UNIVERSITY OF ALBERTA

The Philosophy of the Young Offenders Act and its Impact on the Formal Legal Education and Practice of Advocates for Youth.

by

Cathy G. Lane

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Laws.

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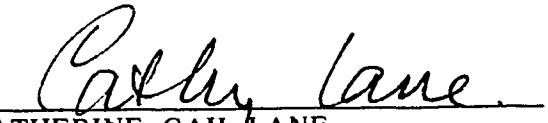

CATHERINE GAIL LANE
BOX 32, SITE 30, R.R.4
CALGARY, ALBERTA
T2M 4L4

August 28, 1995

UNIVERSITY OF ALBERTA

FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled "The Philosophy of the Young Offenders Act and its Impact on the Formal Legal Education and Practice of Advocates for Youth" submitted by Cathy G. Lane in partial fulfilment of the requirements for the degree of Master of Laws.

BRUCE P. ELMAN

GERALD L. GALL

JAMES C. HACKLER

APPROVED THIS 13TH DAY OF JULY, 1995.

This work is dedicated firstly to Steve, my best friend. It is also dedicated to the lawyers and staff of the Calgary Youth Office whose knowledge and integrity exemplify good advocacy.

ABSTRACT

This thesis is divided into five Chapters. Chapter 1 surveys the evolution of the youth justice system and entertains a brief comparison between the Juvenile Delinquents Act and the Young Offenders Act. Chapter 2 discusses the philosophy of the Young Offenders Act and focuses on the significance of statutory interpretation in determining whether section 3 of that Act grants substantive remedies in law. Chapter 3 discusses judicial interpretation of section 3. Chapter 4 outlines the obligations for formal legal education and the past response of Canadian Law Schools to this issue. Chapter 5 contains the conclusion.

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INTRODUCTION

Youth is a blunder; manhood a struggle; old age a regret.

Coningsby [1844], bk.III, ch.1

Any discussion about advocacy in youth court must begin with the acknowledgement that Canadian society is pleading for a solution to youth crime. That pleading takes the form of calls for tougher laws premised on punishment. Unfortunately, punishment means incarceration and incarceration means denial and avoidance of the causes of youth crime. The seeming increase in youth involved in the commission of violent offences has created an hysteria that has provided politicians with "get tough on crime" platforms that attract voters.[1] Young offenders, being below voting age, have no representation in

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[1]. Hysteria is understood in terms of intensity of public response to youth crime. It may seem validated when politicians enter the arena to express extreme views. As an example, the Premier of Alberta, Ralph Klein, was quoted as saying that young offenders convicted of murder in adult court should be sentenced to death. See A. Johnson, "Klein calls for execution of young offenders" Calgary Herald (20 April 1994) A3.

The public is bombarded with information from the media and the response seems largely to have been a call for tougher punishment. However, in the analysis, little consideration seems to have been given to the following statistics:

> * In September, 1993, the Provincial Children's Advocate Berndt Walter said in his review of the Child Welfare system that Alberta has a tendency to keep far more young persons in pre-trial custody than other jurisdictions. He found that on April 30, 1992, 43 youth were in pre-trial custody in the province of B.C. whereas there were 97 held in pre-trial custody in Edmonton, Alberta alone;
>
> * A federal department of Justice discussion paper on the Young Offenders Act, released September 3, 1993, says the crime rate among Canadian youths has remained relatively constant over a 10 year period and between 1991 and 1992 has decreased.(See A. Jeffs, "Youth Crime - Problem or excuse?" Calgary Herald (26 September 1993) B1).

our democracy. Our government and our society sees the adolescent as the enemy, inherently evil and to be feared. This attitude is fuelled by the few tragic, brutally violent offences that go beyond explanation or understanding. A few current examples stand out. On February 12, 1993 James Bulger was one month shy of three years of age. He had wandered away from his mother who was standing in a line at a butcher shop in a busy shopping mall in Liverpool, England. Two ten year old boys took him by the hand and left the Mall. Within four days his mutilated body was found on some train tracks not far from the City.[2] On April 16, 1994 in Edmonton, Alberta, Mrs. Danelesko was stabbed to death in her own home. Three 16 year old males randomly selected a house in south Edmonton to break into. While in the home one of the three youth was startled by Mrs. Danelesko who had awakened and arisen to check on her children. He stabbed her once in the heart and she died shortly after.[3] On July 8, 1995 in Calgary, Alberta, Kulwarn Dhiman was stabbed to death. Two fourteen year old girls were charged with manslaughter.[4]

The brutality of violence in youth shocks us to our moral essence. We are shocked because we cannot conceive of a child or a teen intending to cause death

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[2]. See M. Thomas, Every Mother's Nightmare - The Killing of James Bulger (London: Pan Books Ltd., 1993).

[3]. The decision of the transfer hearing under section 16 of the Young Offenders Act is cited as: R. v. H.(S.R.), L.(D.B.) and F.(A.G.) (22 September 1994), Edmonton 40535080Y & 40511362Y (Alta. Prov. Ct. Yth. Div.).

[4]. See C. McGovern, "You've come a long way, baby" The Alberta Report (31 July 1995) 24.

or grievous bodily harm for no other reason than to cause it. However cynical it may sound, we are not as shocked when an adult causes death or grievous bodily harm because we assume the adult offender possesses a developed social and moral consciousness about that which is right and wrong unless insanity can be proven. Society is burdened with the task of developing social consciousness in its youth. Violent youth crime reminds us that we have failed. Our hysterical response to youth crime shows our immaturity.

This thesis is divided into five Chapters. Chapter 1 surveys the evolution of the youth justice system and entertains a brief comparison between the Juvenile Delinquents Act and the Young Offenders Act. Chapter 2 discusses the philosophy of the Young Offenders Act and focuses on the significance of statutory interpretation in determining whether section 3 of that Act grants substantive remedies in law. Chapter 3 discusses judicial interpretation of section 3. Chapter 4 outlines the obligations for formal legal education and the past response of Canadian Law Schools to this issue. Chapter 5 contains the conclusion.

This work represents an attempt to reconcile the history of the evolution of the youth justice system with the application of philosophical goals in present day youth court. In doing so, the writer has surveyed the development of the law and considered judicial interpretation of section 3 of the Young Offenders Act, which is entitled the "Declaration of Principle". It is the writer's thesis that the philosophical goals inherent in the youth justice system oblige advocates in that

forum to have been exposed to formal legal education in the field to be adequate legal representatives of youth. Adequacy of legal representation implies a legal and moral duty.

The topic of legal representation of youth was chosen for a number of reasons. The writer has been involved in the youth justice system since the proclamation of the Young Offenders Act in 1984 and most recently is involved in a pilot project in Calgary, Alberta, whereby legal representation is offered to young persons by a team of staff lawyers. The writer has followed the application of child welfare principles within the criminal law milieu and has watched advocates for youth struggle with these competing interests. The writer has observed Crown and defense counsel disparage the youth court system yet use it as a training ground for trial work. The youthful client has been subject to the dynamics of creating personal reputation resulting in his or her needs and interests being ignored. The Young Offenders Act was a response, in part, to the perceived need for youth to have the benefit of due process in criminal and quasi-criminal prosecutions. If the statutory guarantees to due process contained within the Young Offenders Act and the Charter of Rights and Freedoms are to have any meaning to youth in conflict with the law, then advocates for youth must adhere to the same professional and ethical standards that guide conduct within the adult criminal forum. Youth, as much as adults, deserve adequate, professional and respectful legal representation. Youth also deserve the benefit of an advocate cognizant of the substance and philosophy of the Young Offenders Act. Society is unrelenting in its quest for conviction and

punishment of young offenders. As a result, being the legal representative of a young offender may not be a popular job, but it is an important one. Therefore, the standards of legal representation in youth court are the proper subject of scrutiny.

CHAPTER 1 FROM JUVENILE TO YOUNG OFFENDER

I. THE HISTORY OF JUVENILE COURT

Dean Roscoe Pound of the Harvard Law School is quoted as once saying that the establishment of Juvenile Court was "one of the most significant advances in the administration of justice since the Magna Carta".[1] The formation of Juvenile Court is largely a phenomenon of the 20th Century although its origins are found, in part, in the equity jurisdiction of the English Courts of Chancery. Historically, children were tried alongside adults upon reaching the age of seven, the common law age of criminal responsibility.[2] Judge Omer Archambault notes that the recognition of a distinct legal status for children "..probably originated with the common law rule of doli incapax, which had its origin in Roman and Ecclesiastical law."[3]

Doli incapax, referring to a child under the age of seven, means "incapable of mischief". A child between the ages of seven and fourteen was only *prima facie* "incapable of mischief" the presumption of which could be overcome by the finding of a court that the child could differentiate between

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[1]. See discussion in M. M. Bowker, "Juvenile Court in Retrospective: Seven Decades of History in Alberta (1913 - 1984)" (1986) 24 Alta. L. R. 234 at 235.

[2]. The Criminal Code of Canada contained a provision regarding the age of seven being the age of criminal responsibility up until the enactment of the Young Offenders Act in 1982.

[3]. Judge Omer Archambault, "Young Offenders Act: Philosophy and Principles", (1983) 7:2 Provincial Judges Journal 1.

good and evil. After such a ruling the child could be convicted and punished accordingly.[4]

The idea for the establishment of a Juvenile Court arose from the unsatisfactory treatment of children within the adult criminal justice system as well as the changing social view of children in the nineteenth Century. Prior to its creation, [5]

> ... children were tried in the same court as adults, subject to the same sentences as adult offenders and imprisoned in the same prisons as adult criminals. It is reported that in Canada's oldest penitentiary at Kingston (dating back to 1835), convicts, women and children were all caged together. Records in 1846 show that 16 children were imprisoned there along with 11 murderers and 10 rapists.

The world's first Juvenile Court was established in the City of Chicago in 1899.[6] Canada quickly followed this initiative with the proclamation of the Juvenile Delinquents Act[7] (JDA) in 1908. This Act remained virtually unchanged until the proclamation of the Young Offenders Act[8] (YOA) in April of 1984. The administration of juvenile justice throughout this period suffered from great philosophical shifts in the approach taken to the legislation. These

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4. J. A. Ballentine, Ballentine's Law Dictionary, 3rd ed. by W.S. Anderson (Rochester, New York: The Lawyer's Co-operative Publishing Company, 1969).

5. Supra note 1 at 235.

6. Ibid. at 234.

7. S.C. 1908, c. 40.

8. R.S.C. 1985, c. Y-1.

shifts ranged from a "child saving" perspective to an adversarial one.[9] Marjorie M. Bowker, who served as a Judge of the Juvenile Court in Alberta from 1966 to 1983, described the entire era in juvenile court from 1913 to 1984 as having been "...marked by vacillation, indecision and inconsistency."[10] In 1984, Marilyn White, a lawyer with the Family and Youth Branch of the Attorney General's Department in Edmonton, Alberta wrote:[11]

> Canadian Juvenile Courts, day in and day out, promise help that is never delivered - promise fictions of adequate professional treatment at residential treatment facilities, of adequate supervision by caseload-smothered probation officers, of adequate assistance from overburdened, floundering social agencies, and of cures not yet invented by social science. Throughout the Canadian juvenile justice system, there was evidence of uncertainty and lack of uniformity. Disparity in charging, diversion, conviction and sentencing resources was present in the twelve different systems operated by the ten provinces and two territories. Further, regional and even municipal divergence suggested that justice for youth offenders had, in many instances, varied with the length of the judge's foot or the social worker's pencil.

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[9]. For a glimpse at what "child saving" meant to those involved in the system, on March 30, 1910, R.B. Chadwick, Superintendent of the Department of Neglected & Dependent Children, writes this at page 6 of his First Annual Report under the Children's Protection Act of Alberta, addressed to the Attorney General:

> The most pressing needs of the Province at the present time in its work of child-saving are: An Institution designed as a "parental"school, where children could be assembled and classified, the defective have his "defects" rectified or be sent to an Institution providing more expert treatment, the milder forms of delinquency referred and the degenerate passed out to a more severe type of Institution.

[10]. Bowker, supra note 1 at 272.

[11]. M. White, "A Comparative Analysis of the Juvenile Delinquents Act and the Young Offenders Act" prepared for the Legal Education Society of Alberta Seminar entitled: "From Juvenile to Youth Court, held at Edmonton, Alberta, June 1984, at 24.

The evolution towards the present youth justice system began in the 1960's. This movement towards reform represented a response to criticisms of the effectiveness of the JDA and to criminological concerns about the extent and nature of juvenile delinquency. In 1961, the Committee on Juvenile Delinquency was created, comprised of five persons drawn from the Department of Justice. This Committee subsequently prepared a Report, Juvenile Delinquency in Canada , which was released in 1965. This Report widely criticized both the philosophical focus and procedure of the existing system. This critique was followed by further study and several attempts at new legislation concluding with the Young Offenders Act in 1984.

Concurrently, Juvenile Court in the United States began to evolve towards a more formal, legalistic and adversarial system in the late 1960's. The movement quickened after the result in In re Gault[12] in 1967. Therefore, it is important to review this decision at some length:

Facts:

On June 8, 1964, Gerald Gault and a friend were taken into custody. A Mrs. Cook had complained about a lewd telephone call. Justice Fortas described the call at page 4 of the decision:

> It will suffice for purposes of this opinion to say that the remarks or questions put to her were of the irritatingly offensive, adolescent, sex variety.

No notice had been given to Gerald Gault's parent about the arrest although his older brother discovered, by chance, that he had been arrested. At that point

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[12]. 87 Supp. Ct. 1428; 387 U.S. 1.

Gerald's mother went to the detention home and was told why her son was in custody and that a hearing would occur the next day. At the June 9 hearing the complainant was not present. No sworn evidence was given. No transcript was made of the proceedings. Gerald was questioned. It was not determined how many of the lewd remarks, if any, were made by Gerald. A delinquency hearing was scheduled for June 15 and on June 11 or 12 Gerald was released from custody. At the time of the release Mrs. Gault received a hand-written note concerning the date of the delinquency hearing. At the hearing on June 15 the complainant again was not present. Gerald, 15, was nonetheless committed to an industrial school until the age of 21.

As there was no right to appeal, legal counsel for Gerald made an application for a writ of habeas corpus on August 17 to have Gerald released from the industrial school. At that hearing, the Juvenile Court Judge was cross-examined and disclosed that Gerald was charged with an offence for which an adult would receive a fine of $5 to $50 or a maximum of two months of imprisonment. The Writ was dismissed and when the family sought review in the Arizona Supreme Court, the Supreme Court denied the review. Thereafter, an appeal was launched with the Supreme Court of the United States. Justice Fortas delivered the main judgment of the Court which reversed the decisions of the lower courts and found that:

1. The adjudication of delinquency is subject to the Due Process Clause of the Fourteenth Amendment;

2. In adjudication hearings due process requires timely and adequate written notice of the specific issues that will be addressed to be given to the child and his parents or guardians;

3. In adjudication hearings the child and his parents or guardians must be advised of their right to counsel and, if they are unable to afford counsel, that counsel will be appointed to represent the child;

4. The Constitutional privilege against self-incrimination is applicable;

5. The child must be afforded the right of confrontation and sworn testimony of witnesses available for cross-examination.

It is interesting to note that some years before the Gault decision, Canadian courts were attempting to define the parameters of due process in juvenile court. In

1947, the British Columbia Supreme Court in R. v. T.[13] strongly criticized the juvenile court system. In that case, a 15 year old boy was charged with indecent assault upon an 8 year old girl and was found guilty. In allowing the conviction

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[13]. [1947] 2 W.W.R. 232 (B.C.S.C.). See also the decision of the Supreme Court of Canada in Gerald Smith v. The Queen, [1959] S.C.R. 639. In that case, the court held that (then) section 708(1) of the Criminal Code of Canada, which required that the substance of a criminal information be stated to the accused and the accused asked whether he pleads guilty or not guilty, must be strictly complied with in juvenile court as well as adult court.

appeal the court reiterated "the grosser points of error" being:[14]

(1) The nature of the offence charged was not, as it should have been, made clear to the accused boy.

(2) He was not offered the elementary right of cross-examination.

(3) He was not asked whether or not he wanted to call witnesses or give evidence in his defence.

(4) He was sworn and told to give evidence without his consent.

(5) He was convicted, against the law, on evidence which was legally unsworn and totally uncorroborated.

Notwithstanding this and other similar statements from the courts, little attention seems to have been paid to the development of a body of law concerned with the civil rights of juveniles during the lifespan of the Juvenile Delinquents Act.[15]

Academics have suggested that Gault represents the source of the trend towards a more legalistic juvenile justice system in the United States. In fact, this decision did culminate with the 1977 Report of the Joint Commission on Juvenile Justice Standards.[16] At the same time, Canada, also struggling with the creation of much needed legislation, moved in a different direction from its

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[14]. Ibid. at 237.

[15]. For a more expansive review see B. Kaliel, "Civil Rights in Juvenile Courts"(1974) 12 Alta. L.R. 341.

[16]. This Report contained 23 volumes of standards and recommendations. "The gist of the conclusions was that punishment should play a greater role in juvenile justice with a shift towards the criminal law model; that sanctions should be based on the seriousness of the offence not on the court's view of the juvenile's needs, and that the rehabilitative ideal be down-graded." See Bowker, supra note 1, at 253.

United States counterpart. By contrast, the Young Offenders Act, in its section 3 "Statement of Principle", counters procedural formality with practical flexibility, legalism and due process with diversion, adversarial process with the duty to safeguard the physical, social and psychological needs of the individual youthful offender. By all accounts this balancing represents a typically Canadian compromise of competing social welfare ideals or an acknowledgement that: "Treatment of social problems is less precise than traditional legal process and difficult to interpose in a legal system."[17]

The following time line discloses some of the more important developments in the formation of the current youth justice system in Canada and contains an indication of the Province of Alberta's legislative response given the Province's jurisdiction over services provided to children:

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[17]. H.A. Allard, "Family Courts in Canada", in Studies in Canadian Family Law, vol.1 (Toronto: Butterworths, 1972) at 1. This quote appears to be a compromise of the dissenting opinion of Justice Stewart in the Gault decision wherein at pages 78 to 79 he stated:

> Juvenile proceedings are not criminal trials. They are not civil trials. They are simply not adversary proceedings. Whether treating with a delinquent child, a neglected child, a defective child, or a dependent child, a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act.

1857 An Act for establishing Prisons for Young Offenders - for the better government of Public Asylums, Hospitals and Prisons, and for the better construction of Common Gaols. is passed by the Fifth Parliament of the Province of Canada and assented to on June 10, 1857.[18]

This enactment made use of the term "young offender". Although not defined in the enactment, it was clear that it applied to persons 21 years of age and under who were sentenced to a period of incarceration. The Act allowed such persons to be sent to "Reformatory Prisons" instead of the regular Provincial Penitentiaries and differentiated the length of the term of incarceration in a Reformatory for persons over and under the age of 16. Section XIII allowed a Ship to be designated a Reformatory Prison for those offenders "...as may desire a seafaring life.."

As early as 1857, Parliamentarians were concerned about the reformation of young offenders and this attitude was evident from the tenor of this Act's Preamble:

> WHEREAS it may be of great public advantage that Prisons be provided, in which *young offenders* may be detained and corrected, and receive such instruction and be subject to such discipline, as shall appear most conducive to their reformation and the repression of crime.(Emphasis added.)

The implied perspective of this legislation is indicative of the social welfare movement which existed at the end of the 19th Century and which promoted the restructuring of the criminal justice system especially in regard to

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[18]. Statutes of the Province of Canada, 2nd Session, Fifth Parliament of Canada, 1857, c. 28.

the legal and social position of children. Judge Omer Archambault writes:[19]

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

1857 An Act for the more speedy trial and punishment of juvenile offenders is passed by the Fifth Parliament of the Province of Canada and assented to on June 10, 1857.[20]

In this enactment, there was a noticeable shift from "young offender" to "juvenile offender". Again there was no definition of the term. The underlying philosophy of this enactment was also evident in its Preamble which read:

> WHEREAS in order in certain cases to ensure the more speedy trial of juvenile offenders, and to avoid the evils of their long imprisonment previously to trial, it is expedient to allow of such offenders being proceeded against in a more summary manner than is now by law provided, and to give further power to bail them..

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[19]. O. Archambault, J.,"Young Offenders Act: Philosophy and Principles" (1983) 7:2 Provincial Judges Journal 1 at 2.

[20]. Statutes of the Province of Canada, 2nd Session, Fifth Parliament of Canada, 1857, c. 29.

This Act applied to persons who had not exceeded the age of 16 and who had committed crimes of simple larceny or crimes that were punishable as simple larceny. It established what we now know as the "summary conviction" procedure for minor criminal offences. Lastly, Section I of this Act is perhaps the first instance where the diversion of a young person is considered:

> Provided always, that if such Justices, upon the hearing of any such case, shall deem the offence not to be proved, or that it is not expedient to inflict any punishment, they shall dismiss the party charged on finding surety or sureties for his future good behaviour, or without such sureties, and then make out and deliver to the party charged, a certificate under the hands of such Justices stating the fact of such dismissal...

1890 The first Children's Court in the world is established in Adelaide, South Australia.[21]

1894 The Federal Criminal Code, 1892 is amended to ensure that children were tried privately and separately from adults.[22]

1899 The first juvenile court in North America is established in Cook County, Chicago, Illinois.

1908 An Act to consolidate and amend the Law relating to the Protection of Children and Young Persons, Reformatory and Industrial Schools, and Juvenile Offenders and otherwise to amend the Law with respect to Children and Young Person, known as the Children Act is introduced into the British House of Commons.[23]

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[21]. K. Newman, "Juvenile Justice in South Australia: In Need of Tune Up or Overhaul?", in J. Hackler, ed., Official Responses to Problen. Juveniles: Some International Reflections (South Australia: A Publication of the Onati International Institute For the Sociology of Law, 1991) at 279.

[22]. See An Act respecting Arrest, Trial and Imprisonment of Youthful Offenders. S.C. 1894, c. 58.

[23]. (U.K.) , c.67.

Section 111 of this Act established a Juvenile Court. Section 131 of the Act defined "child" as a person under 14 and a "young person" as a person 14 years of age or older but under the age of 16. In all cases, the accused person is referred to as either a child, young person, or youthful offender.

1908 The Parliament of Canada passes the Juvenile Delinquents Act.

1909 The Children's Protection Act is passed by the Alberta Legislature.[24]

This Act provided for the appointment of a Superintendent of Neglected and Dependent Children. Under Section 22(3) of that Act, a Judge could order the Superintendent, his officer or a Children's Aid Society, to take charge of a child.

1913 The Federal Juvenile Delinquents Act is brought into force in Alberta by Proclamation of the Governor-General-in-Council.

1913 The Juvenile Courts Act is enacted in Alberta providing that Commissioners appointed under the Children's Protection Act would be judges of the Juvenile Court.[25]

This enactment authorized the administration of the Juvenile Delinquents Act in Alberta by the Department of Public Welfare.

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[24]. S.A. 1909, c. 12.

[25]. S.A. 1913(2), c. 14.

1925 The Child Welfare Act is enacted in Alberta replacing the Children's Protection Act.[26]

Under Sections 6, 8 and 21 of that Act, the Superintendent of Child Welfare could apprehend, as neglected, a juvenile delinquent as defined by the Juvenile Delinquents Act and a judge could commit the juvenile to the care of the Superintendent until the age of 21.

1927 The Juvenile Delinquents Act is consolidated in the 1927 Revised Statutes of Canada.

1929 The Juvenile Delinquents Act is re-enacted with minor amendments.[27]

1944 The Alberta Juvenile Court Act is repealed by Section 130(b) of the new Child Welfare Act which is also amended to include a new Part II relating to Juvenile Court.[28]

1945 The Juvenile Offenders Act is enacted in Alberta.[29]

This Act provided that juvenile delinquents could either be committed to the charge of the Superintendent of Child Welfare or to a detention home to await disposition by the Superintendent. From 1944 to 1952, both the Child Welfare Act and the Juvenile Offenders Act had jurisdiction over the adjudication and disposition of juvenile offenders.

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[26]. S.A. 1925, c. 4.

[27]. S.C. 1929, c. 46.

[28]. S.A. 1944, c.8.

[29]. S.A. 1945, c.13.

1951 In October, by Order-in-Council, the maximum ages for jurisdiction under the Juvenile Delinquents Act in Alberta are changed to 16 for boys and 18 for girls.[30]

1952 The Juvenile Court Act was re-enacted establishing the first Juvenile Court for the province of Alberta.[31]

For the first time the administration of juvenile justice was transferred to the Attorney General's Department.

1952 The Alberta Juvenile Offenders Act is repealed.[32]

1955 Bowden Institute for Boys is built near Bowden, Alberta.

1958 Alberta Institute for Girls is built near Edmonton. Alberta.[33]

Although the Juvenile Delinquents Act required these institutions be formally designated as "industrial schools" this was not done for either institution until 1967.

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30. Notwithstanding the Charter and Rights and Freedoms and the right to equality before and under the law contained in section 15, the writer is of the opinion that female young offenders continue to be treated differently within the youth justice system.

31. S.A. 1952, c.42.

32. S.A. 1952, c. 43.

33. Although not judicially determined, it is arguable that juveniles were illegally sent to these institutions until they were appropriately designated as "industrial schools" in 1967. See infra note 31.

1961 The Department of Justice creates its Committee on Juvenile Justice.

1965 The Report, Juvenile Delinquency in Canada is completed by the Department of Justice's Committee on Juvenile Justice.[34]

1966 On February 9, Bill C-121 is given first reading in the House of Commons.

The Bill amended the Criminal Code to prevent the placement of children under the age of 16 in penitentiaries. This Bill was not passed.

1966 On September 27 the Alberta Provincial Government sets up a Royal Commission to conduct an inquiry into juvenile delinquency in the province.

1967 On January 20, Bill C-13 is given second reading.

The Bill amended Section 26(2) of the Federal Juvenile Delinquents Act concerning the places at which juvenile delinquents were to be confined. This Bill was not passed.

1967 On February 15, the Royal Commission on Juvenile Delinquency files its Report.[35]

This Report strongly opposed the administration of juvenile justice by the Department of Public Welfare.

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[34]. Committee on Juvenile Delinquency, Juvenile Delinquency in Canada (Ottawa: Queen's Printer, 1965).

[35]. Report of the Alberta Royal Commission on Juvenile Delinquency (Edmonton: Royal Commission on Juvenile Delinquency, 1967).

1967 On March 6 the Bowden Institute for Boys and Alberta Institute for Girls are officially designated "industrial schools" within the meaning of the Federal Juvenile Delinquents Act.[36]

1967 A statute entitled Children's and Young Persons' Act is drafted by the Ministry of the Solicitor General.

1967 In re Gault 87 Supp. Ct. 1428; 387 U.S. 1.

1968 In May, the Alberta Provincial Government commissions a study, to be headed by William T. McGrath of Alberta's Correctional system.

This Report was released in November and "...while alluding to possible financial savings to the Province through federal cost-sharing if correctional institutions became classified as child welfare institutions, took care to point out possible risks attendant upon adoption of the child welfare approach to juvenile delinquency."[37]

1970 In April, Alberta closes its industrial schools and replaces them with "open" child welfare institutions administered by the Social Development Department (later called Alberta Social Services).

The Attorney General's Department no longer administered juvenile justice notwithstanding the findings of the McGrath Committee. This change was found in the new Part 4 of the Child Welfare Act

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[36]. O.C. 363/67.

[37]. Bowker, supra note 1 at 263. Also, W.T. McGrath, Report of the Alberta Penology Study (Edmonton: 1968).

entitled "Juvenile Delinquency".[38]

1970 Bill C-192, An Act Respecting Young Offenders and to Repeal the Juvenile Delinquents Act, is introduced to the House of Commons but not passed.[39]

1973 On June 5 the Alberta Provincial Government, by Order-in-Council, appoints The Alberta Board of Review on Provincial Courts, chaired by Justice W.J.C. Kirby, to review the operation of provincial courts.[40]

1975 Young Persons in Conflict with the Law is produced by a Committee created by the Solicitor General to report on, and make recommendations about, the existing Juvenile justice system and to propose new legislation to replace the Federal Juvenile Delinquents Act.[41]

This booklet included a draft Act (Bill C-192) which, inter alia, proposed that the minimum age of criminal responsibility be raised to fourteen years and

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[38]. S.A. 1970, c. 17.

[39]. Bill C-192 was given first reading on November 16, 1970 and on April 6, 1971 was given second reading and sent to the appropriate Standing Committee. There was much argument during the intervening months regarding the philosophy of the proposed Act. The Member from Calgary North, Eldon M. Woolliams stated on January 13, 1971:

> Now, take a look at what the Canadian Mental Health Association has to say about this bill. They use some pretty strong language, too. They say the bill is, in fact, "a Criminal Code for children". I would think that in 1971 we could do something better than that. The Association describes the bill as being "distasteful in its terminology, legalistic in its approach and punitive in its effect."[Canada, House of Commons, Debates of the House of Commons, at 2375 (13 January 1971)]

[40]. O.C. 867/73.

[41]. Committee on Proposals for New Legislation to Replace the Juvenile Delinquents Act, Young Persons in Conflict with the Law (Ottawa: Solicitor General Canada, 1975).

then proposed to have jurisdiction over young persons, who have committed criminal offences, between the ages of 14 and 18 or until the age of 21 if they have offended during the earlier age period. The draft also contained a Preamble which is very similar in content to section 3 of the Young Offenders Act.

The focus of the recommendations was:[42]

> ..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 through judicial and administrative reviews.

The Committee made the crucial point that new legislation was not enough. They identified a number of areas that would require new resources to provide adequate support for the new administration. Included in this list, was the need to train the personnel involved throughout the system. The writer understands this to include defense counsel as well. However, this proposal apparently received so much negative response that it was withdrawn and a new booklet was released entitled Highlights of the Proposed New Legislation for Young Offenders.[43]

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[42]. Ibid. at 12 to 13.

[43]. See Kirby, infra note 42 at 99.

1977 In May, an amendment to the Alberta Child Welfare Act is passed which provides for secure or compulsory care.[44]

The effect of this amendment was that both wards of the government and juvenile delinquents could be ordered into compulsory care and be held in a common facility.

1977 On October 31, the Report of Kirby Board of Review Juvenile Justice in Alberta is released.[45]

The Report concurred with both the 1967 Report by the Royal Commission on Juvenile Delinquency and the 1968 McGrath Report in strongly opposing the practice of jointly confining delinquent and non-delinquent youth.

1977 A duty counsel system is established in Juvenile Court in Edmonton, Alberta.

1977 The Report on the Juvenile Justice Standards Project by the Institute of Judicial Administration and the American Bar Association is published.[46]

1977 Highlights of Proposed New Legislation for Young Offenders is produced by the Ministry of the Solicitor General of Canada.[47]

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[44]. The Child Welfare Amendment Act, 1977, S.A. 1977, c. 11.

[45]. The Juvenile Justice System in Alberta (Edmonton: Alberta Board of Review, Provincial Courts, 1977) (Chair: W.J.C. Kirby).

[46]. See B.D. Flicker & Institute of Judicial Administration & American Bar Association, Standards for Juvenile Justice: A Summary and Analysis (Cambridge: Ballinger Publishing Company, 1977.)

[47]. Solicitor General of Canada, Highlights of the proposed new legislation for young offenders (Ottawa: Supply and Services Canada, 1977.)

The stated objective of the proposed legislation was: [48]

...that the application of the formal youth court process should be limited to those instances when a young person cannot be adequately dealt with by other social or legal means. To achieve this objective, the proposed legislation contains provisions that would encourage screening and diversion.

1978 On September 27, the maximum age for juvenile court in Alberta is set at 16 for both girls and boys by federal proclamation.[49]

1979 A first draft of the Federal Young Offenders Act is produced.

1982 The Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, is enacted and proclaimed in part.

1982 The Federal Young Offenders Act is enacted.

1984 The Young Offenders Act is proclaimed as of April 1.[50]

1992 First reading is given to Bill C - 354, a private members Bill proposed by Mrs. Bobby Sparrow of Calgary, Alberta.

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[48]. Ibid. at 6.

[49]. The Canada Gazette, Part I, Vol. 112 (1978) at 6628.

[50]. The YOA has been amended five times since its proclamation in 1984:

1. Amended RSC 1985 c.27 (1st Supp.) ss.187, 203(1) Proclaimed December 12, 1988.
2. Amended RSC 1985 c.24 (2nd Supp.) ss. 1 - 44, 50 & 51. Proclaimed December 12, 1988.
3. Amended RSC 1985 c.1 (3rd Supp.) s.12(5) Proclaimed May 1, 1989.
4. Amended RSC 1985 c.1 (4th Supp.) ss. 38 - 43 originally in force Feb. 4, 1988.
5. Amended S.C. 1992, c.11, ss.1 - 13 Proclaimed May 15, 1992.

Since none of the amendments directly affected section 3 of the Act, the writer will not extensively review them.

This Bill proposed to amend the Young Offenders Act by reducing the maximum age from 18 to 16 and by providing for an automatic transfer to adult court for all young persons with two previous convictions for indictable offences. The Bill represented a movement away from the diversionary objectives originally deemed of great importance in the Highlights Report in 1977. This Bill was not passed.

1993 A House of Commons Committee Report is released entitled: Crime Prevention in Canada: Towards a National Strategy. [51]

1994 On June 2, first reading is given to Bill C - 37, An Act to amend the Young Offenders Act and the Criminal Code. [52]

II. THE JUVENILE DELINQUENTS ACT AND THE YOUNG OFFENDERS ACT: A COMPARISON

By passing the Young Offenders Act, Parliament reacted strongly to two of the main criticisms of the Juvenile Delinquents Act. First, that the Act was "welfare oriented" and did not adequately emphasize the protection of society or encourage youths to accept responsibility for their actions. Second, that youths were not given the right of due process of law. I will briefly compare the two statutes with these two criticisms in mind. Because the ultimate purpose of this work is not a comparison of the Young Offenders Act with the Juvenile

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[51]. Canada, House of Commons Standing Committee on Justice and the Solicitor General (1993).

[52]. 1st Sess., 35th Parl., 1994. This Bill was given Royal Assent on June 22, 1995.

Delinquents Act, the discussion here will not be exhaustive.

A. PHILOSOPHY

1. IDENTIFYING THE DELINQUENT

The Juvenile Court, authorized by the statute, took the position of child protector. The Juvenile Delinquents Act gave the court broad discretion to find a child between the ages of 7 and 16 to be a 'juvenile delinquent' upon a violation of: [53]

> (a)ny provision 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 juvenile reformatory under any federal or provincial statute;(emphasis added).

Because the definition of delinquency was not restricted to criminal acts, young people were subjected to prosecution for actions for which adults could receive no punishment, most notably truancy, running away, and sexual promiscuity. Upon being found a delinquent, the youth was "dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision." [54]

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[53]. The Juvenile Delinquents Act, R.S.1970, c. J-3, s. 2(1).

[54]. Ibid., s. 3(2).

Female juvenile delinquents were treated in a particularly discriminatory manner. Many agreed that:[55]

> ...young women are brought to court 'for their protection', often without having committed an offence; they are more frequently detained in custody before trials than young men; they are given longer custody sentences than young men; runaway girls are almost always suspected to having sexual relations; and they are judged incorrigible, since they presumably do not have high moral values. Parents do not tolerate behavior from their daughters that stray from traditional sex roles, and bring them before the courts if they defy parental authority.

Section 2(1) of the Juvenile Delinquents Act, quoted above, provided fertile ground for such inequitable treatment.

The federal Young Offenders Act, a "procedural statute", governs the administration of criminal justice when a youth between the age of 12 and 17 commits a specific crime. The Act lends itself to an individualistic approach to youth criminal justice. It governs the administration of federal criminal statutes such as the Criminal Code, the Food and Drug Act, the Narcotics Control Act and related regulations. The Provincial Young Offenders Act[56] governs the administration of provincial quasi-criminal statutes such as the Liquor Control Act, the Highway Traffic Act, and the Motor Vehicle Administration Act as well as municipal bylaws. The specificity of the jurisdiction stated within both the Federal and Alberta enactments relieves the youthful offender from an arbitrary determination of that which is or is not a vice. Therefore, a young

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[55]. C.L.M.Boyle et al, A Feminist Review of Criminal Law (Ottawa: Minister of Supply and Services Canada, 1985) at 143.

[56]. S.A. 1984, c. Y-1 as amended. This enactment was created to mirror the style and processes available under the Federal Act for solely provincial offences and bylaw infractions.

person can no longer be prosecuted for behaviour that an adult could not be prosecuted for. Acts of truancy, vagrancy and sexual promiscuity, to name a few, are no longer prosecuted under the same umbrella as criminal or quasi-criminal offences and the concept of delinquency has been omitted from the Young Offenders Act to avoid stigmatization.[57]

2. TREATING THE DELINQUENT

Once designated a 'delinquent', the Juvenile Delinquents Act approached the youthful offender as a sociological problem and not as a morally responsible individual. This paternalistic approach was clearly set out in Section 38 which stated:[58]

> (t)hat 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.

By contrast, the Young Offenders Act specifically addresses the need to balance the interests of society with the needs and rights of the youthful offender. This is an appropriate juncture to quote Section 3 of that Act in its entirety:

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[57]. It is interesting to note that in 1965 the Department of Justice in its Report entitled Juvenile Delinquency in Canada recommended that the term "juvenile delinquent" be abandoned for that very reason. [Supra note 29 at 36].

[58]. The Juvenile Delinquents Act, R.S.1970, c. J-3, s. 38.

3(1) It is hereby recognized and declared that:

(a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behavior as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;

(b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;

(c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;

(d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;

(e) young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;

(f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families;

(g) young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are; and

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

This section will be discussed more thoroughly in Chapters 2 and 3. However, it is important to note here that this "balanced" approach has also been criticized for being "irresolute" and "ambivalent". Some commentators have gone so far as to ascribe a social control agenda to its creation.[59] This Statement of Principle was notably absent in the initial drafting of the Young Offenders Act in Bill C-192 . Instead, the Bill repeated a philosophy much like that stated in Section 38 of the Juvenile Delinquents Act.

B. THE RIGHT TO DUE PROCESS

An examination of the following subject headings, illustrates the evolution in the youth justice system towards the exercise of due process.

1. THE RIGHT TO COUNSEL

The Juvenile Delinquents Act did not protect a youth's right to due process of the law. The Act notably lacked any reference to the right to counsel. However, a "duty counsel" system - meaning a lawyer that was present for each and every court day for the purpose of providing legal advice when requested - was established in Juvenile Court in 1977. Even then, Marjorie M. Bowker noted the unusual position lawyers needed to take in this system of

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[59]. See discussion in S. Reid-MacNevin, "A Theoretical Understanding of Current Canadian Juvenile-justice Policy" in A.W. Leschied, P.G. Jaffe & W. Willis, eds, The Young Offenders Act: A Revolution in Canadian Juvenile Justice (Toronto: University of Toronto Press, 1991) 17 at 29 to 33.

administering juvenile justice:[60]

> Though some lawyers adopted an adversarial attitude on a first appearance, insisting that the charge be proven rather than admitted (even when the juvenile and his family wished to do so), most lawyers gradually came to see that if a denial were entered when there was no legitimate basis for doing so, the effect would not be protection from punishment but rather depriving the juvenile of what might be much-needed rehabilitative services. **A major challenge to counsel appearing in Juvenile Court was reconciling their traditional adversarial role with the concept of a juvenile's best interest.**[footnote omitted and emphasis added.]

Procedure in Juvenile Court was informal and evidentiary rules were not adhered to strictly.[61] M. White notes that Section 17 of the Juvenile Delinquency Act was so widely interpreted it permitted "...proceedings not strictly in accordance with provisions of the Criminal Code, the Canada Evidence Act, the concept of natural justice, or the Canadian Charter of Rights and Freedoms.[footnotes omitted]" [62] At times unsworn reports of probations officers and doctors were admitted as evidence precluding any right of cross-

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[60]. Bowker, supra note 1 at 247.

[61]. This was in part due to the interpretation of section 17 of the JDA which reads:

> 17. (1) Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be as informal as the circumstances will permit, consistent with a due regard for a proper administration of justice.
>
> (2) No adjudication or other action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child.

[62]. M. White, supra note 11 at 29.

examination.[63] By contrast, the Young Offenders Act insures that a young person charged with an offence has an absolute right to counsel at every stage of the proceedings. Informality of procedure is replaced by substantive and procedural safeguards equivalent to those enjoyed by adult offenders. In addition, the right to these procedural safeguards must now be explained to the youth in language that he or she can understand.

Further, the writer takes the position that the young person has an additional right to adequate representation by counsel. The philosophy of the Young Offenders Act has retained some of the paternalism or protectionism of the Juvenile Delinquents Act. However, the writer is opposed to the view that, in addressing the needs of the youthful client, the advocate in youth court becomes "(t)he Family Court 'specialist' who becomes an invested member in good standing of the treatment oligarchy and compromises his adversarial function."[64]

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[63]. In Shingoose v. The Queen [1967] S.C.R. 298, the Crown applied under section 9 of the JDA to proceed with the case by indictment in the ordinary court. The Juvenile Court judge made the order after hearing unsworn evidence from a Probation Officer and after receiving psychological and psychiatric reports without cross-examination. The Supreme Court of Canada ruled in favour of the Juvenile Court judge and, following the Manitoba Court of Appeal in The Queen v. Pagee (1964), 1 C.C.C. 173, quoted Miller C.J.M. at page 301: "...there is no rule of law , nor any authority, to compel the Magistrate when making an order under s.9(1) of the Juvenile Delinquents Act, to base his opinion solely on sworn testimony."

[64]. A.P. Nasmith J., "Paternalism Circumscribed" (1983) 7:2 Provincial Judges Journal 18.

2. ADMISSIBILITY OF INCULPATORY STATEMENTS

Under the Juvenile Delinquents Act there were no defined rules regarding the admissibility of inculpatory statements made by youths. Statements made to persons in authority were admissible if made voluntarily and without fear of prejudice or hope of advantage.

> Generally in Edmonton, judges were reluctant to find that a statement was made voluntarily by a young person if no adult was present on his behalf at the time. Unfortunately, in some jurisdictions, young persons' statements of questionable voluntariness, given without counsel or warning , to police or, in presumed confidence to a youth worker, have been admitted without question (let alone without a voir dire).[65]

Section 56 of the Young Offenders Act codifies specific requirements that must now be met before an oral or written statement made by a young person "to a police officer or other person who is, in law, a person in authority.."[66] can be admitted into evidence. The categories of "persons in authority" are not closed and already have been deemed to include parents, teachers or case workers.[67]

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[65]. M. White, supra note 11 at 35.

[66]. R.S.C. 1985, c. Y - 1, s. 56(2). The categories of persons in authority have not been exhausted. Parents, teachers, school principles and youth workers have been considered persons in authority.

[67]. In R. v. Ashford and Edie, Ont. H.C., 9 April 1985, per Barr J., Y.O.S. 86-010 the Court found that the youth's step-father and case worker were persons in authority. The Ontario Court of Appeal summarized the law on the issue of parents being persons in authority in R. v. Andrew Thomas B. (1986), 50 C.R. (3d) 247. The Manitoba Provincial Court, Family Division held in R. v. Francis R., [1988] W.D.F.L. 2561 that the youth's teacher was a person in authority.

3. DISPOSITIONS

The Juvenile Delinquents Act gave the Court the discretion to postpone or adjourn the hearing of a charge of delinquency for such period that it deemed advisable, or sine die - meaning to a future but uncertain date. A juvenile could be prejudiced with a potential 'delinquent' status for an indefinite time pending his or her 16th birthday. After adjudication, a child could be summonsed to return to the juvenile court at any time before his or her 21st birthday for a review of the previous disposition. A child committing an offence at age 12 could theoretically be exposed to punishment for the next 9 years. Section 20 of the Young Offenders Act defines precisely the dispositions available to the youth court judge and none are open-ended. They address the three principles of sentencing: deterrence, punishment and rehabilitation, thereby accounting for both the special nature of the youthful offender and the interests of society. However, some courts in Alberta have created a form of "review" by requiring a young person to appear before it as a condition of the probation order. This is something other than a formal review under section 28 or 32 of the Young Offenders Act. At this "review", the court has no jurisdiction to vary the original disposition. However, the prospect of later having to explain to a judge why their disposition has not been adhered to can be an effective deterrent.

4. APPEALS

Appeals of a decision of the Juvenile Court were only allowed on special

leave of a Supreme Court Justice. Practically speaking, allowing an appeal was the exception rather than the rule. The YOA gives the young offender rights of appeal similar to those given to adults under the Criminal Code.

Notwithstanding the brevity of the foregoing, it is evident that the Young Offenders Act provides a far more individualistic and legalistic approach to youth justice although it still retains some of the paternalistic values that were a source of reform at the turn of this Century. This is in part due to the continuing tension between child welfare concerns and the need of society to be protected from crime. An assessment of future legislative goals awaits the proclamation of Bill C-37.[68]

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[68]. For an insightful reflection of the Bill, see N. Bala, "Compromise or Confusion? Some Tentative Thoughts on the Proposed 1994 Y.O.A. Reforms" a discussion paper presented at the Canadian Association of Anthropologists and Sociologists meeting at the Learned Societies Conference, June 13, 1994, Calgary, Alberta.

CHAPTER 2 THE PHILOSOPHY OF THE YOUNG OFFENDERS ACT

The "Declaration of Principle", found in Section 3 of the Young Offenders Act, colors the interpretation and administration of the entire statute and may provide the foundation for new defences at law. As such, counsel's job as an advocate in the youth justice forum is significantly different than that of counsel in any other criminal forum.

Upon reviewing the legislative steps taken between the proclamation of the Juvenile Delinquent's Act and the Young Offenders Act, section 3 clearly represents the first time that a statement of philosophy meant to guide the administration of juvenile law in Canada has been clearly enunciated. No previous legislation has contained a reference similar to the principles that are enumerated in section 3.[1] Therefore, some time will be spent tracing the specific evolution of that section.

The Solicitor General's Highlights of the Proposed New Legislation for Young Offenders[2] shows clearly that prior to Bill C-61 [3], section 3 was

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[1]. See: An Act for establishing Prisons for Young Offenders - for the better government of Public Asylums, Hospitals and Prisons, and for the better construction of Common Goals, Chapter 1, note 15 at page 11; An Act for the more speedy trial and punishment of juvenile offenders, Chapter 1, note 17 at page 12; and, Juvenile Delinquents Act, Chapter 1, at page 15.

[2]. Ministry of the Solicitor General (Ottawa: Supply & Services Canada, 1977).

[3]. This draft Act was sent to the Standing Committee on Justice and Legal Affairs and proclaimed, in amended form, as the Young Offenders Act.

originally drafted as a Preamble. The debates of the House of Commons from 1977 to 1982 do not reveal any discussion relating to the purpose of this drafting change. On March 31, 1993 I contacted Eldon Woolliams, a member of the House of Commons and of the Standing Committee on Justice and Legal Affairs during most of the relevant time period and a very active proponent of the draft Young Offenders Act. He could not recollect any specific reasoning for the drafting change.[4]

That is not to say that the drafting change went unnoticed. In 1981, Justice for Children's Juvenile Justice Committee prepared a report entitled Young Offenders Act Bill C-61 Clause-by-Clause Analysis.[5] At section 3, the authors posed the following point-form questions:[6]

> What is the effect of this declaration of principles? Does it offer remedies? Affect the burdens of proof? Residual? May have lost impact when not part of a preamble. What use will court make of them? May give with one hand and take with the other.

Justice for Children did not offer answers then and these questions continue to be asked to this day. A review of the rules for interpreting legislation assists in

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[4]. As an aside, he did tell me that in those days he was an idealist and believed the Young Offenders Act to be one of the best pieces of legislation ever drafted. Now, he feels it is one of the worst and expressed great distress over the types of violent crimes being committed by youth today. He was pleased with the principles motivating the northern Alberta aboriginal communities to set up Youth Justice Committees but felt that work could be done in the education system concerning the criminality of youth.

[5]. Justice for Children. Juvenile Justice Committee, Young Offenders Act Bill C-61 Clause-by-Clause Analysis (Toronto: The Committee, 1981).

[6]. Ibid. at 1.

determining the effect of the drafting change from "Preamble" to "Section". Thus "Preambles" and "Sections" will be analyzed in terms of their respective impact on the balance of an enactment in which they are contained.

I. PREAMBLES

Section 13 of the Federal Interpretation Act states:[7]

> The Preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.

Section 13 implies that a Preamble could be used to assist in the explanation of the global purpose or objective of an enactment. However, case law has determined that the function of a Preamble is limited to explaining ambiguities. Therefore, the temper of a statute does not change if its preamble is omitted in a later revision.[8] Further: [9]

> Use cannot be made of the preamble to control the enactment itself when the statute is expressed in clear and unambiguous terms. When the enacting part of the statute is unambiguous, the preamble may not be resorted to, nor may it influence the meaning otherwise ascribable to the enacting part unless there is a compelling reason for it.(Footnotes omitted)

Therefore, if section 3 had remained a Preamble, the judiciary would not be compelled to consider it when interpreting the purpose or objective of the Young

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[7]. S.C. , c.I-21, s.13.

[8]. C.E.D. Western, 3rd ed., Statutes, at 60, paras. 7 & 9 and Re Clearwater Election (1912) 6 Alta. L.R. 343 (C.A.).

[9]. Ibid. at para. 9.

Offenders Act unless an ambiguity arose. This would have been contrary to the intention of Parliament in proclaiming the Act, as will be illustrated shortly.[10]

II. SECTIONS:

By contrast, a section in a statute forms part of the text of the enactment and cannot be ignored unless inherently ambiguous. Therefore, using these rules for interpreting statutes, it is arguable that it was Parliament's intention to endow the principles set out in section 3 with the force of substantive law. This argument is further strengthened by two additional factors: (a) the heading preceding the section; and, (b) the text of section 3(2).

(a) The Heading:

Section 3 is preceded by the heading "Declaration of Principle", a clear statement of purport. It is a settled rule when interpreting statutes that headings may be used to aid in the interpretation of the text of a statute.[11] Further, one may argue that more reliance can be placed on the use of a "heading" than on the use of a "preamble":[12]

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[10]. Infra notes 17 to 20.

[11]. Ibid. at para. 10.

[12]. Ibid. at 61, para. 12.

> Headings may be read not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked at to explain the statute's provisions, but as affording a better key to the construction of the sections which follow than might be afforded by a mere preamble. (footnotes omitted)

Therefore, the Dictionary definition of the word "Principle" is an additional aid in interpreting the language, meaning and import to be ascribed to section 3. In The Random House Dictionary of the English Language, "principle" is defined as "an accepted or professed rule of action or conduct; a fundamental, primary, or general law or truth from which others are derived;"[13] In the context of interpreting the Young Offenders Act, the application of principles set out in section 3 is "fundamental".

(b) The Text of Section 3(2):

Section 3(2) prescribes the consideration of those principles enumerated in Section 3(1) when a young person is dealt with under the jurisdiction of the Act as a whole. It reads:

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

If the words found in this subsection, or any other, in section 3 were considered to be unclear or ambiguous, two further principles of interpreting

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[13]. J. Stein & L. Urdang, eds, The Random House Dictionary of the English Language (New York: Random House, Inc., 1966) at 1144.

statutes may assist namely, consideration of the object and policy of the Act and regard for its origin and history. These principles necessitate the identification of the spirit or intent of the enactment using the legislative and historical evolution of the enactment as a tool:[14]

> Statutes should be construed according to the intent of the legislature which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves, in such a case, declare the intention of the lawgiver. But, if any doubt arises from the terms employed by the legislature, it has always been a safe means of discerning the intention to call in aid the ground and cause of making the statute.
>
> Should the language of a statute be capable of rival constructions, resort must be had to the object or principle of the statute, if the same can be garnered from the language. If some governing intention or principle is expressed or plainly implied, then the construction which gives best effect to it ought to prevail over a construction which, though agreeing better with the literal meaning of the words, runs counter to the principle and spirit of the enactment. The law is that which is within the spirit of the statute as collected from the words, and not the words themselves where they do not carry out the object. [footnotes omitted] Likewise, statutory purpose may be considered in attempting to rationalize the seeming conflict between two statutes. [footnote omitted]

However, there are some limiting rules when it comes to interpreting a statute based on its passage through Parliament:[15]

> An inquiry into the origin and history of a statute or of a section of a statute may help to clear ambiguities and may tend to show the proper construction of the enactment.

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[14]. C.E.D. Western, 3rd ed., Statutes, at 83-84, paras. 88 and 89.

[15]. Ibid. at 87, paras. 102 and 103.

> The court may call to its aid all those external or historical facts which are necessary to put itself into the position of the legislature at the time it passed the Act and which led to its enactment, and to ascertain them the court may consult contemporary or other authentic works and writing. This, however, does not justify a departure from the plain, reasonable meaning of the language of the Act. The best and surest mode of expounding a statute is by construing its language with reference to the time when and circumstances under which it was passed.[footnotes omitted]

Although reports of debates of the House of Commons are often not considered proper sources of interpretation for a statute, some courts have found that reference to them or to statements made by ministers when introducing a bill to Parliament have assisted in identifying its object or purpose.[16]

The following are direct excerpts from Debates of the House of Commons and indicate the attitude of the House at the time the Act was created: [17]

> On June 12, 1978 during question period Mr. Bill Jarvis, the member from Perth-Wilmot, asked the Solicitor General about the status of the draft legislation concerning young offenders and referred to it as "...an issue which has been kicking around here a good number of years in the Solicitor General's department, either aging like old wine or having long since turned to vinegar;..."

Then as now Parliament grappled over changes to the youth justice system. However, in 1978 the thrust of those changes were oriented towards due process conditioned by the pervasive welfare or rehabilitative needs of youth. Over a five day period in April and May of 1981, Bill C-61 was given

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[16]. Ibid. at 88 to 89, paras. 104 to 112.

[17]. Canada, House of Commons Debates, 3rd Sess., 30th Parl., Vol. VI, 6279 (June 12, 1978).

second reading. The following represents a small sampling of the comments made by members of the House:[18]

> Hon. Bob Kaplan (Solicitor General):
>
> The proposed legislation blends three principles. The first is that young people should be held more responsible for their behaviour, but not wholly accountable since they are not yet fully mature and are dependent on others. The second point is that society has a right to protection from illegal behaviour, even though committed by a minor. The third point is that young persons have the same rights to due process of law, natural justice and fair and equal treatment as adults, and that these rights must be guaranteed by special safeguards. Thus, the bill is intended to strike a reasonable balance between the needs of young offenders and the interests of society.
>
> ...
>
> Last summer I had the honour and privilege of leading the Canadian delegation attending the sixth United Nations congress on crime and treatment of offenders in Caracas, at which the subject of juvenile justice was an official agenda topic. I was greatly encouraged by the fact that the only resolution adopted on this subject was to the effect that standard minimum rules for the administration of juvenile justice should be developed so as to protect the fundamental rights of young persons. The specific principles agreed upon largely reflected those included in the proposed Young Offenders Act.

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[18]. Canada, House of Commons Debates, 1st Sess., 32nd Parl., Vol. VIII, 9308 (April 15, 1981). On May 12, 1981, at page 9517, the Hon. Bob Kaplan went on to identify the objectives and purposes of the Act:

> They must strike a balance between helping young offenders and protecting society from harmful conduct. They must safeguard the rights of young people in conflict with the law, while discouraging offenders from committing further crimes.

This statement was quoted by Justice L'Heureux-Dube in her dissenting judgement in R. v. J. (J.T.) [1990] 2 S.C.R. 755 at 778 to argue that the treatment of young persons under the Act should be on a sliding scale commensurate with their abilities and understanding. See also pages 9310, 9314, 9316, 9323, 9651, 9498 to 9499 and 9651.

Hon. Ray Hnatyshyn (Saskatoon West):

As I say, there can be no argument against the proposition that young persons should be responsible for their actions, but one would hope that these illegal acts carried out by people in their youth should not carry severely undue consequences. One thing hoped to be accomplished by this legislation is that young people will be given an opportunity to make a fresh start in life through rehabilitation and redemption.

Mr. Svend J. Robinson (Burnaby):

In examining the provisions of this bill, it is important to look back at some of the principles which have guided legislators and parliamentarians in the past and which society has applied generally in dealing with the problem of young offenders or young people in society who have violated the law. There have been many attitudes taken to young offenders. Some 2,000 years ago, Socrates wrote:

> Our youths now love luxury, they have bad manners, they have disrespect for authority, Disrespect for older people. Children generally are tyrants. They no longer rise when adults enter the room...They gobble food and tyrannize their teachers.

...

We must bear in mind the fact that young people who come in contact with the law must be dealt with in a special manner and that adequate resources must be brought to bear to deal with them.

Mr. Howard Crosby (Halifax West):

...mention was made of preventative action. There again we are not referring to the criminal law or criminal justice system but to the social justice system. In the many years that I appeared before juvenile and family courts, I have never seen a child who did not have another problem which was not connected with the criminal justice system. In practically every case, although there were notable exceptions, the child brought before the court had experienced difficulties in his or her family life or educational life causing a departure from standard behaviour. It is only through a competent and effective social justice system that we can remedy these kinds of defects.

And later, on May 12, 1981:

Mr. Bob Rae (Broadview-Greenwood):

I am very concerned that in a declaration of principles for the Young Offenders Act, which is a departure for this Parliament and for Canada, we fail to specify very clearly that we are also very much concerned with the welfare of the young person; that the rehabilitation of the young person is the primary object of the exercise. If we want to preserve the rights of young people when they come into conflict with the law - I will have something to say about where the Young Offenders Act falls down in that regard - we should not provide that a ten-year-old or an eight-year-old or a 13-year-old who has committed a crime should be treated as if he were as responsible as a 20-year-old. We should not be silent in the declaration of principle on the question of the primary objective of any system dealing with young people. It would be a mistake not to say that the Canadian people are concerned about ensuring that a ten-year-old is not forever held responsible and treated in the same way as a 20 or 30-year-old, or that rehabilitation is the primary objective.

Even more should that same concept or notion be attached to the acts of a 12 or 14-year-old. They should be able to say that they are sorry, that they made a terrible mistake and would like to reform and be rehabilitated. It seems to me a major error that that notion is not in the declaration of principle. In my opinion, the notion that a young person is in all circumstances as responsible as an older person is a fiction, and it should be treated as such. It is an important fiction, because the notion that we are responsible individuals, free to choose whether we will commit wrong, is what makes the punishment system work. It is what makes our concept of rights so important. It is the notion of individuals having responsibility that makes the concept of human rights so important in our protection of that responsibility.

Mrs. Celine Hervieux-Payette (Parliamentary Secretary to Solicitor General):

I would like to provide a clarification for the Hon. member for Perth (Mr. Jarvis), who was asking the government about the differences between responsibility and accountability, two words we see in clause 3 of the bill. Perhaps I can offer a small explanation by saying that responsibility relates to capacity to form the intent to commit a criminal offence. According to the proposed Young Offenders Act, a young person would be responsible for his or her illegal behaviour, but she or he would

> not be held accountable in the same degree as an adult. That is why there will be different courts and different procedures for young offenders than for adults, and that is why we can say that responsibility and accountability are two different things under this bill.

After second reading in the House, Bill C-61 went to the Standing Committee on Justice and Legal Affairs. The Bill was given its third reading on May 17, 1982 and after brief debate, passed. On July 7, 1982, it was given Royal Assent.

III. TEXT OF SECTION 3

When one compares Bill C-61 which was presented for first reading on February 16, 1981 with that which was passed on May 17, 1982, some notable changes within section 3 are revealed.

FEBRUARY 16, 1981	MAY 17, 1982
(a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions and society must be afforded the necessary protection from illegal behaviour;	(a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;
	(b) society must, **although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons,** be afforded the necessary protection from illegal behaviour;

The initial subsection 3(a) was divided into two subsections with the addition of the proviso regarding society's responsibility to consider or involve itself in prevention. There was much debate during second reading of the Bill that related to the causes of youth crime and the need for the establishment of community resources to address those causes. One may argue that the insertion in the Act of the phrase highlighted above creates an enforceable legal duty to provide such preventative measures. This portion of subsection 3(b) has not been judicially considered.[19] However, there is mention throughout the Debates and in subsequent Reports and Discussion Papers on legislative reform that, without resources and community support, implementing the philosophy of the Act will be difficult.

(b) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;	(c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;

There was no change made to this subsection.

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[19]. See Chapter 3, Section III at page 13.

(c)	where it is not inconsistent with the protection of society, measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;	(d)	where it is not inconsistent with the protection of society, **taking no measures or taking** measures other than judicial proceedings under this Act, should be considered for dealing with young persons who have committed offences;

The addition of the highlighted phrase above allows for the possibility that no measures at all will be taken in a given case. This arguably represents action other than the diversion to an alternative measures program allowed for under section 4 of the Young Offenders Act. These words broaden the meaning of the subsection's predecessor and imply that there may be occasions when it may be inappropriate for a youth to be prosecuted for an act or omission contained in a federal criminal enactment. Further, as section 736 of the Criminal Code of Canada [20] and section 20(1)(a) of the Young Offenders Act[21], specifically refer to the availability of absolute discharges as a disposition, section 3(1)(d) impliedly refers to something other than a discharge. Judicial interpretation of this subsection is considered in Chapter 3[22].

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[20]. R.S.C. 1985, c. C - 46 as amended.

[21]. R.S.C. 1985, c. Y - 1 as amended.

[22]. See Chapter 3, Section VI.

(d) young persons have rights and freedoms in their own right, including those stated in the Canadian Bill of Rights, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;	(e) young persons have rights and freedoms in their own right, including those stated in **the Canadian Charter of Rights and Freedoms or in** the Canadian Bill of Rights, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;

This amendment occurred to accommodate the Constitution Act, 1982 proclaimed on April 17, 1982.

(e) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom, having regard to the protection of society, the needs of young persons and the interests of their families;	(f) in the application of this Act, the rights and freedoms of young persons include a right to the least possible interference with freedom **that is consistent with the protection of society,** having regard to the needs of young persons and the interests of their families;

The highlighted amendment to this subsection helped to define a young person's personal freedom within the larger societal framework. Society's interests and the youth's interests are interrelated and interdependent. This amendment also qualifies the interpretation of subsection (e) above. This amendment has become important in decisions whether or not to transfer a youth to ordinary court.

(f) young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are;	(g) young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are;

There was no change to this subsection.

(g) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when all measures that provide for continuing parental supervision are inappropriate.	(h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when all measures that provide for continuing parental supervision are inappropriate.

There was no change to this subsection.

(2) This Act shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out in subsection (1).	(2) This Act shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out in subsection (1).

There was no change to this subsection.

IV. BILL C - 37: AN ACT TO AMEND THE YOUNG OFFENDERS ACT AND THE CRIMINAL CODE[23]

This Bill, which was given first reading on June 2, 1994, provides for the addition of two paragraphs to the existing section 3. They are:

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[23]. 1st Sess., 35th Parl., 1994.

> (a) crime prevention is essential to the long-term protection of society and requires addressing the underlying causes of crime by young persons and developing multi-disciplinary approaches to identifying and effectively responding to children and young persons at risk of committing offending behaviour in the future;
>
> and,
>
> (c.1) the protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation, wherever possible, of young persons who commit offences, and rehabilitation is best achieved by addressing the needs and circumstances of a young person that are relevant to the young person's offending behaviour;

These additions create a fertile field for exploring society's responsibility to prevent the causes of youth crime. The Debates in 1982 made it clear that the Legislature felt services and resources provided to youth and their families would be essential to meeting this goal. These new paragraphs make it possible to argue two perspectives. First, in some instances society has failed to respond to the needs of young persons at risk of offending.

Second, some may argue that rehabilitation, not having been defined within the enactment, requires institutionalization in either a child welfare secure facility or a provincial young offender correctional or secure facility. In this approach, we see the resurgence of the "child savers" philosophy applied under the Juvenile Delinquents Act. Critics of the Young Offenders Act should be very interested in how these amendments, now given Royal Assent, are judicially interpreted after their proclamation which seems likely to occur in the early months of 1996.

V. CONCLUSION

It can be forcefully argued that section 3 forms the key to understanding and applying the Young Offenders Act at every stage of criminal proceedings from instituting a criminal charge to disposition and appeal. It is legitimized through the rules of interpretation and a review of legislative intent. Yet, it has been applied sparingly and minimally. A full understanding of its pervasiveness has not been reached. Two reasons are offered. First, judicial interpretation and application has evolved with social consciousness and has at times made wild swings between a "social welfare" orientation and a strictly "punitive" one. One might argue that this is just a natural reflection of the real intent of the Young Offenders Act - to balance the principles enunciated as they relate to each individual accused along a sliding scale of maturity. Chapter 3 will be devoted to the judicial interpretation of section 3.

Second, it is possible that lawyers acting as advocates for youth have not had any formal legal education regarding the Young Offenders Act and have as a result assumed, incorrectly, that the same rules that pervade the adult criminal justice system apply to youth. Section 3 and judicial interpretation of it demand different advocacy. This issue will be examined more fully in Chapter 4.

CHAPTER 3 JUDICIAL INTERPRETATION OF SECTION 3

It bears repeating that section 3 of the Young Offenders Act represents the first time that a statement of philosophy guiding the administration of juvenile law has been so clearly enunciated by Parliament. However, while examining judicial interpretation of this section, advocates of youth should consider whether or not the courts have given full effect to its spirit and intent. In Chapter 2, the writer concluded that the real significance of the "Declaration of Principles" being encompassed in a section of the Act, rather than as a preamble to it, is that the principles carry the force of substantive law. Yet, the remedies available through the enforcement of section 3 have not been fully canvassed. In this Chapter, a sampling of available judicial interpretation will be surveyed.

I. SCOPE OF SECTION 3

Section 3 represents a guiding philosophy to be adhered to at every stage of criminal proceedings involving young persons. The Supreme Court of Canada said in R. v. T.(V.)[1] and affirmed in J.J.M. v. R.[2] that section 3 "should not be considered as merely a preamble. Rather it should be given the force normally attributed to substantive provisions."[3]

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[1]. (1992), 71 C.C.C.(3d) 32.

[2]. [1993] 2 S.C.R. 421.

[3]. Ibid. at 428.

Some attempt has been made to use section 3 to justify a dismissal of charges at trial notwithstanding that the elements of the criminal offence had been made out. In R. v. Crystal M.[4], a thirteen-year-old was charged with assaulting a childcare worker in a treatment home. Defense counsel argued that "because of the declarations in s.3 of the Y.O.A., the youth court has the discretion to declare a crime not to be a crime." The British Columbia Provincial Court held that it was not up to the youth court to decide which matters should be prosecuted and which should be handled by staff of the treatment home as a treatment matter.[5] This same argument was made in the case of R. v. T.(V.)[6]. In this case the Crown appealed a British Columbia Court of Appeal decision allowing an appeal of conviction for uttering threats. The female accused was fourteen at the time of the offense. When asked by a group home staff person to not use foul language at the supper table she pushed her plate across the table and spilled food on the complainant's lap. She used more foul language and on her way out she indicated she would have some friends "get him" or "beat him up". The British Columbia Youth Court on August 15, 1990 felt bound by R. v. A.K.[7] and convicted the young person. At the Court of Appeal level, Justice

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[4]. (29 May, 1989), (B.C. Prov'l Ct), Y.O.S. 89-066.

[5]. The British Columbia County Court in R. v. A.K., (1991), 68 C.C.C.(3d) 135 held that "...then it falls upon the youth court judge, no matter how unpleasant or indeed how unnecessary it may seem to him to deal with it, and moreover, to make a decision in law on the facts which he finds to have been proven. That is the plain duty of any judge whether or not he may be in philosophical agreement with the procedure of [sic] the nature of the charge."

[6]. Supra note 1.

[7]. Supra note 5.

Macdonald, in directing an acquittal, concluded:[8]

> With all respect, it is my view that R. v. A.K. was wrongly decided. The prosecuting authorities are required before they lay charges against young persons to act under the guidance of s. 3(1)(d). If they fail to do so the youth court judges who have the ultimate responsibility for application of the Young Offenders Act are not, in my view, helplessly bound to convict every time all elements of an offence are proved. The contention that they are so bound does not give the statute and particularly s. 3(1)(d) the liberal construction required by s. 3(2). If a judge dismisses a charge on the basis that it should never have been laid, having in mind s. 3(1)(d) , the result is not as stated in R. v. A.K. to declare a crime not to be a crime. An offence has been proven but nevertheless the judge may decline to register a conviction. He or she may dismiss the charge.

The Supreme Co. . restored the finding of guilt holding that a youth court judge does . . . discretion to not make a finding of guilt when the offense is made . . . neit of a mi.or nature. Justice L'Heureux-Dube in delivering the judgement fo. the Court declared that such an interpretation of section 3 would interfere with well-established principles of prosecutorial discretion and that the Young Offenders Act had not been written with the required clarity to show legislative intention to vary these principles. In support of the Court's determination of the issue of clarity, she quoted from the decision of the Supreme Court in R. v. S.(S.)[9]. In that case, in deciding that the Province of Ontario was not under a positive obligation to create an Alternative Measures Program, the Court decided that the word "should" in section 3(1)(d), when read in conjunction with section 4, denoted a desire or request and not a legal

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[8]. (1990), 64 C.C.C. (3d) 40 at 45.

[9]. (1990), 57 C.C.C. (3d) 115 at 129.

obligation.[10] Lastly, Justice L'Heureux-Dube opined that in any event the Court could grant an absolute discharge.[11]

It would appear that section 3 has no application in the area of disturbing prosecutorial discretion when the elements of the criminal offence have been made out. Justice L'Heureux-Dube was careful to point out that the doctrine of abuse of process had not been argued in the context of the case at bar. Therefore, some argument can be made that the principles enunciated in section 3 may supplement such an argument and that the categories for use in argument have not been exhausted. R. v. T.(V.) should not be interpreted,nor used as authority, to deny or fetter enforcement of the principles in section 3. The scope of section 3 prinicples will have to be used to qualify the elements of a criminal offense, namely, actus reus and mens rea.[12] Although L'Heureux-Dube does not give clear examples of future application of section 3 she agrees with the

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[10]. At the time of the Supreme Court of Canada's decision, an Alternative Measures Program had been instituted in Ontario.

[11]. With respect to the availability of this remedy, it does not have the desired affect as does a dismissal. Although deemed not to have been convicted pursuant to section 736(3) of the Criminal Code of Canada, an absolute discharge appears as an item on a young person's youth record and prevents future diversion to the Alternative Measures Program.

[12]. Actus reus: A wrongful deed which renders the actor criminally liable if combined with mens rea; a guilty mind. [H.C. Black, Black's Law Dictionary, 5th ed. (St. Paul: West Publishing Co., 1979) at 34.]

> Mens rea: A guilty mind; a guilty or wrongful purpose; a criminal intent. Guilty knowledge and wilfulness. [H.C. Black, Black's Law Dictionary, 5th ed. (St. Paul: West Publishing Co., 1979) at 889.]

interpretation of the section advocated by Bala and Kirvan[13] and quotes them in the decision:[14]

> While it may not be inaccurate to suggest that the Declaration of Principle reflects a certain societal ambivalence about young offenders, it is also important to appreciate that it represents an honest attempt to achieve an appropriate balance for dealing with a very complex social problem. The YOA does not have a single, simple underlying philosophy, for there is no single, simple philosophy that can deal with all situations in which young persons violate the criminal law. While the declaration as a whole defines the parameters for juvenile justice in Canada, each principle is not necessarily relevant to every situation. **The weight to be attached to a particular principle will be determined in large measure by the nature of the decision being made and the specific provisions of the YOA that govern the situation.** There are situations in which there is a need to balance competing principles, but this is a challenge in cases in the adult as well as the juvenile system.(emphasis added)

Judge Cook-Stanhope of the Alberta Provincial Court, early on, took the position that section 3 should be considered in every disposition made by the court. In R. v. M.E.M.she stated:[15]

> The Young Offenders Act (Canada) in many ways presents a radical departure in philosophy from the former Juvenile Delinquents Act. Codification of its principles in s.3 of the Act was itself an unusual departure from time-honoured legislative style. This very codification means courts and those involved with them are compelled to consider young persons in a special way.

An example of a novel approach to disposition was that taken by the Ontario Court of Appeal in R. v. Elizabeth M.[16]. In this case, the Crown

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[13]. See N. Bala & M. Kirvan, "The Statute: Its Principles and Provisions and Their Interpretation by the Courts" in A.W. Leschied, P.G. Jaffe & W. Willis, eds, The Young Offenders Act: A Revolution in Canadian Juvenile Justice (Toronto: University of Toronto Press, 1991) 71.

[14]. Supra note 1 at 44.

[15]. [1988] 92 A.R. 321 at 327.

[16]. (17 September 1992) ,(Ontario C.A.), Y.O.S. 92-111.

appealed a disposition of three years probation for a conviction of criminal negligence causing death. The Court of Appeal substituted a custodial disposition of 90 days open custody. After determining that intermittent custody was not available, the Court ordered that the serving of the custodial disposition be delayed until after the young person had completed her first year of University. She was an exceptional student and after reviewing section 3(1)(a), (b), (c) and (f) Justice Abella said:[17]

> While these guiding principles in s.3 appear to reflect a philosophical and cautious balancing between offender and offence and between deterrence and rehabilitation, read as a whole they nonetheless call for the determinative emphasis to be on the remedial, rehabilitative, and prospective needs of the particular young offender.

In summary, the scope allotted to section 3 will be case specific and subjectively applied. Although deemed to not be broad enough to overcome the well-entrenched principles of prosecutorial discretion, the categories for application have not been exhausted. Section 3 may have more liberal application at the dispositional stage as opposed to the adjudicative one, given the reluctance of the Supreme Court to disrupt recognized principles of law. Although the Provincial Courts handling youth matters on a daily basis are not so reluctant.[18] Therefore, advocates for youth should consider section 3 when determining whether or not the grounds for detention under section 515 of the Criminal Code or the elements of the criminal offence before the Court, the actus reus and mens rea, can be made out. The import of this consideration will

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[17]. Ibid.

[18]. See R. v. D.S., infra note 62.

become clearer upon further examination of the subsections of section 3.

II. SECTION 3(1)(a)

> **It is hereby recognized and declared that while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions.**

Bala and Kirvan indicate that the notion of responsibility is tempered by a concept of diminished accountability.[19] They give as one legislative example the maximum custodial dispositions available under section 20 of the Young Offenders Act which range from two years to five years less one day. The antithesis of the concept of diminished accountability is found within the transfer section 16. After successful transfer to the ordinary court a young person is subject to the same sentences available under the Criminal Cod for adults. While the authors discuss the tempering of responsibility they do not go so far as to say whether section 3(1)(a) contemplates a situation whereby the nature of the responsibility negates criminal accountability. Although, they do touch upon this concept as a policy consideration vaguely similar to prosecutorial discretion or diversion:[20]

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[19]. Supra note 13 at 76. As Bala and Kirvan's article received favourable mention from the Supreme Court of Canada in R. v. T.(V.), supra note 1, their comments on each of the subsections of Section 3 will be discussed.

[20]. Ibid. at 76.

> However, sometimes such a young person should not be dealt with in the juvenile system at all, but rather under child-welfare, education, or mental-health legislation. Where the illegal behaviour is of secondary importance relative to the other difficulties facing the youth, and protection of the public is not at issue or is being adequately addressed outside the juvenile-justice system, use of the YOA may not be necessary or appropriate. The use of measures other than the YOA, in appropriate cases, is also specifically endorsed in subsection 3(1)(d) of the Declaration of Principle.

Given the decision in R. v. T.(V.)[21], it is unlikely that the appropriateness of prosecution is arguable as a basis for a dismissal. However, the concept of diminished accountability may be argued in the form of the absence of specific or general intent. Accountability and responsibility are distinct concepts. Their differences were commented upon by Mrs. Celine Hervieux-Payette during the Debates of the House of Commons.[22] Although not a definitive answer to the legal extent of the differences, her comments make it clear that Parliament contemplated a scenario wherein the absence of responsibility lead to no criminal accountability. Further, upon a finding of responsibility, accountability is weighed and subjected to the principles of disposition as they relate to young persons in conflict with the law.

Priscilla Platt notes that subsection 3(1)(a) has been applied in the context of bail hearings, transfer hearings and trials despite the fact that it appears to refer to young persons that have been found guilty.[23] Early judicial

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[21]. Supra note 1.

[22]. Chapter 2, supra note 18.

[23]. P. Platt, Young Offenders Law in Canada (Toronto: Butterworths, 1989) at 2-2.

interpretation of this subsection resulted in a very literal approach to "responsibility". In R. v. P.B. (No.1)[24], Larmarche J.C.Q. held that the Young Offenders Act superseded the concept of doli incapax.[25] Therefore, a youth between the age of 12 and 17 could be prosecuted like any adult and tender age is no longer a defense. Youth in itself is no basis for justifying vation of principles of crimin' r' onsibility. He noted that under s. 16 of the Criminal Code either adult or youth could invoke the defence of insanity which at that time included the words "state of natural imbecility".[26] Taken to the extreme a young offender that was severely developmentally handicapped could be kept in "strict custody in the place and in the manner that the court, judge or provincial court judge directs, until the pleasure of the lieutenant governor of the province is known".[27] Given the amendments to s.16 of the Criminal Code in 1991, this case would have limited, if any, application.

The ratio of this case is tempered by the decision of Larmarche J.C.Q.

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[24]. (1 September 1988) (Ct. Que. Yth. Div.), Y.O.S. 89-083.

[25]. Chapter 1, supra note 4.

[26]. R.S.C. 1985, c. C-46. The relevant portion of Section 16 as it appeared at that time is as follows:

> 16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while that person was insane.
>
> (2) For the purposes of this section, a person is insane when the person is in a state of natural imbecility or has disease of the mind to an extent that renders the person incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

[27]. Ibid. s. 614(2).

eight days later in R. v. P.B. (No. 2)[28]. In that case, a twelve-year-old was charged with the shotgun murder of his father while attempting to defend his sister from a physical assault. In assessing the youth's criminal responsibility under what is now known as s. 229(c) of the Criminal Code[29] the Judge determined that capacity to appraise risk was dependent upon the knowledge the individual young offender had of the circumstances taking specific note that the emotional capabilities of a twelve-year-old are less developed than those of an adult. The writer suggests that Larmarche J.C.Q. is, impliedly, quite prepared to relax the principles of criminal responsibility on the basis of youth on the pretext of applying the objective test contained within section 229(c) within the context of generally accepted precepts of the moral and emotional development of young persons.

It is a requirement under Section 24[30] of the Young Offenders Act for

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[28]. (9 September 1988) (Ct. Que. Yth. Div.), Y.O.S. 89-084.

[29]. Section 229(c) reads:

> Culpable homicide is murder where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

However, since R. v. Martineau (1990), 58 C.C.C. (3d) 353 (S.C.C.), section 229(c) probably infringes sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms.

[30]. Section 24:

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

the Court to consider the circumstances of the offence when imposing a custodial disposition. Section 3(1)(a) has been applied to allow the actions of third parties to temper the accountability of the young offender when the effect of those actions is to place the youth in a situation of risk of offending. In R. v. R.B.[31], a fifteen year old boy was expelled from a group home for a twenty-four hour period. His parents were told not to shelter him and he was advised of two agencies that he could access for shelter. That evening he was found in possession of stolen property and charged accordingly. He had nine previous convictions, seven of which were property offences. Judge Fitch said that considering the action of the group home in mitigation of disposition was consistent with the philosophy in section 3(1)(a). The withdrawal of shelter was out of the young offender's control.[32] Judge Fitch ordered that the youth serve a sentence of six days secure custody to be followed by six months of probation during the first three months of which he was to perform fifty community service hours. The sentence is significant because this youth had received a disposition of one month open custody on December 29, 1987 for a charge of

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circumstances of the young person.

(2) Subject to subsection (3), before making an order of committal to custody, the youth court shall consider a pre-disposition report.

(3) The youth court may, with the consent of the prosecutor and the young person or his counsel, dispense with the pre-disposition report required under subsection (2) if the youth court is satisfied, having regard to the circumstances, that the report is unnecessary or that it would not be in the best interests of the young person to require one.

31. [1988] 92 A.R.383 (Alta. Prov. Ct.).

32. Ibid. at 387.

theft over $1000 and was at risk of receiving a lengthier custodial sentence for the subsequent offence which took place on March 23, 1988. But for the aspect of mitigation involved, the youth would probably have received a custodial disposition in excess of thirty days. It is clear from the decision that, although the actions of the group home were not revealed at the adjudication hearing, the youth exercised choice regarding involvement in the illegal activity. Therefore, the actions of the group home would appear to have had no affect upon the assessment of guilt.[33] Nevertheless, the court considered, in assessing accountability and crafting the appropriate disposition, some very general views as to the criminal behaviours of youth which tempered Judge Fitch's assessment of responsibility in the case at bar. Judge Fitch states:[34]

> It is common knowledge that a disproportionate number of offences are committed by young persons who have no proper place of abode and no proper adult supervision.

It seems that faced with what the group home knew about the youth and what we know as a society about youth criminality, this youth was put in a situation, beyond his control, that promoted criminal activity. That it was beyond his control is a social fiction based upon social beliefs about the vagaries of adolescence and implies duress, which is a defence at law, albeit restrictive. In summary, Judge Fitch was not prepared to go so far as to say that the situation negated either the act or the intent on the part of the young person although the reasoning for his decision points towards involuntariness.

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[33]. Ibid. at 385 para. 12 and 386 para. 19.

[34]. Ibid. at 385.

It would appear from a review of the available case law that not only will the very particularized needs and circumstances of a young person be considered by youth courts when assessing criminal responsibility and accountability but also general views as to youth criminality. There is great reluctance to dismiss a criminal offense solely on the basis of immaturity or youthfulness although it is arguable that this was the real basis for the decision in R. v. P.B. (No. 2)[35] and a troubling part of the reasoning in R. v. R.B.[36]. While reviewing this subsection Priscilla Platt refers briefly to R. v. C.G.M.[37] In that case a fifteen year old was acquitted of manslaughter. He had killed his step-sister with a rifle during a practical joke. The Court determined that his youth and inexperience with guns required them to hold him to a different standard of care than an adult.[38] To this writer's knowledge these three cases have not been appealed or judicially confirmed.

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[35]. Supra note 28.

[36]. Supra note 31.

[37]. [1986] W.D.F.L. 2268 (N.S. Fam. Ct.), Y.O.S. 86-125.

[38]. Supra note 23 at 2-2. "Standard of care" in the context of this case may relate to different aspects of criminal law doctrine in this area. For example, it could refer to the standard of care that a reasonable person would exercise in similar circumstances, that being the objective test applied in R. v. Gosset (1993), 83 C.C.C. (3d) 494 (S.C.C.). It could also refer to the objective test of reasonable foreseeability of risk of bodily harm mentioned in R. v. Creighton (1993), 89 C.C.C. (3d) 346 (S.C.C.). Without more than a summary case digest, it is difficult to determine if in fact the Court was attempting to create a reasonable "young" person test.

III. SECTION 3(1)(b)

Society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour.

Bala and Kirvan state that this principle speaks to the responsibility of the juvenile-justice system to meet society's long-term interests in reducing youth crime.[39] However, case law speaks generally to protection of society from illegal behaviour. In an early transfer case the court juxtaposed sections 16 and 3(1)(b) of the Young Offenders Act to put greater weight on the need to protect society.[40] Judge W.G.W.White of the Provincial Court of Alberta quoted section 3(1)(b) in support of his theory that protection of society was to be given greater weight under the Young Offenders Act than that under the analogous transfer provisions of the Juvenile Delinquents Act.[41] However, he did include the needs of the young offender by including them in the larger concept of "society" and stated that "...protection of society therefore also demands consideration for reform of the individual."[42]

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[39]. Supra note 13 at 77.

[40]. See R. v. S.J.B. [1985] W.D.F.L. 837 (Man. Prov. Ct. Fam. Div.) Y.O.S. 85-038 wherein the court in ordering the transfer to ordinary court emphasized the need for society to be protected and section 3(1)(b).

[41]. R. v. B.R.C. (25 September 1984)(Alta. Prov. Ct. Yth. Div.)(unreported) at 5.

[42]. Ibid. at 6. This case precedes the amendments to section 16 found now in section 16(1.1) wherein the phrase "interests of society" now legislatively include the objective of "rehabilitation of the young person" which must be reconciled with the objective of "affording protection to the public".

There is no question that section 3 of the Young Offenders Act mandates a balancing of competing interests. However, it is notable that there is no case law ascribing any weight to that part of section 3(1)(b) that places responsibility upon society to take reasonable measures to prevent the criminal conduct of young persons. If predictive theories for deviance could be factually substantiated, then perhaps it could be argued that society, in failing to respond to such predictors, should be estopped from prosecuting against the individual youth who committed a criminal offense as a direct result of the failure. It is hard to imagine substantiating such cause and effect given the dynamics of deviance. L. Duraj, in her article entitled: "The Concept of Female Juvenile Delinquency: A Feminist or Non-Feminist Approach?" defines delinquency as:[43]

> ...a multidimensional and multicausal phenomenon which comes into existence within the wider socioeconomic, cultural and political context of a given society at a given time and place. It is not an exclusive property of individuals, genders or even of subcultures. Rather it is primarily a 'property of the social systems in which these individuals and groups are enmeshed', thus an inquiry into delinquency cannot be accomplished in a theoretical vacuum. It has to take place 'within the context of the social and emotional environment where people live, adjust, suffer, fail and succeed'.

However, section 3(1)(b) could be used to contextualize available defenses at law. The writer proposes the following fictional example: John Anderson is sixteen and is the subject of a probation order which has certain requirements that he "reside where approved by probation services" and "abide by a curfew of 10:00 p.m. to 7:00 a.m. daily". John is not eligible for assistance from the Department of Child Welfare because he is not deemed to be in need of protective services.

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[43]. [1982] 33 Juv. & Fam. Ct. J. 25.

John does not live with his parents and does not have other family members upon which he can rely. His probation officer is not prepared to approve for him to live with his five friends that have just rented a motel room for one month and has directed him to two agencies that house "street" kids. Both these agencies are full. It is January in Alberta and it is cold. John Anderson is arrested at 11:30 p.m. and charged with break and enter into a home and two counts of section 26 of the Young Offenders Act for breaching the two terms of this probation order. In terms of criminal responsibility, necessity may be offered as a defence to the break and enter charge and absence of wilfulness as a defence to the breaches. These arguments could and should be couched in the language of section 3(1)(b). The effect of 3(1)(b) would be to create a different standard of assessment of the defences already available and thereby qualify the requisite intention to commit the criminal offences. This presupposes that a social duty to provide shelter to homeless youth could be established. However, if one reviews the Debates of the House of Commons during the enactment of the Young Offenders Act, one would find many passages that point to an underlying belief in the importance of protecting and nurturing young people.[44] This belief has been accepted internationally which merits a brief review of international law.

IV. INTERNATIONAL LAW

On November 29, 1985 the General Assembly of the United Nations

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[44]. Chapter 2, supra note 18.

adopted the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (known as "the Beijing Rules"). These Rules appear to impose a positive duty upon Member States, of which Canada is one:[45]

> Clause 1.2 reads:
>
> Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible.
>
> Clause 1.3 reads:
>
> Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.
>
> Clause 30.1 reads:
>
> Efforts shall be made to organize and promote necessary research as a basis for effective planning and policy formulation.
>
> Clause 30.2 reads:
>
> Efforts shall be made to review and appraise periodically the trends, problems and causes of juvenile delinquency and crime as well as the varying particular needs of juveniles in custody.

Of course, while Canada is bound not to legislate in contravention of the Rules, there is no specified remedy for contravention. The Rules signified an intention by the international community to promote a certain philosophy with regard to juveniles in conflict with the law. This Resolution was followed by

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[45]. GA Res. 40/33.

the United Nations Convention on the Rights of the Child which was adopted by the United Nations on November 20, 1989 and entered into force on September 2, 1990.[46] As more than twenty member states have ratified the Convention, it has become a part of international law and may be used by judicial bodies as a guide to interpret their own national laws. In Canada, Prime Minister Brian Mulroney ratified the Convention on December 11, 1991. The Convention includes the following rights:

* the right to be protected against discrimination of any kind;
* the right to have, in all actions, the best interests of the child as a prime consideration;
* the right to survival and development;
* the right to life;
* the right to freedom of expression, thought, conscience, association, peaceful assembly, and religion;
* the right to an education;
* the right to have a name and a nationality;
* the right to due process and to participate in legal proceedings;
* the right to know and be cared for by parents;
* the right to the highest attainable standard of health care;
* the right to be protected against cruel, inhuman, or degrading treatment.

More specific to the fictional example above, the following Articles are significant:

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[46]. GA Res., November 20, 1989, 44/25.

Article 27 reads:

> 1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
>
> 2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capabilities, the conditions of living necessary for the child's development.
>
> 3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material, assistance and support programmes, particularly with regard to nutrition, clothing and housing.

And more particularly relevant to young offenders, Article 40:

> 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
>
> ...
>
> 4. A variety of dispositions, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence.

With respect to the administration of justice in Canadian youth courts, Nicholas Bala, in his article, "The Impact of the Convention on Young Offenders: A Brief Examination", suggests that Article 40:[47]

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47. N. Bala, "The Impact of the Convention on Young Offenders: A Brief Examination" in On the Right Side: Canada and the Convention on the Rights of the Child (Ottawa: Canadian Council on Children and Youth, 1990) 27 at 28.

> [m]ight be invoked to ensure that youths in all parts of the country have access to custody facilities, such as
>
> group homes, and are not unnecessarily placed in institutions and inappropriately secure settings.

Such an interpretation would assist the advocate in the fictional circumstances described above both in arguing the merits of the case and arguing for lifestyle interventions for the youth. Bala goes on to say that:[48]

> [i]n many respects, the Young Offenders Act is consistent with the Convention, and recognizes the legal rights of young offenders enumerated in the Convention. However, there may be situations in which the Convention may aid in the interpretation or application of the YOA. The Convention may also be invoked to ensure that governments provide adequate facilities and programs, and to establish policies for dealing with young offenders.

In contrast to the Beijing Rules, the member states, by Article 44, have undertaken to report on the measures they have adopted which give effect to the rights recognized under the Convention within two years of entry and thereafter every five years.[49] However, there are no specific provisions concerning enforcement. As a matter of interest, the Province of Alberta declined to be a signatory to the ratification in 1991. However, this does not prevent Alberta from being subject to the Convention nor did it prevent the Provincial Court of

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[48]. Ibid.

[49]. The Human Rights Directorate, Department of Canadian Heritage has published Convention of the Rights of the Child - First Report of Canada (Ottawa: May, 1994). Section 3 is cited as an example of measures taken by the Government of Canada that comply with the Convention. See paragraphs 68, 316, 328, 329, and 334 of the First Report. See also L. McKay-Pando, "Child-rights convention applies in Alberta" The Calgary Herald (23 December 1994) A4.

Alberta from affirming the Convention. In In the Matter of H.J.W.C. Jr., et al[50] Judge Landerkin heard an application by the Department of Child Welfare for permanent guardianship status of five children. In determining whether the Director of Child Welfare had established that the children were in need of protective services he stated:[51]

> In my viewpoint, the Child Welfare Act has been created, so far as the child protection part is concerned, with an eye to children's needs. Without attempting to write an exhaustive list, I use a 10-point list to synthesize what I think child welfare is all about concerning children's rights. This comes from "The United Nations Declaration of the Rights of the Child," proclaimed on November 20th, 1959. It has been further added to with the Convention passed in 1989. Children are entitled to the following:
>
> 1. The right to be free from discrimination.
> 2. The right to special protection of the law in which the best interests of the child is the paramount consideration.
> 3. The right to a name and nationality.
> 4. The right to necessaries.
> 5. The right to special treatment if handicapped.
> 6. The right to maintenance.
> 7. The right to education.
> 8. The right to protection.
> 9. The right to be free from neglect and exploitation.
> 10. The right to be brought up in peace, tolerance and understanding.
>
> These precepts are all found within the Child Welfare Act of Alberta. They may be worded in a different way, but these themes, which are accepted by the international community, are readily understood by all right-thinking people in our society.

By analogy, since some of the provisions of the Convention concerning young persons in conflict with the law are embedded within the philosophy of the federal Young Offenders Act they should similarly be affirmed and applied

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[50]. (15 July 1994), Calgary N12366, N12367, N12368, N12369, N12370 (Alta. Prov. Ct.).

[51]. Ibid. at 7 to 8.

when interpreting the Act.

Arguably, international law plays a part in interpreting and applying section 3 of the Young Offenders Act and specifically refers to social responsibility. Notwithstanding the issue of the Convention's enforceability, it should be remembered that Canada had an active role in drafting the Convention and was one of the six countries who initiated the World Summit for Children, a follow-up to the adoption of the Convention, in September of 1990.[52] Furthermore, the Supreme Court of Canada has relied upon European Conventions and International Covenants of the United Nations when judicially interpreting the meaning of rights and freedoms guaranteed under the Canadian Charter of Rights and Freedoms[53].

> In R. v. Big M Drug Mart Ltd.[54], the Supreme Court of Canada stated:
>
> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the

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52. A Canadian children's advocacy organization, Justice for Children, offered fourteen recommendations for change to the text of the Convention. One recommendation was the development of a mechanism to ensure that member states do make changes to meet the goals of the Declaration. See Justice for Children, Brief on the UN Convention on the Rights of the Child (Toronto: Canadian Foundation for Children, Youth and the Law, Inc., 1990).

53. Part 1 of the Constitution Act, 1982, as enacted by the Canada Act, 1982, 1982 (U.K.), c. 11.

54. [1985] 18 C.C.C. (3d) 385 at 423.

> character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms.

This passage was accepted in R. v. Oakes[55] as authority to review the United Nations Universal Declaration of Human Rights as evidence of the breadth of acceptance of the principle of the presumption of innocence. [56] Such a review helps to define the phrase "free and democratic society" found in section 1 of the Charter of Rights and Freedoms which in turn is essential to determining if a Charter violation represents a reasonable limit and can be demonstrably justified.[57] Therefore, the concept of "free and democratic society" can include the provisions in the United Nations Convention on the Rights of the Child should a violation under the Young Offenders Act be deemed a Charter violation as well. Yet, this application of United Nations Conventions by application should not be limited to applications for remedies under the Charter

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[55]. [1986] 50 C.R. (3d) 321. (S.C.C.).

[56]. Ibid. at 334.

[57]. To quote Dickson C.J.C. in Oakes, supra note 55 at 347.:

> The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

as is evident in In the Matter of H.J.W.C. Jr., et al[58].

V. SECTION 3(1)(c)

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

In Bala and Kirvan's discussion, they imply that the "special needs" of a young person must be addressed in order to identify the best possible form of intervention, be it under the Young Offenders Act or other welfare legislation.[59] The Courts have interpreted section 3(1)(c) to authorize novel forms of intervention. This subsection is at the heart of the tension between child welfare and social protection issues, the underlying assumption being adolescence implies special needs. Priscilla Platt notes that this section is "controversial" and a "...concession to the paternalism of the old Juvenile Delinquents Act".[60]

The type of special need a youth has may require his or her advocate to consider some additional factors when making submissions at any stage of the proceedings. For example, consider the youth that is charged with the theft

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[58]. Supra note 50.

[59]. Supra note 13 at 77 to 78.

[60]. Supra note 23 at 2-3, paragraph 2.7.

under $1000.00 of a food item. He enters a plea of guilt. He is not eligible for alternative measures and has no previous youth record. Usually, such a youth would receive a disposition of community service hours to perform within a given time period. However, the youth shows his counsel a number of freshly self-inflicted lacerations and asks for help. His counsel knows that in the City of Calgary as of January 1995 if in a probation order a young person is ordered to attend for assessment and counselling, that young person will receive the benefit of ten sessions with a psychologist that is paid for by Alberta Justice. After discussing with the young person the significance of a probation order being more intrusive than an order for community service hours and after receiving instructions from the young person to suggest to the court probation as a disposition, counsel is put in the situation of asking for a disposition that exceeds that which would be otherwise warranted. From an advocate's perspective, this is the dilemma created by section 3(1)(c).[61]

The courts have used section 3(1)(c) to bridge gaps in the Young Offenders Act caused by this dilemma. In the following two cases the result has been an intrusive one. In R. v. D.S. [62] Judge Kent of the Ontario Provincial Court, Family Division, ordered a youth to be remanded in custody for six days for psychological assessment even though the grounds for detaining him under section 515(10) of the Criminal Code had not been met by the Crown. The Court

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[61]. Professional ethics will be discussed generally in Chapter 4. However, for a brief survey of the effect treatment needs has on disposition, see P. Platt, supra note 23 at 17-11 to 17-13.

[62]. [1984] W.D.F.L. 866. (Ont. Prov. Ct., Fam. Div.), Y.O.S. 84-015.

used section 3(1)(c) to expand the application of then section 13(1)(c) of the Young Offenders Act because of its concern that the youth might be suffering from a condition that could make him a danger to himself. [63] With respect, it is apparent that the youth court judge had no jurisdiction to make such an order. However, without knowing what parallel legislation the Ontario court had to draw remedies from, it is hard to assess a more appropriate or immediate remedy that could have been taken. Although child welfare concerns must form part of judicial inquiry when crafting a disposition that meets the needs of the young person and the needs of society, advocates must scrupulously guard against them affecting due process at the earlier adjudicative stages.

In R. v. T.C.M. [64], the Appellate Division of the Nova Scotia Supreme Court dismissed an appeal of two years secure custody for an attempted robbery. The Court relied upon section 3 (presumably this youth's special needs under section 3(1)(c)) in support of the dismissal and noted that the youth's family were notoriously criminal and that a lengthy period of custody, which would permit access to resources and programs, was his "last hope for the future". To the writer's knowledge this decision was not appealed further. This case is but

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[63]. Section 13 was amended in 1991 but at the time in question gave authority to the youth court to require a young person to be examined by a qualified person for the purpose of making or reviewing a disposition if the court has reasonable grounds to believe that the young person may be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or mental retardation. R.S.C. 1985, c. Y-1 as amended. Currently, a section 13 report may only be obtained to be used for the purpose of disposition, after a finding of guilt. The Crown or defence must rely upon s. 672.11 of the Criminal Code if it requires a fitness assessment prior to findings of guilt.

[64]. (16 December 1991) No. 02612 (N.S.S.C.A.D.), Y.O.S. 92-002.

one example of disparate sentencing practices in youth court albeit acceptable within the jurisdictional confines as outlined in the disposition section 20 of the Young Offenders Act. Further, this case exemplifies the notion that the dispositional practice, pursuant to section 24 of the Young Offenders Act, is to approach each case on an individualized basis. The writer accepts this proposition as practical and appropriate however again cautions advocates that notwithstanding treatment issues, the punishment must fit the crime.[65]

Section 3(1)(c) has also been used in argument to prevent a more onerous or intrusive result. In R. v. S.W.S.[66], Judge Ashdown relied on the section 3(1)(c) reference to "special needs" to decline to make an order of transfer to the ordinary court. It is uncertain to the writer from reviewing the digest of the case at exactly the special needs of the youth were. However, notwithstanding a chaotic home environment, drug use and extensive criminal activity, the youth had shown ability at school and a positive response to efforts made by probation services. One issue for consideration in an application to transfer to the ordinary court is the ability of the young offender system to rehabilitate the young person. In this case, the youth court Judge applied section 3(1)(c) to assist in qualifying the test under the transfer provisions in section 16. Section 16 has

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[65]. By contrast, see also Teresa C. v. R., [1988] 4 W.C.B. (2d) 202 (Ont. Dist. Ct.), Y.O.S. 88-079 wherein the Court reduced a six month secure custody sentence to thirty days. The young person was charged with breach of a residency clause of her probation order. The Court in granting the original sentence wished to prevent the youth from returning to prostitution. The appellate Court found the sentence to be disproportionate to the offence notwithstanding the social issue.

[66]. (9 January 1986)(Man. Prov. Ct., Fam. Div.), Y.O.S. 86-001.

been amended since 1986. However, since section 16(1.1) dictates that rehabilitation of the young person is a consideration in making a transfer decision, R. v. S.W.S., assists in defining the concept.[67]

In R. v. D.A.[68] the same trial Judge, Ashdown J., relying on section 3(1)(c), ordered a disposition of one year secure custody, nine months open custody and one year probation for a charge of theft over $1000 of a vehicle which was also involved in a high speed chase. The Manitoba Court of Appeal reduced this to nine months open custody. Counsel for the youth argued that the trial Judge put too much emphasis on section 3(1)(c) to the exclusion of others in order to use a "firm hand" and that in fact his disposition was tantamount to "using custodial sentences as a substitute for wardship..."[69] The Court of Appeal agreed. Philp, J.A. delivered the judgment and allowed the appeal on the basis that the circumstances of the offence and the young person's level of participation did not warrant such a disposition. Justice O'Sullivan added his

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67. Section 16(1.1) states:

> In making the determination referred to in subsection (1), the youth court shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be reconciled by the youth remaining under the jurisdiction of the youth court, and if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall order that the young person be proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence.

68. [1986] 44 Man. R. (2d) 104. (Man. C.A.).

69. Ibid. at 108.

obiter[70] reflections and stated:[71]

> I think it is incumbent on governmental authorities to make use not only of the criminal law, but also of child welfare laws to propose effective means to deal with young people who are as obviously in need of protection as this 14-year-old boy was. I think it is absurd, with respect, to fault the young man for failing to respond to what the judge was pleased to refer to as "...the direction, control, push and inspiration that is available to him".

Although "special needs" is a consideration, dispositions under the Young Offenders Act should not replace the obligation of the Provinces to provide protective services to those young persons in need. There is often a fine line distinguishing criminalized or "criminal" youth and victimized youth. As an aside, Justice O'Sullivan gave a puzzling direction to counsel for the youth:[72]

> We suggest to counsel who appeared before us that, if counsel are going to accept briefs from 14-year-old children, they have a **duty** not only to take instructions from them but also to ensure that the client has what every child is entitled to have under the law, a competent and caring guardian.(emphasis added)

Query the nature of this duty and whether it flows from this fact situation only or in part from section 3 of the Young Offenders Act.

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[70]. Infra note 86.

[71]. Supra note 68 at 108 - 109.

[72]. Ibid. at 109 paragraph 30.

VI. SECTION 3(1)(d)

Where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences.

Bala and Kirvan suggest that this subsection is "formal endorsement of a traditionally exercised discretion not to commence criminal proceedings."[73] However, for this subsection to be enforceable, there must be attainment of jurisdiction pursuant to section 5 of the Young Offenders Act which does not occur until the commencement of criminal proceedings. The question then is whether section 3(1)(d) is to be interpreted as a supplement or guideline to alternative measures legislated under section 4 of the Act or stands alone as a substantive remedy with questionable enforceability.

Bala and Kirvan cite R. v. David J., a 1985 British Columbia Provincial Court decision, as an example of the application of this subsection.[74] In that case, a thirteen year old boy was charged with assaulting a child care worker in a group home. The court dismissed the charge and relied on section 3(1)(h) to emphasize that parent-child discipline ought to be handled by the "parent" in the home and not by the courts. This case precedes the 1989 decision of R. v. [illegible] M.[75] in which the same court came to the opposite conclusion. However, the ratio of these cases has been superseded by the decision of the Supreme Court of

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73. N. Bala & M. Kirvan, supra note 13 at 79.

74. [1985] B.C.W.L.D. 1570. (B.C.Prov.Ct.), Y.O.S. 85-033.

75. Supra note 4.

Canada in R. v. T(V)[76] and it would appear that there is no remedy under section 3 to found a dismissal if the elements of the criminal offence have been made out. Yet, the writer can think of three examples where the philosophy inherent in subsection 3(1)(d) would be useful in advocacy.

The first example involves a situation where there is enough evidence to found a conviction and there is an ongoing relationship between the victim and the young person (such as employer/employee, neighbour/neighbour, parent/child, teacher/student). After receiving instructions to enter a plea of guilt and subject to the seriousness of the offence, the young person's counsel may attempt to adjourn plea for the purpose of mediation. In Calgary, Alberta, the John Howard Society has a victim-young offender reconciliation program.[77] Just one aspect of this service is the mediation of compensation or

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[76]. Supra note 1.

[77]. The Calgary John Howard Society is a private, non-profit organization. Its mission statement is:

> an organization of citizens active in the research, development and implementation of policies, programs and services designed to redress the inadequacies and inequalities of the criminal justice system for and with people in conflict with the law.

The Victim-Offender Reconciliation Program is described in the Agency's publication What Happens Now? A Parent's Guide to the Young Offenders System, as follows:

> This requires the co-operation of the victim, and is voluntary on the part of both parties. The victim and the young person meet together with a mediator from the Calgary John Howard Society to talk about what has happened and come to an agreement as to the way the young person can address the harm caused to the victim. Harm can mean property damage, financial loss, or emotional distress. Methods of repayment may include an apology and-or service or monetary repayment to the victim.

restitution. Counsel for a young person may convince a Crown Prosecutor that the interests of society have been met through successful mediation and the charge could in all good conscience be withdrawn.

The second example involves the Alternative Measures Program as it is administered in Alberta. In this Province there seems to be two aspects to "alternative measures". A young person who fits within the guidelines of section 4 of the Young Offenders Act may be referred directly to the Alternative Measures Program or may receive what is commonly referred to as the "caution letter". The significance is that a young person in Alberta has only one opportunity to be referred to the Alternative Measures Program and, thereafter, all subsequent matters must be proceeded with through youth court. If, however, a young person receives a caution letter, he or she is also eligible to access the Alternative Measures Program in the future. Therefore, counsel for a young person appearing for the first time before the courts could negotiate with the Crown Prosecutor for the issuance of a caution letter as opposed to a referral to the Alternative Measures Program. P.M.Henderson, a practitioner in Edmonton, Alberta, notes that Crown Prosecutors in that City have been using section 3(1)(d) as authority for sending cautionary letters to first time shoplifters.[78] However, if the cautionary letter is sent by the Alternative Measures Program itself, there is no second opportunity. Unfortunately, the writer is of the opinion that the evolution of policy guidelines set within the Crown Prosecutor's

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[78]. See P.M. Henderson, "Alternative Measures in Legal Education Society of Alberta, Representing Young Offenders - Youth Court Practice [Calgary, March 14, 1992; Edmonton, March 21, 1992] (Edmonton: Legal Education Society of Alberta, 1992) 9 at 13.

Office regarding Alternative Measure eventually eliminate this avenue for advocacy. It is the writer's experience that the policy of the Crown Prosecutor's office in Calgary, Alberta, is to not refer assault charges that occur in school yards to the Alternative Measures Program.

The third example involves the situation where treatment issues are paramount and other, more appropriate, resources can be accessed outside of the young offender system. Again some counsel may have success in advocating for either a withdrawal or stay of charges. The practical key is proposing a plan that meets both the needs of the youth and the interests of society. The concern, as under section 3(1)(c), is that this subsection will be relied upon by the youth court to be more intrusive than is warranted. In R. v. T.L.[79], Judge Hewett of the Alberta Provincial Court, Youth Division, determined that section 3(1)(d) was sufficiently broad to allow him to consider child protection issues when sentencing a youth to ten days in open custody.[80] The Judge ordered the

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[79]. (13 June 1984), Edmonton (Alta. Prov. Ct., Yth. Div.), Y.O.S. 84-016.

[80]. At the time of this decision, the distinction between open and secure custody would have been meaningful. Section 24.1 (1) reads:

> In this section and sections 24.2, 24.3, 28 and 29, "open custody" means custody in
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> (a) a community residential centre, group home, child care institution, or forest or wilderness camp, or
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> (b) any other like place or facility designated by the Lieutenant Governor in Council of a province or his delegate as a place of open custody for the purposes of this Act, and includes a place or facility within a class of such places or facilities so designated;
>
> "secure custody" means custody in a place or facility designated by the Lieutenant Governor in Council of a province for the secure containment

disposition to allow child welfare authorities enough time to intervene since the youth had nowhere to go and his parent no longer wished to care for him and said:

> ...where child welfare authorities become properly involved in the treatment of a youth, that treatment...should definitely be considered and the court should not be limited by the provisions of the Young Offenders Act.

The writer could cite many examples how this philosophy works in practice in youth court in Alberta. This writer has seen a young person charged with a transit fare violation under a City Bylaw held, on order of the youth court, in secure custody for more than seven days because of her tender age, abandonment by an adult and residential ties to another province. As an advocate in youth court extremely difficult to reconcile these types of scenarios, which are not extraordinary or infrequent, with the call for more punitive measures for young offenders.

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or restraint of young persons, and includes a place or facility within a class of such places or facilities so designated.

However, in 1992 by Alberta Regulation 322/92, the following secure facilities, among others, were designated as open facilities as well: Edmonton Young Offender Centre, Calgary Young Offender Centre, Lethbridge Young Offender Centre.
There are now very few open custody beds outside of such facilities.

It is now the practice in both Edmonton and Calgary to have most young persons serve their open custody dispositions in largely a secure setting. Notably, both of these facilities are in geographical locations outside of the City and are without transit service. It is the practice at the Calgary Young Offender Center to house female young persons serving open or secure custody dispositions in the same residential unit. Therefore, a disposition of open custody given in order to access child welfare services does not guarantee a "group home" placement and has a greater punitive effect now than it was intended to have and did not have in 1984.

How is the subsection to be interpreted? One can look for guidance to the decision of the Supreme Court of Canada in R. v. Sheldon S.[81]. In that case the young person was charged with possession of stolen property. Before entering a plea the youth's counsel argued that the Province of Ontario's failure to designate an Alternative Measures Program under section 4 of the Young Offenders Act was a violation of the youth's equality rights under section 15(1) of the Charter of Rights and Freedoms. Judge Bean of the Ontario Provincial Court agreed and dismissed the charge. He found that the Province had a positive duty to designate an Alternative Measures Program by virtue of a contextual reading of sections 3(1)(d), 3(1)(f) and 4(1)(a).[82]

The Attorney General for Ontario appealed the decision to the Ontario Court of Appeal. The reasons of the majority of that court were delivered by Tarnopolsky J.A. who, concurring with the trial Judge, found after examining the Act as a whole, and in particular, ss. 3(1)(d), 3(1)(f) and 3(2), that "...without provincial designation of alternative measures the purpose of the Act would be undermined."[83] The Court of Appeal upheld the dismissal of the charge against the young person but also held that the appropriate remedy was a declaration that until a program was instituted, proceedings against any young person that might have qualified may have to be stayed. This must have caused great consternation for the Province as an interim Alternative Measures Program was

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[81]. Supra note 9 at 254.

[82]. Ibid. at 264.

[83]. Ibid. at 267.

established before leave was granted to appeal the decision to the Supreme Court of Canada.[84] The Supreme Court of Canada reversed the decision of the lower courts and ordered a new trial. Firstly, Dickson C.J. speaking for the Court found that there was no positive obligation upon the Province to initiate a program by virtue alone of the wording of section 4. He then found that the word "should" in section 3(1)(d) was permissive and not mandatory. Given such a determination, the Supreme Court's contextual reading of section 4 within a federal and regionally diversified country resulted in a finding that the provinces were given the power but not the obligation to establish an Alternative Measures Program.[85] The writer would suggest that if section 4 had been drafted in clearer language, then the Supreme Court would have affirmed the decision of the lower courts. Therefore, this case might stand for the proposition that section 3(1)(d) could be used to enforce the application of a more clearly prescriptive provision under the Act that related to extra-judicial remedies. Also, the determination that section 3(1)(d) was not mandatory is likely obiter dictum[86] in this case since the Supreme Court decided the issue on the wording of section 4.

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[84]. On April 11, 1988 the Ontario government announced it was commencing a program. On September 30, 1988 leave to appeal to the Supreme Court of Canada was granted.

[85]. Supra note 9 at 275.

[86]. Meaning "words of an opinion entirely unnecessary for the decision of the case". H.C. Black, Black's Law Dictionary, 5th ed. (St. Paul: West Publishing Co, 1979) at 967.

VII. SECTION 3(1)(c)

Young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms.

Bala and Kirvan refer to both 3(1)(c) and (g) together and indicate that these principles are directly reflected in section 11 (right to counsel) and section 56 (admissibility of statements) of the Young Offenders Act and state:[87]

> Some have argued that those special rights unduly restrict police and crown attorneys. The justification for these rights for young persons has been questioned by some who believe that they are inconsistent with the principles of protection of the public and responsibility for criminal behaviour. This debate is not new to criminal justice, and certainly is not restricted to juvenile justice. However, in the context of youth-court proceedings, the debate takes on an added poignancy as it is sometimes argued that the exercise of legal rights may serve to defeat the needs of a young person. They argue that these rights may actually restrict the ability of the police and the crown to exercise their mandates to the detriment to the needs of the youth and the right of society to be protected.

The special rights enjoyed by young persons only apply to young persons who are charged with an offence and in some cases only until the age of 18.[88]

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87. Bala and Kirvan, supra note 13 at 79. Again, the academic work of N. Bala was cited with favour in R. v. S.(S.), supra note 9 at 276.

88. See R. v. Rennie, (1985), 15 W.C.B. 257, Y.O.S. 86-111 (1985, Ont. H.C.). In this case two young girls were evading service of subpoenas as witnesses. The Crown applied for warrants for their arrest. The lower court refused, deciding that under section 3 the girls had special protections and had not received sufficient notice of the subpoenas. The Supreme Court on Ontario held that the special rights and protections only apply to youths being prosecuted under the Act and not witnesses in adult proceedings. Note: If the girls were picked up on a warrant they would be brought before a youth court judge to determine release. They would then have the special rights and protections given to them

It is evident by the judicial interpretation available that the quality of the rights ascribed under this subsection is different in nature that those enjoyed by adults. Section 3(1)(c) qualifies the paternalistic approach taken by the courts in a response to section 3(1)(c). In R. v. J.M.[89] Judge Bean denied an application for a psychiatric assessment pursuant to section 13 of the Young Offenders Act prior to trial because...

> ..where the rights and freedoms of young persons who are charged with offences conflict with the desire of a judge to help that young persons or of the Crown to help itself, and presumably the young person as a part of society, then in my view, the special rights and freedoms granted to young persons by the Act and the needs of the young person with regard to the legal issues before the court must prevail over any pious intention of either the courts or the Crown to assist the young person by way of reaching a decision.

This case, of course, directly conflicts with the decision of Judge Kent of the same court in R. v. D.S.[90]. However, in the writer's view, it is the correct, professionally ethical, position to take at the adjudicative stage. It is interesting to note that Judge Bean also decided, at the trial level in R. v. Sheldon S.[91], that the Province of Ontario had a positive duty to create an Alternative Measures Program under section 4.

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under the Act. Further, in R. v. D.A.Z., [1993] 5 Alta. L.R. (3d) 1 (S.C.C.) the Supreme Court held that a young person's special rights under section 56 of the Young Offenders Act were not applicable if a statement was taken after the young person attained the age of 18.

89. [1984] 12 W.C.B. 390. (Ont. Prov.Ct., Fam. Div.), Y.O.S. 84-028.

90. Supra note 62.

91. Supra note 9.

It is the writer's position that this subsection is also useful in arguing the applicability of international law to the issues under the Young Offenders Act. For example, over six days in November and December of 1994, Judge Landerkin of the Provincial Court of Alberta heard an application initiated by the Crown under section 7(2) of the Young Offenders Act.[92] That section reads:

> A young person referred to in subsection (1) shall be held separate and apart from any adult who is detained or held in custody unless a youth court judge or a justice is satisfied that
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> (a) the young person cannot, having regard to his own safety or the safety of others, be detained in a place of detention for young persons; or
>
> (b) no place of detention for young persons is available within a reasonable distance.

The intention of the Crown was to have the young person be held in an adult remand facility pending a transfer hearing under section 16. The writer argued that section 3(1)(e) allowed for the application of the Beijing Rules and the United Nations Convention on the Rights of the Child to the case at bar. Clause 13.4 of the Beijing Rules and Article 37(c) of the United Nations Convention both state that young persons held in detention pending trial shall be kept separate from adults.[93] Therefore, it was the thrust of the argument that

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[92]. R. v. C.J.S. (12 December 1994), Calgary (Alta. Prov. Ct.) [unreported]. Notably this was the first time in the history of the Young Offenders Act that an application under section 7(2) was made.

[93]. Clause 13.4 of the Beijing Rules, supra note 45 reads:

> Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

Article 37(c) of the United Nations Convention on the Rights of the Child, supra note 46 reads:

section 7(2) of the Young Offenders Act should be interpreted strictly and the court should be directed by the underlying philosophy in section 3(1)(e) and apply international law. If the Court was prepared to allow the application, the writer would have argued the international law as a basis for a violation of the young person's rights under the Charter of Rights and Freedoms. However, the Judge denied the application on an interpretation of the mootness of section 7(2) in light of section 24.5 of the Act given the fact that the youth was a serving prisoner. Arguably, international law can play a role in interpreting the underlying objectives of the Young Offenders Act through such a use of section 3(1)(e).

VIII.SECTION 3(1)(f)

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

> Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, same in exceptional circumstances.

Upon ratification of Convention on the Rights of the Child Canada did enter a reservation to Article 37(c) "..to ensure that, in determining the custodial arrangements for a young offender, the well-being of other young offenders and the safety of the public may be taken into account." See Human Rights Directorate, Department of Canadian Heritage, Convention on the Rights of the Child - First Report of Canada (Ottawa: May, 1994) at paragraph 337. Therefore, notwithstanding the reservation, the objective of the Article and the reservation are valid considerations in interpreting the Young Offenders Act and section 7(2) in particular.

This subsection also reflects the philosophy of the international law in this area. This subsection has been useful in advocating at the point of pre-trial detention, disposition and dispositional review. In terms of pre-trial detention, the case of R. v. J.F.R.[94] is digested under this subsection in Bala and Lilles' Young Offender Service. In that case a seventeen-year-old was arrested while walking home early one morning by a police office who was investigating a break-in that had occurred twenty minutes earlier. The youth matched the general description of the suspect and a computer search revealed that the youth was the subject of a form of judicial interim release called an Undertaking regarding a curfew of which he apparently was in breach. Although the youth advised the officer that the matter for which the Undertaking was given had been disposed of, the officer took the youth into custody. A narcotic was discovered during a search of the youth. Judge Lilles excluded the evidence obtained from the search of the youth for a number of reasons. The court found the arrest was unlawful and that the officer lacked reasonable grounds to search the youth. The court also found that the youth's rights under section 8 of the Charter of Rights and Freedoms had been violated. Lastly, the court found that the police officer had not complied with the principle of "least interference" found in section 3(1)(f). Given the limited information available in the digest it is difficult to determine whether the remedy under section 3(1)(f) stood alone or substantiated the finding on the Charter argument. What is apparent is the willingness of the court to give the subsection a degree of enforceability.

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[94]. (28 October 1991), T.C. 91-01692 (Territorial Court of Yukon), Y.O.S. 91-156.

Bala and Kirvin, reinforcing what Judge Bean said in R. v. J.M.[95], suggest that:[96]

> The principle also requires that the YOA not be used as a vehicle for imposing a disposition on a youth that is more severe than warranted by the offence but perhaps justifiable on the grounds of treatment.

In terms of the application to disposition, Judge Fitch of the Alberta Provincial Court made an important point in R. v. R.D.[97]. In that case, a fourteen-year-old was stopped in a store with a cassette tape on his person and charged with theft. In rendering a disposition, the Court reviewed the available dispositions under the Act and determined that a $75 fine with 6 months to pay would be adequate. He specifically referred to section 3(1)(f) in the context of a custodial sentence and stated:[98]

> It is doubtful that a custodial disposition for a first offence shoplifting, no matter how short in length, is consistent with that principle of the Act.

Therefore, advocates for youth should consistently argue that in considering a custodial sentence not only must the youth court review section 24 of the Act but place those legislated conditions into the context of section 3(1)(f). Support for this position can be found in the decision of the Ontario Court of Appeal in R. v. S.R.H. et al.[99] In that case two young persons assaulted and killed a seventy-

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[95]. Supra note 89.

[96]. Supra note 13 at 80.

[97]. (1985), 18 C.C.C. (3d) 36.

[98]. Ibid. at 39.

[99]. (1990), 56 C.C.C. (3d) 46.

year old man. At the time of their pleas to manslaughter, they received one month secure custody and twenty-nine months of open custody. The Crown appealed the sentence, not in terms of its length but in terms of the type of custody ordered. The Appeal Court dismissed the appeal only because the youths were doing well in their settings and the Court did not want to disrupt the rehabilitation process. The Court made some important comments with regard to factors to be considered by a court when imposing the type of custody. The Court held that the determination to impose custody must be made in accordance with section 3(1)(f) which includes a consideration of general deterrence.[100] Justice Galligan concluded this portion of the reasons by saying:[101]

> It seems to me that the purpose of the Young Offenders Act is to give the youth court the flexibility necessary to tailor dispositions to fit the needs of individual youthful offenders, keeping in mind the need for the "protection of society".

Therefore the court indicated that there is an inextricable connection between the disposition practice of youth court and the statement of principle in section 3.

IX. SECTION 3(1)(g)

> **Young persons have the right, in every instance where they have rights or freedoms that may be affected by this Act, to be informed as to what those rights and freedoms are.**

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100. Ibid. at 49.

101. Ibid. at 50.

Bala and Kirvan combine this subsection with their discussion of section 3(1)(f). Priscilla Platt notes that this subsection is relevant in reference to the admissibility of statements made at the time of arrest and the rights to review and appeal under the Act.[102] In the absence of any case law interpreting this subsection, the writer would add that the general admonition in section 56(2)(b) that requires the peace officer or person in authority to make explanations to a young person in "language appropriate to his age and understanding" should apply, by virtue of this subsection, to other situations where the effects of criminal proceedings are explained. In other words, a young person has the right to be informed, in language he or she can understand, about his rights and freedoms. The writer has always regarded this subsection as endorsing the notion that counsel require specific training on how to advocate for a youthful client. Chapter 4 will touch upon this issue at greater length.

X. SECTION 3(1)(h)

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

Bala and Kirvan suggest that this subsection "requires that decisions about pre-trial detention and disposition be made, taking into consideration the

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[102]. Supra note 23 at 2-6 paragraph 2.16.

desirability of parental supervision."[103] This philosophy is reflected in the Act and the rights of parents are protected under a number of provisions in the Young Offenders Act. For example, section 9 of the Act provides that notice of arrest or commencement of proceedings must be given to a parent, adult relative or other adult who is likely to assist as soon as possible. In certain circumstances, the failure to give notice to a parent will render subsequent proceedings invalid.[104] Under section 56(2)(c) of the Act, a young person must be given a reasonable opportunity to consult with counsel, a parent, an adult relative or any other appropriate adult chosen by the young person before giving a statement. If not given such an opportunity, the statement will be inadmissible in evidence against the young person. By contrast, the youth court also has the ability under section 10 to order a parent to attend court. If, after service of the order, it is proven that the parent declined to attend, the court may issue a warrant for their arrest. This section is useful to advocates as a tool by which to prevent parents who wish to practice "tough love" from using secure custody facilities in place of parental discipline. It is also useful to hasten child welfare intervention when it is warranted. A failure to attend court after an order has been made under section 10 is indicia of abandonment under child welfare legislation.[105]

Early on, the courts tried to use parental responsibility as a reason to

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[103]. Supra note 13 at 80.

[104]. See section 9(9) of the Young Offenders Act.

[105]. See Child Welfare Act S.A. 1984, c.C-8.1,s.1(2)(a).

dismiss criminal proceedings, refusing to criminalize youth for being a discipline problem. In the case of R. v. David L.[106], the British Columbia Provincial Court dismissed the charge of assault against a small-bodied young offender. The Court determined that the Legislators intended section 3(1)(h) to imply that the control and discipline of children should be left in the hands of parents. The Ontario Provincial Court in R. v. Brian H.[107], citing David L. with approval, dismissed the charge that the youth had assaulted a case worker twice his own size. They suggest that care workers ought not to use the heavy hand of the law and "live with" the miscreant behaviour of the youth. Although the Supreme Court has determined in R. v. T.(V.)[108], that parental responsibility is not a valid reason to interfere with prosecutorial discretion, no mention is made in these two cases of whether or not the offence of assault was made out. Therefore, it is difficult to determine whether or not the court created a substantive remedy. The writer would argue that the two lower court decisions can be used in argument against conviction when the young person is in the care of child welfare authorities because of a need to treat assaultive behaviour.

In relation to the application of the subsection to bail hearings, the British Columbia Court of Appeal in R. v. D.C.L. and D.M.M. upheld the judicial

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106. Supra note 74.

107. [1987] 2 W.C.B. (2d) 426, Y.O.S. 87-112.

108. Supra note 1.

interim release of two young persons charged with first degree murder.[109] The two youths were released to their parents on conditions. The court interpreted section 3(1)(h) as creating a preference for parental supervision over other forms of custody or control. By inference, such a preference was a factor for the court in determining if the young persons had overcome the primary and secondary grounds for detention in section 515(10) of the Criminal Code.

In a most unique way, the British Columbia Court of Appeal applied section 3(1)(h) to vary a disposition of custody, parental supervision being preferable. In R. v. J.G.[110] the young person appealed a disposition comprised of open custody, twenty-two months of probation and community service. The young person had pled guilty to participation in the riot at the Penticton Peach Festival. The trial court ordered that the open custody be served over two periods of time: during the Peach Festivals held in 1992 and 1993. Since the purpose of the open custody was to keep him away from the festival, the Court of Appeal varied the order to allow for the young person to visit his mother in Victoria, B.C. during the two festival periods. Therefore, the probation order was amended.

The writer recalls the advice to counsel given by Justice O'Sullivan in R. v. D.A.[111]. Do advocates for youth have a duty to investigate the adequacy of

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109. [1992] 16 W.C.B. (2d) 137, Y.O.S. 91-025.

110. [1992] 17 W.C.B. (2d) 145, Y.O.S. 92-109.

111. Supra note 68.

parental supervision barring involvement of a probation officer? Certainly effective counsel will supply what information they have in a contentious bail hearing or disposition where custody is a serious possibility.

XI. SECTION 3(2)

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

On a literal interpretation this subsection would appear to lend weight to the arguments advanced above. Yet, there have been a variety of attempts made to define the meaning of "liberal". In Re T.W. and the Queen,[112] Justice Armstrong, in obitur dictum said:

> Section 3(1)(e), in fact, the whole of s.3(1) is not creative of substantive law at all but is nothing more than directory - guidelines as to interpretation of what follows. This would appear to be made clear by s.3(2).

The following year, Justice Mullally in J.R.W. v. Attorney General Prince Edward Island refers to section 3 of the Act as follows:[113]

> Section 3 of the Act is a broad declaration of principles. These are not in a preamble to the Act but have been incorporated into it, and are intended to govern the whole interpretation of it. The section is clearly intended to guide the courts to strike a balance between the needs of young people and the protection of society. It states that young people must bear responsibility for their acts but that they should not always be held accountable as adults, and that they have special needs and require guidance and assistance. It also provides for a liberal interpretation and that a young offender may never receive a harsher disposition than an

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[112]. [1986] 25 C.C.C. (3d) 89 at 94 (Sask. Q.B.).

[113]. [1987] 63 Nfld.& P.E.I.R. 188 at 190.(P.E.I.S.C.).

adult for the same offence.

In 1990, Chief Justice Dickson in R. v. Sheldon S. said:[114]

> While I agree that s. 3(2) dictates that a liberal interpretation be given to the legislation, in my opinion that does not require the abandonment of the principles of statutory interpretation nor does it preclude resort to the ordinary meaning of words in interpreting a statute.

This statement, again obiter dictum, did not affect the pith and substance of the entire section. This Court then affirmed in both R. v. T.(V.) and J.J.M. v. R. that section 3 should be given the force of law attributed to substantive provisions.[115] Something can be said about the ambiguity in the language used by this Court to describe the application of section 3 to dispositional practices. In J.J.M., Justice Cory stated:[116]

> A quick reading of that section indicates that there is a marked ambivalence in its approach to the sentencing of young offenders. Yet that ambivalence should not be surprising when it is remembered that the Act reflects a courageous attempt to balance concepts and interests that are frequently conflicting.
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> ...
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> Section 3(1) attempts to balance the need to make the young offenders responsible for their crimes while recognizing their vulnerability and special needs. It seeks to chart a course that avoids both the harshness of a pure criminal law approach applied to minors and the paternalistic welfare approach that was emphasized in the old Juvenile Delinquents Act, R.S.C. 1970, c. J-3. Society must be protected from the violent and criminal acts committed by the young just as much as from those committed by adults. The references to responsibility contained in s. 3(1)(a) and to the protection of society in paras. (b), (d) and (f) suggest that a traditional criminal law approach should be taken into account in the sentencing of young offenders. Yet we must approach dispositions imposed on young offenders differently because

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114. Supra note 9 at 274.

115. R. v. J.J.M. supra note 2 at 428.

116. Ibid. at 427 to 428.

> the needs and requirements of the young are distinct from those of adults.

Generally, such language makes it difficult to pinpoint the remedies that are or could be made available under section 3. What seems to be true from the survey above is that the remedies that can be used to enforce such substantive law take a variety of forms: from strategy in advocacy to creating reasonable doubt as to actus reus and mens rea. Fulfilling the scope of section 3 remedies is the duty of advocates in youth courts in Canada. As a joinder, the writer cedes to the dissenting opinion of Justice L'Heureux-Dube in R. v. J.(J.T.) wherein she notes that:[117]

> Adolescence cannot be viewed as a snapshot in time. Those youths between the ages of 12 and 18 cannot be aggregated and dealt with uniformly without regard for the discrepancies in their faculties and competence.
>
> The spirit of the Act is intended to reflect the evolution of the maturation process. The Act establishes a spectral scheme ensuring that the treatment of these young persons is commensurate with their abilities and understanding.

Advocates in youth court must be conscious of the application of section 3 to the ever-changing understanding of the maturation process.

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[117]. [1990] 2 S.C.R. 755 at 777 to 778.

CHAPTER 4 YOUTH COURT ADVOCACY AND LEGAL EDUCATION

An understanding of the word "advocacy" and its derivations is useful to this thesis work. The writer is convinced that there is a vast intellectual chasm between our understanding of the word "advocacy" and the word "advocate" that must be bridged in order to understand the concept of advocacy in youth court. It is not enough to understand the concepts fundamental to advocacy in order to properly and effectively advocate in youth court. The youth court advocate must understand the philosophy of the Young Offenders Act and be prepared to apply it to the client's individualized needs and interests within a criminal law milieu.

I. THE ADVOCACY TRADITION IN CANADA

To begin with some personal history, during Law School [1] the writer had two very separate and distinct experiences with advocacy training. The first occurred in the first year. All law students were required to prepare a factum for, and present oral argument to, an appellate court. During the preparation for this "rite of passage", the writer was calmed by the thought that after graduation a solicitor's practice would be chosen thereby barring any need to attend court. Fear, being an effective motivator, fuelled an exhaustive search for case law to lend credibility and support to the writer's oral argument. Fear, however, also stymied the ability to think clearly and logically in order to effectively answer

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[1]. University of Alberta, Edmonton, Alberta, 1980 - 1983.

questions posed by the bench. After that experience, the writer believed advocates were born, not made. In retrospect, the writer has come to realize that many students shared the blinding effect of fear because they had yet to learn any advocacy skills.

The second experience with advocacy was in a pass/fail course bearing that title. It was a lecture course instructed by a highly respected private practitioner that had vast experience in civil litigation. The only thing the writer remembers from that course is the name of the instructor and how amusing it was to watch him revel in his own storytelling abilities. In fairness to him, he did impart the rules and ethics of advocacy but failed to share (at least to this listener) any knowledge as to how advocacy skills are learned other than through the school of hard knocks. Unfortunately, the writer knows from experience how hard those knocks can be and how long the bruises can last.

The writer was obviously unprepared to be placed in an adversarial courtroom situation after law school. Since most principals, lawyers who were assigned to provide practical legal education and guidance to students-at-law, at that time lived through the same "trial-by-fire" experiences in court, they seemed to give no second thought to imposing the same teaching method on their students. This is the writer's impression founded upon listening to coffee shop harangue and observing peers in court those first few painful times. Therefore, in discussing the advocacy tradition in Canada the writer cannot refer to her own formal legal education. The writer can only repeat that which has been learned from observation, personal experience and reading, and from attendance

at the Intensive Trial Advocacy Workshop offered by the Legal Education Society of Alberta. This indeed confirms the general belief that advocacy skills develop without formal training.

The word "advocate" means:[2]

> One who renders legal advice and aid and pleads the cause of another before a court or a tribunal, a counsellor. A person learned in the law, and duly admitted to practice, who assists his client with advice, and pleads for him in open court. An assistant; advisor; a pleader of causes.

"Advocacy", then, is the act of advocating. The advocacy tradition in Canada is an oral one, meaning that oral presentation of a case, supplemented by written submissions, has been and continues to be the traditional format. Advocacy can be broken down into three components: knowledge of the tenets or rules of advocacy; possession of techniques to apply the rules; and, awareness of the human element latent in every form of litigation.

Formal legal education is designed to teach the act of advocating and not how to be an advocate. This division can be illustrated by the following quotation:[3]

> The Advocate must look upon his profession, like every other endowment and possession, as an Instrument, which he must use for the purposes of Morality. To act rightly, is his proper object; to succeed as an Advocate, is a proper object, only so far as it is consistent with the former. To cultivate his Moral Being, is his highest end; to cultivate his Professional Eminence, is a subordinate aim.

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2. H.C. Black, Black's Law Dictionary, 5th ed. (St. Paul, Minn.: West Publishing Co., 1979) 50.

3. From William Whewell's The Elements of Morality as quoted in M.M. Orkin, Legal Ethics (Toronto: Cartwright & Sons Limited, 1957)267.

Therefore, if we understand advocacy to be the instrument of the advocate, the rules of advocacy, strictly adhered to, have no inherent ethics. The rules of advocacy comprise the skeletal framework supporting both civil and criminal trial preparation and presentation.[4] This aspect of advocacy does

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[4]. The litigation framework consists generally of the following headings and sub-headings:

Preliminary trial preparation:
- obtaining facts
- preparing for and conducting pre-trial examinations
- preparing for and conducting pre-trial applications
- preparing documentations for production
- preparing witnesses
- determining order of proof
- negotiating settlements
- preparing trial books

Opening statements at trial:
- before a jury
- before a judge alone

Examinations-in-chief:
- organizing the witnesses
- preparing and examining expert witnesses
- examining adverse witnesses
- conducting the examination
- introducing exhibits

Cross-examination:
- preparing questions
- impeaching witnesses

Re-examination:
- determining when to re-examine and that which is re-examinable

Objections:
- determining how and when to make objections to the admission of evidence

Closing arguments and Speaking to Sentence:
- determining the content of argument

See T.A. Mauet, D.G. Casswell & G.P. MacDonald, Fundamentals of Trial

not require a moral choice to be made. The rules are the internal workings of the advocacy process. Even those techniques of advocacy or trial tactics, acceptable by the profession, have no inherent ethics. Yet, the "advocate", the individual lawyer, must adhere to a minimum ethical standard. In this way the advocate is always at odds with his or her own professional responsibilities from an ethical standpoint. To quote Lord Birkett:[5]

> The advocate has a duty to his client, a duty to the Court, and a duty to the State; but he has above all a duty to himself that he shall be, as far as lies in his power, a man of integrity. No profession calls for higher standards of honour and uprightness, and no profession, perhaps, offers greater temptations to forsake them...[footnote omitted]

It is suggested that the distinction between "advocacy" and the "advocate" is even more evident in youth court. Particularly at disposition stage the special nature of the youthful client and the principles found in section 3 of the Young Offenders Act obliges the judiciary as well as the advocate to address the dilemma between due process and child welfare concerns.

The three components of advocacy that I have mentioned above, knowledge of the rules, possession of techniques to apply the rules and awareness

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Techniques, Canadian Edition (Boston: Little, Brown and Company, 1984); F.R. Moskoff, Q.C., ed., Advocacy in Court: A Tribute to Arthur Maloney Q.C. (Toronto: Canada Law Book Inc., 1986); R.F. Reid & R.E. Holland, Advocacy: Views from the Bench (Aurora: Canada Law Book Inc., 1984); and L. Stuesser, An Advocacy Primer (Toronto: Carwsell, 1990); Trial Advocacy Skills (Edmonton: Legal Education Society of Alberta, 1990).

[5]. E.A. Cherniak, Q.C., "The Ethics of Advocacy" in F.R. Moskoff, Q.C., ed., Advocacy in Court: A Tribute to Arthur Maloney Q.C. (Toronto: Canada Law Book Inc., 1986) 101.

of the human element are teachable concepts. The items listed above are concrete enough to be taught in a law school curriculum that includes both instruction and clinical experience. It is the conceptualization of these components into "judgement" that is not teachable. This intellectualization is the responsibility of the student and of the "advocate" but the writer believes, after personal experience, that it is impeded without instruction in the three components.

To quote from Advocacy in Court: A Tribute to Arthur Maloney Q.C. :[6]

> The art of advocacy is most frequently discussed in terms of its practical constituent elements: the ability to adduce evidence in an orderly and compelling manner, the technique of when and how to object in an astute manner consistent with one's objectives in the litigation, the capacity to argue or address a jury to accomplish one's end. In all of these areas Arthur Maloney undoubtedly excelled; however, it was in another quality altogether, sometimes overlooked but probably the single most important ingredient to be desired in an effective advocate, that he was without peer. Reference in this regard is, of course, to his keen sense of **judgment** based on his encyclopedic knowledge of human affairs.[emphasis added]

If this quality is indeed an overlooked but necessary element of effective advocacy, then it follows that to be an effective advocate one must have certain foundation knowledge from which to form judgment. Therefore, in the youth court forum the resulting questions are:

> (a) does the nature of advocacy that is qualified by judicial interpretation of section 3 of the Young Offenders Act imply an obligation for formal legal education to include that evolving body of law?

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[6]. F.R. Moskoff, Q.C., ed., (Toronto: Canada Law Book Inc., 1986) 1.

(b) does formal legal education in Canada include such instruction?

II. THE OBLIGATION FOR FORMAL LEGAL EDUCATION

The writer's position is that section 3 of the Young Offenders Act implies an obligation to include it in formal legal education. In the Province of Alberta, since the onset of legislative reform in the early 1960's there have been references to and criticisms of the role of the advocate when counselling young persons in conflict with the law.[7] The 1977 "Kirby Report"[8] had as a term of reference the question:[9]

> [w]hether any changes should be made in the administration of justice in the Juvenile and Family Courts and if so, what should be the respective roles of the Judges, Lawyers, Court Counsellors, Probation Officers, Clerks of the Court and other officers and officials of those Courts.

Under the heading, " The Role of Lawyers" and the subheading, "Defense Counsel", some of the identified deficiencies in legal representation at that time are found:[10]

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[7]. See Chapter 1.

[8]. The Juvenile Justice System in Alberta Report No. 3 (Edmonton: Alberta Board of Review, Provincial Courts, 1977) (Chair: W.J.C. Kirby).

[9]. Ibid. p. i.

[10]. Ibid. at 25. Also, at page 26, the police, commenting on the new Duty Counsel Program in Juvenile Court, even then, were saying that some counsel were not familiar with the procedures of Juvenile Court and favored the establishment of a public defender "office" who would acquire a "detailed knowledge of the juvenile justice system."

> The study selected related to children who were not in detention and who were represented by a counsel provided by Legal Aid. Since the study involved only 22 juveniles and seven counsel, its findings can hardly be considered to be definitive.
>
> However, the study does illustrate some possible deficiencies in the performance of some counsel.
>
> 1. Some defence counsel fail to make known to their juvenile clients that they are lawyers.
> 2. Some defence counsel fail to inform their juvenile clients of the help such counsel are supposed to give to their clients.
> 3. Some defence counsel fail to explain Court procedure to their juvenile clients.
> 4. Some defence counsel fail to explain the meaning of the two different forms of plea.
> 5. Prior to a hearing, defence counsel rarely devote sufficient time to discussing adequately with a juvenile client the nature and consequences of the charge that is involved.
> 6. Defence counsel sometimes play an unnecessarily passive role during the trial.

It may appear trite in 1995 to say that these failures are now acknowledged aspects of adequate advocacy in any criminal court.

An earlier study done by Katherine Catton and Patricia Erickson on the pilot duty counsel project in Calgary, Alberta is cited and the following comment made:[11]

> Both reports point to the need for special training of lawyers who intend to serve as defence counsel in Juvenile Court, and for courses in juvenile law to be included in the curricula of faculties of law in this province. The Board has been advised that a course in juvenile law will begin in September, 1977, at the University of Alberta. We also have been given to understand that a course called Children in the Law has been proposed for the third year of law at the University of Calgary, with the

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[11]. Centre of Criminology, University of Toronto, May 1975 The Juvenile's Perception of the Role of Defence Counsel in Juvenile Court: A Pilot Study by Katherine Catton and Patricia Erickson and the Calgary Report on the Legal Aid Society of Alberta pilot duty counsel in juvenile court project in Calgary. Also, supra note 8 at 27 to 28.

> possibility of an introductory course being given during the second year. It has also been suggested that a study of the Alberta juvenile justice system should form a part of the Bar Admission Course.
>
> There is, however, a need for special training in juvenile law for practicing lawyers who are interested in acting as counsel in the Juvenile Court. This special training might be provided in seminars organized by the Legal Education Society of Alberta.

Given that the above comments were made in the 1970's regarding a juvenile justice system in which there was no legislated right to counsel and had a duty counsel system in its infancy only, greater credence can be given them today under the provisions and stated philosophy of the Young Offenders Act.

Past and present reactions of provincial Law Societies to codifying ethics of professional conduct relating to "advocacy" arguably support this position. In 1980, prior to the Young Offenders Act being proclaimed, the Professional Conduct Committee of the Law Society of Upper Canada appointed a sub-committee for the express purpose of assessing the role of the lawyer when representing children. The issue arose from the enactment of section 20 of the Ontario Child Welfare Act which legislated legal representation in child welfare proceedings. This situation is analogous to the institution of the right to counsel in section 11 of the Young Offenders Act as that right did not exist previously under the Juvenile Delinquents Act.

The issues that arose from the change in the law in Ontario regarding the representation of children were deemed to be professional conduct problems. One of the Sub-Committee's implied roles was to determine if the Code of Professional Conduct ought to be amended. The Draft Terms of Reference for

the Sub-Committee read as follows:[12]

> This sub-committee of the Professional Conduct Committee has been charged with the obligation of considering the professional conduct implications of legal representation for children. The sub-committee is not mandated to address changes in the law which might be accomplished either by legislation or by judicial interpretation of existing statutes. However, we are anxious to consider, broadly, the problems confronting lawyers advising and representing parties in litigation or non-litigious situations in which children are either directly involved or by which they may be substantially affected.
>
> Illustrations of the issues to be considered are:
>
> (1) The ability of a lawyer involved in criminal proceedings against persons under the age of eighteen to take instructions from such persons;
>
> (2) The extent to which a lawyer in such circumstances should respond to instructions from the parents or guardians of such persons;
>
> (3) The obligation of lawyers involved in domestic relations controversies to either consult children with regard to their wishes concerning the outcome of such proceedings, or to advise children that they should seek independent legal representation for purposes of such proceedings;
>
> (4) The extent to which lawyers consulted by children are entitled or required to maintain confidentiality even as against their parents or guardians.
>
> As indicated, these are only illustrations of the kinds of problems of professional conduct which might confront lawyers. The sub-committee is anxious to receive views from members of the profession, the bench, social agencies and the general community relating to such questions, or other questions of a similar nature.

Notwithstanding the Terms of Reference, the Sub-committee's

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[12]. Appendix "A" of the Report of the Sub-Committee on the Legal Representation of Children (Toronto: Law Society of Upper Canada, 1981).

conclusions were based on a response to two narrow questions:[13]

> ...whether the Rules of Professional Conduct should be changed to permit counsel representing children not to follow the instructions of the child if to depart from the instructions were, in counsel's opinion, in the child's "best interests".

And,

> ...whether the Rule on solicitor/client privilege should be amended to permit disclosure when it would be in the "best interests" of the child.

In determining that the Rules should not be amended, the Sub-committee acknowledged the dichotomy of approaches towards representing children ranging from paternalistic to fundamentally legalistic. However, the Sub-committee refused to answer the implicit question, that of the nature of the legal representation meant by the amendment to the Ontario Child Welfare Act leaving that determination to the courts. While the writer agrees with the answer to the two narrow issues, it is unfortunate that the Sub-committee declined to go any further in its analysis.

The Sub-committee did address the legal representation of juvenile delinquents. It outrightly rejected "...the suggestion that the solicitor has a duty to the court to advise the court, or to help or assist the court in coming to its deliberation if such advice or assistance constitutes to a disclosure of information which is otherwise privileged, or if it is to act contrary to the instructions of the client."[14] However, the Sub-committee failed to anticipate the corollary concern, is there an implied duty to advise or assist the court when

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[13]. Ibid. at 5.

[14]. Ibid. at 9.

it does not involve a breach of confidentiality which arises from the implied authority of the legal representative?

When the Sub-committee discussed the method of appointing counsel for children under the new law, they decided it would be satisfactory for such appointment be made from a list of lawyers kept by the Official Guardian's Office. To be entitled to be on such a panel, the lawyer must have taken a course on child representation presented by the Official Guardian's office.[15] This implied it was the professional responsibility of legal representatives of children to be adequately trained. Despite the fact the right to counsel became legislated in this example, and the presence of the implied duty to be adequately trained, the Law Society of Upper Canada decided it was not necessary to amend the Code of Professional Conduct. However, that did not leave the issue without its advocates. Once again, in 1980, the Ontario Ministry of Community and Social Services issued a discussion paper entitled Child Advocacy: Implementing the Child's Right to be Heard[16]. Minister Keith C. Norton stated:[17]

> This paper introduces my Ministry's definition of advocacy as the effort to ensure the child's right to be heard. It also describes the work undertaken to translate that meaning into action. I hope that the publication of this paper will mark the beginning of an ongoing discussion of the concept of child advocacy and how it should work.

One of the eight guiding principles for child advocacy enumerated is that

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[15]. Ibid. at 6.

[16]. (Toronto: Ontario Ministry of Community and Social Services, 1980).

[17]. Ibid. at 2.

advocacy techniques and procedures should be understandable and meaningful to the child.[18]

> Research indicates, for example, that children understand and remember little of what happens at court hearings. Much needs to be done to make the environment less threatening, the procedures less mystifying, the language more understandable and the people involved more accessible.

Lastly, under the title "Future Advocacy Efforts", is a position reflective of the Sub-committee's opinion stated above:[19]

> Failure to make the distinction between ensuring the child's right to be heard and speaking on behalf of the child may result in a conflict or confusion of roles. Perhaps the most visible example of such a problem is demonstrated by those lawyers who represent children in court and elsewhere. The issue of the lawyer's role with respect to the child as client is commonly debated in text, classroom and training program and is presently being addressed by the Official Guardian's Office which has been training lawyers for the role in child protection cases. This paper will not address the issue other than to say that there are a number of tasks which should be performed regardless of one's view of the role (e.g., reviewing and testing the evidence presented by the other parties in the case). Further, this Ministry agrees with the office of the Official Guardian that the basic assumption is that the lawyer's role is to ensure that the wishes and preferences of the child are presented to the court. Otherwise, there is the risk that it is the lawyer, not the child, who is being heard and that the lawyer is assuming a role properly assigned to others before the court.

The Sub-committee of the Professional Conduct Committee in 1980 received thirty submissions during the course of its investigation. In its submission to the Sub-committee "Justice for Children"[20] made two very

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[18]. Ibid. at 9.

[19]. Ibid. at 36.

[20]. This Brief was the only one I could find that is held by a library in the province of Alberta.

important recommendations which were ignored by the Sub-committee:[21]

> 7. The Law Society should immediately commence an independent evaluation of the existing quality of representation for children.
>
> 8. The Law Society should also facilitate the development of a specialized bar for children. To that end, "Juvenile and Children" should be designated as a preferred area of practice.

They also make the valid point that:[22]

> The stance which the lawyer adopts in relation to the client determines what facts are gathered, whether communications are confidential, what position is adopted in pre-trial procedures, how the lawyer relates to the other participants in the process, what evidence is led in court, and how submissions are made to the judge. All facets of the lawyer client relationship are affected by the lawyer's conception of his or her role.

Justice for Children promoted the view that if a child has the capacity to instruct a lawyer, then that child should receive the same quality and extent of representation that would be given to an adult.[23]

In support of its recommendation for a specialized bar to represent children, Justice for Children pointed out that:[24]

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[21]. Justice for Children (Canadian Foundation on Children & the Law Inc.), Brief to the Law Society of Upper Canada Professional Conduct Sub-committee on Legal Representation for Children (Toronto: Justice for Children, 1980) on the second page of Recommendations.

[22]. Ibid. at 6.

[23]. Ibid. at 16.

[24]. Ibid. at 19 and 26 to 27.

> One of the most important elements in the child's capacity to participate is the ability of the child's lawyer to explain the nature of the proceedings and its consequences to his or her client. This means that the relationship of the child and the lawyer must be such that the child comprehends and is able to rely on the information forthcoming from the solicitor.
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> Justice for Children, during the summer of 1980, employed two students to visit with young people in residential care facilities across the province, to acquaint them of their legal rights.(footnote omitted) During the course of the presentations, the children volunteered information to the students as to their perceptions of the lawyers with whom they had been involved. The result was a catalogue of complaints which clearly indicate severe violations of the exiting rules of professional conduct.
>
> The consensus was that young people were generally poorly served by their lawyers. Each group expressed negative feelings about lawyers. Many felt that they had been poorly treated by their lawyers, not only in the professional relationship, but also on a personal level. Many young people felt that they had received such poor quality representation that their case would have been more effectively presented without a lawyer. In too many cases, they regard what representation they had from lawyers (often only duty counsel) as a joke. Some said that they would not trust a lawyer to help them again.

The writer sent a letter to the Law Society of Upper Canada dated January 6, 1993, inquiring whether or not anything further was done with recommendations 7 and 8 as noted above from "Justice for Children". On February 3, 1993 the writer received a telephone call from Stephen Travill at the Law Society office in Toronto. He advised that an independent evaluation was not done and that there is no specialized bar for the representation of children.

It seems from the aforementioned that the need for a specialized skill to represent children has been identified. The issues raised by "Justice for

Children" and the Ontario Ministry of Community and Social Services are just as valid and answerable today, especially given the right to counsel under the Young Offenders Act which is guided by section 3. Under section 11(1) of the Act, a young person:

> has the right to retain and instruct counsel without delay, and to exercise that right personally, at any stage of proceedings, against the young person and prior to and during any consideration of whether, instead of commencing or continuing judicial proceedings against the young person under this Act, to use alternative measures to deal with the young person.

Ethically, in Alberta, that right is subject to the new Alberta Code of Professional Conduct[25]. Chapter 9 of the new Code appears to create a positive duty towards the unsophisticated client. Rule 12 of this Chapter states:[26]

> A lawyer must use reasonable efforts to ensure that the client comprehends the lawyer's advice and recommendations.

Commentary 12 expands upon this:[27]

> **Rule #12**: Legal advice must be understood and appreciated by clients to be of value. A lawyer's duty to ensure understanding will vary according to the client's individual attributes. It is necessary to be more painstaking with an unsophisticated client or one who lacks education, experience, financial acumen or intelligence. The lawyer should also take into account client characteristics such as age, temperament and facility with the language, and should adjust the tone, thoroughness and complexity of communications accordingly.

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[25]. Alberta Code of Professional Conduct (Calgary: The Law Society of Alberta, 1994) in force as of January 1, 1995.

[26]. Ibid. at 87.

[27]. Ibid. at 99.

This Rule imposes upon the advocate in youth court a duty to convey information to a young person in such a manner that it will be understood. Correlative to this, is the duty to convey the nature of the proceedings under the Young Offenders Act to the young person. This presupposes a professional knowledge and appreciation of the nature of the proceedings and of the personal circumstances of the client. The codification of this Rule may see an increase in the reporting and perhaps the disciplining of advocates for not having the appropriate skills to communicate advice to young offenders or for failing to take instructions from their clients. This Rule brings more that just the philosophy of plain language to the practice of law. It could be cited as the mandate for, inter alia, education in the area of advocacy for youth - the largest, clearly identifiable unsophisticated client mass.[28] The form such education would take or the extent of the advocate's duty is beyond the scope of this work. The special nature of advocating for youth has been identified.[29]

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[28]. While researching this area the writer happened upon a resource published by the Canadian Foundation for Children and the Law entitled Access to Services: A Handbook for Child Advocates (Toronto: Canadian Foundation for Children and the Law, Inc., 1983.) It is 238 pages of "how to" information ranging from practical suggestions on how to interview the child client to how to access a myriad of services to guidelines for discrediting psychological assessments in cross-examination through to developing an alternative dispositional plan for clients. A similar guide could not be found for the province of Alberta even after consultation with the Children's Advocate Office in the city of Calgary. The creation of a Handbook for advocates under the Young Offenders Act would be a worthy provincial endeavour.

[29]. The writer could only find one case that expressed, by inference, the special right to counsel given to young offenders. In R. v. E.R.S. [1994] 149 A.R.285, the Alberta Court of Appeal allowed an appeal from conviction and ordered a new trial on the basis that the youth's counsel failed in his duty to the court and to his client.

The Summary of the Case reads:

Lawyers are subject to certain rules of professional conduct that circumscribe the ability to advocate. Given what is now understood about the significance of the scope of section 3 of the Young Offenders Act, it follows that "ability to advocate" depends upon comprehension of these principles enshrined in section 3 and an ability to apply them.

John L. Roche in his article entitled "Juvenile Court Dispositional Alternatives: Imposing a Duty on the Defense"[30] discussed the California juvenile court system. According to Roche there are two apparent dangers in the system: incompetent probation officers who have the responsibility of suggesting a disposition; and, defense counsel unprepared to present dispositional alternatives. Roche would have the State adopt a "...legally enforceable ethical duty on the part of defense counsel to present dispositional alternatives to the

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> A youth's original counsel withdrew from his case. The youth arranged to retain Mr. P. as counsel. An agent for Mr. P. obtained an adjournment as Mr.P. was on vacation. Mr. P. returned from his vacation just 17 days before trial. Mr. P. was denied an adjournment and was denied leave to withdraw. During the trial, Mr. P. did not cross-examine, make objections, lead any evidence or make any legal arguments. The youth was convicted and sentenced to two years' closed custody.

The Court of Appeal cautioned that this case should not be used as authority for an adult accused to ask for a new trial because of counsel's inadequacy. The Court was persuaded because the appellant was a young offender and at page 287, paragraph 10 said:

> But we are moved by a several things. First, this is a young offender, and parliament has inserted many words into the Young Offenders Act showing a presumption that a young offender particularly needs procedural protection, legal advice, and trial counsel.

[30]. (1987) 27 Santa Clara L. Rev. 279.

juvenile court."[31] By comparison, Canadian academics are only at the point of identifying the scope of the need for special skills.

Liz Mitchell, in her work entitled "The Clinical/Judicial Interface in Legal Representation for Children"[32] gives an overview of legislation affecting children, its concern with their rights with a particular emphasis on the criminal justice system. She discusses the need for lawyers representing children to be specially trained:[33]

> ...the Young Offenders Act, in its approval of alternative measures, anticipates that lawyers will be knowledgeable about treatment resources in their communities. The Act establishes a principle of "least interference with freedom", or least detrimental alternative. In order to keep this principle before the court in any realistic way, a lawyer will need to know the options and alternatives available to his client. As well, to be a good child advocate, a lawyer should know something of child development and should test his ability to communicate with children.
>
> ...
>
> I submit that the current law school curricula does not recognize these areas; rather than the case study method, I submit that children and the law should be taught with an emphasis on practical experience and inter-disciplinary discussion.

J.C. Pearson in his article, "Legal Representation Under the Young Offenders Act"[34] stated that the Charter of Rights and Freedoms insured

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31. Ibid. at 281.

32. (1984) 7 Canadian Community Law Journal 75.

33. Ibid. at 77 to 78.

34. In A.W. Leschied, P.G. Jaffe & W. Willis, eds, The Young Offenders Act: A Revolution in Canadian Juvenile Justice (Toronto: University of Toronto Press, 1991) 114 at 116.

representation generally and that the Young Offenders Act made representation more significant. The significance is that:[35]

> For the right to counsel to be truly meaningful, young persons who lack the necessary experience, education, or intelligence ought to be provided with a clear explanation of the services that a lawyer can provide.

And...

> For the legal representation to be truly satisfactory, the lawyer must possess the legal knowledge necessary to competently advise the client and the advocacy skills required to carry out his or her instructions.

Pearson clearly contemplates that the role of the advocate in youth court alters the traditional role.

To assess the expectations of the youthful client, the recommendations of the Youth Conference facilitated by the Alberta Youth in Care and Custody Network in 1988 are representative.[36]

On August 20, 1988 a "Youth Conference" was held in the City of Calgary and attended primarily by youths. One of the Conference's objectives was to:[37]

> ...provide practitioners and professionals with an excellent reminder of the importance of listening to those for whom we design and deliver programs and services. Far too often, policies and procedures are developed and implemented without any input from, or accountability

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[35]. Ibid. at 117 and 123.

30. See Youth Conference Report: Youth Advocate in '88 (Calgary: Alberta Youth in Care and Custody Network, 1988).

[37]. Ibid. at i.

to, those who are the objects of the resulting applications of textbook approaches and professional philosophizing.

Reading the Report from the Conference confirmed what the writer believed to be true, that there is often poor communication between advocate and client in youth court. If an advocate is to have skill in advocating for their client, they have to hear the client. One of the workshop issues was "Youth under the Young Offenders Act". The participants of the Conference stated their issues and concerns with the young offender system as follows:[38]

1. Youth feel there is too much abuse by police officers and feel that no one would listen to them if they were to complain.

2. Many youth feel they are not aware of their rights or responsibilities and that they are not usually explained well enough to them by people in authority.

3. Youth feel that the police do not usually inform them of their rights and that they are not interested in the interests of the youth.

4. Many youth were not aware of the fact they have the right to a lawyer free of charge and were not aware that police stations usually have a list of lawyers on call 24 hours.

5. Many youth feel that they cannot trust lawyers and are fearful that they work more with the Crown Prosecutors to make deals instead of working for and with their youth clients.

6. Many youth feel that lawyers speak down to them and use vocabulary that they don't understand. They feel that they are often pushed into saying they understand their charges and the legalities

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[38]. Ibid. at 6 to 9.

because they feel embarrassed or stupid if they have to admit they don't understand something or ask questions.

7. Youth were concerned that although the law states, "one is innocent until proven guilty", 75 percent of the youth held in custody are there on remand status. They did not understand why this is so, especially because the Young Offenders Act says custody should only be used as a last resort.

8. Youth feel that if they are let out on bail and do not breach any terms of that release, that should be taken into account by the court if and when their disposition is decided.

9. If their names are supposed to be kept private and confidential under the Young Offenders Act, then many young people want court to go back to being private hearings. They are often uncomfortable and embarrassed to have strangers in the court room. Stories of youth being pointed out and laughed at on the street were exchanged.

Advocates should be responsive to such concerns from their client group. Two noteworthy recommendations that came out of the discussion of the aforementioned issues included:

1. Pertaining to abuse by police officers, the youth decided that they should go to police headquarters to submit a report. When dealing with in-care facilities, they should go to supervisors, deputy directors, coordinators and/or directors. If they still feel they haven't gotten anywhere, they should make a report to the Ombudsman.

2. In order to assist youth in understanding and exercising their rights, the youth decided that they should write letters to lawyers and government departments and set up a youth advocacy /assistance program or service at court.[39]

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[39]. Although not a direct response to this Conference it is important to note at this juncture that in September 1994 the Law Society of Alberta passed a resolution to approve a staff pilot project for young persons. That project is

In answer to the first question and in conclusion, there is a history in Canada and in Alberta of critiques of the legal services offered to young persons in conflict with the law. The critiques generally have pointed to education including advocacy, skills training and communication. Section 3 of the Young Offenders Act is substantive law that affects criminal proceedings at every stage. Advocates who intend to practice in youth courts, to be adequate advocates, must also be educated in the area.

III. FORMAL LEGAL EDUCATION IN CANADA - A SURVEY

There are seventeen Faculties of Law in Canada. Commencing in December 1992 correspondence was forwarded to each Faculty asking the following questions:

> 1. Does the Faculty of Law offer a course which includes an examination of the Young Offenders Act?
>
> If the answer is Yes, please enclose a copy of the Course Outline/Syllabus and the name of the instructor if he/she is willing to be contacted by telephone.
>
> 2. Does the Faculty of Law offer a course on Advocacy?
>
> If the answer is Yes, please enclose a copy of the Course Outline/Syllabus and the name of the instructor if he/she is willing to be contacted by

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three years in duration and staffs seven lawyers each in Calgary and Edmonton. It also employs two "paralegals" whose job description, in part, includes advocating for community resources, liaising with parents in conflict with their children and comprising client personal histories in support of a plan for judicial interim release or disposition.

telephone.

If the answer is Yes, does the course include any reference to advocacy in youth court?

If the answer is No, does the Faculty of Law offer any course (ie. Criminal Procedure) that makes reference to advocacy in youth court. If yes, please enclose a description of the content of the instruction on advocacy in youth court and the name of the instructor if he/she is willing to be contacted by telephone.

The intent of this survey was to determine what courses, if any, were offered in Canadian legal education curriculum during the 1993/94 winter/spring sessions that included first, an examination of the law and second, an aspect of skills training in youth advocacy. The writer received responses to the initial correspondence from all Faculties.

(a) Summary of Findings:

The University of Toronto and Carleton were the only two Faculties of Law that offered courses that exclusively covered the Young Offenders Act and youth in the criminal justice system. Nine Faculties offered courses that contained some aspect of the youth justice system.[40] Six Faculties offered no relevant courses in the area.[41] All Universities except the University of Ottawa

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[40]. University of British Columbia, University of Calgary, Dalhousie University, University of Manitoba, Queen's University, University of Saskatchewan, University of Victoria, University of Western Ontario, University of Windsor.

[41]. Osgoode Hall, University of Ottawa, University of New Brunswick, McGill University, University of Alberta and L'Ecole de droit de l'Universite de Moncton. The University of Alberta had a course listed entitled "Children and the Law" which I understand had not been instructed for a number of years.

and Carleton offered courses on advocacy. The correspondence that was received explaining the advocacy course outlines, makes it apparent that none of the "advocacy" courses spent any time on youth court scenarios. The presumption appeared to be that the general skills taught would be sufficient for Youth Court as well. If "young offenders" were covered at all, it was done in the course that contained the subject as part of its outline, sometimes as a paper topic or a single mock sentencing presentation within a larger course on Sentencing such as a Course which was offered at the University of Alberta by Ms. Charalee Graydon and Mr. Jack Watson.

(b) Courses Exclusively Concerning the Young Offenders Act and the youth justice system:

A more introspective review of the courses offered was conducted to determine if "youth advocacy" or "section 3" of the Young Offenders Act were stated components.

i. Faculty of Law, University of Toronto

Carol Rogerson, Associate Dean, responded by letter. The University of Toronto offered a course entitled: "Youth and the Criminal Justice System" taught by Professor Janet Mosher. This course is cross-listed with the Faculty of Social Work. The Calendar described it as follows:

> This course will examine the relationship of children and young persons, as either perpetrators or victims of the criminal justice system. A consideration of children and young persons as perpetrators of crime will constitute the major component of the course. In this regard we will

> examine the concepts of "childhood", "adolescence" and "adulthood" and the notions of capacity and competence underlying each of them. We will consider the ways in which these concepts impact upon the extent to which our legal system holds an individual responsible, and subjects him or her to punishment, for engaging in deviant behaviour.

An Outline of the course was forwarded and, regarding the "advocacy" component of the course, the instructor delegated one class session to "The Role of the Lawyer, Exercising the Right to Counsel, The Role of the Prosecutor, The Role of the Judge." The readings for this class were one chapter from a loose collection of materials compiled by N. Bala and D. Stuart entitled Canadian Children's Law: A Sourcebook. This Chapter contained academic articles and excerpts from the 1980 Law Society of Upper Canada Sub-Committee Report discussed above. It contained no case law and the entire Outline did not disclose any discussion of section 3 of the Young Offenders Act. There was also no skills training offered.

The Faculty also offered "Children and the Law" for the first time in the spring of 1992. The Summary of this course read:

> This course will examine the competing objectives that the legal system seeks to satisfy with respect to children - on the one hand, there is a perception that children are vulnerable and in need of protection, and on the other hand, there is the view that in certain circumstances, children ought to be treated in the same manner as adults. In this regard, we will examine the following issues: the evidence of children in the civil and criminal context, child sexual and physical abuse, child pornography, the civil liability of children, young offenders, children and medical treatment, children and education, and the **legal representation of children.**(emphasis added)

No Outline was forwarded to determine the course content with regard to the "legal representation of children".

ii. Department of Law, Carleton University

The Chair of this Faculty, R.P. Saunders, responded by mail. The Department indicated that they did offer a course which examines the Young Offenders Act instructed by Mr. Peter Wright. A course Outline was enclosed. The Outline contained no mention of advocacy in youth court so a follow up letter was sent to the sessional instructor. He was asked two follow-up questions:

> 1. Do you discuss youth court advocacy in your course and, if so, can you give me a brief description of the content of your instruction;
>
> 2. Do you spend any significant amount of time discussing Section 3 of the YOA and, if so, can you give me a brief description of the content of your instruction;

J.Peter Wright responded by letters dated January 18, 1993 and February 11, 1993. He advised that he spent two to three hours discussing issues that could be called youth court advocacy. In the second letter he discussed usages for section 3 of the Young Offenders Act and his own philosophy. A substantial portion of this letter is worth repeating:

> In relation to your question touching on Section 3 of the Act there would be some discussion with respect to the criteria established under Section 3 with respect to arguing against custodial dispositions as you have mentioned but as well in other areas. For example at a show cause hearing I have on many occasions argued that in some instances different criteria should be applied to detention of young persons just as different criteria may be applicable with respect to dispositional hearings. It often happens that a major difficulty in particular with respect to children under the age of 16 is a lack of address. In addition chronic non compliance, running, misbehavior, etc. is often presented to the court in significant detail which would not usually present as something that an adult would have to contend with in those circumstances.
>
> By the same token I think it could be argued that Section 3 is a recognition of some of these circumstances and reactions of children to

argue that they should not in all instances be detained where under the same circumstances perhaps an adult would be detained.

There are as well lines of cases dealing with the "institutional assault" most recently the British Columbia court of appeal case of V. v. T. and as well some Alternative Measures cases where Section 3 has been utilized by the court.

In response to your second question it very often happens I think that most defense lawyers would find themselves in situations where the clients instructions or wishes may not be what we would perceive to be in their best interest.

As a lawyer I believe that my role is fairly straight forward and that is to represent the instructions of my client or to withdraw from the case. At the same time I will attempt to in presenting options to my client direct them towards a conclusion that may at the same time be in their best interest and not inconsistent with their legal rights.

For example it may well be that a client charged with being in possession of a motor vehicle has an absolute defence to that charge by virtue of simply being a passenger. I think that it would be totally unprofessional (or worse) for a lawyer to plead a client guilty under such circumstances to obtain a result which would be in the best interest of the client according to the perception and values of the lawyer.

This does not mean however that the lawyer is not prevented from making suggestions, trying to arrange interviews for the client for drug alcohol assessment, counselling or reintegration in school. In answer to the first issue therefore I would take my instructions from the client but at the same time would feel that I was not outside of my role to attempt to assist them with respect to other problematic areas. All in all the more stable the situation which the client is able to achieve the less likely that the court would want to disrupt or interfere with such a situation.

It seems plain from Mr. Wright's comments that his skills as an advocate are the practical reflection of the case law examined in Chapter 3. This notwithstanding, the writer could only identify three hours of advocacy training in the two courses exclusively addressing the Young Offenders Act.

(c) Courses Containing Some Aspects of the Youth Justice System:

A more introspective review of the courses offered was made to assess the content of what was taught.

i. University of British Columbia, Faculty of Law:

The Associate Dean, Robert D. Diebolt responded by letter. He advised that they offer a course that does include an examination of the Young Offenders Act called "Children and the Law". A syllabus was not sent so a follow-up letter was sent to the instructor, Professor Don MacDougall. Professor MacDougall responded by letter dated February 11, 1993 and advised that in "Children and the Law" ten of the thirty-six class hours are spent on the Young Offenders Act. Regarding advocacy in youth court, he advised as follows:

> This has been largely 'squeezed out'. There is so much technical law in the Young Offenders Act that advocacy is only discussed peripherally. (I used to do more under the Juvenile Delinquents Act). My major objective is to ensure students are professionally competent on the Young Offenders Act.

Regarding section 3 his brief remarks were:

> This is discussed extensively - both in the introduction to the Y.O.A. and in relation to topic (e.g. sentencing) where it is important.

ii. University of Calgary, Faculty of Law:

Mr. H.Ian Rounthwaite corresponded by letter. He advised that they offer two courses that cover the Young Offenders Act: Law 611 - "Children and the Law" taught by Professor Diane Pask and Law 601- "Advanced Criminal Law" taught by Professor Pat Knoll. He did not directly answer the questions in

the original correspondence but simply passed my letter on to those instructors. In a course entitled Law 684, Family Law Practicum I taught by Professor Pask, students may have to represent a youth in youth court. The Calendar description for this course reads, in part:

> [c]linical seminars and experience advising and, where required, representing clients in the Family and Youth Division of the Provincial Court and before appropriate tribunals.

On December 3, 1992 the writer briefly visited with Professor Pask. Her response to the initial correspondence was as follows:

> Students in Law 684 the Family Law Practicum spend 8 hours with members of the Young Offenders Bar observing young offenders matters including client interviews before court and the court proceedings.
>
> In Law 611, Children and the Law, some seminar time is devoted to Young Offenders. The amount of time varies. I enclose a copy of the Table of Contents to the Young Offenders materials but note that last year I was only able to allocate 3 hours to a discussion of current issues in the area. This was done together with Criminal Justice Practicum students and involved presentations by Crown, defence and a judge.
>
> The students are directly supervised by experienced lawyers in their clinical work. However, as most young persons obtain legal aid there is little opportunity for our students to actually undertake young offenders cases.

On December 4, 1992 the writer discussed with Professor Pask the Family Law Practicum Course Outline that she provided. Three questions were asked:

> 1. What did she mean when she referred to advocacy in her outline.
>
> Answer: it concerns both courtroom and tribunal advocacy; both oral and written. It includes instruction on both technique and format. In class it is mainly Chambers advocacy so technique would be restricted to that format. The students are placed with the young offender bar for 1 day where they watch and observe.

2. On page two of the Outline is a reference to an oral class presentation of a problem. Is this problem ever a young offender matter?

Answer: No.

3. In the "Children and the Law" class is there a discussion of advocacy in youth court?

Answer: they usually invite a panel composed of a judge, prosecutor and defense counsel to discuss their roles and current issues. The issues vary from year to year and the amount of time they spend on the area changes from year to year as well. Professor Pask did mention that they have had Judge Cooke-Stanhope speak and that she has talked about advocacy in youth court in terms of the quality of representation and approach taken.

iii.Dalhousie University, Dalhousie Law School:

The Associate Dean, Susan Ashley, responded by letter. Dean Ashley advised although there was no course which dealt exclusively with the Young Offenders Act, the subject was discussed to some extent in the "Clinical Law" course and is mentioned in "Children and the Law". A further request for information was sent to Dean Ashley and she forwarded my letter to Judge Williams the instructor for "Children and the Law". Judge R. James Williams responded by letter and advised that:

1. Youth court advocacy is discussed in the course, both in the context of the Young Offenders Act and the interaction of the Young Offenders Act and other areas of law affecting children, especially the Children and Family Services Act (Nova Scotia's child welfare legislation). The course is a course made up of classroom lecture and mooting. It is a major paper course and each student is required to complete a major research paper dealing with children and the law. The course varies somewhat from year to year in terms of its content. In terms of youth court advocacy, it includes exercises and lectures concerning alternate dispute resolution, social and psychological literature concerning

children and youth, literature concerning children's language competency and communication and language abilities and the Young Offenders Act, particularly disposition alternatives available under the Young Offenders Act. In addition to the disposition alternatives available under the Young Offenders Act, specific portions of the Young Offenders Act covered in class include transfers under s. 16 of the Young Offenders Act from the youth court to adult court, the admissibility of statements under s. 56 of the Young Offenders Act and alternate dispute resolution.

2. Section 3 of the Young Offenders Act is discussed in the context of the comparison of the Young Offenders Act to the Juvenile Delinquents Act and in the context of the impact of s.3 upon judicial proceedings, particularly in the context of dispositions. One part of the class dealing with dispositions involves students in an exercise where they are provided with pre-disposition reports and individually make decisions with respect to disposition and this is then discussed in the context of how they as "judges" would rationalize their decision, particularly in the context of s.3.

Although it is not clear the percentage of class time this information takes, this course appeared to be the most comprehensive regarding the issues of advocacy and section 3. These comments also are the only ones that make reference to the application of alternative dispute resolution techniques in the youth court forum.

In February, 1993, Prof. D. Evans, who teaches Clinical Law, responded by telephone. Mr. Evans advised that the course is centered around a Legal Aid Clinic and accounts for thirteen of the twenty-nine credits required by students in one year. He advised that about one-quarter of the students take this course which is not mandatory. Students are directly responsible for clients and twenty to twenty-five percent of the case load are young offender clients. The skills they learn include interviewing, client counselling, trial skills, negotiating and

presenting Pre-disposition Reports. The location for this course is physically off campus. They operate on a $450,000.00 budget, two-thirds of which is paid by the University. Three faculty members work full time there. The course also requires the completion of a mandatory term paper. This represented, from the information given, the most comprehensive skills course in the country but "Children and the Law" is not a prerequisite.

iv. University of Manitoba, Faculty of Law:

Cameron Harvey, Professor and Associate Dean responded by letter and advised that the Faculty offered "Children and the Law" taught by Professor Anne McGillivray. Correspondence was sent to Professor McGillivray and an extensive Readings List was provided. Section III of this List is entitled: RIGHTS OF THE YOUNG OFFENDER and include two subsections: A. DEFINING DELINQUENCY and B. THE YOUNG OFFENDERS ACT. The elaboration of subsection B reveals two questions:

> Consider the YOA from the viewpoints of its drafters and its critics. What is the underlying philosophy of the Act and what does this say about changes (or lack of change) in state attitude toward juveniles and juvenile crime?"
>
> Results of the YOA are mixed, as reflected in Corrado and Markwart's study out of B.C. Does their conclusion accord with the public's impression of juvenile crime and state response? What are the problems with the Act?

Anne McGillivray responded by letter and she advised that the Young Offenders section of her "Children and the Law" course is three hours long. In response to the question whether youth court advocacy was discussed in her course she

stated that:

> It is preceded by seminars on children's rights theory and configuration. Each year I invite different guests from the Manitoba Bench and Bar to highlight young offender advocacy issues. This year, the guests were a youth court prosecutor and a former 'youth cop' who later worked on alternative measures programs. He is a strong advocate of youth rights. Guests in prior years have included youth court judges, prosecutors and defence counsel.

In response to my question whether any significant time was spent discussing section 3 of the Young Offenders Act, she advised that:

> Section 3 is of course key to the Act's application and surrounding debates. It relates back to the JDA and is a good starting point for a historical overview and for critical commentary on judicial goals and recent legislative reforms. It encapsulates the uncertainty of the legal and social (or psychological or ethical development) status of adolescent children.

v. Queen's University, Faculty of Law:

Professor Sheila Noonan responded by letter and advised that one half of the "Children's Law" class is spent dealing with youth court issues and she sent a Table of Contents prepared by herself and Professor Nick Bala. The Table of Contents reveals extensive materials including the following topics: "The Juvenile Court Hearing", "Transfer Proceedings", "Disposition of the Young Offender" and "The Role of the Defence Lawyer". Further correspondence was sent to Ms. Noonan and no reply was received. However, with Professor Nick Bala serving as one of the instructors, it is hard to imagine a less than

comprehensive treatment of the issues. However, there was no advocacy skills component.

vi. University of Saskatchewan, College of Law:

Professor Douglas A. Schmeiser responded by letter and advised that the Faculty offered a course entitled "Children and the Law" taught by Ron Fritz. Further correspondence was sent to Mr. Fritz. He responded saying that the course would be offered in the second term of the 1992/1993 year for the first time. It was an optional course limited to upper year students. It was a seminar course and is evaluated by a research paper. Therefore:

> ...the extent to which we will be dealing with young offenders will largely be dependent on the papers that the students opt to do on that area.

Mr. Fritz did enclose a copy of suggested research topics. None are specifically directed towards the skill of advocacy in youth court. Three of the twenty-two topics may touch on section 3 of the Act: "18. Delinquency and the age of legal responsibility"; "19. Transfer of young offenders to adult court"; "20. Diversion of young offenders away from the court process".

vii.University of Victoria, Faculty of Law:

Associate Dean Donald G. Casswell responded by letter and advised he believed that youth court is dealt with in their "Children and the Law" course

but did not provide me with a syllabus. He did provide names of instructors to be contacted and further correspondence was sent to Judge J. Michael Hubbard and Ms. Monna Huscroft.

Ms. Huscroft responded by letter. First she advised that the Young Offender portion of the course is taught by Judge Hubbard but provided a Table of Contents for the course. Ms. Huscroft also stated that:

> Judge Hubbard arranges with the local police forces for the students to do evening ride alongs with the youth officers on patrol. Each seminar Judge Hubbard has had the students conduct a mock trial of a YOA matter. He provides the facts and court documents and assigns counsel roles. The YOA portion of the seminar is addressed in the first third of the course.

As far as sensitizing students to the concerns of youth, I note that the students have heard from:

> Speakers who work with young people either through Ministry of Social Services programs or non government agencies that serve youth, as well as lawyers who have acted for children in civil matters participate in seminar discussions. Last year I had the manager of a residential program which assists young mothers in the months preceding the birth to a maximum of 6 months after the birth. Social Workers and leading Crown and private counsel have presented their perspectives on issues in adoption and protection matters. We seek to identify legal issues in the delivery of services and in the recognition of the rights and capacities of youth.

The Table of Contents for the Course contained the following headings:

A. Children in Conflict with the Law

B. Children's Rights (Includes a discussion on the Convention on the Rights of the Child)

C. Children and their Families - on Parents' Separation

D. Children and Parents - Protection by the State

E. Children and Society - Civil Law

F. Children in Court

Judge Hubbard responded and enclosed two interesting attachments, a paper entitled "A Short Guide to Youth Court" which he had prepared for a Judges' Seminar and a paper prepared for his course last year by Simon Knott entitled "Are There Adequate Facilities for Female Young Offenders in Victoria? ..... And Other Related Issues." In his letter he advised that:

> With regard to Youth Court advocacy, I have in the past, had members of both the Crown Office and the Defence Bar attend for one of the classes and discuss the special problems of advocacy in Youth Court. This year I am doing the same and have asked Crown Counsel to deal with the workings of the Crown office, diversion, and the particular problems created by the Young Offenders Act with regard to the Admissibility of Statements made under Section 56. Defence Counsel, in their description of their role, generally tell the students that despite the due process format of the Act, they usually have a somewhat paternalistic attitude towards the offender when it comes to making decisions on how to plead, and have at least some regard to the best interests of the offender from a wider perspective than a purely legalistic one. As Ms. Huscroft had advised you, I frequently have a mock trial as part of the course and have done both a Section 16 Transfer Hearing and a trial involving the Admissibility of Statements. I have, however, found as a result of student questionnaires completed at the end of the course, that at least last year, the students found this trial to be very demanding and stressful with regard to the counsel roles as some of the students had not completed advocacy courses. I have, accordingly, this year decided not to include a mock trial unless I find that there is a unanimous desire to have such a trial.
>
> With regard to section 3 of the Young Offenders Act, I review all the provisions of it with the students but probably spend no more than 20 minutes on it as we only have a total of 6 hours to deal with the whole subject.

viii.University of Western Ontario, Faculty of Law:

S.J. Usprich, Associate Dean (Academic) responded by letter. He advised that they have a course entitled "Children's Law" that is taught by Professor J.G. McLeod. Further correspondence was sent to Mr. McLeod but he failed to respond.

vix.University of Windsor, Faculty of Law:

Associate Dean Donna Marie Eansor responded by letter and advised their Faculty offered a course entitled "Children and the Law" which included an examination of the Young Offenders Act. This course is taught by Professor Larry Wilson. Further correspondence was sent to Professor Wilson. "Children and the Law" was described as follows:

> The course will examine the criminal responsibility of young persons. Topics will include the historical evolution of juvenile justice in Canada, causes and control of delinquent behaviour, alternative measures and other forms of diversion, arrest and detention, the admissibility of statements, jurisdiction of the youth court, trial in youth court, transfer to adult court and disposition of the young offender. The focal point of the course will be the Young Offenders Act." Resource material includes Children's Law: 1992 Edition by N. Bala and S. Noonan; Young Offenders Law in Canada by P. Platt and Young Offenders Service, a loose leaf service from Butterworths which annotates the Act.

Professor Wilson responded by letter. In "Children and the Law" they discuss and analyze the Young Offenders Act but do not undertake an examination of lawyering skill or techniques. However he did mention that

Professor Bill Wardell teaches a course on young offenders at the University of Saskatchewan. This was not mentioned in the response from the U of S so I assumed that this course was no longer offered.

(d) Other:

1. At the University of Alberta the Faculty Calendar included reference to Law 586 : "Children and the Law". This course is described in the 1992/1993 calendar as:

> This course will offer a critical examination of the current legislative regime and policy underlying the legal treatment of children in Canadian Society. A review of case law and legislation relating to areas such as neglect, guardianship, custody, adoption, young offenders and legal capacity will be undertaken to better understand the policy and law forming a distinct legal regime for children.

As previously mentioned, this course had not been offered for a number of years at the time of the survey.

2. At the Faculty of Law, McGill University Associate Dean David Stevens advised that the University did not offer a course which included an examination of the Young Offenders Act. However, the School of Social Work did offer a course that does take up issues related to the Young Offenders Act that law students frequently take.

3. From the University of Ottawa, Common Law Section the writer received a response back from an unknown sender. The sender had simply scribbled "no" beside the questions on our original letter but wrote the name and

telephone number of the instructor for an advocacy course. Further correspondence was sent but no reply received.

In summation, no one course combined a survey of the law with the testing of advocacy skills other than on a cursory basis. Judge Hubbard's comment that the youth mock trial was abandoned because of the stress and demand on students that had not taken an "advocacy" course is most telling. Would his students be any less stressed if required to appear in youth court with no training in advocacy? Many instructors make use of practitioners in the area to provide a sense of effective methods of advocacy. However, hearing a guest speaker talk about how they practice cannot replace the intellectualization of "judgement" based on a background of both substantive law and skills training. In the writer's opinion, the best course of study would include the following components:

1. an expansive study of the Young Offenders Act and other relevant federal and provincial legislation that affects young persons in conflict with the law. This would include a thorough review of youth court criminal procedure and local administrative practices by youth court personnel;

2. an interdisciplinary study into the social and moral development of children, theories of deviance and local law enforcement practices;

3. a study of judicial interpretation of the Young Offenders Act at both

the adjudicative and dispositional stages with special attention given to the philosophy of the Act as stated in section 3;

4. skills training in mock adversarial situations and, if available and where appropriate, actual practicum training in youth court.

The writer acknowledges that the offering of such a course is dependent upon demand and the flexibility (or rigidity) of law school curriculum. However, at minimum, the subject of youth in conflict with the law should form a meaningful part of each course that covers criminal law, criminal procedure, professional responsibility or advocacy.

CHAPTER 5 CONCLUSION

The Young Offenders Act was proclaimed in 1984 after decades of debate and Royal Commission Reports. Its purpose was to entrench, into the youth justice system, the concept of due process. To do so was to create a specialized criminal forum for young persons in conflict with the law. However, it cannot be called a truly procedural enactment. Section 3 of the Act has insured that qualities of adolescent behaviour and child welfare protection concerns form part of the adjudicative and dispositional function of Youth Court. Section 3 carries the force of substantive law, yet, the scope of its remedies has not been fully developed or engaged.

The preceding examination of the evolution of the youth justice system has demonstrated that the advocate in Youth Court has an ethical obligation to consider and apply section 3 of the Young Offenders Act. However, a survey of the formal legal education that has been offered at Canadian law schools leads to the conclusion that it is an overlooked and underexplored area of criminal law. Therefore, it is conceiveable that the inherent philosophy and guiding priniciples of the Act are ignored by its advocates. The writer's interest in this thesis topic grew from the observation that the prinicples of criminal law apply differently to young people. The writer has reached the conclusion that "adolescence" is not only a stage of human development but also a legal term of art. The distinction between adolescent behaviour and actions deserving of criminal sanction in Youth Court is often too subtle or too overshadowed by child welfare concerns to be readily discernible. Advocates who apply the

principles enumerated in section 3 of the Young Offenders Act will have better skills to recognize the distinction and insure adherence to due process in the Youth Court forum.

TABLE OF STATUTES AND BILLS

An Act for establishing Prisons for Young Offenders -for the better government of Public Assylums, Hospitals and Prisons, and for the better construction of Common Goals. Statutes of the Province of Canada, 2nd Session, Fifth Parliament of Canada, 1857, c. 28.

An Act for the more speedy trial and punishment of juvenile offenders. Statutes of the Province of Canada, 2nd Session, Fifth Parliament of Canada, 1857, c. 29.

An Act respecting Arrest, Trial and Imprisonment of Youthful Offenders. S.C. 1894, c. 58.

Bill C - 37, An Act to amend the Young Offenders Act and the Criminal Code, 1st. Sess., 35th Parl., 1994.

Bill C - 192, An Act Respecting Young Offenders and to Repeal the Juvenile Delinquents Act, 3rd Sess., 28th Parl., 1970.

Bill C - 354, An Act to amend the Young Offenders Act , 3rd Sess., 34th Parl., 1991-1992.

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Children's Protection Act S.A. 1909, c. 12.

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Interpretation Act R.S.C. 1985, c.I-21.

Juvenile Courts Act S.A. 1913(2), c. 14.

Juvenile Court Act S.A. 1952, c. 42.

Juvenile Delinquents Act S.C. 1908, c. 40.

Juvenile Offenders Act S.A. 1945, c. 13.

Part 1 of the Constitution Act, 1982, as enacted by the Canada Act, 1982, 1982 (U.K.), C.11.

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Young Offenders Act R.S.A. 1980, c. Y - 1 as amended.

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R. v. S.J.B., [1985] W.D.F.L. 837. (Man. Prov. Ct. Fam. Div.), Y.O.S 85-038.

R. v. P.B. (No. 1) (1 September 1988), (Ct. Que. Yth. Div.), Y.O.S. 89-083.

R. v. P.B. (No. 2) (9 September 1988), (Ct. Que. Yth. Div.), Y.O.S. 89-084.

R. v. R.B. (1988), 92 A.R. 383 (Alta. Prov. Ct.).

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R. v. B.R.C. (25 September 1984), (Alta. Prov. Ct. Yth. Div.).

R. v. Creighton (1993), 89 C.C.C. (3d) 346 (S.C.C.).

R. v. R.D. (1985), 18 C.C.C. (3d) 36 (Alta. Prov. Ct. Yth. Div.).

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R. v. Gosset (1993), 83 C.C.C. (3d) 494 (S.C.C.).

R. v. Brian H., [1987] 2 W.C.B. (2d) 426, Y.O.S. 87-112 (Ont. Prov. Ct.).

R. v. S.R.H. et al. (1990), 56 C.C.C.(3d) 46 (Ont. C.A.).

R. v. H.(S.R.), L.(D.B.) and F.(A.G.) (22 September 1994), Edmonton 40535080Y & 40511362Y (Alta. Prov. Ct. Yth. Div.).

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