Youth Criminal Justice and the Harper Government

The *Youth Criminal Justice Act*

In 1908, the *Juvenile Delinquents Act* determined that young people would be charged with "delinquency" rather than specific criminal offences.[1]Youth were treated much like adults under this regime. Judges based their discretionary sentencing decisions on the likelihood of rehabilitation.[2] In 1984, the *Young Offenders Act* (*YOA*) was introduced in order to allow youth to be charged with specific offences.[3] The change was intended to instill a greater sense of responsibility in young offenders. However, the new Act was also subject to wide-ranging criticism[4] for failing to give appropriate recognition to victims, for lacking coherent principles of youth justice in Canada, for failing to provide consistent and fair sentences, and for burdening the courts unnecessarily. These considerations were eventually taken into account by the federal government and in 2003, the *Youth Criminal Justice Act* (*YCJA*) came into force.[5] Its Declaration of Principles states that the main goals of the *YCJA* are to rehabilitate youth, to provide meaningful consequences and, thereby, to promote enduring protection of the public.

There are a number of important elements of the Act:[6]

- Youth are no longer transferred from youth court to adult court; adult sentences may be imposed within the youth court setting.
- The Act presumes that youth 14 and older, who commit serious offences such as murder, should be tried as adults. This presumption may be rebutted and provinces may choose to raise this age to 15 or 16. Under the *YOA* it was presumed that youth over 16 would be transferred to adult court.
- Jail time is de-emphasized, except in cases of repeat and violent offenders.
- Alternative measures such as community service, meetings with police, and communication with parents are prioritized.
- Victims are given access to youth court records, and notice of sentencing outside of court.
- Upon release from jail, youth, under the Act, face intensive supervision.

The Supreme Court of Canada Decision in *R. v. D.B.*[7]

In May 2008, the Supreme Court of Canada decided that youth charged with serious offences will no longer bear the burden of having to prove that they should be sentenced as youth.[8] It will now be up to the Crown to prove that the youth ought to be sentenced as an adult.

The *YCJA* provides that a person, over the age of 14, can be sentenced either as an adult or a youth if they have committed a crime such as murder, aggravated sexual assault, or manslaughter.[9] The implications can be dramatic because the maximum youth sentence for first-degree murder is 10 years, while, for an adult, the sentence would be life with no possibility of parole for 25 years.[10]

The majority found that these provisions of the *YCJA* breach section 7 of the *Canadian Charter of Rights and Freedoms*.[11] Section 7 states:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[12]

Justice Rosalie Abella, on behalf of a 5-4 majority, explained that it is a principle of fundamental justice that young people are entitled to a presumption of diminished moral blameworthiness or culpability flowing from the fact that, "because of their age, they have heightened vulnerability, less maturity and a reduced capacity for moral judgment."[13] The majority suggested that the international community's support for this decision is evident in the *United Nations Convention on the Rights of the Child*.[14] The dissenting judges argued that there is no societal consensus that the presumption in question forms a principle of fundamental justice.[15]

The Court also struck down a provision that requires young offenders, who have been given adult sentences, to demonstrate that their identities should continue to be protected by a publication ban.[16] The publication ban, Justice Abella explained, is part of the sentence.[17] To remove it adds to the severity of the sentence because the degree of psychological and social pressure on the person escalates as a result. Since the onus is on the Crown to prove that an adult sentence is necessary, the majority argued that the Crown should have to prove that the publication ban, and the added stresses it brings, should be added to the sentence.[18]

On this point, the dissenting judgment also disagreed, saying that the conclusion arrived at by Parliament was a legitimate exercise in balancing competing societal interests.[19] The dissent also found that because the harm is not state induced, the *Charter* should not apply here. Justice Rothstein stated that, in the case at bar, "there is no state action: the stigma and labelling that may result from release of the young offender's identity are a product of media coverage and society's reaction to young offenders and to the crimes they commit."[20]

Harper Government on Crime and Changes to the *YCJA*

Crime

In late September 2008, Stephen Harper announced that, if re-elected, his government would define 30 offences that could not result in house arrest.[21] These include serious property crimes, invading a home, trafficking of illicit substances, kidnapping and offences that involve weapons. Since the election, the Liberals, NDP and Bloc Québécois have

worked hard to lessen the stringency of this key bill.[22] They agreed that sexual and violent offences could not be punishable through house arrest, but that car theft and breaking and entering should be.[23] In an attempt to assuage those who see them as "soft on crime," the Liberals have adopted a new slogan to counter the Conservative's monopoly on a "tough on crime"[24] agenda. For the Liberals, being "smart on crime" suggests making laws that avoid court challenges. However, they have also agreed to bring some other, less pivotal, bills into law.[25] One is in relation to existing DNA data banks of convicted offenders. Another deals with criminal court procedures. Somewhat more dramatically, the Liberals have agreed to speed up the introduction of street-racing legislation, and a bill that could raise the age of sexual consent from 14 to 16.

Despite the Supreme Court decision in May, Harper has pledged to overhaul the *YCJA*, allowing for adult sentences on some occasions and removing publication bans.[26] Additionally, he hopes to raise the maximum terms for youth sentences. Legal experts have suggested these proposals have already been shut down by the Supreme Court's decision in May.[27] The fact that the Court struck down the requirement that the burden of proof is on youth to demonstrate that they should *not* be sentenced as adults suggests that automatic sentences, with no judicial discretion, would also be struck down.[28] Harper said Justice Department officials advised the proposal would not conflict with constitutional principles.[29]

Federalism

In the United States, criminal law is under state jurisdiction.[30] For instance, in Texas murder is punishable by death, but this is not the case in all states.[31] In Canada, however, criminal law falls under federal jurisdiction. Some have complained that the Harper government's position on youth justice allows provinces too much control over criminal law matters, which adds a patch-work quality to the quilt of justice.[32]

In most of Canada, the new sentences would be applied to youth over the age of fourteen. However, the Harper strategy allows provinces to choose whether they would like to see a higher age threshold.[33] Harper's communications director, Kory Teneycke, has referred to this strategy as contributing to the federal governments "open federalism"[34] agenda. The official tenets of open federalism for this government include:[35]

- Taking advantage of the experience and expertise that the provinces and territories can contribute to the national dialogue.
- Respecting areas of provincial jurisdiction.
- Keeping the federal government's spending power within bounds.
- Full cooperation by the Government of Canada with all other levels of government, while clarifying the roles and responsibilities of each.

The catalyst for allowing discrepancies among provinces has been Québec's interest in having the threshold set at 16 years of age.[36]

It should be noted that the Conservatives were not the first to consider differential sentencing rules among provinces.[37] In 2002, when the *YCJA* passed, the provinces were given the power to opt-out of the reverse-onus provisions. Two provinces, Québec and Newfoundland and Labrador, chose not to implement the reverse onus.

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[1] CBC News, "Youth Criminal Justice Act: Changing the law on young criminals" *CBC News* (23 June 2006).

[2] *Ibid.*

[3] *Ibid*

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

[7] *R. v. D.B.,* 2008 SCC 25 (CanLII).

[8] *Ibid.* at para. 95.

[9] *Youth Criminal Justice Act*, S.C., 2002, c. 1, s. 72(2), 61 and 62.

[10] Kirk Makin, "Crown on hook over sentencing youths" *The Globe and Mail* (16 May 2008).

[11] *Supra* note 7 at para. 95.

[12] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7.

[13] *Supra* note 7 at para. 41.

[14] *Ibid.* at para. 60.

[15] *Ibid.* at para. 131.

[16] *Ibid.* at para. 95.

[17] *Ibid.* at para. 87.

[18] *Ibid.* at para. 94.

[19] *Ibid.* at para. 107.

[20] *Ibid*. at para. 178.

[21] "Harper sees crime issues as political winner" *CTV.ca* (28 October 2008).

[22] *Ibid*.

[23] *Ibid*.

[24] *Ibid*.

[25] *Ibid*.

[26] Campbell Clark, Caroline Alphonso and Les Perreaux, "Harper pitches two-tier justice plan" *The Globe and Mail* (22 September 2008).

[27] *Ibid*.

[28] *Ibid*.

[29] *Ibid*.

[30] Orillia Today Com, "Youth Crime" *Orillia Today Com* (30 September 2008).

[31] *Ibid*.

[32] The Globe and Mail, "Tougher Justice, Patchwork Nation" *The Globe and Mail* (23 September 2008).

[33] *Supra* note 21.

[34] *Ibid*.

[35] Office of the Prime Minister, "Prime Minister Promotes Open Federalism" (21 April 2006), online: Office of the Prime Minister.

[36] *Supra* note 21.

[37] *Supra* note 27.