

"Source: *The Young Offenders Act Annotated*, by Nicholas BALA and Heino Lilles, published by R. De Boo in cooperation with the Solicitor General of Canada and the Canadian Government Publishing Centre, Supply and Services Canada, c1984, xxxi, 453 p. Reproduced with the permission of the Minister of Public Works and Government Services Canada, 2011; special thanks to Public Safety Canada for its participation in this copyright matter."

**THE
YOUNG
OFFENDERS
ACT
ANNOTATED**

**THE
YOUNG
OFFENDERS
ACT
ANNOTATED**

by

Nicholas Bala and Heino Lilles
*Faculty of Law, Queen's University
Kingston, Ontario*

Published by

Richard De Boo Publishers in cooperation with
The Solicitor General Canada and the
Canadian Government Publishing Centre,
Supply and Services Canada.

© Minister of Supply and Services Canada — 1984
Catalogue number: JS42-19/1984E

These materials were submitted in November, 1982, in fulfillment of a contract between the Ministry of the Solicitor General of Canada and the authors. Published by the Policy Branch, under the authority of the Hon. Bob Kaplan, P.C., M.P., Solicitor General of Canada, and produced by the Communication Division, Solicitor General Canada. The views expressed in this report do not necessarily reflect the views or policies of the Solicitor General of Canada.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher.

Published and distributed by



**Richard
De Boo
Publishers**

81 Curlew Drive
Don Mills, Ontario
M3A 3P7
(416) 445-4940

Canadian Cataloguing in Publication Data

Bala, Nicholas C.

The Young Offenders Act Annotated

Includes index.

ISBN 0-88820-184-2

1. Canada. Young Offenders Act. 2. Children — Legal status, laws, etc. — Canada.
3. Juvenile delinquency — Canada. I. Lilles, Heino. II. Canada. Young Offenders Act.
III. Title.

KE9445.A315B34 1984 345.71'03 C84-098882-6

FOREWORD

Passage of the *Young Offenders Act* marked the end of a critical phase in the lengthy process of reform of the Canadian Juvenile Justice System. The next phase, however, involving as it does the application of the law, is no less critical. Although I am of the view that the *Young Offenders Act* is basically sound and realistic legislation, it cannot in itself realize the goals of reform for, like any other system of law, it is highly dependent for its success on those who administer it. Thus, the roles to be played by the judges, police, prosecutors, defence counsel, law enforcement officers, court clerks, probation officers and other correctional and social service personnel, in implementing the Act, are vital. I am confident that they will meet this challenge with commitment and resolve.

I would like to express my sincere appreciation to the authors of *The Young Offenders Act Annotated*, Professor Nicholas Bala and Professor Heino Lilles, for their untiring efforts in its realization. The high calibre of this work is a reflection of their dedication and expertise. I expect that this manual will be an invaluable tool for those who will be entrusted with the responsibility of applying this new law. In making the manual available, it is hoped that my Ministry will further contribute to the smooth and uniform implementation of the *Young Offenders Act* throughout Canada.

Bob Kaplan, P.C., M.P.
Solicitor General of Canada

PREFACE

The *Young Offenders Act* is innovative legislation which will create a new way of dealing with young persons who violate the criminal law in Canada. The basic principles and philosophies, the procedures, the rights and responsibilities are all markedly changed from those now in effect under the *Juvenile Delinquents Act*. The *Young Offenders Act* is an important piece of legislation; it will mark the beginning of a new era of juvenile justice in this country.

The Y.O.A. is a complex piece of legislation and these materials are intended to serve as a guide for those who will be implementing and interpreting the Act. Each section of the Act is set out and then followed by a commentary. The discussion explains the meaning of each section and its significance in relation to other sections of the Act, provisions of the *Criminal Code* and other legislation; where appropriate, the implications of the common law and the *Canadian Charter of Rights and Freedoms* are also explained. These materials do not attempt to take a critical policy perspective but rather, provide an explanation of the policy rationale for the enactment of the provisions of the Y.O.A. In addition, the novel features of the Act are contrasted to the law and practice under the *Juvenile Delinquents Act*.

The *Young Offenders Act Annotated* is written for an experienced professional audience: judges, Crown attorneys, defence counsel, court clerks, probation officers and other correctional and social service personnel. This is not an introductory text. It is assumed that readers are familiar with the fundamental principles of the Canadian criminal justice system and will, for example, have ready access to a copy of the *Criminal Code*.

It is possible to read this volume from beginning to end. It is also intended that readers should be able to use this as a reference work and refer to the discussion of a single section of the Act, recognizing that many of the provisions of the Y.O.A. are interrelated. For the legal researcher, this volume may serve as a useful tool; there are many references to existing jurisprudence and such secondary sources as articles and textbooks. It is not intended, however, that this volume should serve as a comprehensive research text.

As these materials were completed in November 1982 and deal with legislation which was not yet proclaimed in force, they inevitably have a speculative quality. An attempt has been made to provide some certainty and guidance for those who must interpret and implement the Act. It is, however ultimately they who must decide what the Act means and how its provisions are to be put into effect. The approaches taken with respect to a number of issues were significantly influenced by our discussions with Judge J.R. Omer Archambault, Director of Policy (Young Offenders), Policy Branch, Ministry of the Solicitor General, but it must be stressed that the views expressed herein do not necessarily reflect the views or policies of the Solicitor General of Canada.

For ease of exposition, the general practice of using masculine pronouns and adjectives in situations where the person referred to may be male or female has been adopted. It goes without saying that judges, lawyers, probation officers, young persons and others come in both sexes.

Nicholas Bala
Heino Lilles
of the Faculty of Law
Queen's University

ACKNOWLEDGEMENTS

These materials could not have been prepared without the efforts of our research assistants: Janet Drysdale, a recent graduate of the Faculty of Law at Queen's University, and two third-year law students at Queen's, Vincent Westwick and Tom Brigham. We thank them for their diligence, intelligence and enthusiasm.

We thank the secretaries and staff at the Faculty of Law at Queen's University, and in particular Tricia McIlveen who, with grace and good humour, did the bulk of typing of the numerous drafts of these materials. We also thank Angela Mangiacasale for her painstaking work as a proofreader, and John Scheulderman for his assistance with the index.

We also express our gratitude to Judge J.R. Omer Archambault, Judge Frederick W. Coward, Mary-Anne Kirvan, Maureen Shea-DesRosiers and the staff of the Young Offenders Policy Division of the Ministry of the Solicitor General of Canada for their assistance, advice, support and patience.

The Faculty of Law at Queen's University provided us with a place to work and materials to work with, and for this we are grateful. A number of colleagues made helpful suggestions, in particular Professor Allan Manson was of great assistance.

Finally, we must thank our families, and especially our wives, Martha and Sheila. They provided the support and advice we have come to expect, but always continue to appreciate.

Nicholas Bala
Heino Lilles

TABLE OF CONTENTS

Foreword	iii
Preface	v
Acknowledgements	vii
Table of Forms	xxv
Table of Cases	xxvii

SHORT TITLE: SECTION 1

Introduction	1
Title: section 1	1

INTERPRETATION: SECTION 2

Introduction	2
Section 2	2
"Adult"	4
"Alternative measures"	6
"Child"	6
"Offence"	9
"Parent"	10
"Provincial director"	10
"Young person"	11

DECLARATION OF PRINCIPLE: SECTION 3

Introduction	13
Section 3	14
Responsibility, accountability, and the protection of society: paragraphs 3(1)(a) and (b)	15
Special needs: paragraph 3(1)(c)	16
Alternative measures: paragraph 3(1)(d)	17
Rights of young persons: paragraph 3(1)(e)	18
Right to the least possible interference: paragraph 3(1)(f)	19
Right to be informed: paragraph 3(1)(g)	19
Parental responsibility: paragraph 3(1)(h)	19

ALTERNATIVE MEASURES: SECTION 4

Introduction	21
Section 4	23
When alternative measures may be used: subsection 4(1)	25

Authorized programs: paragraph 4(1)(a)	25
“Needs of young person and interests of society”: paragraph 4(1)(b)	25
Consent of the young person: paragraph 4(1)(c)	26
Right to counsel: paragraph 4(1)(d)	27
Acknowledging responsibility: paragraph 4(1)(e)	27
Sufficient evidence: paragraph 4(1)(f)	28
Barred at law: paragraph 4(1)(g)	28
Consequences of breach of paragraphs 4(1)(c) to (g)	29
Restrictions on use of alternative measures: subsection 4(2)	29
Admissions not to be received in evidence: subsection 4(3)	30
Further proceedings: paragraph 4(4)(a)	31
Further proceedings: paragraph 4(4)(b)	31
Double jeopardy	32
Private prosecutions: subsection 4(5)	32

JURISDICTION: SECTIONS 5 AND 6

Introduction	34
Section 5	34
Youth court: subsection 5(1)	35
“Exclusive jurisdiction” of youth court: subsection 5(1) .	35
Exceptions to youth court jurisdiction: subsection 5(1) . .	36
“While he was a young person”: subsections 5(1) and (3) .	37
Period of limitation: subsection 5(2)	38
Powers of youth court judge: subsection 5(4)	38
“Court of record”: subsection 5(5)	39
Proceedings before a justice: section 6	39
Section 6	39

DETENTION PRIOR TO DISPOSITION: SECTIONS 7 AND 8

Introduction	41
Section 7	42
Arrest	44
Judicial interim release	46
“Place of temporary detention”: subsections 7(1) and (3) .	48
“Temporary restraint”: subsection 7(2)	49
Detention with adults: subsection 7(3)	50
Placement with a “responsible person”: subsection 7(4) .	51

Additional authorization for detention: subsection 7(5) ..	52
Transfer by provincial director: subsection 7(6)	52
Offence: subsection 7(7)	52
Section 8	53
Orders respecting detention or release: section 8	54
Review of youth court orders: subsections 8(6) and (7) ..	55
Offences referred to in section 457.7 of the Criminal Code: subsections 8(8) and (9)	55

NOTICES TO PARENTS: SECTIONS 9 AND 10

Introduction	56
Notice to parents: section 9	56
Section 9	56
A "parent": section 9	58
Notice where young person in custody: subsection 9(1) .	59
Notice where young person not in custody: subsection 9(2)	60
Whereabouts of parent unknown: subsection 9(3)	60
Where young person is married: subsection 9(4)	61
Notice on direction of the youth court: subsection 9(5) .	61
Contents of notice: subsection	62
Service of notice: subsection 9(7)	62
Effect on validity of proceedings: subsections 9(8) and (9)	62
Proof of service	63
Court order regarding notice: subsection 9(10)	64
Form of notices: subsection 9(11)	65
Sample Form 1: Notice to Parent	65
Sample Form 2: Notice to Relative or Friend	67
Attendance of parent: section 10	68
Section 10	68
Order requiring attendance of parent: subsection 10(1) ..	68
Form and service of order: subsection 10(2)	69
Failure to attend: subsection 10(3)	69
Appeal from contempt conviction: subsection 10(4)	70
Warrant may issue for failure to attend: subsection 10(5)	70
Form of warrant: subsection 10(6)	70
Sample Form 3: Order for Attendance of Parent	71
Sample Form 4: Warrant to Compel Attendance of Parent	72

RIGHT TO COUNSEL: SECTION 11

Introduction	73
Section 11	75

Right to retain counsel: subsection 11(1)	77
Role of counsel in youth court	78
Counsel upon arrest or detention: subsection 11(2) ...	80
Advice of right to counsel: subsection 11(3)	82
“Represented by counsel”: subsections 11(2), (3) and (4)	84
Appointment of counsel: subsections 11(4) and (5) ...	86
Direction by justice: subsection 11(6)	87
Assistance by an adult: subsection 11(7)	88
Counsel independent of parents: subsection 11(8)	89
Statement of right to counsel: subsection 11(9)	90
Consequences of failure to comply with section 11	91

APPEARANCE: SECTION 12

Introduction	92
Section 12	92
First appearance: subsections 12(1) and (2)	93
Plea by young person: subsections 12(3) and (4)	94
Judicial inquiry and explanation concerning plea: subsection 12(3)	95
Where young person does not understand: subsection 12(4)	97

MEDICAL AND PSYCHOLOGICAL REPORTS: SECTION 13

Introduction	99
Section 13	100
Medical or psychological report: subsections 13(1) and (11)	102
Fitness to stand trial: subsections 13(2),(7) and (8) ...	104
Custody for examination: subsection 13(3)	109
Disclosure of the report: subsections 13(4) and (6) ...	111
Cross-examination: subsection 13(5)	117
Part of the record: subsection 13(9)	120
Disclosure by a qualified person: subsection 13(10) ...	121
Form of order: subsection 13(2)	121
Sample Form 5: Order for Examination and Report ...	122

PRE-DISPOSITION REPORT: SECTION 14

Introduction	124
Section 14	125

Ordering a pre-disposition report: subsection 14(1).....	128
Contents of report: subsection 14(2).....	129
Oral report: subsection 14(3)	133
Report part of record: subsection 14(4).....	133
Provision of copies of pre-disposition report:	
subsection 14(5).....	134
Cross-examination: subsection 14(6)	134
Withholding of report from private prosecutor:	
subsection 14(7).....	135
Court disclosure of report to other persons:	
subsection 14(8).....	136
Disclosure by provincial director: subsection 14(9)	138
Inadmissibility of statements: subsection 14(10)	138

DISQUALIFICATION OF JUDGE: SECTION 15

Introduction.....	140
Section 15	140
Disqualification of judge: subsection 15(1).....	140
Exception to disqualification: subsection 15(2)	142

TRANSFER TO ORDINARY COURT: SECTIONS 16 AND 17

Introduction.....	144
Section 16	146
Time of application: subsection 16(1).....	148
Age of young person: subsection 16(1).....	148
Types of offence: subsection 16(1)	148
Who may apply?: subsection 16(1)	149
"Opportunity to be heard": subsection 16(1).....	149
The transfer decision: subsection 16(1).....	150
Effect of transfer: subsection 16(1)	151
Considerations by youth court: subsection 16(2)	152
Seriousness and circumstances of alleged offence:	
paragraph 16(2)(a).....	152
"Age, maturity, character ... background ... and record: paragraph 16(2)(b).....	152
Adequacy of legislative provisions: paragraph 16(2)(c) .	153
Availability of treatment or correctional resources:	
paragraph 16(2)(d).....	154
Other factors: paragraph 16(2)(f).....	154
Pre-disposition reports: subsection 16(3)	155
Dispensing with hearing: subsection 16(4)	155

Reasons: subsection 16(5)	156
No further application: subsection 16(6)	156
Effect of an order: subsections 16(7) and (8).....	156
Review of transfer order: subsections 16(9) to (13) ...	157
Notice of application: subsection 16(13).....	158
Form of transfer order: subsection 16(14).....	159
Sample Form 6: Order of Transfer to Ordinary Court.	159
Restrictions on publicity at transfer hearing: section 17	160
Section 17	160
Publicity ban: subsection 17(1).....	160
“Published or broadcast”: subsections 17(1) and 17(3)	161
Offence: subsection 17(2).....	161
Proceedings in ordinary court after transfer: sections 73 and 74	162
TRANSFER OF JURISDICTION: SECTION 18	
Introduction	163
Section 18	163
Transfer of jurisdiction: subsection 18(1).....	164
Transitional transfer provisions: subsections 18(2) and (3)	165
ADJUDICATION: SECTION 19	
Introduction	167
Section 19	167
Where young person pleads guilty: subsections 19(1) and (2)	168
Where young person pleads not guilty: subsection 19(2)	170
DISPOSITIONS: SECTIONS 20 TO 26	
Introduction	172
Section 20	173
Section 21	176
Section 22	177
Dispositional hearing: subsection 20(1)	178
Absolute discharge: paragraph 20(1)(a)	180
Fine: paragraph 20(1)(b) and subsections 21(1) to (3) ..	181
Compensation: paragraph 20(1)(c) and subsections 21(1), (4) and (5).....	182
Restitution: paragraph 20(1)(d) and subsections 21(4) and (5)	183
Compensation of innocent purchaser: paragraph 20(1)(e) and subsections 21(1), (4) and (5)	184

Personal services: paragraph 20(1)(f) and subsections 21(4) to (8)	184
Community service order: paragraph 20(1)(g) and subsections 21(7) to (9)	185
Prohibition: paragraph 20(1)(h)	186
Detention for treatment: paragraph 20(1)(i) and section 22	187
Probation: paragraph 20(1)(j)	188
Custody: paragraph 20(1)(k)	188
Other reasonable conditions: paragraph 20(1)(l)	188
Disposition coming into force: subsection 20(2)	189
Duration of disposition: subsections 20(3) and (4)	189
Disposition continues when adult: subsection 20(5)	191
Reasons for the disposition: subsection 20(6)	191
Limitation on punishment: subsection 20(7)	192
Criminal Code provisions inapplicable: subsections 20(8) and (9)	192
Probation: section 23	193
Paragraph 20(1)(j) and Section 23	194
Mandatory conditions: subsection 23(1)	196
Conditions that may appear in a probation order: subsection 23(2)	196
Communication of terms of the probation order: subsections 23(3) to (6)	199
Commencement of probation order: subsection 23(7)	200
Appearance before youth court: subsections 23(8) and (9)	201
Form of probation order: subsection 20(11)	201
Sample Form 8: Probation Order	202
Sample Form 9: Notice to Appear Before Youth Court Pursuant to Probation Order	204
Custodial dispositions: section 24	205
Paragraph 20(1)(k) and Section 24	205
Definitions: subsection 24(1)	209
Judicial specification of level of custody: subsections 24(2) to (5)	209
Place of custody: subsections 24(6) to (9)	211
Custody separate from adults: subsections 24(10), (14) and (15)	212
Pre-disposition report: subsection 24(11)	213
Intermittent custody: subsections 24(12) and (13)	213
Form for order of disposition: subsection 20(10)	214
Warrant of committal: subsection 24(16)	214

Sample Form 7: Order of Disposition	215
Sample Form 10: Warrant of Committal to Custody	216
Transfer of disposition: section 25	217
Section 25	217
Transfer of disposition: section 25	217
Interprovincial agreements governing dispositional transfer: section 26	219
Section 26	219
Interprovincial agreements: section 26	220

APPEALS: SECTION 27

Introduction	222
Section 27	222
Appeals: subsections 27(1), (3), (4), (5) and (6)	223
Deemed election: subsection 27(2)	225

REVIEW OF DISPOSITIONS: SECTIONS 28 TO 34

Introduction	226
Youth court hearing to review custody	227
Section 28	227
Automatic review of custodial dispositions: subsections 28(1) and (2)	230
Optional review: subsections 28(3) and (4)	231
No review where appeal pending: subsection 28(5)	232
Failure of youth director to cause appearance of young person: subsection 28(6)	232
Progress reports: subsections 28(7) to (10)	232
Notice of review: subsections 28(11) to (16)	234
Decision of the youth court: subsections 28(17) and (18)	235
Sample Form 11: Notice to Young Person of Review of Disposition	236
Sample Form 12: Notice of Review of Disposition	237
Sample Form 13: Disposition on Review	239
Release from custody on recommendation of provincial director: section 29	240
Section 29	240
Recommendation of provincial director for probation: subsections 29(1), (2), (4) and (5)	241
Procedure on review: subsections 29(3) and (6)	242
Sample Form 14: Notice by Provincial Director of Intention to Release Young Person from Custody	242

TABLE OF CONTENTS

xvii

Review boards: sections 30 and 31	246
Section 30	247
Section 31	248
Constitution and duties of review boards: subsections	
30(1) and (2)	248
Notice: subsection 30(3).....	250
Notice of decision of review board: subsection 30(4)....	250
Effect of decision of review board: subsections 30(5)	
and (6)	250
Sample Form 15: Notice of Decision by Review Board ..	251
Review by youth court: subsections 31(1) and (2)	252
Review of non-custodial dispositions: section 32	254
Section 32	254
Review of non-custodial dispositions: subsections	
32(1) and (2)	256
Progress reports: subsections 32(2) to (5)	257
Compelling appearance of young person:	
subsection 32(6).....	258
Decision of the youth court: subsections 32(7) to (9) .	259
Forms: subsections 32(10) and (11)	260
Sample Form 16: Summons for Appearance on Review	260
Sample Form 17: Warrant to Compel Appearance	
on Review	262
Review of disposition for failure to comply: section 33	263
Section 33	264
Review of disposition where failure to comply:	
subsection 33(1).....	266
Progress report: subsection 33(2)	267
Notice: subsections 33(2) and (4) to (6)	268
Decision of the youth court: subsections 33(6) to (8) .	269
Prevention of double jeopardy: subsection 33(9)	271
Appeals: subsection 33(10)	271
Forms: subsections 33(11) to (13).....	272
Sample Form 18: Information	273
Dispositions on review: section 34.....	274
Section 34	274

TEMPORARY RELEASE FROM CUSTODY:
SECTION 35

Introduction.....	275
Section 35	275

Temporary absence and day release: subsections 35(1) to (3)	276
Revocation of temporary absence or day release: subsections 35(3) and (4)	278

EFFECT OF TERMINATION OF DISPOSITION:
SECTION 36

Introduction	280
Section 36	281
Effect of discharge or termination of disposition: subsections 36(1) and (2)	282
Employment applications: subsections 36(3) and (4) ...	284
Finding of guilt not a previous conviction: subsection 36(5)	284

YOUTH WORKERS: SECTION 37

Introduction	286
Section 37	286
Youth workers: section 37	286

PROTECTION OF PRIVACY OF YOUNG PERSON:
SECTIONS 38 AND 39

Introduction	288
Section 38	289
No publication of identity: subsection 38(1)	290
"A young person aggrieved": subsection 38(1)	290
"Publish": subsection 38(1)	292
Procedure: subsections 38(2) and (3)	292
Contempt of court	292
A Charter of Rights challenge to section 38?	292
Exclusion from hearing: section 39	294
Section 39	294
Exclusion from youth court hearing: subsection 39(1) .	295
Persons who may not be excluded: subsection 39(2) ...	297
Exclusion at disposition or review: subsection 39(3) ...	297
Presence of young person: subsections 39(2) and (3) ..	298
A Charter of Rights challenge to section 39?	299

**MAINTENANCE AND USE OF RECORDS:
SECTIONS 40 TO 46**

Introduction	301
Youth court records: section 40	302
Section 40	302
Youth court records: subsection 40(1)	304
Definition of "record": section 40	304
Appeal court records	306
Review board records	306
Disclosure: subsections 40(2) and (3)	307
Disclosure to whom: paragraphs 40(2)(a) to (d)	307
Disclosure, who decides: paragraphs 40(2)(a) to (d)	308
Disclosure to "any other person" with a "valid interest": paragraph 40(2)(e)	308
Disclosure under subsection 40(3)	309
Disclosure to police investigator: paragraph 40(3)(e)	309
Disclosure for other proceedings: paragraphs 40(3)(f), (g) and (i)	310
Disclosure to researchers or persons having a "valid interest": paragraphs 40(3)(k) and (l)	310
Limitation on disclosure: subsection 40(4)	311
Copies of records: subsections 40(5) and (6)	312
Police records: sections 41 and 42	312
Central repository records: section 41	312
Section 41	312
"Record": section 41	313
Record of offence: section 41	314
"Central repository": subsection 41(1)	314
Record provided to central repository: subsection 41(2) .	315
Access to the central repository: subsection 41(3)	315
Police records: section 42	316
Section 42	316
"Record of any offence alleged": subsection 42(1)	316
Participating police force: subsection 42(1)	318
Police access to police records: subsections 42(2) and (5)	318
Discretionary access to police records: subsections 42(3) and (4)	319
Government and private records: section 43	320
Section 43	320
Government records: subsection 43(1)	321
"Department or agency": subsection 43(1)	322
Records of persons or organizations: subsection 43(2) ...	322

Discretionary disclosures: subsections 43(3) and (4)	323
Review board records	323
Fingerprints and photographs: section 44	324
Section 44	325
Legislative authority: subsections 44(1) and (2)	326
Access to fingerprints and photographs: subsection 44(3)	326
Destruction of fingerprints and photographs:	
subsection 44(4)	327
Storage of fingerprints and photographs: subsection 44(5)	328
Destruction of records: section 45	328
Section 45	329
Destruction if no conviction: subsection 45(1)	331
Destruction after finding of guilt: subsections 45(2)	
and (4)	332
Method of destruction: sections 44 and 45	333
Copies: subsection 45(3)	333
Effect of destruction: subsections 45(5) and (6)	333
Sanctions for failure to destroy: subsection 45(7)	334
Juvenile Delinquents Act records: subsection 45(8)	335
Offence: section 46	335
Section 46	339
Possessing records: subsection 46(1)	336
Disclosure of records: subsection 46(2)	336
Protection for employees: subsection 46(3)	337
Procedure: subsections 46(4) and (5)	338

CONTEMPT OF COURT: SECTION 47

Introduction	339
Section 47	340
Contempt jurisdiction of youth court: subsections	
47(1) and (2)	341
Concurrent contempt jurisdiction of youth court:	
subsection 47(2) and (3)	341
Disposition of young persons: subsection 47(4)	342
Application of section 636 of the Criminal Code:	
subsection 47(5)	342
Appeals: subsection 47(6)	343

FORFEITURE OF RECOGNIZANCES: SECTIONS 48 AND 49

Introduction	344
Section 48	345

Jurisdiction of youth court: section 48	345
Section 49	346
Proceedings in case of default: section 49	347
Liability of sureties: section 49	349
Young persons as sureties	350

INTERFERENCE WITH DISPOSITIONS:
SECTION 50

Introduction	351
Section 50	351
Interference with dispositions: section 50	351

APPLICATION OF THE CRIMINAL CODE:
SECTION 51

Section 51	355
Application of the Criminal Code	355

PROCEDURE: SECTIONS 52 TO 55

Introduction	358
Section 52	358
Summary conviction procedures to apply:	
subsection 52(1)	359
Indictable offences: subsection 52(2)	361
Attendance of young person: subsection 52(3)	362
Limitation period: subsection 52(4)	363
Costs: subsection 52(5)	363
Section 53	363
Joinder of summary and indictable offences: section 53 ..	363
Procuring the attendance of witnesses: section 54	365
Section 54	365
Issue of a subpoena: subsection 54(1)	365
Service of a subpoena: subsection 54(2)	365
Section 55	366
Warrant: section 55	366

EVIDENCE: SECTIONS 56 TO 63

Statements of the young person: section 56	367
Introduction	367
Section 56	371
Common law applies: subsection 56(1)	372
Person in authority: subsection 56(2)	375

Restrictions on admissibility: subsection 56(2)	377
Voluntary statement: paragraph 56(2)(a)	378
Caution: paragraph 56(2)(b)	379
Opportunity to consult: paragraph 56(2)(c)	380
Presence of the person consulted: paragraph 56(2)(d) ...	381
Spontaneously made oral statements: subsection 56(3) ..	381
Waiver of rights: subsection 56(4)	383
Duress: subsection 56(5)	384
Proof of age: section 57	385
Section 57	387
Testimony of a parent: subsection 57(1)	387
Birth certificates and records of societies: subsection 57(2)	388
Other evidence: subsection 57(3)	389
Apparent age: subsection 57(4)	390
Admissions: sections 58 and 59	390
Section 58	391
Section 59	391
Admission: subsections 58(1) and (2)	391
Material evidence: section 59	392
Evidence of children and young persons: sections 60 and 61	392
Section 60	396
Section 61	396
Instruction of child or young person by a judge: subsection 60(1)	397
Solemn affirmation: subsection 60(2)	397
Evidence of a child: section 61	398
Corroboration: subsection 61(2)	399
Proof of service: section 62	400
Section 62	400
Proof of service: section 62	400
Section 63	401
Seal not required: section 63	401
SUBSTITUTION OF JUDGES: SECTION 64	
Introduction	402
Section 64	403
Substitution of youth court judges: section 64	403
FUNCTIONS OF CLERKS OF COURT: SECTION 65	
Section 65	405
Function of youth court clerks: section 65	405

FORMS, REGULATIONS AND RULES OF COURT:
SECTIONS 66 TO 68

Introduction	407
Section 66	407
Forms: subsection 66(1)	407
Where forms not provided: subsection 66(2)	408
Section 67	409
Regulations: section 67	409
Section 68	410
Youth court rules: section 68	411

YOUTH JUSTICE COMMITTEES: SECTION 69

Section 69	412
Youth justice committees: section 69	412

AGREEMENTS WITH PROVINCES: SECTION 70

Section 70	414
Federal-provincial agreements: section 70	414

CONSEQUENTIAL AMENDMENTS:
SECTIONS 71 TO 78

Introduction	416
Section 71	416
Testimony of spouse, Canada Evidence Act, subsection 4(2): section 71	416
Amendments to the Criminal Code: sections 72 to 75 ...	417
Section 72	417
Children under twelve: section 72	418
Section 73	420
Repeal of section 441 of the Criminal Code: section 73 .	420
Section 74	420
Amendment to subsection 442(1) of the Criminal Code: section 74	421
Section 75	421
Young persons sentenced in ordinary court after transfer: section 75	422
Section 76	423
Repeal of section 120 of the Indian Act: section 76	423
Section 77	424
Definition of "inmate" in the Parole Act: section 77	424

Section 78	425
Definition of "prisoner" in the Prisons and Reformatories Act: section 78	425
TRANSITIONAL: SECTION 79	
Introduction.....	427
Section 79	427
Where proceedings NOT commenced under the J.D.A.: subsections 79(1), (3), (4) and (5)	428
Where proceedings commenced under the J.D.A.: subsection 79(2)	431
Status offences in the transitional period	433
Offences committed by a child	434
REPEAL: SECTION 80	
Section 80	436
COMMENCEMENT: SECTION 81	
Section 81	437
CANADIAN CHARTER OF RIGHTS AND FREEDOMS	
CANADIAN BILL OF RIGHTS	
Introduction.....	439
Canadian Charter of Rights and Freedoms	440
Canadian Bill of Rights	442
INDEX	445

TABLE OF FORMS
under
THE YOUNG OFFENDERS ACT

FORM 1	Notice to Parent	65
FORM 2	Notice to Relative or Friend	67
FORM 3	Order for Attendance of Parent	71
FORM 4	Warrant to Compel Attendance of Parent ...	72
FORM 5	Order for Examination and Report	122
FORM 6	Order of Transfer to Ordinary Court	159
FORM 7	Order of Disposition	215
FORM 8	Probation Order	202
FORM 9	Notice to Appear Before Youth Court Pursuant to Probation Order.....	204
FORM 10	Warrant of Committal to Custody.....	216
FORM 11	Notice to Young Person of Review of Disposition	236
FORM 12	Notice of Review of Disposition.....	237
FORM 13	Disposition on Review	239
FORM 14	Notice by Provincial Director of Intention to Release Young Person from Custody .	244
FORM 15	Notice of Decision of Review Board	251
FORM 16	Summons for Appearance on Review	260
FORM 17	Warrant to Compel Appearance on Review ..	262
FORM 18	Information	273

TABLE OF CASES

A, Re (1975), Alta. S.C.	369
Abel and Advisory Review Board, Re (1980), Ont. C.A.	115, 250, 254, 324
Adgey v. The Queen (1975), S.C.C.	167, 168, 169
A.-G. B.C. v. Smith (1967), S.C.C.	301
A.-G. Man. and Radio OB Ltd. Re, (1976), Man. Q.B.	291, 292
A.-G. Ont. and Viking Houses v. Regional Municipality of Peel (1979), S.C.C.	188, 197
A.-G. Que. v. Lechasseur (1981), S.C.C.	32
B. (F.J.), Re (1982), Ont. Prov. Ct.	423
B. and M., Re (1975), Ont. Prov. Ct.	105, 152
Barthe v. The Queen (1964), Que. C.A.	142
Boudreau v. The King (1949), S.C.C.	378, 382
Brosseau v. The Queen (1969), S.C.C.	95
Brownridge v. The Queen (1972), S.C.C.	81, 84, 97, 380
C.B. v. The Queen (1981), S.C.C.	288
DeClerq v. The Queen (1968), S.C.C.	373
Dixon v. MacKay (1902), Man. C.A.	39
Dupuis v. The Queen (1952), S.C.C.	381
F.P. Publications (Western) Ltd. and The Queen, Re (1979), Man. C.A.	294
Gault, In Re (1967), U.S.S.C.	73
Globe Newspaper Company v. Superior Court for the County of Norfolk (1982), U.S.S.C.	300
Helik, Re (1939), Man. K.B.	342
Huziak v. Andrychuk J.M.C. (1977), Sask. Q.B.	142, 143
Ibrahim v. The King (1914), Eng. C.A.	367, 373, 375
Jumaga v. The Queen (1977), S.C.C.	82, 84
Juvenile J (No. 2), Re (1978), Ont. Prov. Ct.	200
Kelly, Re (1929), N.B.C.A.	390
Kienapple v. The Queen (1975), S.C.C.	171, 284
MacIntyre v. A.-G. N.S. (1982), S.C.C.	299
McKeown v. The Queen (1971), S.C.C.	340
Morin v. The Queen (1890), S.C.C.	83
Morris v. A.-G. N.B. (1975), N.B.C.A.	400
Morris v. The Queen (1979), S.C.C.	282, 430
N.N.C. Re (1978), Alta. Juv. Ct.	152

Nemeth v. Harvey (1975), Ont. H.C.	399
Paige v. The King (1948), S.C.C.	400
Park v. The Queen (1981), S.C.C.	392
Racicot v. The Queen (1978), Ont. H.C.	200
Reference re Constitutional Validity of the Juvenile Delinquents Act (1982), Ont. H.C.; affd C.A.	299
R. v. A <i>see</i> A, Re	
R. v. A.M.P. (1977), Ont. Prov. Ct.	388
R. v. Anderson (1912), Alta. C.A.	96, 168
R. v. Andrews (1975), Nfld. S.C.	350
R. v. Arbuckle (1967), B.C.C.A.	150
R. v. Armstrong (1907), Ont. C.A.	393
R. v. B. (1979), B.C.S.C.	149
R. v. Bannerman (1966), Man. C.A., affd S.C.C.	392, 395
R. v. Bartkow (1978), N.S.C.A.	130, 132
R. v. Baskerville (1916), Eng. C.A.	399
R. v. Bates (1977), Ont. C.A.	128
R. v. Benson and Stevenson (1951), B.C.C.A.	114, 179
R. v. Boisvert <i>see</i> R. v. Jean B.	
R. v. Brauser (1779), Eng.	392
R. v. Brophy (1981), Eng. H.L.	373
R. v. Budic (No. 2) (1977), Alta. C.A.	107
R. v. Budin (1981), Ont. C.A.	395
R. v. C.F.; R. v. F.G. (1977), Ont. Prov. Ct.	197
R. v. Camp (1977), Ont. C.A.	420
R. v. Chamberlain (1974), Ont. C.A.	152
R. v. Cote (1976), Sask. Q.B.	63
R. v. Crossley (1950), B.C.S.C.	385
R. v. D. (1976), Ont. Prov. Ct.	386, 388
R. v. Dapic (1977), B.C.S.C.	189
R. v. Deans (1977), Ont. C.A.	422
R. v. Derkson (1972), B.C. Prov. Ct.	181
R. v. Dickson (1949), Eng. K.B.	114
R. v. Dietrich (1970), Ont. C.A.	392
R. v. Donovan (1947), N.B.C.A.	179
R. v. Drew (1979), B.C.C.A.	30, 131
R. v. Dunning (1979), Ont. C.A.	39
R. v. Dubois (1979), Alta. C.A. revd. S.C.C.	400
R. v. Edwards (1907), Man. C.A.	179
R. v. F. (1974), B.C.S.C.	150
R. v. F.J.Y. (1979), Ont. Prov. Ct.	149
R. v. Fallofield (1973), B.C.C.A.	180

TABLE OF CASES

xxix

R. v. Firkins (1977), B.C.C.A.	420
R. v. Fitton (1956), S.C.C.	374
R. v. Giesbrecht (1979), Man. Co. Ct.	81, 380
R. v. Haig (1970), Ont. C.A.	154
R. v. Harford (1965), B.C.S.C.	390
R. v. Hauser (1979), S.C.C.	301
R. v. Hill (1851), Eng.	398
R. v. Hogan (1979), N.S.C.A.	84
R. v. Holden (1974), Sask. Q.B.	402
R. v. Horsburgh (1966), Ont. C.A.	394
R. v. Huard (1962), B.C.S.C.	403
R. v. Hughes (1978), Alta. S.C.	107
R. v. J.(R.) (1982), Ont. Prov. Ct.	293, 300
R. v. Jacques (1958), Que. S.W.C.	368
R. v. Jean B. (1980), S.C.C.	158
R. v. K. (1980), Alta. Q.B.	180
R. v. K.J.H. (1980), Man. Q.B.	149
R. v. Kloschinsky <i>see</i> R. v. K.	
R. v. L. (1981), Ont. Prov. Ct.	63, 385, 386
R. v. Lanteigne (1980), Ont. C.A.	5, 8
R. v. Lauder (1963), Alta. Dist. Ct.	348
R. v. Le Brun (1954), B.C.S.C.	391
R. v. Leduc (1972), Ont. Dist. Ct.	350
R. v. Lochard (1973), Ont. C.A.	402
R. v. M. (1975), Ont. H.C.	73
R. v. M.S. and C.S. (1979), Ont. Prov. Ct.	448
R. v. Marsden (1977), Que. S.C.	342
R. v. Martin (1947), N.B.C.A.	179
R. v. McGrath (1962), S.C.C.	178
R. v. McKay (1975), B.C.C.A.	399
R. v. Mero (1976), Ont. C.A.	144, 145
R. v. Metz (1977), Man. C.A.	149
R. v. Midkiff (1980), Ont. H.C.	376
R. v. Moore (1974), B.C.S.C.	73
R. v. Morelli (1977), Ont. Prov. Ct.	130, 179
R. v. O'Neill (1973), N.B.S.C.	55
R. v. P. (1979), Man. Q.B.	50
R. v. P. (1979), Ont. Prov. Ct.	4, 7, 385
R. v. Page (1969), B.C.C.A.	298, 362
R. v. Paterson (1978), Ont. H.C.	82, 380
R. v. Penner (1973), Man. C.A.	82, 84, 380
R. v. Pilkington (1968), B.C.C.A.	386, 390

R. v. Piper (1965), Man. C.A.	352
R. v. Podola (1959), Eng. C.A.	107
R. v. Policha; Ex parte Pawlewsky (1970), Sask. Q.B.	347
R. v. Quesnel and Quesnel (1978), Ont. C.A.	296
R. v. R. (No. 1) (1972), Ont. Prov. Ct.	368
R. v. R.N.B. (1980), B.C.S.C.	5, 8
R. v. Riddle (1980), S.C.C.	94
R. v. Roberts (1975), B.C.C.A.	106, 107
R. v. Robertson (1968), Eng. C.A.	107
R. v. Rothman (1981), S.C.C.	380
R. v. S. <i>see</i> R. v. Stimpson	
R. v. St. Lawrence (1949), Ont. H.C.	374, 375
R. v. Sanchez-Pino (1973), Ont. C.A.	181
R. v. Seymour (1980), Ont. C.A.	278
R. v. Shrupka (1971), Man. Prov. Ct.	350
R. v. Silk (1979), Nfld. C.A.	132
R. v. Smith (1973), N.B.C.A.	157
R. v. Smith (1975), Man. C.A.	152
R. v. Sorenson (1965), B.C.S.C.	385, 390
R. v. Southampton Justices, Ex p. Green (1975), Eng. C.A.	350
R. v. Stimpson (1974), Man. Prov. Ct.	180
R. v. Strahl <i>see</i> Strahl, Re	
R. v. Tan (1975), B.C.C.A.	131
R. v. Taylor (1970), Man. C.A.	395
R. v. Thompson (1972), B.C.S.C.	55
R. v. Todd (1901), Man.	379
R. v. Vetrovec (1982), S.C.C.	400
R. v. Voisin (1918), Eng. K.B.	374
R. v. Warawuk (1978), Alta. C.A.	296
R. v. West (1973), Ont. C.A.	157
R. v. White (1978), Nfld. C.A.	129
R. v. Wilson (1973), N.S.C.A.	296
R. v. Yenson (1961), Ont. H.C.	368
R. v. Zelensky (1978), S.C.C.	182, 183
Re Regina and Allan (1981), Man. C.A.	5, 8
Richmond Newspapers v. Virginia (1980), U.S.S.C.	300
Rogers v. Rogers (1938), N.S.S.C.	384
Rothman v. The Queen (1981), S.C.C.	376
Sankey v. The King (1927), S.C.C.	394
Smerchanski v. Lewis (1980), Ont. C.A.	320
Smith v. Daily Mail Publishing (1979), U.S.S.C.	292, 293

Smith v. The Queen (1959), S.C.C.	63, 95
Smyth v. The King (1941), S.C.C.	105
Southam Inc. and The Queen (No. 1), Re <i>see</i> Reference re Constitutional Validity of section 12 of J.D.A.	
Strahl, Re (1968), Man. Q.B.	188, 189
Tarasoff v. The Regents of the University of California, (1976), Cal.S.C.	121
United States v. Indian Boy X (1977), U.S.C.A. 9th Cir.	383
West v. State of Louisiana (1973), U.S. 5th Cir.	85

SHORT TITLE
(Section 1)

SECTION 1

1. *Short title.*—This Act may be cited as the *Young Offenders Act*.

Title: section 1

The short title of the Act is the *Young Offenders Act*. A previous draft model Act to replace the *Juvenile Delinquents Act* was entitled the *Young Persons in Conflict with the Law Act*. The title of the new Act denotes a young person in conflict with the law, as distinct from any involvement with child welfare or child protection legislation.

The term “young offender” means a young person who has violated any federal statute, rule or regulation. It also reflects the narrower offence jurisdiction of the Y.O.A., and emphasizes that young persons are responsible for their illegal behaviour.

The legislative citation is S.C. 1980-81-82-83, c. 110.

INTERPRETATION (Section 2)

Introduction

The definition section, explaining words and expressions used in the *Young Offenders Act*, is found in s. 2. The Y.O.A. uses a number of terms that are different from the *Juvenile Delinquents Act*, thus some explanation is warranted. Moreover, the terminology used at present with respect to delivery of services may vary from province to province, making the common frame of reference found in s. 2 helpful. According to s-s. 2(4) of the Y.O.A., the definitions in the *Criminal Code* apply in the case of words and expressions not defined in the Y.O.A. Only terms that are likely to cause difficulty are discussed below.

SECTION 2

2. (1) *Definitions.*—In this Act,

“adult” means a person who is neither a young person nor a child;

“alternative measures” means measures other than judicial proceedings under this Act used to deal with a young person alleged to have committed an offence;

“child” means a person who is or, in the absence of evidence to the contrary, appears to be under the age of twelve years;

“disposition” means a disposition made under section 20 or sections 28 to 33 and includes a confirmation or a variation of a disposition;

“offence” means an offence created by an Act of Parliament or by any regulation, rule, order, by-law or ordinance made thereunder other than an ordinance of the Yukon Territory or the Northwest Territories;

“ordinary court” means the court that would, but for this Act, have jurisdiction in respect of an offence alleged to have been committed;

“parent” includes, in respect of another person, any person who is under a legal duty to provide for that other person or any person who has, in law or in fact, the custody or control of that other person;

"predisposition report" means a report on the personal and family history and present environment of a young person made in accordance with section 14;

"progress report" means a report made in accordance with section 28 on the performance of a young person against whom a disposition has been made;

"provincial director" means a person, a group or class of persons or a body appointed or designated by or pursuant to an Act of the legislature of a province or by the Lieutenant Governor in Council of a province or his delegate to perform in that province, either generally or in a specific case, any of the duties or functions of a provincial director under this Act;

"review board" means a review board established or designated by a province for the purposes of section 30;

"young person" means a person who is or, in the absence of evidence to the contrary, appears to be

(a) twelve years of age or more, but

(b) under eighteen years of age or, in a province in respect of which a proclamation has been issued under subsection (2) prior to April 1, 1985, under sixteen or seventeen years, whichever age is specified by the proclamation,

and, where the context requires, includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act;

"youth court" means a court established or designated by or under an Act of the legislature of a province, or designated by the Governor in Council or the Lieutenant Governor in Council of a province, as a youth court for the purposes of this Act;

"youth court judge" means a person appointed to be a judge of a youth court;

"youth worker" means a person appointed or designated, whether by title of youth worker or probation officer or by any other title, by or pursuant to an Act of the legislature of a province or by the Lieutenant Governor in Council of a province or his delegate, to perform, either generally or in a specific case, in that province any of the duties or functions of a youth worker under this Act.

(2) *Proclamation changing definition of "young person".*—The Governor in Council may, at any time prior to April 1, 1985, by proclamation

(a) direct that in any province "young person", for the purposes of this Act, means a person who is or, in the absence of evidence to the contrary, appears to be twelve years of age or more, but under sixteen or under seventeen years of age, as the case may be; and

(b) revoke any direction made under paragraph (a).

(3) *Limitation.*—Any direction made under paragraph (2)(a) shall cease to have effect on April 1, 1985.

(4) *Words and expressions.*—Unless otherwise provided, words and expressions used in this Act have the same meaning as in the *Criminal Code*.

"Adult"

Under s-s. 2(1), "adult" is defined to mean a person who is "neither a young person nor a child". After April 1, 1985, in all provinces an adult will be a person aged 18 years or over. Until that date, however, a province may, with the approval of the Governor in Council (the federal Cabinet), determine that a young person becomes an adult for the purposes of the Y.O.A. at the age of 16 or 17. The provisions of s-s. 2(2) authorize the Governor in Council to make a proclamation directing the lowering of the maximum age limit for young persons to 16 or 17, prior to April 1, 1985; obviously this would only be done on the basis of a provincial request.

Jurisdiction of the youth court depends on age. A line of cases decided under the *J.D.A.* holds that age is an essential element of the prosecution's case, and that a proper finding as to age must be made in order to establish the jurisdiction of the court: see *R. v. P.* (1979), 48 C.C.C. (2d) 390 (Ont. Prov. Ct.) and *R. v. L.* (1981), 59 C.C.C. (2d) 160 (Ont. Prov. Ct.). While some judges have taken the view that it was the court's responsibility to establish age because it goes to jurisdiction, others have held that the onus falls on the Crown and that failure to do so will result in a dismissal. For example, in *R. v. L.*, *supra*, the court stated: "The finding of age should be part of the trial process in which the trial judge should stand impartial" (at p. 162). While it would be desirable for the prosecutor to deal with the issue as part of his case, or to obtain an admission of age (see s. 58 of the Y.O.A.), the definition of "young person" has been changed from the corresponding definition of "child" in the *J.D.A.*, with the intention of providing that a youth court judge must, at least in the

absence of evidence to the contrary, address the question whether an inference of age can be drawn, and where feasible, make a finding of age based on appearance.

Both the *J.D.A.* and the *Y.O.A.* permit findings as to age based on actual or apparent age. The *Y.O.A.* places primary emphasis on actual age. A finding may be made based on appearance, where there is no evidence of actual age, or in corroboration of other evidence specified in s-s. 57(3). Thus, where a person appears to be a young person, in the absence of evidence that he is actually a child or an adult, the court must find that he is a young person. A youth court will have no jurisdiction to deal with an adult, except for purposes of contempt against itself.

The significant date in determining whether an accused is a "young person", for the purposes of the Act, is the date of the commission of the offence rather than the age of the individual when he is arrested or brought to trial. This is expressly stated in the definition of "young person", which "includes any person who is charged under this Act with having committed an offence while he was a young person . . .".

The issue of age on the day of a person's birthday has been resolved by the repeal of s-s. 3(1) of the *Code* by *An Act to amend the Criminal Code in relation to sexual and other offences against the person*, S.C. 1980-81-82-83, c. 125, which received Royal Assent October 27, 1982 and was proclaimed in force January 4, 1983. Until the repeal of s-s. 3(1), which provided that a person is deemed not to reach a given age until the commencement of the day following his birthday, cases from three different provinces had held that s-s. 3(1) of the *Code* was the operative provision (*R. v. R.N.B.* (1980), 55 C.C.C. (2d) 43 (B.C.S.C.); *R. v. Lan-teigne* (1980), 31 O.R. (2d) 239, 56 C.C.C. (2d) 95, 118 D.L.R. (3d) 520, 3 Fam. L. Rev. 13 (C.A.); and *Re Regina and Allan* (1981), 58 C.C.C. (2d) 282 (Man. C.A.)) rather than s-s. 25(9) of the *Interpretation Act*, which deems a person to have attained a specific number of years only upon the commencement of the anniversary of his birth. The *Interpretation Act* will now govern. Thus, the youth court has exclusive jurisdiction over any offence committed by a young person prior to the commencement of a young person's birthday.

Age may be proved under the *Y.O.A.* by a variety of means, including production of a birth certificate or other documentary

evidence of age, and testimony of a parent. As well, the Act provides that inferences may be drawn from the young person's appearance or testimony. Proof of age is discussed in more details in the comments under s. 57.

"Alternative measures"

"Alternative measures" is defined in s-s. 2(1) of the Y.O.A. to mean "measures other than judicial proceedings under this Act, used to deal with a young person alleged to have committed an offence". Alternative measures programs authorized by the provincial Attorney General may be set up in accordance with the provisions of s. 4 of the Y.O.A. Section 4 outlines criteria setting minimum standards to be adhered to in the application of non-judicial modes of intervention. These minimum standards are designed primarily to safeguard the young person's rights, including his right to insist upon court proceedings.

The term "alternative measures" is used in the Y.O.A. rather than the term "diversion". "Diversion" is currently used to denote both structured diversion programs and unstructured methods of diverting young persons from the courts. For example, "diversion" may include informal "police screening", which is regularly employed to divert a significant proportion of potential cases away from the courts, simply on the basis of a decision on the part of the police not to lay charges. The term "diversion" is also used to describe certain innovative sentencing programs. The term "alternative measures" has been selected to distinguish the structured and formalized type of diversion program from these other, broader uses of the word "diversion". Furthermore, the objective of such programs is to provide more flexibility and alternative options for dealing with young offenders and is not *per se* a substitute for court proceedings. To put it another way, the objective is not so much to "divert from the judicial process", but to seek alternative solutions which will be effective in dealing with young offenders.

"Child"

A "child" under the Y.O.A. is "a person who is or, in the absence of evidence to the contrary, appears to be under the age of twelve years". As mentioned in the discussion of the term "adult", above, age is an essential element of jurisdiction under

the Y.O.A., as it is under the J.D.A.: see *R. v. P.* (1979), 48 C.C.C. (2d) 390 (Ont. Prov. Ct.) and *R. v. L.* (1981), 59 C.C.C. (2d) 160 (Ont. Prov. Ct.). The youth court has no jurisdiction to deal with any person accused of an offence under the Y.O.A. unless a finding is made that the accused is a young person, based on actual or apparent age. Thus, it is important to consider two further matters regarding the issue of age: how the issue is brought before the court, and how age is proven. In *R. v. L.*, the court held that the onus is on the Crown to raise the issue; James, Prov. Ct. J. held: "The finding of age should be part of the trial process in which the trial Judge should stand impartial" (at p. 162). It is suggested by *R. v. L.* that the judge has no authority to raise the issue on his own. While it would be desirable for the prosecutor to deal with the issue as part of his case or to obtain an admission of age (see s. 58 of Y.O.A.), the definition of "young person" has been changed from the corresponding definition of child in the J.D.A., with the intention of providing that a youth court judge must, at least in the absence of evidence to the contrary, address the question as to whether or not an inference can be drawn, and where feasible, make a finding of age based on appearance.

Age may be proven in a number of ways. The Y.O.A., like the J.D.A., allows for findings of either actual or apparent age. The primary test under the Y.O.A., however, is actual age. Where no finding of actual age has been made and where there is no evidence to the contrary, a finding of age may be based upon apparent age. A finding of apparent age may be based on a consideration of the person's size, demeanor and general appearance, including dress.

Section 57 of the Y.O.A. governs proof of age. It provides for the tendering of documentary evidence such as a birth certificate as well as permitting testimony by a parent to prove age. Section 57 also allows the drawing of inferences as to age from testimony given by the young person or from appearance. See the comments following s. 57 for further discussion of proof of age.

The significant date in determining whether an accused is a "child" or a "young person" for the purposes of the Act, is the date of the commission of the offence, rather than the age when the individual is arrested or brought to trial. This is expressly

stated in the definition of "young person", which "includes any person who is charged under this Act with having committed an offence *while he was a young person.*"

The issue of age on the day of a person's birthday has been resolved by the repeal of s-s. 3(1) of the *Code* by *An Act to amend the Criminal Code in relation to sexual and other offences against the person*, which received Royal Assent October 27, 1982 and was proclaimed in force January 4, 1983. Until the repeal of s-s. 3(1), which provided that a person is deemed not to reach a given age until the commencement of the day following his birthday, cases from three different provinces had held that s-s. 3(1) of the *Code* was the operative provision (*R. v. R.N.B.* (1980), 55 C.C.C. (2d) 43 (B.C.S.C.); *R. v. Lanteigne* (1980), 31 O.R. (2d) 239, 56 C.C.C. (2d) 95, 118 D.L.R. (3d) 520, 3 Fam. L. Rev. 13 (C.A.); and *Re Regina and Allan* (1981), 58 C.C.C. (2d) 282 (Man. C.A.)) rather than s-s. 25(9) of the *Interpretation Act*, R.S.C. 1970, c. 1-23, which deems a person to have attained a specific number of years only upon the commencement of the anniversary of his birth. The *Interpretation Act* will now govern. Thus, a child who commits an offence on his twelfth birthday may be prosecuted under the Y.O.A.

The jurisdiction of the youth court under the Y.O.A. is narrower than that of the juvenile court under the J.D.A. in a number of respects. The age jurisdiction of the youth court, at the lower end of the range, is restricted. Under the J.D.A., the minimum age of criminal responsibility is seven (s. 12 of *Criminal Code*). A juvenile between seven and fourteen can only be convicted under the J.D.A. if it is proven that "he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong" (s. 13 of the *Criminal Code*). The Y.O.A. raises the minimum age of criminal responsibility to 12, while repealing ss. 12 and 13 of the *Code* (s. 72 of the Y.O.A.). It is felt that children under the age of 12 should not be held criminally responsible for their acts, and are not to be dealt with under federal criminal legislation. Provincial legislation may be enacted to deal with offences committed by children under the age of 12. It is likely that such children will be dealt with under some form of child welfare legislation, enacted by the provinces pursuant to their general power to legislate in the area of property and civil rights, under s-s. 92(14) of the *Constitution Act*, 1867.

"Offence"

The jurisdictional basis of the *Y.O.A.* is considerably narrower than that found in the *J.D.A.* The definition of "juvenile delinquent", found in s-s. 2(1) of the *J.D.A.* is:

any child who violates any provision of the *Criminal Code* or any federal or provincial statute, or 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.

The *Y.O.A.* is restricted to dealing with violations of federal law. The definition of "offence" in s-s. 2(1) of the *Y.O.A.* is:

an offence created by an Act of Parliament or by any regulation, rule, order, by-law or ordinance made thereunder other than an ordinance of the Yukon Territory or the Northwest Territories.

The narrower offence jurisdiction of the *Y.O.A.* excludes violations of provincial and municipal laws, and such "status offences" as "sexual immorality". This will permit attention to be focussed more on serious criminal offences. The restricted definition of "offence" also obviates any jurisdictional disputes between the federal and provincial governments. In any event, it has been suggested that pursuant to the *J.D.A.*, young persons are unnecessarily subjected to criminal proceedings for non-criminal offences, such as provincial and municipal offences, which can be dealt with effectively by provincial law. Federal regulatory offences are included in the definition of "offence" in the *Y.O.A.* for reasons of expedience and practicality, although their nature is not truly criminal.

The narrower offence jurisdiction of the *Y.O.A.* ensures that young persons are not held more responsible than adults for their conduct. Furthermore, the exclusion of such "status offences" as "sexual immorality" will afford young persons the same element of certainty as adults now enjoy in regard to knowing whether their conduct violates the criminal law.

Provincial legislation will have to be enacted to deal with offences against any law within the legislative purview of the provinces. Further, provinces may wish to enact child welfare legislation to deal with juveniles presently dealt with under the status offence provisions of the *J.D.A.* In fact, in a number of provin-

ces, the existing child welfare legislation may already be broad enough to deal with such cases.

“Parent”

The definition of a “parent” is very broad: It “includes, in respect of another person, any person who is under a legal duty to provide for that other person or any person who has, in law or in fact, the custody or control of that other person.” This broad definition was chosen to ensure that anyone acting in the place of a “parent” is included, so that the benefits flowing from the provisions for notice to parents and the parents’ right to make representations and to seek review will be extended to as many young persons as possible.

The definition of parent clearly includes the biological parents, a person such as a guardian who is under a legal duty to provide for the young person, and persons with custody. A child protection agency with custody of the young person under child welfare legislation is also included.

Although not intended to include a spouse, the definition of “parent” appears to be sufficiently broad to include a spouse of a young person, at least where a spouse is liable under provincial law to “provide for” the support of the other. However, it is clear that such an interpretation was not intended. The principle of parental responsibility which is articulated in para. 3(1)(h) is inconsistent with such an interpretation. In addition, in s. 9 of the Y.O.A., dealing with notices to parents, there is specific provision in s-s. 9(4) for giving notice to a spouse “instead of a parent”; this suggests that the terms “spouse” and “parent” are mutually exclusive.

“Provincial director”

The “provincial director” is defined in the Act to mean “a person, a group or class of persons or a body” appointed or designated by a provincial government “to perform in that province, either generally or in a specific case, any of the duties or functions of a provincial director under this Act.” This definition deliberately allows a class of persons to be appointed provincial directors, for example, a class of employees of the Department of Social Services or the Department of Northern Affairs.

Since the provincial director is an important provincial administrative position, the definition has been made very flexible to accommodate the needs of different provinces and territories.

"Young person"

A young person is "a person who is or, in the absence of evidence to the contrary, appears to be (a) twelve years of age or more, but (b) under eighteen years of age . . .". Until April 1, 1985, any province may request the Governor in Council to provide for a lower maximum age of under 16 or under 17 years. The provisions of s-s. 2(2) authorize the Governor in Council to make proclamations in this regard. In deciding whether an accused is a young person for the purposes of the Act, one must consider the date of the commission of the offence, rather than the age of the individual when he is arrested or brought to trial. This is specifically provided for in the definition; young person "includes any person who is charged under this Act with having committed an offence *while he was a young person.*"

The minimum age of criminal responsibility under the Y.O.A. has been set at 12. A minimum age has been chosen to promote certainty, because it is felt that a young person must know at what age responsibility for illegal activity will be presumed. The age level at which capacity is presumed to exist must be specifically established and must be uniform across Canada.

The decision to adopt a uniform maximum age was in part based on considerations of fairness and uniformity, and also because any age disparity could result in this legislation being ruled unconstitutional under the *Canadian Charter of Rights and Freedoms*. Section 15 of the *Charter*, which guarantees "equal protection and equal benefit of the law" would be the likely basis of any challenge; this particular section will not come into force until April of 1985. Therefore, until April 1, 1985, the provinces may opt under the Y.O.A. for a lower maximum age of either under 16 or under 17. This provision for a flexible age limit gives the provinces that have not already been using a maximum age of under 18 time to prepare facilities, programs and staff for the necessary changes.

While recognizing that there were inherent difficulties associated with choosing a particular age, on February 9, 1982, the Solicitor General of Canada gave the following reasons in support of a maximum uniform age of under 18:

1. The fact that growth into full maturity is not, as a general rule, achieved until age 18 or later, particularly in current times because of the prolonged period of dependency that is required of young persons.

2. The desirability of protecting young persons for as long a period as possible from entry into correctional institutions where they will be exposed to older, more experienced offenders.

3. Having moved to a rights and responsibility model of juvenile justice, it is felt that the benefits of the system should be extended to the largest number of young persons possible who have not yet attained full maturity. This extension of benefits holds out the most promise of preventing a young person's further involvement in illegal activity. The full benefit of the resources of the juvenile justice system with its greater emphasis on individual needs than that adult system should be extended to young persons up to 18 because they are, until then, generally speaking, still in their formative years and at an age level where they can be favourably influenced by positive action and guidance. The law must be particularly sensitive to the special needs and requirements of young persons and provide them with every opportunity for reformation in order to prevent them from graduating into adult offenders.

4. Given sufficient protective safeguards for society which, it is believed, the new Act contains, it is preferable to set the age at a higher rather than a lower level. This is especially desirable in view of the retention of the transfer provision to adult court which provides the system with a "safety valve" mechanism for such difficult cases as the "mature" criminal who is under 18, or the offender who has committed an extremely serious offence.

5. This age level is consistent with the treatment of young persons under civil law including the age of majority. The fact that no province in Canada has its age of civil majority below the level of 18 years bears testimony to the general recognition that young persons under age 18 have not yet attained full maturity and are not considered to have reached adulthood.

6. The age 18 level better accords with international standards and is consistent with the situation prevailing in most European and Western democracies, and most common law jurisdictions including a high proportion of States in the U.S.

For a discussion in respect of a finding of age, see pp. 4-8.

DECLARATION OF PRINCIPLE (Section 3)

Introduction

The Declaration of Principle set out in s-s. 3(1) of the Y.O.A. is to serve as a guide to the interpretation and application of the Act. Rather than simply having a Preamble, as some pieces of legislation have, to assist in explaining their purpose, a policy section is included in the body of the Y.O.A.; such a section is an integral part of the Act, while a Preamble is not. The section containing the Declaration of Principle will govern the interpretation of the whole Act; s-s. 3(2) adds that the 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)."

The years from 1908 to the present have exposed many problems with the welfare approach of the J.D.A., and the federal Parliament has sought to strike a reasonable and acceptable balance in the Y.O.A. between the needs of young persons and the interests of society. To achieve this balance, the Y.O.A. recognizes that young persons must bear responsibility for their acts and that while society has the responsibility to take reasonable measures to prevent crime, it must be protected against illegal behaviour. The Act stipulates, however, that young persons should not always be held as accountable for their behaviour as adults and that they have special needs and require guidance and assistance.

The principles underlying the Y.O.A. can be contrasted with those underlying the J.D.A., enacted in 1908. The J.D.A. takes a social welfare approach to juvenile delinquency; the courts exercise a *parens patriae* ("father of the country") jurisdiction, dealing with young persons as a strict, watchful but loving parent. Under the J.D.A., s. 38 requires that "every juvenile delinquent . . . be treated, not as [an offender], but as a misdirected and misguided child . . .". Subsection 17(2) of the J.D.A. provides: "No adjudication or other action of a juvenile court . . . 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." Thus, the emphasis in the J.D.A. is upon treatment, rehabilitation and informality.

The special parent-child relationship is recognized as well: young persons are only to be removed from parental control when measures that provide for continuing parental supervision are inappropriate.

There is also much more emphasis on the legal rights of young persons. If a young person is to be held responsible and accountable for his actions, he is to be afforded all of the protections an adult receives in our criminal justice system. In particular, the Act guarantees to young persons the right to be informed of their rights and the right to the least possible interference with freedom consistent with society's protection. The informality prevalent in some jurisdictions under the *J.D.A.* will not, for the most part, be allowed under the *Y.O.A.*

SECTION 3

3. (1) Policy for Canada with respect to young offenders.—It is hereby recognized and declared that

- (a) while young persons should not in all instances be held accountable in the same manner and suffer the same consequences for the 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;**
- (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 and 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.

(2) Act to be liberally construed.—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).

Responsibility, accountability and the protection of society: paragraphs 3(1)(a) and (b)

Three of the fundamental principles upon which the Y.O.A. is based are: responsibility, accountability and the protection of society. Society must be protected from the illegal behaviour of young persons, and thus they are to be held responsible for their acts; in view of their level of development, however, young persons will not in all instances be held as accountable for their behaviour as adults.

Two of the major principles of the Y.O.A. are found in para. 3(1)(a). The first of these is the proposition that young persons should "bear responsibility for their contraventions". The degree of responsibility young persons must bear is not to be the same as an adult would face as the second major principle establishes that "young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults". An example of the lesser degree of accountability young persons are held to is reflected in the dispositions available under the Act, which are generally less severe than those an adult might face. Moreover, a young person may never receive a harsher disposition for an offence than that to which an adult is liable.

An essential part of the Y.O.A. and a third fundamental principle of the Act is the recognition of the need to protect society from illegal behaviour. The fact that para. 3(1)(b) is separate from the two other fundamental principles emphasizes the importance of this principle to the Y.O.A.: "society must . . . be afforded the necessary protection from illegal behaviour." The manner in which we treat young offenders is, in part, decided in accordance with the right of society to be protected.

Special needs: paragraph 3(1)(c)

The recognition given under the Y.O.A. to the special needs of the young person illustrates a fundamental distinction between the aims and priorities of the juvenile justice system and the adult criminal justice system. Although both the *J.D.A.* and the Y.O.A. accept the premise that young persons are more amenable to rehabilitation than are adults, the *J.D.A.*'s approach is to treat the young person as "a misguided child" and to offer him "aid, encouragement, help and assistance", while the Y.O.A. puts more emphasis on the goals of responsibility and protection of society. The Y.O.A. does not focus exclusively upon the young person's special needs as the primary reason for intervention, as the *J.D.A.* does. Nevertheless, the Y.O.A. expressly recognizes that young persons have special needs arising out of their "state of dependency and level of development and maturity", and the Act recognizes that young persons "require guidance and assistance" as well as "supervision, discipline and control".

Special provisions to meet the young person's needs come into effect at disposition. There is a considerable amount of flexibility in the Act to assist the young person, particularly through the use of alternative measures or through the wide range of dispositional alternatives. Adequate assessment of the young person's needs is crucial in order to give the young person special help. The youth court may order a medical examination or a psychiatric or psychological assessment in circumstances outlined in s. 13 of the Y.O.A. Pre-disposition reports are also available to ensure that as much pertinent information as possible is before the court prior to disposition. Pre-disposition reports are mandatory before a custodial disposition is ordered for the young person.

The Y.O.A. also provides for parental involvement to promote parents' participation in the court proceedings and their assist-

ance to their child throughout the process and following disposition. It is hoped that involving parents in the judicial proceedings against their child may alert them to his problems, giving the parents a chance to offer guidance and support. Parental involvement may also ensure that a young person's legal rights are protected.

Alternative measures: paragraph 3(1)(d)

The Y.O.A. includes provisions for the establishment of programs of alternative measures by individual provinces and territories, in accordance with s. 4. Alternative measures are mentioned expressly in the Declaration of Principle to signify the importance to be attached to and the use to be made of such procedures. As the provisions of s. 4 of the Y.O.A. include guidelines to provide minimum safeguards for the protection of young persons' rights, the use of alternative measures in lieu of judicial proceedings may be encouraged wherever alternative measures are consistent with the principle of the protection of society. The establishment of standardized parameters within which alternative measures programs operate, with adequate safeguards for the protection of young persons who participate in them, is an important development in diversion.

It has been suggested that a number of benefits result from the use of alternative measures. It is generally recognized that the criminal law need not be invoked in all instances when a law is violated, and that some young persons are being unnecessarily brought before the juvenile court. The benefits of alternative measures range from reducing delays in handling young persons to the increased scope for flexibility, especially in procedures and in the manner of dealing with young persons. The use of alternative measures frees court facilities, allowing the youth court to be reserved for the more serious cases. The range of dispositional options that may be used in alternative measures programs includes special education and counselling for behavioural problems or drug or alcohol related problems. Alternative measures programs can be adaptable to the particular needs of the communities in which they are set up, whether the community is rural, urban, native, etc. One aim of such programs is to involve the community in dealing with the problems of the illegal behaviour of young persons; this is often achieved through the use of

community participants at all levels of the alternative measures program, through the involvement of the victim and the employment of innovative forms of disposition.

Rights of young persons: paragraph 3(1)(e)

Paragraph 3(1)(e) provides that “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*”; young persons also have “a right to be heard . . . and to participate, in the processes that lead to decisions that affect them.” Further, in view of their usually limited economic resources, and the state of their emotional and intellectual development, young persons “should have special guarantees of their rights and freedoms.” The inclusion of the above-mentioned provisions in the Declaration of Principle is a clear statement that the Y.O.A. has adopted a “due process” model of juvenile justice. Under the social welfare approach of the J.D.A., proceedings were intentionally informal, and the rules of criminal procedure and evidence were often not enforced. By way of contrast, the Y.O.A. expressly recognizes that young persons have the same rights to “due process” of law as adults. There are many provisions in the Y.O.A. concerning the legal rights of young persons and these establish “due process” requirements and procedural regularity from the time of initiation of proceedings (by arrest or summons), through adjudication, disposition, appeal and review of disposition.

In addition to legal protections afforded adults in criminal proceedings, such as those contained in the *Charter of Rights*, the Y.O.A. recognizes that because of the level of their emotional and intellectual development, young persons require special legal safeguards. For example, s. 10 of the *Charter* guarantees everyone the right to “retain and instruct counsel” upon arrest or detention. Section 11 of the Y.O.A. goes beyond this, and guarantees every young person being dealt with under the Act by way of trial, hearing or review, who wishes to obtain counsel but is unable to do so, the right to have counsel appointed and paid for by the state. A number of other provisions of the Y.O.A. afford young persons special guarantees of their rights and freedoms.

**Right to the least possible interference:
paragraph 3(1)(f)**

In para. 3(1)(f) of the Y.O.A., it is recognized that a young person has the right "to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families." The principle of minimal interference represents a shift away from the treatment-oriented philosophy of the *J.D.A.* Intervention in the life of the young person is justifiable under the Y.O.A. primarily for the protection of society although the Act continues to recognize that young persons have special needs and require guidance and assistance. It is this philosophy which will distinguish the juvenile justice system from the adult justice system. If intervention is justifiable to protect society, it should be to the least extent possible, and in determining its nature and scope, regard should be had for the needs of the young person and the interests of his family. The principle of minimal interference should serve as a guide at each stage of the proceedings, including alternative measures, pre-trial detention, disposition, and disposition review. Serious restraint measures, such as custodial dispositions, should be used only as last resort remedies.

Right to be informed: paragraph 3(1)(g)

Young persons have the right to be informed of their rights, in every instance where their rights may be affected by the Act. Police, judges, youth workers, counsel and other persons who are part of the juvenile justice system have the primary responsibility for the enforcement of this right. Owing to their age and inexperience, young persons, in many instances, may not be aware of their rights and therefore, a number of specific provisions provide that they shall be so informed. Sections 11 and 12 of the Y.O.A. ensure that a young person must be informed upon his arrest, at court appearances, and on court documents of his right to be represented by counsel. Section 56 requires that police officers take special steps to inform a young person of his rights prior to taking a statement.

Parental responsibility: paragraph 3(1)(h)

The Act recognizes in para. 3(1)(h) that "parents have responsibility for the care and supervision of their children, and, for

that reason, young persons should be removed from parental supervision . . . only when measures that provide for continuing parental supervision are inappropriate.” This special status, for example, entitles parents to receive notice of any proceedings commenced against their child, to receive copies of reports prepared for the youth court, and to make representations at a transfer hearing and at disposition. They also have a right to initiate and participate in disposition review proceedings. Under s. 10, a judge is empowered to make an order requiring a parent’s attendance at proceedings against his child.

This principle recognizes that parents are responsible for the care and supervision of their children; however, this concept does not extend to vicarious liability. Pursuant to s. 22 of the *J.D.A.*, a parent, under certain circumstances, can be ordered to pay a fine, damages, or costs when his child is found guilty of an offence. As well, a parent may be ordered to pay for the support of his delinquent child pursuant to s-s. 20(2) of the *J.D.A.*; the *Y.O.A.* does not have similar provisions. A parent has a right to participate in proceedings, but is under no obligation to assume financial responsibility for the young person’s misdeeds.

The decision a youth court makes in regard to such matters as pre-disposition detention, disposition and disposition review should always be based on a recognition of parental responsibility. To the greatest extent possible, young persons should be dealt with in their community and family environment. Notwithstanding the principle of parental responsibility, it must also be recognized that some young persons, particularly those who are 16 or 17, may have withdrawn from parental control. In such circumstances, in view of the principle of least interference and in consideration of the needs of a young person, it may not be appropriate to force a young person to resume a relationship with his parents.

ALTERNATIVE MEASURES (Section 4)

Introduction

The Y.O.A. provides legislative authority for the use of voluntary "alternative measures" other than judicial proceedings under this Act. The Act defines alternative measures in s-s. 2(1) as "measures other than judicial proceedings under this Act used to deal with a young person alleged to have committed an offence". Alternatives to the juvenile justice system have been commonly known as "diversion" and as the Law Reform Commission of Canada has noted, many types of diversion, formal and informal, are described by this one term. Pre-trial diversion programs involving the handling of cases outside of the juvenile court by settlement or mediation procedures, have been implemented in a number of locations across the country. The Y.O.A. sanctions the use of such programs and, by adopting the designation "alternative measures", avoids the imprecision of "diversion" and encourages flexibility as to the kinds of programs which may be developed in the future.

Another type of diversion, commonly known as "police screening", refers to the police practice of not charging all young people with whom they deal. The police often choose to give the young person a warning and then send him home for appropriate parental disciplinary measures. This kind of diversion has not been formalized, although it will continue as an important method of dealing with young people without resorting to formal alternative measures programs or the courts.

Although the J.D.A. does not specifically refer to diversion, informal diversion programs grew out of dissatisfaction with the traditional juvenile justice system and concern for its possible harmful effects on young people, especially the consequences of a criminal record. As a rule, court proceedings are formal, time-consuming, difficult for a young person to understand and its dispositions are limited by those established by legislation. Many sociologists propound a "labelling theory" that a young person dealt with in juvenile court might come to perceive himself as an

“offender”, and hence the imposition of stigmatizing labels was, in itself, a secondary cause of law-breaking behaviour. Concern about stigmatization was heightened because of the danger of the young person’s susceptibility to labelling. It was felt that removing the young person from the formal court system would prevent labelling and would offer protection from the other harmful aspects of the court process.

Two aims of alternative measures are to prevent the continuation of criminal behaviour and to lessen the stigma of proceedings. Another goal is to promote community involvement and to foster community awareness, partly through participation in alternative measures programs and partly as a result of putting greater emphasis on restitution and victim involvement. Alternative measures also permit the use of effective means of intervention other than by formal court proceedings, where they appear appropriate and adequate to deal with the young offender. In addition, as a by-product, alternative measures should bring some relief to crowded court calendars by dealing with young people out of court. This would leave the court with its limited resources, free to deal with the more serious cases which come before it.

As well as accepting alternative measures as a method of dealing with young people, the Y.O.A. also adopts the closely-related concept of non-intervention. Paragraph 3(1)(d) of the Y.O.A. states that “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”. Paragraph 3(1)(f) guarantees the young person “a right to the least possible interference with freedom that is consistent with the protection of society.” Although non-intervention must be balanced against the protection of society, these principles emphasize the need to consider non-judicial means of resolving conflicts between the young offender and the State.

Under the Y.O.A., each province is free to set up and administer alternative measures programs. If the provincial programs follow the most common model of present diversion programs, a decision will be made prior to the first court appearance to determine whether the young person will be offered an opportunity to participate in the program. If the young person agrees, a meeting will be held to discuss the alleged offence and the choice of

alternative measures available. The young person must acknowledge responsibility for the act, as a minimum prerequisite to participation. If he is not prepared to accept responsibility, the young person should be dealt with in youth court. If alternative measures are felt suitable, the legislation does not specify the conditions which may be imposed. Normally, they might include measures such as writing an essay, restitution, community service work, participation in a recreation program, involvement with Big Brothers/Big Sisters, or some form of counselling. There will be no formal record of a conviction as a result of participation in alternative measures. A record of participation in alternative measures will likely be kept pursuant to s. 43, though access to this record will be limited.

The Y.O.A. incorporates a number of safeguards to ensure that the rights of the young person are not abused. Among these are the fact that the young person must acknowledge responsibility, the requirement of full and free consent and the right to consult counsel before participating in alternative measures. The Y.O.A. legislates minimum standards and rights for the protection of the young person while at the same time it seeks to preserve the public's right to protection.

SECTION 4

4.(1) *Alternative measures.*—Alternative measures may be used to deal with a young person alleged to have committed an offence instead of judicial proceedings under this Act only if

- (a) the measures are part of a program of alternative measures authorized by the Attorney General or his delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of a province;**
- (b) the person who is considering whether to use such measures is satisfied that they would be appropriate, having regard to the needs of the young person and the interests of society;**
- (c) the young person, having been informed of the alternative measures, fully and freely consents to participate therein;**
- (d) the young person has, before consenting to participate in the alternative measures, been advised of his right to be represented by counsel and been given a reasonable opportunity to consult with counsel;**

- (e) the young person accepts responsibility for the act or omission that forms the basis of the offence that he is alleged to have committed;
- (f) there is, in the opinion of the Attorney General or his agent, sufficient evidence to proceed with the prosecution of the offence; and
- (g) the prosecution of the offence is not in any way barred at law.

(2) *Restriction on use.*—Alternative measures shall not be used to deal with a young person alleged to have committed an offence if the young person

- (a) denies his participation or involvement in the commission of the offence; or
- (b) expresses his wish to have any charge against him dealt with by the youth court.

(3) *Admissions not admissible in evidence.*—No admission, confession or statement accepting responsibility for a given act or omission made by a young person alleged to have committed an offence as a condition of his being dealt with by alternative measures shall be admissible in evidence against him in any civil or criminal proceedings.

(4) *No bar to proceedings.*—The use of alternative measures in respect of a young person alleged to have committed an offence is not a bar to proceedings against him under this Act, but

- (a) where the youth court is satisfied on a balance of probabilities that the young person has totally complied with the terms and conditions of the alternative measures, the youth court shall dismiss any charge against him; and
- (b) where the youth court is satisfied on a balance of probabilities that the young person has partially complied with the terms and conditions of the alternative measures, the youth court may dismiss any charge against him if, in the opinion of the court, the prosecution of the charge would, having regard to the circumstances, be unfair, and the youth court may consider the young person's performance with respect to the alternative measures before making a disposition under this Act.

(5) *Laying of information, etc.*—Subject to subsection (4), nothing in this section shall be construed to prevent any person from laying an information, obtaining the issue or confirmation of any process or proceeding with the prosecution of any offence in accordance with law.

When alternative measures may be used: subsection 4(1)

Subsection 4(1) outlines the situations in which alternative measures are appropriate. Alternative measures may be used to deal with a young person "alleged to have committed an offence". Since the word "alleged" is broader than "charged with", it is not necessary for an information to be sworn as a precondition to utilizing alternative measures. It should be noted that alternative measures may be used either before or after the laying of an information. Subsection 2(1) of the Y.O.A. defines "offence" as an offence created by or under an Act of Parliament and therefore s. 4 of the Y.O.A. may only be used to sanction diversion in the case of alleged "federal" offences.

Authorized programs: paragraph 4(1)(a)

Alternative measures must be part of an authorized program. The Act does not set out guidelines for establishing the programs; it merely provides legislative authority for them and legislates minimum standards to safeguard the young person's rights. The Act permits each province to determine whether it wishes to implement alternative measures programs, and provides flexibility for the development of different types of programs in response to local needs, interests and resources. Programs may be local or province-wide. Each program must be authorized by the provincial Attorney General or his delegate, or by a person or class of persons designated by the Lieutenant Governor in Council (Cabinet) of a province. Further, it would seem to be *intra vires* a province to enact complementary legislation governing the administration, staffing and funding of alternative measures programs, as long as such legislation does not conflict with the Y.O.A.

**"Needs of young person and interests of society":
paragraph 4(1)(b)**

The Act specifies that alternative measures should only be used where the person who is authorized to decide whether they should be used is satisfied that they would be "appropriate, having regard to the needs of the young person and the interests of society". The authorized person will be the one designated in any program approved pursuant to para. 4(1)(a). The consideration of these two factors is required in other provisions of the Y.O.A.:

see for example s-s. 28(17) governing review of dispositions. Although in some cases the needs of the young person and the interests of society may be quite consistent, in other situations they may be inconsistent and some balancing will be required.

The needs of the young person may in many situations be advanced if alternative measures are employed. The youth will not be burdened or stigmatized by a formal offence record, and the labelling effect of involvement in the juvenile justice system may be minimized. These needs are recognized in the Declaration of Principle in paras. 3(1)(d) and (f), which recognize the advantages of minimal intervention in a young person's life. Furthermore, a particular program available under alternative measures may be best suited to a young person's needs. On the other hand, in some circumstances it may be felt that the needs of a young person will be best served if he is impressed with the serious consequences of his acts, and is held accountable through the court process: see para. 3(1)(b). Further, if the appropriate response to an offence is a form of treatment available only by way of a formal disposition under s. 20, alternative measures would not be suitable.

The interests of society require protection from illegal behaviour: see para. 3(1)(b). In the case of more serious offences, it may be that the more onerous consequences attached to a court appearance will best ensure the protection of society and deter future offences. On the other hand, society may also benefit if a young offender is dealt with by alternative measures, as this may minimize the possibility of a repetition of criminal behaviour and promote the rehabilitation of the offender.

In each case, the person deciding whether to employ alternative measures will have to consider the offender, the offence, the type of alternative measures which might be employed and the resources of the juvenile justice system.

Consent of the young person: paragraph 4(1)(c)

Alternative measures can be used only if the young person "fully and freely consents"; this requirement protects against possible coercion from parents or other individuals in authority. Before consenting, the young person must be informed of the specific measures to be used. The requirement that a young per-

son must consent with knowledge of the specific form that the alternative measures will take is one method of safeguarding the young person from unsuitable or overly burdensome measures.

Right to counsel: paragraph 4(1)(d)

The young person must be informed of his right to counsel before giving his consent to participate in alternative measures. Without a reasonable opportunity to consult with counsel, it is possible that the young person's consent may not be "fully and freely" given.

The requirements of para. 4(1)(d) are that a young person be informed of his right to consult counsel and be given a "reasonable opportunity to consult with counsel." The use of the term "opportunity" would seem to suggest that a young person be given enough time to consult with counsel, but would not seem to make it mandatory that he be provided with counsel. Thus, if a young person could not afford counsel or obtain some form of legal aid, he might not actually obtain legal advice before consenting to or participating in a program of alternative measures. The provisions of para. 4(1)(c) should be contrasted with s. 11, which creates a scheme for ensuring that each young person involved in judicial proceedings in youth court actually has representation by counsel, provided he wants it and is unable to obtain same. Although the provision of legal counsel is not mandatory pursuant to para. 4(1)(c), in certain circumstances there may be some doubt as to whether the consent was an informed one and was freely given if legal counsel has not been made available. Legal aid officials or administrators of programs of alternative measures may choose to ensure that counsel is actually provided to young people before they participate in alternative measures.

Acknowledging responsibility: paragraph 4(1)(e)

The young person must accept "responsibility for the act or omission that forms the basis of the offence". Intervention and imposition of alternative measures can only be justified where a young person is prepared to acknowledge responsibility as a minimum basis for the application of such voluntary measures. It appears that accepting responsibility is something less than indicating an intention to plead guilty if charged in youth court. The

wording of para. 4(1)(e) requires acknowledgement of responsibility for the act that forms the basis of the offence, rather than responsibility for the offence *per se*, which would require acknowledgement of responsibility for all elements of the offence, both mental and physical. A young person might "accept responsibility" by acknowledging that he is a party or accessory to the offence, rather than admitting full criminal responsibility. On the other hand, a mere acknowledgement by a young person that he was present at the scene while another person committed a criminal act, would undoubtedly not suffice.

A young person may acknowledge responsibility either orally or in writing. Subsection 4(3) provides that no statement made for the purposes of para. 4(1)(e) may be used in subsequent proceedings.

Sufficient evidence: paragraph 4(1)(f)

Alternative measures are only permitted if there is "sufficient evidence to proceed with the prosecution of the offence". This provision acts as a safeguard against "widening the net"; it militates against using alternative measures for weak cases which would not otherwise proceed to court, thus ensuring that alternative measures are truly alternative, and not in addition to, prosecution.

The question of whether there is sufficient evidence must be addressed by the Attorney General or his agent. An "agent" must be someone qualified to pass on the sufficiency of the evidence, from which can be inferred the requirement that the agent be trained in law.

Barred at law: paragraph 4(1)(g)

Alternative measures may only be used when prosecution of the offence is "not in any way barred at law". Where a legal bar exists which would prevent prosecution through the normal court process, intervention of any other kind would be unjustifiable. Thus, for example, alternative measures may not be used after a limitations period has passed. By virtue of s. 51 of the Y.O.A., the six months' limitation period for summary conviction offences set out in s-s. 721(2) of the *Criminal Code* applies to all summary conviction offences under the Y.O.A. Another ex-

ample of a situation where use of alternative measures is prohibited is one in which a young person was previously acquitted or convicted of an offence in youth court. Owing to the principle of *res judicata* and the special pleas of *autrefois acquit* and *autrefois convict*, further prosecutions would be barred for the offence and thus alternative measures should not be employed. The need for independent legal counsel is again emphasized, as the recognition of the availability of these legal defences can be a complex matter.

Consequences of breach of paragraphs 4(1)(c) to (g)

The Y.O.A. does not specify any consequences for a failure to comply with paras. 4(1)(c) to (g). If, for example, alternative measures are used without a young person having been advised of his right to representation by counsel or without having given a full and free consent. It would seem that no program should be authorized under para. 4(1)(a) unless it is clear that paras. 4(1)(c) to (g) will be satisfied. If any one of these conditions are not satisfied, then it would seem that no adverse use should be made of the fact of participation in subsequent youth court proceedings: see subpara. 14(2)(c)(iv) which ordinarily allows reference to be made in a pre-disposition report to "the history of alternative measures used to deal with the young person". Similarly, the young person should not be adversely affected by a failure to satisfy the conditions of paras. 4(1)(c) to (g). On the other hand, he should be able to rely on para. 4(4)(a) or (b) if he has totally or partially complied with the terms of the alternative measures, regardless of whether paras. 4(1)(c) to (g) have been complied with or not.

Restrictions on use of alternative measures: subsection 4(2)

The voluntary nature of a young person's participation in alternative measures programs is emphasized in s-s. 4(2). If the young person "denies his participation or involvement in the commission of the offence" (para. 4(2)(a)), he may not be proceeded with except through the youth court. This follows from the presumption of innocence, until guilt is acknowledged or proven. Since the minimum prerequisite for the imposition of alternative measures is acknowledgement of responsibility, this minimum is absent if the young person denies involvement in the offence.

Paragraph 4(2)(b) provides that the young person may choose to have any charge dealt with by the youth court. It is possible that a young person could receive a more onerous disposition as a result of alternative measures than he would receive in youth court. In this situation, the young person could see the youth court as the more favourable forum. Moreover, the young person has the choice at all times to have available the procedural and substantive protections of the youth court. The choice is the young person's — not his parents' or another adult's.

Admissions not to be received in evidence: subsection 4(3)

Subsection 4(3) renders the young person's "admission, confession or statement accepting responsibility . . . made . . . as a condition of his being dealt with by alternative measures" inadmissible in subsequent civil or criminal proceedings. This provision is intentionally narrow and excludes statements which were not made as a condition of being dealt with by alternative measures. An admission relating to an offence, other than the offence which has been the subject of alternative measures, could presumably be used subsequently. Similarly, an admission made prior to alternative measures being considered would be admissible, as would any physical or other evidence obtained as a result of any admission. The prohibition would seem to cover certain admissions made at the alternative measures hearing, but an admission made after the conclusion of such a hearing would likely be admissible subject to s. 56.

The fact of participation in alternative measures may be noted in subsequent proceedings for the purpose of determining the appropriate disposition. Subparagraph 14(2)(c)(iv) of the Y.O.A. specifically requires the inclusion of the history of alternative measures, where applicable, in a pre-disposition report. See *R. v. Drew*, [1979] 1 W.W.R. 530, 45 C.C.C. (2d) 212, 7 C.R. (3d) S-21 (B.C.C.A.) for a discussion of the extent to which a judge should take into account previous participation in alternative measures in sentencing on a subsequent charge.

The *Canadian Charter of Rights and Freedoms*, s-s. 24(2), allows a court to exclude "evidence . . . obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter . . . if . . . the admission of it in the proceedings would bring the administration of justice into disrepute." This provi-

sion may be a further safeguard for the young person, for example, if he was denied the opportunity to consult counsel.

Further proceedings: paragraph 4(4)(a)

Paragraph 4(4)(a) provides that if a young person “has totally complied with the terms and conditions of alternative measures”, the youth court shall dismiss any charge which formed the basis of the invocation of alternative measures. The youth court is to be satisfied on a balance of probabilities that the terms of the alternative measures have been completed. The use of the civil standard of proof to make this determination should be noted. Once the court is satisfied that the alternative measures have been completed, there is no discretion to do other than dismiss the charge. This provision requires the court to prevent an abuse where there has been total compliance with alternative measures.

Further proceedings: paragraph 4(4)(b)

Paragraph 4(4)(b) provides that where a young person has only partially complied with the terms of alternative measures, he may be dealt with in youth court on a charge based on the original offence. If the judge is satisfied on the balance of probabilities (the civil standard of proof), that the young person has partially complied with the terms of the alternative measures, he may dismiss the charge under para. 4(4)(b). If he is satisfied there has been total compliance, he must dismiss the charge under para. 4(4)(a). Where there has been no compliance at all, there is no discretion to dismiss the charge.

In deciding whether to dismiss a charge the judge must form an opinion, having regard to the circumstances, whether prosecution of the charge would be “unfair”. The court is thus empowered to consider, for example, why the alternative measures were not completed. For example, if restitution were required as a term of alternative measures, and a victim chose to forego further restitution or moved away, it might be unfair to allow a prosecution. Similarly, where there had been substantial compliance with the voluntary measures, prosecution might be unwarranted. In such cases, para. 4(4)(b) permits the judge to pre-

vent an abuse of process, preserving the fairness of the judicial system.

Paragraph 4(4)(b) also provides that where the court has allowed the charge to proceed, and a conviction results, it may consider the young person's performance in alternative measures before making a disposition under the Y.O.A. The Act does not specify how the performance is to be taken into account, and the court has flexibility in considering this factor. In making a disposition, a court might decide merely to require the completion of the terms of alternative measures, or in some other way take into account the partial completion of alternative measures to lessen the severity of disposition. Or the court might simply consider the young person's difficulties with the particular alternative measures imposed, and select a different type of disposition. In any event, it is for the court to take into account all of the circumstances in deciding how to consider the young person's performance in alternative measures.

Double jeopardy

Both paras. 4(4)(a) and (b) protect the young person against double jeopardy. Since alternative measures are not equivalent to proceedings in court, it would seem that the prohibition against double jeopardy found in para. 11(h) of the *Canadian Charter of Rights and Freedoms* is not violated.

Private prosecutions: subsection 4(5)

Section 455 of the *Criminal Code* permits private prosecutions. Subsection 4(5) of the Y.O.A. confirms that the private citizen has the right to lay an information under the Y.O.A. "in accordance with law". This right is subject to the provisions of s-s. 4(4), which protect the young person who has completed alternative measures from further prosecution in court. Subsection 4(5) follows the approach of the Supreme Court of Canada in A.-G. *Que. v. Lechasseur* (1981), 128 D.L.R. (3d) 739, 25 R.F.L. (2d) 1, 63 C.C.C. (2d) 301, 28 C.R. (3d) 44, 38 N.R. 516, where it was held that citizens should not be deprived of access to the courts and should have the right to commence a private prosecution instead of having a young person dealt with by way of alternative measures. Though the Crown may stay a private prosecution pursuant to s. 732.1 of the *Code*, in view of s-s. 4(5)

of the Y.O.A., it would not seem appropriate for the Crown to routinely stay proceedings with the intention of stopping a private prosecution in order to invoke alternative measures; there may be, however, special circumstances which would justify such an action.

JURISDICTION (Sections 5 and 6)

Introduction

The Y.O.A. gives exclusive jurisdiction to a youth court for any offence alleged to have been committed by a young person. The two exceptions to this general rule are:

- (1) where a young person is subject to the *National Defence Act*; or
- (2) where a young person is transferred to ordinary court under s. 16.

Exclusive jurisdiction of the youth court ensures that the guiding principles and entrenched rights and safeguards, found in the Y.O.A. extend to all young persons.

SECTION 5

5. (1) *Exclusive jurisdiction of youth court.*—Notwithstanding any other Act of Parliament but subject to the *National Defence Act* and section 16, a youth court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he was a young person and any such person shall be dealt with as provided in this Act.

(2) *Period of limitation.*—No proceedings in respect of an offence shall be commenced under this Act after the expiration of the time limit set out in any other Act of Parliament or any regulation made thereunder for the institution of proceedings in respect of that offence.

(3) *Proceedings continued when adult.*—Proceedings commenced under this Act against a young person may be continued, after he becomes an adult, in all respects as if he remained a young person.

(4) *Powers of youth court judge.*—A youth court judge, for the purpose of carrying out the provisions of this Act, is a justice and a magistrate and has the jurisdiction and powers of a summary conviction court under the *Criminal Code*.

(5) *Court of record.*—A youth court is a court of record.

Youth court: subsection 5(1)

Youth court is defined in s-s. 2(1) of the Y.O.A. Each jurisdiction is to designate a particular court as the "youth court". In some jurisdictions it is likely this will be a provincial court, but in others it may be a county or superior court. The Y.O.A. contemplates that there may be variation in the level of court designated: see for example s-s. 16(11).

"Exclusive jurisdiction" of youth court: subsection 5(1)

The Y.O.A. requires that unless dealt with by alternative measures under s. 4, a young person who commits an offence will be dealt with, at least initially, by the youth court with its special expertise, experience and facilities for dealing with young persons. It is generally expected that all aspects of a case involving a young person will occur in this specially designated court. Adjudication, disposition and review of disposition are all to be decided by the youth court. Also such issues as pre-trial detention (ss. 7 and 8), service of notice of the hearing (s. 9), parental presence at a hearing (s. 10), custody for medical or psychological examination (s. 13) and access to records arising out of charges under the Y.O.A. (ss. 40 to 44), are to be dealt with in youth court. There are, however, provisions to allow another judicial official to decide matters such as pre-trial detention, which should be resolved expeditiously, where "having regard to the circumstances, a youth court judge is not reasonably available" (s-s. 8(1)).

Provision is also made for appeals to the higher levels of the ordinary (adult) courts if a litigant is dissatisfied with a decision in youth court: see for example s-ss. 8(6) and (9), pre-trial detention; s-ss. 16(9), (10) and (11), transfer; and s. 27, a general appeal provision governing adjudication and disposition.

On the other hand, adults who commit offences involving young people are to be dealt with by the ordinary courts. The *J.D.A.*, s. 33 creates the offence of "contributing to delinquency", under which adults are dealt with by the juvenile court. There is no equivalent to s. 33 of the *J.D.A.* in the Y.O.A. Adults who unlawfully interfere with young people will be dealt with under the *Criminal Code* in ordinary court; amendments to the *Code*, for example s-s. 246.1(2), have effectively replaced the

offence of "contributing to delinquency". The Y.O.A. specifically creates certain offences for failure to abide by the statutory protections afforded young people; for example, it is an offence under s-s. 38(2) of the Y.O.A. to publish a report identifying a young person charged with an offence under the Act. These offences will be dealt with by the ordinary courts, unless of course the offender is a young person.

Exceptions to youth court jurisdiction: subsection 5(1)

Subsection 5(1) creates two exceptions to the exclusive jurisdiction of the youth court to deal with young persons alleged to have violated the criminal law.

A person who is 17 years old may, with parental consent, become a member of the Canadian Armed Forces. As a result of s-s. 5(1) of the Y.O.A., young persons who are members of the Armed Forces will usually not be dealt with under the Y.O.A., but rather will be subject to the Code of Service Discipline and the jurisdiction of the Courts Martial pursuant to the *National Defence Act*, R.S.C. 1970, c. N-4. It is generally desirable to deal with all those who choose to enter the services, with the special demands and discipline entailed, in the military judicial system. However, s-s. 61(1) of the *National Defence Act* states:

61. (1) Nothing in the Code of Service Discipline affects the jurisdiction of any civil court to try a person for any offence triable by that court.

This provision allows a prosecutor to choose to proceed in youth court rather than in the military courts with a charge against a young person who is a member of the Forces. Thus, a provincial Crown Attorney or other prosecutor may decide to charge a young person in the Forces in youth court in regard to offences not directly related to military discipline, or may choose to leave the matter to military courts: see s-ss. 61(2) and (3) of the *National Defence Act* and paras. 11(h) and (i) of the *Canadian Charter of Rights and Freedoms* for provisions concerning situations of double jeopardy. It should be noted that young persons who commit offences on military installations but who are not members of the Armed Forces are within the jurisdiction of youth court; thus, children of servicemen who live on military bases are not to be dealt with by military courts.

Subsection 5(1) provides for another exception to the exclusive jurisdiction of the youth court based on s. 16 of the Y.O.A. Section 16 provides that where a young person is charged with a serious offence, a youth court may decide that his case should be transferred to the ordinary courts for trial and sentencing, which could result in confinement of the young person in an adult correctional facility. Even after transfer to ordinary court under s. 16, it is possible under s. 75 of the Y.O.A. that, at the discretion of the correction authorities, a young person may be placed in custody in a juvenile facility.

It would also seem that s-s. 47(3) creates a further exception to the rule that young persons are dealt with in youth court. Subsection 47(3) provides that if a young person commits contempt in the face of a court, other than a youth court, both the youth court and the other court have jurisdiction to deal with the matter. Subsection 47(4) provides that regardless of which court deals with contempt, if the young person is found guilty of contempt, the court can only impose one of the dispositions found in s. 20 of the Y.O.A.

“While he was a young person”: subsections 5(1) and (3)

The relevant date for determining the jurisdiction of the youth court is the date of the occurrence of the offence or alleged offence. Subsection 5(3) is clear in providing that if a young person becomes an adult after the date of the offence or alleged offence, he will continue to be dealt with under the Y.O.A. There is provision in s-s. 24(14) of the Y.O.A. for confinement in a provincial correctional facility for adults of a person committed to custody under the Y.O.A.; this transfer is to occur only after a young person reaches the age of 18, requires a judicial order made at a youth court hearing, and leaves the individual subject to the Y.O.A.

“Young person” is defined in s-s. 2(1) of the Y.O.A. and “proof of age” is dealt with in s. 57.

Period of limitation: subsection 5(2)

Subsection 5(2) stipulates that the time limitations for commencing proceedings are to be determined by the statute creating

the offence. By virtue of s-s. 721(2) of the *Criminal Code*, this means the limitation period for summary conviction offences is six months. Few indictable offences have specific limitations and therefore the general common law rule *nullum tempus occurrit regi* (time does not run against the Crown) applies to indictable offences committed by young persons. By virtue of s. 27 of the *Interpretation Act*, hybrid offences, which are summary or indictable at Crown election, are deemed indictable unless the Crown otherwise elects.

Powers of youth court judge: subsection 5(4)

Subsection 5(4) provides that a youth court judge "is a justice and a magistrate and has the jurisdiction and powers of a summary conviction court under the *Criminal Code*." The terms "justice" and "magistrate" are defined in s. 2 of the *Code*, while "summary conviction court" is defined in s. 720.

By virtue of s-s. 52(1) of the Y.O.A., the procedure to be followed in youth court is generally that of a summary proceeding under the *Criminal Code*, whether the offence itself is summary or indictable. The combined effect of s-ss. 5(4) and 52(1) is to cloak the youth court judge with sufficient authority to conduct proceedings under the Y.O.A. The powers vested in a youth court judge include the authority:

- to conduct a trial (s. 733 of *Code*);
- to preserve order in the court (s. 440 of *Code*; also s. 47 of Y.O.A.);
- to issue a summons of warrant for arrest (ss. 455 to 456.3 of *Code*);
- to deal with pre-trial detention of young person (ss. 7 and 8 of Y.O.A. and ss. 457 to 458 of *Code*);
- to arraign the accused and accept plea (s. 736 of *Code* and s. 12 of Y.O.A.);
- to make a finding of insanity at time offence or at time of trial (ss. 542 and 543 of *Code*);
- to issue a subpoena or warrant for a witness (s. 728 of *Code*; also s. 54 of Y.O.A.);
- to adjourn proceedings (ss. 725 and 738 of *Code*);

— to require a young person to enter into a recognizance to keep the peace and be of good behaviour ("peace bond", s. 745 of Code).

In addition, youth court judges are expressly given certain powers in the Y.O.A., for example in s. 47 dealing with contempt, and ss. 48 and 49 governing forfeiture of recognizances, and s. 54 concerning the issue of a subpoena.

"Court of record": subsection 5(5)

The term "court of record" is not defined in the Y.O.A. or *Criminal Code*, but the import of s-s. 5(5) of the Y.O.A. is the same as that of s-s. 489(1) of the Code.

Stephen's Commentaries, vol. 3, p. 372 as quoted in *Dixon v. MacKay* (1903), 21 Man. R. 762, at p. 765, defines "court of record" as: "'One whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony; which rolls are called the records of the Court, and are of such high and super-eminent authority that their truth is not to be called in question.'" Thus, there is an obligation upon the youth court to maintain a record of its orders; further certified copies of its orders are self-authenticating and do not require a witness to vouch for their authenticity. Section 40 of the Y.O.A. deals in considerable detail with the youth court record: see that section and the comments following.

As a "court of record", a youth court also has an inherent jurisdiction to deal with contempt in the face of the court: see *R. v. Dunning* (1979), 50 C.C.C. (2d) 296 (Ont. C.A.). Practically, the fact that a youth court is a "court of record" has little significance in regard to contempt jurisdiction, as s. 47 of the Y.O.A. gives the youth court a broad contempt jurisdiction.

Proceedings before a justice: section 6

SECTION 6

6. Certain proceedings may be taken before justices.—Subject to section 8, any proceeding that may be carried out before a justice under the *Criminal Code*, other than a plea, a trial or an adjudication, may be carried out before such justice in respect of an offence alleged to have been committed by a young person, and

any process that may be issued by a justice under the *Criminal Code* may be issued by such justice in respect of an offence alleged to have been committed by a young person.

Section 5 of the Y.O.A. establishes the powers and authority of a youth court judge. It is clear from s. 5, as well as other specific provisions, that the Act contemplates that most of the important judicial functions in respect of a young person will be performed exclusively by a youth court judge.

However, s. 6 of the Y.O.A. provides that certain functions in respect of a young person may be performed by a "justice", where authority is given to a justice by the *Code* to perform these functions. "Justice" is defined in s. 2 of the *Criminal Code* to mean a justice of the peace or a magistrate.

Section 6 of the Y.O.A. generally permits a justice to preside over the same proceedings and issue the same processes under the Y.O.A. that he would be able to preside over or issue under the *Criminal Code*, with certain important exceptions as discussed below. Section 6 allows a justice to carry out certain preliminary or peripheral functions in regard to proceedings under the Y.O.A., such as:

- issuing a summons or warrant for arrest (ss. 455 to 456.3 of *Code*);
- issuing a subpoena or warrant for a witness (s. 728 of *Code*);
- taking an information (s. 723 of *Code*);
- adjournment of proceedings (s. 725 of *Code*);
- dealing with judicial interim release, where "having regard to the circumstances" a youth court judge is "not reasonably available" (ss. 7 and 8 of Y.O.A., ss. 457 to 458 of *Code*).

DETENTION PRIOR TO DISPOSITION (Sections 7 and 8)

Introduction

Section 7 deals with the arrest and pre-disposition detention of a young person, and establishes procedures for making decisions as to the place where a young person is to be detained, or if he is to be released, to whom and under what circumstances. Section 8 provides that the youth court is to have a central position in the making of decisions about pre-trial detention, and provides a mechanism for the review of these decisions.

The Y.O.A. incorporates the basic philosophy of the *J.D.A.* in regard to pre-disposition detention; young persons held in custody are not to be confined with adults, unless absolutely necessary. The Y.O.A. does introduce some new practices, and clarifies some of the confusion concerning pre-disposition detention under the *J.D.A.* Most significantly, it makes clear that the liberal provisions of the *Bail Reform Act* (found in Part XIV of the *Criminal Code*) are to be applied to young people as well as adults.

Some of the significant features of the scheme set out in the *J.D.A.* which will remain essentially unchanged in the Y.O.A. include:

- detention of young people in places separate from adults, Y.O.A., s-s. 7(1) (*J.D.A.*, s-s. 13(1));
- exceptions to separate detention if juvenile facilities not reasonably available or safety problems exist, Y.O.A., s-s. 7(3) (*J.D.A.*, s-s. 13(4));
- release of young person into care of responsible person, Y.O.A., s-s. 7(4) (*J.D.A.*, s-s. 14(2));
- offence established for those who fail to ensure separate pre-disposition detention of young people, Y.O.A., s-s. 7(7) (*J.D.A.*, s-s. 13(2)).

The Y.O.A. presents certain significant new features:

- clarification that provisions of *Criminal Code* governing detention prior to disposition apply to young people, Y.O.A., ss. 8, 51 and 52;
- introduction of scheme of judicial review of decisions concerning pre-disposition, Y.O.A., s. 8;
- opportunity for consultation with counsel after arrest and for provision of counsel at detention hearings, Y.O.A., ss. 11 and 56;
- notification of parents as soon as possible if young person is detained in custody, Y.O.A., s-s. 9(1).

By virtue of ss. 51 and 52 of the Y.O.A., the substantive features of Part XIV of the *Criminal Code*, governing arrest, release and pre-disposition detention are applicable to offences involving young people. Section 7 of the Y.O.A. qualifies the provisions of the *Code* by ensuring that young persons are generally to be detained separate from adults, and s. 8 provides that decisions regarding the detention of young persons are generally to be decided by a youth court judge.

Therefore the Y.O.A. provides for the application of the general provisions of the criminal law with respect to arrest, and pre-disposition detention and release, but with modification to allow the juvenile justice system to accommodate the special needs and problems of young offenders.

SECTION 7

7.(1) *Designated place of temporary detention.*—A young person who is arrested and detained prior to the making of a disposition in respect of the young person under section 20 shall, subject to subsection (2), be detained in a place of temporary detention designated as such by the Lieutenant Governor in Council of the appropriate province or his delegate or in a place within a class of such places so designated.

(2) *Exception.*—Subsection (1) does not apply in respect of the arrest of a young person or in respect of any temporary restraint of a young person in the hands of a peace officer after the arrest of the young person but prior to his detention in custody.

(3) *Detention separate from adults.*—No young person who has been arrested shall be detained prior to the making of a disposition in respect of the young person under section 20 in any part of a place in which an adult who has been charged with or convicted of an offence against any law of Canada or a province is detained or held in custody unless a youth court judge or, where a youth court judge is, having regard to the circumstances, not reasonably available, a justice authorizes the detention, being satisfied that

- (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.

(4) *Placement of young person in care of responsible person.*—Where a youth court judge or a justice is satisfied that

- (a) a responsible person is willing and able to take care of and exercise control over a young person who has been arrested, and
- (b) the young person is willing to be placed in the care of that person,

and where that person undertakes in writing to take care of and to be responsible for the attendance of the young person in court when required, the young person may be placed in the care of that person instead of being detained in custody.

(5) *Authorization of provincial authority for detention.*—In any province for which the Lieutenant Governor in Council has designated a person or a group of persons whose authorization is required before a young person who has been arrested may be detained prior to his appearance before a youth court judge or a justice, no young person shall be so detained unless such authorization is first obtained.

(6) *Transfer by provincial director.*—A young person who is detained in custody in accordance with this section may, during the period of detention, be transferred by the provincial director or his delegate from one place of temporary detention to another.

(7) *Offence and punishment.*—Any person who fails to comply with subsection (1), (3) or (5) is guilty of an offence punishable on summary conviction.

Arrest

The provisions of the *Criminal Code* dealing with arrest are made applicable to the arrest of young persons by virtue of ss. 51 and 52 of the Y.O.A. and the retention in the Y.O.A. of the distinction between indictable and summary conviction offences (s. 52).

By virtue of s. 449 of the *Criminal Code*, a young person may be arrested without warrant by any person where:

- the young person is found committing an indictable offence;
- the young person is believed on reasonable and probable grounds to have committed a criminal offence and is being freshly pursued;
- the young person is found committing a criminal offence in relation to property, he may be arrested by the owner or person in lawful possession of the property.

A peace officer acting on the authority of s. 450 of the *Criminal Code* has authority, in addition to s. 449, to arrest a young person without warrant where:

- the young person is found committing a criminal offence;
- the peace officer believes on reasonable and probable grounds that the young person has committed or is about to commit an indictable offence;
- the peace officer believes on reasonable and probable grounds that a warrant is in force for the young person.

The authority for arrest without warrant by a peace officer is limited by s-s. 450(2) of the *Code*. It provides that, for certain less serious offences, the peace officer shall not arrest without a warrant unless it is in the public interest to do so (for example, to establish the identity of the person) or if the peace officer has a reasonable belief that the young person will fail to attend court.

In situations where the peace officer does not arrest, for offences specified in s-s. 450(2) of the *Code*, the peace officer may issue to the young person an appearance notice under the authority of s. 451 of the *Criminal Code*.

If the young person is arrested without warrant under s. 449 of the *Code*, or with warrant under s. 456.3 of the *Criminal Code*, the Y.O.A. provides that the police

- (1) *must* detain the young person separate from adult offenders, subject to the exception in s-ss. 7(2) and (3);
- (2) *must* forthwith advise the young person of his right to be represented by counsel and give him an opportunity to obtain counsel, s-s. 11(2);
- (3) *must not* fingerprint or photograph the young person unless permitted by the *Identification of Criminals Act*, s. 44;
- (4) *must* give notice to the young person's parents as required by s-ss. 9(1) and (2);
- (5) *must* comply with requirements of s. 56 if statement to be taken from young person (notification of rights, reasonable opportunity to consult counsel, parent or other adult, and reasonable opportunity to make statement in presence of such a person).

These requirements of the Y.O.A. are in addition to those found in the *Canadian Charter of Rights and Freedoms*, s. 10 which provides:

10. Everyone has the right on arrest or detention
 - (a) to be informed promptly of the reasons therefor;
 - (b) to retain and instruct counsel without delay and to be informed of that right; and
 - (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

If a young person is arrested for one of the less serious offences listed in s-s. 450(2) of the *Code*, and if the public interest has been satisfied and there no longer exists a reasonable belief that the young person will fail to attend court, then the young person shall be released, either by the arresting officer or by the officer in charge under ss. 452 and 453 of the *Criminal Code*. In either case, the young person can be compelled to attend court by an appearance notice or summons. The officer in charge also has authority to release a young person arrested for an indictable offence where the maximum punishment for an adult is five years or less; the officer in charge also has authority to require a young person to give his promise to appear or enter into a cognizance to secure his release.

Where the arresting officer or the officer in charge releases a young person under s. 452 or 453 of the *Criminal Code*, notice

must be given to the parent of the young person pursuant to s-s. 9(2) of the Y.O.A..

Judicial interim release

Sections 457 to 459 of the *Criminal Code* deal with “judicial interim release”: the judicial decision to release an arrested person rather than having him detained in custody pending ultimate resolution of his case. Sections 51 and 52 of the Y.O.A. make these provisions of the *Code* applicable.

Where a young person has been arrested, but not released pursuant to s. 452 or 453 of the *Code*, then s. 454 requires that a young person be brought for a decision on judicial interim release before a youth court judge, or where one is not immediately available, as soon as possible thereafter. Subsection 8(1) of the Y.O.A. provides that where a youth court judge is “having regard to the circumstances . . . not reasonably available”, the young person shall be brought before a justice for judicial interim release. The Y.O.A. thus ensures that the sensitive issue of pre-disposition detention will normally be dealt with by the youth court, with its special expertise and understanding. Subsection 8(1) provides an exception to ensure that a young person is not unduly detained on account of the unavailability of a youth court judge.

The substantive features of the *Code* provisions governing judicial interim release also apply to the pre-disposition detention of young persons. Thus, as a rule the onus will be on the prosecutor to “show cause why the detention of the accused in custody is justified.” However, in the more serious circumstances listed in s-s. 457(5.1) or paras. 457.7(2)(b) to (d.1) of the *Code*, the youth court will order the young person detained unless he can show cause why his detention is not justified. Subsection 457(7) of the *Code* provides that the detention of an accused person is only justified if it is necessary to ensure his attendance in court, or if it is “necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or an interference with the administration of justice”. Thus it will clearly not be appropriate for a young person to be detained pending judicial resolution of his case because he may be in need of protection, or

lacks a place to stay, or "needs to be taught a lesson." Subsection 13(3) of the Y.O.A., however, allows a young person to be detained in custody to permit preparation of a medical or psychological report.

Sections 457.2 and 457.3 of the *Code* govern the conduct of a hearing to determine judicial interim release. Generally, the hearings are relatively informal; the court may receive and base its decision upon "evidence considered credible or trustworthy" in the circumstances. Thus the prosecutor often presents all his evidence by means of his own submissions, rather than providing oral testimony. The scope of the hearings is broad; the court may learn of the record of previous convictions, any outstanding charges, and the "circumstances of the alleged offence". Provision is also made for a ban on publication of the details of the hearing.

The court may decide to detain the accused young person, or to release him upon conditions specified in s-ss. 457(2) and (4) of the *Code*, including that the accused:

- enter into a recognizance, with or without sureties and with or without the requirement of a deposit of a sum of money or other valuable security;
- report to a peace officer or other designated person at times specified, and notify such person of a change in address, employment or occupation;
- remain in a specified territorial jurisdiction;
- abstain from communicating with any witness or other designated person;
- deposit his passport, where he has one;
- comply with such "other reasonable conditions specified".

The statutory provisions of the *Code* governing judicial interim release and the jurisprudence interpreting these provisions are complex. The presentation here merely summarizes the *Code* and case law. For a further discussion, see Roger Salhany, *Canadian Criminal Procedure*, 3rd ed. (Aurora, Canada Law Book, 1978), chapter 4; John Scollin, *The Bail Reform Act* (Toronto, Carswell, 1972); John Scollin, *Pre-Trial Release* (Toronto, Carswell, 1977).

"Place of temporary detention": subsections 7(1) and (3)

Section 7 of the Y.O.A. provides that where a decision is made to detain a young person prior to disposition, this will be in a "place of temporary detention". Places of temporary detention will continue under the Y.O.A. to be a provincial responsibility, and are to be designated by the Lieutenant Governor in Council (provincial Cabinet). It is likely that existing facilities will continue to be used, but there will probably need to be some new facilities designated in provinces where 16 and 17 year olds are currently dealt with in the adult system.

Subsection 7(3) of the Y.O.A. provides that, unless otherwise ordered by a youth court, "no young person . . . shall be detained prior to the making of a disposition . . . in *any part* of a place in which an adult . . . is detained" (emphasis added). Ideally, young persons should be detained in completely separate facilities, but this may not always be feasible, especially in remote areas. Although s-s. 7(3) is perhaps slightly ambiguous, the apparent Parliamentary intent is to allow young persons and adults to be detained in separate parts of the same place, as long as they are not detained in the same part of a place. This intent is revealed by contrasting s-s. 7(3) of the Y.O.A. with s. 13 of the J.D.A.; the latter provision simply provided that a juvenile was not to be detained pending disposition in a "gaol or other place in which adults" are or may be imprisoned. Subsection 7(3) of the Y.O.A. provides that detention of young persons in a particular part of a place with adults is prohibited, but implicitly allows detention of young persons in different parts of the same place.

Thus, young persons and adults may be kept in separate facilities, or different parts of the same facility. For example, young persons may be detained in a separate wing of a facility in which adults are detained. It would, however, seem that all aspects of the detention must be separate, and hence if young persons are detained in separate parts of a facility in which there are adults, provision must be made for separate use of such areas as exercise yards, recreation areas, and food service areas.

The provisions of s. 7 regarding pre-disposition detention may be contrasted with those found in s-s. 13(3) which allow a young person to be remanded in "custody" for a medical or psychologi-

cal assessment; this may involve confinement with adults, for example, in a psychiatric facility.

“Temporary restraint”: subsection 7(2)

Subsection 7(2) gives a police officer arresting a young person some leeway. A young person may be kept in “temporary restraint” immediately upon arrest and before the commencement of formal “detention”, and during this time the young person need not be kept in a separate designated “place of temporary detention”. “Temporary restraint” is not statutorily defined, but it would seem that a young person is in “temporary restraint” until a decision is made to detain the young person and bring him before a youth court judge or a justice for consideration of judicial interim release. Such a decision will normally be made by the officer in charge, pursuant to s. 453 of the *Code*. If the young person is arrested on a serious charge, for which he can only be released by judicial decision, “temporary restraint” would appear to end when he is placed in a cell, room or other place designed to detain him pending judicial hearing. Situations of “temporary restraint” would include:

- the young person is taken to the station in a police vehicle;
- the young person is being “booked” or processed through at the police station, including, where appropriate under s. 44, fingerprinted and photographed;
- the police are taking a statement from the young person prior to taking the young person before a youth court judge pursuant to s. 434 of the *Code*;
- the arresting peace officer or officer in charge is taking appropriate steps to satisfy the public interest by ensuring the young person’s attendance at court, prior to releasing the young person under s. 452 or 453 of the *Criminal Code*.

Subsection 7(2) gives the police some flexibility in restraining a young person and in dealing with the young person after his initial arrest; it allows some time for a decision as to whether a charge should be laid and if so, whether the young person should be released. If this provision is abused, however, those responsible face possible criminal prosecution under s-s. 7(7), for violating s-ss. 7(1), (3) or (5).

Detention with adults: subsection 7(3)

As a general rule, young persons are to be detained separate and apart from adults, but s-s. 7(3) provides two exceptions:

- (1) where the safety of the young person or of others requires it (para. 7(3)(a)); or
- (2) where no place of detention for a young person is available within a reasonable distance (para. 7(3)(b)).

The first exception refers to situations where the young person may be in physical danger as a result of detention with other young persons. This exception also encompasses the danger which the young person may present to other inmates or staff; a repeat offender aged 17 may be a serious threat to younger and less experienced young persons. In *R. v. P.*, [1979] 2 W.W.R. 262 at p. 266, 8 R.F.L. (2d) 277 (Man. Q.B.) Wilson J. commented on s-s. 13(4) of the J.D.A. which provides that where a child over the age of 14 "cannot safely be confined" with others his age, he may be detained with adults:

In my view, the phrase "safely be confined" relates to all the circumstances of the intended confinement — safety to the accused himself, the accused delinquent; safety to other persons sharing that confinement with him and safety to persons charged with supervision of the alleged delinquent and his associates in that area of confinement. I think the word "safely" has to be given a wide meaning.

These words would seem equally applicable to the provisions of para. 7(3)(a) of the Y.O.A., and indeed, the subsection appears to have been explicitly worded to comply with this interpretation.

Paragraph 7(3)(b) allows detention with adults when no designated place of detention is available "within a reasonable distance". This provision allows the court to balance the ill-effects of detention with adults against the benefits of family and local community support which may be sacrificed if the young person is detained in a distant facility for young persons. The court will have to consider the distance involved, the likely length of detention, the nature of the adult facility and the type of adults contained therein, the age and maturity of the young person, and the nature of the family relationship. It may be appropriate in some circumstances for a court to consider placing the young person

with a responsible person pursuant to s-s. 7(4), rather than detaining him in an adult facility under para. 7(3)(b).

Authorization for detention in an adult facility under s-s. 7(3) must be obtained from a youth court judge and only where a youth court judge is not reasonably available may a justice authorize it. This requirement serves as a further protection for the young person for it ensures that whenever possible the specialized experience and competence of a youth court judge will be applied to these important decisions.

Placement with a “responsible person”: subsection 7(4)

Subsection 7(4) allows the court to place a young person in the care of a “responsible person” rather than detaining the young person in custody. This provision is not intended to be an alternative to release; rather only following a finding by the youth court that the criteria for detention as set out in the *Code* have been met should a court consider placing a young person in the care of a responsible person as an alternative to actual custody.

This provision recognizes the right of a young person to the least possible interference with his freedom (para. 3(1)(f)) and offers the court an alternative to actual detention where the court is satisfied that public safety can reasonably be protected.

It would appear that “responsible person” is not restricted to a parent or even necessarily an adult; presumably a young person could be placed in the care of a spouse who is a minor, or a corporation such as the Children’s Aid Society. The person must be “willing” and “able” to take care of and exercise control over the young person; although no specific form is identified under the Y.O.A., the person must undertake in writing to take care of and ensure the attendance in court of the young person. The Act provides no consequences for breach of this undertaking although arguably wilful deceit by the person making such an undertaking may fall within contempt of court (see s. 47 of the Y.O.A.).

In a strictly technical sense it might seem less onerous for a “responsible person” to undertake to take care of a young person and be responsible for his attendance in court under s-s. 7(4) of the Y.O.A. than for the same person to act as a surety for the young person’s own recognizance under paras. 457(2)(c) or (d)

of the *Code*. A surety under the *Code* may incur financial liability if the young person fails to attend while the “responsible person” under the Y.O.A. will not. It is generally appropriate for a surety to be required under the *Code* if a decision is made to release the young person, and it is felt the young person lacks sufficient financial resources for him to enter into a meaningful “pledge” to guarantee his attendance; the surety is in effect a financial guarantor. Subsection 7(4) of the Y.O.A. should be used where a decision is made to detain the young person in custody unless some responsible person personally agrees to take care of the young person and be responsible for his attendance in court; the person undertaking this responsibility assumes a broader obligation than one undertaken by a surety.

Paragraph 7(4)(b) requires the youth court to satisfy itself that “the young person is willing to be placed in the care of that person”. This indicates that the young person must be committed to this plan, and agree to stay in the care of the responsible person.

Additional authorization for detention: subsection 7(5)

Subsection 7(5) is a permissive provision allowing a province to designate a person or persons other than the police to authorize detention of a young person prior to his appearance in court. This authority, if so designated, would operate only in the narrow class of situations between temporary restraint in the hands of the police under s-s. 7(2) and the young person’s appearance before a youth court pursuant to s. 454 of the *Criminal Code*.

Transfer by provincial director: subsection 7(6)

The provincial director, as defined in s-s. 2(1) of the Y.O.A., is given discretion under s-s. 7(6) to transfer a young person detained in accordance with the Act from one facility to another. Presumably such a transfer would be based on a consideration of the level of security required for the young person, his needs and the facilities available.

Offence: subsection 7(7)

In order to encourage compliance with these provisions concerning pre-trial detention, the Act sets out an offence punish-

able on summary conviction for a failure to comply with s-ss. 7(1), (3) and (5).

SECTION 8

8. (1) *Order respecting detention or release.*—No order may be made under section 457 of the *Criminal Code* by a court, judge or justice, other than a youth court judge, for the release from or the detention in custody of a young person against whom proceedings have been taken under this Act unless, having regard to the circumstances, a youth court judge is not reasonably available.

(2) *Application to youth court.*—Where an order is made under section 457 of the *Criminal Code* in respect of a young person by a justice who is not a youth court judge, an application may, at any time after the order is made, be made to a youth court for the release from or detention in custody of the young person, as the case may be, and the youth court shall hear the matter as an original application.

(3) *Notice to prosecutor.*—An application under subsection (2) for release from custody shall not be heard unless the young person has given the prosecutor at least two clear days notice in writing of the application.

(4) *Notice to young person.*—An application under subsection (2) for detention in custody shall not be heard unless the prosecutor has given the young person at least two clear days notice in writing of the application.

(5) *Waiver of notice.*—The requirement for a notice under subsection (3) or (4) may be waived by the prosecutor or by the young person or his counsel, as the case may be.

(6) *Application for review under section 457.5 or 457.6 of Criminal Code.*—An application under section 457.5 or 457.6 of the *Criminal Code* for a review of an order made in respect of a young person by a youth court judge who is a judge of a superior, county or district court shall be made to a judge of the court of appeal.

(7) *Idem.*—No application may be made under section 457.5 or 457.6 of the *Criminal Code* for a review of an order made in respect of a young person by a justice who is not a youth court judge.

(8) *Interim release by youth court judge only.*—Where a young person against whom proceedings have been taken under this

Act is charged with an offence referred to in section 457.7 of the *Criminal Code*, a youth court judge, but no other court, judge or justice, may release the young person from custody under that section.

(9) *Review by court of appeal.*—A decision made by a youth court judge under subsection (8) may be reviewed in accordance with section 608.1 of the *Criminal Code* and that section applies, with such modifications as the circumstances require, to any decision so made.

Orders respecting detention or release: section 8

Section 8 modifies the provisions of the *Criminal Code* concerning judicial interim release by requiring all orders regarding pre-disposition, detention or release of a young person to be made by a youth court judge. Where a youth court judge is “not reasonably available”, s-s. 8(1) allows these issues to be decided by any justice. The justice will have to decide whether a youth court judge is not reasonably available before dealing with the matter. In deciding the issue of judicial interim release, the youth court judge or justice will generally apply the principles of ss. 457 to 459 of the *Criminal Code* and the jurisprudence thereunder, except as procedurally modified by the Y.O.A. Thus the same guiding principles as are applicable to judicial interim release for adults apply to young persons. (See discussion above under s. 7.)

If the issue of detention or release of a young person should be decided by a justice, as a youth court judge is not available, then s-s. 8(2) provides that the prosecutor or young person can subsequently apply to a youth court judge to hear the matter again. In this situation, the youth court judge will not simply be reviewing the original decision, but “shall hear the matter as an original application”; there will be a hearing *de novo*. If an application is made to a youth court judge to rehear the matter, s-ss. 8(3) and (4) require two clear days’ written notice of the application, though s-s. 8(5) allows the notice requirement to be waived.

Section 8 thus ensures that decisions regarding detention and release of young persons will be made by a judge with special expertise and sensitivity, while allowing some flexibility by recognizing that youth court judges may not always be immediately available.

Review of youth court orders: subsections 8(6) and (7)

Sections 457.5 and 457.6 of the *Criminal Code* allow for a review by a judge of orders made by a justice regarding detention and release. There is conflicting jurisprudence as to whether this review is a *de novo* hearing with the judge having the authority to substitute his own discretion, or whether this is rather an appeal in which the judge should only reverse the original decision if there has been a demonstrable error: for example, contrast *R. v. Thompson* (1972), 7 C.C.C. (2d) 70, 18 C.R.N.S. 102, [1972] 3 W.W.R. 729 (B.C.S.C.) and *R. v. O'Neill* (1973), 11 C.C.C. (2d) 240, 21 C.R.N.S. 107, 6 N.B.R. (2d) 735 (S.C.).

The decision of a youth court judge regarding detention or release of a young person may be reviewed pursuant to ss. 457.5 and 457.6 of the *Code*. Normally the review is by a superior, county or district court judge. Subsection 8(6) of Y.O.A. provides that if a province designates that its youth court is to be the superior, county or district court, then the review under ss. 457.5 and 457.6 is to be made by a judge of the court of appeal.

Subsection 8(7) of the Y.O.A. provides that if an initial order regarding detention or release was made by a justice as a youth court judge was not reasonably available, then review of that order is to be by a youth court judge under s-s. 8(2), and not under s. 457.5 or 457.6 of the *Code*. Of course, under the s-s. 8(2) rehearing the youth court judge's decision is subject to review under the *Code* provisions.

Offences referred to in section 457.7 of the Criminal Code: subsections 8(8) and (9)

Section 457.7 of the *Code* provides that where a person is accused of one of the serious offences specified, then he is to be released pending trial only by a judge of the superior court of criminal jurisdiction. Subsection 8(8) of the Y.O.A. ensures that where a young person is charged with such an offence, only a youth court judge may release him.

Subsection 8(9) of the Y.O.A. provides that a decision of a youth court judge, made pursuant to s-s. 8(8), dealing with a young person, charged with one of the serious offences listed in s. 457.7 of the *Code*, is reviewable only by the court of appeal. Such a review is to be in accordance with s. 608.1 of the *Criminal Code*.

NOTICES TO PARENTS (Sections 9 and 10)

Introduction

In the Y.O.A.'s Declaration of Principle, it is recognized that primary responsibility for the care and supervision of a young person lies with his parents (para. 3(1)(h)). In keeping with the principle of parental responsibility and to ensure that parents may be available to protect the rights and interests of their children, provision is made in s. 9 of the Y.O.A. to notify the parents of a young person about proceedings under the Act. Further, under s. 10 the youth court can in certain circumstances compel the attendance of a parent if his child is being prosecuted under the Y.O.A. Parents who attend proceedings under the Y.O.A. are not parties to the proceedings, but at certain stages they are assured an opportunity to participate (s. 16 transfer; s. 20 disposition; ss. 28 to 33 dispositional review).

The *J.D.A.* includes a provision for parental notice of the court proceedings, but not for compelling the attendance of parents. Section 9 of the Y.O.A. expands these notice requirements, in particular, by requiring notice to parents as soon as possible if a young person is detained after arrest. The Y.O.A. also clarifies some matters concerning notice, including: service of other adults if parents are unavailable, methods of service, dispensing with notice, contents of the notice, and the effect of a failure to give notice.

Notice to parents: section 9

SECTION 9

9. (1) *Notice to parent in case of arrest.*—Subject to subsections (3) and (4), where a young person is arrested and detained in custody pending his appearance in court, the officer in charge at the time the young person is detained shall, as soon as possible, give or cause to be given, orally or in writing, to a parent of the young person notice of the arrest stating the place of detention and the reason for the arrest.

(2) *Notice to parent in case of summons or appearance notice.*—Subject to subsections (3) and (4) where a summons or an appearance notice is issued in respect of a young person, the person who issued the summons or appearance notice, or, where a young person is released on giving his promise to appear or entering into a recognizance, the officer in charge, shall, as soon as possible, give or cause to be given, in writing, to a parent of the young person notice of the summons, appearance notice, promise to appear or recognizance.

(3) *Notice to relative or other adult.*—Where the whereabouts of the parents of a young person

- (a) who is arrested and detained in custody,
- (b) in respect of whom a summons or an appearance notice is issued, or
- (c) who is released on giving his promise to appear or entering into a recognizance

are not known or it appears that no parent is available, a notice under this section may be given to an adult relative of the young person who is known to the young person and is likely to assist him or, if no such adult relative is available, to such other adult who is known to the young person and is likely to assist him as the person giving the notice considers appropriate.

(4) *Notice to spouse.*—Where a young person described in paragraph 3(a), (b) or (c) is married, a notice under this section may be given to the spouse of the young person instead of a parent.

(5) *Notice on direction of youth court judge or justice.*—Where doubt exists as to the person to whom a notice under this section should be given, a youth court judge or, where a youth court judge is, having regard to the circumstances, not reasonably available, a justice may give directions as to the person to whom the notice should be given, and a notice given in accordance with such directions is sufficient notice for the purposes of this section.

(6) *Contents of notice.*—Any notice under this section shall, in addition to any other requirements under this section, include

- (a) the name of the young person in respect of whom it is given;
- (b) the charge against the young person and the time and place of appearance; and
- (c) a statement that the young person has the right to be represented by counsel.

(7) *Service of notice.*—Subject to subsection (10), a notice under this section given in writing may be served personally or may be sent by mail.

(8) *Proceedings not invalid.*—Subject to subsection (9), failure to give notice in accordance with this section does not affect the validity of proceedings under this Act.

(9) *Exception.*—Failure to give notice in accordance with subsection (2) in any case renders invalid any subsequent proceedings under this Act relating to the case unless

(a) a parent of the young person against whom proceedings are held attends court with the young person; or

(b) notice has been dispensed with pursuant to paragraph (10)(b).

(10) *Where a notice not served.*—Where there has been a failure to give a notice in accordance with this section and none of the persons to whom such notice may be given attends court with a young person, a youth court judge or a justice before whom proceedings are held against the young person may

(a) adjourn the proceedings and order that the notice be given in such manner and to such person as he directs; or

(b) dispense with the notice where, in his opinion, having regard to the circumstances, notice may be dispensed with.

(11) *Form of notices.*—A notice under subsection (1) or (2) may be in Form 1 and a notice under subsection (3) may be in Form 2.

A “parent”: section 9

“Parent” is broadly defined in s-s. 2(1) of the Y.O.A. The definition “includes, in respect of another person, any person who is under a legal duty to provide for that other person or any person who has, in law or in fact, the custody or control of that other person.” An agency with custody of the young person, for example, a Children’s Aid Society, would be included as a parent according to this definition. The spouse of the young person, if he is married, might also be included as a person who is under a legal duty to provide for the young person.

Section 9 requires notice to “a parent” only. Although the provision does not require notice to be given to everyone who is a “parent”, notice may be given to more than one parent. Subsection 26(7) of the *Interpretation Act*, R.S.C. 1970, c. I-23 states :

“Words in the singular include the plural, and words in the plural include the singular.” If the biological parents are separated it would seem to be good practice to give notice to the custodial parent.

If there is some doubt about who is a “parent”, or who should be given notice, direction may be sought from the court pursuant to s-s. 9(5). It is suggested that, as a matter of practice and in order to avoid later delays, directions should be sought whenever there is any doubt as to who should be served.

Notice where young person in custody: subsection 9(1)

Where a young person is arrested and detained in custody pending his appearance in court, the officer “in charge” is responsible for seeing that notice is given to a parent of the young person “as soon as possible”. The notice provisions are in keeping with the recognition in the Y.O.A. of the primary responsibility of parents for the care and supervision of their child. Assumption of this responsibility is predicated upon parents being promptly informed of their child’s involvement with the law; notification may allow parents to become involved and ensure that the rights and interests of their child are protected. See also s-s. 56(2) of the Y.O.A. which guarantees a young person the right to a reasonable opportunity to consult with a parent prior to making a statement to the police, and after consultation to have a reasonable opportunity to have his parent present when a statement is made; the young person must be informed of these rights and may choose to consult with counsel instead of a parent. Notice to parents is additional to the *Criminal Code* provisions for notice to the accused and any information that must be given to the young person under s. 10 of the *Canadian Charter of Rights and Freedoms*.

The officer in charge has the responsibility of giving or causing notice to be given. The definition of “officer in charge” in s. 448 of the *Criminal Code* includes “the officer . . . responsible for the . . . place to which an accused is taken after arrest or a peace officer designated by him . . . who is in charge of such place at the time an accused is taken to that place to be detained in custody.” The officer in charge is also responsible under Part XIV of the *Code* for release of an accused from custody, upon

issuing an appearance notice, a promise to appear, a summons, an undertaking or a recognizance to the accused.

Notice pursuant to s-s. 9(1) must state the place of detention and the reason for the arrest. Subsection 9(6) further specifies the contents of notice to a parent. Notice under s-s. 9(1) may be in Form 1 (see sample form at end of discussion of s. 9).

Under s-s. 9(1), notice of detention must be given to a parent "as soon as possible". To facilitate quick notification, it may be oral or in writing; this contrasts with s-s. 9(2) dealing with the issuance of a summons or appearance notice, which requires notice to the parent to be in writing. If oral notice is given, the person giving it must ensure that all of the requirements of s-s. 9(6) concerning the contents of the notice are satisfied. Although s-s. 9(7) permits service of written notice personally or by mail, it would seem that personal notification, perhaps by a telephone call, would generally seem to be appropriate under s-s. 9(1).

**Notice where young person not in custody:
subsection 9(2)**

Subsection 9(2) applies where the young person is not detained in custody. In cases "where a summons or an appearance notice is issued" to the young person, or "where the young person has been released on giving his promise to appear or entering into a recognizance", notice must be given to a parent. A notice given pursuant to s-s. 9(2) must contain the information required by s-s. 9(6) and must be in writing. As the young person is not being detained in custody, service by mail is sufficient, although personal service is equally acceptable under s-s. 9(7). Notice under s-s. 9(2) may be in Form 2.

Whereabouts of parent unknown: subsection 9(3)

If the whereabouts of the young person's parents are unknown or if no parent is available, s-s. 9(3) permits a notice to be served under s-s. 9(1) or (2) on an adult relative of the young person "who is known to the young person and is likely to assist him". If no such adult relative is available, notice may be given to "such other adult who is known to the young person and is likely to assist him as the person giving the notice considers appropriate". A neighbour or friend of the family of the young person might

come within the definition of "appropriate adult", provided they are known to the young person and likely to assist him. Generally it would seem necessary to consult with the young person to discover whether an adult is known to the young person and is likely to assist him.

The decision as to which relative to serve or as to whether another adult is appropriate is to be made by the "person giving the notice", usually the police. If there is doubt about the person to whom notice should be given, judicial direction may be sought under s-s. 9(5).

Subsection 9(11) provides that notice under s-s. 9(3) may be in Form 2 (see sample form at end of discussion of s. 9).

Where young person is married: subsection 9(4)

Notice "may be given to a spouse of the young person instead of a parent" where the young person is married; the spouse need not be an adult. Although it is sufficient to notify only the spouse, s-s. 9(4) does not rule out notifying the parents of a young person who is married. This provision illustrates an acceptance of the view that while marriage brings with it a legal independence from one's parents, parents continue to have a continuing interest in the welfare of their children.

Since it may be expected that a young person who is married will look for assistance more to his spouse than to his parents, it may be preferable to give notice to the spouse rather than to the parents. Alternatively, there may be a situation where notice to two or more parties is appropriate. Even if notice is given initially only to the spouse, an order may be made under s. 10 to require the presence of the parents, in appropriate cases.

Notice on direction of the youth court: subsection 9(5)

An application may be made to a youth court judge for directions "as to the person to whom the notice should be given". No principles have been set out to clarify to whom service of notice is appropriate. It is likely that each case will have to be decided on the basis of its particular circumstances. The court may have to determine who is a "parent"; consideration may have to be given to the relationship of different adults to the young person. Notice may be served on more than one parent; as a rule, a

custodial parent should get notice, even though notice to another parent would satisfy the Act's requirements. See also s-s. 9(10) which gives the court discretion to dispense with parental notice altogether.

A justice may give directions under s-s. 9(5), where a youth court judge is "having regard to the circumstances, not reasonably available". In deciding whether a youth court judge is not reasonably available, a justice will probably consider the length of time which will elapse before a judge could be available, the distance a judge would have to travel, and the circumstances of the young person. For example, in regard to a notice to be given under s-s. 9(1) where the young person is being detained, a delay of even a few hours until a youth court judge was available might not be justified.

Contents of notice: subsection 9(6)

In order to satisfy the requirements of s-s. 9(6), the following must be included in a notice given a parent: the name of the young person, the charge and the time and place of appearance, and a statement that the young person has the right to be represented by counsel. Subsection 9(6) applies to oral and written notice. See Forms 1 and 2 at end of discussion of s. 9 (see sample forms).

Service of notice: subsection 9(7)

Subsection 9(7) allows a written notice to be served on a parent personally or sent by mail; presumably pre-paid, first-class mail will be sufficient. Subsections 9(1) and (2) refer to service of notices "as soon as possible"; where a young person is being detained, this would suggest that a s-s. 9(1) notice should be given orally or served personally at the earliest opportunity. Subsection 9(10) gives a court flexibility to adjourn proceedings and order notice in a "manner directed", where there has been a failure to give notice and no parent or other appropriate person attends court with the young person.

Effect on validity of proceedings: subsections 9(8) and (9)

Where there has been failure to give notice according to s. 9, the validity of proceedings under the Y.O.A. is preserved by s-s.

9(8), subject to s-s. 9(9). The validity of the proceedings will not be affected if a parent attends court with the young person or if notice is dispensed with pursuant to para. 9(10)(b). If there has been a failure to give notice in accordance with s-s. 9(2), however, and no parent attends with the young person and no order is made dispensing with notice under s-s. 9(10), then any subsequent proceedings under the Y.O.A. are rendered invalid by s-s. 9(9). Where a young person is detained in custody and the notice to a parent required by s-s. 9(1) is not given, the failure to give such a notice to the parents does not invalidate the proceedings or the pre-disposition detention.

The approach of s-ss. 9(8) and (9) of the Y.O.A. marks a change from that taken to this issue under the J.D.A. Subsection 10(1) of the J.D.A. states that "due notice of the hearing of any charge of delinquency shall be served on the parent or parents . . .". The courts held that compliance with s. 10 of the J.D.A. was a condition precedent to a Juvenile Court acquiring jurisdiction to proceed: *Smith v. The Queen*, [1959] S.C.R. 638, 124 C.C.C. 71, 22 D.L.R. (2d) 129, 30 C.R. 230. In *R. v. Cote* (1976), 31 C.C.C. (2d) 414, 35 C.R.N.S. 347 (Sask. Q.B.) it was held that even the presence of the parents at the hearing was not sufficient where it was not proven they had been served with written notices. In *R. v. L.* (1981), 59 C.C.C. (2d) 160 (Ont. Prov. Ct.) it was suggested that the judge himself might take responsibility for ensuring compliance with s-s. 10(1) of the J.D.A. James, Prov. Ct. J. stated at p. 161:

Having stated that it is not improper for a Judge to bring a defect in due notice to the attention of the Crown and defence counsel, and that a Judge has a duty to ensure compliance with s. 10, it does not follow that a Judge should conduct the inquiry as to the sufficiency of notice . . . The onus rests with the Crown to satisfy the Judge that there has been due notice . . .

If the approach of James, Prov. Ct. J. is followed under the Y.O.A., youth court judges may initiate inquiries as to compliance with the notice provisions of s. 9, though there may still be an onus upon the prosecutor to show that proper notice has been served.

Proof of service

The Y.O.A. provides in s-s. 62(1) that service of a notice required by s. 9 may be proved in either of two ways. Oral

evidence given under oath by "the person claiming to have personally served it or sent it by mail" is sufficient, as is an affidavit or statutory declaration of that person. Subsection 62(2) states that where proof of service "is offered by affidavit or statutory declaration, it is not necessary to prove the signature or official character of the person making or taking the affidavit or declaration, if the official character of that person appears on the face thereof." Technically, if service of a notice is by mail, it is sufficient to prove it was posted; it is not necessary to prove receipt. Similarly if substituted service is ordered under para. 9(10)(a), it must be proved that the service was effected as ordered, not that notice was actually received.

Court order regarding notice: subsection 9(10)

If a young person appears in court, and no parent attends and no parent or other adult has been served with notice under s. 9, then the youth court judge or justice before whom proceedings are held may deal with the issue of notice under s-s. 9(10).

Under para. 9(10)(a) the judge or justice may adjourn the proceedings and order that notice be given in such manner and to such person as directed. Alternatively "having regard to the circumstances", the judge or justice may dispense with notice under para. 9(10)(b).

In deciding what type of order to make under s-s. 9(10), the general principle which should govern is that parents are responsible for their children and hence should have notice of proceedings involving them (para. 3(1)(h)). Nevertheless, the circumstances may support ordering some form of substituted service, such as serving notice upon a relative or friend of a parent under para. 9(10)(a), or dispensing with notice altogether. The *Canadian Charter of Rights and Freedoms*, para. 11(b) guarantees a right to trial "within a reasonable time"; a lengthy delay in order to notify a parent or obtain adult assistance may be unwarranted, especially if the charge is not serious. In determining what type of order to make under s-s. 9(10), consideration should be given to a number of factors, including: the age of the young person, the degree of independence he has achieved from his parents, the seriousness of the offence, and the likely difficulty of effecting notice. Generally, a justice, who can only adjourn a proceeding and deal with pre-disposition detention, should be reluctant to

dispense with notice altogether under para. 9(10)(b); it would be preferable for a justice to order notice under para. 9(10)(a) during an adjournment, as this should not further delay the proceedings.

Form of notices: subsection 9(11)

A notice to a parent under s-s. 9(1) or (2) may be in Form 1, and a notice to a relative or other adult under s-s. 9(3) may be in Form 2. (See following samples.)

SAMPLE FORM

FORM 1

THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO

NOTICE TO PARENT

Canada
Province of Ontario
County of Queens

To John Smith of 25 First Ave., Anytown, Ontario.

Whereas it is alleged that you are a parent of, a person under a legal duty to provide for or a person who has in law or in fact the custody or control of David Smith of 25 First Ave., Anytown, Ontario a young person within the meaning of the *Young Offenders Act*;

This is therefore to notify you that an information has been received in the Youth Court wherein it is alleged that:

David Smith on the second day of June 1982 did steal two hundred and fifty dollars from The Corner Milk Store, 2 West Street, Anytown, Ontario, and at the same time thereat did use threats of violence contrary to section 303 of the *Criminal Code of Canada*;

and that David Smith has been arrested in respect of the said offence and detained in The Anytown Youth Detention Centre and is to appear before the Youth Court at 100 Main Street, Anytown, Ontario on the 6th day of June 19 82 at 10:00 o'clock in the fore noon, to answer to the information and to be dealt with according to the *Young Offenders Act*;

And this is also to notify you that David Smith has the right to be represented by counsel;

And this is also to notify you that you or any person who is a parent of, is under a legal duty to provide for or has in law or in fact the custody or control of David Smith may attend with him at the time and place mentioned above.

Dated this 3rd day of June 19 82, at Anytown in the Province of Ontario.

"Thomas Brown"

.....

A Judge of the Youth Court

NOTE: Destruction of records

Section 45 provides for the destruction of records where a young person is charged with an offence and acquitted or the charge is withdrawn or stayed or where a young person who is found guilty of an offence has not been charged with or found guilty of a further offence for a period of five years after all dispositions have been completed in the case of an indictable offence or two years in the case of a summary conviction offence.

SAMPLE FORM

FORM 2

**THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO**

NOTICE TO RELATIVE OR FRIEND

Canada
Province of Ontario
County of Queens

To Peter Martin of 48 Centre Street, Anytown, Ontario :

Whereas it is alleged that you are a relative of David Smith ,
being a maternal uncle of David Smith , a young person within
the meaning of the *Young Offenders Act*;

This is therefore to notify you that an information has been
received in the Youth Court wherein it is alleged that

David Smith, on the second day of June 1982 did steal
two hundred and fifty dollars from The Corner Milk
Store, 2 West Street, Anytown, Ontario and at the time
thereat did use threats of violence contrary to section
303 of the *Criminal Code of Canada*;

and David Smith has been arrested in respect of the said offence
and detained in The Anytown Youth Centre and David
Smith is to appear before the Youth Court at 100 Main Street,
Anytown, Ontario on the 6th day of June 19 82 at 10.00
o'clock in the fore noon, to answer to the information and to be
dealt with according to the *Young Offenders Act*;

And this is also to notify you that David Smith has the right
to be represented by counsel;

And this is also to notify you that you may, if you wish to do
so, attend with David Smith at the time and place mentioned
above.

Dated this 3rd day of June 19 82 , at Anytown in the
Province of Ontario.

"Thomas Brown"

.....
A Judge of the Youth Court

Attendance of parent: section 10**SECTION 10**

10. (1) *Order requiring attendance of parent.*—Where a parent does not attend proceedings before a youth court in respect of a young person, the court may, if in its opinion the presence of the parent is necessary or in the best interest of the young person, by order in writing require the parent to attend at any stage of the proceedings.

(2) *Form and service of order.*—An order made under subsection (1) may be in Form 3 and a copy of the order shall be served by a peace officer or by a person designated by a youth court by delivering it personally to the parent to whom it is directed, unless the youth court authorizes service by registered mail.

(3) *Failure to attend.*—A parent who is ordered to attend a youth court pursuant to subsection (1) and who fails without reasonable excuse, the proof of which lies on that parent, to comply with the order

- (a) is guilty of contempt of court;
- (b) may be dealt with summarily by the court; and
- (c) is liable to the punishment provided for in the *Criminal Code* for a summary conviction offence.

(4) *Appeal.*—Section 9 of the *Criminal Code* applies where a person is convicted of contempt of court under subsection (3).

(5) *Warrant to arrest parent.*—If a parent who is ordered to attend a youth court pursuant to subsection (1) does not attend at the time and place named in the order or fails to remain in attendance as required and it is proved that a copy of the order was served on the parent, a youth court may issue a warrant to compel the attendance of the parent.

(6) *Form of warrant.*—A warrant issued under subsection (5) may be in Form 4.

Order requiring attendance of parent: subsection 10(1)

A parent who receives notice of proceedings pursuant to s-s. 9(2) is not normally obliged to attend. Subsection 10(1) of the Y.O.A., however, allows a youth court judge to order that a parent attend. Such an order may be made at any stage of the proceedings, for example at a pre-disposition hearing, at the adjudication stage, or at disposition.

The Act does not specify who may seek such an order, and it would seem open to either the prosecutor or the young person to request the order. It would also seem acceptable for the judge to make the order on his own motion, providing the parties have an opportunity to address the issue.

The court should only order a parent to attend if this is "necessary" or "in the best interest of the young person". The presence of a parent might be necessary to provide information about a young person's background at a disposition hearing. In some circumstances it might be in the best interest of a young person that his parent attend a disposition hearing to learn more about the young person's problems.

Normally, one would expect the court to order parental attendance only if a parent fails to attend voluntarily after receiving notice of the hearing.

If a party is seeking an order for parental attendance simply so that the parent can be called as a witness, the proper procedure would be for the party to issue a subpoena in the ordinary way. The court should not make an order under s. 10 to require a parent to give testimony at the adjudicative stage.

Form and service of order: subsection 10(2)

An order requiring the presence of a parent may be in Form 3 (see sample at end of discussion of s. 10). Personal service is required unless service by registered mail has been authorized. If the order is to be served personally, this may be done by a peace officer or by a person designated by a youth court. Personal service is preferred here because a parent may be penalized for failure to attend, and the court should be sure that the order was in fact received.

Failure to attend: subsection 10(3)

Failure to attend pursuant to an order made under s-s. 10(1) can result in a parent being found guilty of contempt of court, unless the parent proves he had a reasonable excuse for failing to comply. The onus is on the parent to show "reasonable excuse", for example, non-service or, possibly, physical incapacity. If the parent fails to attend, the contempt of court can be dealt with summarily by the court and he is liable to the punishment for a

summary conviction offence provided for in s. 722 of the *Criminal Code*; currently the maximum punishment is six months in jail, or a fine of up to \$500 or both.

Appeal from contempt conviction: subsection 10(4)

Subsection 10(4) of the Y.O.A. provides that if a parent is convicted of contempt of court under s-s. 10(3), the parent may appeal the conviction or sentence in the manner provided in s. 9 of the *Criminal Code*.

**Warrant may issue for failure to attend:
subsection 10(5)**

In addition to the contempt power set out in s-s. 10(3), the youth court may issue a warrant to require the police to compel the attendance of the parent. The youth court judge may choose between making a contempt order or issuing a warrant or he may do both. A warrant will only issue after an order has been made compelling parental attendance under s-s. 10(1). Appropriate service of an order under s-s. 10(1) must be proved before a warrant is issued.

Form of warrant: subsection 10(6)

A warrant may be in Form 4. See sample on page 72.

SAMPLE FORM

FORM 3

**THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO**

ORDER FOR ATTENDANCE OF PARENT

Canada

Province of Ontario

County of Queens

To John Smith of 25 First Ave, Anytown, Ontario:

Whereas David Smith of 25 First Ave., Anytown, Ontario, a young person within the meaning of the *Young Offenders Act*, has been charged with the following offence:

robbery: to wit on the second day of June, 1982 did steal two hundred and fifty dollars from The Corner Milk Store, 2 West Street, Anytown, Ontario, and at the same time thereat did use threats of violence contrary to section 303 of the *Criminal Code of Canada*;

And whereas it is alleged that you are a parent of, a person under a legal duty to provide for or a person who has in law or in fact the custody or control of David Smith ;

And whereas it has been made to appear that your presence at the proceedings against David Smith is necessary or in the best interest of David Smith ;

This is therefore to command you to attend before the Youth Court at 100 Main Street, Anytown, Ontario on the 6th day of June 19 82 at 10.00 o'clock in the fore noon, and to remain in attendance, unless excused by the Youth Court, during the conduct of proceedings against David Smith , and your failure without reasonable excuse to appear may constitute contempt of court and be punishable by the penalty provided for in the *Criminal Code* for a summary conviction offence;

And further take notice that if you do not attend at the time and place stated herein a warrant may be issued to compel your attendance.

Dated this 3rd day of June 19 82, at Anytown in the Province of Ontario.

"Thomas Brown"

.....
A Judge of the Youth Court

SAMPLE FORM

FORM 4
THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO

WARRANT TO COMPEL ATTENDANCE OF PARENT

Canada
Province of Ontario
County of Queens

To the peace officers in the County of Queens :

Whereas it is alleged that John Smith of 25 First Ave., Anytown, Ontario is a parent of, a person under a legal duty to provide for or a person who has in law or in fact the custody or control of David Smith of 25 First Ave., Anytown, Ontario, a young person within the meaning of the *Young Offenders Act*;

And whereas David Smith has been charged with the following offence:

robbery: to wit on the second day of June 1982 did steal two hundred and fifty dollars from The Corner Milk Store, 2 West Street, Anytown, Ontario, and at the same time thereat did use threats of violence contrary to section 303 of the *Criminal Code of Canada*;

And whereas it has been made to appear that the presence of John Smith at the proceedings against David Smith is necessary or in the best interest of David Smith ;

And whereas John Smith has been duly served with an Order for Attendance of Parent and has neglected or failed to attend at the time and place appointed therein.

This is therefore to command you forthwith to arrest John Smith and bring him before the Youth Court at 100 Main Street, Anytown, Ontario to be dealt with in accordance with the *Young Offenders Act*.

Dated this 15th day of June 19 82 at Anytown in the Province of Ontario.

"Thomas Brown"

.....

A Judge of the Youth Court

RIGHT TO COUNSEL (Section 11)

Introduction

The principles and provisions of the *Young Offenders Act* with respect to rights and safeguards reflect a fundamental shift in philosophy and approach from that adopted in the *Juvenile Delinquents Act*. Under the welfare approach of the *J.D.A.*, juvenile offenders are treated as informally as possible, with the result that a juvenile may not be afforded all the elements of due process of law, notwithstanding that his liberty may be at stake. Historically, this meant that in proceedings under the *J.D.A.*, young persons were often not represented by counsel and that judges often did not follow the rules of evidence or procedure applicable to trials in adult court.

In recent years, there has been more emphasis on due process in the juvenile courts. In the United States, *In Re Gault*, 387 U.S. 1, 87 S. Ct. 1428 (1967) established that juvenile courts must comply with constitutional requirements of due process, and in particular that a young person charged in such proceedings must be advised of his right to counsel, and if his liberty is threatened, the State must provide counsel if he is unable to afford representation. In Canada, in recent years, there has been a continuous trend towards greater recognition of due process and more legal representation in the juvenile court (for example, *R. v. Moore* (1974), 22 C.C.C. (2d) 189 (B.C.S.C.); *R. v. M.* (1975), 7 O.R. (2d) 490, 22 C.C.C. (2d) 344 (H.C.)).

The *Y.O.A.* marks a shift from the welfare approach of the *J.D.A.* to one recognizing accountability of young persons for their offences and accepting the need for society to be protected from illegal behaviour. The *Y.O.A.* also places more emphasis on due process, in part reflecting previous trends in this direction, and in part representing a recognition that an emphasis on accountability and the protection of society must be accompanied by appropriate protections for the young person accused of violating the criminal law. Paragraph 3(1)(e) of the *Y.O.A.* declares that "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.”

One of the most significant rights provided for in the Y.O.A. is the right to counsel, found principally in s. 11. The provision of counsel will help ensure that all of the other rights guaranteed by the Y.O.A., the *Charter* and the *Bill of Rights* will be adequately protected.

The principal features of the Y.O.A., which provide for the right to counsel include:

- the right of young persons to retain and instruct counsel at any stage of proceedings, s-s. 11(1);
- the obligation on the authorities to advise the young person of the right to counsel at the most important stages of the process including:
 - upon arrest, s-s. 11(2),
 - before making a statement to police, s-ss. 56(2) and (3),
 - upon first appearance in court, para. 12(1)(b),
 - at most appearances in court (detention, release, transfer and review hearings and at trial), s-s. 11(3),
 - before participating in alternative measures, para. 4(1)(d);
- the right to be given a reasonable opportunity to obtain counsel, s-s. 11(3) and para. 56(2)(c);
- the obligation on the court to direct that a young person who wishes to obtain counsel but is unable to do so be represented by counsel, s-ss. 11(4), (5) and (6);
- the requirement that various court documents include a statement that the young person has a right to be represented by counsel, s-s. 11(9).

The rights to counsel afforded a young person under the Y.O.A. are considerably broader than the minimum guarantees of the *Charter of Rights*, s. 10, which simply ensures the “right on arrest or detention . . . to retain and instruct counsel without delay and to be informed of that right”. The mere “right to retain

counsel" may not have much effect if the accused lacks resources to retain counsel on his own and is unable to obtain any form of legal aid. Thus, it is most significant that the Y.O.A. effectively ensures that a young person actually has the right to *have* counsel, with the State providing counsel if the young person is unable to do so. These special rights afforded young persons in regard to counsel recognize that because of their limited intellectual and emotional development, and their usually limited economic resources, special steps must be taken to guarantee the rights and freedoms of young persons in criminal proceedings.

SECTION 11

11. (1) *Right to retain counsel.*—A young person has the right to retain and instruct counsel without delay at any stage of proceedings against him and prior to and during any consideration of whether, instead of commencing or continuing judicial proceedings against him under this Act, to use alternative measures to deal with him.

(2) *Arresting officer to advise young person of right to counsel.*—Every young person who is arrested or detained shall, forthwith on his arrest or detention, be advised by the arresting officer or the officer in charge, as the case may be, of his right to be represented by counsel and shall be given an opportunity to obtain counsel.

(3) *Justice, youth court or review board to advise young person of right to counsel.*—Where a young person is not represented by counsel

- (a) at a hearing at which it will be determined whether to release the young person or detain him in custody prior to disposition of his case,
- (b) at a hearing held pursuant to section 16,
- (c) at his trial, or
- (d) at a review of a disposition held before a youth court or a review board under this Act,

the justice before whom, or the youth court or the review board before which, the hearing, trial or review is held shall advise the young person of his right to be represented by counsel and shall give the young person a reasonable opportunity to obtain counsel.

(4) *Trial, hearing or review before youth court or review board.*—Where a young person at his trial or at a hearing or review

referred to in subsection (3) wishes to obtain counsel but is unable to do so, the youth court before which the hearing, trial or review is held or the review board before which the review is held

(a) shall, where there is a legal aid or assistance program available in the province where the hearing, trial or review is held, refer the young person to that program for the appointment of counsel; or

(b) where no legal aid or assistance program is available or the young person is unable to obtain counsel through such program, may, and on the request of the young person shall, direct that the young person be represented by counsel.

(5) *Appointment of counsel.*—Where a direction is made under paragraph (4)(b) in respect of a young person, the Attorney General of the province in which the direction is made shall appoint counsel, or cause counsel to be appointed, to represent the young person.

(6) *Release hearing before justice.*—Where a young person at a hearing before a justice who is not a youth court judge at which it will be determined whether to release the young person or detain him in custody prior to disposition of his case wishes to obtain counsel but is unable to do so, the justice shall

(a) where there is a legal aid or assistance program available in the province where the hearing is held,

(i) refer the young person to that program for the appointment of counsel, or

(ii) refer the matter to a youth court to be dealt with in accordance with paragraph (4)(a) or (b); or

(b) where no legal aid or assistance program is available or the young person is unable to obtain counsel through such program, refer the matter to a youth court to be dealt with in accordance with paragraph (4)(b).

(7) *Young person may be assisted by adult.*—Where a young person is not represented by counsel at his trial or at a hearing or review referred to in subsection (3), the justice before whom or the youth court or review board before which the proceedings are held may, on the request of the young person, allow the young person to be assisted by an adult whom the justice, court or review board considers to be suitable.

(8) *Counsel independent of parents.*—In any case where it appears to a youth court judge or a justice that the interests of a

young person and his parents are in conflict or that it would be in the best interest of the young person to be represented by his own counsel, the judge or justice shall ensure that the young person is represented by counsel independent of his parents.

(9) *Statement of right to counsel.*—A statement that a young person has the right to be represented by counsel shall be included in any appearance notice or summons issued to the young person, any warrant to arrest the young person, any promise to appear given by the young person, any recognizance entered into before an officer in charge by the young person or any notice of a review of a disposition given to the young person.

Right to retain counsel: subsection 11(1)

Subsection 11(1) sets out the right of a young person to “retain and instruct” counsel without delay. By providing that the right exists at “any stage of proceedings”, and also prior to and during any considerations of the use of alternative measures, the Y.O.A. has covered virtually every instance where the young person may be subject to the Act.

“Without delay” suggests the right to counsel must be a direct and available right. The wording of the subsection is such that the right to counsel is a right which will survive any previous waiver of the right. Thus for example, a young person might waive the right to counsel when making a statement to police (s-s. 56(4)), or at a pre-trial detention hearing, but still assert the right at trial.

Subsection 11(1) provides the young person with the right to “retain and instruct” counsel. These words should be interpreted broadly as the intention of s. 11 is to guarantee the young person a right to counsel, and to ensure that at all times the young person has a reasonable opportunity to consult counsel, and that counsel has a reasonable opportunity to meet with his client and prepare for any proceedings.

Subsection 11(1) assures the young person of a right to retain counsel at any stage of Y.O.A. proceedings: s-ss. 11(2), 56(2) and (3) ensure such a right upon arrest and prior to making a statement. Subsection 11(1) and para. 4(1)(d) ensure that a young person has a right to retain and consult counsel when considering whether to participate in alternative measures under s. 4. A young person must freely consent to participation in alternative measures (para. 4(1)(c), and consultation with coun-

sel may help ensure the voluntariness of this consent, but it must be noted that unlike the situation in regard to proceedings in youth court (s-ss. 11(4), (5) and (6)), there are no statutory obligations upon those administering the program of alternative measures to ensure that a young person has counsel, nor is there any obligation to provide counsel if he is unable to obtain counsel on his own.

Role of counsel in youth court

There has been considerable controversy and confusion over the appropriate role for counsel in proceedings under the *Juvenile Delinquents Act*. Difficult issues have arisen in regard to the capacity of a juvenile to instruct counsel, whether privilege attaches to all statements made by a juvenile to his lawyer, and whether the lawyer should be promoting the juvenile's "best interests".

One Manitoba juvenile court judge wrote (Roy St. George Stubbs, "The Role of the Lawyer in Juvenile Court" (1974), 6 *Manitoba Law Journal* 65, at p. 70):

I would like, however, to qualify the statement that the presence of lawyers in juvenile courts will provide better justice, by adding the rider that these lawyers should be lawyers who understand what the juvenile court system is trying to do, who are in harmony with its basic philosophy, who take a socio-legal, and not a strict legal, approach to the problems of children.

When a lawyer comes into a juvenile court, throws his brief case down on the counsel table and announces to the court: "I represent this accused. He is pleading not guilty", the presiding judge knows at once that the lawyer thinks that he is in a criminal court for children, that he does not know what it is all about . . .

On the other hand, a Sub-Committee of the Professional Conduct Committee of the Law Society of Upper Canada, in its *Report on the Representation of Children* (1981), wrote that:

. . . in criminal proceedings, which juvenile delinquency proceedings effectively are, it is the understanding of the Sub-Committee that the traditional solicitor and client role is presently adopted by most counsel. In our opinion, that is the appropriate role.

Even where a child may lack capacity to properly instruct counsel, in our view there is no place in a quasi-criminal proceeding for counsel representing a child to argue which is in his opinion in the

best interests of the child. Counsel should not be deciding whether training school would be "good" for the child.

The *Young Offenders Act* does not expressly address the issue of the role of counsel, and indeed, any express directions in this regard might be considered improper. The thrust of the Y.O.A., however, makes it considerably easier to define an appropriate role for a lawyer. This Act is clearly criminal legislation, with an emphasis on holding young persons accountable for their contraventions of the law and protecting society from illegal behaviour (see paras. 3(1)(a) and (b)). It is submitted that a lawyer representing a young person charged under the Y.O.A. has the same obligation to his client that counsel for an adult has. The lawyer has a duty to advise his client and be certain that his client understands the nature and consequence of the proceedings, but ultimately counsel must follow his client's instructions and advocate the position his client chooses to adopt. If a young person instructs counsel to enter a not guilty plea, counsel must raise all legal defences, even those which rest on "technicalities". At disposition, counsel must continue to follow the instructions of his client. Although the youth court must consider the "special needs" of the young person (para. 3(1)(b)), it is submitted that at disposition, counsel for the young person should continue in his advocate's role, and follow his client's instructions, which will often involve advocating a disposition involving the least possible interference with the freedom of the young person. Counsel should be actively involved in the dispositional proceeding, challenging witnesses, calling his own evidence, addressing the needs of the young person, and perhaps putting forward a plan for disposition, but this activity should be based on instructions from the young person, and not on counsel's unilateral assessment of the young person's "best interests". There are others participating in the disposition process who will focus on the child's needs and interests, including parents, youth workers, psychologists, psychiatrists and other experts, the prosecutor and the judge himself. Counsel for the young person is there to advocate the wishes of his client.

Even with these views in mind, it must be recognized that in proceedings under the Y.O.A. counsel may often face difficult ethical issues, and in some cases may have difficulty in receiving instructions from a client, particularly if he is young. It is submitted that if a young person does not give adequate instructions,

counsel should use all reasonable efforts to secure an acquittal, and if the young person is convicted, should seek a disposition consistent with the least possible intervention with the freedom of the young person. This approach would be consistent with Y.O.A. proceedings being adversarial and criminal in nature, with the onus on the State to justify any intervention in the life of the young person.

It should be emphasized that counsel representing a young person in proceedings under the Y.O.A. is representing that young person, and *not* the parents or family or society as a whole. It will often be appropriate for counsel for the young person to interview parents, family, friends, social workers and others involved in the young person's life, but counsel must only, in the final analysis, take instructions from his client — the young person; this will require interviewing his client alone at some point.

For a further discussion of the issues raised in this discussion, see J. S. Leon, "Recent Developments in Legal Representation of Children: A Growing Concern with the Concept of Capacity" (1978), 1 *Canadian Journal of Family Law* 375; K. N. Komar, "The Criminal Domestication of the Juvenile Delinquents Act: The Lawyer's Role in Juvenile Court" (1979), 2 *Canadian Journal of Family Law* 90; F. Maczko, "Some Problems with Acting for Children" (1979), 2 *Canadian Journal of Family Law* 267; and G. Thomson, N. Bala and H. Lilles, *Canadian Children's Law: Cases, Notes and Materials* (Toronto: Butterworths, 1982), Chapter 12. See also A. S. Manson, "Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality" (1982), 27 *McGill Law Journal* 196, which discusses the ethical difficulties which arise in taking instructions from a client who lacks mental capacity.

Counsel upon arrest or detention: subsection 11(2)

Where a young person is arrested or detained, s-s. 11(2) requires the arresting officer or the officer in charge to comply with a two-fold duty in respect of the right to counsel:

- (1) the young person must be advised of his right to be represented by counsel; and
- (2) the young person must be given an opportunity to obtain counsel.

By requiring the police to advise the young person of his right to counsel "forthwith" on arrest or detention, the Y.O.A. ensures that the young person will be apprised of his rights at the time of initial involvement with the justice system. It would seem that upon arrest the young person must be advised of his rights by the arresting officer, and if detained must be advised by the officer in charge; this might result in the advice being given more than once, although it is not obligatory upon detention if it was given on arrest.

The Y.O.A. does not require the young person to be advised of his right to counsel under s-s. 11(2) in any particular manner or by using any specific words (contrast s. 56 which is quite specific, and requires any waiver of the right to counsel to be in writing). It would seem, however, that the advice must be meaningful, and hence in language appropriate to the age and understanding of the young person. A. B. Ferguson and A. C. Douglas in "A Study of Juvenile Waiver" (1970), 7 San Diego Law Review 39 reports a study of juveniles given "Miranda warnings" (advised of the right under the American constitution to remain silent and have court appointed counsel). The authors concluded (at p. 54) that only "a small percentage of juveniles is capable of knowingly and intelligently waiving *Miranda* rights. The great majority should be advised and counseled carefully if they are to understand their rights competently."

If a young person who has been arrested or detained decides to obtain counsel, he must be given an opportunity to do so. An onus lies upon the police to provide assistance in this regard, to make the "opportunity" meaningful; this might, for example, require the police to provide access to a phone and a list of lawyers' names and phone numbers. As Laskin J. (as he then was) stated in *Brownridge v. The Queen*, [1972] S.C.R. 926 at pp. 952-53, 18 C.R.N.S. 308, 7 C.C.C. (2d) 417, 28 D.L.R. (3d) 1:

The right to retain and instruct counsel without delay can only have meaning to an arrested or detained person if it is taken as raising a correlative obligation upon the police authorities to facilitate to reach counsel . . .

In *R. v. Giesbrecht*, [1979] 5 W.W.R. 630 (Man. Co. Ct.) it was held that *Brownridge* meant that an accused should be allowed as many phone calls as required over a reasonable length of time.

It is reasonably clear that if a young person requests that he consult counsel in private, this request must be granted: see *R. v. Penner*, [1973] 6 W.W.R. 94, 39 D.L.R. (3d) 246, 12 C.C.C. (2d) 468, 22 C.R.N.S. 35 (Man. C.A.); and *R. v. Paterson* (1978), 39 C.C.C. (2d) 355 (Ont. H.C.). However, *Jumaga v. The Queen*, [1977] 1 S.C.R. 486, 29 C.C.C. (2d) 269, 68 D.L.R. (3d) 639, [1976] 3 W.W.R. 637, 34 C.R.N.S. 172, suggests that if there is no objection to a lack of privacy, the fact that communication with counsel is not private does not constitute a deprivation of the right to counsel.

Subsection 11(3) of the Y.O.A. provides that a young person unrepresented in youth court is to be given a "reasonable opportunity" to obtain counsel, while s-s. 11(2) provides that upon arrest or detention, the young person shall "forthwith be given an opportunity to obtain counsel". The requirement of s-s. 11(2) must, however, be interpreted in light of the circumstances. For example, while an arresting officer should advise the young person of his right to counsel immediately upon arrest, if the young person is being taken straight to the station without any questioning at the scene of arrest, it would seem sufficient to give the young person an opportunity to consult counsel at the police station. On the other hand, if police questioning is undertaken at the scene of arrest, s-ss. 11(2) and 56(2) and (3) require that the young person be given an opportunity to consult counsel at that place.

The obligation under s-s. 11(2) to advise a young person of his right to be represented by counsel is in addition to other statutory requirements that a young person must be so advised (e.g. before making a statement, s-ss. 56(2) and (3); upon first appearance in court, s-s. 12(1); at other appearances in court, s-s. 11(3)). The repetition of this advice is to ensure that a young person truly understands his rights, and has ample opportunity to change his mind and obtain counsel, and even change his mind if he has initially waived the right to consult counsel.

Advice of right to counsel: subsection 11(3)

In keeping with the philosophy of the Y.O.A., s-s. 11(3) provides for a young person who is not represented by counsel to be advised of his right to be represented by counsel and to have a

reasonable opportunity to obtain counsel at every significant proceeding under the Act including:

- at a pre-trial detention hearing (s. 8 of Y.O.A. and ss. 457 to 457.7 of the *Criminal Code*);
- at a transfer hearing pursuant to s. 16 of Y.O.A.;
- at trial; and
- at a review of disposition before a youth court or review board pursuant to ss. 28 to 33 of Y.O.A.

Paragraph 11(3)(c) refers to a young person being advised of the right to counsel and having a reasonable opportunity to obtain counsel “at his trial”. The word “trial” has a broad meaning. Citing *Morin v. The Queen* (1890), 18 S.C.R. 407, *The Encyclopedia of Words and Phrases: Legal Maxims (Canada)*, 3rd ed., Vol. 4, p. 328, states:

The word “trial” . . . embraces all proceedings before the judge presiding at the trial, whether those proceedings are preliminary to the investigation by the jury, or, as in the instance of a prisoner pleading guilty, result in a conviction without the intervention of a jury; or relate to the evidence or the directions or ruling of the judge, or to the reception or recording of the verdict; or arise after the conviction, as, for example, with regard to the appropriateness of the sentence or to the punishment assigned by law to the offence; and whether any such questions are actually mooted while the trial is in progress or have not suggested themselves until the trial is over, the prisoner convicted and sentence passed upon him.

“Trial” as used in para. 11(3)(c) of the Y.O.A. thus includes arraignment, plea, and disposition hearings. Therefore since first appearances are similarly covered in s-s. 12(1), the young person must be informed of his right to counsel at virtually every important stage of proceedings in court, provided he is not represented. In an appearance in court by the young person, not technically covered by either s-s. 11(3) or 12(1), such as an appearance to set a date for trial, good practice would indicate that the youth court judge should inform the young person of his right to counsel.

Once an unrepresented young person has been informed of his right to be represented by counsel, he must be given a reasonable opportunity to obtain counsel; this gives substance to the right to counsel guaranteed by s. 11. “Reasonable opportunity” will de-

pend upon circumstances. In determining the duration of any adjournment to be granted to provide an opportunity to obtain counsel, consideration should be given to:

- any indicated desire by the young person to obtain counsel,
- whether the young person has previously sought adjournments to obtain counsel,
- the availability of counsel experienced in dealing with the matters being decided,
- the nature of the proceedings and issues to be resolved, and
- the degree of inconvenience to the prosecutor, witnesses, and others involved.

Although a reasonable opportunity must be given to the young person to obtain counsel, the right granted under s-s. 11(3) does not entitle a young person to indefinitely seek adjournments and unreasonably delay proceedings on the pretext of seeking counsel.

“Represented by counsel”: subsections 11(2), (3) and (4)

The phrase “right to be represented by counsel” is used in s-ss. 11(2), (3) and (4), although the term is not defined in the Act. The substantive right provided for in s-s. 11(1) is “the right to retain and instruct counsel without delay” which is the same wording as subpara. 2(c)(ii) of the *Canadian Bill of Rights* and para. 10(b) of the *Canadian Charter of Rights and Freedoms*.

In defining the extent of this right under the Y.O.A., the courts may refer to existing jurisprudence under the *Bill of Rights* and will refer to decisions under the *Charter*. See for example, *Brownridge v. The Queen*, [1972] S.C.R. 926, 7 C.C.C. (2d) 417, 28 D.L.R. (3d) 1, 18 C.R.N.S. 281; *Jumaga v. The Queen*, [1977] 1 S.C.R. 486, 29 C.C.C. (2d) 269, 68 D.L.R. (3d) 639, [1976] 3 W.W.R. 637, 34 C.R.N.S. 172; *R. v. Penner* (1973), 12 C.C.C. (2d) 468, 22 C.R.N.S. 35 (Man. C.A.); and *R. v. Hogan* (1979), 48 C.C.C. (2d) 149, 11 C.R. (3d) 328 (N.S.C.A.).

It would seem that the minimum requirement under the Y.O.A. for a young person who is arrested or detained is to have reasonable assistance from the police in securing counsel (see comments under s-s. 11(2)) and having obtained counsel the young person is entitled to consultation with counsel in private,

if requested, and consultation for a reasonable length of time unless being used for the purpose of delay.

Subsections 11(3) to (6) provide for representation by counsel before a youth court, justice or review board. Some Canadian jurisdictions presently have "duty counsel" available in juvenile courts. These are lawyers who are at the court, available to provide assistance to those who are not represented; such duty counsel only meet the juveniles at court, and have little or no time to prepare: see Ministry of the Attorney General of Ontario, "Report on Representation of Children in Provincial Court (Family Division)" (1977), 29 R.F.L. 134. Jurisprudence in the United States suggests that in some circumstances representation by duty counsel may not constitute adequate "representation by counsel". For example, in *West v. State of Louisiana*, 478 F. 2d 1026 (5th Cir. 1973), Wisdom Cir.Ct.J. stated at pp. 1033-34:

We hold the applicable standard should be that stated in *MacKenna v. Ellis*, 5 Cir. 1960, 280 F. 2d 592, 599:

"We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel likely to render *and rendering* reasonably effectively assistance." (Emphasis by the Court.)

To "administer justice without respect to persons, and do equal right to the poor and to the rich" we must apply the same standard, whether counsel be court-appointed or privately retained. From the facts of the case it is plain that West's lawyer fell far short of this standard. West might just as well have had no lawyer. By his own admission West's attorney conferred with West no more than an hour prior to trial, and perhaps for little more than five minutes. He conducted no investigation. At the trial he called no witnesses for the defense. After the prosecution presented its case, the defense moved for a directed verdict. When the court denied this motion, the defense immediately rested. We hold that . . . West's legal representation was so inadequate as to deny his constitutional rights [to legal representation].

In *West v. Louisiana*, the conviction which resulted was quashed, and the accused was ordered retried or released.

It is clear that duty counsel can perform a valuable function in youth court, for example at pre-trial detention hearings, on adjournments, and in making representations in regard to dispositions on minor offences. However, there are many situations in

which "representation by counsel" will require that counsel have an adequate opportunity to interview the young person, to carry out any necessary investigations and to prepare for trial. Unless he is able to perform these functions adequately, representation by duty counsel may not meet the requirement of "representation by counsel".

The term "counsel" is defined in s. 2 of the *Criminal Code* to mean a barrister or solicitor, and hence an articling student or law student would not satisfy the Y.O.A.'s provisions regarding "representation by counsel". Such students might, however, be able to serve as suitable adults, assisting a young person under s-s. 11(7).

Appointment of counsel: subsections 11(4) and (5)

Subsections 11(4) and (5) of the Y.O.A. create a scheme under which a young person who is being dealt with under the Y.O.A. is provided with legal representation, if he wishes to obtain counsel but is unable to do so. These provisions extend beyond s-s. 11(3) of the Y.O.A. and s. 10 of the *Canadian Charter of Rights and Freedoms*; the young person is not merely to be advised of his right to obtain counsel on his own and given an opportunity to do so; counsel will be provided.

Under s-s. 11(4), if a young person appears in youth court at his trial (including plea, adjudication and disposition) or at a hearing referred to in s-s. 11(3) (pre-trial detention, transfer under s. 16, disposition review) or if he appears before a review board for disposition review, and the young person "wishes to obtain counsel but is unable to do so", the court or board must ensure that he is represented. First the young person must be referred to any legal aid or assistance program available. If no such program is available, or if the young person is "unable to obtain counsel through such program", the youth court or review board *shall* "direct that the young person be represented by counsel". This provision is not discretionary — if the young person wishes counsel, but is unable to obtain counsel, "upon the request of the young person", the direction for representation must be made. The reference to "the request" of the young person serves to indicate that the appointment of counsel through s-s. 11(5) should not be made against the wishes of the

young person. Paragraph 3(1)(g) of the Y.O.A. requires that the young person be advised of his right to make this request.

Before making a direction under para. 11(4)(b) that a young person be represented, the court or board must be satisfied that the young person is "unable" to obtain counsel. The inability to obtain counsel might result from immaturity or inexperience, but most likely will result from financial inability to retain counsel. The court or board may inquire as to the ability of the parents of a young person under the age of 16 to pay for counsel; such parents may be under a duty to provide a young person with such "necessaries" as legal services. The court or board, however, should be reluctant to force unwilling or hostile parents to pay for counsel, particularly in view of s-s. 11(8) which provides that where the interests of the young person and his parents are in conflict or it would be in the best interests of the young person, the court shall ensure that the young person is represented by counsel independent of his parents. Further, if a young person lacks financial means and his parents simply refuse to pay for his counsel, this constitutes "inability" to obtain counsel. It is submitted that in view of the importance of counsel and the general scheme of the Y.O.A., a court or board should normally make a direction that counsel be appointed where the young person claims inability to obtain counsel.

Under para. 11(4)(b), the court or board makes a direction that counsel be appointed; when such a direction is made, s-s. 11(5) requires the provincial Attorney General to appoint counsel, or cause counsel to be appointed. There is no direct appointment and this avoids any apprehension of bias and any difficulties which could result from a judge or board being required to select specific counsel. Further, s-s. 11(5) gives the province control over the method of delivery of legal services to young offenders. There may be a "judicare" scheme (private counsel paid by the province), "public defender" (staff counsel directly employed by the province or an agency of the province) or some combination of these schemes.

Direction by justice: subsection 11(6)

Subsection 8(1) of the Y.O.A. provides that where, having regard to the circumstances, a youth court judge is "not reasonably available", a justice may deal with the issue of pre-trial

detention. Subsection 11(6) provides for the appointment of counsel where a young person appears before a justice for a hearing to determine whether he will be detained or released prior to disposition of his case pursuant to s-s. 8(1). If a young person wishes to be legally represented, but is unable to obtain counsel, the matter will be adjourned so counsel may be provided. The justice may refer the young person to a legal aid or assistance program to obtain counsel. The justice may choose to refer the matter to a youth court judge to deal with the issue of representation, and he must do so if no legal aid or assistance program is available or if the young person is unable to obtain counsel through such program.

Assistance by an adult: subsection 11(7)

The youth court, justice or review board has discretion to allow a young person, on request, to be assisted by an adult whom the court or board considers suitable. Such a request may occur where the young person is not represented by counsel but wishes some assistance at a trial, hearing, or review referred to in s-s. 11(3).

A youth court, justice or review board has the authority to refuse a request under s-s. 11(7) in a situation where the court or board considers that it would not be in the best interests of the young person to be assisted by the adult or where the court or board believes the adult may frustrate the proceedings.

Subsection 2(1) of the Y.O.A. defines an "adult" as a person who is neither a young person nor a child, and therefore the person requested to assist under s-s. 11(7) must be over 18 years. This means that a spouse under 18 years would not be considered suitable to assist a young person. In addition to age, the youth court, justice or board, in considering suitability, should refer to the following:

- relationship of the adult to the young person;
- the abilities of the adult;
- the adult's undertaking and appreciation of his role in assisting the young person and of the issues involved;
- nature and complexity of issues being dealt with; and
- circumstances surrounding the appearance.

The court or review board should be sensitive to the fact that a young person may prefer to be assisted by a known and trusted adult, rather than professional counsel, no matter how competent the lawyer may be. For example, on a guilty plea on a minor charge, it might be quite appropriate for a parent, relative, social worker or other suitable adult to assist the young person. This assistance might include making a statement, examining and cross-examining witnesses, filing documents and so on. On the other hand, a lay adviser may not appreciate the complexity or seriousness of the matter and the court or board, under such circumstances, may refuse to permit an adult to assist the young person, and might well at that time remind the young person of his right to obtain counsel.

Under appropriate circumstances, a law student or articling student may be a suitable adult under s-s. 11(7), though such a student does not satisfy the requirements of s. 11 for representation by counsel.

Although s. 11 of the Y.O.A. provides for advising the young person of his right to counsel and for appointment of counsel, there is no authority aside from s-s. 543(3) of the *Criminal Code* (insanity at time of trial) to force counsel upon a young person who does not wish to be represented. The intention of the Y.O.A. is to ensure that young persons are aware of their rights in respect of counsel, and to encourage them to employ counsel where needed and desired, but the Act does not presume that every young person will be represented by counsel.

Counsel independent of parents: subsection 11(8)

If a young person becomes involved in the juvenile justice system, there may be considerable family strain and emotional upheaval; the young person and his parents may be in a position of conflict. Subsection 11(8) of the Y.O.A. requires a youth court judge or justice to ensure that a young person is "represented by counsel independent of his parents" where it appears that "the interests of a young person and of his parents are in conflict" or that it would be in the "best interests" of the young person to be represented by his own counsel.

Although the subsection does not specify the options open to the court, it is clear that a conflict between the interests of the

young person and his parents would be cause for a direction to appoint counsel pursuant to para. 11(4)(b). The court should ensure that counsel is "independent" of the parents, and where he is being paid by them, is not acting on their instructions.

The wording of s-s. 11(8) does not require the court to operate only upon a request of the young person, but requires the court to act on its own initiative where it recognizes conflict. Presumably this mandate would entitle the judge to direct questions to the parents, the young person, the Crown or to counsel concerning the independence of the representation. A youth court judge or justice may act to ensure the independence of representation at any stage of a proceeding, but it seems most likely a conflict may arise at disposition.

Statement of right to counsel: subsection 11(9)

In order to ensure that a young person who has not been arrested is advised of his right to counsel prior to appearance in court, any appearance notice or summons issued to a young person must contain a statement concerning the right to be represented by counsel. Further, to ensure that a young person understands and remembers the advice given at the time of arrest or detention, pursuant to s-s. 11(2), such advice must appear on any warrant to arrest the young person, and any recognizance entered into before an officer in charge by the young person. The statement must also appear on any notice of review.

These statements not only ensure that a young person has knowledge of his right to representation, but also may facilitate consultation with counsel prior to appearance. Paragraph 9(6)(c) requires that notices given to parents or other adults in connection with proceedings under the Y.O.A. contain similar statements; this should also help to ensure that these objectives are secured.

The Y.O.A. does not specify the exact words which are to be employed, however, see Forms 1, 11, 12, 16 and 17. It might be appropriate for a statement under s-s. 11(9) to include reference to legal aid or assistance programs which may be available, and to the possibility of appointment of counsel under s-s. 11(4).

The requirements of s-s. 11(9) may necessitate police officers using special summonses, appearance notices, warrants, promises

to appear and recognizances for young persons. Alternatively, such documents may be amended for use in regard to adults or young persons, with special statements directed only at young persons: for example, see Forms 11 and 17. A properly worded statement on such documents might be applicable to both adults and young persons; adults also have the right to representation by counsel, though there are no equivalent guarantees for the provisions of counsel like those found in s-ss. 11(4) to (6) of the Y.O.A.

Consequence of failure to comply with section 11

The Y.O.A. does not specify the consequences of a failure to advise a young person of his rights to representation, or a failure to provide him with counsel as required under s-ss. 11(4) to (6). If a proceeding is completed without adequate provision for counsel, this would doubtless be a ground for appeal.

A statement of a young person obtained by police without adequate advice of the right to and opportunity to consult counsel, is inadmissible under s-s. 56(2) of the Y.O.A. Other evidence obtained in violation of rights to counsel guaranteed by para. 10(b) of the *Charter of Rights* might be excluded in subsequent proceedings under s. 24 of the *Charter*.

Under certain circumstances, violation of s. 11 of the Y.O.A. might give rise to civil remedies, or even a charge under s. 115 of the *Criminal Code* (disobeying a statute).

APPEARANCE

(Section 12)

Introduction

Section 12 sets out the responsibilities of a youth court judge or justice before whom a young person charged under the Y.O.A. first appears, and the further responsibilities of a judge in regard to taking a plea from a young person.

Subsection 12(1) provides that on first appearance the judge or justice shall cause the information to be read to the young person, thereby informing the young person of the reason he is before the court; if the young person is not represented by counsel, the judge or justice must inform him of his right to be so represented. Subsection 12(3) requires that before a plea is accepted from a young person who is unrepresented, the youth court judge must satisfy himself that the young person understands the charge and must explain to the young person that he may plead guilty or not guilty. Subsection 12(4) provides that if the judge is not satisfied that the young person understands the charge, a not guilty plea is to be entered.

Section 12 of the Y.O.A. should be read in conjunction with s. 19 of the Act, which requires a youth court judge to satisfy himself that a plea of guilty by the young person is supported by the facts.

The purpose of s. 12 is to ensure that a young person understands the proceedings and his rights under the Y.O.A.; additional safeguards are provided for the young person who is not represented.

SECTION 12

12. (1) *Where young person appears.*—Where a young person against whom an information is laid first appears before a youth court judge or a justice, the judge or justice shall

- (a) cause the information to be read to him; and**
- (b) where the young person is not represented by counsel, inform him of his right to be so represented.**

(2) *Waiver.*—A young person may waive the requirement under paragraph (1)(a) where the young person is represented by counsel.

(3) *Where young person not represented by counsel.*—Where a young person is not represented in youth court by counsel, the youth court shall, before accepting a plea,

(a) satisfy itself that the young person understands the charge against him; and

(b) explain to the young person that he may plead guilty or not guilty to the charge.

(4) *Where youth court not satisfied.*—Where the youth court is not satisfied that a young person understands the charge against him, as required under paragraph (3)(a), the court shall enter a plea of not guilty on behalf of the young person and shall proceed with the trial in accordance with subsection 19(2).

First appearance: subsections 12(1) and (2)

Paragraph 12(1)(a) requires that the youth court judge or justice, before whom the young person first appears when charged under the Y.O.A., must cause the information to be read to the young person. This ensures that the young person is aware of the charge which he must face and his reason for being in court. Where the young person's rights are protected by the presence of counsel, the requirement of para. 12(1)(a) may be waived to expedite the proceedings.

Paragraph 12(1)(b) also requires the judge or justice presiding at a young person's first appearance to inform him of his right to be represented by counsel, if he is not so represented. In many jurisdictions, a lawyer (often called "duty counsel") will be available in the court-house to provide information and preliminary legal assistance to accused persons who are without their own lawyers. The functions of duty counsel should include explaining the charge to the young person and assisting him to obtain appropriate representation for subsequent appearances. Owing to the obligations of the court with respect to the appointment of counsel pursuant to s-s. 11(4), the young person should be made aware of his rights to counsel under s. 11 of the Y.O.A. at the earliest opportunity. This will ensure that steps can be taken to obtain appropriate representation so as to avoid unnecessary adjournments.

Plea by young person: subsections 12(3) and (4)

The *Criminal Code* and Y.O.A. (in particular s-s. 12(3) and (4) of the Y.O.A.) establish a procedure which a youth court must follow when taking a plea from a young person concerning a charge under the Y.O.A. The procedure is as follows:

- the information shall be read to the young person and he shall be asked to enter a plea, s. 736 of the *Code* deals with arraignment, also para. 12(1)(a) of Y.O.A.;
- where the young person is not represented by counsel, the youth court judge must:
 - (i) advise the young person of his right to be represented by counsel, s-s. 11(3) and para. 12(1)(b) of Y.O.A.;
 - (ii) satisfy himself that the young person understands the charge against him, para. 12(3)(a) of Y.O.A.; and
 - (iii) explain to the young person that he may plead guilty or not guilty, para. 12(3)(b) of Y.O.A.;
- where the young person is not represented by counsel, and the judge is not satisfied that the young person understands the charge, he must enter a plea of not guilty and proceed with a trial, s-s. 12(4) of the Y.O.A.;
- the usual pleas will be guilty or not guilty, but the young person may also enter a "special plea" as provided in the *Criminal Code*, such as *autrefois acquit*, *autrefois convict*, pardon, and justification for a defamatory libel, *Criminal Code* ss. 534 to 541 (applicable to Y.O.A., see *R. v. Riddle*, [1980] 1 S.C.R. 380, [1980] 1 W.W.R. 592, 48 C.C.C. (2d) 365, 100 D.L.R. (3d) 577); or may enter a plea of guilty to an included or other offence pursuant to s-s. 534(4) of the *Code*. The Y.O.A. does not, however, require the judge to advise the young person regarding these special pleas;
- if the young person refuses to plead or does not answer directly, the court shall enter a plea of not guilty and proceed to trial, *Criminal Code*, s-s. 534(2);
- where a plea of guilty is entered by the young person, whether or not he is represented by counsel, the youth court judge must be satisfied that the facts support the charge, s-s. 19(1) of the Y.O.A.;

- where the judge is satisfied that the facts support the charge, the court shall find the young person guilty of the offence and proceed to disposition, s-s. 19(1) of the Y.O.A.;
- where the young person pleads guilty but the judge is not satisfied that the facts support the charge, the judge shall proceed with the trial, s-s. 19(2) of the Y.O.A.; and
- where the young person enters a plea of not guilty, the court shall proceed with the trial, s-s. 19(2) of the Y.O.A.

The effect of these provisions, in particular ss. 12 and 19 of the Y.O.A., is to ensure that a young person understands the charges against him and has every reasonable opportunity to give a full and considered answer to the charges he faces.

**Judicial inquiry and explanation concerning plea:
subsection 12(3)**

A number of reported cases have stressed the obligation upon a judge to ensure that an accused in a criminal trial, whether adult or juvenile, understands and appreciates the full significance of a guilty plea. In *Brosseau v. The Queen*, [1969] S.C.R. 181 at pp. 188-89, [1969] 3 C.C.C. 129, 5 C.R.N.S. 31, 65 W.W.R. 751, 2 D.L.R. (3d) 139, Cartwright C.J. stated:

No doubt when a plea of guilty is offered and there is no reason to doubt the accused understands what he is doing, the judge or magistrate will make inquiry to ascertain whether he does so and the extent of the inquiry will vary with the seriousness of the charge to which the accused is pleading.

In the context of a juvenile trial, in *Smith v. The Queen*, [1959] S.C.R. 638 at p. 649, 30 C.R. 230, 124 C.C.C. 71, 22 D.L.R. (2d) 129, Locke J. stated:

It is unlikely that a boy of fourteen would understand what an "information" was or appreciate the gravity of the offence . . . with which he is charged. These are matters which should have been explained to him before he was permitted to plead.

Essentially, s-s. 12(3) of the Y.O.A. requires a youth court judge to offer the type of explanation suggested in *Smith*. Where a young person appears without counsel, a youth court judge, before accepting a plea, must "satisfy" himself that the young per-

son understands the charge against him, and must explain to the young person that he may plead guilty or not guilty. If the judge is not "satisfied" that the young person understands the charge, s-s. 12(4) provides that the judge must enter a plea of not guilty and proceed to trial.

The Y.O.A. does not specify the nature of the inquiry which a judge must conduct to "satisfy" himself that the young person understands the charge, nor does it specify the kind of explanation which must be offered concerning a plea of guilty or not guilty.

Citing *R. v. Anderson* (1912), 5 W.W.R. 1052, 22 C.C.C. 455, 16 D.L.R. 203, 7 Alta. L.R. 102 (C.A.), the *Encyclopedia of Words and Phrases: Legal Maxims (Canada)*, 3rd ed. (1979), Vol. 4, p. 121, defines "satisfy" to mean: "to free from uncertainty, doubt or anxiety, to set at rest the mind." This suggests that the judge should have a high level of assurance that the young person understands the charge against him. If the judge has any real doubt or uncertainty about whether the young person understands the charge against him, the judge is not "satisfied" in this regard.

In conducting an inquiry into the understanding of the young person, the judge will have to consider all of the circumstances, including the age of the young person, his apparent degree of intelligence, the nature of the charge, and whether he is receiving assistance from an adult other than counsel under s-s. 11(7). The judge should be cautious about simply accepting the assurance of the young person that he "understands the charge" and should never simply rely on the assurance of a parent or other adult. In some situations, a young person may state that he understands, when in fact he does not. This may be done out of sheer naïveté, a desire to expedite the process and quickly resolve the matter, or as a result of peer or parental pressure; it may also be done out of a desire not to appear "stupid", or in an attempt to appear cooperative.

To "satisfy" himself that a young person understands, the judge may engage the young person in conversation, perhaps attempting to explain the charge or clarify any uncertainty. A judge should be cautious when explaining or paraphrasing a complicated charge, however, because of the danger of giving it a

slightly different meaning. A good device to ascertain understanding of the charge may be to ask the young person to explain in his own words the nature and ramifications of the charge. Clearly, "understanding" of the charges requires appreciation of their nature, and of the consequences of conviction.

Under para. 12(3)(b), a youth court judge has an obligation to explain to the young person that he may plead guilty or not guilty. This explanation should be in language appropriate to the age and understanding of the young person. The judge should not, however, attempt to advise the young person about the appropriate plea, and if there is any doubt about how the young person wishes to plead, the matter should be adjourned to allow the young person to obtain the advice of counsel.

Cases like *Brousseau v. The Queen*, [1969] S.C.R. 181, [1969] 3 C.C.C. 129, 5 C.R.N.S. 31, 65 W.W.R. 751, 2 D.L.R. (3d) 139, indicate that the judge must ascertain that the young person comprehends the distinction between guilty and not guilty. If the young person does not appear to understand, the judge may consider adjourning the matter to allow the young person time to obtain counsel. A lack of comprehension, due to immaturity, concerning the meaning of a plea will often constitute a lack of "understanding of the charges", and hence the court shall, pursuant to s-s. 12(4), enter a plea of not guilty and proceed to trial. If there appears to be a lack of competence to understand because of mental illness, or the young person otherwise appears incapable on account of insanity of conducting his defence, the issue of fitness to stand trial may be raised pursuant to s-s. 13(7) and (8) of the Y.O.A. and s. 543 of the *Criminal Code*: see the discussion of s. 13. If the young person simply refuses to plead, the court should enter a plea of not guilty, and proceed to trial (see s-s. 534(2) of the *Code* and Salhany, *Canadian Criminal Procedure*, 3rd ed. (1978), p. 248).

**Where young person does not understand:
subsection 12(4)**

Subsection 12(4) of the Y.O.A. provides that where a youth court judge is "not satisfied that a young person understands the charge against him", as required under para. 12(3)(a), the judge shall enter a plea of not guilty and proceed with the trial in accordance with s-s. 19(2); this requires the prosecutor to ad-

duce evidence and prove all the elements of the offence beyond a reasonable doubt.

If the young person wishes to obtain counsel, but is unable to obtain counsel on his own or through a legal aid or assistance plan, the judge must make a direction under s-s. 11(4) that counsel be appointed. It is submitted that if a trial is to be held after a judge has entered a not guilty plea pursuant to s-s. 12(4), the judge should strongly urge the young person to avail himself of the services of counsel.

Where a young person is not represented by counsel and the judge is not satisfied that the young person understands the charges against him, the judge may, instead of entering a plea of not guilty pursuant to s-s. 12(4), consider an adjournment to allow the young person an opportunity to obtain counsel. Counsel could then ensure that the young person understands the charge and could assist him in making a decision about plea.

If the young person appears to lack the competence to understand the charges because of mental illness, or otherwise appears incapable of conducting his defence on account of insanity, the issue of fitness to stand trial may be raised pursuant to s-ss. 13(7) and (8) of the Y.O.A. and s. 543 of the *Criminal Code*; see also the discussion above, and of s. 13 of the Y.O.A.

MEDICAL AND PSYCHOLOGICAL REPORTS (Section 13)

Introduction

To give effect to the principles of the Y.O.A. which recognize the special needs and circumstances of young persons and which stipulate that young persons are to remain under parental supervision whenever possible, it is essential that an accurate assessment of a young person's condition be available to the youth court. Section 13 of the Y.O.A. deals with the preparation of reports by experts, i.e., a doctor, psychiatrist, psychologist or other qualified person, to assist the court in a number of matters. These include an application for transfer to ordinary court (s. 16 of Y.O.A.), the making or reviewing of a disposition (s. 20 and ss. 28 to 34 of the Y.O.A.), and determining whether to direct that there be a judicial inquiry into whether a young person is unfit to stand trial on account of insanity (s. 543 of the Code). Section 14 of the Y.O.A. governs the preparation of "pre-disposition reports", which may also provide a youth court with valuable background information about a young person; it is anticipated that these s. 14 reports will most often be prepared by youth court workers.

In proceedings under the J.D.A., many courts have made use of medical and psychological reports. Section 13 of the Y.O.A. encourages this procedure in appropriate cases, facilitates the preparation of such reports, and provides for a variety of protections for those involved. The principal features of s. 13 of the Y.O.A. include provisions governing:

- circumstances in which reports can be ordered, s-s. 13(1);
- detention of young person to facilitate examination, s-s. 13(3);
- disclosure of the report, including requirements that certain persons receive a copy of the report, and under limited circumstances allowing for withholding of a report from the young person, his parents or a private prosecutor, s-ss. 13(4), (6) and (10);

- right to cross-examine the maker of the report by the prosecutor, the young person and his counsel (even if the report is withheld from the young person, his counsel must always receive a copy of the report and has the right to cross-examine), s-ss. 13(4) and (5);
- trial of the issue of whether the young person is unfit on account of insanity to stand trial (provisions of *Criminal Code*, s. 543 generally apply), s-ss. 13(2), (7) and (8).

SECTION

13.(1) *Medical or psychological examination.*—For the purpose of

- (a) considering an application under section 16,
- (b) determining whether to direct that an issue be tried whether a young person is, on account of insanity, unfit to stand trial, or
- (c) making or reviewing a disposition under this Act,

a youth court may, at any stage of proceedings against a young person,

- (d) with the consent of the young person and the prosecutor, or
- (e) on its own motion or on the application of either the young person or the prosecutor, where 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 and where the court believes a medical, psychological or psychiatric report in respect of the young person might be helpful in making any decision pursuant to this Act,

by order require that the young person be examined by a qualified person and that the person who conducts the examination report the results thereof in writing to the court.

(2) *Examination for fitness to stand trial.*—Where a youth court makes an order for an examination under subsection (1) for the purpose of determining whether to direct that an issue be tried whether a young person is, on account of insanity, unfit to stand trial, the examination shall be carried out by a qualified medical practitioner.

(3) *Custody for examination.*—For the purpose of an examination under this section, a youth court may remand the young

person who is to be examined to such custody as it directs for a period not exceeding eight days or, where it is satisfied that observation is required for a longer period to complete an examination or assessment and its opinion is supported by the evidence of, or a report in writing of, at least one qualified person, for a longer period not exceeding thirty days.

(4) *Disclosure of report.*—Where a youth court receives a report made in respect of a young person pursuant to subsection (1),

(a) the court shall, subject to subsection (6), cause a copy of the report to be given to

(i) the young person,

(ii) a parent of the young person, if the parent is in attendance at the proceeding against the young person,

(iii) counsel, if any, representing the young person, and

(iv) the prosecutor; and

(b) the court may cause a copy of the report to be given to a parent of the young person not in attendance at the proceedings against the young person if the parent is, in the opinion of the court, taking an active interest in the proceedings.

(5) *Cross-examination.*—Where a report is made in respect of a young person pursuant to subsection (1), the young person, his counsel or the adult assisting him pursuant to subsection 11(7) and the prosecutor shall, subject to subsection (6), on application of the youth court, be given an opportunity to cross-examine the person who made the report.

(6) *Report may be withheld from young person, parents or prosecutor.*—A youth court may withhold the whole or any part of a report made in respect of a young person pursuant to subsection (1) from

(a) a private prosecutor where disclosure of the report or part thereof, in the opinion of the court, is not necessary for the prosecution of the case and might be prejudicial to the young person; or

(b) the young person, his parents or a private prosecutor where the person who made the report states in writing that disclosure of the report or any part thereof would be likely to be detrimental to the treatment or recovery of the young person or would be likely to result in bodily harm to, or be detrimental to the mental condition of, a third party.

(7) *Insanity at time of proceedings.*—A youth court may, at any time before the adjudication in respect of a young person charged with an offence, where it appears that there is sufficient reason to doubt that the young person is, on account of insanity, capable of conducting his defence, direct that an issue be tried as to whether the young person is then on account of insanity unfit to stand trial.

(8) *Section 543 of Criminal Code to apply.*—Where a youth court directs the trial of an issue under subsection (7), it shall proceed in accordance with section 543 of the *Criminal Code* in so far as that section may be applied.

(9) *Report to be part of record.*—A report made pursuant to subsection (1) shall form part of the record of the case in respect of which it was requested.

(10) *Disclosure by qualified person.*—Notwithstanding any other provision of this Act, a qualified person who is of the opinion that a young person held in detention or committed to custody is likely to endanger his own life or safety or to endanger the life of, or cause bodily harm to, another person may immediately so advise any person who has the care and custody of the young person whether or not the same information is contained in a report made pursuant to subsection (1).

(11) *Definition of “qualified person”.*—In this section, “qualified person” means a person duly qualified by a provincial law to practice medicine or psychiatry or to carry out psychological examinations or assessments, as the circumstances require, or, where no such law exists, a person who is, in the opinion of the youth court, so qualified, and includes a person or a person within a class of persons designated by the Lieutenant Governor in Council of a province or his delegate.

(12) *Form of order.*—An order under subsection (1) may be in Form 5.

**Medical or psychological report:
subsections 13(1) and (11)**

Subsection 13(1) provides that a youth court may order an examination of a young person by a “qualified person”, who will present the results of the examination to the court in the form of a written report. The court may only make the order for an examination for the purpose of:

- (a) considering an application pursuant to s. 16 of the Y.O.A. for transfer of the young person to ordinary (adult) court, para. 13(1)(a);
- (b) determining whether to direct that there be a judicial hearing on whether the young person is, on account of insanity, unfit to stand trial, para. 13(1)(b); or
- (c) making a disposition under the Y.O.A. s. 20, or reviewing a disposition under ss. 28 to 34, para. 13(1)(c).

The court may make the order for an examination and report on the consent of the prosecutor and the young person. Alternatively, the court may make the order on its own motion or the application of either party, if the court believes a medical, psychological or psychiatric report "might be helpful" in making one of the decisions listed above, and the court has "reasonable grounds to believe" that the young person may be suffering from:

- a physical illness or disorder;
- a mental illness or disorder;
- a psychological disorder;
- an emotional disturbance;
- a learning disability; or
- mental retardation.

Whether a judge orders a medical, psychiatric or psychological report will depend on the apparent condition of the young person. Provided the conditions stipulated above are satisfied, a youth court may make an order at any stage of the proceedings.

It is suggested that when ordering under s. 13, the youth court should specify the purpose of the report in the order. Thus, a court should specify whether the report is sought in connection with para. 13(1)(a), (b) or (c); further the nature of the court's concerns might be generally described, perhaps using the very broad terminology of para. 13(1)(e) of the Y.O.A. As the Law Reform Commission of Canada, *Report on Mental Disorder in the Criminal Process* (1976), notes (at pp. 33-34):

The . . . order by the court should be specifically linked to the nature of the psychiatric expertise sought and this intent should be clearly communicated to the psychiatrist. Because of the difference in the kinds of information the court is seeking from psychiatrists, it is important that the *purpose* of the report be clearly communicated to the psychiatrist. . . .

.
 . . . the judge must decide what information he needs and then clearly communicate this to the mental health expert. . . .

All psychiatric reports are not the same. Different issues arise at different stages of the process. It follows that the form and content of reports will vary. . . . [Emphasis added.]

Where an order is made under s-s. 13(1), there must be an examination by a "qualified person", who must report the results thereof in writing to the youth court. Although the court has a discretion as to whether to make the order, it is mandatory that a report be submitted before a disposition is made ordering the detention of a young person for treatment in a hospital pursuant to para. 20(1)(i) of the Y.O.A.

Subsection 13(11) provides that a "qualified person" includes a person or member of a class of persons designated by the Lieutenant Governor in Council (provincial Cabinet) or his delegate. It also includes a medical doctor, a psychiatrist, or a person qualified by provincial law to conduct psychological examinations or assessments. If no provincial laws govern qualification for admission to one of the professions, a youth court judge will have to rule as to whether or not a person is duly qualified. The judge must decide on the qualifications of the person, taking into account the apparent condition of the young person. Subsection 13(2) requires that where the youth court orders an examination under s-s. 13(1) for the purpose of determining whether to direct that there be an inquiry into whether the accused is unfit to stand trial on account of insanity, this examination must be carried out by a "qualified medical practitioner"; the *Criminal Code* has the same requirement when this issue arises in adult proceedings.

Fitness to stand trial: subsections 13(2), (7) and (8)

The *Criminal Code* recognizes two distinct ways in which mental illness may affect criminal responsibility: the defence of insanity at the time of the offence; and lack of fitness to stand trial on account of insanity.

(1) *Defence of Insanity*: By virtue of s. 51 of the Y.O.A., the provisions of the *Criminal Code* governing the defence of insanity, and in particular ss. 16 and 542, and 545 to 547 of the *Code* are applicable. Subsections 16(1) and (2) of the *Code* provide:

16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.

(2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

Subsection 542(1) of the *Code* provides that if the evidence at trial reveals that the accused was insane, as defined in s-s. 16(2) of the *Code*, at the time of the commission of an indictable offence, he shall be found not guilty on account of insanity. Pursuant to s-s. 16(4) of the *Code*, a person is presumed to be and to have been sane until the contrary is proven. Accordingly, there is an onus on the accused to establish his insanity on the balance of probabilities: see *Smyth v. The King*, [1941] S.C.R. 17, 74 C.C.C. 273, [1941] 1 D.L.R. 497. If a young person is acquitted on account of insanity, s-s. 542(2) of the *Code* provides that he be held in custody indefinitely at the pleasure of the Lieutenant Governor. This means that a young person in this circumstance would be confined in a mental health facility until released. Release is technically a matter of discretion, but practically is usually governed by a review board process established pursuant to s. 547 of the *Code*. A review board is required under s-s. 547(5) to recommend release only where it is satisfied a person has "recovered" and it is in the "interest of the public" to release him. A young person found not guilty by reason of insanity may thus be detained indefinitely — the limitations governing the maximum duration of any disposition under s. 20 of the *Y.O.A.* do not apply. The young person will be detained until it is considered safe to release him. The detention may be in an adolescent mental health facility or an adult mental health facility, perhaps for the criminally insane.

Where a young person has been acquitted on account of insanity in connection with a summary conviction offence, there appears to be no authority under the *Code* or the *Y.O.A.* to detain him (see *Re B. and M.* (1975), 33 C.R.N.S. 362 (Ont. Prov. Ct.)). Provincial mental health legislation, however, may be invoked in these circumstances.

(2) *Unfit to Stand Trial on Account of Insanity*: Subsection 543(1) of the *Code* provides that a person is unfit to stand trial if

he is "on account of insanity" incapable of conducting a defence. The concept of fitness to stand trial is distinct from insanity at the time of the commission of the offence. The defence of insanity involves mental disability that operates when the offence is committed and is an issue going directly to criminal responsibility. Lack of fitness, however, relates to mental disability at the time of trial, which affects the accused's ability to participate meaningfully in the trial. Lack of fitness is not a matter of criminal responsibility, but is premised on the rationale that an accused must have a full and fair opportunity to answer allegations and present a defence.

While s. 543 links lack of fitness with "insanity", it is clear that insanity in s. 543 refers to mental disabilities which are very different from those described in s. 16 of the *Code*. To be fit to stand trial, a young person must be "intellectually, linguistically and communicatively present and be able to partake to the best of his natural ability in his full answer and defence to the charge against him": see *R. v. Roberts* (1975), 24 C.C.C. (2d) 539 at p. 545, [1975] 3 W.W.R. 742 (B.C.C.A.); application for leave to appeal to S.C.C. dismissed 24 C.C.C. (2d) 539n (S.C.C.). Generally, the young person must be capable of understanding the nature of the proceedings and able to instruct his counsel.

Subsection 13(8) of the Y.O.A. provides that s. 543 of the *Code*, which generally governs the issue of lack of fitness on account of insanity at the time of trial, is applicable to proceedings in youth court, subject to the modifications contained in s-s. 13(1), (2), (3) and (7) of the Y.O.A..

Thus, where at any time prior to adjudication the youth court judge has doubt about whether a young person has the mental capacity to stand trial, he may order an examination and report under s-s. 13(1). By s-s. 13(2) this examination and report must be carried out by a qualified medical practitioner (doctor or psychiatrist). Subsection 13(3) allows the young person to be remanded in custody for the purpose of an examination for a period of up to 30 days: see discussion of s-s. 13(3) below.

Upon receipt and consideration of the report, if it appears to the youth court judge that "there is sufficient reason to doubt that the young person is, on account of insanity, capable of conducting his defence", he must direct pursuant to s-s. 13(7) that there be a "trial" as to whether the young person is on

account of insanity unfit to stand trial. Technically, the judge may make an order for a trial of the issue even without the report, if, for example, from the conduct of the young person in the courtroom, it is apparent that this is appropriate. There is no obligation upon any particular party to raise the issue of fitness to stand trial, and once the judge is satisfied there is "sufficient reason" to doubt the capacity of the young person, it is mandatory that a "trial" of the issue be directed; the issue may be raised by either party or by the judge himself.

A "trial" on the issue of a young person's mental capacity to conduct his defence has been characterized as a non-adversarial inquiry into the mental status of the accused: see *R. v. Roberts*, [1975] 3 W.W.R. 742, 24 C.C.C. (2d) 539 (B.C.C.A.); and *R. v. Budic (No. 2)* (1977), 35 C.C.C. (2d) 272, 5 A.R. 37 (C.A.). It is generally accepted that the accused, the prosecutor or the court itself is entitled to raise the issue of fitness and, if the accused is to stand trial, the onus lies on the prosecutor, where the issue is directed at his instance, to establish to the "reasonable satisfaction" of the trier of fact that the accused is fit. Canadian courts appear to have rejected the application of the presumption of sanity found in s. 16 of the *Code* when fitness to stand trial is the issue: see *R. v. Budic, supra* (contra, *R. v. Podola*, [1959] 3 All E.R. 418 (C.A.) which was relied upon in *R. v. Hughes* (1978), 43 C.C.C. (2d) 97 (Alta. S.C.) to support the conclusion that when the defence raises lack of fitness, "the onus is on the defence to establish by preponderance of evidence that the accused is unfit for trial").

It should be noted that occasionally the issue of fitness arises in a purely adversarial fashion in that one party asserts that the accused is unfit to stand trial while the other party vigorously disputes the assertion. In such instances, it is not clearly resolved where the burden of proof lies, and the extent of the burden (see the English Court of Appeal decision in *R. v. Robertson*, [1968] 3 All E.R. 557; *R. v. Hughes, supra*; see generally A. Manson, "Fit to be Tried: Unravelling the Knots" (1982), 7 *Queen's Law Journal* 305).

Subsection 543(3) of the *Code* requires a youth court judge to assign counsel to represent a young person without counsel where "it appears there is sufficient reason to doubt" the capac-

ity of the young person to conduct his defence. Subsections 543(4) and (8) allow a judge to postpone the trial of the issue of capacity until after the prosecution has closed its case, to allow the young person to secure an acquittal, rather than be found unfit to stand trial. Paragraph 577(2)(c) allows the judge to order that the young person be excluded from the court during the trial of the issue of fitness where the failure to do so "might have an adverse effect on the mental health of the accused".

If a young person is found fit to stand trial, the case proceeds as normal. If the young person is found unfit to stand trial, he is detained "at the pleasure of the Lieutenant Governor". This may result in indefinite detention in a mental health facility, either for adolescents or adults. In practice, there may be ultimate release following a recommendation by a review board, depending on relevant provincial legislation; in such a case, however, the prosecutor may again put the accused on trial or choose to drop the charges. Under s-s. 547(5) of the *Code*, when deciding to recommend that a person previously found unfit to stand trial be released from custody and permitted to stand trial, the review board is only to consider whether the "person has recovered sufficiently to stand trial". In making a recommendation concerning the release of a person found not guilty by reason of insanity, who would not be subject to further prosecution, the board must consider both recovery *and* the public interest. Due to s-s. 13(7) of the *Y.O.A.* and s-s. 738(8) of the *Code*, the issue of fitness to stand trial may be raised in regard to summary conviction offences, as well as for indictable offences.

For a fuller discussion of some of the complex issues which arise in regard to insanity and fitness to stand trial, see A. S. Manson, "Observations from an Ethical Perspective on Fitness, Insanity and Confidentiality" (1982), 27 *McGill L.J.* 196; S. Verdun-Jones, "The Doctrine of Fitness to Stand Trial in Canada: The Forked Tongue of Social Control" (1981), 4 *International Journal of Law and Psychiatry* 363; H. Savage, "The Relevance of the Fitness to Stand Trial Provisions to Persons with a Mental Handicap" (1981), 59 *Canadian Bar Review* 319; and D. R. Stuart, *Canadian Criminal Law: A Treatise* (Toronto, Carswell, 1982), Chapter 7: "Incapacity".

Custody for examination: subsection 13(3)

Where necessary, a youth court judge may remand a young person to "such custody as it directs", for a specified period for an examination or assessment under s. 13.

It is important to note that it is not necessary for the young person to be in custody in order for this type of examination to be performed. However, where it is felt necessary, pursuant to s-s. 13(3), a youth court may, on its own authority, remand the young person to custody for examination for a period not exceeding eight days. Alternatively, the youth court may remand the young person in custody for a period not exceeding 30 days, where the court is satisfied that observation is required for a longer period than eight days, and this opinion is supported by the oral testimony or written report of at least one "qualified person".

It should be noted that an order for detention under s-s. 13(3) should only be made if necessary for examination or assessment. These considerations are quite distinct from those normally applicable at a bail hearing — s-s. 457(7) of the *Criminal Code* normally requires a youth court to detain an accused to ensure his attendance, or if this is necessary in the public interest or to protect the public. A youth court may consider that detention is necessary under the criteria of both s-s. 457(7) of the *Code* and s-s. 13(3) of the *Y.O.A.*

The youth court may remand the young person under s-s. 13(3) "to such custody as it directs". Even though this appears to give a youth court complete flexibility in designating the place or type of custody, it might be argued that the detention is subject to s-s. 7(3) of the *Y.O.A.* However, it is submitted that the clear wording of s-s. 13(3) and the fact that this subsection provides a specific power of remand for the purposes of an examination only, are such that the general rule found in s-s. 7(3), governing pre-disposition detention, is not applicable (*expressio unius est exclusio alterius* — expression of one thing is the exclusion of another). Nevertheless, it is suggested that where feasible, when ordering a remand under s-s. 13(3) the youth court should respect the desirability of detaining young persons separate and apart from adults.

If, however, it is held that s-s. 7(3) applies to s-s. 13(3) remands, the flexibility of the court is considerably constrained. Subsection 7(3) provides:

7(3) No young person . . . shall be detained prior to the making of a disposition . . . in any part of a place in which an adult who has been charged with or convicted of an offence . . . is detained or held in custody unless a youth court judge . . . authorizes the detention, being satisfied that

- (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.

Thus if a young person is to be detained in a part of a place in which adults charged with or convicted of an offence are detained, including a part of a facility in which pre-trial assessments are conducted on adults, the judge must consider the factors set out in s-s. 7(3). For the purpose of a custody order under s-s. 13(3), para. 7(3)(b) would mean no place of detention suitable for examination or assessment is available within a reasonable distance. While s-s. 7(3) restricts the placement of a young person in the *same* part of a place as an adult, a young person may be detained in a *separate* part of the same place. Thus a young person might be detained for assessment in a wing of a psychiatric hospital separate from wings where adults charged with or convicted of offences are detained. This is satisfactory as long as there is no contact between young persons and adults.

To summarize, when a youth court judge makes an order under s-s. 13(1) for an examination or assessment, he has the following options:

- (1) not to remand the young person in custody;
- (2) remand the young person to a facility or part of a facility for the examination and detention of young persons, or to such other custody as is deemed necessary to carry out an order for examination; or
- (3) if s-s. 7(3) is held to apply, and the young person is remanded to a facility or part thereof where adults charged with or convicted of offences are detained, the judge must satisfy himself that the conditions of s-s. 7(3) are met.

In the case where a young person is not in custody, and whether or not he is placed in the care of a responsible person, failure to comply with the court order for examination would be contempt of the youth court, and the young person would be liable to the consequences arising therefrom (see s. 47 of the Y.O.A.). Further, where a young person not in custody fails to comply with an order for examination or assessment, the youth court could subsequently remand the young person in custody pursuant to s-s. 13(3).

Disclosure of the report: subsections 13(4) and (6)

Subsection 13(4) provides that the court shall cause a copy of the written medical or psychological report prepared under s-s. 13(1) to be given to the following persons:

- the young person, subject to the report being withheld under s-s. 13(6);
- counsel representing a young person, who is always entitled to a complete copy of the report;
- a parent of a young person in attendance at the proceedings, subject to s-s. 13(6); a youth court may also direct under para. 13(4)(b) that a parent who has been taking an active interest in the proceedings, but who is not in attendance, shall be given a copy of the report;
- a Crown prosecutor who is always entitled to a complete copy of the report; a private prosecutor may receive a copy of the report, subject to s-s. 13(6).

When a medical or psychological report prepared pursuant to s-s. 13(1) is received by the youth court, the court shall cause a copy of the report to be given to all those entitled under s-s. 13(4). Good practice would suggest that the report should normally be sent out by the court prior to the hearing at which it is to be presented, to allow those involved sufficient time to digest the report and to decide whether to exercise their right of cross-examination under s-s. 13(5). Of course, if a report, or part of a report, *might* be withheld under s-s. 13(6) by judicial direction, the report should not be sent out to a person from whom it might be withheld, until a judge has made a final decision in this regard. If a report might be withheld from a young person under s-s. 13(6), it should not be given to his counsel, except on an undertaking not to disclose it to his client, or with an interim judicial

direction not to disclose it. The difficulties counsel might face when he has a report and it is withheld from his client are considered below.

Subsection 13(6) allows a youth court to withhold *all or part of* a report from some persons otherwise entitled to a copy under s-s. 13(4). Counsel for the young person, if any, and a Crown prosecutor are always entitled to a copy of the entire report.

Under para. 13(6)(a) a youth court may withhold all or part of a report from a *private* prosecutor, where in the opinion of the court the report, or part thereof, is not necessary for the prosecution of the case and disclosure "might be prejudicial to the young person". A judge may decide to withhold a report under para. 13(6)(a) without this being requested by any party, and he need not hold a hearing before deciding to do so. The standard the judge should apply is not high, since it is only necessary that the report "might" (as opposed to "would likely") be "prejudicial" (as opposed to "seriously prejudicial"; contrast para. 13(6)(a) to s-s. 39(1)).

Withholding a report prepared under s-s. 13(1) from a private prosecutor should never affect his ability to participate in an adjudication, and further is not permissible if the report is "necessary for the prosecution of the case". In view of the broad judicial discretion in para. 13(6)(a) to withhold a report, a copy should not be given to a private prosecutor prior to a hearing without express judicial approval.

Under para. 13(6)(b) a youth court *may* withhold the whole or any part of a report from a young person, his parents or a private prosecutor, where the qualified person who made the report "states in writing that disclosure of the report or part thereof would be likely to be detrimental to the treatment or recovery of the young person or would be likely to result in bodily harm to, or be detrimental to the mental condition of, a third party." A direction under s-s. 13(6) requires a written recommendation by the maker of the report, but it also requires a judicial decision. Upon receipt of the report and the written recommendation, the judge must decide whether to withhold the report, or part of the report. The Y.O.A. does *not* require the judge to hold any sort of hearing before deciding to withhold all, or part of, the report under s-s. 13(6). However, in many circumstances it might be

appropriate to hold some kind of an inquiry. If an inquiry into the issue of withholding a report is held, it would seem appropriate to have present any person from whom the report is not being withheld (including counsel for the young person and a Crown prosecutor), and to have the maker of the report available to explain his views and be subject to cross-examination. If an inquiry is held to determine whether to make a s-s. 13(6) direction, it would seem to be a necessary implication of s-s. 13(6) that the person from whom the report, or a part of the report is withheld, is to be excluded; otherwise the very purpose of holding the inquiry would be defeated, as the matters to be withheld would be revealed. The issue of the exclusion of the young person and the interrelationship of s-s. 13(6) and s. 39 of the Y.O.A. is considered below in the discussion of s-s. 13(5).

Although as a rule all of those involved in a proceeding should have access to the information upon which a court will base its decision, there may be circumstances in which it is justifiable to withhold some medical or psychological information, even from the accused person or his parents. Some reasons are suggested by N. Dembitz, "Ferment and Experiment in New York: Juvenile Cases in the New York Family Court" (1963), 48 *Cornell Law Quarterly* 499 at pp. 516-17:

For a judge to make the grave decision to commit a child to an institution, without allowing the child or his parents any opportunity to correct misinformation or offset the data in the reports, seems dictatorial and unfair. The argument that disclosure will have the effect of drying up sources of information is not too compelling: the . . . worker's informants are not undercover agents who must continue to function in secret, as the argument runs in narcotic prosecutions and the like. Further, the practice could be borrowed from internal security cases of a discretionary deletion of names and the informant [is] thus assured of anonymity; the problem here is not confidentiality in the sense of some of the testimonial privileges, where the information itself is intended to be confidential.

Of more moment than the problem of sources: the child or his parents may well suffer serious psychological damage from confronting a report that categorizes their inadequacies and depicts their images as others see them. It is therapeutic to declare to a parent that his neighbors observe him drinking or that he has been judged of low intelligence or that his claimed affection for his child covers rejecting behavior, or to spell out that a child is

illegitimate or shunned in the neighborhood as a troublemaker is disapproved by his teacher as the least responsible child in the class? . . . Might not such unsought and wounding revelations affect the individual's self-confidence and his relationships and block therapy not only immediately but indefinitely?

Social workers with a high sense of professional ethics say they would tailor a report to prevent psychological damage from its disclosure. The result of a disclosure practice may well be reporting on a vague and superficial level. The judge does not need a report in the depth and detail required for psychiatric or social casework. Still, disclosure of background reports will accomplish nothing if they become so general that the judge must either reject them entirely or in effect accept the . . . worker's *ipse dixit*. Thus, there must be a measure of flexibility in a disclosure requirement so that psychological damage can be avoided. . . .

In a number of reported cases dealing with adult criminal proceedings, judges have expressed support for the notion of withholding psychologically harmful information from the accused, at certain points in the proceedings, in particular in regard to sentencing. See *R. v. Benson and Stevenson* (1951), 100 C.C.C. 247, 13 C.R. 1, 3 W.W.R. 29 (B.C.C.A.) and *R. v. Dickson* (1949), 34 Cr. App. R. 9 at p. 13, [1950] 1 K.B. 394, where Lord Chief Justice Goddard, of the English Court of Appeal, remarked in regard to a pre-sentence report prepared for an adult proceeding:

It is not clear to me or to any of His Majesty's Judges why it is necessary to serve that report on the prisoner. In some cases I think it is very undesirable, because it may sometimes give him ideas about his mental condition which he perhaps should not know.

Despite this apparent willingness to withhold potentially damaging reports from those involved in criminal proceedings, it is submitted that s-s. 13(6) should be used only in rare cases. In particular, para. 13(6)(b), giving a youth court judge authority to make a direction withholding a report, or part thereof, from a young person, is clearly an exceptional procedure. The desire to protect the young person, or third parties from harm, must always be weighed against the injustice of basing a decision about a young person's future on information which is withheld from the young person himself. The standard required by para. 13(6)(b) is a high one and this is clear by comparing paras. 13(6)(a) and (b).

The judge must be satisfied that disclosure "*would be likely*" (not merely "*might*") to be "detrimental to the treatment or recovery of the young person or would be *likely* to result in bodily harm to, or be detrimental to the mental condition of, a third party." Thus, if a report is being withheld under the first branch of the test, the young person must *actually* be undergoing some form of treatment or suffering from a mental illness or disorder. It is not sufficient for a psychologist or doctor to assert that a mentally healthy young person will (or might) suffer future emotional shock or harm from the release of the information.

If a report, or part of a report, is withheld from the young person, this may place counsel in a difficult position. Subsection 13(9) of the Y.O.A. makes clear that the report forms part of the "record". Subsection 40(4) provides that any part of a report which has been withheld from the young person under s-s. 13(6) shall not be made available to him for inspection. Further, s-s. 46(2) prohibits any person from revealing to the young person, any information learned from a part of a report if that part has been withheld from the young person. Presumably, this applies to a young person's lawyer. Thus, even the young person's counsel is limited in what he may discuss with his client in regard to a report, or portion thereof, which is withheld from the young person. Counsel may discuss the fact that the report, or part of the report, exists and has been withheld, the general purpose of the report and the general reasons why it was withheld. Counsel may also discuss the legal implications of the information. He may not discuss or reveal the actual information.

The fact that counsel has information which his client does not have, may place counsel in a difficult tactical and ethical position. It may not be possible to receive instructions about how to proceed or handle the information. It may also be difficult for counsel to prepare to challenge those parts of the report. In what might be considered analogous circumstances, in the case of *Re Abel and Advisory Review Board* (1980), 31 O.R. (2d) 520, 56 C.C.C. (2d) 153, 119 D.L.R. (3d) 101 (C.A.), it was suggested that in some circumstances, an Advisory Review Board, making a recommendation on release of persons found insane under ss. 542 and 543 of the Code, might place limitations on the information disclosed to counsel preparing for a hearing. Arnup J.A. commented at p. 534 O.R.:

While it may place the lawyers in an awkward situation, one can envisage cases where information might be disclosed on terms that it not be disclosed to the client.

Nairn Waterman, "Disclosure of Social and Psychological Reports at Disposition" (1969), 7 Osgoode Hall Law Journal 213, stated that in 1969 it was the usual practice of Ontario Juvenile Court Judges not to show psychological reports to juveniles; Waterman commented (note 27, at p. 224):

An interesting qualification (if we do accept the proposition of mandatory disclosure) may be found in *Pinder v. Pinder* (unreported B.C. decision) which holds that failure to disclose the contents of a welfare report did not result in a miscarriage of justice when defendant's counsel had consented to this use of the report. Therefore, under the present case law, a viable solution may be to have the judge disclose to the offender's counsel and if he is unrepresented to duty counsel or appointing counsel and getting his consent not to completely disclose the report to the child.

In some cases, counsel may not be unduly hindered by a direction to withhold a report, or part thereof, from the young person. If the young person is in fact suffering from mental or emotional disorder, the client may not be a useful source of information and may not be able to give counsel meaningfully instruction. However, it must be recognized that in some cases counsel will be placed in a very difficult position by the direction under s-s. 13(6). Particular problems may arise when the reason for withholding the information relates to a potential for harm to a third party based on a factual allegation of danger; in this case counsel will be precluded from raising the allegation with his client. In any event, as an officer of the court, counsel has an ethical obligation to obey the direction, and s. 46 of the Y.O.A. makes it an offence not to do so.

In view of some of the difficulties which may arise if an order is made under s-s. 13(6), particularly in regard to the young person, it may sometimes be appropriate for those concerned to consider some form of compromise to protect the interests of all concerned. For example, it might be agreed to delete certain parts of a report which are of marginal relevance to the issues facing the court, but of potentially significant detriment; the deleted portions will not be considered by the court for any purpose. Another possibility is to have the person who prepared the re-

port discuss it with the young person, perhaps in the presence of his counsel, rather than simply handing it over to the young person.

It is possible that a challenge may be made under the *Canadian Charter of Rights and Freedoms* to s-s. 13(6) of the Y.O.A., at least as it affects the right of the young person to have access to a report which concerns him. The challenge would be based on s. 7 of the *Charter*, guaranteeing "everyone the right [not to be deprived] of liberty and security of person . . . except in accordance with the principles of fundamental justice." Paragraph 11(d) of the *Charter* which guarantees any person charged with an offence the right to be proven guilty "according to law in a fair and public hearing", may also have some applicability, though clearly not at disposition or review which occur after a finding of guilt. It may well be, however, that the provisions of s-s. 13(6) do not violate the *Charter*, or are acceptable as a "reasonable limitation" of the rights of the *Charter*. All legislation concerning those who are, or may be, suffering from mental or emotional disorders, involves a balancing of notions of liberty with the best interests of the individual and the protection of others. If s-s. 13(6) of the Y.O.A. is subject to challenge, so are such legislative provisions as para. 577(2)(c) of the *Criminal Code*, allowing exclusion of the accused from a trial of the issue of his fitness to stand trial, "where . . . failure to do so might have an adverse effect on the mental health of the accused." Indeed, considerable portions of provincial mental health legislation might be subject to similar challenge.

Cross-examination: subsection 13(5)

Subsection 13(5) of the Y.O.A. provides that where a report is prepared pursuant to s-s. 13(1), the young person, his counsel or the adult assisting him pursuant to s-s. 11(7), and the prosecutor shall normally have the right to cross-examine the person who made the report. This opportunity to cross-examine is to ensure that the information contained in the report can be adequately tested, explained, qualified or refuted. The right to cross-examine is exercised "on application", which requires the person who wishes to cross-examine to give some notice of his intention to allow arrangements to be made to secure the attendance of the maker of the report.

The right of cross-examination granted in s-s. 13(5) is expressly made "subject to subsection (6)." A Crown prosecutor and counsel for the young person have an unfettered right to cross-examine. If a private prosecutor is involved in the case, however, he obviously cannot cross-examine in regard to a report, or portion thereof, which has been withheld from him. The phrase "subject to subsection (6)" obviously recognizes and sanctions this limitation. The same disability applies to a young person who has chosen to represent himself.

An adult assisting a young person under s-s. 11(7), in place of counsel, has no independent right to receive a copy of the report, and must receive the report from the young person, for the purpose of allowing cross-examination. Thus, to the extent that a report is withheld from a young person, cross-examination by an assisting adult is limited. Further, if the assisting adult is a parent, the right to cross-examine may be limited if a report, or portion thereof, has been withheld pursuant to para. 13(6)(b).

A more difficult question in regard to the interrelationship of s-ss. 13(5) and (6), and the meaning of the phrase "subject to subsection (6)" in s-s. 13(5), arises in connection with who may be present during a cross-examination. If a direction is made under s-s. 13(6) withholding a report, or part of a report, from a person, it makes little sense to merely restrict the person's opportunity to cross-examine. The direction will only be effective in withholding information if the person is also excluded from the court when another person is cross-examining in regard to a report, or portion thereof, which has been withheld. A person attending a cross-examination by another party concerning a part of a report which has been withheld from the first person, may well learn as much, or more, damaging information by attending the cross-examination.

In general, attendance at youth court proceedings is governed by s. 39 of the Y.O.A. Thus, if a report, or part thereof, is withheld from a parent under para. 13(6)(b), the parent may also be excluded from the hearing under s-s. 39(1). Similarly, if a report, or part of a report, has been withheld from a private prosecutor under paras. 13(6)(a) or (b), the private prosecutor can be excluded under s-s. 39(1), at least at the dispositional stage.

The real difficulty arises if a report, or part of a report, is withheld from a young person under s-s. 13(6). Subsections 39(2) and (3) would appear, at first glance, to guarantee the young person's right to attend a cross-examination in regard to any part of the report. One clear limitation to this right of attendance arises out of s. 577 of the *Criminal Code*, which is applicable to all youth court proceedings by virtue of s-s. 52(3) of the Y.O.A.

Paragraph 577(2)(c) of the *Code* allows a youth court judge to *cause* an accused person to be removed from the court during a trial of the issue as to whether the young person is, on account of insanity, unfit to stand trial, if the court is satisfied that the failure to do so might have an adverse effect on the mental health of the accused. Under specified circumstances, this provision might apply to exclude a young person from a cross-examination and thereby ensure that he does not learn information otherwise withheld from him under s-s. 13(6).

Similarly, under para. 577(2)(b) a youth court judge may *permit* a young person to be absent during any portion of a proceeding. Thus, if counsel or a parent receives a report, or part of a report, that has been withheld from a young person and shares the concern about the impact of the report on the young person, counsel or the parent may suggest to the young person that he be absent during the cross-examination. The young person must willingly consent and the judge must agree to the absence. Counsel or the parent acting as an adult assisting the young person under s-s. 11(7) would represent the young person in court.

If neither para. 577(2)(b) nor (c) of the *Code* is applicable, it is submitted that a youth court judge has the power to exclude a young person from the cross-examination of the maker of the report, pursuant to s-s. 13(5), to the extent that the cross-examination deals with matters withheld from the young person under s-s. 13(6). It is submitted that it is a necessary implication of s-s. 13(6) that the person be so excluded, and that this is the meaning to be given to the phrase "subject to subsection (6)", which appears in s-s. 13(5). Those who are cross-examining under s-s. 13(5), in particular, counsel for a young person from whom information has been withheld under s-s. 13(6), should have a broad right of cross-examination; they should be able to test all aspects of the report, including those withheld by judicial

direction under s-s. 13(6). If information is withheld from a person under s-s. 13(6), and that person is present during a cross-examination under s-s. 13(5), which deals with those matters, the direction under s-s. 13(6) may effectively be rendered useless.

It is thus submitted that it is necessary to interpret s-ss. 13(5) and (6) as giving the judge a power to exclude a person from that portion of a cross-examination under s-s. 13(5), dealing with information withheld from that person under s-s.13(6). Although this interpretation appears to narrow the broad words of s. 39, particularly the apparent right of the young person to be present throughout the hearing, it is submitted that this is the most reasonable interpretation of the Y.O.A., and the only one to give effect to the Parliamentary objective of withholding information from some of those involved in youth court proceedings, under certain very limited circumstances. It may be viewed as an application of the Latin maxim: *generalia specialibus non derogant* — “general words do not derogate from special”; the general rights granted under s. 39 do not derogate from the special power of exclusion given under s-ss. 13(5) and (6). See *Maxwell on the Interpretation of Statutes*, 12th ed. (1969), pp. 196-198; also E. Dreidger, *The Construction of Statutes* (1974), Chapter 3, “Construction by Object or Purpose”.

Part of the record: subsection 13(9)

A report prepared pursuant to s-s. 13(1) becomes part of the youth court record, by virtue of s-s. 13(9). This means that under s-ss. 40(2) and (3), certain specified persons may have access to the record. Subsection 40(4) specifically provides that if a report, or part of a report, has been withheld from a young person, a parent or a private prosecutor under s-s. 13(6), that person shall not have access to that part of the record under s. 40. Section 45 requires ultimate destruction of all copies of the report, provided certain conditions are satisfied. Section 46 makes it an offence to reveal information contained in a report, except as authorized by legislation.

For a further discussion of the significance of a s. 13 report being a part of the youth court record, see comments below under ss. 40, 45 and 46, “Maintenance and use of records”.

Disclosure by a qualified person: subsection 13(10)

Subsection 13(10) gives the "qualified person" who prepares a report pursuant to s-s. 13(1) in regard to a young person, a limited right to disclose some of the information contained in the report. If the young person is being held in detention or committed to custody, and the maker of the report "is of the opinion that the young person . . . is likely to endanger his own life or safety or to endanger the life of, or cause bodily harm to, another person", the maker of the report may immediately advise any person who has the "care and custody" of the young person of this danger, whether or not this information is contained in the report prepared under s-s. 13(1). A person who has "care and custody" of a young person would, in appropriate circumstances, include a parent.

The effect of s-s. 13(10) is to encourage the sharing of information concerning situations of danger. The maker of the report is freed from any potential liability to prosecution under s. 46 of the Y.O.A. which might otherwise result from a disclosure of such information by the maker of the report. The American decision in *Tarasoff v. The Regents of the University of California*, 551 P. 2d 334, 131 Ca. R. 14, 17 C. 3d 425 (1976 Cal. S.C.) held that there might be civil liability in negligence for a psychiatrist or other professional who fails to warn of the possible danger that a person he has examined may pose to others. However, the authority for disclosure granted by s-s. 13(10) of the Y.O.A. is permissive only, and may be qualified by any provincial legislation and codes of professional conduct governing the professionals who prepare s. 13 reports.

Form of order: subsection 13(12)

An order for an examination under s-s. 13(1) may be in Form 5. See following sample form.

SAMPLE FORM

FORM 5

THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO

ORDER FOR THE EXAMINATION AND REPORT

Canada
Province of Ontario
County of Queens

To Dr. Sidney Freedman, a psychiatrist under the laws of the Province of Ontario, being a qualified person within the meaning of the *Young Offenders Act*:

Whereas David Smith of 25 First Ave., Anytown Ontario a young person within the meaning of the *Young Offenders Act*, has been charged with the following offence:

robbery: to wit David Smith on the second day of June 1982 did steal two hundred and fifty dollars from the Corner Milk Store, 2 West Street, Anytown, Ontario, and at the same time thereat did use threats of violence contrary to section 303 of the *Criminal Code of Canada*.

And whereas there exists reasonable grounds to believe that David Smith may be suffering from a mental illness;

And whereas it has been made to appear that a psychiatric report dealing with the issue of whether David is, on account of insanity, unfit to stand trial, would be helpful in the determination of these proceedings;

This is therefore to command you to conduct a psychiatric examination of David Smith and to report the results thereof in writing to the Court;

To the peace officers in the County of Queen's and the person in charge of the hereinafter mentioned place of custody;

You are hereby commanded to take David Smith and convey him safely to the following place, namely Queen's County Psychiatric Hospital and there deliver him to the person in charge thereof, together with the following precept:

And you, the person in charge of the said place, are hereby commanded to receive David Smith into your custody and to detain him safely there until his return to the Youth Court on the 22nd day of June 1982 at 10:00 o'clock in the fore noon and meanwhile to make him available as required for the purposes of the examination of assessment and for so doing, this is sufficient warrant.

Dated this 15th day of June 1982 , at Anytown in the Province of Ontario.

"Thomas Brown"

.....
A Judge of the Youth Court

PRE-DISPOSITION REPORT (Section 14)

Introduction

Section 14 of the Y.O.A. governs the preparation and use of pre-disposition reports by youth courts. These reports are intended to furnish the courts with sufficient information to make the most appropriate decisions in regard to disposition, and certain other matters.

Section 31 of the J.D.A. briefly provides that juvenile probation officers may be required to conduct "such investigation as may be required by the court" and furnish such information as required to the courts. The approach to pre-disposition reports taken by the Y.O.A. is considerably more comprehensive than that of the J.D.A. and reflects the significance which courts have come to place upon such reports.

The principal features of ss. 14 and 15 include provisions governing:

- situations in which a report may be ordered, s-s. 14(1); see also s-ss. 16(3) and 24(11) requiring that a court must consider a pre-disposition report before deciding whether to transfer a young person to adult court or committing a young person to custody;
- minimum contents of the pre-disposition report, s-s. 14(2);
- reporting and disclosure of the report, s-ss. 14(3), (4), (8) and (9);
- right to access to the report and the right to cross-examine the maker of the report, s-ss. 14(5) and (6);
- prohibition against improper use of statements made by young persons in the course of preparation of the report, s-s. 14(10);
- withholding of a report from a private prosecutor, where disclosure is prejudicial to the young person, s-s. 14(7);

- disqualification of a judge from dealing with a case if he has examined a pre-disposition report in regard to an offence prior to an adjudication, for example in the context of a transfer application, with provision for exception to the rule of disqualification if parties and judge consent, s. 15.

The significance of pre-disposition reports lies in the fact that through their presentation in court, the youth court judge has access to a broad range of information about the young person, his family, his personal and criminal history, and about the resources and facilities which are available. The information will be compiled and presented by youth court workers or other competent persons. The reports should save all concerned considerable time and inconvenience, and still allow the court to make the most appropriate disposition. There is provision for cross-examination of the maker of a report and each party has an opportunity to present other information to the court.

SECTION 14

14. (1) *Pre-disposition report.*—Where a youth court deems it advisable before making a disposition under section 20 in respect of a young person who is found guilty of an offence it may, and where a youth court is required under this Act to consider a pre-disposition report before making an order or a disposition in respect of a young person it shall, require the provincial director to cause to be prepared a pre-disposition report in respect of the young person and to submit the report to the court.

(2) *Contents of report.*—A pre-disposition report made in respect of a young person shall, subject to subsection (3), be in writing and shall include

- (a) the results of an interview with the young person and, where reasonably possible, the results of an interview with the parents of the young person;**
- (b) the results of an interview with the victim in the case, where applicable and where reasonably possible; and**
- (c) such information as is applicable to the case including, where applicable,
 - (i) the age, maturity, character, behaviour and attitude of the young person and his willingness to make amends,**
 - (ii) any plans put forward by the young person to change his conduct or to participate in activities or undertake measures to improve himself,****

- (iii) the history of previous findings of delinquency under the *Juvenile Delinquents Act* or previous findings of guilt under this or any other Act of Parliament or any regulation made thereunder or under a provincial statute or a by-law or ordinance of a municipality, the history of community or other services rendered to the young person with respect to such findings and the response of the young person to previous sentences or dispositions and to services rendered to him,
- (iv) the history of alternative measures used to deal with the young person and the response of the young person thereto,
- (v) the availability of community services and facilities for young persons and the willingness of the young person to avail himself of such services or facilities,
- (vi) the relationship between the young person and his parents and the degree of control and influence of the parents over the young person, and
- (vii) the school attendance and performance record and the employment record of the young person.

(3) *Oral report with leave.*—Where a pre-disposition report cannot reasonably be committed to writing, it may, with leave of the youth court, be submitted orally in court.

(4) *Report to form part of record.*—A pre-disposition report shall form part of the record of the case in respect of which it was requested.

(5) *Copies of pre-disposition report.*—Where a pre-disposition report made in respect of a young person is submitted to a youth court in writing, the court

- (a) shall, subject to subsection (7), cause a copy of the report to be given to
 - (i) the young person,
 - (ii) a parent of the young person, if the parent is in attendance at the proceedings against the young person,
 - (iii) counsel, if any, representing the young person, and
 - (iv) the prosecutor; and
- (b) may cause a copy of the report to be given to a parent of the young person not in attendance at the proceedings against the young person if the parent is, in the opinion of the court, taking an active interest in the proceedings.

(6) *Cross-examination.*—Where a pre-disposition report made in respect of a young person is submitted to a youth court, the young person, his counsel or the adult assisting him pursuant to subsection 11(7) and the prosecutor shall, subject to subsection (7), on application to the youth court, be given the opportunity to cross-examine the person who made the report.

(7) *Report may be withheld from young person or private prosecutor.*—Where a pre-disposition report made in respect of a young person is submitted to a youth court, the court may, where the prosecutor is a private prosecutor and disclosure of the report or any part thereof to the prosecutor might, in the opinion of the court, be prejudicial to the young person and is not, in the opinion of the court, necessary for the prosecution of the case against the young person,

- (a) withhold the report or part thereof from the prosecutor, if the report is submitted in writing; or
- (b) exclude the prosecutor from the court during the submission of the report or any part thereof, if the report is submitted orally in court.

(8) *Report disclosed to other persons.*—Where a pre-disposition report made in respect of a young person is submitted to a youth court, the court

- (a) shall, on request, cause a copy or a transcript of the report to be supplied to
 - (i) any court that is dealing with matters relating to the young person, and
 - (ii) any youth worker to whom the young person's case has been assigned; and
- (b) may, on request, cause a copy or a transcript of the report, or a part thereof, to be supplied to any person not otherwise authorized under this section to receive a copy or transcript of the report if, in the opinion of the court, the person has a valid interest in the proceedings.

(9) *Disclosure by the provincial director.*—A provincial director who submits a pre-disposition report made in respect of a young person to a youth court may make the report, or any part thereof, available to any person in whose custody or under whose supervision the young person is placed or to any other person who is directly assisting in the care or treatment of the young person.

(10) *Inadmissibility of statements.*—No statement made by a young person in the course of the preparation of a pre-

disposition report in respect of the young person is admissible in evidence against him in any civil or criminal proceedings except in proceedings under section 16 or 20 or sections 28 to 32.

Ordering a pre-disposition report: subsection 14(1)

Subsection 14(1) provides that where a youth court judge "deems it advisable . . . [he] may require the provincial director . . . cause to be prepared a pre-disposition report" which shall be submitted for consideration to the court. It is suggested that if either party or the parents of the young person request that the court order such a report, the court should accede to the request, unless it is clearly frivolous: see C. F. Domek and M. W. Chitra, "The Pre-sentence Report: An Update" (1981), 23 *Criminal Law Quarterly* 216 for a discussion of when a report ought to be ordered. But note that cases from adult proceedings are of limited applicability as it is generally more important for a court dealing with a youthful offender to have such information: *R. v. Bates* (1977), 32 C.C.C. (2d) 493 (Ont. C.A.). The judge may also require a report on his own motion. A pre-disposition report must be prepared and submitted to the court when an application to transfer a young person to adult court is being considered, s-s. 16(3), and before a young person is committed to custody, s-s. 24(11).

When a youth court orders a pre-disposition report to be prepared, it is the responsibility of the "provincial director" (defined in s-s. 2(1) of the Y.O.A.) to ensure that this is done. Paragraph 37(d) provides that the preparation and presentation of such reports is one of the functions of "youth court workers", although the provincial director may appoint any person to prepare a report. If the court requires relatively sophisticated information about a young person, it may be appropriate to order a report under s. 13 of the Y.O.A., which will be prepared by a medical doctor, psychiatrist, psychologist or other "qualified person". A court may order either a s. 13 report, a s. 14 report or both, depending upon the circumstances, except where the Y.O.A. requires that a pre-disposition report be prepared (s-ss. 16(3) and 24(11)), at least this report must be ordered.

Contents of report: subsection 14(2)

Subsection 14(2) requires a pre-disposition report to be in writing (subject to s-s. 14(3)), and outlines the minimum content for such a report.

The person preparing the pre-disposition report is required to interview the young person who is the subject of the report, and where reasonably possible to interview the parents of the young person, see para. 14(2)(a). The results of the interview are to be reported; this will convey information to the court about the background of the young person and his parents, and any plans they may have for the young person. The interviews will also allow the person making the report to assess the maturity, character and attitude of the young person. Subsection 14(10) ensures that statements made by the young person in the course of the preparation of a report are not used for extraneous purposes.

If there is a known victim, the person making the report shall interview the victim where reasonably possible, and report the results of the interview, para. 14(2)(b). The victim may be asked about whether some form of restitution, compensation or personal service by the offender for the victim is sought and appropriate (see paras. 20(1)(c) to (f)).

In addition to interviewing the young person (and where possible, the parents and victim) the person preparing the report has considerable discretion in regard to the obtaining of information. A person preparing a pre-disposition report would not appear to have an automatic right to disclosure of a young person's youth court record, or police criminal history record, but a youth court should invariably order disclosure of such records under paras. 40(2)(e) or (3)(1); subpara. 14(8)(a)(ii) gives a youth court worker a right to obtain pre-disposition reports on request. The maker of the report may consider it appropriate to consult teachers, a guidance counsellor, family friends or relatives, neighbours, an employer, family doctor, the investigating police officers, or those who may have been involved in supervising previous dispositions or treating the young person. The maker of the report has an obligation to ensure that the contents of the report are adequately substantiated. In *R. v. White* (1978), 16 Nfld. & P.E.I. R. 46 at p. 49, 42 A.P.R. 46 (Nfld. C.A.), Gushue J.A. stated:

In my view, reports of this nature should be strictly factual. They should not speculate, nor should they reach unwarranted or indeed any conclusions. They are meant to assist the trial Judge, particularly with regard to the antecedents of the accused, where the Judge has before him what he considers to be insufficient information relating to the accused for the purpose of imposing sentence. In the particular report in this case, comments are made relating to the alleged effect of the appellant's actions on other prisoners in relation to a job held by him while in prison; it was mentioned that White manipulates acquaintances and friends; that he became "well-known" to the R.C.M.P. Drug Squad within four to five weeks of his last release from prison. These comments are not founded on any facts and, even if they were, would in my view be improper. Further, the probation officer says that White "is apparently dependent upon the profits of illicit drug trading." There is no evidence to support this statement and it is totally inappropriate.

R. P. Nadin-Davis, *Sentencing in Canada* (Toronto, Carswell, 1982), comments (at. p. 527):

It is further submitted that persons preparing reports should be scrupulous in identifying sources of negative substantiated information. In the absence of such identification, it may be difficult if not impossible for the accused adequately to contest allegations which may be quite false.

Paragraph 14(2)(c) specifies that a pre-disposition report shall contain such information as is applicable. Subparagraph 14(2)(c)(i) requires information as to the "age, maturity, character, behaviour and attitude of the young person and his willingness to make amends." Assessments of such matters as "maturity, character, behaviour and attitude" are inevitably subjective, and the maker of the report should at least be clear in identifying whether the assessments are his own, or based on the statements of others. Further, while subparas. 14(2)(c)(iii) and (iv) specifically require that a report contain information about the young person's history of involvement with the courts and alternative measures, a report on "behaviour" should not include a statement that the young person is suspected of being involved in criminal activity which has not resulted in a criminal conviction: *R. v. Morelli* (1977), 37 C.C.C. (2d) 392 (Ont. Prov. Ct.) and *R. v. Bartkow* (1978), 1 C.R. (3d) S-36, 35 A.P.R. 518, 24 N.S.R. (2d) 518 (C.A.). Such information may be highly prejudicial and unless it has resulted in a conviction it is not appropriately before the court.

Subparagraph 14(2)(c)(ii) requires information on “any plans put forward by the young person to change his conduct or to participate in activities or undertake measures to improve himself.” This suggests that the person preparing the report should raise these matters in his interview with the young person, thus encouraging the young person to take responsibility for his own rehabilitation.

Subparagraph 14(2)(c)(iii) requires the report to include the history of previous findings of guilt under the Y.O.A., the J.D.A. or any provincial or municipal law. The report shall also describe the young person’s response to previous dispositions and to community or other services rendered to the young person as a result of his previous involvement with the courts. In *R. v. Tan*, [1975] 2 W.W.R. 747, 22 C.C.C. (2d) 184 (B.C.C.A.) it was held in an adult sentencing that a prior discharge ought to be considered by a court contemplating a conditional or absolute discharge, and therefore a notation of a prior discharge should be included in a pre-disposition report. See also para. 36(1)(e) of the Y.O.A. which specifically allows a court to make use of a previous absolute discharge in considering a subsequent disposition. Section 45 of the Y.O.A. requires the destruction of all records concerning a previous conviction under the Y.O.A. or J.D.A. if a young person has had a conviction-free period (two years after completion of disposition of summary conviction offence, five years after completion of disposition on indictable offence). If a destruction of the record is required, the previous convictions are not to be mentioned in the pre-disposition report or considered by the court.

Subparagraph 14(2)(c)(iv) requires the person making the report to include the history of alternative measures and the response of the young person thereto. *R. v. Drew*, [1979] W.W.R. 530, 45 C.C.C. (2d) 212, 7 C.R. (3d) S-21 (B.C.C.A.) stands for the proposition that a court ought to take into account a young person’s experience in a diversion program, but that the weight given the consideration should be tempered by the fact that diversion is not a substitute for a previous discharge and does not involve a finding of guilt.

Subparagraph 14(2)(c)(v) requires the report to provide information about the “availability of community services and facilities for young persons and the willingness of the young person to

avail himself of such services or facilities." This requires the person making the report to be familiar with the resources of the juvenile correctional system, and to discuss possible dispositions with the young person. It is apparently not an uncommon practice for pre-disposition reports prepared in connection with charges under the J.D.A. to include a recommendation as to an appropriate disposition. In the adult courts, this practice has been the subject of adverse judicial comment. There may be a concern that in the absence of a request by the judge for advice, such recommendations may be too influential and infringe upon the judicial function. See *R. v. Bartkow* (1978), 1 C.R. (3d) S-36, 35 A.P.R. 518, 24 N.S.R. (2d) 518 (C.A.); and *R. v. Silk* (1979), 20 Nfld. & P.E.I. R. 465, 53 A.P.R. 465 (Nfld. C.A.), where Furlong C.J.N. said at pp. 467-68):

Before leaving this case we should also like to repeat what has already been said about pre-sentence reports. These reports should be limited to a recital of facts with regard to the antecedents and background of the accused. In this case the report went further than was strictly necessary and the probation officer included in it the general recommendations as to the form of punishment. Punishment is a matter that lies exclusively within the preserve of the Judge and should remain outside the ambit of any probation officer's report unless his views are sought.

According to this view, it is acceptable for a pre-disposition report to discuss available resources and facilities and the young person's apparent amenability to various dispositions, but unless specifically requested, a recommendation is inappropriate.

Subparagraph 14(2)(c)(vi) of the Y.O.A. requires the report to include information about "the relationship between the young person and his parents and the degree of control and influence of the parents over the young person". The information may come from the assessment of the young person and his parents, or may be based on observations by the maker of the report or others.

Subparagraph 14(2)(c)(vii) provides that where appropriate the report shall include information about school attendance and performance of the young person and about his employment record.

Oral report: subsection 14(3)

While a pre-disposition report shall normally be in writing to give the court and parties an opportunity to study its contents, s-s. 14(3) provides that, with leave of the court, where a report cannot "reasonably be committed to writing" it may be submitted orally in court. Leave to present an oral report might be given when the offence is less serious, or a lack of facilities or time makes it difficult to prepare a report. It is submitted, however, that a court should be reluctant to grant leave for an oral presentation where a severe disposition is being contemplated or where complex issues are involved. An oral report may make it difficult for the parties to prepare for a disposition hearing and participate effectively in the cross-examination of the maker of the report; an oral report may also complicate the court's task. An oral report may not be as well organized and clearly presented as a written report.

Although not expressly provided for in the legislation, it is suggested that where leave is to be sought to present an oral report, the young person, his counsel, the prosecutor and any parent in attendance, where possible, should be informed prior to the court appearance that leave will be sought, and they should be informed of the substance of the report.

Further, where an oral report is being presented and a person entitled under s-s. 14(6) to cross-examine the maker of the report requests an adjournment or recess to allow time to prepare for cross-examination, it is submitted that this request should normally be granted.

A youth court judge may exclude a *private* prosecutor from the oral submission of all, or part, of a report, where disclosure "might . . . be prejudicial" to the young person and the information withheld is not necessary for the prosecution of the case: see s-s. 14(7) and discussion *infra*.

Report part of record: subsection 14(4)

Subsection 14(4) makes clear that a pre-disposition report is a part of the record of the youth court, and therefore subject to the provisions of ss. 40, 45 and 46 in regard to access, disclosure and destruction.

**Provision of copies of pre-disposition report:
subsection 14(5)**

Subsection 14(5) requires that where a pre-disposition report has been prepared, the youth court shall cause copies of the report to be given to:

- (i) the young person;
- (ii) the young person's parent if present at the proceedings; para. 14(5)(b) allows a youth court to cause a copy of the report to be given to a parent not in attendance at the proceedings, if the parent is "in the opinion of the court, taking an active interest in the proceedings";
- (iii) counsel for the young person, if there is one; and
- (iv) the prosecutor, subject to having all or part of the report withheld from a *private* prosecutor under s-s. 14(7).

Thus, where a pre-disposition report is completed, it should be submitted to the youth court. The court should then ensure that all of those entitled to the report under s-s. 14(5) receive copies of the report. Normally, as a matter of practice the copies of the report should be given out prior to appearance in court, to allow those involved to consider the report, and decide whether to exercise their right of cross-examination under s-s. 14(6). A copy of the pre-disposition report should not be given to a private prosecutor without express judicial approval, in view of the broad discretion given to a judge under s-s. 14(7) to withhold all or part of such a report.

Cross-examination: subsection 14(6)

On application to the youth court, the young person, his counsel or an adult assisting the young person pursuant to s-s. 11(7) shall be given the opportunity to cross-examine the person who made a pre-disposition report. Similarly, on application the prosecutor will have the opportunity to cross-examine the maker of the report, subject to s-s. 14(7), which may in certain circumstances reduce or even eliminate a private prosecutor's right to cross-examine. As with a medical or psychological report prepared under s. 13 of the Y.O.A., a pre-disposition report is not a part of the case of either party and so both parties should have a right of cross-examination, to allow adequate testing or qualification of its contents.

As noted above in the discussion of s-s. 14(3) and (5), as a matter of practice, it is usually appropriate to ensure that parties have copies of the report prior to the hearing at which it is submitted, or if the report is to be submitted orally under s-s. 14(3), notice of the substance of the report. Such prior notice of the report may be necessary to give the parties an opportunity to prepare for an effective and proper cross-examination. If a party has not had adequate notice of the report, it is submitted that the court should normally exercise its discretion to grant an adjournment or recess.

**Withholding of report from private prosecutor:
subsection 14(7)**

Subsection 14(7) provides that all, or a part, of a pre-disposition report may be withheld from a *private* prosecutor where "disclosure . . . to the prosecutor *might*, in the opinion of the court, be prejudicial to the young person and is not, in the opinion of the court, necessary for the prosecution of the case". This test for withholding disclosure should be contrasted with s-s. 39(1). Subsection 14(7) adopts a less stringent test with "might" as opposed to "would", and be "prejudicial" as opposed to "seriously prejudicial". Subsection 14(7) might be used to withhold information of an embarrassing nature about background, character or condition. The court may consider the identity of the private prosecutor when deciding whether to direct withholding of information; it may be relevant whether it is a neighbour of the young person or a department store that is prosecuting the case. It should be noted that there is *no* provision for withholding any part of a report from a Crown prosecutor (the Attorney General or his agent).

Paragraph 14(7)(a) allows withholding of a copy of the report from a private prosecutor if it is submitted in writing, while para. 14(7)(b) provides for the exclusion of a private prosecutor from "the court during the submission of the report or a part thereof, if the report is submitted orally in court."

Subsection 14(6), granting a prosecutor the right to cross-examine the maker of a pre-disposition report, is expressly "subject to subsection (7)." Clearly, s-s. 14(7) may be invoked to prevent a private prosecutor from asking questions. It would also seem that s-s. 14(7) is broad enough to have a private prosecutor

excluded from the court during cross-examination by the young person. Paragraph 14(7)(b) allows exclusion of a private prosecutor from the court "during the *submission* of the report, or a part thereof, if the report is submitted orally"; this would seem to cover exclusion during cross-examination. In any event, s-s. 39(3) allows exclusion of a private prosecutor during the disposition stage of a Y.O.A. proceeding if information is "being presented, the knowledge of which [by the private prosecutor] might, in the opinion of the court . . . be seriously injurious or prejudicial to the young person." See also discussion of s-ss. 13(5) and (6) regarding exclusion of a private prosecutor from proceedings.

The decision to withhold disclosure from a private prosecutor under s-s. 14(7) rests with the judge, and no hearing need be held before it is made. The judge may act on his own motion, or as a result of written or oral submissions from the young person or the person preparing the report.

If a youth court withholds all or part of a pre-disposition report from a private prosecutor under s-s. 14(7), s-s. 40(4) provides that this part of the youth court record shall not be made available to him for inspection, and s-s. 46(2) prohibits unauthorized disclosure of information from the report to him.

It should be noted that the English marginal note to s-s. 14(7) states "Report may be withheld from young person or private prosecutor". This marginal note is incorrect, and results from a failure to change the note after the subsection was amended between Second and Third Reading of the Y.O.A. The *Interpretation Act*, R.S.C. 1970, c. I-23, s. 13 provides that "[m]arginal notes . . . form no part of the enactment, but shall be deemed to have been inserted for convenience of reference only." Therefore, although the marginal note to s-s. 14(7) of the Y.O.A. is incorrect, it in no way affects the substantive provisions contained therein. There is no equivalent error in the French marginal note.

**Court disclosure of report to other persons:
subsection 14(8)**

In addition to those immediately involved in youth court proceedings, and hence entitled to a copy of a pre-disposition report under s-s. 14(5), there may be others who should have access to the report; s-s. 14(8) provides for release of a report to other

courts, to youth workers, and to others who have a "valid interest".

Under subpara. 14(8)(a)(i), a copy of a pre-disposition report, or a transcript of the report if it is submitted orally, shall, upon request, be supplied by the youth court to "any court that is dealing with matters relating to the young person". This would appear to include a youth court, a court dealing with the young person under child welfare or youth protection legislation, an ordinary (adult) court dealing with the young person after transfer under s. 16 of the Y.O.A., and a court dealing with the young person after he becomes an adult. This broad reading of subpara. 14(8)(a)(i) is consistent with paras. 40(3)(f) and (g) which give other courts access to youth court records.

Under subpara. 14(8)(a)(ii), a copy of a report or transcript of its oral submission shall, upon request, be supplied by the court to "any youth worker to whom the young person's case has been assigned". A youth worker preparing a pre-disposition report or progress report (for review proceedings under ss. 28 to 34) should find a previously prepared pre-disposition report of great assistance. Similarly, a youth worker assigned to supervise a young person on probation or carry out other duties under s. 37 should find a report to be a valuable source of information to help him better understand the young person.

Paragraph 14(8)(b) allows a youth court to supply a copy or transcript of a report, or part thereof to any person not otherwise entitled under s. 14 access to the report, if, "in the opinion of the court, the person has a valid interest in the proceedings." A court has a broad discretion under para. 14(8)(b) and must weigh any benefits to society or the young person which may result from release of the report against any harm which may result from the release of sensitive and potentially prejudicial information. Examples of persons who might, under certain circumstances, have a "valid interest" in the proceedings are a psychiatrist, psychologist or other therapist treating the young person, or the victim if he has agreed to have the young person perform personal services as a part of his disposition. As a pre-disposition report is a part of the youth court record, a number of persons have a right of access to the report or may at least seek access under s-ss. 40(2) and (3). A youth court judge is not obliged to hold a hearing before deciding to release a report under para. 14(8)(b).

If a copy or transcript of a report is released by a youth court under s-s. 14(8), the privacy of the young person is still protected by s-ss. 40(4) and 46(2). Copies of the report or transcript are not to be released to unauthorized persons, nor is information from the report to be improperly disclosed. Further, all copies and transcripts are subject to the destruction provisions of s. 45.

Disclosure by provincial director: subsection 14(9)

Subsection 14(9) authorizes a provincial director who submits a pre-disposition report to a court to make the report, or a part of the report, available to “any person in whose custody or under whose supervision the young person is placed or to any other person who is directly assisting in the care or treatment of the young person.” Access to the report may have an obvious benefit for those dealing with the young person, and further obviates the need for those persons to contact again those who contributed information to the original report (e.g. parents, the victim, employers), sparing them inconvenience and potential embarrassment or unpleasantness.

If a copy of a report is released by a provincial director under s-s. 14(9), the privacy of the young person is still protected by s-ss. 40(4) and 46(2); copies of the report are not to be released to unauthorized persons, nor is information to be improperly disclosed. Further, all copies of the report are subject to the destruction provisions of s. 45.

Inadmissibility of statements: subsection 14(10)

Pursuant to s-s. 14(10) of the Y.O.A., statements made by a young person in the course of the preparation of a pre-disposition report in respect of the young person are not “admissible in evidence against him in any civil or criminal proceedings except in proceedings under section 16 [transfer to ordinary court] or 20 [disposition] or sections 28 to 32 [disposition review]”. The purpose of s-s. 14(10) is to ensure that statements made by the young person for the purpose of preparing a report are used for the purposes for which they were intended. For example, if a young person admits complicity in criminal activity not arising out of the charge for which the report is being prepared, such an admission is “privileged” and cannot be used

against the young person in other proceedings. As indicated above in the discussion of s-s. 14(2), it is generally considered improper to include such information in a pre-disposition report.

The purpose of s-s. 14(10) is to protect the young person against self-incrimination, and to encourage open communication between the maker of the report and the young person.

DISQUALIFICATION OF JUDGE (Section 15)

Introduction

Subsection 15(1) of the Y.O.A. provides that as a rule a youth court judge who, prior to an adjudication, examines a pre-disposition report or hears a transfer application under s. 16 of the Y.O.A. shall not continue to deal with the case thereafter. This is to prevent any possibility that a judge may be predisposed by any information he receives, or that there is any *appearance* of such predisposition.

Subsection 15(2) provides an exception to the general rule if the young person and prosecutor both consent *and* the judge is satisfied that he has not been predisposed by any information received.

SECTION 15

15. (1) *Disqualification of judge.*—Subject to subsection (2), a youth court judge who, prior to an adjudication in respect of a young person charged with an offence, examines a pre-disposition report made in respect of the young person, or hears an application under section 16 in respect of the young person, in connection with that offence shall not in any capacity conduct or continue the trial of the young person for the offence and shall transfer the case to another judge to be dealt with according to law.

(2) *Exception.*—A youth court judge may, in the circumstances referred to in subsection (1), with the consent of the young person and the prosecutor, conduct or continue the trial of the young person if the judge is satisfied that he has not been predisposed by information contained in the pre-disposition report or by representations made in respect of the application under section 16.

Disqualification of judge: subsection 15(1)

Subsection 15(1) provides that, subject to s-s. 15(2), a youth court judge who, prior to an adjudication in respect of an offence,

- (1) examines a pre-disposition report made in respect of the young person in connection with *that* offence, or
- (2) hears a transfer application under s. 16 of the Y.O.A. in respect of that offence,

shall not "in any capacity conduct or continue the trial of the young person" for that offence, and shall transfer the case to another judge to be dealt with according to law.

The purpose for this general rule is to ensure that a judge is not predisposed in rendering an adjudication in regard to a specific charge, by information received in a pre-disposition report or transfer application, in respect of that charge. This is important not only to ensure that justice is done, but also to ensure that justice appears to be done.

At a transfer hearing under s. 16, a youth court judge may receive evidence of the "seriousness" and "circumstances" of an alleged offence; hearsay and other inadmissible evidence may be received at a transfer hearing. Further, other highly prejudicial information may be revealed at a transfer hearing, for example, concerning a young person's previous convictions. All of this information may be highly relevant to a transfer hearing, but prejudicial and irrelevant to an adjudication.

A pre-disposition report may also contain hearsay evidence and incriminating statements by the accused concerning the circumstances of an offence, and other prejudicial information not relevant to an adjudication. A pre-disposition report will usually be read by a judge in connection with a transfer hearing; s-s. 16(3) requires a judge to read a pre-disposition report in considering a transfer application. There may also be other circumstances in which a judge, through inadvertence or otherwise, reads a pre-disposition report prior to adjudication; this should rarely occur as, apart from a transfer hearing, a pre-disposition report should only be ordered after an adjudication.

Subsection 15(1) requires a disqualified judge to not "in any capacity conduct or continue the trial of the young person for the offence". This means that if the case is not transferred, he is disqualified from dealing with the case in youth court. This also means that if a youth court judge also sits as a judge in ordinary (adult) court and he orders the case transferred to ordinary court, he cannot deal with the case in ordinary court.

It is clear from the wording and punctuation of s-s. 15(1) that a judge who conducts a transfer hearing or reads a pre-disposition report in connection with *one* offence is not disqualified from dealing with the young person in connection with another offence. It is quite common for a judge to render an adjudication and disposition in regard to a person who has been convicted by the same judge on other charges. It is only improper for a judge to deal with a case if there is "a reasonable apprehension of bias", and it is clear that mere familiarity with the accused based on previous charges is not in itself sufficient grounds to apprehend bias. In *Barthe v. The Queen*, [1964] 2 C.C.C. 269, 45 D.L.R. (2d) 612, 41 C.R. 47 (Que. C.A.), the accused sought a writ of prohibition to prevent his trial for conspiracy from being heard before a judge who had already tried other members of the same conspiracy; the Quebec Court of Appeal rejected the suggestion of bias. The Court noted that judges often hear inadmissible evidence at a *voir dire*, and they are relied upon to ignore this evidence in disposing of the case. Hyde J. stated (at p. 50, C.R.): "The ability to judge a case only on the legal evidence adduced is an essential part of the judicial process." To the same effect, see *Huziak v. Andrychuk* J.M.C. (1977), 1 C.R. (3d) 132 (Sask. Q.B.).

Exception to disqualification: subsection 15(2)

There is an exception to s-s. 15(1) found in s-s. 15(2) of the Y.O.A. which allows a judge who, prior to an adjudication, has read a pre-disposition report in connection with an offence or heard a transfer application in regard to that offence, to continue to deal with the charge. Under s-s. 15(2) both the young person and the prosecutor *must* consent to the judge continuing or conducting the trial. Further, the judge himself must be "satisfied that he has not been predisposed by information" contained in the pre-disposition report or received in the course of a transfer application.

If the issue of disqualification arises and the young person is not represented by counsel, the judge should be especially concerned that the consent of the young person to his continuing to deal with the case is given freely and with full comprehension of its significance. The judge may wish to encourage the young person to obtain counsel and to exercise his right to have the

court direct that counsel be appointed pursuant to s-s. 11(4) of the Y.O.A.

In deciding whether he is satisfied that he is not "predisposed" by information received, the judge will ultimately have to assess his own state of mind. Important factors may include: the nature of the information received; the seriousness of the charge the young person faces; and the nature of the proceedings the judge will be required to conduct, for example conducting a full trial versus accepting a guilty plea. Clearly, if a judge is going to continue to deal with a case, in rendering his adjudication he must not consider any of the information received at the transfer hearing or through the pre-disposition report. As *Barthe* and *Huziak*, cited above, indicate, it is accepted that in rendering an adjudication, members of the judiciary generally have the ability to exclude from their consideration matters not properly before the court.

TRANSFER TO ORDINARY COURT (Sections 16 and 17)

Introduction

One of the most serious decisions which may affect a young person facing charges under the Y.O.A. is to have his case transferred to ordinary court under s. 16. If a transfer order is made, the young person is thereafter dealt with as an adult; this includes the possibility of incarceration in an adult correctional facility without the time limitations on disposition found in s. 20 of the Y.O.A. In limited circumstances, it is felt that the broader interests of criminal as distinct from juvenile justice must take precedence, that the interests of society must be the governing factor. This procedure provides a safety valve for dealing with difficult cases, particularly where public protection is at issue.

The *Juvenile Delinquents Act* provides for a transfer procedure:

9(1) Where the act complained of is, under the provisions of the *Criminal Code* or otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of the *Criminal Code* in that behalf; but such course shall in no case be followed unless the court is of the opinion that the good of the child and the interest of the community demand it.

This provision of the *J.D.A.* resulted in a considerable amount of jurisprudence, concerning a number of substantive and procedural issues. An oft-quoted passage from Mr. Justice MacKinnon, in *R. v. Mero* (1976), 13 O.R. (2d) 215, 30 C.C.C. (2d) 497 at p. 504, 70 D.L.R. (3d) 551 (C.A.) is representative of judicial pronouncements on the nature of transfer under the *J.D.A.*:

Parliament has made its intention clear as to the interpretation and application of the Act when, in s. 38 [of the *J.D.A.*] it directs that the Courts should, except in the clearest of cases otherwise, treat the juvenile delinquent not as a criminal but as a misdirected and misguided child who needs aid, encouragement, help and

assistance. To direct that such a child be proceeded against by indictment in the ordinary Courts can only be ordered where the Court is of the opinion that both the good of the child and the interest of the community *demand* it. The Shorter Oxford English Dictionary defines "demand" as: "to ask for peremptorily, imperiously or urgently", and the noun is therein defined as: "an urgent requirement". By this language Parliament has emphasized, it seems to me, that such an order should only be made where the crime is of a most serious nature and the criminal and other record of the child supports no other recourse or solution. The verb "demands" is a powerful one, and with respect, I am of the opinion that the Courts below failed to give it sufficient weight in the context of the legislation, in particular s. 38, and of all the facts of this case.

In practice the actual application of the standard articulated in *Mero* has varied considerably under the *J.D.A.* In some provinces, like Ontario, transfers have been very rare, but in other provinces, such as Manitoba where the *J.D.A.* applies to youths up to the age of 18, transfers have been more common.

The *Young Offenders Act* is intended to ensure more uniformity and a more realistic approach to transfer, and also to resolve certain procedural dilemmas concerning the process. The standard articulated by the *Y.O.A.* requires the court to consider "the interest of society and having regard to the needs of the young person." This recognizes that the primary concern in a transfer situation is the interests of society; however, the needs of the young person in terms of treatment and the protections afforded him under the *Y.O.A.* must also be taken into account. The application of the principle that society is to be protected is to be tempered by a consideration of the needs of the young person.

There are a number of provisions in the *Y.O.A.* which will modify the present practice under the *J.D.A.*, and which should ensure that only appropriate cases are transferred to ordinary court. These include:

- a narrower range of offences than under the *J.D.A.*, s-s. 16(1);
- the young person and his parents have a right to make representations, s-s. 16(1);
- age of the young person is determined at the commission of the offence, s-s. 16(1);

- judicial discretion is more structured than under the *J.D.A.*, with a minimum list of factors to be considered, s-s. 16(2);
- consideration of a pre-disposition report is mandatory, s-s. 16(3);
- the youth court judge must give reasons, s-s. 16(5);
- a statutory right of review exists, s-s. 16(9);
- the young person has a right to counsel, para. 11(3)(b).

SECTION 16

16. (1) *Transfer to ordinary court.*—At any time after an information is laid against a young person alleged to have, after attaining the age of fourteen years, committed an indictable offence other than an offence referred to in section 483 of the *Criminal Code* but prior to adjudication, a youth court may, on application of the young person or his counsel, or the Attorney General or his agent, after affording both parties and the parents of the young person an opportunity to be heard, if the court is of the opinion that, in the interest of society and having regard to the needs of the young person, the young person should be proceeded against in ordinary court, order that the young person be so proceeded against in accordance with the law ordinarily applicable to an adult charged with the offence.

(2) *Considerations by youth court.*—In considering an application under subsection (1) in respect of a young person, a youth court shall take into account

- (a) the seriousness of the alleged offence and the circumstances in which it was allegedly committed;
- (b) the age, maturity, character and background of the young person and any record or summary of previous findings of delinquency under the *Juvenile Delinquents Act* or previous findings of guilt under this or any other Act of Parliament or any regulation made thereunder;
- (c) the adequacy of this Act, and the adequacy of the *Criminal Code* or other Act of Parliament that would apply in respect of the young person if an order were made under subsection (1), to meet the circumstances of the case;
- (d) the availability of treatment or correctional resources;
- (e) any representations made to the court by or on behalf of the young person or by the Attorney General or his agent; and
- (f) any other factors that the court considers relevant.

(3) *Pre-disposition reports.*—In considering an application under subsection (1), a youth court shall consider a pre-disposition report.

(4) *Where young person on transfer status.*—Notwithstanding subsections (1) and (3), where an application is made under subsection (1) by the Attorney General or his agent in respect of an offence alleged to have been committed by a young person while the young person was being proceeded against in ordinary court pursuant to an order previously made under that subsection or serving a sentence as a result of proceedings in ordinary court, the youth court may make a further order under that subsection without a hearing and without considering a pre-disposition report.

(5) *Court to state reasons.*—Where a youth court makes an order or refuses to make an order under subsection (1), it shall state the reasons for its decision and the reasons shall form part of the record of the proceedings of the youth court.

(6) *No further applications for transfer.*—Where a youth court refuses to make an order under subsection (1) in respect of an alleged offence, no further application may be made under this section in respect of that offence.

(7) *Effect of order under subsection (1).*—Where an order is made under subsection (1), proceedings under this Act shall be discontinued and the young person against whom the proceedings are taken shall be taken before the ordinary court.

(8) *Jurisdiction of ordinary court limited.*—Where an order is made under subsection (1) that a young person be proceeded against in ordinary court in respect of an offence, that court has jurisdiction only in respect of that offence or an offence included therein.

(9) *Review of youth court decision.*—Subject to subsection (11), an order made in respect of a young person under subsection (1) or a refusal to make such an order shall, on application of the young person or his counsel or the Attorney General or his agent made within thirty days after the decision of the youth court, be reviewed by the superior court and that court may, in its discretion, confirm or reverse the decision of the youth court.

(10) *Review of superior court decision.*—A decision made in respect of a young person by a superior court under subsection (9) may, on application of the young person or his counsel or the Attorney General or his agent made within thirty days after the decision of the superior court, with the leave of the court of

appeal, be reviewed by that court, and the court of appeal may, in its discretion, confirm or reverse the decision of the superior court.

(11) *Where the youth court is a superior court.*—In any province where the youth court is a superior court, a review under subsection (9) shall be made by the court of appeal of the province.

(12) *Extension of time to make application.*—A court to which an application is made under subsection (9) or (10) may at any time extend the time within which the application may be made.

(13) *Notice of application.*—A person who proposes to apply for a review under subsection (9) or (10) or for leave to apply for a review under subsection (10) shall give notice of his application for a review or for leave to apply for a review in such manner and within such period of time as may be directed by rules of court.

(14) *Form of transfer to ordinary court.*—An order made under subsection (1) may be in Form 6.

Time of application: subsection 16(1)

An application may be made at any time after an information has been laid and prior to adjudication. Subsection 20(3) of the *J.D.A.* allowed an application for transfer even after disposition.

Age of young person: subsection 16(1)

The young person must be alleged to have committed the offence after attaining the age of 14. Some jurisprudence under the *J.D.A.* took the relevant date for the determination of age to be the date of a transfer hearing; this jurisprudence is not applicable under the *Y.O.A.*

Types of offence: subsection 16(1)

Subsection 16(1) requires that a young person be alleged to have committed an indictable offence other than one referred to in s. 483 of the *Criminal Code*, after having attained the age of 14. The indictable offences referred to in s. 483 for which a young person cannot be transferred include: theft, obtaining by false pretences, fraud and possession of stolen property where the subject matter of the offence is worth less than \$200, and a

number of other less serious offences. A young person cannot be transferred to adult court for a purely summary offence. In *R. v. K.J.H.* (1980), 5 Man. R. (2d) 14, 54 C.C.C. (2d) 238, [1980] 6 W.W.R. 644 (Q.B.) it was held that there could be a transfer application in regard to a hybrid offence, an offence for which the Crown has an election to proceed summarily or by indictment. This follows from the *Interpretation Act*, para. 27(1)(a), which deems hybrid offences to be indictable unless the Crown elects otherwise, and the decision in *K.J.H.* should probably be followed under the Y.O.A. (but see to the contrary, *R. v. B.* (1979), 51 C.C.C. (2d) 251 (B.C.S.C)).

Who may apply?: subsection 16(1)

An application for transfer may be brought by the Attorney General or his agent, but not by a private prosecutor. The application may also be brought by the young person or his counsel, who may, for example, be seeking such advantages of ordinary court as a preliminary inquiry or a jury trial. Subsection 16(1) reverses the effect of such decisions as *R. v. Metz*, [1977] 5 W.W.R. 374, 36 C.C.C. (2d) 22 (Man. C.A.) and makes clear that a judge may not initiate an application on his own.

"Opportunity to be heard": subsection 16(1)

Subsection 16(1) specifies that the transfer decision shall be made after affording the prosecutor, the young person and the parents of the young person "an opportunity to be heard". The Y.O.A. does not specify what kind of a hearing must be held, but decisions under the J.D.A. suggest that all of those mentioned have a right to be present, to call evidence, to cross-examine witnesses, to examine all of the documents which the court receives and to make submissions before a decision is made. In *R. v. F.J.Y.* (unreported decision) Ont. Prov. Ct. (Fam. Div.), November 30, 1979, Andrews C.J. Prov. Ct. stated that in regard to a J.D.A., s. 9 application:

The transfer itself is not strictly of a judicial nature. It is more an administrative proceeding. . . . In effect, the Court is not bound to observe the strict rules of trial procedure, but must at least observe the rules of natural justice. . . . The Court may receive hearsay evidence at a hearing of this kind, but, of course cannot base its evidence solely upon it. . . . The Court, of course must

never base its decision upon secret or undisclosed information or upon matters that may be solely in the personal knowledge of the judge.

See also *R. v. Arbuckle*, [1967] 3 C.C.C. 380, 59 W.W.R. 605, 1 C.R.N.S. 318 (B.C.C.A.); and *R. v. F.* (1974), 20 C.C.C. (2d) 11 (B.C.S.C.). It would seem that the characterization of the transfer process put forth by these decisions under the *J.D.A.*, is applicable to the *Y.O.A.* For example, s-s. 16(3) requires a predisposition report to be considered by a court at a transfer hearing. Such a report will invariably be filled with hearsay comments which would be inadmissible under a strict application of the rules of evidence.

Paragraph 11(3)(b) of the *Y.O.A.* provides that where a young person is not represented, the judge presiding at a transfer hearing must advise the young person of his right to be represented by counsel, and give him a reasonable opportunity to obtain counsel. Further, under s-ss. 11(4) and (5) if the young person wishes to obtain counsel but is unable for any reason to do so, the judge shall direct that representation be arranged under the auspices of provincial authorities. Given the very serious nature of a transfer application, a young person should generally be represented by counsel and not, for example, merely assisted by an adult under s-s. 11(7).

The transfer decision: subsection 16(1)

The transfer decision is one of the most important with which a youth court is faced. The court must be "of the opinion that in the interest of society and having regard to the needs of the young person", the young person should be proceeded with in ordinary court. The words of s-s. 16(1) of the *Y.O.A.* are not dissimilar to those found in s-s. 9(1) of the *J.D.A.*, but there is very clearly a major change in emphasis. The phrasing of s-s. 16(1) indicates that the "interest of society" is of primary importance, although the needs of the young person are also to be considered and balanced against the interest of society.

In considering a transfer application, the youth court must take into account all the factors listed in s-s. 16(2), and also consider and apply the general principles articulated in s. 3 of the *Y.O.A.* It is submitted that if the prosecutor seeks transfer, then the onus is upon the Crown to satisfy the court that transfer is

appropriate, and this onus is a heavy one. It is clearly in the interest of society to be protected from criminal activity (para. 3(1)(b)), and this may often suggest that transfer to adult court is appropriate in the case of a serious offence, as longer custodial sentences can be imposed. On the other hand, both society and the young offender have an interest in rehabilitation so as to ensure that the young person commits no further offences. This objective is generally more likely to be achieved if the young person is not transferred, but rather kept in a system where staff, facilities and programs are specifically directed towards the young person's level of development and maturity and where he will be given special opportunities for rehabilitation (para. 3(1)(c)).

If the young person applies for transfer, usually for tactical reasons such as a preference for a jury trial, then it is submitted the onus should be upon him to satisfy the court that this is appropriate. In such circumstances, however, it is submitted that the onus may not be a high one, as the young person should have the right to be able to indicate a desire to waive the special protections afforded in youth court (see paras. 3(1)(e) and 16(2)(c)). The interest of society and needs of the young person for a trial in ordinary court may coincide. It is clear, however, that transfer applications are not simply a matter of consent. The young person does not have "an election", and the court has a duty to form an opinion that a transfer is appropriate.

Effect of transfer: subsection 16(1)

Where a transfer order is made in respect of a charge facing a young person, that charge is then proceeded with in "ordinary court" in accordance with the law ordinarily applicable to an adult charged with the offence. "Ordinary court" is defined in s-s. 2(1) of the Y.O.A. to mean that court "which would have jurisdiction in respect of an offence alleged" but for the Y.O.A. Depending on the offence, the matter could be dealt with by a magistrate, a judge alone or a judge and jury; in most instances the accused young person will have an election in ordinary court as to the method of trial. If a young person is transferred to ordinary court under s. 16 of the Y.O.A. the rules of procedure applicable to adults will apply. As s. 73 of the Y.O.A. repeals s. 441 of the *Criminal Code*, the proceedings will be open to the public; under certain circumstances defined in s. 442 of the *Code*,

as amended by s. 74 of the Y.O.A., the public may be excluded in proceedings under the *Code*. A young person convicted in ordinary court faces sentence under the provisions of the *Code*, or other relevant statute, such as the *Narcotics Control Act*. The judge in ordinary court, sentencing a young person who has been transferred will presumably consider age as an important factor, but generally the sentencing principles applicable to adults will apply: see *R. v. Chamberlain* (1974), 22 C.C.C. (2d) 361 (Ont. C.A.). Thus a young person might face a sentence of life imprisonment in an adult facility after transfer, depending of course on the maximum sentence for the offence and the sentence actually imposed. Section 660.1 of the *Criminal Code*, as enacted by s. 75 of the Y.O.A., allows the adult and juvenile correctional authorities to place in a facility for young persons, a young person sentenced to an adult facility after transfer. A judge in ordinary court cannot directly sentence a young person to a facility for young persons, although he would not be precluded from making such a recommendation to correctional authorities.

Considerations by youth court: subsection 16(2)

Subsection 16(2) contains a number of factors which a youth court *must* take into account in considering an application under s-s. 16(1). Under s. 9 of the *J.D.A.*, courts have often considered all or a number of the criteria listed in s-s. 16(2), although not specifically required to do so. See, for example, *Re B. and M.* (1975), 33 C.R.N.S. 362 (Ont. Prov. Ct.); and *Re N.N.C.* (1978), 6 R.F.L. (2d) 254 (Alta. Juv. Ct.).

Seriousness and circumstances of alleged offence: paragraph 16(2)(a)

Under the Y.O.A. the youth court must consider the seriousness of the offence when deciding whether to transfer. Some decisions under the *J.D.A.* seem to suggest that in certain very serious cases like murder, transfer is obligatory. However, as noted in *R. v. Smith* (1975), 28 C.C.C. (2d) 368 (Man. C.A.), by O'Sullivan J.A. in dissent, Parliament has not statutorily required transfer for any particular offence; the seriousness of the offence is merely one factor the court is to consider. The jurisprudence under the *J.D.A.* suggests that in assessing the "seriousness . . . and circumstances" of the offence, the court may consider:

- the alleged offence itself, including maximum sentence for adults;
- the degree of violence, injury or damage to property;
- the effect of the alleged offence on the victim, and society in general;
- general or local crime problems; and
- the apparent attitude of the alleged offender, e.g. callousness.

The court apparently need *not* be satisfied, beyond a reasonable doubt or otherwise, that the offence actually occurred. Rather, it seems that the court is to consider evidence including hearsay evidence, about the alleged offence, and for the purposes of the transfer decision accept the allegations.

**“Age, maturity, character . . . background . . . and record”:
paragraph 16(2)(b)**

Paragraph 16(2)(b) makes clear that the youth court is to consider the individual young person, his age, maturity, character and background, and not simply his offence, when deciding a transfer application. Some of this information should be available through a pre-disposition report: see s-s. 16(3). The more amenable the young person seems to the program and facilities of the juvenile system, the greater the reluctance the youth court should be to transfer.

The youth court is required to consider the previous record of criminal convictions; the likelihood of transfers increases with the seriousness and length of the record. Note that if a sufficient period has elapsed since a previous conviction, part or all of the record may have been destroyed under s. 45 of the Y.O.A. and may not be used for any purpose, including transfer applications.

Adequacy of legislative provisions: paragraph 16(2)(c)

Paragraph 16(2)(c) requires a comparison of the adequacy of different legislative provisions to deal with the circumstances of the case, depending on whether transfer occurs. A major consideration in this regard will usually be the limitations placed on maximum duration of two or three years for dispositions made under s. 20 of the Y.O.A.; if it is felt a longer period in the

correctional system is required, transfer is necessary. On the other hand, if a youth court judge wishes to ensure that a young person is placed in a juvenile facility, he must deal with the youth under the Y.O.A.

A young person may seek transfer to take advantage of certain provisions of the *Criminal Code*, such as those providing for jury trials.

**Availability of treatment or correctional resources:
paragraph 16(2)(d)**

Paragraph 16(2)(d) requires the youth court judge to assess and compare the resources in the juvenile and adult systems, which would be available to the person upon a finding of guilt. This provision allows the court to recognize that a young person may have exhausted the resources available in the juvenile system. The judge should generally receive testimony or documentary evidence or hear representations about the facilities, particularly in the juvenile system. It is inappropriate for the judge to base his assessment on his own personal knowledge of the resources, without at least directing the parties to this issue and soliciting any evidence or representations they may wish to offer.

The young person and the Crown are both guaranteed the right to make representations and hence participate in the decision-making process. Clearly, counsel can make representations "on behalf of" the young person, but arguably others, such as a social worker, a relative or a parent, may also, with leave of the court, make representations on his behalf. Any of these persons might well be called as part of the defence's case, as well as by the prosecution. Parents are assured of an "opportunity to be heard" in their own right under s-s. 16(1).

Other factors: paragraph 16(2)(f)

Paragraph 16(2)(f) gives the court a broad discretion to consider "any other factors that the court considers relevant." One factor that courts considered under the *J.D.A.* is that a co-accused is an adult. A trial with an adult co-accused can only occur if the case is transferred: see for example, *R. v. Haig* (1970), 1 C.C.C. (2d) 299, [1971] 1 O.R. 75 (C.A.). In some cases under the *J.D.A.*, the courts considered that the defence of

insanity might be raised. It was felt that s. 542 of the *Criminal Code* providing for confinement in "strict custody" of those acquitted by reason of insanity did not apply to juvenile proceedings, and hence such cases should be transferred. Under the Y.O.A., ss. 51 and 52, it is clear that the insanity provisions of the *Criminal Code* apply to young persons, and this is no longer a reason for transfer.

Pre-disposition reports: subsection 16(3)

Subsection 16(3) requires that a youth court have a pre-disposition report prepared, and that this report shall be considered by the court in deciding a transfer application. Defined in s-s. 2(1) of the Y.O.A., a pre-disposition report means "a report on the personal and family history and present environment of a young person made in accordance with section 14." Subsection 14(2) outlines the minimum contents of such a report. The scope of such a report is broad, and it may provide a court with valuable information. All of the provisions of s. 14 regarding preparation, disclosure and presentation of pre-disposition reports apply when they are used in transfer proceedings. Further, as provided by s. 15, a youth court judge who hears an application for transfer or examines a pre-disposition report, cannot thereafter conduct a trial in regard to that offence, subject to exceptions in s-s. 15(2) which allows a judge to continue to preside if the parties consent and the judge is satisfied he has not been predisposed by the report.

If appropriate, a youth court judge may also order a medical or psychological report under s. 13 before deciding whether to transfer a young person.

Dispensing with hearing: subsection 16(4)

The Y.O.A. provides an expeditious procedure for dealing with a transfer application by the Crown, where the young person is charged with an offence alleged to have been committed "while the young person was being proceeded against in ordinary court pursuant to an order previously made" under s-s. 16(1), or "serving a sentence as a result of proceedings in ordinary court" after transfer. The youth court may act on the written or oral application of the Crown and need not hold a hearing or consider a pre-disposition report. Subsection 16(4) probably reflects

present practice, and facilitates the process of dealing with all charges against a young person in a single court.

There are some qualifications to this expeditious process:

- the subsequent offences must belong to the class of offences to which transfer proceedings apply (indictable and not referred to in s. 483 of the *Code*);
- the application must be made by the Crown; s-s. 16(4) of the Y.O.A. does not apply if the young person is seeking transfer;
- the provision is permissive; the youth court still has the option of holding a hearing or considering a pre-disposition report.

Reasons: subsection 16(5)

The youth court must give reasons either “where [it] makes an order or refuses to make an order under subsection (1).” These reasons are to form part of the record of the proceedings in the youth court; they need not be written, but if given orally, a record (mechanical recording or stenographer’s notes) must be kept to comply with s. 40. The requirement of s-s. 16(5) emphasizes the importance of a formal judicial determination of the issue, and facilitates any review which might occur.

No further application: subsection 16(6)

Where a youth court refuses to grant a transfer application, there can be no further applications. Thus, an applicant for transfer cannot go from judge to judge or reapply to the same judge in an attempt to secure an order. Where the applicant is dissatisfied with the original result, the proper procedure is to apply for review under s-s. 16(9).

Effect of an order: subsections 16(7) and (8)

When a transfer order is made under s-s. 16(1), proceedings are discontinued under the Y.O.A. in youth court and the young person is dealt with thereafter in ordinary court. If the young person is acquitted in ordinary court, proceedings cannot be recommenced in youth court in regard to the charge dealt with in ordinary court. The ordinary court can only deal with the spe-

cific offence which is the subject of the transfer order. Other offences alleged to have been committed prior to or at the same time as the offence in respect of which the order is made, remain within the jurisdiction of the youth court, unless a separate transfer order is made. Offences which are alleged to have been committed by the young person, subsequent to a transfer order, must also be the subject of a separate transfer order, or dealt with in youth court. However, in regard to offences alleged to have been committed while a young person was already subject to a transfer order, or serving a sentence after trial in an ordinary court, s-s. 16(4) provides an expeditious process for transfer.

Applications may be made simultaneously in regard to separate offences (multiple charges or counts), and a single hearing held, though each application must formally result in a separate order.

Review of transfer order: subsections 16(9) to (13)

Subsections 16(9) to (13) provide a process for reviewing a youth court's transfer order or its refusal to make such an order. Subsection 16(9) refers to a decision being "reviewed". In *R. v. West*, [1973] 1 O.R. 211, 20 C.R.N.S. 15, 9 C.C.C. (2d) 369 (C.A.), Gale C.J.O. discussed the meaning of the term "reviewed" in s. 608.1 of the *Criminal Code*, which allows review of decisions regarding judicial interim release. He commented that (at C.C.C. p. 375):

[T]he review should take the general form of an ordinary appeal and not a hearing *de novo* or one in which either side has the right to submit additional material to the Court of Appeal. However, while no such right exists, the Court, as in appeals, can grant leave in the usual way and upon the usual grounds to a party to produce new evidence.

These remarks would seem to accurately describe the review process contemplated by s-ss. 16(9) and (10) of the Y.O.A.

The young person and Crown both have a right to seek an initial review under s-s. 16(9); the review is from a youth court to a superior court. The superior court may "in its discretion, confirm or reverse the decision of the youth court." In *R. v. Smith* (1973), 13 C.C.C. (2d) 374, 6 N.B.R. (2d) 494 (C.A.), Hughes C.J.N.B. stated that, under s. 608.1 of the *Code*, the duty of a court reviewing a judicial interim release (at C.C.C. p. 377):

[W]ould appear to be to examine the record judicially and render the decision which we think "should have been" made by the Judge of first instance giving proper regard to his findings of fact and the inferences he has drawn.

Subsection 16(10) provides that the decision of a superior court reviewing a transfer decision under s. 16(9), may in turn be reviewed by the court of appeal. The review by the court of appeal is by leave only, and is not a matter of right.

"Superior court" and "court of appeal" are defined in s. 2 of the *Criminal Code* (see also s. 761). In most provinces the "superior court" is the Supreme Court. It seems likely that in most jurisdictions the youth court will be a provincial court; if the youth court should be the superior court, then s-s. 16(11) provides there is a right of review only from this court to the court of appeal. There is no further right of review or appeal beyond the court of appeal of the province in which the youth court sits.

Subsections 16(9) and (10) require an application for review or for leave to review to be made within 30 days of the decision appealed. In *R. v. Jean B.*, [1980] 1 S.C.R. 80, 48 C.C.C. (2d) 479n *sub nom. R. v. Boisvert*, it was held that an application was "made" when it was filed and served; there need not be an actual hearing within the time specified. *Jean B.* involved an interpretation of s. 37 of the *J.D.A.*, which governs juvenile delinquency appeals, and would probably govern the interpretation of s-ss. 16(9) and (10) of the *Y.O.A.*

Subsection 16(12) gives the reviewing court the jurisdiction to extend the time for making an application. Subsection 607(2) of the *Criminal Code* governs extension of time for making an appeal. The jurisprudence under that provision suggests that in deciding whether to grant an extension, the court will consider the length and the circumstances of the delay, any prejudice resulting, and the *bona fides* of the party seeking an extension.

Notice of application: subsection 16(13)

Subsection 16(13) provides that notice of the application for review or for leave to apply for review shall be given in such manner and within such period of time as may be directed by rules of court. This contemplates rules being formulated under s. 67 or 68 of the *Y.O.A.*, such rules may be similar to those made under s. 438 of the *Code*.

Form of transfer order: subsection 16(14)

A transfer order made pursuant to s-s. 16(1) may be in Form 6 of schedule appended to Y.O.A.

SAMPLE FORM**FORM 6**

**THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO**

ORDER OF TRANSFER TO ORDINARY COURT

Canada
Province of Ontario
County of Queens

Whereas David Smith of 25 First Avenue, Anytown, Ontario, being a young person within the meaning of the *Young Offenders Act*, and having attained the age of fourteen years, is alleged, in an information sworn on the 3rd day of June, 19 82, to have committed the following offence:

robbery: to wit on the second day of June, 1982 did steal two hundred and fifty dollars from The Corner Milk Store, 2 West Street, Anytown, Ontario and at the same time thereat did use threats of violence contrary to section 303 of the *Criminal Code of Canada*;

And whereas that offence is an indictable offence other than one referred to in section 483 of the *Criminal Code*;

And whereas it would appear that, in the interests of society and having regard to the needs of David Smith, he should be proceeded with in ordinary court;

I, Thomas Brown, Judge of the Youth Court in and for the County of Queens, hereby order that David Smith be proceeded with before the court that would, except for the *Young Offenders Act*, have jurisdiction in respect of that offence.

Dated this 24th day of June, 19 82, at Anytown in the Province of Ontario.

"Thomas Brown"

.....
A Judge of the Youth Court

Restrictions on publication at transfer hearing: section 17**SECTION 17**

17. (1) *Order restricting publication of information presented at transfer hearing.*—Where a youth court hears an application for a transfer to ordinary court under section 16, it shall

- (a) where the young person is not represented by counsel or,
- (b) on application made by or on behalf of the young person or the prosecutor, where the young person is represented by counsel,

make an order directing that any information respecting the offence presented at the hearing shall not be published in any newspaper or broadcast before such times as

- (c) an order for a transfer is refused or set aside on review and the time for all reviews against the decision has expired or all proceedings in respect of any such review have been completed; or
- (d) the trial is ended, if the case is transferred to ordinary court.

(2) *Offence.*—Every one who fails to comply with an order made pursuant to subsection (1) is guilty of an offence punishable on summary conviction.

(3) *Meaning of "newspaper".*—In this section, "newspaper" has the meaning set out in section 261 of the *Criminal Code*.

Publicity ban: subsection 17(1)

The publication ban provided for by s-s. 17(1) is intended to protect the young person from exposure to publicity, as do the provisions of ss. 38 and 39 of the Y.O.A. It is also intended to ensure that if a young person is transferred to adult court, he is ensured a fair trial. There may be highly prejudicial information revealed at a transfer hearing, including the circumstances of the alleged offence; it could be most unfair to have this publicly revealed before a trial in ordinary court, especially if there is to be a jury trial. The rationale behind s-s. 17(1) of the Y.O.A. is similar to that which provides for a publicity ban on evidence at a preliminary inquiry in ordinary court (*Criminal Code*, s. 467).

Subsection 17(1) requires that when a transfer application is made, the youth court judge *shall* make an order banning the publication of any information presented at a transfer hearing, in either of the following situations:

- where the young person is *not* represented by counsel, para. 17(1)(a); or
- where the young person is represented by counsel and an application is made by the young person or the prosecutor, para. 17(1)(b).

Subsection 17(1) does not give the youth court judge discretion; thus the only situation in which an order banning publicity will not be made is where the young person is represented by counsel and neither the young person nor prosecutor requests a ban.

The ban under s-s. 17(1) extends until:

- an order for transfer is refused, or the order to transfer is set aside on review, para. 17(1)(c); or
- if an order for transfer is made, until the trial in ordinary court is completed, para. 17(1)(d).

The ban in s-s. 17(1) is in addition to the restrictions on publication of information revealing the identity of young persons charged in proceedings under the Y.O.A., found in s. 38.

“Published or broadcast”: subsections 17(1) and (3)

The ban covers information published in any “newspaper,” as defined by s. 261 of the *Criminal Code*. This might conceivably preclude the reporting of a decision in a transfer hearing in some law reports, prior to the expiry of the order under paras. 17(1)(c) or (d), although one wonders whether a traditional law report would be held to be a “newspaper”. “Broadcasting” is defined in the *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28 to mean “any radio-communication [defined to include radio and television] in which the transmissions are intended for direct reception by the general public.”

Offence: subsection 17(2)

Subsection 17(2) provides that the violation of a s-s. 17(1) order is an offence punishable upon summary conviction in ordi-

nary court. If the identity of the young person is revealed it may also constitute an offence under s-s. 38(1).

**Proceedings in ordinary court after transfer:
sections 73 and 74**

Section 73 of the Y.O.A. repeals s. 441 of the *Code*, and hence any proceedings in ordinary court after transfer are presumed to be open and subject to public reporting. Section 74 of the Y.O.A. amends s-s. 442(1) of the *Code*, but still permits all or any members of the public to be excluded from all or part of the proceedings in ordinary court if it is "in the interest of public morals, the maintenance of order or the proper administration of justice."

TRANSFER OF JURISDICTION (Section 18)

Introduction

As a rule, a youth court judge only has jurisdiction to deal with offences committed within the province in which he sits. Section 18 of the Y.O.A. allows a young person alleged to have committed an offence in one province to enter a guilty plea and receive disposition in another province, provided the Attorney General of the province where the offence was committed consents. Section 18 is designed to allow a young person who commits an offence in one province to be dealt with by the youth court where he resides, and is generally equivalent to the provisions of s-s. 434(3) of the *Code* for adults. Section 18 is intended to allow a young person to be dealt with by a court close to his home, to encourage the involvement of parents, and to allow the benefits of parental supervision and community-based corrections to be utilized whenever possible. Section 18 will also permit outstanding charges against a young person from different jurisdictions to be resolved at one time.

The provisions of s. 18 of the Y.O.A. are in addition to those found in ss. 25 and 26 which provide for the transfer of a young person subject to a disposition under the Act from one province to another.

SECTION 18

18. (1) *Transfer of jurisdiction.*—Notwithstanding subsections 434(1) and (3) of the *Criminal Code*, where a young person is charged with an offence that is alleged to have been committed in one province, he may, if the Attorney General of the province where the offence is alleged to have been committed consents, appear before a youth court of any other province and,

(a) where the young person signifies his consent to plead guilty and pleads guilty to that offence, the court shall, if it is satisfied that the facts support the charge, find the young person guilty of the offence alleged in the information; and

(b) where the young person does not signify his consent to plead guilty and does not plead guilty, or where the court is not satisfied that the facts support the charge, the young person shall, if he was detained in custody prior to his appearance, be returned to custody and dealt with according to law.

(2) *Young person transferred to ordinary court in other province.*—Where a person is charged with an offence that is alleged to have been committed in a province in which he is a young person, that person may be proceeded against in accordance with subsection 434(3) of the *Criminal Code* before the ordinary court in another province in which he is an adult.

(3) *Adult transferred to youth court in other province.*—Where a person is charged with an offence that is alleged to have been committed in a province in which he is an adult, he may be proceeded with in accordance with subsection (1) before a youth court in another province in which he is a young person.

Transfer of jurisdiction: subsection 18(1)

Subsection 18(1) allows a young person charged with an offence alleged to have been committed in one province to appear before a youth court in another province, essentially for the purpose of entering a guilty plea and receiving a disposition. If a young person wishes to have an adjudication after a full trial, this must be held in the province where the offence was committed. (See Salhany, *Canadian Criminal Procedure*, 3rd ed. (1978), pp. 13-26 and 245-46 for a discussion of such matters as jurisdiction over offences committed in more than one province, venue (place of trial), general rules and special statutory provisions regarding jurisdiction.)

Subsection 18(1) should be used to allow a young person to face charges in the province of his residence, or to have outstanding charges from different provinces resolved at one time. A young person can only be dealt with by a youth court outside the province where he is alleged to have committed the offence if the Attorney General of the province where the offence is alleged to have been committed consents.

Section 18 may be utilized if a young person is initially arrested or summonsed to appear in a province outside the one in which the offence is alleged to have been committed. It may also be used if the initial appearance is in the province where the offence is

alleged to have been committed, and subsequent appearances occur in another province. For s. 18 to be a basis for jurisdiction, the young person must appear in the youth court outside the province where the offence is alleged to have been committed, signify his consent to plead guilty and plead guilty. The court must then consider the facts of the case, as presented by the prosecutor, and be "satisfied that the facts support the charge." (See s. 19 of the Y.O.A. and the following discussion concerning the duty of a youth court on a guilty plea in regard to satisfying itself that the facts support the charge.) If the youth court is satisfied the facts support the charge, it shall find the young person guilty of the offence and make a disposition under s. 20. The young person will thereafter be dealt with in regard to that disposition by the youth court in the province that made the disposition.

If the young person does not signify his intention to plead guilty and does not plead guilty, or the court is not satisfied that the facts support the charge, para. 18(1)(b) requires the young person to be "dealt with according to law." This will require a youth court in the province where the offence is alleged to have been committed to deal with the charges, and if the young person was detained in custody prior to his appearance in court, will require his return to custody pending resolution of his case. Even in this case, if the young person is found guilty and a disposition imposed, the administration of the disposition may be transferred to another province under ss. 25 and 26 of the Y.O.A.

Transitional transfer provisions: subsections 18(2) and (3)

Subsections 18(2) and (3) of the Y.O.A. deal with situations which may arise prior to the establishment of a uniform national definition of "young person" on April 1, 1985 (see s. 2 of the Y.O.A.). Until that time, a 16 or 17 year old may be a "young person" in one province and an adult in another.

Subsection 18(2) provides that a person alleged to have committed an offence in a province in which he is a young person, may be dealt with in the ordinary (adult) court of another province in which he is an adult (usually the province of his residence); under these circumstances he is not to be dealt with in youth court in the second province. The transfer of jurisdiction in these circumstances will be in accordance with s-s. 434(3) of

the *Code*, which is generally similar to s-s. 18(1) of the Y.O.A. Under s-s. 434(3) of the *Code*, the Attorney General responsible for the prosecution in the province where the offence is alleged to have been committed must consent to the transfer, and the accused must signify his consent to plead guilty and must plead guilty; however, the judge in ordinary court receiving the plea has no special obligation to satisfy himself that the facts support the charge.

Under s-s. 18(3), where a person is charged with an offence that is alleged to have been committed in a province in which he is an adult, he may be proceeded with in accordance with s-s. 18(1) before a youth court in another province in which he is a young person (usually the province of his residence). Subsection 434(3) of the *Code* has no application in these circumstances and the accused is not to be dealt with in ordinary court in the second province.

ADJUDICATION (Section 19)

Introduction

Sections 12 and 19 of the Y.O.A. impose quite significant obligations on a youth court in regard to the acceptance of a plea and the rendering of an adjudication. Subsection 12(3) requires that before accepting a plea from a young person who is not represented, the court must explain to him that he may plead guilty or not guilty, and must satisfy itself that the young person understands the charge against him; if the court is not satisfied that the young person understands the charge, s-s. 12(4) requires it to enter a plea of not guilty and proceed with a trial. Section 19 requires that in all cases, regardless of whether or not the young person is represented by counsel, before accepting a guilty plea, the court must be "satisfied that the facts support the charge"; if the court is not satisfied, s-s. 19(2) requires the court to enter a plea of not guilty and proceed with a trial. Subsection 19(2) also provides for conducting a trial when a young person pleads not guilty.

In practice under the J.D.A., some juvenile court judges have been following the procedures outlined in ss. 12 and 19 of the Y.O.A. Under these sections a young person is guaranteed the protection which is only given to an adult at the discretion of a judge (see *Adgey v. The Queen*, [1975] 2 S.C.R. 426, 23 C.R.N.S. 298, 13 C.C.C. (2d) 177, 39 D.L.R. (3d) 553). The purpose of ss. 12 and 19 is not to discourage guilty pleas or to require unnecessary trials, but rather to ensure that a young person understands the charges he faces, and that if a conviction occurs, it is warranted in the circumstances. It is felt that the limited financial resources and the level of intellectual and emotional development of many young persons require these special protections.

SECTION 19

19.(1) *Where young person pleads guilty.*—Where a young person pleads guilty to an offence charged against him and the

youth court is satisfied that the facts support the charge, the court shall find the young person guilty of the offence.

(2) *Where young person pleads not guilty.*—Where a young person pleads not guilty to an offence charged against him, or where a young person pleads guilty but the youth court is not satisfied that the facts support the charge, the court shall proceed with the trial and shall, after considering the matter, find the young person guilty or not guilty or make an order dismissing the charge, as the case may be.

**Where young person pleads guilty:
subsections 19(1) and (2)**

Subsection 19(1) provides that if a young person pleads guilty to an offence, the court has an obligation to conduct an inquiry to satisfy itself that the facts support the charge. This obligation exists regardless of whether the young person is represented by counsel. If the court is “satisfied that the facts support the charge”, it shall find the young person guilty of the offence. Subsection 19(2) provides that if the court is not satisfied the facts support the charge, it shall proceed with the trial, receive evidence, consider the matter, and render an adjudication. In practice, if the judge is not satisfied that the facts support the charge, the prosecutor may choose to stay the proceedings (*Criminal Code*, s. 732.1) or may decide to call no evidence, in which case a dismissal will result; thus it is not necessary that there be a full trial.

Section 19 does not specify the nature of the inquiry which a youth court must conduct to “satisfy” itself that the facts support the charge. Citing *R. v. Anderson* (1912), 5 W.W.R. 1052, 22 C.C.C. 455, 16 D.L.R. 203, 7 Alta. L.R. 102 (C.A.), the *Encyclopedia of Words and Phrases: Legal Maxims (Canada)*, 3rd ed. (1979), Vol. 4, p. 121, defines “satisfy” to mean: “to free from uncertainty, doubt or anxiety, to set at rest the mind.” This suggests a judge should have a high level of assurance that the facts support the charge; if the judge has real doubt or uncertainty about the matter, he should proceed under s-s. 19(2).

In *Adgey v. The Queen*, [1975] 2 S.C.R. 426, 23 C.R.N.S. 298, 13 C.C.C. (2d) 177, 39 D.L.R. (3d) 553, the majority of the Supreme Court of Canada rejected the view that a judge has an obligation to conduct an inquiry after a guilty plea has been

entered; this continues to be the law applicable in adult proceedings. However, in proceedings under the Y.O.A., s. 19 does impose such an obligation, and the remarks of Laskin J. (as he then was), in dissent in *Adgey*, shed some light on the nature of the inquiry required under the Y.O.A. Laskin J. stated (S.C.R. at pp. 444-45):

No doubt, a trial judge must have regard to the factual accuracy of a plea of guilty . . . If those advanced by the Crown do not sustain the charge and conviction, then the guilty plea must be struck out . . . I readily agree, moreover, that if the accused gives a version of the facts, after a narration by the Crown . . . the trial judge would in effect be holding a trial after a plea of guilty if he was bound to assess the respective versions as to their credibility and weight. However, either the narration by the Crown or by the accused or by both may raise a question not only as to the factual accuracy of the plea but as well as to the propriety of the plea of guilty in terms of the accused's understanding and appreciation of it and its unequivocal character. . . .

The duty of the Court respecting an inquiry as to the "legality" (if I may make such a compendious reference) of the plea of guilty, must, it seems to me be complemented by a duty of the Crown to adduce facts which, taken to be true, support the charge and conviction. . . . It would, in my view, be unsatisfactory to leave to the discretion of the Crown whether or not to adduce facts supportive of the charge and conviction. The trial judge could undoubtedly call for them, but the issue at that stage ought not to involve him in anything more than being satisfied that what is alleged, taking it to be true, completes the elements of a conviction of a plea of guilty . . .

The remarks of Laskin J. in *Adgey* and the provisions of ss. 12 and 19 of the Y.O.A. suggest the following procedure upon receipt of a plea of guilty. The prosecutor should be asked to state the facts upon which the charge rests. The young person, or counsel if he has one, should be asked if he agrees with these facts, or wishes to add any facts, or provide additional facts or an alternative interpretation of the facts. The judge should then consider whether all of the facts alleged, if proven true, contain all of the elements of the offence necessary in law to sustain a conviction, or whether they reveal an obvious defence; if the judge is satisfied that all the elements are present and no obvious defence appears to exist, he should find the young person guilty. If there is any material discrepancy in the version of the facts

presented by the Crown and that presented by the accused, the judge should proceed with the trial in accordance with s-s. 19(2). Such a discrepancy may in itself be reason for not being satisfied the facts support the charge, or may indicate a lack of understanding of the charge, in which case s-s. 12(4) requires the court to proceed with the trial.

If the judge orders that the case proceed to trial, it would usually be desirable to adjourn the case before proceeding to hear the evidence. The young person should have an opportunity to prepare for trial, and in particular, if not represented, to obtain counsel. Where a trial is required by the court under s-s. 19(2) because the court is not satisfied that the facts support the charge (s-s. 19(1)), or not satisfied that a young person understands the charge (s-s. 12(4)), the case should be conducted in the same manner as a trial resulting from a not guilty plea; there is the normal obligation on the prosecution to prove all elements of its case, with the young person having the right to make a full answer and defence.

Where young person pleads not guilty: subsection 19(2)

Where a young person enters a plea of not guilty, the court shall "proceed with the trial," and after "considering the matter," render an adjudication as required by s-s. 19(2). It is clear that the youth court must "proceed with the trial" in accordance with the general principles, practices and procedures which are applicable in adult court, except as they are modified by the Y.O.A. This procedure is established by the Declaration of Principle, and in particular para. 3(1)(e) guaranteeing the rights and freedoms of young persons. This is also made clear by ss. 51 and 52 of the Y.O.A., which provide that proceedings under the Y.O.A. are governed by the *Criminal Code*, though they are generally to be conducted as proceedings for summary conviction offences.

Thus, when a youth court proceeds with the trial, it must apply the principles and rules applicable in adult proceedings. Some examples are as follows:

- the burden of proof rests upon the prosecution, unless otherwise provided for by law; for example, in regard to the defence of insanity, s-s. 16(4) of the *Code* places the burden of proving insanity upon the young person;

- the standard of proof is the normal criminal standard of proof beyond a reasonable doubt, unless otherwise provided for by law, for example, when the defence of insanity is raised, it must only be established on the balance of probabilities;
- the laws of evidence are applicable as in adult proceedings, except as modified by the Y.O.A., ss. 56 to 63;
- the substantive features of the criminal law and *Criminal Code*, including all of the defences available in adult proceedings are applicable, such as insanity at the time of the offence (s. 16 of the Code), and the defence of *res judicata* (*Kienapple v. The Queen*, [1975] 1 S.C.R. 729, 44 D.L.R. (3d) 351, 15 C.C.C. (2d) 524, 26 C.R.N.S. 1, 1 N.R. 322);
- the provisions of the Code applicable to summary conviction offences, except as modified by the Y.O.A.; for example the issue of fitness to stand trial on account of insanity may be raised pursuant to the Code, s. 543, modified by s. 13 of the Y.O.A.;
- the only parties to the proceedings are the prosecutor and the young person, and each has a right to cross-examine witnesses called by the other, subject to s-s. 13(5) of the Y.O.A. dealing with cross-examination concerning a medical or psychological report;
- the right of the accused to make a full answer and defence, and also his privilege against self-incrimination.

For a further consideration of the procedures applicable in youth court, see discussion of s. 52 below.

DISPOSITIONS (Sections 20 to 26)

Introduction

The *Young Offenders Act* takes a different approach to disposition from that taken in the *Juvenile Delinquents Act*. The *J.D.A.* focusses on the treatment and rehabilitation of the young person, relying heavily on a social welfare approach. Section 38 of the *J.D.A.* directs 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." Considerations of punishment and deterrence are not central to the *J.D.A.*, nor is the protection of the public.

The *Y.O.A.* changes this emphasis on treatment. One of the fundamental aims of the *Y.O.A.* is to recognize the special needs and circumstances of young persons which necessarily call for continued emphasis on treatment and rehabilitation. The Act, however, balances the young person's needs with the public's interest and places much more emphasis on public protection than the *J.D.A.*

The principles of responsibility, accountability and the protection of society are fundamental to the *Y.O.A.*'s philosophy on disposition. Paragraph 3(1)(a) states that young persons are not to be held as accountable as adults, but "young persons who commit offences should nonetheless bear responsibility for their contraventions." The new approach includes 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" (para. 3(1)(f)). The recognition in para. 3(1)(b) that society must "be afforded the necessary protection from illegal behaviour" ensures that the interest of society is considered.

Despite its adherence to these principles, the *Y.O.A.* recognizes the continued need of young persons for treatment and rehabilitation. Paragraph 3(1)(c) allows that: "... because of their state of dependency and level of development and maturity,

[young persons] also have special needs and require guidance and assistance." The guarantee of a right to the least possible interference with freedom consistent with the protection of society in para. 3(1)(f) is meant to safeguard against overuse of custodial and other restrictive measures as well as treatment facilities and programs. This is an important right, especially in view of the wide range of dispositions available under the Y.O.A.

The Y.O.A. also recognizes the fact that parents are responsible for their children. Its provisions seek to acknowledge, support and maintain the relationship between parent and child as much as possible: para. 3(1)(h) states that "young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate."

Along with a distinct shift in philosophy, the Y.O.A. introduces several changes from the provisions of the J.D.A. All dispositions under the Y.O.A. must be of fixed duration. This is not the case under the J.D.A. which permits indefinite committal to training school and other indeterminate dispositions, adjournments for indefinite periods, and the returning of juveniles to court for dispositional review at any time, up to the age of 21. Sections 28 to 32 of the Y.O.A. make clear that a process of judicial review is available from a youth court disposition. The Y.O.A. removes some of the broad judicial discretion in the area of disposition that exists under the J.D.A., while seeking to direct the exercise of judicial discretion in accordance with the various principles set out in s. 3 of the Y.O.A., the Declaration of Principle. The Y.O.A. also clarifies various issues which had arisen under the J.D.A.; for example, under the J.D.A. there was doubt whether a juvenile could receive an absolute discharge. Under the Y.O.A., the power to grant absolute discharges has been expressly conveyed to youth court judges.

SECTION 20

20. (1) Dispositions that may be made.—Where a youth court finds a young person guilty of an offence, it shall consider any pre-disposition report required by the court, any representations made by the parties to the proceedings or their counsel or agents and by the parents of the young person and any other relevant information before the court, and the court shall then make any

one of the following dispositions, or any number thereof that are not inconsistent with each other:

- (a) by order direct that the young person be discharged absolutely, if the court considers it to be in the best interests of the young person and not contrary to the public interest;
- (b) impose on the young person a fine not exceeding one thousand dollars to be paid at such time and on such terms as the court may fix;
- (c) order the young person to pay to any other person at such time and on such terms as the court may fix an amount by way of compensation for loss of or damage to property, for loss of income or support or for special damages for personal injury arising from the commission of the offence where the value thereof is readily ascertainable, but no order shall be made for general damages;
- (d) order the young person to make restitution to any other person of any property obtained by the young person as a result of the commission of the offence within such time as the court may fix, if the property is owned by the other person or was, at the time of the offence, in his lawful possession;
- (e) if any property obtained as a result of the commission of the offence has been sold to an innocent purchaser, where restitution of the property to its owner or any other person has been made or ordered, order the young person to pay the purchaser, at such time and on such terms as the court may fix, an amount not exceeding the amount paid by the purchaser for the property;
- (f) subject to section 21, order the young person to compensate any person in kind or by way of personal services at such time and on such terms as the court may fix for any loss, damage or injury suffered by that person in respect of which an order may be made under paragraph (c) or (e);
- (g) subject to section 21, order the young person to perform a community service at such time and on such terms as the court may fix;
- (h) make any order of prohibition, seizure or forfeiture that may be imposed under any Act of Parliament or any regulation made thereunder where an accused is found guilty or convicted of that offence;
- (i) subject to section 22, by order direct that the young person be detained for treatment, subject to such conditions as the court considers appropriate, in a hospital or other place where treatment is available, where a report has been made in

respect of the young person pursuant to subsection 13(1) that recommends that the young person undergo treatment for a condition referred in paragraph 13(1)(e);

(j) place the young person on probation in accordance with section 23 for a specified period not exceeding two years;

(k) subject to section 24, commit the young person to custody, to be served continuously or intermittently, for a specified period not exceeding

(i) two years from the date of committal, or

(ii) where the young person is found guilty of an offence for which the punishment provided by the *Criminal Code* or any other Act of Parliament is imprisonment for life, three years from the date of committal; and

(l) impose on the young person such other reasonable and ancillary conditions as it deems advisable and in the best interest of the young person and the public.

(2) *Coming into force of disposition.*—A disposition made under this section shall come into force on the date on which it is made or on such later date as the youth court specifies therein.

(3) *Duration of disposition.*—No disposition made under this section, except an order made under paragraph (1)(h) or (k), shall continue in force for more than two years and, where the youth court makes more than one disposition at the same time in respect of the same offence, the combined duration of the dispositions, except in respect of an order made under paragraph (1)(h) or (k), shall not exceed two years.

(4) *Combined duration of dispositions.*—Where more than one disposition is made under this section in respect of a young person with respect to different offences, the continuous combined duration of those dispositions shall not exceed three years.

(5) *Disposition continues when adult.*—A disposition made under this section shall continue in effect, in accordance with the terms thereof, after the young person against whom it is made becomes an adult.

(6) *Reasons for the disposition.*—Where a youth court makes a disposition under this section, it shall state its reasons therefor in the record of the case and shall

(a) provide or cause to be provided a copy of the disposition, and

(b) on request, provide or cause to be provided a transcript or copy of the reasons for the disposition

to the young person in respect of whom the disposition was made, his counsel, his parents, the provincial director, where the provincial director has an interest in the disposition, the prosecutor and, in the case of a custodial disposition made under paragraph (1)(k), the review board, if any has been established or designated.

(7) *Limitation on punishment.*—No disposition shall be made in respect of a young person under this section that results in a punishment that is greater than the maximum punishment that would be applicable to an adult who has committed the same offence.

(8) *Application of Part XX of Criminal Code.*—Part XX of the Criminal Code does not apply in respect of proceedings under this Act except for sections 683, 685 and 686 and subsections 655(2) to (5) and 662.1(2), which provisions apply with such modifications as the circumstances require.

(9) *Section 722 of Criminal Code does not apply.*—Section 722 of the Criminal Code does not apply in respect of proceedings under this Act.

(10) *Forms.*—A disposition made under this section, other than a probation order, may be in Form 7.

(11) *Form of probation order.*—A probation order made under this section may be in Form 8 and the youth court shall specify in the order the period for which it is to remain in force.

SECTION 21

21. (1) *Where a fine or other payment is ordered.*—The youth court shall, in imposing a fine on a young person under paragraph 20(1)(b) or in making an order against the young person under paragraph 20(1)(c) or (e), have regard to the present and future means of the young person to pay.

(2) *Fine option program.*—A young person against whom a fine is imposed under paragraph 20(1)(b) may discharge the fine in whole or in part by earning credits for work performed in a program established for that purpose

(a) by the Lieutenant Governor in Council of the province in which the fine was imposed; or

(b) by the Lieutenant Governor in Council of the province in which the young person resides, where an appropriate agreement is in effect between the government of that province

and the government of the province in which the fine was imposed.

(3) *Rates, crediting and other matters.*—A program referred to in subsection (2) shall determine the rate at which credits are earned and may provide for the manner of crediting any amounts earned against the fine and any other matters necessary for or incidental to carrying out the program.

(4) *Representations respecting orders under paras. 20(1)(c) to (f).*—In considering whether to make an order under paragraphs 20(1)(c) to (f), the youth court may consider any representations made by the person who would be compensated or to whom restitution or payment would be made.

(5) *Notice of orders under paras. 20(1)(c) to (f).*—Where the youth court makes an order under paragraphs 20(1)(c) to (f), it shall cause notice of the terms of the order to be given to the person who is to be compensated or to whom restitution or payment is to be made.

(6) *Consent of person to be compensated.*—No order may be made under paragraph 20(1)(f) unless the youth court has secured the consent of the person to be compensated.

(7) *Order for compensation or community service.*—No order may be made under paragraph 20(1)(f) or (g) unless the youth court

(a) is satisfied that the young person against whom the order is made is a suitable candidate for such an order; and

(b) is satisfied that the order does not interfere with the normal hours of work or education of the young person.

(8) *Duration of order for service.*—No order may be made under paragraph 20(1)(f) or (g) to perform personal or community services unless such services can be completed in two hundred and forty hours or less and within twelve months of the date of the order.

(9) *Agreement to performance of community service.*—No order may be made under paragraph 20(1)(g) unless the youth court is satisfied that the person or organization for whom the community service is to be performed has agreed to its performance.

SECTION 22

22. (1) *Consent for treatment order.*—No order may be made under paragraph 20(1)(i) unless the youth court has secured the

consent of the young person, the parents of the young person and the hospital or other place where the young person is to be detained for treatment.

(2) *Where consent of parent dispensed with.*—The youth court may dispense with the consent of a parent required under subsection (1) if it appears that the parent is not available or if the parent is not, in the opinion of the court, taking an active interest in the proceedings.

Dispositional hearing: subsection 20(1)

After adjudication and a finding of guilt, the youth court must make a disposition. The dispositions available are set out in s-s. 20(1). In arriving at a disposition, a judge must consider a pre-disposition report, before making a custodial order, and may order and consider a pre-disposition report before making any other disposition. A medical or psychological report may also be prepared pursuant to s. 13 of the Y.O.A. for use at disposition.

The youth court must consider any representations made by the parties, counsel for the parties or the young person's parents. Additionally, the youth court may consider any other relevant information before the court, for example, representations made by the victim. In making representations to the court, the parties have the right to call witnesses and to file documents. The general rule that evidence as to sentence need not be proved strictly according to the rules of evidence applies to disposition proceedings in youth court.

In *R. v. McGrath*, [1962] S.C.R. 739, 38 C.R. 115, 39 W.W.R. 304, 133 C.C.C. 57, the Supreme Court of Canada approved the following statement of accepted practice before imposing a sentence (from *Crankshaw's Criminal Code of Canada*, 7th ed., at p. 912):

“After conviction, accurate information should be given as to the general character and other material circumstances of the prisoner even though such information is not available in the form of evidence proper, and such information when given can rightly be taken into consideration by the judge in determining the quantum of punishment, unless it is challenged and contradicted by or on behalf of the prisoner, in which case the judge should either direct proper proof to be given or should ignore the information.”

As the rules of evidence are relaxed during the disposition stage, there is a tendency for proceedings to become more informal than during the adjudication stage. It is essential to remember that the proceedings continue to be a judicial process, however, and as such the usual safeguards guaranteed to the accused continue to apply. As is the case before adjudication, the young person has a right to be represented during the dispositional stage of the hearing: see s. 11 of the Y.O.A. Any statements made about the young person should be made in his presence so that he (or his counsel) has the opportunity of contradicting such statements: see *R. v. Martin*, [1947] 2 D.L.R. 529, 3 C.R. 64, 19 M.P.R. 310, 87 C.C.C. 209 (N.B.C.A.); and *R. v. Benson and Stevenson* (1951), 100 C.C.C. 247, 13 C.R. 1, 3 W.W.R. 29 (B.C.C.A.).

The judge's role at disposition must continue to be one of impartial arbitor. The judge must weigh the interests of society, but must also ensure that the proceedings are conducted in a manner consistent with the needs and rights of the young person. The judge may participate in the proceedings to a certain extent, but even at disposition, the judge should ensure that he does not "descend into the arena." Improper intervention by the judge in the dispositional proceedings may be confusing or embarrassing to the parties or their counsel.

In *R. v. Donovan* (1947), 4 C.R. 212 at p. 219, 8 C.C.C. 86, 20 M.P.R. 44 (N.B.C.A.) Richards J.A. remarked that while there was not an absolute bar to judicial questioning at the time of disposition: "Such questioning . . . ought rarely to be done, but the door should not be closed entirely. Some discretion should be left to the trial Judge." To a similar effect, see *R. v. Edwards* (1907), 13 C.C.C. 202, 17 Man. R. 288 (C.A.). The Canadian Association of Provincial Court Judges, *Canadian Sentencing Handbook* (1982), provides the following caution in regard to a judge's role at sentencing (p. 9):

In seeking information the judge must find a balance between the need for information and the demands of fairness and natural justice . . .

However, in *R. v. Morelli* (1977), 37 C.C.C. (2d) 392 at p. 395 (Ont. Prov. Ct.), August Prov.Ct.J. took a broader view:

After a finding of guilt or conviction a Judge has the undoubted right to inquire into any matter on which he desires information

before sentence and to call such evidence that is necessary for this purpose without the consent of either party but, this information should be given in open Court . . .

If the judge begins to question the young person directly, for example, about his motivation for committing an offence, query whether this might under certain circumstances be construed as a violation of the right of the young person not to incriminate himself, as guaranteed by para. 11(c) of the *Charter of Rights*.

The dispositions available under s-s. 20(1) are available alone or in combination, provided they are not inconsistent with each other. All dispositions are subject to the provisions of s-ss. 20(3) and (4) which limit the duration of disposition.

Absolute discharge: paragraph 20(1)(a)

Paragraph 20(1)(a) of the *Young Offenders Act* provides that a young person may be granted an absolute discharge similar in effect to that which an adult might receive in ordinary court pursuant to s. 662.1 of the *Criminal Code*. Under the *Juvenile Delinquents Act* there was conflicting authority about the applicability of these provisions to juvenile proceedings: see *R. v. K.* (1980), 55 C.C.C. (2d) 324, [1980] 6 W.W.R. 355 *sub nom. R. v. Kloschinsky* (Alta. Q.B.) and *contra, R. v. Stimpson*, [1974] 3 W.W.R. 598, 26 C.R.N.S. 130, 17 C.C.C. (2d) 181 *sub nom. R. v. S.* (Man. Prov.Ct.). The enactment of para. 20(1)(a) of the Y.O.A. resolves this uncertainty. An absolute discharge may be ordered "if the court considers it to be in the best interests of the young person and not contrary to the public interest." Unlike the *Criminal Code*, the Y.O.A. does not provide for conditional discharge as a similar effect is achieved by ss. 36 and 45 of the Y.O.A., governing the effect of dispositions.

The conditions to be satisfied before a discharge is ordered are the same as those required by s. 662.1 of the *Criminal Code*. The interpretation of the phrase "best interests of the accused and not contrary to the public interest" was discussed in *R. v. Fallofield* (1973), 22 C.R.N.S. 342, 13 C.C.C. (2d) 450, [1973] 6 W.W.R. 472 (B.C.C.A.). The first condition, that a discharge be in the best interests of the accused was said (at C.R.N.S. p. 347) to:

. . . presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a

conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

The British Columbia Court of Appeal also explained that, while the public interest "must be given due weight, [it] does not preclude the judicious use of the discharge provisions" (at p. 347). For a similar statement of the criteria for granting a discharge, see *R. v. Sanchez-Pino* (1973), 11 C.C.C. (2d) 53, [1973] 2 O.R. 314, 22 C.R.N.S. 50 (C.A.). Discharges will be granted where it is felt that the court process has served its purpose through the trial stage alone and no further intervention by way of disposition is necessary or desirable. It is important to note that discharges are not to be applied routinely to any criminal offence: *R. v. Derkson* (1972), 20 C.R.N.S. 129, 9 C.C.C. (2d) 97 (B.C. Prov. Ct.). Evidence that an accused has received a previous discharge may be led at disposition to satisfy the judge that a further discharge would not be in the interest of the accused and would be contrary to the public interest: see *R. v. Tan*, [1975] 2 W.W.R. 747, 22 C.C.C (2d) 184 (B.C.C.A.).

Fine: paragraph 20(1)(b) and subsections 21(1) to (3)

Paragraph 20(1)(b) permits the imposition of a fine of up to \$1,000, "to be paid at such time and on such terms as the court may fix." The limit under the J.D.A. is \$25; the increased maximum under the Y.O.A. reflects inflation and the increased earning capabilities of some young persons, particularly 16 and 17 year olds. To prevent the imposition of an excessively large fine or an undue burden on the young person, the Act specifically provides in s-s. 21(1) that in imposing a fine the youth court shall "have regard to the present and future means of the young person to pay." Moreover, there is no provision for the young person to be taken into custody upon default of payment of a fine, unless so ordered by the youth court following a review of the disposition. Subsections 20(8) and (9) of the Y.O.A. stipulate that ss. 646 and 722 of the *Criminal Code*, providing imprisonment for failure to pay a fine, do not apply to a young person. Instead, upon default, a young person will be subject to the judicial review of disposition provisions of s. 33 of the Y.O.A.; at a review hearing a youth court might impose a custodial disposition for a failure to pay a fine, if there is wilful failure or refusal to pay the fine.

Subsection 21(2) allows a provincial government to establish a program under which a young person may perform some type of work rather than pay a fine. If a province establishes such a program, the young person has the option of participating or making monetary payment. A fine option program will help alleviate any financial distress which could result if a young person is obliged to raise a sum of money to pay a fine. Subsection 21(3) provides that the actual rate of crediting the work performed and any other matters necessary for or incidental to the program will be determined by the province.

Normally, a fine option program may be used by a young person if such a program is established in the province in which the fine was imposed. Paragraph 21(2)(b) also allows a young person to benefit from such a program if the youth resides in a province other than the one in which the fine was imposed. There must be a program in the province of the young person's residence and an agreement in effect between the government of the province in which the young person resides and the government of the province where the fine was imposed.

A fine option program may be established by the Lieutenant Governor in Council (provincial Cabinet) and does not require provincial legislation.

Compensation: paragraph 20(1)(c) and subsections 21(1), (4) and (5)

The youth court's dispositional alternatives include the power to make an order for compensation. Compensation orders are consistent with the Y.O.A.'s principles of responsibility and accountability. Their inclusion in the Act also reflects the growing concern in the criminal justice system for victims of crime. In *R. v. Zelensky*, [1978] 2 S.C.R. 940, [1978] 3 W.W.R. 693, 2 C.R. (3d) 107, 21 N.R. 372, 41 C.C.C. (2d) 97, 86 D.L.R. (3d) 179, the Supreme Court of Canada described compensation as a valid objective of sentencing, concluding that it was within the federal Parliament's jurisdiction over criminal law and procedure to enact legislation dealing with compensation.

Orders pursuant to para. 20(1)(c) may be made to cover a broad range of losses including compensation for the following: loss of or damage to property, for example, a broken window. Loss of income or support or "special damages" for personal

injury arising from the commission of an offence, for example, medical expenses and medication for an elderly lady whose leg was broken during a robbery. Compensation orders are suitable in cases where the value of the loss is readily ascertainable. According to the Supreme Court in *Zelensky*: “[It is not] a function of the criminal court to force agreement to enable it to make an order for compensation” (at S.C.R. p. 961). Thus if the amount is in dispute or if the amount is not ascertainable, a compensation order should not be made under para. 20(1)(c).

A youth court may not make an order for “general damages”, as this is an administratively difficult assessment better performed by the civil courts. Watson, Borins and Williams define general damages as items for which there is “no precise measure”, including present, past and future pain and suffering and loss of enjoyment of life and future economic loss. Special damages “consist of the out-of-pocket expenses and other actual loss which the plaintiff [victim] has incurred in consequence of his injuries to the date his damages are assessed at trial. They include such items as medical and hospital expenses, ambulance fees and lost wages.” (*Canadian Civil Procedure: Cases and Materials*, p. 6-53).

The youth court shall “have regard to the present and future means of the young person to pay” before making a compensation order. This provision is to prevent the imposition of an order that is too onerous for the young person. Note also that a young person without money may still compensate the victim by performing personal service pursuant to para. 20(1)(f). Subsection 21(4) provides that the youth court may consider representations made by the person who would be compensated under para. 20(1)(c) in deciding whether to make such an order. If the youth court decides to order compensation, s-s. 21(5) states that the youth court “shall cause notice of the terms of the order to be given to the person who is to be compensated.”

Restitution: paragraph 20(1)(d) and subsections 21(4) and (5)

The Y.O.A. also provides for restitution orders. Restitution is the return of a specific piece of stolen property to the rightful owner or the person who was in lawful possession at the time the offence was committed. The Act provides for restitution “to any

other person of any property obtained by the young person as a result of the commission of the offence." Restitution orders will likely be made in cases of theft or possession of stolen goods. If the property has been damaged during the commission of the offence, compensation may be ordered pursuant to para. 20(1)(c) in addition to restitution.

In considering whether to make a restitution order, the court may consider representations by the person to whom restitution would be made according to s-s. 21(4). Notice of the terms of a restitution order must be given under s-s. 21(5) to the person receiving restitution.

Compensation of innocent purchaser: paragraph 20(1)(e) and subsections 21(1), (4) and (5)

Sometimes property obtained as a result of the commission of an offence may be sold to an innocent purchaser. Generally, the common law provides that the true owner has a civil right to recover the stolen property, even after sale to an innocent purchaser. Although the right of the true owner under Quebec law differs somewhat from the situation in the common law provinces, in many situations the true owner in Quebec has the same right. If property is returned to its true owner after the commission of an offence by a young person, a youth court may order compensation pursuant to para. 20(1)(e) for any innocent purchaser who thereby suffers loss. The youth court may order the young person to pay the purchaser "an amount not exceeding the amount paid by the purchaser for the property."

The same provisions apply in the case of compensation for innocent purchasers as with other forms of compensation and restitution. The youth court must have regard to "the present and future means of the young person to pay," pursuant to s-s. 21(1). Representations by the innocent purchaser may be considered by a youth court judge under s-s. 21(4), and, if an order is made, the purchaser is to receive notice of its terms, in accordance with s-s. 21(5).

Personal services: paragraph 20(1)(f) and subsections 21(4) to (8)

An order may be made under para. 20(1)(f) for the young person to compensate "any person in kind or by way of personal

services” for any losses suffered in respect of which an order for compensation may be made for a victim of crime or an innocent purchaser under para. 20(1)(c) or (e). An order under para. 20(1)(f) would be appropriate where the young person has little or no money and his earning capacity is low, for example, if he is attending school or if he is unemployed. In fact, s-s. 21(7) qualifies the availability of such an order for compensation by specifying that the order must not interfere with the normal hours of work or education of the young person. Subsection 21(7) also requires the youth court to satisfy itself that the young person is a suitable candidate for an order under para. 20(1)(f). As an order for compensation by way of personal services will require a degree of personal involvement, it would be preferable for the young person to display some willingness to perform personal services, although his consent to such a disposition is not required. An example of an order under para. 20(1)(f) might require a young person who vandalised a house to do some gardening work for the home owner. To ensure that one who has suffered loss is not unwillingly forced into contact with the young offender, s-s. 21(6) adds an important condition: no order may be made under para. 20(1)(f) “unless the youth court has secured the consent of the person to be compensated.” As with other forms of compensation and restitution, the person to be compensated may make representations to the youth court pursuant to s-s. 21(4) when the court is considering an order under para. 20(1)(f). If an order is made, s-s. 21(5) requires that notice of its terms are to be given to the person who is to be compensated. Personal service orders must be completed within 12 months of the date of the order and a maximum of 240 hours of work may be assigned; s-s. 32(9) allows a judicial extension of a further 12 months to complete the order.

**Community service order: paragraph 20(1)(g)
and subsections 21(7) to (9)**

An order may be made pursuant to para. 20(1)(g) requiring the young person to perform community service. Community service orders are appropriate where there is no private victim or the victim does not wish to be directly compensated. As stated in a 1979 *Report on the State of Community Service Orders in the Provincial Court (Family Division), Province of Ontario*, the purpose is “to sensitize an offender to the aftermath of an event by emphasizing the relationship between an offence and the ethical

responsibility imposed by society to make reparation." Community service orders have been used for other offences such as public mischief, breaking and entering, arson and wilful damage, all of which involve damage to property. They might also be appropriate for other offences such as causing a disturbance. Examples of such orders would include volunteer work for a community group, visits to a senior citizens' home or perhaps cleaning up a park area.

Paragraph 21(7)(a) provides that the youth court must be satisfied that the young person is "a suitable candidate" for a community service order. The determination of criteria will be up to the youth court but, in view of the direct personal involvement and the degree of cooperation required, a certain amount of willingness on the part of the young person would be preferable. There may, however, be situations where the court will deem it appropriate to compel a young person to perform such a disposition, despite his lack of consent or willingness. Subsection 21(9) recognizes that the cooperation of the beneficiary of the services is essential; it stipulates that no community service order may be made unless the person or organization for whom the community service is to be performed has agreed to its performance. The youth court must also ensure that the order does not interfere with the normal hours of work or education of the young person, according to para. 21(7)(b). Community service orders must be completed within 12 months of the date of the order and a maximum of 240 hours of work may be assigned pursuant to s-s. 21(8). Subsection 32(9) allows a judicial extension of a further 12 months to complete the order.

Prohibition: paragraph 20(1)(h)

Under para. 20(1)(h) the youth court may "make any order of prohibition, seizure or forfeiture that may be imposed under any Act of Parliament or any regulation made thereunder where an accused is found guilty or convicted of that offence." There are a number of sections of the *Criminal Code* and other federal enactments that provide for orders of prohibition, seizure or forfeiture: for example, an order of prohibition respecting firearms may be made under ss. 98 and 101 of the *Code*; seizure of obscene matter is provided for under s. 160 of the *Code*; and an order for forfeiture of a controlled drug may be made under s-s. 37(8) or s. 45 of the *Food and Drugs Act*. Where the circumstan-

ces allow for it, any order under one of these sections applying to adults may be made in the case of a young person.

In some circumstances, a similar order might also be made under para. 20(1)(l) which empowers the youth court to "impose on the young person such other reasonable and ancillary conditions as it deems advisable."

Detention for treatment: paragraph 20(1)(i) and section 22

An additional option is available to the court where a report prepared by a "qualified person" recommends that the young person undergo treatment for a condition referred to in para. 13(1)(e), namely, "a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or mental retardation." The youth court may direct that the young person be detained for treatment in a hospital or other place where treatment is available. This disposition may form part of or be in lieu of any other disposition. Paragraph 20(1)(i) is subject to s. 22, which requires the consent of the young person, the parents of the young person and the hospital or other place of treatment. Subsection 22(2) permits the youth court to dispense with the consent of the parent, if the parent is not available or if the parent is not taking an active interest in the proceedings. No provision is made for dispensing with the consent of the young person; in appropriate circumstances it may be possible to require civil commitment of a young person in a treatment facility under provincial mental health legislation, without the consent of the young person or his parents.

The power of the court to make a disposition requiring the young person to undergo treatment is distinct from the issues of fitness for trial and insanity. The question whether an accused is fit to stand trial arises at any time before adjudication. Section 543 of the *Criminal Code* applies to proceedings under the Y.O.A. by virtue of s-s. 13(8). If the accused is incapable of conducting his defence on account of insanity, he will be kept in custody in a mental health facility for an indeterminate period "at the pleasure of the lieutenant governor," until he is well. Similarly, by virtue of s. 51 and s-s. 52(2) of the Y.O.A., young persons who desire to enter a plea of not guilty by reason of insanity are dealt with under the *Code* as well. If acquitted by

reason of insanity, the young person is also committed to custody in a mental hospital for an indeterminate period. In the case of a young person who is the subject of a treatment order under para. 20(1)(i), however, an adjudication has taken place and the young person has been found guilty of an offence; clearly the young person was fit to stand trial and insanity at the time of the offence was not in issue. Furthermore, the treatment order is for a determinate period. Moreover, the review procedures under ss. 28 to 32 of the Y.O.A. continue to apply.

Probation: paragraph 20(1)(j)

See discussion below under s. 23.

Custody: paragraph 20(1)(k)

See discussion below under s. 24.

Other reasonable conditions: paragraph 20(1)(l)

The final item in the list of dispositions provides that the youth court may "impose on the young person such other reasonable and ancillary conditions as it deems advisable and in the best interest of the young person and the public." This is a flexible provision that will allow for a variety of novel dispositions. The wording suggests that a para. 20(1)(l) disposition cannot stand on its own and should be made in combination with any of the other dispositions listed in s. 20. See comments of Laskin C.J.C. concerning para. 20(1)(g) of the J.D.A. in *Attorney General for Ontario and Viking Houses v. Regional Municipality of Peel*, [1979] 2 S.C.R. 1134, 104 D.L.R. (3d) 1 at p. 12, 29 N.R. 244, 49 C.C.C. (2d) 103. This case suggests that an order under para. 20(1)(l) of the Y.O.A. would probably be made in combination with a probation order, although not restricted thereto.

A similar provision in para. 20(1)(g) of the J.D.A. was used to make an order prohibiting the juvenile from driving for four months in *Re Strahl*, [1968] 2 C.C.C. 34, 2 C.R.N.S. 178, 60 W.W.R. 765 *sub nom. R. v. Strahl* (Man. Q.B.). In that case the judge referred to s. 38 of the J.D.A., providing "that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents ..." to justify the suspension of driving privileges. Since the

philosophy of the Y.O.A. differs significantly from that of the J.D.A., an order suspending driving privileges under the Y.O.A. would only be appropriate in more limited circumstances; for example, an order suspending driving privileges may be considered where a young person used a vehicle in the course of committing an offence.

Another use of para. 20(1)(g) of the J.D.A. was to include a condition that a juvenile on probation attend a wilderness camp, see *R. v. Dapic*, [1977] 5 W.W.R. 447, 36 C.C.C. (2d) 461, 40 C.R.N.S. 156 (B.C.S.C.). It would seem that such an order could also be made under the Y.O.A.: see, however, comments below concerning para. 23(2)(f) which suggest that para. 20(1)(l) cannot be used to place a young person in custody.

Disposition coming into force: subsection 20(2)

A disposition made under s. 20 comes into force "on the date on which it is made or on such later date as the youth court specifies." The power to postpone the starting date of a disposition gives the court some flexibility, for example to allow the young person an opportunity to finish a term at school before the commencement of a custodial disposition. Unless a delay in instituting the disposition is specifically ordered, however, the disposition takes effect immediately. Note that s-s. 23(7) specifies that a probation order must take effect immediately, unless the probation order follows a period of custody. Thus the court may not postpone the commencement of probation under s-s. 20(2).

Duration of disposition: subsections 20(3) and (4)

All dispositions under the Y.O.A. are to be for a fixed length of time. This represents a significant change from the J.D.A. which allowed indeterminate dispositions. Subsections 20(3) and (4) fix a maximum duration for all dispositions under s. 20. As a general rule, s-s. 20(3) limits the duration of most dispositions under s. 20 to two years. Exceptions apply with respect to an order of prohibition, seizure or forfeiture under para. 20(1)(h) (the length of which is limited by the legislation providing for the order) and an order committing the young person to custody under para. 20(1)(k) (the length of which can extend to a maximum of three years for offences carrying a life sentence in the case of an adult). In almost all instances, it is believed that a

period of control for up to two years in length is sufficient. The same limitation applies "where the youth court makes more than one disposition at the same time in respect of the same offence." Again, the total length of dispositions imposed cannot exceed two years.

Subsection 20(4) sets out another exception to the "two-year rule." It establishes a three-year maximum on the combined length of continuous dispositions imposed on the young person in respect to different offences. It is clear that the three-year limitation applies when a young person receives dispositions in regard to two or more offences committed at different times at the same dispositional hearing.

There is arguably some ambiguity about how s-s. 20(4) should be interpreted when a young person is receiving a disposition for one offence, and is already subject to a disposition previously made under the Y.O.A. The words of s-s. 20(4) appear to speak from the time of the making of the last disposition. Thus, a youth court judge making a disposition in regard to a young person already subject to a Y.O.A. disposition, cannot make an order that will result in the young person being subject to a "continuous combined duration" of more than three years from the time the judge makes that disposition. For example, suppose a young person commits an offence, receives a custodial disposition of two years, and while in custody commits a further offence for which a disposition hearing is held one year and 11 months after the original disposition was made. The maximum disposition which can be imposed under the Y.O.A. (assuming subpara. 20(1)(k)(ii) applies), is a three-year custodial disposition to run *concurrently* with the unexpired portion of the original disposition; that is, the youth court can add a maximum of two years and 11 months to the original disposition so that the "continuous combined dispositions" from the time of final disposition, do not exceed three years. This interpretation of s-s. 20(4) renders it generally consistent with subpara. 20(1)(k)(ii).

If a disposition made in regard to one offence has expired at the time of the dispositional hearing for a second offence, then s-s. 20(4) ceases to apply in respect of the first offence; of course s-s. 20(3) applies to any dispositions made at the second hearing.

The basis for the three-year maximum on dispositions under the Y.O.A., found in subpara. 20(1)(k)(ii), is that any benefit a

young person can receive from involvement with the juvenile correction system should occur within that period. Any need for an extension beyond the three-year period would suggest that the young person has "outgrown" the juvenile system, and would be unlikely to benefit from further exposure to the dispositions provided in the Y.O.A.; transfer to adult court under s. 16 should be considered in such circumstances.

Disposition continues when adult: subsection 20(5)

Subsection 20(5) is self-explanatory: "[a] disposition . . . shall continue in effect . . . after the young person against whom it has been made becomes an adult." This section should be read in conjunction with s-s. 24(14) which provides that after a young person serving a custodial disposition has reached the age of 18, the youth court may direct that he serves his disposition or the remaining portion of the disposition in a provincial correctional facility for adults. Even when the young person is transferred to an adult facility pursuant to s-s. 24(14), the youth court retains jurisdiction over him for purposes of dispositional review.

Reasons for the disposition: subsection 20(6)

By virtue of s-s. 20(6), the youth court is under an obligation to state its reasons for making a disposition in the record of the case. It must provide or cause to be provided a copy of the disposition to the young person, his counsel, his parents, the provincial director where the provincial director has an interest in the disposition, and the prosecutor. In the case of a custodial disposition, the review board, if one has been established, must also receive a copy of the disposition. A disposition may be in Form 7, except a probation order, which may be in Form 8. See sample forms at end of discussion of s. 20.

Upon request, any of the persons listed above may receive a transcript or copy of the reasons for disposition. Although a fee could be set under s. 67 or 68, query whether the words "shall provide" suggest an obligation to provide a copy of the reasons without charge. This subsection recognizes the importance which the Y.O.A. places on the young person and his parents knowing the exact reasons for any disposition.

The provisions of s-s. 20(6) do not require that a judge render his decision in writing. Procedures for recording the judge's oral

reasons must, however, be in operation so that written reasons can be made available on request.

Limitation on punishment: subsection 20(7)

Another provision of the Y.O.A. which contrasts with the J.D.A. is the limitation on punishment found in s-s. 20(7), which provides that no "punishment that is greater than the maximum punishment that would be applicable to an adult who has committed the same offence" may be imposed. The *Criminal Code* and other legislation set out a number of offences for which there are maximum punishments. Noteworthy in this context are the maximum penalties applicable under the *Criminal Code*, s. 722 for summary conviction offences; these are a fine of \$500, imprisonment for six months or both. For a "hybrid offence" (one which is indictable or summary at the election of the Crown), the offence is treated as indictable unless the Crown makes a contrary election, and hence the maximum applicable to sentences for summary conviction offences does not apply: see the *Interpretation Act*, para. 27(1)(a).

Criminal Code provisions inapplicable: subsections 20(8) and (9)

Subsection 20(8) makes the provisions of Part XX of the *Criminal Code* inapplicable in respect of Y.O.A. proceedings, with several exceptions. Part XX of the *Code* deals with "Punishments, Fines, Forfeitures, Costs and Restitution of Property." Because the Y.O.A. institutes its own set of procedures with respect to these matters, the *Code* provisions are made inapplicable. By express inclusion the provisions of s. 683 (pardon), s. 685 (remission) and s. 686 (royal prerogative of mercy) continue to apply. Subsections 655(2) to (5) dealing with restitution of property before the court where there is no conviction, also apply under the Y.O.A., as does s-s. 662.1(2), specifying the period for which an appearance notice, promise to appear, summons, undertaking or recognizance is in effect.

Subsection 20(9) provides that s. 722 of the *Code* does not apply to proceedings under the Y.O.A. Section 722, which governs punishment for summary conviction offences, provides in s-s. (1) that the maximum punishment, unless otherwise stipulated, cannot exceed \$500 or six months' imprisonment or both;

s-s. 722(2) to (11) provide generally for fines and default in payment thereof. As the Y.O.A. contains its own range of dispositions for all offences as well as provisions for default, it is unnecessary to make use of s. 722 for these purposes. However, as s-s. 20(7) stipulates that no disposition for a young person shall result in a punishment greater than the maximum punishment applicable to an adult who commits the same offence, it is submitted that where the legislative provision creating the summary conviction offence does not specify a penalty, the general limitations on sanctions in s-s. 722(1) would govern. This interpretation does not involve a direct application of s-s. 722(1); rather, it is arrived at by referring to the legislative provisions which create specific summary conviction offences, which in turn, where no maximum is specified, incorporate s-s. 722(1). This interpretation accords with the clear legislative intent of s-s. 20(7) of the *Young Offenders Act*, namely, not to expose young persons to more serious sanctions than adults. (See L. Wilson, *Juvenile Courts in Canada* (Toronto: Carswell, 1982), p. 200.) Section 15 of the *Charter of Rights*, guaranteeing equal benefit of the law without discrimination based on age (to come into effect April 17, 1985), would seem to require such an interpretation.

Probation: section 23

"Probation is a form of disposition under which an offender who has been found to have committed an offence may be released by the court, subject to the supervision of a probation officer and to certain conditions imposed by the court" (*Juvenile Delinquency in Canada: The Report of the Department of Justice Committee on Juvenile Delinquency* (1965), at p. 173). Probation is used very frequently for both young offenders and adults. It is desirable because it allows the young person to receive supervision and treatment, if necessary, while being subject to minimal restrictions on his freedom. Although the definition above envisions a probation officer's supervision as part of a probation order, a young person may be placed on probation without having to report to a probation officer. In such cases, usually involving less serious crimes, supervision by parents or another responsible person is adequate.

Probation has been frequently used under the *J.D.A.* through committal to the care or custody of a probation officer, placement with supervision or visitation by a probation officer or by

virtue of the power to impose "such further and other conditions as may be deemed advisable." Because the J.D.A. does not specify acceptable conditions of probation as does s. 663 of the *Criminal Code* and does not set out procedures to be followed on breach, an issue has arisen as to what this procedure properly should be. The Y.O.A. clarifies issues such as these. The Y.O.A. provisions are exhaustive and apply to young persons in lieu of the *Criminal Code* provisions dealing with probation. Thus, the Code offence of "breach of probation" does not apply to young persons who are in breach of their probation orders. Under the Y.O.A. a young person in breach of the terms of his probation may be dealt with only by way of review pursuant to s. 33.

Paragraph 20(1)(j) and Section 23

20. (1) Where a youth court finds a young person guilty of an offence . . . the court shall then make any one of the following dispositions,

...

(j) place the young person on probation in accordance with section 23 for a specified period not exceeding two years;

23. (1) Conditions that must appear in probation orders.—The following conditions shall be included in a probation order made under paragraph 20(1)(j):

- (a) that the young person bound by the probation order shall keep the peace and be of good behaviour;**
- (b) that the young person appear before the youth court when required by the court to do so; and**
- (c) that the young person notify the provincial director or the youth worker assigned to his case of any change of address or any change in his place of employment, education or training.**

(2) Conditions that may appear in probation orders.—A probation order made under paragraph 20(1)(j) may include such of the following conditions as the youth court considers appropriate in the circumstances of the case:

- (a) that the young person bound by the probation order report to and be under the supervision of the provincial director or a person designated by him or by the youth court;**
- (b) that the young person remain within the territorial jurisdiction of one or more courts named in the order;**
- (c) that the young person make reasonable efforts to obtain and maintain suitable employment;**

(d) that the young person attend school or such other place of learning, training or recreation as is appropriate, if the court is satisfied that a suitable program is available for the young person at such place;

(e) that the young person reside with a parent, or such other adult as the court considers appropriate, who is willing to provide for the care and maintenance of the young person;

(f) that the young person reside in such place as the provincial director or his delegate may specify;

(g) that the young person comply with such other reasonable conditions set out in the order as the court considers desirable, including conditions for securing the good conduct of the young person and for preventing the commission by the young person of other offences.

(3) *Communication of probation order to young person and parent.*—Where the youth court makes a probation order under paragraph 20(1)(j), it shall

(a) cause the order to be read by or to the young person bound by the probation order;

(b) explain or cause to be explained to the young person the purpose and effect of the order and ascertain that the young person understands it; and

(c) cause a copy of the order to be given to the young person and to a parent of the young person, if the parent is in attendance at the proceedings against the young person.

(4) *Copy of probation order to parent.*—Where the youth court makes a probation order under paragraph 20(1)(j), it may cause a copy of the report to be given to a parent of the young person not in attendance at the proceedings against the young person if the parent is, in the opinion of the court, taking an active interest in the proceedings.

(5) *Endorsement of order by young person.*—After a probation order has been read by or to a young person and explained to him pursuant to subsection (3), the young person shall endorse the order acknowledging that he has received a copy of the order and acknowledging the fact that it has been explained to him.

(6) *Validity of probation order.*—The failure of a young person to endorse a probation order pursuant to subsection (5) does not affect the validity of the order.

(7) *Commencement of probation order.*—A probation order made under paragraph 20(1)(j) comes into force

- (a) on the date on which the order is made; or
- (b) where the young person in respect of whom the order is made is committed to continuous custody, on the expiration of the period of custody.

(8) *Notice to appear.*—A young person may be given notice to appear before the youth court pursuant to paragraph (1)(b) orally or in writing, and where the notice is in writing it may be in Form 9.

(9) *Warrant to arrest young person.*—If a young person to whom a notice is given in writing to appear before the youth court pursuant to paragraph (1)(b) does not appear at the time and place named in the notice and it is proved that a copy of the notice was served on him, a youth court may issue a warrant to compel the appearance of the young person.

Mandatory conditions: subsection 23(1)

Subsection 23(1) sets out three conditions that must appear in a probation order. They are straightforward and need little explanation. The first condition states that the young person “shall keep the peace and be of good behaviour.” Secondly, the young person must “appear before the youth court when required by the court.” This provision allows the youth court judge to make contact with the young person to discuss informally the terms of the probation order and the young person’s compliance with it. It does not allow the youth court to change the probation order; rather it is an option available to reinforce the court’s order, if necessary, without invoking the review mechanisms. A formal review of the probation order for reasons other than failure to comply must be carried out under s. 32. Section 33 deals with review of probation orders where the young person has wilfully failed or refused to comply with the order. The final mandatory condition is that the young person “notify the provincial director or the youth worker assigned to his case of any change of address or any change in his place of employment, education or training.”

Conditions that may appear in a probation order: subsection 23(2)

In addition to the mandatory conditions listed in s-s. 23(1), the youth court may impose one or more of the conditions in s-s. 23(2), as long as the conditions are not inconsistent with each

other. The optional conditions should allow the court to issue a probation order which will meet the particular needs of the young person.

The first in the list of conditions set out in s-s. 23(2) requires reporting to a supervisor who could be the provincial director or "a person designated by him or by the youth court." It is expected that the designated individual would, in most instances, be a youth court worker (probation officer), although the court could appoint any other person that it sees fit. Another condition is an order pursuant to para. 23(2)(b) that the young person "remain within the territorial jurisdiction of one or more courts named in the order." This is a commonly imposed term of probation used to ensure that the young person receives the benefit of supervision ordered for him.

The youth court may order that the young person "make reasonable efforts to obtain and maintain suitable employment" pursuant to para. 23(2)(c). If the young person is not working an order might be made under para. 23(2)(d) requiring the young person to attend school or "such other place of learning, training or recreation as is appropriate." Such an order would be in addition to any provincial education attendance laws and would be appropriate only "if the court is satisfied that a suitable program is available for the young person."

Paragraph 23(2)(e) empowers the court to make an order "that the young person reside with a parent, or such other adult as the court considers appropriate, who is willing to provide for the care and maintenance of the young person." This condition is clearly phrased so that an order may be made for the young person to reside with a natural person only, not a corporation: this corresponds with the approach of the Supreme Court of Canada to orders under the *J.D.A. v. A.-G. Ont. and Viking Houses v. Regional Municipality of Peel*, [1979] 2 S.C.R. 1134, 104 D.L.R. (3d) 1, 49 C.C.C. (2d) 103, 29 N.R. 244. Under para. 23(2)(e) of the Y.O.A., financial responsibility for providing care for the young person is clearly assumed by the adult with whom the young person is ordered to reside and hence there are no cost implications for provincial or municipal governments.

Paragraph 23(2)(e) apparently allows for a residential placement even in the face of a contrary subsisting custody order of a higher court. The cases of *R. v. C.F.*; *R. v. F.G.* (1977), 34 C.C.C.

(2d) 333 (Ont. Prov. Ct.) held that an order under the *J.D.A.* that placed the juveniles in the custody of their fathers superseded prior custody orders of the Supreme Court of Ontario, entrusting the youths to the custody of their respective mothers. The custody order of another court, whether made under federal or provincial legislation, would last "until the issue is raised again in another Court having jurisdiction to hear the matter" (p. 336). While such a disposition under the *Y.O.A.* may suspend the effect of an existing custody order, it does not affect the validity of the custody order or its continued effect following the expiry of the disposition under the *Y.O.A.*

Another condition of probation which may be imposed is set out in para. 23(2)(f), providing for an order "that the young person reside in such place as the provincial director or his delegate may specify." This provision allows the placement of a young person in a facility operated by provincial child welfare authorities, a private agency, or by an individual. The provision would seem broad enough to allow the provincial director to specify that the young person reside at a wilderness camp or at some residential educational facility.

Although the words of para. 23(2)(f) appear very broad, it would not seem reasonable to interpret them as giving the provincial director an unfettered discretion for this provision applies only to residential placements and cannot be used to order detention or custody. Specific provisions of the *Y.O.A.* restrict the placement of young persons in various facilities, and para. 23(2)(f) should not be used to circumvent these provisions. For example, para. 20(1)(i) and s. 22 restrict detention in a hospital or other treatment facility. Paragraph 20(1)(k) and s. 24 contain a number of provisions ensuring that a young person is placed in custody only under restricted circumstances, with clear requirements for judicial control over the commitment process. Subsection 24(10) provides that a young person committed to custody under para. 20(1)(k) will be held separate and apart from any adult charged with or convicted of an offence. It would be both illogical and inappropriate to interpret para. 23(2)(f) as giving the provincial director authority to place a young person in a hospital or other treatment facility, in a place of custody as defined in s. 24 of the *Y.O.A.*, or in an adult correctional facility. The provincial director's discretion under para. 23(2)(f) is, by necessary implication, limited by other provisions in the Act.

Normally before a para. 23(2)(f) condition is included in a probation order, one would expect that the provincial director or his delegate would present a plan at a dispositional hearing concerning the place of residence. If this plan is not followed by the authorities having care of the young person, there would be grounds for a dispositional review under s. 32.

The province will assume the costs of the placement when an order is made under para. 23(2)(f).

Another possible condition of probation is "that the young person comply with such other reasonable conditions set out in the order as the court considers desirable . . .". Such conditions may be included "for securing the good conduct of the young person and preventing the commission by the young person of other offences." Examples include a curfew, writing an essay about an appropriate topic, a requirement that the young person obtain counselling, a non-association order, and an order prohibiting a young person from driving a car (see *Re Strahl*, [1968] 2 C.C.C. 34, 2 C.R.N.S. 178, 60 W.W.R. 765, *sub nom.* *R. v. Strahl* (Man. Q.B.)). It should be emphasized that the condition must be reasonable, and may serve the purpose of securing the good conduct of the young person and may aid in preventing the commission of other offences.

Communication of terms of the probation order: subsections 23(3) to (6)

Subsection 23(3) requires the youth court to ensure that the terms of any probation order are communicated to the young person. The court shall cause the probation order to be read by or to the young person (para. 23(3)(a)). The court further shall explain or cause to be explained the purpose and effect of the probation order, and the judge has an obligation to ascertain that the young person understands the order (para. 23(3)(b)). The words of s-s. 23(3) do not demand that the order be read or explained to the young person by the judge in the courtroom. A youth court worker can acquaint the young person with the terms of the probation order outside the courtroom, though the judge must ascertain that the young person understands the effect of the order. A copy of the probation order must be given to the young person, and to a parent, if in attendance at the proceedings (para. 23(3)(c)).

A parent not in attendance at youth court proceedings may none the less receive a copy of the probation order pursuant to s-s. 23(4) if the parent "is, in the opinion of the court, taking an active interest in the proceedings." Sending a copy to the parent through the mail would be adequate. Although no guidelines have been set out to assist a judge in determining whether a parent is "taking an active interest in the proceedings," it would seem desirable for the judge to err on the side of causing notice to be given. If the parents are likely to be involved in supervising the probation order or if they will be helpful in ensuring that the young person observe certain conditions of the order, for example, if the young person is living at home and he has a curfew imposed upon him, it would seem essential to inform the parents of the terms of the probation.

The Y.O.A. does not specify the consequences of a failure to communicate the terms of the probation order to the young person, but a failure to do so might be brought up at a subsequent review under s. 33; clearly the young person may not be guilty of wilful breach under s. 33 if he did not understand exactly what conditions were imposed on him earlier. Common practice under the J.D.A. has been to require that the young person be informed of the consequences of breach of probation at the dispositional hearing: see *Racicot v. The Queen* (1978), 2 Canadian Journal of Family Law 195 (Ont. H.C.) and *Re Juvenile J. (No. 2)* (1978), 2 Canadian Journal of Family Law 196 (Ont. Prov. Ct.). The Y.O.A. clarifies the nature of the obligation to communicate the terms of probation and the consequences of breach.

Subsection 23(5) requires the young person to acknowledge the explanation of the probation order and his receipt of a copy by "endorsing" the order. An endorsement would most likely be the young person's signature, or in rare circumstances, for example if he was illiterate, his mark. This requirement is to ensure that the young person understands the significance of the probation order. According to s-s. 23(6), however, failure to sign the order does not affect its validity; thus the young person cannot thwart the process by refusing to endorse the order.

Commencement of probation order: subsection 23(7)

A probation order comes into effect on the date on which the order is made, except where the young person is committed to

continuous custody; in the latter case the probation order comes into force on the expiration of the period of custody. Subsection 23(7) specifically modifies the provisions of s-s. 20(2) which generally permit a youth court judge to order that a disposition take effect at a later date.

Appearance before youth court: subsections 23(8) and (9)

Paragraph 23(1)(b) provides that the youth court can require the appearance of the young person at any time. Subsection 23(8) makes provision for notifying the young person to appear. Notice may be given orally or in writing; if in writing, notice may be given in Form 9: see sample Form 9 at end of discussion of s. 23. If the young person does not appear as required after receiving notice, the youth court is empowered to compel the attendance of the young person by warrant pursuant to s-s. 23(9). Note, however, that the purpose of requiring an appearance is to maintain contact with the young person on an informal level, not to review the disposition formally. Formal reviews are to be carried out in accordance with ss. 32 and 33, and, unless there has been a wilful breach of probation within s. 33, the youth court cannot impose a more onerous disposition after review. The informal procedure under para. 23(1)(b) will usually be set in motion by a youth court worker who has reason to think it would be beneficial to bring the young person before the youth court, for example, if the court worker has been having difficulties with the young person. The worker can contact the clerk of the youth court or a youth court judge and request that notice be given pursuant to s-s. 23(8) requiring a young person to appear, and if necessary, have a warrant issued pursuant to s-s. 23(9).

Form of probation order: subsection 20(11)

Subsection 20(11) provides that a probation order may be in Form 8. If probation is combined with another disposition then both dispositions may be in Form 8.

SAMPLE FORM**FORM 8****THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO****PROBATION ORDER**

Canada
Province of Ontario
County of Queens

Whereas on the 28th day of June 19 82 , in the Youth Court at 100 Main Street, Anytown, Ontario , David Smith of 25 First Avenue, Anytown, Ontario a young person within the meaning of the *Young Offenders Act* was tried and found guilty of the following offence:

robbery: to wit on the second day of June, 1982, David Smith did steal two hundred and fifty dollars from The Corner Milk Store, 2 West Street, Anytown, Ontario, and at the same time thereat did use threats of violence contrary to section 303 of the *Criminal Code of Canada*.

And be it remembered that on 8th day of July 19 82 , I Thomas Brown Judge of the Youth Court in and for the County of Queens ordered David Smith to perform the following community service:

For a period of twenty months from the date of this order and during the period of probation herein described, David Smith shall perform two hours per week of service at the Anytown Community Centre under the direction of Mr. George O'Hara, Director of Youth Activities, such service to be in the assistance of Mr. O'Hara in the organization and maintenance of a junior swimming program for handicapped children.

And in addition thereto placed David Smith on probation on the conditions hereinafter prescribed;

Now therefore David Smith , in this order called the young person, shall, for the period of twenty months from the date of this order comply with the following conditions:

1. that the young person shall keep the peace and be of good behaviour;

2. that the young person appear before the Youth Court when required by the court to do so;
3. that the young person notify the provincial director or the youth worker assigned to his case of any change of address or any change in his place of employment, education or training;
4. that the young person attend Sir John A. MacDonald High School in Anytown, Ontario and comply with the requirements of the academic program as directed by Mr. Timothy Jones, Vice-Principal; and
5. that the young person report to the youth worker assigned to his case, on the first Monday of every month for the period of the probation.

Dated this 8th day of July 19 82 at Anytown in the Province of Ontario

"Thomas Brown"

.....
A Judge of the Youth Court

I, David Smith, being the young person referred to in this probation order hereby acknowledge that I have read the order, that the order has been explained to me and that I have received a copy of the order.

"David Smith"

.....

SAMPLE FORM

FORM 9

THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO

NOTICE TO APPEAR BEFORE YOUTH COURT
PURSUANT TO PROBATION ORDER

Canada
Province of Ontario
County of Queens

To David Smith of 25 First Avenue, Anytown, Ontario ,
a young person within the meaning of the *Young Offenders Act*:

Whereas by order dated the 8th day of July 1982 you were
placed on probation for a period of twenty months commencing
on the date of the order;

And whereas pursuant to the conditions of the probation order
you are bound to appear before the Youth Court when required
by the court to do so;

This is therefore to require you to appear before the Youth
Judge sitting at 100 Main Street, Anytown, Ontario on Friday
the 22nd day of October 1982 at 2:00 o'clock, in
the afternoon to be dealt with in accordance with the *Young
Offenders Act*;

And further this is to notify you that if you do not attend at the
time and place stated herein a warrant may be issued for your
arrest.

Dated this 13th day of October 1982 at Anytown in
the Province of Ontario.

"Thomas Brown"

.....
A Judge of the Youth Court

Custodial dispositions: section 24

A custodial disposition is the most serious disposition that can be ordered by a youth court. Although there are different forms of custodial dispositions, all forms of custody impose continuous supervision and restrict the young person's access to the community.

The principles set out in paras. 3(1)(f) and (h) of the Y.O.A. declare that a young person has "a right to the least possible interference with freedom that is consistent with the protection of society" and prescribe removal from parental supervision "only when measures that provide for continuing parental supervision are inappropriate." These principles indicate that custody is to be used as a last resort, only when the young person has committed a serious crime or when he presents a serious threat to the community.

The Y.O.A. establishes two types of custody, open and secure. At no time is a secure custodial disposition to be ordered unless committal is necessary for the protection of the public. The Act forbids the use of secure custodial facilities except for serious offences; further restrictions apply in the case of young persons under the age of 14. Other safeguards apply to any order committing a young person into custody; for example, the youth court must consider a pre-disposition report before making a custodial disposition. The young person is given an absolute right of appeal in regard to disposition, in contrast with the provisions of the *J.D.A.*, requiring special leave to appeal.

Paragraph 20(1)(k) and Section 24

20. (1) Where a youth court finds a young person guilty of an offence . . . the court shall make any one of the following dispositions . . .

(k) subject to section 24, commit the young person to custody, to be served continuously or intermittently, for a specified period not exceeding

(i) two years from the date of committal, or

(ii) where the young person is found guilty of an offence for which the punishment provided by the *Criminal Code* or any other Act of Parliament is imprisonment for life, three years from the date of committal . . .

24. (1) *Definitions.*—In this section,

“open custody” means custody in

- (a) a community residential centre, group home, child care institution, or forest or wilderness camp, or
- (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 or restraint of young persons, and includes a place or facility within a class of such places or facilities so designated.

(2) *Order of committal to specify type of custody.*—Where the youth court commits a young person to custody under paragraph 20(1)(k), it shall specify in the order of committal whether custody is to be open custody or secure custody.

(3) *Conditions for secure custody.*—Subject to subsection (4), no young person who is found guilty of an offence shall be committed to secure custody unless the young person was, at the time the offence was committed, fourteen years of age or more and unless

- (a) the offence is one for which an adult would be liable to imprisonment for five years or more;
- (b) the offence is an offence under section 132 (prison breach) or subsection 133(1) (escape or being at large without excuse) of the *Criminal Code* or an attempt to commit such offence; or
- (c) the offence is an indictable offence and the young person was

- (i) within twelve months prior to the commission of the offence found guilty of an offence for which an adult would be liable to imprisonment for five years or more, or adjudged to have committed a delinquency under the *Juvenile Delinquents Act* in respect of such offence, or

- (ii) at any time prior to the commission of the offence committed to secure custody with respect to a previous offence, or committed to custody in a place or facility for the secure containment or restraint of a child, within the meaning of the *Juvenile Delinquents Act*, with respect to a delinquency under that Act.

(4) *Idem.*—A young person who is found guilty of an offence and who was, at the time the offence was committed, under the age of fourteen years may be committed to secure custody if

(a) the offence is one for which an adult would be liable to life imprisonment;

(b) the offence is one for which an adult would be liable to imprisonment for five years or more and the young person was at any time prior to the commission of the offence found guilty of an offence for which an adult would be liable to imprisonment for five years or more or adjudged to have committed a delinquency under the *Juvenile Delinquents Act* in respect of such offence; or

(c) the young person is found guilty of an offence under section 132 (prison breach) or subsection 133(1) (escape or being at large without excuse) of the *Criminal Code* or an attempt to commit such offence.

(5) *Idem.*—The youth court shall not commit a young person to secure custody unless the court considers a committal to secure 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 circumstances of the young person.

(6) *Place of custody.*—A young person who is committed to custody shall be placed in open custody or secure custody, as specified in the order of committal, at such place or facility as the provincial director or his delegate may specify and may, during the period of custody be transferred by the provincial director or his delegate from one place or facility of open custody to another or from one place or facility of secure custody to another.

(7) *Transfer from secure custody to open custody.*—The provincial director or his delegate may, with the written authorization of the youth court, transfer a young person from a place or facility of secure custody to a place or facility of open custody.

(8) *Transfer from open custody to secure custody.*—Subject to subsection (9), no young person who is committed to open custody may be transferred to a place or facility of secure custody except in accordance with section 33.

(9) *Idem.*—The provincial director or his delegate may transfer a young person from a place or facility of open custody to a place or facility of secure custody for a period not exceeding fifteen days if the young person escapes or attempts to escape lawful custody or is, in the opinion of the director or his delegate, guilty of serious misconduct.

(10) *Young person to be held separate from adults.*—Subject to this section, a young person who is committed to custody under paragraph 20(1)(k) shall be held separate and apart from any adult who is charged with or convicted of an offence against any law of Canada or a province.

(11) *Pre-disposition report.*—Before making an order of committal to custody under paragraph 20(1)(k), the youth court shall consider a pre-disposition report.

(12) *Committal to custody deemed continuous.*—A young person who is committed to custody under paragraph 20(1)(k) shall be deemed to be committed to continuous custody unless the youth court specifies otherwise.

(13) *Availability of place of intermittent custody.*—Before making an order of committal to intermittent custody under paragraph 20(1)(k), the youth court shall require the prosecutor to make available to the court for its consideration a report of the provincial director or his delegate as to the availability of a place of custody in which an order of intermittent custody can be enforced and, where the report discloses that no such place of custody is available, the court shall not make such an order.

(14) *Transfer to adult facility.*—Where a young person is committed to custody under paragraph 20(1)(k), the youth court may, on application of the provincial director or his delegate made at any time after the young person attains the age of eighteen years, after affording the young person an opportunity to be heard, authorize the provincial director or his delegate to direct that the young person serve his disposition or the remaining portion thereof in a provincial correctional facility for adults, if the court considers it to be in the best interests of the young person or in the public interest, but in any such event the provisions of this Act shall continue to apply in respect of that person.

(15) *Where disposition and sentence concurrent.*—Where a young person is committed to custody under paragraph 20(1)(k) and is concurrently under sentence of imprisonment imposed in ordinary court, that person may serve his disposition and sentence, or any portions thereof, in a provincial correctional facility for adults or in a place of custody for young persons.

(16) *Warrant of committal.*—Where a young person is committed to custody under paragraph 20(1)(k), the youth court shall issue or cause to be issued a warrant of committal, which may be in Form 10.

Definitions: subsection 24(1)

There are two types of custody available under the Y.O.A.: "open" and "secure". Each juvenile facility will be designated by the province as being "open" and "secure". Examples of "open custody" listed in para. 24(1)(a) include a community residential centre, a group home, a child care institution and a forest or wilderness camp. Open facilities do not devote resources to prevent the young person from leaving. On the other hand, secure facilities are designed to restrain or contain the young person. The definition of "secure custody" is a place or facility "for the secure containment or restraint of young persons." Physical security is not the only consideration, however, as a place with a high staff to young person ratio might be classified as secure without physical control over the young person; the requisite control could be achieved through close supervision.

It is important to distinguish between the two levels of custody so that the right to the least possible interference with freedom is maintained. If the provincial authorities were to place a young person whose disposition specified "open custody" in "secure custody", the young person could initiate a review or seek a remedy by way of prerogative writ. The designation of open or secure facilities is the responsibility of the Lieutenant Governor in Council (Cabinet) of a province.

**Judicial specification of level of custody:
subsections 24(2) to (5)**

Subsection 24(2) provides that the youth court must specify to which level of custody, open or secure, it is committing a young person. Under s-s. 24(6) the provincial director or his delegate may decide upon the precise facility within the level of custody. It is felt that the judiciary rather than the provincial social service or correctional authorities should bear the responsibility for determining the extent to which a young person will be deprived of his liberty. It is also believed that determination of the level of custody in open court will help to maintain and increase the confidence of young persons and the public in the juvenile justice system. The provision allowing provincial authorities to assign the young person to any facility within the designated level gives the provinces flexibility to plan and implement effective programs and enables them to use their resources most effectively.

There are a number of objective and subjective criteria which must be satisfied before a court makes an order for committal to secure custody. The two objective elements are age and seriousness of the offence. The criteria for the committal of offenders 14 years or older are set out in s-s. 24(3). A young person 14 or over must be convicted of an offence for which an adult would be liable to imprisonment for five years or more, or must be convicted of a violation or an attempted violation of the *Criminal Code*, s. 132 (prison breach) or s-s. 133(1) (escape or being at large without excuse). In addition, a young person, 14 or over, may be committed to secure custody under para. 24(3)(c) if a disposition is being made in regard to any indictable offence, and (i) in the previous 12 months he was convicted of an offence for which an adult would be liable to imprisonment for five years or more, or (ii) at any previous time he was committed to a secure facility.

Subsection 24(4) governs the committal to secure custody of young persons between the ages of 12 and 14 at the time of the offence; it provides for committal only in the most serious circumstances. The young person must have been convicted of an offence for which an adult would be liable to life imprisonment, or convicted of a violation or attempted violation of the *Criminal Code*, s. 132 (prison breach) or s-s. 133(1) (escape or being at large without excuse). A young person between 12 and 14 may also be committed to secure custody under para. 24(4)(b) if a disposition is being made in regard to an offence for which an adult would be liable to imprisonment for five years or more and the young person has previously been convicted of such an offence.

Subsections 24(3) and (4) expressly provide for the consideration of previous adjudications in respect of offences committed when the *Juvenile Delinquents Act* was in force.

Even when a young person has been found guilty of committing an offence for which he may receive a secure custodial disposition under s-s. 24(3) or (4), the Act prescribes a subjective test which must be satisfied before the order is made. Subsection 24(5) provides that secure custody must 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 circumstances of the young per-

son." This permits consideration by the youth court of the circumstances surrounding the offence, the necessity for physical restraint of the young person, the facilities and programs for treatment or rehabilitation of the youth and other factors. Although this provision allows a subjective evaluation that includes the needs of the young person, secure custody must be necessary for the protection of the public.

Place of custody: subsections 24(6) to (9)

Once the designation of "open" or "secure" custody has been made by the youth court, the responsibility for placement of the young person in a particular custodial facility falls to the provincial director or his delegate. Under s-s. 24(6) the provincial director has complete freedom to place the young person and to transfer him from one facility to another, as long as the young person remains within the designated level of custody. The provincial director, however, is restricted in changing the level of custody imposed by the judge because it is felt that a judicial disposition should not be unilaterally altered by provincial social service or correctional authorities.

Transfers from secure custody to open custody may be made by the provincial director or his delegate with the "written authorization of the youth court" pursuant to s-s. 24(7). Although the judge's approval is necessary there is no need for a hearing because the move is from a more restrictive to a less restrictive facility. If the youth court judge refuses to grant his written approval for such a move, the provincial director may seek a hearing by the youth court to review a disposition under s. 28.

Transfers from open custody to secure custody may not be made without going through the s. 33 procedures for review. This ensures that the young person is not committed to more restrictive secure custody without a hearing. Moreover, a s. 33 review can only occur if there has been an escape or attempt to escape custody (open or secure), or there has been a wilful failure or refusal to comply with a disposition. Query whether under certain limited circumstances, a refusal by a young person to participate in the program of a custodial facility might be considered so substantial as to constitute a wilful failure to comply with a disposition.

Subsection 24(9) provides that as an exceptional measure the provincial director or his delegate may transfer a young person from open to secure custody without court authorization "if the young person escapes or attempts to escape lawful custody" or if the young person is "in the opinion of the director or his delegate, guilty of serious misconduct." A transfer under s-s. 24(9) may only be "for a period not exceeding fifteen days." If the young person is kept in secure custody in excess of 15 days or without just cause, the young person could institute a civil suit or seek relief in the form of a prerogative writ or both. In addition there might well be administrative consequences for the provincial director or his delegate.

No definition of "serious misconduct" has been set out in the Act to aid in the interpretation of s-s. 24(9). The intention is clearly to provide the power to deal with young persons in exceptional circumstances. The word "serious" should be stressed. Conduct that might be described as "serious" could involve an unusual threat to the safety of the young person or others living or working in the open facility with the young person. In exceptional circumstances, the persistent breach of the rules of the facility, if sufficiently important to the operation of the facility, might merit the description "serious misconduct."

Custody separate from adults: subsections 24(10), (14) and (15)

Subsection 24(10) states that, subject to s. 24, a young person committed to custody "shall be held separate and apart from any adult who is charged with or convicted of an offence against any law of Canada or a province."

Subsection 24(14) permits the transfer of a young person to a provincial correctional facility for adults when the young person has reached the age of 18 years. Application must be made to the youth court and the young person must be afforded an opportunity to be heard; as the transfer represents a substantial alteration to the original disposition, judicial review is justified. The young person has the right to counsel, and the rules of natural justice apply. The rules of evidence might be relaxed, however, as is usual at a post-adjudication hearing. An order under s-s. 24(14) is appropriate "if the court considers it to be in the best interests of the young person or in the public interest." These

tests are alternatives, if a transfer were necessary in the public interest an order might be made even if it was not in the best interests of the young person to be so transferred. It should be noted that this transfer provision is not intended to reflect general practice. It is an option to be resorted to in appropriate cases.

A transfer under s-s. 24(14) does not have the same effect as a s. 16 transfer to adult court. Subsection 24(14) explicitly provides that "the provisions of this Act shall continue to apply"; the young person is placed in an adult facility, but the judicial review provisions of the Y.O.A. continue to apply.

In the rare situations where a young person is committed to custody under para. 20(1)(k) of the Y.O.A. and the young person is concurrently under sentence of imprisonment in ordinary court, s-s. 24(15) provides that the young person may serve his disposition and sentence in either an adult facility or a place of custody for young persons. The correctional authorities are to decide where the young person will be confined.

Pre-disposition report: subsection 24(11)

A pre-disposition report prepared pursuant to s. 14 is mandatory before an order of committal to custody is made, whether the custody is open or secure. The report is considered necessary in determining the appropriateness of a custodial disposition and should be designed to give a variety of relevant information to the youth court, for example, by pointing out personality characteristics, describing the family and education background, etc.

Intermittent custody: subsections 24(12) and (13)

Young persons are ordinarily deemed by s-s. 24(12) to be committed to continuous custody, unless otherwise specified.

If a place is available, an order of committal to intermittent custody may be made by the youth court. Subsection 24(13) provides that before making an order of committal to intermittent custody, the court shall require the prosecutor to make available to the court a report of the provincial director or his delegate on "the availability of a place of custody in which an order of intermittent custody can be enforced." If no place is available, an order for intermittent custody may not be made. The provisions of the *Criminal Code* dealing with intermittent

sentences for adult offenders do not apply by virtue of s-s. 20(8), which makes Part XX of the *Code* inapplicable to young persons.

Form for order of disposition: subsection 20(10)

Subsection 20(10) provides that a disposition made under s. 20, other than a probation order, may be in Form 7. Form 7, included in the Schedule following the Act, sets out precedents for all of the dispositions in s. 20, such as absolute discharge, imposition of fine, a compensation order and so on. A sample of Form 7 for a committal to custody follows on next page.

Warrant of committal: subsection 24(16)

Subsection 24(16) specifies that a warrant of committal to custody may be in Form 10. A sample of Form 10 follows on page 216.

SAMPLE FORM

FORM 7

**THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO**

ORDER OF DISPOSITION

Canada
Province of Ontario
County of Queens

Whereas on the 26th day of August 19 82 , in the Youth Court at 100 Main Street, Anytown, Ontario, Mary Powell of 452 Blair Road, Anytown, Ontario a young person within the meaning of the *Young Offenders Act* was on her own admission found guilty of having committed the following offence:

theft: to wit Mary Powell on the 13th day of July, 1982 at Anytown, Ontario did steal a Sony television and recorder, Serial Nos. 48774 B and 2236 CF respectively, the property of the County of Queens Board of Education, of a value of \$1345 dollars, contrary to Section 294(a) of the *Criminal Code of Canada*.

Be it remembered that on the 15th day of September 19 82, I Thomas Brown Judge of the Youth Court in and for the County of Queens committed Mary Powell to secure custody in County of Queens Youth Centre or such place of secure custody as the provincial director or his delegate may specify for a period of nine months commencing on the 16th day of September 19 82 .

Dated this 15th day of September 19 82 at Anytown in the Province of Ontario.

"Thomas Brown"
.....
A Judge of the Youth Court

Note: Destruction of Records

Section 45 provides for the destruction of records where a young person who is found guilty of an offence has not been charged with or found guilty of a further offence for a period of five years after all dispositions are completed in the case of an indictable offence or two years in the case of a summary conviction offence.

SAMPLE FORM

FORM 10

THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO

WARRANT OF COMMITTAL TO CUSTODY

Canada
Province of Ontario
County of Queens

To the peace officers in the County of Queens and to the person in charge of the place of custody specified herein:

Whereas Mary Powell of 425 Blair Road, Anytown, Ontario, a young person within the meaning of the *Young Offenders Act*, was on the 26th day of August 1982, found guilty of the following offence:

theft: to wit Mary Powell on the 13th day of July, 1982 at Anytown, Ontario did steal a Sony television and recorder, Serial Nos. 48774 B and 2236 CF respectively, the property of the County of Queens Board of Education, of a value of \$1345 dollars, contrary to Section 294(a) of the *Criminal Code of Canada*;

And whereas Mary Powell was committed in custody in the County of Queens Youth Centre or such other place of secure custody as the provincial director or his delegate may specify for a period of nine months to be served continuously commencing on the 16th day of September 1982.

This is therefore to command you to take Mary Powell and safely convey her to such place of custody and to deliver her to the person in charge thereof, together with the following precept:

This is to command you, the person in charge of the said place of custody, to receive Mary Powell into your custody and to keep her there safely in accordance with the order committing her to custody, and for so doing this is a sufficient warrant.

Dated this 15th day of September 1982 at Anytown in the Province of Ontario.

"Thomas Brown"

.....
A Judge of the Youth Court

Transfer of disposition: section 25**SECTION 25**

25. (1) *Transfer of disposition.*—Where a non-custodial disposition has been made in respect of a young person and the young person or a parent with whom he resides is or becomes a resident of a territorial division outside the jurisdiction of the youth court that made the disposition, whether in the same or in another province, a youth court judge in the territorial division in which the disposition was made may, on the application of the Attorney General or his agent or on the application of the young person or his parent with the consent of the Attorney General or his agent, transfer the disposition and such portion of the record of the case as is appropriate to a youth court in the other territorial division, and all subsequent proceedings relating to the case shall thereafter be carried out and enforced by that court.

(2) *No transfer outside province before appeal completed.*—No disposition may be transferred from one province to another under this section until the time for an appeal against the disposition or the finding on which the disposition was based has expired or until all proceedings in respect of any such appeal have been completed.

(3) *Transfer to a province where person is adult.*—Where an application is made under subsection (1) to transfer the disposition of a young person to a province in which the young person is an adult, a youth court judge may, with the consent of the Attorney General, transfer the disposition and the record of the case to the youth court in the province to which the transfer is sought, and the youth court to which the case is transferred shall have full jurisdiction in respect of the disposition as if that court had made the disposition, and the person shall be further dealt with in accordance with this Act.

Transfer of disposition: section 25

Section 25 recognizes the increased mobility of Canadian families and young persons by providing for a judicial transfer of a non-custodial disposition from one youth court jurisdiction to another, where the young person is a resident of a different jurisdiction or where the young person, his parent or family move to a new jurisdiction. The transfer may occur within a

province or between provinces. Subsection 25(1) provides that the Attorney General or his agent in the province where the original disposition was made must consent to the transfer. The consent of the Attorney General in the receiving province, however, is not required; this obviates the possibility of a virtual veto of such a transfer which would perhaps prevent the young person from taking up residence with his parents.

It should be noted that s. 25 eliminates jurisdictional problems with respect to non-custodial dispositions only. Section 26 provides for interprovincial agreements to allow a young person placed on probation or committed to custody in one province to be dealt with in another province. Section 25 should be distinguished from s. 18 which permits the transfer to another province of a pending charge against a young person, prior to adjudication, if the young person signifies his intention to enter a guilty plea. Under s. 18 the youth court in the province to which the charge is transferred accepts the plea, makes an adjudication, and makes a disposition; the consent of the original province's Attorney General or his agent is also necessary under s. 18.

The most frequent use of s. 25 transfers will probably concern probation orders. Administrative coordination between the provinces will be necessary for the transfer process to function smoothly. Subsection 25(1) provides that all subsequent proceedings relating to the case, such as judicial review of disposition under ss. 32 and 33, shall thereafter be carried out and enforced by the court to which the case is transferred. The original court has no further role to play.

Subsection 25(1) also specifies that "such portion of the record . . . as is appropriate to a youth court in the other territorial division" may be transferred. See comments on s. 40 discussing what constitutes the "record" of a youth court.

It would not appear that a hearing is necessary under s. 25, although a youth court that is inclined to refuse an application under the section might choose to afford the young person an opportunity to be heard. Owing to the recognition the Y.O.A. gives to the parent-child relationship and the obligations of parents towards their children, it would seem that a court should normally grant an application under s. 25 which is based upon a parental move.

Subsection 25(2) provides that no disposition may be transferred under s. 25 until the time for an appeal has lapsed, or, if an appeal has been made, until all appeal proceedings have been completed.

Subsection 25(3) has been included to deal with the difference in maximum ages that may exist on a province-by-province basis until April 1, 1985, when a uniform maximum age will apply across Canada. If a young person applies pursuant to s-s. 25(1) to move to another jurisdiction where he is an adult, the youth court judge may transfer the disposition and the record to the youth court of the receiving province. If such a transfer is made, the youth court in the receiving province has full jurisdiction and the original disposition continues as if the youth court in the receiving province had made it. Moreover, s-s. 25(3) states that "the person shall be further dealt with in accordance with this Act". This provision permits the continuation of a disposition and allows for review under the Y.O.A.

Interprovincial agreements governing disposition transfer: section 26

SECTION 26

26. (1) *Interprovincial arrangements for probation or custody.*—Where an appropriate agreement has been made between two provinces, young persons who have been placed on probation or committed to custody in one province under section 20 may be dealt with under the probation order or held in custody in the other province.

(2) *Youth court retains jurisdiction.*—Subject to subsection (3), where a young person is dealt with under a probation order or held in custody pursuant to this section in a province other than that in which the disposition was made, the youth court of the province in which the disposition was made shall, for all purposes of this Act, retain exclusive jurisdiction over the young person as if the young person were dealt with or held within that province, and any warrant or process issued in respect of the young person may be executed or served in any place in Canada outside the province where the disposition was made as if it were executed or served in that province.

(3) *Waiver of jurisdiction.*—Where a young person is dealt with under a probation order or held in custody pursuant to this

section in a province other than that in which the disposition was made, the youth court of the province in which the disposition was made may, with the consent of the Attorney General of that province and the young person, waive its jurisdiction, for the purpose of any proceeding under this Act, to the youth court of the province in which the young person is dealt with or held, in which case the youth court in the province in which the young person is so dealt with or held shall have full jurisdiction in respect of the disposition as if that court had made the disposition.

Interprovincial agreements: section 26

Subsection 26(1) allows any two provinces to make an agreement so that a young person who is placed on probation or committed to custody in one province may be dealt with in another province. A transfer under s. 26 does not require judicial consent or a court order, though under s-s. 26(3) a waiver of court jurisdiction may be sought after a young person has been transferred pursuant to a s. 26 agreement. A s. 26 transfer cannot be effected solely on the application of the young person, and his consent is not required.

Agreements under s. 26 will be useful in two situations. First, where the young person or his family moves, provincial authorities can make arrangements for transfer of a disposition without the need for judicial involvement. If the young person is on probation, a transfer pursuant to s. 26 may be administratively easier to effect than a judicial transfer under s. 25. If the young person is in custody and his family moves to another province, the correctional authorities may want the youth moved so as to be close to his family, but to remain in custody — this can only be accomplished under s. 26.

The second situation where an order under s. 26 will be available is to allow one province to use custodial or other facilities in another province, and particularly, to take advantage of special programs in one province that are not readily available elsewhere. For example, small provinces such as Prince Edward Island can send young persons to custodial facilities in Nova Scotia if facilities are lacking in P.E.I. In some areas of the country, the nearest specialized institutions are not necessarily to be found within provincial boundaries; for example, communities in Northwest-

ern Ontario may look to Manitoba for specialized facilities rather than to Southern Ontario.

Pursuant to s-s. 26(2), in the event of a transfer under s-s. 26(1), the youth court of the province that made the original order retains exclusive jurisdiction over the young person, notwithstanding the fact that the young person is serving his disposition out of the province. To enforce this out of province jurisdiction, s-s. 26(2) provides that any warrant or process of the youth court of the province where the original order was made may be executed or served outside the province, and has effect throughout Canada.

Notwithstanding s-s. 26(2), the youth court of the original province may waive its jurisdiction to the youth court of the other province pursuant to s-s. 26(3). To do this the consent of both the Attorney General of the original province and of the young person is required. Note here that the Attorney General alone has the authority to consent, unlike the situation in s-s. 25(1) where either the Attorney General or his agent may consent. If the original youth court waives jurisdiction, the receiving youth court has "full jurisdiction in respect of the disposition as if that court had made the disposition."

The original youth court has no obligation to hold a hearing before deciding to waive jurisdiction under s-s. 26(3). If the Attorney General and the young person both consent the youth court might well be reluctant to intervene and to refuse to allow a waiver; nevertheless the court may feel that it has an independent duty, and may choose to hold a hearing to consider the situation, though such action should not ordinarily be necessary.

APPEALS (Section 27)

Introduction

Section 27 of the *Young Offenders Act* provides for an appeal procedure very different from that of the *Juvenile Delinquents Act*. Section 37 of the *J.D.A.* permits appeals only with special leave to be granted if the appellate judge considers that it is "essential in the public interest or for the due administration of justice that such leave be granted." If leave is granted, an appeal under the *J.D.A.* follows the provisions of the *Criminal Code* relating to appeals from conviction on indictment, applied *mutatis mutandis*.

The *Y.O.A.* provides for appeals as of right. The *Criminal Code* procedure applies to *Y.O.A.* appeals; however, unlike the *J.D.A.*, the *Y.O.A.* maintains the distinction between appeals from summary conviction and indictable offences. The provisions of s. 27 of the *Y.O.A.* recognize that young persons affected by the criminal law should have the same appeal rights as adults.

SECTION 27

27. (1) Appeals.—An appeal lies under this Act from a finding of guilt, an order dismissing an information or a disposition made under section 20,

(a) in the case of an indictable offence or an offence that the Attorney General or his agent elects to proceed with as an indictable offence, in the same manner as if the finding of guilt were a conviction, the order dismissing the information were a verdict of acquittal or the disposition were a sentence, in a prosecution by indictment in ordinary court; and

(b) in the case of an offence punishable on summary conviction or an offence that the Attorney General or his agent elects to proceed with as an offence punishable on summary conviction, in the same manner as if the finding of guilt were a conviction, the order dismissing the information were an order dismissing the information or the disposition were a sentence, in proceedings by way of summary conviction in ordinary court.

(2) *Deemed election.*—For the purposes of appeals under this Act, where no election is made in respect of an offence that may be prosecuted by indictment or proceeded with by way of summary conviction, the Attorney General or his agent shall be deemed to have elected to proceed with the offence as an offence punishable on summary conviction.

(3) *Where the youth court is a superior court.*—In any province where the youth court is a superior court, an appeal under paragraph (1)(b) shall be made to the court of appeal of the province.

(4) *Where the youth court is a county or district court.*—In any province where the youth court is a county or district court, an appeal under paragraph (1)(b) shall be made to the superior court of the province.

(5) *Appeal to the Supreme Court of Canada.*—No appeal lies pursuant to paragraph (1)(a) from a judgment of the court of appeal in respect of a finding of guilt or an order dismissing an information to the Supreme Court of Canada unless leave to appeal is granted by the Supreme Court of Canada within twenty-one days after the judgment of the court of appeal is pronounced or within such extended time as the Supreme Court of Canada or a judge thereof may, for special reasons, allow.

(6) *No appeal from disposition on review.*—No appeal lies from a disposition under sections 28 to 32.

Appeals: subsections 27(1), (3), (4), (5) and (6)

Appeal lies as of right from a finding of guilt, an order dismissing an information, or a disposition. Subsection 27(6) of the Y.O.A. provides that there is no appeal from a review of disposition under ss. 28 to 32; because no disposition can be made more onerous under these sections, the substantive rights of the young offender are not affected. There is an appeal from a dispositional review under s. 33, since an additional penalty may be ordered pursuant to that section: see s-s. 33(10).

Subsection 52(2) of the Y.O.A. preserves the summary and indictable character of offences under the Act and different appeal procedures for summary and indictable offences are provided for by s-s. 27(1). Paragraph 27(1)(a) provides that an adjudication or disposition for an indictable offence prosecuted in youth court is the same as if the offence were prosecuted by indictment in ordinary court; thus appeals are governed by the *Criminal Code*, Part XVIII, "Appeals — Indictable Offences."

Under s. 603 of the *Code*, an appeal lies to the provincial court of appeal; appeals may be based on questions of law alone or with leave of the court of appeal on mixed questions of law and fact. In addition, the court of appeal has a discretion to grant leave where other sufficient grounds exist. Leave is required for an appeal regarding disposition alone (para. 603(1)(b) of *Code*). There may be an appeal where the accused is found unfit to stand trial or not guilty by reason of insanity (s-s. 603(2) of *Code*).

Paragraph 27(1)(b) provides that an adjudication or disposition for a summary conviction offence prosecuted in youth court is the same as if the offence were prosecuted summarily in ordinary court; thus the provisions of ss. 747 to 771 of the *Code* govern these appeals. Under these sections of the *Code*, there is some variation between jurisdictions as to which court the appeal lies; in jurisdictions where the youth court is a provincial court, appeals lie to the "appeal court" (as defined in s. 747 of the *Code*), with limited rights of appeal to the court of appeal under s. 771. Subsections 27(3) and (4) of the Y.O.A. specify that in regard to a summary conviction matter, in any province where the youth court is a superior court, an appeal lies to the court of appeal (s-s. 27(3)), and where the youth court is a county or district court, an appeal is made to the superior court of the province (s-s. 27(4)). The provisions of the *Code* in regard to summary matters provide some flexibility as to whether the appeal is on the record, on the basis of a stated case, or even by trial *de novo* (see s. 755 and ss. 761 to 770 of the *Code*).

In addition to the relevant provisions of the *Code*, the appeal procedure will be governed by any applicable provincial criminal appeal rules enacted pursuant to s. 438 of the *Criminal Code*. On appeal procedure generally, see Salhany, *Canadian Criminal Procedure*, 3rd ed. (1978), Chapter 9. The criminal appeal rules for all the provinces are set out in D. Watt, *Criminal Law Precedents*, Vol. 2 (Toronto: Carswell, 1978).

Subsection 27(5) of the Y.O.A. limits recourse to the Supreme Court of Canada. An appeal to the highest court from a judgment of the court of appeal lies only in regard to an adjudication for an indictable offence and not for a disposition, disposition review or adjudication for a summary conviction offence. Further, an appeal to the Supreme Court of Canada requires leave of that

Court; leave must be granted within 21 days, unless the Court grants an extension for "special reasons".

The right of appeal in the Y.O.A. is statutory and extends only to the specific matters set out in the Act. A number of decisions cannot be appealed, for example, an order of exclusion from the court under s. 39, or a decision under para. 40(2)(e) regarding disclosure of records. Some sections of the Y.O.A. create specific appeal or review procedures for certain decisions, for example s-s. 16(9) to (13), which govern review of a transfer decision by a higher court. There may also be a possibility of judicial review of some decisions of youth courts through the use of prerogative writs, even in the absence of express statutory provision in the Y.O.A.

Deemed election: subsection 27(2)

Where no election is made in respect of a "hybrid offence" (an offence which can be proceeded with on indictment or summarily), s-s. 27(2) deems that the prosecutor has elected to proceed with the offence as an offence punishable on summary conviction. This accords with jurisprudence on this matter dealing with adult offenders. Although para. 27(1)(a) of the *Interpretation Act* deems an offence to be an indictable offence until the Crown elects otherwise, if no election is endorsed on the record and the trial proceeds, the offence will be deemed a summary conviction offence. (See Salhany, *Canadian Criminal Procedure*, 3rd ed. (1978), pp. 231-32 and cases cited there.) As a consequence of this rule, the Crown should consider exercising its right to elect at the first opportunity; in any event the Crown must elect before the accused enters his plea. See D. A. MacDougall, "The Crown Election" (1979), 5 C.R. (3d) 315.