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YOUNG OFFENDER DISPOSITIONS

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YOUNG OFFENDER DISPOSITIONS

The determination of a fit disposition for a young offender raises a number of difficult and interesting issues. The purpose of this paper is to examine some of the issues which have been dealt with in recent cases. While the Young Offenders Act[1] is an exercise by Parliament of its criminal law power[2] and as such provides sanctions for breaches of the criminal law by young offenders, it is more socially oriented than the Criminal Code[3]. The Act[4] provides a clearer distinction between criminal and child welfare matters and recognizes that one of the principle purposes of the criminal process is the protection of society[5].

Two issues surrounding the disposition process are:

(1) the relationship between young offenders legislation and child protection laws[5]; and

(2) the applicability of the principle of general deterrence to the Y.O.A.[7]

[1] S.C. 1980-81-82, C.110

[2] The Queen v. W.W., Unreported, May 28, 1985, Man. C.A., suit No.210/84

[3] See s.3

[4] Supra n.1

[5] R. v. Morrissette (1970), 1 C.C.C. (2d) 307. 75 W.W.R. 644

[6] Bala & Lilles, Young Offenders Service, 1984 Butterworth & Co. (Canada) Ltd.

[7] Supra n.1

Relationship between Young Offenders Legislation and Child Protection Laws

This issue arises to a large extent from the recognition in the Act[8] of special needs[9], interests of families[10], the parent/child relationship[11] and the requirement that these factors be taken into account in the disposition process[12]. Broadly interpreted these could be construed as including a consideration of what have been traditionally considered child protection concerns. The issues are further complicated by the use in some provinces of the same facilities for both child protection and young offender cases and in some provinces the designation of the same individual as Provincial Director and Director of Child Welfare[13].

The broad issue was recently the subject of comment in two decisions of the Alberta Court of Appeal. In The Queen v. D.S. Kerans, J.A. cautioned:[13]

> "While it may sometimes be difficult to do, one must maintain the distinction between the role of a judge sitting in Youth Court and the role of a judge sitting in Family Court and exercising the powers under the Child Welfare Act. If direction for future care and supervision of this young man are required, application should be made under the Child Welfare Act."

[8] Supra n.1
[9] s.3(1)(c)
[10] s.3(1)(f)
[11] s.3(1)(h)
[12] s.3(2)
[13] Supra n.5
[14] Unreported, Jan.16, 1985, Alta. C.A., A.N. 8403-8485-A

In The Queen v. G.K. Stevenson, J.A. reaffirmed the Court's position stating:[15]

> "This court has also noted that custodial sentences are not to be imposed as a substitute for wardship; where wardship is appropriate it should be imposed under the mechanism designed for it."

Thorson, J.A. of the Ontario Court of Appeal, appeared to agree with the Alberta position when he commented:[16]

> "The fact that this young offender may require some long term form of social or institutional care or guidance if there is to be any real prospect of his rehabilitation, does not mean that the vehicle of the Young Offenders Act can be employed for that purpose. Here, as under the Criminal Code, it is a cardinal principle of our law that, within the limits prescribed by parliament, the punishment should fit the crime but should not be stretched so that it exceeds it, even where that might be thought desirable by some in the interests of providing some extra protection for the public."

His Lordship did say, however, that:[17]

> "Where a first custodial disposition is being made, it may well be that the public intent is adequately served by a short custodial term, and, if so, that will obviously be the most desirable disposition. Again, however, it cannot be the rule in all cases, regardless of the nature of the offence or the circumstances of its commission. Moreover, the reasoning which has lead our courts to favour, wherever possible, a short first custodial sentence for a youthful adult offender may lose some of its force when sought to be applied to someone of lesser maturity, as, for example, where a young offender's committal to custody reflects and adjudged need to remove him from an unhappy or hostile home environment. (Emphasis added). In his case, whatever ultimate success the custodial order may expect to enjoy may have to

[15] Unreported, Alta. C.A., A.N. 8403-8534-A

[16] R. v. R.I. et al, 44 C.R. (3d) 168 at 178

[17] Supra n.15 at p.175

> be more directly linked to its duration than will generally be the case where a youthful adult offender, facing for the first time a term of incarceration in a prison or reformatory, is the subject of such an order."

This latter comment gives rise to two issues namely: "inflation" sentencing and dispositions which are "more onerous" than that which an adult would be liable to.

The first issue was the subject of comment by Kerans, J.A. in The Queen v. B.S.C.[18]. In this case the youth court judge, when he imposed a disposition of one year, expressed a concern that a short, sharp custodial disposition might not be sufficiently long and rather than risk a premature release imposed a longer disposition relying on the review provisions of the Act should it be warranted. Kerans, J.A., referring to this expressed concern, said:

> "We acknowledge also that it is impossible in advance to tell whether such a sentence will be effective. But the very real risk is that it will not warrant a sentence higher than is otherwise appropriate. To give effect to the concern expressed by the learned sentencing judge is to produce 'inflation' sentencing, and amounts to an abandonment of the judicial sentencing role in deference to the parole authority or its equivalent for young offenders."

His Lordship went on to say that "the traditional stepped sentencing policy" is applicable to young offenders.

Section 20(7) of the Act[19] gives rise to the second issue. It reads:

[18] Unreported, Nov.6, 1984, Alta. C.A., A.N. 8403-8267-A

[19] Supra n.1

> "No disposition shall be made in respect of a young person under this section that results in a punishment that is greater than the maximum punishment that would be applicable to an adult who has committed the same offence."

If this section is interpreted as referring to the statutory maximums in the Code, as was the case in R.M. v. The Queen[20], so long as the youth court disposition is within the statutory limit then there is no concern. If, however this section is interpreted as the maximum punishment an adult would in fact receive, then there may well be a contravention of this section of the Act[21]. The latter interpretation is clearly more difficult to apply but it is more consistent with the declaration of principle, particularly s.3(1)(a). It is this latter approach Stevenson, J.A. adopted when he stated:[22]

> "we remain committed to those positions that reject the suggestion that the young offender's sentence should be modelled on the sentence that would be imposed on an adult offender. If a custodial sentence is warranted, then it ought not to be lengthier than that **which would** be imposed on an adult." (Emphasis added).

Some interesting issues flow from two decisions, The Queen v. A.D.M.[23] and C.B. v. R.[24].

[20]Unreported, February 15, 1985, N.S.C.A., S.C.C. 01143

[21]Supra n.1

[22]Supra n.14

[23]Unreported, October 30, 1984, Man. C.A. Suit No.332/84

[24]Unreported, September 21, 1984, B.C.S.C., No.84/055

The Manitoba decision was an appeal from a disposition of one year open custody to be followed by probation for one year on a charge of robbery. The young offender was 15 at the time of the commission of the offence. On appeal, counsel asked that the Court consider a period of probation to her 18th birthday with the condition that she reside in such place as the Provincial Director or his delegate specifies. [Section 23(2)(f) of the Act[25]]. The intention was that the Director would specify Marymound which was a closed setting under the Child Welfare Act but was not designated as an open or secure place of custody under the Young Offenders Act[26]. Her parents, social workers, psychologists and the young offender herself all approved of the placement. Following her disposition in Youth Court, she was placed in Marymound on a series of "fifteen day orders" under s.35(1) of the Act by the Provincial Director. The Court found this to be not a satisfactory solution to the problem. The Court agreed with the recommendations of the professionals, set aside the original disposition, and substituted a probation order to A.D.M.'s 18th birthday with the condition that she reside in such place as the Provincial Director or his delegate may specify. Matas, J.A. went on to add that:

"if this were done the sentence would be

[25] Supra n.1
[26] Supra n.1

> in accord with the principles of deterrence and with the declaration of principles set out in s.3(1)(c) of the Act."

While one might not take issue with the result in the A.D.M. decision having regard to the needs of the young offender, the case raises concerns with respect to a potential for abuse inherent in the application of s.23(2)(f) of the Y.O.A.[27]. In those provinces where facilities for open and secure custody are also used by child protection agencies, the Provincial Director could in effect be given the authority to make custodial dispositions. The result is alarming. A young person could be placed in a secure custody facility (particularly where parents appear to approve) for lengthy periods. The result circumvents the mandatory requirement of a pre-disposition report[28], is contrary to s.20(7), 24(3)(4)(11) and is subject to a Charter challenge. It seems to me that if the features of a facility of proposed placement, are consistent with either open or secure custody then such action by the Provincial Director is inconsistent with other provisions of the Act[29, 30].

In C.B. v. R.[31] a young petitioner sought an amendment to a probation order to delete the requirement that he reside where

[27] Supra n.1
[28] s.24(11)
[29] See s.20(1)(i) and (k)
[30] Harris, Young Offenders Act Manual, 1984 Canada Law Book Inc.
[31] Supra n.23

placed by a youth worker. The original probation order, made under the Juvenile Delinquents Act[32], required the petitioner to reside in a therapeutic group home for such time as the Director of the group home deemed necessary. Six months later the probation order was varied to provide that the petitioner reside where placed by his social worker. She directed that he return to live with his mother. As a result of the proclamation of the Young Offenders Act[33], an application was made to the Youth Court to vary the original probation order from an indefinite to a specific term. At that time a question was raised as to whether the petitioner should be placed in a group home setting for further treatment or remain with his mother. The Youth Court limited the term of probation to a further nine months, and directed that "he reside where directed by the youth worker". The youth worker directed that he reside in a group home.

On the application for the Writ of Certiorari counsel for the young person argued that the amended order was contrary to s.32(8)[34] as the facility that was designated by the youth worker was more restrictive in terms of access to the community than the first group home he resided in and therefore the latter disposition was "more onerous" than the original disposition. He further argued

[32]R.S.C. 1970, Chap.J-3, repealed

[33]Supra n.1

[34]Supra n.1

that the facility designated by the youth worker was a "semi-containment" facility and therefore he was being detained for treatment without his consent contrary to the provisions of s.20(1)(i) and 22(1) of the Act.

McDonald, J. ruled that because both orders were designed to provide treatment it could not be said that one was "more onerous" than the other and further than the residence requirement was incidental to the principle purpose of both orders. He went on to say that because the probation order was not a direction that the young person be detained for treatment in a hospital or other place where treatment was available, consent of the young person was not required[35].

Probation may be appropriate where a young offender needs some kinds of treatment but having regard to the specific mechanisms[36] in the Act[37] for treatment it should not be used for detained treatment.

While the Act[38] may require a balancing of competing interests in the disposition process, considerations of child protection issues and treatment concerns should not override the procedural and substantive safeguards guaranteed to young offenders[39].

[35] Supra n.23
[36] s.20(1)(i) and (22)
[37] Supra n.1
[38] Supra n.1
[39] See s.3(1)(e)

The Applicability of the Principle of General Deterrence to the Young Offenders Act

The Act[40] with its numerous references to the "needs" of young persons clearly contemplates an individualistic approach to dispositions with the primary focus on the rehabilitation of the young offender rather than on general deterrence. The principle that "the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society"[41] is a recognition of a legislative preference for community based dispositions over custodial dispositions. With first offenders particularly, it is encumbant on youth court judges to canvas and seriously consider other alternatives to custodial dispositions. As stated by Morrison, J.A.:[42]

> "It should be emphasized that a custodial term should rarely be imposed on a first time young offender and then only in the most serious circumstances".

This is not to say that the protection of society is in any way a secondary consideration. The Act[43] itself requires dispositions to be consistent with the protection of society[44]. In the long term rehabilitation affords society the best protection[45].

[40] Supra n.1

[41] s.3(1)(f)

[42] K.L.B. v. The Queen, unreported, April 19, 1985, N.S.C.A., S.C.C. No.01182

[43] Supra n.1

[44] s.3(1)(b)(f) and s.24(5)

[45] R. v. Gionet, (1984) 137 A.P.R. 281, N.B.C.A.; see also R. v. LeCoure, (1985) 148 A.P.R. 82, N.B.C.A.

The Court of Appeal of Alberta, in a decision which involved the armed robbery of a convenient store while masked, referred to "the catalogue in s.3 of the Act which declares the policy for young offenders in Canada" and stated that the concept of general deterrence had no place in the sentencing of young offenders[46]. Even in cases having most serious circumstances, where imprisonment would be the proper sentence for an adult, the Alberta Court of Appeal is of the view that a custodial sentence is not the disposition of first choice for young offenders[47]. Neither the Court of Appeal of British Columbia[48] nor the Court of Appeal of Nova Scotia[49] have gone as far as this, however, they have cautioned against the over-emphasis of general deterrence in the sentencing of young offenders. The Nova Scotia Court stated:[50]

> "While the principle of general deterrence must always be given weight in assessing the proper sanction for the offence of break, enter and theft, particularly when it is committed in relation to a private dwelling house, it is our opinion, that when such offences are committed by youth offenders, the element of specific deterrence must not be lost sight of. The rehabilitation or reformation of a 15 year old boy must surely be a realistic possibility and care must be taken to ensure that sentences for very young offenders are not so harsh as to be counter-productive."

[46] Supra n.14

[47] Supra n.14

[48] R. v. R.B., unreported, May 17, 1985, B.C.C.A., CA004060

[49] B.D.F. v. The Queen, unreported, April 11, 1985, N.S.C.A., S.C.C. 01186

[50] Supra n.46

Referring to the sentences imposed by the trial judge, McDonald, J.A. said:

> "they appear to us to over-emphasize the element of general deterrence and to downplay that of specific or individual deterrence".

It is clear that general deterrence is not a primary goal in the sentencing of young offenders, however, does the individualistic approach to dispositions contemplated by s.3 of the Act[51] necessarily completely preclude a consideration of general deterrence? It will be interesting to see what positions the Courts of Appeal in other provinces adopt.

[51] Supra n.1

FOOTNOTES

1. S.C. 1980-81-82, c.110
2. The Queen v. W.W.W., unreported, May 28, 1985, Man. C.A., suit No.210/84
3. See s.3
4. Supra n.1
5. R. v. Morrissette (1970), 1 C.C.C. (2d) 307, 75 W.W.R. 644
6. Bala & Lilles, Young Offenders Service, 1984 Butterworth & Co. (Canada) Ltd.
7. Supra n.1
8. Supra n.1
9. s.3(1)(c)
10. s.3(1)(f)
11. s.3(1)(h)
12. s.3(2)
13. Supra n.5
14. Unreported, January 16, 1985, Alta. C.A., A.N. 8403-8485-A
15. Unreported, Alta. C.A., A.N. 8403-8534-A
16. R. v. R.I. et al, 44 C.R. (3d) 168 at 178
17. Supra n.15 at p.175
18. Unreported, November 6, 1984, Alta. C.A., A.N. 8403-8267-A
19. Supra n.1
20. Unreported, February 15, 1985, N.S.C.A., S.C.C. 01143
21. Supra n.1
22. Supra n.14
23. Unreported, October 30, 1984, Man. C.A. suit No.332/84
24. Unreported, September 21, 1984, B.C.S.C., No.84/055
25. Supra n.1
26. Supra n.1
27. Supra n.1
28. s.24(11)
29. See S.20(1)(i) and (k)
30. Harris, Young Offenders Act Manual, 1984 Canada Law Book Inc.
31. Supra n.23
32. R.S.C. 1970, Chap.J-3, repealed
33. Supra n.1
34. Supra n.1
35. Supra n.23
36. s.20(1)(i) and (22)
37. Supra n.1
38. Supra n.1
39. See s.3(1)(e)
40. Supra n.1
41. s.3(1)(f)
42. K.L.B. v. The Queen, unreported, April 19, 1985, N.S.C.A., S.C.C. No.01182
43. Supra n.1
44. s.3(1)(b)(f) and s.24(5)
45. R. v. Gionet (1984) 137 A.P.R. 281, N.B.C.A.; see also R. v. Le Coure (1985) 148 A.P.R. 82, N.B.C.A.
46. Supra n.14
47. Supra n.14
48. R. v. R.B., unreported, May 17, 1985, B.C.C.A., CA004060
49. B.D.F. v. The Queen, unreported April 11, 1985, N.S.C.A., S.C.C. 01186
50. Supra n.46
51. Supra n.1