

Orders for open

Custody

A Rebirth of the Status Offence
Under the Young Offenders Act*

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Introduction

The Young Offenders Act¹ ("Y.O.A.") was proclaimed into force on April 2, 1984, changing the law in the area of youth custody and addressing some of the problems inherent in the Juvenile Delinquents Act² ("J.D.A."). The J.D.A., which had been in place since July 20, 1908, reflected the doctrine of *parens patriae*,³ a paternalistic approach which gave the courts authority and responsibility to fill the void in the lives of children where there was no family or social support providing control and guidance. An example of the doctrine is the way the J.D.A. defined juvenile delinquent as:

any child who violates any provision of the Criminal Code or any other federal or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute.⁴

This Act covered two types of offences: violations of laws that applied to both children and adults, and "status offences," which applied only to children. The term "status offence" included a wide range of non-criminal activities which were seen as violations of parental authority, such as truancy from school and running away.⁵ In part, the existence of status offences in the J.D.A. helped lead to the eventual enactment of the Y.O.A.

During the 1950s and 1960s there was a dramatic increase in juvenile delinquency, followed by a growing public pressure to replace the J.D.A. with a statute making young offenders more "accountable" for their actions. In the Y.O.A., the government responded to this pressure for reform, and the Act reflects the public's desire for accountability. The declaration of principle in clause 3(1)(a) is as follows:

[W]hile young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions.

1 R.S.C. 1985, c. Y-1, as am. S.C. 1995, c.19 [hereinafter Y.O.A.].

2 S.C. 1908, c. 40 [hereinafter J.D.A.].

3 P. Platt, *Young Offenders Law in Canada*, 2d ed. (Markham: Butterworths, 1995) at 1.

4 R.S.C. 1970, c. J-3, s. 2(1).

5 B. Schissel, *Social Dimensions of Canadian Youth Justice* (Toronto: Oxford University Press, 1993), at 67: "[a]s well, the trivial acts of deviance (status offences) ... were covered by the Juvenile Delinquents Act." See J.D.A. s. 3(1) which said that the commission by a child of any of the acts enumerated in the definition "juvenile delinquent" in subsection 2(1) constitutes an offence to be known as a delinquency.

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Clearly, a perceived need for punishment was one of the pressures which influenced the legislation.⁶ However, a second force behind the legislative reform was a concern with a lack of due process and procedural fairness under the J.D.A. Problems arose when this lack of procedural protection, such as the right to counsel, occurred in conjunction with the non-criminal “status offence.” In effect, children were being institutionalized for non-criminal behaviour.

These concerns had an impact on the drafting of the Y.O.A. Subsection 3(1) of the Act emphasizes the fact that children have the same rights as adults under the Canadian Charter of Rights and Freedoms. The Act also established the principle that young offenders are to be subject to the least possible interference from the state. Further, it provides for a wide range of sentencing options, allowing sentences to specify whether open custody (such as group homes) or secure custody is required, depending on the factors in an individual case. It appears that the drafters hoped that open custody would provide the system with the ability to take youths into protection without placing them in “penal” settings.

It is important to note that young offenders fall into an area of shared constitutional jurisdiction. The federal government has the power to legislate in regard to substantive criminal law, but the provincial governments administer justice within their borders. This division is important to understand because although the Y.O.A. is an act of the federal Parliament, orders for custody pursuant to it are carried out in provincially-created institutions. While the federal government provides for a range of correctional disposition options, it is up to the provincial governments to create them. It will be seen later in this paper that despite its goal of uniformity between provinces,⁷ the Y.O.A. has seen great disparity in its operation, due to the federal/provincial sharing of power in this area.

While the Y.O.A. may have achieved goals of greater responsibility and punishment, it has not eliminated paternalism and the “status offence” type approach.

6 See W. Wardell, “The Young Offenders Act” (1983) 47 Saskatchewan Law Review 381, at 388.; and T.C. Caputo, “The Young Offenders Act: Children’s Rights, Children’s Wrongs” (1987) 13 Canadian Public Policy 125, at 138.

7 R. Corrado and A. Markwart, “The Prices of Rights and Responsibilities: An Examination of the Impacts of the Young Offenders Act in British Columbia” (1988) 7 Canadian Journal of Family Law 93, at 94.

Further, where administration of a system of open and secure custody lacks provincial resources, and that shortfall is combined with a growing number of orders of custody, the Y.O.A. is having a harsher effect than intended. As a result, the intentions underlying the Y.O.A. are not being realized. This situation occurs in provinces where insufficient resources are allocated to providing the facilities required to implement the sentencing options of the Y.O.A., and is exemplified by Nova Scotia.⁸

I. Meaning of "Open" and "Secure" Custody

Courts derive their jurisdiction to make orders for custody under section 20 of the Y.O.A. Section 24 qualifies this power by stating that custody is to be used only as a last resort, with emphasis on "the needs and circumstances of the young person" and a consideration of a "pre-disposition report."⁹ The principles applied in sentencing adult offenders are tempered in favour of an approach which places greater weight on the needs of the child.

In making a order for custody, the judge must indicate whether it is to be for "open" or "secure" custody;¹⁰ as defined in sub-section 24.1(1). In making this decision, courts must consider whether secure custody is needed to prevent escape or a continuation of illegal behaviour, and must also consider the rehabilitational consequences of the order, and the effect of the order on specific and general deterrence.¹¹ Further considerations have been introduced by recent amendments to the Act.¹²

It is important to define the terms "open" and "secure" custody. Section 24.1 offers the following definitions:

"open custody" means custody in

- (a) a community residential centre, group home, child care institution, or forest or wilderness camp, or
- (b) any other like place or facility designated by the Lieutenant Governor in Council of a province...

"secure custody" means custody in a place or facility designated by the Lieutenant Governor in Council of a province for the secure containment or restraint...

While the Act appears to give broad discretion to the Lieutenant-Governor in Council in designating facilities as "open" or "secure", that discretion is not absolute. As Justice Kroft noted in *C.F. v. R.*:

If it does not meet the description of "open custody" as set forth in the Act then, in my opinion, no regulation or designation can give it a characteristic which it does not possess. The responsibility given to the Lieutenant-Governor in Council must be exercised within the parameters of the law.¹³

This judgment reflects the tension between the federal government's power to make substantive criminal law and the provincial government's duty to administer that law. The more important point, however, is that the "parameters" used in the Act to define open custody are neither clear nor precise. "In spite of the definitions listed

⁸ The same issues arise in other Canadian jurisdictions. In fact, this problem was recognized early in the life of the Y.O.A. by Lyman Robinson in an article entitled "Open Custody: Some Questions About Definition, Designation and Escape Therefrom," in N. Bala and Chief Judge H. Lilles, *Young Offenders Services* (Toronto: Butterworths, 1984-1997) at 7511. The Manitoba courts struggled with this issue in the case of *C.F. v. R.* [1985] 2 Western Weekly Reports 379 (Manitoba Court of Appeal). In *B.(R.) v. R.* (1986), 17 W.C.B. 217, the Ontario Provincial Court criminal division held that the absence of open custody for a 16-year-old violated section 15(1) of the Charter. Speaking generally P. Pratt, see note 3 at 459, noted, "[t]he designation of places of custody has been controversial. In some locales, parts of adult prisons have been so designated. As well, from time to time, open custody places are used as well for children in need of protection." For an examination of the specific resources available in individual provinces and territories, see generally Bala and Lilles.

⁹ "Pre-Disposition Report" is defined in section 14 of the Y.O.A. After interviews with the accused, and some cases the victim(s), the judge is presented with information such as: the behaviour and attitude of the young person, any plans to change his/her conduct, any history of breaching federal or provincial statutes, willingness to participate in community services, the relationship with parents and their degree of influence and control, and the school attendance record. Certainly the judge has a wider range of material when making a disposition in a case under this Act than in an adult criminal case.

¹⁰ Subsection 24.1(2) of the Y.O.A. states: "where the youth court commits a young person to custody... it shall specify in the order whether the custody is to be open custody or secure custody."

¹¹ *R. v. H.(S.R.)* (1990), 56 Canadian Criminal Cases (3d) 46 (Ontario Court of Appeal).

¹² Y.O.A., subsection 24.1(1).

¹³ [1984] 6 Western Weekly Reports 37 (Manitoba Queen's Bench) at 44. Cited with approval on appeal at [1985] 2 Western Weekly Reports 379 at 383.

in the Act, the facilities named as open custody are not capable of exact scientific definition.”¹⁴ Therefore, to achieve a practical and functional understanding of these terms, one must consider in detail the judicial interpretation given to them. From the cases, it is possible to make the following observations:

The distinction between open and secure within a facility

Where a facility is to have both open and secure custody, there must be a distinction between open and secure areas.¹⁵ In *Re D.B.*,¹⁶ Chief Justice Glube of the Nova Scotia Supreme Court (Trial Division) noted,

an examination of the Queens County facility leads to a conclusion that both open and secure facilities are trying to be maintained within the same relatively small building. This, in my view, defeats the philosophy of the statute. The Order in Council for the facility under review does not make any distinction as to which areas are open and which are secure.

Supervision and physical containment

Secure custody is not limited to traditional notions of restraint, and is satisfied by either physical containment or constant supervision. Open custody is defined in section 24.1 of the Y.O.A. as “(a) a community residential centre, group home, child care institution, or forest or wilderness camp, or (b) any other like place or facility...” This definition clearly creates a range of options, all of which have a low threshold of containment. Simply because a facility does not have bars does not mean that it is “open custody,” but may be secure. This point was recognized by Manitoba Court of Appeal Justice Hall in *R. v. David A.B.*:

Moreover, the lack of bars and locked doors does not mean there are no controls. As I understand it, the control and discipline are exercised by the group of approximately ten inmates that each young offender is assigned when committed to secure custody. The peer pressure of the group exercises control over all inmates.¹⁷

This quote demonstrates that secure custody facilities do not have to be “jails.” Aggressive supervision is inconsistent with open custody as it is defined in the Act. The intent of Parliament was to provide options for the sentencing judge through a sliding scale of lesser forms of incarceration. Justice Hall recognized the fact that secure custody can be mistaken for open custody when supervision replaces bars and locks.

Resources and programs available

The principles stated in section 3 of the Act require that open custody offer facilities providing guidance and assistance. That positive duty on the provinces was recognized in *Re D.B.*:

ordering a youth to remain in a single room, even though it is fairly large with a television set available, cannot in today’s philosophy of providing programmes to assist youths to understand their problems, be considered an appropriate facility and one of open custody.... Parliament has stated that open custody would be something other than the previous traditional form of incarceration....

[I]t is not the fact that the young person is not free to leave the

¹⁴ *Re D.B. and the Queen* (1986), 27 Canadian Criminal Cases (3d) 468, at 471 (Nova Scotia Supreme Court, Trial Division) [hereinafter *Re D.B.*].

¹⁵ *Re L.H.F. and the Queen* (1985), 24 Canadian Criminal Cases (3d) 152, at 157 (Prince Edward Island Supreme Court), [hereinafter *Re L.H.F.*].

¹⁶ See note 14, at 472-73.

¹⁷ [1986] Weekly Digest of Family Law, 555 (Manitoba Provincial Court Youth Court), Y.O.S. 86-074.

Provinces are able to frustrate the purpose of the Act by neglecting to create the range of resources intended under "open" custody.

facility which offends the definition but rather the lack of facilities and programmes for guidance and assistance....¹⁸

Therefore, in order to be "like" a community residential centre, group home, child care institution, or forest or wilderness camp, a facility must take positive steps in providing for guidance and assistance. In *Re L.H.F.*, Justice MacDonald made a similar judgment, noting that the court must consider "the number of staff [and] the qualifications of the staff, bearing in mind that one of the primary functions is to teach young offenders how to better achieve in society."¹⁹

Since the Act uses a wide variety of examples within the definition of open custody, it is difficult for the courts to do any more than establish minimum requirements. The unfortunate effect of this limitation is its hamstringing of judicial orders. While the sentencing judge has to make clear whether the order for custody is open or secure,²⁰ there is no power to specify exactly which type of open custody is to be used. For example, the Y.O.A. does not state that there shall be a wilderness camp facility, but only that creation of such a facility is acceptable, at provincial discretion. Therefore, provinces are able to frustrate the purpose of the Act by neglecting to create the range of resources intended under "open" custody.

II. Increase in Orders for Open Custody Under The Y.O.A.

It is accepted that orders for custody have increased significantly under the Y.O.A.,²¹ with the greatest increase in the area of open custody. Judges primarily favour open custody over secure custody because of its perceived softness.²² In many circumstances, when balancing the delicate interests of the young offender with the interests of society, this middle ground is seen as the most attractive option:

the new provisions for the court to directly sentence a young offender to "open custody" may have softened the perception of the apparent onerousness of a custodial sentence, reducing inhibitions to employ that sanction and consequently leading to a widening of the custodial net.... [K]nowing this can "only" result in a placement in either a forest camp or a community residential centre, [open custody] does seem less onerous and, indeed, appears to be an attractive option.²³

It must, again, be noted that this perceived softness does not reflect the true impact of such an order in provinces like Nova Scotia, which do not provide the intended range of open custody.²⁴ For example, in the Shelburne and Nova Scotia Youth Centres, Nova Scotia's primary youth custodial institutions, there is little difference between open and secure custody. In these provinces, the effect of an order for open custody is practically indistinguishable from the effect of an order for secure custody.

The increase in custodial sentences is well documented and consistent across Canada (see Figure One). In Newfoundland in 1984/85 the proportion of cases receiving custodial sentences was 14.3%, the following year it was up to 19.0%, and by 1988/89 it was up to 21.3%. In British Columbia in 1984/85 the proportion of cases receiving custodial sentences was 11.4%, the following year it was up to 16.1%,

18 See note 14, at 473, 475.

19 See note 15, at 156.

20 See note 10.

21 This point has been conceded by the Department of Justice in its report *Consultation on the Custody and Review Provisions of the Y.O.A.* (Ottawa: Queen's Printer, July 1991), at 1-3. Also see, A. Leschied and P. Gendreau, "Declining Role of Rehabilitation in Canadian Juvenile Justice: Implications of Underlying Theory in the Young Offenders Act," in *Youth Injustice: Canadian Perspectives*, eds. T. O'Reilly-Fleming and B. Clark (Toronto: Canadian Scholars' Press, 1993), at 43-44.

22 *R. v. S.A.B.* (1990), 96 Nova Scotia Reports (2d) 374 (Appeal Division).

23 R. Corrado and A. Markwart, see note 7 at 111.

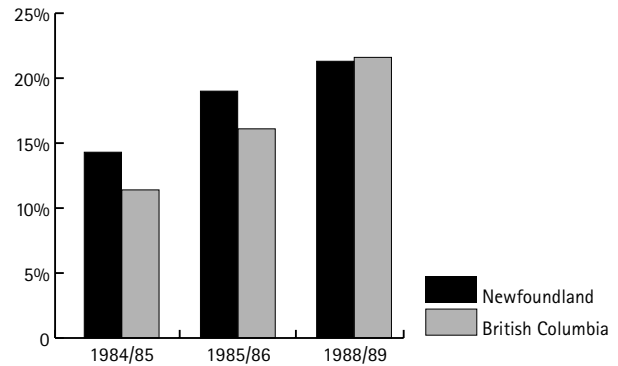
24 V. Samuels-Stewart, *In our Care: Abuse and Young Offenders in Custody: An Audit of the Shelburne Youth Centre and the Nova Scotia Youth Centre, Waterville* (Nova Scotia Department of Justice, 1995).

and by 1988/89 it was up to 21.6%. A Department of Justice study found that six of the eight provinces studied showed a marked increase in the number of orders for custody in the six-year period following implementation of the Y.O.A. For example B.C., Alberta and Manitoba all showed increases in excess of 80%.²⁵

Nova Scotia has also seen a larger percentage of dispositions leading to orders for custody. Disturbingly, this growth has come through a dramatic increase in open custody sentences. The problem, as mentioned earlier, is that there is little difference between an order for open and secure custody in Nova Scotia.²⁶ While an order for open custody is not necessarily a soft middle ground, sentencing judges across the country

continue to choose open custody for this very reason. For a comparison of open and secure custody dispositions in Nova Scotia and the rest of Canada in the years following implementation of the Act, see Figure Two.

The Increase in Custodial Sentences



Percentage of Total Dispositions in Favour of Open and Secure Custody

YEAR	NOVA SCOTIA	CANADA
1984/85	Open - 8.5%	Open - 8.0%
	Secure - 3.0%	Secure - 6.2%
	Total - 11.5%	Total - 14.2%
1985/86	Open - 6.7%	Open - 7.0%
	Secure - 11.2%	Secure - 9.7%
	Total - 17.9%	Total - 16.7%
1986/87	Open - 11.8%	Open - n/a
	Secure - 7.9%	Secure - n/a
	Total - 19.7%	Total - n/a
1987/88	Open - 11.1%	Open - 9.4%
	Secure - 6.7%	Secure - 10.4%
	Total - 17.8%	Total - 19.8%
1988/89	Open - 13.8%	Open - 9.7%
	Secure - 6.8%	Secure - 10.4%
	Total - 20.6%	Total - 20.1%
1989/90	Open - 15.3%	Open - 9.7%
	Secure - 6.7%	Secure - 11.2%
	Total - 22.0%	Total - 20.9%
1990/91	Open - 15.2%	Open - 9.9%
	Secure - 6.2%	Secure - 10.8%
	Total - 21.4%	Total - 20.7%
1991/92	Open - 21%	Open - 17%
	Secure - 5%	Secure - 13%
	Total - 26%	Total - 30%
1992/93	Open - 23%	Open - 17%
	Secure - 6%	Secure - 14%
	Total - 29%	Total - 31%
1993/94	Open - 21%	Open - 19%
	Secure - 6%	Secure - 14%
	Total - 27%	Total - 33%

Figure 2²⁷

25 Canadian Centre for Justice Statistics, *Recidivists in Youth Court: An Examination of Repeat Young Offenders Convicted in 1988-89* (Ottawa: Statistics Canada, June 1990).

26 This is not a new problem in Nova Scotia, but has existed since the inception of the Act. In the early leading case of *Re D.B.* (see note 14) the court held that the Queens County Jail was not properly designated as a facility for open custody as that term is defined in the Y.O.A.. At page 474 the court noted, "[s]adly, the province, in declining to acknowledge the inevitable as far as the implementation of the Young Offenders Act until the last possible date, has apparently failed in its responsibilities at this point in time."

27 The data for this table is derived from the Canadian Centre for Justice Statistics, *Youth Court Statistics, 1984-85 through 1993-94*. It should be noted that different jurisdictions engage in different pre-court screening procedures. The more aggressive the screening, the higher percentage of serious cases go forward, and there is a correspondingly higher percentage which result in custody. For the purposes of the above analysis the author has made the assumption that screening patterns have not changed substantially from 1984 to 1994.

III. Rebirth of the Status Offence

A disturbing result of the judicial misperception that open custody is a soft middle ground is that some children are being ordered into custody for reasons which resemble the J.D.A.'s status offence. This problem is driven by the sentencing considerations required by the Y.O.A.²⁸ Under subsection 24(2), "before making an order for committal to custody, the youth court shall consider a pre-disposition report." The requirements of this report are laid out in section 14:

(2) A pre-disposition report made in respect of a young person shall . . . be in writing and shall include . . .

(v) the availability and appropriateness of community services and facilities for young persons. . .

(vi) the relationship between the young person and the young person's parents and the degree of control and influence of the parents over the young person. . .

The importance placed on the report, and its relationship with the determination of the needs and circumstances of the young offender,²⁹ was made clear by New Brunswick Court of Appeal Justice Ayles in *R. v. R.C.S.*:³⁰

the report did not include information as to the availability of community services and facilities for young persons as required by the statute . . . [S]uch information . . . would be necessary in determining whether the custody should be open or secure.

Justice Daley of the Nova Scotia Youth Court placed similar emphasis on the pre-disposition report in *R. v. C.J.M.*,³¹ pointing out that the report is essential where treatment and rehabilitation are the focus of the sentence. It is clear that the pre-disposition report is critical when a sentencing judge is engaged in balancing the protection of society and the best interests of the young offender. As a result of this emphasis on the report, children without supportive families are often sentenced to open custody in order to provide them with a chance at rehabilitation.³²

The family situation of the young offender becomes the paramount consideration in sentencing when the youth poses little risk to the community. Where an offence is considered "heinous," as in cases like *R. v. J.A.C.*,³³ there is less emphasis on a supportive family and more consideration given to general deterrence and specific deterrence.

The majority of young offender cases are not so heinous as to require a strict adherence to principles of deterrence. Yet in the majority of cases, where youths do not have a supportive family, custody becomes the only option for the sentencing judge. The result is a conflict with the general principle that custody should only be used in serious circumstances.³⁴ Courts justify this outcome on the basis that custody is necessary to provide the structure and guidance needed by the young offender. The Nova Scotia Court of Appeal recently affirmed this proposition in *R. v. G.A.L.*:³⁵

28 Subsection 24(1) reads, "The youth court shall not commit a young person to custody under paragraph 20(1)(k) unless the court considers a committal to custody to be necessary for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed and having regard to the needs and circumstances of the young person."

29 P. Riley, "Proportionality as a Guiding Principle in Young Offender Dispositions" (1994) 17 *Dalhousie Law Journal* 560, at 567:

"the actual effect of requiring a pre-disposition report is to encourage and support the imposition of custodial dispositions. Often youth courts will impose a custodial disposition in order to remove the young person from a negative home environment which has been brought to the court's attention through the pre-disposition report."

30 (1986), 27 *Canadian Criminal Cases* (3d) 239, at 244.

31 (1986), 74 *Nova Scotia Reports* (2d) 388.

32 Also see, *R. v. M. (J.J.)* (1993), 81 *Canadian Criminal Cases* (3d) 487 (Supreme Court of Canada).

33 [1992] N.S.J. No. 483 (Q.L) (Nova Scotia Supreme Court Appeal Division).

34 *R. v. K.L.B.* (1985) 67 *Nova Scotia Reports* (2d) 232 (Appeal Division); *R. v. P.L.M.* (1985), 69 N.S.R. (2d) 99 (Appeal Division); and *R. v. C.J.M.* (1986), 77 N.S.R. (2d) 1 (Appeal Division).

35 [1994] N.S.J. No. 517 (Q.L) (Nova Scotia Court of Appeal) at paragraph 11.

Each of the appellants are in much need of help and assistance. Each is virtually homeless and lacks family support... How better to accomplish these goals then to place them in a protected environment where there is a real measure of hope for their rehabilitation and reform... (emphasis added).

An opposite result occurred in the case of *R. v. S. (D.C.)*,³⁶ where the young offender had a supportive family environment. On appeal, the custodial disposition was removed and probation imposed. The court explicitly relied on and quoted significant portions of the pre-disposition report for the successful appeal.

An examination of two cases in particular demonstrates that judges are using custody to replace missing order and structure in the lives of young offenders. In *R. v. T.S.W.*,³⁷ the court was dealing with a young offender who was convicted of break and enter and sexual assault. The youth court judge described it as one of the most serious cases coming before the court in fifteen years, and ordered five months of secure custody to be followed by sixteen months of probation. In contrast, in *R. v. T.C.M.*³⁸ the court was faced with a young offender convicted of attempted robbery and upheld the youth court order for two years of secure custody.

In comparing these cases, particular regard must be paid to the reasons for the dispositions. In *T.S.W.* (break and enter and sexual assault) the court was greatly persuaded by the fact the young offender had a very supportive family. The court discussed at length the positive role the youth's mother played in his life, and it appears that the home-situation of the young offender was the determinative factor in sentencing. In *T.C.M.*, the youth did not have a supportive family. The court highlighted the fact that the father was an inmate at a federal maximum security institution, while the mother and grandmother did not play major roles in the youth's life. The court said that custodial dispositions under the Y.O.A. are shorter than available for adult offences because they serve a different purpose: to rehabilitate the young offender rather than to protect the public. Justice Freeman stated for the court:

a custodial disposition has precisely the same purpose as a noncustodial: each is to be used to further the interests of the young offender...

A lengthy period of secure custody may be his best (if not his only), hope for the future. There are few positive factors in his life outside an institution which could help him reform himself. This is not a situation where the young offender can be returned to a nurturing family environment, a job, or studies. A lengthy period of custody may permit his involvement in programs to further his education....³⁹

These two cases reflect judges' clear and consistent practice of emphasizing the homelife of the young offender when determining if an order for custody should be handed down. Much of the increase in custodial orders, in these circumstances, is due to the misperceived softness of the order for open custody and the desire to balance rehabilitation with liberty.

Parliament has attempted to address these problems in recent amendments to the Y.O.A. Section 24 was amended by adding the following after subsection (1):

Judges have adopted a clear and consistent practice of emphasizing the home life of the Young Offender when determining if an order for custody should be handed down.

36 [1989] N.S.J. No. 104 (QL) (Nova Scotia Supreme Court Appeal Division).

37 (1991), 100 Nova Scotia Reports (2d) 339 (Appeal Division).

38 (1991), 107 Nova Scotia Reports (2d) 227 (Appeal Division).

39 See above at 230.

(1.1) In making a determination under subsection (1) [conditions for orders of custody], the youth court shall take the following into account:

(a) that an order of custody shall not be used as a substitute for appropriate child protection, health and other social measures.

This enactment clearly rejects the paternalistic approach taken by the courts. Once again, federal substantive law conflicts with the provincial administration of justice. It is unlikely that this new subsection will change the substance of these types of decisions⁴⁰ because judges are still faced with the lack of resources when sentencing. Until the provinces provide a middle ground, the courts will be faced with the stark reality, in some cases, that the only opportunity for structure and control in the life of a young offender is to make an order for custody. Elimination of this paternalistic approach requires changes at the provincial level, not the federal.

IV. Effects of Institutionalization in Young Offender Facilities

With an appreciation of the fact that orders for custody, whether labelled “open” or “secure,” are virtually identical in provinces like Nova Scotia, we must look at the practical effects of orders for custody. The negative impact of institutionalizing young offenders is well-documented. For example, youths in “border-line” custody cases are detained with more serious offenders, placing them in a situation where peer pressure is coming from a decidedly negative source.⁴¹ Placement in an institution stigmatizes young offenders, and fosters negative self-perception. Young offenders are separated from their family and their regular circle of friends.⁴² They are isolated from the community, and but for contact with guards and counsellors, and occasional excursions outside the institution, society in general.⁴³ These factors work against the rehabilitational goal of preparing the young offender to re-enter the community following the term of custody.⁴⁴ In *R. v. A.H.*,⁴⁵ British Columbia Court of Appeal Justice McEachern recognized the effect orders for custody within institutions can have on children:

The report of a psychiatrist who saw the appellant shortly before this appeal states:

I have some concerns that this individual is becoming more and more institutionalized and is beginning to develop peer associations with a largely anti-social group.

... Thus, the choice is to leave him in custody for whatever good that might do, either for the accused personally, or to deter others from committing similar crimes, or release him to the custody of his parents so that he will not risk further “institutionalization”, and where he may most likely be rehabilitated.

The court qualified their decision to allow the appeal and release the youth from custody by pointing out that custody was not needed for the protection of society. Speaking of the order of the trial judge, the court said:⁴⁶

If she had known that he would now be at risk of becoming “institutionalized”, or even criminalized. . . I am confident that is what she would have done either by imposing a shorter custodial

40 See generally, *R. v. S.C.H.*, [1996] A.J. No. 457 (Q.L.) (Alberta Provincial Court, Youth Court); and *R. v. C.M.P.*, [1996] M.J. No. 574 (Q.L.) (Manitoba Court of Appeal), although s.24(1.1) was cited with favour in the later case, the decision turned on consideration of other sentencing factors.

41 “Those who become part of this small population are well on the road to the worst of all possible futures.” Report of the National Advisory Committee for Juvenile Justice and Delinquency Prevention, “Serious Juvenile Crime: A Redirected Federal Effort” (March 1984). Also see, R. Kramer, *At A Tender Age - Violent Youth and Juvenile Justice* (New York: Henry Holt and Company, 1988).

42 A.V. McArthur, *Coming Out Cold* (Toronto: Lexington Books, 1974). For a comprehensive discussion on the negative effects of being separated from family and regular friends, see Chapter Four “The Forgotten Family” at 33.

43 See generally, E. McGarrell, *Juvenile Correctional Reform - Two Decades of Policy and Procedural Change* (New York: State University of New York Press, 1988).

44 *R. v. G.H.* (1994), 119 Newfoundland & Prince Edward Island Reports 75, at 79 (Newfoundland Court of Appeal).

45 (1991), 65 Canadian Criminal Cases (3d) 116, at 120.

46 See above at 122.

sentence and a term of probation or by some other sentence.

An independent auditor for the Nova Scotia Minister of Justice recently documented these effects.⁴⁷ Comments made to the auditor highlight the self-perception problem. Consider the following statements made by young offenders in the Shelburne Youth Centre: “[d]on’t get me wrong, I realize this is an institution for young offenders, and we’ve all done something wrong...”⁴⁸ Also, “I’m considered nobody because I’m here. You don’t get a chance to be heard... they think you are a criminal so they treat you like one.”⁴⁹

Conclusion

Having established that the lack of custodial resources in Nova Scotia has a negative impact on young offenders, it is appropriate to look for some solutions. One of the purposes of replacing the J.D.A. with the Y.O.A. was to remove the possibility of youths being incarcerated for status offences. However, the paternalistic status offence approach has not disappeared and appears to be encouraged by the judiciary’s belief that open custody provides a soft middle ground. The courts may be correct in searching for a middle ground when sentencing, but a problem arises in provinces where open custody is indistinguishable from secure and thus a middle ground does not exist. The system of open and secure custody set up by the federal government is not being implemented by some provinces, with the result that the good intentions underlying the Y.O.A. are not being realized.

There are two ways to address this problem. First, sentencing judges could follow the suggestions of the Supreme Court of Canada in *R. v. M. (J.J.)*,⁵⁰ and make orders pursuant to clause 23(2)(f) of the Y.O.A. This section allows for probation orders which contain residence requirements, and provides judges with the option of placing children, who do not have supportive families, with provincial welfare agencies. It is important to note, however, that the existing resources in Nova Scotia for foster care and welfare agencies are already oversubscribed.⁵¹ The Department of Community Services is having trouble keeping up with orders under the Children and Family Services Act,⁵² and would not be able to handle the flow of young offenders if clause 23(2)(f) became a sentencing reality in Nova Scotia.⁵³ Lower level courts, given this environment, are more likely to follow the message of economic restraint sent by the Supreme Court in *R. v. S. (S.)*.⁵⁴ There, the court refused to force the Ontario government to create an alternative measures scheme.

The other solution is for provincial governments such as Nova Scotia to create open custody facilities which are consistent with the entire range envisioned in the Y.O.A., from group home to wilderness camp. In so doing, provinces would be on track with harmonizing the competing goals of the Y.O.A. and in the process, better meet the needs of the young offender. Neither of these solutions is possible without more resources being allocated to the youth justice system. However, until that funding materializes, the Y.O.A. will continue to have a far harsher effect than its drafters and proponents intended.

47 Samuels-Stewart, see note 24.

48 See above at 29.

49 See note 47 at 29.

50 See note 32.

51 Telephone interview with S. Drisdale, Department of Community Services (5 March 1996).

52 S.N.S. 1990, c.5.

53 See Department of Community Services, *Annual Report 1993-94* (Halifax: Nova Scotia Department of Community Services, 1994); and *Fostering, A Community Service Strategy for the Year 2000: the Report of the Foster Care Consultation Project* (Halifax: Joint Committee on Foster Care Change, 1995).

54 (1990), 57 Canadian Criminal Cases (3d) 115.