



CENTREPIECE

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Young Offenders: New Legislation; Same Old Ideas

by Jan Goodwin and Linda McKay-Panos

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Jan is a third year student at the Faculty of Law, University of Calgary, and was a summer research associate at the Alberta Civil Liberties Research Centre.

Feature Article

The latest effort at tackling youth and crime was enacted in the form of the Youth Criminal Justice Act (YCJA) on April 1, 2003. It is a lengthy and complicated piece of legislation which has been likened to the Income Tax Act. If the new statute is convoluted and confusing, it could be because the subject of that legislation is by its very nature turbulent: adolescents. Excluded from the world of adults, they tend to be viewed as “potentially delinquent” (C. Bellamy, *The State of the World’s Children 2002* (New York: UNICEF) at 61). However, it is important to keep adolescent criminal behavior in perspective. The worst crime that eighty percent of adolescents will ever commit is to push their parents to the limits of their patience. Roughly twenty percent of Canadian adolescents will have one encounter with the legal system, the vast majority of those for minor crimes associated with property. Roughly ten percent will have multiple contacts with the legal system; two thirds of those involving property loss. Each year, in spite of the media focus on sensational crimes committed by youth, only about 100 adolescents across Canada commit offences considered serious enough to warrant adult penalties (Youth Justice Statistics online: Canada Justice <<http://canada.justice.gc.ca/en/news/nr/1999/yoafact4.html>>).

History of Youth and Crime

The development of the legislation governing young offenders is a record

of our efforts to adapt to our changing perceptions of children within a criminal law context. The mid-1800s saw the first legislative recognition in Canada that children needed special treatment.

An Act for the More Speedy Trial and Punishment of Juvenile Offenders was introduced on June 10, 1857 (S. Prov.C. 1857 c.29 (More Speedy Trial Act)) to deal specifically with crimes committed by young people aged 16 and younger—officially designated as—“juveniles”. Section 2 gave young offenders the choice of being treated as juveniles, in which case they could be summarily sentenced in youth court, or they could have an adult trial. This was the only time in Canada’s legislative history that young people could choose where to be tried. Subsequent legislation puts that choice in the hands of the court.

Also in June, 1857, An Act for establishing Prisons for Young Offenders (Cap. XXVIII) (Prisons for Young Offenders Act) was passed, introducing the term “young offenders” into legal and societal vocabulary. This legislation acknowledged the young offender’s choice of where to be tried, but allowed no latitude once a young person had been sentenced. This meant that a young person could be imprisoned in a Reformatory Prison farm (s. 12) or on a sailing ship (s. 13). But it also meant that a young person could be imprisoned in an

adult penitentiary (s. 5) or even a specially designated Criminal Lunatic Asylum (s. 29). The decision was at the discretion of the Governor (s. 7). Separating the system trying the young person from the system incarcerating the young person would have lasting repercussions. Significantly, there was a move towards reserving adult sentences for more difficult and more serious offenders.

The next significant change in the legislation occurred in 1908. After much debate about children, their rights, their welfare, society’s responsibility towards them and its response to their criminal behavior, An Act Respecting Juvenile Delinquents (1908, c. 40 (JDA)) was passed, introducing the “welfare approach” to youth criminal law. An important shift happened with the creation of the transfer to adult court. For the first time, the legislation created the possibility of transfer based on the seriousness of the offence, subjecting the young offender to the harsher penalties of the adult system when the court believed that both the “good of the child and the interest of the community demanded it”. The judge in *R. v. Boisvert* ((1978), 44 C.C.C. (2d) 303 (Que. Sup. Ct.)) described the attitude of the court at this time as “essentially

-continued on page 4

Inside.....

- Feature article continued.....pages 4, 6*
- Staff and Volunteers.....page 2*
- Human Rights Education Project Update.....page 3*
- ACLRC Publications.....page 5*
- Civil Liberties Award.....page 6*

Staff and Volunteers

We have been busy these past few months. Research Associate **Roxanne Pawlick** joined us. We have hired contractors **Dale Hensley, Vicki Lalonde** and **Jonathan Carlzon** to work on our joint CLERC family law for youth project.

We are continuing to work with the **Canadian Institute of Resources Law** on the joint project on human rights and resource development.

We are fortunate to be working with excellent volunteers for the last few months—including **Susan Blackman, Vanessa Griffith, Tam Nguyen, Shamshur Kothari, Heather Mickle, Sena MacDonald, Kerry Cundal, Nyall Engfield, Ben Gabriel, Brandon Heffernan, Justin Dos Ramos, Tara Wells, Mona Motamedi, Paul Harden, Cecilia Wong, Christine Plante, Paul Johnson, Tekisha Rayne, Augustine Lucano** and others. The new semester has just started and we have had many inquiries, so I am sure there will be even more volunteers to thank next newsletter! Thanks!!

Linda McKay-Panos

Ed Webking reading the Civil Liberties award speech at our International Human Rights Day event (Faculty of Law). Beside him are panel members Rick Castiglioni (Master of Ceremonies), Dean Patricia Hughes, Dr. Valerie Pruegger, Michael Greene, and Andrew Mitrovich



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Alberta Civil Liberties Research Centre
University of Calgary
Faculty of Law
2500 University Drive N.W.
Calgary, Alberta T2N 1N4

Publisher and Editor:
Linda McKay-Panos

Regular contributors:
Linda McKay-Panos
Melissa Luhtanen

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Privacy.....

Alberta passed new privacy legislation, applicable to the private sector, effective January 1, 2004.

For information about the Personal Information Protection Act, please contact the Information and Privacy Commissioner at:

Office of the Information and Privacy Commissioner (Calgary)
Suite 500, 640 - 5th Avenue SW
Calgary, AB
T2P 3G4
Phone: (403) 297-2728
Fax: (403) 297-2711
Toll Free: 1-888-878-4044
Email:
generalinfo@oipc.ab.ca

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- *Aruna Marathe
- *Pamela Dos Ramos
- *Anonymous

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Update: Human Rights Education Project

by *Melissa Luhtanen, Human Rights Educator, Alberta*

Pamela Dos Ramos, Human Rights Educator, Southern Alberta and

Susan Jensen, Human Rights Educator, Northern Alberta

It has been a busy time for the Human Rights Education Project in Calgary. I have continued to work on a guidebook for teachers and students discussing the human rights of those who are gay, lesbian, bisexual, transsexual, transgendered (GLBTT) and questioning. This guidebook is shaping up to be a great reference on the rights of communities with sex-and-gender differences. It will examine where Canadian rights stand, province by province. In addition it will compare social status with legal rights, and examine whether the two are on par or not. I am also including some excellent teaching resources and lesson plans to help educators address these important issues with their students.

Calgary is a hotbed of information and activity around the issues facing individuals with sex-and-gender differences. I have had the privilege of representing the ACLRC on a number of committees in Calgary. I am the Chair of the YouthSafe Resource Committee where several organizations in Calgary, including the Calgary Police Service, have come together to address the needs of youth with sex-and-gender differences. Our first project is a website of resources for these youth which has information from across Alberta (www.youthsafe.net). I am also on the Sexual Diversity Education Committee which is working toward educating teachers and administrators about GLBTT communities. In addition, I work on a committee headed by Constable Doug Jones called the Gay, Lesbian, Bisexual, Transgendered Police Liaison Committee. This committee is made up of community members and interacts with the police to address issues of concern.

We have been invited by teachers and students to discuss the human rights of youth with sex-and-gender differences. I spoke to over 40 concerned teachers and administrators at the Calgary Teacher's Convention in February. In March I was invited by a high school's gay/straight alliance to speak to a group of students about the issues affecting GLBTT youth. These are just a few of the initiatives that

are going on around Calgary as we work toward a city free of homophobia. If you know of other initiatives please contact me so I can note them in our resource list at the back of the GLBTT guidebook.

Of course, there are many other human rights issues affecting Albertans today and the Research Centre is continuing to do education and research in those areas as well. I spoke at 6 different sessions for the Calgary and the Palliser Teachers' Conventions on topics ranging from freedom of expression to general human rights issues in Alberta. Last week I was invited to speak to a group of new immigrants on human rights in Canada. The ACLRC also participated in the Rock Against Racism trade fair at SAIT. I continue to sit on the Action Committee Against Violence - Bullying and Harassment Action Committee.

The ACLRC is continuing to offer human rights education seminars on a variety of topics to teachers, high school students, university and college students as well as community groups. Visit us online to check out our website (www.aclrc.com). Soon we will have a list of all the videos that are available for viewing through the Research Centre. As always we continue to give referrals to Albertans in need of information and advice. Here's to a great spring and summer!

- *Melissa Luhtanen*

Report from Northern Alberta

Over the past few months, I have given presentations to high school and college classes, an adult continuing education class and a women's conference. Sessions were given in various locations in Northern Alberta including Edmonton, Lloydminster, Lac La Biche, Kitscoty, Cold Lake, Smith, and a camp near Wabamun. Presentations have been on a range of topics -including Discrimination, Sexual Harassment, Harassment and Bullying, the Charter of Rights and Freedoms and Alberta Human Rights Citizenship and Multiculturalism Act, Will and Estate planning, GLBT issues and Privacy legislation. We also participated in the Expecting Respect Junior High

School Peer Training Program in the fall of 2003.

- *Susan Jensen*

Report from Southern Alberta

Human Rights in Southern Alberta. Hmmmm. Sounds like a contradiction eh? In fact it isn't. Human rights, a concern for human rights and wanting to learn more about Human Rights is alive and well in Southern Alberta. I sent in proposals to do human rights presentations at five Teachers' Conventions in Southern Alberta and received requests to do presentations at two of them on the same days. So Melissa helped me out and I helped her at the Calgary Teachers' Convention.

Schools in Red Deer and Airdrie continue to invite us back to do presentations to their Grades 7 to 10 on "Creating your own classroom human rights charter" for Grade 7's and on "Harassment/Sexual Harassment" and "Hopes and Dreams: Stories from Young Refugees" for Grades 8 to 10. Grade 7 students seem to have fun learning about aspects of Human Rights instruments and the Convention on the Rights of the Child that apply to them and then creating their own classroom charter. The older grades are often quite amazed to learn that many of the behaviours they practice as fun and teasing are really sexual harassment. Westglen Middle School in Didsbury was a new school that requested Harassment/Sexual Harassment workshops from us this year. The students were the most attentive that I have ever encountered.

The "Hopes and Dreams" video continues to be popular. Dr Darren Lund invited us to show it to Faculty of Education students who gave it excellent reviews. On some occasions Augustine Lucano, a participant in the video, came to presentations and responded to questions about his experiences as a refugee teenager. Junior and Senior High students love meeting him in person.

So!! Encouraged by these responses, it's onward and forward for our Southern Alberta HRE Program.

- *Pamela Dos Ramos*

-continued from page 1

paternalistic and... the Court acts as a good father by taking measures at its disposal to protect and to chastise [the offender].” It was assumed that the protection of children from their own evil ways and from the corrupting influence of immoral adults would naturally lead to the protection of society.

The main criticisms of the JDA were a lack of due process, a failure by the welfare approach to emphasize the acceptance of responsibility by the young offender, and a resulting failure to provide adequate protection of society (Cathy Lane, *The Philosophy of the Young Offenders Act and Its Impact on Formal Legal Education* (Master of Laws, University of Alberta 1995) [unpublished] at 26). The next legislation, the Young Offenders Act (R.S.C. 1985, c.Y-1 (YOA)) addressed the issues around due process by ensuring that the legal rights of the young person were properly protected. The YOA included the right to legal representation (s.11), detention separate from adults (ss.7 & 24.2(4)), proper notice to parents (s.9) and dispositions consistent with the seriousness of the offence (s.20). Discretion by the judge to decide what constituted an offence was gone and the transfer hearing was created. The informality of the old youth court system was replaced with many of the rules and protocols governing adult court.

Like the JDA, the YOA set a minimum age under which a young person could not be sent to adult court. Young people had to be 14 years or older and charged with an indictable offence to be eligible for transfer to ordinary court. The provisions of the YOA governing the age for transfers indicated that Parliament believed that under some circumstances it was advisable to deal with the more serious offences under the auspices of the adult system.

The New Legislation

History repeats itself, and, as with the JDA, the main criticisms of the YOA were a lack of due process around transfer issues, a failure to ensure the acceptance of responsibility by the young offender and the inadequate protection of society. Parliament’s solution is the YCJA—the Youth Criminal Justice Act. The most notable change in the new legislation is the substitution of the transfer provisions with the use of adult sentences for

young offenders. The main problem with transfers was that a young person could have been held in custody for the duration of the transfer hearing and appeals, thus remaining in custody for many months while awaiting trial. The new provisions of the YCJA mean that a young person will be tried within the youth justice court system and the decision to proceed with an adult sentence is addressed only after a finding of guilt.

The YCJA defines two categories of offences which may result in an adult sentence: the “presumptive offence” and the “serious violent offence”. A presumptive offence (s.2) is one committed by a young person who has attained the age of 14 years and is found guilty of murder, attempted murder, manslaughter, aggravated sexual assault or two prior “serious violent offences” (s.42(9)). It is up to the court to say what constitutes a serious violent offence. A young offender who meets these criteria will be subject to an adult sentence unless an application is made for a youth sentence.

Under the YCJA, if the young person is 20 years old at sentencing, or if the judge imposes a sentence for a serious violent offence (s. 42(2)(n), (o), (q) & (r)) then the youth may serve the sentence in an adult correctional facility (s. 89(1)). Also, if a youth is serving an adult sentence in a youth correctional facility or is convicted of a serious offense like murder, when he or she turns 20, he or she will be moved to an adult facility unless the court orders otherwise (ss. 76(9) & 93(1)). If youth turn eighteen when they are serving a sentence for murder, for example, they may also be transferred to an adult facility (s. 92). If they have been given an adult sentence, they may serve time in either a youth custody facility or another facility for adults (s. 76(1)).

The effect of the new legislation is that a young offender will be tried in youth court, may be subject to an adult sentence, may be incarcerated in a youth facility except where his or her best interests or the safety of others precludes it, and will be subject to a period of supervision following release. It remains to be seen whether this blend of youth trial-youth facility-adult sentence-mandatory supervision will achieve the desired increase in accountability and rehabilitation that the legislation is designed to produce.

While the legislation places emphasis

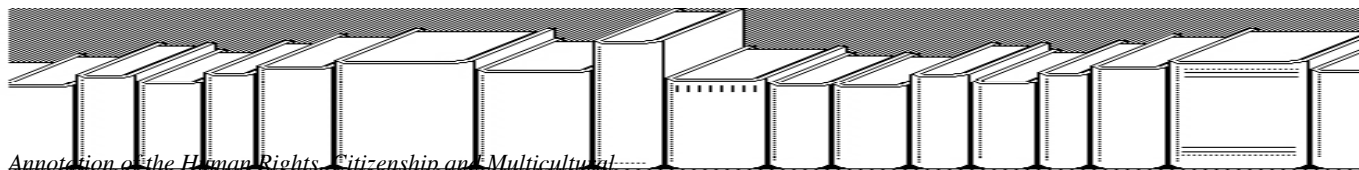
on adult sentences, there remains the question of where the offender is to serve out that sentence. To be considered are finding the right facility and program, their availability, suitability and effectiveness. Consider, for example, the Saskatchewan case of *R. v. L.E.K.* ([2001] S.J. No. 434 (Sask. Y. Ct.)). The accused was a 17-year old youth who was subject to four different probation orders arising out of various offences, committed over a seven-month period. The court reviewed some 30 pages listing assessments, diagnoses and recommendations for this young man. There were a multitude of programs and facilities that he would need to access, without which he was at a high risk of re-offending. The court concluded that, unfortunately, there would be only limited access to the required resources and that the probation period could only continue until he became 18, after which the court would have no jurisdiction for further intervention.

The situation in which L.E.K found himself is not uncommon. A Canadian study of young people involved in the youth criminal justice system, quoted in a British Columbia Provincial Court decision, estimated that in addition to those who have already been diagnosed with Fetal Alcohol Syndrome, another 23.3% have alcohol-related disorders similar to the one L.E.K. suffered from (*R. v. Gray* [2002] B.C.J. No. 428 (B.C. Prov. Ct)) at para. 116, refers to a study by Drs. Conry, Fast, and Looock entitled “Identifying Fetal Alcohol Syndrome Among Youth In the Criminal Justice System”). But what obligation, if any, is the province under to provide treatment facilities and programs?

In 2000, the Alberta Court of Appeal, in *R. v. R.J.H.* ([2000] A.J. No. 396) unanimously held that, “[t]he YOA does not empower a Provincial Court judge to order the government to pay for specific treatment programs. While it was open to the judge to recommend the... program, she did not have the jurisdiction to order the government to pay for it” (para. 38). The result is a situation where the court has a positive duty to fulfill the requirements of the legislation, but neither the federal nor the provincial government is required to provide treatment programs or required to provide funding for such programs. It remains to be seen if this situation will be changed by the YCJA.

-continued on page 6

Research Centre Publications



Annotation of the Human Rights, Citizenship and Multicultural Education Act (2003 Edition) Contains full text of the Alberta Act, as amended, by-laws, current caselaw and panel decisions. Includes table of concordance, glossary and other resources. 110 pages. 2003. ISBN# 1-896225-27-6 (\$22 + \$3 s/h)

Hopes and Dreams: Stories from Young Refugees (video (25 mins. and guidebook 60+ pages) 2002. ISBN #1-896225-38-1. Contact office to receive ordering information.

Rights and Responsibilities in Canada: Young Offenders. Basic guide to laws and procedures involving Canada's new Youth Criminal Justice Act. Covers procedures, being questioned by police, search and seizure, rights of arrested persons, bail, first appearance in court, trials and finding a lawyer. 45+ pages. 2003. ISBN#1-896225-32-2 (\$13 + \$3 s/h).

Privacy Handbook for Canadians: Your Rights and Remedies by ACLRC and Brian Edy. Two Volumes full of user-friendly information about government and private sector privacy laws that affect all Canadians. 2002. Vol. 1 350 pages, ISBN # 1-896225-34-9. Vol. 2 150+ pages, ISBN # 1-896225-36-5 (Both: \$59 + \$10 s/h).

Freedom of Expression and all that Jazz (video). Produced with and marketed by the University of Calgary. Intended for secondary school and up. Provides an overview of laws about freedom of expression and the legal limits placed on it in Canada. Discussion group format. Includes a user's guidebook. 40+ pages. 2001. ISBN #1-896225-30-6. Contact office to receive ordering information.

Seniors and the Law: A Resource Guide by Anna Pellatt, LL.M. In a question-answer format, provides an overview of issues facing seniors, including abuse, mental health, personal directives, powers of attorney and consumer protection. Includes a glossary and list of Alberta agencies. 160 pages. 2000. ISBN #1-896225- 28-4. (\$25 + \$5 s/h).

(video). Intended for ages 12 and up. Provides an overview of laws governing harassment, including racial, sexual and other types, using scenarios and featuring youth. Includes user's guide. 17 mins. 2000. ISBN#1-896225-26-8. (\$22 + \$3 s/h).

The Rights Angle: Human Rights Education Using the Newspaper—Teacher and student materials. Provides background information for teachers, and student activities on human rights, the newspaper, the Charter, hate crimes, war crimes and applicable laws, suitable for secondary school students. Includes reproducible handouts and overheads. 150+ pages. 1999. ISBN# 1-896225-24-1 (\$35 + \$5 s/h).

United Nations Convention on the Rights of the Child: How Does Alberta's Legislation Measure Up? by Anna Pellatt, LL.M, uses a star rating system to assist in analyzing the degree to which Alberta legislation complies with the UN Convention. Appendices include the Convention, a checklist for analysis, a summary of recommendations, a list of pertinent legislation and a compliance chart. 260+ pages. 1999. ISBN #1-896225-23-3 (\$20 + \$5 s/h).

Discrimination, Human Rights and You—Student Guide (Senior High).— Provides information and activities on human rights, the Charter, hate crimes, war crimes and applicable laws. Suitable for students Grades 9 to 12. May be used alone or with teacher's guide. 80+ pages. 1999. ISBN# 1-896225-20-9 (\$10 + \$3 s/h) Discount available for class sets of over 20. Please contact office for details.

Discrimination, Human Rights and You—Student Guide (Junior High).— Provides information and activities on human rights, the Charter, hate crimes, war crimes and applicable laws. Suitable for students Grades 6 to 9. May be used alone or with teacher's guide. 80+ pages. 1999. ISBN# 1-896225-19-5 (\$10 + \$3 s/h). Discount available for class sets of over 20. Please contact office for details.

Harassment and What You Can Do About It

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- _____ *Freedom of Expression and all that Jazz* (video). [ordering information]
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- _____ *Discrimination, Human Rights and You Set:* consisting of the teacher's manual, the student guide and the video. Reduced price of \$65 + \$8 s/h

- _____ *Sexual Harassment in School: Your Rights and Responsibilities—Student's Manual.* \$8 + \$3 s/h
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- _____ *Annotation of the Human Rights, Citizenship and Multiculturalism Act,* 2003. \$22 + \$3 s/h

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Gary Dickson Wins the ACLRC's Civil Liberties Award

At a ceremony on December 3, 2003, Gary Dickson, Q.C., was awarded the 2nd annual Alberta Civil Liberties Research Centre Award. The award was presented by board chair Dr. Ed Webking to Denis Lapointe, who accepted on behalf of Mr. Dickson. Due to his new duties as Saskatchewan's Privacy Commissioner, Mr. Dickson could not attend the ceremony. Below is the speech delivered by Dr. Webking.

The winner of this year's Civil Liberties Award is Robert Gary Dickson, Q.C. This annual award is given by the Civil Liberties Research Centre in recognition of outstanding leadership in promoting civil liberties and human rights through legal research, education or advocacy. Gary's leadership in the area of civil liberties in Alberta goes back many years. Gary has a law degree and was called to the Alberta bar in 1972. He practiced law for a number of years before being elected as a Member of the Legislative Assembly for Calgary Buffalo, serving from 1992 to 2001. Throughout his career, Gary demonstrated dedication to human rights and civil liberties in many ways.

Following are only a few highlights regarding Gary's contribution to civil

liberties. Gary was the founding president of the Calgary Civil Liberties Association in 1977 and 1978. He was the human rights columnist for LawNow magazine from 1998 to 2003. He was the Human rights spokesperson for the Official Opposition in the Legislative Assembly for several years. He taught human rights to political science students at the University of Calgary. He won the Freedom of Expression Award from the Calgary Freedom to Read Week in 2001. He was made an honorary member of the India-Canada Association for the work he did as an MLA on human rights issues. He won the Human Rights Award from the Alberta Human Rights Commission in 2001. And, he served as a board member for ACLRC.

In more recent years, Gary became an expert on privacy laws and advocated for amendments to privacy legislation in Alberta and Canada. He contributed an article on health information to our publication on privacy laws. In his many years of legal practice and politics, Gary was a tireless advocate for human rights and civil liberties. For a long time he was the lone liberal MLA in Calgary, receiving thousands of calls for assistance from many Calgarians; often involving human rights issues. He is truly deserving of this recognition. Accepting on his behalf is Denis Lapointe.

Conclusion *-continued from page 4*

If it is ever appropriate to place children in the adult system, the principles and legislation regarding the sentencing of young offenders dictate that young people sentenced in either the youth or the adult systems are, under all but the most extreme circumstances, going to be incarcerated and treated within the youth system. While adult sentences can be longer than a youth sentence, where the offender serves that sentence depends on the circumstances of the individual offender not on the length of the sentence imposed. In fact, a young offender sentenced in the adult system may have available, under the Criminal Code, the parole options not available in the youth system, which may reduce the actual time served in custody.

So, why the focus on adult sentences? Part of the answer is sensationalism. The media has created a perception that violent youth crime is an ever-increasing threat. They report that the public believes youth crime is rising and courts are too lenient. It appears that the new YCJA, with its focus on adult sentences, is the legislative reaction to these beliefs; a political reaction to appease an apparent public demand for a more rigorous youth criminal justice system. Whatever the justification, the government does not appear to be responding to its own statistics which show that the total number of offences committed by young people has declined since 1991 (CANSIM II, University of Toronto, Statistics Canada online: <http://80-dc2.chassu.toronto.ca.ezproxy.lib.ucalgary.ca:2048/cgi-bin/cansim2/getArraysBySubject.pl?arrayParam=79>).

A focus on the few young people transferred to adult court is a misdirection of energy. The youth courts need something more promising than this. The emphasis, more appropriately, needs to be on a methodical implementation of programs and facilities, prevention and early intervention. These are long-term, non-dramatic, non-front-page types of solutions.

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