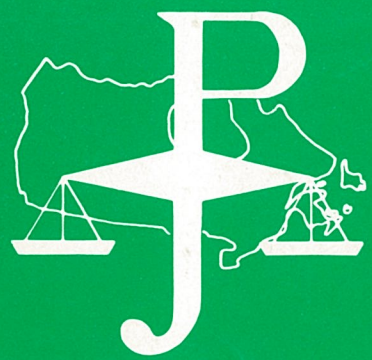


MERCURY GRAPHICS

PROVINCIAL JUDGES

Journal

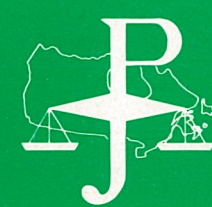
DES JUGES PROVINCIAUX

VOLUME 9, No. 1 & 2

JULY 1985

THE CANADIAN ASSOCIATION OF PROVINCIAL COURT JUDGES

L'ASSOCIATION CANADIENNE DES JUGES DE COURS PROVINCIALES



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Letter To The Editor

Sir:

Whither the C.A.P.C.J.?

I was fortunate enough to have been selected — by lot — to represent the Provincial Judges Association of Alberta as one of the delegates to the last C.A.P.C.J. convention at St. Johns. While the friendliness and hospitality extended was magnificent, the proceedings were, in my opinion a waste of time and money. While there may well be something to be said for challenging the status quo of judges, to spend two days on a foredoomed attempt to interest them in television in the courtroom was a waste of time and appealed only to the media covering the event. At least in the court room my idiocies are only appreciated by a very small number of people, normally not all those present even, so that to threaten the judge with instant broadcasts of his sins is unlikely to appeal to any but the totally selfconfident. As a result, I fearlessly predict that television will only be brought into our court rooms over the objections of judges, not with their willing approval.

The last part of the convention was the annual meeting. In my naivete, I had gone to Newfoundland expecting to participate and shape the direction of the Association for the coming year. Instead I found that most debatable questions had been decided behind closed doors and never got to the floor. In any event there are only ten votes, one for each province — a classic example of democracy in action: P.E.I. = Ontario. None of the reports enthusiastically adopted (including the financial statements) were ever circulated among the rank and file so it was not possible to make an informed comment even without a vote. Does the C.A.P.C.J. ever deal with the issues important to Provincial Judges or is it an oligarchy making its decisions by the Executive, in private meetings without reference to the delegates, never mind the membership.

In three successive Parliaments massive, wide-ranging amendments to the Criminal Code have been introduced. Was the C.A.P.C.J. consulted? Has it even got an ongoing committee to consult? Why should the provincial Court Judges who deal with the vast majority of these matters have no input? Are we to remain forever, the silent uncomplaining lower class, victims of an outdated concept of powers of judges? Is the accused who fails to appear in my court less deserving of arrest than if he fails to attend a High Court? Will an annual token visit to the Minister of Justice ever change any of these things?

It seems to me that the C.A.P.C.J. has become a prisoner of its funding and dares not speak out for fear of jeopardizing those monies. If it cannot address the problems of our court I suggest that we re-organize and have a national association that concerns itself with the real problems of status, pay, pensions as well as law reform, criminal procedure and proposed legislation. Pious platitudes about the Charter of Rights are no substitute for the more common procedural problems, nor any solution to those problems. If we are to have a national association would it not be a thousand times better to have one that concerned itself with these problems and was a voice to be heard by the administrators and legislators?

Yours truly,
M. Horrocks, P.C.J.

President's Page

(The President's Page this issue takes the form of a reply to Judge Horrock's Letter — Editor)

I appreciate your forwarding me a copy of Judge Horrock's letter to you as editor of the Journal, and allowing me the opportunity to reply.

It is apparent, at least to me, that Judge Horrocks has not been informed of the purposes, functions and services of the C.A.P.C.J. through his Provincial Association, which is regrettable. May I advise Judge Horrocks that the C.A.P.C.J. is a federation of Provincial and Territorial Associations, one Association, one provincial representative and one vote. Some constitutional amendment is being considered to allow for representation of Provincial Court divisions, i.e. criminal, family and civil within provincial structures, but this would not change the concept of one province, one vote.

The Association is governed by an Executive Committee, which is made up of seven officers and the twelve provincial representatives. The committee meets three times a year, being a budget meeting in April, and a meeting immediately following the annual meeting. At the Annual Meeting the Provincial Representatives only have the right to vote, but should consult with the other delegates and others from their Provincial Associations, so that they speak with one voice, or at least a consensus.

I regret that Judge Horrocks did not find the programme at St. Johns to his interest. Each year Conference Programme Chairmen do their best to present a programme of current interest.

The prime purpose of the C.A.P.C.J. is judicial education — it is its reason for being. To this end the Association has presented a New Judges' Seminar, a Western Provinces Seminar and an Atlantic Provinces Seminar each year. In addition, special programs on special topics have been presented as needed or as requested.

The Association is, through Committee, on a continuing consultation basis with the Department of Justice (Canada) on proposed legislation or legislative amendment. Input by the Association has been given careful consideration.

While there are some requirements because of funding, the Association is in no way a prisoner of its funding. It is and has been free to undertake its own course of action, limited only by a required amount of judicial education.

I have had the Executive Director forward Judge Horrocks an outline of the history and the functions of the Association.

PRE-REGISTRATION

C.A.P.C.J. ANNUAL MEETING

WINNIPEG, MANITOBA

Sunday, September 8, 1985 — Thursday, September 12, 1985

NOTICE OF INTENTION TO REGISTER

To: Judge Wesley H. Swail
Provincial Court of Manitoba
Building 30, 139 Tuxedo Avenue
Winnipeg, Manitoba
R3N 0H6

Name of Judge: _____

Address: Business _____

_____ Telephone _____

Home _____

_____ Telephone _____

Name of attending spouse: _____

Names of attending children, and ages: _____

_____

_____

Other Guests: Number _____ Ages _____

Special problems affecting visit: _____

_____

Accommodation: Single _____ Double _____ Suite _____

I plan to arrive on: Date _____ Time _____

Via _____

Division:

Criminal _____ Civil _____ Family and Youth _____

Registration Fee for Judges — $150.00; Spouse or Guest — $75.00

In Brief

WINNIPEG CONFERENCE
September 8 - September 12, 1985

Senior Judge Ian Dubienski and his committees have been hard at work preparing for the Annual Conference of the Canadian Association of Provincial Court Judges which will be held September 8 to September 12, 1985, at the Fort Garry Hotel, Winnipeg, Manitoba.

This Conference will afford the Provincial Judges of Manitoba a second opportunity to play host to their counterparts and spouses at a National Conference of Judges. The program is designed to touch upon some of the broader issues which have surfaced and will surface because of the Charter of Rights, and is designed as well to touch upon some specific topics in relation to Criminal Law, Civil Law, Family Law and Youth Court Law. The program is intended to provide a forum for the enhancement of knowledge through the exchange of ideas and experience in a fraternal atmosphere. Some of the program highlights are as follows:

The Charter of Rights and Freedoms

- Public Perception
- Section 15 Challenges
- Parliamentary Supremacy
- Fundamental Justice

The Decision In "Valente"

Criminal Law

- Report of the Commission of Inquiry into Sentencing
- The Contempt Power
- Spousal Competence and Compellability
- Search Warrants
- Absolute and Conditional Discharges
- Admissibility of Intercepted Private Communications

Young Offenders Act

- 18 Months Later
- Judicial Interim Release
- Dispositions and Reviews

Enforcement Of Maintenance Orders

Civil Law

- Section 15 of the Charter of Rights and Freedoms
- Torts

Some of the speakers and panelists who have so far agreed to attend and participate are:

- The Hon. Willard Z. Estey
  Justice, Supreme Court of Canada
- The Hon. John Crosbie,
  P.C., Q.C., M.P.
  Minister of Justice
  Government of Canada
- The Hon. Elmer McKay,
  P.C., Q.C., M.P.
  Solicitor General
  Government of Canada
- The Hon. John Scollin
  Justice
  Manitoba Court of Queen's Bench
- The Hon. Roland Penner, Q.C.
  Attorney General
  Province of Manitoba
- The Hon. Sterling R. Lyon,
  P.C., Q.C.,
  Former Premier and
  Attorney General,
  Province of Manitoba
- His Hon. Judge Omer Archambault
  Chairman
  Commission of Inquiry
  into Sentencing
- Dr. Claudia Wright, Ph.D.
  Chairperson
  Manitoba Human Rights
  Commission
- Prof. R. Dale Gibson
  Faculty of Law
  University of Manitoba
- Dr. John Bock, Ph.D.
  Assistant Deputy Minister
  of Corrections
  Province of Manitoba

Several social events are planned including the President's Reception, a "Manitoba Night", The Lieutenant Governor's Reception, and the Annual Banquet.

The "Alternate" Program will include a welcome brunch, a luncheon cruise, and a fashion show.

The Manitoba Judges sincerely invite each and every member of the Canadian Association of Provincial Court Judges to attend at this Conference and in that regard, a pre-registration form has been duplicated at the back of this issue, and your co-operation is requested in completing same and forwarding it to Judge Swail, Provincial Court of Manitoba, Building 30, 139 Tuxedo Avenue, Winnipeg, Manitoba R3N 0H6, as quickly as possible.

Further details of this Conference will be made available at a later date.

Dr. Richard Gosse Named Inspector General of Canadian Security Intelligence Service

Solicitor General Elmer McKay has appointed Dr. Richard Fraser Gosse, Q.C., as Inspector General of the Canadian Security Intelligence Service (CSIS). Dr. Gosse was the Deputy Minister of Justice in Saskatchewan.

As Inspector General, Dr. Gosse will review the operational activities of CSIS and monitor its compliance with its operational policies. He will be required to certify to the Solicitor General his satisfaction with the actvities of the CSIS under the law. Under the CSIS Act, the Solicitor General is required to transmit to the Security Intelligence Review Committee all reports of CSIS and certificates of the Inspector General.

The Inspector General is appointed by the Governor in Council.

Dr. Gosse, a native of Vancouver, received a law degree from the University of British Columbia, after serving as a pilot in the RCAF. He practised law for serval years in British Columbia, after which he obtained a Doctorate in Law from Oxford. He is a member of the law societies of British Columbia, Ontario and Saskatchewan. He has had a lengthy career as a legal academic and is a respected participant in law reform initiatives in Canada.

Dr. Gosse was a Professor of Law at Queen's University for nine years, and later at the University of British Columbia. He was counsel to the Ontario Law Reform Commission, the first full-time member of the Law Reform Commission of British Columbia, and a consultant to the Law Reform Commission of Canada.

In 1977, he was appointed Deputy Attorney General for Saskatchewan. His responsibilities included provincial policing and prosecutions and the provision of legal and constitutional advice to Saskatchewan. Two years ago, he was appointed Deputy Minister of Justice when his responsibilities were extended to include provincial corrections. As Deputy Attorney General, he has been involved in federal-provincial consultations related to the Canadian Security Intelligence Service legislation.

Judges Unswayed by Pay Cheques, B.C. Court Rules

Even though British Columbia's Attorney General sets the salary of each Provincial Court judge, judges are still independent of his control, Mr. Justice Raymond Paris of the B.C. Supreme Court ruled recently.

The judgment followed Judge John Davies' refusal to preside over trials on the grounds his impartiality could be questioned. Judge Davies said Attorney-General Brian Smith pays his salary as well as that of the prosecutor, and has been meddling in the business of judges by telling them to interpret the Charter of Rights and Freedoms in an "orderly, sensible and moderate way."

Judge Paris said it is understandable Judge Davies was concerned about the Attorney-General's comments but noted Mr. Smith clarified his views in a letter and promised no interference.

"A better arrangement could be found" in paying judges, Judge Paris added, but the lack of a perfect mechanism "does not mean, in itself, that any particular branch of the judiciary or any particular judge is not an independent and impartial tribunal" under the Constitution.

Young Offenders Information System in Nova Scotia

Solicitor General Elmer MacKay and Nova Scotia Social Services Minister Edmund Morris jointly announced recently a $91,718 contribution to the province of Nova Scotia

arguments by which he 'rationalised' his 'considerations of policy', Attiyah believes that 'there is a lot to be said' for Denning's complete candidness. And he finds that Denning was most successful in the fields of contract and tort, because the dominance of common law principles there allowed him to give 'full reign to his policy orientations without having to contend with the often different policy orientation of Parliament'.

Since the most notorious of Denning's decisions concerned labour law it may surprise many readers to learn from Paul Davies and Mark Freeland that most of the judges who repeatedly rejected Denning's judgments shared his views on how the law should be changed. Nevertheless it was here that Lord Denning received the sharpest reprimands, from Lord Simond's famous retort that Lord Denning's view of adjudication was 'a naked usurpation of the legislative function under the thin guise of interpretation', to Lord Diplock's warning that 'it endangers continued public confidence in the political impartiality of the judiciary, which is essential to the rule of law, if judges, under the guise of interpretation, provide their own preferred amendments to statutes'.

That such fears are far from exaggerated is clear from Professor Heuston's engaging account of how Lord Denning became a controversial public figure. That he is not, however, all that eccentric becomes evident from the thoughtful discussion of Denning as jurist by A.W.B. Simpson. Here Lord Denning is shown to be part of a development that has been gathering force since the early part of the century — the spread of a belief that it is wrong or impossible to distinguish between interpreting law and making law, between acknowledging the authority of a law and finding it desirable; in short, the belief that law is politics by another name. Lawyers and laymen have been learning to think that a good judge seeks only to achieve the 'right results' and that if he worries about interpreting the law correctly, he must be an immoral or amoral monster.

Perhaps Lord Denning's antipathy to jurisprudence explains why he became an 'activist' judge without the normal preferences of such judges for powerful trade unions and the permissive society. This anomalous character of his activism is what makes Denning a 'phenomenon'. And it has encouraged a destructive confusion about the relation between law and justice. To avoid such misunderstanding, readers would do well to notice how clearly Denning's words on how judges should treat the law resemble those of Ronald Dworking, the Professor of Jurisprudence at Oxford, whose belief that justice requires complete toleration of pornography and Communists, among others, would not please Lord Denning.

Shirley Robin Letwin:
Lord Denning and the Law

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description, given Lord Denning's many declarations of his faith: 'If there is any rule of law which impairs the doing of justice, then it is in the province of the judge to do all that he legitimately can to avoid that rule —or even to change it . . .' Denning's explanation that 'I need not wait for legislation to intervene . . . I never say, "I regret having come to this conclusion but I have no option" . . . There is always an option — in my philosophy — by which justice can be done' makes it clear that his notion of 'legitimately' imposes no restrictions on his 'activism'.

The most hostile assessment comes from Professor M.D.A. Freeman, who writes on family law. He calls Denning 'a bundle of contradictions' because 'he professes to believe in women's equality yet has been responsible for some of the most sexist and backward-looking rulings'. Freeman says that Denning held no consistent theory about the family or family law but tried to dispense 'some rudimentary form of justice in which the protection of the weak is the main theme'. Professor Freeman does not agree with Lord Denning's identification of the weak: he concludes that Denning's rulings against artificial insemination, pornography and sexual perversion, along with his acceptance of 'sex-role stereotyping', shows him to be a 'moral fundamentalist' and a 'natural ally of the New Right' who 'oozes traditional Englishness'.

But there is no simple link between right-wing politics and approval of Lord Denning. The most enthusiastic defence of him comes from Claire Palley. She sees Denning's conception of the judge as identical with that of Professor John Griffith, who is hardly of the New Right. In her discussion of human rights, Palley grants that Lord Denning misused precedents, reached inconsistent conclusions, and shifted repeatedly on whether the European Convention is part of British law. She finds, too, that he has an 'authoritarian approach' which she regards as 'inevitable' with all interventionists whether of the Right or the Left.

But what matters far more, she argues, is Denning's 'orientation to results'. Because he would not divorce law from morality, he refused 'to interpret or enforce the law irrespective of its morality or justice', and therefore chose whatever technique 'would enable him to achieve the right result'. But only his candour is unusual, Palley insists, because she agrees with Professor Griffith that all judicial decisions are determined by political preferences. Against the charge that such a style of adjudication produces uncertainty, she replies that counsel could always predict how Denning would decide. The only uncertainty was whether he would be sitting. Palley's one discomfort is about Denning's 'statemindedness' displayed in his concern with the security of the state, his 'idealised view of the police' and his readiness to accept the growing power of the executive.

Professor Jowell is equally enthusiastic about Lord Denning's 'activism' in administrative law. He reminds us that many judges who advocated 'restraint' saw themselves as 'handmaidens rather than governors of administration, and were deferential to the growth of state power. Lord Denning, he believes, has recognised that Parliament can no longer control the discretionary powers of public bodies and has asserted the right of courts to do so, thus reinforcing the separation of powers. This is an unusual way to see activism, but it makes an important historical point.

'He dared to render "justice" no matter what the law required'

Dennings's constitutional role is assessed much less favourably in D. J. Hayton's admirably terse essay on equity and trusts, which shows how Denning introduced the flexible principles of Chancery law into the common law to get the results he wanted. But far from admiring Denning's 'creativeness' and 'cavalier' way of citing passages in opinions without disclosing a qualifying clause, Hayton asks: 'Was Lord Denning doing justice to the bankrupt husband's creditors in creating the deserted wife's equity? Parliament did not think so . . . Was he doing justice when he ordered Granada to disclose their source of confidential information? Later, Lord Denning did not think so'. In fact, Lord Denning's doing of justice, Hayton concludes, has 'considerably diminished the coherence and consistency of Chancery law', thus undermining the impartiality of the law and unsettling property rights, so that many thousands can no longer discover their rights without going to court.

The 'middle' on the issue of Lord Denning appears in Professor Attiyah's discussion of contract and tort. Although he criticises Denning's lack of interest in the legal

to study the feasibility of developing an information system in compliance with the Young Offenders Act. The province is financing 20 per cent of the study.

The Young Offenders Act provides for the development in the provinces and territories of new juvenile justice information systems and recordkeeping procedures.

The federal contribution is part of a 12.15 million dollar federal fund set up to help provinces and territories to develop record-keeping and information systems, to develop a central repository of criminal history records in Ottawa, to develop systems policy and technology as well as to aid in compliance of national juvenile justice statistics.

"The Young Offenders Act requires that records of young offenders be created, maintained, and ultimately destroyed in accordance with sections 40 - 46 of the new Act," explained the Solicitor General. "With this contribution, we are helping Nova Scotia to develop a record-keeping and information system that will enhance their ability to meet the records management and destruction provisions of the Young Offenders Act and to ensure compatibility with National Information Requirements."

Canadian Sentencing Commission Appointment

The Honourable John C. Crosbie, Minister of Justice and Attorney General of Canada, recently announced new appointments to the Canadian Sentencing Commission, established in May of 1984.

With the recent resignation of Mr. Justice William Sinclair, the former Chairman of the Commission, Judge Omer Archambault, Judge of the Provincial Court of Saskatchewan and formerly Vice Chairman of the Commission, has been appointed Chairman of the Commission.

Prior to joining the Canadian Sentencing Commission, Judge Archambault was a special advisor (Criminal Law), in the Policy, Planning and Criminal Law Amendments section of the Federal Department of Justice.

The Honourable Claude Bisson, Justice of the Quebec Court of Appeal and Member of the Commission has been appointed Vice Chairman. Mr. Justice Bisson was appointed as a Judge of the Superior Court for the Judicial district of Montreal in 1969 and in 1981 was appointed to the Quebec Court of Appeal.

Judge Edward Langdon, Associate Chief Judge of the Provincial Court of Newfoundland, has been appointed a Commissioner to the Commission.

The Commission's mandate is to investigate and develop model sentencing guidelines, as well as to advise on the feasibility and use of these guidelines in the Canadian context. The Commission is also examining maximum and mandatory minimum sentences in the Criminal Code. The Commissioners are studying the relationship between sentencing guidelines and other aspects of the criminal justice system, such as prosecutorial discretion, parole and remission.

Nominations À La Commission Canadienne Sur La Determination De La Peine

L'honorable John C. Crosbie, ministre de la Justice et procureur général du Canada, a annoncé des nominations à la Commission canadienne sur la détermination de la peine. Cet organisme a été créé en mai 1984.

Par suite de la démission récente du président de la commission, le juge William Sinclair, le juge Omer Archambault de la Cour provinciale de la Saskatchewan, a été nommé à ce poste. Le juge Archambault occupait jusqu'alors la vice-présidence de la commission.

Avant sa nomination à la Commission canadienne sur la détermination de la peine, le juge Archambault était conseiller spécial à la Section de l'élaboration de la politique et des modifications au droit pénal du ministère fédéral de la Justice.

L'honorable Claude Bisson, juge à la Cour d'appel du Québec et membre de la commission, a été nommé vice-président. Il avait été nommé juge à la Cour supérieure du Quebéc pour le district de Montréal en 1969 et à la Cour d'appel du Quebéc en 1981.

Le juge Edward Langdon, juge en chef associé de la Cour provinciale de Terre-Neuve, a été nommé commissaire.

La commission a pour mandat d'élaborer des lignes directrices en matière de détermination de la peine, ainsi que d'étudier la possibilité d'établir et d'utiliser de telles lignes directrices dans le contexte canadien. La commission étudie aussi les peines maximum et minimum prescrites par le Code criminel. Elle étudie par ailleurs le rapport qui existe entre les directives sur la déter-

mination de la peine et les autres aspects du système de justice pénale, par exemple le pouvoir d'intenter ou non des poursuites, la libération conditionnelle et la remise de peine.

Judges No Longer Lumped With Lunatics and Convicts

A recent application by a judge of the Provincial Court of Ontario has resulted in a negotiated settlement with respect to provincial judges' voting in Ontario. Judge Saul Nosanchuk of the City of Windsor brought an Application for judicial review considering the statutory prohibitions of provincial judges to vote in provincial and municipal elections. Under section 11 of the Election Act, "No judge of any court is qualfied to vote in any election". The same provision relates to municipal elections.

Judge Nosanchuk, through his counsel, Aubrey E. Golden, Q.C., requested a declaration from the Supreme Court of Ontario that the said sections of the law were invalid by virtue of being contrary to section 3 of the Canadian Charter of Rights and Freedoms.

Prior to the Application being heard by the Court, a verbal undertaking was given by a representative of the Attorney General that the said sections of the law would be repealed.

The right to vote is a cornerstone of any democracy. The move by the Ontario government certainly recognizes the right of judges to exercise that right if they so choose. Although there are some arguments that judicial independence can be impinged if a judge has a right to vote, the general consensus would appear to be that, in this day and age, a judge's secret ballot is not of so great importance as to open him or her to political influence.

If any Association is interested in receiving a copy of the Notice of Application and supporting Affidavit, Judge Pamela A. Thomson Sigurdson will be pleased to forward a copy.

The Annual Meeting of the Provincial Court Judges' Association (Civil Division) was held April 25 and 26, 1985 in Toronto. A very stimulating programme was provided by the Education Committee, chaired by Judge Moira Caswell. The judges spent a full morning at the premises of Quick Law, having "hands on" demonstration of researching the law. The use of computers to assist the Bench and the Bar is becoming more and more relevant. The judges enjoyed researching various problems — particularly when their own judgments were referred to.

Judge Chester Misener spoke concerning general damages and presented his paper. Associate Chief Justice A.J. MacKinnon addressed the group with respect to judicial ethics and judicial conduct. A stimulating discussion followed his paper.

Mr. Justice Horace Krever discussed Applications for New Trials with the members of the Association. As a member of the Divisional Court which sits in appeal from decisions of the Civil Division, his insights into the realities of our Court and its processes were greatly appreciated.

At the Annual Meeting of the Association, Judge Marvin Zuker was elected President with Judge Charles Tierney being elected Secretary and Judge Pamela Thomson Sigurdson elected Treasurer.

The Annual Dinner was held at the Albany Club. The spouses of all judges (except Judge Thomson Sigurdson!) attended the dinner together with Attorney General Robert Welch. A superb gourmet meal was organized by Judge Ronald Radley and enjoyed by all.

ONTARIO

Appointments:

1. His Honour
   Judge Wayne D. Morrison,
   St. Catherines,
   effective March 18, 1985.
2. His Honour
   Judge David W. Dempsey,
   Smith Falls,
   effective June 3, 1985.
3. His Honour
   Judge Donald C. Downie,
   Kitchener,
   effective June 3, 1985
4. His Honour
   Judge Monte H. Harris,
   Toronto,
   effective June 3, 1985.
5. His Honour
   Judge R. Gary E. Hunter,
   Goderich,
   effective June 3, 1985.

Book Reviews

YOUNG OFFENDERS SERVICE

— N. Bala and H. Lilles
1984 Butterworth & Co. (Canada) Ltd.

Book Review by
Provincial Court Judge M. Wedge

In 1982, the Minstry of the Solicitor General of Canada commissioned N. Bala and H. Lilles of the Law Faculty of Queen's University to compile a report on the not then proclaimed Young Offenders Act. The result was the "Young Offenders Act Annotated" which was produced and circulated by the Policy Branch of that Ministry with a disclaimer that "the views expressed in this report do not necessarily reflect the views or policies of the Solicitor General of Canada".

In that document the authors ventured to prophesy how the Act would be interpreted by the courts and implemented by provincial governments. It was a useful starting point for those of us who were immediately called upon to hear cases under new and substantially different legislation, but was somewhat dangerous to rely upon.

I am pleased that the same authors have recently published a follow-up volume, **The Young Offenders Service**, in which speculations are omitted and personal opinions are confined to clearly identified annotations. An editorial board, which is made up of eminent jurists, including five Provincial Court Judges, should ensure that the service is accurate and learned.

The materials in the loose-leaf binder are indexed and tabbed for easy reference and, in addition to the Young Offenders Act and the Juvenile Delinquents Act, include the legislation of some, but not all, of the provinces dealing with the administration implementation of the Act, and the treatment of young persons charged with violations of provincial Acts. (I was sensitive to the omission of the Saskatchewan amendments to the Summary Offences Procedure Act, passed in April 1984. However, the missing legislation may be inserted.) Also included are the Model Rules of the Youth Court which were adopted by the Association of Provincial Court Judges, and Sample Forms.

Digests of cases and annotations follow the relevant sections. The case digests are particularly helpful as many of these cases have not yet been reported. Full texts of the judgments are available for a fee, and order forms are inserted in the back of the book. The initial cost of the Service is $95.00. This does not include the cost of updating supplements which will be charged as published. To order the Service, write or 'phone:

Joan Chaplin
Butterworth & Co.
(Canada) Ltd.
2265 Midlands Avenue
Scarborough, Ontario
M1P 4S1

(416) 292-1421.

The Young Offenders Service should be a welcome and convenient addition to any Provincial Court Library. Our own reduced book budget is saved from complete depletion as I am able to keep the reviewed copy at no cost. Since the review is favourable, I hope to receive the supplements for the same consideration.

The following **Review** *is reprinted from the January 1985 issue of* **The Listener** *(published by the British Broadcasting Corporation, London) — Editor*

Lord Denning: The Judge and the Law

— Edited by J. L. Jowell
and J.P. W. B. McAuslan
Sweet and Maxwell

It is all too easy to forget the dangers of the passion for doing justice. What Professor Heuston calls the 'phenomenon' of Lord Denning is a good case in point. Just what sort of phenomenon the former Master of the Rolls is has been carefully considered in these essays on various aspects of Lord Denning's work by writers with very different points of view.

All of them accept Lord Devlin's decription of Denning as a judge who dared to render 'justice', no matter what the law required. Indeed it is impossible to quarrel with that

In Lighter Vein

It seems that Judge David F. MacNaughton hadn't yet heard everything — that is, not until a defendant charged with an offence under s.236 of the Criminal Code tried a new defence in Judge MacNaughton's court in Stettler, Alberta recently.

The defendant tried to eat his undershorts on the theory that the cotton fabric might absorb the alcohol in his stomach before he underwent an R.C.M.P. breath analysis.

It appears it was a wasted effort notwithstanding that the defendant was acquitted, because his blood alcohol reading was exactly 80 milligrams of alcohol in 100 millilitres of blood.

The defendant was collared by the police after he ran from his vehicle. He was placed in a police cruiser whereupon he ripped the crotch out of his shorts as he sat in the car, stuffed the fabric in his mouth, and then spat it out.

It also happened to be a day when students from a local high school were in court to view and learn about the "workings of the law".

It is trite to say that they had difficulty in maintaining their composure during the testimony, and were required to leave the courtroom — with tears in their eyes.

(Judge P.C.C. Marshall of Alberta forwarded this report. — Editor)

I thought you might be interested in this incident which happened in my court three weeks ago in Edmonton.

I recently found a young man guilty of theft after a fairly lengthy trial.

In speaking to sentence, defence counsel was very eloquent. "You see that young lady in Court, Your Honour", he said, "she has been here throughout this trial". He then explained that she and the accused had formed a beautiful relationship, and since that time the accused had completely changed his life around, and now he was going to become a great man. His future prospects were now virtually unlimited. Such a relationship was of Divine Origin, and, it was submitted, the magnificent destiny which now lay ahead for this reformed young man should not be lightly interfered with. "Please do not destroy it all by sending him to jail", he pleaded.

With heavy heart, I informed counsel that since this was the fourth similar offence committed by the accused I must send him to jail for 30 days. I then left the courtroom and the Clerk told me what transpired thereafter.

The young lady said to the accused "Give me a call when you get out."

And the accused replied "I sure will; by the way sweetie, what's your last name?"

(It happened to Judge Marshall — again! — Editor)

Last week I received a written request for an extension of time to pay a fine.

The Information was attached. It showed that a month before I had fined the accused $100.00 for theft of condoms from a local drug store. I had given him a month to pay the fine.

On the request for extension for time to pay form, under the words "reason for request" the accused had written "my wife got pregnant".

Retirements:

1. His Honour
   Judge Joffre A. Archambault,
   Ottawa,
   effective January 31, 1985,
   (appointed April 5, 1962)
2. His Honour
   Judge Donald C. Smith,
   Smith Falls,
   effective February 7, 1985,
   (appointed May 8, 1938).
   President of the Association
   1973-1974,
   Honorary Life Member.
3. His Honour
   Judge Edward W. Kenrick,
   Haileybury,
   (appointed January 7, 1955).
   President of the Association
   1962 - 1963.
4. His Honour
   Judge Henry R. Howitt, M.C.,
   Guelph,
   effective June 6, 1985,
   (appointed February 15, 1957).

Deaths:

1. His Honour
   Judge Joffre A. Archambault,
   Ottawa,
   appointed April 5, 1962,
   retired January 31, 1985,
   Honorary Life Member,
   deceased April 17, 1985.

1985 Annual Meeting and Education Conference:

The 1985 Annual Meeting and Education Conference of the Ontario Provincial Judges Association (Criminal Division) was held from May 29th to June 1st at the Westin Hotel, Toronto, Ontario.

The meeting was chaired by His Honour Judge Roderick D. Clarke of Thunder Bay with His Honour Judge Samuel E. Darragh as Conference Chairman with Senior Judge Charles Scullion and Judge Robert D. Reilly arranging the educational program.

The education program of the Conference included the following:

1. Ministry of Correctional Services and the Young Offender presentation by the Deputy Minister, James Keenan, Assistant Deputy Minister, John Duggan, and Mr. Donald Page and Mr. Len Crispino of the Ministry.
2. Discussion and demonstration of breath and blood testing presented by Mr. Douglas M. Lucas and staff of the Ontario Centre of Forensic Sciences.
3. Discussion of the Introduction of the Equality Provisions of the Charter of Rights by Mr. Justice Tarnopolosky of the Ontario Court of Appeal.
4. Discussion of Search and Seizure by Mr. Casey Hill of the Crown Law Office, Ministry of the Attorney General.
5. An overview of the recent amendments to the Criminal Code — Drinking and Driving — by His Honour Judge Robert D. Reilly.
6. Discussion of blood sample amendments by His Honour Judge J. Peter Coulson and His Honour Judge John D. D. Evans.

The ladies enjoyed luncheon and a tour of the Harbourfront area on Lake Ontario, as well as a luncheon and fashion show at the Westin Hotel.

Other guests included The Honourable Alan W. Pope, Q.C., the Attorney General for Ontario.

The formal dinner and dance was held on Friday evening, May 31st, and special guests included:

The Honourable W.G.C. Howland, the Chief Justice of Ontario, and his wife, Mrs. Patsy Howland.

His Honour Chief Judge Frederick C. Hayes, Chief Judge of the Ontario Provincial Court (Criminal Division) and his wife, Mrs. Betty Hayes.

His Honour Chief Judge H. T. G. Andrews, Chief Judge of the Ontario Provincial Court (Family Division) and his wife, Ms. Judy Ryan.

His Honour Association Chief Judge Edward Langdon, President of the Canadian Association of Provincial Court Judges, and Mrs. Langdon.

M. le juge Roger Vincent of the Quebec Judges Association and Madame Vincent.

His Honour Judge Richard Donald, President of the Ontario Family Court Judges Association, and Mrs. Donald.

His Honour Judge Gordon Chown, Immediate Past President of the Ontario Provincial Court Civil Division Association, and his wife.

Mr. Claude Thomson, Q.C., President of the Canadian Bar Association, and his wife, Mrs. Thomson.

Mr. Robert Wells, Q.C., Vice-President of the Canadian Bar Association, and his wife, Mrs. Wells.

Mr. Paul French, counsel for the Association, and his wife, Mrs. French.

At the dinner, His Honour Chief Judge Frederick C. Hayes presented Honorary Life Memberships on their retirement to:

His Honour
Judge William G. Cochrane, Goderich

His Honour
Judge Thomas J. Graham, Toronto

His Honour
Judge Henry R. Howitt, Guelph

His Honour
Judge Edward W. Kenrick, Haileybury

His Honour
Judge James R. H. Kirkpatrick, Kitchener

The new Executive Committee and officers were elected for 1985-1986.

PRESIDENT
Judge C. E. Lewis ..... Toronto

PAST PRESIDENT
Judge R. D. Clark ..... Thunder Bay

1st VICE-PRESIDENT
Judge R. D. Reilly ..... Kitchener

2nd VICE-PRESIDENT
Sr. Judge C. Scullion ..... Toronto

SECRETARY
Judge D. V. Latimer ..... Milton

TREASURER
Judge W. S. Sharpe ..... Milton

MEMBERS OF EXECUTIVE
Sr. Judge P. R. Belanger ..... Ottawa
Judge W. W. Cohen . Sault Ste. Marie
Judge W. P. Hryciuk ..... Toronto
Judge S. W. Long ..... Toronto
Judge A. K. Meen ..... Toronto
Judge C. R. Merredew ..... Pembroke
Judge P. R. Mitchell ..... Hamilton
Judge L. T. Montgomery ..... Orillia
Judge J. D. R. Walker ..... London

REPRESENTATIVE TO C.A.P.C.J.
Judge R. D. Clarke ..... Thunder Bay

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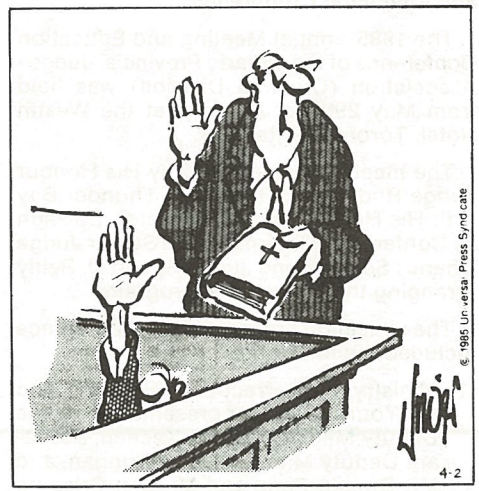

"Is this your eye-witness?"

THE KINDLY JUDGE AND THE LADY BARRISTER

A Learned Judge, on Arriving at the Royal Courts of Justice to Deal with the Non-Jury list, was Told by his Clerk that one of the Counsel for the First Case was Miss Mary Poppleton, the Newly-Called Lady Barrister. The Judge, who was Kindly, Large-Minded, and an Upholder of the Cause of Women, Determined that he would Give Miss Poppleton a Good Run. When the Judge took his Seat he Felt that the fragile Creature with a Squeaky Voice and a Mild Blue Eye who Appeared for the Plaintiff would Need all his Help. For a Robust and Fierce-Looking Individual was Representing the Defendant.

The Case Began. Whenever he had a Chance the Judge gave the Mild Blue Eye a Leg-Up. And he Made a Point of Treating the Fierce-Looking Advocate on the Other Side with Some Severity. Ultimately (though not without Misgiving) the Judge Gave Judgment for the Mild Blue Eye with Costs. The Fierce-Looking Opponent, who had Cross-Examined with Effect and Delivered a Pointed Legal Argument, Promptly Asked for a Stay of Execution.

When the Court Adjourned the Judge's Clerk Expressed the View that he had been Rather Hard on Miss Mary Poppleton. The Judge Angrily Enquired what the Clerk Meant, and Learned, Too Late, that he had been Misled by Appearances. It seemed that the Mild Blue Eye was a Young Man who had steered the University Eight to Victory Three Years Ago, and that the Fierce-Looking Counsel for the Defendant was Miss Mary Poppleton. But Happily no Harm was Done. For Miss Mary Poppleton Promptly went to the Court of Appeal and had an easy win.

Moral: *Spot the Lady.*

THE JUDGE WHOSE APPEARANCE TERRIFIED THE PUBLIC

On the Opening Day of the Michaelmas Sittings no Figure in the Judicial Procession was More Awe-Inspiring than that of Mr. Justice Mildew. His Lordship's Grim Countenance Struck Terror into All Beholders. As he Walked Up the Central Hall of the Royal Courts of Justice, Barristers, Managing Clerks, Office-Boys, and Flappers Shook in their Shoes and Thanked their Stars they were not Standing before him in the Dock. It was Clear to All of them that Mr. Justice Mildew had Something of Grave Importance on his Mind, and that he was Thinking Deeply. They were Right. Mr. Justice Mildew was Reflecting, as the Procession Started, that the Champagne at the Lord Chancellor's Breakfast was (for a Light Wine) Uncommonly Good, that it was a Pity he had not Taken a Third Glass, and that he had Better Find Out Where it Came From before he went Circuit. Half-way up the Hall, Mr. Justice Mildew was Wondering whether the Port at Forty-Two Shillings (of which a Considerable Quantity has been Left Over from the Last Circuit) would be Good Enough for the Bar when they Came to Dinner, and was Sincerely Hoping that his Brother Judge would be a Bit more Lively than his Colleague at the Recent Assizes. And during the last Five Yards, when his Expression became Particularly Fierce, Mr. Justice Mildew was Internally Debating whether he should Purchase a "Wilfred" or a "Gollywog" for his younger Grand-Daughter, and Trying Hard to Remember whether her Birthday was on Tuesday or Wednesday.

Moral: *Look Impressive.*

Forensic Fables

The following excerpts from **Forensic Fables by 'O'** (1961)
are reproduced with kind permission
of Butterworth & Co. Ltd. (Publishers — London).

THE TACTFUL MAGISTRATE AND THE MUCH-RESPECTED COLLEAGUE

A TACTFUL Magistrate who had Dined Very Comfortably the Night Before with a Much-Repected Colleague (to Meet Several Old Friends) Took His Seat Punctually at Ten-Thirty to Deal with the Business of the Day. The First of the Drunk-and-Disorderlies to Meet his Astonished Gaze was his Host of the Last Night. It Seemed that, After Taking Leave of his Guests, the Much-Respected Colleague had Continued his Merry-Making Elsewhere into the Small Hours of the Morning. His contact with the Police had Occurred in the Neighbourhood of Vine Street at Three O'clock A.M. It likewise Appeared that in a Burst of Mistaken Confidence he had Given his Real Name and Address to the Officer in Charge. The Situation was Distinctly Awkward. The Tactful Magistrate did not Lose his Head. Sternly Addressing the Culprit as John Marmaduke Bundlepump (a Name which Occurred to him on the Spur of the Moment), he Told the Much-Respected Colleague that his Attempt to Conceal his Identity, Based as it was upon a Superficial Facial Resemblance to a Public Servant of Unblemished Reputation, was as mean as it was Dishonest; and that in All the Circumstances he Could not Inflict a Smaller Penalty than a Fine of Ten Pounds. The Defendant must also Pay the Doctor's Fee. He Hoped it would be a Warning. It was.

Moral: *Be Prepared for Everything.*

THE JUDGE WHO CLOSED HIS EYES

A Judge of Considerable Experience was Trying on a Summer's Day a Case of Unexampled Dullness. Counsel for the Plaintiff was Opening. He Continued to Cite to the Judge a Multitude of Authorities, including the Well-known Decision of the House of Lords in The Overseers of Criggleswick v. The Mudbank-super-Mare Docks and Harbour Board Trustees and Others, *and the Judge was Satisfied that he had Never been So Bored in the Whole Course of his Professional Life. At about Three-Thirty P.M. the Judge Allowed his Attention to Wander Slightly, as he Felt Sure that Counsel for the Plaintiff would not have Finished his Opening at the Rising of the Court. Five minutes Later he Fell into a Gentle Doze Which Soon Developed into a Profound Sleep. He was Aroused at Four O'clock by the Sudden Cessation of Counsel's Droning and the Cries of "Silence" with which the Usher Preluded the Coming Judgement. The Case was Over, and the Judge had no Notion what Counsel for the Defendant had been Talking about. Was the Judge Dismayed? Not at all. He Assumed a Look of Lively Intelligence and Said that, as he had Formed a Clear Opinion, no useful purpose would be Served by his Reserving his Judgment. He Admitted that During the Course of the Excellent Arguments which had been Addressed to him his Opinion had Wavered. But, After All, the Broad Question was whether the Principle so Clearly Stated in the House of Lords in* The Overseers of the Parish of Criggleswick v. The Mudbank-super-Mare Docks and Harbour Board Trustees and Others *Applied to the Facts of the Present Case. On the Whole, despite the Forceful Observations Made on Behalf of the Defendants, to which he had paid the Closest Attention, he Thought it Did. It was Therefore Unnecessary that he should Discuss a Variety of Topics which, in the View he Took, Became Irrelevant. There would, accordingly, be Judgement for the Plaintiffs, with Costs; but, as the Matter was One of Great Public Interest, there would be a Stay of Execution on the Usual Terms. The Judgment, which was Appealed Against in Due Course, was Affirmed both in the Court of Appeal and the House of Lords; the Lord Chancellor Commenting, in the Latter Tribunal, on the Admirably Succinct Manner in which the Experienced Judge had Dealt with a Complicated and Difficult Problem.*

Moral: *Stick to the Point.*

Justice Informed

"A Report Based on the Recent Experience of the Judiciary and Corrections Committee of Manitoba"

— by Professor Brian Keenan,
Professor of Philosophy
University of Winnipeg, Chairman.

Editor's Note:

Professor Keenan has a specific interest in the administration of justice and the rule of law.

Preface:

In the autumn of 1979 as a result of conversations among some members of the Provincial Judiciary, Corrections, Bar, the Office of the Solicitor General and the Canadian Association for the Prevention of Crime it was decided that a committee be formed in Manitoba to explore ways of fostering communication within the criminal justice system. The committee which came to be known as the Judiciary and Corrections Committee began and today remains an informal body having no official mandate nor responsibilities to any department of government. The independence implicit in its informal structure is in no small way a factor in the Committee's broad acceptance and success. For what has evolved over the past four years is a significant addition to the institutional practice of Manitoba's Judicial system. It is the belief of the members of the Committee that the Manitoba experience could be helpful in other provinces. In order for justice to be blind to partial interests it must have the integrity that comes from a clear vision of its practical function in society. It is our hope that the following remarks will to some degree, further this worthy objective.

Introduction

Although the need for yet another bureaucratic instrument is far from obvious enhanced communication itself requires no special justification. For although the law demands stability and consistency over time the legal world is not static. New individuals are continually assuming positions in the system and however intelligent and well-trained these people may be they inevitably have a partiality that comes from their previous professional or educational background. Thus for example the perspective of a competent judge is not that of a successful trial lawyer, nor do the theoretical possibilities envisaged by a criminologist match the practical options open to a corrections officer. Moreover in an age in which narrow specialization has been wrongly equated with expertise there is a distressing tendency to over value the importance of a particular element of the system of justice to the detriment of the whole. The corrective for the unrealistic and distorted picture that too often results in contemporary circumstances is, at least in part, the broad overview that comes from informative general discussion.

From new legislation on such as the recent "Bail Reform Act" and the "Young Offenders Act" changes in procedures and policies emerge which ramify throughout the system and which are not initially predictable. Hence although it might seem that the responsibility to inform personnel rests with government its ability to do so at the time of legislation is quite limited. Rather it seems reasonable that those persons directly affected by the developmental and unpredictable results of legislation are those best qualified to report such developments. This strongly suggests that any forum for communication and discussion should be initiated and maintained by those immediately affected by change rather than by a central governmental authority.

Beyond changes in personnel and legislation the need for ongoing communication within the criminal justice system results from developments outside of it. Because of demographic and technological change for example the pattern of criminality is not constant. Of even greater significance is the apparently increased attention being paid to the shifting public perception of legal institutions. The gauging of public opinion is fraught with difficulty and even if it could be determined with accuracy it would be

indefensible for the legal system to display a supine and pragmatic responsiveness to whim or rancor. But to be aware of public concerns and to address them when legitimate is, in light of the purpose of the law, a demand of principle.

The custom, tradition and constitution of Canada places the legislative power with parliament and therefore the judiciary properly sees its role as giving effect to legislation rather than initiating it. This is in marked contrast with the self-perception of many judges in the United States of America. The institutional integrity of both legislature and courts demands this. This division of function is of course consistent with the courts providing definitive criticism of Legislation for as technical legal experts they are the appropriate evaluators of legal craftsmanship. Additionally, it could be argued, the courts are in their decisions quasi-Legislative and in any case do provide real guidance to Legislators beyond the realm of technique. What these claims acknowledge is not that judges make the law but rather that legislating is and must be an ongoing process of reciprocity not of hierarchial fiat.

The point of this brief excursion into Canadian jurisprudence is simply to note that when Legislation is so viewed the activities of a committee such as ours are neither unwarranted nor uncalled for.

II. The Judiciary and Corrections Committee of Manitoba

(a) Structure and Membership

As stated above the Committee grew out of exploratory discussions with the organizational task falling to a senior provincial court judge who contacted a representative crosssection of people. That the task of constituting the intial committee fell to this individual was fortunate not the least because he is energetic and personable but also because of his position he had both the knowledge of the legal community and the status within it to attract committee members. The original committee was composed of approximately a dozen people. Following the initial meeting the chairmanship was handed over to a university professor who because of his professional interest in legal theory was a member. The rationale for this was that the chair should be occupied by one having no direct or occupational connection with any of the several elements of the justice system.

The Committee now meets on a more or less regular monthly basis. The continuing membership is smaller than originally (8) and includes representatives of the judiciary, crown, federal, and provincial corrections. It is noteworthy that although invited there has been no regular representation by defence bar and because of a decision by the Committee's founder. There is no regular police representation.

What then has eventuated is an informal standing committee composed primarily of judges and corrections officials. The name of the committee eventually settled on mirrors the reality of present committee memberships.

(b) Activities

In keeping with the original reason for its existence the committee's work has been to facilitate communication and information exchange rather than to initiate or direct it. In this regard the Committee has arranged a number of seminars during which a variety of topics including bail, sentencing alternatives and sentencing rationales have been discussed.

It might be thought that the justification of the committee consists in these semi-annual seminars. These are indeed the visible product of the Committee's deliberations but potentially of at least equal importance is the process of deliberation provided by the regular meetings of the Committee. For the value of the opportunity to discuss informally one's professional concerns in such a setting should not be discounted. Indeed it may be that this unintended benefit is at least as significant as that provided by the semi-annual seminars.

III. Summary Observations

Given the informal structure of the Committee the continuity provided by a continuing active core membership has been important for its cohesion and dynamism. This fortunate outcome is largely the contingent result of the personalities involved. To ensure that this occurs would require some structure for the continuous and orderly replacement of members. Indeed the Committee might be improved by actively promoting a sequentially changing membership. This would over time involve an increasing number of people from the legal community in the work of the Committee.

Although contentious issues that might have required the intervention of a neutral

dispositions.

Why was Section 133(1)(b) of the Code left as an offence under the Young Offenders Act? I believe it was to give effect to another policy behind this legislation — to retain the right of private prosecutors to swear Informations under this section. Only the Crown may lay an Information under Section 33(1) of the Young Offenders Act. It appears that the Crown here prefers to charge under Section 133(1)(b) of the Code because it is a more expeditious way to bring the young person before the court.

I am satisfied that the Youth Court has exclusive jurisdiction over Richard Toutsaint and over the Information in question. Toutsaint should have been detained in Kilburn Hall after he was apprehended and then brought before the Youth Court. Unfortunately, because of this jurisdictional problem and the vagaries of court schedules, he has been in remand in the adult correctional centre for about six weeks — albeit with the consent of his counsel.

For clarification, and to answer the question I posed early in this decision, I have found that a context which requires that a person who is 16 years old or over to come within the definition of "young person" in Section 2 of the Young Offenders Act is one in which that person, who has been found guilty of an offence under this Act, is subject to a disposition with respect to that offence, and is charged with a failure to comply with the terms or conditions of that disposition.

whole structure of the Young Offenders Act must be considered, starting with Section 3 which sets out in detail the policies or principle underlying the Act. Briefly, Section 3 states that, although young persons must bear responsibility for their criminal actions and be given rights similar to those accorded adult offenders, they should not always be held accountable in the same manner or suffer the same consequences as adults, and that the Act must be liberally construed as to give effect to all of these principles.

The scheme of the Young Offenders Act emphasizes several special consequences which flow from contraventions of the Act. Young persons must be kept separate and apart from adult offenders during detention and custody — except in exceptional circumstances. The uses to which Youth Court records may be put are limited and must be accounted for and/or destroyed within certain time frames so that the consequences of youthful illegal acts will not follow throughout adult life. Per al sanctions may follow the knowing bre of the above provisions.

Perhaps the most relevant and radical departure from the adult scheme of sentencing is the control given to Youth Court Judges over their dispositions. Section 20(5) ensures that a disposition shall continue in effect after a young person against whom it is made becomes an adult.

Section 24(4) contemplates that there may be occasions when a young person over 18 years old (note that he is still within the definition of "young person") should be transferred to an adult facility — but even then the review provisions of the Act continue to apply.

Part XX of the Criminal Code, dealing with fines, punishments, etc. is excluded from the operation of the Young Offenders Act by Sections 20(8) and (9) of the Act, as are similar provisions in Part XXIV of the Code (with a few exceptions not relevant here).

The definitions of "inmate" in the **Parole Act** and "prisoner" in the **Prisons & Reformatory Act** have been amended and these amendments are designed to ensure that parole boards or corrections officers do not in effect overrule judicial dispositions.

In Section 52 of the Young Offenders Act, the Crown is given an option to proceed by way of summary conviction or indictment as it is in the Code, but the young person may not elect out of the jurisdiction of the Youth Court — more evidence of a policy of continued supervision of young offenders by Youth Court Judges.

Almost all offences in the Criminal Code are also "offences under this Act". The most notable exception is that the breach of the terms of a probation order, an offence under Section 666(1) of the Code, is not an offence under the Young Offenders Act.

The extensive review procedures found in Section 28 to 34, inclusive, leave the ultimate control over dispositions in the Youth Court, except following successful appeals or Crown applications under Section 16 of the Young Offenders Act.

Section 33(1) of the Young Offenders Act gives the Crown the right to swear special Informations where a young person

a) wilfully failed or refused to comply with a disposition or any term or condition thereof, or

b) in the case of committal to custody under paragraph 20(1)(k) escaped or attempted to escape custody.

Upon receipt of such an Information, the Youth Court Judge is required to intitiate a review and is empowered to impose any appropriate disposition listed in Section 20.

This section, which replaces breach of probation offences in 666(1) of the Criminal Code, omits a specific reference to Section 133(1)(b) of the Code which makes being unlawfully at large before the expiration of a prison term, without lawful excuse, a criminal offence. The manner in which Section 33(1)(a) was drafted leaves it open to several interpretations. It could be argued that the Crown does not have the option of proceeding by way of a Section 33(1) Information for a breach of Section 133(1)(b) of the Code. But Balla and Lilles in **The Young Offenders Act — Annotated**, at page 209, say that 33(1) governs all custodial dispositions. I am of the opinion that this is the correct interpretation. The wilful failure of a young person to return to an open custody facility after being given a "day pass" is surely a breach of a condition of an "open custody" disposition. (See Section 35(1) and (4) Y.O.A.).

The fact that the Act deals with custodial and non-custodial dispositions in one subsection is a strong indication that it was intended that Youth Court Judges have similar powers of control over both types of

chairman have not arisen the possibility of them recommends such a chairman. Also the credibility of the Committee is enhanced if it is and is seen to be important with respect to elements of the judicial system.

The Committee's minimal financial requirements have helped to ensure its autonomy and thus make possible its impartial stance.

In sum both the virtues and the defects of the Committee can be traced to the same sources. Because of its autonomy and informality it provides an impartial and credible forum. And it is for these reasons that the informational seminars held under its auspices have been so widely received. But its lack of structure, specific responsibilities and mandate, concommitants of its autonomy and informality might have resulted in indirection but for the personalities of its founding members.

IV. Recommendations

The members of the Judiciary and Corrections Committee believe that the Committee is worthy of emulation by other provinces. Given the need for information exchange such a vehicle would be undesirable only if its activities were redundant or an unwarranted intrusion, or if the cost of its operation were excessive. In terms of the rationale stated in the introduction above and on the basis of the experience of the Committee it has been found to be none of these.

An alternative to the present Committee might be that a respected person from the legal community, perhaps a retired judge, under contract with the Correctional Services of Canada would act as a liaison between the Service and judicial bodies. In many respects this option is similar to the Manitoba experience because the most active member of the Committee is just such a person. But such an alternative does not provide the benefits derived from the ongoing deliberations of a standing committee. Also whether justified or not this arrangement might be viewed with suspicion by some.

R. v. Toutsaint

Editor's Note: *The following decision will be of interest to those dealing with the Young Offenders Act. The decision was affirmed on appeal without written reasons.*

HER MAJESTY THE QUEEN

— and —

RICHARD JOHN TOUTSAINT

DECISION

This is a decision upon a preliminary motion challenging the jurisdiction of the ordinary criminal court which is based upon the following Agreed Statement of Facts:

1. The Accused, RICHARD JOHN TOUTSAINT, was born on June 13, 1968.
2. On May 9th, 1984, the Accused pleaded guilty to four counts of Break, Enter & Theft pursuant to Section 306(1)(b) of the Criminal Code of Canada and two counts of Break & Enter With Intent pursuant to Section 306(1)(a) of the Code.
3. The guilty pleas were entered before Youth Court Judge R. Moxley in Stony Rapids, Saskatchewan.
4. The Accused was given a disposition of one year to be served in open custody commencing May 9th, 1984.
5. The Accused commenced serving his sentence at Kilburn Hall in Saskatoon, Saskatchewan, on or about May 9th, 1984.
6. On June 13th, 1984, the Accused turned 16 years old.
7. On July 19th, 1984, the Accused was out on a pass from Kilburn Hall and was to return on that day. He did not return.
8. The accused was arrested by the R.C.M.P. in late August, 1984 and was charged with the adult criminal offence of being Unlawfully at Large pursuant to Section 133 (1)(b) of the Criminal Code of Canada.
9. The Accused was placed in custody in Saskatoon Correctional Centre on or about August 28th, 1984 and has been remanded at the said Correctional Centre since that date.

Under these circumstances the Crown claims that it had the option of laying an Information under Section 133(1)(b) of the Criminal Code or under Section 33(1) of the Young Offenders Act. Had the Crown proceeded under the latter Act, Toutsaint, despite his age, would have been a young person over whom the Youth Court had jurisdiction. But the Crown argues that since Toutsaint was 16 years old when the alleged offence occurred and it chose to proceed by way of the Criminal Code offence, the ordinary court now has jurisdiction over him in so far as this offence is concerned.

Section 2(1) of the Young Offenders Act defines a young person. For our purposes the relevant part of that definition is to be found in the last lines:

> "Young person" means a person who is or, in the absence of evidence to the contrary, appears to be
>
> a) twelve years of age or more, but
>
> b) under eighteen years of age or, in a province in respect of which a proclamation has been issued under subsection (2) prior to April 1, 1985, under sixteen or seventeen years, whichever age is specified by the proclamation,
>
> and, where the context requires, includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act.

A mere reading of the words in the passage following "or" does not disclose what is meant by them. Toutsaint has been, in the past, "found guilty of an offence under this Act" but it is obvious that neither the previous finding of guilt nor the fact that he is still subject to a Youth Court disposition would give the Youth Court jurisdiction over him on all circumstances. The Young Offenders Act provides for concurrent adult sentences and Youth Court dispositions in Section 24(15). So in what context is it required that he come under the definition of a young person?

I am satisfied that to determine this the

Any person wishing to make a submission should obtain and consult the Order-in-Council as well as the provisions governing the presentation of submissions. Submissions not complying with these provisions will not be accepted.

Inquiries and communications should be addressed to the Commission's office:

In Person:
5th Floor
Jackson Building
122 Bank Street
Ottawa, Ontario

By Mail
P.O. Box 2399
Postal Station 'D'
Ottawa, Ontario
K1P 5W5

By Telephone
(613) 996-2059

doit consulter le décret créant la Commission et obtenir aussi auprès de la Commission la liste des conditions de présentation des mémoires. Un mémoire ne respectant pas ces conditions ne sera pas accepté.

Toute demande de renseignements et toute communication doivent être adressées au bureau de la Commission:

En personne
5e étage
Edifice Jackson
122, rue Bank
Ottawa, Ontario

Par courrier
B.P. 2399
Succursale "D"
Ottawa, Ontario
K1P 5W5

Par téléphone
(613) 996-2059

TANK McNAMARA® **by Jeff Millar & Bill Hinds**

The Young Offenders Act

The Wonderful World of Section 56

— *by Judge Barry D. Stuart*
Whitehorse, Yukon

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SECTION 56

Part I - Introduction

The importance of s. 56 of the Young Offenders Act can only be appreciated in light of several factors. A vast majority of juvenile cases are processed on the basis of an admission of delinquency; children when confronted by persons in authority readily confess. This may no longer be the case since:

a) Under the Young Offenders Act, the penalties are significantly more severe than under the Juvenile Delinquents Act. Consequently, parents and children, particularly those acting on the advice of lawyers, may be more reluctant to readily co-operate with the police.

AND

b) The Young Offenders Act, especially s. 11 and 56, promotes a greater and earlier involvement of counsel. Acting in the best interests of their client, lawyers are apt to advise both parents and young persons against making incriminating statements.

AND

c) Statements are often the primary, if not the only basis of the prosecution's case against juveniles. The pre-conditions of admissibility established by s. 56 will offer many new and yet unexplored grounds to exclude statements.

AND

d) The percentage of major crimes committed by persons eighteen years of age or younger is significant and appears to be increasing.

The combination of these factors will precipitate more litigation over the admissibility of statements and result in many more trials under the Young Offenders Act than under the existing Juvenile Delinquents Act.

If the Young Offenders Act is strictly interpreted, an unworkable, inflexible and inequitable code of rules will evolve. The case for a liberal interpretation which will constantly explore means of recognizing the statutory objective in a flexible and reasonable manner is ably stated by Rand, J., in **Boudreau vs. The Queen** (1949), 94 C.C.C. 1, at page 9:

> "It would be a serious error to place ordinary modes of investigation of crime in a straight-jacket of artificial rules; and the true protection against improper interrogation or any kind of pressure or inducement is to leave the broad questions to the Court."

Section 56 has left many "broad questions" to the Courts.

Part II - The Bare Bones

Scope of s. 56

Section 56(1) incorporates the existing law of admissibility of statements.

The special statutory protective measures of s. 56 are limited by s. 56(2) to statements by young persons that are:

a) oral or written,

AND

b) given **by** the young person,

AND

c) **to** a person in authority.

Criteria Of Admissibility

For statements defined by s. 56(2) to be admissible, they must be:

a) voluntary - in accord with the existing law of confessions.

AND

b) preceded by the caution set out by s. 56(2)(b),

AND

c) given by the young person **after** he has had a **reasonable opportunity** to consult with an appropriate adult or counsel,

AND

d) given by a young person in the presence of the person consulted, or after the young person has had a reasonable opportunity to have the person consulted present when the statement is given.

Exceptions

Waiver - it is possible by written waiver for the young person to waive his right to consult counsel or an appropriate adult, and his right to have the person consulted present when giving a statement.

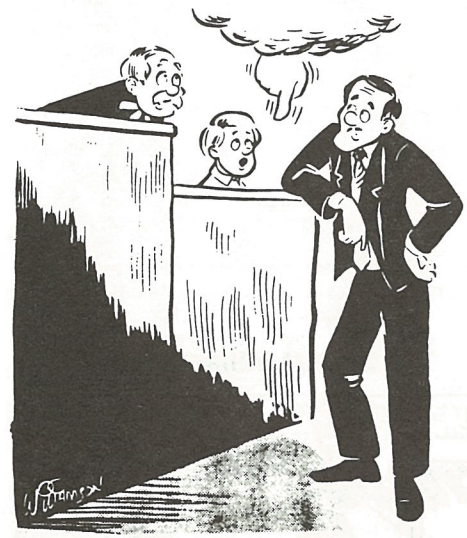
Spontaneous - some statements are excluded from the protective provisions of s. 56(2) if the statement is:

— oral,

— voluntary,

answers to all the problems associated with our sentencing process. We do recognize, however, that sentencing is the most highly visible and crucial stage in our criminal justice process and it is our hope and endeavour to include in our report some concrete recommendations which would assist judges in the difficult task of determining just and appropriate sentences; make the sentencing process and sentencing decisions more understandable to the public and criminal justice professionals alike; and ultimately, enhance the equity and credibility of the laws and practices of sentencing in Canada.

Interested persons and organizations have been invited to submit written information and views on these matters on or before April 15, 1985. Persons or organizations who file written submissions may be invited by the Commission to meet for consultation or to provide additional information during May and June 1985.



Justice is mine: In a recent Ontario case, the judge, trying to decide whether a 10-year-old boy should be sworn as a witness, asked the lad if God would punish him if he told a lie. The boy said yes, the judge asked him what God would do, and the boy replied "He'd send me to my room."

public comme par les professionnels si un énoncé des objectifs et des principes pouvait faire l'objet d'un consensus et être utilisé dans tout le Canada? Est-il possible ou opportun d'avoir des pratiques en matière de détermination de la peine qui soient similaires dans toutes les régions d'une même province ou dans toutes les provinces du Canada? Les Cours d'appel offrent-elles suffisamment de directives aux juges de première instance en matière de détermination de la peine? Les pratiques concernant la négociation du plaidoyer devraient-elles faire l'objet d'une reconnaissance officielle et en conséquence être soumises à des contrôles ou devraient-elles être légalement prohibées? Des modifications devraient-elles être apportées aux procédures actuelles de mise en liberté (par exemple, la libération conditionnelle et la surveillance obligatoire)? Devrait-il enfin y avoir une forme quelconque d'examen et de contrôle judiciaires sur la libération conditionnelle et sur les autres dispositions permettant la libération avant l'échéance d'une sentence d'incarcération?

Ces questions représentent quelques-unes des préoccupations majeurs soulevées par le mandat de la Commission. L'ampleur du mandat est considérable et les membres de la Commission sont pleinement conscients qu'ils ne peuvent offrir de réponses détaillées à tous les problèmes afférents a la détermination de la peine. Nous reconnaissons cependant que la determination de la peine constitue l'étape la plus visible et la plus importante dans le processus de la justice pénale. Nous espérons, à cet égard remplir pleinement notre mission et d'inclure dans notre rapport des recommandations concrètes qui assisteront les juges dans la tâche difficile de déterminer des peines équitables et appropriées et qui rendront plus intelligibles, pour le public comme pour les professionnels de la justice pénale, le processus de détermination de la peine et les décisions qu'il implique. Nous espèrons enfin que ces recommendations augmenteront l'équité et la crédibilité des lois et des pratiques régissant la détermination de la peine au Canada.

Les parties interessées ont été invitées à faire parvenir par écrit leurs renseignements et leurs opinions sur ces questions au plus tard le 15 avril 1985. La Commission pourra, si elle je juge opportun, rencontrer des personnes ou des organismes que auront déposé un mémoire, pendant les mois de mai et de juin 1985.

Toute personne présentant un mémoire

its mandate. The Order-in-Council provides for the appointment of nine members, the majority of whom are members of the judiciary (representing all levels of courts engaged in sentencing) and four Commissioners representing other areas of expertise in criminal justice.

The Commission has a two year mandate and is required to report on its findings and recommendations in May 1986.

Given the broad nature of the mandate and the two year time-frame within which the Commission must complete its work, a number of issues had to be resolved at an early stage. First, issues of capital punishment and dispositions under the **Young Offenders Act** are not included in the Commission's mandate and will not be dealt with. Secondly, the Commission intends to restrict its study to offences contained in the **Criminal Code**, the **Narcotic Control Act** and Parts III and IV of the **Food and Drugs Act**.

There remains a host of questions and issues that the Commission must address in fulfilling its mandate. Maximum penalties represent the sanction available for the worst imaginable case of the particular offence rather than the typical or average case. Would it be helpful to have a reclassification of offences, with a different set of maximum penalties more in line with the seriousness of the offence and the most severe sentences which are normally imposed? Do those few mandatory minimum penalties in the **Criminal Code** and **Narcotic Control Act** serve a useful purpose? Would sentencing be better understood by laypersons and professionals alike if a statement of purposes and principles could be agreed upon and adopted for use throughout Canada? Is it possible or advisable to have similar sentencing practices in all parts of a province or across all provinces in Canada? Are Courts of Appeal providing enough guidance in the area of sentencing to judges of trial courts? Should the practices of plea-bargaining be formalized and controlled or legally prohibited? Should changes be made to existing release procedures (e.g. parole and mandatory supervision)? Should there be some form of judicial review and control over parole and other early release provisions?

These questions represent a few of the central concerns raised by the Commission's mandate. The scope of the mandate is broad and members of the Commission fully appreciate that they cannot provide detailed

pouvaient être abordées en recommandant directement des changements législatifs, il a toutefois reconnu qu'il serait opportun de créer un organisme spécifiquement mandaté d'examiner plus en profondeur les questions importantes ci-haut mentionnees ainsi que d'étudier le rapport entre ces questions et d'autres aspects de l'administration de la justice pénale.

La Commission canadienne sur la détermination de la peine est une Commission royale d'enquête et elle est à ce titre entièrement indépendante dans l'exercice de son mandat. Le décret créant la Commission prévoit la nomination de neuf commissaires, la majorité de ceux-ci étant choisie parmis des membres de la magistrature affectés à tous les niveaux des tribunaux impliqués dans la détermination de la peine. Les quatre autres commissaires pratiquent dans d'autres domaines d'expertise en justice pénale.

La Commission a un mandat de deux ans et doit présenter un rapport énonçant ses conclusions et ses recommandations en mai 1986.

Compte tenu de l'ampleur de son mandat et de la période de deux ans à l'intérieur de laquelle la Commission doit compléter son travail, un certain nombre de questions ont du être tranchées dès le départ. Premièrement, les questions concernant la peine capitale et les dispositions ayant trait à la **Loi sur les jeunes contrevenants** ne sont pas incluses dans le mandat de la Commission et ne seront pas examinées. Deuxièmement, la Commission entend restreindre son étude aux infractions contenues dans le **Code criminel**, dans la **Loi sur les stupéfiants** et dans les parties III et IV de la **Loi des aliments et drogues**.

Outre les questions précédemment enumerées, il subsiste un ensemble de problèmes que la Commission doit aborder afin de remplir son mandat. Les peines maximales représentent la sanction prévue pour le pire cas imaginable d'une infraction particulière plutôt que le cas typique ou moyen. Serait-il utile de procéder à une reclassification des infractions, avec une autre série de peines maximales qui corresponderaient plus étroitement à la gravité des infractions et aux peines les plus sévères qui sont normalement infligées dans la pratique courante des tribunaux? Les quelques peines minimales obligatoires prévues par le **Code criminel** et la **Loi sur les stupéfiants** sont-elles utiles? La détermination de la peine serait-elle mieux comprise par le grand

- spontaneous,
- made by the young person to a person in authority, and
- made **before** the person in authority has had a **reasonable opportunity** to comply with the requirements of providing the caution set out in s. 56(2).

Duress

Any statement may be inadmissible if the young person can satisfy the Judge that the statement was made under duress.

These are the bare bones of the Young Offenders Act Section 56. Simple . . . alas, things are not always what they appear to be. Closer scrutiny of these provisions, particularly in light of other relevant statutes and laws, blurs the otherwise clear import of s. 56. In dissecting each part of s. 56, I hope many questions are either academic, nonsense, or problems of straw that prudent and pragmatic judicial interpretation will resolve. I have tried to raise probable, possible and even impossible issues that might be sprung upon the Courts by resourceful, imaginative or desperate counsel, thereby forewarning and forearming all of us of both real and fanciful issues.

The paper neither answers nor raises all the questions intensive litigation will generate.

Part III - Major Problem Sources

In exploring the impact of s. 56, the following sources of problems must be considered:

1) **Existing law** - Despite the perennial clarification of the law on confessions by the Supreme Court, there remains sufficient uncertainty to produce an annual bumper crop of litigation over confessions. The inter-mingling of s. 56 with the existing law will undoubtedly inspire more confusion and ultimately, more litigation.

2) **Discretionary provisions** - Within s. 56, there is abundant scope for judicial interpretation. The Courts are directly called upon by this section to provide meaningful guidelines for the scope of "reasonable" — a term qualifying many of the protections afforded by s. 56.

3) **Related sections of the Young Offenders Act** - How will the other sections of the Young Offenders Act mesh with the protection provided by s. 56? Section 3(2) directs the Act to be liberally construed to the end that young persons will be dealt with in accordance with the broad principles of s. 3(1). This mandate will govern the relationship of s. 56 with the sections of the Act which provide pre-hearing rights or establish powers to affect the liberty of the young offender.

4) **Proposed Evidence Act** - Since s. 56(1) incorporates the law on confessions, when or if the new Evidence Act is proclaimed, it will significantly affect s. 56. The proposed new Evidence Act's definition of a statement, of what is voluntary, of a person in authority and the exclusion of specific statements from the rules of confessions will pose some interesting questions, particularly in light of s. 3(2) of the Young Offenders Act which directs a liberal interpretation of its protective provisions.

5) **Charter of Rights** - It can be argued that s. 56 embellishes the rights guaranteed by the Charter. In the very least, the Charter will define the minimum standard in interpreting the scope of the protections afforded by the Young Offenders Act.

Part IV - Underlying Rationale for the Admissibility of Statements

The underlying rationale in Canada for the rules on the admissibility of confessions is, to most interpreters, primarily based on concern for the truthfulness of the statement. **If the statement is proved to be voluntary, it is likely to be true.** The exclusivity of this approach, has been persistently challenged by those who believe any action that brings the administration of justice into disrepute is a relevant consideration in determining the admissibility of a confession. This perspective has been frequently and articulately espoused by Quebec Courts; **R. vs. Demers** (1971), 13 C.R.N.S. 338; **R. vs. Turcotte** (1979), 9 C.R. 354; **R. vs. Guerin** (1980), 14 C.R. 1 and **R. vs. Feeny** (1982), 24 C.R. 143 see dissent of Monet, J.A. See also Lamer, J., in **Rothman vs. The Queen** (1981), 59 C.C.C. (2d) 30 at page 74; and Maloney, J.A., Supreme Court and Civil Liberties (1976), 18, C.R.L.Q. 202 at 206.

The perspective of Lamer, J., in **Rothman vs. The Queen,** the Charter and s. 56 of the Young Offenders Act suggests, at least for young offenders, that the traditional rationale underlying the Canadian Courts' approach

to confessions may be expanded to include notions of due process and respect for the administration of justice.

Protection against self-incrimination and concern for the fairness of the proceedings to the accused, are germane concerns in England, **R. vs. Sang** (1979), 2 A.E.R. 1222, in New Zealand, **Nanisoin vs. The Queen** (1971), N.Z.L.R. 296, and in Scotland, **Chalmers vs. H.M.A.** (1954), J.C. 66. The provisions of s. 56 and the Charter may attract Canadian Courts to the jurisprudence of these common law countries.

In the United States, the question of voluntariness is treated as an integral part of due process. Only statements rendered in compliance with established standards of due process are admissible in American Courts. American Courts also exclude statements secured by actions which foster disrespect for the administration of justice.

Implicit in many Canadian cases dealing with statements by juveniles, is a concern for the fairness of proceedings to the juvenile; an approach strikingly similar to the American approach (Refer **R. vs. R.** (1972), 9 C.C.C. 274 at 275.)

These cases appear to be the foundation for many of the protective notions inherent in s. 56 of the Young Offenders Act. Consequently s. 56 leads us closer to the American approach. The relevant U.S. jurisprudence may be persuasively instructive for Canadian Courts. Without access to American authorities, I have been unable to venture into the most productive resource of pending problems for the life and times of s. 56. I recommend that my meager resources and thereby deficient depiction of the problems of s. 56 be augmented by exploring case histories of similar provisions in American jurisprudence.

Part IV - The Scope of Section 56(1)

Section 56 incorporates the general law of confessions. Changes in the law of confessions in adult court must be constantly woven into the scheme of s. 56. For juveniles the general law of confessions has been moulded by the concern that juveniles are less mature, less confident, and more apt to be intimidated by the criminal justice process.

In this regard it may be possible to question whether the proposed Evidence Act's provisions on confessions will apply to young offenders?

Evidence Act s. 5:

> "A Court is not required to apply part i) to iv) and vi) to viii) in a proceeding to determine or protect the best interests of a person who needs the protection of the Court **by reason of his age** or physical or mental condition." (Emphasis mine)

This section, I submit, is intended to apply solely to proceedings involving custody, maintenance of children, and child welfare matters. The declaration of principles in s. 3 of the Young Offenders Act marks a significant departure from the objectives of the Juvenile Delinquents Act. The Young Offenders Act is clearly designed to require young people to account for their behaviour. There is little in the declaration of principles, or in any other part of the Young Offenders Act to invite the application of s. 5 of the proposed Evidence Act.

It may be argued that the proposed Evidence Act will not apply to proceedings under the existing Juvenile Delinquents Act, as s. 3(2), 12, 20(5), and 38 of the Juvenile Delinquents Act could handily be employed to establish that this Act designs proceedings **to protect the best interests of young persons who need the protection of the Court by reason of their age.** (But see **A.G.B.C. vs. Smith** (1968), C.R.N.S. 277 S.C.C.)

Part VII - Specific Scope of Section 56(2)

The statement must be:

a) "oral or written",

AND

b) "**given** by a young person".

AND

c) "**to a person** in authority.

The specific terminology of s. 56(2) may arguably exclude all of the following statements from the special protective measures of s. 56(2)(b).

1) **Conduct** - The law of confessions applies to conduct by an accused that might reasonably be interpreted to constitute an assertion, if the conduct occurs in the presence of a person in authority. The Oxford Dictionary definition of statement, common usage and particularly the modifying terminology "oral and written" combine to suggest that conduct which

Challenges In Sentencing Reform

Un Défi À Relever Dans La Réforme De La Détermination De La Peine

The Establishment of the Canadian Sentencing Commission

— by Judge J. R. Omer Archambault

(Judge Archambault is a Judge of the Provincial Court of Saskatchewan, and is Chairman of the Canadian Sentencing Commission.)

The Canadian Sentencing Commission has invited judges, lawyers and other professionals involved in criminal justice to take an active role in the reform of laws and practices of sentencing in Canada. An advertisement published in every daily newspaper in the country invites laypersons and professionals alike to submit a written brief on the various aspects of sentencing that the Commission is requested to examine including: maximum and mandatory minimum penalties prescribed in the **Criminal Code**; possible approaches to sentencing guidelines within the Canadian context; the relationship between guidelines and prosecutorial discretion, plea and charge negotiation, parole and remission; and finally, information systems necessary for the use and updating of guidelines.

The Canadian Sentencing Commission was established on May 10, 1984 by Cabinet upon the recommendation of the Minister of Justice, to address those areas of sentencing reform that could not be dealt with in a comprehensive manner in Bill C-19, the **Criminal Law Reform Act, 1984** (which subsequently died on the order paper). Although the federal government felt those issues of procedure, evidence, and range of sanctions could be addressed through immediate proposals for legislative change, it recognized the desirability of creating a body to give more in-depth consideration to the important issues listed above as well as to oversee and study the relationship between sentencing issues and other aspects of the criminal justice system.

The Canadian Sentencing Commission is a Royal Commission of Inquiry and as such is fully independent in the exercise of

La Creation de la Commission Canadienne sur la Détermination de la Peine

*- Par le Juge J. R. Omer Archambault**

*(*J.R. Omer Archambault, juge de la Cour provinciale de la Saskatchewan, est président de la Commission canadienne sur la détermination de la peine.)*

La Commission canadienne sur la détermination de la peine a invité récemment les juges, les avocats et les autres professionnels impliqués dans l'administration de la justice pénale à prendre une part active dans la réforme des lois et des pratiques portant sur la détermination de la peine au Canada. Une annonce publiée dans chaque quotidien du pays convie le grand public comme les professionnels à présenter un mémoire sur les divers aspects de la détermination de la peine que la Commission est requise d'examiner. Soient, entre autres: les peines maximales et les peines minimales obligatoires prescrites par le **Code criminel**; les différent méthodes d'aborder l'élaboration de lignes directrices régissant la détermination de la peine compte tenu du contexte canadien; le rapport qui devrait exister entre ces lignes directrices et le pouvoir discrétionnaire des instances de la poursuite, les négociations portant sur les chefs d'accusation et les plaidoyers de même que la libération conditionnelle et la réduction de peine prévue par la loi; enfin, les systèmes d'information nécessaires à l'application et la mise à jour des lignes directrices.

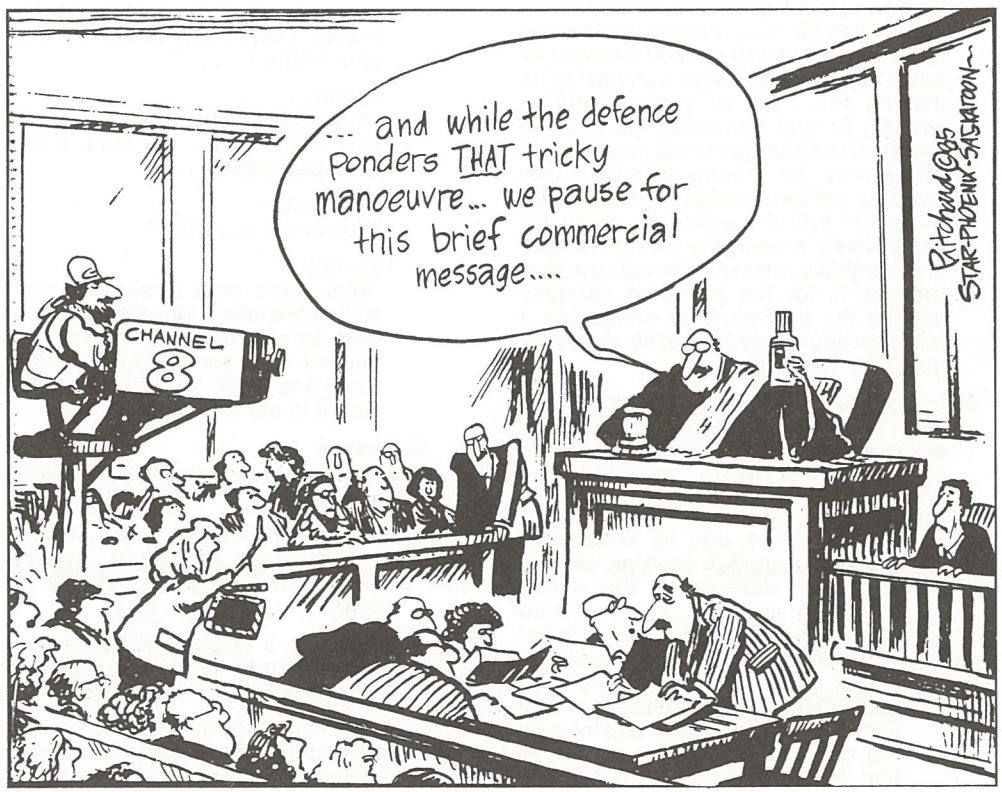
La Commission canadienne sur la détermination de la peine a été établie le 10 mai 1984 par le gourvernement fédéral sur la recommandation du Ministre de la justice, dans le but d'aborder les aspects de la réforme de la détermination de la peine qui ne pouvaient être traités de manière compréhensive dans le projet de loi C-19, la **Loi de 1984 sur la réforme du droit pénal** (ce projet de loi est subséquemment mort au feuilleton). Quoique le gourvernement fédéral ait pensé que les questions relatives à la procédure, à la preuve et à la gamme des sanctions

say anything more until my lawyer gets here" have on the waiver and on any prior subsequent incriminating statements made by Johnny?

Suppose, in the presence of Johnny's lawyer, Cst. Smith and Johnny, Johnny's Dad said to the lawyer, "Johnny has told the truth to the Police and told them he was involved . . . isn't that so?" to which Johnny simply hung his head.

1) Has Johnny adopted the statement of his father by his conduct? If so, is the statement admissible despite any deficiencies in fulfilling the requirements of s. 56(2)(b)?

2) Does it make any difference if Johnny's adoption by his conduct of a statement made by a third person occurred before Johnny had been detained or arrested?



may be interpreted as a statement, is not included within the scope of s. 56.

2) **Adopted statements of third parties** - A statement of a third party adopted by the accused through his conduct, silence, or words, in the presence of a person in authority, is governed by the law of confessions. (**R. vs. Baron** (1976), 31 C.C.C. 525.) Unless the adopting behaviour of the young person is specifically directed to the person in authority, these adopted statements may be beyond the reach of the protective provisions of s. 56, as such statements are not **given** by a young person **to a person** in authority, but rather are given to a third party in the presence of a person in authority.

3) **Silence** - To be significant, the silence of the accused must occur in circumstances where the only reasonable inference is that an ordinary person would deny the statement or action made in their presence if it were untrue. (**R. vs. Christie** (1914), 10 C.R. App. R. 141.) If the young person has been given the warning, or has been arrested or detained, the evidentiary value of silence is questionable. (**R. v. Cripps** (1968), 3 C.C.C. 323; **R. vs. Eden** (1970), 3 C.C.C. 280; **R. vs. Gerald** (1948), 32 C.R. App. R. 132; see also **R. vs. Gouedarov** (1974), 16 C.C.C. 238, where after arrest, the silence of the accused in special circumstances was proof of his adoption of a statement made by a co-accused.) The silence of an accused person in the U.S. has no evidentiary significance after his arrest. (Refer Macquire, **Adoptive Admissions,** 14 MASS. L.Q. 62; see also **Self-Incrimination,** Ratushny, E., (1978), 20 C.R.L.Q. 312 at 328. See dissenting judgment of Dubin in **R. vs. Robertson** (1975), 29 C.R.N.A. 141.)

Due to the inherent ambiguous character of silence, Courts are prudently very reluctant to accord any relevance or probative value to silence (**R. vs. Harrison** (1945), 86 C.C.C. 166; **R. vs. Sayegh** (1982), 69 C.C.C. 84; **R. vs. Dreher** (1952), 103 C.C.C. 321). Regardless of the blatant incriminatory implications of comments made in the presence of young people, the intimidating influence of persons in authority on young persons may be particularly significant in fostering stoney silence.

However, incriminating silence may **not** be covered by s. 56 as silence is not within the ordinary usage and common definition of an oral and written statement.

4) **Statement to a person not in authority in the presence of a person in authority** - A statement made by the accused to a third party, in the presence of a person in authority, may be covered by the laws of confessions. (**R. vs. Demesquito** (1915), 24 C.C.C. 407.) As the statement is **not** given to a person in authority, such confessions may be outside the protective provisions of s. 56(2).

Can such confessions be eluded?

There is, however, much to suggest that the protective reach of s. 56 may include all of these 'special' confessions.

1) The definition of statement in the context of the present law of confession includes conduct, silence, and behaviour by conduct or words which adopts the statements of third parties. There is no express statutory intention in the Young Offenders Act to establish a special and restricted meaning of "statement". In the absence of a statutory definition in the Young Offenders Act of "statement", and as s. 56(1) specifically incorporates the law relating to confessions, the better view is that the terminology of s. 56 does not create a restricted definition of "statement".

2) Section 3(2) of the Young Offenders Act provides:

> "This Act shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out in subsection 1."

Section 3(1)(e) states:

> "Young persons have rights and freedoms in their own right, including those stated in the Charter of Rights and Freedoms or in the Canadian Bill of Rights, and a particular right to be heard in the course of and to participate in the process that leads to decisions that affect them, and young persons **should have special guarantees of their rights and freedoms.**"
> (Emphasis mine)

These sections suggest any doubt in the reach of the rights accorded to a young person should be interpreted in favour of recognizing "special guarantees of

their rights". Accordingly, a liberal construction of s. 56 would embrace all statements considered in law to be confessions.

To exclude certain kinds of confessions from the protective reach of s. 56, is inconsistent with the expressed purpose of the Young Offenders Act, and the need to do so is not apparent.

3) The proposed Evidence Act s. 2, defines statement to mean:

> "Statement - means an oral or recorded assertion and includes conduct that could reasonably be taken to be intended as an assertion."

When the Evidence Act becomes law, it may be argued that s. 56 by incorporating the law of confessions thereby adopts this statutory definition of statements. (Note also s. 57 of the proposed Evidence Act.)

The simple solution to defining the scope of s. 56, is to provide a straight-forward, all-encompassing statutory definition of "statement".

Part VIII - Persons In Authority

Objective Test

Anyone, whom it is reasonable for the accused to believe, could affect the course of the prosecution is a person in authority. (**Rothman vs. The Queen** (1981), 57 C.C.C. 30 S.C.C.) This subjective test, when applied to young offenders will undoubtedly result in enlarging the category of persons who might reasonably be believed to be persons in authority. People who might questionably be regarded as persons in authority in adult court might readily be found to be persons in authority for adults may, in certain circumstances, be found to be persons in authority for young offenders, especially for very young offenders.

Teacher Parents

A teacher, especially a Principal (**R. vs. McLintock** (1962), C.L.R. 549), or parents (**R. vs. Midkoff** (1980), Canadian J. of F.L. 306), may reasonably be considered persons in authority in some circumstances where the age, factual setting and nature of the offence warrant. The Courts, in acknowledging the vulnerability of young persons to intimidation and suggestion, must be prepared to take a liberal view of who might be regarded by a young person to have influence over criminal proceedings affecting him.

Counsellors Employers

Scout, Cub, Brownie and Girl Guide leaders may be seen to have such authority. Employers, camp counsellors, coaches, school bus drivers, anyone who might have, and reasonably be seen to have authority to affect the fate of a young person in trouble with the law, could be a person in authority. The subjective test addresses the particular facts of each case. An adult in one case may be found to have the prerequisite authority, and yet in another case, not to have such authority.

Probation Officers

A Probation Officer may be considered a person in authority. There is good reason for the Court not to admit any statement given to a Probation Officer in order to protect the role of the Probation Officer (**R. vs. Archer** (1963), 41 C.R. 344; Kaufman, **Admissibility of Confessions,** (3rd ed.) at page 102.)

Section 14(10) of the Young Offenders Act renders inadmissible any statement made by a young person int he course of preparing a pre-disposition report. However, such statements are admissible if the proceedings involve a transfer to adult Court (s. 16), sentencing (s. 20), a review of dispositions (s. 28, s. 32), a review of incarceration (s. 29), and matters before Review Boards (s. 30 and 31).

What if the young person made incriminating statements to the Probation Officer **during** the preparation of the pre-disposition report? Such statements are not excluded by s. 14 of the Young Offenders Act from hearings to sentence the young offender or transfer him to Adult Court. In both cases, evidence may be required to prove points in issue. For instance, the gravity or seriousness of the offence may depend upon the premeditation, motivation or degree of involvement of the young offender. Statements touching these matters made to the Probation Officer may be instrumental in determining an appropriate sentence or whether the young offender will be transferred to Adult Court. The same policy considerations excluding those statements in a trial should exclude them in any proceedings affecting the young person's liberty.

Social Workers

Social workers, as in the case of Probation

voir dire, as in **R. vs. Park**, the Court should be satisfied the decision to waive a **voir dire** is clearly expressed and that counsel understood the ramifications of a waiver and made an informal decision to waive the necessity of a **voir dire**. The ability to waive a **voir dire** is established by s. 58 of the Young Offenders Act.

3) If the young offender, after being properly cautioned, states he will not give any statement until he has seen his lawyer, can he, after consulting a parent provide an admissable statement? **R. vs. Morin** (1982), 64 C.C.C. 90 Alta. C.A. at page 94 may be authority to suggest the right to consult with a lawyer is not deprived if the accused does not **assert** his right before giving a statement. Will this case be applied to young offenders who cannot be expected to aggressively assert their rights with the same vigour as adults?

4) In the face of repeated assertions by the young offender that "I did nothing wrong", is there any onus on an adult or lawyer to indicate to the young offender that they have reasonable grounds to believe he is involved in an offence? Some young people may naively believe by denying the need to consult a lawyer or adult, they will be more convincing in making the case they "did nothing wrong". Should the police indicate the nature of the charges being investigated to prompt the young offender into realizing the seriousness of the situation he faces? Will the police, in doing so, just as likely prompt the young offender to incriminate himself? Perhaps the best practice is for the police to carefully explain the procedure of consulting a lawyer or adult regardless of his professed guilt or innocence.

5) In travelling through the world of s. 56 and the inanity, if not insanity, of many of the issues raised by this paper, bear in mind the following example and questions.

> Johnny Jones, age 16, is taken to the Police station by Cpl. Munro. The Cpl., enroute to the police station, gives Johnny the caution required by s. 56(2)(b). Johnny's parents arrive at the police station three hours later. After Johnny has consulted with his parents, Johnny's father calls in Cst. Smith and informs the Cst. his son wishes to talk to him. Mr. Jones advises the Cst. that he and his wife will be back in a few minutes after getting some coffee and calling a lawyer.
>
> Johnny commences to give Cst. Smith an oral statement.
>
> Cst. Smith -
> "Do you want to talk to me about anything Johnny?"
>
> Johnny -
> "Yes, I did it. I want to tell you so you'll know the truth. I want to get it over with as soon as I can, and get out of here."
>
> Cst. Smith -
> "Just a minute Johnny, do you want your father to be here?"
>
> Johnny -
> "No, I'm ready to talk now. I just want to get it over with. I have already talked to him."
>
> Cst. Smith -
> "O.K. Johnny, but first I should caution you that anything you say may be used against you and that you have the right to consult a lawyer. I would like to explain what your rights are . . . "
>
> Johnny -
> "Yes, you're right. I'll wait until Dad gets the lawyer . . . I think that is what Dad wants . . . "
>
> Cst. Smith -
> "You can if you wish."
>
> Johnny -
> "Well, there were three of us there so it might take a long time . . . we all have to wait for our lawyers and I guess I don't see what the hurry is since the stuff we stole is safely stored in our garage."

Questions

1) Is the statement to Cst. Smith spontaneous?

2) Is the statement to Cst. Smith excluded because it was Cpl. Munro and not Cst. Smith who gave Johnny the caution pursuant to s. 56(2)(b)?

3) Was there a reasonable opportunity given to Johnny to make his statement in the presence of his parents?

   If there had been a written waiver pursuant to s. 56(4), what effect does a request by Johnny that "I better not

circumstances constituting duress arise from a collection of many diverse and inextricably related factors, some of which were inadvertently or advertently caused by persons in authority. If the circumstances do not give rise to the law of confessions then the contribution of persons in authority in creating any compulsion should be taken into account in determining whether s. 56(5) applies.

8) **What guidelines will govern the exercise of the Court's decision?** - If the statement is made under duress but its truthfulness is not in doubt and there is nothing to bring the administration of justice into disrepute, then the statement should not be excluded. Conversely, any significant doubt respecting the statement's veracity caused by duress should be fatal to the question of admissibility.

Conclusion

Undoubtedly, many ingenious interpretations of s. 56 will be pressed upon the Courts in the search for the reach and meaning of this section.

Three guiding lights to sanity and viable interpretations are available to the Court to mitigate against superficially attractive arguments that may render the statutory scheme unworkable.

1) **Common Sense** - The statutory protections of s. 56 are primarily extracted from case law and from an awareness of the vulnerability of most young persons. These sources of s. 56 are molded by common sense; that same common sense, if applied in interpreting the Act, will avoid the pitfalls that excessively legalistic renderings of the Act will foster. Common sense will find a viable balance between all competing interests. In this respect, one is harkened to remember the philosophy of Kiss. (**K**eep **I**t **S**imple **S**tupid.)

2) **Annotated commentary of the Young Offenders Act** - The annotation by N. Bala and H. Lilles, available from the the Solicitor General, is excellent, comprehensive, and is replete with informative, useful comments on the law.

3) **The Act** - Most of the provisions of the Young Offenders Act reflect careful and well thought out approaches to very complex questions. The obvious compromises in the Act to resolve competing interests may, as expected, provoke some initial difficulties. Nevertheless, on the whole, the intent of the Act is clear and the provisions are straight-forward. The Act provides a relatively smooth ride through a highly emotionally charged and intensely difficult contemporary problem — the prevention and resolution of criminal behaviour by young persons.

Part XVI - More Puzzles

Some other problems to keep you up late at night . . . .

1) The proposed Evidence Act provides the onus of proof upon the Crown in a **voir dire** held to determine the admissibility of statements, will be proof on a balance of probabilities. A contest of credibility between the evidence of the police and the evidence of the young person will, in many cases determine whether the preconditions of s. 56(2) have been met. In light of the proposed reduced onus of proof incumbent upon the Crown, what new concerns might be warranted in light of the existing concerns that Police tend to reinforce each others' testimony? (Refer to Kaufman, **Admissibility of Confessions**, (3rd Ed.), at page 80; **R. vs. Nowell** (1948), 32 C.A.R. 173; **R. vs. Bass** (1953), 37 C.A.R. 51 at 58; **Authentication of Statements to the Police,** 1979, Criminal Law Review, page 6.)

2) A **voir dire** will be necessary to establish that the caution required by s. 56(2) was properly administered and understood. A **voir dire** will also be necessary to establish a waiver (s. 56(3)) is properly executed. If the young person can waive the **voir dire**, will the Judge have the option to:

   a) accept the waiver of a **voir dire?**

   OR

   b) hold a **voir dire?**

   OR

   c) inquire directly of the young person or his counsel to assess counsel's understanding of the significance and basis of the underlying factual setting warranting a waiver?

See **R. vs. Park** (1981), 2 S.C.R. 64. If the young person is allowed to waive the

Officers, may disburse privileges or exercise control over proceedings affecting a young person, and thereby might reasonably be considered persons in authority (**R. vs. Harrinanan** (1977), 40 C.R.N.S. 231.)

Informants

In some cases, the Informant is not a Police Officer, but the victim of the offence. The victim as an Informant, is a person who can affect the proceedings. (**Rimmer vs. The Queen** (1969), 7 C.R.N.A. 261; **Downey vs. The Queen** (1976), 38 C.R.N.S. 57.) This may be particularly important in dealing with young offenders as often the victim will confront the young offender. These confrontations may involve admissions, apologies and agreements for restitution.

Friends

A friend of the young offender who acts as an agent of the Police and offers inducements or threats in the presence of a person in authority, may be deemed a person in authority (**R. vs. Dequito** (1915), 24 C.C.C. 407, see also Kaufman, **Admissibility of Confessions,** (3rd ed.) at page 89.)

As a result of the subjective test approach to persons in authority (**R. vs. Rothman**), if a person has no authority but is believed by the accused to have authority, the law of confessions applies (**Perras vs. R.** (1973), 111 C.C.C. 499 S.C.C.). Conversely, if a person has authority, but the accused is not aware of that authority, the law of confessions does not apply.

Thus, a confession given to a person thought to be a fellow prisoner, but who is actually a peace officer, does not involve the law of confessions (**R. vs. Pettipiece** (1972, 7 C.C.C. 133).

One reading of s. 56(2), especially the French version, raises the possibility that **any** statement given to a peace officer is subject to the requirements of s. 56.

French version of s. 56(2):

> "La declaration oraie ou ecrite faite par un adolescent a un agent de paix . . . n'est pas recouvable en preuve entre l'adolescent sauf si les conditions suivantes sont complees."

This provision may be read to establish two distinct categories of persons, namely police officers, and others who **in law** are persons in authority. Accordingly, the subjective test of a person in authority does not apply to police officers. If the person is a peace officer it is immaterial who the young offender believed the peace officer to be. The protective provisions of s. 56 would always apply in the case of police officers.

Peace officers could not disguise their authority and thereby deny the statutory protections afforded young persons. This approach, stresses a special protection for young persons, and reflects a concern for fairness, not just for the truthfulness of the statement. Further, this view of s. 56(2) accords with the mandate of s. 3 to liberally construe the Act to the end that young persons have special guarantees of their rights.

For young offenders, there are sound policy foundations to preclude the police from using, the tricks or disguises police employ to secure confessions from adults.

This interpretation of s. 56(2) may be denied by reading into this section the general law of confessions which regards peace officers only as persons in authority when they are reasonably believed to be so by the accused.

The concept of a person in authority is under attack and may one day be eliminated. (See **Person in Authority Requirements**, (1981), Criminal Law Reports, 1982, and **Deokinannan vs. R.** (1969), 1 A.C. 20 at page 33, where the Court suggested the need to determine whether the person was a person in authority was questionably necessary.)

Part IX - Voluntary

Courts have always been cognizant of the special characteristics of young persons in assessing the voluntariness of their statements and have accordingly exhibited a "proper concern for their protection of the interests of juveniles". (Freidman, C.J., **Admissions and Confessions,** in **Studies in Canadian Criminal Evidence** at page 11.) The basis of this special concern is plainly stated by Thomson, J., in **R. vs. R. (No. 1)** (1972), 9 C.C.C. 274 at 275:

> "This concern emanates from an awareness of the inherent vulnerability of the child when the child is dealing with older persons in authority. Whereas an adult who comes in contact with a police officer is not to be considered intimidated by the mere fact that the officer is a man in a position of authority, the same is not

necessarily true of a child. Recognition of the child's reduced capacity of understanding his rights and his reduced capacity to protect himself in his contacts with the adult world has led the Courts to be particularly diligent when deciding whether a juvenile's statement meets the required test of voluntariness."

In addition to the general admonition to bear in mind the intimidating influences of adults upon young persons, the Courts have delineated some specific guidelines. The physical size of the police officer is not determinative. The physical setting for the taking of the statement is important. Questioning should not take place at the young person's school. Detention should not be in any place used to detain adults. Timing of the questioning is also important. The questioning should be carried out as soon as possible. (See **R. vs. Jacques** (1958), 29 C.R. 249 at 268 and **Re A.** (1979), 5 W.W.R. 425 at 428).

To deny the voluntariness of a statement the threat or inducement must emanate from a person in authority and not be self-induced. A desire to avoid getting friends into trouble, a fear of parents finding out, and the fear of arrest. (See **Hubbins vs. R.** (1982), 135 D.L.R. 244 SCC.)

Section 64 of the proposed Evidence Act will change the onus of proof of voluntariness imposed upon the Crown from proof beyond a reasonable doubt, to a balance of probabilities. Perhaps the degree of proof upon the Crown under the proposed Evidence Act ought to depend upon the seriousness of the charge. The more serious the charge, the higher the onus of proof incumbent upon the Crown. This sliding scale of proof is not a satisfactory approach, but is analogous to the varying degrees of proof imposed upon the State in child welfare proceedings. (Refer **Children's Aid Society of Winnipeg vs. Bouvette** (1976), 24 R.F.L. 350 at 352.) However, in criminal matters the manifold difficulties inherent in a sliding scale of proof are significantly more troublesome (refer discussion on page 20).

Part X - Caution Section 56(2)(b)

Many of the projected problems giving rise to a bumpy road in travelling through the requirements of s. 56(2)(b) will be ground down for a much smoother ride after several Courts, pressed by different factual settings, have travelled the route. The questions raised in this section, as in all sections, attempt to identify some of the more likely rough spots along the road.

1) **Who must give the caution to the young person?** - The person receiving the statement must be the same person who gave the caution pursuant to s. 56(2)(b). What if after the caution the young person provides an oral statement to a different person in authority than the person who provided the caution? Is the truthfulness of such a statement in question if it is otherwise proved to be voluntary? If such statements are excluded, then the underlying basis for the exclusion cannot be any concern for the truthfulness or voluntariness of such a statement, but concern for the standard of due process which has been breached. In this respect, the Canadian approach will be akin to the American approach epitomized by "Miranda".

2) **When must the caution be given?** - The caution must be given **before** the oral or written statements is made. Section 56(3) saves only oral statements, and only when they are made spontaneously before a reasonable opportunity existed to comply with the requirements of s. 56(2). As in the United States, the police in Canada will be motivated to administer the caution in a more suitable setting to ensure the young person understood the caution. Statements given either completely or partially before the caution is administered and understood, must be repeated after the requirements of s. 56(2) are fully satisfied.

   If a young person gives a statement before the provision of s. 56(2) are met, will the affect of this incriminating statement taint the voluntariness of the same statement repeated after the provisions of s. 56(2) are completed? The young person may feel bound to repeat what he has already said. In *Hubbins vs. R.* (supra), the Supreme Court of Canada at page 248 provided guidelines to assess the "tainting" effect of police conduct on subsequent statements:

   > "There can be no hard and fast rule that merely because a prior statement is ruled inadmissible a second statement taken by the same interrogating officers must be equally vulnerable. Factual considerations must govern, including

   > "A person who commits an offence under compulsion by threats of immediate death or grievous bodily harm from a person who is present when the offence is committed is excused for committing the offence if he believes that the threats will be carried out and if he is not a party to the conspiracy or association whereby he is subject to compulsion . . . "

   The shorter Oxford English Dictionary at page 619 defines duress as:

   > "hardness, severity, hardiness of endurance, firmness — harsh treatment."

   It is suggested that the duress necessary to effect the protection of s. 56(5) ought to approximate ordinary usage and the dictionary definition of the term. Duress as codified by s. 17 has evolved to serve an entirely different objective than the objective of s. 56(5). Denying criminal liability and excluding a statement involve different results and thereby different policy considerations.

   Duress in the context of civil cases is similarly of marginal relevance. (**Latter vs. Barddell** (1880), 50 L.J.K.B. 448.)

   The common law of statements given under coercion may be too broadly defined to satisfy the elements of duress required by s. 56(5).

2) **What will be the test for duress?** - Will an honest, but not necessarily reasonable belief suffice? The perception of the young offender ought to be a primary consideration, but there should be some reasonable basis for the young offender's perception of duress. Perhaps the amorphous mix of a subjective/objective approach might provide the right balance between the objective and subjective schools of thought — thereby asking if **this** young offender reasonably felt compelled to provide the statement.

   In **R. vs. Hobbins** (supra) the Supreme Court of Canada held the accused subjective interpretation of the situation will not serve to deny the admissibility of a confession unless there are other circumstances arising from police conduct that bring into question the voluntariness of the confession.

3) **What circumstances are relevant?** - To establish duress something more than the minimum conditions necessary to deny the voluntariness of a statement should be required. Duress can be constituted by psychological or physical pressures. Whatever the nature of the pressures, they must create a degree of compulsion upon the young person that it was reasonable for him to have responded in the manner he did. In addition to the specific circumstances of the young offender, and the situation which gave rise to the statement, it will be necessary to determine what reasonable options were available to the young offender to avoid giving the statement or to repudiate the statement at the first reasonable opportunity.

   A statement should not be inadmissible simply because the young person, on the strength of advice or persuasive argument was prompted to make a statement. Nor can a desire to avoid embarassing or inconvenient circumstances warrant excluding the statement. Real and unavoidable compulsion should be the stuffings of any basis for excluding a relevant statement by the accused.

4) **Are any statements not covered by s. 56(5)?** - There is nothing to preclude statements derived from conduct, silence or the adoption by behaviour of statements by third parties, from the ambit of s. 56(5).

5) **What is the onus of proof incumbent upon the young person?** - Duress should be established on a balance of probabilities. In the proposed Evidence Act, the burden of proof for legal as opposed to an evidentiary burden is proof on a balance of probabilities (s. 10, 11). If the statements are admitted, the accused may always attack the probative weight of the statements.

6) **Is a voir dire necessary?** - Any statement which is challenged by the accused ought to be subject to a **voir dire** to determine whether the Court will find duress and exercise its discretion to exclude the statement.

7) **Can a person in authority create the conditions of duress?** - The influence of persons in authority may act in concert with persons not in authority to create an atmosphere of compulsion. (Refer **R. vs. Emele** (1940), 74 C.C.C. page 76.) In some cases the Court may be persuaded to find the compelling

to Canada, he gave a statement implicating him in the murder of his grandmother. The Saskatchewan Court of Appeal characterized his statement as a "spontaneous and voluntary outburst", and thereby admissible.

The present jurisprudence on spontaneous statements as reflected in cases such as **R. vs. Dupuis** and **R. vs. Wolbaum**, pose a number of interesting questions in determining if s. 56(3) creates a distinctly different kind of spontaneous statement or merely adds the precondition to admissibility of denying any reasonable opportunity to caution. There are a number of special factors unique to young offenders that might foster special evidentiary rules for spontaneous statements given by young offenders.

Guidelines must be developed to assess whether a reasonable opportunity existed to provide a caution. With the advent of the proposed Evidence Act, will s. 56(3) of the Young Offenders Act be diminished by the exemption of the following statements from the law of confessions by s. 64 of the Evidence Act?

*s. 62(1) The following statements are admissible to prove the truth of the matter asserted:

a) a statement contained in a marriage, baptismal or similar certificate purporting to be made at or about the time of act certified, by a person authorized by law or custom to perform the act;

b) a statement contained in a family Bible or similar family record concerning a member of the family;

c) a statement of reputation as to family history, including reputation as to age, date of birth, place of birth, legitimacy or relationship of a member of the family;

d) a statement contained in a formally executed document purporting to be produced from proper custody and executed twenty years or more before the time it is tendered in evidence;

e) a statement concerning the reputed existence of a public or general right, made before the commencement of any actual or legal controversy over the matter asserted and, in the case of a general right, made by a declarant having competent knowledge of the matter asserted;

f) the statement as to the physical condition of the declarant at the time the statement was made, including a statement as to the duration but not as to the cause of that condition;

g) a statement, made prior to the occurence of a fact in issue, as to the state of mind or emotion of the declarant at the time the statement was made;

h) a spontaneous statement made in direct reaction to a startling event perceived or apprehended by the declarant;

i) a statement describing or explaining an event observed or an act performed by the declarant, made spontaneously at the time the event or act occured.

Summary

Section 56(3) should not be employed as a means of avoiding the protective measures of s. 56. The solitary purpose of the spontaneous statement exception should be to salvage incriminating statements which could not reasonably be predicated upon the young person's understanding of his rights and options. Assuredly, the Police may question anyone to determine the author of a crime, but the statutory mandate of s .56 is better served if all persons questioned are cautioned unless the questioning is perfunctory, and in no manner directs suspicion to the person being questioned.

Sensible rules will avoid imposing impractical obligations upon the Police. Diligent Police adherence to the special protection afforded young persons will deny the case for impractical and inflexible rules.

The admissibility of a spontaneous statement must be determined in a **voir dire** to the accused as discussed in **R. vs. Erven** (1979), 44 C.C.C. 76).

Part XIV - Duress - S. 56(5)

A statement made under duress may be inadmissible if the young offender who made the statement satisfies the Court the statement was given under the duress of a person who was not in law a person in authority. This section may prove to be very fertile grounds for innovative and resourceful counsel. Delineating the boundaries of duress for the purposes of s. 56(3) poses numerous interesting questions.

1) **What will be the operative definition of duress?** - In codifying the common law defence of duress s. 17 of the Criminal Code provides the following definition:

> similarity of circumstances and of police conduct and the lapse of time between the obtaining of the two statements."

Where the police conduct does not constitute a threat or a promise, but is simply deficient in administering the caution, then the tainting influence doe snot emanate from the police but from the young person who having given a statement without full knowledge of the consequences may feel obligated to repeat the statement. It may be better to ensure the intervention of counsel at this stage to cleanse the effect of the pre-caution statement. **R. vs. Kennedy** (1982), 63 C.C.C. 244 Man. C.A. (leave to appeal to S.C.C. refused) suggests initial deficiencies which do not involve threats or promises may not taint any subsequent statement once the deficiencies are rectified.

3) **How much time will be required to properly administer the caution?** - In most situations, especially if the young person relies on any of his rights, considerable time will be required to ensure all aspects of s. 56(2) are completed.

4) **Must the statement be understood or simply be explained?** - The days of the "standard" police warning are gone. The onus is upon the police to design the warning to fit the specific ability of each young offender to comprehend. It is the young person's specific capability to understand at the time the explanation is given that is relevant. Not only his age, education and intelligence, but equally the influence of drugs, alcohol, and the effect of the totality of the circumstances at the time are relevant measurements of his ability to understand. [Limited academic and intellectual attainment see **R. vs. M.** (1975), 22 C.C.C. 344 at 348, the effect of alcohol see **R. vs. Yensen** (1961), 130 C.C.C. 353 at 359.]

It is submitted the Police must establish the accused, in the circumstances prevailing when the caution was given, could understand what his rights and options were. Further, it may be incumbent upon the Police to not only establish the caution could have been understood, but was understood. This is the position taken by the Court in **R. vs. Yensen** at page 361:

> "I do not think it is sufficient to ask if a child understands the caution. I think the officer must be in a position when he comes into Court to support the statement, to demonstrate to the Court that the child **did understand the caution** as a result of careful explanation and pointing out to the child the consequences that may flow from making the statement." (Emphasis mine)

See also **R. vs. Beaulieu** (1968), 1 C.C.C. 143, and **R. vs. A.** (1976), 23 C.C.C. 537 at 540.

To meaningfully decide who to consult, whether or not to have someone prsent when making a statement, and generally to intelligently exercise the options and rights pursuant to s. 56, the young person must understand all aspects of the caution. The Court may ultimately disbelieve the testimony of a young person who states he did not understand the caution. In all cases, the Crown must establish to the Court that the young offender did understand. In each case, the particular abilities of the young person must be assessed. It is unrealistic to assume all young persons "require special treatment as some may have matured beyond their years", re **R.C.,** Toy, J., unreported, B.C.S.C., September 27, 1976.

5) **Does the degree of care in taking and giving the statement vary with the seriousness of the charge?** This possibility is raised by Fox, W. in **Confessions by Juveniles,** (1961), 5 C.R.L.Q. 457 at 463 in his discussion of **R. vs. Yensen** and **R. vs. Washer** (1947), 92 C.C.C. 218. These cases do not seem to support such a proposition. The better view is to ensure in each case, regardless of the offence, that the young person understands the consequences of providing a statement. There may be a natural tendency for the Court to be more assiduous in testing the understanding of a young person facing serious charges, but the standard ought to be the same in all cases. Too much confusion would be infused into an already difficult area to establish a scale of different standards of proof dependent upon the perceived seriousness of the offence. Until the case is completed and sentencing is addressed, the seriousness of most offences for any young person will not be fully apprec-

iated. A charge of break and enter for a first offender, if nothing is damaged or stolen, may be treated as a relatively minor offence. Another young person with a long and recent record of break and enters might be facing quite different consequences for the same offence. The Police cannot know at the outset which standard of care to employ for each young person.

But note Lamer, J., in **R. vs. Rothman** in setting out the factors to assess in determining whether the conduct in question brings the administration of justice into disrepute, listed the seriousness of the charge as one consideration.

6) **It is necessary to establish the young person understood all aspects of the caution required under s. 56(2)(b)? -** There may be a tendency to accord greater importance to certain aspects of the caution.

Each aspect of the caution is vital and a deficiency in any one aspect should deny the validity of the caution.

7) **What evidence is necessary to establish the young person did not desire to have the person consulted present when the statement was given?**

The evidence necessary to establish the young offender did not desire an adult present when he gave his statement (s. 56(2)(b)(iv)) may require a valid waiver pursuant to s. 56(4).

8) **Does it matter if the charge before the Court is different than the charge facing the accused when the caution was given?**

A caution given for a minor offence may be of no effect in determining the admissibility of a statement in a trial on a much more serious offence. (**R. vs. Bird** (1967), 1 C.C.C. 33, see also commentary **R. vs. Bird** (1967), 9 C.L.Q. 259; **R. vs. Dick** (1947), 87 C.C.C. 101; **R. vs. Kalashnikoff** 21 C.R. 296. When the police are not aware of other offences, and no attempt is made to trick the offender, then the young offender cannot be significantly prejudiced. (**R. vs. Mearow** (1982), 64 C.C.C. 145, Ont. Dist. Crt..) In the absence of any trick or special circumstances, little harm can be done by admitting statements based on cautions administered for equally or more serious charges.

The administration of a caution for one charge and the subsequent tendering of the statement for a different charge should not by itself render the statement inadmissible. The knowledge of the police at the time of other offences and the difference in seriousness of the charges in concert with other relevant considerations must be assessed in determining the admissibility of any statement.

If, unlike the initial charge, the ultimate charge before the Court does subject the young person to the risk of being raised to Adult Court (pursuant to s. 16), then a problem arises. The caution pursuant to s. 56(2)(b)(ii) may have failed to advise the juvenile that the statement could be used in Adult Court. This failure may be fatal to the validity of the caution. (**R. vs. Yensen** at page 357, **R. vs. A.** (1979), 5 W.W.R. 425 at 428.) However, this specific defect may not be material if the proceedings do not involve an application to raise the offender to adult court.

9) **Is it necessary to repeat the caution before each statement? -**

Generally, statements given at a later occasion do not necessarily require any further cautions to be administered (**R. vs. Turvey** (1971), 2 C.C.C. 401 N.S.C.A.) A delay of several days, and other factors which diminish the effect of the first caution may necessitate, in some circumstances, a further caution. The crucial question, whether the young offender understood the caution, will always focus on the time and circumstances when the statement in issue was given.

10) **What if the young offender told the Police he was 19 years of age? -**

There does not appear to be any discretionary power in the Court to deny the prosecution of s. 56(2) to a young offender who acts in bad faith to deceive the police about his age. The lie to Police cannot constitute a waiver. The protections of s. 56(2) seem to apply regardless of the conduct of the young offender.

Summary - What elements must the Police prove to satisfy the requirements of s. 56(2)(b)? - As suggested previously, the Police bear the onus of proof that the

5) **What is the effect of the waiver?** - The thrust of s. 3 of the Young Offenders Act suggests that any waiver should be carefully scrutinized and restrictively construed.

The waiver, under s. 56(4) only applies to rights established by s. 56(2)(c) and (d). If the rights granted by any other provision of the Young Offenders Act are different, to the extent of the difference, the rights pursuant to other statutory provisions cannot be waived under s. 56(4).

Note: Section 11(1) of the Young Offenders Act provides has the right to retain and instruct counsel without delay at any stage of the proceedings. Under s. 11(2) the accused must be advised of his right to be represented by counsel and given an opportunity to obtain counsel forthwith on arrest or detention. Section 10(b) of the Charter provides that the young person has the right on arrest or detention to retain and instruct counsel without delay, and to be informed of that right.

All the requirements of s. 56(2) of the Young Offenders Act may be satisfied without satisfying the requirements of s. 10(b) of the Charter and s. 11(1) and (2) of the Young Offenders Act. Accordingly, if the person consulted is not a lawyer, the requirements of s. 56(2) may be met, but the requirements of s. 11, and of the Charter are not.

The failure of the Police to ensure that the rights provided by s. 11 and by the Charter are realized, should be a significant factor in determining the admissibility of any statement. This must be so, notwithstanding the proof of a waiver pursuant to s. 56(4) or proof that all preconditions to the admissibility of a statement required by s. 56(2) have been met. The protection of s. 56 must be viewed as an additional protective measure and not as a substitute for the rights established by other statutory provisions.

Part XIII - Spontaneous Statements Section 56(3)

The statement must be oral, voluntary, made spontaneously to a person in authority and made **before** the person in authority has had a **reasonable opportunity** to caution the young person in accord with s. 56(2).

The parameters of a reasonable opportunity to caution the young person will be inextricably bound up with the determination of whether the statement is spontaneous. The reasonable opportunity requirement to caution the accused will preclude some of the present common law scope of spontaneous statements, such as the statement admitted in **R. vs. Dupuis** (1952), 104 C.C.C. 290. In this case, the Police had detained the accused before the statement was given. Within the statutory regime of s. 56(3), if the Police had sufficient evidence to detain the accused for questioning, then the police ought to have had cause, and a reasonable opportunity, to caution the accused before a statement was given. In the investigation of any crime, if the police have cause to believe the accused is involved, certainly before detaining and interrogating the accused, and perhaps even before arresting the accused, they must seize upon the first reasonable opportunity to provide a caution. The police in **R. vs. Dupis**, asked the accused how many cartons of contraband cigarettes were hidden in his wagon. Before asking an obviously incriminating question, a caution could have been given.

The underlying rationale in **R. vs. Dupuis** is captured by Cross, (3rd Ed.), at page 451:

> "Before there has been an arrest, a considerable amount of questioning must be permitted and answers encouraged though they cannot be compelled for if this were not so, a great deal of crime would be undetected."

This approach must be significantly tempered by the expressed legislative desire in the Young Offenders Act to afford special protections to young persons.

The English Judges' Rules require police to give a caution as soon as they have evidence which offers reasonable grounds for suspecting the person has committed an offence. If the young person immediately volunteers to give a statement, before the statement is received, a caution should first be given. Further, an accused who has commenced an obviously incriminating statement should be interrupted and the caution given. (Refer **R. vs. Voisin** (1918, 13 C.R. App. Rep. 89).

In **R. vs. Wolbaum** (1965), 3 C.C.C. 191, a sixteen year old youth had been in custody overnight, on the following afternoon, upon being questioned by American immigration officials in connection with his deportation

intial investigation, the Police must notify the offender's counsel and acquire his permission before speaking to the offender. (**R. vs. James** (1979), 7 C.R. 17; **R. vs. McCorkell** (1962), 27 C.R.N.S. 115 [approved by Lamer in **R. vs. Rothman**], and see **Confession - Police By-Passing Counsel**, 1981-82, 24 Crim. L.Q. 162.

Once the young offender has obtained a lawyer, the Charter, the special rights of young offenders to consult and retain counsel provided in numerous circumstances by the Young Offenders Act, the direction of s. 3 of the Young Offenders Act to provide special guarantees of the rights and freedoms, and the recognized vulnerability of young offenders should combine to motivate Courts to ensure the police acquire the consent of counsel for the young offender before any interrogation. There is good reason to make a distinction between the duties incumbent upon the police in dealing with represented young offenders and represented adults.

Summary - It is important for the Courts to establish intelligible and workable guidelines for the police and others in setting out the standards of a "reasonable opportunity to consult". Consultation involves more than just contact to satisfy the requirements of consultation. The adults consulted must be able to provide intelligent, independent, informed and confidential advice.

Part XII - Waiver

1) **Must the statement comprising the waiver be voluntarily given?** - To be consistent with the overall protective scheme of s. 56, a waiver must meet the same test of voluntariness as any confession. (Refer **U.S. vs. Indian Boy X** (1977), 565 F. 2d 585.)

2) **Is a voir dire required to determine the voluntariness of the waiver?** -The Crown must establish certain preconditions to the admissibility of a confession, equally important is the onus upon the Crown through a **voir dire** to prove certain preconditions to the acceptance of a waiver. The issues raised in a **voir dire** to determine the validity of a waiver should include the following:

   a) Was the young person apprised of the rights waived before signing the waiver statement?

   b) Was the explanation of the effect of the waiver in a language appropriate to the age and understanding of the young person?

   c) Did the explanation cover the full effect of the waiver to the young person?

   d) Did the young person understand the effect of the waiver?

   e) Were there any inducements or threats by a person in authority to secure the waiver?

   f) Was there any duress imposed by persons not in authority upon the young person to acquire the waiver?

   g) Were all statements given by the young person covered by the waiver?

   h) Was the waiver revoked? - In the United States, the "Miranda" jurisprudence suggests a waiver, if made voluntarily, intelligently and knowingly, may at any stage be revoked if the accused states a desire to speak to a lawyer. After signing a waiver, if a young person interrupts the questioning and desires to consult an adult or counsel, the waiver should be of no further effect to cover any subsequent statements, oral or written. (Refer **Edwards vs. Arizona** (1981), 451 US 477.)

3) **What must be included in the waiver?** - The young person may waive either or both the right to consult and the right to have the person consulted present when giving a statement. The waiver must specify which rights are being waived. It must be clear on the face of the waiver whether the young person has waived his right to consult all persons, or just one of the persons he is entitled to consult.

   Undoubtedly, the police will develop forms to cover all contingencies. Completion of a form should intimately involve the young person. A series of checks aside statements on a form, plus the young person's signature on the form, ought not by itself be sufficient to satisfy the requirements of s. 56(4), that the young person understood what he was doing.

4) **When can a waiver be executed by a young person?** - The waiver cannot be executed until the caution is explained and understood.

accused understood all aspects of the caution. To do so, the Police must be able to establish the following:

a) The language and methods used to explain the caution were appropriate to the understanding of the young person at the time the caution was administered.

b) Sufficient time was taken in explaining the caution.

c) The consequence of the options were known and appreciated.

d) The resources available to the young person to exercise his options were known, understood, and readily available.

e) Sufficient time without undue pressure was accorded to the young person to consider his options and to act upon his choice.

f) Any adverse influences such as drugs, alcohol, or other circumstances giving rise to unreasonable pressure, did not deny the young person's ability to understand and act rationally (re **Juvenile Delinquents Act and J.B.,** unreported, B.C.S.C., October 20, 1982).

g) The charge before the Court is the same or approximate in seriousness to charge facing the young person when the caution was given.

h) If the young person is over 14 and the offence is indictable, the caution warned the young person of the consequences of being raised to Adult Court pursuant to s. 16 of the Young Offenders Act.

i) If the first person the young person attempts to consult cannot be reached, the young person must be informed of his right to consult and be given a reasonable opportunity to contact and consult with any other person mentioned in s. 56(2)(c).

j) The person consulted was present for **all** of the statement, or the young person was given reasonable opportunity to have that person present and voluntarily decided to give the statement in the absence of that person.

There are many additional elements arising from other aspects of s. 56 that also must be proved in the **voir dire.** The requirements of s. 56(2) impose a very difficult task upon the police. The difficulties facing the police in meeting all these requirements, must be borne in mind in evaluating Police conduct in the circumstances of each case.

Certain situations may create difficult, if not impossible, circumstances for the police to attend appropriately to all the requirements of s. 56(2) in administering a caution. A practical, realistic view of what can be reasonably accomplished in each situation will avoid any miscarriage of justice in determining whether the requirements of s. 56(2) have been realized. It will always be necessary for the police to prove the young offender understood, but some balance of what is required and what is possible in the circumstances, must be sought. A failure to attend to any specific detail of the caution should not, by itself, deny the admissibility of the statement if the young offender was sufficiently informed to intelligently and knowledgeably decide what to do.

Part XI - Person Consulted

Section 56(2)(c) appears to establish a hierarchy of persons to consult. The statutory language suggests the young person must first seek the assistance of a lawyer or parent. If the parent is absent, the young person may then turn to an adult relative, and finally, in the absence of any adult relative, the young person may seek out any other appropriate adult.

1) **Can a young person always consult a lawyer?** - Although s.56(2)(b) and (c) does not require the person consulted to be a lawyer, the effect of s. 11 of the Young Offenders Act and s. 10(b) of the Charter in most circumstances suggests, despite properly meeting all requirements of s. 56(2)(b) the Police also must provide an opportunity to consult a lawyer before an admissible statement can be taken. Section 11(2) requires the Police **forthwith upon the arrest or detention of a young person to advise him of his right to be represented by counsel and provide an opportunity to obtain counsel.** Section 11(1) provides the right at any stage of the proceedings to retain and instruct counsel. Once the young person has been detained, or certainly once an arrest has been made, in addition to the rights provided by s. 56(2)(c), the young person may rely on s. 11 to immediately consult a lawyer.

   Despite a properly executed waiver under s. 56(4), a persistent or sudden desire to see a lawyer should postpone the taking of the statement, and nullify the effect of

a waiver if a statement is taken without adherence to the young person's wish to see a lawyer. If the accused is denied a request to speak to counsel, any subsequent statement in the United States is constitutionally inadmissible **Escabedo vs. Illinois** 378 U.S. 478.

2) **Can a parent be consulted as well as a lawyer?** - The implication of the statutory language is that a young person may consult with a lawyer **or** a parent but not both; it is unreasonable to assume a young person cannot consult both. The parent may not be able to properly advise his child without the assistance of a lawyer. Equally, circumstances may arise where a lawyer wishes the young person to discuss the matter with his parents before making a statement.

3) **Both or only "a parent"** - Although the statute specifies "a parent", it is unreasonable to assume the young person cannot consult both parents. An expressed and persistent unfulfilled wish to consult the other absent parent may render any statement inadmissible. The Interpretation Act, 1970 RSC, Chapter 1-23(7) states that: "words in the singular include words in the plural". This ought to provide the definitive answer.

4) **Who is an "appropriate adult"?** -Section 2(1) of the Young Offenders Act defines an adult as "a person who is neither a young person nor a child". In the absence of a statutory definition, the Courts must determine who is an "appropriate adult". In most circumstances, the choice of the young offender should be the paramount consideration in determining the appropriateness of the adult consulted. The following considerations are relevant in determining whether the adult is appropriate:

   a) The person must be deemed to be an adult by the law of the jurisdiction. While **a spouse** of the young offender who is not an adult may be served with a notice required by s. 9(3), for the purposes of s. 56(2), an underage spouse cannot be considered an adult.

   b) An adult significantly under the influence of alcohol or drugs cannot be considered appropriate.

   c) If the adult consulted was tainted by a conflict of interest through an association with the victim, Police, or for some other reason was not appropriately independent of persons in authority, the appropriateness of the adult is dubious.

   d) If the adult consulted was a stranger to the young person and manifested no interest in the needs of the young person, the appropriateness of such an adult is questionable.

   e) If the adult consulted was not chosen by the young person and was reluctantly accepted, there is cause to be concerned about the appropriateness of the adult.

   f) If the adult consulted could not adequately converse in the language of the young offender, the appropriateness of the adult cannot be accepted.

   The purpose of the consultation is to get meaningful and useful advice. Anything which brings into question the ability of an adult to intelligently, knowledgeably, and rationally advise the young person ought to raise doubts about the appropriateness of the adult.

5) **Who qualifies as an "adult relative"?** - The degrees of affinity to qualify as an adult relative are not defined. Again, any attempt to establish finite rules of affinity for the purposes of addressing litigated questions prompted by s. 56(2)(c) are easily avoided by allowing the young person to consult, subject to reasonable limitations, whatever adult he chooses. In the past, Courts have generally preferred the adult consulted to be of the same sex (**Re. A.** (1979), 5 W.W.R. 425 at 428, see also English Judges Rules).

6) **How many people can the young person consult?** - Section 11 of the Young Offenders Act and s. 10(b) of the Charter cannot be precluded by s. 56(2), and I submit retain the right of the young offender to consult with counsel no matter who else he may have consulted. In the light of s. 3(2) of the Young Offenders Act, which directs a liberal interpretation of the rights accorded to young offenders, s. 56(2)(c) ought to be interpreted to give the opportunity for the young person to consult whomever he chooses. The streetwise young person ultimately achieves this end by persisting in requesting an adult **of his choice** to be present when a statement is taken.

There may be other bonafide reasons which do not exclusively benefit the young offender for ensuring the young offender is permitted to consult whomever he chooses. In **Re R.M.**, (unreported, Ontario Provincial Court Decision) noted in Fox, W., **Confessions by Juveniles** at page 466, the juvenile believed, due to pressures from his parents, he was not free to tell the truth in their presence. Only when he was able to achieve his wish to talk to the Police in the absence of his parents, was he able to tell the truth.

7) **When must a consultation take place?** - Consultation with an adult or lawyer must take place before a statement is given. However, there is **no requirement** to ensure the young offender has consulted an adult **before** the caution is given, or for an adult to be present when the caution is given. Nor is there any requirement upon the Police to advise the adult consulted of the options or rights of the young person. Consequently, it is possible for the young person to consult an adult who has **no** understanding or appreciation of the situation.

   If the adult consulted is not a lawyer, the police should explain **to** the adult the consequences of the options available to the young offender. Where necessary, an interpreter should be provided to an adult or young offender to ensure the consultation is meaningful (**R. vs. D.M. and J.P.** (1981), 58 C.C.C. 373.)

8) **How is the consultation to be arranged?** - On the strength of s. 11(2) and s. 56(2), it is suggested that the Police must assist a young person in contacting a lawyer or an adult. They must ensure the necessary means (telephones etc.), are available to facilitate contact. Further, the police ought to assist the young person in reaching a lawyer or an adult, as the right to retain, instruct, or consult can only have meaning if there is an obligation upon the Police to facilitate that contact. (Refer **Brownridge vs. The Queen** (1972), S.C.R. 926.)

9) **What if the adult contacted does not arrive?** - If the Police are aware the person contacted by the young person is not coming or will not be coming for some time, the Police ought to ensure the young person is aware he may consult other adults. In any event, no statement should be taken until an adult who agrees to come has arrived. (Refer **R. vs. D.M. and J.P.**, supra.)

   In impaired driving offences, the accused is not entitled to await the personal attendance of his lawyer before complying with a demand. (Refer **Franklin vs. R.** (1980), 11 C.R. 353 N.S.C.A.) The particular statutory regime of impaired driving offences and the need to acquire a sample within 2 hours for a prosecution under s. 236 of the Code, embrace distinctively different concerns than the matters surrounding the taking of statements from accused persons. These differences and the protective thrust of the Young Offenders Act should be sufficient to require the police to await the attendance of counsel before questioning young offenders.

10) **How is the consultation to take place?** - When the young person is arrested or detained in custody, the police are directed by s. 9(1) to notify his parents as soon as possible. This section clearly places the onus on the police to make the contact. It is not enough for the police to provide a means for the young person to contact his parents.

    In light of the present law, reasonable opportunity to consult, at the very least includes the ability to consult in private. (**R. vs. Penner** (1973), 6 W.W.R. 94; **R. vs. Patterson** (1978), 39 C.C.C. 355.)

11) **After the young offender has consulted and retained a lawyer, can the Police interrogate the offender without the permission or presence of the lawyer?** - If the offender wishes to speak to the Police, there is no onus on the Police to seek the permission of the offender's lawyer before speaking to the offender (**R. vs. Dinardo** (1981), 61 C.C.C. 52; **R. vs. Settee** (1974), 22 C.C.C. 193; **R. vs. Stefiuk** (1981), 61 C.C.C. 280.)

    The police in the United States "tread on thin ice" when they question a suspect contrary to a request not to do so without the presence of counsel (**Williams vs. State** 566 So 2d 919). See also **State vs. Needon** 342 So 2d 642 where the Court held it was improper to violate an agreement not to question the accused in the absence of counsel.

    There is, however, some authority in Canada to suggest if the Police know the offender is represented by counsel and the questioning is not part of the