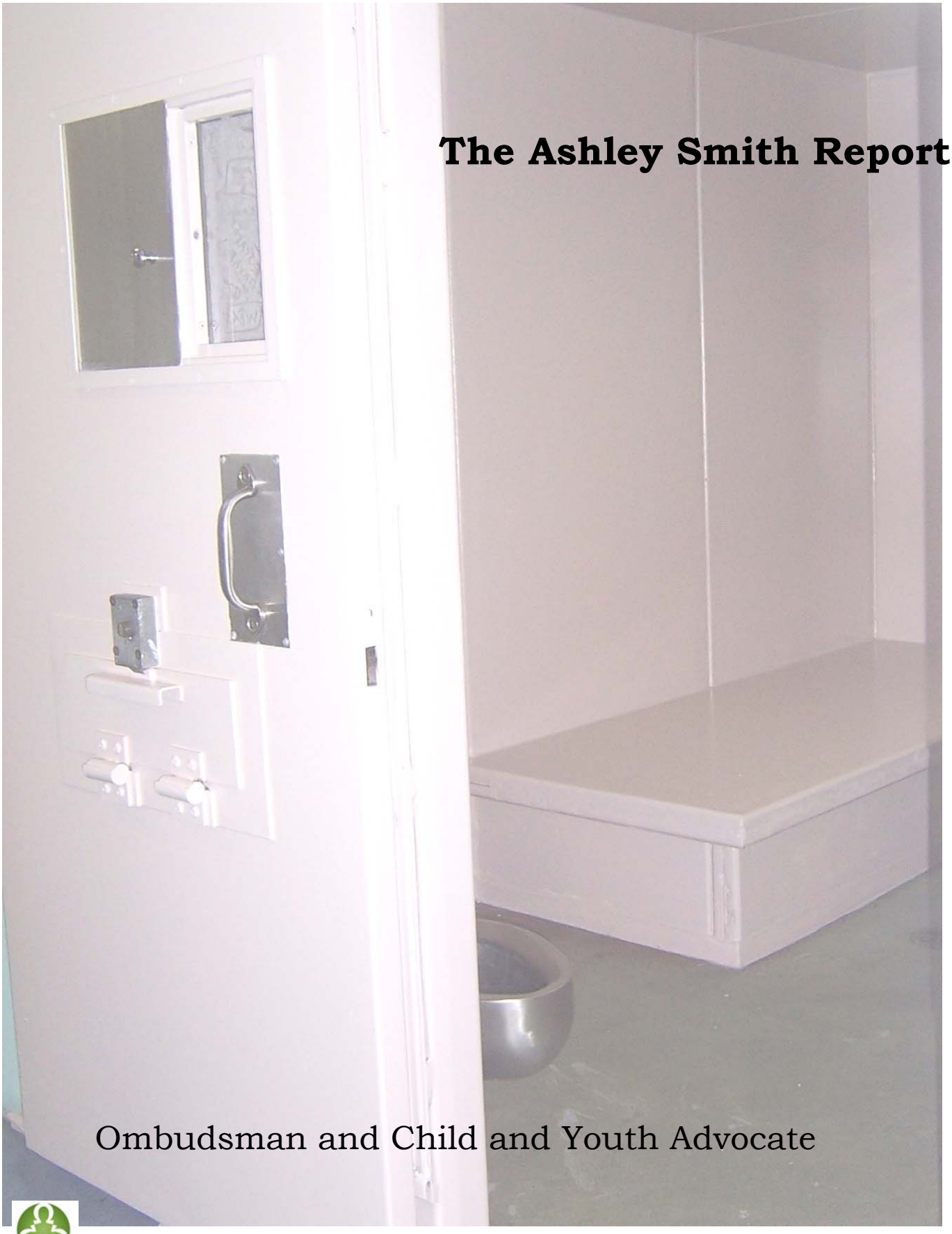
The Ashley Smith Report



Ombudsman and Child and Youth Advocate

June 2008

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and Child and Youth Advocate
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My Life

My life I no longer love
I'd rather be set free above
Get it over with while the time is right
Late some rainy night
Turn black as the sky and as cold as the sea
Say goodbye to Ashley
Miss me but don't be sad
I'm not sad I'm happy and glad
I'm free, where I want to be
No more caged up Ashley

Wishing I were free
Free like a bird.

Ashley Smith, 18 years old
October 1, 2006
New Brunswick Youth Centre

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Cover photo: segregation (Therapeutic Quiet) unit cell, New Brunswick Youth Centre.

1. Executive Summary

The Ombudsman and Child and Youth Advocate is publishing a report further to his investigation into the services provided to Ashley Smith, a youth involved in the youth criminal justice system. As a result of this involvement, Ms. Smith was incarcerated for over three years in two provincial correctional facilities, the New Brunswick Youth Centre and the Saint John Regional Correctional Centre. The investigation was launched on the Ombudsman and Child and Youth Advocate's own motion in October 2007, shortly after Ms. Smith's death at the Grand Valley Institution for Women, a federal correctional facility located in Kitchener, Ontario, which occurred on October 19, 2007.

The report includes historical facts excerpted from document archives and video footage provided by five governmental departments as well as relevant information provided by departmental authorities, experts and other stakeholders. It includes a review of the services provided by the Department of Public Safety, the Department of Social Development, the Department of Health, the Department of Education and the Department of Justice. The report outlines 25 recommendations to government. The Ombudsman and Child and Youth Advocate is committed to reviewing and measuring the progress made with regards to these recommendations by the aforementioned departments and to release publicly a progress report in a year's time.

The first focus of our analysis reiterates the importance of tailoring the educational system to the needs of youths suffering from mental illness or severe behavioural disorders. In addition to the recommendations to government included in a preceding report presented to the Legislature earlier this year, *Connecting the Dots: A report on the condition of youth-at-risk and youth with very complex needs in New Brunswick*, the Ombudsman and Child and Youth Advocate stresses the need to have representatives of the Department of Education actively involved in the case planning and continuing services to youths involved in the youth criminal justice system, given that every child and youth in this province has a right to an education.

The second broad theme relates to the availability of mental health services to children and youths who are sentenced to serve custodial time. The fundamental premise is that youths suffering from mental illness or struggling with a severe behavioural disorder should not be sent to a correctional facility. Additionally, a more structured and effective system of clinical services must be implemented within the existing provincial youth correctional facility to ensure adequate and sufficient intervention for youths who require early or continuing clinical intervention by trained professionals. These improvements underline the pressing need to increase residential capacity, recruiting, training and retaining of staff as well as establishing specialized residential facilities to offer an effective alternative to jail for youths involved with or facing the prospect of being subjected to the youth criminal justice system.

Included in this second broad theme is a review of the existing facilities and services that are provided to incarcerated youths. While the operational philosophy in the provincial youth jail is geared towards empowering youths to live fruitful lives and reintegrate

successfully their respective community, whether it is tailored to meet the needs of youths suffering from mental illness or severe behavioural disorder is questionable. The existing on-site resources are insufficient to offer appropriate treatment. Recommendations are therefore made to have, under the leadership of a clinician, a mental health treatment team constituted at the New Brunswick Youth Centre and that the necessary network be established to ensure continuity in service provision beyond incarceration. These recommendations involve the Department of Public Safety as well as the Department of Health (Mental Health Services), the Department of Social Development and the Department of Education.

The third set of recommendations addresses the use of segregation at the New Brunswick Youth Centre. The use of segregation, for whatever purpose provided by policy or legislation, must be made in accordance with more stringent legislative provisions and policies that will avoid the deteriorating impact this form of prolonged solitary confinement may have on a young person's mental health. Amongst others, it is recommended that placements in the segregation unit be closely monitored by trained clinical staff and that the duration be limited in time and occurrences. Furthermore, senior departmental staff are to be consulted in cases involving prolonged or indefinite segregation placements and stringent guidelines should be implemented to ensure that youths confined to the segregation unit be provided with timely psychological or psychiatric intervention.

The fourth set of recommendations deals with legal implications, namely the legal representation provided to youths faced with the prospect of being involved or those who are already involved in the youth criminal justice system. This section of the report also emphasizes the importance of educating key members of the legal community with respect to keeping youths who require specialized services out of prison. This can be achieved by exploring alternative sentencing options and treatment methods. It is recommended that a collaborative multi-departmental effort be established to provide members of the legal community with educational programs and information sessions on the implications and best practices when servicing youths with mental illness and severe behavioural disorders.

The report also examines the benefits of providing youths with specialized and continuing legal assistance and representation. There is a pressing need to establish a specialized unit that would work with the involved stakeholders by taking full advantage of the provisions of the *Youth Criminal Justice Act* in order to find creative ways of having the existing structures better serve youths. Furthermore, given that institutional conduct can lead to additional charges, it is recommended that this specialized legal assistance be provided throughout the course of a youth's pre-trial proceedings and during his or her custodial sentence.

The fifth theme addressed in the report involves the establishment of a more stringent policy regarding the use of section 92 of the *Youth Criminal Justice Act*. This provision of the federal act provides that the Provincial Director of a youth correctional facility may apply to have an 18-year old youth transferred to a provincial adult facility. It is

recommended that additional criteria be established by the Department of Public Safety before this discretion is exercised by the director and that no application under section 92 proceed before receiving the Minister of Public Safety's approval. Furthermore, any youth subject to a section 92 application should be offered legal assistance from the time the application is contemplated by the director. From an administrative perspective, increased accountability and fairness would be provided by adding a provincial review panel which would have the mandate of reviewing the director's application and recommending alternative measures to attain the objectives of the provision, that is, the interest of the youth or the public interest.

Additional recommendations are made with regards to youths incarcerated in adult facilities. Measures should first be taken to ensure that youths (under the age of 19) be separated from the adult population. Moreover, immediate steps need to be taken to restrict the use of force on minors in provincially run adult correctional facilities. It is specifically recommended that the use of the electronic control device (taser) against a minor in secure custody be halted immediately.

Throughout the report and as a logical succession to most of the recommendations made earlier, emphasis is placed on the need for community-based services to participate actively in the reintegration of the youths remanded and sentenced to the provincial youth closed custody facility. This involvement, particularly where the Department of Social Development, the Department of Health and the Department of Education are concerned, must be continuous and consistent.

The report closes with a section meant to raise awareness on proposed reforms to the *Youth Criminal Justice Act* by the Federal government. Bill C-25 proposes significant changes that may result in an increase in pre-trial detention of youths as well as a rise in the number of young persons being sentenced to a closed custody facility for the purposes of deterring and denunciating them. It is argued in the report that once a full review of the *Youth Criminal Justice Act* has been completed (hopefully followed by a public consultation process), it will undoubtedly reveal that the act offers a number of alternative measures and sentencing options that would better serve our youths and, ultimately, our respective communities and our society as a whole.

2. Overview

On October 19, 2007, Ashley Smith, a young woman, 19 years old, from Moncton, New Brunswick, died while serving a prison sentence in a federal secure custody facility, Grand Valley Institution for Women, located near Kitchener-Waterloo, Ontario. Prior to her nine institutional transfers within the federal and provincial correctional systems[1], Ashley Smith was incarcerated from 2003 to 2006 in two provincial correctional facilities in New Brunswick: the New Brunswick Youth Centre (NBYC) in Miramichi and the Saint John Regional Correctional Centre (SJRCC).

The particular circumstances of Ashley's experiences within the provincial and federal correctional systems may have easily gone unnoticed had it not been for her tragic death. In fact, it quickly became obvious that her personal experience in the correctional system is like that of other young men and women involved in the youth criminal justice system, experiencing a personal struggle with mental illness and severe behaviour disorders.

Her plight along with that of her parents in attempting to obtain the best possible services and treatment for their daughter was unfortunately not an unfamiliar one for my Office. It is a circumstance shared by other parents in this province. The unanswered question remains for them as it does for me and many other New Brunswickers: why are youths suffering from mental illness and severe behavioural disorders being sent to jail? How are their needs addressed in that setting? What must be done to change this situation and its tragic outcomes?

I was initially informed of Ashley's situation by her legal counsel and her mother following Ashley's transfer to the Nova Institution for Women, a federal penitentiary. Since Ashley was at that time in the federal system her family and counsel were directed to the Federal Correctional Officer, the Ombudsman appointed to look into complaints in federal penitentiaries. Due to the similarities between Ashley's case and the investigation I was leading into services to complex needs youths and youth-at-risk, I informed Ashley's parents that I hoped to address some of the systemic issues raised by her treatment while at the NBYC and at the SJRCC, in an upcoming report, later published as *Connecting the Dots*.

Unfortunately, before this report was finalised, Ashley died. Immediately following news of her death, I was asked to comment publicly on this tragic story. I confirmed at that time my intention of investigating here in New Brunswick the background to this tragic event focusing on Ashley's treatment at the NBYC and her transfer to the federal prison system at so young an age.

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[1] In the course of her eleven and half months in federal custody, Ashley was transferred nine times between the following facilities: Nova Institution for Women (Truro, Nova Scotia), Prairies Regional Psychiatric Centre (Saskatoon, Saskatchewan), Joliette Institution for Women (Joliette, Quebec), L'Institut Philippe Pinel (Montreal, Quebec), Grand Valley Institution for Women (Kitchener, Ontario) and Central Nova Scotia Correctional Facility (Nova Scotia provincial facility).

A local investigation in my mind was all the more pressing since my involvement to date with the youth correctional system in New Brunswick led me to conclude that unless things changed quickly, other youths in the Province of New Brunswick could live through similar experiences to those of Ashley. I am convinced that we can and must avoid such risks. I maintain that stories such as Ashley's can be prevented provided that provincial authorities assume their responsibilities in answering the muffled or silent cry for help of youths who commit *punishable acts* but who are not, themselves, forcibly *punishable*.

Ashley Smith became involved in the youth criminal justice system at the age of thirteen when she was charged with assault[2] and disturbance in a public place, offences under the *Criminal Code* of Canada. From that point on, the events involving a young teenager, unconsciously relying on the services provided by a number of provincial governmental stakeholders, went spiralling into an increasingly frustrating and disturbing experience for all parties involved. From conventional education to alternative programs, open custody to secure custody, youth detention centre to adult correctional facility, Ashley Smith appears to have remained the one constant in an ever changing series of initiatives taken by various interveners to have her fit a mould of stability that only resulted in mind-boggling unstable results.

All members of our society need to understand that the youth criminal justice system in New Brunswick needs a substantial revamping. In my opinion, without a proper and realistic appreciation of the purpose of this system, we are losing out on a singular opportunity to invest in the wellbeing of our youth and consequently, in the future of our province. The youth criminal justice system should be administered and implemented as a means to an end, not an end in itself. Only then will it be clearly understood that youths who suffer from a mental illness or a severe behavioural disorder and who commit a crime punishable under existing criminal provisions have a right to a recovery. They must be given the proper tools to make, at the very least, an attempt at reintegrating society as productive members. The alternative is unacceptable.

It is therefore my belief that the story of Ashley Smith illustrates the need to go beyond the operational aspect of correctional services within the province of New Brunswick. There is a much greater need in that all provincial governmental stakeholders involved in providing services to young people in contact with the youth criminal justice system must broaden their perceived scope of responsibilities and work towards a more coordinated and efficient collaboration.

3. Investigation methodology

[2] From a legal perspective, an assault is defined as "any wilful attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and any intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault may be committed without actually touching, or striking, or doing bodily harm, to the person of another." (*Black's Law Dictionary*, 6th Edition, St. Paul (Minnesota), West Publishing Co., 1990.) There is a vast range of assaults that Ashley was charged with either institutionally or criminally while serving time at the NBYC. The assaults ranged from uttering threats at staff to physically striking a Correctional officer.

The investigation that led to the publication of this report was conducted of our own motion pursuant to subsection 12(1) of the *Ombudsman Act* and subsection 13(1) of the *Child and Youth Advocate Act* (*CYAA*). In compliance with subsection 19(1) and pursuant to subsections 21(1) and 21(2) of the *CYAA*, I proceeded to inform the administrative head of the departments concerned of my investigation and requested that all information related to Ashley Smith be disclosed and delivered to my office.

The following departments were requested to provide all or specific information in the context of this investigation and responded favourably to our request: the Department of Public Safety, the Department of Education, the Department of Justice, the Department of Health (Mental Health Services) and the Department of Social Development.

In light of the preliminary findings, the scope and goals of this review were established. The objectives of this investigation were then outlined as follows: to examine the government services Ashley Smith received from the Province of New Brunswick up until the time she was transferred to a correctional facility in another jurisdiction, in order to identify gaps, failures, weaknesses that were preventable, unjustified and unacceptable. Specifically, these services are related to her involvement with the departments of Public Safety, Education, Justice, Health (Mental Health) and Social Development.

In addition to the thousands of documents and numerous hours of video footage received and examined, my investigators conducted interviews with senior departmental officials, members of the judiciary, staff members at the NBYC and the SJRCC as well as other governmental and non-governmental stakeholders.[3]

On March 13, 2008, I requested to meet with Ashley's parents to share a summary of my findings and have them share with me their personal experiences with regards to the events that led to this investigation. This request was met with a positive response and on March 31, 2008, I had the opportunity to hear directly from Ashley's mother and sister on how the ordeal their daughter/sister lived through had such a profound and life changing impact on their lives.

I wish to add a word regarding the jurisdictional scope of this review. Ashley Smith's story has caught the interest of both provincial and federal authorities. From the very moment of her death, I have been in contact with the Office of the Correctional Investigator regarding this matter and have made every effort to work collaboratively with his office as we each investigate separate aspects of this case. His office has been of great assistance throughout our investigation and I welcome this collaboration. This experience has strengthened my belief that greater collaboration between federal and provincial facilities and departments is a critical component in achieving a youth correctional system that serves Canadians well. In fact while the *Youth Criminal Justice Act* (*YCJA*) is federal legislation its administration is left almost entirely to the provinces. There are many variations in practices from one province to the next. Thus while my recommendations in this report are made primarily to the Minister of Public Safety and

[3] A list of the interviewees is available in Appendix B.

some of his provincial counterparts, I do not hesitate to put forward some recommendations on the topic of *YCJA* reform as well.

In closing, it should be underscored that the observations and recommendations outlined in this report are being submitted to concerned authorities pursuant to section 23 of the *CYAA* and section 21 of the *Ombudsman Act*. In accordance with these provisions and as it is customary practice of our office with regards to past reports and recommendations, a request to the relevant departmental authorities will be forthcoming with regards to how and when their respective department intend to give effect to the recommendations contained in our report.

4. The youth criminal justice system and secure custody

Overview of a youth's journey through the criminal justice system

The focus of this investigation involves potentially complicated or confusing legal and correctional terms, processes and procedures. For the purpose of ensuring clarity and demystifying the youth criminal justice process, I felt it necessary to include a short overview of this process to provide the reader with the context in which and, ultimately, *by* which Ashley Smith spent the majority of her teenage years in prison.

In Canada, a person can be charged as a "youth" if he or she is 12 years of age or older but under the age of 18 when the offence occurred. Charges can be laid against a youth for offences found in the *Criminal Code* of Canada, other federal legislation or for violating a condition of their sentence pursuant to the *Youth Criminal Justice Act*. Upon having been charged, a youth may be "remanded" to (or detained in) a youth correctional facility if he or she falls within certain criteria found in the *YCJA* and the *Criminal Code*, namely by being deemed to be a danger to public security[4], a risk of flight (running away and not showing up for trial or sentencing) or when detention is deemed necessary to maintain confidence in the administration of justice. Otherwise, a youth may be released into the community prior to the next hearing. The nature of this hearing will depend on whether the youth pleads guilty or not guilty to the charges he or she faces.

Although it is not required under the *YCJA*, when a youth male is "remanded" to the New Brunswick Youth Centre, the practice is to have him housed in a separate unit from "sentenced" youths. The youths on this unit are young males who have appeared before Youth Court and where a judge has determined that all alternative measures – a meaningful consequence, proportionate to the crime committed, that does not carry a form of custody – or other less intrusive forms of custody, have been exhausted. Less intrusive forms of custody would include "open custody" (sentenced to a community facility – a group home, foster home or other facility based in the community) or other establishments that provide a structured environment geared towards having the youth

[4] This condition is restricted by section 29 of the *YCJA* with a rebutable presumption against custody unless certain conditions are met.

resume life in his or her community. The same sentencing process applies to young women sentenced to the NBYC.

At the NBYC however, I have been informed that young women remanded to the NBYC are housed with sentenced females due to, according to officials at the Department of Public Safety, their limited number and the perceived minimal threat this situation represents to the inmates or staff members.

For all intents and purposes, a "secure custody" facility refers to a prison. The term "closed custody" may also be used to describe this most intrusive form of sentencing option imposed by a judge. In New Brunswick, there is one secure custody facility for youths: the New Brunswick Youth Centre.

Once remanded or sentenced to a secure custody facility, provincial legislation[5] allows for disciplinary measures to be imposed on inmates if they fail to observe the rules of prison. These disciplinary measures may result in "institutional charges" being imposed on an inmate. Although institutional charges do not extend the time a youth was originally sentenced to serve in a secure custody facility, they may have a considerable impact on the privileges he or she is entitled to receive *during* incarceration. It may in fact result in a youth receiving anything from a verbal warning to being segregated for hours, even days. Actions leading to institutional charges can vary from issues such as yelling in the games room to breaking a cell door window with a rock. Institutional charges are handled internally by a board headed by the Superintendent of the institution. Youth may appeal their conviction but rarely do.

Some behaviour in secure custody may also result in criminal charges. The latter are referred to as "external charges". These charges are laid against a young person pursuant to the *Criminal Code* and lead to a process that is very similar to the process that got the youth sentenced to jail in the first place. In the past, such charges have been laid against youths at the NBYC following an assault on Correctional officers, damage to property, breaking or tampering with fire sprinkler devices, etc. Unlike institutional charges, criminal charges may result in an extension of time to be served in custody as well as additional conditions imposed on a youth upon his or her release from the NBYC.

In the end, whatever form of sentence or disciplinary measure is imposed, the youth carries the full burden of abiding by the rules and conditions.

The New Brunswick Youth Centre

[5] *Custody and Detention of Young Persons Act*, S.N.B. 1985, c. C-40.

Shortly after the Miller Inquiry[6] and in light of the recommendations issued in the ensuing 1996 report, the Government of New Brunswick, in the summer of 1997, retained the Portage Program for Drug Dependencies Inc. (hereinafter the Portage Group) to evaluate the program needs of the New Brunswick Youth Center. The Portage Group, established in the early 1970s, is a non-profit organization committed to the rehabilitation of substance abusers. The Portage Group's approach to rehabilitation is the Therapeutic Community Model, which emphasizes self-help and the creation of a beneficial community environment based on peer support and positive role modeling. By adapting and refining the techniques of the Therapeutic Community Model, the Portage Group has developed programs for the provinces of Quebec, Ontario, and New Brunswick. As well, the Portage Group has established rehabilitation services in several foreign countries and continues to be actively involved in consultation and advocacy at an international level.

The Government of New Brunswick mandated the Portage Group to design and implement a therapeutic community based program, to develop a policy and procedures manual and to develop and implement a training curriculum manual for all staff members working at the NBYC. In addition to assisting with the development of programs, the Government mandated the Portage Group to supervise and support the Youth Centre for a period of five months and to perform monthly quality-assurance visits for an additional six-month period.

Physical Structure

The NBYC, located in Miramichi, New Brunswick is a secured custody facility that houses young offenders from across the province. The Portage Group designed the facility to house 100 adolescents at any given time, including the capacity to house both males and females.

Opening its doors in 1998, the Youth Centre consists of one central building with four inter-connected cottages around it, each housing two separate living units containing 12 individual bedrooms with support facilities.

The NBYC is the only secure custody facility for youths in New Brunswick.

The Centre features amenities essential to the therapeutic community, including a gymnasium, library, wood working centre, art room, computer lab, horticulture station, and educational facilities. Medical services and nursing staff are also on site to attend to any medical needs of the youths.

The Therapeutic Community Operational Philosophy

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[6] *Report of a Commission of Inquiry Established by Order-in-Council 92-022*, authored by The Honourable Mr. Justice Richard L. Miller, Commissioner (Province of New Brunswick, 1995). The Attorney General of New Brunswick appointed a Commission of Inquiry because there was recognized and alleged institutional misconduct at the New Brunswick Training School at Kingsclear, with children and youths being the victims. In light of his findings, Justice Miller recommended that government replace the New Brunswick Training School at Kingsclear with a new structure designed to provide guidance and assistance for youth in custody.

The philosophy of the therapeutic community came about around the 1950s as an alternative treatment program for drug abusers. The therapeutic community model emphasizes communal self-help with a focus on residents helping other residents. As well, the therapeutic community uses role modeling to develop personal growth, to achieve behavioural changes, and to help instill social and life skills. The Portage Group formed in the early 1970s, just shortly after the therapeutic community model was gaining momentum.

The therapeutic community model was first introduced in a prison setting in 1969 in the United States at the Federal Bureau of Prisons maximum-security institution in Marion, Illinois. Increasing in popularity throughout the 1970s, the Portage Group helped design and implement therapeutic community based treatment programs in 21 prisons in the state of New York. The Portage Group designed living units that emphasized self-help and mutual support in a positive environment of family-like support systems. The model developed for the prison setting features the correctional officer as the facilitator and role model for inmates. Furthermore, the correctional officer is the primary caregiver and is tasked with assisting to change the culture of the correctional environment and stimulate inmate participation in the program.

In general, the therapeutic community is a highly structured residential setting with a treatment approach focused on self-help. The philosophy emphasizes responsibility for one's own actions and behaviours and turns rehabilitated offenders into role models for others. Furthermore, the goal of the therapeutic community is to alter negative patterns of behaviours and beliefs, which is supposed to have the effect of decreasing drug use and other antisocial behaviour. The therapeutic community itself is the primary "therapist" for offenders and drug users: peers and staff members serve as role models who guide in the recovery process.

Structure of the Program

Incorporated into the therapeutic community model are strict and explicit behavioural norms, as well as clearly set out sanctions for negative behaviour in the institutional environment (referred to as the "community"). The community has a hierarchical structure, with leaders (inmates or members of the staff) that act as role models through monitoring and promoting peer pressure among participants. The ultimate goal of the members is to teach other participants to work within an organized structure and foster respect for authority.

Participants are able to improve their status in the hierarchy and earn privileges as they demonstrate increased competency and emotional growth. The therapeutic community places an emphasis on incremental learning during each phase of the hierarchy. Within each phase of the hierarchy there are also defined therapeutic and education activities that reflect development and the change of process.

To encourage responsibility and mediate therapeutic effects, all participants of the community are responsible for the daily management of the facility. Management structures every day at the facility with a formal schedule that incorporates various therapeutic and educational activities at fixed times and routine procedures. The rigid schedule helps to rehabilitate inmates by distracting them from negative thinking and boredom, assisting in their acquisition of self-reliance in planning, assisting with goal setting and promoting personal accountability.

Common to the therapeutic community are group meetings, typically involving all participants in the morning and ending the day with a night meeting. Meetings contain program information and individual announcements, which are designed to point out improper behaviours and emphasize positive behaviours. Night meetings are typically more relaxed and informal, allowing participants to debrief and discuss their day together.

Another method used to assist with rehabilitation in the therapeutic community is the peer encounter group. The primary objective of the peer encounter group is to heighten individual awareness of attitudes and behavioural patterns. The main tool used in the peer encounter groups is termed confrontation, which is a form of peer helping. These groups are designed to help participants learn to develop tolerance and effective methods to deal with emotions.

Family involvement is another essential feature for the youth members of the therapeutic community. The Centre strives to ensure family members are involved with individual youth and their case plan as much as possible. The NBYC even has available apartments on site to enable family members to visit with the youth in custody.

5. Ashley's story

Ashley Smith was born on January 29, 1988. She was adopted when she was 5 days old. She developed normally, reaching all expected milestones. Up until the time she was in grade 5, there were no significant problems with Ashley. In grade 5, at approximately 10 years of age, she began developing behaviour problems at school. She was disruptive and talked excessively.

According to the information on file, around the age of 13, Ashley's behaviour problems intensified. It is mainly during the 2001-2002 school year that some of the more serious problems began to creep up in Ashley's life and considerably challenge her ability to function within the established school curriculum. Although deemed capable of succeeding, Ashley began exhibiting disruptive and oppositional behaviour, disrespect towards adults in general (both school personnel and visitors) as well as problematic issues in her relationship with her peers. In addition, in a letter dated October 31, 2001, early into Ashley's grade eight school year, the principal reported that attempts at promoting compliant behaviour were unsuccessful. The young student's disrespectful

attitude and defiance of authority were now manifesting themselves during instructional and non-instructional times.

Early in the 2001-2002 school year, all those involved struggled with the taxing challenges that stemmed from the inability of school personnel and officials to bring Ashley to appreciate and comply with the institutional rules as well as apply herself to her school work. In fact, from March 14, 2001 through February 13, 2002, the school administration's incident reports indicate that Ashley had already been suspended from school on six occasions and was assigned to a temporary student placement at an alternate educational site on seven occasions. The motives for these disciplinary actions ranged from use of inappropriate language in class to "playing chicken" in the street with on-coming traffic.

On February 21, 2002, the exceptional step of suspending Ashley from school for five weeks was taken by school district officials. This decision followed a turbulent period into the young student's school year during which, most notably, police intervened at school to physically remove Ashley from school and lay charges following a stalking incident involving a member of the school personnel.[7]

In school, Ashley was refusing to do her work and became very disrespectful to teachers and peers. From September 2002 (she was then 14 years old) to December 2002, there were 17 infractions and many suspensions for being disrespectful, non-compliant with school rules and disruptive in class. These issues progressively became severe to a point where, in December 2002, she was transferred to an alternative educational institution to pursue her schooling.

During the same period these events were taking place in school, her parents state that Ashley had more opportunities to go out in the community and most of the problems with Ashley were occurring on those outings.

Documents on file reveal that progressively, the relationship between Ashley and her parents was becoming very strained, namely after Ashley started running high monthly long distance charges, in excess of $1,000 at times. She would also spend a lot of time on the internet, chatting with others or accessing inappropriate and highly questionable material. At this time, the mother reported that Ashley had few friends, as interactions with kids her age usually ended up in a conflict.

Ashley was first charged in March 2002, at the age of 14, with offences related to public disturbances, trespass or violence (harassing telephone calls to unknown persons, assaulting strangers on the streets, banned from public transportation for insulting passengers and drivers, insulting a parking attendant). According to notes on file, during this time, a psychiatrist, retained privately by the parents for an assessment, apparently ruled out the presence of mental health issues. Between March 2002 and the time she was first sentenced to NBYC, there were numerous other offences. As a result of these offences, Ashley was sentenced to one year probation and enrolled in the Intensive

[7] There are indications that these charges were eventually dropped.

Support Program, an alternative measure to imprisonment geared towards providing youths with a high risk to re-offend with intensive community support. She was not sent to the NBYC until April 2003, at the age of 15, for multiple charges of breach of probation, common assault, trespassing and causing a disturbance.

But before going to NBYC, Ashley's case was referred to the Youth Treatment Program and on March 4, 2003 she moved in to the Pierre Caissie Center for a 34 day assessment. This assessment program is used when it appears that all community resources for a youth exhibiting problems have been exhausted. She was then 15. While there, psychological, psychiatric and educational assessments were completed. The psychiatric assessment states under "diagnostic impression", "learning disorder, ADHD, borderline personality disorder", although depression was ruled out. In an addendum, the assessing psychiatrist added "narcissistic personality traits". The recommendations from the psychological assessment were: for the parents to receive sessions on how to deal with an "oppositional defiant youth', for all partners to work together in dealing with Ashley's behaviour (the parents, the school, the community), for Ashley to receive individual counselling from her local mental health centre, for further monitoring and assessment "for the presence of interpersonally imbalance personality disorder or trait and a cyclic mood disorder, to ensure she's receiving appropriate treatment", and that she receive follow-up on the medication regime prescribed by the psychiatrist at the Pierre Caissie Centre.

Ashley appeared to integrate well to her new environment at Pierre Caissie. However, it was not very long before she started demonstrating highly oppositional behaviour. The police had to be called twice because of assaults on staff. The staff felt that, "since she was seriously disrupting the assessments of the other youths", they had no choice but to cut her stay short. She was sent home after 27 days. Shortly after, she was remanded to NBYC.

By this time, Ashley was already involved in the youth criminal justice system and, as a result of her high risk to re-offend, she remained involved with the Intensive Support Program for young persons (ISP), as mentioned previously. The ISP was then and continues to be managed by the Department of Public Safety. Since Ashley was identified as being part of the program's specific target group, she was a primary candidate to benefit from the objectives of the ISP, namely:

- To be diverted from entering the custodial system;
- To be exposed and integrated into pro-social activities;
- To improve her physical health and psychological wellness;
- To be involved in pro-social community based activities;
- To improve her educational, vocational social functions and interactive skills.[8]

Ashley was involved in the ISP for an approximate nineteen months period overall. Although unsuccessful in the end, this involvement would prove to be one of the few

[8] More information on the ISP is available by contacting the Department of Public Safety.

positive publicly funded initiatives in Ashley's life. In fact, it is reported that aside from her mother, Ashley's ISP worker was one of the only persons with whom she enjoyed spending time and participating in activities. Unfortunately, the ISP program and the worker's involvement would later be discontinued due to Ashley being remanded (and eventually sentenced) to secure custody at the NBYC.

Ashley did attend high school but her experience was short lived. During the first half of her 2002-2003 grade nine school year, from September 3 through November 8, 2002, the newly admitted student had already 17 incidents and two suspensions reported on her file. As early as the month of November, 2002, high school officials reported that Ashley had a "defiant behaviour" and that staff experienced "difficulty in meeting her needs". As a result, during the subsequent month, a referral was made for Ashley to attend an alternate education centre.

This alternative schooling program allowed Ashley more freedom in her out-of-school schedule and as a result, her defiance transcended the confines of the physical building. In December 2002 for example, Ashley was banned indefinitely by the city bus services from using its transportation system following an incident.

There were also incidents reported within the alternate educational settings. Incident reports speak of a young woman who was disrespectful and vulgar towards staff and classmates but remained unmoved when targeted with reprimand. During her last weeks at the education centre, Ashley's *Behaviour Tracking Form* reported bullying (verbal threats), disrespectful attitude and non-compliance. In fact, despite four weeks of suspension from the alternate education centre, attempts at a successful reintegration into the alternative educational system were quashed.

By September 2003, staff at the alternative education centre as well as Ashley's mother suspected that Ashley was unable to attend full days of instructional time in school. Steps were taken by school officials, in cooperation with other stakeholders, to reduce instructional time to half days, as Ashley had little or no tolerance to attend full days of schooling.

In November 2003, at the age of 14 years and 10 months old, Ashley finished attending any form of schooling or educational program.

Ashley's incarceration at the NBYC

During the period between April 2003, and October 2006, at which time she was transferred to the Saint John Correctional Centre, Ashley was either a part-time or full-time resident of the New Brunswick Youth Centre. For over three years, documentation on file indicates that Ashley pushed the staff of the New Brunswick Youth Centre to their limits. With several hundreds of recorded incidents ranging from refusing to hand over a hair brush, to self-harm and suicide attempts, her time at the centre was extremely volatile and disturbing.

Ashley's story at the NBYC began in April 2003, when she was remanded (it was deemed that community intervention had failed) for just a little under one month, for multiple charges of breach of probation, common assault, trespassing and causing a disturbance. From the beginning it was evident that Ashley's time at NBYC would be challenging. In a few short weeks Ashley had accumulated over thirty recorded incidents. The incidents ranged from refusing staff orders and becoming aggressive, to making threats of self-harm. This resulted in Ashley being charged institutionally and, in many cases, being placed in restraints. She was often secured on the Therapeutic Quiet (TQ) unit[9]. Although her first stay at the Youth Centre was short, it established a pattern for her next three years at the NBYC.

A series of events occurred between 2003 and 2006 that would see this young person being admitted and released for short periods of time from the provincial youth correctional facility due to her persistent involvement in the youth criminal justice system. The starting point of Ashley Smith's prolonged experience within this system can be traced back to October 21, 2003. On this date, while she was back home and on probation, Ashley left her yard without permission and threw some apples at a postal worker. That resulted in her being charged and subsequently remanded to the NBYC until her sentencing date. From this time, up until December 29, 2003, Ashley was in and out of the NBYC a total of five times. Ashley would be released under community supervision for a few days until a new incident occurred that would result in a new charge being laid or a breach of probation being brought to the court's attention. She would then be remanded back to the NBYC until sentencing took place. On three separate occasions, Ashley was placed in group/foster homes. All three placements were short-lived. Because of Ashley's defiant and at times violent behaviour, all three placements failed.

At the end of December 2003, Ashley was sentenced to her first lengthy incarceration period at the New Brunswick Youth Centre. Hours after her release on February 26, 2004, while under community supervision, Ashley was arrested for pulling a fire alarm and breaching her probation. Her guilty plea initially got her an additional 75 days of secure custody. However, subsequent criminal charges were laid while she served her custodial time and 75 days quickly cumulated into several months. Ashley remained in secure custody until her release on February 10, 2005.

Four days after her release, on February 14, 2005, Ashley received fifteen more days of secure custody for pulling a fire alarm in a public building. Following this short custodial sentence, Ashley was placed back to reside with her parents but was soon charged with stealing a CD from a local store. As a result, she was placed back into secure custody and would spend most of the remainder of her time as an incarcerated youth.

The incidents in which Ashley was involved were not limited to her brief release periods into the community. In fact, most of the disciplinary measures and incidents involving this young person occurred while she was in prison. The range and number of reported

[9] Therapeutic Quiet is often referred to as segregation, isolation or "the hole" by inmates. It consists of cells located in an isolated area, away from the other units. TQ cells may be monitored by video surveillance and they are equipped with a small window as well as an opening to issue a meal tray.

incidents Ashley had at the New Brunswick Youth Centre is astonishing. She had upwards of eight hundred documented incidents that took place at the NBYC over a three year span. Hardly a day passed that Ashley didn't run into some sort of difficulty. Even the slightest of incidents seemed to get her in trouble. It is NBYC policy for all correctional officers to report in writing their knowledge of any information regarding the conduct, emotional state or events affecting youths in their care. This leads to a high variance in the types of incidents that are reported. The majority of Ashley's incidents were either related to her acting disruptively on a unit and/or refusing staff directives, or to self-harm.

On April 11, 2005, in an effort to inform the court about Ashley's understanding and insight into her actions, she was ordered to the Restigouche Hospital Center (RHC) to undergo a court-ordered assessment. She remained there for 36 days. At the end of her stay, the Restigouche Hospital Center's psychiatrist determined that "Ms. Smith clearly understands her responsibilities and their consequences and can control her behaviours when she chooses to."

On May 18, 2005 Ashley appeared back in court. As a result of the assessment at the RHC she was sentenced to 180 consecutive days which was to be added to the sentence she was already serving.

Ashley's stay at the RHC was very much similar to her stay at NBYC insofar as her living environment was concerned. In fact, she spent most of her time in the seclusion room. She was under almost constant supervision to prevent self-harm or harming others. The report notes: "She states that seclusion room gives her a chance to be away from noise and stimulation and is afraid that she will act out otherwise." During her stay, because she was refusing to take medication, an application pursuant to section 12 of the *Mental Health Act* was made by the attending psychiatrist, requesting an "Admission of a Person as an Involuntary Patient." This was done to allow the RHC to administer medication to Ashley without her consent. The request was granted.

While at NBYC, it was nothing out of the ordinary for Ashley to have anywhere from one to five reported and documented incidents per day. The following provide examples of what types of incidents took place throughout the years:

- On April 28, 2003, there were four different incident reports written for Ashley's behaviour. Two of the reports described her refusing directives from the Sheriff. Another report stated that she refused to be strip searched upon her return from a court appearance and became aggressive towards staff. The fourth report provided information that she was overheard telling another youth that she was going to inflict self-harm with an earring.
- On May 8, 2004, Ashley had two separate incidents. In one of the incidents she was verbally abusive towards staff and refused to hand over a pencil. In the other incident she made a noose in her cell, told another youth that she was suicidal, and assaulted staff.

- On September 28, 2005, there were three incidents reported. One report describes Ashley refusing directives to hand over clothing and then becoming aggressive with staff. The other two reports are related to self-harm. One explains that she had tied the elastic band from her pants around her neck and was hiding behind her cell door to obstruct staff supervision checks. The other report explains that she had ripped material in her cell.
- On July 18, 2006, there were four different incident reports documenting Ashley's behaviour. Two of the reports described her making self-harm attempts by tying material tightly around her neck. Another report stated that she refused to wear footwear while being escorted to TQ. The fourth report provided information that she was overheard telling another youth that she may assault a staff member.

There is a stringent policy on administering discipline for bad behaviour at the NBYC. Staff is to try to correct a young person's behaviour by other reasonable means, before charges are laid, except in the case of a serious misconduct which requires a more severe disciplinary action. If a staff member cannot correct a young person's behaviour with a verbal warning and if they believe the young person is in violation of an institutional rule, they then submit a charge sheet. The charge sheet is examined by their superior and an appropriate course of action is decided upon. The action to be taken varies depending on the type of infraction or misconduct committed by the young person. The following provide examples:

- If a young person will not hand over eating utensils, then the action may be to place that person on finger foods.
- If a young person has made threats of suicide and there is a possibility of them having dangerous material in his or her possession, then it may be decided that he or she be placed in restraints and monitored closely to prevent them from harming themselves.

The most frequent types of actions taken with Ashley when she was institutionally charged were placing her in restraints or TQ, or sometimes even both. These actions were not even so much disciplinary, but allegedly protective measures to prevent her from causing self-harm. Often upon returning from a court appearance or exercise time out in the yard, Ashley would refuse a mandatory skin search (also referred to as a "strip search"). The searches were conducted to ensure she was not concealing any type of contraband that she could use to harm herself. Therefore, uncertain of what Ashley may have in her possession, staff at the NBYC would place her in restraints and confine her to her cell until she decided to comply with the search. This would ensure that she could not free up her hands to inflict harm, and also provide for "eyes on" and video surveillance monitoring. The following provides example of a common occurrence that took place and the actions taken by staff:

- On September 6, 2006, staff members found bruises on Ashley's neck. She had also constructed a noose and tied it to a ceiling vent in her cell. She told staff members that she was scared of receiving more charges that would prolong her sentence and therefore wanted to die. Staff took the initial response of informing

the Unit Managing Officer (UMO) on duty. Then it was decided to move Ashley to a TQ cell where she could be visually checked every ten minutes and to take down the noose she had tied to the ceiling.

Ashley had over one-hundred and fifty self-harm related incidents in a span of three years. Being locked down in TQ and placed in restraints did not appear to have any beneficial effect on Ashley's behaviour. It appears there were no alternative measures in place at the NBYC to deter Ashley's behaviour and as early as 2004, staff at the NBYC began to take notice of this.

There were attempts by NBYC officials to provide help to Ashley. For example, she received anger management interventions and participated in group activities. She was also integrated into therapeutic community meetings[10], going as far as preparing and successfully conducting a presentation before her peers. Attempts to have her return to the female unit were also taken but they were met with little success. Schooling was also provided to this young woman and she was reported to be academically capable. However, given the number of restricted programs she was subjected to, Ashley only managed to progress from grade 9 to grade 10 during her three-year stay at the NBYC.

On June 1, 2004, while secured in TQ, Ashley smeared feces throughout her cell, covering the cell window which obstructed supervision checks. The UMO was notified and spoke with Ashley regarding her behaviour. After the cell was cleaned, Ashley became non-compliant with staff and attempted to exit the cell, which lead to her being physically restrained by staff. After being re-secured in her cell she covered the camera and cell window with torn pieces of her clothing. Staff then placed her in a body belt restraint and conducted a pat search. Later she was taken out of restraints so she could clean the mess she made earlier and then issued a tear proof mattress and blanket.

Ashley received an institutional charge for the above incident under subsection 12 (1)(*b*) of Regulation 92-71 of the *Custody and Detention of Young Persons Act*, which is damage to private or public property. She was found guilty on June 4, 2004, and her sentence was to remain secured on TQ until June 5, 2004. Staff wrote on the charge sheet that she was to be secured in TQ because all other options of discipline were unsuccessful. One might question if TQ was an appropriate solution to manage this youth's behaviour, as Ashley continued this type of behaviour for the next two years. It does not seem that Ashley saw TQ as a threat whatsoever. In fact, on one occasion she even made threats to cause a disturbance if she was not placed back in TQ.

- On January 27, 2006, while serving time on a regular unit, Ashley became extremely vocal towards staff; yelling names, and throwing items around in her cell. Shortly after when staff attempted to retrieve an eating utensil from her cell, she refused to hand it over. She stated that she would not hand it over until she was transferred back to TQ and would even go as far as inflicting self-harm or trashing her cell if her requests were not met. Staff initially removed items from her bunk and then re-secured her in the cell. She then scratched her arms and

[10] Refer to page 12 for a description of the therapeutic community meeting.

began walking around in her cell naked. It was then decided by the UMO that Ashley would be placed back on TQ.

There is no doubt that Ashley challenged the system and the staff while being placed at NBYC. Documentation on file shows how staff struggled with finding the best way to deal with her. Often times, the youths that land at NBYC are the youths that have exhausted all program options and resources offered in the community. They are agitated, demanding and challenging. They are hard to care for and at times, hard to accept unconditionally. However, after having read through Ashley's history, one has to wonder: surely, there is a better way.

After going through the incident reports at NBYC, I feel compelled to raise the issue of the use of restraints with youths. One such incident involving a particularly intrusive form of restraint occurred in the summer of 2004.

- On June 26, 2004, while serving time in TQ, Ashley was going through her regular routine of obstructing supervision checks by covering the cell window and camera with food, toilet paper, and blankets. She then refused staff directives to remove the items so they could make visual contact. After exhausting all other tactics for dealing with a situation of this nature staff were authorized to place Ashley in a restraint belt called the "WRAP". After placing Ashley in the "WRAP", she was secured for a limited amount of time (approximately 50 minutes).

The video documentation of the incident that shows Ashley being placed in the "WRAP" is very disturbing. The best way to describe this most severe of restraint methods would be to say it is very much like a cocoon. She was bound from head to toe, unable to move. The "WRAP" consists of applying restraint belts beginning at the inmate's feet, all the way up to his or her shoulders, ceasing all possibility of bodily movement. Then a hockey helmet is placed on the head which would prevent one from injuring themselves in the event they topple over, and also preventing the subject from biting anyone. After the "WRAP" was applied, Ashley had to be picked up by staff in order to move her to another location, as all movements, including walking, are impossible.

Even though the underlying philosophy at the youth centre aims at successfully reintegrating youths into their community, the New Brunswick Youth Centre remains first and foremost a prison. Therefore, policies are in place for the use of such devices as Oleoresin Capsicum, more commonly known as pepper spray. The use of pepper spray falls under Policy D-32 of the Department of Public Safety - NBYC policy manual. The policy states that pepper spray will only be used after all other reasonable efforts to control a violent person have failed. It is designated to incapacitate a young person who can then be controlled with only minimal physical contact or risk to either the young person or staff. The use of the device has to be authorized by the Superintendent or designate, unless the Unit Manager of Operation (UMO) deems delaying the decision to be unsafe. At that time, the UMO may authorize its use.

- On March 1, 2005, after a long series of negotiations with staff to leave the shower area and return to her cell, Ashley was pepper sprayed. At the time Ashley was nude in the shower area, and in possession of a piece of metal, possibly a razor blade. Female staff members were unsuccessful in removing her from the shower area. Due to her physical size, it was difficult for female staff members to be successful in extracting her from the shower area. It was then decided to consider the option of introducing pepper spray. Ashley was given three warnings and after she refused all warnings the pepper spray was introduced. After she was pepper sprayed she became compliant and was moved to the TQ area where the decontamination process (applying copious amounts of water to the eye area) was commenced. The Superintendent authorized this use of pepper spray.

The pepper spray forced Ashley to comply and to allow staff to place her in restraints and escort her to a cell. Understandably, having additional Correctional officers intervene in crisis situations such as the one described previously is consuming both in time and resources. It was in fact a regular occurrence to have several male and female staff members to be called for back-up when Ashley was causing a major disturbance. Allocating such a large amount of resources to a single person on a regular basis was subsequently reported as having a negative effect on the NBYC as a whole.

Just as Ashley spending time at the NBYC was taking its toll on staff and the other youths, it was taking its toll on her as well. In September 2006, just a few weeks before she was transferred to an adult jail, staff was made aware by another youth of a disturbing journal entry made by Ashley. The following are excerpts from Ashley's journal entry:

> "Mom, If I die then I will never have to worry about upsetting my Mom again. It would have been nice today to stick my head in the lawn mower blade. F***, I really did have to hold back the urge. Maybe next time I will give it a try.
>
> Most people are scared to die. It can't be any worse then living a life like mine. Being dead I think would just suit me fine. I wonder when the best time to do it would be. I'm not going to get locked because then I'm back on checks and they will expect me to act up then. I will call my Mom before bed and have one more chat. Somehow I have to let her know that none of this is her fault. I don't know why I'm like I am but I know she didn't do it to me. People say there is nothing wrong with me. Honestly I think they need to f*** off because they don't know what goes on in my head. When I use to try to hang myself I was just messing around trying to make them care and pay attention. Now it's different. I want them to f*** off and leave me alone. It's no longer a joke. It kind of scares to think that they might catch me before it's done and then I will be a vegetable for the rest if my life. That's why the most important thing right now is to stay unlocked so they don't think anything is up. It's over.
>
> Maybe I will use a brand new pair of socks. Fresh for me. No I don't f****ng deserve a new pair of socks. I will use the old dirty ugly ones. Ha Ha that kind of

> explains me. Dirty and ugly. Two peas in a pot (sic). F*** THIS WORLD!!! Ha Ha. When [*name omitted*] told me she took me off fifteen minute checks I almost s**t myself. Can she help me anymore. I should ask her for a razor blade. Maybe she will give me that to. Joke of the day. Ashley Smith is no longer on checks. 1 2 3 4 5 what the f*** is the point of being alive? [*Name omitted*] said she doesn't know if I will be allowed to have another apartment visit because I waxed my eyebrow. How about this one. "I can't have another apartment visit because I'm f****ng DEAD!" I want to die. I went to court yesterday and I thought he was going to send me to adult! Time is running out. My chances are getting fewer and fewer. F***. I give up! I'm done trying."
>
> - Excerpt, Ashley Smith journal entry (September 4, 2006) New Brunswick Youth Centre

According to the documentation from NBYC, Ashley said when asked about this note, that she was joking. She "insisted staff could not read about her personal thoughts in her journal." She was placed on 15 minute checks. From what the members of my staff were able to gather, no other measures were taken.

I cannot help but read desperation in Ashley's words. We know now that her worse fear expressed in this note was about to happen. She transferred to an adult jail on October 5, 2006.

Transiting into the provincial adult correctional system

Section 92 of the YCJA

Attempts were made by senior staff at the NBYC to have an open and honest discussion with Ashley regarding what could transpire in the event that her behaviour did not change before her eighteenth birthday. Steps were taken to have one-on-one discussions with her and warn her of imminent adult charges that could result in her existing youth sentence being converted to an adult sentence. A longer sentence could potentially result from this and she could also be transferred to an adult facility.

It is reported that Ashley was somewhat responsive to these initiatives taken by NBYC staff and that, in good faith, engaged the path of successful reintegration. However, as it had happened many times during her three years at the NBYC, her motivation would be quashed as quickly as it was ignited and this, following an uncontrollable outburst of anger.

From a custodial perspective, the turning point in Ashley Smith's life occurred upon the successful application by the Superintendent of the New Brunswick Youth Centre to have her transferred – even though still a youth – to a provincial adult institution. This application was submitted pursuant to a provision found in the *YCJA*, section 92. This section is not without controversy.

In short, section 92 of the *YCJA* provides that where a young person turns 18 years of age while serving a youth sentence in a youth correctional facility, the provincial director[11] may apply to a Youth Court and request the authority to transfer this youth to a provincial adult correctional facility. Contrary to an instance where a young person turns 20 years of age and is automatically transferred to a provincial adult facility[12], the transfer process provided by section 92 is *initiated* by the provincial director. Furthermore, although a young person may challenge a section 92 application, there are no specific provisions allowing the youth, his or her parents or legal guardian to formally challenge the provincial director's decision to make the application.

The application will ultimately be granted if it can be determined, after having heard from the youth, the provincial director and other representatives of the provincial correctional system, that the transfer of the youth to a provincial adult correctional facility would be (i) in the best interest of the youth, or (ii) in the public interest.

The application provided under section 92 of the YCJA, also referred to as a "Youth transfer hearing", was filed by the Superintendent of the NBYC with the youth justice court in Miramichi, New Brunswick, on July 29, 2006. At the time of the application, Ashley was due to appear in Adult Court to face additional charges. These ranged from serious charges, such as assaulting a Correctional officer, to less serious ones (damage to a mattress, a pillow and a pillow case). Given her age (18) at the time, her youth sentence could potentially be converted into an adult sentence. These outstanding charges excluded incidents which under the *Criminal Code* would have meant more charges laid against Ashley. In an effort to reduce the potential custodial time imposed as a result of more criminal charges, staff decided to ignore some of these incidents.

The youth transfer hearing was heard before a judge of the Youth Court on September 28 and October 5, 2006. Transcripts of the hearing and a copy of the file obtained from the Department of Justice reveal an impressive amount of details with regard to Ashley's years at the NBYC. It also points to the fact that Ashley, through her lawyer, formally challenged the provincial director's application to have her transferred to an adult facility. In fact, in an affidavit dated September 20, 2006, Ashley outlined in a four page document some key reasons why she felt she should not be subjected to this transfer.

This document offers a rare opportunity to glimpse inside this young person's mind and how she perceived the events that occurred in the course of her years at the NBYC. In it, Ashley emphasizes the fact that contrary to popular belief, she was *incapable* of controlling her outbursts and behaviour although she was very conscious of their impact. A genuine sense of remorse is reflected throughout the affidavit and she argues that with time, she would be able to amend her wrongs and work towards, as she puts it, "get better and do something productive with my life."

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[11] In New Brunswick, for the purposes of section 92, the functions of the "provincial director" as outlined in the *YCJA* are ordinarily reserved to the Superintendent of the NBYC.

[12] Again, this can be challenged by the provincial director, pursuant to section 93 of the *YCJA*.

Regarding the prospect of being transferred to an adult facility, her position is unambiguous :

> *Although I know that my record looks bad, I would never intentionally hurt anyone. I am really scared about the thought of going to an adult facility with dangerous people. It has occupied my mind for a long time. I have wanted to behave to ensure that I would not ever go to adult and was sure that I would succeed* (…).

The representatives of the provincial correctional system did not share her view of the circumstances leading up to the youth transfer hearing. The reasons invoked to justify an application under section 92 of the *YCJA* focused on three main issues: Ashley's "poor choices" and the resulting effects on herself, other youths and staff; the burden and strain that this young woman posed on the resources available at the NBYC; and finally the NBYC's apparent inability to offer any more solutions to this 18 year old offender. Much emphasis was placed on the fact that she influenced her peers on the female unit into making "bad choices". These actions attempted or taken by the latter includes non-compliance with institutional rules and committing criminal acts (such as tampering with or destroying fire sprinklers). According to the Superintendent's testimony at the youth transfer hearing, while other youths were subsequently charged and successfully prosecuted with offences under the *Criminal Code*, blame for these actions appear to have been almost exclusively attributed to Ashley's pervasive negative influence. Lack of appropriate supervision by NBYC staff was never identified as a possible source of the disruption allegedly caused by a single individual within the confines of the female unit. Furthermore, it was not explained why she could actually be considered a disruption among her peers even though she spent two-thirds of her time at the New Brunswick Youth Centre off the female unit, either in segregation or alone on a unit.

Other factors motivating the section 92 application involve the threat of physical violence posed by this young person towards correctional officers. These threats consisted mainly of physical assaults, biting and spitting.

Closing arguments presented by both lawyers at the hearing are indicative of how, from a layperson's perspective, Ashley Smith's experience at the New Brunswick Youth Centre can be interpreted from two diametrically opposed view points: she was either *victimizing* others involved within the correctional system or was a *victim* of the said system. The prospect of transferring Ashley to an adult facility was also presented by one side as offering solutions while, by the other, it could possibly not achieve any good for a person with Ashley's needs.

In his decision to grant the section 92 application, the presiding judge gave considerable weight to the testimony given by two witnesses – Ashley's Probation officer and the Deputy Superintendent of the Saint John Regional Correctional Centre. During examination, these witnesses outlined the variety of programs available for women at the provincial adult correctional institution. These included programs provided by non-governmental organizations and focused mainly on self-esteem, anger management,

relationships and substance abuse. The description of the information based programs was sufficiently appealing to have the Court conclude that a transfer to the SJRCC may very well serve this young person's best interests. What failed to be elucidated during the hearing was that in order to benefit from the programs offered to women at the SJRCC as described by the witnesses, a female offender has to present an "appropriate behaviour" to be entitled to these privileges.

In any event, after weighing the arguments put forward before him, on October 5, 2006, the youth court judge granted the application. That same day, NBYC officials proceeded with the transfer of Ashley Smith to the SJRCC.

Saint John Regional Correctional Centre

Immediately upon her admission to the SJRCC, Ashley was confined to a cell in the segregation unit and would remain there for the greater part of her 26-day stay. Before being released to the federal correctional authorities and transferred to the Nova Institution for Women in Truro, Nova Scotia on October 31, 2006, Ashley's file posted 34 incident reports, some of which led to criminal charges being laid – to which she plead guilty – that resulted in additional custodial time being added to the time she was already scheduled to serve.

The documentation as well as the video footage contained in Ashley's SJRCC file was released by the Department of Public Safety to our office. It paints an extremely disturbing picture of the events that transpired in the course of this young person's three and half week incarceration period at the adult provincial correctional facility.

The first incident report filed by Correctional officers regarding Ashley is dated October 5, 2006, the day of her admission at the SJRCC. Several hours into her new correctional setting, Ashley had already been segregated for refusing a strip search and was threatened with an electronic control device, more commonly referred to as the "taser". In fact, in addition to two occurrences where Ashley was threatened with the use of oleoresin capsicum (commonly referred to as "pepper spray"), she would also be threatened with the use of the taser a total of seven times during her short stay at the SJRCC. Unlike the provincial youth correctional facility, where the use of the taser is prohibited, the SJRCC operates under the Adult Institution Policies and, as such, the use of taser is permitted in certain circumstances. Therefore, regardless of her age, "managing" Ashley was now determined by her status as a female inmate within an adult institution.

Institutional charges were laid on several occasions for non-compliance or incidents resulting from her aggressive behaviour. Criminal charges were also processed by external law enforcement authorities in relation to the damaging of institutional property, in most cases, handcuffs.

Most incidents reported on file occurred as a result of Ashley covering her cell window and the monitoring camera with paper, threatening to self-harm, obstructing her air way,

refusing to return plastic utensils, destroying her institutional clothes and damaging her mattress or other institution property.

Exceptionally, from October 17 to 19, Ashley was moved out of segregation onto Unit 2-A, a female unit. She soon requested to be brought back to the segregation unit but after some encouragement by one of the Correctional officers on duty, Ashley managed to remain for several more hours. It was hoped that the older offenders might have a positive impact on her. This experience was short-lived however. Less than 24 hours following her admission to a regular female unit, Ashley was back in shackles and restraints on the segregation unit.

Ashley's self-harm behaviour became increasingly dangerous as she scratched and cut herself more often and to a point where medical intervention was required. During one particular incident (October 15), Ashley, while being escorted to medical services for slashing her left forearm with a razor blade, clearly indicated to staff that "she wanted to die". On a number of occasions, staff also had to remove pieces of clothes tied around her neck.

A more intrusive and brutal force was exercised to ensure Ashley's compliance with institutional rules and directives. On October 19 for example, while being transferred from the admission unit back to her segregation cell, the young inmate refused to comply with a strip search. As a result, eight Correctional officers were dispatched to restrain her while the nurse on duty removed her clothes by cutting them with scissors.

Although only 18 years of age, Ashley was subjected to the use of the taser during two separate incidents. On October 21, Correctional officers were dispatched to the segregation unit only to find Ashley standing on her bed with two cups filled with an unidentified liquid substance. After several attempts at having her come down from her bed and empty the cups, Correctional officers barged into her cell, hitting her with the shield and while four officers restrained Ashley on her bed, a fifth Correctional officer entered the cell and tasered her in "stun mode". This allowed for Ashley's muscles to relax and as a result, her arms could be safely raised behind her back and better positioned for her to be handcuffed. Contrary to departmental policy[13], Ashley was not given a verbal warning that the device was going to be used. In defiance, Ashley reacted by yelling: "If that was the taser, I'm going to do everything I can to get it every day."[14]

Three days later, on October 24, after returning from a court appearance, Ashley refused to comply with a mandatory strip search. After being threatened with pepper spray and use of the taser, she complied. Following her return to the segregation unit, the situation deteriorated and in a matter of a few hours, during two separate incidents, she was pepper sprayed and subsequently tasered.

Throughout these incidents, there is no evidence indicating that Ashley's mental health status was ever of such concern to SJRCC staff that the mobile mental health unit would

[13] Department of Public Safety, Adult Institution Policy D-47.
[14] Excerpt from video recording of the incident.

have been dispatched to assist her. Although she was placed on regular checks, senior staff confirmed that Ashley was never sent for a formal psychological evaluation after being admitted to the adult facility. Furthermore, according to a SJRCC senior staff, the mobile mental health unit was reserved for "really very distraught" individuals, those inmates "verbalizing a high level of suicidal threats"; simply put, when "the situation was (…) really out of control and we really couldn't get a handle on it"[15]. In fact, theirs was a "reactive mode" and any intervention on their part was mainly dictated by the absolute need to ensure compliance to institutional rules and protect her from herself.

On October 24, 2006, Ashley appeared in Adult Court and was imposed an adult sentence for criminal charges laid while she was still at the NBYC. As a result of the additional 348 days of custodial time added to the already existing 1,455 days, Ashley was to serve the remainder of her sentence in a federal institution due to the fact that this totality exceeded two years.

On October 31, 2006, at the age of 18, Ashley Smith left New Brunswick and was transferred to the Nova Institution for Women in Nova Scotia, a federal correctional facility.

6. Issues identified, analysis and recommendations

Throughout this investigation, I have identified a considerable amount of systemic issues that need to be addressed immediately by a number of governmental stakeholders. Even though many stem from this office's fact-finding mission concerning Ashley Smith, I conclude that in many respects, the issues specific to this young woman's case go beyond the experiences of a single youth. As such, although we can no longer help Ashley, we can at least learn from her experiences and make recommendations to improve a system that is called on to provide services to other youths such as Ashley. Essentially, the goal is to ensure that a story such as Ashley's never reoccurs.

Many who have read the report "*Connecting the Dots: A report on the condition of youth-at-risk and youth with very complex needs in New Brunswick*" released by my office earlier this year, will see many similarities in Ashley's story and the stories outlined in the report. Because of these similarities, many of the recommendations made in *Connecting the Dots* are quite pertinent here. I am therefore including in the next few pages some of the recommendations put forward in the previous report.

While Ashley's story revolves more around her time spent at the New Brunswick Youth Centre, other departments also need to be involved if we are to ensure that youths currently in the system do not experience what she has gone through. I would like to argue that while at NBYC, Ashley was not the sole responsibility of Public Safety. The Education department has to do a better job at providing children with adequate schooling no matter where they are placed. Mental Health Services need to be at the forefront of the service delivery system to ensure youths do not remain in a revolving

[15] Youth transfer hearing, page 171.

door situation for years as Ashley did. Departments need to be held accountable for servicing youths at all levels, no matter where they are, or for how long.

I would therefore like to reiterate one of the most important recommendations made in *Connecting the Dots*: that the Government of New Brunswick appoint, from among its senior ministers, a minister responsible for child and youth services, with a legislative mandate to ensure the integration of services to children and youths across all government departments and agencies.[16]

Education

Ashley Smith's education file outlines many of the genuine efforts made by her parents, her teachers and principals as well as a child psychologist to address many of the behavioural and educational issues Ashley faced. Although there is little indication that *preventive* measures were taken between grades five and seven, there is ample evidence that consistent and important disciplinary measures were taken in what appears to have been an attempt to "curve" her oppositional and disruptive behaviour and bring her around to complying with school rules.

One also gets a sense of desperation amongst teachers who, for lack of a better solution, resorted to "sending Ashley to the office". This solution of "last resort" was precisely what she wanted in most cases. Although teachers involved with her did not have the resources, the opportunities or the time to provide a one-on-one intervention-style instructional model with Ashley, this setting paved the way for what became a predictable vicious cycle for all involved: Ashley, her parents and school personnel.

One would expect that the school's incident reports would have alerted school, district and departmental officials of the disturbing trend that was developing in this youth. Furthermore, after numerous yet unsuccessful attempts at promoting compliance with Ashley, most outside observers would likely come to the conclusion that despite the stakeholders' best efforts, whatever they were able and willing to put forward was not succeeding. Worse, it appears to have exasperated the situation by fuelling Ashley's non-compliance and oppositional behaviour.

The documented incidents and numerous reports contained in Ashley Smith's education file clearly demonstrate how disciplinary methods are not universally effective. One size does not fit all. Clearly, a severely oppositional and defiant youth will not necessarily be able to process the underlying "life lessons" of conventional disciplinary measures. As early as October 2001, this position was taken by the Principal of one of the schools Ashley attended. In a letter prepared on that date to the psychologist retained to assess her, the Principal wrote: "No matter what strategy teachers and administrators implement, none seem to be effective in promoting compliant behaviour from Ashley. In fact, it almost seems as if consequences have exacerbated her non-compliance."

[16] *Connecting the Dots* (recommendation #5), p. 27.

It is obvious that a number of children and youths are still falling through the cracks of the existing education and "alternative education" systems. No child or youth should be left unaccounted for in New Brunswick where the fundamental right to be educated is concerned. Therefore, I maintain the following three previous recommendations:

The Department of Education renew its efforts to promote and model effective multidisciplinary approaches to inclusive education and that it renew its efforts to intervene immediately to correct violent or aggressive misconduct by pupils.[17]

The department of Education devise a new dedicated focus on children with complex needs who, for whatever reason, are no longer in the mainstream system. Its purpose would be to ensure that these pupils continue to receive educational services, regardless of their placement status.[18]

The Minister responsible of Child and Youth Services[19] and the Minister of Education consider establishing a Special Education Authority to coordinate services to pupils with highly complex needs at the provincial level and possibly at the regional level. This should be done in partnership with, or along the model of the Altantic Special Education Authority.[20]

Incorporating the education file into case conferencing

Finally, to build on the previous recommendations, as leaders and active partners in providing an essential frontline community-based service to children and youths, education staff should be actively involved in the case planning for youths involved with the criminal justice system.

1. Therefore, in their role as community-based service providers, it is further recommended that the Department of Education participate fully in case conferences involving youths suffering from mental illness, severe behavioural conduct disorders and all youths involved in the youth criminal justice system as an integral part of the team.

Availability of Mental Health Services

[17] *Ibid.* (recommendation #34), p. 67.
[18] *Ibid.* (recommendation #36), p. 69.
[19] As recommended in *Connecting the Dots* (pp. 26-28), this minister would be granted a legislative mandate to ensure the integration of services to children and youth across all government departments and agencies. The minister's mandate should include (but not be limited to) developing agreements within and among departments to promote and further the child and youth-centered approach to the delivery of public services through joint funding of programs and services as well as information sharing. It would also include operational responsibility for the various agencies, committees and programs established to achieve the integration and coordination of services to children and youth.
[20] *Connecting the Dots* (recommendation #37), p. 69.

It is absolutely crucial that we divert youths with mental illness and severe behavioural problems from jail. As stated by a senior official from the Department of Public Safety we met in the course of this investigation, "We have to work harder at keeping kids out of custody." I believe this starts as soon as the first signs of trouble appear.

As Child and Youth Advocate I have talked on numerous occasions about Early Intervention Programs and the importance of these services being delivered in a timely fashion to those needing it the most. Without spending a lot of time on this issue in this report, I need to reiterate the urgency of structuring and resourcing these services adequately. The case has clearly been made in the literature around preventing small problems from developing into big ones. It is clear from looking at the history of cases referred to my office before and after the release of *Connecting the Dots*, that these families started experiencing difficulties with their children at an early age. Prevention remains the best tool available to us.

The ways we intervene with adolescents while in the care of the Minister of Social Development have also been raised before by my office. Youths are taken into the care of the Minister for different reasons, but often because their parents are unable to care anymore for them at home. Foster parents and staff in group homes need to be adequately equipped to deal with these youths' challenging behaviours. We have seen in *Connecting the Dots* individuals responsible for looking after them becoming completely overwhelmed by the presenting behaviours, and therefore unable to deescalate difficult situations. As a result, the police were called repeatedly, and youths began their journey into the justice system. Again, if we are to divert youths from jail, we must have a well trained, well staffed and well supervised work force and network of foster and group homes. I am therefore including some of the same recommendations proposed in *Connecting the Dots* pertaining to these areas.

It is recommended that the Province of New Brunswick invest significantly in on-going training, clinical support, and better pay for group home and youth transition home staff with demonstrated competencies.[21]

It is important to elaborate here on the specialized training needed for all professionals and caregivers involved in the immediate circle of care of youth with mental illness, (for example, child protection workers, correctional officers, probation officers, group home staff, parents, foster parents) and the ones who become involved with these youths on a sporadic basis (for example, police officers, paramedics). Traditionally, the training provided has focused on 'checklists' type of training, i.e. the symptoms of a mental disorder. In order to be truly understanding of mental illness and to provide effective interventions, the training needs to be targeted to the experience of the person dealing with a mental illness, and how they are impacted by the illness. I therefore fully support the Department of Health's intent of "…provi(ding) opportunities, province-wide for front-line responders such as police and correctional workers and health-care professionals to attend the Canadian Mental Health Association's *Changing Minds* two-day workshop on mental health, mental illness and stigma reduction.", as outlined in its

[21] *Ibid.* (recommendation #19), p. 44.

recently published Health Plan. If, as a society and a service delivery system we are to become more understanding and better equipped to deal with mental illness, we must be, across sectors, properly trained.[22]

Involving stakeholders and service providers in the legal process

If we are to divert youths from jail, we also need a more rigorous approach at the very first appearance in court. And the focus needs to be on services offered to the youth and his/her family. There needs to be a process in place whereby the courts can be informed if there is a current information on file of the youth's condition, or if an order for such an assessment is necessary (many interviewees have told us that very often, assessments are being ordered because no one really knows what to do with the case, or to 'buy' more time to try to determine what to do with the youth. In other cases a recent assessment is available on file but there is no one to bring it to the attention of the court). This process would also ensure that the youth's history, past attempts at involving services, and other pertinent information is promptly shared with everyone involved and that the case can be moved quickly towards adequate intervention, whether it be treatment, specialized residential services, or other.

2. I therefore recommend that the Department of Public Safety develop a renewed plan that it is committed to using and that it convince all stakeholders across the province to participate in using the conferencing option, as provided under section 19 of the *YCJA* to its fullest potential.

3. I also recommend that when a youth is under the care of the Minister of Social Development, a representative of the Minister be present at ALL Youth Court appearances pertaining to that youth.

Improving residential capacity

4. I recommend that the province of New Brunswick develop a range of community residential capacity options for youths who enter the youth criminal justice system, to divert them from the secure custody system.

The priority should be on family based care and the first option should be the youth's own family. The next option should be a foster family. It is absolutely essential that families providing this care, whether the youth's own family or a foster family, be adequately trained but also adequately supported by specialized teams who provide guidance and treatment and who are available immediately to intervene in crisis

[22] I reiterate the need to have a strong clinical framework and adequate supervisory support implemented to respond promptly and adequately to situations in group homes, especially after hours. *Ibid.* (recommendation #20), p. 44.

situations, to avoid having to call the police and send the youth to secure custody. The second element of the residential capacity, would be staffed treatment homes of no more than two or three beds per residence. This resource could be used as a crisis bed when a youth needs an interim placement to stabilize a situation in a home, or it could be used as a longer term placement for those youths unable to function in a family setting. As the parents in the family-based care model, the staff in the residential model would be trained in dealing with these youths, and the treatment team would also be providing on-site service to these youths, and, where necessary, emergency crisis intervention, again to prevent having to involve the police, and send the youths to secure custody.

It is imperative that the treatment team, i.e. child psychiatrists and psychologists along with other specialized staff, be put in place and maintained if this model is to be successful. This model is not new. However, historically, foster families, therapeutic foster families and "specialized placements" have been created, with the promise of support and treatment when in actual fact, the support was inadequate and, too often, nonexistent. Too often in the past, we have set up families and youths for failure.

5. I further recommend that the province of New Brunswick design a provincial recruitment campaign to recruit foster families to care for youths involved in the youth criminal justice system (or who have the potential to end up there) with the understanding that they would care for youths aged between 12 to 18 years of age, be provided training and remuneration reflecting the work they do, and work as part of a team of specialized professionals to ensure successful reintegration of these youths in the community.

Currently, youths can be held at the NBYC for a court-ordered psychological or psychiatric assessment. They can also be held at the Restigouche Hospital Center for the purposes of complying with the mental disorder provisions of the *Criminal Code* if custody is deemed necessary. In other words, even before having been found guilty, youths are inappropriately sent to these institutions to receive an assessment because there are no other designated resources in this province for youths to be sent to. It is important to remember that while being held at the NBYC for an assessment, or while being on remand (awaiting trial), they are treated as any other youth inmate, but are not eligible to receive all the services offered by the institution. Moreover, in some situations, especially pertaining to females, youths on remand are placed on units with other youths who have already been found guilty and sentenced.

As outlined in *Connecting the Dots*, I recommend the designation of resources in the province as approved observation sites for youths under the *Criminal Code* and the *Youth Criminal Justice Act* for assessment purposes.[23]

Specialized residential capacity as an alternative to secure custody

[23] *Ibid.* (recommendation #26), p. 55.

A number of recommendations have been made in *Connecting the Dots* pertaining to capacity building of residential options for youths with mental illness and complex needs. I am encouraged by government's recent endorsement of this and other recommendations made in that report. Hopefully, as this recommendation is implemented and more residential capacity is developed for complex needs youth, less strain will be placed upon the youth correctional system. However, I am very much aware that even if we stop sending mentally ill children to jail, that young offenders sentenced to secure custody will continue to have mental health and counselling services needs within correctional facilities and as an alternative to secure custody. We need residential capacity as an alternative to secure custody as suggested above, and we also need separate residential capacity as outlined in *Connecting the Dots*, for the cases that should never have had anything to do with the youth correctional system in the first place.

6. It is recommended that the residential capacity developed as an alternative to secure custody for youth charged or facing the possibility of charges under the *YCJA* be developed within the Public Safety system. As such these facilities should be managed and funded separate and apart from residential facilities recommended in *Connecting the Dots*.

At the same time as we divert youths from youth jail, funds should also be diverted. It is estimated that one youth in custody for one year costs approximately $100,000. I f there is a will to better service these youths, and we are successful at diverting most of them from closed custody, the 'savings' could then be applied to residential capacity, either within or without the Public Safety envelope. As an example, if we divert 20 youths a year, that should free up roughly 2$ million in savings. This is very rough accounting but it illustrates the potential to re-direct funds rather than spend new money to develop these services.

Reviewing the NBYC therapeutic philosophy

I was very disturbed by the account of Ashley's numerous and continuous attempts at harming herself (we have logged at least 168 from the file, some very mild, two near fatal). In the month of September 2006, just before her transfer to an adult facility, she attempted to self-harm 16 times (which is at a higher rate than any other time while she was at NBYC). Call it attention seeking, manipulation, suicidal gestures or suicidal attempts, or whether it started as an attention seeking behaviour and ended up being desperate calls for help, one cannot help but feel that something more could have and should have been done to help her. It was also very disturbing to see how few attempts seem to have been made to understand the underlying reasons why Ashley continued to self-harm and behave the way she did.

The model called "Therapeutic Community", as documented previously in this report, was put in place to help youths who have taken a wrong turn somewhere in their short

lives. It is supposed to provide them the specialized care they need to get back on the right track. Yet, the relatively young history of the NBYC has demonstrated that the therapeutic community model is not successful with all youths. Some youths suffering from a mental health illness or a severe psychological disorder will require a more specialized and intensive therapeutic intervention, one that cannot be provided by a Correctional officer who would ordinarily play the role of the primary caregiver in the current model. Additionally, for youths such as Ashley, one would argue that the focus should not have been placed on her rehabilitation but rather on the treatment of her disorders. One must question whether the rehabilitation process was sufficient to treat her disorder.

It is clearly understood in our society that youths, because of their age, vulnerability, inexperience, immaturity, and limitations to process difficult situations they might be facing, need to be provided with every opportunity to change their ways and become well adjusted and productive adults. Our best resources and our best people need to be put toward helping the most vulnerable in our society. Some of the most troubled, difficult and challenging youths are placed at NBYC. We have heard professionals say on a number of occasions during the course of this investigation, that most of the youths at NBYC have some form of attachment disorder. The following quote illustrates well the reasons we should be intervening early and the consequences of not doing so:

> "…disorganized attachment is seen as the beginning of a developmental trajectory that will take the individual ever farther from the normal range, culminating in actual disorders of thought, behaviour, or mood. Early intervention for disorganized attachment, or other problematic styles, is directed toward changing the trajectory of development to provide a better outcome later in the person's life."[24]

Ashley was one of those very troubled youth placed at NBYC. Although some will argue that many of these youths have broken the law repeatedly, are non appreciative and do not want to be helped, I insist that it is still our responsibility to do everything we can to help them start over.

Having watched hours of videos of Ashley being escorted to TQ, being restrained, strip searched, shackled, because she was harming herself, I wondered why staff would not always reach out to her, conveying the message they were worried about her, and needed to keep her safe. We have been told that between incidents, staff would try to talk to her about her behaviour. But the view that staff have to remain distant when intervening when she self harms so that they do not send the "wrong message" to the youth, i.e. when you misbehave you get positive attention, is questionable. The purpose of youth jail continues to be to rehabilitate and not to demean and humiliate youths. I therefore reiterate my recommendation outlined in *Connecting the Dots* with regards to the shackling, hand-cuffing and strip-searching children and youths with mental health disorders. It is recommended that the NBYC immediately suspend the practice of

[24] Levy KN, Meehan KB, Weber M, Reynoso J, Clarkin JF (2005), "Attachment and borderline personality disorder: implications for psychotherapy.", *Psychopathology* 38 (2): 64-74.

shackling, hand-cuffing, and strip-searching children and youths with serious mental health conditions and the protocol requiring the video-taping of this process. Additionally, it is recommended the Department of Public Safety and the Department of Justice consult with the Department of Health and the Minister of Child and Youth Services to establish new protocols and guidelines for the safe transportation, detention, or isolation of children and youths with serious mental health conditions, and for children and youths generally, when placed in the care of the Department of Justice or Youth Correctional Services.[25]

Also, at least on one occasion, Ashley was deprived of a weekend visit with her mother (in the supervised apartment on site), because she had misbehaved. I think all of us would agree that it has already been established that it is through relationships that we can successfully help our young people. Why then do we tamper with youths' relationships with their families when these are healthy? Why would such consequences be used in an effort to have kids comply? Upon discharge from the Youth Centre, all youths need a place to go. If family relationships have not been nurtured, it could seriously compromise reintegration within the community. Every effort has to be made to accommodate family contacts, including through visits within the walls of NBYC.

In addition, every effort should be made to work at improving the relationship between a youth and his or her family, or significant others. We know that many of the youths at the NBYC have dysfunctional family relationships or have significantly damaged whatever relationship they had with their family. Part of the transitioning back to the community involves resolving conflicts, and rebuilding healthy family connections that are crucial to the youths' reinsertion. The supervised apartments within the walls of NBYC should be used to their fullest capacity, through visits and intensive therapy by the clinical team, between the youth and his or her family.

7. It is therefore recommended that the Department of Public Safety renew its commitment in philosophy and in practice to enhancing, maintaining and mending family relationships (or with significant ones) with the youths. The apartments on site should be used to their full capacity (providing family therapy on-site, for example) towards achieving this goal.

We have met with youths and inmate advocates in the community who question these youths' capacity, not on an intellectual level, but on an emotional level, to understand the rules and the order that needs to be kept in the youth jail. Most of them come from deprived backgrounds and have led very chaotic lives or have been through traumatic events, having found coping mechanisms that have allowed them to survive thus far, but which often have gotten them into further trouble. They often function at a younger level than their chronological age, having missed important emotional development stages earlier in their lives. They have impaired social skills, disorganized thinking, and are in a constant state of hyper-vigilance or alert, often feeling much anger. In all likelihood, many of them don't get the rules, and are so far from understanding their responsibility for their actions,

[25] *Connecting the Dots* (recommendation, #30), p. 58.

that when they misbehave on the unit, the concept of 'making good choices' escapes them completely. Moreover, it appears the approach used with these youths is to curb their behaviour rather than go beyond the presenting behaviours, which are at the cause of so much pain and anger. Because of the system's inability to help them, many of these youths find themselves in a vicious circle, where they accumulate institutional charges, burning all their bridges, and ending up losing all hope. Sadly, this is exactly what happened to Ashley.

Improving mental health and community-based services

Prior to her incarceration and in the early stages of her incarceration, Ashley was being followed by a psychiatrist from her community mental health clinic, and receiving counselling from the same clinic usually on a weekly basis. When reading the file, it is obvious that her counsellor was strongly advocating for a continuation of these services. Ashley eventually received a longer sentence, and her counsellor had, for this reason, to discontinue the service. Despite recommendations from her psychiatrist that she receive individual counselling, no one at the NBYC took over from the community health clinic.

My investigation has led me to believe that for those we are unable to divert from the youth jail, specialized mental health services need to be put in place at NBYC. Currently, and at the time Ashley was there, there is a social worker on staff and a nurse. Public Safety contracts out the services of a psychologist and a psychiatrist. These professionals will see the youth when medication is prescribed or when an assessment has been court ordered. They may also from time to time attend a 'clinical meeting' to review a particular case and give advice on that case. Otherwise, there appears to have been very little clinical intervention provided to Ashley. Even when the consulting psychiatrist recommended in September 2004, more than two years before her transfer to a provincial adult facility, that she receive "individualized counselling", nowhere can any evidence be found that she received this counselling.

It is important to understand that contracting out the services of psychiatrists and psychologists means that these professionals are doing work for NBYC over and above their regular work load, for a different employer. This work with youth placed at NBYC represents an "add on" for them. We were told by these professionals that they might receive calls from staff at NBYC about a youth who threatens to self harm for example, while they are busy seeing other patients or fulfilling other duties related to their "regular" job, and cannot in many instances provide immediate assistance to the youth or the staff. They would eventually make their way to NBYC once they became available, usually once the crisis and the opportunity to intervene had passed.

I believe this way of delivering essential services to vulnerable youth is inadequate. If we are to provide prompt and appropriate mental health services to these youth, the resources allocated must be available to NBYC on a priority basis.

There is a self-admitted reluctance on the part of mental health professionals to label children and youths with a mental health/psychiatric diagnosis. This is probably wise but it is also true that without a diagnosis, services are difficult to access. That is a significant problem. If there are still presenting behaviours, there is still the likelihood, that an underlying problem is present. Treatment is needed without delay even though there is no formal mental health/psychiatric diagnosis.

Having examined the "therapeutic model" in place at NBYC, I have to express my reservations around some of the practices it involves. While I recognize that Correctional Officers (COs) have a crucial role to play with the youths, and are so much more than "guards", they are not trained therapists. As outlined above most of these youths arrive with a lot of 'baggage' from the past. In Ashley's case, assessments done prior and during her incarceration have mentioned the following possible diagnoses: adjustment disorder, attention deficit hyperactivity disorder, narcissistic personality traits, oppositional and defiant behaviour, borderline personality traits, post traumatic stress disorder and possible Aspergers. Any youth with such an array of possible diagnoses needs specialized services to have a chance at rehabilitation and successful reinsertion in the community.

In the struggle between detention and treatment, in most cases, treatment must prevail. Moreover, treatment and intervention must continue at the community level once youths are released from the NBYC. For that purpose, networking is essential to ensure consistent and continuing care.

8. I am therefore recommending that a mental health treatment team be put in place to provide clinical programming and individual counselling for youths placed at NBYC. This has to be based on a model where these responsibilities are at the core of their duties in order to provide prompt and appropriate mental health services to youths and clinical assistance to staff.

Professionals such as a child psychiatrist and a psychologist, as well as a psychiatric nurse and a social worker specialized in psychiatric and conduct disorders must be part of this team.

9. I am further recommending that a clinician assume a leadership role in terms of putting this team together and of supervising the delivery of these mental health services. The province must ensure a full complement of professionals on the team at all times.

10. It is finally recommended that the Department of Public Safety, in collaboration with the Department of Health (Mental Health), Social Development and the Department of Education, implement the necessary networks to allow for consistent and continuing treatment and intervention in the community.

Working towards an efficient reintegration strategy

It is essential that while youths are incarcerated, people both on the 'inside' and the 'outside' work for their return to the community. Since I have been appointed Child and Youth Advocate, I have been told that in many cases, once a youth has been sentenced to NBYC, services on the 'outside' will put the case at the bottom of their piles and bring it up again only a couple of weeks before the youth is discharged. The common factor with these situations is the severing of important ties between the youths and government stakeholders and service providers as well as the community. I can understand that professionals in child protection and mental health services feel that while the youth is at NBYC, they have nowhere else to go and are therefore safe. They can then service other cases on their caseload, also in urgent need of intervention. While I recognize that waiting lists are long and that professional staff throughout the province are extremely busy, I am concerned that the transition work back to the community often begins too late to prepare the youth adequately.

I will never forget the case of a 17 year old referred to my office in the last year. He was under the care of the Minister and was being discharged from NBYC on a Friday. Staff from the New Brunswick Youth Centre were unsure whether or not someone from the then Department of Family and Community Services (FCS) office would come and pick him up either in Miramichi or would meet him when he got off the bus in his home community. Unable to firm up a plan with FCS, the Superintendent was not satisfied that putting him on a bus under these circumstances was adequate. He decided to have one of his staff drive him to his home community. My office was able to determine that no placement was available for him that Friday night. FCS suggested that the youth ask a friend he had been living with before being incarcerated if he could stay with him for the weekend and that he should come in to FCS office on Monday morning to talk about his future living arrangements. Finally, after a member of my staff intervened, FCS agreed to cover the lodging costs of this youth, give him a meal allowance and provide him with an intervening worker over the course of the weekend, to tie him over until Monday morning, at which time the office opened and planning could begin. Thankfully, NBYC officials made an extra effort in this case. I cannot say as much about FCS, which, as a substitute parent, should have done more to ensure a smooth transition.

11. In light of this I am recommending that the necessary resources be allocated by all departments involved with remanded or sentenced youths in order to ensure the strengthening of the transition phase so that reintegration to the community starts upon admission. Community resources need to be aligned much sooner than they are currently.

Filling the gap

The gap in services for youths aged 16 to 18 is a great concern to me. Since the publication of *Connecting the Dots*, I have received an impressive number of calls from professionals

and parents about this issue. I have gone as far as saying this is discriminatory. Many youths to the NBYC are suffering the consequences of this gap in services. I therefore need to reiterate the recommendation made in *Connecting the Dots* that government take immediate steps to ease the discriminatory impact of current regulations that create a gap in services to youths between the ages of 16 to 18.[26]

Therapeutic Quiet (Segregation)

I cannot submit this report without addressing the issue of placing youth in segregation for prolonged periods of time. Ashley spent over two thirds of her time at NBYC, alone in a 9 by 6 foot cell, 7.5 feet high, equipped with a sink/flush combination with a water fountain, a concrete slab topped off with a mattress and bedding. On occasions when she self-harmed or threatened to do so, namely by tearing the mattress or bedding into pieces to tie around her neck, these items were replaced with protective and indestructible mattress, bedding and clothing. Placements in Therapeutic Quiet usually involves 23 hours of cell confinement. One hour is reserved outside of the cell for exercise and showering.

Segregation cells are smaller than regular cells and have no window to the outside. There is a window in the cell door and a slot to pass a meal tray or other small objects.

'Living' is segregation as Ashley did essentially meant that she was on a modified program and as a result, was excluded from regular programming. Her opportunities to participate in productive activities for herself or to be with her peers were limited. She lived in extreme idleness for countless number of hours and was only allowed personal items when her behaviour was deemed appropriate to have them.

I found it distressing to think that for approximately two thirds of her sentence, this teenager was alone in a cell most of the time, with very little loving physical contact (the only constant physical contact she had with others was mainly when she was restrained, sometimes forcefully). There is in fact evidence in what we have shown in this report that Ashley's mental health state was deteriorating as the months went by. I challenge anyone with a sane mind to live in conditions similar to the ones described above, for half the time Ashley had to endure, and to come out having maintained a perfect mental equilibrium. In fact, the following research shows the detrimental effect of prolonged segregation on human beings:

> "…direct studies of prison isolation have documented an extremely broad range of harmful psychological reactions. These effects include increases in the following potentially damaging symptoms and problematic behaviors: **negative attitudes and affect** (e.g., Bauer, Priebe, Haring & Adamezak, 1993;Hilliard, 1976;Koch, 1986, Korn, 1988a, 1988b;Miller & Youngs, 1997: Suedfeld, Ramirez, Deaton, & Baker-Brown, 1982), **insomnia** (e.g., Bauer et al., 1993; Brodsky & Scogin, 1988;Haney,1993;Koch, 1986;Korn, 1988a, 1988b;**anxiety** (e.g., Andersen et al., 2000;Brodsky & Scogin, 1988;Grassian, 1983;Haney,

[26] *Connecting the Dots* (recommendation #48, p. 86).

> 1993;Hilliard, 1976;Koch, 1986; Korn, 1988a, 1988b Toch, 1975;Volkart, Dittrich, Rothenfluh, &Werner, 1983;Walters, Callagan, & Newman, 1963) **panic** (e.g. Toch, 1975), **withdrawal** (e.g. Cormier & Williams, 1966; Haney, 1993; Miller & Young, 1997; Scott & Gendreau, 1969; Toch, 1975;Waligora, 1974; **hypersensitivity** (e.g. Grassian, 1983;Haney, 1993;Volkart, Dittrich, et al., 1983), **ruminations** (e.g., Brodsky & Scogin, 1988; Haney, 1993; Korn, 1988a, 1988b; Miller & Young, 1997), **cognitive dysfunction** (e.g., Brodsky & Scogin, 1988; Grassian, 1983; Haney, 1993; Koch, 1986; Korn, 1988a, 1988b; Miller & Young, 1997;Suedfeld & Roy, 1975; Bolkart, Dittrich, et al., 1983), **hallucinations** (e.g., Brodsky & Scogin, 1988; Grassian, 1983; Haney, 1993; Koch, 1986;Korn, 1988a, 1988b; Suedfeld& Roy, 1975), **loss of control** (e.g. Grassian, 1983, Haney, 1993;Suedfeld &Roy, 1975;Toch, 1975), **irritability, aggression, and rage** (e.g., Bauer et al., 1993;Brodsky & Scogin, 1988;Cormier & Williams, 1966; Grassian, 1983; Haney, 1993; Hilliard, 1976; Koch, 1986; Miller & Young, 1997; Suedfeld et al., 1982; Toch, 1975), **paranoia** (e.g., Cormier & Williams, 1969;Grassian, 1983; Volkart, Dittrich, et al., 1983), **hopelessness** (e.g., Haney, 1993;Hilliard, 1976), **lethargy** (e.g., Brodsky & Scogin, 1988; Haney 1993;Koch, 1986;Scott & Gendreau, 1969; Suedfeld and Roy, 1975), **depression** (e.g., Andersen et al., 2000;Brodsky & Scogin, 1988;Haney, 1993;Hilliard, 1976; Korn, 1988a, 1988b), **a sense of impending emotional breakdown** (e.g., Brodsky & Scogin, 1988, Grassian, 1983; Haney, 1993; Koch, 1986; Korn, 1988a, 1988b; Toch, 1975), **self-mutilation** (e.g., Benjamin & Lux, 1975; Grassian, 1983; Toch, 1975;**and suicidal ideation and behavior** (e.g., Benjamin & Lux, 1975;Cormier & Williams, 1966;Grassian, 1983;Haney, 1993).[27]

The author continues with the following:

> "In fact, many of the negative effects of solitary confinement are analogous to the acute reactions suffered by torture and trauma victims, including post-traumatic stress disorder or PTSD (e.g., Herman, 1992, 1995;Horowits, 1990; Hougen, 1988; Siegel, 1984) and the kind of psychiatric sequelae that plague victims of what are called "deprivation and constraint" torture techniques (e.g., Somnier & Genelke, 1986)."

Ashley's time in segregation continued throughout her stay at the SJRCC, and in every single federal institution thereafter until her death on October 19, 2007. How this was supposed to rehabilitate and promote her reinsertion in the community escapes me. As a modern society, we must be held accountable for subjecting youths with limited life experiences and coping abilities to this kind of treatment. The fact that no one from the correctional system was able to see or effectively intervene in the out of control spiralling condition Ashley was in is shameful.

New Brunswick Youth Centre policy D-27 provides that no young person will be confined for more than five days in Therapeutic Quiet (i.e. segregation) without the

[27] HANEY, Craig, "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement", *Crime and Delinquency*, vol. 49, no. 1, January 2003, pp. 124-156.

Regional Director's permission. The policy does not provide that the Provincial Director of Operations (Correctional Services) or other senior departmental staff members be consulted in such cases. It is also mute with regards to potentially necessary psychological or psychiatric assessment of the young person while he or she is segregated.

Segregation is generally for an indefinite period of time, albeit "no longer than is required to achieve a change in conduct."[28] From what I have gathered in the course of this investigation, it appears obvious that segregating Ashley was not and would not have the desired effect. In fact, whatever "positive" effect it had with regards to compliance, if any, the evidence overwhelmingly establishes that these changes were accompanied by a detrimental impact on this young person's mental health.[29]

> The issue of prolonged periods of segregation raises a number of legal issues, not the least of which has to do with the rights and freedoms protected under the *Charter of Rights and Freedoms*. The Supreme Court of Canada also has commented on the duty of procedural fairness that lies on "every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges and interests of an individual".[30] In my opinion, these considerations require more than changes in policy to ensure an effective consideration and protection of the fundamental rights of youths; they require legislative amendments.

Due to the intrusiveness of a prolonged period of segregation and in light of the impact it may have on a young person's mental health and psychological well-being, changes are required to the existing legislation, policies and operational practices to ensure that this form of placement be limited and controlled.

> **12. I recommend that the New Brunswick *Custody and Detention of Young Persons Act* and its corresponding Regulation be amended to include strict provisions on the use of segregation (Therapeutic Quiet) with young persons. These amendments should also provide for the establishment of an independent review panel that would be tasked with hearing appeals and issuing recommendations with regards to the situation of young persons challenging a segregation period exceeding five days.**

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[28] New Brunswick Youth Centre policy D-27.

[29] The *Youth Criminal Justice Act* provides that the purpose of the youth custody and supervision system is geared towards protection society by rehabilitating young persons, reintegrating them into the community and providing them with effective programs in custody and while under supervision in the community (paragraph 83(1)(*b*)). This purpose is to be achieved by respecting a number of legislated principals, namely that the least restrictive measures be used during a young person's custodial sentence (par. 83(2)(*a*)).

[30] *Cardinal* v. *Director of Kent Institution*, [1985] 2 S.C.R. 643 (par. 14).

13. **I recommend further that the Department of Public Safety review its policy on segregation (Therapeutic Quiet) and that more stringent guidelines be implemented to eliminate the practice of resorting to prolonged or indefinite segregation. Further actions should be taken by departmental and NBYC authorities to ensure that young persons who are temporarily assigned to Therapeutic Quiet are not subjected to additional intrusive actions by institutional staff or that any undue restrictions are placed on the provision of existing programs. Alternative measures to achieve a change in conduct should be explored before resorting to segregation.**

14. **It is further recommended that any period of segregation exceeding five days (consecutive or cumulated within a fifteen-day period) be requested in writing, justified as well as documented and approved in writing by the Regional Director and the Provincial Director of Operations (Corrections). Youth suffering from mental illness or severe behavioural disorder should not be confined to segregation under any circumstances.**

15. **It is finally recommended that the Department of Public Safety establish a policy by which a mandatory clinical assessment of all youths confined to the segregation unit shall be ordered immediately upon their admission to Therapeutic Quiet. Stringent guidelines should be implemented to ensure that the necessary psychological or psychiatric intervention is in effect as quickly as possible.**

Youth criminal justice system: providing consistent legal representation

From my preliminary findings in the course of this investigation, I believe that to better understand the scope of Ashley's story, a general overview of the legal issues at play in the youth criminal justice system is essential.

My first thoughts were of the Convention on the Rights of the Child[31], more specifically Article 37. This article provides that States Parties to the Convention (including Canada):

- shall ensure that no child shall be deprived of his or her liberty unlawfully or arbitrarily;
- that the detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- that a 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;

[31] United Nations General Assembly, December 12, 1989; ratified by Canada on January 12, 1992.

- shall be separated from adults unless it's considered in the child's best interest;
- shall have the right to prompt access to legal and other appropriate assistance;
- shall have the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority.

Although these provisions are not legally binding on public authorities or members of the judiciary, they have had and, I hope, will continue to have a positive impact on the development of guiding principles applicable within the youth criminal justice system, the enactment of rehabilitative and reinsertion-oriented legislation and perhaps more importantly, the way in which the existing legislation is applied.

In New Brunswick as well as throughout Canada, young people over the age of 12 and under the age18 who find themselves in conflict with the law can be subjected to the provisions of the *YCJA*. Under these provisions, society as a whole has a responsibility to ensure that every effort is made for youth involved in the youth criminal justice system to give them the opportunity for reinsertion into the community. In fact, the act has been labelled as community-based legislation[32].

The *Youth Criminal Justice Act* came into effect on April 1, 2003 and was meant to act as an important guiding tool with respect to imposing "meaningful consequences". Emphasis is also placed on *understanding* a young person's underlying offending behaviour and providing the necessary intervention to rehabilitate and reinsert young offenders into society.

During our investigation, judges, lawyers and offenders' advocates came forward and cited the challenges posed in meeting the objectives set out in the *YCJA* for youths suffering from mental illness and severe behavioural disorders. Some went as far as suggesting that all members of the judiciary involved with young persons entangled in the youth criminal justice system should be provided with training from community-based interveners in order to better appreciate the options they have before imposing a consequence.

The *YCJA* is often referred to as one of the most misunderstood pieces of legislation in Canadian criminal law. Aside from the obvious problem associated with case conferencing (section 19), in that it remains discretionary, those who have the power to influence the long-term treatment of youths involved with the criminal justice system are sometimes ill-informed of the programs available in the community or, worse, are simply frustrated in their attempts to find alternative solutions in light of the lack of available community-based resources for youths. As one Youth Court judge put it during an interview: "What can I do? I am left with no other option…"

Educating the legal community

[32] For a discussion on this topic, see namely ROBERT, Julian V. and Nicholas Bala, "Understanding Sentencing under the Youth Criminal Justice Act", (2003) 41 Alta. L. Rev. 395-423.

There is a need for governmental stakeholders to examine the sentencing options available to judges in the *YCJA* and incorporate these options into the services they provide to youths involved in the criminal justice system.[33] There is an additional obligation on the part of these public service providers to work with and inform members of the judiciary on the services they provide in order to have them transformed into potential alternative measures to secure custody sentences.

16. I therefore recommend that the departments servicing youths involved with the youth criminal justice system collaborate and participate cooperatively in providing members of the judiciary with educational programs and information sessions on the implications and best practices when servicing youths with mental illness and severe behavioural disorders. Members of the judiciary should also attend the Canadian Mental Health Association's *Changing Minds* training, as outlined previously in this report.

Consistency and continuing legal assistance and representation

At the NBYC, there are essentially two types of legal consequences that may result from non-compliance with legislation, regulation, rules or institutional policies. Non-compliance leading to institutional charges may be handled internally, that is, at an institutional level (i.e. outside of the judicial system). Formal charges may also be laid externally (i.e. by law enforcement officials commonly resulting in a formal hearing before a judge of the Youth Court).

Institutional charges handled internally are done so pursuant to the *Custody and Detention of Young Persons Act* of New Brunswick (sections 9 through 15). Measures taken pursuant to the preceding sections may be appealed or a grievance filed by a youth in a case where the youth feels he or she is a victim of unfair treatment. In practice, I find that the opportunities given to youths who wish to challenge institutional charges or actions taken by staff members are not as effective as they are meant to be.

This was certainly true in Ashley's case. From taking a sample of her Incident Report Sheets I have made the following discoveries with regards to the 501 institutional charges[34] that were laid against her at the NBYC:

- She plead guilty 90.07% of the time.
- She plead not guilty 9.93% of the time.
- She appealed the verdict 11.43% of the time.

[33] In a recent judgment, the majority of the Supreme Court of Canada has confirmed that "the approach to the sentencing of young persons is animated by the principle that there is a *presumption* of diminished moral culpability to which they are entitled" and that, as a legal principle, the "presumption of diminished moral culpability in young persons is fundamental to our notions of how a fair legal system ought to operate.", *R.* v. *D.B.* [2008] S.C.J. No. 25, at par. 45 and 68 respectively.

[34] This number is based on the information on file.

- She chose not to appeal the verdict 88.57% of the time.
- She was found guilty 100% of the time.

These numbers are disturbing to say the least. Unfortunately, they do not lead me to view the internal disciplinary system at the NBYC as offering any *actual recourse* to Ashley. It comes as no surprise that she turned down the right to appeal or challenge the decisions taken by this "internal court" well before she left the NBYC.

At the risk of over-simplifying, it is fair to say that the dominant reason Ashley Smith spent such a lengthy period of time in prison is that she was sentenced to serve time in a secure custody facility in the first place. One could conclude that Ashley became a young *punishable* offender *in* prison. There are a number of reasons for which this occurred, not the least of which remains that the correctional setting where she spent the greater part of her teenage years was ill-equipped to deal with her specific needs. Despite their best efforts and what I perceive to be a genuine commitment to the wellbeing of the youths in their care, I am of the opinion that NBYC staff and the outside interveners who provide services to young residents of this correctional facility did not possess the necessary training or tools to address some of the most fundamental needs of Ashley's mental health. This contributed heavily to the accumulation of institutional *and* criminal charges that could otherwise have been challenged successfully or dealt with using alternative measures had there been timely, consistent and adequate legal representation.

I am of the opinion that young persons involved in the youth criminal justice system – particularly those remanded and sentenced – should be provided with independent and continuing legal representation. This includes having every youth charged institutionally or criminally provided with the services of a legal representative or, at the very least, an independent and legally trained representative, operating at arms length from the administration, that would assist the youth in the course of the process. It is unacceptable and potentially unconstitutional to have an internal and parallel judicial system that does not provide a youth with adequate representation while imposing serious consequences that may result in an extension of a young person's period of incarceration

17. I therefore recommend that remanded or sentenced youths (secure custody) charged with an institutional charge be provided with the services of an independent legal representative or an independent and legally trained advocate that would assist them throughout the process. A youth should not have to enter a plea with regards to the charge before he or she has had the opportunity to meet with his or her representative.

As a pre-emptive step in improving incarcerated youths' understanding and appreciation of their rights, I further reiterate the recommendation made in *Connecting the Dots* regarding the education and promotion of youths' rights to prevent abuse of vulnerable youths in custody. I recommend that the Department of Public Safety devise an educational program aimed at youths in custody and their care-givers about their rights while in custody, and the procedures to follow when they believe their rights have been

violated. This should be done in consultation with the Minister responsible of Child and Youth Services and jointly with the Office of the Child and Youth Advocate. This is necessary to ensure that the rights of youths, and particularly vulnerable youths, are protected from the possibility of abuse and to make available to them all avenues for redress.[35]

All actors involved with incarcerated youths would agree on one essential point: these *punished* youths needed help before they became *punishable*. A facility such as the NBYC should not be an environment where a youth can sink further into the youth criminal justice system. For this to happen, governmental stakeholders will have to re-think and re-draw the map leading to efficient assessment, intervention, adequate treatment and, hopefully, an appropriate placement for youths suffering from mental illness and severe behavioural disorders.

In that respect, as first reported in *Connecting the Dots*, it is recommended the Minister responsible of Child and Youth Services establish, with appointed representatives from the judiciary, the Department of Justice, the Department of Health, the Department of Public Safety and the New Brunswick Legal Aid Services Commission a task force to review alternative measures currently in use within the justice system and to extend the adoption of identified best practices to divert youth-at-risk and youths with highly complex needs from the criminal justice system. Specifically, this group should review, following recommendations from the current Legal Aid Review, means of improving the legal representation of youths in all instances.[36]

Establishing specialized legal assistance for youths

Given the percentages outlined above regarding institutional charges and considering the impact a criminal charge can have on a youth (whether he or she is facing charges for the first time, remanded or already sentenced to open or secure custody), there is a need to ensure that the legal representation provided to youths be geared towards taking advantages of all that the *YCJA* has to offer. In many cases, such legal representation involves continuing services to youths both in and out of court, case planning being an example of the latter.

18. It is recommended that the New Brunswick Legal Aid Services Commission establish a specialized unit within its legal aid program that would provide services exclusively to youths involved with the youth criminal justice system. This unit would be responsible to ensure consistent and continuing legal representation for youths charged with initial or subsequent criminal offences, whether they be remanded to a secure custody facility or sentenced to an open or secure custody facility.

[35] *Connection the Dots* (recommendation #31), p. 58.
[36] *Ibid.* (recommendation #33), p. 59.

Such a model has proven effective in other provinces and it should be imported to New Brunswick. In fact, both Alberta and Nova Scotia have separate legal aid offices that offer specialized services for youths.[37]

These models could very well offer extensive benefits for youths in New Brunswick.

Section 92 of the Youth Criminal Justice Act

An application made by the provincial director pursuant to section 92 is a legal process that can carry considerable and potentially traumatic consequences for a youth. This hearing is held before a judge and involves all of the actors one would expect to find in the course of a trial: lawyers, parties and witnesses. Although most cases in New Brunswick have involved youths actually requesting the provincial director to apply for them to be transferred to an adult provincial correctional facility, I am quite concerned that in cases where the situation is reversed, the parties involved – the provincial director and the youth – do not necessarily benefit from the same vantage point when the application is initiated. Although the onus is on the provincial director to demonstrate that the application is done with the best interest of the youth or the public interest in mind, the playing field is not levelled as the burden of proof quickly shifts to the youth who is ill-equipped legally to argue against and challenge effectively what can almost be considered a *fait accompli*.

The provincial director can bring forward many arguments as well as institutional witnesses to support his or her application and can also link these arguments to the conditions outlined in section 92 ("best interest of the youth" or the "public interest"). These terms can lead to an overly broad interpretation and, as a result, stigmatize a youth

[37] In Alberta, the Legal Aid Society refers most of its youth clients in Edmonton and Calgary to the Youth Criminal Defence Offices (YCDO). The YCDO operates under the supervision of a Senior Counsel who is hired by and reports to the Board of Directors of the Legal Aid Society. The office also employs a number of lawyers in Calgary and Edmonton. Social workers, youth workers and administrative staff support the lawyers. Both offices also have access to a psychologist through a pilot project with the Child and Adolescent Services Association.

The two offices provide legal assistance to unrepresented youths on a daily basis in Youth Justice Court. The YCDO operates for the benefit of young people, and young persons as clients have special needs that must be addressed. The problems are many and various. Homelessness, poverty, addiction, sexual and/or physical abuse, foetal alcohol spectrum disorder, and learning disabilities are common and can contribute to conflict with the law. Whenever possible, the social and youth workers employed by the Youth Criminal Defence Offices prepare release and sentencing plans for lawyers to present to the Court. Wherever possible, they advocate the use of community rather than custodial resources to promote rehabilitation and to deal with problems contributing to criminality. The social and youth workers may also advocate for service for the young person. These may be sought from the child welfare, education or health systems.

Given the nature of their work, lawyers and other staff at the YCDO develop an expertise in the unique problems facing young people and the law relating to them. This knowledge brings with it a responsibility to help develop resources that are needed in the community. The YCDO advocates for such resources and, where feasible, co-operates with other agencies to create them.

involved in the criminal justice system even more. From his or her standpoint, the youth faced with the prospect of being transferred to an adult facility is already one step behind as this application does not focus on an offence that occurred in the past but rather on a possible future occurrence.

For these reasons, a youth facing a section 92 application must be equipped with the legal assistance to prepare appropriately for the youth transfer hearing.

19. It is recommended that a youth challenging a provincial director's application pursuant to section 92 of the *YCJA* be provided independent and consistent legal representation in a timely manner.

This legal representation should be provided from the moment the application is contemplated. This would allow for legal counsel to represent the youth's interests before the Youth Court.

All relevant institutional and departmental documentation should be disclosed promptly to the youth's legal counsel in order for this person to adequately prepare for the youth transfer hearing before the Youth Court.

Provincial legislation, regulation, policies or standards cannot contravene existing federal legislation in matters of criminal law. As a result, it would be futile for this office or another provincial authority to recommend amendments to limit the scope or impact of section 92 of the *Youth Criminal Justice Act*, a federal piece of legislation. Nonetheless, nothing prevents provincial departmental authorities from implementing a policy that provides additional conditions for its use by the Director.

More importantly, the criteria established should emphasize the fact that section 92 must always be used with the youth in mind, not the institution. Otherwise, the system could allow for an imbalance of power between a vulnerable youth and the public authorities.

Restricting the discretionary power under section 92

In order to ensure transparency and accountability on the part of the provincial director *and* the Department of Public Safety, an internal mechanism must be implemented to filter all section 92 application.

20. I recommend that the Department of Public Safety establish and implement a policy providing additional conditions for the use of section 92 of the *YCJA*.

21. It is further recommended that the Department of Public Safety establish and implement a mandatory policy by which the provincial director referred to in section 92 of the *YCJA* would have to obtain

approval from the Minister of Public Safety before proceeding to apply for the transfer of a youth to an adult facility.

Securing the application process: the Ontario model

More could be done to give youths an effective voice when challenging a provincial director's application made under section 92. In Ontario, the Custody Review Board, pursuant to sections 51 and 52 of the *Ministry of Correctional Services Act*[38] has, upon the application of a young person, the authority to review an application made pursuant to section 92 of the *YCJA*. Even though the Board may not compel the provincial director to reverse his or her decision, it may nonetheless issue formal recommendations regarding how the decision to transfer a youth to another facility fails to meet his or her needs.

Establishing a section 92 provincial review panel

When taking into consideration the potential impact of a successful application to have a youth transferred to an adult correctional institution, and given that any contentious proceeding involving a youth requires considerable attention to ensure that the parties are on an equal footing, we recommend that a preliminary step be taken before the application is made by the provincial director pursuant to section 92 of the *YCJA*.

22. Provincial legislation should provide that all applications instigated by the provincial director to have a youth transferred from a youth detention facility to an adult facility, pursuant to section 92 of the *YCJA*, should be reviewed by an independent review panel. This panel would have the power to make recommendations to the Minister of Public Safety and no section 92 application would proceed to Youth Court before the board issues it recommendations.

The youth's legal counsel, as recommended in a previous recommendation, would also be tasked with representing the youth's interests before the review panel.

Youths in adult provincial correctional facilities

Despite the value given to the rights of children and youths in Canada, it appears strikingly contradictory that our legal system allows for a youth serving a sentence in a secure custody establishment to be transferred to an adult correctional institution. What is more surprising is the relative ease of the process by which the provincial director of a youth correctional facility can apply for this transfer.

[38] R.S.O. 1990, c. M.22.

Perhaps the more alarming reality is the fact that upon admission into a provincial adult facility in New Brunswick, an 18 year old minor is automatically subject to adult institutional policies. This essentially means that a youth can be incarcerated with adults and can also be physically restrained in a manner that is not allowed or tolerated at the New Brunswick Youth Centre.

The presence of adult offenders at the NBYC also bears scrutiny. I have long argued that adult offenders should not be incarcerated at the New Brunswick Youth Centre. At the present time, four of the eight units at the youth correctional facility are used for adult offenders.[39] This impacts on the services or programs that could be otherwise provided to youths if the space was available. It could also be used to house young persons who require special assistance or treatment. More important, it contravenes the UN Convention on the Rights of the Child.

For the same reasons, it is not acceptable that a youth be incarcerated in a unit with adults. This is precisely what can and does occur within our provincial adult institutions.

23. I therefore recommend the Minister of Public Safety take the necessary steps to ensure that youths (under the age of 19) incarcerated in a provincial correctional facility be confined independently from adult inmates.

Restricting the use of force on minors in adult provincial facilities

Moreover, following a review of the video footage of incidents in the segregation unit of the SJRCC involving Ashley, I could only be left with an overwhelming sense of disappointment in the lack of policies addressing the status of young persons incarcerated in provincial correctional facilities for adults. Policies regarding the use of force, of oleoresin capsicum (pepper spray) and of electronic control devices (taser) need to be addressed urgently by the Department of Public Safety when youths serving time in adult jails are concerned.

This office has been actively involved in submitting recommendations to the Department of Public Safety regarding the use of tasers by correctional officers. Departmental authorities have been receptive to our recommendations which include (but are not limited to) establishing more stringent policies with regard to the procedures prior to the use of the electronic control devices and the circumstances in which such a device may be used.

[39] I reiterate the recommendation issued in *Connecting the Dots* regarding ending the co-location of adult and youth populations at the NBYC: It is recommended that the Minister responsible of Child and Youth Services and the Minister of Public Safety develop short-term and long-term plans to put an end to the placement of adult offenders in the provincial facility designed for young offenders. (*Ibid.*, recommendation #32), p. 59.

However, much more must be done in situations involving youths. No minor should be tasered. Period. I cannot accept the argument brought forward by senior correctional officials according to which excluding some of the inmates from the allowed practices in adult jails would be "operationally unfeasible". The fact of the matter is that subjecting a youth to the taser is unethical and departmental officials should be able to provide the necessary "operational tools" to stop this practice immediately.

24. I recommend that the use of the electronic control device (taser) against a minor (under the age of 19) serving a sentence in a provincial correctional facility be halted immediately.

Pepper spray is an aerosol product designated to incapacitate an inmate who can then be controlled with only minimal physical contact or risk to either the inmate or staff. The incident that occurred on October 24, 2006 where Ashley was pepper sprayed for allegedly refusing to back away from her cell door is an example of an excessive use of force and illegitimate application of the adult institutional policy on oleoresin capsicum.[40] Policy states that this product is only to be "used after all other reasonable efforts to control a violent person have failed." However, the policy does not describe "violent person" and does not set a clear grade of "reasonable efforts" that are to be exhausted prior to the use of the debilitating agent.

The adult institutional policy on the use of force however clearly establishes that chemical agents and restraints are only considered to be used as a reasonable level of force when exercised against an inmate who is "actively aggressive". The use of pepper spray is nonetheless permitted to be introduced as an alternative to physical intervention, where a threat to personal safety and security exists. Again, "threats to personal safety and security" is a vague criterion and can be interpreted subjectively. This can undoubtedly result in inconsistent use of the agent, and use in circumstances where it is not appropriate.

What is needed is a new policy on the use of force as well as a revamping of the related policies. At the very least, a more stringent application of the existing policies is required. This should be addressed by senior departmental officials and regional authorities should report to central office on the initiatives taken within the individual facilities to ensure compliance with all aspects and criteria outlined in policies regarding the use of intrusive modes of force.

The proposed YCJA reforms: avoiding an obvious pitfall

To deal with the concerns of young persons sentenced or detained in custody, and to avoid some of the problems encountered by Ashley Smith and other young persons like her, our laws must prevent youths with mental illnesses or severe behavioural disorders from being thrown into a system ill-equipped to meet their needs. To this end, we cannot consider the provincial legislative regime in a vacuum. The main legislative scheme is

[40] Policy D-32 – Oleoresin Capsicum.

determined by our federal Parliament, and administered provincially. I cannot conclude this report without forwarding a few suggestions for law reform in this area, considering in particular the *YCJA* review underway and an amending bill currently before Parliament. In particular, I have grave reservations regarding the potential fall-out of the recently proposed amendments to the *YCJA*.

Last November, the Federal Government introduced Bill C-25 *An Act to Amend the Youth Criminal Justice Act*. More recently, the Federal Minister of Justice announced his intention to undertake a comprehensive review of the *YCJA*. Like all my colleagues at the Canadian Council of Provincial Child and Youth Advocates, I am concerned that Parliament would consider fast-tracking fundamental changes to the *YCJA* before any formal consultation and review is undertaken.

Bill C-25 introduces two significant changes to the *YCJA*, both of which have been criticized by many Canadians active in the field of youth sentencing and rehabilitation. The first clause in the bill seeks to significantly broaden the circumstances where a court may order pre-trial detention of youths charged under the Act. The second clause in the bill would add denunciation and deterrence of crime to the sentencing principles applicable under the Act. Both changes run the risk of sending many more youths to jail, which is exactly the problem the *YCJA* was meant to fix.

I am concerned also by invoking deterrence and denunciation as a sentencing principle the bill runs counter to one of the pillars of the *YCJA*, the "interest of the young person". It also seems contrary to the legislation's aims of achieving crime prevention through a focus on root causes (i.e. circumstances underlying a youth's criminal behaviour), working towards a successful reintegration, and providing young persons with meaningful consequences.

The *YCJA* was proclaimed only five years ago, after seven years of consultation and review. It repealed and replaced the *Young Offenders Act*. The latter law had left Canada with the highest rate of youth incarceration in the world, higher even than the Americans who routinely outpace all other nations by a healthy margin in such measures. In fact, recent statistical data indicates that the number of admissions to youth custody and community correctional services has declined by an appreciable margin since the introduction of the *YCJA*.[41] Those are results worth celebrating.

In other words, the *YCJA* is delivering well ahead of expectations. All the experts I have consulted enthusiastically support it, especially the officials in our own Department of Public Safety, who work with these difficult-to-serve youths on a daily basis. Consequently there is a lot of concern in the field with the direction which the federal government has taken by introducing amendments last fall.

Unfortunately, Bill C-25 appears to be something of a knee-jerk reaction to isolated incidents of violent youth crimes with tragic consequences. Faced with these harsh

[41] Statistics Canada, *The Daily* (Wednesday, March 14, 2007) (http://www.statcan.ca/Daily/English/070314/d070314d.htm).

realities, the electorate clamours for retribution. At these times it is important for public officials to keep their wits about them and to propose policy solutions based upon actual needs and not upon prevailing political winds.

The danger with putting more kids in jail is that in a context of limited resources we will be depleting resources from programs that might stretch a dollar further by focussing on diverting youths from a life of crime. We could with these same dollars be helping kids address addiction, mental health and social inclusion challenges. Investing in secure secure custody programs is much more costly than youth intervention programs and incarceration bears an associated risk of developing hardened criminals.

What is most disquieting about the federal government's approach is the decision to legislate now, and do the research later. Proponents of Bill C-25 may call this leadership, my work with young offenders in this province leads me to agree with the detractors who suggest that government is throwing out the baby *before* the bath water is even run.

Rather than attempting to rewrite existing pre-trial detention provisions, we should keep our current focus on efforts to educate defence counsel, crown prosecutors and members of the judiciary on the alternative solutions that promote community-based interventions over incarceration. Federal and provincial authorities must work together to develop guidelines and educational programs for police authorities, lawyers and judges. With a law that is barely five years old and which has delivered impressive results to date it makes much more sense to invest in education, enforcement and monitoring of the *YCJA*, rather than work on a substantial rewrite. This is not to say that there is no room for improvement.

Subsection 29(1) of the *YCJA*, for instance, seems relatively clear: "A youth justice court judge or a justice shall not detain a young person in custody prior to being sentenced as a substitute for appropriate child protection, mental health or other social measures [my emphasis]." This is a laudable provision of the YCJA. However, in practice, given the lack of residential capacity of specialised facilities in New Brunswick at this time, the practice of resorting to the "default option" quite often prevails and youths will be remanded before trial to the provincial youth centre, *faute de mieux*. Sadly though, as was pointed in our recent report Connecting the Dots, for many youths in this province, neglect or abandonment due to a lack of social welfare and mental health supports, is often the only substitute for detention. To reinforce what was stated in that report educational efforts and better efforts at coordinating services to children and youths will clearly pay important dividends. Some key areas of focus on this front should be:

- Educate all interested parties about existing social safety net mechanisms (not just among provincial agencies but with federal and municipal and non-governmental agencies as well);

- Educate and explain the actual intent behind subsection 29(1) of the *Youth Criminal Justice Act*: does it mean what it says – that detention should not be used as a substitute for child protection, mental health or other social measures – and if so why is this prohibition too often ignored?;

- Coordinate efforts between provincial public stakeholders – in Social Development, Public Safety, Health, Justice, Education, and professional associations in particular (Law Society, Social Workers, College of Psychologists, etc.) – to ensure concerted, sustained and effective responses to the needs of youths transitioning either to or from a custodial setting;

- Establish "effective" alternatives to detention that would deter law enforcement authorities from defeating the actual intent of Parliament as outlined in subsection 29(1) of the *YCJA*;

- Educate members of the public on the actual problem (the lack of coordinated intervention) versus the perceived challenges to ensure public safety or to detain a young person "for his or her own good";

- Establish and maintain adequate approved hospital resources specifically for youths in order to insist and ensure that youths not be remanded to jail for psychological or psychiatric assessments; and

- Coordinate all program efforts to ensure, for instance, that minor breaches of probation not result in detentions that could disrupt specialised addiction services, beneficial mental health counselling or social welfare program supports.

It may be however, that section 29 of the *YCJA* needs to be rewritten or reinforced as a no-fly zone in either remand or sentencing situations. In reality, the situation is often such that provincial court judges are faced with no other alternative options to detention.

My main concern is that no changes be made to the *Youth Criminal Justice Act* until a full review and thorough public consultations on any proposed reforms are carried out. In particular, I would strongly urge Parliament to put Bill C-25 on hold and to rethink its approach to this issue.

At the same time, I recognise that some important and helpful work has already been undertaken on certain aspects of reform by the Continuing Committee of federal/provincial/territorial Officials on Youth Justice. Like much new legislation the *YCJA* has its share of complexity and ambiguity. Some house–keeping amendments might be appreciated by practitioners across the country in order to rephrase certain provisions more clearly or succinctly. Beyond that however, any suggestions that I would have stemming from this investigation, would suggest the need for an approach quite different from the path taken in Bill C-25.

As Ashley Smith's case demonstrates all too well, the problem with custodial sentences in New Brunswick is not that we don't see enough of them; the problem is that we sometimes use them when we shouldn't and we fail to adequately meet the mental health needs of youths sentenced into the province's care. My earlier report *Connecting the Dots* focussed on the need to keep youths with mental health problems out of the youth

criminal justice system. The current investigation has convinced me of the need to have better mental health services and social services at New Brunswick Youth Centre for offenders in the youth criminal justice system who need them. Section 29 of the *YCJA* addresses the first problem – although even legislative safeguards were ineffective in Ashley Smith's case. The *YCJA* should be strengthened with separate provisions to guarantee proper mental health and social services for children in secure custody based upon their actual needs and best interests. I would suggest that the state's duty of care in this context, where it has deprived a child of his or her liberty, is in fact higher than for any other ward of the state, or any other detainee. These children are in fact the most vulnerable in our society. While public safety considerations may require their forced incarceration, we must deploy every reasonable effort to meet their physical, social, educational and health care needs.

To ensure greater success, this initiative should bring together federal and provincial correctional authorities in consultation with their respective oversight agencies. Paving the path to an efficient strategy regarding the provision of mental health services and clinical intervention to offenders calls for a national multi-jurisdictional concerted effort.

25. It is recommended that the Department of Public Safety and the Department of Health initiate discussions with their federal and provincial counterparts on the development of a National Strategy for correctional services in Canada that would ensure a better coordination among federal/provincial correctional and mental health systems. The development of the National Strategy should focus on information sharing between jurisdictions, and promote a seamless delivery of mental health services to offenders. It should also include an examination of the Department of Public Safety and the Department of Health's governance model and alternatives for the provision of Health Care services to provincial offenders. A broad consultation with various federal/provincial partners, inclusive of the new national Mental Health Commission of Canada, led by Michael Kirby, should be undertaken. The development of this National Strategy should include public consultations.

The overall message to Parliament is therefore that we must continue to reduce our reliance on incarceration, not increase it. Beyond these considerations however, *YCJA* reform should be considering not merely how to decrease pre-trial detention, but what minimal principles should guide lawyers and judges in devising conditions to a young person's release. Prosecutors, defence counsel and judges have informed my office that bail conditions and probation orders are often far more invasive than they should be and these can make open custody more constraining than any stint at NBYC. Amendments to the *YCJA* could be developed to provide some statutory guidance in this area.

Ashley Smith's case also raises some troubling issues with respect to the *YCJA* in the area of record management. Others have commented on the rampant disregard that exists in all systems with respect to the *YCJA*'s provisions on disclosure of youth records. I

raise again the concern mentioned in *Connecting the Dots* that youth privacy rights should not be raised as a shield to defeat a youth's right to educational, social or health services. A child's best interests must be paramount in this context. The *YCJA* could be revisited to ensure such outcomes. Beyond that however, there are nonetheless numerous incidents where youth privacy rights are flouted unnecessarily, and Canadian Privacy and Information Commissioners should take particular heed of these concerns and work with stakeholders to ensure better outcomes. Finally, while this investigation was greatly informed and made possible by the extensive records, electronic, video and paper-based maintained on Ashley, this raises squarely the issue of record retention and whether stronger safeguards need to be built in to the *Youth Criminal Justice Act*.

Several jurisdictions in Canada have noted concerns with the increasing rate and ease with which young offenders are being transferred to adult facilities. While I believe that the Province can and must act quickly to put in place similar safeguards for our youths, the transfer process under section 92 of the *YCJA* is also ripe for review.

A broader comprehensive review may yield other suggestions for helpful areas of reform, perhaps with a view to limit unduly harsh sentences for administration of justice offences, or to refocus bail conditions on the goals and interests of administering the *YCJA* rather than parenting or reforming youths in general – a predisposition we should all try to keep in check, despite our good intentions. There is no doubt that there is still much good work to be done. At this point, I hesitate to add my voice in any significant way to the calls for reform. The *YCJA* is working very well. We need to study the situation carefully, consult broadly and only proceed with law amendments when all the results are in and the path for reform much clearer than it possibly can be on the basis of our limited experience to date.

Having opened this parenthesis, I close it with a final comment to reinforce the point that the problem extends beyond how often we use, or when to use secure custody solutions; the issue is also about how we deal with the youths in secure custody. I continue to be concerned by the number of youths at NBYC who regale my officers with stories of how quickly they intend to return to NBYC upon their release. The conclusion I draw is not that we're doing a poor job of rehabilitation at NBYC. What is more likely is that we have not invested sufficient efforts in transitioning these youths back into society and making their social environment as safe and enticing as the place they have left. The conditions which judges set for an open custody environment and beyond are a big part of that world and how youths perceive it. But each individual case is very much more complex than that. Ashley Smith's comfort zone at New Brunswick Youth Centre was quickly reduced to a barren cell where she could close out the world by covering over her cell's window. Why could she not do what was needed to get out? This question should have been explored more effectively with her during the three years she spent inside. We weren't able to reach Ashley. We'll never have the answers now.

7. Conclusion

Investing in the care, treatment, rehabilitation and reinsertion of youths involved in the youth criminal justice system is not a debatable issue. It must be viewed by all as an essential investment made by citizens and government toward the improvement of our social structure. This is especially true for youths who suffer from a mental illness or a severe behavioural disorder. Ignoring the problem will not make the problem go away. And managing this issue with archaic methods will only serve to worsen an already disturbing trend.

There is a pressing need to build into legislation the obligations that stem from the fiduciary relationship we have with vulnerable young New Brunswickers who are left struggling against the wind on the various imperfect and often neglected paths we guide them to. Departmental policies also have to abide and be in line with the wording *as well as* the spirit of relevant provincial and federal legislative provisions. We owe it to ourselves to ensure that no child or youth is left vulnerable and lacking the necessary tools to better their present condition. No child or youth's future should be compromised due to a lack of publicly funded service, or worse, through confused or inadequate delivery of services.

In that respect, the observations and recommendations made in this report are meant to fill gaps in the services for youths who are within the reach of the arm of the law, particularly those who require much more than punitive measures. They are also geared towards improving the existing system by raising a number of red flags around issues that may otherwise go unnoticed.

This is essentially what Ashley Smith's experience has taught me in the course of this investigation. The events that have characterized her journey through the youth criminal justice system are larger than the experience of a single individual. It mirrors the plight of other youths who, even as these words are drafted, require specialized intervention and continuity in care and treatment to avoid sinking deeper into despair. In the end, it is about hope, trust and accountability.

The information gathered in the course of this investigation has revealed the true picture of a youth who, in her own words and often inappropriate actions, lost hope in a system that should have been able to offer her a more intensive treatment than it did. This intervention should also have been provided in an appropriate environment rather than one where the actions of a youth suffering from a mental illness or severe behavioural disorder stand to be misunderstood, left untreated and, often, criminalized.

Unless legislation, policies and practices are improved, life altering frustrations such as those experienced by Ashley Smith and members of her family will leave New Brunswickers with an overwhelming feeling of disappointment and a lack of trust by citizens of this province with regards to the provision of services to children and youths. Children and youths suffering from mental illness or severe behavioural disorders involved in the youth criminal justice system are children and youths nonetheless and, as such, they have a right to the best services our public officials can offer.

This report concerning the services provided to Ashley Smith should also raise awareness with regards to inter-departmental collaboration when dealing with youths with very complex needs and youth-at-risk involved in the youth criminal justice system. Governmental departments will ultimately be held accountable for the success stories and failures of service provision to children and youths in our province. In that respect, as a citizen of New Brunswick, I hope public officials will tackle the challenges set by the bar of accountability and implement the recommendations issued in this report.

In fact, there are indications that this process has begun. From the time this investigation was launched and following the release of *Connecting the Dots* (February 2008), the Department of Public Safety has shown a strong commitment to developing a departmental action plan implementing many of the recommendations outlined in this report and previous reviews. The components of the action plan include areas that we have identified as requiring immediate attention, most notably a review of policies, procedures and practices regarding the use of force, segregation, strip searches, restraints and institutional charges.

From what I am being told, and despite the fact that I have not seen this for myself, it appears the Department of Public Safety and the Department of Health have started taking the necessary steps to improve the clinical capacity of the correctional facilities. I am hopeful that these improvements will address all of the issues outlined in this report as well as those in *Connecting the Dots*. While I applaud their willingness to provide effective clinical planning and monitoring, on-site institutional clinical teams and timely access to assessment and treatment of mental illness, I reiterate my initial discontent with regards to the incarceration of youths suffering from mental illness or severe behavioural disorders at the NBYC. The fact remains that the NBYC is not the appropriate environment for these youths. A court-ordered assessment should simply not lead to a *de facto* incarceration.

In fact, it will be up to the Community and Correctional Division of the Department of Public Safety, along with other departments involved in servicing children and youths in our province, to come up with alternative solutions to provide to youth-at-risk and to the members of the judiciary who have the responsibility of interpreting and applying the legislative provisions of the Canadian youth criminal justice system.

APPENDIX A

TABLE OF RECOMMENDATIONS

Responsibility	Recommendation(s)
The Department of Education The Department of Public Safety The Office of the Attorney General The Department of Social Development The Department of Health	*Incorporating the education file into case conferencing* 1. It is recommended that the Department of Education participate fully in case conferences involving youths suffering from mental illness, severe behavioural conduct disorders and all youths involved in the youth criminal justice system as an integral part of the team.
The Department of Public Safety The Department of Social Development Minister responsible of Child and Youth Services (*) (*) *Connecting the Dots*, p. 26.	*Involving stakeholders and service providers in the legal process* 2. It is recommended that Public Safety develop a renewed plan that it is committed to using and that it convince all stakeholders across the province to participate in using the conferencing option, as provided under section 19 of the *YCJA* to its fullest potential. 3. It is recommended that when a youth is under the care of the Minister of Social Development, a representative of the Minister be present at ALL Youth Court appearances pertaining to that youth. 4. It is also recommended that the province of New Brunswick develop a range of community residential capacity options for youths who enter the youth criminal justice system, to divert them from the closed custody system.
The Department of Social Development The Department of Public Safety	*Improving residential capacity* 5. It is recommended that the province of New Brunswick design a provincial recruitment campaign to recruit foster families to care for youths involved in the youth criminal justice system (or who have the potential to end up there)

	with the understanding that they would care for youths aged between 12 to 18 years of age, be provided training and remuneration reflecting the work they do, and work as part of a team of specialized professionals to ensure successful reintegration of these youths in the community.
The Department of Health The Department of Social Development The Department of Public Safety	*Specialised residential capacity as an alternative to closed custody* 6. It is recommended that the residential capacity developed as alternative to secure custody for youth charged or facing the possibility of charges under the YCJA be developed within the Public Safety system. As such these facilities should be managed and funded separate and apart from residential facilities recommended in *Connecting the Dots*.
The Department of Public Safety	*Reviewing the NBYC therapeutic philosophy* 7. It is recommended that the Department of Public Safety renews its commitment in philosophy and in practice to enhancing, maintaining and mending family relationships (or with significant ones) with the youths. The apartments on site should be used to their full capacity (providing family therapy on-site for example) towards achieving this goal.
The Department of Health The Department of Public Safety The Department of Social Development The Department of Education	*Improving mental health and community-based services* 8. I am therefore recommending that a mental health treatment team be put in place to provide clinical programming and individual counselling for youths placed at NBYC. This has to be based on a model where these responsibilities are at the core of their duties in order to provide prompt and appropriate mental health services to youths and clinical assistance to staff. 9. It is further recommended that a clinician assume a leadership role in terms of putting this team together and of supervising the delivery of these mental health services. The province must ensure a full complement of professionals on the team at all times. 10. It is finally recommended that the Department of Public Safety, in collaboration with the Department of Health (Mental Health), Social Development and the Department of Education, implement the necessary networks to allow for consistent and continuing treatment and intervention in the community.
The Department of Public Safety	*Working towards an efficient reintegration strategy*

The Department of Health The Department of Social Development The Department of Education	11. It is recommended that the necessary resources be allocated by all departments involved with remanded or sentenced youths in order to ensure the strengthening of the transition phase so that reintegration to the community starts upon admission. Community resources need to be aligned much more quickly than they are currently.
The Department of Public Safety The Department of Health	*Therapeutic Community (Segregation)* 12. I recommend that the New Brunswick *Custody and Detention of Young Persons Act* and its corresponding Regulation be amended to include strict provisions on the use of segregation (Therapeutic Quiet) with young persons. These amendments should also provide for the establishment of an independent review panel that would be tasked with hearing appeals and issuing recommendations with regards to the situation of young persons challenging a segregation period exceeding five days. 13. I recommend further that the Department of Public Safety review its policy on segregation (Therapeutic Quiet) and that more stringent guidelines be implemented to eliminate the practice of resorting to prolonged or indefinite segregation. Further actions should be taken by departmental and NBYC authorities to ensure that young persons who are temporarily assigned to Therapeutic Quiet are not subjected to additional intrusive actions by institutional staff or that any undue restrictions are placed on existing programs. Alternative measures to achieve a change in conduct should be explored before resorting to segregation. 14. It is further recommended that any period of segregation exceeding five days (consecutive or cumulated within a fifteen-day period) be requested in writing, justified as well as documented and approved in writing by the Regional Director and the Provincial Director of Operations (Corrections). Youth suffering from mental illness or severe behavioural disorder should not be confined to segregation under any circumstances. 15. It is also recommended that the Department of Public Safety establish a policy by which a mandatory clinical assessment of all youths confined to the segregation unit shall be ordered immediately upon their admission to Therapeutic Quiet. Stringent guidelines should be implemented to ensure that the necessary psychological or psychiatric intervention is in effect as quickly as possible.

The Department of Public Safety The Department of Health	*Educating the legal community* 16. It is recommended that the departments servicing youths involved with the youth criminal justice system collaborate and participate cooperatively in providing members of the judiciary with educational programs and information sessions on the implications and best practices when servicing youths with mental illness and severe behavioural disorders. Members of the judiciary should also attend the Canadian Mental Health Association's *Changing Minds* training, as outlined previously in this report.
The Department of Public Safety The Department of Justice	*Consistency and continuing legal assistance and representation* 17. It is recommended that remanded or sentenced youths (secure custody) charged with an institutional charge be provided with the services of an independent legal representative or an independent and legally trained advocate that would assist them throughout the process. A youth should not have to enter a plea with regards to the charge before he or she has had the opportunity to meet with his or her representative.
The New Brunswick Legal Aid Services Commission The Department of Public Safety	*Establishing specialized legal assistance for youths* 18. It is recommended that the New Brunswick Legal Aid Services Commission establish a specialized unit within its legal aid program that would provide services exclusively to youths involved with the youth criminal justice system. This unit would be responsible to ensure consistent and continuing legal representation for youths charged with initial or subsequent criminal offences, whether they be remanded to a secure custody facility or sentenced to an open or secure custody facility.
The Department of Public Safety The Department of Justice	*Section 92 of the Youth Criminal Justice Act* 19. It is recommended that a youth challenging a provincial director's application pursuant to section 92 of the *YCJA* be provided independent and consistent legal representation in a timely manner.
The Department of Public Safety	*Restricting the discretionary power under section 92* 20. In order to ensure transparency and accountability on the part of the provincial director *and* the Department of Public Safety, it is recommended that the Department of Public Safety establish and implement a policy providing additional conditions for the use of section 92 of the *YCJA*.

	21. It is further recommended that the Department of Public Safety establish and implement a mandatory policy by which the provincial director referred to in section 92 of the *YCJA* would have to obtain approval from the Minister of Public Safety before proceeding to apply for the transfer of a youth to an adult facility.
The Department of Public Safety	*Establishing a section 92 provincial review panel* 22. Provincial legislation should provide that all applications instigated by the provincial director to have a youth transferred from a youth detention facility to an adult facility, pursuant to section 92 of the *YCJA*, should be reviewed by an independent review panel. This panel would have the power to make recommendations to the Minister of Public Safety and no section 92 application would proceed to Youth Court before the board issues it recommendations.
The Department of Public Safety	*Youths in adult provincial correctional facilities* 23. It is recommended that the Minister of Public Safety take the necessary steps to ensure that youths (under the age of 19) incarcerated in a provincial correctional facility be confined independently from adult inmates.
The Department of Public Safety	*Restricting the use of force on minors in adult provincial facilities* 24. It is recommended that the use of the electronic control device (taser) against a minor (under the age of 19) serving a sentence in a provincial correctional facility be immediately suspended.
The Department of Public Safety The Department of Health	*Development of a National Strategy* 25. It is recommended that the Department of Public Safety and the Department of Health initiate discussions with their federal and provincial counterparts on the development of a National Strategy for correctional services in Canada that would ensure a better coordination among federal/provincial correctional and mental health systems. The development of the National Strategy should focus on information sharing between jurisdictions, and promote a seamless delivery of mental health services to offenders. It should also include an examination of the Department of Public Safety and the Department of Health's governance model and alternatives for the provision of Health Care services to provincial offenders. A broad consultation with various federal/provincial partners, inclusive of the new national Mental Health Commission of Canada, led by Michael Kirby, should

	be undertaken. The development of this National Strategy should include public consultations.

APPENDIX B

List of Interviewees and Contributors

Family members

Ashley Smith's mother and sister

Professionals

Dr. Niaz Khan, Psychiatrist
Dr. Sanjay Siddhartha, Psychiatrist
Luc Dubé, Psychologist

Review Panel

Tracy Ryan
Ron Murray
Eugene Niles

Organisations

Elizabeth Fry Society

Government Officials

Len Davies
Brian Mackin
Bob Eckstein
Mike Boudreau
Ian Walsh
Mark Palmer
Bruce Kingston
Tom Swain
Pamela Beers-Sturgeon
Katherine Rodger
Barbara Whitenect
Yvette Doiron-Brun

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