

JUVENILE DELINQUENTS, YOUNG OFFENDERS AND YOUNG PERSONS IN CONFLICT
WITH THE LAW: A STUDY OF JUVENILE DELINQUENCY LAW REFORM IN CANADA

by

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ABSTRACT

On July 31, 1975, the Solicitor-General of Canada received from a Committee appointed by him a report containing proposals for new legislation to deal with young persons in conflict with the law and to replace the present Juvenile Delinquents Act. Since that date, consultations with professionals involved in the field of juvenile justice, provincial officials and interested members of the public has yielded a wide range of reactions and suggestions. At the present time, it is expected that a Bill based on that report will be placed before Parliament in the fall of 1976.

The purpose of this paper is to explore, from a number of perspectives, both the recent proposals and the legislation which they are meant to replace. To that end, this paper is divided into two major Parts. Part I consists primarily of a retrospective analysis of the first 100 years of the juvenile court movement in Canada. Chapter 1 traces its origins from the inherent equitable jurisdiction of the Courts of Chancery and from the earliest legislative initiatives in the United States to the creation of this nation's first Juvenile Delinquents Act in 1908, and concludes with a discussion of the effect that attacks based on constitutional and Bill of Rights grounds have had upon its development and continued viability. Chapter 2 examines the demands for reform that had arisen by mid-century and compares and contrasts in detail the federal government's three major reform efforts to date: the Department of Justice Report (1965), Bill C-192: The Young Offenders Act (1970), and the Young Persons in Conflict with the Law Act (1975).

In evaluating any reform efforts in this field a number of

distinct areas of concern can be identified. The scope of the legislation, diversion and other pre-trial procedures, practice and procedure in the juvenile court, the dispositional alternatives, appeal and other methods of dispositional review, and the consequences of juvenile convictions are all equally important facets of delinquency law reform today. In Part II of this paper we focus on two of those areas--namely, the scope of the legislation and practice and procedure in the juvenile court--considering in detail the development of the law to date, the issues that are currently facing reformers, and the way in which those issues have been dealt with in each of the three primary reform documents. Chapter 3 discusses the various jurisdictional issues that will determine the future role of the juvenile court: geographical scope, minimum and maximum age limits, offence jurisdiction, and finally, the complex problem of waiver. Chapter 4 examines another area of prime concern to lawyers, the rules governing practice and procedure in the juvenile court. Such topics as the right to counsel, publicity and private hearings, notice and duty to attend, and the conduct of the proceeding itself are considered and both judicial developments and the statutory reform proposals are described and evaluated.

In Chapter 5 a number of other issues not discussed here but still requiring attention are identified. Finally, in the two Appendices, the problems of legislative reform in this field are considered from a different perspective, that of the individual provinces of British Columbia. After briefly summarizing the various sections of provincial legislation that affect the operation of the federal Act, the major trends suggested by the recent federal report are compared to and contrasted with those found in the recent

reports of the B.C. Royal Commission on Family and Children's
Law.

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PART I - FROM J.D.A. to Y.P.I.C.W.T.L.A.

CHAPTER 1 - THE JUVENILE DELINQUENTS ACT IN PERSPECTIVE

A. Background to Reform

A proper understanding of the modern problems in the field of juvenile delinquency requires a basic familiarity with the history of the juvenile court itself. As is the case with so many fields of Canadian law, our historical roots are closely intertwined with and dependent on both English tradition and American legislative initiatives.

The heritage begins with the English Court of Chancery which, from earliest times, has exercised an undefined supervisory jurisdiction in respect of infants. In the 18th Century, the Court of Chancery expanded this jurisdiction into a broad scheme of protection for the rights and interests of children. Although the origin of this equitable jurisdiction has not been clearly established, the prevailing modern opinion has it that it was founded on the prerogative of the Crown as parens patriae¹, the exercise of which was delegated to the Chancellor.² The nature of the Court's inherent equitable jurisdiction was described by Kay, L.J., in The Queen v. Gyngall³:

...the jurisdiction...arising as it does from the power of the Crown delegated to the Court of Chancery,...is essentially a parental jurisdiction, and that description of it involves that the main consideration to be acted upon in its exercise is the benefit or welfare of the Child. Again, the term "welfare" in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration, and the Court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. 4

More recently Ungood-Thomas, J., remarked:

The jurisdiction regarding wards of court which is now exercised by the Chancery Division is an ancient jurisdiction deriving from the prerogative of the Crown as parens patriae. It is not based on the rights of parents, and its primary concern is not to ensure their rights but to ensure the welfare of the children. Although it is an ancient jurisdiction it serves a modern need, which has perhaps increased rather than diminished. 5

There were, however, significant limitations on the Court of Chancery's power to aid children in need. Initially, the Court's jurisdiction was exercised almost exclusively on behalf of infants whose property rights were jeopardized, on the theory that it lacked the means with which to provide for impoverished, neglected 6 infants. When the scope of the Court's activities was later broadened to include protection of infants in danger of personal as well as property injury, although it did apply to neglected, destitute and dependent children, it still did not extend to 7 children accused of criminal law violations. In addition, the Court was still limited by its lack of any means of investigating the child's social situation.

Even today, the debate over the scope of the inherent equitable jurisdiction remains a contentious issue. As Pennycuik, 8 J. commented in the recent English case of In Re X:

It may well be, and I have no doubt that it is so, that the courts, when exercising the parental power of the Crown, have, at any rate in legal theory, an unrestricted jurisdiction to do whatever it considered necessary for the welfare of a ward. It is however, obvious that far-reaching limitations in principle on the exercise of this jurisdiction must exist. 9

While few would dispute the proposition that such limitations must exist, the precise nature of those limitations still remains a matter of considerable uncertainty.

At common law, children under the age of seven were considered¹⁰ incapable of possessing criminal intent. There was also a presumption, rebuttable by evidence that the child had sufficient moral discretion and understanding to appreciate the wrongfulness of this act, that a child between the ages of seven and fourteen was¹¹ incapable of committing a crime. Subject to these two limitations, children were subjected to arrest, trial, and in theory to punishment like adult offenders. The absence of Chancery jurisdiction over infants charged with criminal offences, combined with the harshness of the existing criminal justice system allowed the criminal courts' harsh and cruel treatment of errant children to continue unabated throughout most of the 19th Century. In 1801, for example, a thirteen-year-old boy was publicly hanged for stealing a spoon. In 1831 a nine-year-old boy was hanged for setting fire to a house, as was another boy of the same age in 1833 for¹² stealing an object valued at two cents. These occurrences were not rare, isolated incidents, but rather were typical of a system in which the fundamental aim of criminal jurisprudence was punishment, both as retribution and as a deterrent to others, rather than¹³ reformation. Nor were these the only deplorable consequences. In addition to the harsh punishments meted out by the system, great numbers of reform-minded citizens began to deplore publicly the abominable prison conditions, the indiscriminate intermingling of adults and infants in the prisons, jails, and criminal courts, as well as the frequent application of the criminal law and procedure¹⁴ to children below the lawful age of criminal responsibility. It is not surprising, therefore, that reform of the ways in which children were treated was an early goal of the resulting movement to

humanize the criminal law.

Many other social conditions prevalent in North America in the 19th Century gave impetus to the juvenile law reform movement. The rapid urbanization caused by industrialization and immigration brought with it, among other things, tremendous increases in vice and crime, truancy and delinquency. As the public became more aware of the dangers of exposing children to tobacco, alcohol, pornography, and similar vices, increased attention was given to the problem of rescuing wayward youth. In addition, demands for social justice reflected an increasing concern over official treatment of children. Ultimately, philanthropists, feminists, penologists, and other social reformers joined forces and, aided by their recently gained knowledge of the behavioural sciences, succeeded in obtaining public recognition of "the greater vulnerability and salvageability of children",¹⁵ and later in establishing separate institutions and separate probationary supervision for children, foster homes for destitute, neglected and orphaned children, and finally, the right for children to be tried and diagnosed in a completely separate court. This new court was to be not only physically separate from the adult courts but also based on a new and distinct philosophy, one that placed greater emphasis on achieving socialized justice and less on following the procedural technicalities of the criminal law.¹⁶

Seen in this context, the juvenile court movement was clearly more than just a stage in the evolution of the criminal law. As one commentator wrote:

[The reformers'] concern for children extended beyond the criminal and incorrigible. They wished to protect and redeem those boys and girls who were victims of vicious environments, unfortunate

heredity and cruel treatment at the hands of parents, guardians and employees. Therefore, the juvenile court movement was but a fraction of their whole crusade in child-saving. The call for change was but a part of a social movement to clear slum tenements, to enact and enforce humane factory laws, to ameliorate prison conditions and save future generations from misery, pauperism and crime. 17

B. The First Juvenile Court

Although the first juvenile court in the United States did not come into existence until 1899, numerous individual reforms in a number of states preceded and led to its creation. Houses of Refuge were established in New York City (in 1825) and in Pennsylvania (in 1826) to house children who were deemed incorrigible or in violation of the criminal law and to provide them with care, discipline and training rather than punishment.¹ Although these institutions still subjected children to what we would consider to be harsh and cruel treatment, they did merit the distinction of being the first to achieve the separation of children from adult criminals. In 1847, Massachusetts established the first of many state reform and industrial schools for juveniles in which attempts were made to teach young offenders discipline as well as an honest trade.² In the city of Chicago, the power to dispose of minor charges against juveniles by means of probation or reform school was given to a specially appointed commissioner in 1861, and to the judges of the normal criminal courts six years later.³ In 1869, legislation was passed in Massachusetts authorizing a "visiting agent" to attend hearings and to advise the court regarding the disposition of juvenile offenders, as well as to arrange foster home placements and to make subsequent home visits in cases where such treatment seemed appropriate.⁴ Further Massachusetts legislation in 1870 and 1872 provided for the separation of juvenile trials and court records as well as the appointment of a State official whose duties were to investigate juvenile cases, attend trials, and protect children's interests.⁵ In 1892, New York followed suit by establishing separate trials, dockets and records, as did Rhode

6
Island in 1898. In addition, throughout these later years, more and more judges began to experiment with the use of probation, in lieu of imprisonment, as a means of preventing further criminality. Thus, by 1899, the concept of a separate court for juveniles had already received widespread recognition and acceptance in many areas of the United States, and the stage was thereby set for what Dean Roscoe Pound of the Harvard Law School would later call "one of the most significant advances in the administration of justice since the Magna Carta": the establishment of the first juvenile court.
7

The first official legislative recognition of a separate state-wide court for children was contained in the Juvenile Court
8 9
Act enacted by the State of Illinois in April, 1899. The original Act and the subsequent amendments to it gave the court jurisdiction over cases of dependency, neglect and delinquency involving children under the age of sixteen. The Act provided for informal, private hearings, confidential records, separate detention facilities for children, as well as a separate probation staff appointed to work
10
exclusively on juvenile matters. In addition, the traditional terminology of criminal procedure was reformed in order to reflect the civil, rather than criminal, nature of the proceedings: complaint was replaced by petition, warrant became summons, arraignment was now initial hearing, conviction was instead finding of involvement and sentence became disposition. Even the physical surroundings were changed so as to bear less resemblance to a courtroom: the judge (no longer gowned) was now seated at a desk ~~at a table~~ beside the youth rather than towering above him behind a huge, imposing
11
bench. Finally, since the proceedings were viewed as civil, rather

than criminal, and designed to be helpful and rehabilitative to the offender rather than punitive or aimed at retribution, it was thought to be in the interests of all children to define delinquency in the broadest of terms. Accordingly the definition of "delinquency" in the Act went beyond just criminal conduct to include any behaviour which suggested the need for the court's intervention in order to prevent the child developing further criminal traits in his later¹² years.

According to the terms of the Illinois Act, its objective was to ensure that "the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by his parents".¹³ The philosophy underlying the Act was that society should not try to ascertain whether or not the child was "guilty" or "innocent", but should instead concentrate on determining "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career".¹⁴ According to this view, the child was essentially good and should be made to feel that he is the object of the state's "care and solicitude," and not that he was under arrest or on¹⁵ trial.

The role of the court in this context was therefore one of investigating, diagnosing and prescribing treatment, rather than adjudicating guilt or assigning blame.¹⁶ The court's focus was shifted from the facts surrounding the "offence" to the background of the "offender", the theory being that the youth's specific conduct was important more as evidence of the need for the court's assistance than as a prerequisite to the court's exercise of jurisdiction. Since the sole objective of the court proceeding was the determination

of the most suitable treatment plan for the child, the rules of criminal procedure were deemed inapplicable and lawyers and their adversarial techniques were considered to be unnecessary, if not harmful. Instead, the responsibility for guiding the court in its exercise of disposition and developing a suitable scheme for treatment was assigned to the increasingly popular psychologists and psychiatrists. In fact, it has been said that the entire scheme of the juvenile court was largely based on the view that delinquency was little more than a disease, one that could be diagnosed and treated adequately by specialists. This philosophy (today labelled by many as too idealistic and simplistic) is apparent in the following quotation from Judge Ben Lindsay, a well-known juvenile court judge of the time, who wrote that the aim of the juvenile court:

...was to bring into the life of the child all of those aids and agencies that modern science and education have provided through the experts in human conduct and behaviour; in a word, to specialize in the causes of so-called bad things as doctors would in the cause of disease. 17

At the same time that Illinois was enacting this historic statute, the state of Colorado was also in the process of creating its own legislative scheme to deal with the problem of juvenile delinquency. In 1899, a new amendment to Colorado's "school law" provided that:

Any child between the ages of eight and fourteen years, and every child between the ages of fourteen and sixteen, who cannot read and write the English language or is not engaged in some regular employment who is an habitual truant from school..., or who is in attendance at any school, and is incorrigible, vicious or immoral in conduct, or one who habitually wanders about the streets and public places during school hours, having no business or lawful occupation, shall be deemed a juvenile

disorderly person and be subject to the provisions of this act." 18

The Act gave jurisdiction to the County Court over any cases arising under these "truancy" provisions, although it is unclear whether or not juveniles who were suspected of committing specific crimes¹⁹ were also dealt with by the Courts under this Act. In 1901 the administrative machinery for a juvenile court was set up in Denver and by 1903 this juvenile court received legislative approval.

Once given this initial legislative recognition, the juvenile court concept spread with tremendous speed. By 1910, twenty-two states had followed Illinois' example, and by 1925 there were juvenile courts in every state but two. As of 1967, there was a Juvenile Court Act in every American jurisdiction, with approximately²⁰ 2,700 courts hearing children's cases.

C. The Juvenile Delinquents Act

Many of the same factors that gave rise to the juvenile court movement in the United States were also present in Canada in the late 1800's. The first major legislative initiative in this country was the enactment of the Children's Protection Act¹ by the Ontario Legislature in 1893. This Act provided for the establishment of children's aid societies and for the commitment to them of dependent and neglected children. In addition, the Act provided specialized measures in relation to children who violated provincial statutes. The Act provided that where a complaint was made against any boy under the age of twelve years or any girl under the age of thirteen years for an offence against provincial laws, the court having jurisdiction and was to give notice of the charge to the local children's aid society who would then investigate the background of the child and the circumstances of the case and submit a report² containing that information to the judge. If, after a trial and conviction on the offence charged, it appeared to the judge that "the public interest and the interest of the child will be best subserved thereby," the judge was authorized to make an order for the return of the child to his parents or guardian, or an order directing the children's aid society to place the child in a foster home for any length of time until the child reaches the age of twenty-one, or impose a fine, or suspend sentence for a definite or indefinite period.³ The judge was also empowered, where the child was found guilty of the offence charged or where the court found the child to be "wilfully wayward and unmanageable", to commit the child to an industrial⁴ school or provincial reformatory. In addition, section 28 authorized any judge, in lieu of committing to prison any child under the age of

fourteen years convicted before him of any provincial offence, to hand over custody of such a child to a children's aid society, home for destitute and neglected children, or industrial school whereupon the officials receiving such custody would have complete authority⁵ to arrange for the child's adoption by some suitable person.

The Act also dealt with the juvenile trial itself as well as the care and custody of children both before and after trial. It provided that no child under the age of sixteen being held for trial or under sentence in a jail or other place of confinement was to be placed or allowed to remain in the same cell or room with adult prisoners.⁶ It also established certain conditions that were to apply only in cities and towns with a population of more than ten thousand, in cases where children under the age of sixteen years were charged with provincial offences or were brought before a judge for examination under any provision of the Act. These conditions⁷ included separate facilities for pre-trial detention, a requirement that the trial or disposition of such a case be conducted, where⁸ practicable, in premises other than the ordinary police court premises, and a direction that the judge shall exclude from the room where the trial or examination is being held "all persons other than the counsel and witnesses in the case, officers of the law or of any children's aid society and the immediate friends or relatives of the child or parent."⁹

The major inadequacy of the Children's Protection Act was that it did not extend to cover the great number of cases of children violating federal laws (for example, the Criminal Code). The only provision governing trials of juveniles for federal offences in¹⁰ existence at that time was section 550 of The Criminal Code, 1892

It provided that:

which provided that:

The trials of all persons apparently under the age of sixteen years shall, so far as it appears expedient and practicable, take place without publicity, and separately and apart from that of other accused persons and at suitable times to be designated and appointed for that purpose. [emphasis added]

As one can see from the words emphasized above, the application of the above provision was left to the discretion of the local authorities.

This defect was remedied by the enactment by Parliament in 1894 of An Act Respecting Arrest, Trial and Imprisonment of Youthful Offenders 11

which made it mandatory that all trials of young persons under the age of sixteen years for alleged violations of federal legislation be private and separate from those of adults (the words emphasized in the ~~excerpt~~ quoted above were simply deleted) 12 and also required that prior to the trial, those alleged offenders be detained 13

separately from adults. 13 In addition, the Act provided that where children were charged in the Province of Ontario with offences against federal legislation, the presiding judge would have available to him powers of disposition almost identical to those available to the judge under the Children's Protection Act, 1893 in the case of offences against provincial legislation. 14 It is noteworthy that no mention was made in the Act of any provision of such special powers of disposition in trials of federal offences in provinces

other than Ontario. One can only speculate as to whether Parliament was content to keep juvenile offenders in such cases subject to the same punishments imposed in adult court, or whether the provinces other than Ontario were simply not yet prepared to provide the additional facilities and support services necessary to make an expanded range of dispositions of this nature practicable.

On July 20th, 1908, Parliament enacted Canada's first Juvenile
Delinquents Act.¹⁵ Subsequent amendments were made in 1912, 1914,
1921 and 1924 and, finally in 1928, the Minister of Justice called
a conference in Ottawa, to which interested persons from all over
Canada were invited, to discuss the practical experience under the
Act and to make recommendations as to possible changes in the statute.¹⁶
Fifty persons (including representatives from every province except
Prince Edward Island) attended the conference and, after three days
of discussion, a draft bill was endorsed and submitted to the Minister
of Justice. This bill was subsequently adopted by Parliament and
brought into force on June 14th, 1929.¹⁷ The resulting legislation,
known as The Juvenile Delinquents Act, 1929,¹⁸ is substantially the
same as the Juvenile Delinquents Act currently in force in Canada
today.¹⁹ Although there have been several minor amendments of the
Act since 1929²⁰ (most of which have been merely improvements in
detail), the principles and major provisions of the 1929 Act have
remained unchanged. For this reason, we shall not deal separately
here with the Acts of 1908 and 1929 (except when differences from
the present Act are particularly worthy of comment) but will
restrict our discussion to the present Act - namely, the Juvenile
Delinquents Act, R.S.C. 1970, c.J-3. (hereinafter referred to as
"the J.D.A.").

The J.D.A. is basically the product of a merger of the
earlier Canadian and American legislative initiatives. In fact,
most of the comments made earlier regarding the philosophy and
objectives underlying the Juvenile Court Act of Illinois, as well
as the role of the juvenile court envisioned by that Act, are
equally applicable to the J.D.A.²¹ Since the remainder of this

paper will involve a detailed consideration of the J.D.A., its weaknesses and its proposed successors, we will not at this point embark upon a detailed review of its provisions. Instead, we shall confine ourselves to highlighting briefly what some consider to be the J.D.A.'s four major features.

The J.D.A.'s first and most important feature is undoubtedly the separation of child offenders from adult offenders at all stages in the criminal process. Subject to the court's discretion to raise certain cases to the adult courts, the juvenile court is given exclusive jurisdiction over offences committed by juveniles. Similarly, the J.D.A. provides that juvenile offenders awaiting trial are to be detained separately from adults awaiting trial.

The second major feature is the very wide definition given to the concept of "delinquency". Because the draftsmen of the J.D.A. believed that the intervention of the juvenile court would always be in the child's best interests, a court appearance came to be regarded as a good thing for its own sake whenever circumstances suggested that a child might be in moral danger. As a result, the offence of delinquency was defined in very broad and general terms and the juvenile court was given jurisdiction over a very wide age range. For example, the J.D.A. provides that "delinquency" includes not only criminal behaviour but also many other forms of problem-oriented behaviour. In addition, the minimum age for liability under the J.D.A. is seven and the maximum age is 16 (although each Province has the option of raising the maximum as high as eighteen)), although jurisdiction, once obtained, can continue until the child's twenty-first birthday.

The J.D.A.'s philosophy of intervention, articulated in

sections 3(2) and 38, is its third major feature. A child who has committed a delinquency is to be dealt with "not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision." ³⁰ In addition, the J.D.A. also directs 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 a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance. 31

A child who has committed a delinquency is therefore not to be treated merely as a young criminal, but rather as one being "in a condition of delinquency." Implicit in the passages quoted and in other provisions contained in the J.D.A. is the belief that delinquency can be best considered and treated as a manifestation of some psychological illness suffered by the child. Once one accepts the concept of "delinquency as illness", it seems unreasonable for a child to be held legally or morally responsible for his behaviour, and accordingly the J.D.A. places little or no emphasis on the concept of responsibility or accountability for one's actions. ³²

Similarly, given this view and the prevailing view of the juvenile court acting as "parens patriae", it would have appeared desirable, in the eyes of the draftsmen, to place as few restrictions as possible on the court's power to intervene in the life of the child in order to do what it deems necessary for the child's best interests. It is therefore understandable why the J.D.A. allows proceedings to be conducted in private, ³³ in an informal manner, ³⁴ in the absence of the child's parents or of counsel, and without most of the procedural protections available to an accused in the adult courts.

The fourth and final feature of the present J.D.A. is the provision of a wide range of reformative sentencing dispositions focussed primarily on the welfare of the individual offender.³⁵

The juvenile court judge's powers of disposition include suspension of final disposition; adjournment of the hearing or disposition; imposition of a modest fine; committal to a probation officer; supervision by a probation officer while child is in its own home or in a foster home; committal to the Superintendent of Child Welfare; and committal to an industrial or training school.³⁶ The judge is given virtually unlimited power to impose any one or combination of these dispositions, subject only to a single restriction in section 25 regarding committal to training schools and to the general requirement that "the action taken shall, in every case, be that which the court is of opinion the child's own good³⁷ and the best interests of the community require."

D. The Constitutional Framework

It has been no secret that copies of most of the juvenile court acts at the time in force in the United States and the Children's Act then before the British House of Commons, were examined prior to the drafting of the J.D.A.¹ of 1908. In fact, a careful examination of the present J.D.A. reveals the significant influences the early Illinois and Colorado statutes had upon the Canadian draftsmen. For example, the statement of the philosophy of the J.D.A. contained in section 38 is in part an exact duplication of section 21 of the Illinois Act of 1899.² However, differences between the American and Canadian constitutional structures prevented the Canadian legislators from completely adopting any of the early American statutes. Unlike the American constitutional structure, wherein the individual states have power to enact both social welfare and criminal legislation and can therefore both act as "parens patriae" and treat acts of delinquency as non-criminal matters, the Canadian constitutional system allocates exclusive legislative power in relation to criminal law (excluding the creation of courts of criminal jurisdiction, but including the procedure in criminal matters) to the federal Parliament³ but gives to the provincial legislatures exclusive jurisdiction in relation to the administration of justice within the province (including the constitution, maintenance and organization of provincial courts of criminal jurisdiction), civil rights within the province, all matters of a purely local or private nature, as well as the enforcement of provincial legislation.⁴ Therefore, although Parliament has the power to define delinquency and the dispositions available to a judge upon a finding of delinquency, the provincial legislatures have sole responsibility for the actual administration of justice, which includes the police, the juvenile courts, and general social welfare services. As a result, the "parens patriae"

of children in any province is the Crown in right of that province rather than the Crown in right of the federal government. Furthermore, since the power to legislate regarding welfare matters is within exclusive provincial jurisdiction, the federal government is therefore, if it is to legislate at all within this field, forced to deal with delinquency in a criminal-law format. Accordingly, in the J.D.A., delinquency is defined not as a state or condition (as was the case in most of the early American statutes), but rather as a distinct act, and is in many respects treated as a criminal or quasi-criminal offence.

The attempt to apply the American juvenile court concept in the context of the Canadian constitutional system has resulted in at least two unusual features of the present pattern of the J.D.A. One of these features is an apparent inconsistency at the heart of the J.D.A.'s philosophical approach to the problem of delinquency. For example, the J.D.A. adopts (for the reasons discussed above) a criminal law approach, whereby criminal conduct (violations of federal, provincial, or municipal statutes or regulations) and certain types of non-criminal behaviour are classified as acts of delinquency and can result in the imposition of various degrees of restraint on the offender's liberty. At the same time, however, the J.D.A. still purports to embrace the same benevolent and non-punitive philosophy that was originally developed by American legislators for use in a basically non-criminal, civil proceeding, in which the court was to act more as a mere adjunct of the social welfare system, not doing things to the child but rather for the child. Another unusual feature resulting from the division of constitutional jurisdiction is that the J.D.A., although federal legislation, depends almost exclusively on provincial participation and resources for its effective application. For example, the J.D.A. itself can only be proclaimed with respect to those provinces that have already established their own juvenile courts and detention facilities for children (subject to certain

exceptions in section 43); the judges of the juvenile court are appointed by the province and paid by the province or by the province and the municipality which the court serves; and, most importantly, the resource facilities upon which the court relies (e.g. diagnostic services, child welfare services, probation services, and numerous types of institutions for children) are controlled and usually financed by the provinces.¹¹ These two features - the conflict between an essentially non-criminal philosophy and its criminal-law context and the dependance of federal legislation on provincial facilities and resources - have resulted in many of the problems that have arisen in practice under the J.D.A. and also give rise to many crucial issues that must be resolved before any attempt at juvenile law reform can be successful. As a result, we shall have occasion to return to these two topics at various stages during the course of this paper.

After half of a century of operation without a single attack on its validity,¹² it is rather surprising to note that in recent years proceedings under the J.D.A. have suddenly given rise to a number of important constitutional issues. One of the first cases to deal with the issue of the constitutional basis for the J.D.A. was Re Dunne.¹³ In this case, the Ontario High Court held that section 20(2) of the J.D.A., which provides that an order for the payment of money towards the support and maintenance of a child adjudged to be a juvenile delinquent may be made against the parents of such child or upon the municipality to which it belongs (whereupon the latter could recover the same from the parents), is intra vires the Parliament of Canada. The court held that such legislation, although it may affect provincial rights in respect of municipal institutions and property and civil rights, is not legislation in relation to such rights, but rather, is valid as being ancillary and necessarily incidental to the carrying out of the provisions of the J.D.A. under the criminal law powers of the federal government.

There seems to have been little doubt that Parliament can, on the basis of the federal criminal law power, exercise control over juveniles as a consequence of their breaches of the Criminal Code and other federal statutes creating criminal offences.¹⁴ A more contentious question has been whether federal authority extends to the supervision of juveniles on the broader basis of violation of provincial or municipal legislation, or of immoral conduct that is not in itself illegal.¹⁵ In Regina v. Kelleher¹⁶ this question was raised and answered in favour of the federal claim. The court, in quashing a magistrate's conviction of a juvenile under provincial motor vehicle legislation on the grounds that such an offence constituted a delinquency over which the juvenile court had exclusive jurisdiction, gave obiter approval to Re Dunne and to the view that the J.D.A. fell within Parliament's criminal law jurisdiction.¹⁷

This constitutional issue arose again in A.-G. B.C. v. Smith¹⁸ in the context of a fact situation virtually identical to that in Kelleher. The accused Smith, a juvenile, had been convicted in Magistrate's Court pursuant to the provisions of the provincial Summary Convictions Act¹⁹ for the offence of speeding contrary to the Motor-Vehicle Act.²⁰ On an application for a writ of certiorari, the trial judge, relying on the obiter in Kelleher, ordered the writ to issue and quashed the conviction. This decision was subsequently affirmed by a three to two majority judgment of the British Columbia Court of Appeal.²¹ Before the Supreme Court of Canada, the major argument was not that the J.D.A. per se was ultra vires Parliament, but rather that sections 2(1)(h), 3(1), and 4 were ultra vires to the extent that they purport to apply to children who have violated "any provincial statute, or ... any by-law or ordinance of any municipality."²² The problem before the court²³ could be stated in the form of two questions:

1. Is the J.D.A. intra vires Parliament under S.91(27) of the B.N.A. Act (i.e. legislation in relation to the criminal law), or is it ultra vires on the ground,
 - (a) that it is legislation relating to the welfare of children, within the scope of the Reference Re Adoption Act case, 24 or
 - (b) that collectively ss. 2(1)(h), 3(1), and 4 infringe the provincial jurisdiction under the B.N.A. Act, S.92(15) to impose punishment for enforcing any law made in the province in relation to any matter within the scope of its legislative competence?
2. Assuming that the J.D.A. is held to be intra vires, does S.4 of the J.D.A. operate to prevent a juvenile from being prosecuted under the provisions of the Summary Convictions Act for an offence under the Motor-Vehicle Act or any other offences validly created in the province?

In his judgment on behalf of a unanimous seven-man court, Mr. Justice Fauteux held, with respect to question (1), that the impugned sections of the J.D.A. were intra vires Parliament under S.91(27) of the B.N.A. Act. Although he conceded that the primary legal effect of the J.D.A. was the effective substitution, in the case of juveniles, of the provisions of the J.D.A. for the enforcement provisions of the Criminal Code or of any other federal or provincial statute, he went on to state that the true nature and character of an Act cannot always be conclusively determined by the mere consideration of its primary legal effect. On the contrary, he stated, the preamble (appended to the original 1908 J.D.A.), the interpretation section, and the main operative provisions of the J.D.A. clearly demonstrate that the substitution of the provisions of the J.D.A. for the enforcement provisions of other laws was merely a means adopted by Parliament in order to achieve "an end, a purpose or object which, in its true nature and character, identifies this Act as being genuine legislation in relation to criminal law," that "end, purpose or object" being to prevent juveniles from

becoming prospective criminals and to assist them in being law-abiding
citizens. Nor does it matter that there is a lack of uniformity in the
application or operation of the J.D.A.; in the court's view, desirable as
uniformity may be in criminal law, it is not per se, a dependable test of
constitutionality. In summing up the scope of the J.D.A., Fauteux J.
concluded that:

[T]he Act deals with 'juvenile delinquency' in
its relation to crime and crime prevention, a
human, social and living problem of public interest,
in the constituent elements, alleviation and solu-
tion of which jurisdictional distinctions of
constitutional order are obviously and genuinely
deemed by Parliament to be of no moment. 29

In regard to the second question before the court, it was held that
a child within the meaning of the J.D.A. cannot be charged with speeding
under the Motor-Vehicle Act because the provisions of that Act, so far as
they purport to relate to such a child, are rendered inoperative under the
paramountcy doctrine by the provisions of the J.D.A., and further, that
the Motor-Vehicle Act was not a statute intended for the protection or
benefit of children within the meaning of S.39 of the J.D.A. and was not, as
a result, thereby excepted from the operation of the substitutional provisions
of the J.D.A.

Smith has been followed in at least two reported cases. In R. v.
Prescott, Dohm, Co. Ct. J. had to deal with the case of a juvenile who was
the subject of a "traffice report" under section 126A of the Motor-Vehicle
Act. It was argued before him that the J.D.A. was ultra vires as it
relates to section 126A in that this section merely provided the procedure
for the operation of a point system to regulate the possession of a driver's
licence in that province, and did not, in any way, deal with a criminal offence.
The court rejected the argument that Smith should be read narrowly, so as

only to authorize the substitution of the J.D.A.'s provisions for those violations of provincial or municipal legislation that expose the offender to the possibility of criminal sanctions. Instead, it held that the Smith decision, like the J.D.A. itself, is to be interpreted broadly, and, based on that view, ruled that the J.D.A. was intra vires and was applicable in the present case. Smith was also applied in Regina v. M.,³⁵ a case to which we shall refer at a later stage.

The reasoning and the result in the Smith case have been questioned by a number of writers.³⁶ It has been argued that if one focuses on the subject-matter of the legislation, as opposed to its alleged object or purpose³⁷ (which Fauteux, J. seized on), the finding that the J.D.A. is, in pith and substance, in relation to criminal law, becomes more difficult to justify.³⁸ For example, aside from the single reference to delinquency as constituting an "offence",³⁹ there is no statement in any other sections, either explicitly or implicitly, that the J.D.A. purports to be an exercise of the criminal law. On the contrary, the language of the J.D.A. (that a juvenile delinquent is to be treated "not as an offender"⁴⁰ and "not as a criminal"⁴¹) seems to disclaim quite clearly any intention to deal with the problem of delinquency in a criminal law context.⁴² In addition, there are numerous features of the J.D.A. which depart from the traditional elements of criminal law and which, although when considered individually are not of great significance, when viewed collectively give weight to the argument that the actual character of the statute is other than criminal law. These include the facts that the J.D.A. is not a law of general application, either in terms of territorial operation,⁴³ acts or conduct proscribed,⁴⁴ or categories of persons dealt with;⁴⁵ that delinquency itself was not a crime known to the common law; and that many of the types of conduct covered by the definition of delinquency involve not only no mens rea

or moral turpitude but also only a very remote connection with "criminal"
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conduct. It is worth noting that all of the above arguments were accepted
as valid in the two dissenting judgments in the British Columbia Court
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of Appeal.

Similarly, the Supreme Court's conclusion that the J.D.A. relates more
to the federal criminal law power than to either of the competing provincial
heads of power (namely, the jurisdiction over welfare matters and the power to
impose sanctions for the violation of provincial legislation) can be subjected
to some thought-provoking criticism. There is no doubt that the field of
welfare legislation is committed to provincial jurisdiction by the combined
operation of sections 92(13), (14) and (16) of the B.N.A.A Act, or even that
such provincial legislation may have as one of its objects that of "controlling
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social conditions that have a tendency to encourage vice or crime." In
light of the tenuous relationship between the types of conduct that can bring
the J.D.A. into operation and the reasonable scope of the criminal law power,
is it not, one might argue, more consistent with common sense to conclude
that, in fact, the subject-matter of the J.D.A. is more closely related to
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matters of welfare concern? Similarly, can it not be argued that if
S.92(15) is to have any substantial meaning it must have the effect of
limiting the scope of S.91(27) so as to preclude the federal government from
imposing its own set of sanctions for the violation of provincially prescribed
standards of conduct? Surely the fact that Parliament has, in the context
of this legislation, merely attached its own tag of "delinquency" to such
violations and has restricted its intervention to a limited class of case
cannot strength the claim that S.91(27) justifies the J.D.A.'s imposition
of special penalties for the violation of provincial or municipal laws
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by juveniles.

Finally, it has been suggested that if one adopts the view of the paramountcy doctrine that when the doctrine is invoked, provincial competence with respect to matters dealt with in the federal legislation is completely suspended (rather than just temporarily suspended), it can be argued that the referential incorporation adopted in the definition of delinquency in the J.D.A. is unconstitutional to the extent that it is ambulatory. The argument is that, based on this view of the paramountcy doctrine (a view which, one might note, is not widely accepted), any amendments to the provincial or municipal provisions after the initial incorporation by the J.D.A., so far as they purport to apply to juveniles, will be without support from any persisting head of provincial competence, since the J.D.A. must be assumed to have occupied the relevant field. According to this view, the independent legal validity of the incorporated legislation is a condition precedent to the validity of an ambulatory referential incorporation. Consequently, it has been argued, the J.D.A. must be held to be ultra vires in that it attempts to incorporate in its scope provincial legislative changes in matters in respect of which the provinces have lost their competence by the very enactment of the incorporating legislation. This rather esoteric argument was not considered by any of the courts in the Smith case, and it is submitted here that its utility is rather questionable in light of the many doubtful premisses on which it is based.

In light of the fact that the Smith case has resolved the issue of constitutional validity, at least with respect to the basic scheme of the J.D.A., it would seem that further consideration of the soundness of the Supreme Court of Canada's decision and its effect on the limits of Parliament's criminal law power would best be left to the constitutional law commentators. Furthermore, as we shall soon see, the proposed legislation to replace the J.D.A. no longer purports to incorporate violations of provincial or

municipal legislation or the commission of "status offences" within the scope of the federal Act; as a result, if these proposals become law, the specific issue in Smith will then have little practical relevance. However, our examination of the constitutional issues in this case has not been a useless exercise, for it has served to highlight in a most practical context the continuing conflict inherent in the Canadian approach to the problem of delinquency. The point that is amply illustrated by the dissenting judgments in the Court of Appeal and the criticisms of the Supreme Court's decision that we have discussed is that the issue of the basic character of the J.D.A. is not as clearly defined as the judgment of Fauteux J. might suggest. The reality of the matter, it is submitted, is that regardless of whether one focuses on its subject-matter or its object and purpose, the true character of the J.D.A., in pith and substance, is equally concerned with and directed towards matters of criminal law and child welfare. As was shown earlier, in our discussion of its historical heritage, the J.D.A. was the product of the attempt to reproduce the American juvenile court in the context of the Canadian constitutional system. As a result, the J.D.A. does take the form of a comprehensive criminal code for children - one which covers all breaches of statute or bylaw as well as any form of immoral behaviour - but one that prescribes humane and compassionate treatment and rehabilitation, based on the needs of the individual offender, rather than punishment and retribution geared to the severity of the offence. To the extent that the J.D.A. follows the format of the Criminal Code, it is undoubtedly criminal in nature: the creation of the "offence" of delinquency, the establishment of a separate court and procedure for the prosecution of such offences, and the provision of a series of dispositions ranging from fines and probation to indefinite institutional incarceration are all elements that contribute to the criminal law character of the legislation. However, other features including the

stated philosophy and prescribed method of treatment, that portion of the definition of juvenile delinquent which goes beyond the mere violation of federal statutes, the dependence on provincial participation and resources, as well as other features discussed earlier, reflect the J.D.A.'s preoccupation and dedication to essentially welfare concerns. As unsatisfactory as it may be to the constitutional analyst, the conclusion that the J.D.A., as it has existed from 1908 to date, is substantially based on two distinct heads of power - one provincial and one federal - is perhaps the one answer that best accords with reality.

Such a constitutional quagmire must obviously have implications for the future of juvenile law reform. As Graham Parker noted in 1969:

The remarks of Fauteux, J. to the effect that the Juvenile Delinquents Act is a criminal statute may have simply been a constitutional skirmish but, on the other hand, this characterization of the act may well return to haunt the juvenile court. 55

As we shall see in later chapters, in recent years there have been growing demands for a further décriminalization of the juvenile justice system. What lessons can be learned from the above by the draftsman who sits down today, with such a goal in mind, to write our new delinquency legislation? He would undoubtedly agree that new legislation should not, because of the character and extent of the problem with which it deals, and could not, because of the central role that the federal criminal law power must play, at least in certain cases, be established and administered solely by the provinces. However, the experience to date under the J.D.A. shows the inevitable difficulties that Parliament would face in dealing with this problem, in anything but a strictly criminal-law format. At the same time, the law is clear that however sympathetic one may be to the aims of the

draftsman and the theory of the legislation, the practical necessities or inherent logic of a comprehensive base of regulation cannot be used to allow⁵⁶ either level of government to exceed its sphere of legislative competence.

If, as it seems, such legislative objectives could not be accomplished by either level of government without involving an illegal exercise of legislative power, then perhaps the only answer lies in a compromise: complementary

legislation by both levels of government, each within its own constitutional⁵⁷ limits. As suggested by the Department of Justice Committee on Juvenile

Delinquency approximately ten years ago, it seems that any attempt at delinquency law reform, in order to be successful, will require " 'co-operative⁵⁸ federalism' of the highest order."

At a later stage in this paper we shall consider how successful to date attempts at such "co-operative⁵⁹ federalism" have been.

E. The Impact of the Canadian Bill of Rights

A related issue that has also arisen before the courts in recent years is the extent to which provisions contained in and procedures conducted under the J.D.A. may lawfully infringe upon the civil rights of juveniles. We are not concerned here with the details of the procedure of the juvenile court established by the J.D.A. : that we propose to deal with in a later chapter of this paper. Nor are we focusing for the time being on the many reported cases dealing with the recognized rights of a juvenile before a juvenile court: although some aspects of this area will be touched on later, this topic has been adequately dealt with elsewhere.¹ What we shall attempt to provide is a brief review of the reported cases in which the Canadian Bill of Rights² has been used to challenge the validity of specific provisions in the J.D.A. in order to determine what issues have been raised in the past and what issues we might expect to be raised in the future. Furthermore, since this paper deals primarily with proposals for new legislation to replace the J.D.A., and since the Canadian Bill of Rights can have significant effects on the interpretation or even validity of a federal enactment, it may prove valuable at later stages in our study to have determined the results of the application of the Canadian Bill of Rights to Canadian delinquency legislation to date.

Before turning to the recent Canadian developments, let us look for a moment at the comparable American experience. The Fifth and Fourteenth Amendments to the Constitution of the United States provide that "no person shall... be deprived of life, liberty, or property without due process of law." In the last ten years, a series of leading cases handed down by the Supreme Court of the United States have established that juvenile court proceedings must comply with the essentials of "due process".

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In Kent v. United States, a case of a 16-year-old charged with housebreaking, robbery and rape, the U.S. Supreme Court considered the requirements for a valid waiver of the exclusive jurisdiction of the Juvenile Court of the District of Columbia so that a juvenile could be tried in the adult criminal court of the District. Although the court's decision turned upon the language of the statute, it emphasized the necessity that "the basic requirements of due process and fairness" be satisfied in such proceedings.⁴

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In the landmark case of In Re Gault the Supreme Court took the matter one step further and attempted to ascertain the precise impact of the due process requirement on the adjudication stage of a delinquency hearing. Gault concerned a 15-year-old, already on probation, committed in Arizona as a delinquent after being apprehended upon a complaint of having made lewd telephone calls. If Gault had been an adult convicted of the same offence he could only have been fined \$500 or imprisoned for two months; however, because he was a juvenile, he was committed to confinement in Arizona's Industrial School until he reached the age of twenty-one. Reaffirming its view that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,"⁶ the U.S. Supreme Court granted habeas corpus on the grounds that the due process requirement of the Fourteenth Amendment had not been complied with in that the child and parents were not given proper notice of the hearing, they had not been advised of their right to counsel, either retained or appointed, and that the right to cross-examine and to be confronted with one's accuser had been denied. The court also held that the privilege against self-incrimination was available to a juvenile, but refrained from deciding whether a State must provide appellate review in juvenile cases or a transcript or recording of the hearings.

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In Re Winship concerned a 12-year-old charged with delinquency for having taken money from a woman's purse. The court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable⁶ doubt of every fact necessary to constitute the crime with which he is charged,"⁸ and then went on to hold that this standard was applicable, too, during the adjudicatory stage of a delinquency proceeding.⁹

Finally, in the 1971 case of McKeiver v. Pennsylvania¹⁰ the U.S. Supreme Court indicated the limitations on the extent of procedural revision it was prepared to undertake in holding that trial by jury in the juvenile court's adjudicative stage was not a constitutional requisite of due process of law.

In Canada, the development of the law regarding civil rights in juvenile courts has not been as rapid or dramatic as it has been in the United States. However there have been a number of reported cases in recent years that may suggest the direction in which our courts are pointed.

Even prior to the enactment of the Canadian Bill of Rights, it was suggested in a number of reported Canadian cases that juvenile court proceedings must be conducted according to due process of law and consonant with fairness and fundamental procedural safeguards.¹¹ In Re Miller¹² Disbery, J., in considering an application for leave to appeal under S.37 of the J.D.A., stated that:

It is essential for due administration of justice that an accused be tried according to law, and that he should have a fair trial and not be deprived of any of his rights. 13

In R. v. T. Wilson,¹⁴ J. quashed a juvenile court conviction on the grounds of a series of procedural defects during the trial and explained:

I am not concerned with barren trivialities, but with fundamental rights - rights which we provide for the sorriest scoundrel tried in

our criminal courts, and should accord with
double handed generosity to an immature lad. 15

Similarly, comments in a number of other cases¹⁶ have reinforced the view that although young persons in juvenile court may not be entitled to all of the rights granted to adults in the context of the adult criminal justice system, the former should at least be entitled to a trial in accordance with the principles of due process of law.

What effect has the Canadian Bill of Rights had on the J.D.A. or on proceedings thereunder? To date, arguments based on the Canadian Bill of Rights have been raised in only three reported cases under the J.D.A. as well as in ~~one~~ case dealing with an analogous piece of legislation. In each of these cases the argument made was that a specific provision of the Act in question had the effect of denying all juveniles or a certain group of juveniles the right to "equality before the law" as guaranteed by S.1(b) of the Canadian Bill of Rights.

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In Regina v. O. a juvenile, convicted under the J.D.A., sought leave to appeal that conviction notwithstanding the fact that the time period provided in S.37(3) of the J.D.A. for an application for such leave had elapsed. In rather brief reasons, McIntyre, J. of the British Columbia Supreme Court rejected the applicant's argument for extension of time, and held that there is no denial of equality before the law contrary to the Canadian Bill of Rights even where the combined effect of section 37(3) of the J.D.A. and sections 603 and 750(2) of the Criminal Code is to deny all juveniles a right guaranteed by the Criminal Code to all adults charged with the same offence - namely, the right to apply for an extension of time for leave to appeal. He declined to attempt to define the expression "equality before the law," but did suggest that such exceptional treatment for juveniles was justified because the J.D.A. provides special benefits

and protection to juveniles and because it "applies to all citizens of Canada regardless of race, national origin, colour, religion or sex when they fulfil the condition of being a juvenile, a state into which all citizens are born but from which all who survive emerge at a fixed time." ¹⁸ One might well question the validity of the latter statement as a rationale for upholding the presence of equality before the law in this case, especially in light of the fact that the J.D.A. does not, in fact, apply to "all citizens of Canada." but only to those who reside in areas of the country where the J.D.A. has been proclaimed, and that the "fixed time" at which all citizens are said to emerge from the state of being a juvenile can, in fact, vary up to two years depending on the province in which one happens to be.

In Regina v. M. ¹⁹, a 15 1/2 year-old boy was charged with four separate counts of delinquency, two based on charges of breaking, entering and theft and two based on allegations of rape. In answer to the Crown's motion under section 9 of the J.D.A. that the accused be proceeded against by indictment in the ordinary courts, it was argued that section 9 violated the Canadian Bill of Rights and was therefore inoperative because it created an inequality in that it did not apply to all juveniles but only to a limited class, namely ²⁰ those over the age of fourteen. Felstiner, Prov. Ct. J. acknowledged that "equality before the law" in S.1(b) means that no individual or group of ²¹ individuals is to be treated more harshly than another under the law, and concluded that the waiver provision in the J.D.A. does not permit a 14 or 15-year-old boy to be treated more harshly than others before the law, since the particular standard of treatment which is relevant for such a comparison is that pertaining to adult criminals, and if he is transferred from the ²² juvenile to the adult court, he is not thereby treated more harshly than they. He went on to express grave concern that if the impugned section was held to be invalid, numerous other provisions involving benevolent discrimination

on the basis of age, both in the J.D.A. and in other legislation, would be
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placed in jeopardy. Finally, he held that since Parliament clearly had the
power to allocate jurisdiction over 14 and 15-year-olds to either the juvenile
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or the adult courts and could have done so by an all inclusive rule, it
cannot validly be argued that by choosing instead to vest jurisdiction in
the Juvenile Court Judge to transfer some juveniles where the good of the
child and the community so requires, Parliament has denied to any juvenile
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equality before the law.

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The appeal to the Ontario Supreme Court was dismissed. Houlden, J.
adopted the narrow interpretation of "equality before the law" laid down by
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Ritchie J. in the Lavell case and held that the provisions of S.9(1) of the
J.D.A. do not violate the Canadian Bill of Rights in that they:

do not deprive children between the ages of
14 and 16 of equality of treatment in the
enforcement and application of the Juvenile
Delinquents Act before the law enforcement
authorities in the ordinary courts of the land.
If Parliament can validly divide adults from
children for the purpose of criminal legis-
lation, I can see no reason why it cannot
further subdivide the classification of
children when the reason for such subdivision
is the benefit and the protection of the
children so subdivided. 28

One question raised, but not answered by Felstiner, Prov. Ct. J. was
whether or not S.2(1) of the J.D.A., which permits the Governor General
in Council to raise the age limit for juveniles in any province to 18 years
from time to time, denies equality before the law. Such an issue subsequently
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arose in Regina v. Dubruide. In this case a 16 1/2-year-old boy was charged
with non-capital murder under the Criminal Code, the J.D.A. not being
available since no order extending the juvenile age beyond 16 years of age
had been made in that jurisdiction (the Northwest Territories). It was

argued on behalf of the accused that the failure to treat the boy as a "child" under the J.D.A. would constitute an infringement of the Canadian Bill of Rights in that it would be unfairly discriminating and improper to treat someone as subject to the full rigours of the criminal law in the Northwest Territories, when he would not necessarily be so treated in at least some of the other provinces. De Weerd, Magis. held that he had proper jurisdiction under the Criminal Code and that the J.D.A. had no application here, since the accused was assured of equality with all others in his position in the same jurisdiction and the court cannot substitute its discretion for that of the Governor in Council. Although his decision was affirmed by Morrow, J. for slightly
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different reasons, it is worth noting that, in his judgment, the learned Magistrate placed considerable emphasis on the fact that, for historical and constitutional reasons, it is doubtful that "equality before the law" requires complete legal parity between persons in the provinces and persons in the
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Territories of Canada. Accordingly, in light of his judgment, one might well wonder whether Regina v. Dubrule would have been decided differently if the same fact situation arose in a province where the maximum age was still 16, rather than in the Territories.

A final case of relevance in our consideration of the effect of the Canadian Bill of Rights on the J.D.A., although not dealing specifically with
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the J.D.A., is Regina v. Burnshine. In this case a 17-year-old boy was convicted in the adult courts for causing a disturbance, the maximum sentence for which was six months under the provisions of the Criminal Code. Following a pre-sentence report, the accused was sentenced to a term of three months definite and two years less one day indeterminate pursuant to section 150 of
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the Prisons and Reformatories Act, which permits such definite and indeterminate sentences for young offenders who are under the age of 22 years and are convicted in British Columbia for an offence against the laws of

Canada. An appeal by the accused from his sentence on the ground that this provision violated the Canadian Bill of Rights and that the sentence was therefore illegal, was allowed by the British Columbia Court of Appeal and the indeterminate portion of the sentence was set aside. On further appeal by the Crown to the Supreme Court of Canada, it was held by a six to three margin that the appeal should be allowed.

In the Supreme Court of Canada the respondent argued that he had been denied the right to equality before the law in that section 150 permits a British Columbia court to impose upon him a punishment greater than that which would have been imposed: (i) by a court in any other province of Canada, except Ontario (since there was also a comparable section in the ³⁴ Prisons and Reformatories Act applicable to Ontario); or (ii) upon a person not within the age group defined in section 150 in any province, including ³⁵ British Columbia, other than Ontario. Martland, J. speaking for the majority, concluded that section 150 did not infringe the respondent's right to equality before the law under section 1(b) of the Canadian Bill of Rights and, in doing so, he adopted a very narrow view of the meaning and scope of the Canadian Bill of Rights. He held that the Canadian Bill of Rights merely declares and continues existing rights and freedoms and that in 1960, when it was enacted, the concept of equality before the law did not and could not include the right to insist that all statutes apply to everyone in all areas of Canada. After noting that the purpose of the legislation is to reform and benefit persons within a younger age group, and that its application was made limited because of the existence of the necessary institutions and staff in the provinces, he concluded:

In my opinion, it is not the function of this Court, under the Bill of Rights, to prevent the operation of a federal enactment, designed for this purpose, on the ground that it applies only

to one class of persons, or to a particular area.

. . .

In my opinion, in order to succeed in the present case, it would be necessary for the respondent, at least, to satisfy this Court that, in enacting S.150, Parliament was not seeking to achieve a valid federal objective. This was not established or sought to be established. 36

Laskin, J. (as he then was), with whom Spence and Dickson, J.J. concurred, agreed with the majority of the British Columbia Court of Appeal that so far as section 150 provided for the imposition of a greater punishment of the accused in British Columbia than elsewhere in Canada (except Ontario) for the same offence it denied to him as an individual equality before the law. However, rather than hold that the Canadian Bill of Rights therefore rendered section 150 inoperative, he chose instead to adopt a construction of section 150 that was compatible with the former-namely, that the combined fixed and indeterminate sentences are to be limited in their totality to the maximum term of imprisonment prescribed for the offence - and thereby accommodate section 150's rehabilitative purposes within an equality of maximum sentence. On this view, he concluded, "the age factor in section 150 does not amount to a punitive element in that provision but rather redounds to the advantage of an accused who is within the age group."

It has been suggested that three provisions of the J.D.A. might possibly conflict with the Canadian Bill of Rights and thereby be rendered inoperative, namely - the scheme whereby the same penalty may be imposed for all wrongs, the possibility of indefinite periods of incarceration, and the "resentencing" (under section 20(3)) of a former juvenile who has already been "punished". According to this view, a juvenile might argue that, as a result of one or more of the above provisions, he, as a juvenile, has been: (a) deprived of

his liberty other than by due process of law; (b) subjected to cruel and
unusual treatment or punishment; or (c) denied equality before the law,
in that he has been "penalized" more than an adult who committed the same
offense.

As we have seen, there are no reported cases dealing specifically with
the first two arguments, but there have been a number of recent cases dealing
with the third, namely the right to equality before the law, and these cases
have consistently rejected the argument that this right is violated by
benevolent legislation such as the J.D.A. notwithstanding the fact that it
is applicable only to those persons in a particular class, as defined by their
age and/or place of residence. Although one might successfully argue that
Regina v. O., Regina v. M., and Regina v. Dubrule should not be taken
as a general endorsement of the J.D.A., in that they deal only with restricted
aspects of its operation - namely, applications for leave to appeal, transfer
applications, and proceedings in the Northwest Territories, respectively -
it will be very difficult, it is submitted, for any juvenile attacking the
J.D.A. on the grounds of violating equality before the law, to overcome the
implications of the Burnshine decision. Although Burnshine does deal with
a different piece of legislation, and perhaps can therefore be distinguished
on that ground, the majority's narrow and restrictive view of the effect of
the Canadian Bill of Rights (particularly the requirement that in order for
a statutory provision to be rendered inoperative it must first be established
that it was not enacted pursuant to a valid federal objective) on legislation
very similar in intent and in format to the J.D.A. would seem to render it
extremely unlikely that any attack on the J.D.A. on the grounds of S.1(b),
even one based on any of the three provisions noted in the preceding paragraph,
could be successful.

As for the two grounds for attack based on sections 1(a) and 2(b) of

the Canadian Bill of Rights, it would seem, although there is no authority directly on point, that the narrow approach taken in Burnshine and other recent Supreme Court of Canada decisions dealing with the Canadian Bill of Rights⁵⁰ will in the future have the effect of greatly limiting the utility of the Canadian Bill of Rights in restricting or rendering inoperative legislative provisions such as those contained in the J.D.A.

What significance does this ~~current~~ state of affairs have for proposed new juvenile delinquency legislation? In light of the fact that recent judicial interpretations have significantly weakened the once-hoped-for clout of the Canadian Bill of Rights, it would seem that the draftsman of new legislation, assuming that he can create an Act that is clearly within the accepted range of valid federal objectives, need have little concern as to the possible limiting effects of the Canadian Bill of Rights. On the other hand, if the draftsman is desirous of protecting the civil rights of juveniles, it will be interesting to see whether he finds it necessary to specify in the legislation what civil rights of juveniles are to be recognized and how they are to be guaranteed, rather than rely on the device of judicial interpretation, aided by equitable doctrines and the Canadian Bill of Rights, to see that these rights are, in fact, protected.

CHAPTER 2 - THE SEARCH FOR A NEW ACT

A. Demands for Reform

[T]he great hopes originally held for the juvenile court have not been fulfilled. It has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of juvenile criminality, or in bringing justice and compassion to the child offender. 1

With these words, the 1967 Report of the U.S. President's Task Force on Juvenile Delinquency launched into a critical reassessment of the experience of the juvenile court in the half-century of its operation. Such official criticism was not the first, nor the last, to be heard during that decade. In 1960, a major report tabled in the British House of Commons reached similar conclusions and recommended substantial reform of the English delinquency legislation, greatly restricting the role of the juvenile court. In 1964, a committee in Scotland, reviewing that country's juvenile legislation, chose to scrap the juvenile court altogether and proposed a completely new approach to the problem. Finally, in 1966, a Committee of the Canadian Department of Justice issued a major report entitled Juvenile Delinquency in Canada, containing a series of one hundred recommendations regarding both preventive and legal aspects of juvenile delinquency, and including proposals for significant revisions in the J.D.A. What had led to these broad demands for reform throughout the Anglo-American world? How had the juvenile court failed to fulfil its objectives?

In Canada, criticism of the J.D.A. did not emerge suddenly in the 1960's, but had arisen over the years as experience was gained with its administration. It is interesting to note that despite the traditional disinterest of lawyers and legal scholars in the field of juvenile delinquency law, a number of these criticisms were first formally voiced in articles appearing in legal journals. Since many of these criticisms will be discussed in greater detail elsewhere, we will not undertake a detailed analysis of them here. Instead, we shall only

note some of the major criticisms of the J.D.A. and of the Canadian juvenile justice system most frequently heard in the last twenty years. These can be briefly summarized as follows:

(1) The juvenile justice system has developed many of the very same characteristics of the adult criminal process that the former was created to avoid. Such elements as deterrence, punishment, detention and the resulting stigma have surfaced in the juvenile justice process despite initial intentions to the
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contrary.

(2) As a result of a lack of financial resources, the juvenile court and its related support services have been frustrated in their attempts to fulfil the treatment intent expressed in the J.D.A. and the needs of many children have
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continued to be unsatisfied.

(3) The scope of the legislation (and, therefore, the court's jurisdiction) is much too wide. As a result, the J.D.A. and the juvenile court have been required to deal with many types of problem behaviour (e.g. "status" offences, municipal bylaw infractions, "unmanageability" and "incorrigibility") and with offenders of widely varying ages (as young as seven and as old as seventeen years of age, in some provinces) for which they are not designed or equipped to deal adequately. Regarding the age jurisdiction, it is said that very young offenders should not be prosecuted at all; regarding the offence jurisdiction it is said that the young should not be prosecuted for conduct that is not an offence in the case of adults nor should the same range of disposi-
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tions be available for all types of prohibited conduct.

(4) The absence of sufficient substantive and procedural safeguards in the juvenile justice process allows for many unjust infringements on the rights and liberties of young persons. The absence of counsel, the lack of legally-trained judges and the restrictive appeal provisions in the J.D.A. only serve
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to aggravate this serious problem.

(5) The absence of any meaningful restrictions or guidelines applicable to the judge's power of disposition has in some instances allowed punitive sentencing practices to develop.¹⁰

(6) The rules restricting publicity of and attendance at juvenile court proceedings have obstructed community input and public awareness and understanding of the juvenile justice system.

(7) The present juvenile court philosophy and the range of dispositions available to the juvenile court judge do not have the effect of encouraging children to act responsibly nor of adequately protecting the community.

Aside from these specific criticisms, many took the view that the fact that an Act so dependent on progress in the behavioural services had remained substantially unchanged for over half a century was itself a persuasive reason¹¹ for a reassessment of its objectives and performance.

Why did the juvenile court fail? Although the professionals in the juvenile justice process - the judges, the lawyers, the social workers, and so on - might disagree as to the validity of one or more of the above criticisms or as to which is the most pressing ground for reform, it is likely that nearly all would agree that the juvenile court both in Canada and elsewhere, has generally failed to achieve the lofty objectives originally held for it. Many of the professionals - particularly the social workers and others involved in the treatment side of the court's functions - have tended to place the blame for the juvenile court's failure (to the extent that they will admit that it has failed) chiefly at the feet of the community arguing that it has been the community's unwillingness to provide the court with the necessary services - the staff, the facilities, and the concern - that has prevented the court from realizing its potential and resulted in it taking on many of the undesirable features of the adult criminal courts. Undoubtedly, there is some validity to this argument: the efforts of the juvenile court certainly haven't been

aided by the generally low status of the court and of juvenile court judgeship, many 'judges' general lack of education, training and expertise in juvenile matters, the lack of highly trained probation staffs, the scarcity of assessment services, and the generally limited range of resources (both programs and facilities) available on disposition. However, the lack of these resources is clearly not the only explanation. Rather, it is submitted that the primary reason for the juvenile court's failure to live up to its rehabilitative and preventive goals was the extremely unrealistic nature of those goals based as they were upon the overoptimistic view of the court's earliest proponents as to what was and what could be known about the phenomenon of juvenile criminality¹² and as to what even a fully equipped juvenile court could do about it. There is no doubt that the problem of delinquency has proved itself to be infinitely more complicated than the 19th Century reformers thought. Not only has the attempt to develop effective rehabilitation programmes met with only very¹³ limited success, but even the causes of delinquency itself have remained substantially a mystery. Despite the great numbers of theories that have been put forward regarding the etiology of delinquency and the enormous body¹⁴ of research literature (mostly American) accumulated over the past forty years, it is clear that the development of a workable theory of delinquency, if one is possible at all, is still many years away. Although most social scientists will agree that a myriad of sociological, psychological, hereditary and other factors all play a part in producing anti-social behaviour, little is known about the importance or weight that should be attached to each in order to¹⁵ understand and cope with juvenile delinquency. As the U.S. President's Task Force frankly concluded: "Study and research tend increasingly to support the view that delinquency is not so much an act of individual deviancy as a pattern of behaviour produced by a multitude of pervasive societal influences well beyond the reach of the actions of any judge, probation officer, correctional¹⁶ counsellor, or psychiatrist."

The importance of this dichotomy between the ideal and the actual regarding both what is known and what can be done about delinquency cannot be over-emphasized, for it can be seen as the basis for many of the major criticisms of the juvenile court noted earlier. It can be argued that the early reformers' faith in and reliance on official action, both in the juvenile court proceeding and in the subsequent disposition, has tended until recent years to obscure the dangers of labelling and stigma often inherent in that action. ¹⁷ Similarly, it is not surprising that, as a result of the inability of strictly rehabilitative dispositional efforts to stem the rising tide of juvenile crime, elements of retribution, condemnation, deterrence and incapacitation have gradually crept ¹⁸ into the juvenile dispositional process. The failure of the rehabilitative ideal is also reflected in the current objections to the broad jurisdiction given the juvenile court by the J.D.A.; obviously judicial intervention on the grounds of relatively minor matters of morals and misbehaviour can only be justified if the court is actually able to identify the seeds of future delinquency and then act effectively to prevent their growth. ¹⁹ Finally, the rejection of the conception of "delinquency as illness" (or, at least, as one that can be readily diagnosed and treated) has substantially weakened the justification for informality and privacy of proceedings and has given rise to the current demands for the establishment of procedural safeguards, the imposition of limitations on the judicial power of disposition, and a relaxation of the bars against public attendance at and publicity of juvenile court proceedings. ²⁰ It was obviously such considerations that prompted Mr. Justice Fortas of the United States Supreme Court to comment, in words that have since been repeatedly cited and adopted not only by American jurists and commentators but also by many in this country as well:

There may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children. ²¹

In assessing the results of the "juvenile court experiment" after over half a century of operation, we are drawn towards the following view expressed by The President's Task Force in its 1967 Report:

What emerges, then, is this: In theory the juvenile court was to be helpful and rehabilitative rather than punitive. In fact the distinction often disappears, not only because of the absence of facilities and personnel but also because of the limits of knowledge and technique. In theory the court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services--by society generally--as a criminal. In theory the court was to treat children guilty of criminal acts in noncriminal ways. In fact it labels truants and runaways as junior criminals.

In theory the court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law--knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's. In theory it was to exercise its protective powers to bring an errant child back into the fold. In fact there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses. In theory it was to concentrate on each case the best of current social science learning. In fact it has often become a vested interest in its turn, loathe to cooperate with innovative programs or avail itself of forward-looking methods.

It is our submission that the above passage, harsh as it may be, has come to be equally applicable to the Canadian juvenile justice system. The extent to which the federal government of Canada has recognized the validity of these criticisms and the ways in which it has, as a result, attempted to revise and re-focus its approach to the problem of delinquency shall be the central topic addressed in the remainder of this, and subsequent chapters.

B. The Department of Justice Report

In 1960, recognizing the need for reform, the correctional planning committee of the Department of Justice recommended that the existing J.D.A. be overhauled and reorganized and that a new integrated approach to delinquency be adopted.¹ Accordingly, the following year, the Minister of Justice announced the appointment of a departmental committee whose primary responsibility would be "to make recommendations concerning steps that might be taken by the Parliament and Government of Canada to meet the problem of juvenile delinquency in Canada."² The five-member Justice Committee³ commenced its study in January, 1962, and completed its 377-page Report in June, 1965. In the 3 1/2 years it took the Committee to research and prepare its Report, it visited 27 juvenile training schools and seven detention centres across Canada, attended sittings of the Juvenile and Family Court in eight different cities, and received and considered a total of 77 briefs from a broad range of interested individuals, professional associations and agencies from across the country.⁴ Because of the Report's length and the great number of issues with which it dealt, we do not propose to review here all 100 of its recommendations. Instead, we shall confine our discussion to a general review of the philosophical and practical approach it adopted in dealing with the problem of delinquency.

In its Report, The Committee reviewed the nature and extent of delinquency in Canada in the years preceding 1962,⁵ and predicted a marked increase in the amount of juvenile crime in coming years.⁶ Although it too recognized the lack of agreement among the experts as to the causes of delinquency, it clearly did not consider such a limitation to be a sufficient ground for avoiding the problem.⁷ Instead, it proposed a philosophy and design for a new juvenile court which, although modelled substantially after the traditional juvenile court, at the same time also took into account many of the

philosophical and practical limitations of the traditional approach that had become obvious in recent years as well as most of the specific criticisms noted earlier in this paper. The Committee commenced its inquiry by rejecting outright the argument that Parliament should leave the field of delinquency to be defined and dealt with by the provinces under child welfare legislation. Taking the view that delinquency is only a welfare problem in the same sense that adult crime is, and that the benefits of a system of uniformity of legal sanctions against uniformly prohibited conduct would generally outweigh any advantages of a welfare treatment by the provinces, the Committee adopted the approach that delinquency legislation should merely be the counterpart of ordinary criminal legislation, but modified for a specialized group defined by age. In so doing, the Committee reaffirmed its commitment to the criminal-law context followed in the J.D.A. and implicitly rejected among other possible alternatives, the adoption of a non-criminal welfare approach of the sort that had been approved shortly before by similar committees in England and Scotland.

Having thus chosen the desired format for new legislation, the Committee then proceeded to reduce the scope and soften the impact of that legislation. Citing such considerations as the desire to achieve uniformity, to avoid wherever possible the dangers of stigma and labelling, and to use quasi-criminal legislation to achieve welfare purposes only where those purposes cannot be achieved by non-criminal legislation, the Committee recommended: that the new legislation apply uniformly throughout Canada, that the federal government establish standards of service and provide necessary financial assistance to the provinces to see that those standards are met; that the term "juvenile delinquent" be replaced by less stigmatizing nomenclature; that the minimum age of juvenile court jurisdiction be raised and that the variable maximum age be abandoned in favour of a uniform maximum age; that the offence

jurisdiction be substantially narrowed, abandoning the general offence of delinquency in favour of specific offences and applying only to conduct that also constitutes an offence for adults; that controls be introduced to limit the judge's discretion regarding waiver; that definite limits be placed on the length of institutional committal and other dispositions; and that procedures for the periodic review of dispositions be adopted.

Dealing with practice and procedure in the juvenile court, the Committee expressed its agreement with the essential philosophy contained in section 17 of the present Act - that is, that proceedings should be as informal as the circumstances will permit, provided that they remain consistent with a due regard for the proper administration of justice. However, in its view, the "proper administration of justice" required a closer adherence to the traditional rules of criminal procedure, at least in the adjudication stage of the proceedings, than had been the practice under the J.D.A. Accordingly, it recommended: restrictions on the admissibility of statements by juveniles; strict limitations on the use of detention before and during trial; tighter rules regarding privacy and publicity of proceedings; the provision of counsel at public expense for those unable to obtain a lawyer; clarification and expansion of the right of the child's parents or guardians to notice of any proceedings that may affect their child's liberty; clarification of the law in relation to the taking of pleas and to the privilege against self-incrimination; limitations on the practices of informal disposition; and expansion of the rights of appeal from juvenile court decisions.

The view taken by the Committee towards disposition also reflected the ways in which modern criticism of the juvenile court has required modification of the original juvenile court approach. To a certain extent, the Committee continued to adhere to traditional principles - namely, that the goal of the juvenile court should be to ensure that the juvenile offender becomes a law-abiding citizen, that treatment, institutional or otherwise, should be

exclusively designed to further the juvenile's education and readjustment, and that the question of whether a particular measure is to be applied should depend not on what he has done but on what is necessary and useful for him. 29

At the same time, however, it recognized that the experience of the juvenile court has shown that a significant qualification has to be placed upon the traditional philosophy. It admitted that although rehabilitation may be the primary goal of the juvenile justice system, it can't be its only goal: other values, such as deterrence, must also be recognized as important and inevitable factors in the dispositional process. 30

The actual extent to which deterrence is presently involved in the dispositional process is a moot point; not only is it often very difficult to determine whether a particular disposition is designed as treatment or punishment by the judge (since his intentions are often not revealed by his objective conduct), 31 but one is also faced with the reality that in the eyes of the juvenile (and, for that matter, those of his family and the community generally) most dispositions, regardless of their intent, will be seen as punishment. 32

The important point is that the Committee recognized that the dispositional process does not, in practice, nor could it ever, involve solely rehabilitative considerations, but that other factors such as deterrence (and, possibly, retribution and incapacitation) must always enter into many of the court's decisions and that it is unrealistic to pretend that they do not. In light of this conclusion, one may be surprised to note that the Committee then went on to indicate its agreement with the philosophy of the J.D.A. as set out in s.38, a philosophy which, although somewhat vague, clearly emphasizes rehabilitation over deterrence or any other factors, and to express the view that "the difficulty has not been in the basic philosophy of the Act but in the failure of society to give to the juvenile court adequate resources with which to fulfil the aims of that philosophy." 33

Because of the brevity with which the Committee dealt with the

matter; it is very difficult to ascertain whether or not this view is consistent with its earlier conclusions. However, there does seem to be some inconsistency between its recognition of the limitations of treatment and of the traditional rehabilitative approach and the latter view that, given the availability of adequate resources, the original juvenile court philosophy could still be successful and its goals attained. This problem aside, the Committee's actual recommendations regarding disposition reflected elements of all of these considerations: starting with the basic system established by the J.D.A., they generally involved the addition of certain procedural protections for the rights of the juvenile, the provision of a number of additional dispositional alternatives, and the encouragement of various means of providing greater resources for the court's use. For example, the Committee recommended:

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mandatory use of pre-sentence reports in certain cases, and disclosure of
their contents to the child's counsel; the creation of new dispositional
alternatives including informal disposition, absolute discharge, adjust-
ment to allow short-term counselling, and restitution; minor revisions
to the existing dispositions of fine, probation, foster home placement,
committal to a children's aid society, and training school committal;

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and assorted other provisions relating to such matters as transfer to adult
institutions, after-care, orders for support, and other facilities.

The final three parts of the Justice Report dealt with matters beyond the scope of this paper. Suffice it to say that in those three parts, the Committee made a series of recommendations relating to the criminal liability of parents and other adults in relation to juvenile matters, the field of prevention, the need for research, and the possible roles of the federal government in prevention, research, staff training and resource development.

Although the Justice Committee's Report was completed and submitted to the government in June, 1965, it was not tabled in Parliament and made public

until February, 1966. In September, 1967, a First Discussion Draft of a
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proposed Children's and Young Persons' Act, prepared by the legal staff
of the Solicitor-General's Department and based substantially on the recomm-
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endations in the Department of Justice Report, was circulated to various
professional groups for comment, the Department's intention being that
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legislation could be put before Parliament in the spring of 1968. In
January, 1968, a federal-provincial conference was held in Ottawa to con-
sider the Discussion Draft. In attendance at the conference were senior
officials of the Solicitor-General's Department as well as senior represen-
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tatives of provincial Corrections and Attorney-General's Departments. Although
no public report was ever issued concerning the results of the conference, it
is generally known that the provincial representatives did not give the Draft Act
a warm reception. One of the major objections heard was from those provinces
for whom the Draft Act would have required a raising of the existing maximum
age of juvenile court jurisdiction, who argued that the higher age would
place unreasonable demands on their already over-crowded juvenile courts
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and services. Following the conference, nothing more was ever heard of
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the proposed Act.

Despite the Justice Report's broad scope - the federal government's
first major study of the entire field of delinquency since the adoption of
the present J.D.A. in 1929 - its timeliness - coming at a time of relatively
high interest in juvenile court reform - and the potential importance of its
recommendations for lawyers, social workers, judges, criminologists, and
numerous others, the Report drew surprisingly little formal response from
these professionals. Aside from two short articles written prior to the
completion of the Report and concerned primarily with the establishment and
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membership of the Committee, a brief response by the Canadian Corrections
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Association, and two articles directed at the Discussion Draft based

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thereon, the delinquency literature in the five years following its publication is totally devoid of any serious attempt to analyze all or even part of the Justice Report. Not until the flurry of articles following the introduction, in the fall of 1970, of Bill C-192 was there any further discussion of the Report; even then, references to the Report's recommendations were only made for comparison purposes, invariably without any consideration of the Committee's philosophical premises or of the reasoning which led to its conclusions. Notwithstanding this paucity of critical comment, it seems, according to the view of at least one commentator, that the Report was generally well-received by most professionals involved in this field and that most of these persons looked forward to legislation based on its recommendations.

What has been the importance of the Justice Report in the development of juvenile delinquency legislation in Canada? As one will recall from our earlier discussion, it seems that the 1960's represented a major cross-roads in the history and development of Anglo-American juvenile justice legislation. In 1961 the Ingleby Committee in England recommended substantial restrictions on the prosecutory functions and corresponding increases in the child welfare functions of the juvenile courts; eight years later, the Children and Young Persons Act, 1969 gave effect to those recommendations. In 1964, the Kilbrandon Committee in Scotland recommended the abolition of the juvenile court and its replacement by a new system of children's panels for those "in need of compulsory measures of care"; four years later, the Social Work (Scotland) Act did just that. In the United States, the President's Commission on Law Enforcement and the Administration of Justice recommended in 1967 that only the most serious cases of delinquency be referred to the juvenile court and that all others be dealt with in a welfare context by a local Youth Services Bureau; in that same year, the U.S. Supreme Court handed down its historic decision In Re Gault. In light of the contrasting

directions taken by law reform bodies in those countries, it is submitted that the most significant aspect of the Justice Report, and its major contribution towards the development of Canadian delinquency legislation, was its firm re-affirmation of the validity and viability of the traditional juvenile court concept. In the words of the Committee, it concluded that "the present juvenile court process, in its essential features, [is] the preferred approach to the problem of the juvenile offender."⁷¹ Granted, the Committee did recognize that experience under the J.D.A. had substantiated a number of difficulties that had to be remedied: accordingly, it recommended a narrowing of the juvenile court's jurisdiction in terms of age of the offender and nature of the offence; the introduction of legal safeguards to protect the rights of the young person exposed to the juvenile justice process; the recognition of other social objectives, such as deterrence, that the juvenile court must also attempt to satisfy while it pursues its primary goal of rehabilitation; and the provision of greater and more effective resources for both prevention and treatment of delinquency. However, none of these recommendations were designed to have the effect of substantially modifying the role of the juvenile court nor its central position in the traditional scheme of the juvenile justice system.

One might tend to downplay the significance of the Justice Report's re-affirmation of the traditional juvenile court by arguing that, as a result of the division of legislative power under the B.N.A. Act the Committee could not possibly have recommended any radical change from the present criminal-law format for handling delinquent youth. We would argue, on the contrary, that if it saw fit the Committee could have endorsed any one of a number of alternative approaches including, for example: the establishment of a high minimum age of criminal responsibility, above which offenders would be dealt with under the Criminal Code either in the adult or juvenile court and below

which they would be dealt with under provincial legislation in a non-criminal
72 context; a procedure whereby all offenders with special needs, regardless of age, could be given special treatment by a judge of either the juvenile or adult court; a system involving the separation of the adjudication and disposition stages of the proceedings, whereby the two would be dealt with either in different courts or under different legislation; or, perhaps, a scheme, obviously requiring the joint action of both levels of government, for the handling of both protection and delinquency cases by lay welfare panels. Similarly, although one might be tempted, in light of the paucity of critical response to the Report, and the Discussion Draft based thereon, to conclude that the Report was generally either read and forgotten or not read at all, or that whatever potential impact it had was lost when the Discussion Draft was abandoned, it seems that such a conclusion is not justified by later developments. As we shall soon see, the two pieces of legislation proposed by the federal government on five and ten years, respectively, after the completion of the Justice Report, tend to follow in many respects, both the philosophy and the actual recommendations of that Report. It does not seem unreasonable to conclude that in drafting these two proposed Acts the draftsmen in the Solicitor-General's Department were substantially influenced by the approach taken by the Department of Justice Committee in its 1965 Report.

Next to the Committee's retention of the juvenile court per se, the second most important contribution of the Report may well have been its emphasis on the importance of and need for federal-provincial cooperation in this field. Recognizing the problems that have arisen out of the allocation of legislative jurisdiction relevant to this field, the Committee refrained from making final recommendations regarding a number of important issues, choosing instead to leave the final decision to be made through

federal-provincial consultation. To this end, the Committee recommended that the federal government sponsor a series of federal-provincial conferences to discuss delinquency law reform, to which should be invited representatives of the major private agencies and provincial and municipal government branches concerned with the administration of justice and with the welfare of children. Similarly, emphasizing the crucial importance of provincial services and resources under the proposed new legislation, the Committee recognized the federal government's responsibility to ensure, by means of financial assistance to the provinces, that a uniform standard of treatment and services are provided to children regardless of where in Canada they reside. As the Committee stated, "the remedy for the defects and deficiencies outlined in many sections of our Report will require what has been called "co-operative federation" of the highest order before a solution will be found." The federal-provincial conference regarding the Discussion Draft obviously was an attempt at such co-operation; unfortunately, as we have seen, the experiment resulted in failure. When we turn to our consideration of Bill C-192 and the most recent reform proposals, it will be interesting to see the nature and extent of the role co-operative federation has played in their development.

There is no doubt that the Department of Justice Report, the first major study of its kind ever in Canada, was a document of major importance in the evolution of new Canadian delinquency legislation. However, it should not be inferred that the Report is beyond criticism. On the contrary, a careful reading of the Report suggests that one significant deficiency was perhaps its failure to adequately explain and justify a number of the basic philosophical and practical premises upon which its recommendations were based. Given the critical atmosphere out of which the Report was borne and the divergent approaches being adopted at that time by the nations to which Canadian legislators normally look for guidance, one would have thought

that the Report would have initially addressed and considered in depth two principal questions:

- (1) Is the traditional juvenile court concept still viable today?
- (2) If it is viable, is it the best approach to be adopted in this country in light of the extent and nature of the delinquency problem in Canada and the existing state of social science knowledge?

It is unfortunate that the Committee did not deal specifically with these two issues nor did it give even a cursory examination or consideration of the alternatives to the traditional juvenile court being developed elsewhere. 77
Indeed, one expecting a thoughtful re-evaluation of the juvenile court concept would have generally been rather disappointed; instead, the Committee seems to have assumed, with little or no question, 78 the continuation of the traditional juvenile court process in generally the same form as it exists today, and concerned itself primarily with responding to specific criticisms of the J.D.A. and individual problems that had arisen in practices. As a prominent official in the Solicitor-General's Department recently commented, in reading the Justice Report "one can sense the pragmatic approach of a committee that is trying to propose solutions to concrete legislative problems 79 without challenging the basic orientation of Canadian juvenile courts."

It is perhaps not unfair to say that the Report as a whole tends to avoid broad philosophical questions and policy issues and that where such issues are discussed they are usually dealt with in the relatively narrow context of a specific practical problem. The fact that out of a 377-page Report less than twenty pages are addressed to basic questions of philosophical 80 direction tends to support such a comment. Similarly, although the Report generally deals quite thoroughly with the legal considerations bearing on most issues, it tends to give rather short shift to the relevance and impli-

cations of social science research. As one expert has noted: "Its approach was that of jurists interested in legislation more than that of social scientists focusing their attention on how social organization works ... [The Report] will never rank among the classic works of the sociology of delinquency?"⁸¹

Although such conclusions may be regrettable, it can't be said that they are surprising, for the membership of the Justice Committee would seem, at least to some extent, to have pre-determined both the nature of its approach as well as its ultimate conclusions. In light of the fact that all five members of the Committee were senior staff of the federal Department of Justice, it should not be surprising that it declined to endorse any scheme involving a substantial abdication of federal jurisdiction. By the same token, the fact that none of the Committee members had any previous experience in juvenile matters, nor in any related fields such as that of child welfare, could not help but have had an effect on the nature of their inquiry and their conclusions; the more time and effort that was required merely to familiarize the members of the Committee with the operation and problems of the existing system, the less one would expect such a group to propose a radical reorganization or restructuring of the existing system.⁸² Similarly, the professional background of the members (four were lawyers, one a psychiatrist) cannot be ignored for it helps to explain a number of the Report's features, including the Committee's great concern regarding legal rights and procedural safeguards, its decision to retain ultimate jurisdiction in a quasi-criminal judicial body, its tendency to place great reliance on the briefs presented to it by certain professionals in other disciplines,⁸³ as well as its general reluctance to consider new and different approaches to diversion or treatment, or even to undertake a more detailed evaluation of the relative success or failure of existing programmes.⁸⁴ One might well wonder what effect the choice of a Committee more representative of the various disciplines involved in the field of juvenile delinquency and more experienced in delinquency

matters might have had on the nature of its eventual Report and recommendations.

C. Bill C-192: The Young Offenders Act

On November 17, 1970, a full five years after the publication of the Justice Committee Report and two years after the demise of the proposed Children's and Young Persons Act, then Solicitor-General George McIlraith introduced in the House of Commons "An Act respecting young offenders and to repeal the Juvenile Delinquents Act," more commonly referred to as Bill C-192 or the Young Offenders Act.¹ The Bill did not receive a warm reception, either in the House or in the press. In fact, by the time the Bill was introduced for second reading on January 13, 1971, it had already been harshly criticized by judges, social workers, psychologists, psychiatrists, provincial Ministers, and in fact, just about everyone except the Canadian Bar Association which gave the Bill its approval in principle.² Notwithstanding these views, and to the surprise of many, the new Solicitor-General, Jean-Pierre Goyer, resolved to press on with second reading.³ However, if the Minister thought that the Bill could be quietly pushed through the House, he was quite mistaken; instead, opposition critics joined forces to insist that the Bill be withdrawn, alleging that the Bill was "the most punitive, enslaving, vicious and tyrannical piece of legislation that has ever come out of the legislative grist mill,"⁴ and demanding to know who was responsible for "this criminal law monstrosity, this caveman's approach to young people, this bill of rights for social wrongs, this simplistic Spiro Agnew approach to young people's problems."⁵ Following this extensive verbal barrage in the House,⁶ the Bill was referred to the Standing Committee on Justice and Legal Affairs for more detailed study (and, inevitably, more criticism) for the balance of the year.⁷ In November, 1971, the Government announced that it had decided to let the Bill die on the order paper. A month later, the Commons Justice Committee recommended that it be scrapped altogether.⁸ As a result, the federal government had, once again, failed in its bid to revise the venerable J.D.A.

To this writer, the most unusual aspect of the chronology described above is the fact that, although the Bill was almost unanimously condemned by the so-called "experts" in the delinquency field, neither its stated objectives nor its substantive provisions varied all that substantially from those endorsed in the recommendations of the Justice Committee, recommendations which, as we have noted, received general (albeit largely tacit) support from the same professional community.⁹ For example, in addition to the Bill's continuation of the traditional juvenile court concept first embraced in the J.D.A. and subsequently endorsed by the Justice Committee, the goals allegedly sought to be achieved through the Bill are all consistent with recommendations in the Justice Report. As noted by one commentator, the four major policy objectives underlying the Bill, as revealed by the Minister's second reading speech, were:

- (a) the redefinition of the grounds upon which a child may be tried in juvenile court;
- (b) the modification of the age group over which a juvenile court has jurisdiction;
- (c) the elimination of arbitrary treatment in the trial process; and
- (d) the continuation of emphasis on social rehabilitation of juvenile offenders.¹⁰

¹¹

As we have seen earlier, all of these objectives were advocated by the Juvenile Committee in its Report. But, one might argue, these objectives are all very general in nature; could not the two documents vary greatly in the way in which each seeks to implement them? Although they could, it is submitted that they don't; on the contrary, the specific reforms contained in Bill C-192 (with the exception of a few isolated and clearly severable provisions to be discussed later)¹² generally parallel identical or similar recommendations in the earlier Report. It may be helpful at this stage to summarize the major reforms proposed by the Bill. According to one published

account, they were as follows: the raising of the minimum age to ten; the change in designation from "juvenile delinquent" to "young offender"; the exclusion of the status offences and the abolition of the general offence of delinquency; the abolition of the offence of contributing to delinquency; the provision of the right to counsel; the expansion of the right of appeal; the granting to the judge of limited diversionary powers; the creation of the new dispositions of absolute discharge, restitution and compensation; the increase in the maximum amount of fines; the establishment of a three year maximum term for committals to training schools; the new guidelines for the exercise of the transfer power; the new procedures for arrest by summons or warrant and for release following arrest; the section making mandatory the attendance of parents in juvenile court; and a special provision for the re-sentencing of delinquents

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in adult court at age 21. A careful review of the Justice Committee Report will show that, with the exception of the last proposal (which, it is submitted, is clearly severable from the remainder of the Bill), each of these reforms was recommended therein. It is not suggested that the statutory language used to effect all of these reforms coincided in all cases with that envisioned by the Justice Committee, nor is it suggested that all of the provisions in the Bill are also reflected in the Report or vice-versa; clearly that is not the case. However, it does seem fair to conclude that in many respects the Bill did follow the general approach and indeed reflect the specific recomm-

¹⁴
endations contained in the Justice Report. In light of this conclusion, it is hard to give much weight to many of the exaggerated criticisms popular at the time, such as those of one provincial Minister who claimed that the Bill's approach was "foreign to all accepted principles of child care" and that the Bill itself "would set the treatment of children back to the beginning of the
¹⁵
century."

Aside from the general similarities between Bill C-192 and the Justice

Report, it is also important not to forget that many of the major reforms in the Bill were widely applauded at the time by various authorities in the field, including some of the Bill's most vocal critics. Among the reforms receiving support from various commentators were the limitations on the powers of arrest and pre-trial detention, the broader appeal provisions, the restrictions on the dissemination of information from juvenile court records, the abolition of the offence of "contributing to juvenile delinquency," the provision for trial in juvenile court of criminal offences primarily affecting family members, the abolition of the general offence of delinquency in favour of charges based on specific offences, the restriction of the legislation to only federal offences, the requirement that a juvenile be notified of his right to counsel, or, in the absence of counsel, that he may be represented by a parent or some other adult, the elimination of the provision encouraging informality of procedure, the adoption of limitation periods similar to those applicable to adults, the clarification of the practices to be adopted on arraignment and on the taking of pleas, the provisions restricting the admissibility of pre-disposition reports or of other statements during the adjudicatory stage of the proceedings, the provision allowing for an absolute discharge, the raising of the minimum and maximum age limits, the requirement that parents attend proceedings involving their children, and the provisions allowing attendance by representatives of the press.

In reconsidering the strengths and weaknesses of the Bill, it is important that one resist the tendency to ignore the widespread support attracted by many of the above proposals.

If, as we have suggested, the Bill was generally consistent with the Justice Report and many of its specific provisions were favourably received, why did it fail? The answer to this question involves many factors. To begin with, some critics took the view that, for reasons unknown (although probably

the result of provincial pressure) the Bill failed to give full effect to a number of the Justice Report's more important recommendations.³³ For example, although the Bill attempted to follow the Justice Report by introducing a provision to officially authorize and regulate the disposal of cases without court hearings, the restrictions the Bill placed on that provision would probably have had the effect of limiting, rather than expanding, the already existing informal diversionary practice.³⁴ Dealing with the use of juvenile court convictions, the Bill would have provided that such a conviction is not to be considered a criminal conviction for the purposes of any criminal proceedings subsequently brought in adult court; regret was expressed by a number of critics that the Bill declined to go further to protect against any discrimination in any form (e.g.- by potential employers) on the basis of a juvenile court record.³⁵ Similarly, although at least four sections of the Bill require that a juvenile be given notice of his right to counsel,³⁶ there is no section that guarantees him the right of legal representation at public expense, as advocated by the Justice Committee.³⁷ Finally, dealing with training school committals, although the Bill adopted the Report's recommendations that such committals be made only after consideration of a pre-disposition report and only for a maximum period of three years, it failed to set forth the requirement, found in the Discussion Draft (in relation to all young offenders) and even the present J.D.A. (in relation to children under 12), that every effort first be made to treat the child in his own home.³⁸

A second major criticism of the Bill was that it contained, in the words of one commentator "punitive provisions which would have the effect of stigmatizing juvenile offenders and undermining the traditional separation of juvenile from adult offenders."³⁹ What were these so-called "punitive provisions?" The most blatant and most publicized example was undoubtedly the provision in sections 30(1)(k) and 30(4) whereby a juvenile found to have

committed an offence for which he might, if he had been tried on indictment, have been sentenced to death or to imprisonment for life as a minimum sentence (i.e.- capital or non-capital murder) could be committed to a training school until age 21, whereupon he could then be taken before an adult court for further sentencing "as if he had then and therebeen convicted of the offence...⁴⁰ and as if he were thereupon liable to imprisonment for life." Not only did this provision fly clearly in the face of the Justice Committee's recommendation regarding a three year maximum for all training school committals as well as its warnings as to the serious detrimental effects of long-term confinement on juvenile offenders, but it also smacked of extreme harshness (in effect, permitting a ten-year-old child to be imprisoned for life) and injustice (allowing what would clearly have been prohibited as double jeopardy in the case of adults) and was, as a result, unanimously (and rightly, it is submitted) de-⁴¹ plored by virtually every critic of the Bill. A second such provision was that allowing a juvenile court judge to order that a juvenile may be finger-⁴² printed and photographed. Although there has been and continues to be con-⁴³ siderable controversy over whether or not the Identification of Criminals Act⁴⁴ applies to charges under the J.D.A., many critics, fearful of the likely stigmatizing effects of such a process, have opposed granting the police such⁴⁵ powers at all or except for limited purposes and under strictly controlled⁴⁶ conditions. Finally, objections on similar grounds were also made to the provisions allowing the transfer of juvenile offenders from training schools⁴⁷ to adult correctional institutions and the detention of child witnesses⁴⁸ who refuse to be sworn or to testify.

Closely related to the previous criticism, although much broader in its implications, was the argument that the proposed legislation, through its specific provisions and general format, rejected the treatment-oriented philosophy of the J.D.A. in favour of a more punitive criminal-law approach.

This was the view expressed by the Canadian Mental Health Association in its letter and pamphlet to the members of Parliament wherein it stated: "The Bill is, in fact, a criminal code for children, which is distasteful in its terminology, legalistic in its approach and punitive in its effect. Although the phrase "Criminal Code for Children" became a rallying cry of sorts for critics of the Bill, few took the opportunity to analyze what was meant by this phrase. In its brief, the C.M.H.A. cited the provisions allowing for re-sentencing of juvenile offenders at age 21, allowing the court to permit fingerprinting and photographing, limiting the term of probation orders to two years and training school committals to three years, abolishing the general offence of "delinquency" in favour of specific changes based on specific offences, as well as the legalistic format of the Bill as proof that the proposed new Act treated juveniles as little criminals, rather than as children in need of treatment. Leaving aside the first two provisions, inserted as a result of pressure from provincial law enforcement departments and easily severable from the remainder of the Bill, it is clear that the remaining three provisions were all deliberately inserted by the legislators as an expression of their concern to eliminate arbitrary treatment of juveniles in the trial process and reduce the juvenile court's scope for interference in their lives. In recent years the concept of indeterminate sentences, the general concept of "delinquency" and the loose and informal drafting of the J.D.A. had all come in for substantial criticism at the hands of lawyers, judges, and others. Clearly, in the eyes of this latter group of critics these reforms were valid and desirable; in fact it is reasonable to assume that they would not have objected to the comparison made between the proposed Act and the Criminal Code. In summary, it seems that the debate over the desirability of a "Criminal Code for children" comes back to the basic controversy between the "parens patriae" and "due process" approaches. In light

of the support given to the views expressed in the C.M.H.A. brief, it is clear that in the case of this particular issue the "parens patriae" view (as advocated by the C.M.H.A.) prevailed over the argument for "due process" (as supported by the Canadian Bar Association).

A fourth major factor in the demise of the Bill was the same factor that is generally believed to have led to the death of its predecessor, the Children and Young Persons Act, two years earlier, namely, the enormous potential costs to the provinces of implementing the proposed legislation. ⁵² Much publicity was given to the complaint by Ontario Minister of Correctional Services Allan Grossman that increasing the maximum age from 16 to 17 would mean that his Department would have to provide four or five more training schools at a capital cost of around \$20 million and an annual operating cost of about \$3 million. ⁵³ Similarly, many provinces complained bitterly that the increased pressures on provincial services and facilities that would result from the revised minimum age and the narrowing of the Act's offence jurisdiction would be impossible to bear without additional federal financial assistance which, contrary to the urging of many, the proposed new legislation failed to provide. The brief of the Canadian Association of Social Workers, typical of many presented to the House Committee on Justice and Legal Affairs, criticized the government's failure to deal with the problem of the lack of resources and, in particular, the absence of cost-sharing provisions in the Bill. As one commentator concluded: "Thus, in the end, the real complaint to be lodged against the Young Offenders Bill relates not to what is included but to what is omitted, namely, a section amending the Canada Assistance ⁵⁴ Plan."

In addition to these major objections, a number of other factors also played a part. There was resentment expressed by many of those who were involved in the Justice Committee's deliberations and whose comments were

sought regarding the 1967 Discussion Draft, that they were not consulted in
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relation to Bill C-192. This attitude extended to provincial government

officials as well as to professionals in the child care field, since, contrary to the suggestions of some government representatives that the Bill was the result of extensive consultations, (and contrary to the Justice Committee's emphasis on the need for "co-operative federalism of the highest order") it seems that there were no federal-provincial discussions relating
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to the Bill before its introduction in the House. Secondly, there was general agreement among both lawyers and non-lawyers that, aside from the question of legalistic versus informal approach, the Bill was in many areas poorly drafted, containing much unnecessary detail and obscure and technical language, and that the wording of many sections, particularly the Forms
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appended to the Bill, could have been substantially improved.

Another significant factor was the brief, referred to earlier, presented by the C.M.H.A. to members of Parliament prior to the Bill's second reading in the House. This document, although not in itself a particularly thorough or sound analysis, proved itself to be, as a result of its timely presentation and its rather quotable rhetoric, a handy tool for Opposition M.P.s bent on criticizing the Bill, particularly those who did not have the time or interest to actually read the Bill and consider its contents before joining the debate. Finally, in dealing with the contribution of the Opposition critics who spoke on the matter during the debates in the House and subsequently in Committee, we would be remiss if we did not state the obvious factor apparent from even the briefest consideration of the transcripts of those debates - namely, that the majority of these M.P.s appear to have been more interested in exploiting the Bill as an opportunity to embarrass the Government and to attract personal publicity than in suggesting workable alternatives to the legislation proposed.

In answer to the question "why did Bill C-192 fail?" one must acknowledge

that all of the factors and considerations cited above played a role. A more complex question is what implications the Bill's failure had for the development of delinquency legislation in Canada. Clearly a number of the difficulties the Government encountered in this ill-fated law reform attempt could have been avoided. The failure to consult with provincial officials or with the professionals in the delinquency field before introducing the Bill in Parliament simply reflected poor political strategy; rather than silence the potential critics in these two groups, such an approach merely fanned the flames of their discontent. Secondly, as suggested earlier, the Bill's poor drafting immediately alienated many individuals who otherwise might have been more sympathetic to its aims; there is no reason why the Bill's objectives could not have been achieved through the use of less confusing, technical, obscure, and at times threatening language than that found in the Bill. Lastly, it must be admitted that a number of the Bill's provisions were validly open to the criticism either that they failed to give full effect to desirable reforms proposed by the Justice Committee or that they constituted a harsh and primitive method of dealing with certain problems. These provisions point up even more dramatically the valuable role that prior public consultation could have played. Either public hearings or the submission of briefs from interested professionals or government groups would surely have sensitized the officials in the Solicitor-General's Department as to which provisions might be re-thought and which ought to be discarded altogether. By following such an approach (in effect, the same procedure tried in the case of the Discussion Draft a few years earlier) the Government might have avoided a large number of the objections subsequently raised. Because it chose to act otherwise, a relatively small number of objectionable provisions attracted an inordinate amount of critical attention and publicity, obscured the many progressive reforms in the Bill, and ultimately led to the Bill's withdrawal.

Although it would have been convenient to end our consideration of the Bill on that note, and leave the impression that, had the Government avoided these three practical and political pitfalls, the Bill would have been warmly received and readily adopted, such a conclusion would be very misleading, for it seems that even if the problems noted above had been avoided, a much broader and more critical one would still have remained. It is submitted that the most significant result of the entire Bill-C-192 fiasco may well have been its revelation that there currently exists in Canada two conflicting views, each with a large, articulate, and qualified group of supporters, as to the proper role of the juvenile court in the juvenile justice system. On the one hand, there appears to be a large number of professionals in the child welfare field, including judges, social workers, probation officers, academics and others, who still favour the broadly-defined, treatment-oriented, paternalistic approach of the J.D.A. and who staunchly oppose such proposed reforms as the abolition of indeterminate sentences, the replacement of the general offence of delinquency with charges based on specific offences, the restriction of the broad discretionary powers of the juvenile court judge, and the introduction of more formalized procedural safeguards traditionally associated with the adult criminal justice process. On the other hand, there are many who are prepared to argue that the traditional paternalistic view advocated by the 19th century child-savers is no longer (if it ever was) justifiable, and advocate instead a system more akin to the adult criminal process, involving narrowly-defined offences, adjudication based on the principles of due process, and determinate dispositional alternatives. This group (in which the legal profession would be very well represented) would suggest that the expertise in assessment and disposition upon which the paternalistic approach is based has failed to develop in practice, and that even if such expertise could be developed, society now recognizes that juveniles are individuals entitled to

rights and liberties no less than those accorded to adults, central among which are the rights to substantive and procedural safeguards in any adjudication process and, in the course of the disposition process, to be subjected only to the least restrictive treatment consistent with their own interests and the protection of the community. The conflict between these two views was recognized by one commentator who, in concluding his analysis of Bill C-192, noted:

The overall pattern of critical response... symbolizes the gulf which separates those who contend that, in dealing with juvenile delinquency, the state should assume and maintain coercive power over the misbehaving child, primarily by reference to his or her apparent need for care, protection or treatment, and those, on the other hand, who would limit the state's criminal jurisdiction over children to cases in which the commission of a substantive criminal offence can be demonstrated. 58

It seems, therefore, that underlying the entire debate over Bill C-192 there was a crucial and fundamental difference in philosophy that would have prevented unanimity over the Bill's provisions even if the practical and political problems we have noted had been overcome or avoided. Unfortunately, however, because of these other problems, attention tended to be focussed on relatively minor issues, and as a result, the Bill came and went without a meaningful and thorough discussion, either by the Members of Parliament or by the professional community, of the relative merits of these two views or of the possible grounds for compromise between them.

D. The Young Persons In Conflict With the Law Act

In December, 1973, following the withdrawal of Bill C-192, two committees were formed. One, dubbed the Federal-Provincial Joint Review Group, was established at the Conference of Corrections Ministers in Ottawa to study the positions adopted by the provinces on various corrections matters. The other, a committee of the Ministry of the Solicitor-General, was given the task of formulating proposals aimed at developing a replacement for the J.D.A. This latter body was composed of ten members, six of whom were jurists, three persons trained in the social sciences, and one from the field of administration. In September, 1975, this Committee issued its Report entitled Young Persons in Conflict With the Law,¹ in which it presented a series of 108 recommendations for the reform of Canada's existing juvenile delinquency law, both in the form of a lengthy discussion of issues, alternatives and recommendations and in the form of a draft piece of legislation to be known as the Young Persons in Conflict with the Law Act.²

Like the Justice Report and Bill C-192 before it, the Solicitor-General's Committee endorsed the continued validity and viability of the traditional juvenile court concept. Rather than turn to radically different models for the juvenile justice system, the Committee, like its two predecessors, chose instead to direct its efforts towards remedying the various weaknesses of the present system pointed out by the critics in recent years.³ Accordingly, one can find many similarities between this Report and the two earlier documents.⁴ In fact, nearly all of the eight "main thrusts" of the Report reflect identical or similar trends found both in the Justice Report and Bill C-192. For example, four of the eight main goals articulated in the YPICWTL Report are nearly identical, both in theory and in actual implementation⁵ to the four major policy objectives we noted earlier underlying Bill C-192: the proposal to abolish the concept of delinquency and to limit the juvenile court's offence jurisdiction solely to federal offences is virtually the same as that found

in Bill C-192; the proposal to raise the minimum age and adopt a higher, uniform maximum age continues the trend begun with the Justice Report, advanced by Bill C-192, and further developed by Bill C-192's critics; the proposed safeguards to protect the rights of young persons in the juvenile court process mirror substantially similar reforms found in Bill C-192; and finally, the emphasis on social rehabilitation first adopted in the J.D.A., continued in the Justice Report and Bill C-192, is re-affirmed once again in the new Draft Act. Similarly, three of the four remaining "main thrusts" in the Report - those provisions requiring mandatory assessments in cases where open or secure custody or probation is being considered, those promoting more active participation of the young person in the juvenile process, and those establishing a judicial and administrative review procedure - reflect themes discussed and supported in the Justice Report, although developed to a somewhat lesser extent in Bill C-192. Only the proposals for the establishment and operation of a formal screening agency designed to divert juveniles from formal judicial proceedings represent a totally new step, one not foreshadowed by either the Justice Report or Bill C-192. However, even in the case of the screening agency, recommendations for similar reform could be found in at least one paper written in response to Bill C-192.⁶ As a result, it seems fair to say that none of the major reforms in the Solicitor-General's Report constitute radically new or unprecedented innovations in the field. The majority of the proposals represent an extension of views and trends reflected both in the Justice Report and in Bill C-192, and even the most innovative of the proposals has some precedent in recent years.

Despite the similarity of many of the objectives articulated by the Solicitor-General's Committee to those advocated earlier by the Justice Committee and by the supporters of Bill C-192, some confusion has been expressed regarding the philosophical, sociological, and psychological premises under-

lying the proposed new legislation. While some professionals in the field have viewed the Draft Act as reinforcing the J.D.A.'s emphasis on treatment and rehabilitation, others have seen it as a step in the direction of the adult criminal process because of its references to "the age of criminal responsibility" and to the concept of "accountability."⁷ In its Report, the Solicitor-General's Committee recommended that the new legislation incorporate a preamble "as a declaration of the philosophy, spirit, and intent of the legislation and as a guide to its administration."⁸ Accordingly, the Draft Act included in the Report contains a preamble consisting of some seven paragraphs. We shall now examine the preamble and the commentary regarding the same contained in the YPICWTL Report, and thereby attempt to ascertain more clearly the "philosophy, spirit, and intent" underlying the proposed new Act, particularly in comparison to that of the J.D.A. At the same time, we shall attempt to briefly summarize the major reforms proposed in the Draft Act. For purposes of convenience, we shall deal with the preamble under a series of headings, each representing a major principle articulated therein.

(a) Specialized treatment for children

In its Report the Committee states that: "We believe the preamble should state that young people who are in conflict with the law should ... be dealt with separate from and in a manner different than adults."⁹ Although nowhere in the preamble does it in fact state that young people should be dealt with separate from adults (perhaps it was thought to be too obvious a principle to require stating), it is specifically declared in the first paragraph of the preamble that they should "not be held accountable ... in the same manner, or suffer the same consequences ... as adults".¹⁰ Why are young persons entitled to such special treatment? According to the preamble, the reason is that "because of their state of dependency and level of development and maturity, [young persons] have special needs." This principle - that young people,

because of their age and level of maturity, should be treated differently than adults - is by no means novel. The J.D.A. follows the same philosophy, albeit implicitly. For example, the J.D.A. states that "where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency",¹¹ and further, that "as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child."¹² It seems, therefore, that the J.D.A.'s principle of specialized treatment of child offenders has been continued unchanged in the proposed new legislation.

(b) Responsibility for one's contraventions

One clause that is somewhat novel is that found in the opening words of the preamble: "Young persons in conflict with the law should bear responsibility for their contraventions." Although this view is immediately qualified by the words "but should not be held accountable therefor in the same manner, or suffer the same consequences thereof, as adults," it is still worth noting in that it introduces into the proposed legislation a concept that had no explicit recognition in the juvenile justice scheme created by the J.D.A.- that is, the concept of a child being responsible for his actions. In the scheme of the J.D.A., wherein the child was found to be "in a condition of delinquency"¹³ and delinquency was considered to be a psychological or social illness,¹⁴ little significance was attached to the child's responsibility for his own actions. Instead, the J.D.A. concentrated on removing or counter-acting those anti-social or destructive influences that led the child to demonstrate the behaviour he had shown (by punishing the parent who encouraged or allowed the behaviour, by removing the child from the pernicious environment in the home, by allowing a probation officer to become involved with the child, etc.). The reoccurrence of the concept of responsibility, albeit in this limited and qualified form, may be the result of a number of influences.

It may reflect current disenchantment with the behaviourist psychology and positivist philosophy that had become so widely popular at the turn of the century when the original juvenile courts were formed. Alternatively, it may represent an attempt by the draftsman to appease those critics who have in recent years deplored the failure of the J.D.A. and of the present juvenile justice system to instil a sense of responsibility in those children that come in contact with them.¹⁵ Similarly, it may be a reflection of the recent renaissance, both in professional and lay circles, of the classical (i.e. punishment and deterrence) school of thought, which has come about not because of any recent evidence that punishment is, in fact, an effective deterrent, but rather because the treatment-rehabilitation ideal of the juvenile correctional system has been viewed as failing. Whatever the reasons the draftsman had for its inclusion, the ultimate effect and significance of the principle of responsibility for one's contraventions in theory and in practice under the proposed legislation still remains to be seen.

(c) Individualized treatment

We have established that offenders under the Draft Act are to be held responsible for their anti-social conduct, but in a different way and with different consequences than adults. But how, in fact, are they to be dealt with by the juvenile court? According to the preamble, they are to be given "aid, encouragement and guidance, and, where appropriate, supervision, discipline and control." These words are nearly identical to those in the J.D.A. which provide that the young offender should be treated as one requiring "help and guidance and proper supervision"¹⁶ and needing "aid, encouragement, help and assistance."¹⁷ In fact, the range of dispositions available to the juvenile court under the Draft Act is, with certain notable exceptions, very similar to that available under the J.D.A. The dispositions proposed, with the comparable disposition, if any, under the J.D.A. appearing in brackets, are as

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follows: adjournment for up to eight days (adjournment for any definite
or indefinite period); absolute discharge (suspension of final disposition);
fine of up to \$200 (fine of up to \$25); community service order (no
comparable disposition); compensation or restitution (no comparable dis-
position); probation (same); committal to open or secure custody (place-
ment in foster home, committal to children's aid society or Superintendent,
or committal to industrial school); and imposition of ancillary conditions
(same). Other proposed provisions contain limitations or restrictions on
the Court's disposition power. Briefly, these include the requirement of an
assessment report whenever the imposition of a restrictive disposition such
as probation or open or secure custody is being considered; a maximum term
of three years for any disposition; and the creation of a comprehensive
procedure for judicial and administrative review of all dispositions.

(d) Prosecution as a last resort

According to the preamble, prosecution of young persons should only be
utilized "when their acts or omissions cannot be adequately dealt with other-
wise", or, as stated elsewhere in the Report, "when other alternatives,
whether social or legal are inappropriate." These statements suggest a
significant redefinition of the role of the juvenile court from that estab-
lished by the J.D.A. They echo the view first suggested in the 1965 Depart-
ment of Justice Report that the court should only be used as a last resort
and only as one of a number of alternative methods of providing treatment,
as opposed to the J.D.A.'s approach wherein the court itself was the central
feature of the entire juvenile justice system and the court process was often
a prerequisite for obtaining access to needed treatment. They also represent
a recognition of certain limitations of the juvenile court process, many of
which were cited earlier in Section A of this Chapter. Many of the new
reforms proposed in the Draft Act reflect this restricted and less optimistic

(some would say more realistic) view of the role of the formal court proceedings. For example, the narrowing of the offence jurisdiction and the raising of the minimum age are rationalized on the grounds that status offences, offences against provincial and municipal legislation, and those offences committed by children under the age of fourteen years can best be handled, not in the context of quasi-criminal legislation of this nature, but rather under the provisions of provincial child welfare, youth protection and juvenile correctional legislation.⁴⁰ Similarly, the rationale for the creation of a formal screening process⁴¹ is based on the view that young persons should, if possible, be spared the "stigmatizing effects" that are characteristic of the present judicial system,⁴² and that the use of various community resources in lieu of that system would in many cases be more beneficial to the young person, his family and society.⁴³ While discussing the screening process, it is relevant to note that one of the three factors (the other two are the preamble and the facts of the case) to be considered by the screening agency in deciding whether or not to recommend to the Attorney-General that an information should be laid, is the principle that no information should be laid against a young person "unless there are clear indications that the needs and interests of the young person and of the public cannot be adequately served without the use of procedures and facilities that are available to the court."⁴⁴ Finally, the exclusion of offences or trials for adults in the juvenile courts⁴⁵ constitutes further recognition of the limited role envisioned for the juvenile court under the proposed new system.

(e) Rights and freedoms of young persons

Unlike the draftsmen of the J.D.A., who believed that informal proceedings were in the best interests of young persons and that there was no need for the procedural and substantive safeguards characteristic of the adult criminal justice system, the Solicitor-General's Committee has agreed with

the modern "due process" view that the State shouldn't intervene in a young person's life as a result of an offence until it is proved, beyond a reasonable doubt and within proper legal safeguards, that the young person has, in fact, committed the offence. According to the preamble, young persons are to have all of the rights and freedoms available to adults, including the right to special safeguards and assistance in the preservation of those rights and freedoms; a right to be heard and to participate in the proceedings that affect them; a right to be informed as to what their rights and freedoms are; and finally, and perhaps most importantly, "a right to the least invasion of privacy and interference with freedom that is compatible with their own interests and those of their families and of society."

How has this so-called "due process" approach been incorporated into the proposed legislation? The Draft Act contains provisions declaring a young person's right to representation by counsel or by a responsible person (although it does not go so far as to require that legal services be made available to young persons unable to make their own arrangements for such assistance); restrictions on the admissibility of statements made by young persons; restrictions on the court's power to accept admissions of guilt; limitations on the use of detention; restrictions on the taking and use of fingerprints and photos; provisions outlining the assignment and duties of youth workers; provisions relating to the creation, maintenance, and access of youth court records; limitations on the length of adjournments permitted; requirements of notice to parents upon arrest or detention and prior to appearance in court; the requirement that written reasons be given by the judge in cases where a disposition of probation or of committal to open or secure custody is ordered; and finally, expanded rights of appeal.

One particular right quoted above from the preamble deserves special comment. The recognition of the right of young persons to "the least invasion of privacy and interference with freedom that is compatible with their own

interests and those of their families and of society" is clearly a significant departure from the paternalistic "parens patriae" approach of the J.D.A. This statement implicitly recognizes that the process of the juvenile court invariably does constitute an "invasion of privacy and interference with freedom." Similarly, it suggests what has long been recognized by many of those involved in the child welfare field: that notwithstanding the noble and lofty goals of the juvenile court, in practice the intervention of the court is not always compatible with the interests of the young persons it attempts to serve. Finally, it acknowledges the reality that there are three separate and, in many cases, conflicting interests which the court must ultimately attempt to serve--namely, the interests of the young person, of his family and of society.

(f) Limitations on removal from the home

The last principle set out in the preamble represents the logical extension of the "least invasion of privacy and interference" principle. It provides that young persons should only be removed from the care of their parents when all other measures are inappropriate. Furthermore, in those cases where it is necessary for their removal from their home, the State is given the responsibility to see that they are dealt with "as if they were under the care and protection of wise and conscientious parents." The best examples of this principle are the restrictions the Draft Act imposes upon the use of open and secure custody. According to section 16(9), open custody may only be ordered if the judge is satisfied that it is necessary in light of the factors listed in section 9(4). Similarly, section 16(10) provides that secure custody may only be ordered if the judge is satisfied that it is necessary in light of section 9(4), or is necessary to prevent the young person from doing harm to himself or another, or because he would be likely to escape if placed in a place of care and open custody.

Turning from the specific provisions of the preamble to a broader consideration of the legislation as a whole, there are two other philosophical considerations that should be noted. As suggested earlier,⁵⁸ central to the development of the original juvenile justice system and the reform attempts of recent years has been the continuing tension between two contrasting views - that of a paternalistic, parens patriae approach on the one hand and that of a quasi-criminal, due process approach on the other. Generally these two views have been characterized by the concepts of the "state of delinquency" (as typified by the J.D.A.) and the "Criminal Code for Children" (as reflected in Bill C-192), respectively. We also noted at the outset of this discussion the conflicting views that have been expressed as to which of those two approaches have been adopted in the Draft Act.⁵⁹ Having reviewed the principles enunciated in the preamble as well as the "main thrusts" of the legislation, it is our submission that the focus found in the Draft Act reflects features of both of these two philosophies. Although many provisions in the proposed legislation (for example, the title of the Draft Act, the abolition of the offence of delinquency, the references in the preamble to "accountability", the procedural safeguards added to the adjudication process, the limitations imposed on the court's powers of disposition, the expanded rights of appeal, and the provision for judicial and administrative reviews of disposition) tend to suggest a swing towards a quasi-criminal, due process philosophy, other provisions (for example, the statement of the treatment philosophy in the preamble, the procedure and criteria involved in decisions regarding screening, transfer to adult court, disposition, and review of dispositions, etc.) continue to place considerable emphasis on the "state" and "special needs" of the young person. As a result, the only conclusion that one can draw is that the philosophy underlying the Draft Act is still a somewhat schizophrenic one, involving elements of both of these two

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approaches.

A second consideration that should be noted is the Committee's recognition of the fact that the conflict arising out of a young person's conflict with the law often involves the interests of parties other than just the young person and the State. In the past, the entire juvenile justice system, like the adult justice system, has been geared towards the punishment or treatment of the offender and little attention was paid to the needs of the victim or of the community in terms of reparative measures. The YPICWTL Report, through its introduction of such dispositions as community service orders⁶¹ and compensation or restitution orders,⁶² has taken a first step towards recognizing the needs and interests of the community in the treatment of young persons in conflict with the law.

PART II - Two Aspects of Reform: Jurisdiction
and Procedure in the Juvenile Court

CHAPTER 3 THE SCOPE OF THE LEGISLATION

A. Geographical Scope

As mentioned, earlier, the J.D.A. does not, by its terms, automatically apply throughout Canada. Instead, it contains a scheme whereby it can be put in force by proclamation of the Governor in Council, provided that either of two conditions precedent are satisfied. It can be put in force in any province or part thereof¹ provided that that province has previously enacted legislation establishing a system of juvenile courts and detention homes. Alternatively, in the absence of such provincial legislation, it can be proclaimed in any city, town or other portion of a province if the Governor in Council is satisfied that sufficient facilities are available in that area.² The reasons why this piecemeal system was incorporated into the original J.D.A. of 1908 are threefold. First of all, because the establishment of juvenile courts was clearly a matter of provincial jurisdiction,³ it was considered necessary that appropriate provincial legislation be enacted before the J.D.A. was put into force in any province.⁴ Secondly, the disposition of probation, the "keystone in the arch of the modern juvenile court"⁵ was practically unknown in most areas of Canada in 1908, and it was therefore thought that if the J.D.A. were immediately made operative throughout the country it might have been ignored or condemned as a failure without having been given a fair trial.⁶ Finally, because of the shortage of facilities and personnel at the time, it was believed that a gradual introduction of the J.D.A. would be more practical than its immediate universal application.⁷ At the present time the J.D.A. is in force in all major metropolitan areas of Canada.⁸ It is not, however, in force in

Newfoundland, as a result of the terms of union between that province
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and Canada.

In its Report, the Department of Justice Committee on Juvenile Delinquency rejected the piecemeal approach of the J.D.A. and recommended that any new Act operate equally throughout Canada and
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be available for the benefit of all Canadian children. The Committee took the view that the shortage of facilities and personnel should not restrict the Act's operation, on the ground that such legislation shouldn't be available only for those living in the more affluent areas of the country; that the problem of the provision of court services in remote areas could be solved by the adoption of a circuit court system; and that if the provinces were unable to finance the establishment of detention facilities and other ancillary services in remote areas, then the federal government should consider
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providing subsidies for this purpose. There have been cases in which courts have experienced difficulty in determining whether or
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not the J.D.A. has been brought into force in a particular area; such a problem obviously could not arise if the Act were made applicable throughout Canada.

The proposed Young Offenders Act (Bill C-192) did not specifically deal with the issue of its geographical scope. The two sections of the Bill that do have relevance to this question are section 2(1), which defines the term "juvenile court", and section 5(1), which establishes the juvenile court's exclusive jurisdiction. Section 2(1) defines "juvenile court" as:

a court established or designated by or under an Act of the legislature of the appropriate province or designated by the Governor in Council or by the Lieutenant Governor in Council of the appropriate province for the purposes of this Act.

Section 5(1) provides, in part that:

Notwithstanding any other Act, every young person who is alleged to have committed an offence...shall be dealt with as hereinafter provided and...a juvenile court has exclusive jurisdiction in respect of every such offence.

Based on these two provisions, it seems reasonable to infer that the Bill was intended to apply throughout Canada, or at least wherever a juvenile court has already been, or shall be, established.

The Draft Act proposed in the Report of the Solicitor-General's Committee follows the very same approach taken in Bill C-192. In fact, the definition of the juvenile court (renamed the "youth court"¹³) and the delineation of its exclusive jurisdiction are described in sections 2 and 4(1) respectively in virtually identical language (aside from the differences in the court's age limits) to that found in Bill C-192 and quoted above.

There would appear to be little reason for disagreement with the view that federal legislation of this nature should apply equally throughout Canada. Regardless of whether one characterizes such legislation as criminal law or as more related to child welfare concerns, it is clearly undesirable that a child should be denied the resources and specialized treatment of the juvenile court because the Act has yet to be proclaimed in the particular area in which the offence was allegedly committed. Furthermore, it goes without saying that many of the reasons behind the adoption of the piecemeal system are no longer as persuasive as they were seventy years ago when the J.D.A. was first framed. However, while it may be commonly agreed that new legislation should attempt to establish uniformity in the treatment of juvenile offenders, it is not quite so clear that the Draft Act has achieved this desired goal, for although the Draft Act provides that the youth

court has exclusive jurisdiction over all "offences" (as defined in the Act) committed by "young persons" (as defined in the Act), it does not require that youth courts be established in areas where they do not presently exist. If, for example, a province refuses to establish a youth court in a given area for financial or other reasons, the federal government could, through the Governor in Council designate an existing court to be a "youth court" for the purposes of the Act.¹⁴ However, that is as far as the federal government's powers extend. The other powers necessary to put the Act into effect - those of appointing youth court judges, designating places of detention and of open and secure custody, appointing or designating a person as a provincial director or as a youth worker - all rest with either (or, in some cases, both) the legislature or the Lieutenant Governor in Council of the province in question. Clearly, this is not an example of poor legislative drafting, but rather a reflection of the province's exclusive legislative power under the B.N.A. Act¹⁵ in relation to the administration of justice within the province. But what is the effect of the Draft Act on those areas in which the provincial authorities do not choose to establish youth courts? It would seem that, in such cases, not only could young offenders not be prosecuted in a youth court (since such a court would not exist) but they also could not be dealt with in adult court (because of the exclusive jurisdiction given to the youth court by section 4), and, as a result, the only route for treatment of any sort would be under provincial child protection legislation. Clearly, such treatment would be very inappropriate in many cases, particularly those of older offenders and of more serious offences. Thus, although a province seems to retain a discretion under the Draft Act to refuse to

establish a youth court, and thereby to frustrate the goal of uniformity in the application of the Act, by doing so it runs the risk of seriously limiting its own powers to deal with young offenders.

One additional matter deserves brief comment. As mentioned earlier, as a result of the terms of the union between Canada and Newfoundland, the J.D.A. has never been brought into force in that province.¹⁶ However, as we noted above, the effect of section 4(1) of the Draft Act would be to vest exclusive jurisdiction over offences and offenders within the scope of the Act in the "youth court" for the particular area in which the offence allegedly occurred. It would seem that the effect of section 4(1) would be to preclude the operation of Newfoundland's existing juvenile court system¹⁷ and to force that province either to establish a "youth court" and thereby come under the scope of the Draft Act or to deal with all such offences and offenders under its child welfare legislation. Quaere whether it was intended that Newfoundland be affected by the provisions of the Draft Act and if so, whether that province has agreed to be subject to the federal legislation?¹⁸

B. Nomenclature

As the title of this paper suggests, the selection of an appropriate term to designate those young persons who contravene criminal or quasi-criminal legislation has not been without controversy. Similarly, considerable debate has arisen concerning the suitability of various alternative titles proposed for any new legislation. In its Report, The Department of Justice Committee considered some of the major objections that have been voiced regarding the use of the term "juvenile delinquent" in the context of legislation entitled the Juvenile Delinquents Act.

One of the most frequently heard criticisms of the terminology found in the J.D.A. is that the use of the term "juvenile delinquent" tends to "stigmatize" or "label" the child, a process which often leads to harmful results to the child. It is argued, for example, that because of the strong emotional connotation that the term has acquired, many police officers will be reluctant to brand a child as a "juvenile delinquent" in order to enforce the law and therefore will never lay charges against children for minor offences; secondly, that by "labelling" a child as a "juvenile delinquent", society is generating pressures that push the offender further in the direction of anti-social behaviour (ie. the "self-fulfilling prophesy"); and that, in certain cases, the "label" is worn by the child "not as a derogatory label, but as a badge of merit".¹ Although the "stigma" argument has been made by many critics of the system in recent years, there still is, however, little in the way of social science research (particularly in Canada) to prove conclusively that such a thing as "stigma" exists, or if it does exist, that it arises in the context of our juvenile justice system and that it thereby has a detrimental

effect on young persons who are dealt with by the system. Furthermore, it can be argued that changes in terminology will not have a significant beneficial effect because whatever stigma there is attaches not to the term "juvenile delinquent", but rather to the juvenile court proceeding itself, being as it is a formal response to anti-social conduct, and because any new designation "can become as infamous as "delinquent", a term that was itself, after all, designed to protect against the stigma of 'criminal.'"

In addition to the stigma aspects of the term "juvenile delinquent", objections have been made to the various connotations that have, over the years, attached to the term. It has been said that the true meaning of the term has been obscured by the tendency of doctors and behavioural scientists to use the term in a descriptive sense (wherein the delinquent act is viewed merely as a symptom of specific underlying behavioural problems) rather than according to the meaning given it by lawyers (concerned more with the specific conduct that gives rise to a finding of delinquency). Similarly, some have thought that the term tends to imply a course of conduct or a delinquent pattern of behaviour, while in fact the child may have committed only one such undesirable act and has no habit or pattern of anti-social behaviour; in such a case there is the danger that the child may be "pre-judged by title". After considering these and other arguments pro and con, the Department of Justice Committee recommended: (1) that the term "juvenile delinquent" be abandoned as a form of legal designation in favour of the terms "child offender" and "young offender"; and (2) that the title of the J.D.A. be changed to the "Children and Young Persons Act".

Bill C-192 attempted to follow the general approach, although

not the precise terminology, recommended by the Department of Justice Committee. The Bill changed the designation of the offending child from "juvenile delinquent" to "young offender" and changed the title of the legislation to the "Young Offenders Act". However, critics of the Bill argued (justifiably, it is submitted) that the nomenclature chosen was no better than and was open to the same objections as that in the J.D.A.. It was suggested by some that the "Youth Offences Act" or "Social Work Act" would be preferable. 7

As might be expected, the Solicitor-General's Committee was not satisfied with any of the names proposed above. It agreed with the view expressed earlier that the term "juvenile delinquent" has, as a result of misuse and misinterpretation, become a label with serious negative effects and that therefore the terms "juvenile delinquent" and "Juvenile Delinquents Act" should not be used in the new legislation. However, it felt that all of the titles that had been considered previously were undesirable either because they tended (as did the J.D.A.) to create a specific class of offender and to stigmatize that offender by means of a label or because they failed to provide a clear definition of the persons and the kinds of offences to which it applies. 8 Instead, it recommended that the new legislation be entitled the "Young Persons in Conflict with the Law Act" and that the persons to whom the legislation applies be designated accordingly. 9

In the absence of convincing social science research on the point, it is very difficult to evaluate or to comment constructively on the pros and cons of the nomenclature debate. Undoubtedly there will be those who will maintain that the proposed changes in terminology will remove all traces of stigma from the juvenile justice

system. On the other hand, there will be others who will argue that, just as "a rose by any other name would smell as sweet", a child who has broken the law, whether he be called a "juvenile delinquent", a "young offender", or a "young person in conflict with the law", will inevitably experience some degree of stigma by virtue of his contact with the juvenile justice system. Perhaps the most satisfactory blend of optimism and realism lies in a middle ground between the two extremes. It is submitted that if, in fact, there is no special significance to the term "juvenile delinquent", then there should be no strong reason in favour of retaining such a designation, particularly since it was originally the product of American legislation over three-quarters of a century ago. Secondly, although it is possible that, in time, the proposed new terminology will also take on certain elements of stigma, at least at the outset it has the advantage of being more objective and less emotionally charged than many of the terms formerly proposed. Finally, the view that we are suggesting is not dissimilar to that expressed in the following passage from the Department of Justice Report:

Undoubtedly an element of stigma will continue to accompany an appearance in juvenile court, regardless of any change in descriptive language that is made. It is perhaps not unreasonable to hope, however, that terminology less open to confusion, or burdened by acquired meanings, will not attract quite the same degree of stigma as has come to be associated with the words 'juvenile delinquent'. 10

C. Minimum Age Jurisdiction

At common law and today under the Criminal Code a child under the age of seven years is not criminally responsible for his conduct,¹ nor can a child be convicted for an offence committed between the ages of seven and fourteen, unless it is proven that he or she had the capacity to know the nature and consequences of the conduct and to appreciate that it was wrong.² These minimum age limitations apply not only to proceedings under the Criminal Code, but also to charges under other federal legislation including the J.D.A.³ In practice, however, very few offenders under the age of twelve are charged under the J.D.A.; instead, most are dealt with under provincial child welfare or youth protection legislation.⁴

In recent years it has often been suggested that Parliament should leave the matter of delinquency in the very young to be dealt with by the provinces under their child welfare legislation. In its Report, the Justice Committee discussed the various arguments that have been put forward in favour of raising the minimum age limit:

(1) The juvenile court procedure is not appropriate for the very young offender because:

- (a) the child is unable to participate actively in the adversarial process envisioned by the J.D.A., and
- (b) the court proceedings themselves tend to confuse the child and have no positive value in terms of his behavioural problem.⁵

Although the Committee acknowledged that the problem of a young child's participation in a delinquency hearing is a very real one, it doubted whether dealing with the matter under provincial protection legislation would substantially improve the situation. Similarly, it noted that there has been no research to show whether or not juvenile court proceedings have a positive value in terms of a child's behaviour problems nor is there any reason to believe that proceedings under provincial welfare legislation would be any more beneficial, or less confusing, to the child.⁶

The Committee was also unsympathetic to the suggestion that court proceedings could be avoided altogether by the referral of very young offenders and their families to child welfare agencies. Its view was that in those cases where the public interest might require an interference with parental rights or the liberty of the child, the agency should always be required to justify its acts in a formal court hearing.

(2) The quasi-criminal nature of the juvenile court proceedings result in detrimental consequences to juveniles, including:

- (a) the denial of services to children in need (because of the desire to avoid the stigma of a court appearance and the inability of the prosecution to meet the high standard of proof),
- (b) the harmful "labelling" effect of a finding of delinquency,
and
- (c) a tendency towards punitiveness in the making of dispositions.

Dealing with each of these points in turn, the Committee took the view that the denial of services is more a result of the lack of facilities and personnel in the juvenile court, a lack which exists equally in protection proceedings under provincial legislation; that stigma attaches not only because of the form of the proceeding, but also because of the possible consequences that flow from it, and that the improper use of a finding of delinquency can be avoided or lessened without the case being taken out of the juvenile court's jurisdiction; and finally, that the tendency to use the available dispositions as "punishment" could and should be prevented by the appointment of properly qualified judges together with the direction in section 3(2) of the J.D.A. as to how delinquents are to be dealt with.

(3) The quasi-criminal nature of the proceeding often leads the parties before the court and the public generally to view the treatment ordered as "punishment" for the original offence, and as an unduly harsh one where the offence is not very serious, thereby resulting in confusion and feelings of injustice.

The Justice Committee acknowledged not only that this difficulty exists, but also that it is inherent in any legislation that combines the

requirement of proof of a specified event or condition with a general
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direction to have regard to the child's welfare. It doubted that a
change in the nature of the procedure would have a significant positive
effect; even if proceedings were brought under provincial protection legisla-
tion, the child and his parents would still consider the act leading to
the court's intervention as an "offence" and the treatment ordered as
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"punishment" for that offence.

(4) The court would be better able to deal with a child's parents in a civil proceeding than under the present system wherein its jurisdiction over parents is dependent upon proof of fault on their part. 13

The Committee agreed that it is desirable to involve a child's
parents as fully as possible in proceedings affecting the child but
felt that this can adequately be done in the context of quasi-criminal
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proceedings, although some element of compulsion may be required.

(5) The distinction between a "neglected" and a "delinquent" child is often an artificial one and raising the minimum age would partially eliminate this source of unfairness. 15

Although it conceded that it is often a matter of chance whether a
child is dealt with under the J.D.A. or under provincial child welfare
legislation, the Committee defended the legal distinction between
"delinquency" and "neglect". It argued that maintaining the distinction
allows one to choose the appropriate proceeding to achieve a desired
result. In addition, in some cases the distinction is quite valid; for
example, where a child engages in anti-social activities which are not the
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result of any parental neglect.

The main argument against raising the minimum age involves the
problem of providing appropriate welfare services for those juveniles who
would no longer be dealt with under federal legislation. It has been said
that provincial welfare departments and children's aid societies do not
have sufficient facilities to deal with some problem children under

the age of ten, nor do they have sufficient personnel or other resources to cope with increased numbers of problem children. Accordingly, provincial welfare authorities have argued that a higher minimum age should not be established unless provision is made for a substantial increase in financial

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grants for welfare services. Although it admitted that raising the minimum age would have some effect upon existing child welfare arrangements in each province, the Committee felt that this argument did not carry great weight. Since, at the present time nearly all services rendered under the J.D.A. are financed by the provinces and the municipalities, what difference would it make, the Committee asked, if these same services are provided under provincial child welfare legislation rather than under the J.D.A.?

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The Committee ultimately concluded that the minimum age for juvenile court jurisdiction should be raised, primarily because it could not see how a very young child could be held responsible at all "on any reasonable conception of the purpose and function of the criminal law". Having made this decision, however, the Committee then experienced difficulty in reaching agreement on what the actual minimum age should be. In its view, the age chosen should satisfy two major criteria: at that age a child's comprehension of events should be such that the adversary system can function effectively and more serious offences should occur with sufficient frequency to require that criminal-type procedure be available. Based on these considerations it recommended:

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- (1) that the minimum age of criminal responsibility under Canadian law and the minimum age of juvenile court jurisdiction under the Act - should be raised to ten or, at most, twelve;
- (2) that although it is preferable that a uniform age be adopted throughout Canada, the possibility of a variable or flexible age should not be excluded; and

- (3) that the minimum age to be selected should be the subject of federal-
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provincial discussions before a final decision is made.

The Committee also considered a number of practical and theoretical problems that have arisen regarding the rule - known as the doli incapax rule - that requires the prosecution, in the case of a child between the ages of seven and fourteen, to rebut a presumption that the child is incapable of committing a crime by showing that the child had sufficient moral discretion and understanding to appreciate the wrongfulness of his
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act. Based on these considerations it concluded:

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(4) that the doli incapax rule should now be abolished.

Bill C-192 proposed the amendment of section 12 of the Criminal Code so as to raise the minimum age of criminal responsibility across Canada to ten years and the amendment of section 13 so as to make the doli incapax
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rule apply only to those between the ages of ten and fourteen. In introducing the Bill, Solicitor-General Goyer gave no indication of the policy reasons behind the raising of the minimum age or why the age of ten was chosen. It is reasonable to suspect that in doing so, the Government
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was merely adopting the Justice Committee's recommendations; however, if that is the case, it is hard to understand the reasons for the retention, contrary to the Committee's recommendations, of the doli incapax rule.

The Draft Act proposed by the Solicitor-General's Committee defines
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the minimum age of juvenile court jurisdiction as fourteen years, amends section 12 of the Criminal Code by substituting the age of fourteen
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years for that of seven as the minimum age of criminal responsibility,
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and abolishes the doli incapax rule. In the commentary accompanying the Draft Act, the Committee conceded that the selection of an appropriate age is a very difficult problem, one that cannot be solved by a purely
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objective analysis of an empirical nature. It recognized the simple

fact that children develop at different rates and that there is no single point in a child's life when he automatically becomes capable of adhering to society's behavioural standards. ³⁰

Notwithstanding these limitations, however, the Committee agreed that it was still necessary, as a practical matter, to specify a minimum age in the legislation in order to allow for uniform and consistent application of the law. ³¹

What, according to the Committee, is the proper criteria for choosing such an age? In its view, the proper age is that at which "it can be assumed that most children have matured sufficiently to be responsible for their conduct and to be held accountable for that conduct which contravenes provisions of the Code and other federal laws". ³²

After considering various other alternatives, the Committee concluded that children under the age of fourteen should not be subject to the criminal law, but instead would be better cared for under the provisions of provincial child welfare, youth protection or juvenile correctional legislation. ³³

It seems that the general consensus in recent years has been that very young children, for many of the reasons discussed above, should not be treated under criminal legislation such as the J.D.A. ³⁴ If one examines recommendations made recently in other jurisdictions, one can see a general trend in favour of raising the minimum age of criminal responsibility. ³⁵

The major issue has, and continues to be, what is the proper minimum age? ³⁶ Many different criteria have been used to justify various choices of age.

³⁷ These include the age of puberty, ³⁸ the age at which a child begins high school, ³⁹ the age at which compulsory schooling ends, ⁴⁰ or the age at which a youth is regarded as able to marry and earn money;

still others stress intellectual discretion, knowledge of right from wrong, and other motivational factors. ⁴¹ It is submitted, however, that generalizations of this nature are of little utility, since "maturity is not a concept for

which a universally valid or precise definition can be formulated. It⁴² is a derivative of age, but is not synonymous with it." Indeed, as the Justice Committee Report acknowledged, there is no age that can be said⁴³ to be the "right" age of criminal responsibility. Rather, as the Kilbrandon Committee noted, the "age of criminal responsibility" is itself an entirely artificial concept, in that it "is not...a reflection of any⁴⁴ observable fact, but simply an expression of public policy".

Table No. 1 - Minimum Age Provisions

Provision	J.D.A.	Justice Committee Report	Bill C-192	Draft Act
Minimum age for criminal responsibility	7	10 (or possibly 12)	10	14
Applicability of <u>doli incapax</u> rule	7 to 14	Abolished	10 to 14 10 to 14	Abolished

If, as we have suggested, the choice of a minimum age is basically a public policy issue, what policy considerations or other influences account for the variations in the minimum age recommendations contained in the Justice Committee Report, Bill C-192 and the recent Draft Act (see Table No. 1)? Regarding Bill C-192 we can only speculate since, as mentioned earlier, in introducing the Bill the Government gave no indication of the objectives sought to be attained in raising the lower limits. The Justice Committee clearly saw the issue as one of weighing the effectiveness of the criminal law against other methods of social control, as a means of dealing with the problem of anti-social behaviour presented by different age groups. Indeed, as we have seen earlier, it was even able to specify certain minimum requirements that any age chosen would⁴⁵ have to satisfy. But how in fact did the application of these criteria

result in the ultimate recommendations that were made? To the extent that the Committee preferred that the decision be left to federal-provincial negotiations, it tended to avoid dealing with the issue. But even in its suggestion that the minimum age be raised to ten (or, at most, to twelve), the Committee failed to explain why, in its opinion, the age of ten was found to be the most suitable answer to the question, as framed. Clearly, no reasons were given as to why a ten-year-old's (but not a nine- or eight-year-old's) comprehension of events is such that the adversary system could function effectively.⁴⁶ Nor were any statistics cited, (although it is reasonable to assume that all existing statistics were made available to the Committee) to support its implicit conclusion that ten was the age at which more serious offences occurred with sufficient frequency to require that criminal-type procedure be available.⁴⁷ In fact, it has been argued that based on the actual numbers that would be excluded by this proposal, the raising of the age to ten would have a negligible practical effect.⁴⁸ In light of the above, one is led to conclude either that the Committee took into account other considerations which it failed to articulate or that, having stated what it considered to be the relevant considerations, merely made a rough guess, based more on hunch than logic, as to what age would best satisfy those same considerations.

The report of the Solicitor-General's Committee is equally inadequate in that it fails to articulate the reasons why it chose the minimum age that it did. Although it does propose one criteria - namely, the age at which most children have matured sufficiently to be responsible and accountable for their actions, there is no suggestion as to why the age of fourteen was chosen to be the most suitable. Presumably, it merely reflects the subjective views - perhaps an average of the suggested ages - of the members of the Committee. Perhaps it merely reflects the Committee's

sensitivity to numerous criticisms that the age proposed in Bill C-192
49

was too low or its desire to follow provisions adopted on recent years
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in other "progressive" jurisdictions. In light of the Report's emphasis on responsibility and accountability, it may be fair to say that the Committee chose the high age it did in order to ensure that any error in drawing the line would more likely be on the side of excluding sufficiently mature children, rather than including immature children, within the scope of federal criminal legislation.

In making the above criticisms, we are not suggesting that the failure of the two Committees to explain in sufficient detail the reasons behind their decisions implies a lack of expertise or candour in either case. Given the brevity of the Solicitor-General's Committee's Report, one could not expect a more detailed discussion in that case. Rather, it is suggested that the criticism reflected above may be of broader application and might, in fact, be directed against many of the decisions made in the course of delinquency law reform: that because of the lack of social science research in those areas where research could be of value, and in other areas where the choices that have to be made depend on highly subjective considerations, not only are the decisions hard to make (since the making of hard decisions is inherent in any process of law reform), but also, once they are made, they are hard to explain and support in a logical and convincing manner and, as well, equally difficult to criticize in a meaningful and constructive way.

D. Maximum Age Jurisdiction

The J.D.A. applies to any young person apparently or actually under the age of sixteen years, or such other age under eighteen as may be designated in any province by the Governor in Council.^{1.} As a result of the flexible age provision, there is no uniform age across Canada. At present, the maximum age in Saskatchewan, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, the Yukon, and the Northwest Territories remains unchanged at sixteen years; Manitoba and Quebec have opted for the maximum of eighteen years; British Columbia (as noted earlier) has recently lowered its limit from eighteen to seventeen;^{2.} and Alberta has set its limit at sixteen for boys and eighteen for girls. In Newfoundland, where the J.D.A. doesn't apply,^{3.} the maximum age under provincial legislation is seventeen. A similar diversity can be found in the juvenile legislation of other countries.^{4.}

The Justice Committee dealt in depth with the various issues that arose out of proposals to it to raise the maximum age of juvenile court jurisdiction. The three main arguments that were made against raising the maximum age were: that offenders over the age of sixteen are unsuitable for the juvenile court process, because of the seriousness of their offences and their behavior problems, the limitations of the juvenile court approach, and the problems that they present in terms of treatment resources and programming;^{5.} that the minimal resources available should be used with the younger juvenile offenders (ie - those under sixteen) where it is thought that there is the greatest chance of success; and that many of the types of conduct caught by the broad definition of delinquency in the J.D.A. (ie - the "status offences")^{6.} were particularly inapplicable to older juveniles. On the other hand, those in favour of raising the maximum age argued that since adolescents aren't given the benefits of adulthood it would be unjust

to hold them responsible for their actions in the same way as adults; that teenagers have become an identifiable group in society and therefore should be dealt with together in a single specialized court; and that the benefits of the juvenile court approach (especially separation from adult jails and adult criminals) should be extended to as wide a group of offenders as possible. 7. After considering these arguments the Committee recommended:

- (1) that the juvenile age should be uniform throughout Canada; 8.
- (2) that the maximum juvenile age should be seventeen (that is, the juvenile court's exclusive original jurisdiction would extend to all offenders sixteen years of age and under); 9. and
- (3) that there should be an intensive and detailed study of the problem posed by the older juvenile offender (ie - sixteen to twenty-four years of age) as part of the development of the criminal law policy of Canada. 10.

The Committee gave three main reasons for its decision to raise the maximum age to seventeen. To begin with, it accepted the reasons set out above in favour of raising the age, particularly that dealing with the desirability of keeping as many sixteen-year-olds as possible out of adult penal institutions. 11. Secondly, it emphasized the practical consideration that an increase to seventeen would involve less administrative changes or adjustment from province to province than would an age of sixteen or eighteen. 12. Finally, although it acknowledged that the age of seventeen is in some respects a compromise, the Report went on to state quite categorically that:

...we are firmly of the view that the juvenile age should not be set as high as eighteen. It seemed to us that there was something artificial about some of the juvenile court proceedings that we observed where older offenders were involved. Having regard to what we think are the inherent limitations of the juvenile court approach, and also to the problems presented from the point of view of treatment resources and programming, it is our conclusion that seventeens should mark the upper limit for the operation of the juvenile court process. 13.

Bill C-192 followed the Justice Committee recommendations in part.

14.

Although it adopted the suggested age of seventeen, it still preserved the

15.

provinces' powers to increase that age to eighteen years. As in the case of minimum age jurisdiction, the government did not state its reasons for choosing the age it did and, as a result, one must assume that for reasons of convenience it merely adopted the recommendation of the Justice Committee Report. Its decision to retain the provincial option to raise that age limit by one year is more difficult to justify, not only because it constituted a rejection of the Justice Committee's recommendation as to uniformity, but also in light of certain comments made by the Solicitor-General while introducing the Bill in the House of Commons. After announcing that one of the Bill's major objectives was to redefine the age jurisdiction of the juvenile court in order to obtain uniformity across Canada, he stated that:

...since the definition of a juvenile is not uniform in all the provinces of Canada, a delinquent who is considered a juvenile according to law in one province may be tried as an adult in the neighbouring province, where the J.D.A. applies only to those under sixteen years of age. It is obvious that such inconsistencies are unacceptable and contrary to the concept of justice. 16.

Given such a policy, it is hard to understand why the government bowed to what were undoubtedly vociferous provincial demands that it continue to allow them the right to raise the maximum age. By so doing, the government was clearly frustrating, rather than facilitating, the goal of uniformity, and the inconsistencies which the Solicitor-General called "unacceptable and contrary to the concept of justice" were allowed to continue, albeit within
17.
a narrower range for disparity.

Aside from the uniformity problem, a number of commentators attacked the Bill's choice of the maximum age of seventeen. Although some argued that the existing system should not be changed, since provinces that already had the age limit of eighteen would then be forced to abandon special facilities which they had established, while those that still had the limit of sixteen would be forced to deal with older offenders for which they lacked
18. adequate facilities, most agreed that the existing age should be raised but
19. that eighteen would be better than seventeen. Since eighteen had already been accepted as the age of majority in most provinces it was thought to be a more logical limit, one which could achieve consistency with other
20. legislation as well as uniformity across the country under this Act.

These criticisms were answered in the Draft Act proposed by the Solicitor-General's Committee. Not only did the Draft Act reiterate the view of the Justice Committee that in order to achieve consistency and avoid
21. discrimination a uniform maximum age should be adopted, but it also reflected the criticisms of Bill C-192 by rejecting the choice of seventeen as the
22. most suitable maximum age. As in the case of minimum age jurisdiction, the Committee acknowledged that the choice of a proper age is a very difficult question which does not allow for a completely objective assessment. Citing similar considerations to those that were taken into account in its
23. discussion of the minimum age, as well as the experience of other countries and the desire to extend the benefits of the juvenile court to as many young persons as possible, the Committee concluded that the age of eighteen
24. was the most suitable alternative. Other related proposals dealt with the juvenile court's jurisdiction over persons who have committed offences and
25. subsequently reached their eighteenth birthday, the provision of services
26. until the age of twenty-one, the retention of the court's power to transfer

27.

certain young persons to the adult court, and the applicability of limitation
28.
periods in other legislation.

We find ourselves in general agreement with the Draft Act's proposals regarding maximum age jurisdiction. Dealing with the issue of uniformity, it is submitted that although a lack of uniformity in the application of a
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federal criminal statute does not render it unconstitutional, considerations of fairness still require that, except in very unusual circumstances, the
30.
application of the criminal law should be uniform across the nation. Similarly, although the choice of a maximum age limit of eighteen is admittedly somewhat arbitrary and (as in the case of the minimum age) based on many subjective (and, therefore, vague and undefinable) considerations,
31.
it is consistent with that adopted in many other "progressive" nations, and is supported by recommendations in a number of recent studies including the
32.
CELDIC Report and the Report of the British Columbia Royal Commission on
33.
Family and Children's Law.

Assuming that Parliament adopts the proposals of the Solicitor-General's Committee, two major problems will still have to be faced. The first involves the additional burden that the raising of the maximum age will place on provincial services and resources, and, in particular, on those provincial correctional authorities responsible for institutional care for juvenile offenders. There is no doubt that the proposed change would significantly increase the number of young persons likely to come into contact with the juvenile court. In those provinces where the maximum age is currently eighteen, those in the sixteen to seventeen-year range
34.
constitute approximately 20% of all delinquencies, and there is no reason to doubt that similar figures would apply across the country once the age was lifted. In November, 1970, much publicity was given to a statement by

the Ontario Minister of Correctional Services that the raising of the maximum age to seventeen would require the building of four or five new training schools, at a capital cost of around \$20-million and an operating cost of some \$3-million a year, as well as the establishment of completely
35.
new training programs for sixteen-year-old offenders. Quere what the figure would be to-day for a maximum age of eighteen? Although the precise impact of the proposed changes on provincial budgets will vary from province to province, depending not only on what facilities (such as training schools) are already in existence, but also on what effect proposed diversionary procedures have and what alternative, community-based facilities can be developed to relieve the pressure on costly training school facilities, it is clear that these changes will undoubtedly have serious financial and resource implications for the provinces. In this context, the brief passing reference in the Report of the Solicitor-General's Committee to the resource implication
36.
of its proposals is clearly not an adequate response on the part of the federal government. The demand for federal financial assistance for the development of necessary resources has become one of the key issues in this field and one of the major obstacles to sound delinquency law reform.

The second unresolved problem, one that was discussed in the Justice Committee's Report but not in Bill C-192 or in the Report of the Solicitor-General's Committee, is that of the treatment of those offenders whose age is slightly above the upper limit of juvenile court jurisdiction. A number of reports, both in this country and elsewhere, have recognized the special needs of offenders in this category and have made various proposals regarding special legislation and correctional services (possibly including the creation of a new "young adult court") for those in between the proper
37.
38.
realms of the juvenile and adult courts. As we noted earlier, the Justice

Committee acknowledged that Canadian criminal and corrections policy must take into account the special needs of this older adolescent group, and although it rejected the concept of a separate court for these offenders, it did urge the development of diversified and adequate treatment resources for this age group. However, once again, money is the great limiting factor. In light of the fact that finances and resources are inadequate for the needs of the juvenile court - the place where we purport to be concentrating our greatest efforts and resources - it would seem that, at least for the reasonably foreseeable future, or until there is a radical shift in government spending priorities, little funds will be available for the development of special services for those young offenders in this intermediate age group.

<u>Table No.2 - Maximum Age Provisions</u>				
Provision	<u>J.D.A.</u>	Justice Committee Report	Bill C-192	Draft Act
Maximum age for juvenile court jurisdiction	16	17	17	18
Provincial power to raise maximum age?	Yes (to 18)	No	Yes (to 18)	No

A final comment. The development of the current proposals regarding maximum age jurisdiction are interesting also from the point of view of a student of the science of law reform. If one compares the existing law and the various recommendations made by the three bodies that have considered the matter in the last ten years (see Table No.2), it seems fair to say that law reform in this area appears to a large extent to be just a "hit and miss" process. One notes, for example, the striking contrast between the most recent age proposal (eighteen) and the very firm conclusion of the Justice Committee quoted earlier that the upper limit should not exceed

seventeen. It is hard to believe that such a marked change in policy reflects a significant change in social science thinking over the past ten years. Similarly, one searches in vain for a rationale behind the inconsistent policies towards the issue of provincial power to raise the age. Secondly, on reading the explanations given (either by Minister's statement or in commentary accompanying the proposals) for the recommendations made by the various law-making groups, one often notices the absence of any attempt to justify the conclusions drawn in light of previous inconsistent proposals. From this, perhaps one can conclude that law reformers in this country, or at least those in the field of delinquency law reform, tend not to place much weight or accord much respect to the reasoning and conclusions of their predecessors. Perhaps both of these reasons account, in part, for the apparent tendency of many of those involved in the field, whether in a practical or theoretical capacity, to approach new proposals with a great deal of skepticism and hostility, often even before the details of the proposals have been given a fair hearing.

E. Offence Jurisdiction

The J.D.A.'s offence jurisdiction is established in sections 2 and 3, Section 2(1) defines "juvenile delinquent" as:

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

Section 3(1) provides that the commission by a child of any of the above-mentioned acts "constitutes an offence to be known as delinquency" and section 3(2) states that such a child "shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision".

A number of the important features of the J.D.A.'s offence jurisdiction¹ were discussed in our introductory chapter. It was noted that the J.D.A. creates an omnibus offence, known as "delinquency", which covers all forms of prohibited conduct by children, that the definition of such prohibited conduct is both very broad and rather imprecise, that the same definition includes conduct that isn't prohibited in the case of an adult, and that the offence provisions are directed more towards the offender's state or condition than towards his prohibited conduct.² We have also attempted to explain the reasons why this particular approach towards offence jurisdiction was adopted in the J.D.A. of 1908. We suggested that the present offence jurisdiction was the result of the attempt to adopt the philosophy of the early American juvenile courts despite the constitutional limitations under the B.N.A. Act.³

In recent years the existing offence jurisdiction under the J.D.A. has been the subject of growing criticism. It has been argued that the terminology in section 2(1) is very subjective, thereby making the finding

of delinquency depend to a large extent on the judge's subjective and moral views; that it violates the principle that criminal or quasi-criminal⁴ legislation should not be vague or ambiguous in scope; that it allows for the oppressive substitution of minor offences where more serious conduct is suspected but can't be proved; and that it results in a wide⁵ expansion of the scope of police powers. Other critics, noting that⁶ "incurrigibility" charges often result from conduct such as truancy, running away from home, or resistance to a guardian's instructions, and that "sexual immorality" charges often result from acts which are generally regarded as normal expressions of childhood curiosity and immaturity, have suggested that such types of behaviour should not be dealt with under⁷ criminal legislation at all. Furthermore, there is evidence of discrimination in the application of the "sexual immorality" clause: statistics suggest that it tends to be applied more frequently to children in lower socio-economic classes, and much more often in the case of girls than with⁸ boys. Finally, many have objected to the entire approach of the J.D.A. whereby the single finding of "delinquency" applies to all forms of prohibited conduct by children; they argue that it is unjust that every child who is found delinquent is liable to the same range of dispositions and that institutional commitment is possible for even the most minor⁹ offences.

The Justice Committee made a series of recommendations regarding offence jurisdiction. Adopting the view that "as a matter of public policy quasi-criminal legislation should not be used to achieve welfare purposes¹⁰ if those purposes can be achieved by non-criminal legislation," it concluded that children should only be charged with specific offences as¹¹ is the case in proceedings against adults. It noted that much of the conduct covered by the J.D.A. is not anti-social in nature nor does it

lead to anti-social adult behaviour and, furthermore, that other, less
stigmatizing, non-criminal means are in many cases available to protect
12
children from possible detrimental influences. Although it acknowledged
the historical and philosophical reasons why the J.D.A. directed its
attention towards the underlying behavioural problem of the offender rather
than on the offence itself and therefore adopted the all-inclusive offence
of "delinquency", it took the view that today "a competing interest of
public policy, namely, the protection of the individual against undue
interference by the state requires some limitation upon the unrestricted
13
application of this principle " and, as a result, recommended the abolition
of the concept of "delinquency".

The Committee rejected suggestions that lesser offences be
excluded from the federal Act and be left for treatment under provincial
14
legislation. Instead, it recommended that a distinction be made under
the federal legislation between more serious and less serious offences.
They suggested that any offence against the Criminal Code or of such provisions
of other federal or provincial statutes as are from time to time designated
by the Governor in Council should give rise to a finding that a young
person is an "offender" and thereby bring into operation all of the provisions
of the Act. Any other offence, (ie. - against a federal or provincial
statute, a municipal by-law, or a regulation or ordinance), would be
considered an offence of a lesser degree, to be known as a "violation". A
person charged with a "violation" would be dealt with in generally the same
manner as those charged with "offences", with the notable exception that it
would not be permitted to commit him to a training school or, in the absence
15
of parental consent, remove him from the parental home. In addition to
the above, the Committee also recommended: that most juvenile traffic
cases should continue to be heard in the juvenile court, with the court

being given broader powers regarding transfer, disposition, and procedure
in such areas; ¹⁶ that conduct within the non-offence categories (eg.
incorrigibility, unmanageability, etc.) should not be included within
the offence provisions of the federal Act, but should be dealt with under
provincial legislation; ¹⁷ and that the law should make it clear that a
finding that a person ~~is~~ a "young offender" is not to be regarded as a
¹⁸
~~conviction~~ for a "criminal offence".

Bill C-192 showed a more radical response to the criticisms of the
J.D.A.'s offence jurisdiction. According to the Solicitor-General, one
of the aims of the legislation was "to cease stigmatizing deviant, but non-
criminal behaviour in young persons and to recognize only offences for
¹⁹
which penalties are imposed when committed by adults. The Bill's attempt
to decriminalize and destigmatize such "deviant but non-criminal" behaviour
went even further in the direction of narrowing the Act's scope than did the
²⁰
Justice Committee recommendations. Like the Justice Committee, it
excluded the non-offence categories from the scope of the Act and abandoned
the concept of a single offence of delinquency in favour of a system based
on separate specific offences. However, instead of dealing with all
violations of existing law together and on an equal basis (as in the J.D.A.)
or in two separate classes, but still under the same legislation (as in
the Justice Committee Report), the Bill proposed to restrict its applica-
tion only to federal offences, leaving to the provinces the responsibility
for dealing with those juveniles who violate provincial or municipal laws
or ordinances. Such a result was achieved by limiting the juvenile court's
exclusive jurisdiction to:

...an offence created by an Act of the Parliament of
Canada or by an ordinance, rule, order, regulation
or by-law made thereunder or a criminal contempt of
court other than in the face of the court. ²¹

The proposals of the Solicitor-General's Committee regarding offence jurisdiction are, with one minor exception, identical to those contained in Bill C-192. Adopting the recommendations of the 1969 Quimet Report in favour of increased decriminalization and destigmatization, the Committee agreed that the status offences should be abolished. It also agreed that the Act should be restricted to offences against federal statutes and regulations and that provincial and municipal offences should be left to provincial control. As a result the definition of the juvenile court's offence jurisdiction is virtually identical to that contained in Bill C-192, the only change being the specific exclusion of ordinances of the Yukon and Northwest Territories.

In comparing the present law with the proposals made in the last ten years (see Table No. 3), there seems little doubt that the current trend is away from the paternalistic, quasi-criminal approach of the J.D.A. and towards a much narrower, and more carefully defined "criminal code for children". This phrase is not being used here in the derogatory sense that it has been in the past. On the contrary, such a result may in fact be the most reasonable and practical response to the criticisms of the juvenile justice system within the context of Parliament's constitutional limitations. Recognizing that the federal government's involvement can only be through the mechanism of the criminal law and that, by its very nature, the criminal law is not applicable to many types of deviant conduct, the legislators seem to be attempting to remove all but the most serious offences from the jurisdiction of the juvenile court. In addition, the principle that juveniles shouldn't be made liable to criminal prosecution for conduct that does not constitute an offence in the case of adults has, for the first time, been recognized in federal government policy. Similarly, the umbrella offence of "delinquency" has been abolished;

Table No. 3 - Proposals Regarding Offence Jurisdiction

	<u>J.D.A.</u>	<u>Department of Justice Report</u>	<u>Bill C-192</u>	<u>Draft Act</u>
1. Offence of Delinquency ¹	Yes	No	No	No
2. Status Offences	Yes	No	No	No
3. Criminal Code	Yes	Yes ^{2,3}	Yes	Yes
4. Other Federal Statutes	Yes	Yes ^{2,3}	Yes	Yes
5. Provincial Statutes ⁴	Yes	Yes ²	No	No
6. Federal Regulation ⁵	Yes	Yes ²	Yes	Yes
7. Territorial Ordinance ⁴	Yes	Yes ²	Yes	No
8. Provincial Regulation ⁴	Yes	Yes ^{2,6}	No	No
9. Municipal By-Law	Yes	Yes	No	No
10. Criminal Contempt of Court Yes? Other Than On The Face Of The Court	Yes?	No? (what authority?)	Yes	Yes

- 1 - includes "sexual immorality", "any similar form of vice", or liability "by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute" (ie. "incorrigibility" or "unmanageability" offences)
- 2 - classed as a "violation" - all provisions of federal Act apply, except that the juvenile court cannot commit the offender to a training school or, in the absence of parental consent, remove him from the parental home
- 3 - footnote 2 not applicable if so designated by Governor-in-Council
- 4 - includes ordinance, rule, order, regulation or by-law
- 5 - ie. ordinance of the Yukon Territory or the Northwest Territories
- 6 - suggested that Act allow for transfer of certain juvenile traffic cases (including all of those involving operation of a vehicle) to ordinary Adult Courts

a child will, instead, be charged with a specific offence as he would be in adult court, although the trial procedure and the range of dispositions will be those more suited to his age and needs. Finally, as we shall see in a later chapter, new safeguards (many of them being protections traditionally provided to adults under the Criminal Code) have been incorporated into the juvenile court trial process. Thus, the label "criminal code for children" seems, in many respects, a valid and a

24

laudable one.

A major question that arises as a result of these new proposals is that of their implications for the provinces: how will their provision of services and resources be affected and how will they respond to the onus of legislative responsibility suddenly cast upon them? Dealing with the first aspect, the provision of services and reasons, the Minister responsible for Bill C-192 acknowledged that the Bill "must be complemented by the formulation of social measures for which responsibility lies with the

25

provinces". Similar statements can be found in the more recent Report. Unfortunately, although the federal government has been quick to point out the added demands the provinces will have, to face, it has been much more reluctant to provide any direct assistance towards the meeting of those demands. The issue of federal financial commitment to the financing of provincial services is a major question in this context, as it was regarding the issue of maximum age jurisdiction and we shall deal with the various problems involved therein at a later point.

The second aspect of the problem, one that does not involve federal responsibility, but should interest us as observers of current law reform, is that of how young persons who are excluded under the federal Act's new, narrower age and offence jurisdiction are to be treated or handled by the provinces. In dealing with the raising of the maximum age, the

Solicitor-General's Committee suggested that children under fourteen "would be better looked after under provincial child welfare, youth protection, or juvenile correctional legislation".²⁶ Similarly, in its discussion of the restricted offence jurisdiction the Committee noted:

Various options would be open to the provinces, such as dealing with the young person in adult court or under their youth protection legislation, child welfare legislation or other special legislation that might adopt the procedures of the proposed legislation to deal with provincial and municipal offences. ²⁷

It has been suggested that by giving the provinces carte blanche to determine how to deal with those offenders excluded from the operation of the Act, Parliament is leaving open the possibility that a province may choose to deal with its offenders in a punitive or harsh manner or according to a philosophy inconsistent with that proposed in the federal Act. In fact, some have even suggested that, in order to avoid the possibility of children being dealt with in adult court, the new Act should require that any judicial proceedings commenced against children under provincial laws should be within the exclusive jurisdiction of the provincial

²⁸
family court. ²⁹ Aside from the possible constitutional difficulties inherent

in such a proposal, ³⁰ it is submitted that such an attempt to restrict the legislative options open to the provinces would have the detrimental effect of preventing provinces from developing independent policies and innovative programmes for the treatment of juveniles excluded from the operation of the federal Act. Although, admittedly, the initial response from the provinces has tended to be more concerned with the financial aspects of implementing the new Act than with the opportunities it offers for creative legislating, it seems reasonable that the provinces should be given the opportunity, at least for a certain period of time, to attempt to develop viable alternative approaches for the treatment of those

offenders within their jurisdiction, and should not be forced to follow
the same route taken by the federal government.³¹

F. Waiver of Jurisdiction

In nearly every jurisdiction in which juvenile courts have been established, some method has been employed to sort out those offenders^{1.} thought to be inappropriate subjects for the juvenile court process. As we have noted earlier, the Canadian system is no exception. Section 9(1) of the J.D.A. provides:

Where the act complained of is...an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the Court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provision of the Criminal Code in that behalf; but such course shall in no case be followed unless the Court is of the opinion that the good of the child and the interest of the Community demand it.

Section 9(2) allows the juvenile court judge the power to rescind an order so made. Although both of these provisions appear to be relatively straightforward, there is no doubt that S.9. has been one of the most controversial sections of the entire J.D.A., as evidenced by both the number of reported^{22.} cases and the extent of scholarly comment. In this section we propose to consider a number of the issues that have arisen in regard to waiver, including the principles that are to govern the trial judge's exercise of^{3.} discretion and the effect of a waiver order, together with the recent reform proposals. A final aspect of the waiver problem, the procedural and evidentiary rules that apply to the waiver hearing itself, relates more to the topic of procedure than to that of jurisdiction, and for that reason will^{4.} be dealt with separately in the following chapter.

Although S.9.(1) gives a juvenile court judge tremendous discretionary power, it also imposes certain limitations on the type of cases in which the waiver power can be exercised. According to that sub-section, waiver can only be ordered where: (1) the child has allegedly committed what, in the case of an adult, would be an indictable offence; (2) the child is "apparently or actually"

over the age of fourteen years; and (3) the judge is of the opinion that "the good of the child and the interest of the community demand it." While there never has been any doubt as to the meaning of the first of these three conditions precedent, the effect of the words "apparently or actually" in the second condition has given rise to some uncertainty.^{5.} However, the most controversial of the three has undoubtedly been the third requirement. Because the many reported cases prior to 1970 have been exhaustively summarized and discussed elsewhere,^{6.} we do not propose to undertake here a detailed review of the caselaw prior to that date. Instead we shall merely note two significant trends that are discernible in the numerous waiver cases reported between the years 1960 and 1970. The first trend was that the various "clichés of waiver"^{7.} - that is, the catch-phrases traditionally used by the appellate courts to justify the making of a waiver order - tended to be relied upon less frequently by the courts.^{8.} Whereas the earlier reported cases regularly approved waiver on such diverse, vague, and questionable grounds as the "experimental" nature of the juvenile court, its suitability for trying only less serious offences, its lack of procedural protections, (including the absence of a jury, its "inability to evaluate technical defences", and its restrictive appeal provisions), the dangers of an in camera trial, and the public's "right to know",^{10.} a number of these grounds were specifically disapproved by many courts in the late 1960's. It was held, for example, that the proposition that the "interest of the community" demands waiver of all serious offences was no longer good law.^{11.} Even in the case of a capital offence, where in the earlier cases waiver had always been required, it was held that "special circumstances" must be shown before it can be said that the public interest automatically demands a trial in open court.^{12.} Furthermore, a growing number of courts refused to accept the argument that waiver

could be justified merely on the ground that the juvenile court is "experimental" or that it is unable to provide an accused with a fair trial.^{13.}

In R. v. Liefso, Jessup J. of the Ontario Supreme Court stated that "the presumption must be that an accused will receive a fair trial before a Juvenile Judge and I do not think there can be any presumption that he will have a better or fairer trial before a Supreme Court Judge and jury."^{14.}

^{15.} Similarly, in R. v. Sawchuk, Wilson J. held:

..Surely it is no longer necessary to refer to [the juvenile court] as an experimental court or to question the fairness to all concerned, delinquent and community alike, of its procedure. It is not for me to cast oblique doubts upon the capacity of the officers of another tribunal invested by Parliament with a duty to discharge functions which include what is now proposed. ^{16.}

A second major trend in the 1960's was the increasing emphasis on the type of treatments needed for the youth and the availability of such treatment in either the juvenile or adult court. Because the "clichés of waiver" had been primarily concerned with the type of trial available in either forum, the view was taken by some that a juvenile court judge, in exercising his discretion under S.9. was limited to considering the relative advantages and disadvantages of the two alternative modes of trial in relation to the seriousness of the offence charged and the circumstances alleged as to its commission. However, in R. v. Trodd (No.1.)^{17.} it was decisively held that while these are undoubtedly considerations to be taken into account, they are by no means the only relevant considerations.^{18.}

As Aiken J. noted in that case:

Indeed, it is difficult to see how a Juvenile Court judge could reach any sensible conclusion as to what might be good for a juvenile and in the best interest of the community without carefully exploring the character and background of the juvenile, previous delinquencies, his response to previous corrective treatment and considering

the relative value, in the best interests of the particular juvenile, of the facilities for rehabilitation and correction available to a Juvenile Court judge and the facilities available to the ordinary Courts. 19.

The leading case most often cited to support the "treatment-oriented" 20.

approach suggested by Aiken, J. is R. v. Pagee(No.1.). Here, in

considering the nature of the test laid down by S.9. Bastin J. took the position that "the good of the child" must be taken to mean "the treatment which will provide the eventual welfare by eradicating its evil tendencies and transforming its character" and that "community" must

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refer to "society at large". Furthermore, in the course of his reasons for judgment, Bastin J. observed that the wording of S.9. :

..emphasized the exceptional nature of such an order, which leads me to conclude that the opinion of the juvenile court judge must rest on cogent evidence as to the character of the juvenile. Logically, this will be ascertained from the circumstances of the indictable offence complained of, the school record and the record of past delinquencies of the juvenile, his family background and his state of maturity, so that the judge can intelligently answer the question: Is the limited treatment provided by sec. 20 of the Juvenile Delinquents Act of a nature to reform him or is he so mature or so incorrigible that his reclamation needs the harsher treatment provided by the Criminal Code, 1953-54, ch.51? 22.

A great number of cases since Pagee have adopted Bastin J.'s "treatment- 23.

oriented" approach. While it is clear that waiver is only justified if 29.

both the interests of the community and the good of the child require it, it has been held that "if there is a reasonable prospect of the reform of the offender his interest no less than that of the public requires that he 25.
be dealt with in juvenile court."

Do the post-1970 cases indicate further developments in the substantive law of waiver? In the province of British Columbia it seems

that the courts have continued to adhere quite closely to the "treatment-oriented" approach laid down in Pagee. In R. v. Proctor, the juvenile before the court was almost eighteen years of age, had a long criminal record, and was charged with the serious offence of armed robbery. Notwithstanding these liabilities, but primarily because of the unique offer by a police officer to take the accused into his home, Munroe, J. quashed the waiver order made in the court below. In his reasons for judgment, the learned judge emphasized: (1) that a previous record and the serious nature of the alleged offence, although factors to be considered, are not conclusive and cannot alone justify waiver; (2) that the accused could be returned to the juvenile court any time before his 21st birthday if he should breach his probation; (3) the desirability, in the interest of both the accused and the community, of the accused avoiding a criminal record; and (4) the inadequacy of the present adult penal system. In R. v. Bock a transfer order dealing with charges of theft, wilful damage, and murder was set aside on the ground of insufficiency of evidence to support that order. Citing R. v. Pagee, Toy, J. reaffirmed the view that waiver must be justified by the good of the child as well as by the interest of the community and that J.D.A., S.9. does not require that the offence of murder be dealt in any different manner than any other indictable offence. Finally, in R. v. F., Meredith, J. quashed a waiver order, holding that "the principles governing applications for transfer from juvenile to adult court are well expressed by Bastin, J. [in Pagee]" and that the key issue in any waiver application is whether, having regard to the accused's character, his reformation if convicted would be possible under the J.D.A. or could only be achieved under the Criminal Code. Although there have been three other B.C. waiver cases reported since 1970, all of these deal primarily with procedural issues and, consequently, have no bearing on this discussion.

In summary, it would seem that the view of the B.C. appellate courts as to this aspect of waiver has remained quite consistent over the past six years. All of the cases cited above adopt Pagee's "treatment-oriented" emphasis. In addition, the B.C. courts have deliberately placed less weight on the fact of previous delinquencies or the seriousness of the offence, have insisted that the seriousness of the offence cannot by itself justify waiver, and have emphasized, perhaps for the first time, both the importance of avoiding, if at all possible, a criminal record, as well as the inadequacy of the treatment offered in the adult prison system. Finally, it is interesting to note that in all of the reported B.C. waiver cases since 1970 save one (and in that case the court was prevented by a procedural obstacle from quashing the order) the appellate courts have set aside the waiver orders made by the lower courts.

In Ontario, the three waiver cases reported since 1970 suggest the somewhat different direction in which the superior courts of that province are moving. In R. v. Haig, the Ontario Court of Appeal overturned a juvenile court judge's refusal to order waiver on a rape charge and directed a trial on the merits in the adult court. The Court held that the juvenile court judge had erred in failing to recognize: (1) the importance of the type of the offence as well as the particular facts and circumstances surrounding its alleged commission; (2) the fact that protection of the public is an important factor in the "interest of the community"; (3) the principle that where a juvenile and an adult are jointly involved in the same offence, prima facie they should be tried together; and (4) the fact that the accused's age and the relevant provincial legislation would have precluded the juvenile court from sending the accused, if convicted, to a training school. This last ground was clearly the dominant factor behind

the appellate court's decision: because the juvenile obviously needed supervision, training and treatment and because the disposition of training school would not be available through the juvenile court, the Court of Appeal was firmly of the view that both the interests of the community and the long term good of the juvenile himself required that he be waived. An application for leave to appeal to the Supreme Court of Canada was subsequently dismissed without written reasons.

The two cases reported after Haig indicate the impact that that decision has had on waiver practice in that province. In R. v. M. the judges of both the Juvenile Court and the Ontario Supreme Court approved the waiver of a 15-year-old on four separate delinquency charges, two involving breaking and entering and two involving rape. In the Juvenile Court, Felsteiner, J. cited Haig as to the importance of the nature and circumstances of the offence and held that waiver was justified both on the grounds of the community's interest (to protect citizens from such behaviour and to prevent similar occurrences) and the child's best interests (so "that he not have an opportunity to endanger his own liberty as well as the safety of others until he can be helped to control his behaviour", and so that his needs for psychiatric help and further education could be satisfied). As in Haig, the court's major concern was the inavailability of training school facilities. While Felsteiner, J. admitted that "the evidence...indicates that under either the juvenile or adult reformatory system, there may be glaring inadequacies in treatment for this boy," he still held that "since the training school authorities would have to release this boy in 26 months, only the adult penal system has a chance to help him." In the Supreme Court, Houlden, J., relying again on Haig, affirmed the waiver order made in the court below. In the most recent Ontario case, R. v. Chamberlain, a juvenile court judge's transfer order on a charge of attempted murder by a

15-year-old was first set aside by a judge of the Supreme Court and then re-instated on a further appeal to the Court of Appeal. Although Schroeder, J.'s reasons were primarily concerned with the nature of the court's duty on an appeal from a transfer order, he did place considerable weight on the desirability of determining the accused's fate at the earliest possible date and the desirability of a public trial jointly with the co-accused in view
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of the serious nature of the charge.

Although none of these three cases contain any startling new approach to waiver, when viewed collectively they do yield some interesting features. To begin with, in contrast to the recent trend noted above in B.C., in all three Ontario decisions waiver orders were either restored or affirmed on appeal. Secondly, unlike the B.C. decisions reviewed above or even the
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leading Ontario decisions of the 1960's, all of which downplay considerations such as the seriousness of the offence, these cases have tended to emphasize such factors as the serious nature and circumstances of the offence, the protection of the public, the importance of determining the accused's fate as soon as possible, and the desirability of trying joint charges together as reasons favoring trial in the adult courts. Finally, while the reasons for judgment in these cases still utilize the language of the "treatment-oriented" approach, one reading these reports is left with the feeling that this language may actually be little more than a judicial excuse to satisfy the "good of the child" requirement when in fact the court is more concerned with protecting the "interests of the community" (as determined by the seriousness of the offence and the possible threat to public safety). Although the decisions in both Haig and R. v. M. deal extensively with the accused's need for treatment and the inavailability of training school resources for the child before the court, one wonders why,

if the Courts were as concerned with the treatment available to the juvenile as they professed to be, they did not give any consideration to the other dispositions available in the juvenile court or even to the actual treatment facilities that would be available to the juvenile if convicted in the adult court. Surely, in light of the "glaring inadequacies in treatment" 51. admittedly present in the adult penal system, a thorough evaluation of all of the treatment alternatives should be considered nothing less than a condition precedent to the making of any waiver order based, in whole or in part, upon the treatment needs of the child.

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While the 1976 Saskatchewan case of Re C. indicates that that province seems to be following the same approach taken by the Ontario courts in Haig and R. v. M., recent developments in Manitoba suggest that the courts of that province have embarked upon a third approach, one unlike either that of B.C. or Ontario. Five Manitoba decisions have been reported or referred to in reported cases since 1970. The two earliest ones are not particularly note-

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worthy for present purposes: in R. v. Martin the Manitoba Queen's Bench, relying on the principles in Pagee, quashed a transfer order; in

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R. v. Woodhouse a judge of same court dealt solely with a procedural issue.

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What is more interesting is the unreported 1972 decision of R. v. Cloutier and its subsequent treatment. In Cloutier the problem was the familiar one of whether or not to waive to the adult court a charge of non-capital murder against a 16-year-old. In the court of first instance, Johnston, Prov. Ct.J. applied the principles laid down in Pagee, Proctor, and Sawchuk and decided 56. to deny waiver. In the Court of Queen's Bench, Nitikman, J. allowed the

appeal on the ground, inter alia, that the juvenile court judge erred "in failing to recognize that it was in the interests of the juvenile that he be

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transferred to adult court" and that transfer was required by the principle

laid down by Adamson, C.J.M. in Re Regina v. Paquin and De Tonnancourt that:

[i]t is not in the interest of the accused nor in the public interest that the accused should be tried on a charge of juvenile delinquency by one man sitting in camera. What is said and done in such grave matters should not take place in camera: Scott v. Scott, [1913] A.C. 417. 59.

Nitikman, J.'s decision was affirmed by the Manitoba Court of Appeal in a single sentence and leave to appeal to the Supreme Court of Canada was
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subsequently denied.

In the absence of a more complete report of the reasons for judgment in Cloutier, it is difficult to fully assess its significance. At the very least, it would appear to represent a rebirth in the Manitoba courts (and, perhaps, in the Supreme Court of Canada) of one of the oldest "clichés of waiver." The retrospective view of the trial judge in Cloutier suggests, however, that the case stands for a much broader principle. In his view:

The law applying to transfer applications in this province appears to have shifted recently in a new direction. ...

The Cloutier case, supra, seems to be a departure from the present standard to be arrived at in each case under s. 9 of the Juvenile Delinquents Act and suggests that in the case of serious offences involving violence in the death of another or grievous personal injury to the person of another, in such cases the good of the child and the interests of the community both demand transfer to adult court albeit the power to transfer a juvenile to the ordinary courts is a discretionary one conferred upon the Juvenile Court judge. 61.

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This view is not an isolated interpretation. In R. v. Edwards, Kopstein,

Prov. J., after reviewing the caselaw including Cloutier, took the view that:

...in Manitoba the rule, or if not the rule, at least the guideline which has emerged from the cases upon the issue of transfer is this: That where an application for transfer under s. 9 of the Juvenile Delinquents Act arises out of a charge, the facts pertinent to which suggest that the juvenile is implicated either actually or by operation of law

in a crime involving the infliction of violence of a cruel or vicious nature, which violence has resulted in the death of another or in grievous personal injury to the person of another, the good of the child and the interest of the community demand that he or she be dealt with in the ordinary courts." 63.

However, there are indications that not all Manitoba juvenile court judges are content with this new "rule" or "guideline". In R. v. Mezzo, for example, Johnston, Prov. Ct. J. doubted the correctness of Nitikman, J.'s reasoning in Cloutier and struggled to distinguish Cloutier and Edwards from the case before him. Furthermore, his obiter comments on the last page of his judgment clearly indicate his dissatisfaction with the shift in emphasis which "the unenlightened" have urged the court to adopt and which, presumably, he saw reflected in the Cloutier decision.

Since reported cases represent only a minute proportion of those cases in which waiver has actually been considered and, at that, tend to represent more frequently the views of superior court judges than those of juvenile court judges themselves, one should hesitate to make any broad generalizations as to juvenile court practice on the basis of the cases considered above. However, on the assumption that, whether bound by precedent or not, lower court judges will generally follow the interpretations taken by the superior courts of that province, a number of observations can still be made. To begin with, it is particularly interesting to note that it has been the courts of Ontario and Saskatchewan, rather than those of B.C., that have been more inclined in recent years to order waiver because of the absence of training school facilities. In light of the fact that B.C. has, since 1969, been without training schools entirely while both Ontario and Saskatchewan have had such facilities for offenders under certain prescribed ages, and the fact that, during that same period the maximum juvenile court age in B.C. has been 18, and more recently 17, while that in

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the two other provinces has remained fixed at 16, one would have expected the B.C. courts, if any, to rely more frequently on this rationale for waiver. 71.
Oddly enough, it appears that just the opposite has been the case. Secondly, there do appear to be certain very distinct differences in the approach taken by the superior courts of the various provinces surveyed. While the B.C. courts have seemed content with the treatment-oriented emphasis laid down in Pagee, the recent decisions in Ontario and Saskatchewan, although still citing treatment as an important consideration, have all tended to place greater weight on such factors as the seriousness of the offence and the protection of the community. Finally, although the ultimate impact of the recent unreported decisions in Cloutier and Edwards remains to be determined, the shift in emphasis suggested in those two cases cannot be ignored. While it should seem doubtful that Cloutier will be interpreted as laying down a hard and fast rule favoring the waiver of all serious offences involving violence 72.
and resulting in death or grievous personal injury, the re-birth in Cloutier of some of the earlier "clichés of waiver" and the approval of Nitikman, J.'s decision by the Manitoba Court of Appeal and the Supreme Court of Canada may ultimately pose a serious threat to the present waiver philosophy of the courts in this province.

In addition to the substantive law of waiver considered above and the procedural and evidentiary rules applicable to a waiver hearing considered 73.
elsewhere in this paper, there is another aspect of the waiver process that has received some recent attention in the caselaw and merits comment here. While it has long been recognized that a juvenile court judge can transfer 74.
on a lesser included offence and that once a transfer order has been made a new charge must be laid to initiate the proceedings in the adult court, there 75.
has recently been some uncertainty as to whether the indictment in adult court may charge a juvenile with an offence different from that in respect of

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which the order for waiver was made. In R. v. Goodfriend, the B.C. Court of Appeal held that where the Crown at the opening of a trial before a Magistrate withdraws the information charging the accused with the offence in which he was waived from the juvenile court (here possession of a narcotic for the purpose of trafficking), the Magistrate is without jurisdiction to accept a plea of guilty on a new information sworn before him charging another, though included, offence (here simply possession). However, one year later, in a case involving somewhat similar circumstances,

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the same court took a very different approach. In R. v. Beeman, the Crown sought to prefer an indictment for counselling another person to commit gross indecency after he had already been committed for trial on a charge of attempted gross indecency. By a two to one majority, the Court of Appeal affirmed the decision of MacDonald, J. to the effect that:

The Crown was entitled to prefer an indictment on a charge different from that which was the subject-matter of the order transferring the accused from the Juvenile Court. Once valid proceedings are begun in the ordinary Courts the accused is beyond recall to the Juvenile Courts. When an order is made under S.9. of the Juvenile Delinquents Act its effect is that the accused is proceeded against in accordance with all of the provisions of the Criminal Code and not just some of those provisions. 78.

In upholding that decision, McFarlane J.A. indicated that the effect of the Goodfriend case ought not to be extended "beyond the precise matter there decided." 79.

An application for leave to appeal to the Supreme Court of Canada was subsequently refused. 80.

In the third case in this trilogy, Re Woodhouse and The Queen, 81.

a juvenile was transferred on a charge of capital murder and discharged following a preliminary inquiry. When the Criminal Code was subsequently amended to alter the definition of capital murder, an indictment was preferred by the Attorney-General charging the accused with

non-capital murder. The Manitoba Queen's Bench dismissed the accused's application to quash the indictment, following Beeman and holding that the words "in that behalf" in S.9. are not to be construed as confining the transfer of jurisdiction to the strict form and language of the charge initially before the juvenile court. As was done in Beeman, the court distinguished Goodfriend on the ground that there "the power to amend had not^{82.} been invoked." Although, as has been pointed out elsewhere, the result in Goodfriend would seem to be more consistent with the language and intent of both S.9. and the J.D.A. itself, it would seem that Beeman and Woodhouse have, in effect, overruled that decision.

Throughout the last twenty years, recommendations have frequently been made for changes in the law relating to waiver. Most notable among these have been the suggestions that certain cases should go initially to the adult courts subject thereafter to possible waiver to the juvenile court; that the discretion as to waiver might be better exercised by the crown attorney than^{83.} by the judge; or that the practice of waiver should be eliminated altogether. In recent years, encouraged by the decline in judicial popularity of many of the long-standing "clichés of waiver", some critics have again urged that the^{84.} waiver sections be deleted from any new legislation. Although the abolition of waiver would be a tempting step, we doubt that it is a practical one at^{85.} the present time. Rather, in light of the various alternatives, we are inclined to agree with the U.S. President's Task Force on Delinquency that it is "a necessary evil, imperfect but not substantially more so than its^{86.} alternatives." A number of factors would seem to make its retention inevitable. Even the most optimistic juvenile court supporters have recognized that many young offenders will fail to respond to the juvenile court's rehabilitative efforts, regardless of the extent of its available

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resources. Similarly, the proposed raising of the maximum age will undoubtedly bring before the court many more older offenders charged with more serious crimes, thereby posing greater threats to public safety and security and placing even greater pressures on the court's time and available resources. It is probably because of these very considerations that the Dept. of Justice Committee, the draftsmen of Bill C-192, and the Solicitor-General's Committee all proposed the retention of the waiver procedure in substantially the same form as presently found in the J.D.A.

What changes do these three reform documents propose regarding waiver?

To begin with, as can be seen from the summary of recommendations contained
88.
in Table No. 4, all three have attempted to further restrict the type of cases in which waiver can be ordered. Both the higher minimum age for waiver and the narrower range of offences for which waiver can be ordered emphasize the exceptional nature of the procedure that is envisioned. In addition, attempts are made to remedy certain procedural defects under the existing legislation; the requirement of written reasons for judgment, the expansion of appeal rights, and the termination of a judge's further jurisdiction once he has considered a waiver application are all provisions aimed at clarifying uncertainty or filling gaps that have appeared in present practice. Of greatest importance, however, are the criteria proposed to govern the exercise of the discretion to waive jurisdiction to the adult court. In our discussion of the recent caselaw we suggested that in interpreting the J.D.A.'s test of "the good of the child and the interest of the community" most courts have fallen into one of two camps: those who base their waiver decisions primarily on the factor of "treatment potential" and others who are concerned primarily with the protection of the community. Focussing on both of these two key factors, the Justice Report's test would have allowed waiver either where the juvenile was "not suitable for treatment by any

TABLE No.4 - Waiver of Jurisdiction

Provisions Re:	J.D.A.	Dept. of Justice Report	Bill C-192	Draft Act
(a) Minimum Age	14	14	14	16
(b) Types of offences	Any indictable Offences	All Criminal Code offences plus those Federal or Provincial offences designated by Governor-In-Council [RPT, pp.82-83]	All offences against Criminal Code or other Federal Statutes or Regulations [S.24(1)]	All Federal offences that are indictable, except those listed in Code, S.483 and those also punishable on summary conviction. [S.14(1)]
(c) Test to be applied	Judge must be of the opinion that (i) The good of the child and the interest of the community demand waiver.	Judge must find that: (i) Young person not suitable for treatment by any juvenile Ct. Facility, or (ii) Community's safety requires restraint for period longer than Juv. Ct. can order. *[RPT, pp.80-81]	Judge must find that: (i) Young person not suitable for committal to any Juv. Ct. Facility, (ii) Community's safety requires restraint for period longer than Juv. Ct. can order, and (iii) It is in the interest of the young person and the community to make such an order. * [S.24(2)]	Judge must be of the opinion that: (i) Having regard to the needs and interests of the young person and of the public, the young person should be proceeded against in adult court. [S.14(1)]
(d) Factors to be considered	-	1. Judge must consider: (i) Background of the young person (ii) Circumstances of the offence 2. Judge may request and consider an assessment report. [RPT, pp.83]	1. Judge must consider: (i) Background of the young person (ii) Circumstances of the offence 2. Judge may request and consider an assessment report. [S.24(2)]	1. Judge must consider: (i) Seriousness of and circumstances surrounding alleged offence, (ii) Young person's age, maturity, character, attitude and previous history, (iii) Adequacy of dispositions available under code or other Act and this Act, (iv) Nature and effect of community services previously rendered, (v) Contents of a pre-disposition report, (vi) Any repns. on behalf of young person or A-G [S.14(2)]
(e) Reasons for granting order	-	Judge must give written reasons to adult court. [RPT, p.83]	Judge must give written reasons if appeal filed. [S.24(5)]	Just must file written reasons in youth court records. [S.14(4)]
(f) Variation of order	1. Judge may rescind his own order. 2. Right of Appeal with leave, on special grounds	Right of Appeal	Right of Appeal	Right of Appeal [S.42(2)]
(g) Miscellaneous	-	1. Parents' right to notice of waiver hearing. 2. Judge has additional power (which young person or crown can insist that he exercise) to transfer case to adult court for finding, subject to its return to juvenile court for disposition. [RPT, pp.81-82] 3. Suggestion of giving adult court judge power to waive to juvenile court offenders who are one year older than juvenile court's maximum age limit. [RPT, pp.84-85]	1. Judge who makes or refuses waiver order loses jurisdiction over case. [S.24(3)(4)]	1. Judge who makes order or examines pre-disposition report loses jurisdiction over case. [S.19] 2. Judge has additional power to transfer case where so requested by young person over 16 yrs. of age if trial by judge and jury would be available in adult court. [S.14(3)] 3. Effect of transfer order: suspends operation of act with respect to all other offences except those for which information already laid. [S.14(5)]

*An additional condition precedent found in both the Justice report's and Bill C-192's tests is that the juvenile is not subject to committal to a mental institution. Although an investigation as to sanity is not required as part of their waiver procedures, both the J.D.A. (through the relevant Criminal Code Provisions) and the Draft Act (through S.20) also provide special treatment for those found to be insane.

juvenile facility" or where "the community's safety requires restraint for
89.
a period longer than the juvenile court can order." Bill C-192 adopted
somewhat similar factors (plus the old test from the J.D.A.) but phrased
them cumulatively rather than in the alternative, as was done in the Justice
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Report. Finally, rejecting both of these approaches, the draftsmen of the
YPICWTL Draft Act chose instead to rely on a test, virtually identical to
that contained in J.D.A. S.9., based on "the needs and interests of the
young person and the public", accompanied by a list of six factors that a
91.
judge was directed to take into consideration.

Do the Draft Act proposals represent an improvement over the waiver
provisions in the J.D.A.? As suggested, the Draft Act's test is, for all
practical purposes, identical to that in the J.D.A. The only significant
change is the list in S.14(2) of relevant factors to be taken into account.
Considering the latter first, it would seem that S.14(2) has retained all
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of the more important factors suggested by the courts and the commentators
while omitting those factors (especially those relating to the suitability
of the juvenile court as a forum for trying serious offences) that are
considered by most to be no longer justified. While we are generally in
favor of this attempt to limit and guide the scope of judicial discretion,
it should be noted that it still does not preclude a judge from taking into
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account "any other factor that he deems relevant." As to the test proposed,
we consider it unfortunate that the Solicitor-General's Committee saw fit to
reject the more specific criteria suggested in the Justice Report and
Bill C-192 in favor of such vague and indefinite terms as "the needs and
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interests of the young person and of the public." If, as it seems, the only
real grounds upon which juveniles should be transferred are the lack of
appropriate facilities in the juvenile court or the community's need for

protection by providing longer periods of incarceration than are available in the juvenile court, it is hard to see why the test should not refer to these factors specifically, as was done in the Justice Report, instead of through vague and indefinite terminology which invariably permits uncertainty and other less relevant considerations to obscure the court's actual purpose. While some might argue that retaining language so similar to that in the J.D.A. will have the beneficial effect of perpetuating the applicability of the old caselaw, it is our opinion that the discrepancies in the interpretation of the old test that have arisen in recent years are not worth maintaining. Furthermore, just as applicable to-day as it was ten years ago is the Dept. of Justice Committee's warning as to the "danger... that without the direction and assurance that reasonably firm legislative guidelines provide, waiver of jurisdiction will tend to become an expression, not of any consistent policy, but of the predilections of individual juvenile court judges or of local pressures upon them." As a result of these considerations, we see no reason in favour of the retention of the provision in the J.D.A. which more than one judge has termed "poorly drafted". Instead, we would have preferred that the Committee adopt the more specific, two-pronged test suggested in the Justice Report.

Another noteworthy provision is that relating to the effect of a transfer order on the juvenile court's jurisdiction over other offences committed by that young person. The Draft Act proposes that in such a case, provided that an information regarding the second charge is not laid before the transfer of the first charge, the transfer has the effect of suspending the operation of the Act with respect to that young person, and the Crown then has the option of either proceeding with the second charge directly in adult court or waiting until the suspension is terminated (ie - the first

charge is disposed of and any sentence has been completed) and then
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proceeding in juvenile court. According to the Report, the reason behind
this provision is to allow the adult court proceedings to be terminated and
to reduce the "multiplicity of proceedings and potential inconsistencies." 99.

It is submitted that this provision is manifestly unjust and that it has the
potential for great abuse at the hands of the Crown. Merely because a
juvenile court judge has seen fit to raise one particular charge to the adult
court does not guarantee that a second, unrelated offence should also
properly be waived. Clearly "the degree of seriousness of the alleged
offence and the circumstances in which it was allegedly committed" (one of
the factors noted in section 14(2)) might not require transfer of the
second charge. If the young person is not prepared to consent to waiver, he
should not be forced to sacrifice his right to an independent assessment by
a juvenile court judge for each offence with which he is charged.

One province in which the Draft Act's proposals may give rise to
certain special problems is that of B.C. As a result of the provincial
government's repeal of the Training Schools Act in 1969 so much pressure was
placed on the juvenile courts and their other existing facilities that in
1973 the province found it necessary to reduce the maximum juvenile court age
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from 18 to 17. If the Draft Act becomes law and the maximum age is again
established at 18, one can expect that the problems that came to a head in
B.C. in 1973 will be revived anew. While in any other province a substantial
influx of 17-year-old offenders could simply be dealt with by the liberal use
of the waiver power, such an approach would appear to be somewhat less
practicable in B.C., where, as we have seen, both governmental and judicial
policy frowns on the liberal use of that procedure. Furthermore, nothing in
the wording of S.14 of the Draft Act would appear to necessitate any change

in this policy. As a result, it would seem that if and when the Draft Act becomes law, those involved in the administration of juvenile justice in that province will have a hard choice to make as to how the many older and more dangerous juvenile offenders are to be dealt with. On the one hand, if they are to be dealt with in the juvenile court, it would seem to be an absolute necessity that some sort of secure custodial facilities be provided. On the other hand, if they are to be treated in adult court, both the provincial government and the courts will be forced to make a radical shift from their current attitude towards waiver. While it is still too early to predict which route will ultimately be followed, recent policy statements by both politicians and law reformers in this province have suggested that the
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former avenue may be the more likely alternative.

CHAPTER 4 PRACTICE AND PROCEDURE IN THE JUVENILE COURT

A. General

The one aspect of juvenile justice that is usually of most practical interest to lawyers is that of practice and procedure in the juvenile court. The relevant statutory provisions contained in the J.D.A. can be summarized quite briefly. The general rule regarding prosecutions and trials under the J.D.A. is that, except as provided in that Act, they are to be summary in nature and are to be governed mutatis mutandis by the provisions in the Criminal Code relating to summary convictions insofar as such provisions as applicable.¹ The major exceptions to this rule are found in subsections 17(1) and (2) which provide, respectively, that proceedings under the J.D.A. with respect to children, including the trial and disposition of the case,² "may be as informal as circumstances permit, consistent with a due regard for a proper administration of justice", and that no adjudication with respect to a child shall be quashed or set aside "because of any informality or irregularity where it appears the disposition of the case was in the best interests of the child". Other specific provisions in the J.D.A. deal with the powers of the juvenile court judge,³ the appointment, powers and duties of probation officers,⁴ the court's power to waive jurisdiction to the adult court,⁵ the giving of notice of proceedings to a child's parents or guardian,⁶ pre-trial detention, release from detention, and adjournments,⁷ publicity and the admission of the public to juvenile proceedings,⁸ the admission of evidence of children of tender years,⁹ the procedure relating to appeals,¹⁰ and various other housekeeping matters.¹¹

The reasons why the first American juvenile courts, and subsequently the Canadian J.D.A., were drafted so as to encourage procedural informality

as opposed to traditional criminal law procedures were discussed in depth

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at the outset of this paper. It will be recalled that the prevailing philosophy dictated that a child's only right was that of care and custody,

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rather than that of liberty. With this in mind, the draftsman sought to create an informal and flexible procedure in which the judge, in the role of the kindly and protective father, would uncover the source of the child's difficulties and then prescribe the rehabilitative measures most likely to further the child's interests and welfare. In such a setting the requirements of traditional criminal procedure were considered not only unnecessary but also detrimental to the very objectives of the juvenile court process itself. They were considered unnecessary because the entire process was designed as a benevolent and therapeutic one; one in which the court's sole objective was that of administering treatment for individual needs, rather than punishment for wrongdoing. They were considered destructive for a number of reasons. To begin with, a formal trial procedure was considered inevitably associated with the criminal law, the atmosphere and premises of which the juvenile court was determined to avoid. Secondly, it was thought that the rigid constraints of a formal and structured procedure would prevent the court from going beyond the particular offence which precipitated the hearing and delving, where it thought it appropriate, into a broad range of matters relevant to the child's background, including both his previous conduct and his associations. Finally, it was felt that the creation of a competitive, adversarial atmosphere would impede the court's attempts to encourage the child to co-operate with and to assist the court in its rehabilitative efforts.

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Despite the occasional criticism from the legal profession, the informal juvenile court procedure was generally endorsed and encouraged for most of the first half-century of its existence. In recent years,

however, an increasing number of critics concerned about the dangers of arbitrariness and unfairness arising from relatively unfettered judicial discretion, have deplored the traditional juvenile court's failure to provide safeguards for the legal rights of children. In the United States, the President's Task Force on Juvenile Delinquency noted not long ago:

Scholarly commentators have been virtually unanimous in decrying the injustices and harmfulness of completely abandoning procedural protections. Only rarely in recent years is a voice heard in praise of the old ways. Legislative studies in a variety of States reflect the same judgement. 15

A similar view has been expressed by a Canadian commentator:

A decade of critics have questioned whether, in ministering to the rehabilitative needs of children, juvenile courts have perhaps lost sight of the obligation to do so with procedural fairness and in a manner which ensures that their factual determinations are accurate. 16

What are the reasons behind this widespread disaffection with the original philosophy of the juvenile court as to legal protections? To a certain extent, it might just be viewed as a reflection of the recent expansion of the post-World War Two American ~~civil~~ rights movement to encompass the rights of children, as it did blacks, native peoples, and women earlier. However, clearly there are other reasons more specific to the juvenile court. In recent years, it has been recognized that no judicial intervention can be successful unless it is based on an accurate determination of the facts, including both the facts of the conduct giving ~~rise~~ to the court's jurisdiction and also the facts likely to be relevant for disposition. 17 By the same token, many now argue that any State interference with the rights and liberties of individuals (which any juvenile court involvement invariably constitutes), no matter how beneficent and enlightened the underlying intent, can be morally justified only if

the State has first established its right to intervene and then undertakes its intervention in accordance with and subject to the limitations of a formal, defined procedure consistent with what we know today as "due process".¹⁸ Following the approach developed earlier in this paper,¹⁹ it may be argued that because the juvenile court has failed to develop the expertise necessary to accurately assess and rehabilitate delinquents, the entire basis for the court's reliance upon the parens patriae doctrine, and for the consequent informality of procedure in juvenile matters, has become questionable.²⁰ Similarly, critics such as Fox have adopted the view that since a finding of delinquency has become nearly as stigmatizing as a criminal conviction, and since the juvenile courts of today, like the criminal courts, tend to rely greatly on the same traditional ways of protecting society (e.g. - deterrence, condemnation, and incapacitation) and on the same restrictive and stigmatic means of correctional treatment (e.g. - fines, probation, and constitutional commitment), it is hardly justifiable to trade²¹ valuable procedural and substantive civil rights for debatable benefits. Finally, it has been suggested that the informality of the juvenile court may itself constitute an additional impediment to effective rehabilitation. Although there has been no conclusive evidence to support this position, it has been reinforced by a number of sociological studies illustrating the sense of injustice,²² the feelings of inadequacy and frustration,²³ and the attitudes of resentment and/or intimidation²⁴ acquired by many children²⁵ as a result of their experiences in the juvenile courts.

What has been the effect of this dissatisfaction on practice and procedure in the juvenile court? In the United States, as we have seen²⁶ earlier, the major initiatives for reform have arisen through a series of Supreme Court decisions dealing with such matters as the minimum²⁷ procedural requirements for a valid waiver proceedings, the procedural

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safeguards to be applied in the adjudicatory stage of a delinquency hearing,
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the standard of proof applicable in juvenile court proceedings, and the
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right to a jury trial in juvenile court. In Canada, in the other hand,
although there have been statements in a number of cases to the effect that
juvenile court proceedings must be conducted according to the principles
of due process and in a manner consistent with fairness and fundamental
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procedural safeguards and certain cases have suggested general minimum
procedural standards and requirements that should be adhered to at specific
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stages in the juvenile court proceeding, the courts (and particularly the
appellate courts) have generally been much more loathe to embark upon any
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major restructuring of the informal proceeding envisioned by the J.D.A.
However, the demand for procedural safeguards has not subsided. On the
contrary, its influence has been apparent in both the Justice Report
and Bill C-192 and most recently in the YPICWTL Report. Indeed, as we noted
in the preceding chapter, the elimination of arbitrary treatment in the
trial process, by means of incorporating new substantive and procedural
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safeguards into that process, has been a major theme in all three documents.
In this chapter we propose to examine in greater detail some of the areas
in which the demands for due process for juveniles have in the past
clashed with the J.D.A.'s traditional approach, how (if at all) the courts
have attempted to resolve these conflicts, and finally the reform proposals
contained in the Justice Report, Bill C-192, and the YPICWTL Act, and
some of their implications.

B. Counsel

There is no single action that holds more potential for achieving procedural justice for the child in the juvenile court than provision of counsel. The presence of an independent legal representative of the child, or of his parent, is the keystone of the whole structure of guarantees that a minimum system of procedural justice requires. The rights to confront one's accusers, to cross-examine witnesses, to present evidence and testimony of one's own, to be free of prejudicial and unreliable evidence, to participate meaningfully in the dispositional decision, to take an appeal - all have substantial meaning for the overwhelming majority of persons brought before the juvenile court only if they are provided with competent lawyers who can invoke those rights effectively. 1.

As the above passage forcefully suggests, the presence of counsel has been the major issue in the attempts to reconcile the demands for due process with the philosophy and rehabilitative objectives of the juvenile court. In fact, the right to counsel actually comprises not one, but three distinct rights: the right to be represented by counsel at various stages of a proceeding, the right to have counsel appointed or provided by the court or the state when one is unable to retain counsel without such assistance, and 2. finally the right to be meaningfully advised of those rights. In the United States, the turningpoint in the establishment and recognition of all 3. three rights was undoubtedly In re Gault. In that case, the U.S. Supreme Court, dealing for the first time with the question of the minimum procedural safeguards that were to be accorded a juvenile in the adjudicatory stage of his hearing, held that he and his parents were entitled to be advised of his right to be represented by counsel; furthermore, if he or his parents were unable to afford legal counsel, he was entitled to have such counsel 4. appointed by the court. In Canada, although the juvenile courts have been faced with similar problems, the development and expansion of the right to

counsel has been, as one might expect, a much slower and more tentative process.

For the same reasons that it was sought to avoid the formalities of criminal procedure, the draftsman of the J.D.A. did not wish to encourage the presence of counsel in juvenile courts. As one juvenile court judge has explained: "since at the heart of the juvenile court movement was the vision of the court as a benevolent parent dealing with his erring child, the view was widely held that legal counsel could serve little function...other than to obstruct and delay the providing of necessary diagnosis and treatment by 5. pettifoggery and technical obstructionism." As a result of this attitude, the J.D.A. does not contain a single reference to defence counsel. Instead, it assigns to the probation officer the responsibility of representing the 6. interests of the child at the hearing. In light of the above it would seem necessary to ask: does a juvenile, appearing in proceedings brought against him under the J.D.A., have the right to be represented by counsel? There seems to be little doubt that the answer is 'yes'. There would seem to be no reason to believe that sections 2(c)(ii) ("the right to retain and instruct counsel") and 2(e) ("the right to a fair hearing in accordance with the principles of fundamental justice") of the Canadian Bill of Rights would not apply to a juvenile in a delinquency proceeding. In addition, there is a reported decision of a single judge of the B.C. Supreme Court in which a transfer order was quashed, inter alia, on the ground that the juvenile was denied the presence of his counsel on the hearing of the merits of the 7. application to transfer. It would not seem unreasonable to assume that the same principle would apply during other stages (e.g. - adjudication, 8. disposition, etc.) of a delinquency proceeding. Perhaps most directly on point is section 737(2) of the Criminal Code which provides that "the...

defendant...may examine and cross-examine witnesses personally or by counsel or agent" and which is made applicable to juvenile court proceedings by sections 5(1) and 35(2) of the J.D.A. 9. Clearly this section would appear to be authority for the right to be represented by counsel, at least at the adjudication stage of the proceedings. Finally, although up until recent years lawyers have generally played a very minimal role in representing 10. children in the juvenile court, to-day the presence of defence counsel in a juvenile matter would by no means constitute an unusual or controversial occurrence. Unfortunately, there are still some juvenile court judges who actively discourage parents from retaining counsel, suggesting that it would 11. be a needless expense and would have little effect on the result of the case.

Although there does seem to be a right to counsel in juvenile court proceedings, there does not appear to be any right to be given notice of that right. Although section 10(1) of the J.D.A. requires that the parents or guardian of a child be given "due notice of the hearing of any charge of delinquency," it does not specify that such notice must also advise of the 12. right to counsel. In the case of Smith v. The Queen ex. rel. Chmielewski, the Supreme Court of Canada quashed a finding of delinquency on the ground that section 10(1) was not complied with in that the notice given did not refer to the nature of the charge or to the time and place of the hearing that eventually took place. Although no notice of the right to counsel was given, nor did any counsel appear at the hearing, this deficiency was not raised as a ground of appeal nor was it referred to in any of the judgments 13. as a possible ground for invalidating the proceedings. As a result of the 14. narrow requirements of section 10(1) and the approach taken in Smith and a 15. number of similar decisions, one is led to believe that there is no right to advance notice of the right to counsel in delinquency proceedings. In

practice, although most judges do usually advise parents of the right to obtain counsel, invariably it is not done until they appear in court, at which time the necessity of an adjournment to obtain counsel together with the resulting inconvenience and possible loss of another day's work has the effect of discouraging most parents from exercising this right.^{16.}

Finally, the third aspect of the right to counsel, namely the provision of free legal counsel to those unable, for financial or other reasons, to obtain their own, has long been and continues to be a serious and pressing problem, although it has been alleviated somewhat in recent years by the development and expansion of public defender, law guardian, and legal aid programmes in certain jurisdictions.^{17.}

When the Department of Justice Committee turned its attention to the question of the need for counsel in delinquency proceedings, its first step was to declare that the J.D.A.'s allocation of defence-counsel responsibilities to the probation officer was a "serious error".^{18.} In its view, not only does the probation officer's heavy work load unvariably make the carrying out of this additional task impossible, but the provision is also unsound in principle, for the probation officer's primary responsibility must always be to the court and not to the child.^{19.} Nor is it reasonable to expect the juvenile court judge to perform the function of representing the child's interests.^{20.} As a result, the Committee took the view that a juvenile, like any adult, is entitled to be represented by counsel "in any proceeding where [his] liberty or property may be affected,"^{21.} and that in the context of a juvenile court proceeding, the right can only be meaningful if notice of that right is given well in advance of the trial date.^{22.} Accordingly, it recommended that the notice to a parent informing him of his child's appearance in juvenile court should contain a statement that the child is

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entitled to be represented by counsel. The Committee was much more tentative in its recommendations in regard to the third aspect of the right to counsel, namely, the right to free legal assistance. Having accepted the proposition that every person has the right to the assistance of counsel, it agreed that the failure to provide counsel to indigent defendants is a violation of basic

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human rights. However, rather than endorse any particular system for the delivery of appropriate legal services, it only went so far as to recommend that the legal profession should study, with a view to its introduction in Canada, the "law guardian" system contained in the then-recent New York

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Family Court Act. Finally, because of the fact that many juvenile court judges were not legally trained, it suggested to the provincial authorities that there should always be a crown attorney or a similar officer, instead of an untrained police officer, representing the prosecution in all juvenile

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court proceedings.

Both Bill C-192 and the Y.P.I.C.W.T.L. Report followed the Justice Committee's first two recommendations but stopped short of implementing the

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third. Bill C-192 would have required that a juvenile charged with an offence

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must be notified of his right to engage counsel to represent him. However, rather than provide free legal counsel for those unable to afford their own, the Bill merely permitted a judge, in the absence of counsel, to allow a parent or other adult to represent a child, or, alternatively, to put

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questions himself to witnesses on the juvenile's behalf. Dealing with the related problem of admissions, the Bill provided that no admission by a juvenile would be admissible unless, before making the admission, the young

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person was assisted by counsel, a parent, or some other person. The

Y.P.I.C.W.T.L. Report followed generally the same approach. It made it clear that a young person was entitled to be assisted by a lawyer retained by or for him during all proceedings (including pre-trial and post-dispositional

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proceedings) and that notice of this right was to be given to his parents
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upon his arrest, detention, or otherwise prior to trial and to the young
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person himself when he appears in court. It also provided that a juvenile
could be represented by any responsible person at any stage of the
proceedings, except at the trial itself (unless no lawyer is reasonably
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available and the judge so permits) and that no written statement given by
a young person would be admissible in evidence unless he had first been given
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the opportunity to consult with a lawyer, parent, or adult friend. As in
the case of its predecessor, the Report declined to require that free legal
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services to be made available to those unable to obtain their own.

The fact that so few changes were introduced in the Draft Act from
that contained in Bill C-192 and the rather brief discussion of the right to
counsel in the Y.P.I.C.W.T.L. Report might lead one to conclude that the
Solicitor-General's Committee felt that there were no longer any contentious
issues surrounding the provision of counsel in juvenile court. If that is,
in fact, the view taken by the Committee, it would seem that it was mistaken,
for there does appear to be a body of public and professional opinion that
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still opposes any expansion of the use of counsel in juvenile court. Some,
for example, have expressed the fear that lawyers will import into juvenile
court proceedings the worst features of adult criminal procedure, including
unnecessary emphasis on technicalities and legalisms, habitual reliance on
delaying tactics, and preoccupation with "getting the client off" rather than
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concern for the broader general welfare of the child. Another argument often
heard is that lawyers are actually unnecessary in juvenile court because in
the vast majority of cases the adjudication stage is substantially abbreviated
by virtue of a guilty plea and because a lawyer can be of little assistance
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to his client or to the court in the determination of disposition. Similarly,

it is sometimes suggested that by introducing defence counsel and creating a more adversarial atmosphere there is a danger that the prosecutor may tend to become more competitive, more aggressive, and less attuned to the welfare of the child. Finally, it has been argued that "procedural protections...will seriously damage any attempt to reintegrate the juvenile and treat him within the community" and that "every effort should be directed to oppose the advent of rigid adversary procedures that will bring hostility and social ostracism to the juvenile."

Although each of these arguments carry some validity and weight and therefore cannot be dismissed out of hand, it is suggested that in the final analysis they must yield to greater countervailing considerations. To begin with, although there is, admittedly, a danger that some counsel may tend to adopt the same rigidly adversarial approach to juvenile matters that they have developed for use in adult criminal trials, one would expect that the majority of judges would be able to control even the most dilatory, repetitious and argumentative lawyer. In addition, where one draws the dividing line between "pettifoggery and technical obstructionism" and responsible representation obviously depends to a large extent on one's perspective of the juvenile process. As the U.S. President's Task Force noted:

Effective representation of the rights and interests of the offender inevitably appears to those accustomed to complete freedom of decisionmaking as needless obstreperousness and dilatoriness. Of course law is an irksome restraint upon the free exercise of discretion. But its virtue resides precisely in the restraints it imposes on the freedom of the probation officer and the judge to follow their own course without having to demonstrate its legitimacy or even the legitimacy of their intervention. 44.

Contrary to the view held by some, it seems clear that there is a need for lawyers at both the adjudication and disposition stages of the proceedings. As the Justice Committee and numerous others have suggested, many of the responsibilities traditionally delegated to judges and probation officers can only be adequately performed by independent legal counsel. Although it is true that a vast majority of children tend to plead guilty to the charge against them, it is not unlikely that in many cases such a plea can be a result of a child's misapprehension of the facts or of the law, or of subtle situational pressures on him to confess. In addition, there is considerable evidence that, aside from his obvious role in the adjudication stage, the lawyer can often be instrumental at both intake and disposition, clarifying the facts upon which decisions can be based, critically analyzing the opinions and reports of probation officers and other witnesses, and offering alternative plans for either diversion or disposition. As the New York Family Court Act states: "Counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. Similarly, the view that prosecutors will likely respond to the increased participation of defence counsel by adopting less than benevolent objectives has been rightly deemed "unwarranted and uncharitable" by one commentator, and has been discredited by recent empirical evidence. To the extent that there may be a tendency to respond to the presence of counsel with stronger prosecutorial representation, it has been suggested that a proper delineation of the prosecutor's role would adequately protect against any threat to the court's rehabilitative aims and functions.

Finally, we disagree with the proposition that an increase in the use of lawyers would have the effect of increasing significantly the trauma and stigma which the informality of the juvenile court was designed to avoid,

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thereby subverting the goals of the entire process. As we have noted earlier,
there is evidence to suggest that even under the present system, considerable
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stigma and trauma is associated with the juvenile court process. Furthermore,
given the proposed increase in the use of pre-trial diversion, it is not
unreasonable to assume that under the new legislation only those offenders
who have already been stigmatized and found delinquent on previous occasions
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will be dealt with by the court. Nor does the evidence from those
jurisdictions where defence counsel have appeared in juvenile court on a
regular basis seem to substantiate any of the gross distortions of the
juvenile justice system that have been predicted as a result of the
participation of counsel. On the contrary, the experience under the New York
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law guardian and California public defender systems, in a number of American
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juvenile courts after Gault, and in the few Canadian courts operating with
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legal aid duty counsel present on a regular basis, tends to disprove the theory
that the introduction of defence counsel would inevitably hinder the court's
welfare functions or import into the juvenile court process disruptive and
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detrimental influences.

Having concluded that the presence of legal counsel in juvenile
court is both justified and desirable, a second question must then be faced:
do the most recent Canadian reform proposals go far enough? As we have seen,
the Y.P.I.C.W.T.L. Draft Act provides only that a young person is to be
notified of his right to the assistance of counsel (or, in lieu of counsel,
to that of some other responsible person, subject to certain restrictions)
during any proceedings pursuant to that legislation. Such a proposal is
clearly quite conservative compared to that enunciated by the U.S. Supreme
Court in Gault, whereby free legal counsel was to be supplied to any child
unable to retain his own. Should any new legislation attempt to duplicate

this aspect of Gault? Even prior to the publication of the Y.P.I.C.W.T.L. Report, some commentators were arguing that this question must be answered in the affirmative. MacDonald, for example, suggested that in the light of the fact that most young persons appearing in juvenile court come from low income families unable to afford a lawyer, no legislative attempt to protect the legal rights of children could be meaningful unless it guaranteed legal^{61.} counsel at public expense. Others, such as Grygier, were quick to point out the dangers inherent in allowing other persons, such as a child's parent or^{62.} guardian, to assist him in conducting his defence. Clearly, if we do agree with Fortas, J. that "the right to representation by counsel is not a^{63.} formality...it is the essence of justice," it can hardly be argued that any progress at all has been made in the attempt to provide "justice" for juveniles in this country until free legal counsel for all those unable to obtain their own has become a reality. Similarly, if the provisions in the preamble to the proposed Draft Act guaranteeing a young person "a right to special safeguards and assistance in the preservation of [their] rights and freedoms and in the application of the principles stated in the Canadian Bill of Rights and elsewhere" and "a right to be heard in the course of, and to participate in, the processes that lead to decisions that effect them" are to be meaningful at all, it would seem that there must be some sort of statutory guarantee that all young persons, rich or poor, will be able to call on counsel to represent their interests in any proceeding under that Act. The current experience in most Canadian courts, whereby all children have the "right to retain counsel" yet few actually do, demonstrates how devoid of meaning that "right" is for those typically the subjects of juvenile court proceedings. In response to those who might suggest that the absence of lawyers merely reflects the lack of any real need for them, we would point to the experience in New York where the enactment of legislation allowing for the appointment of law guardians brought

a dramatic increase in the number of juveniles represented by counsel over the number that were so represented prior to the new Act, when all the juvenile had ^{64.} was the mere "right" to retain counsel. In addition, the experience in numerous jurisdictions suggests that the provision of counsel should not be dependent on any request for counsel or waiver of that right by either a child ^{65.} or his parents. With this point we heartily agree. For these reasons, we firmly endorse the recommendations of the U.S. President's Task Force that: "Counsel should be appointed as a matter of course wherever coercive action is ^{66.} a possibility, without requiring any affirmative choice by child or parent."

A difficult question is how and by whom such counsel is to be provided. Although certain commentators have urged that any new federal legislation should attempt to guarantee legal counsel as of right for all young persons ^{67.} dealt with under that legislation, it is not clear how that could be done. Even if the federal government did agree with the suggestions in the Justice ^{68.} ^{69.} Report and elsewhere that a "law guardian" (ie - a government-funded public defender for juveniles) system comparable to that in New York State would be the best means of delivering free legal services to those in need, it is very doubtful whether the federal government would have any consitutional jurisdiction to establish and operate such a program. The Solicitor'General's Committee seems to have recognized this fact, for although it acknowledged having considered including in the Draft Act a section dealing with the provision of counsel, it ultimately decided against doing so on the ground that such a matter "concerns more the availability of legal services and funds and a provision in legislation would not alone be sufficient to ensure the ^{70.} development or availability of these resources." For this reason, the Committee chose to leave the responsibility for the development of these "resources", be they permanent child advocates, law guardians, duty counsel or public defender services or merely broader availability of legal aid, to the

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various provincial authorities. We have no quarrel with the Committee's decision to leave the development of these services to the provinces, for it seems that constitutional realities left it little otherchoice. Nor do we propose to decide which of the various suggested methods of delivery of legal services should be adopted by any or all of the provinces. Clearly such decisions must be based not only on the results of a comparison of a wide variety of existing and proposed programs, but also on considerations of local demand and the most efficient means of utilizing available funds.

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However, there is reason for concern that unless the federal government establishes some commitment to or guarantee of the right to state-financed legal counsel, many provinces may be unable or unwilling to develop the needed resources. If this occurred, and there is reason to believe that it might, not only would many young persons be effectively denied the benefits of their "right" to counsel, but, in addition, many of the same regional inequities and disparities that have long been deplored in regard to the application of the J.D.A. itself, to the availability of qualified judges and probation officers, and to access to needed treatment resources would be perpetuated in regard to the availability of legal counsel for the indigent. What can the federal government do? It is suggested that it can and should include in the new legislation a declaration that every young person dealt with under that legislation is not only entitled to be notified of his right to counsel but that he is to be provided with such counsel by the court or otherwise if he is unable to retain his own. Notwithstanding the reservations expressed by the Solicitor-General's Committee, it would seem that such a provision would undoubtedly put the necessary pressure on the provinces to develop schemes for the provision of the requisite resources. But such action alone would not be enough. Having taken such a step, the federal government

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would then have a responsibility to assist in the development and operation of those services. To this end, we would endorse the recommendation that the federal government commit itself to the provision of funds for the development of such services, either through the expansion of the Canada Assistance Plan to include the provision of legal services to juveniles or by the creation of a separate federal-provincial cost-sharing plan dealing solely with that

76. matter. Only in this way would the provision of needed legal services for all Canadian children that come in conflict with the law become a reality. As one Canadian juvenile court judge recently wrote:

[U]ntil all courts have the services of a lawyer to appear on behalf of all young people appearing before our courts, justice will be left undone and many of Mr. Justice Fortas' criticisms [in Gault] will remain valid. 77.

The problem of the right to counsel in juvenile court is indeed a complex and multifaceted one. No sooner does one decide that a child is entitled to be represented in juvenile proceedings, than he is faced with a whole battery of accompanying questions: Who does the lawyer represent, the child or the parent? Should indigency be the sole test for the provision of government-supported counsel? Can the right to counsel ever be meaningfully waived, and if so, by whom and in what circumstances? Although the

78. experience in other jurisdictions suggests answers to each of these problems, there are innumerable others that have yet to be answered.

One issue that has yet to be resolved is that of the proper role for counsel for the child in juvenile court proceedings. It seems that, particularly in the United States, in the rush to declare and implement the right of the juvenile to legal representation, most courts and legislatures either forgot or deliberately declined to define with any precision what the

79. role of the child's counsel was to be. In the years following Gault, some confusion has arisen in a number of American juvenile courts as increasing

numbers of lawyers, trained in the adversarial system, suddenly found themselves thrust into a new and unfamiliar setting. More than one study has demonstrated the difficulties experienced by some judges, probation officers, and defence counsel in defining their respective roles. A series of recent empirical studies conducted in the juvenile courts in Toronto have revealed similar uncertainty and inconsistency regarding the role of duty counsel and private defence counsel in Canadian courts as well. In addition, there is a rapidly growing body of Canadian and American literature dealing with this very issue from various different perspectives. However, despite the considerable amount of attention this problem has received, no clear, concise and practical guidelines for the uncertain defence counsel have found general acceptance in the legal profession.

The stage of the proceedings wherein the defence lawyer's role seems most in doubt is that of adjudication. The basic question has been whether or not the lawyer should use tactics inherited from criminal court practice, and if so, to what extent? As stated by the McRuer Commission, the problem is that the juvenile courts judge's rehabilitative function:

...can not be properly performed if he is surrounded by too many legalistic trappings; nevertheless there must be some basic ones... It is most difficult to lay down specific rules ...which would adequately protect the civil rights of those appearing before [the court], without unduly limiting the court's social function. 84.

Because of a lack of such "specific rules" or even general judicial or legislative guidelines, a lawyer undertaking juvenile court work has generally been left to his own devices to decide:

...is he an advocate in the traditional legal sense of the term, defending in every available ethical way, the rights of his juvenile client? Or is he a legal officer doing social work ... striving to conciliate conflicting parties in a manner that will serve the ultimate "best interests" of the juvenile? Or is his responsibility some kind of an amalgamation of the two roles, so that he is at times an unrelenting legal advocate for his client, and at other times a willing social disciplinarian of youth? 85.

As is apparent from a review of the literature, "expert" opinion on this issue is quite divided. While many commentators feel that the lawyer should limit his use of "legal tactics" so as to avoid any possibility of obstructing the rehabilitative efforts of the court, others, including the U.S. Supreme Court, have taken a more rigid, legalistic approach. A third body of opinion, rejecting the extreme positions taken by both the "rehabilitative group" and the "advocate group" (as they are sometimes called) argues that these two functions are not mutually exclusive. This group suggests that a defence lawyer should perform the tri-partite function of defending the juvenile client's legal rights, acting to further what he perceives to be the child's best interests, and fulfilling his obligation, as an officer of the court, "to interpret the court and its objectives to both parent and child, to prevent misrepresentation and perjury in the presentation of facts and to disclose to the court all facts and circumstances which bear upon the proper disposition of the matter." However, as even the supporters of this position admit, experience has shown how rarely all three of these functions can be accommodated.

Much less controversy has arisen regarding the role of defence counsel at the dispositional stage. Although, as we have noted earlier, there are still some who insist that because this stage is more social in nature than legal, it allows no role for the lawyer to play, most critics agree that there

are a number of functions arising out of the dispositional process that
independant counsel is best equipped to fulfil. Although there are differences
in the manner in which those in the "advocate" and those in the "rehabilitative"
schools regard the lawyer's exercise of these functions (the former
encouraging, the latter at times only tolerating them) most would agree that
the lawyer can assist the court in making a thoroughly informed disposition
by volunteering information on the child's personality, home life, associates,
and other mitigating factors as well as by making suggestions about the
method of treatment. If the intake process involves a system of pre-judicial
dispositions, obviously many of those functions would be equally applicable
at that stage, too.

Because of the complexity of the problem of the role of counsel in
juvenile court, we do not propose to attempt to resolve it here. Although we
are firmly of the belief that the lawyer in juvenile court, no less than in
any other court, must stand as the ardent defender of his client's legal
rights, it is impossible to ignore the fact that at the same time his role
must also include that of "counsellor" and "officer of the court". Which of
these three roles should take priority when one or more of them conflict, as
they inevitably will, is a question that would not seem answerable by means of
a hard and fast rule.

What effect can one expect the Y.P.I.C.W.T.L. Proposals to have on this
debate? It would seem that, through its emphasis on procedural and
substantive legal safeguards, the Y.P.I.C.W.T.L. Proposals strongly support
the "advocate" view of the defence lawyer's proper functions, at least as far
as the adjudicatory stage of delinquency proceedings are concerned. To begin
with, the declaration of the child's right to counsel during all proceedings
(including pre-trial and post-dispositional proceedings) would obviously

preclude any remaining doubts that the lawyer has a role to play in each and every stage of a delinquency proceeding.^{97.} Secondly, the recommendations for the abandonment of the general offence of delinquency in favour of specific statutory offences clearly suggests that the juvenile court is no longer to have the broad, wide-ranging mandate for intervention that it did under the J.D.A., and as a result the rationale underlying the "rehabilitative" position loses much of its force. Similarly, by separating more clearly the adjudicatory and dispositional stages of the hearing, the proposed Draft Act would appear to weaken those arguments that the court's rehabilitative goals should require limitations on the role of defence counsel at the adjudicatory stage. Other significant proposed reforms include the deletion of those provisions of the J.D.A. that declared that proceedings were to be "as⁹⁸ informal as the circumstances will permit" and that no decision was to be set aside "because of any informality or irregularity where it appears that the^{99.} disposition of the case was in the best interests of the child", as well as the expansion of the child's rights of appeal. Not only do these reforms encourage the development of procedure more analogous to that in the adult criminal courts but they also seem to reverse the J.D.A.'s preference of the "best interests of the child" over the interest of procedural regularity. These changes, too, reinforce the argument that the role of the lawyer under the new legislation should be one closely akin to that of defence counsel in the adult criminal courts. Finally, there are a number of principles articulated in the preamble to the Draft Act that also tend to support this view. Clearly if a young person is to have "basic rights and fundamental freedoms no less than those of adults" and "a right to special safeguards and assistance in the preservation of those rights and freedoms and in the application of the principles stated in the Canadian Bill of Rights and

elsewhere", he would seem to be entitled to have counsel act on his behalf in a legalistic and adversarial manner, just as he would be if he were on trial in adult criminal proceedings. Similarly," the right to be heard in the course of, and to participate in, the processes that lead to decisions that affect [him]", [emphasis added] would seem to necessarily imply the right to instruct counsel and to have that counsel put forward the client's views, and not merely his own personal views as to what decision would be in the client's best interests. In this context, the conception of lawyer as amicus curiae or as social worker seems quite inconsistent with the intent of the legislation. By the same token, the right not to be brought to court unless one's "acts or omissions can not be adequately dealt with otherwise" and the right "to the least invasion of privacy and interference with freedom that is compatible with their own interests and those of their families and society" would seem to expand and clarify the adversarial aspects of the defence counsel's role at the intake and dispositional stages, respectively. 100.

In a study published after the demise of Bill C-192 but prior to the issuance of the most recent legislative proposals, P. Erickson concluded:

Whether Canadian juvenile courts are to be guided in the future by some form of cooperative, conflict or non-interventionist model awaits legislative decision. Certain assumptions regarding the child's rights and the justifiable bases for intervention in his life will underly the ultimate choice. As Stapleton and Teitelbaum succinctly pose the question: "Is the distance between the child and the state the same as that between the adult and the state?"... These are fundamental issues of political philosophy that cannot be easily resolved. Clarification of defence counsel's role must await answers to these basic questions. 101.

Although the Y.P.I.C.W.T.L. Report certainly does contain a new set of such "assumptions" and, as we have suggested, one is able to deduce from them a

preference of one particular characterization of defence counsel's role, the ultimate effect the proposed legislation will have on role expectations for the lawyer will only become apparent if and when the proposed legislation becomes law and experience is gained in its implementation. Until we are more familiar with the theoretical and practical dynamics of the new system (and, particularly, the manner in which the principles articulated in the preamble will be interpreted in practice by the courts) it will be premature to try to delineate in any great detail the roles and functions appropriate to any of the characters in that system. Perhaps, even at that stage, it will be expecting too much to look to the legislation for a simple answer to the question: what should be the role of defence counsel in juvenile court?
102.
Indeed, as the Justice Report implied, perhaps the question is not a proper one for the legislators at all, but rather one that the legal profession itself must grapple with and attempt to resolve as it expands its understanding of and experience in juvenile matters.

C. Publicity and Private Hearings

Although less critical an issue than that of the presence of counsel, the topic of the publicity and privacy of juvenile court hearings has given rise to nearly as wide a diversity of opinion. It will be recalled that a major criticism of the J.D.A. in recent years has been that the restrictions on publicity of and attendance at juvenile hearings have obstructed community input to and public awareness of the juvenile justice system.¹ Similarly, it has often been argued that the dangers posed to the rights and liabilities of young persons arising from the lack of procedural safeguards are substantially increased by the fact that proceedings in juvenile court are generally not subjected to the critical eye of public scrutiny.² Some commentators have attempted to analyze the subject of publicity and privacy in terms of three separate issues:

- (i) Should there be limitations, and if so, what limitations on the publicity of juvenile court proceedings?
- (ii) Should juvenile court hearings be open to the public or should they be conducted in camera?
- (iii) Should the juvenile court judge have the power to admit or exclude certain persons on special grounds?

While we agree that each of these questions are important and merit careful consideration, it would seem impossible, because of the interrelation between the three, to consider any one of them in isolation from the other two. For this reason, we shall in this section deal collectively with these three interlocking issues, considering first the pertinent existing law, secondly the recommendations of the three law reform bodies and the policy considerations on which they were based, and finally, certain problems arising from the most recent proposals.

As noted on a number of occasions during the course of this paper, proceedings under the J.D.A. are usually held in camera and without the publicity usually accompanying proceedings in the adult courts. Surprisingly, however, while the practice of in camera juvenile hearings may be commonplace, the authority for such exclusion of the public is still rather uncertain. The only two sections in the J.D.A. relevant to the issues of publicity and private hearings are sections 12 and 24. Section 12 provides that trials shall take place without publicity and separately and apart from the trials of other accused persons,³ that trials may be held in the private office of the judge or in some other private room in the court house,⁴ and that no report of a delinquency etc. in which a child's name or identity is disclosed or indicated shall be published without leave of the court.⁵ Section 24 provides that, subject to certain exceptions, no child shall be permitted to be present in court during a trial unless his presence is required.⁶ In addition, two sections of the Criminal Code may be applicable to juvenile proceedings.⁷ Section 441 provides that "[w]here an accused is or appears to be under the age of sixteen years, his trial shall take place without publicity,"⁸ and section 442 provides:

The trial of an accused . . . who is or appears to be sixteen years of age or more shall be held in open court, but where the . . . judge . . . is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room, he may so order.

What is the effect of the above provisions? According to Adamson, C.J.M., section 12 does not constitute authority for conducting hearings in private:

. . . [N]o power is given by the Juvenile Delinquents Act to exclude the general public or to hold trials in camera. The only authority that a juvenile court judge has to hold trials in camera is the general one, seldom used, provided in the Criminal Code to exclude the public or certain classes or age groups in the interests of public morality . . . The salutary practice of public trials should not be departed from to any greater extent than the statute specifically requires. 9

However, the opposite conclusion was reached by Manson, J. in R. v. H. and H.¹⁰ Although he acknowledged the principle that an exception to the general rule that trials are to be held in open court "is not to be countenanced unless . . . as a result of clear and unmistakeable statutory enactment"¹¹ as well as the fact that his interpretation of section 12(1) resulted in an inconsistency between that sub-section and subsections (3) and (4) of section 12,¹² Manson, J. held that the words "without publicity" in section 12(1) are to be read as synonymous with "in camera". In his view, section 12(1) "constitutes a statutory exception to the general rule that trials shall be held in public."¹³ Turning to the section¹⁴ dealing with the right of members of the juvenile court committee to attend juvenile court hearings, he commented:

A fair inference therefrom is that the court is to be held in camera except for members of the Juvenile Court Committee, and, of course, such persons as are entitled to be present at a trial in camera. 15

As has been suggested elsewhere,¹⁶ it is doubtful whether, on a strict reading of section 12(1), Manson, J.'s interpretation is correct. As Adamson, C.J.M., points out, there is a distinction between "without publicity" and "in private," and it is significant that the well-known and understood legal phrase "in camera" was not used.¹⁷ Similarly, although section 12(2) allows a trial to be held in "a private office

of the judge or some other private room," it would seem that this sub-section is more concerned with the place of the trial than with who is or is not to have access to that proceeding.¹⁸ In fact, the implication to be drawn from the very existence of sub-sections 12(2), 12(3) and section 24 is that the public and press have not been excluded by sub-section 12(1).¹⁹ At the very least, a due process advocate would argue,²⁰ "so fundamental and historical a right as the right to a fair and open trial cannot be cut down by inference."²¹

Although the matter is not free from uncertainty,²² it is suggested that the view of Adamson, C.J.M. is the correct statement of the law. Accepting this view, section 12(1) would not authorize the conducting of juvenile court proceedings in private. However, assuming its applicability to juvenile matters,²³ section 442 of the Code would still give a juvenile court judge the discretion to conduct proceedings in camera where the accused is over the age of sixteen and where it would be in the interest of public morals, the maintenance of order, or the proper administration of justice to so order. But what about cases where the juvenile is under the age of sixteen? If the interpretation we have given to section 12(1) is correct, one would expect section 441 of the Code to be given a similar construction; accordingly, although it would bar publicity of the trials of such persons, it would not limit access to the public.²⁴ Although one might argue that the common law exception (in the case of wards of the court) to the rule prescribing publicity of and free access to judicial proceedings still applies to those under sixteen,²⁵ there is little doubt that such a discretionary provision would not be applicable in juvenile court proceedings wherein neither the judge²⁶ nor the governing legislation²⁷ is clothed with a parens

patriae jurisdiction. We can conclude therefore, that while a juvenile over the age of sixteen years can be deprived of an open trial in the circumstances listed in section 442, the corresponding right of a juvenile under sixteen is inviolable, except, possibly, in certain very exceptional circumstances.²⁸

How was the issue of publicity and privacy dealt with in the recent Canadian law reform documents? In its Report, the Department of Justice Committee affirmed the philosophy expressed in section 12 that publicity in regard to juvenile proceedings is to be avoided.²⁹ Regarding the question of publicity, it recommended that the identification ban in section 12(3) should extend, not only to newspapers and similar publications, but also to radio and television, that it should apply also to children involved in criminal proceedings in adult court where the offence involves conduct contrary to decency or morality, and that it should be reinforced by an adequate penalty provision.³⁰ Regarding the question of privacy, the Committee dealt separately with access to the press and to members of the general public. Recognizing the importance of the press' "public watchdog" function, it recommended that representatives of the news media should be permitted to attend juvenile court hearings as of right and except where expressly prohibited by the judge, should be permitted to report the evidence adduced at the hearing, subject always to the aforementioned identification ban.³¹ Finally, it recommended that the legislation should specifically provide that members of the public are not permitted to attend juvenile court proceedings, subject to the judge's discretion to permit any member of the public to attend where he is satisfied that such a person has a bona fide reason to be present.³²

Both Bill C-192 and the YPICWTL Draft Act adopted the recommendations of the Justice Report and, as a result, the relevant provisions in each one are virtually identical. Both provide that juvenile court proceedings are to take place without publicity and in the absence of the general public, but that the judge may admit to the proceedings "any person who, in his opinion, has a valid interest in the case or in the work of the court."³³ Both allow a designated number of representatives of the media to appear in juvenile court as of right, plus additional representatives in the discretion of the judge.³⁴ Finally, both continue and expand the scope of the ban on identification contained in section 12(2) of the J.D.A., the Draft Act providing that no person may, without the permission of the juvenile court judge, publish any proceedings of the juvenile court which would have the effect of identifying a juvenile who is charged in the proceedings, or appears as a victim or as a witness.³⁵ Violation of the identification ban would now constitute an offence punishable on summary conviction.³⁶

The interlocking questions of publicity and privacy involve similar considerations to those that we have found operative in other areas of delinquency law reform. There seems to be two very distinct arguments in favour of greater publicity of and access to juvenile court proceedings. One is that the "fear engendered by public notoriety" will act as a deterrent to the juvenile or as a warning to parents of delinquency-prone youngsters,³⁷ and the other is that the accused has a right and the public an interest in open and public trials as a guarantee of fair trial procedures.³⁸ The traditional argument against publicity has been well put by Professor Mannheim:

The fullest publicity for every criminal trial has been one of the basic safeguards of enlightened criminal justice On the other hand, it has been recognized ever since the establishment of Juvenile Courts that this great principle is not equally suitable for

the trial of juveniles. In the first place, the danger of political and social bias which publicity of the trial is intended to guard against does not to the same extent exist in cases of juveniles. Secondly, . . . it is obvious that the benefits of publicity, great as they may be, would here be bought at too great a price. If the stigma . . . which is the almost inevitable consequence of a public trial is often an undeservedly severe penalty even for the adult offender, in the case of the juvenile delinquent it would mean the most flagrant negation of all those ideals the Juvenile Court stands for. Moreover, the force of imitation being particularly strong in the immature mind, more juveniles are likely to be encouraged than might be deterred by publicizing their own criminal exploits or those of their contemporaries. Juvenile Court Acts everywhere have, therefore, in one way or another restricted the publicity of the trial of juveniles.

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Substantially similar considerations are involved in the issue of the privacy of juvenile hearings.⁴⁰

The Solicitor-General's Committee expressed the problem as one of "finding an adequate balance between meeting the needs of the young person and keeping the public informed of youth court proceedings in the interest of society."⁴¹ Although it was concerned to protect a young person and his family from undue influence in their lives, it also sought to keep the public informed in order to protect against possible abuses resulting from private proceedings.⁴² It is suggested that the Committee's proposals do constitute a reasonable compromise between these two conflicting objectives.⁴³ By restricting access to and publicity of juvenile court proceedings, the proposals avoid much of the stigma that the social scientists suggest would accompany open hearings. At the same time, the provisions allowing access to representatives of the media, although still restricted by the ban on identification, would seem to allow for a means of achieving the same "public watchdog" purposes that the pro-publicity and pro-open hearing

advocates pursue. By implementing the Justice Report's recommendations aimed at clarifying and expanding the protections contained in section 12 of the J.D.A., it would appear that the proposed provisions are a significant improvement over that in the J.D.A. However, there does seem to be some inconsistency between, on the one hand, the proposals and policy considerations weighed by the Committee in reaching these proposals, and, on the other hand, the rights of a juvenile articulated in the preamble to the Draft Act. Although the Committee's compromise solution would appear to further the juvenile's right "to the least invasion of privacy and interference with freedom that is compatible with their own interests . . ."⁴⁴ it is questionable whether it is consistent with the declaration that young persons are to have "basic rights and fundamental freedoms no less than those of adults,"⁴⁵ particularly in light of the fact that the right to an open trial is one of the most important rights possessed by an adult in our system of criminal justice. It would seem that, in order to maintain consistency between the preamble and section 20 of the Draft Act, either the juvenile or his counsel must be given the option of waiving the protections of section 26 or the clause "young persons have basic right and fundamental freedoms no less than those of adults"⁴⁶ should be modified by the words "to the extent that those rights and freedoms are compatible with their own interests and those of their families and of society". With the Draft Act in its present state, the Solicitor-General's Committee appears to be in the awkward position of articulating due process principles in the Draft Act's preamble while discarding those in favour of parens patriae considerations in the body of the Draft Act itself.

A second problem arising from the most recent proposals would appear to be the divergence between this approach and that recently adopted by the province of British Columbia. As discussed elsewhere in this paper,⁴⁷ recent legislation resulting from recommendations of the Berger Commission

has established that in this province Provincial Court proceedings dealing with family or children's matters shall be open to the public, subject to the judge's power to exclude individuals on the ground of prejudice to a party or interference with the administration of justice, and subject to a ban on the publication of identifying information similar to that found in J.D.A., section 12(3).⁴⁸ Although this provision to date only applies to proceedings under certain provincial legislation,⁴⁹ and although it is arguable that, as a result of the discretion vested in the presiding judge, both this approach and that in the Draft Act may ultimately lead to the same results in practice,⁵⁰ there would appear to be a greater likelihood of inconsistency and injustice where proceedings under provincial legislation are prima facie open and proceedings under related federal legislation are prima facie closed.⁵¹

A final question relates to the possible effect of the Canadian Bill of Rights on the right of a juvenile to an open trial. Section 2(f) of the Bill provides "that no law of Canada is to be construed or applied so as to deprive a person charged with a criminal offence of the right to . . . a fair and public hearing." Since the Canadian Bill of Rights applies to juveniles as well as to adults,⁵² and since a charge under either the J.D.A. or the Draft Act would, by its very nature, constitute a "criminal offence",⁵³ one might argue that notwithstanding the provisions of the J.D.A., section 12 or the Draft Act, section 26, section 2 of the Bill gives a juvenile an unqualified right to insist upon an open trial. Does section 2(f) have this effect? According to Tarnopolsky, it was clearly the intention of the draftsman of the Bill of Rights that it should.⁵⁴ However, the only reported decision dealing with the effect of section 2(f) on the right to an open trial appears to reach the opposite conclusion. In Benning v. A.-G. for Saskatchewan,⁵⁵ MacPherson, J. dismissed an application for prohibition based, inter alia upon an allegation that the refusal

of the magistrate to hold an open trial on a charge of indecent exposure involving young children was contrary to the Bill of Rights. Taking a very narrow view of the effect of the Bill, he held that the discretionary power to exclude the public from the court under the Code, section 442, is not affected by section 2(f).⁵⁶ Tarnopolsky takes the position that Benning was wrongly decided:

While it is eminently reasonable that in a case such as the one before MacPherson J., where young children were involved, the trial should be held in closed court, the terms of the Bill of Rights are clear. If the result is absurd, amendment is necessary. 57

Although Tarnopolsky's view may indeed be more consistent with the intentions of the draftsman, the more recent decisions of the Supreme Court of Canada⁵⁸ would tend to support the interpretation drawn in Benning. As a result, barring a change in the direction of judicial construction of the Bill, one can reasonably assume that provisions in federal legislation restricting publicity of and access to juvenile trials will be unaffected by the Canadian Bill of Rights.

D. Notice and Duty to Attend

A fundamental ingredient of procedural justice in any context is that of notice. In the context of federal delinquency legislation, the question of notice involves a number of aspects: In what circumstances is the parent of a child entitled to notice of legal proceedings involving that child? Upon whom should the obligation to give notice rest? What type of notice is sufficient? What is the effect of failure to give proper notice? A related question is whether, once they have been given notice, parents should be required to attend the proceedings.

The key provision in the J.D.A. regarding notice is s.10(1) which provides that "due notice of the hearing of any charge of delinquency shall be served on the parent or parents or the guardian of the child..." Because the section only refers to notice of "the hearing of any charge of delinquency", it has been held that the J.D.A. does not require that notice be served on parents in connection with a hearing on an application for waiver,¹ nor does it require that parents be notified of a child's detention,² although notice in the latter case is often given in practice. Similarly, although a number of recent cases have suggested that police should, in practice, allow a parent or relative of a child to be present when questioning or taking a statement from the child, it is clear that there is no rule of law that a parent or person in loco parentis must be notified or be present before police commence interrogation of a juvenile.³ Where the child has previously been committed to the care of the Superintendent of Child Welfare,⁴ notice is sufficient if it is given to the Superintendent.

Just as the J.D.A. does not specify who is responsible for the giving of notice, it also fails to explain what "due notice" under s.10(1) requires.⁵ The result has been considerable uncertainty. It has been held that sufficient notice is not given where a juvenile's mother is told of the

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hearing only after she goes to the police station on the day of the hearing.
Similarly, the mere fact that a parent sends another adult to attend the
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hearing in her place is not sufficient proof of compliance with the statute.
In addition, although there is authority for the proposition that the
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requirement in s.10(1) is only satisfied by notice in writing, it appears
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that many juvenile courts still require only oral notice. The drafting
of s.10(1) has led to other problems, particularly as a result of its
failure to allow for substituted service or for dispensing with service
in certain cases. Because the section allows for service on "some near
relative" only where there is no parent or guardian or where the residence
of either is unknown, some children have remained in detention for weeks
pending notice to their parents, notwithstanding the availability of some
other adult to represent them, where the residence of their parents was
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known but inaccessible. There are, however, two matters that are beyond
doubt. The first is that a failure to comply with s.10 deprives the
juvenile court of jurisdiction and will be a sufficient ground for quashing
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a juvenile court conviction or other decision on appeal. The second is
that there is no duty at law on parents to attend proceedings involving
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their child.

In its Report, the Department of Justice Committee recommended that
the procedure for giving notice should be clarified and expanded. It
recommended that there should be a legal duty to notify the parents or
guardian of every step in a proceeding (including detention, hearing, waiver
application, etc.) that may affect the child's liberty, even though the
parent may have disregarded previous notices, and that this duty should
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rest on every official exercising power under the J.D.A. Where the notice
relates to an actual hearing in juvenile court, whether for the purpose of
dealing with a charge or with a waiver application, the Committee suggested

that the notice should be in writing; accordingly, it recommended that a set of standard forms, including a standard form of notice, should be a part of any new legislation.¹⁴ In order to meet with the problems noted earlier, it recommended that the juvenile court judge be authorized, where necessary, to permit substituted service of notices, or to order that notice may be served on some other relative or advisor who would be entitled to appear on the child's behalf.¹⁵ Finally, regarding the duty to attend, the Committee recommended that new legislation should provide for compulsory attendance of parents at juvenile court hearings involving their child, subject to the court's power to dispense with their attendance in special circumstances.¹⁶

Bill C-192 responded to some, but not all, of the Justice Committee's recommendations. While it did clarify the form and content of proper notice and did provide standard forms for that purpose,¹⁷ it only went so far as to require that notice be given when a summons is issued or a juvenile arrested.¹⁸ Similarly, although it did offer a procedure for substituted service,¹⁹ and continued the provision in J.D.A., s.10(1) regarding notice to a relative or friend when the juvenile has no parents or their whereabouts is unknown,²⁰ it did not deal adequately with the situation noted earlier where the parents' whereabouts may be known but they themselves are inaccessible.²¹ It did, however, fully implement the Justice Report's recommendations regarding the attendance of parents, imposing a requirement that parents must appear in juvenile court with their children (breach of which constitutes a contempt of court),²² unless relieved of the obligation by the juvenile court judge on the grounds of "undue hardship".²³ While the Bill's notice provisions as a whole did not attract much critical response, the mandatory attendance requirement was attacked by at least one professional group.²⁴

Although similar in many respects to the approach taken in Bill C-192,

the Draft Act's notice provisions are much more detailed, as well as containing a number of entirely new and controversial innovations. Section 6 of the Draft Act deals with a number of distinct situations. Where a police officer "upon arresting a young person, restrains his liberty temporarily, not in a place of detention," he is required to give oral or written notice as soon as possible of the whereabouts of the young person and the reason²⁷ for the restraint. In addition, in cases involving arrest and detention,²⁸ issuance of an appearance notice,²⁹ or issuance of a summons or warrant for appearance or arrest,³⁰ the person in charge or the person issuing the appearance notice, summons, or warrant, as the case may be, is required to³¹ give, as soon as possible, written notice of the place of detention or care (where applicable), the nature of the charge, the next step in the³² proceedings, and the right to counsel. Three other new provisions offer a substantial change from the present law:

- (1) Although notice is normally to be given to a parent, when a parent is "not available" it may be given, instead, to³³ an adult relative or friend.
- (2) Where a juvenile over the age of sixteen so requests, and³⁴ a judge consents, no notice is to be given.
- (3) The failure to give notice does not invalidate subsequent³⁵ proceedings.

Finally, although the Committee felt that parents should generally attend juvenile court proceedings involving their children, it left it to the judge's discretion to require the parents' attendance where he is "of the opinion that the attendance in youth court...will be to the advantage of the young³⁶ person or parent."

Having accepted the proposition that juvenile court proceedings should be conducted according to the principles of due process and in a manner

consistent with fairness and fundamental procedural safeguards, it should no longer be necessary to justify the requirement of notice. Indeed, the very fact that the draftsman of the J.D.A., despite his willingness to dispense with most of the "procedural niceties" of criminal procedure, saw fit to retain in that legislation a mandatory notice requirement, is perhaps the clearest indication of the importance of notice to parents of proceedings involving their children. As a result, there should be little ground for disagreement with the view expressed in the YPICWTL Report that "parents have a right to be informed of the State's intervention in the life of their child, as does a child have a right to have his parents so informed." 38

However, agreement in principle does not necessarily imply agreement with practice. Although we are in agreement with the general objectives of section 6, there are a number of aspects of the provision that raise potential problems and therefore require comment:

(1) The Justice Report recommended that the procedure for giving notice should be "clarified and expanded". Are the proposed notice provisions sufficiently clear? A close examination of the section reveals a number of vague or potentially confusing terms. For example, it is unclear what is meant by the words "upon arresting a young person, restrains his liberty temporarily" in section 6(1). Isn't every arrest a "restraint" on one's liberty? If so, why is the second phrase necessary? If not, what is the provision aimed at? The meaning of the word "available" in section 6(3) is also somewhat vague. Although some critics may argue that the term should remain undefined so as to allow officials sufficient flexibility to circumvent many of the practical problems that may arise, would it not be unjust if, as a result of this imprecise provision, a parent was deprived of his right to notice merely because of some temporary inconvenience in contacting him? Similarly, the phrase "as soon as possible", used throughout

section 6, may be so vague as to be useless. Perhaps the addition of the words "in any case no later than 24 hours" would help to add an element of certainty. Finally, there may be difficulty in interpreting the phrase "substance of charge" in section 6(5). Since the notice would usually be given before an information was laid, would it be necessary to specify with accuracy the precise charge that might ultimately be laid, or would it be sufficient to merely recite the alleged facts giving rise to a possible offence? It would seem important that all of these drafting problems be attended to before this provision of the Draft Act is fit to become law.

(2) Do the provisions expand the right to notice sufficiently? Although most due process advocates will applaud the requirement of notice upon arrest, at the same time they would undoubtedly deplore the fact that the Solicitor-General's Committee did not see fit to adopt the Justice Report's recommendation requiring notice "of every step in a proceeding that may

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affect the child's liberty." In this vein, it is interesting to note that, under the proposed provisions, once notice upon arrest has been given the obligation of giving notice is exhausted. In addition, the Draft Act only requires notice of "the next step in the proceedings in so far as

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known." Since, in most cases, the "next step" following an arrest

would probably be interrogation of the child by the police, a review of

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detention, or an appearance before the screening agency, it would seem

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that in most situations the Draft Act would not even require notice of the

actual hearing in juvenile court, much less notice of other interlocutory

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and post-adjudicatory events such as applications to transfer, the fact

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of a transfer to adult court, any eventual finding or disposition, any

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subsequent detention for purposes of a medical examination or as a result

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of a finding of insanity, transfers of jurisdiction or of disposition,

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subsequent reviews of disposition, or appeals. If this interpretation

of section 6 is correct, the legislation would have the effect of implicitly denying a child and his parents the right to notice of the most important stage of the proceedings - the trial itself - ⁵¹ as well as numerous other possible steps in the juvenile court proceeding. If, on the other hand, the word "step" is interpreted so as only to refer to judicial proceedings, such as the trial itself, the provision would still seem unsatisfactory in that it would not require any notice to parents of police interrogation of the child. The failure to require notice prior to police interrogation would seem to be especially troublesome, particularly in light of the failure of the courts, in the past, to adequately protect the child's interests in such a procedure, as well as the inadequate protection offered by other provisions in the proposed legislation. ⁵² Regardless of whether these consequences were deliberate or unintentional, it is suggested that revision of this section, preferably along the lines proposed by the Justice Committee, is essential.

(3) Should a juvenile over the age of 16 be allowed to prevent notice being given to his parents? Undoubtedly there have been and will continue to be certain situations in which the involvement of a young person's parents would not be helpful to either the young person or the court, or could, in fact, even be prejudicial to the interests of either the young person or his parents. However, one would expect the number of these cases to be relatively small. The problem that we anticipate once juveniles become aware of this right is that of what criteria should guide the judge's exercise of discretion under section 6(7). Unfortunately, neither the preamble nor the notice provision itself would assist the judge in this difficult and important decision. Since notice provisions of this sort ⁵³ are for the protection and benefit of both the child and his parents, and since the treatment of a child's problems is often dependent on the

resolution of broader family problems, it would seem reasonable that a judge should only give his consent under section 6(7) in the rare case where he is convinced that the family relationship has little or no value.

Furthermore, since, in the majority of cases, a judge would not be in a position to reach such a drastic conclusion merely on the basis of the juvenile's own story,⁵⁴ we would suggest that section 6(7) should be re-drafted so as to indicate more clearly the exceptional nature of this relief, and, perhaps, the factors that should guide the court in its exercise of this discretion.

(4) Without a doubt, the most objectionable provision in section 6 from a due process point of view is that in subsection 6(9) reversing the present rule that failure to give notice as prescribed is a ground for quashing the proceedings.⁵⁵ Why this provision was inserted at all is not clear. Neither the Justice Report nor Bill C-192 contemplated such a provision, nor is it explained in the YPICWTL Report itself. It would seem obvious that without the sanction of invalidity, the remainder of the notice provisions with lose much of their effect and the "right to notice" will become little more than a privilege, the availability of which would depend solely on the whim and fancy of individual police officers. For this reason, it is urged without reservation that sub-section 6(9) be deleted in toto.

As suggested earlier, we are of the view that, except in very rare cases, parents should be encouraged and given the opportunity to become involved in juvenile court proceedings involving their children. However, we agree with the Canadian Criminology and Corrections Association that parents can't be forced to be good parents and that in most cases little can be gained by forcing them to attend the hearing against their will.⁵⁶ It is for this reason that we feel that the provision in the Draft Act

allowing the judge to compel their attendance only if he is of the opinion that it will be to the advantage of the young person or parent is a much more sensible and realistic approach than that advocated in the Justice⁵⁷ Report and proposed in Bill C-192. As in the case of the discretion to waive the notice requirement, it is expected that this power would only be exercised in exceptional cases.

E. The Conduct of the Proceedings

As noted earlier, prosecutions and trials in juvenile court are generally "governed by the provisions of the Criminal Code relating to summary convictions in so far as such provisions are applicable." ¹ In attempting to determine the exact extent to which these provisions are "applicable", one must consider the effect not only of specific sections in the J.D.A. but also of the provision encouraging informality of proceedings in s.17. In this section we focus on a number of significant features of the juvenile court trial itself. We shall consider a number of problems that have arisen in practice under the J.D.A., how the courts have dealt with these problems, the proposals for reform and the significance thereof. For convenience we propose to deal with these matters under a series of separate headings.

(i) The Information

Most of the reported cases dealing with the laying of informations in juvenile court have arisen out of challenges to the form or contents of informations used in charges against adults under J.D.A., s. 33. Invariably² these decisions have held that the relevant Code provisions and the caselaw³ based thereon are applicable. As a result, there would seem to be no reason to doubt that these provisions and cases also apply to delinquency proceedings under J.D.A., s.3. Although a brief survey of the informations used in cases reported on other grounds suggests that the contents of the informations used⁴ in delinquency proceedings are fairly uniform, it has nonetheless been suggested that in the past many juvenile courts have experienced uncertainty as to the proper form and contents of the information to be used in proceedings against⁵ juveniles under the J.D.A.

A problem that has received surprisingly little judicial attention despite its prime importance in other fields of litigation is that of the limitation period applicable to the commencement of proceedings under the J.D.A. Even more surprising is the fact that the only two reported cases on point purport to resolve the question in conflicting ways. In the case⁶ of In Re Dureault and Dureault, a juvenile was charged with committing a delinquency arising out of a violation of a provincial Highway Traffic Act, and prohibition was sought on the ground that the summons was not issued until after the twenty-day limitation period prescribed in that Act. DuVal, J. dismissed the application, holding that there is no time limitation restricting the commencement of delinquency proceedings in juvenile court. Dealing with⁷ the argument that s.5 of the J.D.A. (as it then read) incorporates the Criminal Code's six-month limitation into summary proceedings, he held that the limitation in s.1142 of the Code(now s.721(2)) had no application to⁸ juvenile court proceedings. Twenty-one years later, following a slight

revision of the wording of s.5, a similar problem arose in Ontario. In
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R. v. M. and D., delinquency charges based on what would have otherwise
been indictable offences under the Criminal Code were laid fourteen months
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after the alleged contraventions. Noting the provisions of Code, s.723,
and authority to the effect that a prosecution is "commenced" when an infor-
mation is laid, Steinberg, Prov. Ct. J. found that subsections 5(1)(b) and
5(2) of the J.D.A. appear to lay down inconsistent rules regarding the
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operative limitation period. Without citing Dureault, he held that Parlia-
ment's intention in enacting s.5(2) must have been to incorporate the six-
month summary conviction time limit in s.72(2) into all juvenile proceedings
which would otherwise have been offences under the Code, even those where
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the alleged offence would have been indictable but for the J.D.A. In the
case of prosecutions in regard to offences not otherwise dealt with under
the Criminal Code, he took the view that Parliament (through s.5(1)(b)) must
have intended that the only applicable limitations would be that specially
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set out in the particular Act giving rise to the offence. Based on this
interpretation, he found the informations in the case at bar to be out of
time and he dismissed them accordingly. Although the decision in R. v. M.
and D. may appear to be a sensible and reasonable one, an historical analysis
of J.D.A., s.5 suggests quite strongly that R. v. M. and D. was wrongly decided
and that there is, except with respect to a few rare exceptions, no limitation
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period applicable to proceedings against a juvenile under the J.D.A.

The Justice Report did not dwell at length on the problems associated
with the information in juvenile court. It merely noted that there had been
some uncertainty and inconsistency in practice regarding the form and contents
of informations and therefore recommended that a standard form of information
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be appended to any new legislation. Bill C-192 followed this recommendation;
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the YPICWTL Draft Act allows for it through regulations. Regarding the problem
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of the relevant limitation period, both documents adopted the limitation period provided in the legislation upon which the charge was based.¹⁸ For greater certainty, the Draft Act provided that s.721(2) of the Code does apply to charges based on summary offences governed by Part XXIV of the Code¹⁹ but not to charges based on indictable offences. Finally, while neither the J.D.A., the Criminal Code, nor Bill C-192 contain any restriction on who has authority to lay an information, the Draft Act provides that no information shall be laid against a juvenile except on the direction of the Attorney General or his agent.²⁰

It is anticipated that few will quarrel with the first two of these three recommendations. To the extent that they achieve certainty and tend to accord juveniles the same protections available to adults, they appear to be progressive and consistent with the thrusts of the new legislation. More opposition may be expected to the third proposal, namely that restricting the authority for laying an information to the "Attorney General or his agent."²¹ Although there may be some doubt as to who would be included in the definition of "agent" for the purposes of this section, some crown attorneys have already taken the position that this section "administers the death blow to the present system of independent prosecutions carried on at a local level"²² and have²³ opposed the new provision both on policy grounds and on the ground that it²⁴ is unconstitutional and contrary to the Canadian Bill of Rights. Without further information as to the problems under current practice and as to the manner in which s.8 would actually be implemented, it is difficult to firmly approve or disapprove of the proposed reform. Nonetheless, a number of comments can be made. We do not agree with the view that the denial of a private complainant's unrestricted power to lay a charge against a juvenile is a significant incursion on individual rights or a threat to the proper administration of justice. On the contrary, it would seem doubtful whether a private

complainant would be able to competently and responsibly exercise the considerable discretion (with respect to referral to the screening agency, commencement of proceedings, and so on) vested in the prosecutor by the new legislation. In addition, there would appear to be merit to the argument that by restricting the prosecutorial discretion to a limited group of (hopefully) specially-trained "experts" in each province, the proposed centralization may result in fewer unnecessary formal interferences in the life of a young person²⁵ as well as a more enlightened and consistent application of the new legislation. Finally, recent authority would seem to suggest that the chances of a successful constitutional attack on this provision are²⁶ relatively minute.

(ii) Arraignment and Plea

Section 736(1) of the Code provides in part that where a defendant appears before a summary conviction court the substance of the information shall be stated to him and he shall be asked whether he pleads guilty or not guilty. Does this requirement as to arraignment and plea apply to proceedings in juvenile court? If so, to what extent can the form of the arraignment and plea be modified from that required in adult court? Finally, can a guilty plea alone be a sufficient ground for conviction under the J.D.A.?

There are three reported cases pertinent to these questions. In R. v. Wigman,²⁷ a sixteen-year-old girl was convicted of juvenile delinquency on the basis of a guilty plea. On a motion for a writ of habeas corpus, the conviction was quashed on the ground that the absence of a provision in the J.D.A. dealing with pleas implies that a child cannot be convicted on his own admission. A completely different approach was taken by Manson, J. in R. v. H. and H.²⁸ To begin with, he took the view that because of special circumstances not disclosed in the report of that case, the decision in R. v. Wigman must be restricted to its facts.²⁹ Secondly, he held that, depending on the age and mentality of the child and the nature of the delinquency charged, a juvenile court judge may often proceed upon the basis of a guilty plea.³⁰ Furthermore, in his view it was not necessary that the precise language of s.736(1) be followed. Instead, he suggested that in many cases it would be sufficient for the judge to explain the charge in a language which the child can understand, followed by the question "Did you do this?" or words to like effect.³¹ However, he did impose a caveat upon this approach:

If there is the least doubt as to what the child has to say, the only safe course to pursue is for the Court to enter upon an inquiry as under subsection 3 of sec.721 [now s.736(3)]. The Court should always be cautious to satisfy itself that the accused understands the offence with which he is charged. 32

Manson J.'s approach was followed in a number of reported cases³³ before the issue arose again in Gerald Smith v. The Queen.³⁴ In this leading case, one of the key issues was the legal effect of a conversation in which the judge asked "there's an information here sonny that . . . [you did] unlawfully and indecently assault H.B. What about that is that correct or not? What did you do?" to which the fourteen-year-old accused replied "We took her pants down and let her go."³⁵ The juvenile court judge held that the juvenile's answer constituted a plea of guilty and subsequently refused to allow its withdrawal. On appeal, the Manitoba Queen's Bench³⁶ and the majority of the Manitoba Court of Appeal³⁷ held that s.736(1) applied and was complied with, albeit in an informal manner, in the present case. Adamson, C.J.M. (dissenting) took the view that this case was not an arraignment as required by statute, but an improper attempt to interrogate the child "in a manner calculated to incriminate him."³⁸ The appeal to the Supreme Court of Canada was allowed on a number of grounds³⁹ and the three of the five judges who dealt with this issue all agreed with the dissenting judgment in the Court of Appeal that the conversation between the juvenile court judge and the accused did not constitute a valid arraignment as required by s.736(1).⁴⁰ As a result of this decision, there is no longer any doubt that arraignment and plea is just as much a condition precedent to jurisdiction in the juvenile court as it is in the adult court.⁴¹ However, the degree of formality required in a proper arraignment and plea is still somewhat unclear, for while Locke and Martland, JJ. seemed to suggest that s.736(1) must be strictly complied with (and, in addition, that the meaning of the charge should also be explained),⁴² Cartwright J. took the view that informal compliance might be enough, and that had the juvenile court judge in the present case not added the words "What did you do?", thereby converting a question as to plea into an invitation to make a statement, the

dialogue between he and the accused might have constituted sufficient compliance with s.736(1).⁴³ Similarly, although (as one commentator suggests)⁴⁴ one might infer from the result that a child can be convicted on a plea alone, this point has yet to be decisively resolved.⁴⁵

In its Report, the Justice Committee acknowledged that a number of problems and some confusion had arisen in practice concerning the matter of arraignment and plea.⁴⁶ It admitted that some juvenile court judges have failed to sufficiently explain the charge to a young person before asking him to plead.⁴⁷ It also raised the questions left open by the Supreme Court of Canada's decision in Smith: should a judge be permitted to make a finding upon the admission of a juvenile alone? Does an informal procedure fulfil the purposes of arraignment and plea? Does an informal arraignment, in effect, encourage a child to incriminate himself?⁴⁸ Unfortunately, the Committee declined to grapple with these issues. Instead, it contented itself with making the uninspiring "recommendation" that the law in regard to plea procedure requires clarification, and suggesting that the existing English rules⁴⁹ might offer a workable solution.⁵⁰

Following the Justice Committee's suggestion, both Bill C-192 and the Draft Act adopted the English provision that where a young person appears before a judge, the judge shall "cause the information to be read to him in simple language suitable to his age and understanding."⁵¹ and shall inform him that "if he so desires he may, but he need not, admit such offence."⁵² As noted earlier in our discussion regarding counsel,⁵³ both Acts contain a provision to the effect that an admission cannot be accepted and is deemed not to have been made unless, before making the admission, the young person had an "opportunity" to be assisted by a lawyer, parent or some other capable adult.⁵⁴ Both Acts prohibit a judge from accepting an admission if the offence is one for which an adult may be punished by death or life

imprisonment.⁵⁵ Finally, as to the effect of the admission once it is made, both allow the presiding judge a discretion either to base his finding on the admission or to proceed to hold a trial in spite of it, depending on whether or not he is satisfied that the admission is true.⁵⁶

The proposed reforms regarding arraignment and plea seem consistent with and integral to the due process objectives of the proposed legislation. They also appear to be consistent with both the judicial trends in this country⁵⁷ and the legislative initiatives undertaken elsewhere.⁵⁸ In addition, it is implicit in the proposals that our legislators have finally shaken free from the shackles of the traditional juvenile court concept that a child should not be informed of his privilege not to testify because to do so would tend to detract from the effectiveness of the hearing as part of the dispositional process.⁵⁹ For all of these reasons, the proposals regarding arraignment and plea seem laudable and, with the exception of one provision, seem adequate to meet the needs and protect the rights of juvenile accused. The one exception is the provision in s.11(2) of the Draft Act to the effect that an admission cannot be accepted unless, before making the admission, the young person had "an opportunity to be assisted" by a lawyer, parent, or some other capable adult. Our comments regarding this sub-section are three-fold. To begin with, the term "opportunity" is extremely vague; as a result, one can anticipate some uncertainty as to the lengths to which a court must go to provide to a young person such advisory assistance. Secondly, our earlier comments regarding the inadequacy and dangers of relying on parents and other relatives as legal advisors would seem apposite.⁶⁰ Finally, we have some doubts as to whether a young person should even be allowed to admit to an offence without being required to first consult with duty counsel or some similar legal personnel. However, if, as suggested earlier,⁶¹ legal counsel is provided as a matter of course to all those young persons not appearing with privately-retained counsel, it is possible that all three of these problems might be neatly avoided.

(iii) Determination of Age

A preliminary matter that has given rise to a considerable amount of litigation in recent years is that of proving the age of the juvenile before the court. Since it is an inferior court, the juvenile court's jurisdiction can only be established if all of the statutory conditions precedent are satisfied. Accordingly, the juvenile court does not acquire "exclusive jurisdiction" over an offence until it has been properly established that the juvenile before the court is in fact a "child" within the meaning of the J.D.A.: that is, that he or she is "apparently or actually" under the maximum juvenile court age.⁶² The problem of proof of age is one that arises not only where a juvenile is charged with having committed a delinquency⁶³ but also where he or she is the victim of an alleged offence in a prosecution against an adult under J.D.A., s. 33.⁶⁴ Despite some earlier authority to the contrary⁶⁵ it is now settled law that the word "or" in s.2(1)(a) is to be read disjunctively.⁶⁶ Accordingly, a juvenile court will have jurisdiction where the child is either "actually" under the maximum age or just "apparently" so.

The problem surrounding the proof of "actual" age arises out of the rule of evidence in criminal matters that where an essential element of an offence is that a person is of or under a certain age, that person's own testimony is hearsay and therefore not admissible to prove his or her actual age.⁶⁷ Since actual age must always be proved by admissible evidence,⁶⁸ it has been held in proceedings under the J.D.A. that where a judge purports to establish a child's age solely from the child's own testimony, the court will lack jurisdiction and any decision made will be quashed on appeal.⁶⁹ In contrast to the rule governing "apparent" age, it does not seem to be necessary that an actual "finding" of actual age appear on the record. However, if, on appeal, the record does not disclose sufficient evidence given under oath to support

a finding of actual age (assuming that the court does not purport to make a finding of "apparent" age), the decision of the court will be set aside and a new trial ordered.⁷⁰ Although the matter is not free from uncertainty, it would appear that the only way in which actual age can be proven is by the evidence under oath of one or more of the child's parents,⁷¹ or by the production of an official birth certificate together with evidence that the juvenile before the court is, in fact, the one mentioned in the certificate.⁷²

What can give rise to a finding of "apparent" age has not been definitely established; however, it would seem that both "physical appearance" and "other indicia" can be relevant and sufficient criteria.⁷³ There is no doubt, on the other hand, that jurisdiction on the basis of apparent age can only be established where the juvenile court record discloses a specific finding by the juvenile court judge to that effect. In one case, for example, where a judge's finding of actual age was found to be improper, it was held that he lacked jurisdiction, notwithstanding the fact that he could have proceeded on the basis of apparent age, because no specific finding of apparent age was ever made.⁷⁴ Another question that has yet to be resolved is the effect of Code, S. 585(2). This section, which provides that "in the absence of other evidence...a...magistrate may infer the age of a child or young person from his appearance" has been held not to be applicable in every reported J.D.A. case in which it has been considered. Although it would seem that its only effect on determination of age under the J.D.A. would be to give additional support to the juvenile court's already-recognized power of inferring apparent age from the child's appearance, it is arguable that judicial authority limiting that section's applicability may also have the effect of limiting the circumstances in which a juvenile court can rely upon a finding of apparent age.⁷⁵

In the past few years, the B.C. Court of Appeal has handed down a series of decisions dealing with the situation where an accused appearing in adult

court has told the judge he was over the maximum juvenile court age, and then, following his conviction, appealed on the ground that because he was in fact under the juvenile court age the adult court lacked jurisdiction and therefore its decision should be quashed. In R. v. Pilkington,⁷⁶ dealing with just such a fact situation, the Court of Appeal held that notwithstanding the juvenile court's "exclusive jurisdiction" over the accused because of his actual age, the adult court judge had, on the evidence before him, jurisdiction to try the accused.⁷⁷ As a result, the only way in which the conviction could be set aside was by the admission on appeal of new evidence as to the accused's actual age. Although it agreed to do so in this case, the Court of Appeal served notice that in cases thereafter it would only exercise its discretion to admit new evidence regarding actual age in "very exceptional circumstances."⁷⁸ Since Pilkington, the only reported case in which leave to introduce new evidence was refused was R. v. Marcille.⁷⁹ In that case, in light of the facts that the accused had "almost" reached the maximum age, that other offences were involved (and that waiver would therefore have been likely), and that the accused had deliberately deceived the adult court as to his age, the Court of Appeal took the view that the "special circumstances" described in Pilkington were not satisfied. However, the B.C. Court of Appeal seems more recently to be moving away from the strict approach taken in Marcille; in two subsequent cases, for example, the same appellate court agreed to admit new evidence as to age and to quash adult court convictions notwithstanding the seriousness of the offences involved or the accused's deliberate deception as to age.⁸⁰ Despite this proliferation of cases, important questions still remain unanswered. Whether other Canadian appellate courts will take a similar approach towards this problem is as yet unknown. In addition, the possible implications of the B.C. Court of Appeal's view that adult court proceedings over juveniles are not a nullity, but only reviewable on discretionary grounds, remain to be explored.⁸¹

Although it acknowledged the practical problems that had arisen regarding proof of age, the Justice Committee contented itself with merely recommending that some "clear and simple method" of proving the age of a juvenile should be found and incorporated into any revision of the J.D.A. ⁸² While both Bill C-192 and the YPICWTL Draft Act retained the "apparently or actually" criterion in its definition of "young person" ⁸³ and gave the juvenile court exclusive jurisdiction over juveniles where the alleged offence was committed and the proceedings commenced within a certain prescribed age range, ⁸⁴ neither Act dealt specifically or even implicitly with the problem of proof of age. As a result, one would expect that the existing caselaw just surveyed would continue to apply to proceedings under the YPICWTL Act if and when the Draft Act becomes law. Not only is such a consequence regrettable in light of the vagueness and uncertainty that, as we have seen, still plague the proof of age provision in the J.D.A., but it may be even more unfortunate as a result of possible uncertainty as to the proof requirements created by s.4(1) of the Draft Act. To begin with, while the phrase "apparently or actually" does appear in the definition of "young person" in s.2, it is not clear whether it applies only to the minimum age limit or to the maximum age limit, as well. Secondly, because the juvenile court's exclusive jurisdiction is declared to apply, not to "young persons" (thereby incorporating the "apparently or actually" definition in s. 2), but instead just to "persons" who meet certain age requirements prescribed in s.4(1), it would appear that jurisdiction for the purposes of s.4(1) could only be established on proof of actual, and not just apparent age. Whether or not this result was intended by the draftsmen is not clear. Similarly, whether Code, s.585(1) would apply and thereby give a judge the power to infer age from appearance remains an open question; some might argue that the omission of the word "apparently" in s. 4(1) suggests a deliberate legislative intent to exclude the applicability of s.585(2). In any event, the restriction on its use laid down in Linnerth would appear still to limit its

practical utility. In light of the above, and in light of the fact that the new maximum age makes proof of age problems twice as likely to arise as they did under the J.D.A., it would seem essential that s.4(1) be redrafted so as to clearly indicate the standard of proof of age required under the new legislation and that regulations be enacted governing the type of evidence that will suffice to meet that standard. In light of the widespread acceptance and general availability of birth certificates throughout Canada today,⁸⁵ we would suggest that the regulations should provide that the production of an official birth certificate purporting to be in the name of the juvenile should be received as prima facie evidence of the age of the child before the court.⁸⁶ Where such a certificate is not available or where evidence is lawfully admitted to rebut its authenticity, validity or applicability to the juvenile before the court, the court should be empowered to make a finding of actual age on the basis of admissible evidence given under oath. Only where no certificate or other lawful evidence is available should the court be allowed to make a finding on the basis of the judge's observation alone.

(iv) The Presentation of Evidence

Where the accused pleads not guilty (or where the juvenile court judge declines to accept a guilty plea)⁸⁷ the court is required by the Criminal Code⁸⁸ to proceed with a trial, taking the evidence of witnesses for the prosecution and the defendant in accordance with the provisions of Part XV relating to preliminary inquiries.⁸⁹ Although some variation from this procedure will be permitted by J.D.A., s. 17, there are limits on the extent of informality the courts will allow. While it has been suggested that the court's reception of evidence as to age or identity under oath but prior to arraignment would be an informality permitted by the Act,⁹⁰ the admission, in similar circumstances, of evidence relating to the substance of the charge has been held not only to be an impropriety, but also sufficient grounds for quashing a subsequent conviction.⁹¹ Furthermore, it seems that the trend in nearly all of the reported cases in the last twenty years has been towards extending to a juvenile the same rights of procedural due process available to a person tried in the adult criminal courts. In addition to the right to counsel,⁹² it has been held that a juvenile has the right to make a full answer and defence to the prosecution's case,⁹³ the right to cross-examine witnesses,⁹⁴ the right to refuse to incriminate himself,⁹⁵ and the right to speak to sentence after judgment is given.⁹⁶ While there remains some doubt as to the applicability of and the effect of a breach of the other "rules of natural justice,"⁹⁷ it appears that juvenile courts today are generally loathe to allow the informality provision in s.17 to permit trial procedures that infringe the fundamental rights recognized by our criminal process.

One of the most important of the rules of natural justice is the principle that judicial proceedings are to be conducted in accordance with the rules of evidence.⁹⁸ Do the rules of evidence generally applicable in summary conviction proceedings governed by Part XXIV of the Code apply to the adjudicatory and dispositional stages of a juvenile court trial?⁹⁹ Most of the

reported cases that deal with the issue tend to answer this question in the affirmative.¹⁰⁰ For example, as a general rule evidence can only be considered in juvenile court proceedings if given under oath or solemn affirmation.¹⁰¹ However, this rule is modified by certain statutory¹⁰² and common law safeguards and procedures concerning the testimony of children of tender years.¹⁰³ Before allowing a child of tender years to testify, a judge in the juvenile court, like his adult court counterpart, must undertake an investigation as to the child's understanding of an oath.¹⁰⁴ If he is satisfied that the child understands the nature of an oath and has assumed a moral obligation to tell the truth, the child must be sworn.¹⁰⁵ If, on the other hand, the child does not appear to understand the nature of an oath, he can still give evidence if he "is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."¹⁰⁶ However, no person can be convicted upon the evidence of a child of tender years not under oath unless such evidence is corroborated in some material respect.¹⁰⁷ What constitutes sufficient corroboration in such circumstances has been the subject of considerable judicial and scholarly discussion.¹⁰⁸ Furthermore, while it has been held that these rules are applicable in prosecutions brought under both J.D.A., s. 3¹⁰⁹ and s.33,¹¹⁰ it has also been established that a court is not obliged to rely on sworn testimony in waiver proceedings under s.9.¹¹¹

The courts have held various other specific evidentiary rules to be applicable to the adjudicatory stage of juvenile court proceedings. Convictions have been quashed, for example, on the grounds of the improper use of leading questions,¹¹² the admission of irrelevant and prejudicial testimony,¹¹³ and the reliance upon hearsay evidence to establish proof of age.¹¹⁴ It has been held that similar fact evidence may be admissible in juvenile court proceedings¹¹⁵ and that the concept of included offences applies to delinquency prosecutions.¹¹⁶ Furthermore, it is settled law that both the rule in Hodge's Case and the doctrine of reasonable doubt are applicable to all proceedings under the J.D.A.¹¹⁷

An issue that has received considerable attention in recent years is that of the admissibility of confessions made by juveniles.¹¹⁸ While the draftsmen of the original J.D.A. no doubt would have taken the position that an admission of guilt is a condition precedent to effective rehabilitation and that therefore police interrogation of juveniles should be encouraged rather than restricted, much concern has been voiced in recent years as to possible injustices resulting from the greater susceptibility of juveniles to the coercion and intimidation inherent in police confrontation.¹¹⁹ Consequently, since the 1959 case of R. v. Jacques,¹²⁰ it has been settled law in Canada that the conventional principle of "voluntariness"¹²¹ that governs the admission of confessions in adult criminal proceedings is no less applicable in juvenile matters.¹²² In the Jacques case, ruling that a statement given to police was inadmissible because of the oppressive circumstances of the child's detention and interrogation, Schreiber J. left little doubt as to the importance of providing sufficient protection to juveniles:

Indeed, if the jurisprudence concerning the taking of a statement shows clearly at what point the rights of the individual should be protected, these rights should be observed even more carefully in the case of a child by reason of the fact that a child is a child and that, as such, he has not the resistance, maturity or understanding of an adult to cope with a situation of this nature.¹²³

He then went on to articulate a series of "recommendations" which he suggested might "ensure the future admissibility" of statements made by juveniles. In his opinion, police officials intending to interrogate a juvenile should:

1. Require that a relative, preferably of the same sex as the child to be questioned, should accompany the child to the place of interrogation;
2. Give the child, at the place or room of the interrogation, in the presence of the relative who accompanies him, the choice of deciding whether he wishes his relative to stay in the same room during the questioning or not;
3. Carry out the questioning as soon as the child and his relative arrive at headquarters;
4. Ask the child, as soon as the caution is given, whether he understands it and if not give him an

explanation;

5. Detain the child...in a place designated by the competent authorities as a place for the detention of children.¹²⁴

A number of subsequent cases have given consideration to the significance of Schreiber J.'s recommendations and to the effect of a failure to comply therewith. In R. v. Yensen,¹²⁵ McRuer, J. took the view that although the recommendations are not rules of law:

...it does commend itself to me that if a child is to be questioned and invited to make a statement of such a character that may be used against him at his trial, especially a trial in the higher Court, a relative should be present; and certainly if the child asks for a parent to be present, the parent should have the opportunity of being present.¹²⁶

Furthermore, with reference to the caution given to the child before a statement is taken, the Chief Justice went one step further than Judge Schreiber:

I do not think it is sufficient to ask a child if he understands the caution. I think the officer must be in a position when he comes into Court to support the statement, to demonstrate to the Court that the child did understand the caution as a result of careful explanation and pointing out to the child the consequences that may flow from making the statement.¹²⁷

Finally, he suggested that there should be added to Schreiber J.'s list of guidelines a sixth requirement, namely that where the accused being questioned is over fourteen years of age, he should be advised of the possibility of waiver to the adult court as well as the likely consequences thereof.¹²⁸

While there is English authority to the effect that the absence of a parent requires the prosecution to produce "stronger evidence" that the statement was voluntary,¹²⁹ there have also been fact situations in which it has been suggested that it would "perfectly proper" for the investigating officer to conduct his interrogation and take a statement from a child in the absence of a parent or relative.¹³⁰ Similarly, although it has been recently suggested that the presence of a parent or person in loco parentis is an absolute requirement and consequently a rule of law,¹³¹ higher authority has it that

there is no such rule of law but rather that the presence or absence of such a person is simply one factor to be taken into consideration by the trial judge, along with all of the other surrounding circumstances, in his consideration of the "voluntariness" of the statement in question.¹³² In light of recent decisions of superior court judges of two provinces,¹³³ it would seem safe to conclude that the principles laid down in R. v. Jacques, as modified by R. v. Yensen, are still good law in Canada today.

Just as important as the evidentiary and procedural rules that govern the adjudicatory stage of a delinquency proceeding are the standards applicable to the "trial within a trial" required by s.9 of the J.D.A. What are the principles governing the taking of evidence in a waiver application?¹³⁴ Of the relevant cases, those reported prior to 1970 generally emphasized the "non-judicial" nature of the waiver proceeding. It was held, for example, that the function of a juvenile court judge under s.9(1) is not judicial in the strict sense of exercising judicial power, but is instead "administrative and ministerial,"¹³⁵ that there is no rule of law requiring a juvenile court judge to base his opinion as to waiver upon sworn evidence alone,¹³⁶ and that the court can even proceed upon the basis of hearsay evidence.¹³⁷ Still, it was never suggested that the discretion granted by s.9(1) was totally unregulated. It was still recognized that the judge must "act judicially in the sense of proceeding fairly and openly,...giving proper consideration to the views and representations of the parties before him,"¹³⁸ that he must, in evaluating any hearsay evidence, "exercise a wise discretion recognizing the weaknesses to which such evidence is subject,"¹³⁹ and that he must afford an accused "full opportunity to offer evidence if he so desires and to submit argument with respect thereto."¹⁴⁰ It has also long been settled that a waiver order cannot not be valid unless the juvenile court judge has endorsed on the record a specific finding that it is for the good of the accused and in the interest of the community that the juvenile be tried in the ordinary

criminal courts.¹⁴¹

In the years since 1970, four reported cases, all decisions of the British Columbia Supreme Court, have reversed the emphasis of the earlier waiver cases and have gradually returned to a more "judicial" model for waiver proceedings. In R. v. R.,¹⁴² for example, a transfer was made in the absence of any application from the Crown or notice to the accused and without any inquiry having been made or evidence having been taken. In quashing the order on appeal, Rae, J. held that a juvenile court judge has an obligation to hear all cogent and relevant evidence and cannot base his decision on information or evidence not disclosed in open court nor on matters solely within his own knowledge.¹⁴³ Similarly, in R. v. W. and W.,¹⁴⁴ Smith, J. took the view that the transfer order made by the juvenile court - without any application by the Crown, in the absence of counsel or parents for the child, and where the only evidence before the court was the fact that it was a first offence - constituted "the most serious miscarriage of justice I have ever seen while at the bar or on the bench of this Province",¹⁴⁵ and would surely have been quashed had the appeal not been out of time. The question of what constitutes a "proper hearing" for the purposes of s.9 also arose in Re David and the Queen.¹⁴⁶ Here it was held that a transfer order cannot be validly made unless the accused is first informed of his right to cross-examine witnesses, call evidence, and make submissions, as well as the nature of the test under s.9.¹⁴⁷ Finally, in R. v. F.¹⁴⁸ the Supreme Court gave some indication of the standard of proof necessary to justify a waiver order. In quashing an order based solely on the evidence of two probation officers (neither of whom had ever even met the accused), a security officer of the juvenile detention centre, and the accused's parents, Meredith, J. held that there was not sufficient evidence of the accused's character to support the conclusion that he could only be helped through the sentencing alternatives available in the ordinary courts.¹⁴⁹ Thus, in summary, although the older cases still allow

the juvenile court judge, when conducting a waiver proceeding, to avoid some of the formalities required at the adjudicatory stage of the trial, those more recent cases make it clear (at least for the province of British Columbia) that unless a waiver order is preceded by a "proper hearing" (as defined in R. v. R. and Re David) in which sufficient evidence is tendered to satisfy a fairly high standard of proof (as suggested in R. v. F.), the waiver proceeding will be held to have been improper and the order will be set aside on appeal.

A final issue that has received some consideration is that of what rules of evidence are applicable at the dispositional stage of the hearing. Although it has been held to be trite law that the rules as to the admissibility of evidence will be relaxed at the dispositional stage,¹⁵⁰ there is little authority as to what rules, if any, are in fact applicable. There is no doubt that following judgment the accused has a right to address the court regarding the matter of disposition.¹⁵¹ Furthermore, although the juvenile court judge is given an enormous amount of discretion under J.D.A., s.20, it would still seem essential that he exercise that discretion in a "judicial" manner¹⁵² - i.e. - for the proper purpose for which it was granted, on relevant grounds, and in good faith.¹⁵³ Where, for example, a juvenile court judge addressed the juvenile during disposition in a cruel and insulting fashion, the juvenile court proceeding was quashed on appeal on the ground, inter alia, that the judge's comments constituted "improper punishment."¹⁵⁴ Finally, there are a number of unresolved problems surrounding the admissibility and the need for disclosure to the accused of pre-dispositional reports prepared for the court's consideration.¹⁵⁵ For example, although there is authority which seems to require that the juvenile or his representative be given both complete access to such reports as well as notice of the right to challenge their contents by cross-examination and by calling witnesses,¹⁵⁶

doubts have been expressed as to both the validity and desirability of such a rule.¹⁵⁷ One might well ask whether or not the B.C. Court of Appeal's present prohibition on the use of secret reports in custody cases¹⁵⁸ will have an effect on proceedings pursuant to the J.D.A. in that or other provinces?

The Justice Report did not direct itself towards evidentiary problems per se. Although it did acknowledge some of the more basic procedural difficulties that the juvenile courts had by then encountered,¹⁵⁹ it only went so far as to recommend that "appropriate steps be taken" to provide more adequate guidance to juvenile court judges on matters of procedure.¹⁶⁰ It was more specific, however, in its consideration of two particular problems among those surveyed above. Regarding the admissibility of juvenile confessions it recommended that where a child is to be questioned by the police - and particularly if he is to be invited to make a statement that may be used against him - a responsible adult who is concerned with protecting the child's interests should be present.¹⁶¹ Furthermore, it suggested that where a statement is taken from a juvenile who does not have the benefit of adult advice, that statement should be received in evidence in juvenile court only with the utmost caution and should be totally inadmissible in any subsequent proceedings in the adult courts.¹⁶² Secondly, regarding the interrogation and testimony of children of tender years in cases involving offences against morality, it suggested that some means should be devised to avoid the necessity of the child's attendance at court and to avoid the possible trauma of police questioning. To this end, it recommended that the Israeli youth examiner system - a procedure whereby a court-appointed official is given the authority to refuse or consent to a child's interrogation or attendance as a witness in court as well as to question the child in private and then report under oath in court the results of his examination - be studied with a view to its adoption in Canada.¹⁶³

While neither Bill C-192 nor the YPICWTL Draft Act implemented the

Justice Committee's suggestion regarding the evidence of child witnesses,¹⁶⁴ the Draft Act did introduce reform regarding the matter of juvenile confessions. Attempting to provide young persons with "a form of protection that goes beyond the rules of practice, the provisions of the Criminal Code and the case law regarding the admissibility of statements "...while at the same time not interfering with good police practice,"¹⁶⁵ the Solicitor-General's Committee proposed that no written statement given by a juvenile shall be admissible in evidence against him unless he was first "afforded an opportunity to consult with, and give his statement in the presence of, a lawyer, parent, adult relative or adult friend."¹⁶⁶ Although we endorse the view that juveniles, because of their particular vulnerability in the matter of police questioning, require protections beyond those that have been developed to date by the courts, we have some doubts as to the scope and adequacy of the actual "protection" provided to a child by the proposed subsection 10(2). To begin with, why is the protection limited only to written statements? Do not the very same policy considerations apply to oral statements given in answer to police questions? Secondly, does the sub-section restrict the admissibility of juvenile confessions in adult court, as well as juvenile court in the case where waiver has been ordered? While the Justice Committee and others insisted that it should,¹⁶⁷ it is doubtful whether s.10(2), as it presently reads, would have that effect. Furthermore, does s.10(2) replace the common-law test of voluntariness and the "guidelines" for interrogation laid down in the cases, or does it merely supplement those protections already in existence? Although there would seem to be little doubt that the draftsmen only intended the latter, it is still possible that some judges may interpret this section as relieving the police and the prosecution from some of their common-law duties and responsibilities. Finally, our earlier criticisms as to the use, the meaning, and the effectiveness of the "opportunity to be assisted by counsel, etc." approach in dealing

with the problem of admissions at trial¹⁶⁸ would seem to be equally applicable here. In our opinion, it should be mandatory that a competent adviser be given access to the child before and during the taking of a statement from him. If counsel cannot be provided on a universal basis as suggested earlier, then perhaps the Israeli "youth examiner" system or other similar schemes should be given careful appraisal and consideration.

Aside from the proposed reform regarding the admissibility of confessions, a provision reiterating the standard of proof applicable at the adjudicatory stage,¹⁶⁹ and a section dealing with the use of pre-dispositional reports,¹⁷⁰ the proposed Draft Act does little to further the Department of Justice Committee's goal of providing "more adequate guidance" to juvenile court judges on matters of procedure. While the proposed legislation does continue to incorporate the provisions of Part XXIV of the Code (and, presumably, the relevant caselaw based thereon) no attempt, other than those noted above, has been made by the Solicitor-General's Committee to clarify the areas of procedural uncertainty canvassed earlier. Furthermore, although the Draft Act does allow for the promulgation of regulations regarding the "practice and procedure to be followed by a court,"¹⁷¹ there is no suggestion anywhere in the Report as to the types of matters that would be dealt with therein, if and when such regulations are drafted. In light of the above, it would seem essential that new provisions be incorporated into the legislation, by regulation or otherwise, to clarify those remaining areas of procedural and evidentiary uncertainty. Not until this has been done will the draftsman be able to claim that the goal of "procedural justice for young persons" has been achieved.

CHAPTER 5 - CONCLUSIONS

Approximately 300 pages ago, at the outset of this paper, we suggested that the purpose of this study was to explore, from a number of perspectives, both the recent reform proposals and the legislation which they are meant to replace. Because of the diversity and complexity of the many topics dealt with in the course of this paper, we shall not attempt to review or to summarize here all of our findings and conclusions. Instead, we propose to use this concluding chapter as an opportunity to offer some general comments as to certain problems inherent in any efforts at delinquency law reform in Canada, to elaborate on one particular deficiency in the YPICWTL Report referred to on a number of occasions during the course of this paper, and to highlight certain specific problem-areas not dealt with in this study but deserving of detailed examination by other researchers in the future.

A. Obstacles to Delinquency Law Reform

As our retrospective analysis in Chapter 2 vividly indicated, the road to reform of juvenile delinquency legislation in Canada has been a very slow and tortuous one. After fifteen years of intermittent reform efforts, three Draft Acts (one of which made it as far as second reading in the House), as well as numerous Solicitors-General, we are only just now on the verge of effecting some change in the legislation that has governed the treatment of young offenders in this country since 1929. And perhaps even that statement is premature: if, in fact, legislation based on the YPICWTL Report is introduced in the upcoming session of Parliament, it is not inconceivable that the Bill will receive the same treatment that its predecessor, Bill C-192, received at the hands of the Opposition, the child welfare professionals, and the public. Why, one might well ask, has the process of law reform in this field been such a slow and difficult one?

One contributing cause has undoubtedly been the juvenile justice system's lack of a concerned and vocal constituency. Needless to say, the persons at whom the legislation is directed - the young offenders themselves - are unable to generate any pressure for reform. Similarly, the public has generally shown little real interest in the problem of juvenile delinquency except on the odd occasion when a local incident briefly attracts some public attention and concern. As a consequence, aside from the occasional opinion in a professional journal or newspaper editorial, relatively little pressure has been put on the federal government over the past few years to speed up the ordinarily slow and tentative law reform process.

A second factor that has undoubtedly been of significance has been the lack of pertinent social science research to guide the reform process. As one prominent Canadian social scientist recently admitted: "the Canadian data on the effects of different kinds of treatment of young offenders is so

scarce that it almost might as well be considered not to exist."¹ Because of the skimpy evidence available as to the actual effects of the present system and the likely effects of various alternative systems, the making of informed and considered policy decisions has been considerably more difficult than is usually the case in law reform work in other fields.

A third although somewhat related factor is the general confusion that has continued to plague the professional child welfare community as to the direction any new reform should follow. Aside from the communication problems inherent in any field requiring inter-disciplinary discussion, the child welfare field has been and continues to be characterized by a wide schism separating those in the behavioural science fields (e.g. - social workers, psychologists, etc.) who generally favour the retention of the traditional, paternalistic juvenile court system and those (among whom the legal profession is most dominant) who tend to lean in the opposite direction, favouring the inclusion of an increasing number of due-process protections and formalities into the juvenile system.² As we saw in Chapter 2, the tension between these two groups was a major contributing cause of the demise of Bill C-192. It is not unreasonable to expect this controversy to come to the fore once again if and when a new Bill reaches the floor of the House.

Finally, the fact that the field of juvenile delinquency legislation generally straddles the line separating federal and provincial jurisdiction has only served to add more fuel to the fires of discontent arising out of each new reform proposed. Despite the wise advice in the 1965 Justice Report to the effect that successful law reform in this field can only be brought about by "co-operative federalism of the highest order," the federal government tried through Bill C-192 to push into law, without any previous consultation or discussion, provisions that would have had significant administrative and financial implications for all of the provinces. While the most recent

proposals have been put forward in a more tactful and tentative manner, the extent to which both the federal and provincial governments are prepared to negotiate and compromise in this field still remains to be determined.

B. Finances: The Forgotten Issue

As we saw in Part II of this paper, the YPICWTL Draft Act takes great pains to define clearly the juvenile court's age and offence jurisdiction and to guarantee sufficient procedural rights to ensure that the court's jurisdiction is properly established before any dispositional power is exercised. However, perhaps just as important as what it does, is what the YPICWTL Draft Act fails to do. The proposed Act, like the Children's and Young Persons' Act and the Young Offenders Act before it, fails to address itself to one of the major defects in the present juvenile justice system - namely, the lack of adequate support services and resources. Furthermore, although many of the reforms proposed in the Draft Act (e.g. - the higher maximum age, the guarantee of the right to counsel, and the expansion of diversion services, to name just a few)¹ would place even greater demands on already overburdened provincial facilities, there is at no place in the Report or the Draft Act any commitment by the federal government to providing assistance, financial or otherwise, to the provinces to help them cope with the added burdens and responsibilities that they will be forced to bear if the proposed legislation becomes law. The Report does acknowledge that:

A broad spectrum of resources and services, adequate and appropriate in scope, is essential if the legislation is to achieve the objective of more just, equitable and effective treatment of young persons in conflict with the law. The proposals for new legislation would, if adopted, have significant service and resource implications for the provinces. 2

However, the Committee then sidesteps the key issue of the federal government's role in assisting to provide those resources and services by merely stating that "the development of these resources raises financial implications which will require careful examination."³ The difficulty that results from such an approach was well stated by Fox in his 1972 critique of

Bill C-192. His comments are equally applicable here:

...[S]imply to revise legislation, without also taking steps to improve the range and quality of supportive services, is an exercise in futility. The root problem is not one of legislative drafting or even of philosophy. It is one which rests squarely upon society's failure to grant the juvenile court sufficient resources to fulfil the rehabilitative aims set out in the enabling Act. 4

...Simply to attempt to cast responsibility off on to unready provinces, without providing them with adequate means and guidance, is an unrealistic response to the demands for revision of Canadian juvenile delinquency law. 5

Indeed, at least one province has stated in no uncertain terms that it is not prepared to continue negotiations related to the proposed legislation until the federal government provides some assurance that the provincial financial requirements will be met. 6

In light of the central importance of the provision of adequate financial support for the proposed services and resources, the provincial demand for a greater federal commitment to cost-sharing does not seem at all unreasonable. On the contrary, we endorse the view that the federal government should be required to adopt an equitable cost-sharing formula prior to the enactment of any new delinquency legislation. Furthermore, certain restrictions on the scope of that federal aid should be removed. The legislation by which federal financial assistance is provided - the Canada Assistance Plan - has since its creation authorized federal contributions towards the cost of provincial assistance and welfare services but specifically excluded the support of services "relating wholly or mainly to... correction." In the past, the effect of the latter provision has been to deny assistance to those provinces which prefer to administer juvenile services through either a justice department or a separate department of correctional services. Although, in the 7 8 9 10

past year, the federal government has indicated that it may be willing to extend financial support to J.D.A. programs administered through either justice or corrections departments, there has yet to be any move to delete or to amend the exclusionary clause in the existing legislation. Similarly, while the Plan does cover most post-dispositional services used by the majority of Canadian juvenile courts, the Plan has never extended to pre-dispositional services, such as those required for remand or assessment, nor to such matters as the provision of legal counsel to juvenile accused, the importance of which will become even greater under the proposed new legislation.¹¹ Finally, while the current federal contribution of 50% of the cost of treatment services may be fair and adequate in the case of the more affluent provinces, the less affluent provinces may still be unable to develop even the most fundamental resources and facilities unless a higher federal contribution is provided. In our opinion, any consideration of proposed new delinquency legislation should be preceded by a thorough revision of the Canada Assistance Plan the effects of which should be to increase the federal government's contribution in the case of the poorer provinces, to remove any restriction on financial assistance based on which department administers a province's juvenile corrections programme, and to expand the scope of the Plan to cover both pre- and post-dispositional services and facilities as well as the cost of extending legal aid services to young persons.¹² Unless and until this is done, it would seem that "the broad spectrum of resources and services, adequate and appropriate in scope"¹³ envisioned by the YPICWTL Report will never have a chance of becoming a reality.

C. Other Areas of Concern

Despite its length and the number of topics examined herein, this paper by no means purports to be the definitive work on modern Canadian delinquency law reform. Because of the limitations of time and space we were unable, much to our regret, to examine in the course of this study many other issues relevant to the reform of Canadian juvenile delinquency legislation. In particular, there are a number of important aspects of the proposed YPICWTL Act which, as a result of our choice of areas for emphasis, were given less than a comprehensive analysis. Certain other problems arising from the recent proposals, rather than be dealt with in a cursory and incomplete manner, were deliberately set aside and left for examination by other researchers. To make their task somewhat easier, we have listed below some of the key areas not examined in detail in this paper but of major importance nonetheless from both a theorist's¹ and a practitioner's standpoint.

(1) Pre-Court Diversion and Screening

The diversion of juvenile offenders from formal court proceedings has been said to be "one of the most promising developments in the corrections² field over the past ten years." However, whether or not the proposed "screening agency" is the most suitable method for the exercise of this function is a³ question that has already given rise to much heated debate. Criticism of the screening agency to date has generally centred on the fact that the proposed legislation does not require that every case be referred to a screening agency. Other criticism has related to the elaborate and formal procedure and potentially enormous cost of the screening process itself. In the province of British Columbia there is the additional problem that the federal scheme would in all likelihood pre-empt the informal, inexpensive, yet apparently effective division-⁴ary programme already in existence. Further unanswered questions include who

is to comprise the screening agency and what treatment resources are to be made available to it.

(2) The Role of the Police and the Prosecutor

In addition to the creation of the screening agency, the new provisions relating to pre-trial detention, notice to parents, right to counsel, and the authority for laying an information have given rise to some confusion as to the roles envisioned for both police and local crown attorneys under the proposed new legislation. Is a police officer to be included in the definition of "youth worker"?⁵ Will representatives of the police or the Attorney-General's Department be included in the membership of each screening agency?⁶ Is the proposed centralization of prosecutorial discretion unconstitutional and contrary to the Canadian Bill of Rights?⁷ These and other related questions deserve further discussion and consideration.

(3) The Dispositional Alternatives

The dispositional alternatives proposed in the YPICWTL Report do not vary substantially from those found in the original J.D.A. Do the alternatives available to a juvenile court judge encompass all of the types of care or treatment that might be utilized? Should the alternatives provided in the Draft Act be more specific? Other concerns relate to the proposed provision whereby the juvenile court judge, rather than a probation officer or the Superintendent of Child Welfare, must decide as to whether a child should be committed, and if so, to what type of custody. Will this procedure signal a return to the large-scale use of custodial facilities?⁸ Will this procedure allow for a reasonable degree of administrative control over the flow of juveniles in and out of custodial facilities?⁹ These are just some of the questions arising from the broad subject of disposition.

(4) Rights of Appeal and Review of Disposition

As noted earlier, the YPICWTL Act not only expands the restrictive appeal provisions contained in the original J.D.A., but also establishes a detailed and comprehensive scheme for the periodic review of dispositions by a juvenile court judge as well as by an independent "review agency". Pertinent questions arising from these proposals include the following: Is a system of mandatory periodic review necessary? If it is, are the time periods proposed the most suitable? Is the duplication of effort envisioned by the Draft Act's two-tier system really justifiable? Finally, should the judge have the power to increase the severity of a disposition if a juvenile's rehabilitation record has not been satisfactory?

(5) The Consequences of a Juvenile Conviction

Two main issues can be lumped together under this heading: the accessibility and use of juvenile court records and the power of the police to fingerprint and photograph juveniles. In both cases the present law is unclear and the policy issues at stake are quite complex. While the Draft Act clearly states that a conviction in juvenile court shall not be deemed to be a conviction for a criminal offence, nonetheless it allows the fact of that conviction to be disclosed to an adult court judge in the event that the same young person is at a later date facing sentencing in an adult court. The policy issue - should a person with a juvenile record who is later tried in adult court be treated in that court as a first offender - although easy to state is much more difficult to resolve. Other concerns relate to the proposed safeguards against the dissemination of information from the juvenile's record. While the proposed safeguards do seem to be a considerable improvement over the presently unregulated practice, it may be that the large area of discretion given to the judge leaves too much opportunity for abuse. Even more con-

troverſy ſurrounds the iſſue of fingerprinting. Does the practice have the effect of creating an "aura of criminality" detrimental to the objectives of the legiſlation itſelf? On a practical level, do the potential law enforcement gains outweigh the poſſible ſocial-psychological harm that can be done to juveniles ſubjected to ſuch a procedure?¹¹ Theſe are all difficult policy queſtions which merit careful conſideration in the months ahead.

FOOTNOTES - CHAPTER 1 - SECTION A

1. The Latin phrase parens patriae is defined in Webster's Third New International Dictionary of the English Language (Springfield, Massachusetts: G. and C. Merriam and Co., 1966) 1641 as:

the father of the country constituted in law by the state (as in the U.S.) or by the sovereign (as in Great Britain) in the capacity of legal guardian of persons not sui juris and without natural guardians, of heir to persons without natural heirs, and of protector of subjects unable to protect themselves.
2. R. v. Gyngall, [1893] 2 Q.B. 232, at 240, 247; Official Solicitor v. K., [1965] A.C. 201.
3. [1893] 2 Q.B. 232. See also Eyre v. Shaftesbury (1772), 2 P. Wms. 103, 24 E.R. 659.
4. Id., at 248.
5. Re K. (Infants), [1962] 3 W.L.R. 752. See also Scott v. Scott, [1913] A.C. 417; Re O. (Infants), [1962] 1 W.L.R. 724; and most recently In Re X (An Infant), [1975] 2 W.L.R. 335, 1 All E.R. 698.
6. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime (Washington, D.C.: U.S. Govt. Printing Office, 1967) 2 [hereinafter referred to as the "U.S. Task Force Report"]. Later cases disagreed with the proposition that the Court's equitable jurisdiction is limited to instances where the child had property. For example, in Re McGrath, [1892] 2 Ch. 496, at 511-512, North, J. stated:

But then it is said that I have no jurisdiction in this case, and for this reason, because the infants are not wards of the Court and have no property, that the Court cannot interfere under such circumstances. I think that proposition is wholly unsupported by either principle or authority.

To a similar effect, see In Re Spence, 2 Ph. 247, at 252 (Per Cottenham, L.C.).
7. U. S. Task Force Report, at 2.
8. In Re X, [1975] 2 W.L.R. 335, 1 All E.R. 697.
9. Id., at 706 (All E.R.).
10. This rule was subsequently incorporated into the Criminal Code of Canada. See the Criminal Code, R.S.C. 1970, c. C-34 [hereinafter referred to as "the Criminal Code"], s. 12. See discussion infra at p. 94 .

11. This rule, known as the doli incapax rule, has been carried over into s.13 of the Criminal Code. See discussion infra at p. 94 .
12. A. Koestler, Reflections on Hanging (London: Gollancz, 1956) referred to in K. Wang, The Continuing Turbulence Surrounding the Parens Patriae Concept in American Juvenile Courts (1972), 18 McGill L. J. 219-245, 418-460, at 220. [hereinafter referred to as "Wang"].
13. Wang, at 220.
14. G. Parker, Some Historical Observations on the Juvenile Court (1966-67), 9 Crim. L.Q. 467. [hereinafter referred to as "Parker (1966-67)"]
15. U.S. Task Force Report, at 3.
16. Parker (1966-67), at 476-483.
17. Id., at 476.

FOOTNOTES - CHAPTER 1 - SECTION B

1. Wang, at 221; U.S. Task Force Report at 3.
2. U.S. Task Force Report, at 3.
3. Id.,
4. Supra, note 1.
5. Supra, note 2.
6. Id.
7. Quoted in National Probation and Parole Association, Guides for Juvenile Court Judges, 127 (1957).
8. Laws of Illinois, 1899, p. 131.
9. The first juvenile court in the United States was established in Cook County, Illinois, and officially opened in Chicago on July 1st, 1899.
10. Supra, note 2.
11. Chicago's first juvenile court judge, Julian Mack, may have had these physical changes in mind when he described his vision of the judge in the new court: "Seated at a desk, with the child at his side, where he can, on occasion, put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work". - Quoted in Junius L. Allison, The Juvenile Court Comes of Age, Public Affairs Committee, 1968, at 2-3. See also W. L. Scott, The Juvenile Delinquent Act (1908), 28 Canadian Law Times 892, at 898-899 [hereinafter referred to as "Scott (1908)"] .
12. Canada Dept. of Justice. Juvenile Delinquency in Canada: The Report of the Department of Justice Committee on Juvenile Delinquency (Ottawa: Queen's Printer, 1965), at 30 [hereinafter referred to as the "Justice Report"].

FOOTNOTES - CHAPTER 1 - SECTION C

1. An Act For The Prevention of Cruelty To, and Better Protection of Children 1893 (Ont.), 56 Vict., C.45.
2. Id., s. 24.
3. Id.
4. Id.
5. Id., s.28.
6. Id., s.29.
7. Id., s.30(1).
8. Id. Compare to s.12 of the Juvenile Delinquents Act, R.S.C. 1970, c.J-3.
9. Supra, note 1, s.30(4).
10. 55-56 Vict., c.29. The only other sections in the 1892 Criminal Code dealing specifically with charges against infants were s.9, which established the age of seven as the minimum age for criminal prosecution, and s.10, which established the doli incapax rule. The comparable sections in the current Code (s.12 and s.13, respectively) are discussed infra at p.94-102.
11. 57-58 Vict., c.58.
12. Id., s.1.
13. Id., s.2.
14. Id., s.3-6.
15. The Juvenile Delinquents Act, 1908, 7-8 Edward VII, c.40.
16. Canadian Welfare Council, The Juvenile Court in Law (4th ed. Ottawa: Canadian Welfare Council, 1952) at 2-3. [hereinafter referred to as "Canadian Welfare Council (1952)"].
17. Id.
18. The Juvenile Delinquents Act, 1929, 19-20 George V, c.46.
19. The Juvenile Delinquents Act, R.S.C. 1970, c.J-3.
20. Statutes of Canada 1932, c.17; 1935, c.41; 1936, c.40, 1947, c.37; 1949 (1 Sess.), c.6; 1951, c.30; 1972, c.17, s.2.
21. See supra, Chapter 1, Section C.

22. See a similar discussion in J.A. MacDonald, A Critique of Bill C-192, The Young Offenders Act (1971), 39 The Social Worker 59, at 59-60.

Some commentators have placed greater emphasis on other aspects of the Act. Writing in 1908, W.L.Scott, one of the draftsmen of the original J.D.A. stated:

The Juvenile Delinquents Act...may be said to be based on three principles:-

1. That probation is the only effective method of dealing with youthful offenders.

2. That children are children even when they break the law, and should be treated as such, and not as adult criminals. As a child cannot deal with its property, so it should be held incapable of committing a crime, strictly so called.

3. That adults should be held criminally responsible for bringing about delinquency in children.

See Scott (1908), at 892.

23. J.D.A., s.4.

24. Id., s.13.

25. E.g. the status offences in J.D.A., s.2(1).

26. Criminal Code, s.12.

27. See the definition of "child" in J.D.A., s.2(1).

28. J.D.A., s.2(2).

29. Id., s.20(3).

30. Id., s.3(2). Regarding the philosophy of the Act, W.L. Scott wrote:

The reform which the Act seeks to introduce is marked not alone by a change of procedure or the adoption of new methods, but most of all by the introduction of a new spirit and a new aim. The judicial attitude towards the child has hitherto been that of punishment and repression. The attitude of the Juvenile Court is benignant, paternal, salvatory, and for these reasons more efficiently corrective.

See Scott (1908) at 894-895.

31. Id., s.38.

32. See a similar discussion, with references to the findings of contemporary social science studies, in Scott (1908) at 893-894.

33. J.D.A., s. 12.

34. Id., s.17.

35. The most significant advance brought about by the J.D.A. in this area was the introduction of probation. Prior to the 1908 Act, the only dispositions available to a judge following a conviction for a federal offence was release on suspended sentence, commitment to an industrial school or similar institution (in the limited number of areas where these facilities were available), or commitment to jail or penitentiary. It is interesting to note that at the time of the passage of the Act, there were more than one hundred children incarcerated in adult penal institutions. W.L. Scott commented:

So that in Canada today, under the best of circumstances, in dealing with delinquent children, you have either the reform school, which seldom reforms, or the suspended sentence, which means doing nothing and trusting to luck. Probation supplies a third alternative and one vastly more effective than either of the others.

See Scott (1908) at 898, and generally at 896-898.

36. J.D.A., s.20(1).

37. Id., s.20(5). However, it seems that the intent of the draftsman was that industrial or training schools were only to be treated as a last resort, to be used only when the juvenile court's other methods of rehabilitation (particularly probation) have been tried and have failed. See Scott, (1908) at 894-895.

FOOTNOTES - CHAPTER 1 - SECTION D

1. Canadian Welfare Council (1952) at 2. Similar legislation was by then already in force in Germany, Australia and Sweden, as well and presumably these statutes were also consulted. See Scott (1908) at 892.
2. See supra, Chapter 1, Section B, note 13.
3. British North America Act, 1867, 30-31 Vict., c.3, s.91 (27).
4. Id., ss. 92(14), (13), (16) and (15), respectively.
5. Justice Report, at 30.
6. Joseph Laycock, Juvenile Courts in Canada (1943), 21 C.B.R. 1.
7. See definition of "juvenile delinquent" in J.D.A. s.2(1).
8. See J.D.A., s.20(1).
9. See J.D.A., ss.3(2) and 38.
10. J.D.A., s.42. See discussion infra in Chapter 3, Section A.
11. Justice Report, at 31.
12. See Abel, Laskin's Canadian Constitutional Law (4th ed. Toronto: The Carswell Company, 1973) 844-845.
13. [1962] O.R. 595, 33 D.L.R. (2d) 190.
14. One view opposing the criminal law characterization of the J.D.A. was that expressed in Ex parte Grey (1958), 123 C.C.C. 70, at 71 (N.B.C.A.), wherein Ritchie, J.A., dealing with a preliminary objection, stated that: "Proceedings in Juvenile Court are not criminal proceedings. The Crown is not a necessary party to a proceeding in a Juvenile Court".
15. See definition of "juvenile delinquent" in J.D.A., s.2; See Abel, supra, note 12, at 842.
16. [1964] 3 C.C.C. 299, 43 C.R. 257 (B.C.S.C.).
17. Id., at 259 (C.R.).
18. (1965), 53 D.L.R. (2d) 713, 53 W.W.R. 129 (B.C.C.A.); aff'd [1967] S.C.R. 702, 65 D.L.R. (2d) 82.
19. R.S.B.C. 1960, c.373.
20. R.S.B.C. 1960, c.253.
21. [1966] 2 C.C.C. 311, 53 D.L.R. (2d) 713, 53 W.W.R. 129.

22. J.D.A., s.2(1)(h).
23. See judgment of Fauteux, J. at 85 (D.L.R.).
24. [1938] S.C.R. 398, [1938] 3 D.L.R. 497.
25. Supra, note 23, at 86.
26. Id.
27. Id., at 88.
28. Id., at 88-89.
29. Id., at 88.
30. The paramountcy doctrine is the rule of constitutional law that a statute of Parliament which strictly relates to one of the subjects of legislation expressly enumerated in s.91 of the B.N.A. Act is of paramount authority, even though it trenches upon matters assigned to the provincial legislatures by s.92: Re Fisheries, 1914, [1930] 1 D.L.R. 194, at 196-7, [1929] 3 W.W.R. 449, [1930] A.C. 111 (sub. nom. A.-G. Can. v. A.-G.B.C.).
31. Supra, note 23, at 92.
32. Id., at 91-92.
33. [1974] 1 W.W.R. 35.
34. R.S.B.C. 1960, c.253, as am.
35. (1973), 22 C.R.N.S. 263, aff'd sub nom. M. v. The Queen (1973), 23 C.R.N.S. 313 (Ont. Sup. Ct.); discussed infra at p. ~~35~~³⁶.
36. See Abel, supra, note 12, at 842-845; C.B. McNairn, Juvenile Delinquents Act Characterized as Criminal Law Legislation, (1968), 46 C.B.R. 473; G. Parker, The Appellate Court View of the Juvenile Court, (1970) 7 Osgoode Hall L.J. 155, at 171-174, P. Walker, The Law and The Young: Some Necessary Extra-Legal Considerations (1971), 29 U.T. Faculty L.R. 54 at 57-58.
37. The importance of this distinction was illustrated in a number of constitutional law cases wherein the court held the impugned legislation to be invalid but at the same time admitted that the legislation could, if framed slightly differently, validly achieve the same object. See, for example, The King v. Eastern Terminal Elevator Co., [1925] S.C.R. 434, [1925] 3 D.L.R. 1.
38. McNairn, supra, note 36, at 476.
39. J.D.A., s.3(1).
40. Id., s.3(2).

41. Id., s.38.
42. McNairn, supra, note 36, at 476-477. See dissenting judgment of Norris, J.A. in the B.C. Court of Appeal, infra, note 47, at 722 where this argument was accepted.
43. J.D.A., s.41-43.
44. Id., ss.2(1)(h) and 3(1).
45. Id., s.2(2).
46. McNairn, supra, note 36, at 477-478. See also dissenting judgments of Davey and Norris, J.J.A., infra, note 47, at 717-718, and 723-724, respectively, where these arguments were accepted.
47. See judgments of Davey and Norris, J.J.A. in (1966), 53 D.L.R. (2d) 713, at 715-730.
48. Reference Re Adoption Act, supra, note 24, at 403 (S.C.R.).
49. See McNairn, supra, note 36, at p. 479. See also the dissenting judgments of Davey and Norris, J.J.A. supra, note 47, at 717-718, and 723-724, respectively, where this argument was accepted.
50. McNairn, supra, note 36, at 479-480; supra, note 47.
51. See McNairn, supra, note 36, at 480-482.
52. I.e. - to the extent that it purports to incorporate whatever provincial or municipal offences are in force from time to time, as opposed to just those provisions in force on a specific date.
53. Supra, note 51.
54. J.D.A., ss.3(2) and 38.
55. Parker, supra, note 36, at 174; see also Walker, supra, note 36, at 58.
56. The King v. Eastern Terminal Elevator Co., [1925] S.C.R. 434, [1925] 3 D.L.R. 1; McNairn, supra, note 36, at 476.
57. See Abel, supra, note 36, at 843.
58. Justice Report, at 29.
59. See text, infra, at p. 68-69, 209-210.

FOOTNOTES - CHAPTER 1 - SECTION E

1. See B. Kaliei, Civil Rights in Juvenile Courts (1974), 12 Alberta L. Rev. 341, at 344-355.
2. R.S.C. 1970, Appendix III.
3. 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966).
4. 383 U.S. 541, at 553; 86 S. Ct. 1045, at 1053.
5. 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (Hereinafter referred to as Gault).
6. 387 U.S. 1, at 13, per Fortas, J.
7. 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).
8. 397 U.S. 358, at 364; 90 S. Ct. 1068, at 1073.
9. 397 U.S. 358, at 368; 90 S. Ct. 1068, at 1075.
10. 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).
11. See Kaliei, supra, note 1, at 356.
12. (1962), 37 W.W.R. 571 (Sask. Q.B.).
13. Id., at 573.
14. [1947] 2 W.W.R. 232 (B.C.S.C.).
15. Id., at 234.
16. See R. v. Nicholson, [1950] 2 W.W.R. 309 (B.C.S.C.) ; R. v. Gerald X. 28 C.R. 100, 25 W.W.R. 97 per Adamson, C.J.M., rev'd on other grounds (sub nom. Gerald Smith v. R.), [1959] S.C.R. 638, 22 D.L.R. (2d) 129, 30 C.R. 230.
17. (1972), 6 C.C.C. (2d) 385 (B.C.S.C.).
18. Id., at 388.
19. (1973), 13 C.C.C. 437, 22 C.R.N.S. 263 (Prov. Ct.), affid. 23 C.R.N.S. 313 (Ont. S.C.).
20. It was not argued that the general discretionary power granted to a Juvenile Court Judge by S.9 offends against the Canadian Bill of Rights, since R. v. Smythe (1971), 3 C.C.C. (2d) 266, [1971] S.C.R. 680 was taken to have established that the exercise of such a discretionary power is not contrary to the Bill.
21. R. v. Drybones, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355, at 365 (C.C.C.) per Ritchie, J.

22. [1970] 3 C.C.C. 355, at 440-441.
23. Id., at 441-442.
24. See A.G.B.C. v. Smith, supra, Chapter 1, Section D, note 18, and text at p. 22-24.
25. Supra, note 22, at 442-443.
26. (1973), 23 C.R.N.S. 313 (Ont.S.C.).
27. See Attorney-General of Canada v. Lavell; Isaac et al v. Bedard, infra, note 50. At p.211(C.R.N.S.), Ritchie J. expressed the view that "'equality before the law' as employed in S.1 (b) of the Bill of Rights is to be treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land."
28. Supra, note 26, at 318 (emphasis added).
29. [1973] 6 W.W.R. 570, 13 C.C.C. 358 (N.W.T. Magis. Ct.).
30. [1974] 6 W.W.R. 568.
31. Supra, note 29, at 361 (C.C.C.).
32. 44 D.L.R. (3d) 584, 13 C.C.C. (2d) 505 (S.C.C.).
33. R.S.C. 1970, c. P-21.
34. Id.
35. Supra, note 32 at 510 (C.C.C.).
36. Id., at 515.
37. Id., at 521.
38. Id.
39. Id.
40. See Kalie1, supra, note 1, at 357.
41. Canadian Bill of Rights, supra, note 2, S.1(a).
42. Id., S.2 (b).
43. Id., S.1 (b).
44. Supra, note 40.
45. Supra, note 17.

46. Supra, note 19.
47. Supra, note 29.
48. Supra, note 32.
49. See passage from judgment of Martland, J. in text, supra, at p. ~~38~~**39**.
50. For example, Curr v. The Queen, [1972] S.C.R. 889, 26 D.L.R. (3d) 603, 7 C.C.C. (2d) 181; A.-G. Can. v. Lavell ; Isaac et al. v. Bedard (1973), 38 D.L.R. (3d) 481, 23 C.R.N.S. 197, rev'g 22 D.L.R. (3d) 188, [1972] 1 O.R. 396 n.

FOOTNOTES - CHAPTER 2 - SECTION A

1. U.S. Task Force Report, at 7.
2. Ingleby (Chairman), Report of the Committee on Children and Young Persons, Great Britain, CMND 1191 (1960). [hereinafter referred to as "Ingleby Report"]
3. Kilbrandon (Chairman), Report of the Committee on Children and Young Persons, Scotland, CMND 2306, (1964) [hereinafter referred to as "Kilbrandon Report"]
4. Justice Report, supra, Chapter 1, Section B, note 12.
5. See, for example, J. Laycock, Juvenile Courts in Canada (1943), 21 C.B.R. 1; E. Peplar, The Juvenile Delinquents Act, 1929 (1952), 30 C.B.R. 819; W. T. McGrath, Some Suggested Amendments to Canada's Juvenile Delinquents Act (1962), 4 Crim. L.Q. 259; E. Teed, The Juvenile Delinquents Act (1958), 36 C.B.R. 600; J. A. MacDonald, Juvenile Court Jurisdiction (1965), 7 Crim. L. Q. 426; H. Allard, What do we want from our juvenile and family courts? (1968), 44 Can. Wel. 1:18; H. Litsky, The Take-over from the Juvenile Courts (1969), 45 Can. Wel. 6:8; H. Litsky, Justice with Mercy? (1970), 28 Advocate 261; H. Litsky, The Cult of the Juvenile Court (1970), 46 Can. Wel. 4:16.
6. See J. A. MacDonald, A Critique of Bill C-192, The Young Offenders Act (1971), 13 Can.J.Corr. 166, (1971), 39 The Social Worker 59, at 60. [hereinafter referred to as "MacDonald (1971)"] For a detailed discussion of the problems of stigma and labelling in the juvenile courts, see P. Walker, The Law and the Young: Some Necessary Extra-Legal Considerations (1971), 29 U.T. Faculty L.R. 54, at 60-66. [hereinafter referred to as "Walker"]
7. Canada.Ministry of the Solicitor General, Young Persons in Conflict with the Law (Ottawa: Tri-Graphic Printing Ltd., 1975), [hereinafter referred to as YPICWTL Report] , p.3. The lack of community resources has also resulted in the committal to training schools of a disproportionately high number of children from those juvenile courts with limited treatment resources: MacDonald (1971) at 60.
8. YPICWTL Report, p.3; Canadian Corrections Association, The Child Offender and the Law(Ottawa: Mutual Press Ltd., 1963), at 7-8; MacDonald (1971) at 60.
9. MacDonald (1971) at 60-61; YPICWTL Report, at 3-4.
10. MacDonald (1971) at 60-61.
11. See Walker, at 70. Even the conservative Toronto Globe and Mail felt obliged to admit that the J.D.A. "in several respects perpetuates attitudes condemned a century ago by Charles Dickens." Globe and Mail (Toronto), November 18, 1970, p.6.

12. U.S. Task Force Report, at 8.
13. Id. Although probation services were originally considered to be the backbone of the court none of the "new professionals" (ie - social workers, psychiatrists, sociologists or criminologists) have been able to produce the extraordinary rehabilitative results once expected of them. See Parker, The Appellate Court View of the Juvenile Court (1969-70), 7 Osgoode H.L.J. 155, at 156.
14. As suggested, the literature dealing with the etiology of delinquency is enormous and, rather than run the risk of falling prey to the "monastic fallacy" (ie - the tendency of those involved in causation research to oversimplify their theories: Tappan, infra, at 58), we shall not attempt to summarize or review it here. For an introduction to the views and work of some of the better-known theorists and researchers in this field, we would refer the reader to the following:
Tappan, Juvenile Delinquency (New York: McGraw Hill Book Co. Ltd., 1949);
S. Glueck, Unraveling Juvenile Delinquency (New York: The Commonwealth Fund, 1950);
A. Jones, Juvenile Delinquency and the Law (New York: Penguin Books, 1945);
E. Sutherland, "Theory of Differential Association", in R. Giallombardo, (ed.) Juvenile Delinquency (New York: John Wiley and Sons, Inc., 1966) [hereinafter referred to as Giallombardo], 81;
G. Sykes and D. Matza, "Techniques of Neutralization: A Theory of Delinquency" in Giallombardo, 129;
J. Short, Jr., "Differential Association and Delinquency", in Giallombardo, 85;
T. Monahan, "Family Status and the Delinquent Child" in Giallombardo, 209;
A. Reiss, Jr. and A. Rhodes, "Status Deprivation and Delinquent Behavior" in Giallombardo, 195;
S. Glueck, Delinquents and Nondelinquents in Perspective (Cambridge: Harvard University Press, 1968);
S. Rubin, Crime and Juvenile Delinquency (2nd ed. New York: Oceana Publications, Inc, 1961);
D. Matza, Delinquency and Drift (New York: John Wiley and Sons, Inc. 1964).
An excellent summary of most of the leading works as well as an extensive bibliography is to be found in H. Rodman and P. Grams, Juvenile Delinquency and the Family: A Review and Discussion in U.S. Task Force Report, at 188-221.
15. In its Report, the U.S. Task Force on Juvenile Delinquency concluded:

There is no shortage of theories of the etiology of delinquency. They range from the intrapsychic to the sociological, from the genetic to the anthropological, even to theories turning upon analyses of body types and structures. Some have looked for basic, generalized explanations of all delinquency. Some have noted the enormous variety in the types of conduct officially denominated delinquency as well as in the types of juveniles

found to be delinquents and have begun to suggest narrower explanations differentiating among kinds of deviant behavior. But fundamentally delinquency is behavior, and until the science of human behavior matures far beyond its present confines, an understanding of those kinds of behavior we call delinquency is not likely to be forthcoming.

See U.S. Task Force Report at 8. See also the discussion of theories of causation and the similar conclusions in Justice Report, at 12-19.

16. U.S. Task Force Report, at p.8. The tendency of Canadian lawyers judges and legislators to depend upon psychiatry, for example, as the panacea for overcoming all sorts of mental and behavioral disorders arising in the criminal process has been recently criticized: "Exaggerated confidence in the prognostic and therapeutic powers of psychiatrists has been evident on many fronts. In this regard, the exhortations of some leaders of the profession not to expect too much of psychiatry have fallen on deaf ears..." J. Edwards, in Proceedings of the National Symposium on Medical Sciences and the Criminal Law (Toronto: University of Toronto Press, 1973), p.ii.
17. Id.
18. Id.
19. Id., at 9.
20. Id.
21. Kent v. U.S. (1966), 383 U.S. 541, at 556.
22. U.S. Task Force Report, at 9.

FOOTNOTES - CHAPTER 2 - SECTION B

1. Justice Report, at 1.
2. Justice Report, at 2. Its two other responsibilities were to "enquire into and report upon the nature and extent of the problem of juvenile delinquency in Canada", and to "hold discussions with appropriate representatives of provincial governments with the object of finding ways and means of ensuring effective co-operation between federal and provincial governments acting within their respective constitutional jurisdiction." Id.
3. Representing four divisions of the Department of Justice: the Criminal Law Section, the Royal Canadian Mounted Police, Penitentiaries and Parole.
4. Justice Report, at 301-305.
5. Id., at 7-11
6. Id., at 8.
7. "[T]he inability of social scientists to pinpoint the causes of delinquency does not justify a failure on the part of society to act. In the analogous field of public health effective measures have frequently been taken to reduce the incidence of certain diseases before their causes were discovered." Id., at 19.
8. Id., at 25. The Committee failed to articulate what the benefits of uniformity were; it merely noted that they were "evident to anyone who is familiar with other systems." Id.
9. Id., at 26.
10. See Ingleby and Kilbrandon Reports. To its credit, the Justice Committee did, at a later stage of its study, briefly note the possibility of provinces developing non-criminal approaches, based either on The English or Scottish models, for the handling of young offenders. See Justice Report, at 51-52.
11. Justice Report, at 35.
12. Id., at 26.
13. Id., at 36-40.
14. Id., at 40-54.
15. Id., at 54-62.
16. Id., at 62-77.
17. Id., at 77-85

18. Id., at 85-90.
19. Id.
20. Id., at 139.
21. Id., at 112-113.
22. Id., at 115-119.
23. Id., at 139-142.
24. Id., at 142-145.
25. Id., at 145-147.
26. Id., at 147-149.
27. Id., at 150-153.
28. Id., at 154-155.
29. Id., at 105.
30. The Justice Committee implicitly agreed with the Ingleby Committee that:
Although it may be right for the court's action to be determined primarily by the needs of the particular child before it, the court cannot entirely disregard other considerations such as the need to deter potential offenders. An element of general deterrence must enter into many of the court's decisions and this must take the distinction between treatment and punishment even more difficult to draw.
See Ingleby Report, para. 110, at 41 and Justice Report, at 105.
31. The Justice Committee agreed with the Ingleby Committee that "in practice...it is impossible to distinguish between treatment and punishment. The same thing may be either punishment or treatment, or both at the same time." Ingleby Report, paras. 111-112, at 42, quoted in Justice Report, at 106.
32. See E. Younghusband, The Juvenile Court and the Child (1957), 7 British Journal of Delinquency 181, at 182-183.
33. Justice Report, at 106.
34. Id., at 164.
35. Id., at 165-166.
36. Id., at 167-168.
37. Id., at 169-170.
38. Id., at 170-171.
39. Id., at 172-173.

40. Id., at 171-172.
41. Id., at 176-178.
42. Id., at 178-179.
43. Id., at 179-182.
44. Id., at 182-184.
45. Id., at 186-187.
46. Id., at 187-188.
47. Id., at 184-185.
48. Id., Chapter X.
49. Id., Chapter XI.
50. Id., Chapter XII.
51. Id., Chapter XIII.
52. Canada, Dept. of the Solicitor-General, First Discussion Draft of Proposed Children's and Young Persons' Act (Ottawa: Queen's Printer, 1967) [hereinafter referred to as the "Discussion Draft"]
53. Although the Discussion Draft was unusually long (99 sections compared to 45 in the J.D.A.) and rather legalistic in style (many of the sections adopting the language of the Criminal Code) it seems that in most respects it accurately reflected the recommendations of the Justice Committee. See MacDonald (1971) at 61.
54. Globe and Mail (Toronto), June 7, 1975, p.6.
55. MacDonald (1971) at 61.
56. Globe and Mail (Toronto), June 7, 1975, p.6.
57. For an analysis of various provisions in the Discussion Draft, see T. Grygier, Juvenile Delinquents or Child Offenders; Some Comments on the First Discussion Draft of an Act Respecting Children and Young Persons (1968), 10 Can. J. Corr. 458, and K. Regier, Proposed Revisions to Juvenile Delinquents Act, [1970] Pitblado Lectures 194.
58. A. MacLeod, The Juvenile Delinquency Committee (1964), 6 Can. J. Corr. 43; W. McGrath, Juvenile Delinquency; Federal Committee (1962), 5 Crim. L.Q. 9.
59. Canadian Corrections Association (now the Canadian Criminology and Corrections Association), Report of the Committee Established to Consider Child Welfare and Related Implications Arising from the Department of Justice Report on Juvenile Delinquency (1968), 10 Can. J. Corr. 480. [hereinafter referred to as "C.C.A. (1968)"]

60. Supra, note 57.
61. The one exception that has come to the writer's attention is an article by John Spencer entitled Social Workers, the Social Services and the Juvenile Court: the Relevance for Canada of Recent Scottish Proposals (1967), 9 Can. J. Corr. 1. Although the author, a professor of social work and of criminology, confined his comments to a rather limited number of issues confronted by the Report and primarily concerned himself with a comparison with proposals in another jurisdiction, his article is noteworthy both for his comments on these issues as well as for his observation that "this well-organized and challenging document [the Justice Report] deserves a much wider debate than it has hitherto received..." Id., at 1.
62. See list of articles dealing with Bill C-192 collected infra, Chapter 2, Section C, note 2.
63. MacDonald (1971) at 61. One is left to wonder whether the lack of critical comment reflected the critics' approval or, perhaps, their unwillingness to tackle such a large and complicated topic.
64. Supra, Chapter 2, Section A.
65. Ingleby Report.
66. 1969, C.54 (U.K.).
67. Kilbrandon Report.
68. 1968, C.49 (U.K.).
69. U.S. Task Force Report, at 19-21.
70. Supra, Chapter 1, Section E, note 5.
71. Justice Report, at 51.
72. See Justice Report, at 25.
73. For example, this approach was adopted regarding the issue of the juvenile court's minimum age jurisdiction. See Justice Report, at 51-53.
74. Id., at 29.
75. Id., at 26.
76. Id., at 29.
77. The only consideration the Committee gave to the non-criminal alternative approaches advocated by the Ingleby and Kilbrandon Committees can be found at pp.51-52 of its Report, where the Committee noted that "the view is held by some that future efforts at dealing with the problem of the juvenile offender should move still further away from a criminal law approach in the direction of welfare or educational measures,

administered either through a form of child welfare legislation or through a system almost entirely divorced from the courts" and expressed concern that one of the effects of establishing a minimum age of ten might be to limit, to some extent, "the development of such alternative techniques of a welfare or educational nature by any province that should wish to undertake them."

78. The only real analysis of the validity of the juvenile court in light of modern criticisms appears at pp.40-51 of the Report. Unfortunately, this discussion is framed in terms of the problem of minimum age jurisdiction, and as such, is not as broad a consideration as one would have hoped for.
79. Bernard C. Hofley, Assistant Deputy Minister, Research and Systems Development Branch, Ministry of the Solicitor General Secretariat in a speech to the National Social Science Conference '75 (Ottawa: November, 1975).
80. See Justice Report at 25-26, 29, 105-106, 163-164, and to a certain extent at 40-51.
81. Supra, note 79. See also the comments of Grygier, supra, note 57, at 458, who noted that although the research upon which the Report was based was "outstanding in legal scholarship" it did not include the social psychological findings produced by empirical research.
82. "This inquiry has taken much longer to complete than was anticipated at the beginning. Since none of the Committee members had worked in the juvenile field we were not entirely aware of the complexity of the problems the subject presents..." Justice Report, at 4. See also McGrath, supra, note 58 at 10.
83. Note, for example, the significant extent to which many of the recommendations contained in the brief of the Canadian Corrections Association (now the Canadian Criminology and Corrections Association) were reflected in the Justice Committee Report. See Canadian Corrections Association, The Child Offender and the Law (Ottawa: Canadian Welfare Council, 1963) and comments to the above effect in C.C.A. (1968) at 2, and in Grygier, supra, note 57, at 459.
84. There is no doubt that the interpretation of much of the technical material relevant to any evaluation of proposed or existing programs or procedures requires special knowledge and experience. It is doubtful whether the Justice Committee, given the background of its members and the limited time allowed for its study, was able to develop the expertise necessary to competently and constructively evaluate treatment methods proposed for or already in existence in the juvenile process. See McGrath, supra, note 58, at 11.

FOOTNOTES - CHAPTER 2 - SECTION C

1. Young Offenders Act (Bill C-192) 3rd Session, 28th Parliament, 19 Eliz. II, 1970.
2. The development of opposition to the Bill can be charted through the following series of articles in the Globe and Mail (Toronto): "Juvenile Offenders Get New Treatment under Proposed Act" (November 17, 1970) p. 6; "It Will Take Two" (November 18, 1970) p. 6; "Juveniles Not Pint-Sized Criminals: Judge," (November 21, 1970) p. 31; "Concept of new Young Offenders Act described as Frightening" (November 28, 1970) p. 11; "Young Offenders Act is 'Punitive'; C.M.H.A. Urges Defeat or Change" (December 9, 1970) p. 8; "Young Offenders Bill Throwback, Punitive to Children: Grossman" (December 10, 1970) p. W6; "Critics of Young Offenders Act Prepare for Battle at 2nd Reading" (January 12, 1971) pp. 1-2; "Grossman Attack on Young Offenders Act Not Inspired by Power Change, Deputy Says" (January 13, 1971) p. 4; "A Child's Criminal Code?" (January 13, 1971) p. B2; "Opposition Demands Government Abandon its Young Offenders Act" (January 14, 1971) p. 3; "Reasoned Response Needed" (January 19, 1971) p. 6; "Psychiatrist's View of the Law and the Child's World" (February 4, 1971), p. 7. For an interesting up-date four year later, see "Young Offenders Wait" (June 7, 1975).

In contrast to the response (or lack of response) to the Justice Report and the 1967 Discussion Draft, the legal literature devoted considerable attention to Bill C-192. See Canadian Criminology and Corrections Association, Brief on Young Offenders Act Bill C-192 (1971), 13 Can. J. Corr. 307 [hereinafter referred to as "C.C.C.A. Brief"]; J. MacDonald, A Critique of Bill C-192, The Young Offenders Act (1971), 13 Can. J. Corr. 166, (1971), 39 The Social Worker 59; B. Grossman, Young Offenders Before The Courts (1971), 2 Can. B.J. (N.S.) 2:6; M. Fish, Bill C-192, Another View (1971), 2 Can. B.J. (N.S.) 31; M. Tadman, A Critical Analysis of Bill C-192: The Young Offenders Act (1971), 4 Man. L.J. 371; R. Fox, The Young Offenders Bill: Destigmatizing Juvenile Delinquency? (1972), 14 Crim. L.Q. 172; P. Walker, The Law and the Young: Some Necessary Extra-Legal Considerations (1971), 29 U.T. Faculty L.R. 54.

3. Globe and Mail (Toronto) January 19, 1971, p. 6.
4. Eldon Woolliams (P.C., Calgary North), Debates, Vol. 115, No. 53.
5. John Gilbert, (N.D.P., Broadview), Debates, Vol. 115, No. 53.
6. For a summary of the debate on second reading see Globe and Mail (Toronto) January 14, 1971, p. 3.
7. See J. MacDonald, Some Recommendations for Amendments to Bill C-192 (The Young Offenders Act) for the Attention of Members of the Standing Committee on Justice and Legal Affairs (June 17, 1971) (unpublished).
8. Globe and Mail (Toronto) June 7, 1975, p. 6.
9. See text, supra, at p. 54 .
10. R. Fox, The Young Offenders Bill: Destigmatizing Juvenile Delinquency?

(1972), 14 Crim. L.Q. 172 [hereinafter referred to as "Fox"] at 174.

11. See text, supra, at p. 49-52.
12. See text infra, at p. 63-66.
13. Globe and Mail (Toronto), November 17, 1970, pp. 1-2.
14. Still, the differences between the Bill and the Report drew greater attention than the similarities between the two. It is interesting to note that Ronald R. Price, the Secretary of the Justice Committee and the principal author of the Justice Report also opposed Bill C-192. See House of Commons-Debates, January 13, 1971, p. 2375, and MacDonald (1971) at 61.
15. Allan Grossman, Ontario Minister of Correctional Services, quoted in Globe and Mail (Toronto), December 10, 1970, p. W6. A similar comment was that of Dr. M.P. Marcillo, the former head of the psychiatric clinic of the Provincial Court (Family Division) of York County, who wrote: "[T]he tragedy is that the Act... is as misdirected, as psychologically unsound, as potentially harmful, as unrealistic and as unworkable as it is possible to imagine." Globe and Mail (Toronto), February 4, 1971, p. 7.
16. Bill C-192, ss. 7-10; MacDonald (1971) at 59.
17. Bill C-192, ss. 51, 56; MacDonald (1971) at 59.
18. Bill C-192, s.73; MacDonald (1971) at 59.
19. Bill C-192, ss.48, 49; MacDonald (1971) at 59.
20. Id.
21. Bill C-192, s.2(m); C.C.C.A. Brief, at 310.
22. Id.
23. Bill C-192, ss. 9(1)(d), 10 (1)(d), 14 (b), 16(1)(e); Fox, at 202.
24. Bill C-192, ss. 26(2), 27; Fox, at 202.
25. Fox, at 201.
26. Bill C-192, s.5(2); Fox, at 201.
27. Bill C-192, s.26; Fox, at 201.
28. Bill C-192, s.35; Fox, at 201.
29. Bill C-192, s.30(1)(a); Fox, at 211.
30. Bill C-192, ss.2(c),(s), 3; Globe and Mail (Toronto), November 18, 1970, p. 6.
31. Bill C-192, s.16; Globe and Mail (Toronto), November 18, 1970, p. 6.

32. Bill C-192, s.60(2); Globe and Mail (Toronto), November 18, 1970, p. 6.
33. MacDonald (1971) at 62.
34. See Justice Report, at 153; Bill C-192, s.23(3); MacDonald (1971) at 62.
35. See Justice Report at 189; Discussion Draft, s.81(1); Bill C-192, s.71; MacDonald (1971) at 62-63. To be fair, one should note the doubts expressed by the Justice Committee as to the extent to which this problem could ever be solved by legislation alone. Justice Report at 189. See also C.C.C.A. Brief, at 315.
36. Supra, note 23.
37. Justice Report at 144; MacDonald (1971) at 63. It is doubtful whether this need would be adequately met by the provisions in the Bill allowing a judge a discretion, where he considers it in the child's best interests, to allow a parent [s.27(1)], another adult person [s.27(2)], or the judge himself [s.28] to assist the young person.
38. See Justice Report at 179; Discussion Draft, s.59(f) and 60(e); Bill C-192, s.30(1)(i); J.D.A., s.25; MacDonald (1971) at 63-64.
39. MacDonald (1971) at 64. Since none of these provisions were recommended by the Justice Committee, it was suspected that most, if not all of them were introduced at the urging of provincial authorities. Id.
40. Bill C-192, s.30(4).
41. MacDonald (1971) at 64; C.C.C.A. Brief at 314; Fox, at 212. See also M. Tadman, supra, note 2, at 378-379, where this section is described as "medieval in philosophy and effect." It is interesting to note that although the C.C.C.A. opposed re-sentencing at age 21, it did not object to committal until age 21 followed by proceedings under provincial mental health legislation. See C.C.C.A. Brief, at 314. It is also remarkable that until this provision was proposed, few critics were even aware that a similar, but even broader power, was already available under s.20(3) of the J.D.A., whereby a judge could waive a juvenile to adult court for trial on any indictable offence, notwithstanding an earlier juvenile court delinquency finding and disposition on the same facts. See Fox, at 212 and cases cited therein.
42. Bill C-192, s.74(1).
43. R.S.C. 1970, c. I-1, s.2.
44. Although the Justice Report did not discuss the issue of fingerprinting juveniles, this has been a very important issue in recent years. Although not noticed by any of Bill C-192's critics, the effect of s.74 (1) would seem to have been that a juvenile could be fingerprinted even though his act, in the case of an adult, would have only constituted a summary offence.
45. MacDonald (1971) at 65.

46. C.C.C.A. Brief at 315-316.
47. Bill C-192, s.47(1). Contrast to J.D.A., s.26 which expressly forbids the incarceration of juveniles and adults in the same facility. See Justice Report at 183; MacDonald (1971) at 65-66; and C.C.C.A. Brief at 314.
48. Bill C-192, s.58(3); Justice Report at 123; MacDonald (1971) at 60.
49. Globe and Mail (Toronto), December 9, 1970, p. 8.
50. Id.
51. Regarding the general concept of delinquency: see C.C.C.A. Brief at 6. Regarding the wording of the J.D.A.: see, for example, the comment of Manson, J. (B.C.S.C.) in Rex, v. H. and H., [1947] 1 W.W.R. 49, at p. 59: "[The J.D.A.] is not a lawyer's Act, not a model of perfection in the matter of draughtsmanship, not one to which it is easy to apply the ordinary rules of construction."
52. Fox, at 172-173.
53. Globe and Mail (Toronto), November 18, 1970, p. 6.
54. Fox, at 213.
55. Id., at 173.
56. This view was reflected in the comments of the Ontario Deputy Minister of Correctional Services [Globe and Mail (Toronto), January 13, 1971, p.4]:

] The introduction of the bill came to the provincial ministers out of the blue sky without giving them any opportunity to comment. Upon receipt and study of the new act the Minister [of Correctional Services] wrote to the Solicitor-General and received a telegram informing us that we could appear before the standing committee and make our objections known.
57. C.C.C.A. Brief, at 310.
58. Fox, at 214.

FOOTNOTES - CHAPTER 2 - SECTION D

1. Canada, Solicitor General, Young Persons in Conflict with the Law: A Report of the Solicitor General's Committee on Proposals for New Legislation to Replace the Juvenile Delinquents Act (Ottawa: Ministry of the Solicitor General, 1975). [hereinafter referred to as the "YPICWTL Report"].
2. YPICWTL Report, at 84-104 [hereinafter referred to as the Draft Act].
3. See, supra, Chapter 2, Section A.
4. YPICWTL Report, at 12-13.
5. See text, supra p. 62.
6. See J. MacDonald, Some Recommendations for Amendments to Bill C-192 (The Young Offenders Act) for the Attention of Members of the Standing Committee on Justice and Legal Affairs (June 17, 1971) (unpublished), at 3.
7. Toronto Star, December 6, 1975, p. H1.
8. YPICWTL Report, at 14-15.
9. YPICWTL Report, at 14 [emphasis added].
10. Emphasis added.
11. J.D.A., s.3(2).
12. Id., s.38.
13. Id., s.3(2).
14. See text, supra, at p. 10-17.
15. See text, supra, at p. 44.
16. J.D.A., s.3(2).
17. Id., s.38.
18. Draft Act, s.12.
19. J.D.A., s.20(1)(b).
20. Draft Act, s.16(1)(a).
21. J.D.A., s.20(1)(a).
22. Draft Act, s.(1)(b)(i).
23. J.D.A., s.20(1)(c).

24. Draft Act, s.16(1)(b)(ii).
25. Id., s.16(1)(b)(iii).
26. Id., s.16(1)(b)(iv).
27. J.D.A., s.20(1)(d), (e), and (f).
28. Draft Act, s.16(1)(b)(v) and (vi).
29. J.D.A., s.20(1)(f).
30. Id., s.20(1)(h).
31. Id., s.20(1)(i).
32. Draft Act, s.16(1)(b)(vii).
33. J.D.A., s.20(1)(g).
34. Draft Act, s.17(1).
35. Id., s.16(1)(b)(iv), (v) and (vi).
36. Id., s.30-34.
37. YPICWTL Report, at 84.
38. Id., at 14.
39. See text, supra, at p. 44-47.
40. YPICWTL Report, at 17-20.
41. Draft Act, s.9.
42. See criticisms to this effect, supra, at p. ; see also discussion in YPICWTL Report at 10.
43. YPICWTL Report, at 26.
44. Draft Act, s.9(3).
45. Formerly contained in J.D.A., s.33-34.
46. Draft Act, preamble.
47. Draft Act, s.10(1) and (2).
48. Id., s.10(3).
49. Id., s.11.
50. Id., s.5.

51. Id., s.37.
52. Id., s.24 and 25.
53. Id., s.38 and 39.
54. Id., s.12.
55. Id., s.6
56. Id., s.16(8).
57. Id., s.42.
58. See text, supra, at p. 71-72.
59. See text, supra, at p. 74-75.
60. A similar observation has been made by the Deputy Attorney-General for the Province of British Columbia. In presenting the provincial government's official response to the proposed federal legislation, he wrote:

There appears to be a contradiction between the stated philosophy, as it appears in the preamble, and the procedure by which the philosophical approach will be enacted. There, further, appears to be a contradiction in the philosophical position itself.

See a letter from David H. Vickers, Deputy Attorney-General to Mr. Dan Prefontaine, Director, Social Planning and Analysis, Ministry of the Solicitor-General dated December 8, 1975, at 1.

61. Draft Act, s.16(1)(b)(ii).
62. Id., s.16(1)(b)(iii).

FOOTNOTES - CHAPTER 3 - SECTION A

1. J.D.A., S.42
2. J.D.A., S.43 (1). In cases where this latter method is followed, the Governor in Council can designate a superior court or a county court judge or justice having jurisdiction in the designated area to act as the juvenile court judge for that area. J.D.A., S.43(2).
3. See discussion of constitutional jurisdiction, supra, at p. 19-21.
4. Canadian Welfare Council, The Juvenile Court in Law (4th ed. Ottawa: Canadian Welfare Council, 1952) at 30.
5. Id.
6. Id.
7. Justice Report, at 35.
8. Id.
9. See British North America Act, 1959, 12-13 Geo. 6, C.22, S.1.
10. Justice Report, at 35-36.
11. Id.
12. Id., at 91, n.5. See, for example, Regina v. Mahaffey (1961), 36 C.R. 262.
13. The terms "juvenile court" and "youth court" are used interchangeably throughout this paper.
14. See definition of "youth court" in Draft Act, S.2.
15. British North America Act, 1867, 30-31 Vict., C.3, S.94(14); supra, note 3.
16. Supra, note 9.
17. See The Welfare of Children Act, R.S.N. 1970, C.190, as am. by Statutes of Newfoundland 1973 (No.48), SS. 12 and 20.
18. Since this section was written the author has been advised by an official in the Solicitor-General's Department that there is a consensus that any new legislation should apply to Newfoundland although there are still certain constitutional obstacles yet to be overcome.

FOOTNOTES - CHAPTER 3 - SECTION B

1. Brief submitted to the Dept. of Justice Committee by The John Howard Society of British Columbia (1962), at 1-2, cited in Justice Report at 37.
2. A. Doob, "Young persons in conflict with the law" or "The influence of small-1 liberal social science wisdom on large-J Justice", a speech delivered to the National Social Science Conference '75 on Social Science and Public Policy in Canada (20-22 November, 1975, Ottawa).
3. Paulsen, "The Delinquency, Neglect and Dependency Jurisdiction of the Juvenile Court", in Justice for the Child (Rosenheim ed., 1962) at 46, cited in Justice Report at 37.
4. Justice Report, at 38.
5. Id., at 39.
6. Id., at 40. The title Children and Young Persons Act was later adopted for the new English legislation found in Statutes of England, 1969, C.54.
7. C.C.C.A. Brief, at 311. But see Fox at 177.
8. YPICWTL Report, at 16.
9. Id. Its alternative recommendation was "The Young Persons Act" (short title) together with "An Act Respecting Young Persons in Conflict with Federal Statutes and Regulations" (longer title).
10. Justice Report, at 40.

FOOTNOTES - CHAPTER 3 - SECTION C

1. Criminal Code, S.12.
2. Id., S.13
3. The J.D.A. does not specifically establish a minimum age for juvenile court jurisdiction; in section 2(1)(a) it defines a child as "any boy or girl apparently or actually under the age of sixteen years..." However, sections 12 and 13 of the Criminal Code are made applicable to proceedings under the J.D.A. by reason of the fact that sections 12 and 13 apply to "offences" (e.g. "No person shall be convicted of an offence... while he was under the age of seven years...") [emphasis added] and section 3(1) of the J.D.A. defines "delinquency" as an "offence".
4. In British Columbia, the Department of Human Resources has issued a directive providing that children under the age of 12 should not be taken before a court except in exceptional circumstances. See D. Hart, "Juveniles and the Courts" in Process (Justice Development Commission, Dept. of the Attorney-General, British Columbia: 1973) at 2.
5. Justice Report at 41.
6. Id., at 44-45.
7. Id., at 45-46.
8. Id., at 41-42.
9. Id., at 46-47.
10. Id., at 42-43.
11. Id., at 47, adopting the view of the Ingleby Committee. See Ingleby Report at 26, para. 66.
12. Id., at 47.
13. Id., at 43.
14. Id., at 48.
15. Id., at 43.
16. Id., at 48-49
17. Id., at 44.
18. Id., at 49.
19. Id., at 49
20. Id., at 51; see Fox at 184-185.

21. Id., at 52-53.
22. Criminal Code, S.13.
23. Id., at 53-54.
24. Bill C-192, S.78.
25. Fox, at 184.
26. Draft Act, S.2.
27. Id., S.44.
28. Id.
29. YPICWTL Report, at 19.
30. Id.
31. Id.
32. Id.
33. Id., at 20.
34. Although most authorities in the field have argued that one advantage of the raising of the minimum age would be the avoidance of the stigma of the formal hearing, there are others who have expressed a contrary view. In his analysis of the English White Paper, Fitzgerald wrote:

It may be that stigmatising conduct as criminal and stigmatising those who perform it as offenders is one of the most useful functions of the criminal law, and if this is so, then the value of sparing children this stigma must be weighed against the general value of stigmatising offenders, and it is not crystal clear that below sixteen the stigma should not be applicable.

Fitzgerald, The Child, the White Paper and the Criminal Law: Some Reflections, [1966]Crim. L.Q. 607, at 609.
35. See, for example, the Ingleby Report at 32-36.
36. See generally Fox, at 185. According to one of the authors of the Ontario Training Schools Act, the age of 12 was chosen as the minimum age for the admission of a child to a training school on the basis of his having committed an offence on the grounds that 12 is the age at which, statistically, anti-social behavior increases rapidly and at which most children enter a period of psychological change. T. Grygier, Juvenile Delinquents or Child Offenders: Some Comments on the First Discussion Draft of an Act Respecting Children and Young Persons (1968), 10 Can. J. Corr. 458, at 461. [hereinafter referred to as "Grygier"]

37. Canadian Corrections Association, The Child Offender and the Law (1963), at 7-8 [hereinafter referred to as "C.C.A. (1963)"].
38. Id.
39. Great Britain Home Office White Paper, The Child, The Family and the Young Offender, CMND 2742 (1965).
40. Id.
41. O. Nyquist, Juvenile Justice (London: MacMillan and Co. Ltd., 1960) 178-179.
42. Tappan and Nicolle, Juvenile Delinquents and their Treatment (1962), 339 *The Annals* 157, at 162.
43. Justice Report at 50.
44. Kilbrandon Report, at 33, para. 65.
45. See text, supra, at p. 97.
46. Id.
47. Id.
48. Fox, at 187.
49. Fox, at 187; C.C.C.A. Brief, at 311; Grygier, at 461-462; M. Tadman, A Critical Analysis of Bill C-192: The Young Defenders Act (1971), 4 *Man. L.J.* 371, at 374-5. [hereinafter referred to as "Tadman"]
50. For example, in Sweden the minimum age of criminal responsibility is 15 years (Penal Code of Sweden, 1965, C.33, S.1) but in practice it is 18 years (see Child Welfare Act of Sweden, 1961, C.4, S.25). In England the minimum age is 14 years except for homicide: Children and Young Persons Act 1969, SS.4 and 70. See discussion in Justice Report at 43 et seq.

FOOTNOTES - CHAPTER 3 - SECTION D

1. J.D.A., ss.2(1)(a) and 2(2).
2. See discussion supra, at p.312. The validity of the proclamation establishing the maximum age of 17 was upheld by the Supreme Court of Canada in R. v. McEwen, [1972] 2 W.W.R. 618, 24 D.L.R. (3d) 312.
3. The Child Welfare Act, R.S.N. 1970, c.190, as am. by Statutes of Nfld. 1973 (No. 48), ss. 12 and 20.
4. The maximum age of juvenile court jurisdiction is 18 in Denmark, Finland, France, Italy and the Netherlands; in Belgium it is 16; Greece and Great Britain, 17; six Australian states have chosen 17, while the other three have chosen 18; and most American states (with certain exceptions, such as New York) have set their limit at 18. See Justice Report at 54.
5. This argument was accepted by the Ingleby Committee as a ground for rejecting the suggestion that the maximum age in England be raised to eighteen. See Ingleby Report at 36-38.
6. Justice Report at 55-57.
7. Id., at 57-59.
8. Id., at 61-62.
9. Id., at 59-60.
10. This recommendation followed the approach established in s.4 of the J.D.A. - namely, that the juvenile court would have jurisdiction even though the offender is over the maximum age at the time he is apprehended. Although it acknowledged that this provision is somewhat of an anomaly (since it allows offenders over the maximum age to be brought before the juvenile court) the Committee felt that it was more consistent with the philosophy of the Act to establish the juvenile court's jurisdiction by reference to the time when the offence was committed, than to limit jurisdiction (as under the English statute) to cases where the offender is actually under the juvenile age at the time of his court appearance. See Justice Report, n. 68 at 95-96.
11. Id., at 61.
12. Id., at 60.
13. Id.
14. Bill C-192, s.2(c).
15. Id., s.3.
16. Debates, Vol. 115, No. 53, p. 2371.
17. See C.C.C.A. Brief at 311; see Fox, at 188.

18. Grygier, at 462.
19. See for example, C.C.C.A. Brief at 311; Fox, at 189-191.
20. Fox, at 189-190.
21. YPICWTL Report at 20; Draft Act, s.2.
22. Id.
23. "We are again concerned with factors involving levels of maturity and development of individuals in their formative years, as well as the perceptions of society about characteristics of adulthood and ages regarding the attribution of civil responsibility". YPICWTL Report, at 20.
24. Id.
25. Id., at 20-21. As noted earlier (*supra*, note 9), both the J.D.A. and the Justice Report adopted the approach that a juvenile who commits an offence while under the juvenile court's maximum age limit should be considered to be within the juvenile court's jurisdiction regardless of his age at the time when he appears before it. The Draft Act has opted for a more restrictive view of this extended jurisdiction. According to ss.4(1) and (2), where a youth has committed an offence while under the age of eighteen and the information is laid before he reaches the age of twenty-one, the youth court will have jurisdiction, notwithstanding the fact that he may subsequently reach the age of twenty-one before he appears before the court. However, where the information is not laid until after the person reaches the age of twenty-one, he can only be dealt with in an adult court (s.4(5)). In addition, any disposition made under the proposed Act terminates when the young person reaches the age of twenty-one, unless it has expired sooner (s.4(3)).
26. YPICWTL Report at 21; Draft Act, s.4(3).
27. YPICWTL Report at 21; Draft Act, s.14. See infra, Chapter 3, Section F.
28. Draft Act, s.4(6).
29. A.-G. of B.C. v. Smith, [1969] 1 C.C.C. 244, at 251.
30. Fox, at 188.
31. For example, Denmark, Finland, France, Italy and the Netherlands.
32. One Million Children (Ottawa: 1970).
33. British Columbia Royal Commission on Family and Children's Law, Fourth Report (Victoria: Queen's Printer, 1975) at 58-64.
34. Statistics Canada, Juvenile Delinquency (Ottawa: Queen's Printer, 1973).
35. Toronto Globe and Mail, November 8, 1970.

36. "...[W]e are also cognizant of the problems that will exist in dealing with 16 and 17 year olds in terms of the need for more and different services and resources in those provinces where the maximum age is not now 18 years." YPICWTL Report, at 21-22.
37. Great Britian Home Office White Paper, The Child, the Family and the Young Offender, CMND 2742, (1965), at 12; Report of the Canadian Committee on Corrections (The "Quimet Report") (1969), c.21.
38. Supra, at p. 104 .
39. Justice Report, at 61.
40. Supra, at p.104 .

FOOTNOTES - CHAPTER 3 - SECTION E

1. See, generally, Chapter 1, Sections B and C.
2. See text, supra, at p.16-18. According to the Canadian Corrections Association (now the Canadian Criminology and Corrections Association), "... delinquency is defined as far as possible as a state or condition, so that the child is looked upon as having a tendency to anti-social behavior, rather than as having committed one undesirable act." C.C.C.A. Brief, at 5.
3. See text, supra, at p.16-18.
4. The "principle of legality" (NULLUM CRIMEN SINE LEGE, NULLA POENA SINE LEGE) requires that offences be defined with sufficient definiteness to afford an accused fair warning of the conduct that is prohibited. See Hall, General Principles of Criminal Law (2nd ed., 1960), c.11; Justice Report, at 66.
5. See generally Justice Report at 66-67.
6. In B.C. "incurrigibility" charges are usually laid under the Protection of Children Act, R.S.B.C. 1960, c.303 as amended. See Appendix A, at p. 310 .
7. Brief submitted by School of Social Work at the University of British Columbia (1962), at 1-2; Justice Report, at 65.
8. Justice Report, at 66.
9. "No legal distinction is made between the child involved in a serious offence such as armed robbery and one involved in an infraction of a by-law, such as driving a bicycle without a licence." C.C.C.A. Brief, at 5-6.
10. Justice Report, at 67.
11. Id.
12. Id.
13. Id., at 68.
14. Id., at 72.
15. Id., at 68.
16. Id., at 71-72.
17. Id., at 72-75.
18. Id., at 69.

19. Debates, Vol. 115, No. 53, p. 2373.
20. Other proposed reforms which may be seen as part of this attempt to decriminalize juvenile delinquency include the change in nomenclature from "juvenile delinquent" to "young offender" and the raising of the lower age limit from 7 to 10 years. See supra, sections B and C, respectively, of this chapter.
21. Bill C-192, S.2(m).
22. YPICWTL Report, at 18.
23. Id., Draft Act, S.2.
24. As Dr. J.W. Mohr, one of the authors of the newest Report, has noted: "[The Draft Act] is clearly a modified version of the Criminal Code". Toronto Star, 6 December, 1975, p. H1.
25. Supra, note 19, at p. 2371.
26. YPICWTL Report, at 20.
27. Id., at 18.
28. J.A. MacDonald, A Statement of Proposed Improvements to or Changes in the Model Young Persons in Conflict with the Law Act (unpublished), at 1-2.
29. It could be argued that such an intrusion into provincial enforcement of its own legislation, because it is not contained in a comprehensive scheme for the treatment of juveniles, would not constitute a valid exercise of Parliament's criminal law power and would not be supported by the decision in the Smith case.
30. See Globe and Mail (Toronto), 18 November, 1970; Toronto Star, supra, note 24.
31. Some of the alternatives proposed thus far include: juvenile court jurisdiction, together with incorporation by reference of the dispositional provisions of the Federal Act; handling of bylaw and minor traffic offences in the ordinary adult criminal courts; jurisdiction vested in a non-adversarial welfare panel. See Fox, at 183-184.

FOOTNOTES - CHAPTER 3 - SECTION F

1. See Justice Report, at 77, where techniques adopted by other jurisdictions are reviewed.
2. A great many of the reported cases will be referred to in this section and in Chapter 4, Section E.
The leading articles on s.9 include G. Parker, The Appellate Court View of the Juvenile Court (1969), 7 Osgoode Hall L.J. 155 [hereinafter referred to as "Parker (1969)"]; G. Parker, Juvenile Delinquency - Transfer of Juvenile Cases to Adult Courts - Factors to be Considered under the J.D.A. (1970), 48 C.B.R. 336, at 337, [hereinafter referred to as "Parker (1970)"]; J.A. MacDonald, Juvenile Court Jurisdiction (1964-65), 7 Crim. L. Q. 426 [hereinafter referred to as "MacDonald (1964-65)"]; D. Bowman, Transfer Applications, [1970] Pitblado Lectures 78 [hereinafter referred to as "Bowman[.]".
3. The term "waiver" is often used interchangeably with the terms "transfer" or "raising."
4. See infra, Chapter 4, Section E, at p. 201-203.
5. The meaning of the words "apparently or actually" in the context of J.D.A., s.2(1)(a) is discussed infra, at p. 192-196. It has been suggested by at least one commentator that the approach taken in R. v. Pilkington (1969), 67 W.W.R. 159, 5 C.R.N.S. 275 requires that a juvenile can only be transferred if he is actually over the age of fourteen: see Bowman, op. cit., at 80. In addition, it seems that in practice many courts tend to ignore the word "apparently" in s.9 and require in all cases proof of actual age. On the other hand, it has been specifically held by at least one judge that failure to prove strictly the juvenile's age is not fatal to jurisdiction where the juvenile court judge is satisfied that the accused is apparently over fourteen. See Re Strazza (1967), 60 W.W.R. 110, at 112-114 (B.C.S.C.).
6. See Parker (1969), Parker (1970), and MacDonald, (1964-65).
7. Parker (1969) at 167.
8. Id.
9. See, generally, Rex. v. H., [1931] 2 W.W.R. 917 (Sask. K.B.); Re L.Y. (No. 1) (1944), 82, C.C.C. 105 (Man. C.A.), [1944] 3 D.L.R. 796; Re Rex v. D.P.P. (1948), 92 C.C.C. 282, [1948] 2 W.W.R. 891 (Man. Q.B.), aff'd. 93 C.C.C. 159, [1949] 1 W.W.R. 48 (Man. C.A.), R. v. Paquin and De Tonnancourt (1955), 111 C.C.C. 312, 15 W.W.R. 224 (Man. C.A.), R. v. Truscott 125 C.C.C. 100, 31 C.R. 76 (Sub. nom. Re S.M.T.) (Ont. H.C.); R. v. Cline, [1964] 2 C.C.C. 38 (B.C.S.C.).
10. This phrase while undoubtedly the most frequently used "cliche of waiver", is also perhaps the most elusive to define. At times it has been used to refer to the dangers of an in camera trial or to the view

that the juvenile court was not designed to handle serious offences. At other times it has meant that because of the great public sentiment against the accused, an open trial in adult court was necessary. See Parker (1969), at 167. It has also been stretched to encompass the supposed greater benefits to the accused of an acquittal by a jury in an open trial over a similar verdict by a single judge in an in camera trial. See Re Rex v. D.P.P., supra, note 9, at 285 (C.C.C.) and R. v. Truscott, supra, note 9, at 102-3 (C.C.C.).

11. R. v. Moroz (1963), 45 W.W.R. 50, [1964] 2 C.C.C. 135 (Sub. nom. R. v. M.) (Man. Q.B.); but see R. v. Cline (1963), 45 W.W.R. 184, [1964] 2 C.C.C. 38 (B.C.S.C.) to the contrary. See also the discussion of these two decisions in MacDonald (1964-65), at 429-432.
12. Re Liefso, [1965] 2 O.R. 625, 46 C.R. 103, [1966] 1 C.C.C. 227 (Ont. S.C.), at 105 (C.R.). In this decision after reviewing the cases of Re L.Y. (No.1), Re Rex v. D.P.P., R. v. Paquin and De Tonnancourt, and R. v. Truscott, supra, note 9, Wallace Juv. Ct. J. stated at 321 (C.C.C.):

The foregoing cases, while admitting the order is a discretionary one, nevertheless appear to lay down rules which would in effect remove such discretion where the offence is one of murder. Such a view, in the writer's opinion, if acted upon, would constitute viewing the decision as an amendment to the section and would not be sound.

For a decision where the juvenile court judge may have erred in the opposite direction, see R. v. P.M.W. (1955), 16 W.W.R. 650 (B.C. Juv. Ct.) where Pool, Juv. Ct. J. expressed the opinion that where there is evidence which would justify a conviction for murder transfer could never be for the good of the child. Id., at 652. According to this view, a juvenile court judge could not, for all practical purposes, ever waive a murder charge. Id.

13. [1965] 2 O.R. 625, 46 C.R. 103 (Ont. S.C.).
14. Id., at 106 (C.R.).
15. (1967) 1 C.R.N.S. 139 (Man. Q.B.).
16. Id., at 142. To a similar effect is R. v. Simpson, [1964] 2 C.C.C. 316 (Ont. Juv. Ct.) at 324 and R. v. P.M.W. (1955), 16 W.W.R. 650 (B.C. Juv. Ct.) at 652.
17. (1966) 47 C.R. 365, 55 W.W.R. 41 (B.C.S.C.).
18. Id., at 367 (C.R.).
19. Id., at 367-8 (C.R.).
20. (1962), 39 C.R. 329, 41 W.W.R. 189 (Man. Q.B.).
21. Id., at 190 (W.W.R.).

22. Id.
23. See, for example, R. v. R. (1969), 70 W.W.R. 292 (B.C.S.C.) at 296; R. v. Martin (1970), 9 C.R.N.S. 147 (Man. Q.B.) at 151-2; R. v. F. (1975), 20 C.C.C. (2d) 11 (B.C.S.C.) at 12-13.
24. R. v. Martin, supra, note 23
25. R. v. Proctor (1969), 69 W.W.R. 754 (B.C.S.C.), headnote (emphasis added).
26. Id. See also the discussion of this case in Parker (1970), at 340-3.
27. Supra, note 25 at 757-759.
28. Decided March 22, 1974 (S.C.B.C.) (unreported).
29. (1975) 20 C.C.C. (2d) 11 (B.C.S.C.).
30. The 15-year-old accused was charged with criminal negligence causing death, theft of an auto and possession thereof.
31. Supra, note 29, at 12.
32. Id., at 13.
33. R. v. W. and W. (1970), 5 C.C.C. 298 (B.C.S.C.); R. v. R. supra, note 23; Re David and the Queen (1972), 9 C.C.C. (2d) 60, [1972] 6 W.W.R. 611 (sub. nom. R. v. David) (B.C.S.C.). The only one of the three dealing at all with substantive law is R. v. R. and it merely follows Pagee.
34. R. v. Proctor, supra, note 25.
35. Id.,; R. v. Bock, supra, note 28.
36. Supra, note 34.
37. R. v. W. and W., supra, note 33.
38. [1971] 1 O.R. 75, (1970), 1 C.C.C. (2d) 299 (C.A.)
39. Id., at 306-307 (C.C.C.)
40. Id., at 306 (C.C.C.)
41. [1970] S.C.R. ix, 1 C.C.C. (2d) 307n.
42. (1973), 2 O.R. (2d) 86 (sub. nom. Re Regina and M.), 15 C.C.C. (2d) 214, 23 C.R.N.S. 313 (Ont. H.C.J.); affg. 13 C.C.C. (2d) 437, 22 C.R.N.S. 263 (Ont. Prov. Ct.)
43. (1973) 22 C.R.N.S. 263, at 270.
44. Id.

45. Id., at 270-1.
46. Id., at 271.
47. (1973), 23 C.R.N.S. 313, at 314-5.
48. (1974), 15 C.C.C. (2d) 379 (Ont. C.A.).
49. Id., at 386.
50. See, for example, R. v. Liefso, *supra*, note 13.
51. R. v. M., *supra*, note 43, at 270-1.
52. [1976] 1 W.W.R. 182 (Sask Q.B.).
In this case, where a 15-year-old (16 at the time of trial) was charged with murder, the Saskatchewan court was faced with the same problem that had arisen in Haig and R. v. M., namely that because of the child's advanced age and the maximum admission age to training schools (here called "industrial schools") under the relevant provincial legislation that form of disposition would not be available to the juvenile court. The appeal from the juvenile court judge's waiver order to the Saskatchewan Queen's Bench was dismissed, MacPherson, J. holding that because it can award no more than parental supervision, the juvenile court was not the proper forum. A subsequent application for leave to appeal to the Saskatchewan Court of Appeal was dismissed: (1976), 25 C.C.C. (2d) 140.
53. (1970), 9 C.R.N.S. 147 (Man. Q.B.).
54. (1974), 16 C.C.C. (2d) 501, [1974] 3 W.W.R. 281 (Man. Q.B.).
See text, *infra*, at p. .
55. Unreported. The following analysis of R. v. Cloutier and R. v. Edwards is based on the discussion of those two cases in Re Mezzo, [1974] 2 W.W.R., 699 (Man. Prov. Ct.).
56. See Re Mezzo, [1974] 2 W.W.R. 699 (Man. Prov. Ct.) at 705-6.
57. Id., at 706.
58. Supra, note 9.
59. Id., at 316 (C.C.C.).
60. Supra, note 56, at 705.
61. Id., (emphasis added).
62. Decided July 4th, 1973 (Man. Prov. J. Ct.) (unreported).
63. Supra, note 56, at 707.
64. Supra, note 56.
65. Id., at 706.

66. Id., at 707-8.
67. Id., at 708.
68. See Appendix A, at p. .
69. See Appendix A, at p. .
70. See text, supra, at p. 19.
71. One explanation may lie in the fact that in recent years the B.C. Attorney-General's Department has imposed certain administrative restrictions on the individual prosecutor's power to apply for waiver. See infra, Appendix A, at p. 312-313.
72. As suggested by Johnston, J. in Re Mezzo, supra, note 61. More likely it will be just viewed as a "guideline": R. v. Edwards, supra, note 63.
73. See, infra, Chapter 4, Section E (v).
74. R. v. P.M.W. (1955), 16 W.W.R. (N.S.) 650. (B.C. Juv. Ct.). However, the correctness of this procedure has been questioned: D. Bowman, Transfer Applications, in 1970 Pitblado Lectures 78, at 82.
75. R. v. McKellar (1967), 9 Cr. L. Q. 503 (Ont. C.A.).
76. [1969] 1 C.C.C. 184, 65 W.W.R. 189 (B.C.C.A.).
77. (1970), 71 W.W.R. 543, [1970] 5 C.C.C. 347 (B.C.C.A.), affg. (1969), 69 W.W.R. 624, [1970] 2 C.C.C. 159 (B.C.S.C.), revg. in effect 69 W.W.R. 46 (Co. Ct.).
78. [1970] 2 C.C.C. 159, at 160 (headnote).
79. [1970] 5 C.C.C. 347, at 348.
80. [1970] S.C.R. vii.
81. [1974] 3 W.W.R. 281 (Man. Q.B.).
82. See the dissenting opinion of Branca, J.A. in Beeman, supra, note 78, particularly at 352, as well as Parker (1970), at 339-340.
83. Justice Report, at 78.
84. M. Tadman, A Critical Analysis of Bill C-192: The Young Offenders Act (1971), 4 Man. L.J. 371, at 378.
85. The alternatives have been thoroughly considered, and rejected, elsewhere. See U.S. Task Force Report, at 24-25; Justice Report, at 77-80.

86. U.S. Task Force Report, at 25.
87. Justice Report, at 87.
88. Infra, at p. 135 .
89. See table No. 4, at p. 135 .
90. Id.
91. Id.
92. See, for example, the factors suggested in Re Trodd (No. 1) and R. v. Pagee (No. 1), supra, at p. 122-123.
93. See MacDonald, (1964-65) at 432-3.
94. Draft Act, s.14(2).
95. Id., s. 15(1). See also Table No. 4, supra, note 89.
96. Justice Report, at 79.
97. R. v. P.M.W., supra, note 16.
98. Draft Act, s.14(5).
99. Justice Report, at 39-40.
100. See Appendix A, at p. 312 .
101. During the spring of 1976, both the Minister of Human Resources and the Attorney-General suggested that the provincial government's policy on secure facilities for juvenile offenders was being re-evaluated. For the view of the Berger Commission, see Appendix B, at p.348-349.

FOOTNOTES - CHAPTER 4 - SECTION A

1. J.D.A., S.5(1). There are certain exceptions to this rule with respect to appeals and the laying of informations. See J.D.A., S.5(1) (a) and (b).
2. It is interesting to note that S.17(1) originally only applied to the trial stage. Canadian Welfare Council, The Juvenile Court in Law (Ottawa: Canadian Welfare Council, 1952) at 13.
3. J.D.A., SS.6, 36.
4. Id., SS.29-32.
5. Id., S.9.
6. Id., S.10.
7. Id., SS.13-16.
8. Id., SS.10, 12, 24.
9. Id., S.19.
10. Id., S.37.
11. Id., SS.5(2), 5(3), 7, 8, 11, 12, 17(3), 17(4), 17(5), 18, and 24.
12. See Chapter 1, Sections B and C.
13. In Re GAULF 387 U.S.1 (1967), at 16-17.
14. U.S. Task Force Report, at 28. The related argument that procedural protections are not needed because juvenile court proceedings are civil and not criminal, although less applicable in Canada where the federal jurisdiction in this field has been held to be based on the criminal law power, has nonetheless been advanced by some Canadian commentators as well as by those in the United States.
15. U.S. Task Force Report, at 29.
16. Fox, at 195. See also the extensive list of recent articles cited therein. Id., at 185, n. 84.
17. U.S. Task Force Report, at 30.
18. Id.
19. See Chapter 2, Section A.
20. Fox, at 194; U.S. Task Force Report, at 7-8, 30-31.
21. Fox, at 195; U.S. Task Force Report, at 30-31.
22. D. Matza, Delinquency and Drift (New York: John Wiley and Sons, Inc., 1964), 136.

23. Studt, The Client's Image of the Juvenile Court in Justice for the Child (Rosenheim (ed.), 1962) at 200.
24. A. Platt, The Child-Savers (Chicago: University of Chicago, 1969).
25. U.S. Task Force Report, at 31. Many of these philosophical and theoretical objections underlie the practical complaints of one American juvenile court judge who, after reviewing the original rationale for informality, stated:

Experience ultimately demonstrated, however, that excessive rejection of traditional legal safeguards and procedures carried with it the seeds of abuse of individual rights. The jurisdiction of the new juvenile courts could be invoked on the basis of vague allegations of anti-social behavior. Informality of procedure was frequently equated not only with absence of legal representation but also with the acceptance of uncorroborated admissions, hearsay testimony and untested social investigations as the basis for adjudication. The usual protections against self-incrimination and double jeopardy were rejected as inapplicable to the civil rehabilitative approach espoused by the court. The judge wielded great power shielded from the glare of public scrutiny, his broad range of dispositional powers including commitments for indefinite periods to institutions having therapeutic facilities of at least questionable value.

J. Isaacs, The Lawyer in Juvenile Court (1967-68), 10 Crim. L.Q. 222, at 224.

26. See Chapter 1, Section E.
27. KENT v. UNITED STATES, supra, Chapter 1, Section E, footnote 3.
28. In Re GAULE, supra, Chapter 1, Section E, footnote 5.
29. In Re WINSHIP, supra, Chapter 1, Section E, footnote 7.
30. McKEIVER v. PENNSYLVANIA, supra, Chapter 1, Section E, footnote 10.
31. See Chapter 1, Section E, at p.33-34; see also B. Kalief, Civil Rights in Juvenile Courts (1974), 12 Alberta L.R. 341, at 354-355.
32. See, for example, the waiver cases discussed infra, at pp.201-203.
33. As Professor Graham Parker has noted, in none of the reported appeals based on some procedural irregularity at trial is there any extended discussion of the procedure which should be followed in the juvenile court. G. Parker, The Appellate Court View of the Juvenile Court (1969-70), 7 Osgoode Hall L.J. 155, at 158. His criticism of the

Canadian appellate courts goes even further, as he states:
"In summary, our courts have little conception or only
slight regard for the concept of the juvenile court and the
potential importance of its work." Id., at 157.

34. See text, supra, at pp. 50 , 52 , 79-81.

FOOTNOTES - CHAPTER 4 - SECTION B

1. U.S. Task Force Report, at 30.
2. Id., at 31.
3. 387 U.S.1 (1967).
4. Id., at 41-42. For the further development of the right to counsel after Gault, see the following:

Institute of Continuing Legal Education, Gault: What Now for the Juvenile Court? (V. Nordin, ed., Ann Arbor, Michigan: Lithocrafters, 1968), at 93-119.

National Council of Judges of the National Council on Crime and Delinquency, Provision of Counsel in Juvenile Courts, (New York: National Council on Crime and Delinquency, 1970);

S. Davis, Rights of Juveniles: The Juvenile Justice System, (New York: Clark Boardman Co. Ltd., 1974) at 125-129.
5. J. Isaacs, The Role of the Lawyer in Representing Minors in the New Family Court (1963), 12 Buffalo L. Rev. 501, at 503 [hereinafter referred to as "Isaacs (1963)"]; also in J. Isaacs, The Lawyer in Juvenile Court (1967-68), 10 Crim. L.Q. 222 at 223-224 [hereinafter referred to as "Isaacs, (1967-68)"].
6. J.D.A., s.31(b).
7. R. v. Painter (1967), 62 W.W.R. 418 (B.C.S.C.).
8. The right to counsel was recognized by Zuber, J. in Re P., [1973] 2 O.R. 818, 12 C.C.C. (2d) 62.
9. See the dissenting judgment of Adamson, C.J.M. in R. v. Gerald X. (1958), 25 W.W.R. 97 (Man. C.A.) at 110.
10. U.S. Task Force Report at 31-32; Justice Report at 142-143.
11. Justice Report, at 43.
12. (1959), 124 C.C.C. 71 (S.C.C.).
13. See, however, the dissenting opinion of Admason, C.J.M., at the Court of Appeal level [(1958) 25 W.W.R. 97] who urged that "in the case of an undefended child it is imperative that he be given an opportunity to have a parent, guardian or counsel present and if he is not given that opportunity the magistrate has no jurisdiction". Id., at 111.
14. Supra, note 12. Admittedly, this decision is not of binding authority on this point, for it is trite law that a decision cannot be authority for a point not considered therein.

15. In R. v. MacLean, [1970] 2 C.C.C. 112 (N.S.S.C.) a finding of delinquency was quashed on the grounds that section 10(1) was not complied with. As in Smith, although no counsel was present nor was any notice given of the right to counsel, no mention of this fact was made by the Court. In Re David and the Queen (1973), 9 CCC (2d) 60 (B.C.S.C.), it was held that a transfer hearing is not valid unless the juvenile is informed of his rights to cross-examine, call evidence and make submissions at the hearing. Again, no mention was made of a right to be informed of the right to counsel.
16. Justice Report, at 43.
17. See the description of the role of the Family Advocate in the Unified Family Court project in B.C., infra Appendix B, at p. ~~327-328~~. Regarding the right of indigent adult accused to have counsel appointed for them at trial see Re Ewing and Kearney and the Queen, [1974] 5 W.W.R. 232, and the excellent discussion in W. Black, Right to Counsel At Trial (1975), 53 C.B.R. 56.
18. J.D.A., s.31(b); Justice Report, at 142.
19. Justice Report, at 142. This view has been echoed by many other critics, including one Canadian juvenile court judge who wrote:

A probation officer cannot act as counsel for a child...nor can a judge. The presence of a lawyer whenever a child is before a court is an essential element of justice.

W. Little, A Guarantee of the Legal Rights of Children through Legal Aid (1970), 4 Gazette 217, at 219.
20. Justice Report, at 142. See also Schinitzky, The Role of the Lawyer in Children's Court (1962), 17 The Record of the Association of the Bar of the City of New York 10, at 17-23, and Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, [1965] Wisconsin Law Rev. 7, at 29-31.
21. Justice Report, at 142.
22. Id., at 143.
23. Id., at 143-144.
24. Id., at 144.
25. N.Y. Sess. Laws 1962, c.686, as am., s.249. Justice Report, at 144-145.
26. Justice Report, at 142.
27. The fourth recommendation, regarding the use of crown attorneys in juvenile court, would seem to be clearly within provincial jurisdiction and therefore not a proper subject-matter for federal legislation. It seems, however, that the YPICWTL proposals do attempt to restrict the scope and the number of persons who can exercise the prosecutorial function, both in relation to the laying of informations [Draft Act, s.8]

and other matters [e.g. - s.9(2), s.9(5), s.9(6), s.12, s.14, s.17(5)(d), s.27(1)(a)] by providing that all decisions are to be made by "the Attorney-General or his agent" and by allowing for an over-riding discretion in the proposed screening agency. Some local crown attorneys have objected to this proposed transfer of power from them and from local police chiefs to central government agents. In fact, it has already been suggested that section 8 (authority for laying information) and section 9 (screening agency) may, on those grounds, be both unconstitutional and contrary to the Canadian Bill of Rights. See F. Armstrong (ed.), An Act to Replace the Juvenile Delinquents Act - Legislation in Conflict with the Law? (November, 1975) Crown's Newsletter 1, at 1-2. See also F. Armstrong and K. Chasse, The Right to an Independent Prosecutor (1975), 28 C.R.N.S. 160.

28. Bill C-192, ss.9(1)(d), 10(1)(d), 14(b), 16(1)(e).
29. Id., ss.27, 28.
30. Id., s.26(2). The subject of admissibility of confessions is discussed infra, at pp. 199-201.
31. Draft Act, s.10(1).
32. Id., s.6(2),(5).
33. Id., s.11(1)(a).
34. Id., s10(2). It is possible that section 10(2) may have the unintended effect of restricting, rather than expanding, the child's opportunities to be represented by counsel. Given the unfavourable view that some juvenile court judges still may have towards the need for independent representation in juvenile court, it is conceivable that a judge having such sentiments may utilize the discretion granted by section 10(2) to justify his denial of the right of a non-lawyer to appear at trial on the grounds that he has not been satisfied that "no lawyer is reasonably available" or on the ground that the non-lawyer does not appear to be a "responsible person". In light of the uncertainty of what "reasonably available" might mean, and the fact that this subsection, where applicable, would appear to require a separate hearing on the question of the availability of a lawyer and the suitability of the proposed lay advocate, it is arguable that this provision may give rise to more problems than it solves. Clearly, the only satisfactory solution to the entire problem lies in the provision of free legal counsel to all juveniles unable, for any reason, to retain their own. See text, infra, at p. 155-157.
35. Draft Act, s.10(3).
36. YPICWTL Report, at 33. Quaere whether it could be argued that the provision in section 10(2) that he is "entitled to be assisted by a lawyer retained by him or for him" (my emphasis) can be interpreted

so as to place an obligation on the court to provide him with counsel if he fails to obtain his own? A more realistic interpretation would suggest that the words "for him" refer only to his right to have his parents retain counsel on his behalf (although one might then argue that this section gives the juvenile a right as against his parents).

37. See, for example, the conflict between the views of lawyers and child welfare staff noted by Grygier, Chapter 2, Section B, footnote 57, at 464. See B. Grosman, Young Offenders Before the Courts (1971), 2:2 Can. Bar Assn. J. 6. Typical of the view of many is the following opinion of one American juvenile court judge:

The Gault decision has given aid
and comfort to those who would
destroy the concept of individualized
justice for children through a non-
adversary judicial proceeding where the
judge personally administers the precept
of ~~parens patriae~~ ~~parens patriae~~.

A. Noyes, Has Gault Changed the Juvenile Court Concept? (1970), 16 Crime and Delinquency 159.

38. U.S. Task Force Report, at 33. See also Molloy, Juvenile Court - A Labyrinth of Confusion for the Lawyer (1962), 4 Ariz. L. Rev. 1.
39. U.S. Task Force Report, at 33; Fox, at 203-204.
40. Fox, at 204; Grosman, supra, note 37, at 6.
41. Grosman, supra, note 37, at 7.
42. Id. In the view of this author, "once adversary procedures become entrenched in the juvenile court, hostility between adults and deviant youngsters will become deeply entrenched." Id.
43. Schinitsky, supra, note 20, at 25, quoted in U.S. Task Force Report at 33.
44. U.S. Task Force Report, at 33.
45. See Justice Report, at 142-143. See also Schinitsky, supra, note 20, at 17-23, and Handler, supra, note 20, at 26-28. Discussing the deficiencies in practice under the J.D.A. prior to Ontario's introduction of duty counsel in juvenile court, Judge William T. Little wrote:

Prior to 1967, one of the serious
problems was that countless children
came before our Ontario courts
completely ill-equipped to speak to a
plea, points of law, admissibility of
evidence, or even to comprehend the law
that they were accused of breaking.

Because these young clients lacked counsel, many judges performed the role of judge, defence, crown attorney, interrogator of witnesses, as well as that of cross-examining the crown, the police and the defendant. Unfortunately this practice made complete fairness impossible. No one person can perform all these roles with complete objectivity and skill.

W. Little, The Need for Reform in the Juvenile Courts (1972), 10 Osgoode Hall L.J. 225, at 226.

46. One American commentator reports: "In one court a count of three thousand consecutive cases revealed that only five children had wholly denied involvement in the named offences." Alexander, Constitutional Rights in Juvenile Court, in Justice for the Child (Rosenheim (ed.), 1962), 82 at 87.
47. U.S. Task Force Report, at 33-34. See also Handler, supra, note 20, at 27-28; Isaacs (1967-68) at 230.
48. See in particular W. Treadwell, The Lawyer in Juvenile Court Dispositional Proceedings: Advocate, Social Worker or Otherwise, 16 Juv. Ct. Judges J. 109, at 421-427, quoted in P. Chapman, infra, note 82, at 106-107 and Isaacs (1967-68), at 235, where each author lists his own set of eight basic and distinct functions which a lawyer can perform at the dispositional stage. See also U.S. Task Force Report, at 32-33; Coxe, Lawyers in Juvenile Court (1967), 13 Crime and Delinquency 488; Lemert, The Juvenile Court-Quest and Realities, in U.S. Task Force Report, at 102-103; Fox, at 206;
W. Little, supra, note 45, at 226; R. Stubbs, The Role of the Lawyer in Juvenile Court (1974), 6 Man. L.J. 65, at 78.
49. N.Y. Sess. Laws 1962, c.686, s.241.
50. M. Fish, Bill C-192: Another View (1971), 2:3 Can. Bar Assos. J. 31, at 32.
51. P. Erickson, The Defence Lawyer's Role in Juvenile Court (1974), 2 U. of T.L.J. 126, at 138-141, 145.
52. Fox, Prosecutors in the Juvenile Court: A Statutory Proposal (1970), 8 Harvard J. Legn. 33, at 37.
53. See text, supra, at p. 150-151.
54. See text, supra, at p. 43.
55. Fox, at 206-207.
56. New York Family Court Act, N.Y. Sess. Laws 1962, c.686, s.249.

57. Calif. Welf. and Inst.'ns Code, 1961, s.634.
58. See, for example: Reasons, Gault: Procedural Change and Substantive Effect (1970), 16(2) Crime and Delinquency 163.
59. Juvenile courts in Toronto have operated successfully with full-time duty counsel since 1967: W. Little, supra, note 45, at 225-228. According to one empirical study of the Toronto court, most of the feared negative consequences of lawyer participation appear to have been largely avoided. See P. Erickson, The Defence Lawyer's Role in Juvenile Court (1974), 24 U.of T. L.J. 126, at 146. In B.C., the Legal Aid Society, in addition to providing funding on a case-by-case basis for private lawyers in juvenile court, has in recent years conducted several experiments with the use of duty counsel as well. See K. Hamilton, Duty Counsel in Juvenile Court (1975), 1(2) Process 1.
60. See Lemert, supra, note 48; Fox, at 204-207; Little, supra, note 45, at 225-228; U.S. Task Force Report, at 34.
61. J. MacDonald, A Critique of Bill C-192, The Young Offenders Act (1971), 39 The Social Worker 59, at 63 [hereinafter referred to as "MacDonald (1971)"]; J. MacDonald, Some Recommendations for Amendments to Bill C-192 (The Young Offenders Act) for the Attention of Members of the Standing Committee on Justice and Legal Affairs (June, 1971) (unpublished), at 4. [hereinafter referred to as "MacDonald (Recommendations)"].
62. T. Grygier, supra, note 37, at 464.
63. Kent v. U.S. 383 U.S. 541 (1966), at 1054.
64. Isaacs (1963); U.S. Task Force Report, at 34.
65. U.S. Task Force Report, at 34.
66. Id. To a similar effect is the following passage found in the authoritative Standards for Juvenile and Family Courts and cited with approval in Gault:

As a component part of a fair hearing required by due process guaranteed under the 14th Amendment, notice of the right to counsel should be required at all hearings and counsel provided upon request when the family is financially unable to employ counsel.

Children's Bureau of The United States Department of Health, Education and Welfare, Standards for Juvenile and Family Courts (Washington: U.S. Government Printing Office, 1966). (hereinafter referred to as "Standards"), at p. 57. For a similar Canadian view, see W. Little, The Need for Reform in the Juvenile Courts (1972), 10 Osgoode H.L.J. 225. The author, a Canadian juvenile court

judge, states (at 227):

Having legal aid lawyers in court to represent children when private counsel has not been procured, is the only effective way to protect children's legal rights. Legislation by itself cannot provide that guarantee.

67. See, for example, MacDonald (1971) at 63 and MacDonald (Recommendations) at 4.
68. Justice Report, at 144.
69. Supra, note 67.
70. YPICWTL Report, at 33.
71. Id., at 34.
72. As noted earlier, lawyers in private practice have been employed as full-time duty counsel in juvenile courts in Toronto with considerable success since 1967. See the comparison between this program and the previous system, whereby legal aid merely provided funding for lawyers in private practice retained on an ad hoc basis, in Little, supra, note 19. In addition to recent experiments with duty counsel in B.C. sponsored by the B.C. Legal Aid Society (see Hamilton, supra, note 59), provincial officials will undoubtedly want to give consideration to the experience with the use of family advocates gained in the B.C. Unified Family Court pilot projects over the past two years. See the Unified Family Court Act, S.B.C. 1974, c.99, s.8 and Appendix B, at p. 327-328.

It is also interesting to note that in British Columbia, at the time of this writing (Spring, 1976), the Legal Services Commission is actively engaged in a consideration of the various means of providing legal services to indigent parties in the Juvenile and Family Courts generally. The three alternatives it is seriously considering are: the provision of more family advocates, with duties as defined in the Fourth Report of the B.C. Family and Children's Law Reform Commission (See Appendix B, at p. 327); the creation of a full-time civil service duty counsel staff, with broader responsibilities than that accorded family advocates; and finally, the expansion of the availability of traditional legal aid funding and continued reliance upon the services provided by lawyers in private practice. To date, no decision has been made as to which approach shall be followed.

For a comparison of two systems widely used in American juvenile courts - the public defender system and the assigned counsel system - see Council of Judges of the National Council on Crime and Delinquency, Provision of Counsel in Juvenile Courts (New York: National Council on Crime and Delinquency, 1970), at 27-32.

73. While this paper was being prepared, two separate developments in British Columbia alone gave cause for concern that this province, for one, may be unwilling to develop these needed programs. On December 8th, 1975, the Deputy Attorney-General for the province, in a letter to the Ministry of the Solicitor-General concerning the proposed federal legislation, expressed his department's concern that "the cost of implementing this proposed legislation would be prohibitive to the province without significant federal participation and cost-sharing." Supra, Chapter 2, Section D, note 60, at 1. According to the Deputy Attorney-General, one aspect of the legislation that had "major costing implications" for the province was the provision of legal services Id., at 7. Secondly, on March 30th, 1976, the Legal Services Commission of British Columbia announced a substantial reduction on the budget of the Legal Aid Society of B.C. for the coming fiscal year. In order to keep within this reduced budget, officials indicated that the Legal Aid Society would be forced to undertake drastic reductions of existing services, specifically including certain services to juveniles. The Province (Vancouver), March 30th, 1976, p. 1.
74. See a similar recommendation by a Canadian juvenile court judge: W. Little, supra, note 45, at 227.
75. Supra, note 70.
76. See MacDonald, (Recommendations) at 4.
77. W. Little, supra, note 45, at 226.
78. See J. Isaacs, The Lawyer in the Juvenile Court (1967-68), 10 Crim. L.Q. 231. Under the law guardian system in New York State, counsel is viewed solely as the representative of the child, and will be appointed if, for reasons apart from indigency, independent representation cannot be provided the young person. Id., at 230. It is also the practice in New York State that waiver of the right to counsel can be exercised by a juvenile, but only after prior consultation with counsel. Id., at 231. However, many other more difficult questions have yet to be resolved even in that progressive jurisdiction. Id., at 232.
79. Id., at 231-232.
80. See, for example, Cayton, Relationship Between the Probation Officer and the Defense Attorney after Gault (1970), 34 Federal Probation Journal 8, and the discussion of same in Walker, at 69-70; W. Brennan and J. Ware, infra, note 82; W. Brennan and S. Khinduka, infra, note 82.
81. See P. Erickson, The Defence Lawyer's Role in Juvenile Court (1974), 2 U. of T.L.J. 126; I. Dootjes, et al., Defence Counsel in Juvenile Court: A Variety of Roles (1972), 14 Can. J. Corr. 132; P. Erickson, Legalistic and Traditional Role Expectations for Defence Counsel in Juvenile Court (1975), 17 Can. J. Corr. 78.

82. See, for example, the following:

G. Johnston, The Function of Counsel in Juvenile Court (1969-70), 7 Osgoode Hall L.J. 200;

P. Chapman, The Lawyer in Juvenile Court: "A Gulliver among Lilliputians" (1971), 10 Western Ont. L. Rev. 88-107;

I. Dootjes, et al., Defence Counsel in Juvenile Court: A Variety of Roles (1972), 14 Can. J. Corr. 132;

P. Erickson, Legalistic and Traditional Role Expectations for Defence Counsel in Juvenile Court (1975), 17 Can. J. Corr. 78; [hereinafter referred to as "Erickson (1975)"].

W. Little, The Need for Reform in the Juvenile Courts (1972), 10 Osgoode Hall L.J. 225;

R. Stubbs, The Role of the Lawyer in Juvenile Court (1974), 6 Man. L.J. 65;

P. Erickson, The Defence Lawyer's Role in Juvenile Court (1974), 2 U. of T. L.J. 126; [hereinafter referred to as "Erickson (1974)"].

Royal Commission Inquiry into Civil Rights (Ontario: Queen's Printer, 1968) (hereinafter referred to as the "McRuer Report") Report One, Volume 2, at 554-604, especially at 603-604.

P. Walker, The Law and the Young: Some Necessary Extra-Legal Considerations (1971), 29 U. of T. Faculty L. Rev. 54, at pp. 69-70.

83. The leading American articles and studies include the following:

J. Isaacs, The Lawyer in the Juvenile Court (1968), 10 Crim. L.Q. 222;

J. Isaacs, The Role of the Lawyer in Representing Minors in the New Family Court (1963), 12 Buffalo Law Review 501.;

U.S. Task Force Report, at 34-35;

Newmann (ed.), Children in the Courts - The Question of Representation (Ann Arbor: Institute of Continuing Legal Education, 1967). [hereinafter referred to as "Children in the Courts"];

J. Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, [1965] Wis. L. Rev. 7;

Skolev, Counsel in Juvenile Court Proceedings - A Total Criminal Justice Perspective 8 J. of Fam. L. 269;

A. Platt and Friedman, The Limits of Advocacy and Occupational Hazards in Juvenile Court, 116 U. of Penn. L. Rev. 1166;

- T. Watch, Delinquency Proceedings: Fundamental Fairness for the Accused in a Quasi-Criminal Forum, 50 Minn. L. Rev. 653;
- Furlong, The Juvenile Court and the Lawyer, 3 J. of Fam. L. 1;
- Dyson & Dyson, Family Courts in the United States, 9 J. of Fam. L. 52;
- Shaw, The Attorney-Parent Relationship in the Juvenile Court, 12 St. Louis L.S. 604;
- Lockwood, The Role of the Attorney In the Treatment Phase of the Juvenile Court Process, 12 St. Louis U.L.J. 659;
- Tinney, The New Dilemma in the Juvenile Court, 47 Neb. L.R. 67;
- Walsh, The Attorney and the Dispositional Process, 12 St. Louis U.L.J. 646;
- W. Brennan and S. Khinduka, Role Expectations of Social Workers and Lawyers in the Juvenile Court (1971), 17 Crime and Delinquency 191;
- W. Brennan and J. Ware, The Probation Officer's Perception of the Attorney's Role in Juvenile Court, (1970), 16 Crime and Delinquency 172;
- C. Cayton, Relationship of the Probation Officer and the Defence Attorney after Gault (1970), 34(8) Federal Probation 8;
- Molloy, Juvenile Court - A Labyrinth of Confusion for the Lawyer (1962), 4 Arizona Law Rev. 1;
- Ferster, Courtless, & Snethen, The Juvenile Justice System: In Search of the Role of Counsel (1971), 39 Fordham Law Review 375;
- Coxe, Lawyers in Juvenile Court (1967), 13 Crime and Delinquency 488;
- W. Stapleton & L. Teitelbaum, In Defense of Youth (New York: Russell Sage Foundation, 1972) especially chapters III, V, & VI;
- Treadwell, The Lawyer in Juvenile Court Dispositional Proceedings; Advocate, Social Worker or Otherwise, 16 Juv. Ct. Judges J. 109. Also in Children in the Courts, supra, at 412.
84. McRuer Report, at 555.
85. Treadwell, supra, note 83, at 413.
86. See, for example, Platt and Friedman, supra, note 83, at 1179; Turner, Juvenile Justice: Juvenile Court Problems, Procedures, and Practices in Tennessee (Charlottesville: The Mitchie Company, 1969) at 12-14; Alexander, Constitutional Rights in Juvenile Court, 46 A.B.A.J. 1206.
87. See In Re Gault, 387 U.S. 1 ; Skolev, supra, note 83, at 272-274;

One Canadian commentator has put forward the novel suggestion that a lawyer is bound, by virtue of professional ethics (Canons of Legal Ethics, Canadian Bar Association, 1920) and by the Canadian Bill of Rights to use every available legal Technique that is available in defending the juvenile client. See P. Chapman, supra, note 82, at 102-103.

88. Isaacs, (1967-68), at 232.
89. Id.
90. See text, supra, at p. 150-151.
91. Tinney, supra, note 83; M. Nestle (ed.) California Juvenile Court Practice (University of California: California Practice Book No. 39, 1968) at 11-13.
92. See the test of functions suggested by Treadwell, supra, note 83 at 421-427, summarized by P. Chapman, supra, note 80 at 106-107, and another list in Isaacs (1967-68) at 235.
93. Chapman, supra, note 82, at 105-107; U.S. Task Force Report, at 33.
94. U.S. Task Force Report, at 32-33.
95. See, for example, the position taken by Chapman, supra, note 82, at 103. We are unable, despite a great temptation to do so, to endorse without qualification the position that juvenile court counsel, like their adult court counterparts, should not hesitate to use every legal technique that is available in defending their juvenile clients, for clearly there would be many situations where such an approach would constitute a disservice to those clients themselves.
96. A similar conclusion was reached in one analysis of Bill C-192. See Dootjes, supra, note 82, at 148.
97. Draft Act, s.10(1). See the broad definition of "proceeding" in section 2.
98. J.D.A., s.17(1).
99. J.D.A., s.17(2).
100. Supporters of the "rehabilitative" view might still, however, argue that the words "adequately" and "their own interests" in the statement of these two rights imply that the defence lawyer's role must be more than merely to "get the client off".

It is interesting to note that in a similar analysis of Bill C-192, although it was concluded that the reforms proposed therein (substantially similar to those in the YPICWTL Report) would probably increase the legalistic orientation at the adjudicatory stage, it was also felt that they would result in the lawyer responding in more of an amicus curiae or social work capacity at the dispositional stage. See Dootjes, supra, note 82, at 148.

101. See Erickson (1975), at 88.
102. Justice Report, at 145. See also P. Chapman, supra, note 82, at 88 and 107.

FOOTNOTES - CHAPTER 4 - SECTION C

1. See Chapter 2, Section A, at p. 44.
2. Justice Report, at 139.
3. J.D.A. S.12(1).
4. Id., S. 12(2).
5. Id., S. 12(3).
6. Id., S. 24.
7. They are applicable [J.D.A., S. 5(1)] so far as they are not inconsistent with the provisions of the J.D.A. [J.D.A., S.40]
8. The nature and effect of this section is discussed in R. v. Gratton (1972), 5 C.C.C. (2d) 150 (N.B.C.A.).
9. R. v. Gerald X. (1958), 25 W.W.R.97, at 112 (Man.C.A.). This point was not discussed by the majority of the Court nor by the Supreme Court of Canada. See Gerald Smith v. R., [1959] S.C.R. 639.
10. [1947] 1 W.W.R. 49 (B.C.S.C.).
11. Id., at 55.
12. Id., at 55-56.
13. Id., at 56.
14. J.D.A., S. 28(2).
15. Supra, note 10, at 55.
16. See Kalie1, at 348-349.
17. R. v. Gerald X. (1958), 25 W.W.R. 97, at 112.
18. Kalie1, at 348.
19. See K. P. Regier, Proposed Revisions to Juvenile Delinquents Act, in 1970 Pitblado Lectures, supra, note 94 at 98.
20. Kalie1, at 348.
21. Supra, note 17.

22. In R. v. Gratton (1972), 5 C.C.C. (2d) 150 (N.B.C.A.), an appeal turned on the meaning of S.421 of the Code which, like S. 12(1) of the J.D.A., provides that trials (here dealing only with those of persons under the age of sixteen years) must take place "without publicity". Although the trial judge took the view that "without publicity" means "in private", the Court of Appeal specifically side-stepped the issue, stating: "It is unnecessary to consider the extent of publicity prohibited, whether it applies to the news media only or to the admission of the public at the trial as well." Id., at 153, per Limmerick, J.A. See also R. v. Truscott (1959), 125 C.C.C. 100, [1959] O.W.N. 320, 31. C.R. 76 (sub nom. Re S.M.T.).
Although the Justice Committee did not deal with this issue in its Report, it did note the "doubts that have been expressed concerning the power of a judge to exclude the general public under existing law." See Justice Report, at 141.
For two conflicting views as to the present law see also K. Regier, Proposed Revisions to Juvenile Delinquents Act in 1970 Isaac Pitblado Lectures 94, at 103-4.
23. Supra, note 7.
24. See supra, note 22.
25. Scott v. Scott, [1913] A.C. 417 (H.L.) See, in particular, the obiter of Lord Shaw at 482-483, and of Viscount Haldane, L.C. at 437.
26. The court's inherent equitable jurisdiction, the modern equivalent of the Court of Chancery's parens patriae jurisdiction is vested only in judges of the Superior Courts, and not in the lower court judges who conduct juvenile court proceedings.
27. As Katiel argues, since the Supreme Court of Canada has held that the J.D.A. is legislation in relation to criminal law, and since the doctrine of parens patriae traditionally did not extend into criminal jurisprudence, there would appear to be no basis for the argument that the exception for wards of the court can apply in proceedings under the J.D.A. See Katiel at 349-350.
28. 9 Hals. (3d) 345-346.
29. Justice Report, at 139.
30. Id., at 140-141.
31. Id., at 141.
32. Id., at 141-142.
33. Bill C-192, S.60(1). Draft Act, S. 26(1).
34. Bill C-192, S.60(2). Draft Act, S. 26(2).

35. Draft Act, S. 26(3). The corresponding provision in Bill C-192 is slightly narrower in scope. Bill C-192, S. 60(4). Neither Act, however, implemented the Justice Committee's recommendation that the identification ban should also apply to reports of children involved in proceedings in the adult court. Presumably, the legislators thought that such a provision would be more appropriate in the Criminal Code than in the context of juvenile delinquency legislation.
36. Bill C-192, S. 60(5). Draft Act, S. 26(4).
37. Justice Report, at 139. This argument was rejected by the U.S. President's Task Force in its Report, at 38.
38. Id. See also U.S. Task Force Report, at 38-39.
39. Mannheim, The Procedure of the Juvenile Court in Lawless Youth: A Challenge to the New Europe (Howard League for Penal Reform, Fry ed., 1974) 51, at 66-67, and quoted in Justice Report, at 139-140. See also U.S. Task Force Report, at 38-39.
40. Although one of the major reasons for having private hearings is to avoid publicity, it is important to note that adverse publicity can be avoided without resorting to the exclusion of the public. See for the device of identification bans used in J.D.A., S. 12(3), Draft Act, S. 26(3). In addition, private hearings are also said to serve the independent function of ensuring an "appropriate" atmosphere in the juvenile court. See Justice Report, at 140, and U.S. Task Force Report, at 38-39.
41. YPICWTL Report, at 59.
42. Id.
43. A similar approach was endorsed in the U.S. Task Force Report, at 38-39.
44. Preamble, Draft Act.
45. Id.
46. Id.
47. See Appendix B. at p. 341-342.
48. Provincial Court Act, S.B.C. 1975, C.57, S. 3.
49. Pursuant to the authority granted under Provincial Court Act, S.B.C. 1975, C. 57, S. 3(2), only proceedings under the Family Relations Act, Parts IV, V and VI, Protection of Children Act, and Children of Unmarried Parents Act have been designated and deemed by the Attorney-General to be "family or children's matters" for the purposes of S. 3 of the Act. See Reg. 612/75, published in the B.C. Gazette, Sept.30/75.

50. See Appendix B at p. 343.
51. This inconsistency might become particularly embarrassing if the province should enact quasi-criminal delinquency legislation to deal with those juvenile offenders who, for reasons of age or offence, would not be subject to the proposed federal legislation.
52. Regarding the effect of the Bill of Rights on proceedings under the J.D.A., see discussion supra in Chapter 1, Section E. As a result of the specific reference to the Bill in the preamble to the Draft Act, there would seem to be no reason to doubt its application to proceedings under that proposed Act.
53. Regarding the J.D.A., see A.-G. of B.C. v. Smith (1963), 53 W.W.R. 129 (B.C.C.A.) (especially at 156), aff'd [1967] S.C.R. 703 (especially at 710), and see Kalil, at 357-358. The same argument would seem to apply with even greater force to the Draft Act.
54. W. Tarnopolsky, The Canadian Bill of Rights (Toronto: The Carswell Company, 1966), at 190.
55. (1963), 2 C.C.C. 197, (1963) 41 W.W.R. 497 (Sask. Q.B.).
56. (1963), 2 C.C.C. 197, at 200; (1963) 41 W.W.R. 497, at 499-500.
57. Supra, note 54, at 191.
58. See, supra, Chapter 1, Section E.

FOOTNOTES - CHAPTER 4 - SECTION D

1. R. v. Pacquin and De Tonnacourt (1955), 15 W.W.R. (N.S.) 224, at 227 (Man. C.A.).
2. Justice Report, at 146.
3. R. v. A., [1975] 5 W.W.R. 425 (Alta. S.C.), reversing [1975] 2 W.W.R. 247; and R. v. M. (1975), 7 O.R. 490 (Ont. H.C.).
4. Re Strazza (1967), 66 W.W.R. 110 (B.C.S.C.).
5. Supra, note 2.
6. R. v. MacLean, [1970] 2 C.C.C. 112 (N.S.C.C.) per Cowan, C.J.T.D. (at 116-117):

... there is no indication that any notice was given to [the accused's mother] in the present case. If such notice were given, it does not appear to me to be "due notice" of the hearing as required by s. 10(1).

7. Re Wasson (1940), 14 M.P.R. 405, at 408, 73 C.C.C. 227, at 229, [1940] 1 D.L.P. 776, at (N.S. Sup. Ct. in banco). But see Re Strazza, supra, note 4, to the contrary. Where a child had been previously committed to the care of the Superintendent of Child Welfare, it was held that failure to prove service of such notice may be cured by the presence in court of the Superintendent's agent. Id., at 114-115.
8. Re Wasson, supra, note 7. Speaking on behalf of the court, Doull, J. examined J.D.A. s.10(1) and concluded [at 229 (C.C.C.)]:

I think the word "served" contemplates a notice in writing. There may be cases where some other notice would be sufficient, and no doubt, if the parent appears in response to an oral notice, the more formal notice would be held to be waived. But in the absence of a written notice, it can seldom be safe for the court to proceed in the absence of the parent.

It is arguable that the second and third sentences in this passage are obiter and that the decision is therefore authority only for the proposition suggested.

9. Supra, note 2.
10. Id.
11. Smith v. The Queen, [1959] S.C.R. 638, 22 D.L.R. (2d) 129, 30 C.R. 230, 124 C.C.C. 71 reversing (sub. nom. Reg. v. Gerald X. [G.S.]) (1958) 25 W.W.R. 97, 28 C.R. 100, 121 C.C.C. 103, per Locke and

Martland, J.J. (at 648, 649); R. v. Lawrence, ex P. Painter, [1968] 3 C.C.C. 77, 62 W.W.R. 418 (sub. nom. R. v. Painter) (B.C.S.C.); R. v. MacLean, supra, note 6.

12. Supra, note 2.
13. Id. With respect to notice of detention, the duty would rest on the person in charge of the detention facility. With respect to all other matters, the ultimate responsibility would rest on the juvenile court judge. Id.
14. Id.
15. Id.
16. Id., at 146-147.
17. Bill C-192, s.16(1) specified the requirements of a proper notice, including the fact that it must be in writing.
18. Id., s. 16(6), (7).
19. Id., s. 15(1).
20. Id., s. 17
21. Id., s.15(2)
22. See text, supra, at p. 175 .
23. Bill C-192, s.16(2).
24. Id., s.16(5).
25. Id., s.16(3).
26. C.C.C.A. Brief, at 312.
27. Draft Act, s.6(1).
28. Id., s.6(2)(a).
29. Id., s.6(2)(b).
30. Id., s.6(2)(c).
31. Where such notice cannot be given immediately in writing, oral notice shall be given but shall be followed by written notice as soon as possible. Id., s.6(6).
32. Id., s.6(5).
33. Id., s.6(3). Where there is any doubt, the judge may give directions as to whom notice is to be given. Id., s.6(4).

34. Id., s.6(7). In the case of notice following mere arrest and temporary restraint, no judicial consent is necessary. Id., s.6(1).
35. Id., s. 6(9).
36. Id., s.7.
37. See text, supra, Chapter 4, Section A, at p. 144.
38. YPICWTL Report, at 24. Compare to a similar comment by Doull, J. regarding s. 10 of the J.D.A.: "The provision in the statute is partly for the protection of the child and partly for the benefit of the parent or guardian." Re Wasson (1940), 73 C.C.C. 227, at 229-230.
39. Supra, note 2 (emphasis added).
40. Draft Act, s.6(5).
41. Id., s.5.
42. Id., s.9.
43. Id., s.14.
44. Id., s.16.
45. Id., s.18.
46. Id., s.20.
47. Id., s.22.
48. Id., ss.21 and 29.
49. Id., ss.30-34.
50. Id., s.42.
51. As noted earlier, this right already exists under the J.D.A. and would have existed under Bill C-192, as well.
52. See text, infra, at pp. 204-206.
53. Supra, note 38.
54. A somewhat similar view was expressed by the Deputy Attorney General for B.C. who wrote:

[T]he only time family responsibility should be negated is if there is an agreement between the young person and his family that the family relationship has little or no value. We would suggest that this is a decision that ought to be made between a young person and his family before a judge rather than simply between the young person and the judge.

Supra, Chapter 2, Section D, footnote 60, at 5.

55. See text, supra, at p.175, and cases cited supra in note 11.
56. C.C.C.A. Brief (1971) at 312.
57. It should be noted that section 7 adopts the recommendation of the C.C.C.A. See C.C.C.A. Brief (1971), recommendation no. 7, at 312. This approach also allows the judge to take into consideration any hardship that the parent would suffer if compelled to attend.

FOOTNOTES - CHAPTER 4 - SECTION E

1. J.D.A., s.5(1).
2. Code, ss. 723, 724.
3. For example, it has been held that the charge must not only allege the offence, but also the relevant act or omission. See Re Veltri (1963), 41 C.R. 186 (Man. Q.B.) and Re Kipling (1962), 36 C.R. 317, 36 W.W.R. 273, 131 C.C.C. 314 (Man. Q.B.). But see contra Rex v. Kendarick, [1946] 3 W.W.R. 348, 2 C.R. 277, 86 C.C.C. 316 (B.C.S.C.). Similarly, an information is bad for duplicity where two offences are charged: Rex v. Burrows, (1950) 9 C.R. 441 (Sask. Q.B.), R. v. Simmons, [1970] 5-C.C.C. (B.C.S.C.).
4. E.g. - "did commit a delinquency, to wit, breaking and entering..."
5. Justice Report, at 147.
6. (1952) 14 C.R. 279 (Man. K.B.).
7. See infra, note 14.
8. Supra, note 6, at 282.
9. (1973) 12 C.C.C. (2d) 441. (Ont. Prov. Ct.).
10. "Proceedings ... shall be commenced by laying an information ..."
11. Supra, note 9, at 443-444.
12. Id., at 444.
13. Id.
14. A review of the history of J.D.A. s.5 not only helps to explain what actually was Parliament's intention in enacting that section, but also reveals the dangers of careless consolidation of statutes. Neither s.5(1)(b) nor s.5(2) are to be found in the 1929 version of the J.D.A. in their present form. What their predecessor [S.C. 1929, c. 46, s.5(1)] did contain was a provision that s.1142 of the Code [now s.721(2)] shall not apply to any proceeding other than one against an adult, and that s.1140 of the Code [a provision imposing various limitation periods for certain more serious indictable offences] shall, mutatis mutandis, apply to all proceedings in juvenile court. According to the draftsman of the J.D.A., the clear intent of these provisions was that, in the case of delinquency proceedings against a child, the general six-month limitation in s.1142 [now s.721(2)] would not apply although the specific limitation periods set out in s.1140 would, where applicable. [Canadian Welfare Council (1952), at 7-8].

In the case of juvenile court proceedings against adults, on the other hand, s. 1142 [s.721(2)] did apply, unless overridden by a specific provision in s. 1140 [Id.]. Amendments to this section in 1935 [S.C. 1935, c.41, s.1] and 1936 [S.C. 1936, c.40, s.1] dealt solely with the limitation period applicable to adult proceedings, and as such, do not concern us here. However, something unusual happened when the existing provisions were consolidated and re-organized in the 1952 Revised Statutes of Canada. The provision that formerly dealt specifically with s. 1142 [s.721(2)] now referred to the same section, but only in a much more general fashion. Perhaps because the Criminal Code was then in the process of revision itself, the new s.5(1)(b) of the J.D.A. did not refer to the successor of s. 1142 [S.C. 1953-54, s.693 (2); R.S.C. 1970, c.34, s.721(2)] by number, but instead by description, using the very language of the former s. 1142. Similarly, whereas the original s.5(1) dealt with these serious Code offences that had specific time limitations by reference to a specific section [s. 1140], the successor of this provision [J.D.A. R.S.C. 1952, c.160, s.5(2)] referred to those limitations only in general terms, namely as "the provisions of the Criminal Code prescribing a time limit for the commencement of prosecutions for offences against the Criminal Code." As a result of this imprecise terminology adopted in the 1952 revision, one can well understand why Steinberg, Prov. Ct. J. reached the conclusion that s.5(1)(b) and s.5(2)" purportedly say different things regarding the same set of facts." However, once one obtains the benefit of this historical perspective, and assuming (as we do) that in consolidating these provisions Parliament did not intend to effect any change in the law regarding time limitations, it appears that Steinberg's inference as to Parliament's intention in enacting s.5(1)(b) and s.5(2) is not justified. Rather, in light of the foregoing, it is suggested that:

- (a) where the delinquency charge is based on an act that would otherwise be an offence punishable on summary conviction under the Code or under other federal legislation, J.D.A., s.5(1)(b) renders Code, s.721(2) inapplicable and, as a result, there is no time limit on the laying of an information;
- (b) where the delinquency charge is based on an act that would otherwise be an offence punishable on indictment under the Code, J.D.A., s.5(2) makes applicable any time limitations prescribed by the Code. In practice (contrary to the implication of Steinberg, Prov. Ct. J.), the only offences for which such limitations exist are those relating to treason [s.46(1)(d)], defilement of a female person [ss. 166, 167, 195; ss. 141, 194(4), corrupting a child [s. 168; s.141], seduction [ss. 151, 152; s.141], and sexual intercourse with a female employee [s.153 (1)(b); s.141], all of which are very unlikely to be the basis of a delinquency charge. See. R. Salhany, Canadian Criminal Procedure (Toronto: Canada Law Book Limited, 1972) at 11.

- (c) where the delinquency charge is based on an act that would otherwise be an offence permissible under a provincial or other federal statute, since neither s.5(1)(b) nor s.5(2) are applicable, there would be no operative time-limit. See Dureault, supra, note 6.

In summary, it is suggested that the decision in Dureault is correct; R. v. M. and D. is not. Although Steinberg Prov. Ct. J. may indeed consider it to be an "absurd result" [supra, note 9, at 444] it would seem that except for charges based on the handful of rarely-used indictable offences cited above, and except for the loss of juvenile court jurisdiction when the child becomes an adult, there is no time-limit on the commencement of delinquency prosecutions under the J.D.A.

15. Justice Report, at 147.
16. Bill C-192, s.8(3).
17. YPICWTL Draft Act, s.43(1)(a).
18. Bill C-192, s.5(2); Draft Act, s.4(6).
19. Draft Act, s.40(2)(a). As a result, the Draft Act appears to establish the limitation scheme first suggested in R. v. M. and D.
20. Draft Act, s.8.
21. Id.
22. F. Armstrong (ed.), An Act to Replace the Juvenile Delinquents Act-Legislation in Conflict with the Law? [Nov. 1975] Crown's Newsletter, 1.
23. They prefer to leave the prosecutorial discretion with local Crown Attorneys and local police chiefs.
24. Supra, note 22, at 1. See also F. Armstrong and K. Chasse, The Right to an Independent Prosecutor (1975), 28 C.R.N.S. 160.
25. See YPICWTL Report, at 26.
26. R. v. Pelletier (1975), 28 C.R.N.S. 160 (Ont. C.A.)
27. (1918) 25 B.C.R. 350, 30 C.C.C. 362 (B.C.S.C.).
28. [1947] 1 W.W.R. 49, 63 B.C.R. 449, 88 C.C.C. 8, [1947] 3 D.L.R. 564.
29. [1947] 1 W.W.R. 49, at 58-60.
30. Id., at 57-58.

31. Id., at 58.
32. Id.
33. R. v. Wood (1952), 101 C.C.C. 126 (B.C.S.C.); R. v. B., [1956] W.W.R. 651, 116 C.C.C. 383 (B.C.S.C.); R. v. MacLean, [1970] 2 C.C.C. 112, at 117-118 (N.S.S.C.)
34. [1959] S.C.R. 638, 22 D.L.R. (2d) 129.
35. Id., at 641 (S.C.R.).
36. R. v. Gerald X. (1958), 24 W.W.R. 310 (Man. Q.B.).
37. R. v. Gerald X. (or G.S.) (1958), 25 W.W.R. 97 (Man. C.A.).
38. Id., at 106.
39. Supra, note 34.
40. Id.. See the judgments of Locke, J. (Martland, J. concurring) at 649-650 (S.C.R.), and Cartwright, J. at 650-651.
41. Kaliel, at 348.
42. Supra, note 34, at 649-650 (S.C.R.). See Kaliel, at 345, 348.
43. Supra, note 34, at 650-651 (S.C.R.). See Kaliel, at 345, 348.
44. Kaliel, at 350.
45. It is still arguable, for example, that because a child can only be dealt with under J.D.A., s.3(2) where he is "adjudged to have committed a delinquency" [emphasis added] there must always be some evidence before the court on which it can base its finding. As a result, even where a plea of guilty is accepted, the court must then go on to make a judgment on the basis of facts admitted or proved in evidence. See A. Popple (ed.), Crankshaw's Criminal Code of Canada, (Toronto: The Carswell Company Ltd., 1959) 7th ed., at 1351, also referred to in R. v. MacLean, supra, note 33.
46. Justice Report, at 148.
47. Id.
48. Id.
49. The Summary Jurisdiction (Children and Young Persons) Rules, 1933, Rule 6.
50. Justice Report, at 149.
51. Bill C-192, s.26(1)(a); Draft Act, s.11(1)(b).

52. Bill C-192, s.26(1)(b); Draft Act, s.11(1)(c). The Draft Act also requires the judge to inform him of his right to counsel [s.11(1)(a)] and to explain to him the consequences of admitting an offence [s.11(1)(c)].
53. See text, supra at p. 149-150.
54. Bill C-192, s.26(2); Draft Act, s.11(2).
55. Bill C-192, s.26(3); Draft Act, s.11(3).
56. Bill C-192, s.29; Draft Act, s.15.
57. See the discussion of the Smith case supra, at p.189-190.
58. Supra, note 49.
59. See Justice Report, at 148.
60. See text, supra, at p. 154 .
61. See text, supra, at p. 156-157.
62. J.D.A., s.2(1)(a). The issue of the choice of the maximum juvenile court age is discussed supra in Chapter 3, Section D.
63. See, for example R. v. Crossley, [1950] 2 W.W.R. 768, 98 C.C.C. 160, 10 C.R. 348 (B.C.S.C.); Re Kelly (1929), 51 C.C.C. 113, [1929] 1 D.L.R. 716 (N.B.S.C.); R. v. Hankins (1955), 111 C.C.C. 387, 14 W.W.R. 478, 20 C.R. 407 (sub.nom. R. v. H. (a juvenile))(B.C.S.C.); R. v. Harford (1964), 48 W.W.R. (N.S.) 445, 43 C.R. 415 (B.C.S.C.); It has also arisen, on occasion, in proceedings in adult court: see E. v. The Queen (1965), 53 W.W.R. 114 (Alta. S.C. in Chambers).
64. See, for example, Rex v. Ivall (1949), 4 D.L.R. 144, 94 C.C.C. 388. (Ont. C.A.); Rex v. Denton, [1950] 2 W.W.R. 315, 98 C.C.C. 391, 10 C.R.218; R. v. Linnerth (1957), 27 C.R. 69 (Ont. S.C.); R. v. Sornsen (1965), 46 C.R. 251 (B.C.S.C.).
65. See the judgment of Rand, J. (Locke, J. concerning) in Regina v. Rees, [1956] S.C.R. 640, 24 C.R. 1, 115 C.C.C. 1, 4 D.L.R. (2d) 406, at 647-8 (S.C.R.).
66. R. v. Pilkington (1968), 5 C.R.N.S. 275, 67 W.W.R. 159 (B.C.C.A.).
67. R. v. Denton, supra, note 64.
68. R. v. Ivall (1949), 94 C.C.C. 388, [1949] 4 D.L.R. 144; R. v. Hauberg (1915), 24 C.C.C. 297, 8 D.L.R. 239, [1915] 8 W.W.R. 1130.
69. R. v. Hicks, [1969] 4 C.C.C. 203, 1 D.L.R. (3d) 724 (B.C.S.C.); R. v. MacLean, [1970] 2 C.C.C. 112 (N.S.)
See also cases cited supra, notes 63 and 64.

70. R. v. Harford, supra, note 62; R. v. Hanks, supra, note 63.
71. An admission by the father as representative or agent of his son and not made under oath is clearly not sufficient. R. v. Harford, supra, note 63.
72. The Canada Evidence Act, R.S.C. 1970, c. E-10, s.24 (as amended) clearly gives authority for proof of age by certificate. See R. v. Amero, (1975), 24 C.C.C. (2d) 234, at 238 (Prov. Magis. Ct., N.S.).
73. See R. v. Pilkington, supra, note 66, at 281 (C.R.N.S.) per Robertson, J.A.).
74. R. v. Hicks, supra, note 69.
75. In R. v. Linnerth, supra, note 64, it was held that the Crown could not rely upon s. 585(2) "where evidence of the age of the child or young person may be presumed to be readily available." Id., at 70. It is still unclear as to whether s.585(2) constitutes a third method of establishing a juvenile's age or is just further justification for the apparent age method already in existence. Since s.585(2) is incorporated into juvenile proceedings by J.D.A., s.5, and since neither the J.D.A. nor the caselaw delineate a procedure for determining apparent age, could one not argue that in every case in which apparent age is found, the court must, in effect, be relying on s.585(2)? If so, could one not then argue that the ratio in Linnerth has the effect of precluding a finding of apparent age except in circumstances where absolutely no other evidence of the age of the child is "readily available"?
76. [1969] 3 C.C.C. 327, 5 C.R.N.S. 275, 67 W.W.R. 159 (B.C.C.A.).
77. Id., at 283 (C.R.N.S.) (per Robertson, J.A.).
78. Id., at 277 (C.R.N.S. per Bull, J.A.).
79. (1971) 1 C.C.C. (2d) 179 (B.C.C.A.).
80. R. v. Aheler (May 3/73, unreported) - conviction on two counts of break and enter and two counts of theft; R. v. Casimel (April 22/74, unreported) - conviction of rape.
81. For example, in the Pilkington situation, if the Court of Appeal had quashed the conviction but had not ordered a new trial, could subsequent juvenile court proceedings have been blocked by a plea of autrefois convict? While Ex Parte Carr (1952), 103 C.C.C. 283 (B.C.S.C.) seems to answer this question in the negative, it also suggests that an adult court proceeding in the circumstances of Pilkington is a nullity. It also shows how certiorari could be used even if leave to introduce new evidence is refused. Similarly, how can such a position be reconciled with those cases that have held that in light of J.D.A., s.8(1), the age of a young person

charged before a magistrate with a criminal offence goes to jurisdiction, and must be proved by the prosecution with properly admissible evidence (i.e. not just the accused's own testimony)? See, for example, E. v. The Queen, supra, note 63.

82. Justice Report, at 150.
83. Bill C-192, s.2(s); Draft Act, s.2.
84. Bill C-192, s.5(1); Draft Act, s.4(1).
85. See R. v. Amero, supra, note 72, at 237-8.
86. Justice Report, at 150.
87. See text, supra, Ch. 4E(ii) at p. 190-191.
88. Code, s.736(3).
89. Of particular importance are sections 468(1)(a) and 469.
90. R. v. B. (1956), 19 W.W.R. (N.S.) 651, 25 C.R. 95 (B.C.S.C.) at 95 (C.R.).
91. Id. See KalieI, at 350.
92. See, generally, Chapter 4, Section B.
93. Code, s.737(1); R. v. Gerald X, supra, note 36, at 111 (W.W.R.) (per Adamson, C.J.M.); R. v. T., [1947] 2 W.W.R. 232 (B.C.S.C.); KalieI, at 350.
94. R. v. T., supra, note 93. Where the trial judge interferes with the defence counsel's cross-examination, the conviction will be quashed: R. v. Pepin (1974), 20 C.C.C. (2d) 531 (Que. S.C.).
95. Id.; R. v. Gerald X, supra, note 36.
96. R. v. B., supra, note 90. See KalieI, at 351.
97. See KalieI, at 353-354. Other rights (apart from those already noted, the audi alteram partem rule, and the rights to notice and to a hearing) which KalieI suggests may apply to juvenile proceedings include the right to an open court, the right to be heard by the person who decides, the right to examine reports and other evidence, the right to be tried according to the rules of evidence and the right to be tried by a tribunal free of interest and bias. Id.
98. Id. Regarding the use of evidence at the juvenile court hearing see generally U.S. Task Force Report, at 35-36.

99. The cases have established that different evidentiary standards are applicable to waiver proceedings. Consequently, the rules governing the waiver process will be discussed separately, infra, at p. 201-203.
100. Kaliel, at 353.
101. R. v. Gerald X., supra, note 36, at 110 (per Adamson, C.J.M.).
102. J.D.A., s.19. This section is identical to s.16 of the Canada Evidence Act, R.S.C. 1970, c. E-10.
103. I.e.- under the age of 14 years: R. v. Antrobus, [1947] 1 W.W.R. 157, 63 B.C.R. 376, 87 C.C.C. 118, 1(B.C.C.A.). See generally, K. Turner, Children in Court (1962), 1 Man. L.S.J. 23, at 27-29.
104. R. v. T.; [1947] 2 W.W.R. 232, at 236 (B.C.S.C.); R. v. Bannerman (1966), 48 C.R. 110 (Man. C.A.).
105. R. v. Bannerman, supra, note 104, particularly the judgment of Dickson, J. at 133-138 (C.R.). The rule laid down in R. v. Antrobus, supra, note 103, that a child must also understand the religious consequences of not telling the truth would appear to be no longer good law. Id. See also Kaliel, at 353; F. Turner, Rules of Evidence in 1970 Pitblado Lectures 58 at 59-60.
106. J.D.A., s.19(1). Canada Evidence Act, R.S.C. 1970, c. E-10, s.16(1).
107. J.D.A., s.19(2); Canada Evidence Act, R.S.C. 1970, c. E-10, s.16(2); Criminal Code, s.586.
108. See, for example, R. v. Horsburgh (1967), 2 C.R. 228 and the discussion thereof in P. Schulman, Rules of Evidence Relating to Children in 1970 Pitblado Lectures 86; A Maloney, Sex Offences and Corroboration, in 1959 L.S.U.C. Special Lectures 73; A. Branca, Corroboration, in R. Salhany and R. Carter (eds.), Studies in Canadian Criminal Evidence (Toronto: Butterworths, 1972) 133, at 173-179. It has also been held that the rule of practice that on trials without a jury the judge should keep in mind the danger of convicting on the uncorroborated evidence of the complainant applies in juvenile cases: R. v. McBean, 17 C.R. 357. See also R. v. McLeish (1961), 34 C.R. 305, and R. v. Pepin (1974), 20 C.C.C. (2d) 531 (Que. S.C.).
109. See, for example, R. v. T., supra, note 104, where a conviction of juvenile delinquency was quashed on the ground, inter alia, that the accused was convicted on the unsworn and uncorroborated evidence of children of tender years.
110. R. v. Nicholson, [1950] 2 W.W.R. 309 (B.C.S.C.).
111. See R. v. Shingoose, [1967] S.C.R. 298. See also text, infra, at p. 201.

112. R. v. Nicholson, supra, note 110; but see R. v. M. (1975), 7 O.R. 490 (Ont. S.C.) to the contrary.
113. R. v. B., supra, note 90; R. v. Gerald X., supra, note 36.
114. R. v. Hicks, R. v. MacLean, supra, note 69.
115. R. v. F., [1968] 1 O.R. 658 (Ont. S.C.).
116. R. v. M. (1974), 27 C.R.N.S. 145 (Ont.).
117. R. v. Moore (1975), 22 C.C.C. (2d) 189 (B.C.S.C.).
118. See, generally, W. Fox, Confessions by Juveniles (1962), 5 Crim. L. Q. 459; F. Kaufman, The Admissibility of Confessions in Criminal Matters (Toronto: The Carswell Company Ltd., 1974) (2d. ed.) at 171-179; Kalief, at 352.
119. See Justice Report, at 112-113 and authorities cited therein.
120. (1959) 29 C.R. 249 (Que. Soc. Wel. Ct.).
121. "No statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."
Ibrahim v. The King, [1914] A.C., 599; Boudreau v. The King, [1949] S.C.R. 262, 94 C.C.C. 1, [1949] 3 D.L.R. 81.
122. R. v. Jacques, supra, note 120, at 260-261.
123. Id., at 267.
124. Id., at 268.
125. [1961] O.R. 703, 130 C.C.C. 353, 29 D.L.R. (3d) 314 (Ont. S.C.).
126. Id., at 360-361 (C.C.C.).
127. Id., at 361 (C.C.C.). It is clear, however, that the presence or absence of a caution is not decisive as to whether or not the statement is voluntary, but is merely one of the factors to be considered: Boudreau v. The King, supra, note 121, at 267, 269, 270 (S.C.R.). For an earlier case dealing with the volunteering of a juvenile's confession in the absence of a caution see Re R.D. (A juvenile) (1961), 35 C.R. 98, 130 C.C.C. 41 (sub. nom. Re Day) (B.C.S.C.).
128. Id., at 357 (C.C.C.).
129. R. v. Roberts, [1970] Crim. L.R. 464 (C.A.). For the comparable American rule see Gallegos v. Colorado (1962), 370 U.S. 49 and the discussion in Kaufman, supra, note 115, at 177-178.

130. See the discussion of Re R.M. (unreported - Ont.) in Fox, supra, note 118, at 466-469, and in Kaufman, supra, note 118, at 175-176.
131. Re A., [1975] 2 W.W.R. 247 (Alta. Juv. Ct. J.).
132. Re A., [1975] 5 W.W.R. 425 (Alta. S.C.).
133. In Re A., supra, note 132, Shannon, J. reaffirmed the five recommendations suggested in R. v. Jacques and the sixth added by R. v. Yensen. Because the juvenile court took the recommendation as to presence of a parent to be a rule of law, the acquittal was quashed and a new trial was ordered.
134. In R. v. M. (1975), 7 O.R. (2d) 490 Grange, J. applied R. v. Yensen to quash a conviction where the only evidence implicating the accused was an ambiguous confession, the truth of which was denied at trial by the accused. The court held, inter alia, that the circumstances in which the statement was taken were "objectionable" in that:
- (1) the officer did not permit the juvenile to have a relative present, and
 - (2) he did not ensure, beyond merely asking the juvenile if she understood the caution, that she in fact understood it, by carefully explaining it to her and pointing out the consequences that might flow from making the statement.
- Query whether the decision could be distinguished on the ground that that the accused was "not only ... a juvenile, but [also] ... a resident of a reserve and clearly of limited academic and intellectual attainment?" Id., at 194.
135. See, generally, Kalief, at 347; Bowman, at 82.
136. The principles relating to the substantive law of waiver and to the effects of a waiver order were discussed, supra, in Chapter 3, Section F.
137. R. v. Arbuckle, [1967] 3 C.C.C. 380, 1 C.R.N.S. 318 (B.C.C.A.), revg. [1967] 2 C.C.C. 32, 50 C.R. 45 (B.C.S.C.).
138. Shingoose v. The Queen, [1967] S.C.R. 298, [1967] 3 C.C.C. 290, approving R. v. Pagee (No. 2), 42 W.W.R. 241, [1964] 1 C.C.C. 173 (sub. nom. R. v. Pagee) (Man. C.A.). In this case the Supreme Court of Canada held that the acceptance by the juvenile court judge of unsworn testimony (although subjected to cross-examination) and of psychiatric and psychological reports not given under oath, did not invalidate the transfer order.
139. Supra, note 135.

138. Id., at 386 (C.C.C.).
139. Id.
140. Re Miller (1962), 132 C.C.C. 349, 37 W.W.R. 571 (Sask. Q.B.) at 351 (C.C.C.).
141. Id., at 351 (C.C.C.) and authorities cited therein.
142. (1969) 70 W.W.R. 292 (B.C.S.C.).
143. The Court also held: (1) that while disclosure of probation reports relied upon need not be disclosed in all circumstances, those cases where it should not be revealed would be very rare and even in those few cases disclosure could still be made to the solicitor if not to the client; Id., at 301, and (2) that while it may be that a judge can initiate waiver proceedings on his own, such a procedure is fraught with grave dangers to the administration of justice. Id., at 303-4.
144. [1970] 5 C.C.C. 298 (B.C.S.C.).
145. Id., at 299.
146. (1972) 9 C.C.C. (2d) 60, 20 C.R.N.S. 185, [1972] 6 W.W.R. 64 (sub. nom. R. v. David) (B.C.S.C.).
147. Id., at 62 (C.C.C.).
148. (1974) 20 C.C.C. (2d) 11 (B.C.S.C.).
149. Id., at 16.
150. Re P., [1973] 2 O.R. 818, 12 C.C.C. (2d) 62.
151. R. v. B. (1956), 19 W.W.R. (N.S.) 651 (B.C.S.C.).
152. See Sharp v. Wakefield, [1891] A.C. 173.
153. See Kaliel, at 354.
154. R. v. B., supra, note 151, at 656.
155. See generally N. Waterman, Disclosure of Social and Psychological Reports at Disposition (1969-70), 7 Osgoode H.L.J. 213.
156. See Re C. (an infant) (Ont. S.C. - unreported), an analysis of which appears in Waterman, supra, note 155, at 214-226. Regarding the disclosure of probation reports considered in waiver proceedings see R. v. R., [1970] 1 C.C.C. 283, 8 C.R.N.S. 257 (B.C.S.C.). Regarding the disclosure of pre-sentence reports in adult court see R. v. Benson and Stevenson (1951), 100, C.C.C. 247, 3 W.W.R. (N.S.) 29, and R. v. Dolbec, [1963] 3 C.C.C. 87.

157. See Waterman, supra, note 155, at 227-233.
158. Re Moilliet (1966), 56 W.W.R. 458, 58 D.L.R. (2d) 152 (B.C.C.A.).
159. Justice Report, at 148-149.
160. Id., at 149.
161. Id., at 112.
162. Id., at 112-113.
163. Id., at 119-123.
164. While Bill C-192, s.69 did repeat the provisions of J.D.A., s.19(1) and (2) regarding the reception of unsworn evidence and the need for corroboration, the draftsman of the more recent proposals chose to omit those provisions altogether, presumably being content to rely on the identical provisions in the Canada Evidence Act, s.16(re unsworn evidence and re corroboration) and in the Criminal Code, s.586 (re corroboration only).
165. YPICWTL Report, at 34.
166. Draft Act, s.10(3).
167. Justice Report, at 113.
168. See téxt, supra, Chapter 4, Section E (ii), at p.191 .
169. Draft Act, s.15(2).
170. Id., s.17.
171. Id., s.43(1)(b).

FOOTNOTES - CHAPTER 5 - SECTION A

1. Doob, supra, Chapter 3, Section B, note 2, at 1.
2. According to family law lawyer Ed Ryan:

There is a great, yawning gulf between the
legal profession and the behavioural sciences.
They shout their differences across a vacuum.

Quoted in Toronto Star, December 6, 1975, H.1.

FOOTNOTES - CHAPTER 5 - SECTION B

1. For a detailed list of those areas of the Report which have major financial implications for the province of B.C. see the letter from D. Vickers, Deputy Attorney-General to D. Prefontaine, Ministry of Solicitor-General, dated Dec. 8, 1975 (unpublished), at 7-9.
2. YPICWTL Report, at 13.
3. Id.
4. Fox, at 212-213.
5. Id., at 215.
6. Supra, note 1, at 7.
7. See J.A. MacDonald, A Statement of Proposed Improvements to or Changes in the Model Young Persons in Conflict with the Law Act (unpublished) at 3.
8. R.S.C. 1970, c. C-1.
9. Id., s. 2.
10. MacDonald, supra, note 7; Fox, The Young Offenders Bill: Destigmatizing Juvenile Delinquency? (1972), 14 Crim. L. Q. 172, at 213.
11. MacDonald, supra, note 7. See also J.A. MacDonald, A Comparison of the Juvenile Delinquents Act with the Proposed Young Persons in Conflict with the Law Act (January, 1976) (unpublished) at 11.
12. See, generally, MacDonald, supra, note 7, at 2-3.
13. Supra, note 2

FOOTNOTES - CHAPTER 5 - SECTION C

1. Since a number of these areas are considered briefly in Appendix B, we would suggest that the interested reader consult that discussion before turning elsewhere.
2. J. MacDonald, A Comparison of the Juvenile Delinquents Act with the Proposed Young Persons in Conflict with the Law Act, (January 27, 1976) (unpublished), at 3.
3. See, generally, MacDonald, supra, note 2, at 3-5.
4. See discussion infra in Appendix B at p.333-336.
5. See Canadian Police Chief (January, 1976) at 7.
6. Id.
7. See Crown's Newsletter (November, 1975) at 1-2.
8. See MacDonald, supra, note 2, at 8.
9. See letter from D. Vickers, supra, Chapter 5, Section B, note 1, at 6.
10. See MacDonald, supra, note 2, at 9.
11. Id., at 10-11.

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APPENDIX A: A SUMMARY OF RELEVANT PROVINCIAL LEGISLATION

As a result of the division of legislative jurisdiction, all of the provinces have found it necessary to enact legislation relating to the problem of juvenile anti-social behavior. In every province there can be found statutes dealing with at least four important matters: (a) the establishment of courts to deal with juvenile matters; (b) the procedures to be followed in the care and treatment of children found to be "neglected" or "in need of protection;" (c) the administration of industrial or training schools; and finally (d) the financing of child welfare services. The following are the provisions which deal with these four subjects in British Columbia:¹

(a) In this province, jurisdiction over proceedings under the J.D.A. is specifically vested in the Provincial Court of British Columbia.² The new Provincial Court Act further provides that, subject to a judge's residual exclusionary powers³ and certain specified restrictions on publication,⁴ all proceedings before the court that deal with family or children's matters shall be open to the public.⁵ Section 4 of the Act allows for the appointment of court family matters committees by individual municipalities.⁶

(b) The Protection of Children Act⁷ governs the care of children whose parents are unwilling or unable to look after them. When a child is deserted, abused, denied medical treatment, or otherwise neglected, a representative of the government

is empowered by this Act to remove or "apprehend" the child as being "in need of protection."⁸ The child, the governmental representative, and the parents then appear before a judge of the Provincial Court, Family Division, for a hearing on whether the child is "in need of protection."⁹ If the court so finds, it can then return the child to its parents or guardian subject to supervision by the Superintendent of Child Welfare, or can order the child committed either temporarily or permanently into the care of the Superintendent.¹⁰ Another important provision in this Act is that dealing with the "unmanageable child." Section 65 provides that, following the swearing of a complaint by the parent or guardian of a child, by the Superintendent, or by a probation officer, a judge may hold a hearing and, if he finds that the child is "beyond the control" of his parents or guardian, he may dispose of the matter under the provisions of the J.D.A. as if the child had been adjudged to be a juvenile delinquent under that Act.

(c) Until 1969, the establishment and administration of industrial and training schools in B.C. was governed by the Training-schools Act.¹¹ The provincial government's decision in 1969 to repeal this Act¹² had a significant effect on practice under the J.D.A.: since there were no longer any industrial or training schools in existence in B.C., the disposition provided in S.20 (1) (i) of the J.D.A. (i.e. committal to an industrial school) was no longer available to any juvenile court judges

in the province. As a result, a judge who wished to remove a child from his home could only commit the child to the care of the Superintendent, who would then retain ultimate discretion regarding committal to open or secure custody as opposed to other means of treatment.

(d) Each province has instituted its own arrangement for financing its child welfare services. The basic system in most provinces is one of primary responsibility on the municipality to which the child belongs coupled with a system of provincial government grants. B.C.'s scheme is established by sections 32 to 34B of the Protection of Children Act.¹³ According to these provisions, when a judge commits a child to the care and custody of the Superintendent, he is also required to make an order for the payment of maintenance expenses by the municipality to which the child belongs.¹⁴ for which expenses the municipality can reimburse itself from either the parents of the child¹⁵ or the Province.¹⁶ In practice, however, for at least the past ten years, no orders for maintenance have been requested or made against a municipality where a child resides. Instead, the general practice has been for the Superintendent, upon receiving notice of a protection hearing, to acknowledge receipt of that notice and in the same document to accept responsibility on behalf of the Province "as a local area" for the maintenance of the child in the event of a committal order being made.¹⁷

(e) In addition to the above-mentioned provisions, a number

of recent legislative and administrative reforms instituted by the provincial government have significantly affected (or have the potential of affecting) the operation of the J.D.A. in the province of British Columbia. Briefly, these include:

(i) An amendment to the Corrections Act authorizing out-of-court diversionary arrangements in delinquency cases made upon the consent of the probation officer, the Crown Attorney, the child and his or her parents.¹⁸

Section 7 requires that in every case under the J.D.A., a probation officer shall ("may" in the case of provincial legislation) investigate the facts and circumstances, including the family background, relating to the child, and if after such an examination the probation officer feels that some action other than prosecution would be in the best interest of the child and the public, he shall so recommend to the prosecutor.¹⁹

(ii) The reduction of the maximum age of juvenile court jurisdiction in British Columbia from eighteen to seventeen years of age.²⁰ The repeal of the Training-schools Act²¹ in 1969 led to great pressures on the existing facilities for seventeen-year-olds. As a result, in 1970 the Province asked the federal government to lower the upper age limit by one year.²²

(iii) Administrative restrictions on applications to transfer young persons to adult courts. Until 1972, the transfer power in section 9 of the J.D.A. was used

extensively by juvenile courts in B.C. In 1973, however, as a result of growing resistance by judges and senior government officials to the frequent use of this power, the Attorney-General's Department adopted the rule that prosecutors must obtain the consent of the department before applying for transfer.²³ According to the B.C. Task Force on Correctional Services and Facilities, such consent is only given when all resources available to the juvenile court have been tried unsuccessfully.²⁴

While this approach still appears to be departmental policy, it should not be forgotten that, notwithstanding that policy, it is still possible for an individual juvenile court judge to initiate such a transfer without prior consultation with the Attorney-General's Department.

(iv) The adoption of provisions allowing for the use of lay panels in proceedings under the Protection of Children Act.²⁵

(v) The creation of a Unified Family Court Project to deal with all family matters (including J.D.A. proceedings) in three judicial districts. As well as bringing together under one roof and one registry the Supreme Court and Provincial Court judges dealing with family matters, the Act implementing this Project²⁶ also assigns powers and responsibilities to two new figures in the Unified Family Court system - the "family advocate" and the "family counsellor."²⁷

In addition to the above, the Royal Commission on Family and Children's Law has in its Fourth and Fifth Reports²⁸ offered a series of recommendations regarding the law relating to children, a number of which would, if followed, substantially affect practice under the J.D.A. These proposals, like the numerous reforms and provisions cited above, have significant implications for the juvenile justice system, and, as a result, will be discussed in greater detail in Appendix.B.

FOOTNOTES - APPENDIX A

1. See Department of Justice Report, at 31-32 and footnotes 10 and 11 (at 33-34) for citations of comparable statutes in all ten provinces.
2. Provincial Court Act, S.B.C. 1975, c. 57, s. 2(4) - proclaimed in force September 15, 1975.
3. Id., s. 3(3), (4), (5).
4. Id., s. 3(6) and (7).
5. Id., s. 3 (1).
6. Id., s 4 - not yet proclaimed in force.
7. R.S.B.C. 1960, c. 303, as amended.
8. Id., s. 7 (1) and 8 (1).
9. Id.
10. Id., s. 8 (9) (a).
11. S.B.C. 1963, c. 50. Since, according to s. 2, "training school" includes an industrial school, these terms are used here interchangeably.
12. See An Act to Amend the Protection of Children Act, S.B.C. 1969, c. 27, s. 6. The two existing training schools in the province - BRANNAN LAKE SCHOOL (formerly known as the Industrial School for Boys) and WILLINGDON SCHOOL (formerly the Industrial School for Girls) - were thereafter deemed to be "child care resources" available to the Superintendent: An Act to Amend the Protection of Children Act, S.B.C. 1969, c. 27, s. 5.
13. Supra, note 7.
14. Id., ss 32 (1), 34 (1)
15. Id., s. 32 (5).
16. Id., ss. 32 (11), (12).
17. Professor J.A. MacDonald, Faculty of Social Work, University of British Columbia.
18. Corrections Act, S.B.C. 1970, c. 10, s. 7, as amended by Provincial Court Act, S.B.C. 1975, c. 57, s. 38.

19. Id., ss. 7 (1), 7 (3).
20. Proclamation of the Governor in Council, dated October 6, 1970, 104 CAN. GAZ. (No. 43), p. 2506.
21. S.B.C. 1963, c. 50.
22. Task Force on Correctional Services and Facilities, Dept. of the Attorney-General, B.C., February 28, 1973, at 128.
23. Id.
24. Id.
25. Protection of Children Amendment Act, 1974, S.B.C. 1974, c. 69, s. 2.
26. The Unified Family Court Act, S.B.C. 1974, c. 99.
27. Id., ss. 8 and 9, respectively.
28. Queen's Printer (Victoria, 1975).

APPENDIX B: A COMPARISON OF RECENT PROPOSALS BY THE BRITISH COLUMBIA ROYAL COMMISSION ON FAMILY AND CHILDREN'S LAW AND THE SOLICITOR-GENERAL'S COMMITTEE ON YOUNG PERSONS IN CONFLICT WITH THE LAW.

The last ten years have seen an unprecedented flurry of law reform work in Canada in the field of family law. During this period, as a result of overlapping efforts by numerous law reform groups, a series of major re-assessments and proposals for reform have been published dealing with almost every aspect of the field, including the structure and organization of family courts, the creation and termination of marriage, the law of marital property, custody, and maintenance, child protection, adoption, and so on.¹ In the past year, both a provincial Royal Commission and a special committee of a department of the federal government have issued major reports dealing with a topic that straddles the boundaries between criminal and family law: namely, the field of juvenile delinquency. In this Appendix we propose to summarize the philosophical and practical approaches to the delinquency problem taken by these two groups, compare and contrast certain specific proposals made by each, and offer some comments on the direction of current juvenile delinquency reform efforts.

A. The Reports

Because delinquency legislation has been held to be within the field of criminal law and, therefore, within the exclusive jurisdiction of the federal government,² the province's role in reforming substantive law in this field can only be a rather limited one. This limitation notwithstanding, the B.C. Royal Commission on Family and Children's Law (hereinafter referred to as the Berger Commission), in its wide-ranging review of all aspects of the law relating to families and children, saw fit to make a series of recommendations regarding the administration of justice in and the ancillary services available to the family courts. These recommendations, if implemented, would undoubtedly effect substantial changes in the practice under the present federal delinquency legislation. In addition, the Commission also proposed a number of reforms which it urged the provincial government to support in any federal-provincial negotiations regarding reform of the existing Juvenile Delinquents Act³ (hereinafter referred to as the "J.D.A."). Nearly all of these particular recommendations are found in the Commission's Fourth Report⁴ and its Fifth Report, Parts III and V,⁵ and, as a result, it is with these two Reports that we shall be concerned in this paper.⁶

A few months after the above Reports were published, the Ministry of the Solicitor-General Committee on Legislation on

Young Persons in Conflict with the Law issued ~~its~~ proposals for new legislation to replace the present J.D.A. Entitled Young Persons In Conflict With The Law⁷, its Report (hereinafter referred to as the "federal Report") discussed the various issues and alternatives with which the Committee was faced and set forth the Committee's proposals, both in the form of a series of recommendations and in the form of a Draft Act. Because of the broad scope of the Report, it is not possible in a paper of this length to review all of the reforms proposed therein. Instead, we shall only deal with those provisions that relate to specific proposals made by the Berger Commission.

B. Approaches to the Problem

Since the Berger Commission did not discuss the substantive law of delinquency per se, the philosophical approach upon which its various recommendations are based is not perfectly clear. However, from examining the discussion in its Reports, one can infer at least six themes underlying its proposals regarding the treatment of young offenders.

(1) The Rights of Children

A major theme throughout the Fifth Report, particularly in Part III, is the importance of recognizing the legal rights of children. It is noteworthy that four of the rights contained in the proposed Statement of Children's Rights - namely, the right to be consulted, the right to independent adult counselling and legal assistance, the right to a competent interpreter if needed, and the right to an explanation of any decision - are proclaimed as procedural rights which are to be complied with as necessary elements of any legal or administrative decision concerning the custody, guardianship or status of the child.⁸ Although the Commission does not specifically discuss the effect of such rights in proceedings under federal legislation, it is reasonable to assume that the family advocate, as proposed by the Commission, would attempt to enforce these rights in the context of any judicial proceedings, whether it be under provincial legislation or under the J.D.A.

(2) Responsibility For One's Conduct

Along with its emphasis on children's rights, the Commission clearly rejected the conventional view that children should not be treated as responsible for their conduct. As it stated quite forcefully in its Fourth Report:

It is our conviction that any person sufficiently mature to appreciate the nature and consequences of his acts must be dealt with on the footing that he must understand that he is responsible for what he does. We fully understand that a whole range of external factors may have contributed to a young person lashing out against his parents, his school, his community or society generally. Yet it must be borne in mind that if you say to anyone that he is not responsible for what he does you are in a sense diminishing him; you are stripping him of his dignity as a human being.

Children and young people must realize that freedom is meaningless without responsibility, and that the assertion of rights is an exercise in selfishness without the acknowledgment of responsibility.

(3) Decriminalization and Destigmatization

A number of the Commission's recommendations reflect the dual goals of decriminalizing and destigmatizing the justice system. One example is the proposal to raise the maximum age of juvenile court jurisdiction, thereby reducing the number of young persons who would be dealt with in adult

court.¹⁰ Another is the proposed new provisions for dealing with the "unmanageable child" which, through changes in procedure, terminology and disposition, are designed to avoid the stigma associated with the present provision.¹¹ A third is the endorsement given to present diversion practices.¹²

(4) Secure Accommodation for "Hard-core" Juveniles

During the period from 1969 to 1975, the Government for the province of British Columbia maintained a policy favouring treatment of juvenile delinquents in their own homes and communities over incarceration in juvenile prisons. Although it endorsed this general policy, the Commission also acknowledged that there are a limited number of juveniles whose behavioral problems are so severe that they must be confined either for short or long periods in order to adequately protect themselves and the public.¹³

(5) Increase Accountability

The Commission also took the view that by giving certain responsibilities and powers to Family Counsellors, Family Advocates, and Family Court Committees as well as certain special powers to judges of the juvenile court, those individuals and organizations involved in caring for and treating the juvenile could be made much more accountable to the court which originally put that child in their care.¹⁴

(6) Community Involvement

A final aspect of the Commission's philosophy involves the encouragement of increased community participation in the functioning of the family and juvenile court. Some of its recommendations aimed at this goal were those dealing with lay panels, Family and Juvenile Court Committees, and community development workers.¹⁵

The philosophy and practical objectives underlying the Report of the Solicitor-General's Committee, although outlined in greater detail, are in many respects very similar to those reflected in the Berger Commission's recommendations. The preamble to the Draft Act, which according to the Report was designed "as a declaration of the philosophy, spirit and intent of the legislation,"¹⁶ states that the Committee's approach is based on the following principles: that young persons must bear responsibility for their contraventions; that because of their special needs they are not to be held accountable for such contraventions in the same manner or be made to suffer the same consequences as adults; that instead of punishment they are to be given "aid, encouragement, and guidance, and where appropriate, supervision, discipline and control;" that court proceedings are only to be utilized as a last resort; that young persons are to be accorded all of the legal safeguards available to adults in criminal proceedings; and that they should only be removed from their homes when all other

measures are inappropriate. In addition, many of the proposals themselves are aimed at objectives similar to those found in the provincial Report. To summarize the objectives underlying the proposed Draft Act, we can do no better than to quote the Committee's own words:

In summary, the main thrusts of the 1970 proposals are to restrict the scope of the legislation, provide for a formal process to divert young persons from the juvenile justice process through the establishment of a screening agency, place emphasis on responding as precisely as possible to the individual needs of young persons by providing for mandatory assessments in those cases where probation, open or secure custody is being contemplated, promote more active participation of the young persons and their parents in the process, stipulate specific substantive and procedural safeguards and outline the accountability of those persons involved in the administration of the process through¹⁷ judicial and administrative reviews.

Thus, there appears to be substantial justification for concluding that, at least in terms of philosophy and general objectives, the two Reports have followed a similar approach towards the problem of juvenile delinquency law reform.

C. The Proposals

The Berger Commission's recommendations regarding delinquency and the corresponding proposals in the federal Report can best be compared under a series of specific headings covering the various aspects of the juvenile justice system.

(1) The Juvenile Court and its Personnel

In its Fourth Report, the Berger Commission reviewed the experience of the Unified Family Court Pilot Projects and proposed the gradual expansion of the Unified Family Court concept across the province.¹⁸ Aside from the convenience of having the judges of the Supreme Court, the County Court and the Provincial Court (Family Division) located under one roof and consolidated through a single registry, the Commission also noted with approval the work being done by the Family Counsellors and Family Advocates attached to such courts, and recommended that these positions be continued, that their powers and responsibilities continue as defined in the Unified Family Court Act,¹⁹ and that they be made available throughout the province.²⁰ There seems to be no reason to doubt that the definition of "youth court" in the proposed Draft Act is broad enough to include either the traditional family court, as a division of the Provincial Court system, or a Unified Family Court, as provided for in the Unified Family Court Act.²¹ A more interesting question is whether or not the Draft Act allows

Family Counsellors and Advocates a role in the proposed juvenile justice system, and to answer it we must consider the roles proposed for each by the Berger Commission.

The powers of a Family Counsellor, as far as juvenile court proceedings are concerned, include those of a social worker, those of a probation officer under the J.D.A., the Criminal Code, and the Provincial Court Act, as well as those conferred on him or her by the Unified Family Court Act.²² More specifically, his or her responsibilities include performing intake, crisis counselling and crisis intervention functions, making referrals to available community resources, acting as probation officer and preparing pre-sentence reports under both the J.D.A. and the Criminal Code, and coordinating or instituting community service programs.²³ The Commission left open the question of whether the Family Counsellor's caseload should consist only of family disputes, or only juvenile cases, or a mixture of both; it preferred to leave that decision to each counsellor's interests and aptitudes as well as the local needs. The federal Draft Act, like the Berger Report, proposed to replace the position of probation officer with a new designation; the term it adopted was that of "youth worker." The role of the youth worker under the Draft Act would be generally that of a probation officer at present: meeting with the juvenile immediately after arrest; explaining to him the procedure involved as well as his legal rights; preparing or ensuring the preparation of a pre-disposition

report if required by the provincial authority; attending the juvenile court proceedings; assisting the youth in complying with the conditions and terms of any disposition, as well as giving any other appropriate assistance.²⁴ Both the federal Report and the Draft Act suggest that persons who are currently designated as probation officers under provincial law could be simply designated as "youth workers" for the purposes of this Act.²⁵ Accordingly, there would seem to be no reason why persons appointed as Family Counsellors under the Unified Family Court Act could not simply be designated by the provincial government as "youth workers;" although the Act does delineate the responsibilities of such a worker in greater detail than did s.31 of the present J.D.A., none of these duties are inconsistent with those envisioned by the Berger Commission for Family Counsellors and in most cases they merely represent what most counsellors are already doing in practice.

The role of the Family Advocate proposed for juvenile matters is no different from that in other family matters where he may intervene in any court proceedings, upon his own initiative or at the request of the court, to act as counsel or assist any child or other party.²⁶ Although the Draft Act provides that a youth is entitled to be assisted by a lawyer retained by or for him during all proceedings,²⁷ or by a responsible person at any stage of the proceedings, except at trial,²⁸ it does not deal with the question of how legal

services are to be made available to those juveniles unable to make their own arrangements for such assistance. Instead, the federal Committee chose to leave the problem of the provision of legal services completely up to the individual provinces, merely noting that means such as legal aid systems, permanent child advocates, law guardians, duty counsel or public defenders services might be utilized.²⁹ Therefore, although the province might want to argue that the federal government should make some financial contribution towards the provision of such services, or at least for those utilized in proceedings under the federal Act, the Draft Act does not seem to infringe upon or restrain in any way the function of the provincial Family Advocate, but rather seems to anticipate and rely upon his presence.

A third character with whom the Commission saw fit to deal was the prosecutor in cases brought before the juvenile court. Recognizing that prosecutors are assigned on a rotating basis by Regional Crown Counsel in each judicial region, the Commission recommended that the Regional Crown Counsel carefully consider such assignments and attempt to select, where possible, prosecutors with special interests and aptitude in this field.³⁰ Obviously, the Draft Act could not deal with a matter such as this, being as it is clearly within exclusive provincial jurisdiction.³¹ Thus, the references in the Draft Act to "the Attorney-General or his agent" are totally dependent upon the provincial government's selection of prosecutor, and as a result, the significance of the above recommendation will

depend solely upon its reception in the provincial Attorney-General's Department.

(2) The Scope of Juvenile Court Jurisdiction

The proper scope of juvenile court jurisdiction has been a very important and contentious issue in the past few years. Many have argued that the jurisdiction allowed the court under the J.D.A. is much too broad, and have objected specifically to the low minimum age, the variable maximum age, the broad and indefinite offence jurisdiction, as well as the lack of uniformity in the application of the Act across the country. The Solicitor-General's Committee dealt in depth with this problem and made a series of recommendations, the effect of which would be to substantially restrict the scope of the federal Act. Two of these recommendations are, in effect, responses to two specific criticisms and proposals made by a number of groups including the Berger Commission: one relates to the maximum age of juvenile court jurisdiction and the other deals with the problem of the "unmanageable child."

While the Berger Commission did not deal with the issue of the minimum age for juvenile court jurisdiction and the problems of provincial concern arising therefrom,³² it did touch on the topic of maximum age jurisdiction. It noted that many have, for various reasons, urged a lowering of the

age for adult prosecution (i.e. the maximum age of juvenile court jurisdiction) from the present age of seventeen (17) to sixteen (16),³³ and that the deliberations of one federal-provincial delinquency reform group at that time seemed to be favouring a boundary age of eighteen (18).³⁴ The Commission recommended that until the current review of the J.D.A. was completed and until all of the provinces had had an opportunity to agree upon a possible standardization of all age limits across Canada, this province should retain the age of seventeen (17) as the dividing line between juvenile and adult court jurisdiction.³⁵ Having done so, however, it then recommended that the province, in the course of any federal-provincial discussions regarding the ages of protection, of majority and of adult prosecution, should advocate that the age of eighteen (18) be adopted across Canada for all three purposes.³⁶ Like the Berger Report, the federal Report acknowledged the difficulty of this question and conceded that it does not lend itself to a completely objective assessment. The Committee was, however, of the opinion that a standard maximum age should be stipulated so that the legislation could be applied in a consistent and uniform manner. After considering various factors including the experience of other countries, it chose the age of eighteen (18) as the most suitable alternative.³⁷ In the result, therefore, the federal proposals are consistent with the goals of the Berger recommendations (although not with its provisional proposal in favour of retaining the present age), and if, as the Berger

Report recommended, the age of majority and age of protection in B.C. are set at eighteen (18), uniformity will have been attained within the province and a major step will have been made towards achieving uniformity across the nation.

The Commission also dealt with one aspect of the related issue of the offence jurisdiction of the juvenile court.³⁸ In Part V of its Fifth Report, the Commission discussed the problems surrounding §.65(1) of the Protection of Children Act,³⁹ which provides that upon a complaint, a judge can find that a child is "beyond the control of his parents or guardian" and then dispose of the matter under the provisions of the J.D.A. "as if the child had been adjudged to be a juvenile delinquent under that Act." Accepting the arguments that unmanageability should not be equated with delinquency (because of the unfairness of subjecting children to behavioral standards for which adults are not similarly accountable, the injustice felt by a child where parental fault or inability is a major reason for his "unmanageability," and the detrimental effects of stigma associated with the label "juvenile delinquent") and that the section fails to protect the child's legal rights (by giving certain adults unrestricted arrest and detention powers), the Commission recommended that §.65 should be repealed. It suggested that it be replaced by a provision authorizing the family or juvenile court, upon the application of the Superintendent of Child Welfare, a family counsellor, the parents or the child, to make a finding of "irreconcilable

differences between parent and child which cannot be resolved unless the Court makes an order."⁴⁰ Among the advantages claimed for this approach would be the absence of any blame or detrimental label attaching to the child as well as the fact that the matter would not even go before the court until other means of resolution had already been exhausted.⁴¹ The dispositions available to a judge following such a finding would be clearly distinct from those available in delinquency proceedings; instead, the judge's alternatives would be similar to those recommended for use in protection proceedings plus a limited power of placement in a confined setting (although separate from those found delinquent under the J.D.A.).⁴²

The definition of "juvenile delinquent" in the J.D.A. includes, in part, "any child ... who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute."⁴³ It is the latter phrase that incorporates into the federal Act provisions relating to "unmanageability" such as that in s.65(1). In dealing with the issue of offence jurisdiction generally, the Solicitor-General's Committee adopted one of the principles enunciated in the 1969 Ouimet Report, namely that "the goals of decriminalization and destigmatization should be pursued by excluding from the application of the law conduct which is not sufficiently serious that it could not be dealt with satisfactorily by other social or legal means."⁴⁴

Citing similar considerations to those recognized by the Berger Commission, the Committee concluded that quasi-criminal federal legislation should not apply to deviant, though non-criminal behavior. It therefore proposed that the juvenile court's jurisdiction under new legislation should exclude the "status offences" based on vice or immorality as well as those provincial provisions (such as those dealing with "unmanageability") presently incorporated by reference into the federal Act, and that it extend only to contraventions of federal statutes and regulations.⁴⁵ In summary, therefore, it seems that even without the Berger Commission's recommendations, the proposed federal legislation would have no longer authorized quasi-criminal legislation such as s.65(1); the intention of the federal Committee was clearly that such matters should only be dealt with in a civil context under provincial legislation. As a result, the Berger Commission's proposed reform is clearly consistent with the federal Committee's objective of decriminalization and destigmatization and with the offence jurisdiction provisions contained in the Draft Act.

(3) Screening and Diversion

One theme common to both the Berger Reports and the federal Report is that court proceedings should only be used as a last resort. According to the preamble of the Draft Act, prosecution of juveniles should only be utilized "when their acts

or omissions cannot be adequately dealt with otherwise," or, as stated elsewhere in the Report, "when other alternatives, whether social or legal, are inappropriate."⁴⁶ Similarly, the Berger Commission noted that "adjudication accompanied by legal sanctions is in many cases to be regarded as a last resort, and certainly not the necessary outcome of every case."⁴⁷

In its Fourth Report, the Berger Commission directed a number of comments towards the topic of diversion. It noted that its proposed revision of s.65(1) of the Protection of Children Act, to the extent that it avoids a formal swearing of a complaint or the labelling of a child as a "delinquent," constitutes a form of diversion.⁴⁸ It also mentioned, but without any critical comment, the existing practice under then - section 16 of the Provincial Court Act⁴⁹ whereby diversion can be arranged by agreement of the child, the probation officer (or family counsellor), and the prosecutor, and an Appendix to the Report described the significant numbers of juveniles that are currently being diverted by this procedure in one of the Unified Family Court Pilot Project areas.⁵⁰ After briefly reciting the above, the Commission merely recommended that the arresting officer should, if possible, be involved in any consultations regarding diversion and should at least be notified of subsequent diversion or disposition, and that the police should attempt to establish some uniformity in the practice of informal diversion.⁵¹ Aside from these marginal comments, however, the Commission declined to offer its view as

to how diversion could best be accomplished.

The Solicitor-General's Committee began where the Berger Commission left off. While acknowledging the value of the informal screening currently being done by many police and communities, it recommended the establishment of a formal "screening agency" whose responsibility it would be to consider the feasibility and possibility of diverting juveniles from the judicial process to other resources better able to deal with them.⁵² While the actual operation of the proposed screening agency is too complicated to explain here, suffice it to say that the agency is given the power (subject to the Attorney-General's discretion not to refer the case to it) to consider the case on the basis of certain specified statutory criteria, to enter into a voluntary agreement with the juvenile, to issue a binding recommendation to the Attorney-General that the charge not be laid, or to issue a non-binding recommendation that the charge be laid.⁵³

Because the Berger Commission did not specify the type of diversion system it preferred, it is difficult to conclude whether or not it would have been in favour of the screening mechanism proposed under the federal scheme. One might assume that it would object to the fact that the screening agency is not required to consult with or even notify the arresting officer; presumably an amendment to that effect would not be opposed by the federal Committee. The reactions of the professionals

professionals involved in the field have been mixed.⁵⁴ Some have argued that the provisions in the Draft Act allowing the actual composition and form of the agency to be determined by each province should allow for considerable flexibility and variation in the hands of provincial authorities.⁵⁵ Others have expressed fears that, notwithstanding the Committee's support of existing informal diversion by police and others, the establishment of a formal screening agency would probably have the effect of destroying any existing diversion practices, and that the province of British Columbia would particularly suffer in that the simple, inexpensive, yet seemingly effective diversion system already in effect under s.16 of the Provincial Court Act would be replaced by the complicated, costly and not necessarily effective scheme proposed in the federal Report.⁵⁶ In light of the fact that the proposed screening agency has been the most criticized provision in the Draft Act to date, it is regrettable that the Commission failed to give greater consideration to the various ways proposed for handling diversion. It is to be hoped that individuals and groups working in this field in this province will give careful consideration to the likely practical effects of the federal proposals and will voice their concerns to the federal Committee before the Draft Act becomes law.

(4) Practice and Procedure in the Juvenile Court

Numerous critics in recent years have argued that the absence of sufficient substantive and procedural safeguards in the juvenile justice process allows for many unjust infringements on the rights and liberties of young persons. It has been said that the absence of counsel, the lack of legally-trained judges, the provision in the J.D.A. allowing informality of proceedings,⁵⁷ the lack of publicity and the restrictive appeal provisions⁵⁸ all have had the effect of aggravating this serious problem. Unlike the draftsman of the J.D.A., who believe that informal proceedings were in the best interests of young offenders and that there was no need for the procedural and substantive safeguards characteristic of the adult criminal justice system, the Solicitor-General's Committee adopted the view that the State should not intervene in a young person's life as a result of an offence until it has been proved, beyond a reasonable doubt and within proper legal safeguards, that the young person did, in fact, commit the offence. According to the preamble of the Draft Act, young persons being dealt with under that Act are to have all of the rights and freedoms available to adults, including the right to special safeguards and assistance in the preservation of those rights and freedoms; a right to be heard and to participate in the proceedings that affect them; a right to be informed as to what their rights and freedoms are; and finally, and perhaps most importantly, "a right to the least invasion of privacy and interference with

freedom that is compatible with their own interests and those of their families and of society."⁵⁹

The Draft Act's emphasis on children's rights is very similar to the approach taken by the Berger Commission in Part III of its Fifth Report, dealing with Children and Law. The Commission proposed that new legislation should contain a statement of twelve rights of children which were to be "universally applicable, practicable, and enforceable."⁶⁰

According to the Commission's scheme, the responsibility for satisfying these rights would rest initially with a child's parents or guardian and, failing them, with the government,⁶¹

and the primary legal remedy for their enforcement would be a judicial declaration, available in any of the Provincial, County or Supreme Courts.⁶²

As noted earlier, a number of these rights are procedural rights which are to be complied with "as necessary elements of any legal or administrative decision concerning the custody, guardianship, or status of the child," non-compliance with which would result in the decision being voidable or subject to judicial review.⁶³

Despite the broad wording used above, constitutional and practical considerations (not the least of which is the question of whether a delinquency proceeding is one concerning the "status" of the child) would tend to suggest that the Commission did not intend that the Statement of Children's Rights should be binding and enforceable in proceedings under federal criminal legislation. However, as can be seen from the accompanying

COMPARISON OF GUARANTEED CHILDREN'S RIGHTS

<u>RIGHTS</u>	<u>BERGER REPORT</u>	<u>FEDERAL REPORT</u>
GENERAL		"(A) right to special safeguards and assistance in the preservation of those rights and freedoms (available to adults) and in the application of the principles stated in the Canadian Bill of Rights and elsewhere." (preamble, para.3)
RIGHT TO BE HEARD	"The right to be consulted in decisions related to ... determination of status." (Statement of Children's Rights, No. 8)	"The right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them" (preamble, para.3)
RIGHT TO COUNSEL	"The right to independant adult counselling and legal assistance" in relation to such decisions. (No. 9)	The right "to be assisted by a lawyer ... during all proceedings." (Draft Act, S 10(1))
RIGHT TO AN INTERPRETER	"The right to a competent interpreter where language or a disability is a barrier" in relation to such decisions. (No. 10)	The right to "the assistance of an interpreter in any proceedings in which he is involved." (preamble, para. 3 and Canadian Bill of Rights, S 2(g))
RIGHT TO NON-INTERFERENCE	"The right to reside with parents and siblings except where it is in the best interests of the child and family members for the child to reside elsewhere." (No. 4)	The "right to the least invasion of privacy and interference with freedom that is compatible with their own interests and those of their families and of society" and the (preamble, para.4)

RIGHT TO NON- INTERFERENCE (continued)		right <u>not</u> to "be removed from parental supervision either partly or entirely (unless) all other measures are in- appropriate." (preamble para.6)
RIGHT TO AN EXPLANATION	"The right to an explanation" of all such decisions. (No. 11)	The right to an explanation of the procedure of the screening agency and the youth court (S 25(1) (a)), of the charge and the consequences of an admis- sion of the offence (S 11(1)(b)(c)), of the reason for any exclusion from the hearing (S 27 (3)), of the contents of any probation order, (S23 (3)), etc.
RIGHT TO BE INFORMED OF ONE'S RIGHTS	"The right to be informed of the rights of children and to have then applied and enforced. (No. 12)	The right "to be informed as to what those rights and freedoms are." (preamble, para.5)

table, all of the procedural rights that would be available to a child in delinquency proceedings if the Statement of Children's Rights were applicable are, in fact, provided in one way or another through the proposed Draft Act. It would seem, therefore, that not only have both law reform bodies adopted the principle of children's rights but that both have also recognized substantially the same set of basic rights and have, through their two Reports, attempted to apply those rights to all proceedings, whether civil or criminal, in which the care, control or liberties of children are in issue.

The two Reports were not as consistent, however, in their approach to the question of whether or not juvenile court proceedings should be open to the public. Although the J.D.A. only provides that the trials of children shall take place without publicity and separately from those of adults,⁶⁴ in practice, most juvenile court proceedings are conducted in private. Further, the present Act specifies that no report shall be made in any newspaper or other publication without the judge's permission concerning a delinquency or alleged delinquency, the trial or other disposition of a charge against a child, or of a charge brought against an adult in juvenile court in which the name of the child involved is mentioned.⁶⁵ The Berger Commission recommended that all courts dealing with family or juvenile matters be open to the public, subject to the following two limitations: (a) that the judge should be allowed to exclude the public if he is satisfied that without such an order there will be prejudice

to the best interests of a child, substantial prejudice to the interests of an adult party, or interference with the administration of justice; and (b) that the present provision in the J.D.A. restraining the publication of names or identifying information should be retained.⁶⁶ These recommendations have since been implemented⁶⁷ with respect to proceedings in Provincial Court under the Family Relations Act,⁶⁸ Parts IV, V, and VI, Protection of Children Act,⁶⁹ and Children of Unmarried Parents Act.⁷⁰ The federal Report clearly favoured an approach similar to that in practice under the J.D.A. over that proposed by the Berger Commission. It recommended that proceedings should take place without publicity or the presence of the general public, except for those persons the judge may admit on the basis that they have a valid interest in the case at hand or in the work of the court;⁷¹ that one or two representatives of the media should be allowed to attend such proceedings;⁷² and that it be an offence to publish, without the permission of the judge, any report of such proceedings which would have the effect of identifying a juvenile who is charged in the proceedings or appears as a victim or witness.⁷³ As the Solicitor-General's Committee noted in its Report, the question of privacy obviously involves a balancing of two competing interests: the needs of the juvenile and his family versus the rights of the public to be informed. From the above, it seems that the federal Report tends to place greater weight on the former interest while the Berger Commission tended to favour the latter. In practice, however, the major difference between the two proposals may be

really one of where the onus is placed: under the Berger plan the court would be prima facie open unless valid reasons are given to the contrary, while according to the Federal proposals the court would be prima facie closed unless the judge can be persuaded to grant admission; in both cases identifying publicity would be barred as at present. In fact, depending on how a judge would exercise the discretion given him under the two proposals, it is conceivable that both approaches would generally lead to the same results in practice.

(5) Detention, Assessment and Disposition

In its Fourth Report, the Berger Commission discussed a number of issues relating to the problem of treating the so-called "hard core" juvenile. As noted earlier, although it approved the present provincial policy of treating children in their own homes and their own communities where at all possible, it acknowledged that some of these more difficult offenders will ultimately require special facilities and programs, as well as secure accomodation. The Commission's recommendations regarding such facilities and programs can be compared to the Draft Act's corresponding provisions under the headings of pre-disposition detention, assessment and planning, treatment, probation, and secure custody.

(a) Pre-Disposition Detention

The Berger Commission recommended that specialized and decentralized secure accomodation be established for holding

juveniles before and during their trial. In order to protect against the unnecessary use of such facilities, it also recommended that the Family Advocate should be promptly notified of and be required to review every case of pre-trial detention.⁷⁴ The Draft Act also dealt briefly with pre-disposition detention: assuming that separate detention facilities would be designated by each province, it imposed restrictions on the situations where and the procedures whereby juveniles could be placed in such facilities and required the constant review of such detentions by the juvenile court judge.⁷⁵ Thus, aside from the question of who is best suited to review detention (the Berger Commission favouring the Family Advocate while the federal Report supporting the juvenile court judge), the recommendations of the two bodies approached the problem of pre-disposition detention in a consistent fashion, one providing the required facilities and the other providing the procedure to govern its use.

(b) Assessment and Planning

A related issue is that of assessment and planning. The Berger Report suggested a broad scheme composed of four levels of assessment, each involving a progressively broader range of services and a greater degree of physical restraint: assessment by the family counsellor, assessment in the community, assessment in "open" group home, assessment centres, and finally secure assessment.⁷⁶ Following the assessment, the resulting conclusions and recommendations would be compiled by the youth's Family

Counsellor into a report for the juvenile court. While the Draft Act also recognized that professional assessment has an important role to play, it did not place as much emphasis on it as did the Berger Report. Under section 17 of the Draft Act, a juvenile court judge is merely allowed (except in more serious cases where he is required) to order a pre-disposition report, and similarly, section 18 merely permits (but does not require) the judge to order a medical report as to the juvenile's mental or physical state. It seems from the above that the Commission was in favour of extensive pre-trial assessment and treatment; clearly such an approach is inconsistent with the federal Committee's view that such invasions of privacy should only follow a finding that a juvenile has, in fact, committed the offence. In addition, it seems that the broad mandatory assessment scheme proposed by the Berger Commission has gone well beyond that expected by the federal legislators, since the latter specifically rejected requiring the preparation of reports in all cases on the grounds that the benefits to be gained thereby would be outweighed by the likely administrative problems and substantial costs.⁷⁷ Although we agree that it is necessary to establish secure assessment facilities in areas in which such facilities do not presently exist, it is questionable whether the mandatory assessment in every case which the Berger proposals seem to require would be practically and financially feasible or even necessary under the proposed federal legislation. To a large extent, the answer to this question will depend on the percentage

of cases that are dealt with at the screening agency stage (where no formal assessment is done) as well as the frequency with which judges ask for reports under sections 17 and 18 of the Draft Act.

(c) Treatment

In its Report, the Berger Commission summarized the many programs and facilities currently used in the treatment of young offenders in this province,⁷⁸ and encouraged the continued development of new methods by various government departments. Dealing with the question of treatment it noted: "If anything is clear, it is that no one approach to the problems of children in distress and of juveniles violating the law has been successful. The wider the variety of approach, the more likely we are to come up with solutions."⁷⁹ The Commission did, however, make two specific recommendations. The first was that the use of restitution and community service orders should be expanded.⁸⁰ The second was that juvenile court judges should be allowed to send a child to a facility operated by the Department of Human Resources as a condition of probation, instead of being required to commit the child to the care and custody of the Superintendent of Child Welfare, thereby leaving the choice of appropriate treatment to that official.⁸¹ The Draft Act adopted the first proposal, giving the judge the power to make orders for community service,⁸² compensation, or restitution⁸³ up to a value of two hundred dollars (\$200.00). Regarding the second proposal,

however, it preferred a compromise solution. Although the Draft Act granted the judge the power to commit directly to "open custody"⁸⁴ (which includes custody in a foster home, group home, child care institution or other like place designated by the provincial authorities)⁸⁵ or to "secure custody"⁸⁶ (a place so designated by the provincial authorities)⁸⁷ it still retained in the "provincial director" (an official similar to the current Superintendent of Child Welfare)⁸⁸ the ultimate discretion as to the actual facility for placement.⁸⁹ The reasons behind the second Berger proposal - namely, to provide judicial accountability for the care of juveniles in D.H.R. facilities - were not ignored by the federal Committee, however; as we shall see shortly, other provisions in the Draft Act provide specifically for a comprehensive system of judicial⁹⁰ as well as administrative reviews.⁹¹

(d) Probation

One complaint often made by Family Counsellors and probation officers is that so-called "hard-core" juveniles tend to demand an extremely large percentage of their time and energy. As a means of alleviating this problem, the Berger Commission proposed that special staff be trained to deal exclusively with particularly difficult offenders.⁹² The federal Committee, although recognizing the value of probation,⁹³ and retaining it as a form of disposition in the Draft Act,⁹⁴ did not concern itself with this problem. However, there is no reason to think

that a special group of "youth workers" could not be so trained and readily incorporated into the proposed juvenile justice system. Assuming that there are personnel willing to undertake such a task and sufficient funds to train them, such a program would seem to offer significant potential benefits both to the seriously troubled youngster who would be dealt with by these "specialists" as well as to the less troubled juveniles whose workers would hopefully be able to devote more attention to them.

(e) Secure Custody

Recognizing the sad fact that many juveniles will ultimately require containment and long-term treatment, the Berger Commission recommended that facilities for secure post-disposition accommodation be developed in this province. Although it was unable to say what kind of facilities would be appropriate for this function, it did suggest that they should at least involve the skills of many disciplines and should attempt to avoid the degrading and stigmatizing features of many of the large, closed institutions of the past.⁹⁵ These recommendations are consistent with the federal Report; as noted earlier, the Draft Act assumes that suitable places of "secure custody" would be developed by each province. However, the fact that neither the federal nor the provincial Reports even attempt to suggest the form that such facilities should take nor the types of programs that should be developed therein illustrates quite clearly the extreme difficulties faced by those given

the responsibility of developing this "last resort" in the juvenile justice system.

(6) Review

As noted a number of times during this paper, a major theme in both Reports has been the desirability of imposing greater accountability upon those given the responsibility of caring for or treating young offenders. To this end, the Berger Commission proposed in its Fourth Report that probation orders be coupled with referrals to D.H.R. facilities, that Family Court Committees be urged to investigate the conditions in juvenile institutions, that the Family Advocate be given the duty of inspecting facilities and bringing to the court's attention any cases involving sub-standard conditions or practices, and that the courts be given the necessary powers of declaration or injunction to rectify such situations.⁹⁶ In addition, assuming that committals to the care and custody of the Superintendent of Child Welfare would be continued, the Commission recommended in its Fifth Report that such cases should be returned to the juvenile court at least once every twelve months, at which time it would review the case and have the power, if it saw fit, to rescind the committal because of the absence of adequate planning for the child's future.⁹⁷ Although none of the specific proposals in the Fourth Report were implemented in the proposed federal Act (since committal to open or secure custody was made a specific

disposition and since the Act didn't contemplate the existence of Family Advocates or Family Counsellors), the Act did adopt a procedure similar to that proposed in the Fifth Report by establishing a mandatory system of post-dispositional judicial review. Under this system, a report of the child's care and progress (and in some cases, the juvenile himself) would be brought before the court at certain prescribed intervals (subject to earlier reviews at the request of the judge, the juvenile, his parents or the provincial authority), at which time the judge could confirm the disposition, terminate it, or substitute for it a more appropriate (and, in most cases, a less restrictive) form of disposition.⁹⁸ In addition to this judicial review process, the federal Report proposed the establishment of an administrative review agency appointed by the provincial authorities, whose duty it would be to periodically review the case of each young person placed on probation or in open or secure facilities to ensure that the services and programs made available to him or her are sufficient to meet his or her needs, and where it finds that they are not, to recommend to the provincial authority an appropriate remedy to correct the situation.⁹⁹ Finally, the Draft Act proposed broad rights of appeal from any juvenile court decisions.¹⁰⁰

In light of the restrictive appeal provisions in the J.D.A. and the lack of any provisions in that statute for mandatory judicial or administrative review of dispositions at regular intervals, it is submitted that the current trend towards greater accountability in the juvenile justice system is both desirable

and long overdue. It is worth noting that the functions of the proposed judicial review and that of the proposed review agency, although at first glance almost identical, are in fact somewhat more distinct. The function of the court appears to be one of evaluating the appropriateness of the existing disposition in light of the offender's progress (or lack thereof), the manner in which the disposition is being carried out, or material changes in the circumstances that led to the making of that disposition in the first place. The review agency, on the other hand, is primarily responsible for monitoring the quality of the treatment facilities, their programs and other amenities. In light of the valuable role that this review agency could play, some might argue that it is unfortunate that its establishment was not made mandatory, but instead was left to the discretion of provincial authorities. It would appear, however, that for constitutional, political and financial reasons, the federal government has probably gone as far as it can.. Others might suggest that the review agency should be given stronger remedial powers than just those of reporting its findings to the provincial director or, failing an adequate response from him, to the juvenile court. Perhaps by giving the juvenile court judge the declaratory and injunctive powers suggested by the Berger Commission, the proposed review system could thereby be supplied with a strong enough sanction to guarantee the maintenance of at least minimal standards of care.

(7) The Court and the Community

Stressing the importance of community involvement in the juvenile justice system, the Berger Commission made four specific recommendations designed to encourage and facilitate such community involvement. The first such recommendation was the proposal, discussed earlier, regarding open courts.¹⁰¹ Secondly, recalling its discussion in an earlier report of the worthwhile contribution that might be made by "lay panels"¹⁰² and the legislation subsequently based thereon,¹⁰³ the Commission urged that if lay panels prove to be useful in protection cases they should, wherever practicable, be used in delinquency proceedings.¹⁰⁴ The Commission was also supportive of Family and Juvenile Court Committees, taking the view that they "are a means of extending the court into the community and ... enabling the community to take an active part in the justice system,"¹⁰⁵ and made a number of recommendations regarding the manner of their appointment, their composition, their powers and their resources.¹⁰⁶ Finally, the Report urged that community development must be regarded as an essential component of the Unified Family Court's work, and that consideration should be given to the appointment of a Co-ordinator of Community Development.¹⁰⁷

By contrast, the Solicitor-General's Committee did not deal with the use of community involvement at all and essentially ignored the above provincial proposals. Despite urgings to the

contrary,¹⁰⁸ the definition of "judge" in section 2 effectively precluded the use of lay panels; similarly, no mention was made anywhere in the Report or the Draft Act of Juvenile Court Committees or of community development. In fact, the only concession to the interest of the community in juvenile court matters seems to be the limited provision for entry to the juvenile court itself by persons having "a valid interest in the case or the work of the court"¹⁰⁹ or by two "representatives of the mass media."¹¹⁰ The absence of any significant provisions in the Draft Act aimed at increasing community involvement seems to suggest either that the federal Committee was just not interested in pursuing this objective or that it did not feel that federal legislation of this nature was the proper vehicle for achieving that goal. Although this province could still, if it so wishes, act on its own to encourage the involvement of Family Court Committees in juvenile court work and to support various community development programs, it is clear that the provincial proposals regarding open courts and lay panels could not be implemented if the present Draft Act becomes law.

(8) Departmental Jurisdiction

The last but not least important topic covered by the Berger Reports was the question of which provincial government department should be responsible for the provision of legal and counselling services in the family and juvenile courts. At present, the

Corrections Branch of the Department of the Attorney-General has the responsibility for the provision of probation services under the J.D.A., while the Department of Human Resources (D.H.R.) has the primary responsibility for developing and operating resources for children. Although unanimous in the view that those professionals performing the functions of family counsellors or probation officers should come under one administration, the Commission itself was divided over the question of which department should be given that control, a majority of the Commission favouring the A.-G.'s Department and two members supporting the D.H.R.¹¹¹ Ultimately, the Commission recommended that a new Family and Children's Branch be established within the Attorney-General's Department and that this new branch be responsible for providing legal and counselling services in the Unified Family Court (including the recruitment and training of Family Advocates and Family Counsellors), developing the Unified Family Court throughout the province, and locating and co-ordinating the development of secure accommodation in each community for juveniles for remand purposes.¹¹² At the same time, the D.H.R. would continue to have responsibility for developing programs and resources for juveniles, including the exclusive responsibility for developing group homes.¹¹³

Because the provision of court services and treatment facilities is a matter totally within provincial jurisdiction, the Solicitor-General's Committee did not address itself to the allocation of responsibility among provincial government

departments. There are, however, two problems that may arise out of the interplay between the provincial and federal reports and that do deserve comment. The first arises out of the reference in the Draft Act to the "provincial director;" according to a note in the federal Report this term "is used throughout the proposals to imply the provincial authority who will perform the functions stipulated in the legislation - e.g., the child welfare, corrections, probation, mental health authority, as determined by the province."¹¹⁴ According to the Draft Act, the provincial director's powers and responsibilities include the authorization of pre-trial detention,¹¹⁵ the discretion as to the placement of juveniles committed by a judge to either open or secure custody,¹¹⁶ the preparation of pre-disposition reports,¹¹⁷ and the assignment of youth workers to their cases and their subsequent supervision.¹¹⁸ The problem is: in what Department or Branch should this official be located? Clearly, the function of allocating juveniles to appropriate treatment facilities should be retained by the Department that is developing and maintaining those facilities, namely the Department of Human Resources. On the other hand, however, there is no doubt that the other three functions listed above are clearly within the mandate proposed by the Berger Commission for the new Branch of the Attorney-General's Department. Thus, it would seem that the allocation of authority proposed by the Berger Commission may be somewhat inconsistent with the structure of the proposed new federal Act, and may, as a result have to be reconsidered in light of it.

The second problem arising out of the Berger proposals relates to the issue of federal financial assistance for provincial services. At the present time, federal cost-sharing is available under the Canada Assistance Plan only for designated post-dispositional services where these are administered by a provincial Department of Social Welfare (such as the D.H.R.) but not where these same services are provided by a Justice Department or a separate Department of Correctional Services. Despite numerous provincial demands to expand the scope of the Canada Assistance Plan to include pre as well as post-disposition services and facilities and to include these programs regardless of the provincial department that administers them, the federal Report did not discuss the problem of federal financial assistance aside from conceding that its proposals "raise financial implications which will require careful examination."¹¹⁹ Similarly, the Berger proposals did not take into consideration the possible financial significance to the province of a shift of responsibilities from the D.H.R. to a new Branch of the Attorney-General's Department. Since the problem of cost-sharing is a very live issue in current federal-provincial negotiations, it would seem only reasonable that the province not embark on a major departmental re-organization for the time being or at least until the federal government's position on this crucial question becomes known.¹²⁰

D. Conclusions

Trying to compare the Reports of the Berger Commission and the Report of the Solicitor-General's Committee is somewhat like trying to compare apples and oranges. Whereas the Berger Commission's mandate was to review and make recommendations regarding the entire field of family and children's law, the Solicitor-General's Committee dealt with a much narrower, topic, one involving many aspects of criminal, as well as family law. Similarly, whereas the federal Committee could propose wide-ranging substantive and procedural law reform in this field, the provincial Commission could, on the other hand, only deal with the topic in a marginal manner, offering criticisms and recommendations only with respect to those aspects of the field that touch upon matters of provincial jurisdiction. Nonetheless, provided that these differences and limitations are kept in mind, a number of generalizations can still be made regarding the approach taken by these two law reform groups towards the reform of juvenile delinquency law.

The major feature arising out of our comparison of the two Reports has been the marked similarity in philosophical and practical approach taken by the two bodies. As outlined in Part B of this paper, both Reports adopted the principles that children should be treated as responsible for their conduct but that they should be treated separately from and differently than

adults, that children have rights which should be recognized and respected in any legal proceedings, that the criminal process is a blunt instrument and that the detrimental influences of stigma often outweigh the therapeutic effects of a court appearance (and that, as a result, diversion should be employed whenever possible and the court proceeding should only be used as a last resort), and that those persons given the responsibility of caring for and treating young offenders should be held accountable for their actions and for the quality of the care and treatment they provide. The extent of this similarity should not, however, be very surprising since most of these principles have become accepted and recognized in recent years by many professionals involved in this field.

At the same time, we should not ignore the differences in approach revealed by our analysis. Whereas the Berger Commission was strongly in favour of greater community participation, through lay panels, Family Court Committees and relatively open courts, the federal Committee did not reflect similar concerns. While the Berger Commission favoured less formal mechanisms (i.e. vesting unregulated discretion in a Family Counsellor or a Family Advocate) to control such matters as diversion, review of pre-disposition detention, as well as post-dispositional review, the federal Committee preferred to delegate those functions to relatively formal, structured bodies (such as the screening agency, the judge in the judicial review process, and the review agency) operating within narrowly defined

statutory parameters. Finally, the Berger Commission's emphasis on and concerns regarding the problems of controlling and treating the so-called "hard core" juveniles have no parallel in the Report of the Solicitor-General's Committee.

Another feature that might be noted by those responsible for drafting the province's response to the federal proposals is the broad range of discretion allowed the respective provincial authorities under the federal Act. Because of constitutional and political pressures, in many matters the federal legislators, although proposing a particular procedure, have left within the realm of provincial decision-making the power to decide (a) whether the federally proposed procedure is to be used in an individual case, and (b) if so, who is to exercise the relevant power or bear the applicable responsibilities. For example, although the federal proposals provide for the establishment of a screening agency, the decision as to whether or not a particular case is to be referred to that agency rests with a provincial official (the Attorney-General or his agent), and even if the case is so referred, the power to designate who is to constitute the screening agency is also left in the province's hands. Similarly, although the Draft Act allows a special review agency to review cases and monitor the services and facilities provided to young offenders, the provincial authorities are given the power to decide whether or not a reviewing agency is even to be established for a particular juvenile court, and if it is, who shall constitute that agency.

It is submitted that these and other opportunities for provincial discretion in the proposed Draft Act, although not detracting significantly from the goal of uniformity of treatment, may have the beneficial result of encouraging the individual provinces to experiment with different approaches and methods of implementing the new federal Act.

At the present time it seems likely that a bill based on the Draft Act will be introduced at the coming Fall Session of Parliament. In British Columbia, however, recent governmental changes seem to have reduced the likelihood of further implementation of the Berger Commission proposals discussed in this paper, at least for the reasonably foreseeable future. In light of these political realities and the conclusions we have drawn regarding the general similarity and consistency between the two Reports, there may be a tendency to dismiss the Berger Commission's recommendations regarding delinquency as unimportant and unnecessary. We would suggest, however, that such an attitude would be unfortunate, since there are a number of the Berger proposals that were not also included in the federal Report but are nonetheless worthy of further consideration. Proposals such as those relating to the various possible functions of the Family Advocate, the development of specially-trained staff to deal with "hard core" delinquents, the use of the judicial powers of declaration and injunction to rectify sub-standard facilities and services, and the use of lay panels and Family Court Committees all have potential for improving

the juvenile justice system. They should not be rejected without further consideration and evaluation. Rather, they should be given a trial implementation under the new federal legislation soon after it has been proclaimed into law.

FOOTNOTES - APPENDIX B

1. See, for example, Law Reform Commission of Canada, Working Paper No. 1: The Family Court (1974), Working Paper No. 12: Maintenance on Divorce (1975), Working Paper No. 13: Divorce (1975);
2. A.G. of B.C. v Smith (1968), 65 D.L.R.(2d) 82 (s.c.c.)
3. R.S.C. 1970, c. J-3.
4. Entitled The Family, the Courts and the Community (Issued February 12, 1975)
5. Entitled Children and the Law; Part III - Children's Rights; Part v - The Protection of Children (Child Care). (Issued March, 1975.)
6. For a review of the Commission's first four Reports, see J.A. MacDonald, Family Court Reform in British Columbia (1975) 18 R.F.L. 201.
7. Issued October, 1975.
8. Fifth Report, Part III, pp. 16-17
9. Fourth Report, p. 67
10. Id., p. 59-64
11. Fifth Report, Part V, p. 58-63.
12. Fourth Report, pp. 88-89.
13. Id., pp. 65-69.
14. Id., pp 90-91.
15. Id., pp. 92-104.
16. Federal Report, pp. 14-15.
17. Id., pp. 12-13.
18. Fourth Report, pp. 8-9.
19. S.B.C. 1974, c.99, ss.8 and 9.
20. Fourth Report, pp. 10-20.
21. Supra, note 19

22. Fourth Report, p. 17.
23. Id., pp. 17-19.
24. Draft Act. s.25(1).
25. Federal Report, pp. 58-59; Draft Act, s.2.
26. Unified Family Court Act, supra, note 19, s.8.
27. Draft Act, s. 10(1).
28. Id., s. 10(2)
29. Federal Report, pp. 33-34.
30. Fourth Report, p. 27.
31. B.N.A. Act, 1867 30-31 Vict., c.3, ss.92(14) - "the administration of justice within the province."
32. One such problem not dealt with by the Commission is how the Province should deal with those offenders below the minimum juvenile court age.
33. Fourth Report, pp. 58-60.
34. Id., p. 63.
35. Id.
36. Id., p.64.
37. Federal Report, p.20; Draft Act, s.2.
38. A related issue not dealt with by the Commission is how the Province would handle infringements of provincial legislation, assuming that such offenders are excluded from the scope of any new federal legislation.
39. R.S.B.C. 1960, c.303.
40. Fifth Report, Part V, pp. 60-61.
41. Id., p.60
42. Id., pp. 60-61
43. J.D.A., s.2(1).
44. Federal Report, p.18.
45. Id., pp. 17-18; Draft Act, s.2

46. Federal Report, p. 14.
47. Fourth Report, p.3
48. Id., p.88.
49. Provincial Court Act, S.B.C. 1969, c.28, s.16 (4). Now Corrections Act, S.B.C., c.10,s.7, as.am. by Provincial Court Act, S.B.C. 1975, c.57, s.38.
50. Fourth Report, Appendix E. p.6.
51. Id., pp. 88-89
52. Federal Report, pp. 26-32.
53. Id., ; Draft Act, s.9
54. See, for example, J.A. MacDonald, A Comparison of the Juvenile Delinquents Act with the Proposed Young Persons in Conflict with the Law Act (January 27, 1976) (unpublished); proceedings of the Joint Alberta-British Columbia Meeting to discuss Federal proposals (January 9, 1976) (unpublished); Working Papers of the Joint Committee of Canadian Bar Association on Young Persons in Conflict with the Law - B.C. Branch (unpublished).
55. See C.B.A. Joint Committee Working Papers, supra, note 54.
56. See MacDonald, supra, note 54, at pp. 3-5.
57. J.D.A., ss.17 (1) (2).
58. Id., s.37.
59. Draft Act, preamble.
60. Fifth Report, Part III p.6.
61. Id., p. 10.
62. Id., p. 13.
63. Id., p. 17. (emphasis added).
64. J.D.A., s. 12(1).
65. Id., s. 12(3)
66. Fourth Report, pp. 28-30.
67. Provincial Court Act, S.B.C. 1975, c.57, s.3. For those matters designated by the Attorney-General as "family or children's matters" for the purposes of s.3, see B.C. Reg. 612/75 (September 30, 1975).

68. S.B.C. 1972, c.20, as amended.
69. R.S.B.C. 1960, c.303, as amended.
70. R.S.B.C. 1960, c.52, as amended.
71. Draft Act, s.26(1)
72. Id., s.26(2)
73. Id., s. 26(3),(4).
74. Fourth Report, pp. 73-74.
75. Draft Act., ss.2 and 5.
76. Fourth Report, pp. 74-81.
77. Federal Report, p. 50.
78. Fourth Report, p. 87.
79. Id., pp 81-82.
80. Id., p. 83
81. Id., pp82-83.
82. Draft Act, s. 16(1)(b)(ii).
83. Id., s. 16(1)(b)(iii).
84. Id., s. 16(1)(b)(v).
85. Id., s.2
86. Id., s. 16(1)(b)(vi).
87. Id., s.2
88. Id.
89. Id., s. 16(6),(7).
90. Id., ss.30-34.
91. Id., s.36.
92. Fourth Report, pp.83-84.
93. Federal Report, p. 46.
94. Draft Act, s. 16(1)(iv).

95. Fourth Report, pp. 84-86.
96. Id., pp. 90-91.
97. Fifth Report, pp. 44-46.
98. Draft Act, ss.30-34.
99. Id., s.36
100. Id., s.42
101. Fourth Report, pp. 28-30.
102. See Second Report, pp. 1-6. The term "lay panel", although widely used today, is actually somewhat misleading. Because the presiding judge is also a member of the panel it is therefore not a "lay" panel exclusively. To be more precise, one should refer to the decision-making body as a panel including lay members of the public. For convenience, however, we shall continue to use the former designation.
103. Protection of Children Amendment Act, 1974, S.B.C. 1974, c. 69, s.2.
104. Fourth Report, pp. 92-98.
105. Id., p. 99.
106. Id., pp. 98-102.
107. Id., pp. 102-104.
108. See J.A. MacDonald, supra, note 6, at p. 215.
109. Draft Act, s. 26(1).
110. Id., s. 26(2).
111. Fourth Report, pp. 50-51.
112. Id., pp. 51-52
113. Id., p. 55.
114. Federal Report, p. 23.
115. Draft Act, s.5.
116. Id., s. 16(6) and (7).
117. Id., s. 17(3)
118. Id., s.24(3).

119. Federal Report, p. 13.

120. Since the above was written, the writer has learned that during the past year the federal government, in negotiations with the provinces of Ontario and New Brunswick, has indicated that it would be prepared to include within the scope of the Canada Assistance Plan provincial programs administered through a provincial Justice or Corrections Department. The above comments and criticisms must therefore be read in light of these recent policy changes.