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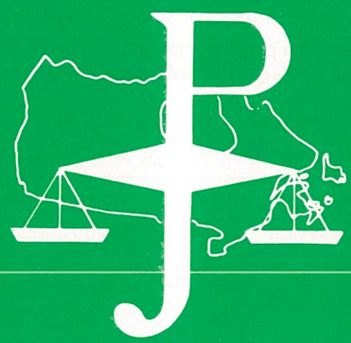

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PROVINCIAL JUDGES

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VOLUME 7, No. 2 JUNE, 1983

YOUNG OFFENDERS ISSUE

THE CANADIAN ASSOCIATION OF
PROVINCIAL COURT JUDGES

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L'ASSOCIATION CANADIENNE DES
JUGES DE COURS PROVINCIALES

The Provincial Judges Journal is a quarterly publication of the Canadian Association of Provincial Court Judges. Views and opinions contained herein are not to be taken as official expressions of the Canadian Association's policy unless so stated.

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Procureur général du Canada, communiquera sous peu avec les provinces et les territoires pour renégocier les ententes concernant l'aide juridique au criminel. Un élément important de ces négociations sera l'augmentation des fonds fédéraux aidant à mettre en application les dispositions de la **Loi sur les jeunes contrevenants** en matière d'aide juridique.

En 1972-73, le gouvernement fédéral concluait pour la première fois avec les provinces et les territoires des ententes relatives au partage des coûts de l'aide juridique dans des procédures criminelles. Ces ententes assurent des normes nationales uniformes concernant la prestation d'aide juridique à des individus financièrement défavorisés, y compris des services d'aide juridique à des jeunes aux termes de la **Loi sur les jeunes délinquants**, dans les cas plus graves. Le programme fédéral-provincial d'aide juridique dans des procédures criminelles est important parce qu'il assure à tous les Canadiens l'égalité d'accès à la justice.

M. Kaplan propose que les fonctionnaires du gouvernement fédéral, des provinces ainsi que des administrations territoriales se rencontrent le plus tôt possible pour entamer des discussions, de sorte que cette réforme législative urgente soit mise en oeuvre rapidement et équitablement.

APPOINTMENTS

Recent appointments of which the Journal has been advised are as follows:

Me Jean-Pierre Bonin of Montreal, to the Cour des Sessions de la Paix in Montreal

Me Michel Cote, of Montreal, to the Cour des Sessions de la Paix for the district of St-Francois.

M. Marc Dufour to the Cour des Sessions de la Paix in Quebec

Judge Robert T. Weseloh of Brampton to the Provincial Court (Criminal Division) of Ontario

Judge Donald S. Ebbs of Windsor to the Provincial Court (Criminal Division of Ontario.

In addition, the Ontario Provincial Judges Association (Criminal Division) notes with pride the following judges, elected honorary Life Members:

Judge Peter B. Parker, Toronto, former Chief Magistrate of the Northwest Territories from 1962-74, appointed in Ontario in 1974.

Judge Robert J. Graham of Toronto, appointed in 1967.

IN MEMORIAM

The deaths of the following judges are noted with regret:

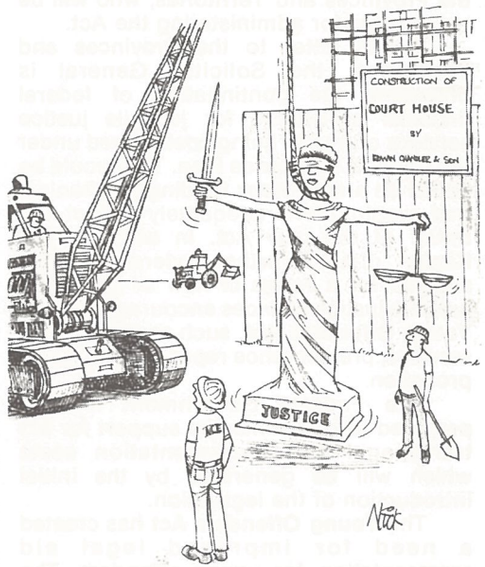
M. le Juge Remi Paul, of the Cour Provinciale du district of Quebec, on December 20, 1982

M. le Juge Jacques Anctil, on January 2, 1983

M. le Juge Emmett J. McManamy, retired from the Cour Municipale de la Ville de Montreal, on December 21, 1982

M. le Juge Redmond Dayes, of Sherbrooke, Quebec

Judge Aaron Brown, of Toronto



"The rope goes under the arms, Charlie."

Young Offenders Act: Philosophy and Principles

by Judge Omer Archambault

The author was, until recently, Director, Policy (Young Offenders) of the Policy Branch of the Ministry of the Solicitor General of Canada.

The Young Offenders Act represents one of the most significant pieces of social legislation enacted by the Parliament of Canada during the past few years. Its passage marked the end of a critical phase in the lengthy process of reform of our juvenile justice system. The challenge facing all of us now is to give proper effect to this law so as to ensure the realization of its objectives. Its impact and orientation will be very much shaped by you, representing as you do, the various key disciplines, responsible for its implementation and administration. It is, therefore, imperative that we have a common and as thorough as possible an understanding of the fundamental assumptions and principles underlying this new legislation. The declaration of principles contained in the **Young Offenders Act**, in addition to serving as a guide to its interpretation and application, as well reflects Canadian society's attitudes toward and expectations of its youth justice system.

I believe that a brief foray into the origins and evolution of our juvenile justice system will assist us in assessing the essential differences between **The Young Offenders Act** and **The Juvenile Delinquents Act** and gaining an appreciation for the new course of juvenile justice set by the **Young Offenders Act.**

HISTORY

The gradual emergence and recognition of a separate legal status in law for children as distinct from adults probably originated with the common law rule of Dilo Incapax, which had its origin in Roman and Ecclesiastical law. This rule, as part of the broader doctrine of mens rea which has been a cornerstone of our criminal law, concerned the relationship between the age of an individual and capacity to form the intent to commit a criminal act. It provided that a child under the age of seven years was deemed incapable of having a "Guilty Mind", and that a child between the ages of seven and fourteen years was presumed to lack such capacity, although this presumption was rebuttable. Once capacity was proven, however, early criminal law dealt with the child in the same way as an adult, both being subject to the same punishment.

Other early signs that children were to be afforded a status distinct from adults were evidenced by isolated acts passed in the mid 1800's and beyond to help children, to improve their welfare, and to control their unacceptable behavior. Thus, for example, the construction of special reformatories was authorized in England, the United States and Canada during the mid and late 1800's for the treatment of children and to prevent their contamination by older offenders. As another example, an act for the more speedy trial and punishment of young offenders was passed in 1857 in upper and lower Canada, which essentially gave magistrates the power to deal summarily with children, thereby protecting them from the full rigours of the criminal law, as the sentencing powers of the lower courts were less extreme. Aside from these few enactments, however, it is, for the most part, fair to say that little was done until the end of the nineteenth century to differentiate between the treatment in law afforded children and adults. As well, it should be noted that the existing legislation concerning children, generally speaking, failed to distinguish between a neglected child and an offender.

While there was little by way of law in the eighteenth and nineteenth centuries to differentiate the treatment afforded children, as distinct from adults, the western world did, however, witness the development of increasingly influential reform movements dedicated to improving the criminal justice system in general and the legal and social conditions of children in particular. The advocates of reform were concerned with the provision of public education and medical services, the protection of abused

and abandoned children and the elimination of the exploitation of child labor, as well as the reform of criminal procedures. In incremental steps throughout the 1800's and into this century, these reform influences promoted the introduction of child protection legislation, special institutions to care for children, public education, and, not insignificantly, at the turn of the century, the juvenile court system.

In the last third of the eighteenth century, a reform movement was spawned by the disciples of classical criminology in reaction to a system of criminal justice perceived as both savage and inefficient. For example, England had, in less than 100 years, increased its capital criminal offences from fifty to two hundred, and, thus, such disparate offences as murder, rape, destruction of trees, consorting with gypsies, theft and forgery . . . all were subject to the death penalty. Over and above such atrocious punishment, trials were often conducted unfairly, presumptions of guilt were made, and punishments were devised on an ad hoc basis. In many instances, the more serious the crime the less the standard of proof was applied. In reaction, proponents of the classical school advocated restraint in the face of potential criminality and punishment only after a finding of guilt. A high value was placed on the rights of the person, certainty and "due process". Classical theory reflected the belief that behavior was the result of the exercise of free will, and that criminal behaviour could be dealt with within a hedonistic framework — reward good and punish evil.

Classical criminology had a very substantial impact on the reform of the ordinary criminal process but having preceded the development of specialized juvenile court systems, its influence thereon was overshadowed by the later positivist philosophy. Nonetheless, its influence lingered on and ultimately impacted in an important way on the current reform of our juvenile justice system, particularly as greater emphasis is placed on rights, procedural regularity and responsibility.

The positivist school of criminology came into prominence in the last third of the nineteenth century in large measure as a reaction to the perceived failures of the classical model. Rejecting the freewill explanation of behaviour and the natural law conception of social order which had shaped political and legal theory during most of the nineteenth century, the positivists argued that antisocial behaviour was a manifestation of a person's response to external stimuli which transcended individual control. Thus, a combination of heredity, upbringing, social status, economic structure and biological factors impelled irrational and criminal behaviour. It followed that if such behaviour was the inevitable result of external forces, a person, and especially a child, could not be considered to be responsible for illegal behaviour and, therefore, punishment would be non-productive and even unjust.

Further the positivist school advocated an activist doctrine of intervention and, thus, not only should criminals be apprehended and dealt with but potential criminals should as well be diagnosed and treated in order to prevent crime. Accordingly the state could exercise its power of coercion over an individual and subject that individual to treatment, whether or not a criminal act had been committed, so long as the analysis of the individual's condition predicted future dangerousness. Intervention of this nature was justified on the basis that the state possessed a natural right and duty to protect itself and its members from dangerous behaviour. Pushed to its extreme, this doctrine would justify such radical measures as lobotomies for political prisoners, and castration of sex offenders, and in its more moderate application, would support indeterminate sentences, compulsory treatment and the detention of habitual and dangerous criminals.

Passage of **The Juvenile Delinquents Act** marked the creation of a distinct system of juvenile justice in Canada, which would, in large measure, reflect positivist philosophy. The preamble to the 1908 act well illustrates this. It provided:

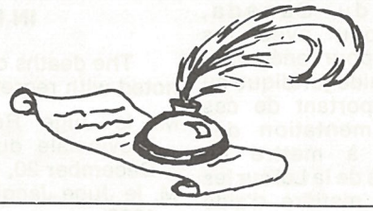
> "Whereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts."

There appeared to be little need to dwell on the distinction between "neglected" and "delinquent" children, as was observed by Mr. Justice Scott, one of the original drafters of the legislation:

> "There should be no hard and fast distinction between neglected and delinquent children. All should be recognized as the same class and should be dealt with a view to serving the best interests of the child."

It was, thus, evident that the focus was to be primarily on treatment with minimal

In Brief



Financial Implications of the YOA

Ottawa — The Federal Government has invited the Provincial and Territorial governments to join in discussions on the increase in the Federal financial contribution to young offender programs under the **Young Offenders Act**. In a letter to the provincial and Territorial governments, the Hon. Bob Kaplan, P.C., M.P., Solicitor General of Canada, suggested that these discussions will deal with the nature and level of the increased federal financial support to be provided to the Provinces and Territories, who will be responsible for administering the Act.

In his letter to the Provinces and Territories, the Solicitor General is proposing the continuation of federal financial assistance for juvenile justice services currently being cost-shared under the Canada Assistance Plan. This would be based on a new block funding mechanism that would more adequately reflect the thrust of the new Act. In addition, Mr. Kaplan offered further federal financial support for a range of new or enhanced juvenile justice services encouraged by the **Young Offenders Act**, such as assessment services, pre-sentence reports and juvenile probation.

The Federal Government is also prepared to offer financial support for the transitional and implementation costs which will be generated by the initial introduction of the legislation.

The **Young Offenders Act** has created a need for improved legal aid representation for young offenders. The Hon. Mark MacGuigan, Minister of Justice and Attorney General of Canada, will shortly be contacting the Provinces and Territories to renegotiate the existing criminal legal aid agreement. A major consideration in these negotiations will be increased federal funding to help give effect to the legal aid requirements of the **Young Offenders Act**.

The Federal Government first entered into cost-sharing agreements with the Provinces and Territories for criminal legal aid services in 1972-73. These agreements assure uniform national standards for the provision of legal aid to financially disadvantaged persons, including legal aid for juveniles under the **Juvenile Delinquents Act**, in more serious cases. The Federal-Provincial criminal legal aid program is important because it makes it possible for all Canadians to receive equal access to justice.

Mr. Kaplan is suggesting that officials of the Federal, Provincial and Territorial Governments meet at the earliest opportunity to begin the discussions so that this much needed legislative reform can be implemented quickly and equitably.

Ottawa -- Le gouvernement fédéral a invité les gouvernements provinciaux et les administrations territoriales à discuter de l'augmentation de la contribution financière fédérale aux programmes pour les jeunes contrevenants aux termes de la **Loi sur les jeunes contrevenants**. Dans une lettre aux gouvernements provinciaux et aux administrations territoriales, l'hon. Bob Kaplan, CP, député et Sollilciteur général du Canada, a donné à entendre que ces discussions porteront sur la nature et l'importance de l'appui financier accru que le gouvernement fédéral fournira aux provinces et aux territoires, qui seront chargés de l'application de la Loi.

Dans sa lettre aux provinces et aux territoires, le Solliciteur général propose le maintien de l'aide financière fédérale à l'égard des services de justice pour les jeunes, services dont les coûts sont actuellement partagés en vertu du Régime d'assistance publique du Canada. Cette aide serait fournie selon un mécanisme de financement en bloc mieux approprié à l'orientation de la nouvelle loi. En outre, M. Kaplan offre un appui financier supplémentaire appelé à couvrir divers services, nouveaux ou améliorés, destinés aux jeunes et mis de l'avant dans le sillage dela **Loi sur les jeunes contrevenants**, par exemple, les services d'évaluation, les rapports prédécisionnels et la probation.

Le gouvernement fédéral est de plus disposé à assurer une partie des coûts de transition et de mise en oeuvre entraînés par l'entrée en vigueur de la Loi.

Avec la **Loi sur les jeunes contrevenants**, a surgi le besoin d'améliorer les services d'aide juridique pour les jeunes contrevenants. L'hon. Mark MacGuigan, ministre de la Justice et

système juridique qui protège les droits individuels de ces adolescents et qui interdit toute intervention autoritaire dans leur vie, à moins qu'il n'existe pour cela un motif d'une importance

Beginning
(Con't from P.26)

[15]See Bala, Lilles and Thomson, **supra** at foonote 2, under the heading "Treatment and Its Effectiveness", at page 686.

[16]For example, the young person may be placed in determinate custody for up to 3 years (para. 20(1) (k)) or fined up to one thousand dollars (pars. 20(1) (b)); this compares to an average stay of 6 to 8 months in training school under the **JDA,** and a maximum fine of twenty-five dollars (para. 20(1) (c), **JDA**).

[17]Of particular concern is the high suggestibility of children and adolescents under conditions of stress. See J. Rich, "Interviewing Children and Adolescents" (1968) at p. 53 where he states: "What is common, however, is the way in which almost any child can be led, simply by the form of the question put by the adult, to make false statements. This is because their relative positions are unequal: the adult is so much more powerful and more sure of himself than the child. This imbalance will vary with the child's age, his personality, and the relationship with the interviewer."

[18]An American study concluded that a large majority of juveniles who were cautioned as to their rights to remain silent and to consult counsel, waived these rights without fully understanding them: Ferguson and Douglas, "A Story of Juvenile Waiver" (1970), 7 San Diego Law Rev. 39.

[19]In any event, it could be argued that the protections provided in subs. 56(2), along with the exceptions specified in subs. 56(3) and (4), apply to "young persons" as defined in the **Act** whether the prosecution takes place in the youth court or in adult court subsequent to a s. 16 transfer. It would be illogical to confine the application of the principles set out in s. 3 to youth court proceedings as they address the condition of adolescence and not the forum of the proceedings. Note as well the apparent general application of subs. 56(1) and (2), and the absence of any limiting words such as "In any proceedings under this Act . . ." or "A youth court judge may . . .", which can be found in other subsections — see subs. 57(1) and subs. 57(3) as examples.

[20]It could be argued that findings of "not guilty by reason of insanity" or "unfit to stand trial" are dispositions, although technically they take place prior to or instead of a finding of guilt. In such instances, the **Criminal Code** applies: see ss. 51 and 52, and subs. 13(7) of the **YOA.**

[21]A plea of guilty presumably represents an admission as to the **actus reus** and the necessary **mens rea;** must this distinction be explained to the young person by the youth court judge? Alternatively, a not guilty plea could be viewed as an assertion on the part of the accused of his right to put the prosecution to the full proof of its case, regardless of the innocence of the accused — must this right be explained to the young person? Does the wording of para. 12(3) of the **Act** excuse the judge from explaining the special pleas of **autrefois acquit** and **autrefois convict?**

[22]The withholding of a report or part thereof from the young person, while making it available to the young person's lawyer, may create a difficult ethical problem for counsel. Furthermore, a practical problem is also created in that the lawyer may not be able to properly "test" the information contained in the report without the assistance of his client. If cross-examination of the excluded parts of the report is to be permitted, it follows that the young person must be excluded from the court room otherwise he may learn the details of the report which was to be kept from him. To exclude the young person appears to conflict directly with s. 39(2) of the **Act**, and possibly with sections 7, 11 and 15 of the **Constitution Act;** it may be argued, however, that such an exclusion is a "reasonable limit" which can be "demonstrably justified in a free democratic society" (s. 1, **Constitution Act**).

Commentary
(Con't from P. 29)

challenges to the procedures, approaches and decisions of the Youth Court.

For those who sit within the newly-established Youth Court and apply this highly complex, sometimes contradictory Act, with whatever new resources are avaiable and within a much more open environment than existed under the Juvenile Delinquents Act, the next few years should be both exciting and challenging.

attention paid to accountability, or the justification for intervention. As Mr. Justice Scott envisonned it:

> "The spirit of the court is always that of a wise and kind, though firm and stern, father. The question is not, "What has this child done?" but "How can this child be saved?"

This new philosophy, perceived to be humane and benevolent, and obviously derived from the doctrine of parens patriae, finds expression in section 38 of the Juvenile Delinquents Act which provides that:

> "This act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child and one needing aid, encouragement, help and assistance."

As the focus was on assisting and treating young persons, it was not felt necessary to confine intervention to those children who committed acts considered criminal by adult standards and, thus, children remained vulnerable to the protective intrusion of others; the broad and all inclusive definition of delinquency as contained in **The Juvenile Delinquents Act** provided the state with a very extensive basis for intervention. Moreover, intervention in the form of help and treatment, as opposed to punishment, did not, by the thinking of the day, necessitate procedures that would meet the standards for due process or natural justice which prevailed in adult criminal courts.

It is not surprising that a law passed just after the turn of the century and essentially unaltered to this day, has, in the face of the evolution of cultural values, changes in attitudes towards criminal justice, and enhanced scientific knowledge and information, been the subject of increasing criticism, particularly within the past two decades.

ASSUMPTIONS AND PRINCIPLES

The Young Offenders Act, 1982, is parliament's response to this evolution of cultural values and attitudes towards criminal justice. The legislation is based on a new set of fundamental assumptions reflecting this evolution and inspired, as well, by extensive research and a more sophisticated knowledge of human behaviour generally, and the moral and psychological development of children in particular. Let me now discuss four of these assumptions and the principles flowing from them, which are set out in the act's "Declaration of Principles". As well, I would like to highlight, by way of examples, some of the provisions in the act which give effect to these assumptions and principles.

1. AGE AND CRIMINAL RESPONSIBILITY

With respect to the relationship of age of an individual and capacity to form criminal intent, the simple dichotomy of child and adult, while innovative in 1908, is no longer considered adequate. Contemporary knowledge and cultural values now recognize a third crucial phase of maturation, namely adolescence. Whereas a child is perceived to be completely dependent and lacking the capacity for criminal responsibility and an adult is generally considered to be fully independent and responsible, the adolescent is in a state of transition and considered capable of independent thought and responsibility although not to the same degree rightfully expected of adults. The age levels under **The Juvenile Delinquents Act** do not accurately reflect these realities.

This concept of responsibility was recognized by the special parliamentary committee of the Quebec National Assembly in its November, 1982 report on youth protection. It is stated at page 13 of the summary:

> "Toutes les études sur le développement psychologique des adolescents indiquent que les jeunes délinquants sont conscients du tort qu'ils occasionnent. En conséquence, soutenir leur responsabilité face à leurs actes illicites — responsabilité qui peut cependant être pondérée en fonction du degré de maturité qu'ils ont atteint — ne peut constituer une affirmation contradictoire avec les connaissances actuelles sur le fonctionnement psychologique et moral des adolescents. D'autant plus que dans l'optique d'une aide efficace à leur apporter, la responsabilisation face à leurs actes est un élément clé au plan pédagogique."

The refinement in the Young Offenders Act with respect to age finds its expression in four principles which can be briefly described as responsibility, accountability, protection of society, and needs. **The Juvenile Delinquents Act** is believed to insufficiently emphasize the concepts of personal responsibility and protection of society, thereby failing to adequately reflect the interests and beliefs of contem-

porary society. By contrast, **The Young Offenders Act** in its declaration of principle states unequivocally that young persons who commit offences should bear responsibility for their illegal actions and that society must be afforded necessary protection from illegal behaviour. These fundamental principles of responsibility and protection of society are at the core of the new legislation.

The principle of responsibility should be viewed in its fullest sense; thus, a three fold responsibility is expected of young persons. They must, firstly, exercise responsibility towards society, secondly, towards the victims of their crime, by making amends, where possible, and thirdly, towards themselves by actively participating in their own reformation and self-improvement. By way of illustration let me refer to the following three examples:

- Provisions in The Young Offenders Act allow young persons, by way of alternative measures programs or community-based dispositions, to assume responsibility for their illegal behaviour through a wide variety of measures including compensation in kind or by personal services, restitution or community service.
- At the dispositional stage, it will now be possible for a judge to order treatment for a young person suffering from a condition such as a physical or mental illness or disorder or learning disability, where such treatment is recommended by a qualified person and the young person consents.
- Where a custodial disposition is ordered, it will be possible for the young person to be released for a specified number of hours on a daily basis in order to work, attend school, or participate in a training program.

The basic capicity of young persons to accept responsibility for their positive and negative behaviour is recognized but so are the limits of that capacity. Hence, the principle of responsibility is tempered under **The Young Offenders Act** by the principle of mitigated accountability. Premised on the concept of adolescence and the attendant implications regarding dependancy, maturity and level of development, this principle holds that young persons should not, generally speaking, be held accountable in the same manner as would adults.

Two examples of the lesser degree of accountability expected of young persons follow:

- The dispositions available under the act are generally less severe than the sentences adults would face.
- The requirement that records be destroyed following completion of the disposition and a qualifying period of crime-free behaviour.

While not detracting from the principle of responsibility, these provisions recognize that a young person should not be subject to consequences as severe as those imposed on an adult.

The fourth principle, related to the assumption of age and responsibility concerns the special needs of young persons. It states:

> "Young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance".

Thus, while the concepts of responsibility and public protection are integral to both the juvenile and adult criminal justice systems, the emphasis on the special needs of the offender is unique to the juvenile system. This principle which is intended to temper the application of the principle of responsibility and reflect an attitude of help and support for young persons, is not mere rhetoric and indeed is given effect by numerous provisions in the new law: Let me give you two examples:

- The expanded use and emphasis on medical and psychological assessments and pre-disposition reports will enhance the information available to the court, thereby making it more aware of the special needs of the young person;
- An extensive review process is provided for to ensure continual monitoring of dispositions in order that they remain relevant and geared to the changing needs and circumstances of young persons. A review hearing will be available at the instance of young persons or their parents, as well as the crown.

The second major assumption which distinguishes **The Young Offenders Act** from its predecessor concerns the relationship of state and citizen. The doctrine of parens patriae is now believed to be unacceptable to exclusively define this relationship. It is assumed under **The Young Offenders Act** that the role of the state be defined in terms of the rights and responsibilities of both the state and the individual, rather than simply in terms of

Ce sont là, bien sûr, des gestes fort louables, mais ce n'est pas sur la base unique d'initiatives individuelles et clairsemées que nous pourons taire l'anxiété de la victime, mais bien plutôt par un effort collectif et concerté, ainsi que par l'adoption de mesures précises que nous pourron y arriver.

Mais rien de tout cela n'aura d'effet déterminant à moins que ne s'opère un changement d'attitude de la part des opérateurs du système.

L'idée d'une législation qui viendrait affirmer les droits d'une victime sera sans doute mise de l'avant dans les discussions en ateliers. Il est valable de rappeler que l'article 7 de la charte des droits et libertés contenue dans notre nouvelle constitution consacre le droit de chacun à la vie, à la liberté et à la sécurité de sa personne. Une certaine prudence doit être exercée si l'on ajoute à la législation existante et en retenant l'idée que celle-ci pourrait avoir pour effet de stigmatiser davantage la victime.

D'autres solutions ont été proposées, telle cette recommandation du comité spécial mis sur pied en 1980 pour fair l'étude de la criminalité au Québec et qui suggérait à la direction générale de la sécurité publique de déployer un service d'aide et d'information aux victimes.

L'on apprendra sans doute au cours de ce congrès gue certaines réalisations ont déjà été amorcées dans ce sens.

Enfin, et pour éviter de nous engager dans un débat stérile, peut-être devrions-nous ne point trop nour attarder sur le fait que dans l'élaboration du système l'on ait mis moins d'intérêt à l'endroit de la victime que d'attention à l'égard du délinquant, même s'il faut reconnaître qu'il existe une certaine distorsion entre la norme juridique et la réalité sociale.

Peut-être pourrions-nous néanmoins conclure que l'armada de la justice a vogué à travers les décennies, toutes voiles déployées, sans trop souvent faire escale pour se ravitailler.

Si cela est, c'est à nous qu'il appartient, comme officiers de bord, de mettre le cap vers les horizons les plus favorables.

Philosphie
(Con't from P. 15)

pas perdre l'occasion de les influencer à un âge où ils sont encore maniables et ouverts au changement. A long terme, un système de justice pour adolescents qui serait à la fois efficace et renforcé selon les besoins est la meilleure manière de prévenir la criminalité. C'est investir dans l'avenir et dans nos jeunes. Dans la plupart des cas, programmes adaptés et des mesures efficaces de rééducation répondent à l'importance accrue que l'on attache aux notions de responsabilité et de protection de la société. Voilà l'esprit de la **Loi sur les jeunes contrevenants.** Bien qu'elle permette l'adoption de mesures destinées à protéger la société contre des contrevenants dangereux, nous ne devons pas confondre protection de la société et rigorisme et nous ne devons pas concevoir la responsabilité sous le seul angle du châtiment. Pareille êtroitesse est contraire à l'esprit de la **Loi sur les jeunes contrevenants** et en corrompt le sens. Si,par hasard, une telle étroitesse d'esprit l'emportait, nous devrions, tous ensemble, accepter la responsabilité de l'échec car c'est à nous qu'incomberait la faute de ne pas avoir correctement appliqué la **Loi.** Je m'empresse d'ajouter, cependant, que j'ai le sentiment qu'avec un peu de bonne volonté, beaucoup de compassion, de compréhension et d'efforts, nous allons pouvoir offrir à nos jeunes un rare degré de justice sociale. L'intérêt de la société n'exige pas l'emprisonnement de chaque adolescent qui a des démêlés avec la justice ni la prise à son égard de mesures restrictives; pareille solution aurait sans doute en fait des effets négatifs. Nous devons, au contraire, tenter de réhabiliter et de rééduquer les jeunes contrevenants au sein de leur famille et de leur communauté; c'est là la meilleure façon d'assurer la protection efficace et à long terme de la société et de poursuivre l'intérêt général du public. A cette fin, tous, la société, la famille et l'adolescent lui'même doivent assumer la responsabilité qui est la leur.

Ce qu'ont voulu les législateurs, mesdames et messieurs, c'est un système de justice pour adolescents qui ne soit pas exclusivement fondé sur la notion de traitement, qui ne vise pas principalement la dissuation et le châtiment, et qui ne sont pas exclusivement axé sur le bien-être ou la justice. Le système que nous avons enfin adopté est à mon avis admirablement décrit par Faust et Brantingham à la page 25 du livre qu'ils ont consacré à la philosophie du système judiciaire pour les jeunes (Juvenile Justice philosophy). Voici ce qu'ils en disent: (traduction)

> "Certains indices importants signalent la naissance d'un nouveau système de justice pour les jeunes — un système qui conserve les acquits de la philosophie sociale dans la mesure où il permet d'utiliser les progrès des sciences du comportement pour traiter les jeunes trublions ou les jeunes désaxés mais qui ne le permet que dans le cadre d'un

précise que l'étude de ce projet est actuellement en cours, sous la responsabilié de Madame Micheline Baril, dont l'activité débordante dans ce domaine est connue de la plupart d'entre vous.

Ces initiatives me permettent à tout le moins de vous donner l'assurance que la magistrature est disposée à collaborer à une évaluation de son action sachant fort bien que le mécanisme mis à sa disposition demeure tributaire de certaines conditions qui n'ont pas été satisfaites sur le plan social.

Vous ayant formulé ces dernières remarques en aparté, je retourne aux dernières questions soulevées et touchant l'imbrication de la victime dans le rouage de l'appareil judiciare.

Un document de travail déjà préparé à l'intention des participants aux travaux d'ateliers contient une affirmation que la victime, en raison de l'intérêt axé sur la personne du délinquant, n'a pas sa place dans le système pénal, ce qui en fait une critique des plus sévère à ce niveau.

Vous aurez alors à vous demander si cette assertion ne mérite pas à tout le moins qu'on la nuance avec cette hypothèse que cette absence découle du fait qu'on ne lui fait pas toujours jouer le rôle qu'on lui a conçu.

Il faut bien reconnaître que cette présence de la victime dans le système n'est pas aussi manifeste que celle de l'accusé, alors que cela répond, dans une certaine mesure, aux règles du jeu.

L'on sait qu'une très forte proportion des causes se règlent hors la présence de la victime, le pôle d'attraction étant alors strictement orienté vers le délinquant. Est-il normal qu'il en soit ainsi, et si anomalie il y a, à quels facteurs faut-it attribuer cette situation?

Le traumatisme subi par la victime d'un acte criminel est un aspect important dont il est tenu compte dans la détermination de la peine. Mais alors à qui incombe la responsabilité d'en informer le Tribunal? En d'autres termes, quels sont les usagers du système qui doivent se faire le porte-parole de la victime pour que celle-ci perçoive une préoccupation à son égard? Il suffit de s'arrêter aux acteurs en scène pour y apporter la réponse.

Les modifications que nous pourrions apporter à notre système de justice en rendant la procédure pénale plus rationnelle ne parviendront pas à réduire d'une façon appréciable la contribution que la victime doit y apporter pour en assurer la réalisation de ses objectifs. La victime est consciente de ce que son obligation légale de participer à l'administration de la justice ne fait que refléter un devoir moral dont les membres de notre société se doivent de s'imposer pour assurer leur protection collective. Mais encore faut-il que le prix à en payer ne lui paraisse pas exhorbitant.

Une analyse attentive du cheminement que parcourt la victime à compter du moment de son infortune jusqu'à l'instant où elle s'engage dans le dédale de l'appareil judiciaire pour, en cours de route, se frotter aux aspérités de la procédure pénale qui en précède l'issue, ne saurait donner une meilleure illustration des obstacles qu'il lui faut franchir.

Le carrefour que représente le contact avec la police marque une étape importante car s'il est empreint d'un certain humanisme, déjà l'appréhension de la victime quant aux jalons à suivre peut en être considérablement atténuée. Une politique bien définie avec le concours de directives administratives devrait permettre de rencontrer ce premier objectif. L'ignorance dans laquelle la victime demeure quant à la marche de l'enquête policière ajoute le désabusement à la méfiance qui s'instaure dans son esprit. C'est là un point important où des mesures correctives s'imposent.

Par ailleurs, cette fiction légale qui range la victime dans la seule classification des témoins en fonction d'une interprétation restrictive du rôle du procureur de la Couronne, ainsi que le veut le système, échappe à la compréhension de la victime.

En outre et pour quiconque n'est pas initié à la procédure pénale, l'étape initiale qui marque le contact avec l'appareil judiciaire paraît rude et parfois vexatoire. Mais c'est surtout l'ignorance dans laquelle la victime demeure du dénouement de la poursuite judiciaire qui crée chez elle le plus profond ressentiment.

A tout cela s'ajoute cet aspect de dépendance complète de la victime dans l'utilisation et l'application du système pénal, alors qu'elle ignore les conditions dans lesquelles elle sera appelée à rendre témoignage et avec sa convocation devant le Tribunal de façon souvent arbitraire et parfois abusive.

Certes, certaines mesures palliatives peuvent être apportées pour combler certaines carences du système.

Il y a par exemple cette procédure spéciale que nous avons instaurée à la Cour des sessions de la paix qui permet, par une audition préalable au procès, d'éviter la convocation de la victime que dans la stricte mesure où sa présence est requise et cette récente directive en force depuis quelques semaines à l'effet d'informer cette dernière de l'issue finale du litige, et autres mesures analogues.

the state as surrogate parent. Apart from the concepts of responsibility and public protection previously discussed, the following principles in the young offenders act flow from this assumption, namely the rights and responsibilities of parents, the rights of young persons, and the responsibility of society to take measures to prevent crime by young persons.

These principles recognize that the state cannot routinely usurp the rights and responsibilities of parents merely because of a young person's illegal behaviour nor can it assume that such behaviour is per se evidence of parental neglect or inadequacy. Accordingly, it is stated in the declaration that:

> "Parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate".

Numerous provisions in the act give clear effect to the responsibility of and special status afforded to parents. For example, parents of a young person are entitled to:

- Receive notice of any proceedings commenced against their child;
- Receive copies of reports prepared for the youth court;
- Be heard at transfer and disposition hearings;
- Initiate and participate in the review of dispositions.

The second principle, heavily influenced by the assumption of the altered relationship between state and individual, concerns the rights of young persons in conflict with the law. The act provides that "young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of rights and freedoms and the Canadian Bill of Rights". Thus, an alleged young offender has:

- The right to counsel;
- The right to be heard and to participate in proceedings;
- Special guarantees of rights and freedoms which are consistent with the assumption discussed earlier regarding age and criminal responsibility for it is as a result of the young person's age and level of development that such special measures are required;
- The right to be informed of rights and freedoms where these may be affected by the act;
- The right to the least possible interference with freedom consistent with the protection of society and having regards to the needs of young persons and the interests of their families.

The last principle emanating from the relationship of the state and its citizens reflects the contractual nature of this relationship in terms of the rights and responsibilities of both the state and its citizens. Thus, it is stated in the declaration of principles that while society has a right to be afforded protection from illegal behaviour, it also has the "responsibility to take reasonable measures to prevent criminal conduct by young persons". In short a **right** to protection and responsibility for crime prevention.

A third and equally fundamental difference between **The Young Offenders Act** and **The Juvenile Delinquents Act** is the former's assumption that the criminal law must be used with restraint, intervention being justifiable only where a young person has committed an offence. This assumption is premised on the belief that our formal criminal justice system including as it does police, prosecutors, defence counsel, judges, and correctional officers, should be seen to represent only one element, albeit a major one, of a more complex and broadly based system of response to crime.

The best illustration of this concept of restraint is the greatly reduced jurisdiction of the act with respect to both persons and offences. This restricted jurisdiction is exemplified by the following:

- The present minimum age of criminal responsibility at age seven is too low and has thus been revised to 12 years. A child, lacking the capacity for criminal intent, should not be subjected to the jurisdiction of the criminal law. Thus, the new minimum age of 12 years more appropriately reflects the level of development and maturity which justifies holding a young person responsible for illegal behaviour.
- The establishment of a maximum age of 17 years inclusive, as well gives effect to this assumption for it allows a greater number of young persons who have not yet attained full maturity, the benefits of a specialized juvenile justice system and, moreover, prevents their subjugation to the full rigours of the criminal law.

- The offence jurisdiction is limited to federal statutes and regulations only. The broader offence jurisdiction of **The Juvenile Delinquents Act** has resulted in discrimination against young persons who have been criminalized for behaviour which is not illegal for adults and which more properly belongs to the domain of child welfare and youth protection legislation.

The fourth assumption which distinguishes the approaches pursued by the existing and the new legislation concerns the added emphasis placed in **The Young Offenders Act** on the role to be played by the community in dealing with young offenders. Under **The Young Offenders Act,** three principles flow from an expanded concept of community involvement, namely, minimal interference, the responsibility of society for crime prevention and the sanction of alternative measures.

The right of a young person to the least possible interference with freedom consistent with the protection of society is premised on the belief that other effective means of intervention exist and indeed that in some cases non-intervention is more beneficial. To give positive effect to this principle, the act provides the followng:

- A broad range of community-based dispositions to enable the young offender to assume responsibility and to be dealt with within the community;
- Restrictive criteria apply where a disposition of custody is considered so as to limit the instances when secure custody may be used;
- A decision respecting custody must be made by a youth court judge in open court where the parties will have the opportunity to challenge and make representations.

Reference has already been made to the principle which, while recognizing the need of society to be protected from illegal behaviour, as well states the responsibility of society to take reasonable measures to prevent illegal behaviour by young persons. This obviously is an objective to which the community as a whole must contribute. One might recall here section 69 of the act respecting youth justice committees, which provides the scope for a wide range of community involvement and activity ranging from crime prevention to assistance in the development and administration of programs and services for young offenders. The provision by the act of a specialized and separate juvenile system is in itself the greatest measure of prevention against the further involvement of young offenders in crime.

The principle which directs that in seeking solutions to juvenile crime, measures other than judicial proceedings should be considered is dependent on community-based alternatives. Such programs and services have the potential to be adapted to the specific circumstances and requirements of any community be it rural, urban, native or otherwise and, further, provide the scope for the involvement of community and volunteer organizations. An added benefit to effective programming in this area is that it prevents the overuse of custodial and other types of institutionalized treatments and programs.

Having discussed the origin and evolution of our juvenile justice system and the assumptions and principles underlying the new legislation, what, you might ask, have we, in the final analysis, achieved with **The Young Offenders Act.** Some have suggested that all we have done is create a criminal code for kids or a mini-adult system. While **The Young Offenders Act** is basically criminal legislation intended to deal with young offenders and juvenile crime, and we should not hesitate to own up to that, it is, however, criminal legislation with a broader social objective. This new law, while it speaks of public protection and responsibility, does not make these objectives its exclusive domain for it speaks as well of the rights of individuals, the obligations and responsibility of the state, and the special needs of young persons, including guidance and assistance. I suggest that we have created a coherent and balanced process to deal with juvenile crime which will encourage respect for the law and promote the well-being of both the young offender and society.

Let me conclude by briefly demonstrating how, in addition to continuing a separate juvenile justice system for young persons, **The Young Offenders Act** forms the basis of a system which is very distinguishable from the ordinary criminal process. While I believe that some of my previous comments have already given you a good indication of this, a number of points should be reiterated or highlighted.

Firstly, let me suggest that while the new law differs fundamentally from **The Juvenile Delinquents Act** by emphasizing, as it does, the principles of responsibility, protection of society and the rights of young persons, it nevertheless retains, in common with its predecessor, the belief that young persons should be dealt with differently than adults. The policy section entitled "Declaration of Principle" makes

procédure pénale ou encore de certains comportements dont les usagers du système font preuve à son endroit?

D'aucuns soutiennent que dans l'élaboration du processus judiciaire, la victime a été laissée pour compte et que le pendule s'est arrêté au-dessus du délinquant. D'abord et lorsque l'on y regarde de plus près, cette critique ne semble pas vouloir mettre en cause le fondement même de notre code pénal non plus que la philosophie dont elle s'est inspirée à cette époque lointaine où il a été conçu, mais plutôt l'absence d'une préoccupation envers la victime dans l'application de sa procédure pénale.

C'est du moins le sens que je crois devoir prêter aux propos tenus par monsieur Gerry Léger, attaché au ministère du Solliciteur-Général du Canada, division de la recherche, dans son article intitulé "La victime du crime", que l'on retrouve dans la brochure IMPACT no: 1 1982, émanant de ce ministère et où il s'exprime ainsi:

> "les victimes du crime ont besoin de sentir que justice se fait et que les organismes de justice pénale se soucient de leurs intérêts. Tel n'est cependant pas le cas pour bien des victimes. Des études récents de victimologie indiquent que les victimes du crime se sentent en effet impuissantes et frustrées parce que leurs besoins ont été négligés.
>
> La société s'est généralament efforcée de s'occuper du crime par l'intermédiaire de son système de justice pénale. Mais la victime, elle, est souvent laissée pour compte du système de justice pénale parce que nos services de police, nos tribunaux et nos services correctionnels s'intéressent presque exclusivement à l'infracteur."
> (fin de la citation).

De ces propos, ne faut-it pas en conclure que ce n'est point tant le système pénal en lui-même qui fait obstacle à ce que les victimes puissent obtenir pleine justice, mais plutôt de la façon dont celles-ci sont traités par les usagers du processus pénal.

Le même raisonnement me paraît s'appliquer en évoquant cette fois les propos tenus par le Solliciteur-Général du Canada, l'Honorable Robert Caplan, lui-même, à l'occasion de la Conférence nationale d'aide aux victimes du crime, tenue à Toronto, le 14 octobre 1981, où il affirmait ce qui suit:

> "En tant qu'administrateurs du système, nous devons reconnaître que la réforme dans le domaine de la justice semble s'opérer à sens unique. Avec tout ce que nous avons réalisé, nous n'avons toujours pas su régler, d'une façon appropriée, certains des problèms véritables des victimes et des témoins."

L'on ne saurait recourir à meilleure autorité pour bien comprendre que la portée du problème se situe bien plus au niveau de l'utilisation du système que de sa conception et de son fondement.

Je vous dis ces choses parce que je me permets de supposer qu'en ateliers d'aucuns croiront trouver une solution aux problèmes des victimes en les incorporant comme telles dans le système de justice. Vous aurez alors à vous demander si la prodédure pénale peut subir une quelconque altération pour y permettre d'y insérer certains droits aux victimes sans pour autant saper à sa base l'un des principes fondamentaux sur lesquels le syst ème pénal lui-m ême a été érigé.

Par ailleurs, vous aurezà vous demande si l'on peut concilier dans une m ême législation deux ordres de prioritée distincts, voir même oposés l'un à l'autre sans donner à cette législation un caractère d'ambivalence qui rendrait son application extrêmement complexe sinon impraticable.

Suffira-t-il alors de concevoir une législation dont le seul objectif serait de définir les droits fondamentaux de la victime et les recours qu'elle serait en droit d'exercer pour apporter une réponse valable à ses besoins?

Là encore, j'appréhende une solution insatisfaisante à moins que ne s'y accompagne une transformation d'attitude parmi l'ensemble des opérateurs du systéme.

Qu'en est-il maintenant de la condition de la victime dans l'application du processus pénal? Quel traitement lui est réservé alors qu'elle est appelée à y participer? Quelles préoccupations peut-on démontrer à son endroit?

La frustration de la victime face à la justice et le traumatisme additionnel qu'elle peut en ressentir découle de nombreux facteurs. J'évite à dessein de vour faire une énumération qui me vient à l'esprit afin de ne point influencer l'orientation de vos débats sur ce sujet et que je considère pour ma part d'une extrême importance.

J'ajouterai également que l'autorité judiciaire comme telle n'est pas insensible à la situation de la victime à l'intérieur du processus pénal. Voilà pourquoi je crois devoir porter à votre connaissance une initiative de notre juge en chef, Yves Mayrand, qui, en date du 4 décembre 1981, mettait sur peid un comité spécial en vue de l'implantation dans notre district judiciaire de Montréal d'un réseau de services aux témoins et victimes d'actes criminels. Je

La Victime Face a la Justice

par M. le juge Jacques Lessard

Répondant aux règles de la bienséance, l'on acceptera sans doute bien volontiers que je dirige mes premières remarques vers les membres de votre comité d'organization, d'abord pour les remercier de cette fort aimable invitation à participer aux assises du 21ième congrès de votre société, pour ensuite les féliciter de la qualité du programme qui vous est présenté et plus particulièrement sur la sélection de thèmes d'un vif intérêt qui, sans doute, ne manqueront pas de susciter un débat des plus fructueux.

Aux premiers instants où j'entreprenais la rédaction de mon exposé, il m'est dès lors paru que mon rôle en ce moment ne consistait pas à soutenir un point de vue personnel sur la matière à l'ordre du jour, mais bien plutôt d'exprimer certaines idées qui, à l'intéreur de sujets davantage particularisés, seraient susceptibles de créer une certain animation.

S'il arrivait que dans mes propos, je ne rejoigne pas toutes les situations réservées à la discussion en ateliers, je me plais à croire que vous pourrez y suppléer par votre participation et vos interventions opportunes.

La présence à ce congrès d'un nombre aussi impressionnant de magistrats, juristes, professionnels de la justice de toutes qualifications, pour n'en excepter aucun, n'est pas sans être des plus significative.

Quelles que soient l'issue de ce congrès, les résolutions qui y auront été adoptées, les recommandations qui en surgiront, l'on peut d'ores et déjà affirmer que les cris d'angoisse, parfois lointains mais combien distincts, qui nous parviennent des victimes d'actes criminels, auront trouvé un écho dont la répercussion aura attient tous les personnages engagés dans notre système de justice pénal.

Certes, le sort réservé aux victimes méritait un tel déploiement de même qu'il commandait une telle attention, et c'est sans doute par notre vive participation à ce colloque que nous parviendrons à en fair l'illustration.

Si en s'addressant à un juge pour ouvrir le débat dans une matière où tant d'autres compétences s'offraient comme alternatives, l' on a cherché à associer la magistrature à l'objet de votre démarche, je ne puis faire autre que de vous en savoir gré.

J'en suis d'autant plus à l'aise que j'ai pour ma part eu l'opportunité d'exprimer certains points de vue sur le sujet à l'occasion de causeries que je prononçais les 16 juillet 1981 et 8 juin 1982 respectivement, lors de la tenue de colloques à l'intention des juges de ma juridiction.

Comme remarque prémonitoire, je vous souligne que pour les sous-titres l'on emploie la formule copulative pour décrire les sujets qui y seront traités alors que le thème 2 lui-même "La victime face à la justice" sugg ère l'idée d'un affrontement. Il faudra peut-être s'en méfier dans nos discussions si l'on veut en arriver à des résultats positifs et éviter d'ajouter à toute forme d'incompréhension. Ce que l'on doit davantage rechercher, c'est de percevoir aussi objectivement que possible la situation qui s'offre à la victime à l'intérieur de notre système de justice et le traitement qui lui est réservé avec l'application de la procédure pénale.

Ce n'est certes pas chose facile que de nous situer dans le contexte du thème dont nous passons maintenant à l'étude, car tel qu'énoncé et eu égard aux facteurs multiples qui entrent en jeu, celui-ci me paraît atteindre une dimension dont la délimitation reste à définir.

Cela présuppose en premier lieu que nous nous entendons sur la définition que nous pouvons donner à la victime d'un acte criminel. Or et si tant il est vrai que pour une certaine catégorie de crimes, la victime est aisément identifiable, il en est bien d'autres qui dépassent cet entendement. Point n'est besoin de passer en revue la nomenclature des délits criminels pour accepter l'idée que d'une part, une certaine délinquance atteint une collectivité importante d'individus quand ce n'est pas la société toute entière tandis que pour d'autres délits l'ampleur du préjudice demeure indéterminable.

Présumons cependant et pour les fins de nos discussions qu'il s'agit de répondre aux seules situations que les sous-titres énoncés au programme permettent d'identifier.

Au fait, de quoi s'agit-il vraiment lorsque l'on parle de la victime face à la justice? Les problèmes auxquels celle-ci est confrontée découlent-ils d'une faiblesse de notre système de justice, ou plutôt d'une utilisation irrationnelle de la

this abundantly clear:

- The new law as previously indicated, continues to recognize the special needs and circumstances of young persons.
- The new legislation not only advocates the concept of responsibility, but it recognizes, as well, that young persons should not be held accountable in the same manner or suffer the same consequences for their behaviour as adults.

While the principles of rights, responsibility and public protection are integral to both the juvenile and adult criminal justice systems, the special emphasis on the needs of young persons and the concept of mitigated accountability are unique to the juvenile justice system.

These principles are more than simple rhetoric: indeed as we have seen the act contains concrete measures to give effect to them, some of which bear repeating:

- The expanded use and emphasis on assessments and pre-disposition reports will sensitize the court to the special needs of the young person being dealt with;
- The young offenders act, in defining the relationship between age and criminal responsibility, recognizes and incorporates the concept of adolescence. As a consequence, we have responsibility with reduced accountability. The types of dispositions available and the limitations placed on them clearly illustrate this and constitute a marked distinction from the ordinary criminal process.
- The provision governing the maintenance and use of records are con-; sistent with responsibility and reduced accountability. A young person will be given a fresh start where it is deserved.

The ordinary criminal justice system focuses primarily on the offence committed and the public interest, whereas the juvenile justice system not only concentrates on offenders and public protection, but brings in the added dimensions of special needs and the interest of the offender's family. Again, this is made explicit in the following principles contained in the "Declaration of Principle".

> "In the application of this act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;"
>
> "The principle recognizing the primary responsibility of parents for the care and supervision of their children."

To give effect to these principles, parents are required to be notified of any arrest, detention and court proceedings involving their child. Furthermore, parents, alghouth not technically a party to the proceedings, are granted special status to make representations to the court at crucial stages of the process, namely, on an application for transfer to adult court, prior to a disposition, or upon a review of disposition.

Another extremely important procedure which is peculiar, and distinguishes the juvenile justice system from the adult system, is the extensive review process. The review procedure permits monotoring and modification of dispositions to adapt them to the changing needs and circumstances of young persons.

I believe, that these special procedures and measures clearly refute the thesis that **The Young Offenders Act** merely rubber stamps a mini-adult system. The fact remains that a specialized juvenile justice system will continue to emphasize and cater to rehabilitation and reformation ideals, which many say are dead in the adult system. It is essential to continue the special juvenile justice system in order to capitalize on the opportunity to positively influence young persons while they are still malleable and receptive to change. A strengthened and effective juvenile justice system is still, in the long term, the best crime prevention measure. It is an investment in the future and in our young people. Even the increased emphasis on responsibility and public protection can, in most instances, be met by proper programs and effective measures to promote the self-improvement of young offenders. That is the spirit of **The Young Offenders Act.** While it allows the taking of adequate measures to protect society from dangerous offenders, let us not fall into the trap of equating public protection with harsh treatment or looking at responsibility only in terms of punishment. Such a narrow approach would not only be contrary to the spirit of the Young Offenders Act, it would be a perversion thereof. Let me suggest that is such a narrow approach were to prevail, we would collectively have to accept responsibility for the failure to properly apply this legislation. I hasten to add, however, that I am fully confident that with a little good

(Con't on P. 20)

Philosophie et principles de la loi sur les jeunes contrevenants

par M. le juge Omer Archambault

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INTRODUCTION

La **Loi sur les jeunes contrevenants** constitue une des lois sociales les plus importantes que le Parlement du Canada ait adoptée ces dernières années. Son adoption marque la fin d'une étape cruciale du long processus de réforme de notre système de justice pour les jeunes. Il nous appartient maintenant de veiller à l'application de cette loi pour assurer la réalisation des objectifs qu'elle poursuit. C'est **vous,** les représentants des diverses disciplines chargés de la mise en application et de l'administration de cette loi qui, dans une large mesure, en déterminerez la portée réelle et l'orientation. Il est donc essentiel de travailler ensemble à bien connaître et comprendre les idées et les principes fondamentaux dont s'inspire cette nouvelle législation. La déclaration de principes qui figure dans la **Loi sur les jeunes contrevenants** constitute non seulement un guide pour son interprétation et son application, mais reflète également, les attitudes et les attentes des Canadiens envers leur système de justice pour les jeunes.

Je pense qu'une brève incursion dans l'histoire et l'évolution de notre système de justice pour les jeunes nous aidera à comprendre les différences essentielles qui existent entre **la Loi sur les jeunes délinquants** et la **Loi sur les jeunes contrevenants** ainsi que la nouvelle orientation que cette dernière donne à la justice canadienne pour les jeunes.

APERÇU HISTORIQUE

L'apparition et la reconnaissance progressive d'un statut juridique distinct pour les enfants, différent de celui des adultes, tire probablement son origine de la règle de common law **doli incapax,** qui, à son tour, a son origine dans le droit romain et ecclésiastique. Cette règle faisait partie du concept plus large de la **mens rea**, principe fondamental de notre droit pénal,et visait le rapport entre l'âge d'une personne et sa capacité à former l'intention exigée pour commettre une infraction criminelle. D'après cette règle, un enfant de moins de sept ans était réputé incapable d'avoir un "esprit coupable" et un enfant entre sept et quatorze ans était présumé incapable de former l'intention nécessaire, la présomption étant cependant, dans ce cas, réfragable. Cependant, lorsque la capacité criminelle était établie, l'ancien droit pénal traitait l'enfant de la même manière qu'un adulte, tous deux étant passible des mêmes peines.

Certaines lois adoptées vers le milieu du dix-neuvi ème si ècle et par la suite, destinées à aider les enfants, à ameliorer leur bien-être et à contrôler leur comportement inacceptable, constituent également les premières indications d'un souci d'accorder aux enfants un statut distinct de celui des adultes. C'est ainsi qu'on a, par exemple, procédé, vers le milieu et la fin du dix-neuvième siècle, à la construction d'établissements de réforme spécialisés, en Angleterre, aux Etats-Unis et au Canada, destinés à favoriser le traitement des enfants et à empêcher qu'ils ne subissent l'influence des contrevenants plus âgés. Autre exemple, on a adopté en 1857, dans le Haut et Bas-Canada, la Loi pour accélérer le procès et la punition des jeunes délinquants qui, pour l'essentiel, accordait au magistrat le pouvoir de traiter sommairement les enfants, ce qui les protègeait des rigueurs du droit pénal, les pouvoirs des tribunaux inférieurs en matière de peine étant plus limités.

ment of the principle that legislative criteria should be precise, clear and measurable. In this respect it stands in obvious, marked contrast to the Juvenile Delinquents Act. Detailed provisions answer such questions as when pre-disposition reports should be prepared, what should be contained in them, what are the criteria for transfer to adult Court, how long should records be kept and when destroyed, etc. In some areas, while the intent is supportable, the Act's requirements seem excessive and difficult to implement (e.g. the sections relating to the maintenance, use and destruction of records and those dealing with what must be contained in pre-disposition reports). In other areas, the criteria are less extensive than one would have hoped. For example, unless the intent, when introducing the judicial power to place and keep young offenders in secure custody, was to increase substantially the number of offenders in such facilities (and the recent cost-sharing proposals from the federal government would indicate that this was not the intent), experience elsewhere, such as in Washington State, would suggest that the criteria for admission of offenders 14 and over into secure custody should have been much tighter and less open to broad judicial discretion. Otherwise the phenomenon of overcrowded correctional facilities may soon become a feature of the young offender system as well as the adult system.

6. This commentary has avoided detailed discussion of individual sections. However, it is felt that section 13, dealing with medical and psychological reports, is worthy of special note. As already mentioned, it includes the most substantial departure from basic due process protections contained in the Act: the power to deny the young offender the right to see the report. It also seems to allow the judge to choose the individual "qualified persons" who will be permitted to prepare reports for the Court. Beyond that, it contains a list of potential disabilities which should make it hard for any judge not to see a report is needed in most cases and then to see most criminal behaviour is caused by one or more of the disabilities. Despite last minute amendment, the definition of "qualified person" is worded in a way which runs the risk of reinforcing the old myth that only psychiatrists and psychologists can assess the special needs of adolescents and, more than that, may put out of business a large number of experienced people (such as social workers) who are presently doing assessments for the Courts. Finally, when combined with the later sections dealing with pre-disposition reports, the result may be that, in a large number of cases, the Court may need to have before it two detailed reports before deciding upon the appropriate disposition.

The above represents some of the problematic areas within the new Act. I have not dealt with the fact that, for a number of provinces, the Act raises the maximum age from that now applicable under the Juvenile Delinquents Act. This is because the issues here are, in my view, not whether a uniform age ought to have been adopted or whether the provisions of the Act are appropriate for 16 and 17 year olds, but rather ones relating to resources and the means by which the provinces implement the change and, in particular make the new Youth Court a reality. At the time of writing, the answers to both of these issues are unknown.

As a final comment, not criticism, I would note that the Young Offenders Act will make a number of matters much more visible and subject to judicial scrutiny and/or public debate than ever before. The system which takes on the care, treatment and reformation of the young offender will become much more open and accountable for its performance. Through the review process, judges will be receiving much more extensive feedback on the results of their decisions. They will become aware, in a much more systematic way, of both the effectiveness and ineffectiveness of much of that which is done to and on behalf of young offenders.

The Court process itself has become and will grow to be even more visible and open to public scrutiny (for example, through the media). The differences between us as judges will become more apparent. The introduction of fixed dispositions highlights this fact and one will begin, in all liklihood, to read much more about the differences in the sentencing practices of judges than is the case now under the Juvenile Delinquents Act, where indeterminate sentencing is the norm. Given the expected increase in legal representation, the vexing and hotly debated issue of the role of counsel will become much more open to debate. The Declaration of Principles, other provisions of the Act and the Charter of Rights will support extensive

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about their philosophical underpinnings and consistent in the effort to reflect them, I am less than sanguine about the fuzziness to be found within the Young Offenders Act.

2. Uncertainty and ambivalence seem most apparent in those provisions which outline the enormous amount of discretion left to the individual provinces. For example, the Act expresses extensive support for alternative measures and yet each province is free to offer or not offer such programmes. The Act makes a clear distinction between open and secure custody with the Court determining which is to be used in the individual case, and yet the definitions are such that the provinces seem free to blur or even eliminate the differences between the two. Heavy emphasis is placed upon the young offender's need for legal representation and yet it is difficult to determine whether the requirements of the Act could be met by having one legal aid lawyer on duty at each Youth Court. No firm position is taken on the advisability of administrative bodies to determine whether an arrested offender is to be detained or to review custodial dispositions. Intermittent custody dispositions are supported but only if the provinces choose to introduce such programmes.

3. These days, any new legislation which sets out detailed requirements for those affected by it, raises the question of whether there will be adequate resources to implement it; this is a particular concern with the Young Offenders Act. For those provinces facing a raise in the maximum age, the worry is greatest because of the fear that strained Court and dispositional resources will be spread that much more thinly over a much wider population. In my view, the major concern which the resources issue raises is that young offenders may become subject to extensive delay. This is a concern both because I think the juvenile system has generally been free of the delays which seem to plague the adult criminal justice system and because the surest way to set aside the gains which come from added due process protection is to force one to wait forever to obtain them. The Act in its emphasis upon such things as reports, legal representation, reviews (all laudable proposals) could produce extensive delay if the necessary funds are not available.

4. An issue which produced extensive discussion amongst judges and others was whether the Act would appropriately recognize the role of the Court at the dispositional stage of proceedings under the Act. One heard this issue discussed most often in relation to the present provincial discretion to alter or set aside the Court's intent when making more serious dispositions, such as a committal to an industrial or training school.

   The end result is that the power of the Youth Courts at the dispositional stage seems to have been strengthened considerably. Not only is a broad range of dispositions available, but the Court may determine whether an offender goes into secure or open custody, subject to a determinate disposition which may be reduced only with an opportunity for Court review. In this way the Act seems to go beyond anything presently found in provincial adult correctional legislation.

   On the other hand, the provincial authorities may designate places as open or secure custody in a way which possibly obliterates the distinction, there is no role to play when the choice of setting or location is being made, there is no guaranteed acess to the child protection stream if an offender is seen as much more appropriate for that system and the role of the youth worker (probation officer) as an overall officer of the Court seems to have been eliminated. It will be interesting to see whether, in practice, judges see their role as considerably strengthened by the new Act.
   On some issues the authority assigned to the Court seems almost excessive, such as the apparent power (in section 13) to pick one's own expert to do individual medical or psychological reports. On the other hand, there are examples of very extensive authority being conferred upon provincial authorities, such as the broad power to move an offender from open custody into secure custody for 15 day periods (section 24(8)). One wonders if those who drafted the Act were aware of Prof. Lerman's study which demonstrates how, through repeated use of a power such as this one, some young offenders placed in the community found themselves spending a lengthy period of time in secure settings (Community Treatment and Social Control, U. of Chi. Press, Chicago, 1975).

5. The Act as a whole represents endorse-

Exception faite de ces quelques textes législatifs, il est néanmoins possible d'affirmer, d'une manière générale, qu'avant la fin du dix-neuvième siècle, les règles juridiques applicables aux enfants n'étaient pas différentes de celles applicables aux adultes. En outre, il y a lieu de remarquer qu'à cette époque, d'une manière générale, la législation en vigueur concernant les enfants ne faisait pas de distinction entre un enfant délaissé et un contrevenant.

Si, au cours des dix-huit et dix-neuvième siècles, le droit positif n'a pas accordé aux enfants une place particulière, différente de celle des adultes, on a par contre assisté, dans les pays occidentaux, au développement progressif de mouvements de réforme influents qui visaient à améliorer le système de la justice pénale, en général et les conditions juridiques et sociales des enfants, en particulier. Ces mouvements prônaient un système d'éducation public ainsi que des services médicaux, la protection des enfants abandonnés et maltraités, l'élimination de l'exploitation du travail des enfants, de même que la réforme de la procédure pénale. Par étapes successives, ces idées de réforme ont favorisé au cours des dix-neuvième et vingtième siècles, l'apparition d'une législation pour la protection des enfants, d'institutions spécialisées dans les soins donnés aux enfants, d'une instruction publique et, nouveauté considérable au début du siècle, celle d'un système judiciaire pour les jeunes.

Au cours du dernier tiers du dix-huitième siècle, les tenants de la criminologie classique ont suscité un mouvement de réforme en réaction à un système de justice pénale qu'ils trouvaient à la fois cruel et inefficace. Ainsi, en Angleterre, le nombre des infractions criminelles passibles de la peine capitale était passé en moins d'un siècle de cinquante à deux cents; des infractions aussi différentes que le meurtre, le viol, l'abattage d'arbres, l'association avec des bohémiens, le vol et l'usage de faux . . . étaient toutes passible de la peine de mort. Il n'y avait pas que la cruauté de ces peines, les procès se déroulaient souvent injustement, la culpabilité était présumée et les peines étaient imposées de façon arbitraire. Dans de nombreux cas, plus le crime était grave, moins le fardeau de la preuve était exigeant. En réaction à cette situation, les disciples de l'école classique prônaient une attitude de contrainte face à la criminalité potentielle et l'imposition d'une peine qu'après une déclaration de culpabilité. Ils accordaient une grande importance aux droits de l'individu, à la certitude et à "la procédure (régularité) légale". La théroie classique s'inspire de l'idée que le comportement résulte de l'exercice d'une volonté libre et que le comportement criminel peut être contrôlé dans une perspective hédoniste — récompenser les bonnes actions et punir les mauvaises.

La criminologie classique a influencé de façon marquée la réforme du processus pénal ordinaire; cependant, comme elle a précédé l'institution des tribunaux spécialisés pour les jeunes, son incidence sur le système judiciaire pour les jeunes a été moins importante que celle de la doctrine positiviste élaborée par la suite. Néanmoins, l'influence de la criminologie classique s'est quant même prolongée; en effet, celle-ci a exercé une action importante sur la réforme actuelle de notre système de justice pour les jeunes, notamment en raison de l'accent mis sur les droits, l'application systématique de la procédure et la notion de la responsabilité.

L'école positiviste de criminologie a pris de l'importance au cours du dernier tiers du dix-neuvième siècle, dans une large mesure, en réaction aux lacunes apparentes du modèle classique. Elle rejetait l'explication du comportement fondé sur le libre arbitre et la conception de l'ordre social issu du droit naturel dont s'était inspiré la pensée politique et juridique durant la plus grande partie du dix-neuvième siècle. Les positivistes soutenaient que le comportement antisocial était la manifestation de la réponse de l'individu à un stimulus externe sur lequel celui-ci n'avait aucun contrôle. On expliquait ainsi le comportement criminel et irrationnel par une combinaison de l'hérédité, l'éducation, du statut social, de la structure économique et de facteurs biologiques. Dans cette optique, ce genre de comportement est le résultat inévitable de forces extérieures et l'individu, particulièrement s'il s'agit d'un enfant, ne peut être tenu responsable de ses actes illégaux et toute peine est donc inefficace, voire injuste.

En outre, l'école positiviste prônait une attitude interventioniste, d'après laquelle il ne fallait pas seulement apréhender les criminels mais également s'occuper des criminels en puissance qu'il convenait d'identifier et de soigner pour empêcher qu'ils ne commettent des crimes. Par conséquent, l'Etat était justifié d'exercer un pouvoir de contrainte sur les individus et de les soumettre à un traitement, qu'ils aient ou non commis une infraction criminelle, pourvu que l'étude du cas d'un individu décèle des risques de danger. Ce genre d'intervention se justifiait par le droit et le devoir naturel de l'Etat de se protéger, ainsi que ses citoyens, des comportements

dangereux.

Poussée à l'extrême, cette école de pensée pourrait justifier des mesures aussi radicales que la lobotomie pour les prisonniers politiques, la castration pour les contrevenants sexuels et sous une forme plus modérée, favoriserait les peines à durée indéterminée, le traitement obligatoire et la détention des récidivistes dangereux.

L'adoption de la **Loi sur les jeunes délinquants** a entraîné la création d'un système distinct de justice pour les jeunes au Canada qui s'inspire, dans une grande mesure, de la pensée positiviste. Le préambule de la **Loi** de 1908 fait ressortir cette influence. Il énonce:

> "Considérant qu'il n'est pas à propos que les jeunes délinquants soient classés ou traités comme les criminels ordinaires, le bien de la société demandant au contraire qu'ils ne soient pas mis en contact avec les criminels et qu'ils soient sommis à une surveillance, à un traitement et à un contrôle éclairés tendant à réprimer leurs inclinations mauvaises et affermir leurs meilleurs instincts."

Comme l'a fait remarquer M. le juge Scott, l'un des rédacteurs de cette loi, il ne semblait pas nécessaire à l'époque d'insister sur la distinction entre les enfants délaissés et "délinquants":
(Traduction)

> "Il ne faudrait pas établir une distinction rigide entre les enfants abandonnés et les enfants délinquants. Ils appartiennent tous à la même catégorie et devraient être traités dans le but de satisfaire l'intérêt de l'enfant."

Il est bien évident que cette loi devait insister principalement sur la notion de traitement des jeunes, en faisant passer au dernier plan les notions de responsabilité et de justification d'intervention. M. le juge Scott a remarqué à ce sujet:
(Traduction)

> "Les tribunaux devraient agir comme un père sage et bon, autant que ferme et sévère. Il ne faut pas se demander: "qu'a fait cet enfant?" mais plutôt "comment cet enfant peut-il être sauvé?"

Cette nouvelle philosophie, que se voulait humaine et bienveillante découlait de la notion de **parens patriae,** et se trouve formulée à l'article 38 de la **Loi sur les jeunes délinquants** qui prévoit ce qui suit:

> "La présente loi doit être libéralement interprétée afin que son objet puisse être atteint, savoir: que le soin, la surveillance et la discipline d'un jeune délinquant ressemblent autant que possible à ceux qui lui seraient donnés par ses père et mère, et que, autant qu'il est praticable, chaque jeune délinquant soit traité, non comme un criminel, mais comme un enfant mal dirigé, ayant besoin d'aide, d'encouragement et de secours."

L'important étant d'aider et de traiter les adolescents, il ne semblait pas nécessaire de limiter l'intervention de l'Etat aux enfants qui avaient commis des actes qui auraient été considérés comme criminels d'après normes établies pour les adultes; les enfants étaient donc susceptibles de se voir protéger contre leur gré; la large définition donnée au mot délit par la **Loi sur les jeunes délinquants** fournissait à l'Etat un puissant moyen d'intervention. De plus, une intervention sous la forme d'aide et de traitement, par opposition à une peine, n'exigeait pas, dans cette optique, des procédures qui satisfassent aux normes de la justice naturelle ou de la procédure (régularité) légale adoptée par les tribunaux criminels pour adultes.

Il n'est pas surprenant qu'une **Loi** adoptée au tout début du siècle et presque inchangée depuis, ait pu faire l'objet de critiques, particulièrement nombreuses ces vingt dernières années, étant donné l'évolution des valeurs culturelles et des attitudes nouvelles face à la justice pénale ainsi que les connaissances et les données scientifiques accumulées pendant cette période.

NOTIONS FONDAMENTALES ET PRINCIPES

La **Loi sur les jeunes contrevenants** de 1982 constitue la réponse du Parlement à cette évolution des valeurs culturelles et des attitudes face à la justice pénale. Cette nouvelle législation s'inspire d'un nouvel ensemble de notions fondamentales qui reflètent, cette évolution et tient également compte des recherches et des connaissances plus approfondies du domaine des sciences sociales, en général et du développement psychologique et moral des enfants, en particulier. Je voudrais examiner maintenant quatre notions qui sont au coeur de cette nouvelle législation ainsi que les principes qui en découlent, et qui figurent dans la déclaration de principes de la **Loi.** De plus, je voudrais également souligner, à titre d'exemple, un certain nombre de dispositions de cette loi qui donne effet à ces notions fondamentales et à ces principes.

1. AGE ET RESPONSABILITE PENALE

En ce qui concerne rapport entre l'âge

Commentary on the Young Offenders Act

by Judge G.M. Thomson

The author is a Judge of the Ontario Provincial Court (Family Division)

The request that I offer some critical comment on the newly enacted Young Offenders Act has not been an easy one to fulfil for, on the whole, I believe it to be good legislation and a major improvement on the Juvenile Delinquents Act (although that Act has adapted much more readily to recent demands for offender accountability and due process than its wording would suggest). I say this because a discussion of only the weaknesses thought to be contained in the new Act runs the risk of distorting the author's overall position. I also personally share many of the goals and philosophical perspectives which I think motivated those who produced the new Act. In addition, predicting how a new law will function prior to implementation is always a risky undertaking; this is particularly so here where so much has been left to provincial decision-making, and at the time of writing most of this has not yet taken place.

Within this context and with apologies to those who may be disappointed with the moderate tone of my comments, I offer the following broad concerns about the new Act:

1. In the overall terms, the Act does, I think, betray one of the unfortunate, but perhaps inevitable results of so many years of consultation and redrafting: that is a tendency to include provisions which betray some inconsistency or at least ambivalence about both the approaches which should be taken with young offenders and the objectives it is hoped will thereby be achieved. Clearly the Act represents a substantial shift from the juvenile court philosophy of the early twentieth century, to one which stresses much more strongly the rights of young offenders as well as accountability for one's behaviour, responsibility of the individual and the protection of society And yet the Declaration of Principles is worded so broadly that it seems to endores firmly both the old philosophy and the new. Examples of this ambivalence can be found throughout the Act. The protection of society is emphasized in the broad range of dispositions available to the Court and yet the Act also introduces the broadest power I have ever seen to order assessments to determine and presumely to respond to the young person's special needs (section 13). Most of the dispositions seem to encourage responses which are closely tied to the offensive behaviour itself (thus, to be consistent, the present power in the Juvenile Delinquents Act to place the offender in the child protection stream has been eliminated—, and yet a provision was introduced just prior to the final passage which allows an offender, on consent, to be detained for the purposes of treatment (section 20(1))i)). We know from our experience with diversion programmes how hard it is to ensure that such consent is; in fact, "voluntary". Major emphasis is placed upon due process throughout the Act and yet the Court is given the power to deny the young offender access to assessment information the Court has in its possession which is likely to play a major part in the decision as to disposition. (Section 13 (16)). It is difficult to complain when this Act is one of the very few to even attempt to include a statement of the principles which are to guide those who implement it. It may be argued that the philosophical ambivalence expressed in the Declaration of Principles and in other sections of the Act mirrors that found in Canadian society as a whole; as well it can be said that the Act is then able more easily to adapt as societal views change (today one stresses those principles and provisions which suggest a "criminal code for children"; tomorrow, when and if the pendulum shifts once again, the needs-oriented provisions which can be emphasized). However, as one who welcomes laws which are clear

The foregoing examples demonstrate the importance of the youth court judge within the operating framework of the **YOA;** no other person or agency is entrusted with as much responsibility under the **Act** and no one is in a stronger position to influence, in a positive manner, the direction of juvenile justice development in Canada. All of us — lawyers, law professors, youth court workers — will be awaiting anxiously for those first judicial decisions interpreting and applying the **Young Offenders Act.**

FOOTNOTES

[1]With the passage of the **Canadian Charter of Rights and Freedoms, Constitution Act, 1982,** several sections of the **JDA** have been challenged: s. 15 dealing with bail, subs. 20(3) and (4) which permit the juvenile to be brought back for a re-opening of disposition, and the **Act** itself insofar as it is used to impose a punishment of five years or more without a jury trial. See Bala, "Constitutional Challenges Mark Demise of Juvenile Delinquents Act" (1983) 30 C.R. (3rd) 245 and the cases cited therein.

[2]For a fuller discussion of the philosophical differences between the **JDA** and the **YOA,** see Bala, Lilles, Thomson "Canadian Children's Law" (1982), chapter 6 entitled **Introduction: "Child Saving" and "Children's Rights".**

[3]A more detailed explanation of the s. 3 principles can be found in the Solicitor General's publication: Bala and Lilles, "The Young Offenders Act — Annotated", (1983).

[4]See **A.G. of British Colunbia** v. **Smith (s),** (1967) S.C.R. 702 and **Morris** v. **The Queen,** (1979) 1S. C.R. 405 for a discussion of the principles applicable in determining the constitutional validity of the **JDA.**

[5]See Canadian Children's Law", **supra,** and in particular chapter 9, **The Juvenile Court Hearing** and chapter 12, **The Role of the Lawyer, Prosecutor and Judge** for a discussion of relevant case law and articles dealing with the changing emphasis towards more due process in the Canadian Juvenile Courts.

[6]At the present time, the upper-age limit is sixteen in all provinces except British Columbia and Newfoundland where it is 17, and Manitoba and Quebec where it is 18. The **Charter** (s. 15) provisions requiring "equal treatment" do not come into effect until April 1, 1985, by which time a single maximum age across Canada will be mandatory.

[7]The salient portions of this press release are reproduced in "Canadian Children's Law" **supra,** at footnote 2 at p. 418.

[8]In particular, reference should be made to the work of L. Kohlberg, and the extensive research and articles supporting his theories or moral development. For example, see McKay "Moral Development", chapter 7 entitled "Moral Judgements in Adolescence". Of particular interest is the observation that significant proportion of late adolescents are unable to make higher level moral judgements.

[9]The cases decided under s. 9 of the **JDA** indicate that the test is a difficult one to meet: both "the good of the child" and "the interests of the community demand it". The **YOA,** on the other hand, merely requires the court to form an opinion that the young person should be proceeded against in ordinary court, in the interest of society and having regard for the needs of the young person.

[10]Brief of the Canadian Association of Chief of Police (CACP) to the Justice and Legal Affairs Committee, February, 1982.

[11]These concerns are summarized in a recent publication entitled "Youth Opportunity Action (Toward Ontario's New System for Young Offenders)", Central Toronto Youth Services (1983), pages 12-18.

[12]A maximum age of 18 years has been adopted by many American jurisdictions; the United Kingdom has clearly attempted to reduce judicial involvement in the processing of juveniles and has made it very difficult to bring criminal proceedings against anyone under the age of 14 years: see **Children and Young Persons Act 1969** and the **Social Work (Scotland) Act 1968.**

[13]See footnote 8, **supra.**

[14]In 1981, 871 seven-to-eleven year olds were charged and appeared before the Ontario Juvenile Courts; of these 508 were found delinquent. Of these, 203 were placed under the supervision of a probation officer, and the rest were adjourned indefinitely or received suspended dispositions. Only one child under 12 was committed to training school. See "Youth Opportunity Action . . . ", **supra** footnote 11 at page 21.

(Con't on P. 34)

d'une personne et sa capacité à former une intention criminelle, la dichotomie élémentaire enfant — adulte, bien que nouvelle en 1908, nous paraît maintenant insuffisante. Les connaissances actuelles et les valeurs de la société reconnaissent maintenant l'existence d'une troisième étape cruciale dans le processus de maturation, il s'agit de l'adolescence. On perçoit généralement l'enfant comme un être dans un état de dépendance totale et qui n'a pas la capacité d'encourir une responsabilité pénale et l'adulte comme un être tout à fait indépendant et responsable; l'adolescent, lui, est dans une étape de transition et est capable de prendre des décisions et d'assumer la responsabilité de ses actes, à un degré moindre, cependant, que dans le cas d'un adulte.

Les niveaux d'âge définis par la **Loi sur les jeunes délinquants** ne tiennent pas suffisamment compte des ces réalités.

La Commission parlementaire spéciale de l'Assemblée nationale du Québec a reconnu cette notion de responsabilité dans son rapport sur la protection de la jeunesse. One peut lire à la page 13 du résumé:

> "Toutes les études sur le développement psychologique des adolescents indiquent que les jeunes délinquants sont conscients du tort qu'ils occasionnent. En conséquence, soutenir leur responsabilité face à leurs actes illicites — responsabilité que peut cependant être pondérée en fonction du degré de maturité qu'ils ont atteint — ne peut constituer une affirmation contradictoire avec les connaissances actuelles sur le fonctionnement psychologique et moral des adolescents. D'autant plus que dans l'optique d'une aide efficace à leur apporter, la responsabilisation face à leurs actes est un élément clé au plan pédagogique."

Les précisions qu'apporte la **Loi sur les jeunes contrevenants** à question de l'âge s'exprime par l'intermédiaire de quatre principes que l'on peut rapidement décrire ainsi: responsabilité face aux actes et à leurs conséquences, protection de la société et besoins spéciaux. Il semble que la **Loi sur les jeunes délinquants** n'ait pas suffisamment insisté sur les notions de responsabilité personnelle et de protection de la société, et, par là, n'ait pas suffisamment tenu compte des intérêts et des valeurs de la société contemporaine. Par contre, la **Lois sur les jeunes contrevenants** énonce clairement dans sa déclaration de principes que les adolescents qui commettent des infractions doivent assumer la responsabilité de leurs actes illégaux et que la société doit pouvoir se protéger contre toute conduite illicite. Ces principes fondamentaux de responsabilité et de protection de la société sont au coeur de cette nouvelle législation.

Le principe de responsabilité doit être pris dans son sens le plus large; la responsabilité des adolescents comporte ainsi trois éléments. Ils doivent assumer leur responsibilité, tout d'abord, à titre de membres de la communauté, face à la société deuxièmement, face aux victimes de leurs actes en réparant le tort causé, lorsque cela est possible et troisièmement, face à eux-mêmes en participant activement à leur réhabilitation et à leur croissance personnelle. Voici trois exemples qui illustrent notre propos:

- **Les dispositions de la Loi sur les jeunes contrevenants** permettent aux adolescents d'assumer la responsabilité de leurs actes illégaux en participant à des programmes de mesures de rechange ou en exécutant des décisions en milieu communautaire, et en exécutant des décisions sous des formes fort variées comme l'indemnisation en nature ou en services personnels, la restitution ou les services communautaires.
- A l'étape de la décision, le juge pourra désormais ordonner le traitement d'un adolescent qui souffre d'une maladie ou d'un dér èglement d'ordre physique ou mental ou de troubles d'apprentissage, lorsqu'une personne compétente recommande ce genre de traitement et que l'adolescent y consent.
- Lorsque l'adolecent fait l'objet d'une décision avec placement sous garde, il pourra être mis en liberté pendant un nombre d'heures déterminées chaque jour pour lui permettre de travailler, de fréquenter l'école ou de participer à un programme de formation.

On reconnaît à la fois la capacité essentielle des jeunes d'assumer la responsabilité de leur comportement, tant négatif que positif, et les limites de cette capacité. Ainsi, la **Loi sur les jeunes contrevenants** apporte quelques nuances à ce principe en adoptant celui de la responsabilité atténuée. D'après ce principe, fondé sur la notion d'adolescence et les conséquences qui en découlent pour ce qui est de la dépendance, de la maturité et du degré de développement, les adolescents, de façon générale, ne sauraient être assimilés aux adultes quant à

leur degré de responsabilité.

Voici deux exemples qui font ressortir la responsabilité atténuée des adolescents:

- les décisions qui peuvent être imposées dans le cadre de la **Loi** sont généralement moins sévères que les peines qui pourraient être imposées aux adultes.

- l'obligation de détruire les dossiers suite à l'exécution de la décision et à l'expiration d'une certaine période sans qu'il y ait de nouvelle condamnation.

Ces dispositions ne dérogent pas au principe de responsabilité, elles ne font que reconnaître que les adolescents ne devraient pas subir des conséquences aussi graves que celles que l'on impose aux adultes.

Le quatrième principe qui relie les notions d'âge et de responsabilité touche aux besoins spéciaux des adolescents. D'après ce principe:

> "La situation des jeunes contrevenants requiert surveillance, discipline et encadrement; toutefois, l'état de dépendance où ils se trouvent, leur degré de développement et de maturité leur créent des besoins spéciaux qui exigent conseils et assistance."

Les principes de la responsabilité et de la protection de la société sont à la base même de la justice criminelle, qu'il s'agisse du système prévu pour les adultes ou du système consacré aux jeunes. Mais ce qu'il y a d'unique dans le système consacré aux jeunes, c'est l'accent porté sur les besoins particuliers du contrevenant. Par ce principe, on entend tempérer l'application du principe de la responsabilité et manifester le souci d'aider et d'encourager les jeunes. Il ne s'agit pas là simplement de mots mais d'une intention concrétisée dans de nombreuses dispositions dans la nouvelle loi. Permettez-moi de vous en donner deux exemples:

- La nouvelle loi attache beaucoup d'importance aux examens médicaux et psychologiques, ainsi qu'aux rapports prédécisionnels et cet ensemble de mesures augmente les informations dont disposent les tribunaux, ce qui a tendance à les rendre plus conscients des besions spéciaux des adolescents;

- Nous disposons d'un processus très complet d'examen qui permet le contrôle continu de l'application des décisions rendues à l'égard des jeunes, afin d'assurer qu'elles demeurent adaptées aux situations et aux besoins changeants des jeunes. Ainsi, une audition d'examen pourra être réclamée non seulement par la Couronne, mais également par l'adolescent ou par ses parents.

La seconde idée importante qui distingue la **Loi sur les jeunes contrevenants** du texte qu'elle remplace, porte sur les rapports entre l'État et le citoyen. La doctrine du **Parens Patriae** ne suffit plus aujourd'hui à définir ce rapport. La nouvelle tendance, manifestée dans la **Loi sur les jeunes contrevenants,** consiste à définir ce rapport dans la double optique de l'Etat et de l'individu, c'est-à-dire de chercher à définir les droits et les responsabilités à la fois de l'État et du citoyen et de ne pas se contenter d'examiner le rôle de l'État à titre de substitut aux parents. En plus des idées de responsabilité et de protection de la société que nous avons examinées tout à l'heure, considérons les principes suivants qui inspirent la **Loi sur les jeunes contrevenants** et qui découlent de ces idées: les droits et les responsabilités des parents, les droits des jeunes et les responsabilités de la société à l'égard des mesures qu'elle doit prendre afin de prévenir la criminalité des jeunes.

Ces principes reconnaissent que l'État ne peut pas s'arroger les droits et les responsabilités des parents du simple fait du comportement illégal d'un adolescent, pas plus qu'il ne peut tenir pour acquit que pareil comportement constitue en soi la preuve de l'incapacité ou de la négligence des parents. C'est pourquoi il est dit dans la déclaration que:

- "Les père et mère assument l'entretien et la surveillance de leurs enfants; en conséquence, les adolescents ne sauraient être entièrement ou partiellement soustraits à l'autorité parentale que dans les seuls cas où les mesures comportant le maintien de cette autorité sont contre-indiquées."

Nombreuses sont les dispositions de la **Loi** qui donnent l'effet voulu à la responsabilité des parents et à la situation spéciale qui leur est faite. Les parents d'un adolescent sont en droit, par exemple,

- d'être avisés de toutes procédures intentées contre leur enfant;

- de recevoir copie des rapports préparés à l'intention du tribunal pour adolescents;

- de se faire entendre lors des auditions de renvoi ou de décision;

one currently involved in the system will be immune from the effects of the **Act,** although some groups will be affected more dramatically than others. There is no doubt that the judiciary — the youth court judges under the **Act** — will experience the impact of this new legislation most strongly.

The philosophical basis of the **YOA** represents a dramatic change, moving away from the **parens patriae** notions of the **JDA:** by way of comparision, the **YOA** is more punishment oriented than treatment, focuses more on the offence than on the offender and purports to limit the wide scope for judicial discretion possible under the **JDA.** Due process will clearly be a mandatory element of all proceedings taken pursuant to the **YOA,** in contrast to the wide variation possible in delinquency proceedings.

As a corollary to these changes in underlying philosophy, the **YOA** imposes upon youth court judges a greater judicial responsibility and, inevitably, an increased accountability. Several provisions of the **Act** serve to demonstrate this new role of the judiciary:

i) where the young person is not represented by counsel, the youth court judge **must,** on his first appearance, advise the young person of his right to representation, and before accepting a plea, satisfy himself that the young person understands the charge and **must** explain to him that he may plead guilty or not guity,[21] presumably in language suitable to the age and understanding of the young person (s. 12). If the young person wishes to obtain counsel, but is unable to do so, the youth court judge **must** ensure that counsel is appointed (subs. 11(4));

ii) reasons must be given in the case of every disposition (subs. 20(6)) and every decision in a transfer application (subs. 16(5)), and these decisions form part of the record;

iii) the **Act** sets out guidelines to be considered by the court in specific instances; for example, certain matters must be considered in a transfer application (subs. 16(2)). Prior to making a custodial disposition (subs. 24(11)) or considering a transfer application (subs. 16(3)), the court must consider a predisposition report, which must contain the information specified in subs. 14(2);

iv) pursuant to s. 13, the youth court can remand a young person into custody on its own motion for 8 days, and, in certain circumstances, up to 30 days for the purpose of preparing a medical or psychological report; the conditions which may justify such a remand are very broad and general and include a suspected "emotional disturbance" or "learning disability"; Furthermore, the young person can be detained pursuant to this section, prior to a finding of guilt;

v) the variety of dispositions available (s. 20) has been increased and the youth court retains substantial control over the sentence imposed as a consequence of the provisions for determinate sentencing (para. 20(1)(k)) and for mandatory and discretionary reviews of sentences (ss. 28-33) which, for the most part, directly require the participation of the youth court judge. While in the past, the judge could rely on the correctional authorities to assess a juvenile and to place him in an appropriate setting, the youth court juge must now assume much of this responsibility and must tailor his dispositions accordingly;

vi) the witholding of a medical or psychological report from the young person pursuant to subs. 13(6) involves a delicate balancing of the rights of the young person to be advised of the case he must meet and to be present during proceedings under the **Act** (subs. 39(2)), against the adverse impact on the health or welfare of the young person or a third party as a result of the disclosure of the report to the young person (subs. 13(6));[22]

viii) the provisions involving the maintenance and use of records, and their release (ss. 40-44) impose upon the youth court judge substantial and new responsibilities requiring the weighing of the obligation to protect the privacy of young persons against the rights of third parties having a legitimate interest in the information contained in the records;

viii) the role of the youth court judge as a protector of the rights and freedoms of young persons, and as a check on the use of improper practices by police and others involved in the criminal justice system, is emphasized by s. 56 which empowers the court to exclude from evidence statements made by an accused where the requirements of that section have not been met.

year limit, depending on the seriousness of the offence (para. 20(1) (k) and subs. 20(3));

ii) maximum fine of $1,000 (para. 20(1) (b));

iii) alternative measures (s. 4);

iv) requirement that records be destroyed after a qualifying period of crime-free behaviour (ss. 40-46).

2) Society must be afforded protection from illegal behaviour (para. 3(1) (b));

i) the test for transfer to adult court appears to be significantly lower than the corresponding section in the **JDA** (s. 16);

ii) the youth court retains control over custodial dispositions (subs. 24(7) (8) and (9));

iii) insanity provisions of the **Criminal Code** apply (ss. 51 and 52).

3) Young persons have special needs (para. 3(1) (c);

i) wide range of dispositions set out in **Act** (s. 20);

ii) provision for intermittent custody whereby the young person can be released during the day to work or attend school, or on weekends to participate in special training programs (para. 20(1) (k));

iii) at disposition, with the consent of the young person, a judge can order treatment for a wide range of medical or psychological disorders (s. 22(1));

iv) the expanded use of predisposition reports (s. 14) and mandatory reports prior to the transfer hearing and any custodial disposition (subs. 24(11));

v) the expanded use of psychological and medical assessments (s. 14);

vi) extensive mandatory and optional review provisions are included in order to ensure that the disposition continues to be relevant to the needs of the young person.

4) Right to least possible interference with freedom (3(1) (f)):

i) provision is made for absolute discharges (para. 20(1) (a)), fines (para. 20(1) (b)), fine options (s. 21(2)), and a wide range of community-based orders such as compensation orders (para. 20(1) (c), restitution (paras. 20(1) (d) and (3)), compensation by way of personal services (para. 20(1) (f)), community service orders (para 20(1) (g)) and probation (para. 20(1) (i));

ii) in lieu of pre-trial detention, the youth court must consider the suitability of placing the young person into the care and custody of a responsible person (subs. 7(4)).

5) Rights of parents are emphasized (para. 3(1) (h)); in general, parents have the following righs:

i) parents have a right to receive notice of any proceedings commenced against their child (s. 9);

ii) right to receive copies of reports prepared for the youth court (ss. 13 and 14);

iii) right to be heard at transfer hearings (s. 16) and at disposition hearings (sub. 20(1)), although it appears that the parent is not technically a "party" to the proceedings and cannot call and cross-examine witnesses as a right;

iv) right to initiate and participate in reviews of dispositions (s. 32).

It is important to note that while the rights of parents are recognized, the **Act** does **not** make parents responsible for the criminal acts of their children. A parent who refuses to attend court after the judge has ordered the parent's attendance can be punished pursuant to subs. 10(3), however.

6) Young persons have special rights and protections beyond those afforded adults (para. 3(1) (e)):

i) right to be advised of right to counsel at every stage of the proceedings (subs. 11(1));

ii) the provision of counsel at trial or review where the young person desires counsel and is unable to obtain such (subs. 11(4));

iii) special protections when making statements to persons in authority (s. 56);

iv) privacy rights consistent with the rights of the press, including non-publication of any evidence presented at a transfer hearing (s. 17) and prohibition against the publication of the identity of the young person accused or any witness or victim who is either a child or a young person (s. 38).

Conclusion

The **YOA** marks a substantial change in procedure and philosophy underlying the juvenile justice system in Canada; no

- de demander l'examen des décisions et de participer à cet examen.

Le second principe, largement influencé par l'idée d'un changement dans le rapport existant entre l'État et l'individu, touche aux droits des jeunes ayant des démêlés avec la justice. Selon la nouvelle loi, "les adolescents jouissent, à titre propre, de droits et libertés, aux nombres desquels figurent ceux qui sont énoncés dans la **Charte canadienne des droits et libertés** ou dans la **Déclaration canadienne des droits.**" Ainsi, un adolescent à qui l'on reproche d'avoir commis une infraction a les droits suivants:

- le droit à un avocat;
- le droit d'être entendu et de participer aux audiences;
- le droit de bénéficier de certaines garanties en accord avec l'idée que nous avons examinée plus tôt touchant l'âge et la responsabilité pénale car c'est en raison de l'âge des adolescents et de leur niveau de développement qu'il convient de prévoir des mesures spéciales;
- le droit d'être informé de ses libertés et de ses droits lorsque ceux-ci risquent d'être affectés par la **Loi**;
- le droit à ce que les limites posées à ses libertés soient réduites au minimum qu'exige tout de même la sécurité de la société, compte tenu des besoins des adolescents et des intérêts de leur famille.

Le dernier principe qui découle de cette idée du rapport entre l'État et ses citoyens reflète la nature contractuelle de ce rapport dans l'équilibre des droits et des responsabilités de part et d'autre. C'est ainsi qu'il est dit dans la Déclaration de principes que la société a le droit de se protéger contre toute conduite illicite mais qu'elle doit "prendre les mesures raisonnables qui s'imposent pour prévenir la conduite criminelle chez les adolescents." Bref, il s'agit du droit de la société à la protection et de sa responsabilité au chapître de la prévention du crime.

Une troisième différence importante entre la **Loi sur les jeunes contrevenants** et la **Loi sur les jeunes délinquants** est que la première reconnaît que le droit criminel doit être utilisé avec modération et que l'intervention n'est justifiée que lorsque l'adolescent a commis une infraction. Cette idée est fondée sur la conviction que notre système de justice pénale qui comprend la police, les procureurs de la Couronne, les avocats de la défense, les juges et les agents des services correctionnels, ne représente qu'un élément, bien qu'il s'agisse d'un élément fondamental, qu'un élément donc, d'un ensemble beaucoup plus complexe et beaucoup plus large de réponses et de mesures visant la criminalité.

Nous trouvons la meilleure illustration de cette idée de modération ou de réserve dans la très importante réduction qu'a subie la portée de la **Loi** en ce qui concerne à la fois les personnes et les infractions. Voici la nouvelle portée de la **Loi:**

- L'actuel âge de la majorité pénale est de 7 ans, ce qui est trop bas et ce chiffre a donc été porté à 12 ans. Un enfant qui ne possède pas la capacité de former une intention criminelle, ne devrait pas tomber sous le coup du droit criminel. Ainsi, fixée à 12 ans, la nouvelle majorité pénale rend mieux compte du niveau de développement et de maturité qui permet de tenir un adolescent pour responsable de sa conduite illicite.
- En fixant à 17 ans inclusivement l'âge maximum, on élargit le champ d'application de cette loi en accordant à un plus grand nombre d'adolescents qui ne sont pas encore arrivés à pleine maturité les bénéfices d'un système de justice spécialement conçu pour les jeunes et, de plus, on les empêche d'être soumis aux pleines rigueurs du droit pénal.
- La portée de la **Loi** ne s'étend qu'aux loi et règlements fédéraux. Le champ plus large d'application de la **Loi sur les jeunes délinquants** avait entraîné un certain degré de discrimination envers des adolescents qui se voyaient ainsi criminalisés pour un comportement qui n'aurait pas été illégal, s'ils avaient été adultes et qui appartient plutôt au domaine du bien-être et aux lois sur la protection de la jeunesse.

La quatrième idée qui fonde la distinction entre l'approche adoptée par la loi actuellement en vigueur et celle retenue par la nouvelle loi est liée à la plus grande importance que la **Loi sur les jeunes contreventants** accorde au rôle de la collectivité à l'égard des jeunes contrevenants. Dans la **Loi sur les jeunes contrevenants,** trois principes découlent de cette notion de participation accrue de la communauté: l'intervention minimale, la responsabilité de la société en matière de prévention de crime et l'approbation de mesures de rechange.

Le droit qu'a une jeune personne de ne voir restreindre sa liberté que dans la mesure où l'exige strictement la protection

de la société est fondé sur la conviction qu'il existe d'autres méthodes efficaces d'intervention voire même le bénéfice de non-intervention dans certains cas. Afin de donner effet à ce principe, la **Loi** a prévu:

- Un large éventail de mesures qui trouvent leur application en milieu communautaire et qui permettent à un jeune contrevenant d'assumer ses responsabilités au sein même de la communauté;
- L'application de critères restrictifs lorsqu'il s'agit d'ordonner des mesures de détention afin de restreindre le nombre d'occasions où peuvent être imposées des mesures de garde en milieu fermé;
- Toute décision concernant la détention doit être rendue par le juge du tribunal pour adolescents en audience publique afin que les parties aient l'occasion de débattre les questions en litige.

Nous avons déjà signalé le principe qui, tout en reconnaissant la nécessité d'assurer à la société une protection contre les comportements illicites, énonce la responsabilité de la société de prendre des mesures raisonnables afin de prévenir la conduite criminelle chez les adolescents. Il est clair que la communauté toute entière doit contribuer à cet objectif. Il est peut-être utile de rappeler ici l'article 69 de la **Loi** visant les comités de justice pour la jeunesse qui prévoit toute une gamme de mesures et d'activités communautaires allant de la prévention du crime à la participation au développement et à l'administration de programmes et de services à l'intention des jeunes contrevenants. Le fait que la **Loi** prévoit un système distinct de justice qui vise tout spécialement les adolescents est en soi la meilleure garantie contre la récidive des jeunes.

Le principe selon lequel il faut chercher, en matière de criminalité des jeunes, des mesures autres que des procédures judiciaires, dépend des mesures de rechange que l'on pourra instituer au sein de la communauté. De pareils programmes et services sont susceptibles d'êtres adaptés aux circonstances et aux besoins particuliers de toute communauté, que ce soit en milieu rural, en milieu urbain ou chez les autochtones et, de plus, offrent toute latitude pour la participation des organismes bénévoles et communautaires. Un avantage supplémentaire des programmes de ce genre est qu'ils permettent d'éviter le recours excessif à des mesures de détention ou autres programmes de traitement institutionalisé.

Après avoir examiné l'origine et l'évolution de notre système de justice pour les jeunes ainsi que les idées et principes sur lesquels la nouvelle loi est fondée, on pourrait bien se demander ce qu'en dernière analyse nous avons accompli avec cette **Loi sur les jeunes contrevenants.** Certains ont dit que nous avons tout simplement créé un code criminel pour enfants ou un modèle réduit du système pour adultes. La **Loi sur les jeunes contrevenants** forme effectivement un droit criminel applicable aux jeunes contrevenants, à la criminalité des jeunes et nous ne devons pas hésiter à le reconnaître mais, ceci dit, il s'agit d'un droit pénal qui vise un objectif social beaucoup plus large. Cette nouvelle loi parle de la protection de la société et des responsabilités à cet égard, mais ne retient pas ces éléments en tant qu'objectifs exclusifs car la **Loi** souligne également les droits des individus, les obligations et les responsabilités de l'État, et les besoins spéciaux des adolescents qui doivent être en mesure de bénéficier de conseils et d'assistance. Je considère, pour ma part, que nous avons créé, afin de faire face à la criminalité des jeunes, un processus cohérent et équilibré qui va encourager le respect de la loi et promouvoir le bien-être à la fois de la société et des jeunes contrevenants. Il n'est pas facile d'atteindre un certain équilibre entre ces divers objectifs et cela, la Commission parlementaire du Québec l'a très bien reconnu, ainsi qu'on peut le constater à la page 13 de son rapport sommaire:

> "Puisque la délinquance des mineurs est un phénomène complexe et diversifié dont la colonne vertébrale est la commission d'une infraction qui lèse une victime individuelle ou collective, il nous est apparu essentiel que des objectifs spécifiques soient arrêtés la concernant.
>
> Ces objectifs doivent se fondre dans un équilibre que la loi actuelle rend parfois difficile à établir. Ces objectifs sont de cinq ordres: respect des droits qui vont de pair avec une attitude d'aide de la part des intervenants, responsabilisation du jeune, protection de la société et responsabilisation des parents."

En guise de conclusion, j'aimerais maintenant expliquer brièvement comment la **Loi sur les jeunes contrevenants,** tout en maintenant un système judiciaire spécialement conçu pour les jeunes, sert de fondement à un système qui, sous divers aspects, est différent du régime pénal pour adultes. Mes observations jusqu'ici vous

court must direct that the young person be represented by counsel (subs 11(4);

v) and, where a statement is taken from a young person, it shall not be admissible unless the young person has, before the statement was made, been given a reasonable opportunity to consult with counsel (para. 56(2)(c)).

It is evident from the above provisions that the **YOA** impresses upon youth court judges and justices, review boards, and police officers and other persons in authority involved in taking statements from young persons, a minimum duty to advise the young person of his right to counsel. In addition, s. 56 of the **YOA** imposes upon persons in authority who are involved in taking statements, the obligation to caution the young person. While no specific words have been prescribed, it is intended that this advice be meaningful and must be "clearly explained to the young person, in language appropriate to his age and understanding . . ." Depending on the age, condition and intelligence of the young person, this obligation may be difficult to discharge;[18] furthermore, the youth court will be required to rule on the adequacy of this caution in order to determine the admissibility of a statement made by a young person.

There is no doubt that the **YOA** will have the effect of increasing the involvement of lawyers both prior to and during youth court proceedings. As the juvenile's confession is often the only evidence the Crown has available in a significant number of prosecutions, it is quite likely that the effect of s. 56 of the **YOA** will be to reduce the number of such statements and to increase the proportion of trials. As an indirect result, one could expect to see an increased proportion of police resources redirected towards juvenile investigations and a greater use of legally trained "Crowns" in the youth court. It may also result in attempts to divert weak or "defective" cases away from the youth court by using alternative measures (s. 4), or by a transfer to adult court to avoid the requirements imposed by s. 56.[19]

The actual provision of counsel pursuant to s. 11(4) does not ensure that the young person will have legal representation at proceedings held pursuant to s. 4. At the alternative measures state of the proceedings, the young person is merely to be advised of his right to counsel; thus, as young persons are often without financial resources, the right to counsel may be a "hollow" right, unless a parent or other person is prepared to provide financial assistance. Another concern is that the young person or his parents may not fully appreciate the importance of retaining counsel for the alternative measures stage of the proceedings; note that information and statements made at alternative measures hearings may be used in subsequent civil and criminal proceedings, with the exception only of the actual statement by the young person accepting responsibility for the offence (subs. 4(3)). Further, subject to subs. 4(4), the use of alternative measures is not a bar to subsequent proceedings against the young person under the **Act** for the same offence.

Disposition

The **YOA** in ss. 20-24, sets out a complete code for dispositions and in this regard, supercedes the **Criminal Code.**[20] As a result of specifying the available dispositions, any uncertainty which exists under the **JDA** to order an absolute discharge, community service order, restitution or compensation, will be clarified.

The majority of dispositions currently used by juvenile court judges will also be available under the **YOA.** One noteable exception can be found in s. 20(1) (h) of the **JDA,** which authorizes the court to commit a juvenile into the care of the Children's Aid Society or into the charge of the Superintendent of Welfare. Under the **YOA,** the distinction between criminal law dispositions and child welfare placements is more clearly defined; hence, there is no similar provision in the **Act.** Paragraph 23(2) (f) does permit the youth court judge to order that the young person reside in such place as the Provincial Director or his delegate may specify, as a condition of probation. While the purpose of this section of the **Act** is to enable the young person to live in a provincially organized and funded group home, camp or other residential facility, it falls short of placing the young person into the care of the society or other welfare authorities, as there is no termination of parental rights involved.

It is particularly at disposition that the **YOA** will present the greatest challenge to youth court judges, for it is at this stage of the proceedings that the competing principles enunciated in s. 3 of the **Act** must be carefully considered and balanced. Nearly every principle has its dispositional counterpart or is reflected in some other legislative provision. Consider the following comparisons:

1) Young persons should not in all instances be held accountable in the same way as adults (para. 3(1) (a)):

i) custodial sentences have a 3 or 2-

for criminal law purposes. Indeed, fixing the maximum age at 18 makes the law consistent with the general civil law relating to majority and takes account of the teachings in the field of developmental psychology and other social sciences.[8] In those few cases where it is clearly inappropriate to deal with a young person pursuant to the **YOA,** the transfer provisions of s. 16 can and should be invoked. It should be noted that the criteria for transfer in the new Act are not as strict as those found in the JDA.[9]

The increase in the minimum age of criminal of criminal responsibility from 7 to 12 years, has also been subject to some criticism, incliding from police organizations.[10] Many of the concerns expressed were not substantitive in nature, but appeared to reflect apprehension about the availability of resources and uncertainty as to the exact role of the police in dealing with children under 12 years of age who are alleged to have broken the law.[11] The clarification of these uncertainties and apprehensions lies largely with the provinces and should not be allowed to detract from the substantive reasons favouring an increased age.

A number of arguments favouring an increased age of criminal responsibility and the resulting decriminalization of antisocial behaviour by children can be identified. In general, it can be said that these changes:

i) are consistent with legal developments in many other jurisdictions;[12]

ii) reflect society's increased understanding of the cognitive and moral development of children and adolescents;[13]

iii) mirror current police and judicial practices, as only a small proportion of children under 12 years brought to juvenile court receive dispositions which are unavailable to social welfare agencies;[14]

iv) recognize that the intervention of correctional law authorities at such a young age has not been demonstrated to be successful, using traditional measures such as recidivism;[15] and

v) parallel society's expectations, as children under 12 rarely represent a significant threat to others; very violent chldren suffer from physical or mental illness which may be better treated using medical rather than criminal law methods.

Rights of the Young Person

The **Young Offenders Act** places a greater emphasis on the legal rights of the young person, but this is totally consistent with the young person's increased responsibility under this new legislation.[16] In many instances, the young person is given the same rights as an adult in similar circumstances; for example, upon arrest, the provisions of the **Criminal Code,** the **Canadian Charter of Rights and Freedoms** and the **Identification of Criminal Act** apply to both young persons and adults. The **Act** goes further, however, and provides additional safeguards in those situations where the young person's lack of maturity and life experience places him in a more vulnerable position.[17] Some examples of these special protections are:

i) provisions for temporary detention separate from adults (s. 7);

ii) notice to parents upon arrest, summons or apperance notice (s. 9);

iii) the requirements that certain cautions be given as a precondition to the admissibility of any statement made by the young person (s. 56);

iv) release of the young person into care of responsible adult **in lieu of** pre-trial detention (subs. 7 (4));

v) limitations on the publication of evidence given during the transfer hearing (s. 17);

vi) protection against publication of information identifying young persons or children involved in proceedings under the **Act** (s. 38).

Perhaps most importantly, the **YOA** provides the young person with a "right to counsel" that goes beyond the rights provided by the **Criminal Code,** the Common Law or the **Charter.** Consider, for example, the following provisions of the **YOA:**

i) All appearance notices, summonses, warants, etc., must contain a statement of the young person's right to counsel (subs. 11(9));

ii) the young person has a right to retain and instruct counsel without delay at every stage of the proceedings, including alternative measures, (sub. 11(1));

iii) Where a young person appears without counsel before a judge or justice, that judge or justice must advise the young person of his right to counsel and must give him a reasonable opportunity to obtain counsel (subs. 11(3));

iv) Should the young person desire the assistance of counsel, and is unable to obtain such counsel, the youth

ont déjà permis de le percevoir, mais il convient de revoir ou de souligner un certain nombre de points.

En premier lieu, permettez-moi de dire que la nouvelle loi se distingue de la **Loi sur les jeunes délinquants** par l'importance qu'elle attache aux principes de la responsabilité, de la protection de la société et des droits des adolescents, mais qu'elle garde en commun avec la **Loi sur les jeunes délinquants** la conviction que les adolescents ne peuvent pas être traités de la même manière que les adultes. A mon avis, la section intitulée "Déclaration de principes" est tout à fait claire sur ce point.

- La nouvelle loi, comme on l'a déjà fait remarqué, continue à reconnaître les besoins spéciaux et les situations spéciales des adolescents.

- La nouvelle loi préconise l'idée de responsabilité mais reconnaît aussi que les adolescents ne souraient être assimilés aux adultes quant à leur degré de responsabilité et les conséquences de leurs actes illicites.

Le principes des droits, de la responsabilité et de la protection de la société sont à la base même du système de justice pénale pour les adultes et les jeunes; toutefois, seul le système prévu pour les adolescents attache une importance spéciale aux besoins des jeunes et à la notion de la responsabilité atténuée.

Ces principes ne sont pas purement théoriques et nous avons vu que la **Loi** comporte des mesures concrètes qui permettent de mettre ces principes en application. Certaines de ces dispositions méritent d'être citées à nouveau:

- On a accru le recours aux évaluations et aux rapports prédécisionnels et augmenté l'importance qu'on y attache. Cela va multiplier les informations dont peuvent disposer les tribunaux et cela devrait les rendre plus conscients des besoins des adolescents qui comparaissent devant eux;

- La **Loi sur les jeunes contrevenants** définit le rapport entre l'âge et la responsabilité pénale et reconnaît en cela le concept d'adolescence. C'est ainsi que nous pouvons parler de responsabilité tout en atténuant, si l'on peut dire, les conséquences de celle-ci. Les types de mesures prévues et les restrictions qui leur sont imposées illustrent très clairement ce fait et permettent d'opérer la distinction avec le processus pénal ordinaire.

Les dispositions régissant la tenue et l'utilisation des dossiers sont compatibles avec les notions de responsabilité pénale et de responsabilité atténuéee. On donnera à l'adolescent qui le mérite la possibilité d'un nouveau départ.

Le système de justice pénale s'attache essentiellement à l'infraction commise et à l'intérêt public alors que le système de justice pour les jeunes non seulement s'attache aux contrevenants et à la protection de la société mais, en plus, fait entrer en ligne de compte les besoins spéciaux du contrevenant et l'intérêt de sa famile. Ceci découle clairement des principes suivants, exposés dans la "Déclaration de principes":

> "Dans le cadre de la présente loi, le droit des adolescents à la liberté ne peut souffrir que d'un minimum d'entraves commandées par la protection de la société, compte tenu des besoins des adolescents et des intérêts de leur famille;"
>
> "Les parents sont au premier chef responsables de l'entretien et la surveillance de leurs enfants."

Afin de rendre ces principes efficaces, la **Loi** prévoit que les parents doivent être avisés de **toute arrestation,** de toute détention ou de toutes procédures judiciaires visant leur enfant. En outre bien que les parents en principe ne soient pas partie au procès, ils sont dotés d'un statut spécial qui leur permet de se faire entendre par le tribunal à diverses étapes cruciales du processus, soit lors d'une demande de renvoi devant un tribunal pour adultes, avant que la décision ne soit prise ou lors de l'examen d'une décision.

Il existe une autre procédure très importante propre au système de justice pour les jeunes, différente donc du système pour adultes. Il s'agit d'un processus d'examen très développé. Cette procédure d'examen permet le contrôle continu et la modification des décisions afin que celles-ci restent en rapport avec l'évolution des besoins et des situations de jeunes.

A mon avis, mes dames et messieurs, ces procédures et ces mesures spéciales permettent de contredire la thèse selon laquelle la **Loi sur les jeunes contrevenants** ne fait que créer un mini modèle du système pour adultes. Ce système judiciaire pour adolescents continue à attacher une très grande importance aux idéaux de rééducation et de réintégration qui, pour beacoup, n'existent plus dans le système pour adultes. Il est essential de maintenir un régime spécial pour les jeunes afin de ne

(Con't on P. 33)

Paternalism Circumscribed

by Judge A. Peter Nasmith

The author is a judge of the Ontario Provincial Court (Family Division). These are excerpts of remarks made to a meeting of the Young Lawyers' Division of the Canadian Bar Association — Ontario.

I PHILOSOPHY

The winds of paternalism have blown hard since before the turn of the century and have contributed to some extraordinary features in criminal proceedings against young people. In 1908 Parliament apparently validated these forces and to some extent sacrificed procedure safeguards for the sake of intervention and treatment for the young accused.

In the last 15 years there has been growing resistance to the forces of paternalism in these criminal proceedings. This resistance has arrived by way of injections of legalism from lawyers, legally-trained judges and the champions of children's *rights* on the one hand and the explosion of treatment myths on the other.

As if marching to the same drum, the courts, the new legislation governing young offenders and the new *Constitution Act* have concurrently marked the distance the juvenile justice system has moved away from paternalism and toward what the Americans call "due process" and what Canadians call "principles of fundamental criminal justice" (including the right of the accused young person to counsel, to the presumption of innocence, to a fair and full hearing and to minimize interference with his freedom).

The Supreme Court of Canada confirmed the criminal nature of the proceedings against young persons charged with committing offences in *Morris v. R* when the majority ruled that a finding of delinquency was the equivalent of a *conviction* for an offence.

Since the *J.D.A.* is essentialy a dispositional statute, any excuses for a special departure from standard principles of criminal justice prior to adjudication are specious. At disposition the situation may be somewhat different.

The Young Offenders Act has codified many of the procedural safeguards that have developed. Although much of the focus of this new code is on proceedings prior to adjudication, there is a spillover into the structure of the dispositional hearings including the offender's right to counsel, to be present for *all* considerations of disposition and with certain exceptions (to be discussed below) the right to see reports and other material received by the court and to confront and cross-examine the authors and to give and call evidence.

The Canadian Charter of Rights and Freedoms is the central feature of the *Constitution Act* 1982 and it provides some impressive ammunition for attacking the *J.D.A.* It is ironic that such potential should develop after all these years and on the eve of the natural death of the *J.D.A.*.

Already the review provisions contained in section 20(3) of the *J.D.A.* have been declared of no force or effect by a Provincial Court Judge because of double jeopardy. At the same time the section has come under *Charter* attack in another juvenile court as violating the right of the young offender not to be deprived of liberty except in accordance with the principles of fundamental justice not to be arbitrarily detained or imprisoned, and not be deprived of a fair hearing in accordance with section 11 of the *Charter*.

The review mechanism in the *J.D.A.* is typical, I think, of the priority given in that Act to paternalistic treatment at the expense of proper procedure. The reviews under this section have been used largely to give Probation Officers some administrative clout and to create, in many cases, a kind of Court Wardship whereby the offender (however trivial the initial offence may have been) can get hooked into an endless management continuum which is lacking in procedural safeguards.

The Young Offenders Act goes a long way in curtailing these intrusive reviews and limiting them to changes in disposition which are reductions rather than increases in the quantity of intervention. Generally speaking, any problems that develop with the carrying out of a disposition must be dealt with as a *new charge* and that is itself will clear a lot of the procedural fog.

By no means have all of the by-products of paternalism been eliminated. The stated principles of the *Y.O.A.* retain some of the language. The elaborate

Beginning a New Era

by Prof. Heino Lilles

The author is a Professor of the Faculty of Law, Queen's University at Kingston, Ontario.

The **Juvenile Delinquents Act** has remained essentially unchanged since 1908, and it is not surprising to find that, in recent years, it has been subjected to some criticism. Perhaps more surprising is that is has survived intact for so long,[1] when one takes into account seventy-five years of rapidly changing social values and the substantial population shift towards urban centres. It has been only within the last two decades that significant proposals for reform have been advanced, beginning with the **Report of the Department of Justice Committee on Juvenile Delinquency in Canada (1965)** and culminating with the **Young Offenders Act** which received Royal Assent on July 7, 1982.

The most significant difference between the **Juvenile Delinquents Act** (JDA) and the **Young Offenders Act** (YOA) can be identified by comparing the underlying principles of the former with the Declaration of Principle found in s. 3 of the **Y.O.A.** The **JDA** emphasizes the treatment of the delinquent as a misguided child; the **YOA,** on the other hand, takes account of several quite different principles such as: i) the increased accountability and responsibility of young persons; ii) young person are not fully mature, and have special needs and should not be held responsible in the same way as adults; iii) society must be afforded protection from illegal behaviour; iv) young persons have the right to the least interference with their freedom which is consistent with the protection of society; and v) parents have the primary responsibility for the care and supervision of their children.

There is no doubt that s. 3 is intended to be used as guidance in interpreting the entire **Act;** the fact that these principles have been incorporated into the statute itself suggests that they were intended to be something more than simply an explanation of the philosophy of the **Act.** Nor should they be considered contradictory or inconsistent; rather, they should be viewed as competing principles which are to be carefully balanced and applied, as circumstances dictate, to the facts of a particular case.[3]

A detailed consideration of some of the important changes incorporated into the **YOA** will be left to the papers which follow A brief overview of the major changes, however, may be useful at this point to emphasize the general shift in philosophy between the old and the new legislation.

Jurisdiction

By narrowing the definition of "offence" to exclude breaches of provincial legislation, municipal by-laws and territorial ordinances, as well as the so-called "status" offences, the **Act** clearly reveals its criminal law origins and should be considered a valid exercise of this federal constitutional power.[4] This narrowing of the offence jurisdiction also serves to emphasize the criminal nature of this statute, from which can be inferred that informal court procedures based upon the **parens patriae** notion found in the **JDA** can no longer be justified.[5] On the other hand, a closer examination of s. 3 will clearly demonstrate that it would be wrong to refer to the **Act** as being merely a "kiddies Criminal code": the needs of the young person are still very important but must be balanced against the interests and protection of society.

The raising of the minimum age to 12 years and the fixing of the maximum age to under 18 years serves both to promote certainty and uniformity across Canada and is, therefore, to be welcomed.[6] More importantly, this age range reflects reasonably accurately the state of maturation transition commonly referred to as adolescence, during which period the special safeguards provided by the **YOA** are most appropriate. The reasons for choosing age 18 were given by the Solicitor General of Canada in a press release dataed February 9, 1982, and they are compelling;[7] they do not address, however, some of the transitional problems faced by the majority of provinces in implementing the new maximum age.

It is worth noting that recent public criticisms of this upper age have come largely from provincial politicians and administrators who have been concerned with providing adequate facilities for 16 and 17 year olds, while the provinces were negotiating cost-sharing arrangements with the federal government. There has been no serious suggestion that age 18 is inappropriate to accurately mark the transition to full individual responsibility

(c) New services or programs are available that were not available at the time of disposition; or

(d) Other grounds as considered appropriate by the youth court.

Where the Provincial Director recommends release from custody and placement on probation he can give notice to the young person, his parents and the prosecutor and if any one of these parties' wishes, a hearing can be held before the youth court. The release is automatic if none of these parties requests a review.

For reviews of disposition it is mandatory that progress reports be prepared and distributed to the parties with the same rights to cross-examination as set out in s. 14, *Y.O.A.*

The only changes open to the reviewing court under s. 28 involves a *reduction* in intervention by way of movement from secure to open custody or from custody to probation for the balance of the original term of custody.

Dispositions *not* involving *custody* can be reviewed under s. 32. Again, it is impossible to make the disposition more onerous than the original.

If any more serious disposition is sought it has to be based on an alleged failure to comply with the original disposition and the procedure for dealing with these *specific new charges* is set out in section 33. A young person has the same right to a fair hearing as he would have on any original criminal charge.

If the previous disposition did not involve custody the maximum custodial period ordered under review based on a failure to comply would be six months. Of it there was previous custody, the limit is an additional six months.

The application for a review based on failure to comply must be made before the original disposition runs out or within six months thereafter.

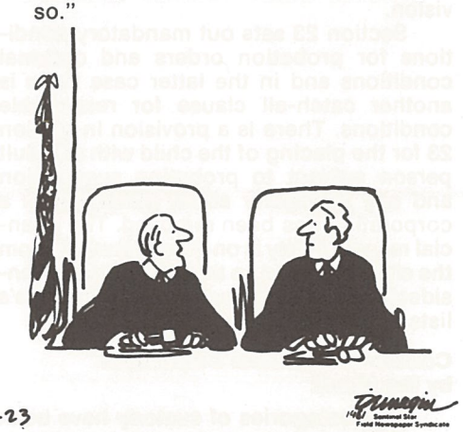
The careful boundaries around the Courts' powers as drawn by these sections of the *Y.O.A.* dealing with reviews of disposition demonstrate, as well as anything, I think, the modern emphasis on the circumscription of paternalism in the responses to the crimes of young offenders.

Philosophy and Principles
(Continued from P.7)

will, plenty of understanding and compassion and persistent efforts, we can and will achieve a measure of social justice, equal to none, for our young people. The overall public interest does not demand that we lock up or use restrictive sanctions with respect to every young person who has gone afoul of the law — surely that would be counterproductive. Rather, we must strive to rehabilitate and reform young offenders within their community and family setting; for there lies the best prospect for effectual and long-term public protection and the effective pursuit of the overall public interest. To this end, all — society, the family and the young person — must contribute and assume their responsibilities.

What parliament has intended, ladies and gentlemen, is a system of juvenile justice which is neither exclusively treatment-based nor which subscribes primarily to deterrence and punishment; nor is it exclusively welfare or justice oriented. What we have, I believe, is best summed up by Faust & Brantingham in their book on juvenile justice philosophy, at page 25, where they say:

> "There are significant indications that a new system of juvenile justice is emerging — a system which can preserve that advancements in the behavioural sciences can be utilized in the treatment of troubled and troublesome youth, but only within a legal framework of justice, that protects the individual rights of such youth and precludes authoritative intervention in their lives without a crucially important reason for doing so."



"I'm going to start tempering mercy with a little more justice."

support system that has evolved around the Juvenile Courts in Ontario for the treatment of juveniles and their families has been validated. And the otherwise immaculate structure of the *Y.O.A.* contains one or two conspicuous departures from "due process" principles.

For example, the *Y.O.A.* provides in section 13 dealing with medical and psychological reports:

> "13(6) A youth court *may withhold* the whole or any part of a report made in respect of a young person pursuant to subsection (i) *from . . . (b) the young person,* his parents or a private prosecutor where the person who made the report states in writing that disclosure of the report or part thereof would be *likely to be detrimental* to the treatment or recovery of the young person or would be likely to result in bodily harm to, or be detrimental to the mental condition of a third party."

The *Y.O.A.* also provides in dealing with mandatory terms of probation:

> "23(1) (b) that the young person appear before the youth court when required by the youth court to do so; and . . .
>
> (8) A young person may be given notice to appear before the court pursuant to paragraph (1) (b) orally or in writing and where the notice is in writing it may be in Form 9.
>
> (9) If a young person to whom a notice is given in writing to appear before the youth court pursuant to paragraph (1) (b) does not appear at the time and place named and it is proved that a copy of the notice was served on him, a youth court may issue a warrant to compel the appearance of the young person."

According to Professors H. Lilles and N. Bala who worked with the Ministry of the Solicitor-General in preparing training materials for the introduction of the *Y.O.A.* section 23:

> "allows the youth court judge to make contact with the young person to discuss informally the terms of the probation order and the young person's compliance with it . . . The informal procedure under paragraph 21(1)(b) will usually be set in motion by a Youth Court Worker who has reason to think it would be beneficial to bring the young person before the youth court, for example, if the court worker has been having difficul-..es . . ."

Paternalism dies hard. These apparent compromises seem to have perpetuated the anomalies of secret evidence, procedural arbitrariness and procedural double jeopardy (where no new offence of any sort has been committed by the young person).

In fairness to the draftsmen, s. 633(2) of the *Criminal Code* is a precedent for a condition in probation orders requiring the accused to ". . . appear before the court when required to do so by the court . . . "

To my knowledge this section is rarely, if ever, used and leaves questions about the mechanics of its operation. But in s. 23 of the *Y.O.A.* the procedure is laid down and provides for arrest and detention. It may well encourage the treatment-minded Youth Court Judge to stay on as a member of the treatment team — an amorphous role for a judge somewhere outside the boundaries of the traditional judge in the adversary system.

The provision for secret evidence will place the lawyer in the anomalous position of having knowledge of evidence affecting his client's case that he will apparently be ordered not to disclosure to the client It may be that this procedure will only be used in desperate situations.

In any case, it will be interesting to see if these apparent departures from natural justice are saved by section 1 of the *Charter of Rights* where they come under inevitable attack; whether, for example, it is deemed "reasonable" to subject a young person to a court hearing and to possible arrest and detention where he has done no act constituting an offence or a breach of probation or a failure to comply with his disposition but where the Youth Court Worker is "having difficulty".

The role of the lawyer at the disposition hearing of young offenders will continue to be difficult and challenging. I would like to share my observations of four of the categories of lawyers representing young people whose roles at disposition appear, in different ways, to be influenced by paternalism.

(1) The child-saver who suggests a response beyond what the Crown is seeking.

(2) The parents' lawyer (wearing the cap of the young offender's lawyer) speaking for intervention in accordance with the parents' wishes and perhaps contrary to his real client's wishes.

(3) The trial lawyer, alienated in the Family Court, who says, in effect, after adjudication, "That finishes my part. I will now gladly turn the whole matter of disposition over to you, judge, and your wonderful network of social workers."

(4) The Family Court 'specialist' who becomes an invested member in good standing of the treatment oligarchy and compromises his adversarial function.

Of course there *is* a key role for the young offender's lawyer to play at the disposition stage of the proceedings. If he knows the dispositional alternatives and the variety of resources within those alternatives he can participate vigorously in out-of-court contact with support agencies and he can influence them and, where necessary, he can confront the authors of reports and those making recommendations about disposition and challenge the reliability of their sources and their assumptions.

The following declaration of principle from the *Y.O.A.* should be remembered by the lawyer for the young offender:

"3(1) (f) In the application of this Act the rights and freedoms of young persons include a right to the *least possible interference with freedom* that is consistent with the protection of society having regard to the needs of young persons and the interests of their families."

To the extent that the treatment sciences are imperfect and to the extent that minimum intervention is a principle to be upheld, the lawyer for the young offender should be ready to step back from the oligarchy of treatment professionals and to protect the child from over-zealous rescue missions.

II DISPOSITIONAL

CHANGES UNDER THE YOUNG OFFENDERS ACT

Sections 20 to 36 of *The Young Offenders Act* deal with dispositions and the review of dispositions.

The *Y.O.A.* codifies many practices that have evolved in the last few years and in that sense does not introduce change so much as validate the status quo and confirm the importance of proper procedure at disposition. For example there are the provisions concerning legal representation, the obtaining and distribution of assessments and reports, the opportunity to challenge the authors of those reports by way of cross-examination and the giving of independent representation — presumably by evidence and/or submissions.

In another sense, the new Act answers some of the unsettled questions. A discharge is now clearly available to the offender and any alleged non-compliance with the dispositional order must be dealt with by way of a fresh information. The responses listed in s. 20(1) (a) - (h) are generally the common responses under the existing system which can now be ordered independently of other dispositions. These include absolute discharges, fines of up to $1,000.00, restitution (return of property), payment in lieu of return of property, personal services for the victim, community service in lieu of service for a victim and orders of prohibition, seizure or forfeiture.

The Statement of Principle adds considerations of accountability by the young offender (albeit less than for adults), protection of the public and guarantees of rights and freedoms and minimum interference with freedom to the previous treatment objectives of the *Juvenile Delinquents Act*. The accumulation of these principles, old and new, seems to call for a delicate balancing act by the court. To what extent this rhetoric in itself will effect change remains to be seen but there is clearly a call for more attention to accountability, protection of the public and procedural safeguards.

Moreover, apart from the stated principles, the new legislation does carry some profound changes in dispositional alternatives:

Jurisdiction:

In Ontario the *Juvenile Delinquents Act* presently covers charges against persons under 16 years of age. As of April 1, 1985, at the latest, the Youth Court in Ontario will deal with criminal charges against persons up to 18. The expansion upward of age by two years will no doubt change significantly the type of offences and offenders, thereby increasing the gravity of the dispositional hearing. The same could be said for the raising of the minimum age to 12 and the exclusion of other than federal offences from the purview of this Code of criminal procedure.

Definite and Maximum Dispositions:

Generally, the judicial discretion in dispositions has been reduced. This will no doubt reduce the lack of uniformity in response to criminal offences by young offenders. The court is also more accountable in being required to give reasons for disposition.

In contrast to the indefinite nature of dispositions under the *Juvenile Delinquents Act*, the duration of any non-custodial disposition for any one offence under the *Young Offenders Act* is limited to two years and the combined duration of dispotions for multiple offences cannot exceed three years except for prohibition or forfeiture orders. No punishment can be greater than it would have been for an adult. Moreover, probation orders and

custodial orders must be for *specific* periods of time. If a young person is found guilty of a single offence which is punishable under the *Criminal Code* by imprisonment for life, the duration may be up to three years. The limit on all personal or community service orders is 240 hours within one year. It should be noted that within these limitations if a young person becomes an adult the disposition can continue to run for its term. But if a young person is serving a custodial disposition, the court may direct that he serves the remaining portion of his disposition in an adult correctional facility. It is mandatory that the court consider a pre-disposition report before any custodial order is made.

If the pre-dispositional report indicates the need for treatment it is possible for the court to "direct" that a young person be detained for treatment of "a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or mental retardation" in a hospital or other place where such treatment is available. It is crucial to note, however, that under section 22 the consent of the young person, the parents of the young person and the treatment facility are all required before this can be directed. Even so, the treatment order is caught by the two-year maximum duration.

Within these tight parameters there is room for innovative dispositions. Now the "catch-all clause" seems to be section 20(1)(1) which allows the court to:

"Impose on the young person such *other reasonable and ancillary conditions* as it deems advisable and in the best interest of the young person and the public."

These other conditions cannot be imposed independently but will no doubt be part of an order for probation supervision.

Section 23 sets out mandatory conditions for probation orders and optional conditions and in the latter case there is another catch-all clause for reasonable conditions. There is a provision in section 23 for the placing of the child with an adult person subject to probation supervision and any ambiguity about placing with a corporation has been removed. The financial responsibility is on the adult with whom the child is placed so that any funding considerations are removed from the judge's lists of concerns.

Control of Custodial Disposition by the Court:

Two categories of custody have been created, namely "open" and "secure". It is for the provincial Lieutenant-Governor to designate facilities for both. Secure custody is:

" . . . for the *secure containment or restraint* of young persons . . . " Both types would seem to involve supervision and some restriction on the young person's activity. It is mandatory that the judge ordering custody specifies which of the two types applies, but of course he must be within the parameters of section 24 which limits secure custody to the following situations:

(a) the offenders be at least 14 years of age.
(b) the offence would be punishable by five years imprisonment for an adult or it involves escape or it is a second indictable offence within 12 months or ot is indictable and the offender has previously been in secure custody at any time.

A young person under 14 could be ordered into secure custody on an offence for which an adult would be liable to life imprisonment or a second offence involving adult liability of more than five years or escape.

Section 24(5) provides further rhetoric to the effect that all secure custody must be deemed necessary by the court for the protection of society having regard to the seriousness of the offence and the circumstances in which it was committed including the needs and circumstances of the child. The net effect of these words remains to be seen.

Transfers from open custody to secure custody can only be carried out through the review procedures set out in section 33. Herein lies a striking change, i.e. the system of court reviews.

Reviews of Disposition:

In contrast to the *Juvenile Delinquents Act*, the "review" procedures under the *Young Offenders Act* are structured and codified so that a fair hearing is available and due process is mandatory. The potential for endless reviews and continuing intervention without regard to procedural safeguards would seem to be eliminated.

After one year there is an automatic review of *custodial dispositions* and there *may* be reviews after six months if the Provincial Director deems it advisable or if a young person applies and grounds for review are established from the following:

(a) The young person has made sufficient progress to justify a change in disposition.
(b) The circumstances that led to the committal to custody have changed materially.