

Reducing child imprisonment in Canada

Anthony Doob and Jane B Sprott examine the imprisonment rates of young Canadians following the introduction of the Youth Criminal Justice Act in April 2003.

A 1998 policy paper outlining the federal government's plans for changes in Canada's youth justice system set the tone for what was to follow five years later (Department of Justice, 1998). It implied not only that Canada had a youth imprisonment rate that was too high, but also that Canada's youth imprisonment rate was higher than that of the USA. Canadians' identity is, in part, formed on the basis that we are different from Americans. On the use of imprisonment, for example, a Conservative dominated (Canadian) House of Commons' committee suggested in 1993 that 'If locking up those who violate the law contributed to safer societies than the United States should be the safest country in the world' (Standing Committee, 1993).

Canadians have traditionally looked beyond imprisonment for solutions to crime. Numerous Canadian government reports over the past 40 years have suggested that imprisonment is over-used and have suggested that the criminal justice system and imprisonment should only be used if necessary. Simultaneously, however, Canadian politicians' responses to high profile crimes usually involve suggestions of harsher penalties. Most Canadians, like residents of many Western countries, think that sentences are too lenient, and thus many politicians are quick to respond to crime concerns by focusing on sentences. Nevertheless, Canada's adult imprisonment rate has been relatively stable for at least the past 50 years (Webster and Doob, 2007).

When the (Liberal) Minister of Justice proposed, in 1998, to replace

the existing youth justice legislation with a new law, she was taking a risk in implying that Canada has a high youth imprisonment rate. The law that she was replacing – the Young Offenders Act (YOA) – was seen by the public as being too lenient. However, Canada, throughout the 1990s, had a remarkable ability to fill its youth courts and its youth custody facilities with youths who had committed trivial offences. By 1998, it was well known that most (73 per cent) of the cases going to court under the YOA were minor and that most (75 per cent) of those sentenced to custody had committed minor offences (Doob and Sprott, 2004). Reducing imprisonment was not controversial in this context. It was a straightforward task: sentences should be proportionate to the seriousness of the offence. These were the Minister's marching orders for her officials.

In March 1999, the Government of Canada tabled new youth justice legislation – the Youth Criminal Justice Act (YCJA) – after a carefully orchestrated and successful attempt at characterising the proposed law as being 'tough' on youths. This may have helped sell the new bill in English Canada, but it created problems in Quebec, which traditionally has had a more 'child friendly' approach to youth justice. For various reasons (e.g., an intervening election) the bill did not come into force until April 2003. One effect of this four-year delay was that there was substantial time for the groups who administer youth justice in Canada (the police, prosecutors, defence counsel, youth court judges) to learn about changes in the law.

This – and the fact that the government *replaced* the old law with a new and clearly more complex law, rather than *amending* the old law – meant that nobody could pretend that youth justice was simply 'business as usual'. People were forced to learn a new Act. The previous legislation (YOA) had been amended twice in its relatively short (1984–2003) life. One amendment mandated that custody should not be used as a substitute for child welfare purposes (S. 24(1.1) of the YOA). However, many judges seemed to ignore this part of the law. In a survey of 234 youth court judges across Canada, 37 per cent of them freely admitted that in at least half of the cases in which they imposed custody, a youth's poor home or living conditions was one of the reasons for imposing a custodial sentence (Doob, 2001). One youth court judge asked one of us what the purpose of an identical provision in the YCJA was. When given the explanation that it had come directly from the YOA, the judge's response was simple: 'Nobody told me about it'.

Canada's constitutional arrangements partially shield the federal government from the winds of punitive change. Youth justice law is unambiguously criminal in Canada. The federal government is responsible for criminal law legislation, but the administration of justice (police, courts, corrections, etc.) is a provincial (or territorial) matter. Hence the federal government could not assume that its wish – to reduce the use of imprisonment – would be realised unless the law was written in a way that ensured that it could not be undermined by those administering it.

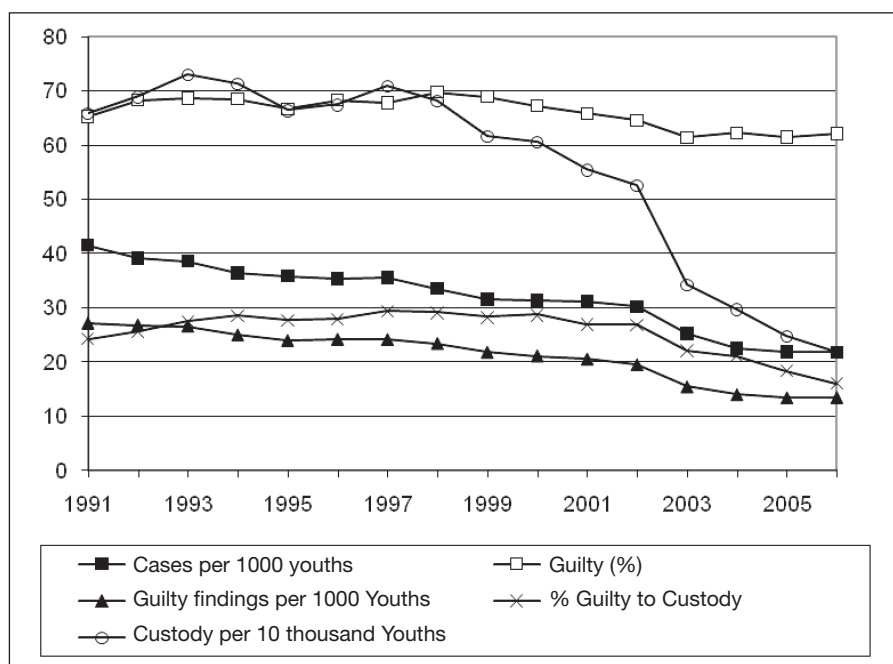
The YCJA required that youths be dealt with in a manner that emphasised 'fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity' (S. 3(1)(b)(ii)). It also stated that non-court responses to young offending were 'presumed to be adequate' for first time offenders accused of non-violent offences. Furthermore, police officers were

told that they 'shall', before taking a case to court, consider whether a non-court solution was adequate. Carrington and Schulenberg (2008) demonstrate convincingly that there was a large decrease, when the YCJA came into force, in the proportion of youths apprehended by the police who were sent to court. We can see, in Figure 1 (for violent offences) that this drop was largely the result of a decrease in the lowest level of assault (Assault level 1).

In addition, the YCJA sought to reduce the use of custody. To this end, the YCJA explicitly requires that sentences be proportionate to the seriousness of the offence and the youth's responsibility for that offence. But in addition, a custodial sentence can only be handed down if one or more of four conditions were met (S. 39(1)):

- the youth had committed a violent offence; or
- the youth had failed to comply with two or more non-custodial sentences; or
- the youth had committed a relatively serious offence and 'has a history that indicates a pattern of findings of guilt'; or
- the youth had committed an offence that would not normally permit a custodial sentence, but, because of exceptional circumstances, a custodial sentence was necessary.

Figure 2: Youth Court Activity, Canada



These provisions almost certainly contributed to the reduction in custody. In particular, when one looks at the cases that, prior to 2003, filled up Canada's youth custody facilities, these 'hurdles' to the use of custody would almost certainly make it more difficult for a custodial sentence to be imposed.

The overall impact can be seen by looking at the five lines in Figure 2. The number of cases being brought to court had been drifting downwards about 1 per 1,000 per year until fiscal year 2002 and then,

under the new law dropped 5 per 1,000 in one year. Traditionally, prosecutors have stayed or withdrawn charges in a reasonably large number of cases leading to only 60–70% of cases in youth court resulting in a guilty finding. One might have thought that with fewer cases coming into court, this practice might have decreased. Instead, one sees, in 2003, a drop in the percentage of cases resulting in a finding of guilt. Together these two findings (a reduction in bringing cases into court, and a reduction in the proportion that were found guilty amongst those brought to court) add up to the third curve in this figure: a rather dramatic drop between 2002 and 2003 in the rate of findings of guilt. Given that more serious cases were being brought to court, it is notable that the percentage of guilty cases that received a custodial sentence dropped, in one year, from 27% to 22%. These findings combine to create the final, most dramatic impact – the reduction in the imposition of custodial sentences per 10,000 youths. In numbers, the one-year drop – from 2002 to 2003 – is impressive. In 2002, 13,246 youths were sent to custody; in 2003 this was reduced to 8,683.

Prior to 2003, custodial counts were not available for Canada's largest province, Ontario (ON), and

Figure 1: Rate (per 100,000 12–17 year olds) of charging youths (all violence and selected violent offences: Canada)

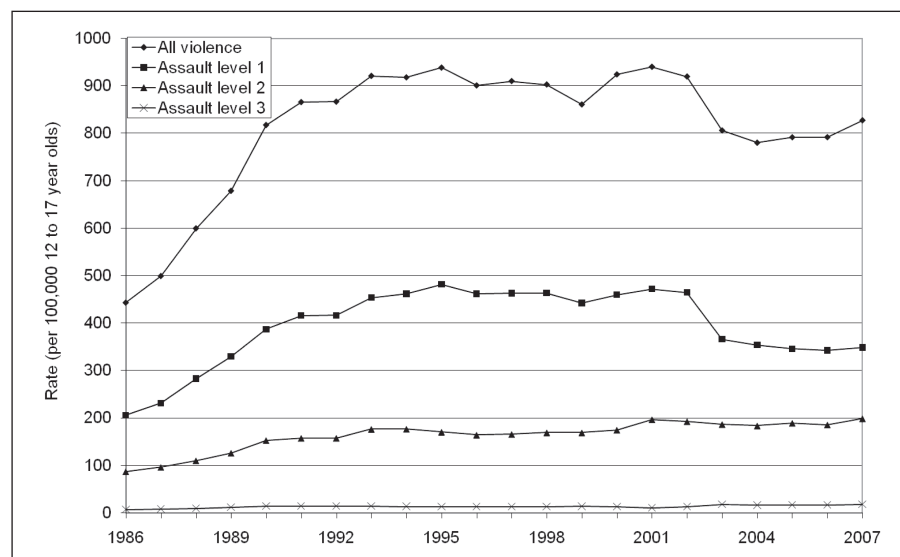
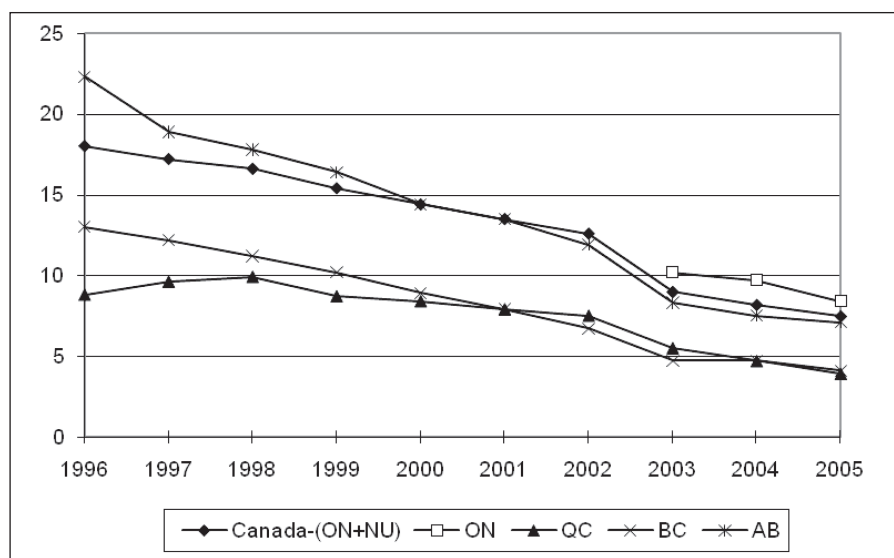


Figure 3: Incarceration Rate, Youths, per 10 thousand Youth Population

the smallest territory, Nunavut (NU). For the other three large provinces in Canada – Quebec (QC), Alberta (AB) and British Columbia (BC), and for all of Canada (minus Ontario and Nunavut), we can see in Figure 3 that custodial counts had been drifting downwards. But for Canada as a whole, as well as the three largest provinces (with data), the drop from 2002 to 2003 was larger than it had been in the previous years. Ontario's post-YCJA rate is comparable to that of the rest of Canada and there is every reason to believe that the YCJA had an effect in Ontario that was comparable to that elsewhere in Canada.

What, then, can be concluded from this 'case study' of restraint in the imprisonment of youths? We would suggest that each of the following may have played a part:

- The 'culture of restraint' in the use of custody generally in Canada – most notably for adults – set the overall tone.
- The decision by the government to suggest that Canada imprisoned too many youths set the political agenda.
- The official provincial attitudes toward youths in Quebec – and the political necessity for any party in Canada to appeal to Quebec voters – helped constrain pressures to be tough.
- The decision to replace the YOA, rather than amend it, meant that criminal justice professionals needed to reconsider their whole approach to decision making in light of the new YCJA, rather than to neutralise or ignore changes.
- The clear statement – in the preamble and throughout other parts of the law – that one of the major goals was to be more selective in the use of imprisonment created a framework for thinking about how to respond to offending.
- Explicit provisions requiring decision makers to consider whether court or custody was necessary meant that decision makers had to think about alternatives to prison. And, because it was a new Act, the fact that in the past certain kinds of cases had, in the past, routinely received custodial sentences was not relevant.
- The fact that sentencing provisions of the YCJA were new to youth sentencing and are dramatically different from the sentencing provisions for adults meant that there was no existing 'default' model of sentencing to fall back on.
- The inclusion of explicit 'hurdles' to the use of custodial sentences restricted the ability of judges to imprison minor offenders. Crown Attorneys then felt it necessary to argue that certain

types of offences such as car thefts were 'violent' offences rather than to simply argue that custodial sentences were in some undefined way 'appropriate' for cases of this kind.

In sum, then, the reduction in the use of custody for youths happened, in part, because the government wanted it to happen and wrote a new law that focused attention on these goals. But we believe that the law might not have been as successful if the preconditions – such as a long history of official endorsement of restraint in the use of imprisonment and a long period of education and adaptation to new rules for youth – had not been present as well. Laws are not made or implemented in a cultural vacuum. What fills that vacuum may be as important as the law itself. ■

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