

**BRIEF TO THE SENATE COMMITTEE  
ON LEGAL AND CONSTITUTIONAL  
AFFAIRS**

**RE Bill C-7  
(THE YOUTH CRIMINAL JUSTICE ACT)**

**October 30, 2001**

# Introduction

The role of the Senate in reviewing legislation passed by the House of Commons is one frequently taken for granted by most Canadians. Indeed, even academic commentators speak of the Senate's function as "political" in nature confined to "tidying up" Commons approved legislation and discharging some Committee functions.\* In truth, of course, the Senate possesses an inherent legislative authority and a legislative review authority that can, literally, return unsuitable legislation to the House. Obviously, the exercise of such authority is rare as the circumstances calling for such action are themselves neither ordinary, nor engaged by a mere difference of opinion.

No doubt, scholarly texts or manuals of Parliamentary procedure exist detailing precedent of when and how the Senate should exercise its authority beyond the limited and appropriate scope of consideration and approval of duly passed legislation originating in the House. Hopefully, those authorities are at hand as the Bill to reform youth justice in Canada (C-7) presents the Senate with a challenge that, we believe, calls on its residual authority as rarely done in the past.

- The Senate should consider returning a Bill rather than approving it has generally not received adequate consideration by the House and no compelling reason exists for such a process.
- The Bill contains provisions believed to be fundamentally contrary to the public interest where such issues have not been canvassed, explored or considered in the House deliberations,

Our suggestion is not that the Senate should, on our recommendation alone, return the Bill to the House. Rather, it is simply our hope that this Brief and the oral submissions made in support of it, will cause the Honourable members of the Senate Committee to examine C-7 with a perspective that *includes* whether the Bill should be returned. While we appreciate this will result in a Senate review that is both substantive and procedural, the importance of the subject matter of the Bill and the corresponding deficiencies of it are such as to merit such an approach.

## **Do the provisions of the YCJA unjustifiably deprive crime victims (and arguably citizens generally) of their rights pursuant to section 7 and 12 of the Charter?**

The various protections provided by the Charter of Rights and Freedoms in Canada to date in a criminal context, while protecting societal values, have all factually benefited those that commit crime. It is no overstatement, therefore, to say that in the context of criminal law, insofar as individuals are concerned, our Charter has had the result of becoming a **protection of wrongs** rather than a **Charter of rights**.

We offer this observation not as mere glibness but in confidence that the overwhelming majority of Canadians would agree with that assessment of who has been the primary beneficiary of the Charter.

The Charter's protections are however, not restricted to those that break the law and there is nothing stopping a crime victim in an individual case, or a government on their behalf in a constitutional reference, from arguing that their rights have been violated by the provisions of Bill C-7.

We fully appreciate that such an argument, indeed such an approach to the Charter (to protect victim rather than offender interests), will be nothing short of revolutionary as far as the legal system is concerned. That doesn't, of course, make it wrong.

It might be argued that in order to achieve its pre determined purposes, the federal government has enacted legislation that will necessarily result in violations of Charter protected rights (assuming, of course, that the applicant can convince the Court of the small point that crime victims and the public, and not just criminals, actually *have* Charter rights). Thus, for example, by refusing to use the objective means of scheduled offences (used frequently elsewhere by the federal governments) instead of individually litigatable and inadequately defined subjective facts as criteria for transfer and sentencing, Parliament needlessly has exposed victims to testifying as to the circumstances of their victimization. Expert evidence is available to document the severe impact such a provision will have. In this area, like consideration should be given to:

- definition of presumptive offence
- definition of serious violent offence
- failure to include consideration of victim interests in decision making especially re delay
- reduction of publication of identity of offender
- conjunctive inclusion of offender interest with victims in Youth Justice Committees without specific inclusion of victims
- exclusion of victims from conferencing
- removal of private right to prosecute where charges 'screened'
- presumptive early release from custody
- absence of victim input at release hearings

The same approach could be taken with respect to the public's entitlement to a justice system that excludes deterrence and denunciation as principles and creates so artificial and biased a process for decision making that affects their safety and security.

## **Substantive Concerns with C-7**

It is probably fair to note that few areas of the criminal justice process in Canada have been the subject of as widespread public discussion, and dissatisfaction as the youth justice system. Our experience suggests that the Young Offenders Act (YOA) itself has undoubtedly been the subject of more constituent inquiries and public petitions for government representatives than most other issues. The YOA, fairly or unfairly, for many Canadians became synonymous with an ineffective justice system. In short, while disagreement obviously exists on what should be changed about the Youth Justice system in Canada, there can be no doubt that the desire for change was both real and widespread. As such, we cannot help but notice that the federal government has actually chosen to not

merely amend the existing Act (as is the normal practice) but instead to replace it with a statute with an entirely different name. We urge the Senate not to assume that changing names necessarily changes, or improves, the original legislation.

Public concern with the YOA has never been focused on the inappropriateness of its provisions in dealing with minor crime.

Instead, it is repeat and serious violent youth offenders that were viewed as not belonging within the artificial and clearly more 'liberal' (to use the words of the Act itself) youth justice system. Regrettably, the YCJA has taken an odd response to this by going to great and disturbing lengths to purge minor (and not so minor) offences from the youth justice system while arguably clinging to the most serious, violent and repeat offenders even more tenaciously than the YOA. We believe that that retaining a clear rehabilitative and crime prevention focus, including structured diversion out of the justice system, can co-exist with measures that emphasize public protection for violent and repeat offenders. The point is that despite assertions from federal officials to the contrary, Bill C-7 utterly fails to meet this balance specifically in relation to serious and repeat crime and the manner in which crimes victims will be treated in the new youth justice system. Hard as it may be to fathom, we agree with those provincial Crown representatives and other witnesses that have concluded that C-7 is *worse* than the YOA it purports to improve upon.

Normally, we would offer substantive alternatives to the various provisions of the Bill but given its passage by the House we felt it appropriate to simply illustrate examples of the many flaws of the Bill so as to provide information for the Senate to ask further questions. To that end, we urge that the Senate Committee take the federal Justice Minister up on her request to return before you to answer any additional inquiries you may have and, failing satisfactory response, to return C-7 to the House.

Before dealing with specific flaws of the Bill, it is helpful to consider and dispel some of the "myths" surrounding youth justice in Canada. This approach is advanced as these "myths" frequently appear as the rationale for the choice of actions or the refusal to take action especially insofar as serious and repeat youth crime is concerned. In adopting this approach we want to emphasize that, contrary to some commentators, we do not advise getting "tough" on youth crime; rather we suggest being honest about youth crime.

### **(i) *Canada's incarceration rate of young persons***

Justice Minister McLellan gave voice to this oft-quoted "truth" when she appeared before this Committee on September 27<sup>th</sup>, 2001. Speaking of the various flaws of the YOA, The Minister said,

*"Next, it fails to keep the minor offenders out of custody. Canada's incarceration rate is higher than that of most western countries, including the United States. This is a severe systemic failing. In order that there is no confusion around this fact, while the U.S. has a higher incarceration rate of adults, we incarcerate young people at a rate almost four times higher than the United States of America. We incarcerate young people in this country at a rate very much higher than some of our European neighbours, Australia and New Zealand -- countries with which we regularly like to compare ourselves. You need to ask yourselves why this has happened and what in*

*the YOA has led to it. You must also ask yourselves the policy question of whether you want to continue to incarcerate young people in this country at that rate, which is disproportionate, even to the rate in the United States of America. This is not a minor thing. This speaks to the entire orientation of what happened under the YOA. This is not what was intended in 1984, but this is what we have seen. We see this use of incarceration not in one province only but all across the country, especially in relation to relatively minor offences. As a humane society, keeping the UN convention in mind, we must consider what the purpose of incarceration was in relation to young people. We have the balance wrong and we must honestly address that.”*

Has any member of the Committee actually reviewed the statistic report upon which these sweeping condemnations are presumably based? Our experience dictates that it is *a/ways* a good idea to ask for and then examine the source of the claimed statistical fact. It would not be the first time that federal authorities have used crime statistics to advance a particular argument or position without reference to objective factual accuracy. We urge the Senate to ask for production of this statistical report and then carefully review it to ensure that, among other things, ‘custody’ is measured the same way in comparative jurisdictions, numbers and ‘rates’ of custody are clear and not misleading, recidivism is compared (in fairness this is more analytical but still critical) and that the claims advanced are a fair interpretation of the data supplied.

For example, in Canada the average length of sentence for young offenders is 30 days. Incarceration in Canada includes open sentencing (sitting at home or going back to school). The USA processes hundreds of thousands of people under the age of 18 each year directly into the adult system where no specialized youth justice program exists.

In Quebec, Young offenders are processed through diversion and alternative measures pre sentence. In the rest of Canada the same crimes are processed post sentence therefore making a direct statistical comparison meaningless.

Equally, the notion that change is required to reduce incarceration per se is fundamentally wrongheaded. The ultimate purpose of the criminal justice system, including a youth justice system, is to protect the public. In attempting to do so, a number of measures are employed but the real measure of success is the reduction of crime or put differently, outcomes rather than outputs. It may be that incarcerating young people does not result in less crime, or the converse, but measures aimed specifically at reducing resort to one measure without reference to the goal of reducing crime is to mistake the real purpose of the public criminal justice system. This approach was mirrored in the creation of the deservedly criticized conditional sentence in Bill C-41 when the federal Justice Minister again asserted the purpose of reducing incarceration rather than reducing crime. Literally, assertion of the former outside the context of the latter is inappropriate.

Finally, when federal officials who have had stewardship of the YOA finally admit that it has failed in relation to serious and repeat offenders, it is a little disingenuous for them to suggest that continuing to reject the solutions proposed by those that predicted the failure in the first place is justified or intellectually honest. Conversely, if as the Justice Minister admitted to you, "... *the Young Offenders Act is a law that has lost the confidence of Canadians.*", perhaps it would be wise to remember who has been responsible for maintaining and defending the system when it comes time to changing it.

### ***(ii) The nature of the adult alternative to a youth justice system***

At the outset, it should be acknowledged that the adult or regular criminal justice system in Canada is one, the procedures of which, generally apply to persons under the age of 18. Equally, our adult criminal justice system features broad discretionary consequences. Unlike many other jurisdictions, with some few exceptions, Canada does not use tariff or grid sentencing, relying instead on a judicial assessment of what is the appropriate disposition in each case. (Often referred to as 'this offender-this offence'). The youth justice system in Canada largely incorporates adult process and uses the same broad discretionary sentencing provisions already in place in the adult system, with some specific restrictions (length and type of sentence, sentence review etc). Thus, the choice of having a separate, age restricted, criminal justice system with specialized measures restricted to young people is just that, a choice. It is by no means inherently necessary.

Quite simply, as a society we have concluded that the age of the person committing the offence is so important a factor in deciding what to do about it that an entirely separate criminal justice process for young people has been created. A large part of the rationale for this and the admittedly more lenient approach to criminal conduct is the expectation that a greater capacity to change the anti social behavior exists than with older offenders. This conscious determination to recognize age and susceptibility to change should not necessarily be viewed as equating with avoidance of consequences for conduct. In fact, a major failure of the current YOA and policies that enforce it is its disinclination to recognize the fundamental importance of ensuring that consequences follow from unacceptable conduct in a swift, sure and appropriate fashion. Greater reliance on rehabilitation efforts necessarily includes greater emphasis on following youth justice system imposed rules to assist in that rehabilitation and greater consequences when such rules are ignored or breached. Regrettably, this is absent in C-7.

One of the most frequently employed, but least honest, means of denigrating a position in criminal justice debate is to exaggerate and misdescribe the opposing suggestion. Nowhere is this truer than in the repeated assertions that creating certain adult transfer (or youth justice ineligibility) for certain offences or repeated offences will result in babes locked away in the darkest of federal penitentiaries for minor offences. The truth, of course, is that options exist between the 'no consequence' exaggeration some make of the YOA and the Faganesque picture of penal brutality. As noted above, the adult justice system is inherently one with broad sentencing and parole discretion and thus, a 16 year old armed robber, 17 year old drug dealer or a 15 year old six time car thief all could be placed on probation.... in adult court. It must also be stressed that every single day, sentencing courts in Canada take into account the age and life experience of the offender as a relevant factor in sentencing. Overt failure to do so is an error of law.

Further, persons under the age of 18, even if automatically transferred to adult court by virtue of a combination of their age, past record or current offence, would, presumably receive a fair trial and could thereafter, if convicted and ordered incarcerated, be placed in specialized youth facilities. There are no adult court systemic barriers to any of this occurring and thus the supposed “choice” so often presented between the YOA/YCJA and the Kingston Pen is a false one.

The criminal justice system in Canada theoretically balances the various principles of sentencing (specific deterrence, general deterrence, hope of rehabilitation and denunciation) to arrive at an appropriate sentence for the individual offender convicted of a specific crime. What occurs, of course, is a balancing of interests based on the specifics of an individual case? Logically, factors such as severity of the crime, especially where violence is involved, ongoing risk to the public and the presence (or absence) of a past record of crime are central to any appropriate sentence. Serious crimes of violence and crimes committed over and over again therefore necessarily merit greater emphasis on the principles of deterrence and denunciation in order to enhance public safety. While there is clearly value in using a specialized system emphasizing hope of rehabilitation for young offenders, there is an equal value in stressing the other principles of sentencing for repeat and serious violent offenders including what would otherwise be prohibited in the youth justice system (name publication, consideration of full range of sentencing principles etc...) What's more, measures that add clarity and certainty with how this differentiation will be made are welcome. Certainty of consequence rather than simply increased consequence is a fundamental deterrent to criminal behavior (see for example Stop Check Programs and CSC's recidivism study re offenders detained).

### ***iii. Youth Crime is decreasing***

Public safety focused change to youth justice in Canada is frequently dismissed as unnecessary given the unappreciated “success” of the YOA (notwithstanding the Minister's admission before you) demonstrated by a decrease or at least absence of increase of youth crime. Would that this were true.

As the governments Juristat Youth Violent Crime report (Volume 19 n.13) notes, the increase in youth violent crime from 1988 to 1998 has exploded with a 77% increase in the rate of youths charged with **violent** offences in that time period. In fact, taking it back to 1986, the result is an ever-higher **120% increase**. Further, unlike adult Juristat data from the past, this rate (and numbers of offences) only reflects youths *charged* with offences rather than reported offences. There is absolutely no question that this results in an underestimation of the existence of violent youth offences and correspondingly victims of such violence.

According to the Jurist data, the following are other "highlights" of our youth justice system:

- \*66 %of the victims of youth violence are young people
- \*Rate of violent youth crime *increased* by 9.5% since 92-93 (p.13)
- \*Number of violent youth crimes *increased* by over 2,000 cases since '92-93 (p.13)
- \*Number of YOA charges (breaching conditions, i.e. ignoring the current YOA) *increased* by 37.5% since '92-93 (p.13)
- \*Rate of robberies committed by youths *increased* 35% from '95-96 (p.3)

- \*Rate of assault with weapon or aggravated assault committed by youths *increased* by 16% from '95-96 (p.3)
- \*Rate of Violent crime committed by female youths *increased* 25% since '92-93 (p. 5)
- \*Number of youths convicted who were repeat offenders (recidivism rate) *increased* by 3% since '95-96 [40% to 43%] (p.8)
- \*Number of youths convicted who were "persistent offenders" (at least 3 previous convictions) *increased* by 2% (10%-12%) from '95-96 (p.9)
- \*Almost half (49%) of the youth case load is made up of 16 and 17 year olds but the increase in cases involving 12 and 13 year olds has ominously begun to rise.

The 1999 figures are no better. Despite a Justice Department claim that youth crime was "down" 7%, the truth was less comforting. Using their own data, there were a grand total of *two* less homicides in 1999 compared to 1989. On the other hand, assaults have increased from 9,245 in 1989 to 15,306 (an approximate 60% increase), sexual assaults are virtually the same as ten years ago, robberies have increased from 1,950 reported incidents to 3,189 (approximately 60% increase).

Under-reporting of youth violent crime by the victim (over 60% of whom are themselves youths according to StatsCan) as a result of fear of reprisal and, arguably, a recognition of the inadequacy of the YOA, *deflates* even these numbers. There has been a significant decrease in the number of reported youth property offences resulting from non reporting aggravated by the legitimate public perception that little of consequence results from youth court prosecutions. Residential break and enters (62% of all reported break and enters) are shown as being down almost 40% since 1989. Such a stark reduction is perhaps also explained by the growing practice of "diversion" whereby young persons (and now adults) avoid criminal proceedings altogether. As the Crime Stats Report itself notes:

"...the reader should be cautioned that the data on youths "not charged" is underreported...As well, certain police services do not collect any information on youths "not charged"."

This rather relevant disclaimer is contained at page 14 at the back of the text portion of the report. Claiming reduced youth crime in these circumstances is at best questionable.

There are however two other statistics which are relevant for the Senate to consider, both from the federal government's own Juristat. The first is reflected in the 2000 Victimization Survey which indicates that only a fraction of crime is actually reported by Canadians and that the survey displays an incredible *actual* crime occurrence *over three times* greater than that which is captured in the reported crime statistics. Finally, earlier this year, Juristat reported on one criminal justice statistic that actually is falling. Unfortunately, it measures public trust and confidence in the justice system. We urge the Senate to ask themselves whether they can in all honesty conclude that the Bill before them will do anything but further erode that public confidence.

#### ***iv. The YOA and YCJA contain adequate measures to deal with 'serious' crime***

The most frequent response to the criticism that the YOA fails to deal with serious and repeat offenders is a reassuring reference to the possibility of transferring a youth to adult court where the full principles and penalties (with some exceptions) of sentencing apply and automatic concealment of offender identity is prohibited. This, Canadians have been assured, is the answer to their concerns. Closer scrutiny, however, is recommended.

Once again, the federal governments own Juristat is revealing. As the 1998 Youth Crime Stats report noted,

*“The most troublesome offender for the criminal justice system is the persistent offender, that is, the young offender that has been through the system many times, defined here with at least three previous convictions.”*

Using that report it is clear that a full 10 % of the entire caseload of 111,027 (1997 Report) offences were committed by these persistent offenders. What does this mean? To use their own stats again, it means that if we take just the worst, violent and sexual offenders and exclude the 'minor assaults' and break and enters, for that same time period there were 10,966 serious violent offenders in 1995-96. Using the government's own figures, albeit in a general and non actuarial way, it would appear that about 1100 of these worst crimes were committed by the chronic offender with at least three previous convictions (and this does NOT include first time killers, rapists, robbers, etc...) Consider then the validity of the “myth” that the Act's transfer provisions deal effectively with these phenomena. Of these 1100 most violent repeat offenders, **only 74** were actually transferred to adult court in that time period. As noted above, one statistic has changed. The percentage of 'persistent offenders' has increased from 10% to 12% from 1997 to 1999.

Clearly, the YOA transfer approach is not the answer. Our experience suggests that transfer hearings are rarely undertaken due to a variety of reasons including significant delay (and thus cost), inappropriate statutory criteria with a bias against transfer and existence of wide discretionary sentencing available in adult court even should the transfer occur. Alone or in combination these realities of the day to day administration of justice produced the startling results described above.

Given the clear failure of the artificial transfer process under the YOA, the federal government was faced with three choices:

- leave the current flawed process in place despite the escalating public outcry,
- mandate automatic transfer based on defined age, past record and current offence criteria (recommended by Ontario)
- retain the transfer procedure but “change” its operation

With C-7, the federal government has chosen the third option, which is an appropriate place to begin the identification of the serious substantive flaws of this Bill.

## **The C-7 Transfer Process**

As noted above, the federal government has chosen to retain a transfer process to deal with serious violent crime. It is appropriate then to examine whether C-7 will likely be any more effective than its predecessor in doing so. At first blush, one improvement seems significant. By virtue of section 71, the determination of whether to seek such a transfer will be made after the finding of guilt. Thus, the long delays occasioned in youth court at the beginning of the prosecution where the Crown sought to “raise” the young offender, including appeals of such orders, will be eliminated. Instead, the Act contemplates a “transfer hearing” (as will be discussed below) as a preliminary or included part of the sentencing hearing. If that were all the Act said this would fairly be viewed as an

improvement. Like so much else of C-7, however, hidden in complex cross-referenced sections and sub sections, are additional measures which will clearly negate the potential benefit such an amendment will bring.

Under the YOA, the Crown could give notice of transfer any time between the laying of the information and the adjudication on the charge (s.16). Accordingly, trials were held in youth court with the exception of young persons charged with murder. In those cases, the young person was given an election and if they chose a trial with a superior court judge and jury a preliminary inquiry before the youth court judge was required (s.19).

The YCJA has taken this right of election and extended beyond those young persons charged with murder *to all young persons in relation to whom the Crown wishes to seek an adult sentence*. Thus, the inherent delay of preliminary inquiry plus trial has been extended from persons charged with murder to:

- \*persons charged with manslaughter
- \*persons charged with attempted murder
- \*persons charged with aggravated sexual assault
- \*persons charged with presumptive offences (themselves determined in bizarre fashion)
- \*persons charged with non-presumptive offences where an adult sentence is sought (64(1))

Members of the Committee have no doubt heard the repeated urgent concern that C-7 is a dangerously and needlessly complex Bill. We suggest Senators may wish to examine this themselves by reviewing the Act to try and determine who is entitled to an election and how that would work where the Crown has brought an application pursuant to section 42(9) after conviction, yet still must comply with the notice requirements under section 64(2).

In our view, the net effect of these provisions are precisely what several witnesses and MPs warned about; an explosion of jury trials if the Crown seeks to take advantage of the supposedly improved transfer provisions. Instead, we suspect that for many of the same reasons prosecutors declined to seek transfer under the YOA, the YCJA will result in the same dismal, public confidence sapping failure to seek transfers. We encourage the Committee to review the Act themselves and to question the Minister on this interpretation.

It is not merely the process of transfer that is flawed. Indeed, the most serious and incomprehensible flaw is what the Act directs someone must actually do to even qualify as a presumptive offence. For this it is necessary to closely examine the definition of 'presumptive offence' and 'serious violent offence' both of which are predicate determinations for transfer eligibility.

The YCJA has a convoluted view of the entire issue of recognizing and dealing with violent crime notwithstanding the Minister's protestations to the contrary. In fact, s.2 of the original Bill (C-3) actually defined a "violent offence" so as to *exclude* assault. Only assaults (rapes robberies etc) that "...caused or created a substantial risk of bodily harm" constituted 'violent offences'. While this absurdity has been corrected (after we pointed it out in the House Committee), the definition of 'serious violent offence' has been changed from 'causing or creating substantial risk of bodily harm') to 'causing or attempting to cause serious bodily harm (itself undefined). This is no small change. A sexual assault involving a weapon or force or armed robbery certainly carry with them the potential risk of such harm and thus would have qualified. The new definition would mean that a rapist would have had to tried to strangle or choke their victim or an armed robber would have had to shot and missed to qualify. Worse, even if that had happened, the definition of presumptive offence requires that two other additional crimes of equal severity had been committed. Even that's not enough. The two previous "judicial determinations" have to have been made at different

proceedings so a past gun shooting armed robber or slasher rapist that had five convictions entered at the same date, wouldn't qualify. Different determination dates are required.

Obviously, these provisions raise the eligibility to ridiculously high standards and, in our view, will result in even more derision and contempt for a youth justice and indeed criminal justice system that continues to say one thing but do another when you read the fine print. We urge Senators to seek independent legal analysis of these sections to assess the analysis we provide. We further urge Senators to recall the Justice Minister and ask her directly if our interpretation is correct. Should, after all of that, our interpretation be shown to be accurate, then we urge the Senate to refuse to be a party to this kind of legislative chicanery and to return this Bill as being not worthy of enactment

## **Subjective nature of serious violent offence**

Rather than specify individual offences as qualifying, the YCJA unwisely uses subjective characterizations like serious violent offence, and presumptive offence. Thus, determination of that fact will be a litigatable issue, including being subject to appeal. This is not speculation or assumption; it is confirmed by sections 41(8) and 41(9). (Usually, the objective fact of conviction for a specified offence results in eligibility for the specialized sentence (firearms prohibition orders, delayed parole eligibility, detention under the Corrections and Conditional Release Act etc) .By making it a subjective, litigatable issue, C-7 guarantees exactly the kind of defense counsel generated delay and uncertainty which has resulted in the non use of the current transfer process under the YOA. Worse, it exposes crime victims to the all too frequent abuse by defense counsel and revictimization trauma inherent in the justice system. As regrettable as it is, such traumatization is largely unavoidable in the trial process where culpability is determined. This is vastly different as a clear, obvious and fair alternative exists with scheduled offence convictions as the prerequisite for transfer/presumptive eligibility. Imposing such a burden on victims of violent and sexually violent crime is a cruel and unnecessary treatment of victims that will definitely be a consideration of the Crown in whether to seek the adult sentence. Anyone that thinks that this fact will not be exploited by defense counsel is unfamiliar with the current standards of the defense bar and the scope of conduct permitted by courts in Canada today.

In another retrogressive step, the YCJA recognizes only 'serious bodily harm' and not psychological harm or emotional trauma. This amendment is a repudiation of gains made in just the last decade, for example, in old C-45 which amended the definition of 'serious harm' to include psychological harm in determining detention eligibility under the Corrections and Conditional Release Act. Such a definition, with its attendant ramifications are a disgrace in a supposedly humane society as Canada and themselves justify deletion and return of the Bill as unworthy of passage. Again we urge the Committee to recall the Justice Minister and test our analysis

Finally, should, for some reason, the Crown have slogged it out all the way to the actual sentencing hearing (which looks a lot like an old transfer hearing), the decision whether to impose an adult sentence (which could be probation) is dependant on the subjective principles enunciated in section 72, which are again, cast in terms of sufficiency of a youth sentence which is itself to be determined in accordance with the principles of section 37. Not surprisingly, these bear a distinct similarity to the old YOA and, are mandatorily conjunctive with "...promoting his or her rehabilitation and re-integration into society." The "onus" created by a presumptive offence is, at this point in the proceedings in

our experience, essentially meaningless as the Court is obliged to make substantive determinations on a decidedly less than level playing field basis where the difference between 49 and 51% are never relevant. Here is the flaw of the old YOA and the new YCJA revealed. Promoting the re-integration into society or hope of rehabilitation is usually far less likely and far less relevant when a justice system deals with the most serious offenders. Removing someone from society, deterring that person or others by such forced removal and denouncing the original conduct are generally far more important in such cases. Given the way this process has been "rigged", this is not likely to happen and the loss of public confidence in youth justice will continue unless new measures are enacted. As will serious repeat and violent youth crime.

## The YCJA and victims of crime

As outlined above, the YCJA will unnecessarily force victims to give viva voce evidence and be cross-examined in minute detail in relation to the harm caused them from crimes committed against them. Unfortunately, this is not the end of the negative ramifications for victims which enactment of this Bill will cause.

Even more than in the adult justice system, victims of crime are very much an afterthought of youth justice in Canada. One would have hoped that the long awaited reform of youth justice (announced by the current Minister in July 1997 as her "first" priority) was therefore an opportunity to introduce some much deserved recognition that crime and the prosecution process has serious impact on crime victims. Decisions are routinely made during the often-glacial course of youth prosecutions which affect crime victims yet consideration of their interest is almost never included in the process.

From the perspective of according victims better treatment, the following are examples of deficiencies under the YOA which remain unchanged in the YCJA:

**\*No** reference to victims exists in relation to protection of public or of deterrence or denunciation as part of principles [3(1)(a)]. Ensuring that the principles that govern the Act are appropriate is not merely a 'window dressing' issue. It is anticipated that any youth justice system will continue the broad discretionary authority for the court in the variety of decisions that person is empowered and obliged to make. A major complaint about both the YOA and the YCJA is that its statement of principles is such as to make more likely outcomes that undervalue protection of the public determined without selective criteria that ignore basic criminal justice principles.

Nowhere in the lofty principles of the YOA or C-7, for example, are the concepts of deterring future offender conduct (specific deterrence) deterring other persons' conduct (general deterrence) or societal denunciation of wrongful conduct or conversely affirming valued societal principles (denunciation) appear. These are all, of course, principles of sentencing which have evolved as part of Anglo-Canadian judicial (and political culture) over centuries. Their absence, as it was in the YOA, is a guarantee of failure for any new Act no matter what new title it is given. While there is no question that the age, immaturity, vulnerability and greater prospect of rehabilitation of a young person that has committed a crime should be taken into account (as they were before the YOA and are currently in the adult system), they are only factors that do not exist in a vacuum and are, instead, part of the competing interests that should be properly considered in each case.

These overriding principles should also give life to what are, in effect, the lessons learned from the past operation of the YOA and current analysis of the YCJA. We offer the following (as we did to the House Committee) on draft principles that, with respect, would guide an inherently more balanced and effective Act.

## Statement of Principles

The following principles apply in this Act:

- Protection of the public is the paramount goal of the youth justice system, which can best be obtained by use of different measures appropriate to different offences and different offenders
- Deterring offender conduct, denouncing criminal conduct and rehabilitation are appropriate considerations in determining dispositions
- Rehabilitation includes respect for and compliance with orders of a court made for that purpose
- The impact of a decision or disposition on victims of the offence is an appropriate consideration in making decisions or dispositions
- Offenders should be held accountable to the victims of their crime for any financial loss suffered by them as a result of the crime.
- Expeditious proceedings are a benefit to the effectiveness and integrity of the youth justice process
- Clarity and, to the extent possible, certainty re-inforce the integrity of the youth justice system

\*Only non mandatory direction in relation to victims in terms of proceedings [3(1)(d)]

\*Section 3(1)©(ii) encourages "repair of harm to the victim and the community"

\*Part I (ss4-5) do not require victim consent for not invoking criminal procedure

\*Section 4 makes no mention of victims whatsoever

\*Sections 6-8 permit (and arguably mandate) not laying charges where a crime has occurred without input from the victim.

\*Above and beyond all of these measures to avoid the criminal process there also is now created 'extra-judicial sanctions [s.10] which equally do not permit victim impact or veto

\*More ominously, section 24 severely restricts the long held right of citizens to initiate criminal proceedings by laying a private information and seeing it prosecuted unless the Crown intervenes and stays the process. Having to secure the consent of the Crown is a much higher standard than permitting the Crown the right to prevent a prosecution. This is a disturbing attack on the individual liberty of citizens in a

democracy as it virtually extinguishes the notion that the courts do not belong to the Crown, residing instead with the population for whom the Crown acts as agent in criminal prosecution. This section means that the Crown will now functionally decide whether the criminal law is enforced or not and a citizen victimized by crime (and this is not a debate on whether what the law defines as a crime has been committed) will not be able to disagree and have resort to the public courts. This is an invitation to abandonment of the rule of law and the entire notion that citizens forego their personal claim against a person that has offended against them by relying on the Crown.

\*Section 12 requires a victim to *request* notification of the extrajudicial sanction disposition and the identity of the offender, which is retrogressive and contrary to the direction of victims rights legislation in this country.

\*Youth justice committees are provided with a mandate [18(2)(ii)] to support the victim by soliciting their concerns and facilitating reconciliation with the offender which contemplates a highly restrictive role for victims (including ones who don't want reconciliation). Equally, while such Committees have roles to ensure community support for the offender, there is nothing mentioned about such support for the victim.

\*Section 19 "conferences" (vague as they are) have no mandated obligation to consider victim participation including at sentencing [Section 40]

\*Section 23 creates a pre-charge screening process without reference whatsoever to consideration or participation of victims of crime.

\*The definition of principles of sentencing in Section 37 includes, as the last phrase, "acknowledgement of harm done to victims". This afterthought reference demonstrates the low priority this Bill assigns to victims.

\*Section 40(2)(b) does not make victim interview mandatory and

\*Section 50 continues the non applicability of victim fine surcharges to convicted young persons although section 53 permits deduction of a percentage of a fine ordered to be paid into a victims fund. Sort of making the Crown pay the victim fine surcharge which is an odd way to demonstrate acknowledgement of harm to victims by the *offender*.

\*Sections 5960 seem to permit variation of the terms of various sentences and orders without notice to the victim

\*The application of the CCRA provisions with the new mandatory 1/3 off custodial sentences continues the non-involvement of victims in the process

\* The Act still prohibits a sentencing court from imposing a victim restitution order against the parent/guardian of an offender found to be negligent in their supervision (a power that previously existed in the old Juvenile Delinquents Act)

\*Absence of a bail condition restricting offender attendance at school of victim and witnesses. A full 63% of the victims of youth violent crime (22,145) were under the

age of eighteen years and almost all of those (60%) were "acquaintances" of the victim. Virtually of all these persons charged with violent offences against people they knew were granted bail and returned to school.....with their victim. Groups such as CAVEAT and the Canadian Safe Schools Network and others, report that this phenomena of forcing the victim to endure the continued close and generally unsupervised presence of their attacker is a reality which significantly contributes to unacceptable atmospheres of fear within schools which itself aggravates the influence of the offender.

Put differently, if this was a workplace, forcing people to attend in such circumstances would be a violation of the most basic Occupational Health and Safety Codes.

Amending the Code and the YOA to prohibit a person charged with a violent offence from attending the school where the victim or witnesses attend (except in geographical circumstances where such attendance is necessary and then only on conditions and as agreed to by the Crown) until the matter before the court is disposed of would be a significant improvement for such child victims. There is no question that such an order will be inconvenient and potentially disruptive for the offender and his or her family. Given the predicate circumstances, however, a little disruption from the norm might not be a bad thing for the offender as well. If such inconvenience is to occur, it is also entirely fair to assess who should best bear the brunt of it, the person charged (and it should be remembered that charging is itself a legislated, defined and regulated process and by no means random or subjective) or the person victimized.

Finally, enactment of such an amendment would be a strong signal that schools are meant to be places of safety and free from fear. It would also likely serve as an incentive for school boards and individual schools to become much more actively involved in ensuring a safe school environment. At the same time, parents and students would be clear that violent behavior has consequences which are personal and immediate and, which may therefore serve as a greater deterrent than a youth court probation order. Irrespective of all of this, such an amendment would be a step toward greater safety and freedom from fear for students victimized by crime.

## **Diversion**

Faced with increasing crime (as we are with youth crime over the past decade), society has a number of choices. It can strengthen the penalties in a hope to deter conduct, add enforcement in a hope to catch and thus deter more offenders or it can simply decide that that which was previously a crime will no longer be treated as a crime.

This somewhat jaundiced view of the recent evolution of diversion is actually an appropriate prism through which the various and sundry youth diversion schemes contemplated by C-7 can be examined. Before doing so, it is worth noting however that the focus of dissatisfaction with the YOA has been on its inability to deal with the most serious and repeat crime rather than on what it does, or doesn't do with what is

vaguely now described as 'minor crime'. It is therefore curious that, as noted above, C-7 creates a youth justice system that clings tenaciously to serious and repeat crime yet expels from it large and undetermined volumes of precisely the kind of anti social behaviour that its admittedly rehabilitative focus would benefit. In short, far from improving things, the drafters of C-7 have literally made a bad situation worse although such an approach will, however, keep the crime stats down.

The following would appear to be the contemplated procedures now arising out of a police officer catching a young person stealing a car (although this could theoretically also apply to beating someone up, dealing drugs, sexual assaulting someone etc.. as there are no crimes, or criminals exempted by the Act from 'diversion' eligibility).

1. Ignore it and drive away (take no action -s.6)
2. Tell the young car thief not to do that and drive away (warn-s.6)
3. Get out of the car and use a pre-printed form to tell the young car thief not to do that and drive away (administer a caution-s.6)
4. Get out of the car and if, and only if, the young person agrees take them home or to the 'Don't Steal Cars Club' and then drive away. (refer-s.6)

The YCJA COMPELS police officers to "consider" all of these options before taking any option which raises the disturbing notion of proving that or the impact should that not be proved (while 6(2) says that such failure does not invalidate a charge it certainly doesn't rule out it having an impact on what happens to a charge).

Given the fact that no evidence of this interaction (s.9) can be used to show prior offending behavior before a youth court (like at a bail hearing or for a pre disposition report) the odds of police keeping records of this are slim at best. Concealing the truth in this fashion will be an obvious drawback to ensuring appropriate decisions are made especially with young people who continue to re-offend which was, and is, the primary problem with the YOA.

Should a police officer actually decide to lay a charge another layer of the diversion maze is engaged as the Act provides the Crown with its own layer of diversionary tactics.

5. The Crown can tell the police to tell the young car thief not to steal the car and then withdraw or refuse to lay the charge. (Crown cautions -s.8)
6. The Crown can tell the police to refer the young car thief to an extra judicial sanction if he wants to go which can mean writing a letter to someone that doesn't have to read it saying it's not notice to steal cars. (extrajudicial sanctions-s.10)
7. If the young car thief agrees to participate in extrajudicial sanctions but then only writes one sentence and won't write any more, the original charge can be prosecuted except that if the youth court judge thinks one sentence is good enough he must dismiss the charge or if he thinks one sentence is close enough he can dismiss the charge (10(5)).

If, after all of this somehow a charge actually gets to court and the young car thief gets convicted, the youth court judge can reprimand him and tell him not to steal cars anymore as a sentence. (reprimand s. 42(a))

Bill C-7 does not prohibit application of this process to any specific offence or offender with a past record. We invite the Committee members to raise these issues and examples with the federal Justice Minister as they are further indications of a wholly impractical and needlessly

complex process which this Bill will foist upon law enforcement and the public. It will, however, keep the crime stats down.

## Mandatory Parole/Swarming

Statutory release (mandatory release at expiration of 2/3 of sentence pursuant to the Corrections and Conditional Release Act) is perhaps the only criminal justice regime which has attracted as much criticism as the YOA's failure to deal with serious and repeat offenders. It is therefore, perhaps not surprising to see that the drafters of C-7 have chosen to add its mandatory release provisions onto any custodial sentence ordered by a court. The net effect, of course, is to reduce eligible custodial terms, already more restricted, by one third.

Our experience in this area suggests that, especially with young persons, basing early release on positive change and development is far wiser than reference to a statute section. Parole truly should be a privilege to be earned rather than a right to be demanded but C-7 rejects this concept completely.

We also wish to caution that if meaningful supervision is intended, it is extremely important to ensure that public officials are given responsibility for offender supervision and revocation. Permitting offender advocates or private groups that have a philosophical or financial interest in not reporting breaches is a recipe for disaster. People have, quite literally, lost their lives because federal correctional officials have ignored this simple but important insight.

Over the past number of years, violent crime committed by a group or gang of young people has become dramatically more prevalent in urban Canada. We are unaware of any statistical information which can pinpoint whether this is simply happening more frequently or that it is reported more prominently or a combination of the two. Frankly, whatever the reason, group violence, "swarmings" or group beatings of an individual are actions so repugnant to our sense of order that directly addressing this through the criminal law (and youth justice) is appropriate. Making participating in a group that inflicts or threatens violence an *aggravating* factor in assessing consequences also has great practical worth as well. When such offenders are brought to court, inevitably each and every person involved becomes a 'follower' meriting more lenient treatment than their cohorts. This attempted diminution of criminal responsibility is, of course, the function of defense counsel but its artificiality need not be the position of the law. Instead, participation in a group that does or threatens violence should be a mandatory aggravating factor in sentencing rather than an excuse. C-7 has failed to address this important issue and such an amendment would make it clear that society recognizes the special circumstance of group violence and has resolved to convert it from an excuse into a liability.....for the offender.

## Conclusion

Asking the Senate to return a Bill passed by the House of Commons is an exceptional request. The Youth Criminal Justice Act (C-7) is, however, an exceptionally bad bill, produced in an exceptionally deficient process. Apart from the havoc we, and others, have predicted it will inflict on the administration of justice, its passage will signal the continuing disconnect between truth and the justice system and ensure the ominous erosion of public confidence in the Canadian justice system.

We appreciate what we suggest is not something done lightly. Accordingly, we have repeatedly urged the Committee and all Senators to use these materials as a guide in asking questions, especially of the federal Minister of Justice, to ascertain whether what we describe is accurate. We are confident that if this is done the duty of the Senate will be clear.