who lack structure, support, and stability, and who require specialized, targeted interventions."[44]

## From Objects to Persons: Acknowledging the Rights of the Young

There is a societal shift toward an understanding of children and adolescents *with rights* and in need of special care due to their inherent human dignity and particular vulnerability.

The path toward the *Youth Criminal Justice Act*, with its emphasis on diversion away from courts and toward support services for youth, represents a progression in our society's understanding of youth behaviour and effective means of steering it in the right direction. It is important to note, though, that while the evidence base for the principles underlying the *Act* is founded on many years of solid research, and the *Act* is now twelve years old, in many ways it is only beginning to be comprehensively implemented in New Brunswick.

The slow transition to an evidence-based, rights-respecting youth justice system reflects the slow transition toward a view of children as people in their own right. Children and adolescents had been, in the not-too-distant past, regarded more as the property of their parents than as individuals with rights. This state of the law persisted from colonial times into the nineteenth

---

[40] Andrews, D.A. and James Bonta: The Psychology of Criminal Conduct, Fifth edition, Mathew Bender and Company, New Providence, New Jersey, 2010.

[41] Goge, R.D. and D.A. Andrews. "Youth Level of Service / Case Management Inventory."

[42] Corrado, Raymond, and Lauren Freedman. "Youth at Risk of Serious and Life-Course Offending: Risk Profiles, Trajectories, and Interventions, Research Report 2011-02," National Crime Prevention Centre. Ministry of Public Safety, Canada, 2011.

[43] Barbaree, Howard, A. Cook, K. Douglas, L. Ellerby, M. Oliver, M. Seto and J.S. Wormith. Canadian Psychological Association Submission to the Senate Standing Senate Committee on Legal and Constitutional Affairs, 2012.

[44] MacRae, Leslie, Lorne Bertrand, Joanne Paetsch &Joseph Hornick. "Relating Risk and Protective Factors to Youth Reoffending: A Two-Year Follow-Up," *International Journal of Child, Youth and Family Studies*, 2011.

century.[45] The lack of protection for those children who were abused and neglected led eventually to a societal shift towards a welfare-based approach in which children and adolescents were viewed as vulnerable and in need of state protection. This shift was ushered in by the *Juvenile Delinquents Act*, introduced in 1908. Prior to the *Juvenile Delinquents Act*, youth over the age of thirteen who committed crimes were held accountable in the same way as if they were adults.[46]

At the time of the *Juvenile Delinquents Act*, just as today, children were seen to have a lesser level of accountability than adults for crime. In an effort to shield youth from the stigmatizing effects of the adult criminal justice system, they underwent a different process than adults. However, youths were afforded few rights in this process. Children aged 7 to 15 could be prosecuted but were not allowed to have legal representation. Due process, standard rules of evidence and other legal protections were not afforded to them. The young person could be ordered by the judge to be sent to a 'training school' until the authorities felt he or she should be released. In essence, the rule of law was suspended in favour of the government and courts playing a parental protector (*parens patriae*) role. The basic idea behind the *Juvenile Delinquents Act* was to promote child welfare, but what all too often occurred was that a little bad parenting meant the youth would be shipped off to be 'corrected' in an institution and remain there until they reached adulthood.

The birth of the human rights movement following World War II led eventually to a new conception of children as individuals with inherent civil, political, economic, cultural and social rights.[47] The *Universal Declaration of Human Rights*, adopted in 1948, was followed in 1959 by the UN *Declaration of the Rights of the Child.* The major human rights treaties (the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*) followed in 1966 (coming into force in 1976).

In Canada, the *Constitution Act 1982* and its *Charter of Rights and Freedoms* ushered in a new era of human rights protection and consequently "it became increasingly difficult to justify the lack of legal rights for youth in conflict with the law, the use of indeterminate sentences, and the abuse of due process rights."[48] Two years after the introduction of the *Charter of Rights and Freedoms,* the *Juvenile Delinquents Act* was replaced by the *Young Offenders Act*. Suddenly, there was a notion in Canada that youth had rights in the criminal justice system.

---

[45] Covell, Katherine and R. Brian Howe. The Challenge of Children's Rights for Canada. Waterloo: Wilfred Laurier University Press, 2001.

[46] Denov, Myriam. "Youth Justice and Children's Rights," in A Question of Commitment: Children's Rights in Canada, Katherine Covell and R. Brian Howe, eds. Waterloo: Wilfred Laurier University Press, 2007, p. 157.

[47] Denov, Myriam. "Youth Justice and Children's Rights," in A Question of Commitment: Children's Rights in Canada, Katherine Covell and R. Brian Howe, eds. Waterloo: Wilfred Laurier University Press, 2007, p. 158.

[48] Denov, Myriam. "Youth Justice and Children's Rights," in A Question of Commitment: Children's Rights in Canada, Katherine Covell and R. Brian Howe, eds. Waterloo: Wilfred Laurier University Press, 2007, p. 158.

Under the *Young Offenders Act* youth had due process rights. The minimum age of criminal responsibility was raised from age 7 to 12. Both of these changes were very positive, but the system did not make a clear distinction between serious violent offences and less serious offences. The *Young Offenders Act* did not effectively promote alternative measures or other means of diverting youth away from jail. Consequently, under the *YOA* more than 75% of custodial sentences were for non-violent offences.[49] Things did not go well, giving rise, as we have stated, to Canada at this time having the highest rate of incarceration in the economically developed world,[50] and an incarceration rate in Canada twice that of the US.[51]

Five years after the coming into force of the *Young Offenders Act*, the UN *Convention on the Rights of the Child*[52] was adopted by the UN General Assembly. Canada ratified this treaty in 1991. A new era of protecting and promoting children's rights was underway in our country. In 2003, the *Young Offenders Act* was replaced by the *Youth Criminal Justice Act*.

The *Youth Criminal Justice Act* concentrates on integrating various areas of young peoples' lives including their mental health, education, and welfare, while placing emphasis on rehabilitation and reintegration. The *Act* is very much influenced by the rights enshrined in the UN *Convention on the Rights of the Child* and on evidence of what works best to lead youth away from crime.[53]

Reflecting Article 40 the UN *Convention on the Rights of the Child*, the *Youth Criminal Justice Act* promotes the idea that recourse to the formal criminal justice system should be avoided as much as possible for youth. One of the primary reasons for this is very simple. For the majority of youth, arrest, prosecution and incarceration all hold the potential for seriously negative side-effects, aggravating a mild condition and creating a major problem. When offenders who are at low-risk for repeat crime are subjected to intense criminal justice intervention or even to overly-intense Extrajudicial Sanctions it potentially creates high-risk repeat offenders. In custody, education is stunted, job prospects are lowered, youths associate with peers who are negative influences, and youths are stigmatized and feel branded as criminals; they can be corralled into a life of crime.

The *Youth Criminal Justice Act* creates clear distinctions between serious violent offences and less serious offences. It promotes the reduction of the use of custody so that the most serious

---

[49] Bala, Nicholas and Sanjeev Anand. Youth Criminal Justice Law, Second Ed. Toronto: Irwin Law Inc., 2009, p. 20.

[50] Caputo, Tullio and Michel Vallée. "Review of the Roots of Youth Violence: Research Papers Volume 4: A Comparative Analysis of Youth Justice Approaches," Ministry of Children and Youth Services, Government of Ontario, 2008.

[51] Bala, Nicholas and Sanjeev Anand. Youth Criminal Justice Law, Third Ed. Toronto: Irwin Law Inc., 2012, p. 21

[52] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

[53] Bala, Nicholas and Julian Roberts. "Canada's Juvenile Justice System: Promoting Community-Based responses to Youth Crime," in International Handbook of Juvenile Justice, Josine Jujnger-Tas and Scott Decker, eds. New York: Springer, Ltd., 2006.

interventions are reserved for the most serious crimes. It puts emphasis on rehabilitation. It provides means for effective reintegration of youth into the community and encourages supports that address the causes of their offending behaviour. To be effective in crime prevention, youth justice requires a holistic system that includes: child welfare; educational supports; mental health supports; knowledgeable police, lawyers and judiciary; and also family and community involvement.

## Extrajudicial Measures

Under the *Youth Criminal Justice Act,* diversion comes in the form of what are called Extrajudicial Measures (EJM). These include all measures outside the formal criminal justice system employed by police officers and prosecutors to deal with young persons in conflict with the law.

A Provincial Diversion Steering Committee has now brought together police and seven youth-serving government Departments to oversee a community-based approach to diverting youth away from courts and into supports. A Youth Diversion Model has been developed that in many respects emulates best practice nationally in youth criminal justice (and benefits from studies such as the review of Extrajudicial Measures and Extrajudicial Sanctions in New Brunswick conducted by Dr. Susan Reid[54]). It is based on evidence of what is most effective in reducing youth crime, and references the UN *Convention on the Rights of the Child*. It strives to provide consistency throughout the Province, something that has been sorely lacking. And it brings together stakeholders who for too long had been operating in silos. This model holds much promise, and if all stakeholders in the youth criminal justice system put it into effect then New Brunswick will surely see more improvements in the near future.

The least intrusive options for Extrajudicial Measures are warnings, cautions and referrals. When a youth has engaged in offending behavior, a police officer can decide to use his or her discretion to take no action. Alternatively, he or she could issue a police warning. A more formal avenue is to issue a police caution, which is issued by means of a letter to a youth and parents; while this appears to be more formal and serious than a verbal warning, the legal ramifications are no more serious – it is not punitive. At the time of this report going to print the Attorney General had not authorized a police cautions program as per section 7 of the *Youth Criminal Justice Act*, but we are assured that this is planned.

Similarly, a prosecutor can administer a Crown caution under section 8 of the *Youth Criminal Justice Act*, although we have not seen uptake of this option among New Brunswick prosecutors.

[54] Reid, Susan. "125 Warnings: A Review of Extrajudicial Measures and Extrajudicial Sanctions Related to Youth with Highly Complex Needs within the Criminal Justice System in New Brunswick," Department of Public Safety, New Brunswick, 2009.

The intent of this program, used in other provinces, is to *encourage* prosecutors to formally warn youths and then divert them from the justice system without charges. A program for Crown cautions is noticeably absent from the newly developed Youth Diversion Model. While there are certainly good reasons to focus Extrajudicial Measures on police actions rather than actions by Crown prosecutors, the Public Prosecutions branch has, in our opinion, historically not embraced the full potential of the *Youth Criminal Justice Act*. Developing guidelines on the appropriate use of Crown Cautions, preferably in consultation with the newly created Extrajudicial Sanctions Coordinator positions, would be another way for Crown prosecutors to play increasingly effective roles in diverting youth from courts and incarceration.

Police can also choose to refer a young person to a community program in order to address the young person's offending behavior. Police must have a young person's consent to refer him or her, but this can be an extremely effective means of addressing offending behavior before it gets out of control. The problem again, however, is that policing and corrections officials need to know which community resources exist nearby that youth may access. Often community programs do exist, but there is a lack of coordination between police, social workers, probation officers, schools and community programs to make these options available to youth in need. The newly established Youth Justice Committees, discussed later in this report, should help to make the necessary links.

It is very important to note that there is no limit to the number of times a youth can be diverted by use of Extrajudicial Measures. We are glad to see that the newly developed Youth Diversion Model makes this point, because in individual cases at the Office of the Child and Youth Advocate we have perceived a lack of consistency in EJM application, with some police seeing it as a valuable tool to use repeatedly for a youth but others seeming to take a 'two strikes and you're out' approach, charging youths after giving them one chance at EJM diversion. Studies have shown that when deciding whether to recommend charges or to divert a youth, police can be prone to place heavy weight on a youth's prior police contact. This can mean that minor, non-violent offending behaviour such as shoplifting and mischief can lead to a decision to charge a youth (subject in N.B. to prosecutors' screening of charges).[55] We believe that a shift is occurring among New Brunswick police to place greater emphasis on diversion from court, and we are optimistic that this progress will continue.

Diversion is to a large extent about wrapping community supports around youth at risk. Communities can support families, and together they have the moral and legal power to provide guidance to young people. This is the most effective means of crime prevention we have. Two particular means of community and family supports can be provided by Youth Justice Committees and Case Conferences, which are discussed further below.

---

[55] Marinos, Voula and Nathan Innocente. "Factors Influencing Police Attitudes towards Extrajudicial Measures under the Youth Criminal Justice Act," *Canadian Journal of Criminology and Criminal Justice*, July, 2008.

**Under the *YCJA*, all Extrajudicial Measures should be designed to:**

**Provide an effective and timely response to offending behavior outside the bounds of judicial measures;**

**Encourage youth to acknowledge and repair the harm caused to the victim and community;**

**Encourage the families of youth – including extended families where appropriate – and the community to become involved in the design and implementation of those measures;**

**Provide an opportunity for victims to participate in decisions related to the measures selected and to receive reparation; and**

**Respect the rights and freedoms of young persons and be proportionate to the seriousness of the offence**

## RECOMMENDATION

1. We recommend that police forces, the Office of the Attorney General and the newly established Youth Justice Committees work collaboratively to produce clear practice guidelines and protocols on the use of police warnings, police cautions, police referrals, and Crown cautions as part of a comprehensive and consistent system of Extrajudicial Measures.

# Section II – Part Two

# More Intensive Diversion Options (Extrajudicial Sanctions Programs)

A more intensive form of Extrajudicial Measures is called Extrajudicial Sanctions (EJS). Extrajudicial Sanctions are means of addressing the criminal behaviour of a young person when other Extrajudicial Measures are considered too lenient to hold the young person sufficiently accountable but prosecution is considered too severe. However, Extrajudicial Sanctions should not be an automatic response to youth offending. While these sanctions are less serious than prosecution, they still can have harmful consequences for youth. Under the newly devised NB Youth Diversion Model, the Extrajudicial Sanctions Coordinators screen youth for their level of criminal (criminogenic) risk, in order to determine what level of services is appropriate. This is imperative, as overly intensive sanctions or even 'services' can be counterproductive for youth who are at low risk of repeated involvement in crime.

When used in appropriate circumstances Extrajudicial Sanctions are very worthwhile. When a youth completes an EJS program, the Crown will have the charges dismissed without the youth returning to court. The youth must accept responsibility for the offence in order to participate in an EJS program, but statements regarding responsibility cannot be used as evidence against the youth in future proceedings. However, one problem with these Extrajudicial Sanctions programs is that youth may in effect be waiving their legal rights in a desire to get their situation over with, even if they have a valid legal defence. We therefore recommend some caution, because participation by a youth in an Extrajudicial Sanctions program can lead to problems down the road. If a youth is prosecuted for a later offence, then the court can receive evidence about the use of any Extrajudicial Sanctions in the previous two years and use that evidence in sentencing as a "pattern of offending."

An Extrajudicial Sanctions program can provide a very good opportunity for a youth to take responsibility for an offence, be accountable, and make reparations. Still, youth ideally would have access to legal advice before deciding to take part in one of these programs. The *Youth*

*Criminal Justice Act* does not provide a right to government-paid legal representation for decisions about participating in EJS. Under the new NB Youth Diversion Model, a youth must be informed of his or her right to consult with legal counsel before participating in EJS. However, that is not a right to have counsel provided at no cost under section 25 of the *YCJA*. In effect, it is a right for youth with families who can afford a lawyer. This lack of counsel adds to the need for police and prosecutors to be extra conscientious when deciding between less serious Extrajudicial Measures and more serious Extrajudicial Sanctions.

When the Child and Youth Advocate first contemplated undertaking a comprehensive review of the youth criminal justice system, the picture was very disturbing. New Brunswick had lagged behind for years compared to Canadian best practices in this area. This was especially true in regard to our Province's lacklustre performance in diversion through Extrajudicial Measures and Extrajudicial Sanctions. However, there has been the beginning of a significant shift recently, and we have seen New Brunswick beginning to achieve impressive successes. The new Youth Diversion Model (under the guidance of the Provincial Diversion Steering Committee, a collaboration between police forces and various government Departments) is a solid, evidence-based system. It holds great potential to continue New Brunswick's recent progress and make our Province a real leader in youth criminal justice best practices.

This model reflects the fact that for a sanction that best addresses the needs of individual youth, the involvement of a community Youth Justice Committee is most efficacious. These committees are addressed in the next section of this report.

# Section II – Part Three

# Keeping it in the Community: Youth Justice Committees

Communities can help to stop the conveyor belt to incarceration. To this end, the *Youth Criminal Justice Act* provides for the creation of Youth Justice Committees as a mechanism for allowing communities to help youth in trouble with the law. Youth Justice Committees are aimed at allowing community members, non-profit organizations, police and government services to work hand-in-hand.

These Committees provide community solutions to youth crime problems. They have two primary goals: (1) to build on the strengths of at-risk youth; and (2) to reduce the risk factors for repeat crime. By doing so, they help to keep youth out of the trap of the traditional justice system, and help to ensure community supports.

The Attorney General is sanctioned under section 18 of the *Youth Criminal Justice Act* to be able to officially designate Youth Justice Committees. We have been advocating for the creation of these Committees for several years. It has taken a decade for these to be created, and we have often looked in exasperation and envy at other Provinces that utilized this aspect of the *YCJA* (Alberta, for example, has over 100 of these committees). Youth Justice Committees had started operating two months prior to this report going to print. It remains to be seen whether these Youth Justice Committees will be utilized to their maximum potential. We have already heard stories about difficulties getting representatives from certain government Departments to participate in Youth Justice Committees. We have heard anecdotally about a mixed response to the use of these new Committees – some Extrajudicial Sanctions Coordinators in the Province are calling meetings of these Youth Justice Committees, while others have not yet deemed this to be necessary. We hope that this essential resource with its ability to bring diverse professionals together to address root causes of youth crime does not go underused.

**Some of the primary functions of a Youth Justice Committee include:**

- **Giving advice to the police or Crown counsel on the appropriate extrajudicial measure to be used in respect of the young person**
- **Convening and acting as a case conference in a given case**
- **Supporting any victim of the alleged offence by soliciting his or her concerns and facilitating the reconciliation of the victim and the young person**
- **Enlisting the support and involvement of the community and community groups in the rehabilitation of the young person; ensuring that community support is available to the young person by arranging for the use of services from within the community, and enlisting members of the community to provide short-term mentoring and supervision**
- **Tailoring responses and measures to the individual youth's needs and circumstances.**
- **Helping to coordinate the interaction of social services and community groups within the youth criminal justice system**
- **Coordinating the efforts of schools, social workers and other relevant stakeholders.**
- **Monitoring youth justice services and advising governments as to whether young person's rights are being respected**
- **Giving advice to government on youth criminal justice policy in general**
- **Educating the public with respect to the YCJA and youth criminal justice matters**

Although there had been until recently no official Youth Justice Committees in our Province, in a vacuum of care, people did step in, particularly over the past four years, to fill the void as much as they could. This occurred in New Brunswick, largely at the prompting of the RCMP (through Community Program Officers) and of certain municipal police forces, where groups formed to act as *ad hoc* committees that function in ways similar to Youth Justice Committees.

The Office of the Child and Youth Advocate has been very encouraged by the institution of RCMP Community Program Officers (CPOs) in New Brunswick. These CPOs are civilian members of the RCMP who deliver crime prevention programs and create new ones where there is a gap in service delivery. CPOs form connections in our communities and provide a timely, informed, meaningful and appropriate response to youth justice issues. In the areas of the Province that have municipal forces instead of RCMP, community police officers, have played a similar role. We have seen the beginnings of an organization-wide shift toward community ownership of crime prevention activities, and the RCMP and municipal police forces supporting those activities. We now see that under the Province's new Youth Diversion Model, CPOs play

the role of Extrajudicial Sanctions Coordinators in many areas across the Province. In areas that have municipal police forces instead of RCMP, the Department of Public Safety has been contracting with community agencies such as the John Howard Society to fill the Coordinator roles. This is all excellent progress.

The advantage of officially sanctioned rather than ad hoc Youth Justice Committees is that they provide a stable source of community expertise in youth justice matters and they have broad mandates and functions to operate in a way that integrates the work of many different actors in the youth justice system. Moreover, official sanction to Committees can make government employees more comfortable with joining and sharing information, with formal protocols addressing confidentiality requirements of the *YCJA*..

We expect these new Committees to convene case conferences in order to provide an opportunity for a wider range of perspectives, more creative solutions, better coordination of services, and increased involvement of young persons, the victim and other community members. For youths who are at high risk for criminal activity, the recently created Youth Diversion Model *requires* EJS Coordinators to convene a Youth Justice Committee meeting. Again, we are seeing great changes taking place with a multidisciplinary approach being led by the Department of Public Safety.

We are especially pleased that the new Youth Justice Committees have been developed to coordinate with the existing Integrated Service Delivery (ISD) teams that are operating in schools (teams including social workers, school psychologists, clinical coordinators and behaviour intervention mentors link children and youths to appropriate services and ensure 'wraparound' services involving the community, school, family, and other supports as necessary). The government has promised to roll-out the ISD model to all of New Brunswick by 2018. Combining the work of Youth Justice Committees and Integrated Service Delivery teams will help to ensure that where vulnerable youth come into conflict with the law they are diverted to strength-based community intervention programs and supports to avoid further criminal behaviour. Child and youth policy in New Brunswick must work with the developmental assets of every child, and identify children and youth at risk from a young age. Where Integrated Service Delivery teams exist in schools, they will be part of the Youth Justice Committee and will assume a case management role.

The goals of each Youth Justice Committee and those administering the services are to identify the youth's strengths, build upon those strengths, reduce the youth's risk factors, reconnect the youth with positive links within the community and, when warranted, negotiate an appropriate way for the youth to make amends for his or her actions. For young people in conflict with the law, Youth Justice Committees can provide many benefits. They provide a more timely reaction to their offending behaviour. They also provide an opportunity to connect with support and services, to be linked with positive mentors, and to reconnect with community. They provide an opportunity to take responsibility in a serious and honest way, and, when appropriate, an

opportunity to "make it right" with the person harmed by acknowledging responsibility and doing whatever is reasonable and possible to make amends. They provide an opportunity for youth to fully participate and to understand the process. Teens do not understand court – sending them through that process does not, in most cases, serve a corrective purpose. Court is confusing and youth should normally not be there. These Youth Justice Committees can help to keep youth out of the 'sticky' system of incarceration and be part of a process that is meaningful to youths. The newly created Extrajudicial Sanctions Coordinators positions can be an important mechanism for ensuring the rights of youths to have their voices heard and given due weight (as per Article 12 of the UN *Convention on the Rights of the Child*).

For communities, these Youth Justice Committees provide an opportunity to assume some responsibility and control in a youth's developmental path. They lead to an increased likelihood of deterrence from further harmful behaviour through building youth's protective factors, reducing their risk factors, and by having them take direct face-to-face responsibility for their actions. Moreover, court is costly to taxpayers. So is custody. A timely and effective intervention by an alternative process can save scarce resources, both in the short-term and the long-term. All crime prevention measures are cost-saving measures. It should also be noted that Youth Justice Committees can play an integral role in working with municipal governments in developing youth crime prevention investments. Excellent resources exist to guide in the important aspect of municipal involvement in youth crime prevention.[56]

It is also important to stress that special care must be taken to ensure cultural appropriateness when working with First Nations youth.[57] Our office has emphasized that Youth Justice Committees in areas that include First Nations communities should have an Elder as a permanent member of the Committee. It is therefore very good to see that under the newly devised NB Youth Diversion Model, inclusion of a representative First Nations is mandatory when a Youth Justice Committee is convened in a case involving a First Nations youth.

Not all criminal conduct by youths will be suitable to be transferred to a Youth Justice Committee. Some illegal conduct by youths will result in only a police warning, rather than referral to a Youth Justice Committee or to the Attorney General's Public Prosecution branch for screening of a criminal charge. Many youthful indiscretions should be handled with an informal or formal police warning. However, if the nature of the alleged offence poses serious or definite risk to the safety and well-being of the community, police and prosecutors may decide to put the youth through the process of the formal court system.

When a youth proceeds through the traditional justice system and is either found guilty or pleads guilty, a Youth Justice Committee can still play a role. For many years already the Department of Public Safety has had an underused protocol for using case conferences for the purposes of

[56] See for example: Institute for the Prevention of Crime. "Making Cities Safer: Action Briefs for Municipal Stakeholders," University of Ottawa, 2009.
[57] See Section 3(1)(c)(iv) of the *Youth Criminal Justice Act*.

sentencing. We hope that community Youth Justice Committees will help ensure that case conference processes be used much more frequently in the future as the normal route in defining appropriate sanctions and rehabilitation plans for young offenders.

We understand that the youth criminal justice system begins with the exercise of police discretion to charge. We want police to continue to increasingly exercise that discretion. We understand further that the prosecutorial function belongs with the Attorney General's Public Prosecutions Services branch in our Province, and that the ultimate decision to proceed with a charge resides with that office. However, a fair and purposive interpretation of the *Youth Criminal Justice Act* commends us to the view that police and prosecutors are accountable to local communities in the exercise of their functions and that it is well within the functions of Youth Justice Committees to raise questions and give advice to government regarding a decision to proceed with formal charges in cases where Youth Justice Committee members believe that Extrajudicial Sanctions should be used. That is part of the Committees' mandate, and their terms of reference should explicitly outline how Committees can exercise the monitoring and compliance function intended in paragraph 18(2) (b) and (c) of the *Act*. Conversations we have had with people involved in the newly created Youth Justice Committees have led us to have concerns that there is as yet a lack of understanding among all stakeholders regarding the full mandates of these Committees under the *Youth Criminal Justice Act*.

When it is determined by a court that a custodial sentence is required, the community Youth Justice Committee may still provide support to the youth following their release. The Youth Justice Committee may be called upon to assist a probation officer in revising or implementing an individual youth's case plan or connecting the youth to existing services and programs in the community. This may include assistance in securing volunteer work, in helping a youth become involved in an extracurricular activity, in transitioning effectively back into the classroom or into his or her family environment, or extending other available resources to the youth.

The last third of a youth custodial sentence is normally spent by the youth in the community under conditions. To effectively reintegrate a youth back into the community during this stage, the family and community members must be engaged. Youth Justice Committees can play an essential role in coordinating and facilitating this engagement. Again, Youth Justice Committee members should be encouraged to solicit and listen to the views of youths and their families.

## RECOMMENDATION

2. The Department of Public Safety and the Office of the Attorney General should promote the use of Youth Justice Committees to their full mandate under the *Youth Criminal Justice Act*. Youth Justice Committee functions should include: providing advice to Crown prosecutors and police concerning Extrajudicial Sanctions; offering suggestions to Court regarding appropriate sentencing; advising government on youth justice policy; and helping to coordinate the efforts of schools, health workers, social workers and others within Integrated Service Delivery.

# Section II – Part Four

# Finding Solutions Together: Case Conferences

A youth justice case conference is comprised of a group of people who are convened to give advice concerning a young person in trouble with the law. Section 19 of the *Youth Criminal Justice Act* provides for these youth justice case conferences. These conferences may be convened by police officers, youth court judges, probation officers or prosecutors. We have been invited by probation officers and police to participate in them. There were 203 youth corrections case conferences convened in 2013.[58] But we do not see them being convened by prosecutors. Some people working in the justice system view them positively, some do not. If not structured well, they are of limited use. A good case conference is not a one-off; issues must be followed up on. We have occasionally heard comments from probation officers to the effect that case conferences are a burden on their time. It is undeniably true that case conferences can take some time to set up and to follow up on (again, having new officially sanctioned Youth Justice Committees should help greatly in this regard). However, case conferences inevitably reduce the time burden on probation officers, police, prosecutors, sheriffs who transport youth in the justice system, and corrections officers who work with incarcerated youth. Youth move away from criminal activity when they have supports in place. When a youth slides into a life of crime, the burden on our resources, both time and money, far outweigh the investment in case conferences.

[58] Government of New Brunswick, Department of Public Safety.

## *A GUIDE TO LAW AND POLICY*

**Youth Criminal Justice Act, s. 19.**

**(1) A youth justice court judge, the provincial director, a police officer, a justice of the peace, a prosecutor or a youth worker may convene or cause to be convened a conference for the purpose of making a decision required to be made under this Act.**

**(2) The mandate of a conference may be, among other things, to give advice on appropriate extrajudicial measures, conditions for judicial interim release, sentences, including the review of sentences, and reintegration plans.**

Case conferences began to occur in New Brunswick even in the absence of any Youth Justice Committees officially sanctioned by the Attorney General. An advantage of Youth Justice Committees, though, is that they provide a stable source of community expertise in youth justice matters and they have broad mandates and functions to operate in a way that integrates the work of many different actors in the youth justice system. Case conferences held by Youth Justice Committees provide an opportunity for a wider range of perspectives, more creative solutions, better coordination of services, and increased involvement of the victim and other community members.

## A Youth's Story from our Files

### Case Conferencing Works

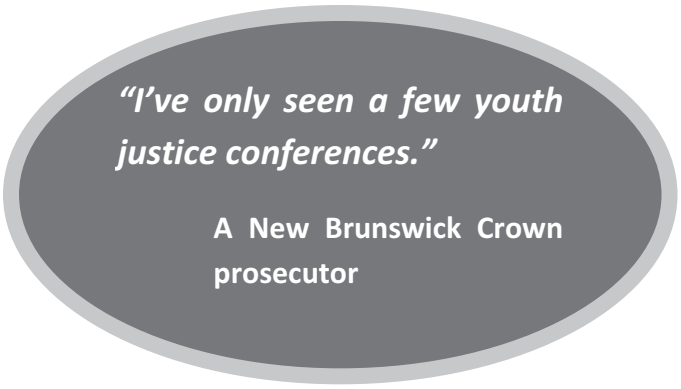
**The power of case conferencing can be seen in the example of Kevin, a teenager who was serving time at the youth secure custody facility. Kevin's probation officer convened a case conference and invited us. Kevin's mother and grandmother participated, as did Kevin. Mental health and addictions counseling was set up. A School District representative attended and got Kevin enrolled in an alternative education program so that he could graduate high school and acquire some job skills**

**at the same time. A support worker (mentor) was provided by the Department of Public Safety to accompany Kevin on trips from the detention centre into his community, to help with his eventual reintegration. A community-based organization set Kevin up with a professional mentor to give him some guidance in engine repair, an interest of Kevin's. With supports in place, Kevin completed the terms of his probation, got a job and gained self-confidence and resilience enough to overcome the recent death of a family member without descending back into addictions. This was an excellent example of how the system should work.**

Case conferences provide an alternative process to the traditional criminal justice prosecutions function. They are aimed at providing better opportunities to youth for rehabilitation, victim-offender reconciliation, accountability and restitution. They also provide a mechanism for connecting youth with services that will enhance pro-social protective factors and further reduce any risk of future offending. To uphold their duties to the proper administration of justice and to further the safety of society, those working in the field of youth criminal justice should invest wholeheartedly in this process.

Crown prosecutors need to be provided training to support their role as promoters of Crown-convened case conferences. These conferences can be used to provide information and recommendations to prosecutors in regard to Extrajudicial Sanctions or to judges in regard to sentencing. A conference may be called to give advice on appropriate Extrajudicial Sanctions, conditions for judicial interim release, sentences, including the review of sentences, and reintegration plans. These conferences can even be used after a finding of guilt in court, in which case they would be used to provide advice to the judge on sentencing options. Section 41 of the *Youth Criminal Justice Act* provides for case conferences to be convened by judges. Bringing the community into the court process in a youth-focused manner can reap huge benefits. A judge in youth court can call a conference and preside over it, or refer a matter to a case conference without taking part, with the intention that the conference will provide the judge with recommendations on appropriate sanctions. Legal Aid lawyers for youth need to be aware of available resources and programs, and to help suggest options for conferences.

Crown Prosecutors, in a liberal and purposive application of the *YCJA* should, in our opinion, be leading the charge in promoting case-conferencing and reserving traditional prosecution mechanisms for only the most serious youth offenses.




***Restorative Justice***

Youth justice case conferences in many areas in Canada typically have an emphasis on restorative justice, based on Indigenous traditional responses to crime. Restorative justice consists of responses that involve the offender and his or her family members, the victim, and various community members in a process of discussion about the offence and its effects. Restorative justice approaches are also aimed toward developing a plan to recompense the victim and prevent recurrence of offending behaviour. Restorative justice is essentially about building relationships and reintegrating the offender back into being a responsible member of the community and of society at large – reflecting the essential principles of the *Youth Criminal Justice Act* as found in section 3 of this *Act*. As stated by Chief Justice Drapeau of the New Brunswick Court of Appeal: "Section 3 is not a collection of pious wishes."[59] Actions taken by all actors in the youth criminal justice system should reflect these principles, and restorative justice can play an essential role.

However, we have not seen enough of this outside of First Nations contexts in New Brunswick. The use of restorative justice in Elsipogtog First Nation is a great example of such an initiative in New Brunswick. There, the community has taken on a greater role in the administration of justice after consensus was built among the community regarding the most appropriate response to crime. The Elsipogtog Restorative Justice Program has been convening sentencing circles since 2010, in which victim and offender reconciliation occurs in a community-based and traditional forum.

Discussions with Elsipogtog First Nation, the Attorney General, the Departments of Justice, Health, and Public Safety, along with the Legal Aid Services Commission, have also led to an agreement to create the Elsipogtog Healing to Wellness court. This court system is based on a therapeutic model with Aboriginal cultural aspects such as the use of sweat lodges. The court is supported by a treatment and healing team that works with offenders over extended periods, and First Nations elders work alongside medical and mental health professionals.

[59] *R. v. L.R.P.,* [2004] N.B.J. No. 544, at para. 3.

These are excellent initiatives, but remain relatively uncommon in New Brunswick, even in First Nations communities. Still we look jealously at other areas of the country, including our neighbours in Nova Scotia, where restorative justice is used to a far greater degree and to great effect within the youth criminal justice system.[60] These experiences have shown that restorative justice can play an impactful role in youth justice – a role we have not generally incorporated into our youth system in New Brunswick. As one of the founders of Winnipeg's restorative justice program has stated regarding their success: "we operated outside the mainstream justice system and so we were free to design processes that dealt with the underlying reasons why youth offended."[61] This ability to address the root causes of youth crime is one of the most powerful aspects of restorative justice.

It is difficult to empirically measure the impacts of restorative justice approaches. However, Canadian and international studies have shown some reductions in recidivism rates through restorative justice programs.[62] They provide greater accountability because the youth agrees to face his or her victim and hear about the impact the youth's actions have had. Restorative justice processes also provide opportunities for more meaningful restitution from the youth to the victim. It must be said that these approaches will not be appropriate in all youth justice cases. For example, youth with mental health disorders will often not benefit from restorative justice – they need clinical treatment. Also, where the alleged victim is not emotionally or psychologically prepared to participate, restorative justice approaches are not appropriate. But when appropriately used, these approaches can "return some power to control the situation to the actors involved while reducing the costs of processing through the criminal justice system" – a far more outcome-effective and cost-effective process than the standard prosecutorial route.[63]

It is very encouraging to see reference to restorative justice in the new NB Youth Diversion Model. There will be much work to be done in order to build up capacity to incorporate restorative justice approaches with trained facilitators, but we strongly recommend that this investment be made.

---

[60] See for example: Archibald, Bruce and Jennifer Llewellyn. "The Challenges of Institutionalizing Comprehensive Restorative Justice Theory and Practice in Nova Scotia," *The Dalhousie Law Journal*, 2006; Randy Munro. "Nanaimo Restorative Justice Program," *Journal of the Institute of Justice International Studies*, 2006. Megan Stephens. "Lessons from the Front Lines in Canada's Restorative Justice Experiment: The Experience of Sentencing Judges," *University of Queen's Law Journal*, 2007-2008; Tomporowski, Barbara, Manon Buck, Catherine Bargen and Valerie Binder. "Reflections on the Past, Present and Future of Restorative Justice in Canada," *Alberta Law Review*, 2010-2011.

[61] Quoted in: Maynard, Robyn. "Incarcerating Youth as Justice? An in-depth examination of youth, incarceration, and restorative justice, *Canadian Dimension*, Sept/Oct 2011.

[62] See, for example: Latimer, Jeff, Craig Downden and Danielle Muise, "The Effectiveness of Restorative Justice Practices: a Meta-Analysis, *The Prison Journal*, Vol. 85, No. 2, June 2005, pp. 127-144. See also: Bonta, J., Wallace-Capretta, S., Rooney, J., & McAnoy, K. (2002). An outcome evaluation of a restorative justice alternative to incarceration. *Contemporary Justice Review, 5,* 319-338.

[63] Alvi, Shahid. Youth Criminal Justice Policy in Canada: A Critical Introduction. New York: Springer Ltd., 2012.

Promoting restorative justice approaches to case conferences is part of an overarching goal of strengthening the role of families and communities in New Brunswick under the *Youth Criminal Justice Act.* The *YCJA* was premised in large part on the history of youth criminal law in New Zealand. In the 1980s, New Zealand, like Canada, had a very high youth crime rate and a very high rate of youth incarceration. Today New Zealand's rates on both scores are among the lowest in the economically developed world. New Zealand has seen youth offences decline by nearly two-thirds, and they achieved this in large part by placing ownership and responsibility for addressing problems of youth violence and delinquency where it squarely belongs: with parents, families and relations through Family Group Conferencing, modelled on restorative justice.[64]

This version of case conferencing involves the youth and his or her extended family, friends and community supporters who work together to develop a plan for the youth. In New Brunswick we have seen significant social and fiscal benefits from an increased investment in Family Group Conferencing in our Child Protection system. By following New Zealand's model and putting families in charge of the solutions to child protection concerns, the Department of Social Development has been able to reduce the rate of placement of children in government care and foster care, realizing savings in public expenditure on these services. Savings have been redirected from foster care and guardianship services to other more proactive services to families in need. These successes have led the Department to expand its use of Family Group Conferencing. The Family Group Conferencing process reinforces relationships that matter and achieves true accountability with lasting impacts in cases where traditional criminal justice approaches have been proven to fail. Family Group Conferencing is possible in the youth criminal justice context under section 19 conferences in the *YCJA*. This can provide a community and family focus on youth crime issues. In a 2011 survey of staff, volunteers and board members in the Nova Scotia Restorative Justice program, Family Group Conferencing was seen as the most restorative practice.[65]

[64] Mulligan, Steve. "From Retribution to Repair: Juvenile Justice and the History of Restorative Justice," *University of La Verne Law Review*, Vol. 31:1, 2009-2010.

[65] Crocker, Diane and Rebecca Craig (2011) Results from a Survey of Staff, Board and Volunteers of the Nova Scotia Restorative Justice Program. Unpublished report produced for the Nova Scotia Restorative Justice-Community University Research Alliance (NSRJ-CURA), Halifax, NS. Available at: http://www.nsrj-cura.ca/publications

# A Youth's Story from our Files:

## Are we Helping or Handcuffing?

**Kathleen is a sixteen year-old girl with low self-esteem whose parents requested that the government take over parental responsibility for her. She was placed in a group home. Kathleen acted out, as often happens with youth moving through these periods of personal turmoil. She was then caught shoplifting twice, and from the charges springing from these events she was put on probation while awaiting her court date. While on probation, she began to run away from her group home, which led to charges of breach of probation. She missed a court date, which led to more charges. It is a common story, one or two incidents leading to probation orders that are inevitably breached and then the charges multiply rapidly. It is a sure-fire way to point youth in the direction of incarceration.**

**However, Kathleen's Social Worker stepped in and the Department organized a Family Group Conference. Kathleen participated in the conference, voicing her opinions and working collaboratively on a plan to keep her out of the secure detention and custody facility and in school. The session demonstrated the power of community and family coming together to create a new path for a youth. Unfortunately the session also demonstrated how the criminal justice system in many ways acts as an obstacle to the ability of communities and families to provide support – Kathleen was accompanied by two guards during the entire Family Group Conference and still she was forced to remain in leg shackles and handcuffs during the session. We need to build their resilience and strengthen youths' self-worth, not shackle them in front of their family.**

**This sixteen year-old girl trying to participate in an event to put her life in order was lifting her chained hands up to a whiteboard to write suggestions to turn her life around. That image presents a stark reminder why youth justice should not be approached as a corrections issue as it presently is in New Brunswick, but rather should predominantly be approached as a community and social services issue.**

New Brunswick's *Provincial Offences Procedure for Young Persons Act* has since 1987 provided that "young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them."[66] However, this legislated provision has to date largely rung hollow in practice. The new Youth Justice Committees can be a major force to change this, and provide for the right to youth voice, especially through Family Group Conferencing and restorative justice processes.

## RECOMMENDATION

3. The Department of Public Safety and the Office of the Attorney General should provide training on effective use of case conferencing for defence counsel, Crown prosecutors, probation officers, police and judges, to provide for a fulsome application of case conferencing under section 19 of the *Youth Criminal Justice Act*. They should also provide the means for Youth Justice Committees to build capacity for Restorative Justice practices.

[66] Provincial Offences Procedure for Young Persons Act, SNB 1987, c P-22.2, s. 3(1)(e)

# Section II – Part Five

# Prosecutorial Due Diligence: Crown Screening of Youth Charges

If a police officer has decided not to use his or her discretion to divert a youth prior to charges, prosecutors can still do so. Prosecutors (Crown counsel) can refer youth justice cases to Extrajudicial Sanctions after charges have been laid, or they may do so before deciding to lay charges. Crown counsel have been receiving training recently on the newly developed Youth Diversion Model, and we expect that they will be more inclined to divert youth within this welcome new process. In New Brunswick, Crown prosecutors screen all adult and youth cases prior to charges being laid. We are one of the few Provinces that have this laudable system. However, we believe that to be most effective, the screening of charges for youth should have a comprehensive youth focus.

The *Youth Criminal Justice Act* is meant to create a separate justice system for youth, and section 23 of the *Act* provides for the establishment of a pre-charge screening tool. Section 23 provides a 'quality control' function under the *Act*, to ensure that Extrajudicial Measures and Extrajudicial Sanctions are routinely used to divert youth away from the 'charge-prosecute-incarcerate' sequence.

However, we have heard the complaint from several members of the criminal defence bar and from probation officers and various youth workers that at times insufficient consideration is given to the importance of diversion in Crown screening of charges. Due to the lack of a measurement system for Crown screening, we have no way of empirically assessing the accuracy of this concern, but our office has noted a distinct lack of consistency across the Province in the application of Crown screening in youth cases.

The charge screening process of youth cases should also have a means of monitoring and measurement to ensure consistency across the Province. The criteria applied by prosecutors in deciding whether or not to proceed with a charge is that there is credible evidence of the offence and it is in the public interest to proceed. At the present time there is no regular measurement aspect of the charge screening program, and the discretion vested in prosecutors to determine whether it is in the public interest to proceed with charges can potentially lead to a lack of consistency.

Furthermore, we note that the Public Prosecution Operation Manual contains only two sparse pages dealing with youth criminal justice. More than half of the word count on those two pages deals with a part of the *Youth Criminal Justice Act* that was repealed in 2012 and which had been found unconstitutional by the Supreme Court back in 2008.[67] The youth criminal justice section of the Public Prosecution Operation Manual is outdated and does not provide comprehensive information to guide prosecutors in youth criminal justice cases.

The remaining part of the Manual does speak to the importance of the principles of the *YCJA*, but provides little detailed guidance. Other than a note regarding a youth's right to have counsel paid for by the Attorney General, the Manual includes only the following information:

> **Introduction**
>
> Crown Prosecutors dealing with young persons appearing before the Youth Justice Court must at all times act in accordance with the Declaration of Principle found in section 3 of the Youth Criminal Justice Act.
>
> The ***purpose*** of this guideline is to reinforce the concept that the criminal justice system for young persons must be separate from that of adults and that the Act must be liberally construed to ensure that young persons are dealt with in accordance with the Declaration of Principle.
>
> **Extrajudicial Sanctions**
>
> In considering Extrajudicial Sanctions for young persons, Crown Prosecutors must not only keep in mind the general Declaration of Principle found in section 3, but also the Principles and Objectives found in section 4.
>
> Crown Prosecutors are strongly encouraged to support the full use of Extrajudicial Sanctions for young persons in appropriate cases.

[67] Section 63 of the *YCJA* was repealed by legislative amendments in 2012, but this section of the *Act* had already been found in 2008 by the Supreme Court of Canada to be a violation of the *Charter of Rights and Freedoms*. The provision had placed the onus on youth to prove that a youth sentence was warranted instead of an adult sentence for certain offences. The Court held this provision to be a violation of section 7 of the *Charter*, as young people are presumed to have less moral blameworthiness. See: *R. v. D.B.*, [2008] 2 S.C.R. 3.

This is important information for prosecutors to have, but it is not the comprehensive guide we would want to see in the Public Prosecution Operation Manual. A noted shortcoming of the *Young Offenders Act*, the legislation that preceded the *Youth Criminal Justice Act*, was that there was no structured guidance for Crown prosecutors with regard to diversion.[68] In New Brunswick, Crown prosecutors will be receiving training under the newly developed Youth Diversion Model, but structured guidance on Crown screening is also essential.

In order to better respect the *Youth Criminal Justice Act* and ensure a distinct youth-focused process, we believe that the Attorney General should develop more detailed guidelines for pre-charge Crown screening of youth cases. This screening should incorporate principles and standards found in the *Youth Criminal Justice Act*, the *Convention on the Rights of the Child*, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, and the United Nations Guidelines for the Prevention of Juvenile Delinquency. Separate criteria and considerations must apply to a *Youth Criminal Justice Act* screening process, with regard to youth-specific needs. All matters proceeding under the *YCJA* should be screened only by Crown prosecutors specially trained in respect to the principles and provisions of the *YCJA*. And the screening program should undergo regular evaluation to measure efficacy and consistency.

## RECOMMENDATION

4. The Attorney General should develop a process with detailed guidelines for youth-specific pre-charge screening by specially trained Crown counsel. This screening should incorporate principles and standards found in the *Youth Criminal Justice Act*, the *Convention on the Rights of the Child*, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, and the United Nations Guidelines for the Prevention of Juvenile Delinquency. The charge screening process of youth cases should have a means of monitoring and measurement to ensure efficacy and consistency across the Province.

[68] Marinos, Voula and Nathan Innocente. "Factors Influencing Police Attitudes towards Extrajudicial Measures under the Youth Criminal Justice Act," *Canadian Journal of Criminology and Criminal Justice*, July, 2008.

# Section II – Part Six

# Mental Health Supports for At-Risk Youth

Mental health disorders and youth criminalization unfortunately have long gone hand-in-hand in North America.[69] New Brunswick unfortunately fits this paradigm. Without adequate diagnosis and treatment, mental health and addictions issues put people at risk of being repeatedly caught in the criminal justice system.[70] Diagnosis and treatment in New Brunswick remains a challenge.

Seven years after the Child and Youth Advocate's *Connecting the Dots* report, there remains only one hospital in the entire Province that has a dedicated adolescent psychiatric unit.[71] This unit is in the Moncton Hospital and has a capacity of six beds. When those beds are full, children and youth across the Province with severe mental health disorders are left in the hands of family or care workers, or, as we see time and again, are left to the criminal justice system to scoop them up.

These youth need mental health services, not correctional services. It is a terrible thing for youth with complex needs to be subjected to the criminal justice and corrections system. These youth should be diverted away from the formal justice system and into support programs.

Certainly New Brunswick has seen progress in dealing with these issues since the *Connecting the Dots* report. As an example, the Department of Health collaborates with the Departments of Education and Early Childhood Development, Public Safety, and Social Development in a Provincial Youth Treatment Program. This program provides services to at-risk youth who have a diagnosis of conduct disorder. Youth Treatment Program services include a clinical provincial outreach team that works in coordination with multi-agency regional teams. As part of the program the residential facility Pierre Caissie Centre provides assessment and evaluation, as well

---

[69] See for example: Brian Jay Nicholls. "Justice in the Darkness: Mental Health and the Juvenile Justice System," *Utah Law Review*, Vol. 11, No. 2, 2009.

[70] See for example O'Driscoll, C., et al. "The Impact of Personality Disorders, Substance Use and other Mental Illness on Reoffending," *Journal of Forensic Psychiatry & Psychology, 2012*, pp. 1-10.

[71] The Youth Wellness Unit replaced the Pediatric Observation and Assessment Area at the Moncton Hospital.

as recommendations for treatment. During the 2014-2015 fiscal year, there were 25 youth admissions to the Pierre Caissie Centre. The Youth Treatment Program as a whole worked with 233 youths in that period.[72]

Burdening staff at New Brunswick's youth secure detention and custody facility (NBYC) with the task of handling mentally disordered youth is no solution to the problem. Nevertheless, given the seeming inevitability of youth with mental health needs slipping into the criminal justice system, all corrections staff should have mental health training, as should everyone in the youth criminal justice system. We have seen much progress at NBYC already, with the creation of a clinical team and a Behavioural Management Review Board.

***"We are not good at dealing with mental health and addictions issues in the criminal justice system."***

**A New Brunswick Department of Public Safety official speaking at a youth crime conference**

[72] Information provided by the Government of New Brunswick, Department of Health, June 4th 2015.

## *A GUIDE TO LAW AND POLICY*

**"Those persons having an influence on persons living with mental illness, such as teachers' assistants, methods and resource teachers, guidance counselors, police and correctional officers, should be well-versed in dealing with issues involving mental health and mental illness."**

**Government of New Brunswick, *The Action Plan for Mental health in New Brunswick 2011-2018,* May 2013.**

## Incarceration of Youth with Mental Health Issues

New Brunswick is using court as a surrogate measure to address its failings in providing services for mental health issues. An endemic problem with the youth criminal justice system in New Brunswick is that there are a large number of youths who are incarcerated who have mental health or addictions issues. These youth fall easily into the trap of the criminal justice system and are sometimes unable to get out. Conditions are imposed on their release that are too onerous for them to meet (for example they may have addiction issues and a court ordered condition may be to not take any drugs, or they may have mental health issues that lead them to act out and breach an undertaking to be of good behaviour). They are charged with breaching probation and incarcerated again. Here in New Brunswick the story of Ashley Smith is a harrowing example of this disturbing phenomenon. What she needed was mental health care, from day one.

Much of the available statistical data come from the US system, but are informative for the Canadian experience. An American study in 2006 found that over 70% of youth in the justice system had a mental health disorder (or multiple disorders), compared to three earlier studies which all found over 67% prevalence of mental health disorders.[73] Professionals in New

[73] Shufelt, Jennie L. & Cocozza, Joseph J., "Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study," National Center for Mental Health and Juvenile Justice, June 2006; Teplin, L.A. and Abram, McClelland, Dulcan & Mericle, "Psychiatric disorders in youth in juvenile detention," *Archives of General Psychiatry*, 2002; Wasserman, G., McReynolds, L., Lucas, C., Fisher, P., & Santos, L., "The Voice

Brunswick often tell us that they see these kinds of numbers reflected in the youth criminal justice system here.

## A Youth's Story from our Files

### Mental Health Supports in New Brunswick's Youth Secure Custody Facility

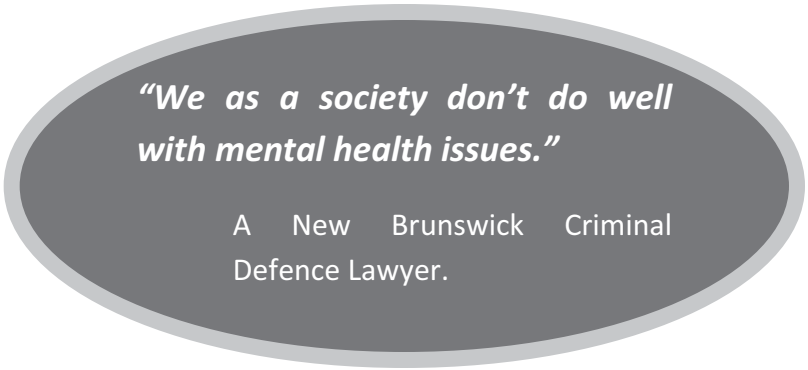
**Our office worked with a refugee youth who had been diagnosed with Post-Traumatic Stress Disorder and a number of other conditions related to his life in his home country. This youth was sentenced to custody at the youth secure detention and custody facility (NBYC). The Department of Social Development had been funding treatment sessions with a psychologist in private practice. These sessions were disrupted by the youth's incarceration. While NBYC had managed in the past to transport some youth to treatment sessions with therapists outside the facility, resources are scarce and no money was found to continue this practice. As a result, this youth's deeply necessary treatment was stalled; this was both detrimental to him and dangerous to our society.**

For offences related to drug addiction, the criminal justice system is not simply ineffective, it is severely harmful. Studies have found that the majority of youth in the juvenile justice system with a mental health disorder also have a substance abuse disorder.[74] Addictions counseling is sometimes a term of probation for these youth, but failure to 'kick the addiction' or attend counseling then results in a charge of breach of probation. In such situations the Department of Health (through its Addictions and Mental Health Services branch) therefore has a major role to play in youth crime prevention. Initiatives such as the Youth Treatment Program require sustained support. But again, it is not enough. Courts cannot order government to provide specific services and programs. The support infrastructure and willingness to use it must come from government.

---

DISC-IV with incarcerated male youths: Prevalence of disorder," *Journal of the American Academy of Child and Adolescent Psychiatry*, 2002.

[74] See, for example: Shufelt, Jennie L. & Cocozza, Joseph J., "Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study," National Center for Mental Health and Juvenile Justice, June 2006.




Individual case workers at the Office of the Child and Youth Advocate continue to hear again and again how parents are advised by social workers to call the police when their children are "out of control." We need other options. Thankfully, under the recently created Youth Diversion Model, Extrajudicial Sanctions Coordinators will screen youth for mental health disorders in order to direct youth in need to appropriate services; unfortunately this occurs after criminal involvement. We need more upstream interventions.

The prior recommendations from this Office's *Connecting the Dots Report* and *Ashley Smith Report* continue to have bearing in this context. The promised roll-out of the Integrated Service Delivery (ISD) Model to all regions of the Province by 2018 and the construction of the Provincial Treatment Centre for Complex needs youth are important government responses to this challenge. The planned development of safe spaces to improve outcomes for 11 to 25 year olds experiencing the onset of mental illness will also be an important transformation in service delivery. So too will be the upcoming establishment of a new Research Chair in Adolescent Mental Health at the Université de Moncton. Youth criminal justice officials in youth corrections, policing, prosecutions, the defence bar and on the Bench will have to familiarize themselves with these programs and their potential to ensure that the *Youth Criminal Justice Act* is applied in New Brunswick in keeping with the best interests and rights of young persons experiencing mental health challenges.

# A Youth's Story from our Files

## A Youth Faces an Incomprehensible Situation

**Anthony was first remanded to the youth jail when he was twelve years old. By the time he was 17, he had been there many times, and a mental health professional told our staff that she felt Anthony had the mentality of a 6 year old. He cannot reason properly and he becomes confused very easily. At this point it is difficult to change the trajectory for Anthony toward a life of repeated incarceration. The Province should have been there for him years ago, to present him with mental health supports, not prosecution.**

## Keeping Youth in Communities and out of Custody

We hear all too frequently from parents that if their child could just commit a crime, then he or she could get mental health or addictions services. This is such a common comment that it is difficult not to succumb to the temptation to simply agree. We know that sometimes, in frustration at the lack of any other alternative, even social workers, health care workers, addictions workers, and police feel that criminal charges are the most effective route to getting mental health supports. We have seen adults in youth-serving roles express relief when a youth is brought to court under criminal charges so that the youth can be sent for a psychiatric assessment. Using the criminal law and courts to obtain mental health services is a terribly stigmatizing, frightening and inappropriate means of trying to get help for a youth with mental health problems.

It is also important for all defence counsel to bear in mind that the youth's lawyer is *the youth's* lawyer. Defence counsel may receive pressure from parents, social workers and well-meaning police who believe that it is in the best interests of the youth to be subject to the criminal justice system in order to curb behaviour issues. Counsel is to represent the youth client, and no one else.

The criminal justice system is not to be used as a substitute for social and clinical supports for youth in need,[75] and parents, police, defence counsel and youth workers need to understand this. As a distinguished clinical psychologist has frankly stated: "There seems to be little justification for any violation or usurpation of a juvenile's due process rights if we are exposing them to the

[75] *Youth Criminal Justice Act*, Section 39(5) A youth justice court shall not use custody as a substitute for appropriate child protection, mental health or other social measures.

possibility of being trapped in a detention center either 1) getting poor services that are not appropriate for their needs or 2) waiting for services to become available on the outside so that they can be released."[76] Judging from anecdotal evidence from caseloads at the Office of the Child and Youth Advocate, and regular visits by our staff to the youth secure custody facility, our informal estimation is that there are always some youth who are in sentenced custody or on pre-trial detention as a measure to address mental health issues.

New Brunswick cannot allow a situation to persist that forces people who work with youth to feel they have no choice but to recommend such a drastic and dangerous course of action. Courts cannot, under the law, sentence a youth in order for that youth to access social services. Nevertheless, this still occurs. It occurs because New Brunswick sometimes offers no other option. This absolutely must change. Government needs to provide a more fulsome system for youth, with adequate supports outside the criminal justice system.

Similarly, some parents can no longer cope with the extreme difficulty of being the sole caregivers for children with complex needs. And they sometimes feel they have no choice but to give up custody of their children. When parents feel they have no choice but to give up their parental rights and allow the government to assume custody of their child, it is obviously a tragic situation. The Department of Social Development does not want to take custody of a child. It is not a situation that anyone in the Department would hope for. Social workers and mental health workers throughout this Province have to sit in a room with parents and hear them say that they love their children but can no longer be responsible for them. That is a heartbreaking thing to hear a parent have to say.

**"What has to happen here? Does my daughter have to commit a crime to get help? Or do I have to? I'm there, so help me God."**

**Mother of a teenage girl asking for help in a meeting with the Department of Social Development and the Department of Health**

[76] Nolan, Scott. "Adolescent Mental health and Justice for Juveniles," *Whittier Journal of Child and Family Advocacy*, Vol. 7:2, 2007-2008.

At this juncture, we as a society must have the resources in place to say to those parents that we can help them through their difficulties before resorting to taking their children from them. We need to provide the tools to parents to empower them to be the primary care-givers for their children. It must be noted that the Department of Social Development has been making great progress with programs such as its Family Enhancement Services, which provide supports to families as an alternative to taking a child from his or family into government protection. Absent severe child protection concerns, willing parents must be given the supports to enable them to raise their children. Interventions and supports to families are time-saving and cost-saving; it is also not a stretch to say that they can often be life-saving.[77] In-home intervention, family therapy programs, and parental training generally can prevent crises that require institutionalization of youth, and have been shown to reduce recidivism among at-risk youth.[78] Parents should not have to give up on their children because they have not been provided the supports necessary to keep them at home.

Youths being bounced around in group homes, hospital placements, psychiatric wards and ultimately in incarceration is not an acceptable result.

## Youth Unfit to Stand Trial and Youth Not Criminally Responsible

If a youth with a mental disability or limited intellectual capacity cannot comprehend court proceedings enough to meaningfully participate, he or she may be found to be unfit to stand trial.[79] Prior to trial, a court can order that a youth be assessed by a psychiatrist to determine if he or she is fit to stand trial.[80] Youths will, however, usually be found fit to stand trial; the threshold for fitness to stand trial is quite low.[81] The number of youths with diagnosed or suspected Foetal Alcohol Spectrum Disorder the Child and Youth Advocate's Office sees going to court is a testament to this sad fact.[82]

---

[77] See for example: Woolfenden, S., J. Peat & K. Williams. "Family and Parenting Interventions in Children and Adolescents with Conduct Disorder and Delinquency Aged 10-17," *Cochrane Database of Systematic Reviews*, Issue 2, 2001.

[78] Savignac, Julie. "Families, Youth and Delinquency: The State of Knowledge, and Family-based Juvenile Delinquency Programs," National Crime Prevention Centre, Public Safety Canada, 2009; McIntosh, Cameron, "Results from the Multisystemic Therapy Program," Public Safety Canada, 2013.

[79] *Criminal Code*, RSC 1985, c C-46, section 2, definition of "Unfit to stand trial"

[80] *Criminal Code*, RSC 1985, c C-46, section 672.11(a)

[81] See: Bala, Nicholas and Sanjeev Anand. Youth Criminal Justice Law, Third Edition. Toronto: Irwin Law Inc., 2012, p. 336.

[82] It is important to note that while some youths in the criminal justice system have been diagnosed with FASD, there are regularly other cases of suspected FASD that are undiagnosed. This issue is apparent in Canada, the US, the UK, and other states. See, for example: Burd, Larry, Diane Fast, Julianne Conry & Andrew Williams. "Fetal

When a youth is found unfit to stand trial, a court may order that the youth be detained in custody in a hospital. The Department of Health has jurisdiction in these cases, as opposed to the Department of Public Safety. This detention is subject to periodic review, but it can be for an indefinite period of time.[83]

A similar yet distinct issue is whether a youth suffered from a mental disorder at the time of the offence. If a youth is found fit to stand trial, he or she may still be determined to be Not Criminally Responsible (NCR) for his or her acts due to mental disorder. We are only responsible for those criminal acts for which we have the mental capacity to intend to commit. This is known to lawyers as *mens rea* – the 'criminal mind'. A person may be exempt from criminal responsibility due to a mental disorder rendering the person incapable of appreciating the nature and quality of the act, or of knowing that it was wrong.[84] A court may therefore order an assessment of a youth to determine "whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility."[85] If a youth is found to be NCR due to a mental disorder, he or she may be committed to a mental health facility for treatment.

When psychiatric assessments are ordered by the court, there is a presumption that the youth will remain in the community. However, the youth may instead be detained for up to sixty days for an assessment to be carried out (in practice at Restigouche Hospital Centre, youth are held for 30 days). Not Criminally Responsible youths may be held until it is deemed to be safe to release them.

After an assessment by a psychiatrist, if a youth is determined by a court to be unfit to stand trial, the court can order the youth to undergo treatment in a hospital or mental health facility in order that he or she may become fit to stand trial.[86] This treatment may be for up to sixty days. If a youth is ultimately found unfit to stand trial, he or she may be discharged into the community (usually with conditions), or alternatively he or she may be detained indefinitely (subject to periodic review) in a mental health facility. The same alternatives may occur if a youth is found fit to stand trial and subsequently found guilty of the crime yet not criminally responsible due to mental disorder.

Youth who are hospitalized under the mental health review board do not know at what date they will be able to leave the facility. It has been a difficult challenge to have them return to the community once they are given a conditional discharge or a full discharge unless they have

---

Alcohol Spectrum Disorder as a marker for increased risk of involvement with correction systems," *Journal of Psychiatry and Law*, Winter 2010; Roach, Kent and Andrea Bailey. "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing," *University of British Columbia Law Review*, 2009-2010.

[83] *Criminal Code*, RSC 1985, c C-46, section 672.54(c)

[84] *Criminal Code*, RSC 1985, c C-46, section 16.

[85] *Criminal Code*, RSC 1985, c C-46, section 672.11(b)

[86] *Criminal Code*, RSC 1985, c C-46, section 672.58

caregivers willing to have them return home. After a youth is found Not Criminally Responsible and committed to a mental health facility for treatment, he or she can get stuck there due to lack of necessary supports in the home and/or community to ensure the reintegration is safe.

The Department of Health had in 2014 intended to move Not Criminally Responsible youth to a retrofitted unit at the youth secure detention and custody facility (NBYC). This was occurring due to the fact that the Restigouche Hospital Centre was being rebuilt and was planned to have no capacity for youths. The move to NBYC was presented as an interim one, while the government established a residential treatment facility as part of its planned Network of Excellence. Now a unit has been created that will soon accommodate these youth in the new Restigouche Hospital. We have visited this facility and it is a very welcome improvement. It is a brighter, more youth-friendly area, and there are facilities conducive to youth development including an outdoor recreational area. Yet this 'interim' measure also raises concerns. This 'interim' measure is planned for two and half years, the time estimated for construction of the new Provincial Treatment Centre for complex needs youth.

In New Brunswick, youth in need of a forensic assessment have been sent to an adult facility, the Restigouche Hospital Centre, not designed to house youths. These youth remained there for treatment because there was nowhere else youth-specific to place them. We are one of the few provinces that has not had a youth-specific forensic facility to assess and treat youth with mental illness when they are found not criminally responsible for their actions at the time of the incident. It was dangerous to the development of these youths to be held in a facility with mentally disordered adults. Youths in the Restigouche Hospital Centre, an acute psychiatric hospital designed for adults, lived a life of mental sterility. There were few spaces for youth to play inside or outside the institution and limited access to these spaces throughout the day. There were only very empty rooms and televisions. While this was a treatment facility staffed by highly skilled experts, the environment itself was not conducive to an adolescent's healthy development. The new youth unit at the Restigouche Hospital Centre will be a vast improvement.

While we welcome this impending change, staff will need training in child-centred approaches, to deal with distinct behavioural issues of youths. We have remaining concerns, including how professionals at the facility will connect with community resources to facilitate the reintegration of these youths; particularly since Campbellton (the Restigouche Hospital Centre location) is not centrally located and is particularly inaccessible for youth from Moncton or Saint-John, our largest urban centres. Staff will face challenges in focussing on reintegration of these youths into community and facilitating parental visits.

## RECOMMENDATION

5. Government should end the use of criminal prosecutions as a means to access services for youth in need. To that end, government should:

i. Create strong processes to enforce the prohibition in section 29 of the *YCJA* against detention as a substitute for social or mental health measures. For those youth with high needs who do come to court, Crown counsel and defence counsel must be aware of the benefits of sections 34 and 35 of the *Youth Criminal Justice Act*, in order to recommend that judges order referrals for assessment of needs related to social services, physical health, learning disabilities and mental health issues;

ii. Provide training in diversion, mental health and child development to all youth-serving workers, including social workers, probation officers, educators, group home staff, foster parents, correctional staff, police and others.

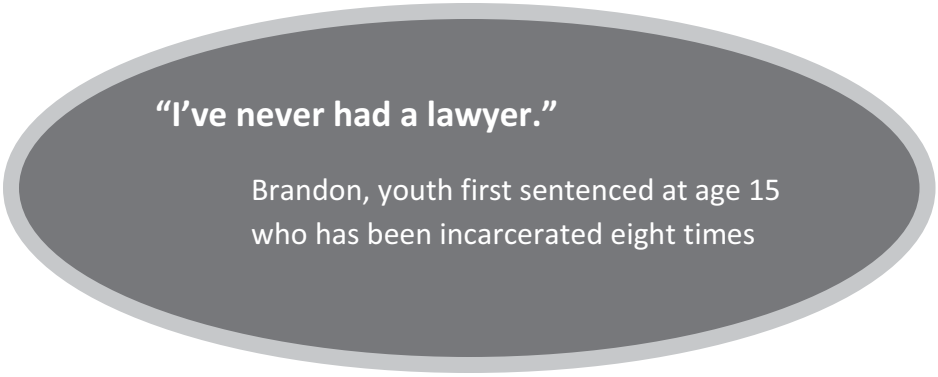
# Section II – Part Seven

# A Youth-Centred Court System

Youths step into court scared, and they leave it bewildered. Social workers, mental health workers, and corrections staff often tell us that they themselves barely understand the youth criminal justice system. How can kids be expected to?

In New Brunswick, Provincial Courts sit at times as Youth Court. But Youth Court is not, as one might expect, a distinct court with its own space. In other provinces it is. Here, however, one day in a week is set aside to hear youth matters in the regular court rooms. Sometimes youth are forced to wait while adult cases are 'cleared' first. This may in fact be the result of a judge wanting to clear cases in order to leave a good amount of time to hear a youth case. But even this altruistic purpose leaves youths waiting for hours, often handcuffed, shackled, stigmatized and shamed. Adult cases are at times interjected between youth cases. We have seen and heard of situations where youth court is temporarily adjourned to deal with adult cases involving disturbing crimes such as serious sexual violence. Youths waiting for their appearances sit in court as this takes place. Watching this is an unnerving experience, and it is hard to believe that it accords with the principles of the *Youth Criminal Justice Act*. This situation is not the norm, of course, but the fact that it happens at all gives cause for concern and we would hope that it gives pause for thought. The system can be improved.

When speaking with youth at the youth secure detention and custody facility, it is most common to hear that they did not have lawyers other than duty counsel when they were remanded into custody. We have also seen youth being called before the judge *without even having met and spoken with duty counsel*. The youth we speak to at the detention centre generally tell us that if they spoke to duty counsel at all prior to being called at their first appearance in court, it was only for a couple of minutes at the courthouse prior to their first appearance. The amount of time youths speak with duty counsel appears to vary according to the day and the location of the court. Some areas of the Province are better than others.




For most youths it seems as though the whole experience is a blur of incomprehension. Courts that operate in an impenetrable language, that do not communicate meaningfully to youths brought before them, are not playing a positive role in a youth-specific justice system. Unsurprisingly, research has found that "how young offenders felt they had been treated by various court actors was significantly related to their overall assessments of the legitimacy of the justice system."[87] The current system in New Brunswick is not conducive to youths feeling they are being held accountable through a legitimate and fair process.

This lack of an understandable process for youths is a problem in many countries, particularly economically-underdeveloped countries. The UN Committee on the Rights of the Child has noted in many countries "children were seldom made sufficiently aware of their rights, including the right to assistance from a legal counsel, or of the circumstances surrounding the case."[88] This is also a problem in parts of Canada[89] and certainly is a reflection of what we see too often in New Brunswick.

A youth being able to speak with duty counsel prior to his or her appearance is important. It is also important that youths have general (private) counsel for ongoing matters. Under section 25 of the *Youth Criminal Justice Act*, youths have a right to a lawyer *paid for by government*. In practice, however, we find that youth are not adequately informed of this right, and they often feel that they might have to pay for a lawyer themselves, and therefore they do not attempt to

[87] Greene, Carolyn, Jane Sprott, Natasha Madon, and Maria Jung. "Punishing Processes in Youth Court: Procedural Justice, Court Atmosphere and Youths' Views of the Legitimacy of the Justice System," *Canadian Journal of Criminology and Criminal Justice*, Vol. 52, No. 5, October 2010.

[88] UN Committee on the Rights of the Child, Day of General Discussion – Juvenile Justice, CRC/C/46, 1995, pp. 36-37.

[89] See: Canadian Foundation for Children, Youth & the Law (Justice for Children and Youth). "Children's Right to be Heard in Canadian Judicial and Administrative Proceedings: Submission for the United Nations Committee on the Rights of the Child," http://jfcy.org/wp-content/uploads/2013/10/UNDiscussionPaper.pdf

secure one. Not only do these youths not understand the process they are being subjected to, they have no lawyer to explain it to them and defend their legal rights.

In youth criminal justice the matters at stake are serious, because if the system fails these youths, it can ruin lives from the start. It is imperative that defence counsel and Crown prosecutors have a comprehensive understanding of the *Youth Criminal Justice Act* and of youth criminal justice issues generally. And that is not as common as we would hope

## *A GUIDE TO LAW AND POLICY*

**The young, owing to their early stage of human development, require particular care and assistance with regard to physical, mental and social development, and require legal protection in conditions of peace, freedom, dignity and security…**

**United Nations Standard Minimum Rules for the Administration of Juvenile Justice**

Youth in government care who have been removed from abusive homes or given up by their parents have one advantage among all of their many disadvantages. They always have a lawyer appointed if they are charged with a crime. The Department of Social Development is very diligent about ensuring this. A youth under the care of the Minister of Social Development told us: "I always request the same lawyer, that way he knows me and my situation." All youth deserve this level of representation.

On either side of New Brunswick we find more youth-specific approaches. In Québec, specially-appointed judges sit on specialized youth courts which are normally located in facilities separate from where adults appear in court. There, very experienced prosecutors are assigned to youth court, because adequately upholding the administration of justice requires an understanding of the complexity of youth criminal justice matters. In Nova Scotia, Halifax's youth court has a dedicated process. There is a dedicated team for legal aid duty counsel and general counsel for youth, operating in a specialized youth court.

Moreover, The Halifax Youth Attendance Centre is a very forward-thinking operation, in which various government departments come together to ensure timely access to supports and services for those youths under community supervision orders who are assessed as moderate to high risk of reoffending. Teams provide services such as mental health supports, education supports, employment support, and addictions intervention.

## *A GUIDE TO LAW AND POLICY*

**The criminal justice system for young persons must be separate from that of adults.**

***Youth Criminal Justice Act*, Declaration of Principle**

Other Canadian jurisdictions have created specialized services for youth in the criminal justice system. One of the most impressive examples is the Youth Criminal Defence Office (YCDO) in Alberta, which provides specialized duty counsel at youth court and has staff lawyers to represent youth as general counsel. The YCDO also provides lawyers to call when a youth is detained. The YCDO uses social workers and youth workers to prepare sentencing plans and release plans for lawyers to present to court.[90]

The Youth Criminal Defence Office prepares youths for experiences in courts and the court process; they advocate for the use of community instead of custodial resources to promote rehabilitation. The YCDO social and youth workers assist youth with education or work programs, counseling and housing. They focus on issues underlying criminal behaviour in order to aid in rehabilitation.[91]

We have seen some youths being repeatedly sent to New Brunswick's youth closed-custody detention centre under pre-sentence custody. There is little hope for continuity of education and development for youths when they are sent ten or more times to detention under a remand order. Their development suffers through a broken system.

Youths can spend several weeks remanded to the youth closed-custody detention centre, awaiting sentencing, often for what are, in our opinion, very minor offences. During this time

[90] Youth Criminal Defence Office website: http://www.ycdo.ca/about/about.htm
[91] Legal Aid Alberta website: http://www.legalaid.ab.ca/about/programs/Pages/YCDO.aspx

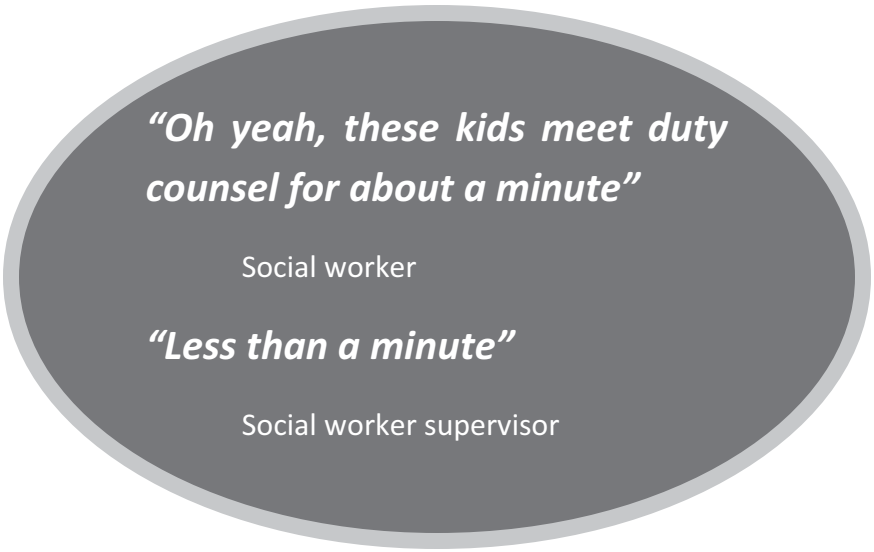
they live in limbo, with their education interrupted, difficulties having their medication follow them to the detention centre, and being torn away from any community supports they may have.

We see youths who decide to plead guilty in order to spend less time in prison on remand and get things over with more quickly. Whether or not they have a valid defence is not a point that seems to be considered in their decision. This is a phenomenon in the adult system as well ("It is commonly accepted that innocent defendants who do not receive bail will sometimes plead guilty rather than wait for trial in order to secure earlier release from custody"[92]) but we would suggest that the greater emphasis on diversion in the youth criminal justice system likely makes it proportionately more common for youths. Research has also pointed to the increased vulnerability of youth to make false confessions due to their lesser ability to understand the complexities of police interrogations.[93] Youth should have youth-specialized legal representation; it should begin at the pre-trial stage and it should continue throughout their time in detention, trial and incarceration.

## Effective Lawyers in the Youth Criminal Justice System: Duty Counsel

When a youth makes a first appearance in front of a judge it is with a duty counsel lawyer they may have never met (or may have met very briefly just before entering court). Duty counsel lawyers do not know the youth's history, the caregivers involved or other issues affecting the particular youth. Duty counsel lawyers are lawyers paid by Legal Aid who are available at court to provide very limited assistance to people who are not otherwise represented. Duty counsel typically wander the halls outside the courtroom and call out names of youths on the docket for the day. Youth often only arrive at court (whether transported by Sheriff Services or by other means) at 9:00 a.m., leaving little time before court begins. There is only a very brief period of time for the duty counsel to talk to the youth, parents, Social Workers, Probation Officers and others, or, often, no time at all (in which case duty counsel first lays eyes on youth when their names are called in court). We have seen that these youths sometimes do not know the difference between the prosecutor standing on one side of them and duty counsel on the other.

[92] Sherrin, Christopher. "Excessive Pre-Trial Incarceration," *Saskatchewan Law Review Vol. 75*, 2012.
[93] Eastwood, Joseph, Brent Snook and Kirk Luther. "On the Need to Ensure Better Comprehension of Interrogation Rights," *Canadian Criminal Law Review*, June, 2014.




Duty counsel lawyers can give advice in relatively simple cases to anyone who has to appear before a judge and is without counsel, but duty counsel lawyers have extremely heavy caseloads and limited time. In this system, there are serious obstacles to the provision of meaningful assistance to youth.

Duty counsel is present at interim release hearings for those youths who don't have general counsel, but duty counsel generally lack the time to get enough details on any particular matter to assist a youth in making a plea.[94] Duty counsel mostly help in obtaining an adjournment so that the youth can apply to Legal Aid. Interim release hearings are challenging for Duty Counsel, as there is little time to meet the client and to develop a suitable plan for supervision in the community. The Hughes/MacKinnon Report on New Brunswick Legal Aid noted that "duty counsel often has a very large file load and has unmet training needs for special and high needs clients.[95] We hear complaints from Probation Officers and others that Duty Counsel do not have enough expertise in the *Youth Criminal Justice Act*. This is certainly unsurprising when duty counsel are not Legal Aid staff lawyers but lawyers working on certificates from Legal Aid; graduates of the law schools in New Brunswick get very little education in the *Youth Criminal Justice Act*. Duty counsel should receive additional training in youth criminal justice issues, particularly to effectively handle cases involving high-needs youth.

[94] The Hughes/MacKinnon report on Legal Aid in New Brunswick noted the following: "services were often provided in an assembly line and rushed fashion. Given the high importance of the plea stage in criminal proceedings, all reasonable efforts must of course be made to ensure that guilty pleas are sound. This requires more preparation time than appears to be available to many duty counsel." Hughes, J. and E.L. MacKinnon. "If there were Legal Aid in New Brunswick… A Review of Legal Aid Services in New Brunswick." Fredericton: Province of New Brunswick, September, 2007

[95] Hughes, J. and E.L. MacKinnon. "If there were Legal Aid in New Brunswick… A Review of Legal Aid Services in New Brunswick." Fredericton: Province of New Brunswick, September, 2007, p.1.

***"I don't like doing duty counsel cases for youth because you can't give them what they need. There is no time or system to provide support."***

Criminal law lawyer in N.B.

***"I know what day of the week youth court day is, and I avoid taking Legal Aid jobs on that day."***

Criminal law lawyer in N.B.

When speaking to youths in the criminal justice system, we rarely find any who fully understand the role of duty counsel. Our office's experiences in New Brunswick reflect the picture nationwide portrayed by two of Canada's pre-eminent youth justice experts, with regard to duty counsel: "many adolescents have difficulty in communicating effectively with unfamiliar adults, especially in the context of a rushed interview in an intimidating setting."[96]

It is indicative of the lack of priority society gives to youth justice matters that there has not been enough empirical investigation in Canada to date relating to legal representation of youths in the criminal justice system. However, an Ontario study found that youths felt dissatisfaction with their lawyers because the youths' input was ignored.[97] We see this anecdotally reflected in the youth we speak with in New Brunswick. We stress the need to adhere to the *Youth Criminal Justice Act*, which states in section 3: "young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes… that lead to decisions that affect them."

**"Duty counsel can't remember your story. It makes you look like an idiot, and the judge says 'that's not a very solid plan, you're going back to jail.' And look at me now. End of story, right?"**

Jacob, incarcerated 16 year-old NB Youth

[96] Bala, Nicholas and Sanjeev Anand. Youth Criminal Justice Law, Third Edition. Toronto: Irwin Law Inc., 2012, p. 411

[97] Peterson-Badali, Michele, Stephanie Care and Julia Broeking. "Young People's Perceptions and Experiences of the Lawyer - Client Relationship," *Canadian Journal of Criminology and Criminal Justice*, Vol. 49, Issue 3, July 2007, p. 390.

**"When I went to court, some lawyer [duty counsel] called my name in the hallway, then took me into a room for 2 minutes… then this guy tells the judge that I want a job, but I already had a job and I had already told the lawyer [duty counsel] that… he [duty counsel] didn't hear a word I said."**

Michael, Seventeen year-old boy incarcerated at the New Brunswick youth secure detention and custody facility, NBYC

## Youth Court Workers

**Question to a youth incarcerated at the New Brunswick youth secure detention and custody facility:**

**"Did you have a lawyer?"**

**Youth's answer:**

**"I don't know."**

The above quote is not unique. We hear that answer time and time again. While there are some youth who, due to their repeated involvement with the justice system, have a sadly in-depth knowledge of how it works, the simple fact is that for the majority of incarcerated youths we meet it is a bewildering process. It is a process that leaves them feeling that they don't understand how the world works. It is alienating. Without appropriate guidance and support, youths get caught in this system and can't find their way out. This is why creation of youth court worker positions could be of enormous benefit. As an example, at an interim release hearing, a youth has a legal right to present the court with a plan of release that provides for adequate supervision in the community. A youth can ask for a three day adjournment,[98] in which time various stakeholders could work with the youth and his or her family to develop a plan for interim release into the community.

We see cases where mental health professionals from the Department of Health go to court to try to catch a word with a youth's lawyer to apprise him or her of issues that could help in a youth's advocacy. This is obviously commendable effort on the part of these health care professionals, but it also obviously points to a need for better and more timely contact between Mental Health workers and their youth clients' lawyers. Showing up at court and trying to catch a word with a lawyer on a court day is not effective. The same applies for Social Workers. We know that many Social Workers work closely with lawyers defending youth in care. All youth could benefit if youth court workers existed.

[98] Under Section 516 of the *Criminal Code* RSC 1985, c C-46

In order to limit the use of pre-trial detention in New Brunswick and provide for a more youth-centred court process, the Department of Social Development in conjunction with the Department of Public Safety should train and provide youth court workers who can coordinate with family members, duty counsel, general counsel and Youth Justice Committee coordinators to present plans and perform other functions. This function would be uniquely important for First Nations youth, who represent one in ten youths in pre-trial detention in New Brunswick and have distinct rights.[99]

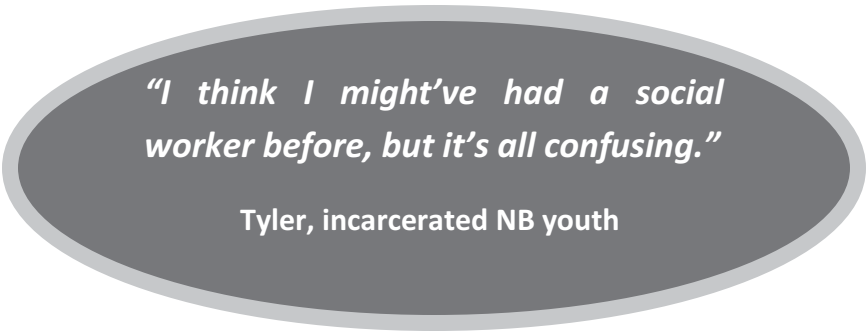
Youth court workers can help provide the court with necessary information and guide youth and their families through the process. In order to be able to effectively use the provisions in the *Youth Criminal Justice Act*, judges need to be presented with a picture of what pro-social supports a youth has at home and in community, and what options exist to divert a youth to supports.

**"Some random lady [duty counsel] told the judge my father didn't want me at home, so the judge said there was no choice but to send me here."**

**Connor, youth remanded to secure custody because no other options were presented for a placement in the community while awaiting trial**

Not-for-profit organizations such as Partners for Youth, the John Howard Society, the Elizabeth Fry Society, multicultural associations across the Province, the YMCA and many others can provide considerable assistance if they are aware that a youth is in the criminal justice system. This is where youth court workers could provide invaluable help in connecting youth with available community resources. The same is true for helping youth access available government services. Youths have to interact with so many individuals in the maze of government services it becomes overwhelmingly confusing. They need a guide to navigate.

[99] Statistics Canada. *Table 251-0012 - Youth custody and community services (YCCS), admissions to correctional services, by sex and aboriginal identity, annual (number),* CANSIM (database). (accessed: 2015-06-01)




A judge is more likely to accept a proposal for a less severe sentence from defence counsel if the youth has begun a self-rehabilitation plan.[100] Lawyers provided through Legal Aid in New Brunswick have little or no time to work with the youth, his or her family, and various community professionals in order to help create such a plan. Instead, courts rely upon pre-sentence reports from probation officers. Creation of youth court worker positions could be of great help to defence counsel, to work effectively toward convincing the Crown prosecutor to divert youth from the courts prior to trial, and to help with submissions to court.

***The Family Role in the YCJA***

Parents and legal guardians should also play a major role in the youth criminal justice system, as emphasized in section 3(1) of the *Youth Criminal Justice Act*. Parental involvement is integral to the effective functioning of the youth justice system and is important in preventing further youth offences. But parents also need support in navigating this confusing system. This is another reason for the importance of a youth court worker system available throughout the province.

When a judge hears from a parent that he or she is willing to supervise his or her child's conditions, the youth is more likely to be released pending trial.[101] Parents should often be tasked with taking on the role of supervising court-ordered conditions. Beyond the importance of solidifying the cohesiveness of the family unit, there is an assumption that parents will be more motivated and better able to monitor the behaviour of their children.[102] Community agencies should be positioned to assist parents with advice or referrals to deal with concerns that arise during the period of supervision before trial.

---

[100] See: Bala, Nicholas and Sanjeev Anand. Youth Criminal Justice Law, Second Edition. Toronto: Irwin Law Inc., 2009, p. 411.
[101] Varma, Kimberly. "Parental Involvement in Youth Court," Canadian Journal of Criminology and Criminal Justice, Vol. 49, Issue 2, April 2007, p. 242.
[102] Varma, Kimberly. "Parental Involvement in Youth Court," Canadian Journal of Criminology and Criminal Justice, Vol. 49, Issue 2, April 2007, p. 235.

However, the *Youth Criminal Justice Act* does not provide detailed, specific roles for parents. There is often confusion as to what role a parent should play at various stages of the process – should parents lean toward being strong advocates for the legal due-process rights of their child in the adversarial criminal court system, or should they lean toward cooperating with police and other actors in the system to improve their child's expected participation in society? These questions may result in confusion for parents, youth, and those who work in the system, reducing the effectiveness of parents' involvement.[103]

## A Youth's Story from our Files

### A Parent Steps Up

**At sixteen years old, Jahina was on a bad track. She had experienced trauma in her home country and had developed a violent temper. Eventually she was charged with assaulting her mother and several breaches of probation. She had been taken into group homes but had not functioned well socially. When she contacted us, all signs pointed to her being sentenced to secure custody at the youth secure detention and custody facility. However, her mother spoke in court, providing a comprehensive overview of the issues Jahina faced, and the judge ordered a deferred custody sentence. Her trajectory into the youth criminal justice system turned around. She began attending school again and received supports to help her function in her relationship with her mother. She was able to return home. This example illustrates the power of parental involvement in youth court outcomes.**

[103] Broeking, Julia and Michele Peterson-Badali. "Parents' Involvement in the Youth Justice System: Rhetoric and Reality," *Canadian Journal of Criminology and Criminal Justice*, January 2010.

For parents to play the roles that the legislation provides for them, and for youth and parents to understand and knowledgeably participate in court proceedings, there is a need in New Brunswick to create youth court workers to guide them in the process. These workers could also aid in developing plans for interim release and direction to appropriate mental health or social support programs.

## Effective Lawyers in the Youth Criminal Justice System: Crown Counsel

Let us be clear that Crown prosecutors throughout New Brunswick are undoubtedly dedicated and knowledgeable. We meet such Crown counsel regularly. There are also some Crown counsel who could benefit from more professional development opportunities relating to the *Youth Criminal Justice Act,* the UN *Convention on the Rights of the Child*, and various international juvenile justice instruments.

We understand that Crown counsel have heavy caseloads and may sometimes feel that they lack adequate time to prepare for youth cases. To enhance efficiency and effectiveness, prosecutors should be given sufficient training not only about the *YCJA* but also about youth mental health and welfare matters.

When Crown prosecutors are seeking sentences in youth cases, they should remain mindful that community-based sentences that are designed to address underlying risk factors are more likely to be effective than incarceration in curbing repeat criminality. Prosecutors should offer submissions to the court regarding appropriate sentences that are in accordance with the *Youth Criminal Justice Act*, and which reflect the holistic approach to youth rights in the *Convention on the Rights of the Child*.

The *Youth Criminal Justice Act* ensures that youths have access to lawyers, to be paid by the Attorney General. But in reality, many youths facing criminal charges are not adequately represented.[104]

Given that adolescents are thrust into a court system that is largely incomprehensible to them, and when they are represented by counsel appointed through Legal Aid who simply are not afforded the time to do everything they would want to do in defence of their client, there is a very strong obligation on the Crown prosecutor to work for justice and bear in mind the rights of

[104] Bala, Nicholas and Sanjeev Anand. Youth Criminal Justice Law, Third Edition. Toronto: Irwin Law Inc., 2012, pp. 420-427.

these youths under the United Nations *Convention on the Rights of the Child*, the Canadian *Charter of Rights and Freedoms* and the *Youth Criminal Justice Act*.

## *A GUIDE TO LAW AND POLICY*

**It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction… The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty.**

**Justice Rand, Supreme Court of Canada*, Boucher v. R.*, [1995] S.C.R. 16, at paras 23-24.**

We make these submissions while attempting to remain mindful and respectful of the Crown's role in determining the course of public prosecutions. However, the mandate of the Office of the Child and Youth Advocate, and our obligation to ensure that the rights of children and youth are protected, requires us to urge the Office of the Attorney General to reflect upon its practices.

**"We call it Kiddie Court"**

**A newly trained Crown prosecutor in New Brunswick speaking about youth court**

Due to these concerns and those noted earlier in this report, we question whether it is time for the Office of the Attorney General to review processes for youth court. In one day for youth court, several different Crown counsel may come and go; circumstances such as this raise the question of whether there are more efficient and effective ways to operate, such as having Crown counsel dedicated *only* to youth court (a situation which presently only exists in Moncton).

# Effective Lawyers in the Youth Criminal Justice System: Private Defence Counsel

**"In practice many youths are either inadequately represented or not represented at all."[105]**

Nick Bala and Sanjeev Anand

The above quote reflects concerns about common practice in many parts of Canada, and from our office's experience we feel it is very much the case here in New Brunswick. This criticism does not reflect the expertise of the defence bar nor that of Legal Aid staff lawyers in our Province. It reflects the Province's investment in Legal Aid. The New Brunswick government funds its Legal Aid program 40% *less* than Newfoundland and Labrador funds theirs, and yet our Province's population is 30% *larger* than theirs. Ontario's population is 18 times bigger than ours but it funds its Legal Aid *45 times* as much as New Brunswick funds its. On a per capita basis New Brunswick funds its Legal Aid far less than other Provinces also, including Nova Scotia, Quebec, British Columbia, Saskatchewan, Manitoba, and Alberta.[106] Our system is underfunded and Legal Aid staff lawyers in New Brunswick are under intense time pressures. Also, outside counsel who take these cases and get reimbursed by Legal Aid have to make a living and handle the cases within a time frame that makes their reimbursement worthwhile; in certain cases they are simply not paid for enough time to provide the representation they would want to provide. Parents and youth who complain to our office about the quality of counsel are, we feel, reflecting this underfunding situation.

We have encountered some parents and youth who have refused to apply for Legal Aid out of frustration. They would rather have no lawyer at all than have a Legal Aid lawyer.

[105] Bala, Nicholas and Sanjeev Anand. Youth Criminal Justice Law, Third Edition. Toronto: Irwin Law Inc., 2012, p. 394.

[106] Statistics Canada, "Legal Aid in Canada, 2013/2014," Canadian Centre for Justice Statistics, Legal Aid Survey, Modified April 8th, 2015.

**"If he feels like saying what my mother and me want him to say, he says it, if he doesn't, he doesn't."**

**Jackson, youth in secure custody speaking about his lawyer.**

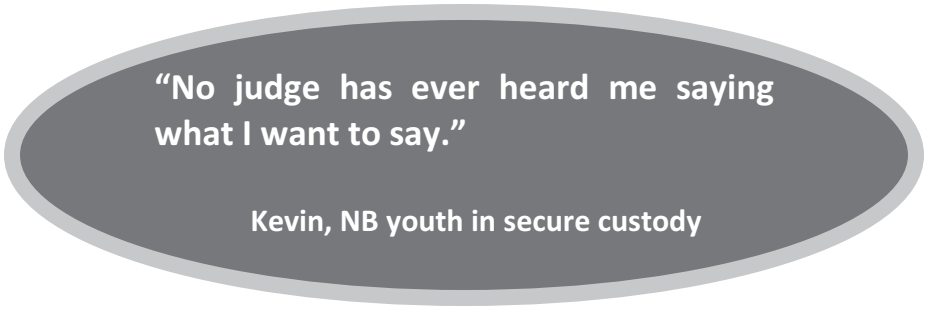
Youth want to have counsel who represent them know what their situation is – and they have this right under Article 12 of the *Convention on the Rights of the Child*. New Brunswick has a long way to go to live up to its obligations under Article 12. Every aspect of the youth criminal justice system should take into account the opinions of youth.

## *A GUIDE TO LAW AND POLICY*

**Article 12 of the *Convention on the Rights of the Child***

**1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.**

**2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.**




There is a belief among some that, due to the likelihood in many cases that there will be no criminal sentence for a youth, and no permanent criminal record, it is unnecessary for a youth to have zealous legal advocacy. For an adult, the possibility of a criminal record is generally viewed as more dire than it is for a youth. For example, if a youth is likely to receive a community sentence, the punishment may be deemed by some lawyers to be so light that it becomes a moot point as to whether the youth's *Charter* rights have been violated. Youths are advised to plead guilty and accept what are seen as relatively minor sentences for minor crimes.

Sometimes youth are in the wrong place at the wrong time but not doing the wrong thing, yet still they get swept up with their peers and processed through the criminal justice system. Even when many people might look at a sentence in a particular case as unjust in the circumstances, the penalties appear light enough to not warrant the effort of overturning a sentence – and moreover, who would take on that appeal challenge?

There is a particular knowledge set that is necessary for lawyers to have in youth justice matters. Lawyers representing youth must be knowledgeable about the psychological, educational, developmental and social issues facing these youths. It is imperative that lawyers who work in this field are cognizant of the various services available in their communities. They must also have the time to apply this knowledge. Defence counsel require time to communicate with youth clients to be effective and forceful advocates. Most importantly, they must understand the *Act*. One parent who spoke with us stated that paying for private counsel (instead of getting Legal Aid) was "a waste of time" because in the parent's opinion the lawyer seemed to know very little about the *Youth Criminal Justice Act* and did not refer to it in court.

Government Departments should come together to collaborate in educational and informational sessions for members of the practicing bar and the judiciary who handle youth cases. The focus should be on best practices for at-risk youths and youths with mental illness or severe behavioural disorders. The newly established Children's Law Section of the New Brunswick branch of the Canadian Bar Association can aid in such sessions.

## A Youth's Story from our Files

### Balancing Between Rehabilitation and Repeat Offending

**Brian was sexually abused as a child, and found by a psychologist to be naïve, with Autistic traits. Brian had no run-ins with the law until one night as a youth when he felt an adult was attempting to sexually assault him after the adult had given him nine bottles of beer to drink. Brian was convicted of manslaughter.**

**The crime was extremely serious and disturbing, and no one questioned whether Brian should be held accountable through a prison sentence. The concern that remained was whether Brian would continue to be a danger to our society upon his inevitable release. Our Office was very committed to advocating for the fullest rehabilitation possible for Brian, in his own interests and for the protection of the public. Prior to Brian being sentenced, our office advocated that a sentence of Intensive Rehabilitative Custody and Supervision could be a possibility. An Intensive Rehabilitative Custody and Supervision (IRCS) order is a sentence that provides for a very high level of treatment to reduce the risk of repeat offending. It is a sentence option that can be extremely effective in cases where a youth has a high probability of rehabilitation given appropriate intervention and treatment. To her credit, the Crown prosecutor was open to the idea.**

**Unfortunately, Brian's defense lawyer was not receptive when approached with the idea. Defence counsel was not interested in speaking with our Office. While we fully understand the importance of solicitor-client privilege, it should not be used as an excuse for not wanting to be bothered with any 'complicating' case history. When we spoke with Brian after he was incarcerated, he informed us that his lawyer had told him that he would be in jail longer under an IRCS sentence. According to Brian, the lawyer apparently gave Brian incorrect information about the length of time a psychological assessment would take and**

**the length of time the sentence would run. Brian was under the misunderstanding that the IRCS sentence could take longer than another sentence. The maximum length of an IRCS sentence is the same as the maximum length for a custody and supervision order. Brian would have served the same amount of time either way, but under an Intensive Rehabilitative Custody and Supervision sentence he would have been provided treatment that could ensure the ongoing safety of the general public on his release. His lawyer should have known that and informed Brian of it. New Brunswick Youth Centre staff helped Brian file an application for an appeal.**

**A defence lawyer must fully understand his or her youth client's situation, must understand all of the provisions in the *Youth Criminal Justice Act*, and must effectively communicate with his or her client to ensure that the youth can make informed decisions. Moreover, a defence lawyer has a duty to society, and when there is an opportunity to rehabilitate a youth in the best interests of the protection of the general public, a lawyer needs to at least understand that option, take that option into consideration, and communicate that option to the client.**

## Legal Aid Services

If you go to a youth court session you will see youth after youth who barely understand any of what is happening. These teenagers are not intellectually incapable of understanding. They simply are faced with a structure that is foreign and incomprehensible to them.[107] No one has told them about the process. When we hear youths telling a judge that they "don't know" if they have applied for Legal Aid, it shows the shocking level of bewilderment our youth have to face in criminal court.

No reasonable person could assert that Legal Aid is not staffed with highly experienced lawyers. New Brunswick Legal Aid Services Commission staff criminal lawyers have an average tenure to the bar of nearly 20 years.[108] The question, though, is whether the present system allows for those lawyers to operate to their full abilities when representing youth as duty counsel and general counsel. These lawyers are on very limited time allotments per case.

---

[107] See, for example: Doob, Anthony & Carla Cesaroni. Responding to Youth Crime in Canada. Toronto: University of Toronto Press, 2004, pp. 39-40. After canvassing many studies of youth perceptions of the criminal justice system, Doob and Cesaroni state: "Looking at this research as a whole, it is clear that we cannot assume that young people have sufficient knowledge of the legal system and the criminal law provisions that govern proceedings in the youth justice system to fully and freely participate in criminal proceedings against them."

[108] New Brunswick Legal Aid Services Commission. Annual Report, 2010-2011. Fredericton: NBLASC, p. 2.

This system is often incomprehensible to the average person – any adult who has had to navigate it knows this. For youth, it is an alien process that is being imposed upon them. Their rights in that system are only as good as the knowledge and willingness of adults to stand up for them. The current process in New Brunswick is unsustainable – it continues to perpetuate the massive costs associated with repeat criminal behavior and incarceration. The conveyor belt to incarceration is a costly one for our Province, and it makes us no safer.

Youths should not have to face the traumatizing and stigmatizing situation of being in court without representation. The law is complex. Self-representation by youths is unacceptable. Moreover, the monetary costs associated with self-represented youths are left uncalculated but are unquestionably high (due to added trial time, higher remand rates, higher custodial sentencing rates, and other costly repercussions).

There are statutory obligations for the provision of counsel to youth. Section 25 of the *Youth Criminal Justice Act* requires that the Attorney General pay for defence counsel to a youth who does not qualify for Legal Aid. Until recently in New Brunswick this has meant that youth who have not met the eligibility criteria had to apply for Legal Aid, be turned down, appeal the decision, be finally turned down, and then apply to the court for the appointment of counsel under section 25. The Attorney General then had to pay for counsel. This process meant added cost to taxpayers from the added administrative time for New Brunswick Legal Aid Services Commission and court time involved. It also meant more time youth had to spend in the criminal justice system.

Youth rates of eligibility for Legal Aid had been shockingly low (54.2% eligibility rate for boys; 57.8% eligibility rate for girls in 2010-2011).[109] In one of the most forward-looking actions we have recently witnessed in New Brunswick's youth criminal justice system, the New Brunswick Legal Aid Services Commission has extended Legal Aid eligibility to *all* youth, doing away with restrictive eligibility criteria. It is worth noting that the Legal Aid Services Commission has done this without any added funding by the Attorney General's Office.

Unfortunately, even with this welcome change, the system remains very far from perfect. An essential problem is that youths are not, in our opinion, adequately informed and guided in the process of securing general counsel through Legal Aid. Moreover, Legal Aid does not provide general counsel for youth at sentencing, it provides only duty counsel. Having counsel at sentencing is extremely important for youths. Our concern is that these youth have only the summary assistance of *duty* counsel when the youth have a right to *general* counsel. There is a huge difference. Duty counsel are not the youth's lawyer. General counsel, on the other hand, can make representations to the court regarding appropriate sentencing based on a comprehensive understanding of the youth's situation and the specific case. That right is explicit in section 25 of the *Youth Criminal Justice Act*.

[109] New Brunswick Legal Aid Services Commission. Annual Report, 2010-2011. Fredericton: NBLASC.

**"Nobody told me I could get Legal Aid."**

**Jeff, youth remanded at the youth detention centre**

Another possible avenue to support the efforts of Legal Aid could be the creation of Youth Justice Legal Aid Clinics at both l'Université de Moncton and the University of New Brunswick law schools. Among the many benefits of student legal aid clinics would be the provision of support to legal aid duty counsel and general counsel.

Dalhousie University presently has a clinic with staff lawyers, community legal workers, support staff, and over 40 law students. Students work at the clinic in a 13-credit course and are at the clinic essentially full-time for the term. The Dalhousie Legal Aid Clinic does not specialize in youth justice matters, but it handles youth files. This clinic also has an outreach and education function, presenting workshops on the *Youth Criminal Justice Act* to community and professional groups.

It would be unrealistic to attempt to replicate the Dalhousie model completely, as it has been developing since the 1970s and has a broad scope of practice. However, the sad state of New Brunswick's laggard implementation of the *Youth Criminal Justice Act* provides fertile ground for a targeted youth-focused initiative.

**"I want to appeal, but I don't know how to go about doing it – where do I even start that, ya know? I don't know, nobody tells me"**

**Dwayne, NB youth in secure custody**

The effectiveness of these student clinics at New Brunswick law schools can be augmented by courses in youth criminal justice law as prerequisites for student involvement in the clinics. Creating such clinics at the University of New Brunswick and Université de Moncton could provide very effective advocacy for defence counsel to persuade Crown counsel to divert youths from court and incarceration. Such clinics could provide for greater protection of youth rights in court. They can also provide law students with knowledge of the youth criminal justice system.

## RECOMMENDATIONS

6. Government should develop youth court services with specialization in the unique needs and developmental circumstances of youth. Included in this system should be the appointment of an itinerant youth court judge, specially trained youth-specific duty counsel, Legal Aid counsel, and Crown prosecutors.

7. Government should create youth court worker positions to coordinate with youth, family members, duty counsel, defence counsel, and Youth Justice Committee coordinators. Crown prosecutors should connect youth court workers with a youth's parents or legal guardian upon the laying of charges, before a first appearance in court. All actors in the youth criminal justice system should develop working protocols with youth court workers.

# Section II – Part Eight

# Incarceration

There are situations in which custody is the only appropriate option. Society demands custodial sentences for most of the abhorrent cases of violent crime. Incarceration plays an essential role in the justice system, for the protection of society and the accountability of the criminal. However, it is expensive, and in most cases (which do not involve serious violent crime) it is less effective for rehabilitation and crime prevention than is diversion to community programs.

The Office of the Child and Youth Advocate has witnessed very significant improvements in the functioning of New Brunswick's youth detention facility (the New Brunswick Youth Centre). We have great respect for much of the work being done there. In particular, since the *Ashley Smith* report the establishment of the Behavioural Management Review Board has been an excellent additional quality control mechanism. There has been a decline in use of segregation, improved mental health screening of new inmates, increased use of escorted leaves and a host of other process improvements. The detention centre is run by very capable staff, and certainly dedicated in its search for continuous improvement of its practices in handling youth sent there on both custodial sentences and pre-trial detention.

However, no matter how dedicated and skilled the staff is, this is not the appropriate place for most of these youths to be in. They need to be in their communities getting the help they need to ensure their maximum safe and healthy development.

The New Brunswick Youth Centre is attempting to transform itself from a penal institution into a comprehensive support structure, and we support the underlying reasoning of this shift, but we see it as a band-aid solution to a malady that requires a more holistic remedy.

## *A GUIDE TO LAW AND POLICY*

**The placement of a juvenile in an institution should always be a disposition of last resort and for the minimum necessary period.**

**United Nations Rules for the Protection of Juveniles Deprived of their Liberty**

Detention in a secure custody facility can have serious negative psychological effects on youth. This is unsurprising given the fear and stress and stigma that go with incarceration.[110] It is all the more troubling when we see studies that show that a high proportion of incarcerated youth already have mental health disorders – a proportion several times higher than found among youth generally.[111]

## The Dangers of Over-Incarceration

The lives of these youths at the New Brunswick youth secure detention and custody facility are very programmed, but not with enough actual 'programs'. There is an extraordinary amount of waiting around for doors to be opened remotely by the control room and escorts to arrive to move youths from one area to another. One youth we spoke with summed up the experience there very succinctly: "boring."

For other youths there, however, it is not boring, but frightening. It is inevitable that youth will be exposed to negative peer influences at a detention facility. There are incidents of youths assaulting other youths. Drugs are smuggled in. Youths attempt to make alcohol in their cells. Given the negative peer influences and the trauma of incarceration, these youth may acquire behaviours upon release that are detrimental to their health and well-being (such as drug use, depression, anger, etc.). We should be mindful of each individual life diminished by

[110] See: Liebling, Alison. "Prison Suicide and Prison Coping," in Prisons: Crime and Justice, Michael Tonry and Joan Petersilia, eds. Chicago: University of Chicago Press, 1999; and Hayes, Lindsay. "Juvenile Suicide in Confinement: and Overview and Summary of One System's Approach," *Juvenile and Family Court*,1994.

[111] Kazdin, A. E. "Adolescent Development, Mental Disorders, and Decision-Making of Delinquent Youths," in Youth on Trial: A Developmental Perspective on Youth Justice, Thomas Grisso and Robert Schwartz, eds., Chicago: University of Chicago Press, 2000.

incarceration. It is a situation that detracts from a youth's ability to achieve his or her full potential as a contributing member of society.

Incarceration creates better criminals. Sending youth to correctional facilities does not make our communities safer – it makes our communities more dangerous. It has been called "crime school," as youths learn about crime from other youths. Incarceration continues to be shown, through study after study, not to prevent future crime.[112] If there is little rehabilitation and minimal reintegration support through a secure custody system, then youths are released back into communities feeling no more connected to society than before. They may, though, feel a deeper connection to other youths they have met in custody. They not only learn the tricks of the criminal trade from other youths in custody, they may develop role models and a sense of belonging that they may never have had before, a reinforcement of the belief that this criminal way of life is a good choice for them.

It can also be a place of violence and intimidation. For example, one youth in our caseload had a noose put in his cell by another youth, along with a note that said "just do it." Some groups of youth, such as LGBTQ youth, face distinct discrimination and harassment from peers that adds to the stigmatization and trauma of being incarcerated.[113]

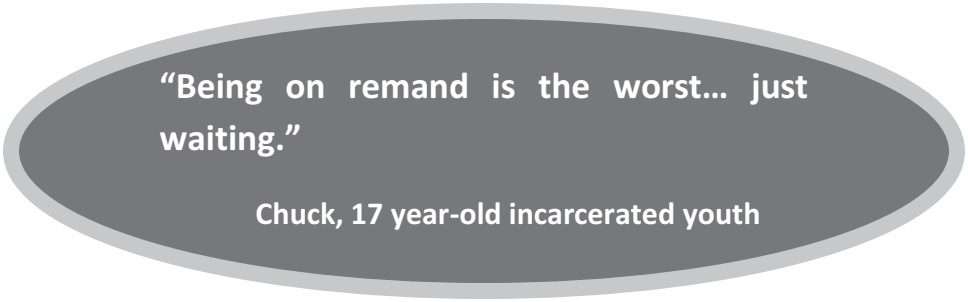
**"Where crime is taught from early years, it becomes a part of nature."**

**Ovid, *Heroides*, Circa 25 B.C.E.**

[112] Greenspan, Edward and Anthony Doob, "The Harper Doctrine: Once a Criminal, Always a Criminal," *The Walrus*, September, 2012, p. 25.

[113] See: Peter A. Hahn, "The Kids Are Not Alright: Addressing Discriminatory Treatment of Queer Youth in Juvenile Detention and Correctional Facilities," The Boston University Public Interest Law Journal, 2004; Heather Squatriglia. "Lesbian, Gay, Bisexual and Transgender Youth in the Juvenile Justice System: Incorporating Sexual Orientation and Gender Identity into the Rehabilitative Process," Cardozo Journal of Law and Gender, 2007-2008; Amanda Valentino, "LGBTQ Youth in the Juvenile Justice System," American Bar Association, 2011.

Youth in custody in New Brunswick receive some support from very capable professionals at the secure detention and custody facility (NBYC), where there is a full-time psychologist and two social workers. These staff members meet with every youth that comes to NBYC, maintain contact with them while there, and help to plan for their return to the community. We are not questioning the dedication and expertise of these people, but prison is no place to mend youth. Family connections are disrupted, community connections are severed, education is interrupted, and for youth the stigma of incarceration is difficult to overcome. Youths label *themselves* as criminals. We have seen New Brunswick children as young as twelve years old remanded to our Provincial youth secure detention and custody facility while awaiting trial. These are youth whose crime-causing personal and behavioural issues surely would be more effectively addressed in other ways.




The last thing that management and staff at the New Brunswick Youth Centre want is a pipeline into, out of, and back to this detention facility. The professionals there are doing their best to function in a system that is set up as a prison, when many (perhaps most) of the youth there require community, school and home supports, or sometimes a treatment facility. Nevertheless, although there is no doubt that the past five years have seen major positive changes at the New Brunswick Youth Centre, with a shift to a greater clinical component, and much more focus on preparing youth for reintegration into their communities, it is still a secure custody facility with all of the slow bureaucratic processes that come with such a structure. It is also still a facility that is far away from most major centres in New Brunswick, making family visits and reintegration leaves more difficult. Family connection is a very important aspect of reintegrating youth back into their communities.

## *A GUIDE TO LAW AND POLICY*

**Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.**

***Convention on the Rights of the Child*, Article 37**

**"All ya do is sit around and play cards and talk about the crimes you're gonna commit when you get out."**

**Shawn, 17 year-old incarcerated NB youth**

The New Brunswick Youth Centre is not a facility that is set up for appropriate clinical intervention, even with the skilled clinical staff that has been added. Treatment-based custodial programs can reduce recidivism substantially.[114] The New Brunswick Youth Centre provides some treatment-based programming to address the criminogenic needs of these youths. However, it is not the best environment for this treatment.

We would like to see ongoing staff training on the *Youth Criminal Justice Act*, the UN *Convention on the Rights of the Child*, and youth well-being and development generally. There is always a need for greater youth-centred approaches. An illustration of why reminders of youth rights are important is that an internal review at NBYC revealed that some staff members were setting clocks back in order to fool the youth, leave them in their cells and allow staff to have a longer break. The administration dealt with the issue promptly. New tamper-proof satellite clocks were ordered. However, the real issue is not about making it physically impossible for staff to re-set clocks, it is about addressing the attitudes that led staff to think this was justifiable.

[114] See: McMurtry, Roy and Alvin Curling. The Review of the Roots of Youth Violence, Volume 5, Literature Reviews. Toronto: Queen's Printer for Ontario, 2008.

Three years have passed since this occurred, and we have seen steady progress in adherence to youth rights and listening to the concerns of youth themselves. This has been aided by the existence in the past two and half years of a chapter of the group Youth Matters at NBYC, who meet weekly to further the voices of vulnerable institutionalized youth.

## Adults and Youth Incarcerated in the Same Location

Article 37 of the *Convention on the Rights of the Child* provides that every incarcerated youth must be treated in a manner that takes into account his or her developmental needs. These needs include, among others, the following: to maintain contact with family members (Articles 9 and 37) and friends (Article 15); to engage in unstructured play, structured recreation, leisure activities, culture, and the arts (Article 31); and to continue their education to their fullest possible intellectual development (Article 28).

Canada was a driving force in crafting the wording of the rights in the *Convention on the Rights of the Child*, including the rights found in Article 37.[115] Then Canada made a reservation to that Article, meaning Canada could continue to detain children and adults together. New Brunswick is approaching a decade of housing incarcerated adults and youth in the same facility. While male adults were previously located at the same facility as youths, today the New Brunswick Youth Centre and our provincial women's prison are co-located. There is no physical interaction, but there apparently remains some visual contact (notwithstanding the administration's continued efforts to minimize this).

## *A GUIDE TO LAW AND POLICY*

**Every child deprived of liberty shall be separated from adults …**

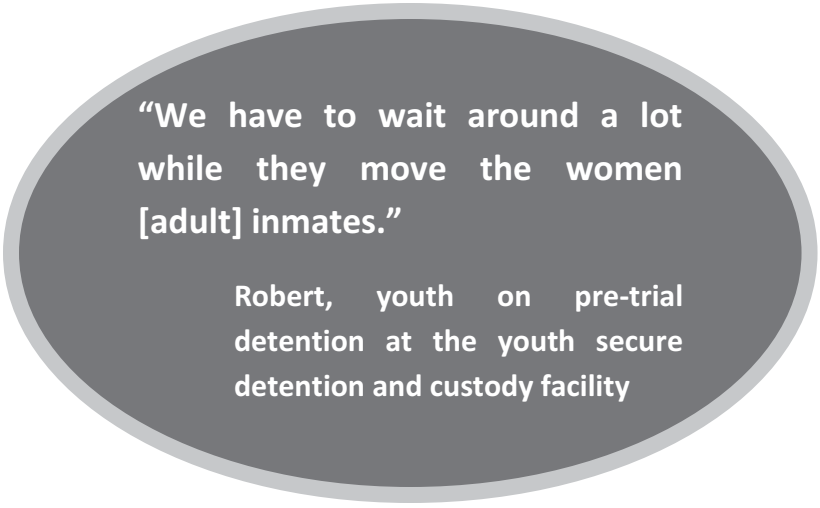
***Convention on the Rights of the Child*, Article 37**

[115] Schabas, William & Helmut Sax. A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty. Boston: Martinus Nijhoff Publishers, 2006, pp. 51-52.

What is even more troubling is the practice of transporting youths to court, handcuffed and shackled (often for many hours) in vehicles along with adult inmates.

While provisions do exist in the *Youth Criminal Justice Act* for courts to deem it appropriate for youth and adults to serve sentences at the same facility under very specific (and rare) circumstances[116], the situation at the New Brunswick Youth Centre is unique.

Federal statutory law, international legal obligations, constitutional law, and best-practice gleaned from experience all argue against the situation of housing youth and adult inmates in common facilities. Youth-only detention facilities are uniquely designed to help rehabilitate young offenders during this time of rapid development. When government says as policy-makers and lawmakers that "children come first," government has to be true to its words and implement policies and actions consistent with these sentiments. This is particularly true with respect to vulnerable youth, including those who have run into some trouble with the law.




[116] Pursuant to s. 76, a youth may be sentenced to serve his/her term in an adult facility. Pursuant to the same section, a youth may also be sentenced to serve his/her term at a youth facility and remain there even though he/she becomes an adult during his/her term. Furthermore, although a provision exists in the *YCJA* to allow for temporary pre-sentence detention of youths in the same facility as adults, that provision (s. 30(3)(1)) states that this is only to occur when: (*a*) the young person cannot, having regard to his or her own safety or the safety of others, be detained in a place of detention for young persons; or (*b*) no place of detention for young persons is available within a reasonable distance.

If the under-capacity of NBYC for youths in custody is a chronic issue (and this seems to be the reasoning behind placing adults in the otherwise unused units), then perhaps the time has come to consider a new facility for youths (which would therefore leave the Miramichi facility free to house adult inmates). This Office has been calling for several years now for the creation of a new centre for youth in secure detention and custody. That centre should be located closer to the Saint John–Moncton–Fredericton areas in order to provide greater family and community support for these youths.

## RECOMMENDATION

8. Government should give greater effect to the fundamental principle of the *Youth Criminal Justice Act* that youth justice be a separate system from the adult criminal system, by discontinuing the practice of incarcerating adults and youth at the same facility, and by ending the practice of transporting youths handcuffed and shackled and with adult prisoners in the same vehicles.

# Section II – Part Nine

# Custody with Care: Rehabilitation and Reintegration back into Community

The federal *Youth Criminal Justice Act* has created new options for community-based sentences (as opposed to incarceration). But it is the Provinces and Territories that must create the community-based programs to make these sentencing options viable. As succinctly stated by two experts in Canadian youth criminal justice, "the success of this Act depends on jurisdictions developing and maintaining programs, resources and services to support the key initiatives of this legislation."[117] If programs and support services are not available, judges are usually less inclined to order a community-based sentence. The judiciary cannot force government to create services, although some judges have tried to do so, presumably due to frustration with the lack of adequate social supports.[118] It is frustrating for all those involved when community supports are sparse.

## *A GUIDE TO LAW AND POLICY*

**States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration … Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.**

**UN *Convention on the Rights of the Child*, Article 39**

[117] Tustin, Lee and Robert Lutes. A Guide to the Youth Criminal Justice Act, 2012 Edition. Markham, Ont.: LexisNexis Canada, 2011, p. 6.
[118] See: *R. v. K. (L.E.),* 2001 SKCA 48 (CanLII)

## A Youth's Story from our Files

### Youths need Rehabilitation, not Re-incarceration

**Francine, in Grade 10, was homeless, binge-drinking, waking up at strangers' houses, meeting men online and being taken to parties by them and having sex. No one in her community was willing to take her in and provide care. Coming into contact with the criminal justice system was almost inevitable. One charge and a probation order quickly led to more charges of breach of probation as she missed her curfew and was caught with alcohol. While at the youth detention centre she received counseling and decided that she would like to undertake the program at Portage, a substance abuse rehabilitation centre. She spent six months there, during which time a Delegate from our office made several visits. During each visit the Delegate asked Francine how she was doing on a scale from 1 to 10. The first answer was a 6. A month later it was a 7. Then an 8. At the end, it was a 9.**

**When she was ready to leave the rehabilitation centre, Francine asked the Child and Youth Advocate Delegate if she could stay in touch, telling our Delegate that it was important to Francine because "you helped me change my life."**

**Francine re-established a connection with her mother, who agreed to undertake addictions counseling herself. Francine did well in the academic program at Portage, and upon leaving she re-entered her old High School, in Grade 11. She is continuing with her counseling for addictions, is living with her mother again, is involved in physical fitness activities, is staying focused, and is on track to graduate.**

The period immediately following release from custody is a time of high risk of reoffending. It is therefore imperative that plans and supports are in place to help youth through this time. Youth have issues particular to their personal situations. Reintegration is not a one-size-fits-all approach, and it is a difficult challenge for social workers, psychologists and probation officers to ensure that reintegration efforts are tailored to each individual youth. Different types of approaches are effective with different youth. Some youth need behavioural programs, others need addictions support, many need educational and home supports, others require employment and mentoring options, and many need help addressing mental health issues. One important principle with youth justice is that problems should usually be addressed where they occur, in the

community. In most cases, treatment is more likely to be effective in community than in a custodial environment.

## A Youth's Story from our Files

### Nowhere to turn for Help

**Veronica has limited cognitive abilities, perhaps Fetal Alcohol Spectrum Disorder. This made her susceptible to negative peer influences and she would often be caught by police using alcohol and drugs or for other minor crime. Her mother consistently abandoned her and Veronica wound up shuffled from group homes to foster homes to a woman's shelter. Not abiding by curfews meant breach of probation charges and inevitably incarceration. She needed treatment. Her cognitive abilities are too low to meet the minimum criteria for treatment facilities such as Douglas Lake and Portage. There were no other options presented. The limited treatment she received was at the secure custody detention facility, New Brunswick Youth Centre.**

**With nowhere for Veronica to go, her probation officer attempted to have an independent living situation set up for her, but funding was problematic. In the meantime, Veronica grew older and reached age 18 without the supports she needed to function in our society. She ended up back in the secure custody facility in Miramichi, but this time incarcerated on the adult side, rather than the youth side.**

If youth are provided appropriate rehabilitation, most move on and do not fall into repeat criminal behaviour. Sometimes it can require several attempts, it is not about quick fixes, but success is attainable. Most youths leave crime behind. It is our responsibility as a Province to ensure that youth develop into resilient and resourceful adults.

**"I don't know… I did something I shouldn't have, they put me here… then I'll go back to where I was. I'm just going back to nothing."**

**Thomas, a young person incarcerated at New Brunswick's youth secure detention and custody facility for a breach of conditions at a group home**

## Probation Services

Probation officers play an integral role in the reintegration of youth back into their communities. By and large we find excellent probation officers who are dedicated to the best service possible to youths. We do, however, at times see issues that show an apparent lack of a youth-rights focus by probation services.

One particularly disconcerting example was that the Department of Public Safety instituted a new policy wherein all requests for information from the Office of the Child and Youth Advocate to probation officers must be sent in writing to District Heads. While it is not for a government Department to dictate the process by which we undertake our work according to our governing legislation, in the interests of maintaining good relationships we complied with the request. At first we found it not overly onerous, as the majority of probation officers are extremely dedicated to working in the best interests of youth, and they are happy to work with us. However, due to a minority of Regional Directors who perhaps viewed our office as a problematic watchdog over their work, this process became cumbersome, as we could not immediately speak directly with probation officers.

What occurred was a mishmash of procedure. There was a great lack of consistency, as sometimes we were met with cooperation and other times with obstruction. This kind of arbitrary discretion is contrary to effective work and to principles of administrative fairness – it does a disservice to the youth who are to be helped by the system.

Even the simplest questions would sometimes be met with a wall of bureaucracy. For example, an email from one of our Delegates asking for the date of a youth's escorted leave from Portage was met with this response: "All requests for information must be clearly stated in writing." By "in writing", this probation officer was stating that requests had to be in the form of a letter, not an email. It has to be said emphatically that probation officers (of whom there are many, many great ones) should be working with our office and anyone else who can help youths get supports to keep them away from crime. This problem has been resolved, and we have seen a very welcome new openness and youth focus at the Department of Public Safety in all matters. With the recent work emanating from the Crime Prevention and Reduction Strategy being led by the Department of Public Safety, we are confident that approaches that are not in the best interests of youth will be a thing of the past.

Still, we see a lack of youth-specific focus in some areas in the Province. We see youths getting bounced from one probation officer to another. They need continuity; they need connections that don't get repeatedly broken. And they need probation officers that have the time to gain a deep expertise in youth matters. Some areas have probation officers who work only with youth. All areas should try to institute this structure. The youth criminal justice system is meant to be a separate justice system, not a sideline to the adult system. It is meant to be a system that responds

to the unique needs of adolescents. In that regard, one conversation that has not received much attention is over whether Probation Services would be better housed in a Department that works to a greater degree with youth needs such as the Department of Social Development, rather than the Department of Public Safety. In Quebec, for example, youth justice has long had a child social development approach to youth criminal justice, with a focus on rehabilitation and reintegration, and Youth Workers (who do work similar to Probation Officers in New Brunswick) work based in Youth Centres funded by the Ministry of Health and Social Services.[119]

## *A GUIDE TO LAW AND POLICY*

**The *Youth Criminal Justice Act***

**90. (1) When a youth sentence is imposed committing a young person to custody, the provincial director of the province shall, without delay, designate a youth worker to work with the young person to plan for his or her reintegration into the community, including the preparation and implementation of a reintegration plan that sets out the most effective programs for the young person in order to maximize his or her chances for reintegration into the community.**

**(2) When a portion of a young person's youth sentence is served in the community, the youth worker shall supervise the young person, continue to provide support to the young person and assist the young person to respect the conditions to which he or she is subject, and help the young person in the implementation of the reintegration plan.**

[119] DeGusti, Berenice et al. "Best Practices for Chronic/Persistent Youth Offenders in Canada: Summary Report," National Crime Prevention Centre, Ministry of Public Safety, Government of Canada, 2009.

# A Youth's Story from our Files

## A Victim, not a Criminal

**David is a fourteen year-old who was sexually abused as a child. He has been diagnosed with Post-Traumatic Stress Disorder. His behavioural issues brought him to court facing criminal charges. He had already been, as he put it, "kicked out" of school. While everyone involved in his case would have rather he had received intensive supports before having to go through the ordeal of court (which he found bewildering and, in his words, "weird") he did eventually get the supports he needed.**

**His probation officer wrote a pre-sentence report recommending that he be referred to the Intensive Support Program. David was sentenced to a Community Supervision order, which meant he could remain at home and get the care he needed. He was admitted to the Pierre Caissie Centre, a drug and alcohol addictions rehabilitation facility, and he was assigned a place in the Intensive Support Program. His school worked to get him into an alternative education program, in order to gradually reintegrate him back into his mainstream class. A community-based not-for-profit organization provided support. Government and community came together to keep David out of custody and give him the tools to gain an education. Every youth deserves to have the youth criminal justice system work for him or her to provide positive outcomes.**

## Open Custody

The Office of the Child and Youth Advocate feels strongly that a youth-rights focus must be taken to open custody facilities in New Brunswick, to draw sharp distinctions between open and secure custody. Secure custody should be a last resort, used in exceptional circumstances for violent offenders. Open custody should be readily available to young persons *in their own community*, in order to ensure the least disruption possible to their development and rehabilitation.

As succinctly put in Ontario's *Review of Open Detention and Open Custody* report:

> The essential role of an open custody/open detention facility is not one of simple containment. The more appropriate role is one that attempts to normalize life for the residents and to provide maximal programmatic opportunities for pro-social role modeling and reintegration in the community.[120]

***The recent context of open custody***

In April 2014 the Department of Public Safety decided to end its contracts with the community-based open custody group homes which had remained in operation in Moncton and Saint John. The youth at those group homes were transferred to Portage, an addictions rehabilitation facility.

The Advocate's Office had previously expressed its reservations with respect to this proposal. Portage's program can be beneficial to some youth sentenced to open custody, if adequate screening for suitability to the program is undertaken. However, Portage does not afford youths sentenced to open custody the essential opportunity to remain close to their communities with continuity of services and connections to family. Moreover, not all youth sentenced to open custody have addictions issues. Even those who do have addictions issues are not all prepared to undertake Portage's program. What transpired was that youth were not screened for suitability to Portage's program, and Portage could not handle some of the youth sent there. Mixing two youth populations with different needs jeopardized all of their rehabilitation plans and led to problems that were predictable and avoidable.

An emergency solution was then approved by the Department of Public Safety in early July 2014 to transfer some of the open custody population away from Portage and place these youths on an interim basis at the youth secure detention and custody facility , the New Brunswick Youth Centre (NBYC)) in Miramichi, in a section of the facility previously used as apartments for visiting family members.

[120] Cooke, Diana, and Judy Finlay. ,"Review: Open Detention and Open Custody in Ontario," Office of Child and Family Services Advocacy, January, 2007.

The Office of the Child and Youth Advocate expressed serious concern at this decision. Our concern was that this move to place open custody youth at this secure custody facility would develop from an interim measure into a permanent situation. Closed and open custody youth being co-located does not accord with the purposes of the *Youth Criminal Justice Act* or with the *Convention on the Rights of the Child.*

Neither of these facilities (Portage or NBYC) is located close to the communities that youths come from; youths' reintegration into their home communities and families will therefore be that much more challenging. The remoteness of services is a problem, as is the disruption to the youths' relationships, family life and education. Beyond the issues of these facilities being geographically isolated, there is also the matter of the disruption in the continuity of care for youths. Social workers, healthcare workers and mental health workers will not be following youth to these facilities. Moving open custody youth to the New Brunswick Youth Centre also means that there will be more youths at the facility sharing the existing resources, leading to fewer services for everyone. This problem is further exacerbated by the presence of adult female inmates.

There is also the very important matter of keeping an open custody option that is tailored to the needs of First Nations youth. It has been shown again and again that in the criminal justice system Aboriginal-specific interventions work best for Aboriginal youth. Connecting youth with Aboriginal culture and traditions is imperative for rehabilitation and reintegration into community. Removing these youth from their home communities for open custody is not conducive to respect for the role that their First Nations communities can play. There continue to be First Nations youth, both male and female, sentenced to open custody (four in 2013-2014).[121] These youths should have culturally-specific options in First Nations communities.

This office's advice to the Department of Public Safety was that in weighing the costs of what to do with open custody youth, the Province has to look first to its statutory, Constitutional and international human rights obligations, but it must also look deeply into the social, educational and health impacts and opportunity costs of every potential solution.

The Child and Youth Advocate's recommendations to the Department of Public Safety at the time were for the Department to maintain community open custody options while undertaking a more thorough review of open custody options, and in the meantime refraining from significant infrastructure investments for open custody at the youth secure detention and custody facility.

[121] Statistics Canada. *Table 251-0012 - Youth custody and community services (YCCS), admissions to correctional services, by sex and aboriginal identity, annual (number),* CANSIM (database). (accessed: 2015-06-01)

## *A GUIDE TO LAW AND POLICY*

**Alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.**

**The UN Convention on the Rights of the Child, Article 40**

***Family connection***

It is a *lengthy* and *costly* drive for virtually all families and other members of youths' support groups to visit NBYC. We have seen how infrequently most families visit secure custody youth at NBYC. The high incidence of youth coming from low-income families underscores the problem of transportation costs.

The option of videoconferencing is not reassuring. It is difficult to imagine a scenario less likely to promote meaningful family-youth connection. Section 3(1)(c)(iii) of the *Youth Criminal Justice Act* stresses measures that should "where appropriate, involve parents, the extended family, the community, and social or other agencies in the young person's rehabilitation and reintegration". This fundamental *YCJA* principle of family and community connection is integral to the proper and effective functioning of the youth criminal justice system. Youth Justice Committees will not be able to perform their community support facilitator functions effectively if open custody youth are at NBYC and Portage rather than in communities closer to their homes.

***Envisioning a legitimate open custody program***

As stated in the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, different custody options for youth must be developed to:

> take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the

> individuals concerned and the protection of their physical, mental and moral integrity and well-being.[122]

The United Nations Rules further state that:

> Detention facilities for juveniles should be decentralized and of such size as to facilitate access and contact between the juveniles and their families. Small-scale detention facilities should be established and integrated into the social, economic and cultural environment of the community.[123]

The Department of Public Safety should also pay due regard to the United Nations Guidelines for the Alternative Care of Children, the purposes of which include:

> To support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and permanent solution…

and

> To ensure that, while such permanent solutions are being sought, or in cases where they are not possible or are not in the best interests of the child, the most suitable forms of alternative care are identified and provided, under conditions that promote the child's full and harmonious development[124]

In our view these principles find expression already in the *Youth Criminal Justice Act*.

Justice Cory in the Supreme Court of Canada decision in *R. v. M. (J.J.)* commented on open custody facilities as follows:

> Those facilities are not simply to be jails for young people. Rather they are facilities dedicated to the long term welfare and reformation of the young offender. Open custody facilities do not and should not resemble penitentiaries. [125]

We agree. The youth secure detention and custody facility is not an appropriate facility to be designated as a "lower level" form of custody or as an open custody facility. To do so opposes the meaning of the *Youth Criminal Justice Act* and does not accord with rights under the *Convention on the Rights of the Child*. New Brunswick can and must do better.

---

[122] UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty : resolution / adopted by the General Assembly.*, 2 April 1991, A/RES/45/113, section 28.
[123] UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty : resolution / adopted by the General Assembly.*, 2 April 1991, A/RES/45/113, section 30.
[124] UN General Assembly, *Guidelines for the Alternative Care of Children : resolution / adopted by the General Assembly*, 24 February 2010, A/RES/64/142, section 1(a) and (b).
[125] *R. v. M.(J.J.)* [1993] 2 SCR 421, at para 430.

We have seen no evidence to support housing open custody youth at NBYC as an option in the best interests of youth (or society). Best practices based on evidence point to the advantage of community and family connection for rehabilitation and reintegration. For example, specialized foster care options for open custody could be created in communities across the Province.

We see very different approaches to open custody being used in the provinces with the best results for preventing youth crime. A jurisdictional scan should be undertaken by government, not simply to determine what the practices are in other provinces, but rather which provinces have the *best results*.

We assume that, in order to avoid some of the pitfalls that resulted from the Portage decision, the Department of Public Safety will be in consultation with judges, Crown counsel, Legal Aid, the Department of Social Development and the Department of Health, education officials, our office, and most importantly *with youth themselves*, regarding changes to the open custody program.

The numbers of youth in open custody has been in steady decline, falling by 67% between 2009 and 2014.[126] As less than 30 youth are being sentenced to open custody per year now, the low numbers provide a perfect opportunity to provide community-based options such as specialized foster care. We will continue to encourage the Department of Public Safety to look toward these approaches that are most beneficial for positive youth development.

## RECOMMENDATION

9. Government should develop open custody options in accordance with the Guiding Principles of the *Convention on the Rights of the Child* and the principles and objectives of the *Youth Criminal Justice Act*. Such open custody options should be guided also by the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Guidelines for the Alternative Care of Children. All efforts should be aimed at reintegration of youth into community and family settings.

[126] Statistics Canada, CANSIM Table 251-0011, Youth custody and community services (YCCS), admissions to correctional services, by sex and age at time of admission, April 21st, 2015.

# SECTION III

# CREATING A HOLISTIC SYSTEM

# Section III – Part One

# Rights-Respecting Processes across Government Youth-Serving Areas

## Human Rights for Youth – Implementing the *Convention on the Rights of the Child* in New Brunswick

The UN *Convention on the Rights of the Child* provides the internationally recognized framework for the legal rights of those under the age of eighteen. New Brunswick has obligations under this legal regime. No one has to be an expert in law, or in international human rights instruments, to understand the *Convention on the Rights of the Child* and use it to bolster their work.

As a starting point, it is important to note that children's rights are human rights. Human rights are not static, not fixed in time. This is particularly true when it comes to children's rights. Many of the rights enshrined in the *Convention on the Rights of the Child* are progressive rights, meaning that there is an obligation on government to continually strive for greater provision of these rights. The law is a continually changing phenomenon, and we often see the law changing as it relates to children. This is a very important point because not long ago children had no rights.

For most of you reading this report, when your great-grandparents were children they had no rights. They were the full property of their parents, in effect just chattel. The first child welfare case in North America was brought to court by the Society for the Prevention of Cruelty to Animals (SPCA). Existing legal protections for animals were applied to a neglected and abused

child.[127] This gradually led to a societal welfare approach to child wellbeing and protection. While this was a good shift, it was in many ways still problematic.

This welfare approach to children was reflected in many areas in our society including in the criminal justice system. As was noted earlier in this report minors had no rights under Canada's *Juvenile Delinquents Act*, no due process rights, no right to a lawyer, nothing we would call a fair trial. They could be sent to reformatories and kept there until they were adults, regardless of the crime. Becoming an adult was the only definite limit to the sentence. Thankfully, we are now in the midst of a shift from a needs-based welfare approach to a rights-based approach.

The *Convention on the Rights of the Child* is the cornerstone of this shift. It is the most widely ratified international treaty, and Canada was very instrumental in its drafting. The UN General Assembly unanimously adopted the *Convention* on November 20, 1989. Canada ratified it on December 13, 1991.

The *Convention* has 41 rights provisions to be safeguarded or provided for. It brings together civil, political, economic, social and cultural rights for children. It aims to protect and support children in all areas of their lives. It reflects a holistic approach to child and youth development.

All children's rights are u*niversal* – every child has these rights. They are all of *equal importance* – there is no hierarchy of rights. They are all i*ndivisible and interdependent* – we cannot look at rights in isolation from one another. And they are all *inherent and inalienable* – these rights are not gifts from the government to children, we are born with them, and they cannot be given away or willingly allowed to be extinguished. Ignoring legal obligations does not make the law less legitimate, it makes governance less legitimate.

The *Convention* is very comprehensive and extremely cross-sectoral. Implementation requires great breadth of action. What can be difficult sometimes for people in government is to try to stop thinking compartmentally. Too often they are too busy within their own area of work to look at what is happening across government or outside of it. Youth issues are interconnected, as are their rights. A holistic approach is required to address root problems and take into account the whole child.

In Canada there is a legal presumption that our domestic law conforms to International Law. The UN *Convention on the Rights of the Child* is therefore essential to interpretation of Canadian law relating to youth criminal justice. The same applies of course to interpretation of New Brunswick's legislation such as the *Family Services Act*, the *Health Services Act*, the *Mental Health Act*, the *Mental Health Services Act*, the *Custody and Detention of Young Persons Act*, the *Education Act*, the *Early Childhood Services Act*, as well as a host of other Acts, and all regulations and policies pursuant to them.

[127] See: Shelman, Eric A. and Stephen Lazoritz, Out of the Darkness: the Story of Mary Ellen Wilson, Dolphin Moon publishing, Cape Coral, Florida, 2003.

Canada reports to the UN Committee on the Rights of the Child every five years, concerning our implementation of the rights of those under age 18. The Committee then releases Concluding Observations to Canada. The most recent Concluding Observations from the Committee to Canada were in late 2012. The Committee remains concerned at the absence of legislation that comprehensively covers the full scope of the *Convention* in Canada's national and provincial law. The Committee calls for specific plans and strategies for implementation of these rights. The Committee is concerned that awareness and knowledge of the *Convention* remains limited amongst children, professionals working with children, parents, and the general public. The Committee encourages Canada to raise awareness among children concerning the existing children's Advocate offices in their respective provinces and territories. And the Committee notes with concern Canada's limited progress made to establish a national, comprehensive data collection system covering all areas of the *Convention on the Rights of the Child*.

**"I think I've got rights, but, yeah [laughs], I guess they're not doing me much good."**

**Trevor, 17 year-old in secure custody**

## The Importance of Data Collection, Analysis and Dissemination

Misconceptions of what works best to deter crime are as old as recorded history. The movement toward research in evidence-based crime prevention methods largely began to emerge in the 1970s, but only began to gain serious traction in the 1990s and 2000s. The US Department of Justice has funded major research, such as the seminal study What Works, What Doesn't and What is Promising.[128] This study accelerated the move toward empirical studies of crime

[128] Sherman, Lawrence et al. Preventing Crime: What Works, What Doesn't and What is Promising. National Institute of Justice, 1998.

prevention in the US and Canada. It has also influenced present-day understanding of crime prevention, as it included major sections on the roles of communities, families and schools.

Excellent resources exist to inform evidence-based decision-making. The International Centre for Prevention of Crime (ICPC), located in Montreal but truly global in scope and expertise, was founded in 1994, and is a non-governmental organization specializing in evidence-based crime prevention and community safety.[129] The ICPC collects evidence on crime prevention practices around the world, to act as a repository of information of best practices. It promotes international norms such as those found in the UN Guidelines on the Prevention of Crime. Many organizations and individuals are producing well-researched, evidence-based studies on crime prevention, and there exist many resources that present innovative global practices.[130] These studies and program examples should guide crime prevention policy in New Brunswick.

In New Brunswick, the Department of Public Safety facilitates a Crime Prevention and Reduction Strategy that focuses on best-practices emerging from the large body of evidence-based studies on youth crime, and we encourage this cross-governmental and civil society collaboration approach. We hope to see an analysis based on child and youth rights applied to this initiative and we already see a more evidence-based approach to youth justice matters in New Brunswick.

To have evidence-based decisions, we need data. There is always a need for more and better data collection and analysis. Crime prevention is an area that has incurred massive spending with very unimpressive results. If our health or education systems operated with such disastrous results, we would all demand not only improvements, but wholesale change. Not only are we unable to effect high rates of positive outcomes in crime prevention, we have not even undertaken an exhaustive inspection of the ways in which we are failing. If we do not collect information, analyze it and put it to use, then we are operating blindly. There is no such thing as well-informed and well-crafted youth justice policy without comprehensive data collection and analysis.

Each year the Child and Youth Advocate releases the State of the Child Report. That report includes the NB Child and Youth Rights and Wellbeing Snapshot, created with the expertise of the New Brunswick Health Council. The Child and Youth Rights and Wellbeing Snapshot seeks to create a standardized annual outcome measurement tool, with indicators reflecting fundamental rights of New Brunswick children and youth. We collect data from child-serving government Departments and make comparisons to national data and between years. We have four years of comparable data in the Child and Youth Rights and Wellbeing Snapshot. It contains indicators that point to positive resiliency-building factors that can protect our youth from falling into the criminal justice system and it has indicators that point to negative risk-

[129] International Centre for Prevention of Crime (ICPC) http://www.crime-prevention-intl.org

[130] For example: International Centre for the Prevention of Crime. "International Compendium of Crime Prevention Practices: To Inspire Action Across the World," 2008.

factors that can reveal warning signs. It captures over 200 indicators of children's rights, disaggregated as much as possible. We see it increasingly being used by policy developers in New Brunswick, and we hope that it will increasingly serve as a resource for evidence-based decision-making that takes into account children's rights.

The Canadian Centre for Justice Statistics provides important youth crime-related data[131], but it is not nearly enough to gain a clear picture of what is happening in New Brunswick. Under-resourcing of research capacity in New Brunswick must be addressed. During the course of this systemic review, we found that much information is simply not collected. This is not for lack of dedicated and talented people working in Departments such as Public Safety, Social Development, Health, Justice, and Education & Early Childhood Development. We fully understand that staff members are extremely busy with their workloads and structural change is not easy. Nonetheless, research positions should exist in order to better inform policy effecting our children and youth. All Departments need to collect statistics for analysis. These statistics must be disaggregated between minors and adults. We have often found statistics collected that do not differentiate between these groups. Many of our Provincial criminal justice statistics are not disaggregated by age, which is very discouraging given that we have separate youth and adult justice systems by law. We need to pay more attention, in order to create an accurate picture of how youths are faring in this province. And we need to ensure data-sharing. All that being said, qualitative evidence must also play an important role, just as quantitative evidence does. And most importantly, the opinions of youth must be solicited and given due weight.

The system often gives little room for people working within it to maneuver, and it can be frustrating for those who want to do more. All systems need continual refinement. Change is difficult, to be sure, but it is necessary, and it always will be. Perfection is never going to be reached, but change helps us to get closer to it, by applying new knowledge to current problems. We have occasionally, though thankfully rarely, encountered people working within New Brunswick's system of youth justice who resist changes to the youth criminal justice system. When problems are pointed out and the need for change is suggested, there is sometimes the response that "this is New Brunswick" and that what works elsewhere won't work here. What works elsewhere can very often be adapted to work here. The search for best practices must be a constant one and involve every government department with operations that effect youth in the criminal justice system. And better data collection will assist the evaluation and analysis of youth policy.

We encourage the good work being done by New Brunswick's Crime Prevention and Reduction Strategy, and especially commend the recently developed Youth Diversion Model; this strategy can play a lead role in improved data collection and analysis.

---

[131] Specifically: police-reported data on youth crime from the Uniform Crime Reporting Survey; youth court data from the Integrated Criminal Court Survey; and youth correctional data from the Youth Custody and Community Services Survey.

## RECOMMENDATION

10. Government should develop better data-monitoring, analysis and dissemination processes in order to ensure effective evidence-based decisions are being made in youth criminal justice matters and to guide the work of the Provincial Diversion Steering Committee as part of the New Brunswick Crime Prevention and Reduction Strategy.

## Child Rights Impact Assessments

Children are a large yet uniquely vulnerable segment of the population, generally lacking means of influencing government decision-making. A Child Rights Impact Assessment (CRIA) tool provides a means of helping to ensure the implementation of children's rights.

The essential purpose of Child Rights Impact Assessments is to bring child and youth issues to the forefront of government decision-making. The CRIA process examines potential positive and negative impacts of a proposal on minors, allowing for promotion of the former and mitigation of the latter. These assessments provide decision-makers with evidence-based perspectives on how proposed government action might affect children's comprehensive and interdependent rights, as articulated under the *Convention on the Rights of the Child*.

The only Canadian example of Child Rights Impact Assessment at the provincial level presently is the CRIA process in place is New Brunswick. The New Brunswick government has made a very laudable commitment that all proposed legislation and policy changes must undergo a CRIA before being brought to Executive Council. The New Brunswick government is instituting a measurement system to assess the effectiveness of this tool, and we hope to see evaluative research made public from this in the future.

This very significant investment in children's rights and in evidence-based decision-making should lead to many benefits. Increasing the child and youth focus of government decisions will help to avoid harmful effects, improve cross-departmental coordination in the best interests of children and youth, provide greater cost savings and efficiencies, and increase accountability. It

should also help to lessen youth criminal involvement, as it has been found that policies and practices that respect child rights are associated with lower levels of youth crime in the Canadian context.[132]

We hope to see Child Rights Impact Assessments being utilized in government decision making not only in regard to legislation, regulations and policies, but also in program planning and implementation. Government has a legal duty to protect and provide for children's rights under the *Convention*. If implemented robustly, the commitment of the government of New Brunswick to Child Rights Impact Assessments will pay dividends to us all.

[132] Howe, R.Brian. "Children's Rights as Crime Prevention," *International Journal of Children's Rights*, 2008.

# SECTION IV

# BRINGING IT ALL TOGETHER

Continued training on the *Youth Criminal Justice Act* has been lacking since some training was provided in New Brunswick when the *Act* first came into force. Given the absence of training, and the recent amendments to the *Act*, it is time to provide more educational opportunities for police, probation officers, prosecutors, defence counsel, judges and corrections personnel on the proper application of the *Act*.

We are confident that all would welcome provision of educational resources to increase their abilities to handle youth criminal justice cases according to the (newly amended) *Youth Criminal Justice Act* as well as the UN *Convention on the Rights of the Child*.

The effect of the 2012 amendments to the *Youth Criminal Justice Act* will depend on actors in the youth justice system. In our opinion, the amendments did not substantially change the *Act*. What we would like to see is a more comprehensive application of the *Act* as a whole in New Brunswick. We have not robustly implemented this *Act* in our Province. Building on the recent progress being led by the Roundtable on Crime and Public Safety, now is our chance to do so.

To be truly effective in our support for families, New Brunswick needs to invest in early intervention and positive parenting programs to ensure more dedicated and involved parents. Offending behaviour by youths often is a result of underlying problems that are best addressed long before a child is old enough to be subject to the criminal justice system.

Therefore, the most important government stakeholders in crime prevention are not the police, the Department of Public Safety, the Office of the Attorney General and judges. The most important government stakeholders are the Department of Education and Early Childhood Development, the Department of Social Development, and the Department of Health. And the most important stakeholders of all in youth crime prevention are families, friends and communities.

## Schools

This Province is teeming with dedicated, caring teachers and administrators in schools as well as staff in the Department of Education and Early Childhood Development. We have witnessed far too many positive stories to recount in the space of this Report. But as an example, we have seen a vice principal, a school behaviour interventionist and teacher drive several hours to Miramichi in order to meet with a student who had been remanded to the youth jail. They made the trek to discuss a plan with him for getting back in school and back on track. It also happened to be that youth's birthday. This is a deeply impressive example of going beyond the norm for a youth's reintegration. What the province needs, though, are standards that outline the obligations of schools in relation to youths' reintegration into school and society, and to build confidence. Government should be insisting on the school and teacher's role in support and reintegration.

**"I was banned [from High School] after the first time they caught me with two roaches, but I went with my dad to District Council to have the ban lifted, and we got it. But now I imagine I won't be allowed back again when I get out of here."**

**Alex, Grade 9 student remanded to NBYC after being charged with theft (using parent's credit card to buy video games through the Internet).**

Engaging schools is critical to crime prevention. Most children and youth spend most of their hours in the home and in school. Government can do much to promote crime prevention in both environments. Police, probation services and courts are after-the-fact means of addressing crime. Prevention is most effective when it is proactive. Moreover, the victims of youth crime are often other youths, and a large proportion of offences occur in schools. Surveys often reveal very high incidence rates of victimization in schools.[133] Furthermore, research has shown that poor school attendance and academic performance often links with school misbehaviour and youth crime.[134] As a well-known psychologist has noted: "In some cases, this kind of chronic absence from school is maybe an indication of mental-health problems, that a young person is really struggling… skipping school should be a signal to the school system."[135] Programs such as Rights Respecting Schools, Young Leaders, and Roots of Empathy can play vital roles in the needed transformation.

The monetary cost of putting a youth in secure custody at the New Brunswick Youth Centre is many times greater than the cost of keeping a youth in school. The societal cost is, one could argue, even greater.

Much can be done in schools to improve outcomes for youth at risk of criminal involvement.[136] It is the students who are most likely to criminally offend who have the greatest need for assistance from schools. For example, the relationship-building that occurs as a result of community policing in schools has been shown to lead to double-digit reductions in school suspensions and in criminal charges, especially when officers take part in school activities such as coaching sports teams and extracurricular activities (although it is imperative to avoid a 'law and order' mentality in schools with police presence).[137] Officers in schools should have specialized training in mental health, addictions, and child development, to recognize issues and refer students appropriately. As another example, restorative practices (modelled on restorative justice) have been practiced in New Brunswick schools to a small degree, but we see these

---

[133] See for example: Gomes, J.T., Bertrand, L.D., Paetsch, J.J., & Hornick, J.P. "The Extent of Youth Victimization, Crime and Delinquency in Alberta, 1999," Canadian Research Institute for Law and the Family, 2000 [a study of over 200 Alberta students in which over half (54%) of the respondents indicated they had been victimized at least once within the past year at school]

[134] See for example: Gottfredson, D., M. Sealock & C. Koper. "Delinquency," in DiClemente, et al., eds., Handbook of Adolescent Health Risk Behaviour. New York: Plenum, 1996; DeGusti, Berenice, L. MacRae and J.P. Hornick. "An In-depth Examination of School Investment and Extracurricular Activities by a Youth Offender Cohort," Canadian Research Institute for Law and the Family, 2008.

[135] Dr. Debra Pepler, professor of psychology at York University and co-founder of PREVNet (Promoting Relationships and Eliminating Violence Network), commenting on a 2013 report commissioned by the NS government.

[136] For some informative examples see: Paige Wallace. "Juvenile Justice and Education: Identifying Leverage Points and Recommending Reform for Reentry in Washington DC," *Georgetown Journal on Poverty & Law Policy*, Vol. 19, No. 1, Winter 2012.

[137] Appleby, Timothy. "Police Presence in High Schools Makes the Grade," *The Globe and Mail*, February 5th, 2009.

practices being used more in schools in our neighbouring Province Nova Scotia[138] as well as internationally[139] to address minor and serious matters. Of course, the most important means schools can take to reduce criminality is to focus on education that is tailored to individual learning styles and inclusive of mental health needs, learning disorders, culture, sexual orientation and gender identity, ethnicity, and other statuses.

Academic underachievement is a risk factor for juvenile crime, whereas attachment to school is a protective factor guarding against criminal involvement. Social exclusion and discrimination are risk factors for school suspension and involvement in youth crime.[140] The education system is addressing these issues more and more in efforts to become truly inclusive (the LGBTQ Inclusive Education Resource produced by the Department of Education and Early Childhood Development in 2015 is an excellent example), but there is a long way to go. We have seen multiple times across parts of the Province how students who have been charged with crimes are then suspended indefinitely by their schools. School safety is a legitimate and serious concern, but in some situations brought to our attention it would appear that some schools have taken an extremely reactive and overly heavy-handed approach.

Schools have the most potential (next to parents) to prevent youth crime. They also have dangerous potential to create the conditions for it. Learning disabilities unidentified or unaddressed are risk factors for youth crime. Research has pointed to a very high rate of incarcerated youths having learning disabilities.[141] Mental health disorders can hamper the ability to learn in the traditional class setting.[142] Some students have difficulty with school, which can be intensely frustrating and lead to oppositional behaviour. Long-term suspension from school puts a youth in a situation with no structure and no guidance, but with a lot of free time; suspension is also one of the primary indicators of school drop-outs.[143]

The Province does not adequately track the numbers of youth who should be but are not in the mainstream education system, but our Office encounters them often. A disproportionate number of students who have been suspended or expelled from, or have simply quit, the school system wind up before the courts in criminal matters. We see this at our youth secure detention and

---

[138] Halpern, Emma, "Building School Communities of Attachment and Relationship: A Restorative Approach to Schools in Nova Scotia," Nova Scotia Restorative Justice Community University Research Alliance, April 2011.

[139] Buckley, Sean, and Gabrielle Maxwell. "Respectful Schools: Restorative Practices in Education," Office of the Children's Commissioner and The Institute of Policy Studies, School of Government, Victoria University, 2007.

[140] Vanderhaar, Judi, J. Petrosko & M. Munoz. "Reconsidering the Alternatives: The Relationship among Suspension, Placement, Subsequent Juvenile Detention, and the Salience of Race," in in Closing the School Discipline Gap, Daniel Losen, ed., New York: Teachers College, Columbia University, 2015.

[141] Cesaroni, Carla. "The Changing Face of Youth Corrections," in Children and the Law: Essays in Honour of Professor Nicholas Bala, Sanjeev Anand, ed. Toronto: Irwin Law Inc., 2011.

[142] DeGusti, Berenice, L. MacRae and J.P. Hornick. "An In-depth Examination of School Investment and Extracurricular Activities by a Youth Offender Cohort," Canadian Research Institute for Law and the Family, 2008.

[143] Balfanz, Robert, Vaughan Byrnes & Joanna Fox. "Sent Home and Put off Track: The Antecedents, Disproportionalities, and Consequences of Being Suspended in the 9th Grade," in Closing the School Discipline Gap, Daniel Losen, ed., New York: Teachers College, Columbia University, 2015.

custody facility, the New Brunswick Youth Centre. Our Province does not adequately track the number of youths who simply no longer go to school. These youth are left to their own devices.

## *A GUIDE TO LAW AND POLICY*

**Affirming that every child has basic human rights, including, in particular, access to free education…**

**United Nations Guidelines for the Prevention of Juvenile Delinquency**

When students are suspended from school, alternative educational arrangements should be available. What we see being made available to these students is some limited tutoring offered. This is not a sufficient education option. Suspension from school can in effect become the end of education – we see time and again how it leads to a situation where students can't catch up. They are left behind by the education system, and, very unsurprisingly, become discouraged and then quit altogether.

Suspensions from school may have their place in very extreme situations, but such actions without remedial support can aggravate already dangerous conditions. Suspensions add criminal risk factors for youth, increasing the likelihood of involvement with the criminal justice system.[144] Education is fundamental to learning how to live responsibly; denying the right to education accomplishes nothing. When schools decide that they must remove a youth it is important to provide not only alternative educational services, but also support services that can address root causes of behavioural problems.

Our Office has worked with youth who have been refused re-entry to school after criminal involvement, and it is frustrating. For the most part, no other options are created for these youths. Many youths give up or age out. All youths have a right to education. It is a fundamental right under the *Convention on the Rights of the Child*. We as a society should be insisting on the availability of quality education for all.

[144] Weissman, Marsha. Prelude to Prison: Student Perspectives on School Suspension. Syracuse, N.Y.: Syracuse University Press, 2015.

# A Youth's Story from our Files

## Criminalizing Autism? Surely we can do Better

**Timothy, a thirteen year-old with Autism Spectrum Disorder, very understandably has difficulties functioning in the school environment. When one day Timothy had an episode and hit two staff members at school, the principal 'threw the book at him', calling the police and insisting that criminal charges be laid. What this youth really needed was more support services in school. Unfortunately, it took a lot of time and effort to get to the point where everyone understood this. Prior to that consensus, however, a case conference had to be called by the Child and Youth Advocate's Office under our legislation because no one in the youth criminal justice system convened a case conference under the *Youth Criminal Justice Act*. The principal's position at that point remained that she needed to protect her staff. This is unquestionably a valid and important concern, but it should not be the only one. Through discussion at the case conference with Timothy's lawyer, the Crown prosecutor, Timothy's parents, school officials, Department of Education officials, and other stakeholders, everyone realized that it was not in Timothy's best interests to put him through the frightening ordeal of the criminal process. A plan was created and appropriate supports were put in place in the school.**

**There is an absolute necessity to create school environments where everyone feels safe. But working toward non-criminal resolutions for student offending is the best way to ensure the safety of our children.**

**The seemingly simple solution of turning to the criminal justice system may be tempting, but it is not always (or even often) the best solution. Using meaningful interventions and supports to promote positive behaviour and accountability is essential to allow schools to play the role they should play in crime prevention. We hope that the government's Inclusive Education commitment can help shape this attitudinal and resources shift.**

## Integrated Service Delivery

Integrated Service Delivery focuses on educational development, emotional/behavioural functioning, mental health and addictions, family relationships and physical health and wellness. Through Integrated Service Delivery, Child and Youth Development Teams work in schools and consist of professionals including social workers, school psychologists, clinical coordinators and behaviour intervention mentors. Linking children and youths to appropriate services should prove to be far more efficient and effective through these teams. Integrated Service Delivery teams can provide 'wraparound' services involving the community, school, family, and other supports.

Integrated Service Delivery can link together early childhood services, community-based services and organizations, youth diversion through Extrajudicial Measures, youth justice and custody services, rehabilitation and other specialized health services. It incorporates the underlying principles of the *Youth Criminal Justice Act*, being child and youth-centred with a focus on family involvement. It is an extremely promising method of meeting the needs of children and youths who have emotional and behavioural issues, through multi-disciplinary strategies.

The costs of these proactive interventions are undoubtedly far less than the immense and rising costs of reactive police, prosecutor and court interventions,[145] and with better outcomes. Without Integrated Service Delivery, we are informed that complex cases in New Brunswick average $350,000 per year per youth. Youth incarceration in New Brunswick costs approximately $100,000 per year *per youth*. Preventing these costs is in everyone's interest. Integrated Service Delivery can save both of these costs, as well as costs in policing, prosecutions, Legal Aid, Sheriff Services transportation, and probation services. In the context of Youth Justice Committees, Integrated Service Delivery can provide information about a youth in order to help ensure timely intervention and meaningful consequences emphasizing rehabilitation and reintegration.

[145] See: Story, Rod and Tolga Yalkin. "Expenditure Analysis of Criminal Justice in Canada," Office of the Parliamentary Budget Officer, 2013.

**"Everybody wants to put it on someone else. Mental Health, Social Development, and the police, they all tell me it's another department's problem. So, you know, then it's just my problem."**

**Mother of 14 year-old girl.**

We expect positive outcomes from Integrated Service Delivery that will directly impact crime reduction, such as: increased school engagement leading to lower school dropout and suspension or expulsion rates; less redundancy and duplication of services; increased early identification of needs; decreased wait times for child and adolescent mental health services; more expedient access to information on existing formal and informal programs and services; a decrease in numbers of high risk complex needs youths; and less bureaucracy for families to wade through when attempting to get help for their children.

## The Obligation to Teach Youth about their Rights

The repeated calls by the UN Committee on the Rights of the Child for the integration of the *Convention on the Rights of the Child* into school curricula have remained largely unheeded in Canada. The *Convention* provides a context within which to teach children the importance of understanding their own rights as well as those of others. It provides a framework for healthy, respectful, supportive relationships. Article 42 of the *Convention* obligates government to make the provisions of the *Convention* widely known.

**… The education of the child shall be directed to… the development of respect for human rights … [and] the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.**

***Convention on the Rights of the Child*, Article 29**

The Rights-Respecting Schools initiative promoted in New Brunswick by the Child and Youth Advocate is an example of a program that aids schools in creating a 'whole learning environment'. It uses the *Convention on the Rights of the Child* as the basis for promoting an inclusive, participatory and respectful school culture through a rights-based approach. This initiative can begin in Kindergarten, instilling a rights-respecting mindset in children from an early age.

Children learn accountability when they have an understanding of their rights and the rights of others. As Professor Wayne McKay has succinctly stated in his report on cyberbullying commissioned by the Nova Scotia government after the death of Rehtaeh Parsons: "No longer are reading, writing and arithmetic the most fundamental skills that need to be taught in school; we must now also teach children about rights, responsibilities and relationships."[146] We know, based on research findings, that strategies that include children and respect their rights are most effective in addressing and preventing bullying.[147] An early example of this conclusion is found in a seminal study of bullying which concluded that when students participate in the construction of school rules, bullying incidents can be cut in half.[148] We can best nurture a culture of respectful and responsible human relationships through commitment to all human rights and to children's rights in particular.

Issues such as bullying, drug and alcohol use, sexual misconduct, and various forms of delinquency have long been issues at school and will continue to be. However, the challenges

[146] McKay, A. Wayne. "Respectful and Responsible: There's no App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying", 2012, p. 16.

[147] Canadian Coalition for the Rights of Children, "Right in Principle, Right in Practice: Implementation of the Convention on the Rights of the Child in Canada," 2011, p. 30.

[148] Olweus, Dan. Bullying at School: What We Know and What We Can Do. Oxford: Blackwell Publishing Ltd., 1993.

facing youth today appear to be more complex than ever before. Challenging societal changes show the need for our children's lives to be rooted in a rights-respecting culture at school and beyond. The UN *Convention on the Rights of the Child* provides a context within which to teach children the importance of understanding their own rights and those of others. The *Convention* provides a framework for healthy, respectful, supportive relationships.

Schools are also in a key position to identify and address harm to children and youth. Those who suffer abuse have been shown to be statistically more prone to perpetrate abuse against others, and bullying can therefore be a warning sign. Violence begets violence and victims often create more victims. A Statistics Canada report found that children who lived in punitive homes scored 83% higher on an aggressive behaviour scale than those in less punitive homes.[149] A comprehensive World Health Organization report unsurprisingly pointed to the fact that prevention of violence requires addressing social risk factors.[150] The report concluded that violence against children in the home and in school are major factors leading to children growing up perpetrating violence. Bullying behaviour left insufficiently addressed puts youth at risk of developing long-term problems such as substance abuse, anger issues, and involvement with the criminal justice system.[151]

There is a heightened awareness in schools today of cyberbullying, sexual harassment, discrimination, homophobia, racism, violent threat risk and many other concerns. When addressing these issues, we need to be mindful that supportive and restorative measures should be the default over punitive ones.

It is important to be mindful that the lessons students learn in school will guide their future behaviour. Lessons don't come only from curricula, they come from how students are treated within the system. It has been stated that "the operation of the system of justice within a school is a powerful part of the hidden curriculum influencing students."[152] While the Supreme Court of Canada has held that students have a reduced expectation of privacy in schools[153] students nonetheless have many rights. As stated by Justice LeBel of the Supreme Court of Canada: "Entering a schoolyard does not amount to crossing the border of a foreign state."[154] It is important for the upbringing of our children as engaged citizens that these rights be upheld and taught.

---

[149] Statistics Canada, "Parenting Style and Children's Aggressive Behaviour," The Daily, October 25th, 2004.
[150] World Health Organization. "World Report on Violence and Health," 2004.
[151] See McMurtry, Roy and Alvin Curling. "Community Perspectives: The Review of the Roots of Youth Violence." Toronto: Queen's Printer for Ontario, 2008.
[152] Dickinson, Greg. "School Searches and Student Rights," in The Courts, the *Charter* and the Schools: The Impact of the *Charter of Rights and Freedoms* on Educational Policy and Practice, 1982-2007, Michael Manley-Casimir and Kirsten Manley-Casimir, eds. Toronto: University of Toronto Press, 2009.
[153] *R. v. M.R.M.*, [1998] 3 S.C.R. 393, at para 33 and para 47
[154] *R. v. A.M.*, [2008] 1 S.C.R. 569, at para 1.

# SECTION V

# CONCLUSION

The *Youth Criminal Justice Act* has been extremely successful in some Provinces, and we have begun to see successes in New Brunswick. These successes mean that courts are less burdened and fewer youths are locked up.

Yet there remain many challenges. There remains a deficiency of resources in our Province for community-based responses to these issues. To make our Province safer for all of us, but most importantly for our children, we need to redouble our efforts to provide social responses to youth crime, and to invest in prevention. It requires a comprehensive strategy including: investment in child and adolescent mental health services; preventing child abuse and neglect; and addressing issues such as Fetal Alcohol Spectrum Disorder, addictions, homelessness, and school drop-out.

In 2012, an Omnibus Crime Bill included amendments to the *Youth Criminal Justice Act*. There were substantial fears among experts in the country when these amendments were tabled in Parliament, as Canada had been put on the right track with the introduction of the *Youth Criminal Justice Act* and many people felt that the *Act* should be given time to continue to produce desirable effects before making substantial changes.[155] While the Child and Youth Advocate's Office also had concerns, and presented them to the Senate committee reviewing the Bill,[156] in our opinion the structure of the *Youth Criminal Justice Act* remains strong. Moreover, we feel that New Brunswick has only begun to achieve the progress the *Act* provides for – our Province needs to live up to the entire *Act*, and the amendments should not negatively affect that.

It remains to be seen how courts in New Brunswick will give effect to the amended *Youth Criminal Justice Act.* However, crime prevention is not primarily a matter of corrections and courts. It is a community matter. It requires the informed efforts of police, lawyers and judges of course. But it requires informed efforts also of government Departments such as Public Safety, Health (Addiction and Mental Health), Social Development, Education and Early Childhood Development, Justice, and the Office of the Attorney General. And perhaps most importantly it requires the efforts of various members of civil society, including families, youth peers, non-governmental organizations, community volunteers, group home staff and foster parents .

There are already innumerable ways in which people working in these areas help to provide pro-social supports for our children. There will also always remain ways in which children fall

---

[155] See for example the concerns presented by the CBA: Canadian Bar Association, National criminal justice section: "Bill c-4: Youth Criminal Justice Act Amendments," 2010, https://www.cba.org/CBA/submissions/pdf/10-41-eng.pdf

[156] Whalen, Christian, Acting Child and Youth Advocate, Province of New Brunswick. "Submission to the Standing Committee on Justice and Human Rights: Study: Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts," February 2, 2012. Available online: http://www.parl.gc.ca/Content/SEN/Committee/411/lcjc/PDF/Briefs/C10/CYA-NB-EN.pdf

through the gaps and thereby get trapped in the criminal justice system. In producing this report we have intended to provide some specific ways in which certain gaps can be closed We have therefore also provided recommendations on how to create an overarching system wherein the rights of youth are respected and youth can develop into resilient, independent members of our society.

As the Preamble to the *Youth Criminal Justice Act* states: "members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood." We all have a role to play in keeping our communities safe and in providing positive role models to youth in our communities.

After nearly ten years of false starts New Brunswick is finally poised to make impactful progress in implementing one of the best youth criminal justice laws the world over. We acknowledge the excellent work thus far of the Roundtable on Crime and Public Safety, and the significant leadership New Brunswick has shown in child rights implementation and in the integration of service delivery to children and youth. We hope that the reforms proposed in this report are taken up to further put New Brunswick on the path to a leadership role in youth criminal justice administration.

New Brunswick has not only an ethical but also a fiscal imperative to act now. Previous governments have taken a short term electoral cycle view and have opted to cut community based programs. These short sighted approaches have refused New Brunswick youth the equal protection and benefit of the law and they have cost New Brunswick far more in the long run. The *Youth Criminal Justice Act* is inherently a matter of local governance. Healthy children and youth are the life-blood of our communities. They give us meaning and purpose and a sense of common enterprise. By investing in community-based approaches to youth crime reduction we can help guide vulnerable youth to strength-based programs and interventions that will avoid further additional costs in education, child protection, social assistance and other health-related systems. By relying with much less frequency on traditional criminal justice prosecutorial and custodial approaches we can realize significant cost savings. Reactive approaches by the traditional means of policing, prosecuting and incarcerating have been shown to be ineffective in crime prevention not just here but everywhere. Alternatives to the usual system need to be explored, as approaches such as restorative justice cost the taxpayer far less than the court system. Our rates of pre-trial detention and youth incarceration are still higher than they should be. By diverting these savings to community-based crime-prevention programs we will realise further economic benefits.[157]

The *Youth Criminal Justice Act* is sound law that holds much still unrealized potential in New Brunswick. We hope that the voices of vulnerable New Brunswick youth will be heard. We at the Child and Youth Advocate's Office are prepared, as ever, to be a partner in moving forward

[157] Murphy, Peter, A. McGinness and T. McDermott. "Review of Effective Practice in Juvenile Justice," Australia: Noetic Solutions Pty Limited, prepared for the Minister of Juvenile Justice, 2010.

with the task at hand of bettering the common good and improving the lives of this Province's children and youth. The recommendations included in this report are offered in furtherance of our collective objectives of providing the best supports and services possible, while upholding the rights of children and youth in our Province.

# SECTION VI

# RECOMMENDATIONS

1. We recommend that police forces, the Office of the Attorney General and the newly established Youth Justice Committees work collaboratively to produce clear practice guidelines and protocols on the use of police warnings, police cautions, police referrals, and Crown cautions as part of a comprehensive and consistent system of Extrajudicial Measures.

2. The Department of Public Safety and the Office of the Attorney General should promote the use of Youth Justice Committees to their full mandate under the *Youth Criminal Justice Act*. Youth Justice Committee functions should include: providing advice to Crown prosecutors and police concerning Extrajudicial Sanctions; offering suggestions to Court regarding appropriate sentencing; advising government on youth justice policy; and helping to coordinate the efforts of schools, health workers, social workers and others within Integrated Service Delivery.

3. The Department of Public Safety and the Office of the Attorney General should provide training on effective use of case conferencing for defence counsel, Crown prosecutors, probation officers, police and judges, to provide for a fulsome application of case conferencing under section 19 of the *Youth Criminal Justice Act*. They should also provide the means for Youth Justice Committees to build capacity for Restorative Justice practices.

4. The Attorney General should develop a process with detailed guidelines for youth-specific pre-charge screening by specially trained Crown counsel. This screening should incorporate principles and standards found in the *Youth Criminal Justice Act*, the *Convention on the Rights of the Child*, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, and the United Nations Guidelines for the Prevention of Juvenile Delinquency. The charge screening process of youth cases should have a means of monitoring and measurement to ensure efficacy and consistency across the Province.

5. Government should end the use of criminal prosecutions as a means to access services for youth in need. To that end, government should:

i. Create strong processes to enforce the prohibition in section 29 of the *YCJA* against detention as a substitute for social or mental health measures. For those youth with high needs who do come to court, Crown counsel and defence counsel must be aware of the benefits of sections 34 and 35 of the *Youth Criminal Justice Act*, in order to

recommend that judges order referrals for assessment of needs related to social services, physical health, learning disabilities and mental health issues;

ii. Provide training in diversion, mental health and child development to all youth-serving workers, including social workers, probation officers, educators, group home staff, foster parents, correctional staff, police and others.

6. Government should develop youth court services with specialization in the unique needs and developmental circumstances of youth. Included in this system should be the appointment of an itinerant youth court judge, specially trained youth-specific duty counsel, Legal Aid counsel, and Crown prosecutors.

7. Government should create youth court worker positions to coordinate with youth, family members, duty counsel, defence counsel, and Youth Justice Committee coordinators. Crown prosecutors should connect youth court workers with a youth's parents or legal guardian upon the laying of charges, before a first appearance in court. All actors in the youth criminal justice system should develop working protocols with youth court workers.

8. Government should give greater effect to the fundamental principle of the *Youth Criminal Justice Act* that youth justice be a separate system from the adult criminal system, by discontinuing the practice of housing adults and youth at the same prison facility, and by ending the practice of transporting youths handcuffed and shackled and with adult prisoners in the same vehicles.

9. Government should develop open custody options in accordance with the Guiding Principles of the *Convention on the Rights of the Child* and the principles and objectives of the *Youth Criminal Justice Act*. Such open custody options should be guided also by the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Guidelines for the Alternative Care of Children. All efforts should be aimed at reintegration of youth into community and family settings.

10. Government should develop better data-monitoring, analysis and dissemination processes in order to ensure effective evidence-based decisions are being made in youth criminal justice matters and to guide the work of the Provincial Diversion Steering Committee as part of the New Brunswick Crime Prevention and Reduction Strategy.