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REVIEW OF DISPOSITIONS
(Sections 28 to 34)

Introduction

The disposition review provisions of the Y.O.A. are set out in sections 28 to 34. The function of a review is to ascertain whether a disposition is still appropriate after some time has elapsed or circumstances have changed or to provide for proper enforcement in cases of wilful failure to comply with a disposition. This accords with the principles of the Y.O.A. that dispositions are to be geared to needs which may change (para. 3(1)(c)), and that young persons are guaranteed the right to the least possible interference with their freedom that is consistent with the protection of society (para. 3(1)(f)).

Sections 28 to 34 form a procedural code; review is available to the young person under one of these sections. Review of custodial dispositions is available pursuant to ss. 28 and 29. Under s. 28, there is an automatic review by a youth court after one year. Upon request, review may take place after six months from the date of the disposition or earlier, with leave of the court, where the young person has made progress with the disposition, there has been a change in circumstances or where the young person can otherwise satisfy the youth court that grounds for review exist.

Section 29 provides a procedure that allows the provincial director to make a recommendation for release of the young person from custody. If the provincial director's recommendation is acceptable to the court, it is not necessary to conduct a hearing or to make a court appearance.

Under s. 30, review of custodial dispositions may be carried out by provincial review boards. These boards are empowered to take over the s. 28 and 29 functions of a youth court, other than the release of a young person from custody to probation, which must be effected by the court. Any decision of a review board is made reviewable by a youth court under s. 31.

Review of non-custodial dispositions is governed by s. 32. The youth court may confirm or vary non-custodial dispositions on

review; as well the court is empowered to terminate the disposition outright, unlike the situation under ss. 28 and 29. Provincial review boards have no jurisdiction to review non-custodial dispositions.

Review under ss. 28 to 32 may not result in a more onerous disposition. Section 33 is the only provision for review allowing for the imposition of a more severe disposition. Review under s. 33 can occur only where there has been a wilful failure or refusal to comply with the disposition or the young person has escaped or attempted to escape from custody, and any such allegation must be proved beyond a reasonable doubt.

The provisions for review of disposition under the Y.O.A. contrast with the provisions of the *Juvenile Delinquents Act*, which are less structured and broader. According to s-s. 20(3) of the *J.D.A.*, once adjudged delinquent, a juvenile can be brought back before the Juvenile Court at any time before he is 21; the Court may then make any disposition listed in s-s. 20(1). The review provisions of the *J.D.A.* are potentially subject to abuse. For example, there is no duty on the Court to carry out a full hearing regarding allegations of wilful breach of a disposition. Moreover, at the time of review under the *J.D.A.*, a delinquent may be subject to transfer to adult court pursuant to s. 9.

The Y.O.A. sets out a number of procedures that must be followed upon review, thus ensuring that the young person has a fair hearing. Provision is made for such matters as notice, and progress reports are required to provide the court with adequate information about the young person. At every stage of review proceedings, the young person has the right to counsel. The possibility of transfer to ordinary court at the time of review does not exist under the Y.O.A.

It should be noted that a disposition review under ss. 28, 29, 31 to 33 need *not* be conducted by the youth court judge who made the initial disposition. See discussion following s. 64, substitution of judges.

Youth court hearing to review custody

SECTION 28

28. (1) *Automatic review of disposition involving custody.*— Where a young person is committed to custody pursuant to a

disposition made in respect of an offence for a period exceeding one year, the provincial director of the province in which the young person is held in custody shall cause the young person to be brought before the youth court forthwith at the end of one year from the date of the most recent disposition made in respect of the offence, and the youth court shall review the disposition.

(2) *Idem.*—Where a young person is committed to custody pursuant to dispositions made in respect of more than one offence for a total period exceeding one year, the provincial director of the province in which the young person is held in custody shall cause the young person to be brought before the youth court forthwith at the end of one year from the date of the earliest disposition made, and the youth court shall review the dispositions.

(3) *Optional review of disposition involving custody.*—Where a young person is committed to custody pursuant to a disposition made in respect of an offence, the provincial director may, on his own initiative, and shall, on the request of the young person, his parent or the Attorney General or his agent, on any of the grounds set out in subsection (4), cause the young person to be brought before the youth court at any time after six months from the date of the most recent disposition made in respect of the offence or, with leave of a youth court judge, at any earlier time, and, where the youth court is satisfied that there are grounds for the review under subsection (4), the court shall review the disposition.

(4) *Grounds for review under subsection (3).*—A disposition made in respect of a young person may be reviewed under subsection (3)

(a) on the ground that the young person has made sufficient progress to justify a change in disposition;

(b) on the ground that the circumstances that led to the committal to custody have changed materially;

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

(d) on such other grounds as the youth court considers appropriate.

(5) *No review where appeal pending.*—No review of a disposition in respect of which an appeal has been taken shall be made under this section until all proceedings in respect of any such appeal have been completed.

(6) *Youth court may order appearance of young person for review.*—Where a provincial director is required under subsections (1) to (3) to cause a young person to be brought before the youth court and fails to do so, the youth court may, on application made by the young person, his parent or the Attorney General or his agent, or on its own motion, order the provincial director to cause the young person to be brought before the youth court.

(7) *Progress report.*—The youth court shall, before reviewing under this section a disposition made in respect of a young person, require the provincial director to cause to be prepared, and to submit to the youth court, a progress report on the performance of the young person since the disposition took effect.

(8) *Additional information in progress report.*—A person preparing a progress report in respect of a young person may include in the report such information relating to the personal and family history and present environment of the young person as he considers advisable.

(9) *Written or oral report.*—A progress report shall be in writing unless it cannot reasonably be committed to writing, in which case it may, with leave of the youth court, be submitted orally in court.

(10) *Provisions of subsections 14(4) to (10) to apply.*—The provisions of subsections 14(4) to (10) apply, with such modifications as the circumstances require, in respect of progress reports.

(11) *Notice of review from provincial director.*—Where a disposition made in respect of a young person is to be reviewed under subsection (1) or (2), the provincial director shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person, his parents and the Attorney General or his agent.

(12) *Notice of review from person requesting it.*—Where a review of a disposition made in respect of a young person is requested under subsection (3), the person requesting the review shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person, his parents and the Attorney General or his agent.

(13) *Statement of right to counsel.*—Any notice given to a parent under subsection (11) or (12) shall include a statement that

the young person whose disposition is to be reviewed has the right to be represented by counsel.

(14) ***Service and form of notice.*****—A notice under subsection (11) or (12) may be served personally or may be sent by registered mail and, in the case of a notice to a young person, may be in Form 11 and, in any other case, may be in Form 12.**

(15) ***Notice may be waived.*****—Any of the persons entitled to notice under subsection (11) or (12) may waive the right to such notice.**

(16) ***Where notice not given.*****—Where notice under subsection (11) or (12) is not given in accordance with this section, the youth court may**

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

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

(17) ***Decision of the youth court after review.*****—Where a youth court reviews under this section a disposition made in respect of a young person, it may, after affording the young person, his parents, the Attorney General or his agent and the provincial director or his agent an opportunity to be heard, having regard to the needs of the young person and the interests of society,**

(a) confirm the disposition;

(b) where the young person is in secure custody, by order direct that the young person be placed in open custody; or

(c) release the young person from custody and place him on probation in accordance with section 23 for a period not exceeding the remainder of the period for which he was committed to custody.

(18) Form of disposition.—A disposition made under subsection (17) may be in Form 13.

Automatic review of custodial dispositions: subsections 28(1) and (2)

Section 28 provides for a review hearing by a youth court where a young person has been committed to custody. Review is mandatory at the end of one year from disposition, where the young person has been committed to custody for a period of more than one year.

Under s-s. 28(1), a duty is placed on the provincial director to cause a young person committed to custody for more than one year to be brought before a youth court at the end of one year. This automatic review is included in the Act to ensure that the disposition remains relevant to the needs of the young person and also to make the most effective use of resources.

If a young person is committed to custody as a result of dispositions for more than one offence, s-s. 28(2) provides for mandatory review at "the end of one year from the date of the earliest disposition made." Subsection 28(2) applies if all of the dispositions are made at one hearing and applies to all consecutive or concurrent custodial dispositions, exceeding a total period of one year. It also applies if there is an initial custodial disposition, and one or more subsequent custodial dispositions are made while the first one is still in effect, so that the total of the custodial dispositions exceeds one year.

Optional review: subsections 28(3) and (4)

Subsection 28(3) provides for a review of custodial dispositions earlier than the one-year period specified in s-ss. 28(1) and (2). There is a right to apply for a review before a youth court at any time after six months from the date of the most recent disposition or dispositional review in respect of the offence. The review may be initiated by the provincial director on his own motion. Alternatively, the young person, his parent, or the Attorney General or his agent, may request that the provincial director cause the young person to be brought before the youth court; the provincial director must comply with such a request. Grounds for a disposition review under s-s. 28(3) are set out in s-s. 28(4), and are as follows: the young person has made sufficient progress to justify a change in disposition; circumstances that led to the committal to custody have changed materially; new services are available; or "on such other grounds as the youth court considers appropriate." If any of these grounds are established, the youth court must review the disposition.

It is also possible for the provincial director, the young person, his parent, or the Attorney General or his agent, to seek youth court review of a custodial disposition at an earlier time, before the expiration of six months from the most recent disposition or last review. Leave of a youth court judge is required before such a

review occurs; the youth court judge must be satisfied that there are grounds for review under s-s. 28(4). Leave for a review hearing may be granted after giving the parties an opportunity to make summary representations, or presumably may be dealt with on the basis of written submissions.

No review where appeal pending: subsection 28(5)

Subsection 28(5) makes clear that appeal proceedings must be completed before a review of disposition can take place under s-ss. 28(1) to (3).

Failure of provincial director to cause appearance of young person: subsection 28(6)

Subsection 28(6) provides a remedy if the provincial director fails to cause a young person to be brought before the youth court, as required by s-ss. 28(1) to (3). In such an instance, the young person, his parent, or the Attorney General or his agent may apply to a youth court for an order requiring the provincial director to bring the young person before the court; as well, the youth court may make such an order on its own motion. Breach of a youth court order made pursuant to s-s. 28(6) would constitute contempt of court and would be punishable as such under s. 47 of the Y.O.A.

Progress reports: subsections 28(7) to (10)

Subsection 28(7) requires that prior to a review hearing under s. 28 a progress report shall be prepared and submitted to the youth court on the performance of the young person since the disposition took effect. The provincial director is officially responsible to cause the report to be prepared; the youth court worker will usually be charged with its preparation. The object of the report is to provide the court with adequate information about the young person to facilitate the review procedure. Subsection 28(8) permits the author to include "such information relating to the personal and family history and present environment of the young person as he considers advisable." There is flexibility regarding the contents of the report according to this formula.

Subsection 28(9) requires a progress report to be in writing, "unless it cannot reasonably be committed to writing"; with

leave of the court in such circumstances a progress report may be submitted orally in court. If a lack of time or resources necessitates oral submission of a progress report, the parties should, where possible, be informed of its contents before presentation of the report so that they will be put on notice and can respond to it. A judge may consider an adjournment in preference to allowing an oral report if a party objects to its submission as it is more difficult for a party to prepare to challenge an oral report than a written one.

Subsection 28(10) provides that the procedural provisions of s-ss. 14(4) to (10), dealing with pre-disposition reports, are adopted in regard to progress reports "with such modifications as the circumstances require." By adopting the provisions of s-s. 14(4), a progress report is specifically made part of the youth court record. Provision is made for distribution of the report to the young person, a parent in attendance at court, the young person's counsel and the prosecutor (para. 14(5)(a)). If a parent is not in attendance but is taking an active interest in the proceedings, the youth court may cause a copy of the report to be given to the parent (para. 14(5)(b)). The opportunity to cross-examine the person who made the report is given to the young person, his counsel or an adult who is assisting the young person pursuant to s-s. 11(7), and the prosecutor (s-s. 14(6)).

Further dissemination of the progress report is permitted by the adoption of s-ss. 14(8) and (9). The first provision allows copies or transcripts of the report to be furnished to "any court that is dealing with matters relating to the young person" and to "any youth worker to whom the young person's case has been assigned"; as well, the court may furnish the report, or a part thereof, to any person who in the opinion of the court has a valid interest in the proceedings. Subsection 14(9) operates so as to permit the provincial director to make the progress report available to a person supervising or having custody of the young person, or to a person who is directly assisting in the care or treatment of the young person.

The application of s-s. 14(10) generally forbids the use in evidence of any statement made by a young person in the course of preparation of a progress report in any civil or criminal proceedings, except for the purposes of a proceeding under s. 16 (transfer), s. 20 (disposition) or ss. 28 to 32 (disposition review).

For a more complete discussion on s-ss. 14(4) to (19), see the discussion under s. 14 "Pre-disposition report."

Notice of review: subsections 28(11) to (16)

The Y.O.A. contains detailed provisions to ensure that adequate notice of review proceedings is given to the young person, his parents and the Attorney General or his agent. The legislation uses the word "parents," and presumably includes all parents of the young person. If there are difficulties in locating or notifying all parents, s-s. 28(16) provides for substituted service or dispensing with notice. Subsection 28(11) specifies that "such notice as may be directed by rules of court applicable to the youth court" must be given. If notice is not dealt with by rules of court enacted pursuant to ss. 67 or 68 of the Y.O.A., a minimum of five clear days' notice of review must be given in writing to each of the persons mentioned in s-s. 28(11).

Subsection 28(11) imposes responsibility upon the provincial director to see that notice is given of a review commenced pursuant to s-s. 28(1) or (2). An equivalent responsibility is placed on "the person requesting the review" by s-s. 28(12), where review is initiated before one year under s-s. 28(3). Subsection 28(13) provides that notice to parents must include a statement advising the parents that the young person has the right to be represented by counsel. Subsection 11(9) requires the same statement on any notice of review of disposition given to the young person.

Notice under s-s. 28(11) or (12) may be sent by registered mail or served personally according to s-s. 28(14). Subsection 62(1) of the Y.O.A. provides that service "may be proved by oral evidence given under oath by, or by the affidavit or statutory declaration of, the person claiming to have personally served it or sent it by mail." A notice to a young person may be in Form 11. Notice to any other person may be in Form 12: see samples at the end of discussion of s. 28.

Any person entitled to notice under s-s. 28(11) or (12) may waive his right to notice pursuant to s-s. 28(15). In the event that notice is not given in accordance with s. 28, the youth court may, pursuant to s-s. 28(16), make an order dispensing with service of notice or it may adjourn the proceedings to allow time for notice to be served in accordance with the direction of the court. The provisions for substitutional service and the dispensing of notice

are similar to the provisions in s. 9 governing notice to parents: see the discussion of s-s. 9(10).

Decision of the youth court: subsections 28(17) and (18)

Before making a new disposition or confirming the old disposition, the youth court must afford the young person, his parents, the Attorney General or his agent and the provincial director or his agent an opportunity to be heard pursuant to s-s. 28(17). This provision ensures that the rules of natural justice apply to reviews, with all parties having the right to call witnesses and cross-examine the witnesses called by other parties. Even though the right to a hearing is guaranteed, the strict rules of evidence do not apply to dispositional hearings. See comments above on the conduct of a disposition hearing under s. 20.

No disposition imposed on review under s. 28 may be more onerous than the original disposition. The youth court is limited to three options on review: it may confirm the disposition; it may change the level of custody from secure to open; and it may release the young person from custody and place him on probation for a period not exceeding the remainder of the period for which he was committed to custody. Note also that there is no provision for outright release from custody, without a period of probation. A further review under s. 32 would be necessary to secure the termination of probation.

In deciding whether to release a young person from custody, or to reduce the level of custody, the youth court must have regard to "the needs of the young person and the interests of society." The court should consider the Declaration of Principles, set out in s. 3, and will doubtless refer to the factors mentioned in s-s. 28(4). The court will thus consider whether the young person has made sufficient progress to justify a change in disposition, whether the circumstances that led to the commission of the offence have materially changed, and whether new services or programs that were not available at the time of disposition are now available. The court may consider any other factors it considers appropriate. In assessing these factors, the court must consider the interest of society and the needs of the young person.

Subsection 28(18) permits the use of Form 13 for a disposition made under s-s. 28(17). See sample forms on the following pages.

SAMPLE FORM

FORM 11
THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO

NOTICE TO YOUNG PERSON OF REVIEW
OF DISPOSITION

Canada
Province of Ontario
County of Queens

To: Mary Powell of 425 Blair Road, Anytown, Ontario , a young person within the meaning of the *Young Offenders Act*,

Whereas on the 26th day of August 19 82 , you were 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, contrary to Section 294(a) of the *Criminal Code of Canada*;

And whereas by order of disposition dated the 15th day of September 19 82, it was ordered;

that Mary Powell be committed to secure custody in the County of Queens Youth Centre for a period of sixteen months commencing on the 16th day of September, 1982.

And whereas a review of the disposition is required pursuant to subsection 28(1) of the *Young Offenders Act*:

This is therefore to notify you that the review will be heard before the Youth Court at 100 Main Street, Anytown, Ontario on Monday the 19th day of September 19 83 , at 10:00 o'clock in the fore noon;

And this is to notify you that you have the right to be represented by counsel.

Dated this 8th day of September 19 83 at Anytown in the Province of Ontario.

"James Flynn"
.....
A Judge of the Youth Court

SAMPLE FORM

FORM 12
THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO

NOTICE OF REVIEW OF DISPOSITION

Canada
Province of Ontario
County of Queens

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

Whereas on the 28th day of June 19 82 , David Smith was 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 whereas by probation order dated the 8th day of July 19 82 , it was ordered:

1. that David Smith be placed on probation commencing on the date of that order for a period of twenty months and subject to the conditions therein prescribed; and
2. that David Smith perform, at the Anytown Community Centre, two hours per week of community service for a period of twenty months as described in the order.

And whereas an application has been made by John Smith for a review of the disposition;

This is therefore to notify you that the review will be heard before the Youth Court on Tuesday the 16th day of January 19 83 , at 10:00 o'clock in the fore noon:

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

And this is to notify you that you or any other person who 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 and control of David Smith may appear at the hearing and will be given an opportunity to be heard.

Dated this 8th day of January 19 83 , at Anytown in the Province of Ontario.

"Thomas Brown"

.....

A Judge of the Youth Court

SAMPLE FORM

FORM 13
THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO

DISPOSITION ON REVIEW

Canada
Province of Ontario
County of Queens

Whereas on the 26th day of August 19 82 , you were 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, contrary to Section 294(a) of the *Criminal Code of Canada*.

And whereas by order of disposition dated the 15th day of September 19 82 , it was ordered

that Mary Powell be committed to secure custody in Anytown Group Home for a period of sixteen months commencing on the 16th day of September, 1982:

And whereas a review of the disposition has been heard by the Youth Court

Be it remembered that on the 29th day of March 19 83 , I, James Flynn , Judge of the Youth Court, following the review ordered:

Mary Powell be committed to open custody in the County of Queens Youth Centre for the remainder of the period prescribed in the order of disposition dated the 15th day of September, 1982.

Dated this 29th day of March 19 83 , at Anytown in the Province of Ontario.

"James Flynn"
.....
A Judge of the Youth Court

Release from custody on recommendation of provincial director: section 29

SECTION 29

29. (1) *Recommendation of provincial director for probation.*—Where a young person is held in continuous custody pursuant to a disposition, the provincial director may, if he is satisfied that the needs of the young person and the interests of society would be better served if the young person were released from custody and placed on probation, cause notice in writing to be given to the young person, his parents and the Attorney General or his agent that he recommends that the young person be released from custody and placed on probation and give a copy of the notice to the youth court, and the provincial director shall include in the notice the reasons for his recommendation and the conditions that he would recommend be attached to a probation order.

(2) *Application to court for review of recommendation.*—A youth court shall, where notice of a review of a disposition made in respect of a young person is given under subsection (1), on the application of the young person, his parents or the Attorney General or his agent made within ten days after service of the notice, forthwith review the disposition.

(3) *Subsections 28(5), (7) to (10) and (12) to (18) apply.*—Subsections 28(5), (7) to (10) and (12) to (18) apply with such modifications as the circumstances require, in respect of reviews made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

(4) *Where the court does not review the disposition.*—A youth court that receives a notice under subsection (1) recommending that a young person be released from custody and placed on probation shall, if no application for a review is made under subsection (2),

(a) release the young person and place him on probation in accordance with section 23, in which case the court shall include in the probation order such conditions referred to in that section as it considers advisable having regard to the recommendations of the provincial director; or

(b) where the court deems it advisable, make no direction under this subsection unless the provincial director requests a review under this section.

(5) *Where the provincial director requests a review.*—Where the provincial director requests a review under paragraph (4)(b),

(a) the provincial director shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the young person, his parents and the Attorney General or his agent; and

(b) the youth court shall forthwith, after the notice required under paragraph (a) is given, review the disposition.

(6) *Form of notice.*—A notice given under subsection (1) may be in Form 14.

Recommendation of provincial director for probation: subsections 29(1), (2), (4) and (5)

Section 29 provides that the provincial director may initiate a young person's release from custody to probation by making a recommendation for release to the youth court. The provincial director may thus play a major part in bringing about early release. The granting of the power to the provincial director to initiate early release without going so far as to permit him to alter unilaterally a custodial disposition is consistent with the complementary roles of the judiciary and juvenile correctional services, and recognizes that ultimate control over dispositions rests with the judiciary.

Detailed procedures are set out in s. 29 to ensure that the rights and interests of a young person, his parents and society are safeguarded. Notice of the provincial director's recommendation must be given to the young person, his parents, and the Attorney General or his agent, and where applicable, to the review board pursuant to s-s. 30(3). A copy of the notice must be given to the youth court. Subsection 29(1) specifies that the reasons for the provincial director's recommendation must be included in the notice, as must the conditions that the provincial director recommends for the young person's probation order.

Within ten days of the receipt of the provincial director's notice recommending release of the young person from custody on probation pursuant to s-s. 29(1), the young person, his parents, or the Attorney General or his agent, may apply to the youth court for a review hearing to consider the matter.

If no application is made for a review hearing, the youth court has two options under s-s. 29(4). The youth court may follow a provincial director's recommendation and release the young per-

son from custody, placing him on probation on such terms as it considers advisable having regard to the recommendations of the provincial director; however, the court is not bound by the conditions of probation suggested by the provincial director. Alternatively, the youth court, where it deems it advisable, may make no direction unless the provincial director requests a review. Thus if the judge is of the opinion that a hearing is necessary, he may decline to make any order. The provincial director then has the option of requesting a review or abandoning or postponing his recommendation to release. Should the provincial director request a review under para. 29(4)(b), para. 29(5)(a) provides that notice must be given to the young person, his parents, and the Attorney General or his agent. Subsection 30(3) provides that where applicable, notice be given to a review board. Notice must be in accordance with the rules of court made pursuant to s. 67 or 68; if no rules of court apply, a minimum of five clear days' notice must be given. After the notice required by para. 29(5)(a) is given, the youth court shall forthwith hold a review hearing.

Procedure on review: subsections 29(3) and (6)

A youth court hearing is required in order to consider a provincial director's recommendation to release a young person from custody on probation if a review is sought by the young person, his parents or the Crown under s-s. 29(2). Alternatively, a hearing must be held where a judge refuses to accept the recommendation and the provincial director requests a review under para. 29(4)(b). The conduct of such a review hearing is governed by s-s. 29(3), which adopts many of the provisions of s. 28, making review hearings under the two sections quite similar.

One such provision, adopted in s-s. 29(3), is found in s-s. 28(5), providing that no review can take place in respect of a disposition that is being appealed until all appeal proceedings have been completed.

A progress report on the young person's performance since the disposition took effect must be prepared and submitted to the court; the provisions of s-ss. 28(7) to (10) apply to such reports. Information in the report may relate to the young person's personal history, his family history and his present environment. The report is to be in writing, with leave of the court, an oral report may be submitted. The report is part of the youth court

record. The young person, a parent in attendance, his counsel and the prosecutor must receive copies of a written report prior to the hearing, and a parent with an active interest may receive a copy (s-s. 14(5)). Cross-examination of the author of the report is specifically provided for.

Copies of the progress report shall be supplied on request to other courts dealing with the young person and to a youth court worker assigned to the young person's case. Copies may be supplied on request to any person who, in the opinion of the court, has a valid interest in the proceedings — for example, a person supervising the young person or directly assisting in his care or treatment. Any statement made by the young person in the preparation of a progress report may not be used in civil or criminal proceedings, except under s. 16 (transfer), s. 20 (disposition) or ss. 28 to 32 (disposition review).

The person requesting review must comply with the notice requirements set out in s-ss. 28(12) to (16), with such modifications as the circumstances require; as well, the person requesting review shall give notice to the provincial director pursuant to s-s. 29(3). Such notice as the rules of court require, or at least five clear days' notice if no rules have been made, is mandatory. Any notice given to a parent or young person must include a statement of the young person's right to counsel; notice may be served personally or sent by registered mail. The right to notice may be waived. Where notice has not been given, in accordance with s-s. 28(16), the youth court may order an adjournment so notice may be given as directed, or the court may dispense with notice altogether. Notice to a young person may be in Form 11. Notice to a parent, the Attorney General or his agent or the provincial director may be in Form 12. See sample forms at the end of comments.

Subsection 29(3) also incorporates the provisions of s-s. 28(17), which ensure the young person, his parents, the Attorney General or his agent, and the provincial director or his agent, have an opportunity to be heard. As well, the effect of s-s. 28(17) is that no disposition imposed on review may be more onerous than the disposition under review. After a review under s. 29, the youth court may change the level of custody from secure to open custody, release the young person and place him on probation or confirm the disposition. In deciding on the appropriate course of action, the youth court shall have regard to "the needs of the

young person and the interests of society"; the court should also consider the factors set out in s-s. 28(4).

A disposition under s. 29 may be in Form 13: see p. 239. A notice under s-s. 29(1) may be in Form 14: see sample below.

As the procedure for a s. 29 hearing largely adopts the procedure for the conduct of a s. 28 hearing, reference should be made to the discussion following that section.

SAMPLE FORM

FORM 14
THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO

NOTICE BY PROVINCIAL DIRECTOR OF INTENTION TO RELEASE YOUNG PERSON FROM CUSTODY

Canada
Province of Ontario
County of Queens

To: Mary Powell of 452 Blair Road, Anytown, Ontario, a young person within the meaning of the *Young Offenders Act*:

Whereas on the 26th day of August 19 82, you were 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, contrary to Section 294(a) of the *Criminal Code of Canada*;

And whereas by order of disposition dated the 15th day of September 19 82, it was ordered

that Mary Powell be committed to secure custody in County of Queens Youth Centre for a period of sixteen months commencing on the 16th day of September, 1982:

And whereas it appears that the needs of Mary Powell and the interests of society would be best served if Mary Powell were released from custody and placed on probation for the remainder of the disposition;

This is therefore to notify you that I recommend that Mary Powell be released from custody and placed on probation by the Youth Court;

And this is also to notify you that unless you or any other party entitled to apply to the Youth Court or the Review Board established or designated for the purposes of section 30 of the *Young Offenders Act*, if any, for a review of the disposition so applies within a period of ten days from the date of service of this notice Mary Powell will in accordance with subsection 29(4) of the *Young Offenders Act* be placed on probation by the Youth Court at the expiry of that period:

And this is also to notify you that I recommend that Mary Powell be placed on probation for the following reasons:

1. The progress report indicates that Mary Powell has participated in drug abuse programs during her period in custody and has responded well to them;
2. Mary Powell has re-established a relationship with her mother, Mrs. Helen Powell, and intends to return to her mother's home. Mrs. Powell, for her part, feels that Mary would now be better off with her;
3. Mary Powell has indicated a desire to continue her education at Great Lakes Community College;
4. Mary Powell has during her stay in custody improved her attitude and is now prepared to get on with her life without drugs;
5. The youth worker from the County of Queens Youth Centre feels that nothing is to be gained by Mary Powell's continued committal to custody.

And this is to notify you that I recommend the following conditions to Mary Powell's probation order:

1. that Mary Powell live at her mother's residence at 452 Blair Road, Anytown, Ontario; and
2. that Mary Powell attend the drug abuse program conducted at the Regional Drug Research Centre, Anytown, Ontario.

Dated this 8th day of February 19 83, at Anytown in the Province of Ontario.

"J. Paul Henry"

.....

Provincial Director

Review boards: sections 30 and 31

Sections 30 and 31 allow individual provinces to establish review boards to carry out the "duties and functions of a youth court" under ss. 28 and 29 in regard to review of a custodial disposition. A review board does not have the authority to release a young person from custody and place him on probation, although it can recommend to a youth court that the young person be released from custody and placed on probation. If the young person, his parents, the provincial director or the Crown do not object to the recommendation, a youth court must follow the recommendation of a review board to release the young person and place him on probation, though the youth court may decide to impose any conditions of probation it considers advisable, having regard to the recommendations of the review board.

The review board's jurisdiction is limited to review of custodial dispositions. Alteration of non-custodial dispositions is entirely in the hands of the youth court under ss. 32 and 33. The review board's "duties and functions" include the holding of a hearing at which the young person, his parents, the Crown and the provincial director have an opportunity to be heard. Section 11 of the Y.O.A. assures the young person of the right to representation at a review board hearing. There are provisions in s. 30 ensuring that those involved receive adequate notice of the proceedings. There must be a progress report prepared for the review board hearing, and the parties must have an opportunity to cross-examine the maker of the report.

Where there is no application made to the youth court for a review hearing, the review board's recommendation goes into effect without a court hearing. If, however, an application for review is made by the young person, his parents, the Crown or the provincial director, the youth court must conduct a hearing pursuant to s. 31 to consider the recommendation. The Y.O.A. does not specify the exact nature of the review to be conducted by the youth court; however, it is evident that s-s. 31(2) requires a full hearing rather than simply a review on the record of the board's proceedings. Subsection 31(2) incorporates the provisions for notice, requires the submission of a progress report and affords those involved an opportunity to be heard as set out in s-ss. 28(7) to (10) and (12) to (18). Section 11 guarantees the young person's right to counsel at such a youth court hearing.

The effect of ss. 30 and 31 is to allow provinces to set up review boards to consider whether a custodial disposition should be continued. The members of the boards need not have legal training, and may bring other special expertise to the issue. The proceedings need not follow strict procedural and evidentiary rules which govern trials in youth court. Although proceedings before a review board may be relatively informal compared to those in a youth court, a board must comply with certain procedural standards. The Y.O.A. specifies many of the procedures to be followed, for example in regard to affording those involved, notice and an opportunity to be heard, and providing the young person with a right to counsel. Further, it is submitted that as a review board is required under s-s. 30(1) to "carry out the duties and functions of a youth court" under ss. 28 and 29, it is a tribunal carrying out an essentially judicial function. Hence, in addition to the statutory requirements, the review board is to follow the rules of natural justice and might be well advised to follow similar procedural standards as would normally be expected in a dispositional hearing conducted by a youth court.

In any event, the Y.O.A. ensures a degree of judicial control over the review board process, and guarantees a right to review by a youth court if any of the parties involved are dissatisfied with the recommendations of a review board.

SECTION 30

30. (1) ***Review board.*—Where a review board is established or designated by a province for the purpose of this section, that board shall, subject to this section, carry out in that province the duties and functions of a youth court under sections 28 and 29 other than releasing a young person from custody and placing him on probation.**

(2) ***Other duties of review board.*—Subject to this Act, a review board may carry out any duties or functions that are assigned to it by the province that established or designated it.**

(3) ***Notice under section 29.*—Where a review board is established or designated by a province for the purposes of this section, the provincial director shall at the same time as any notice is given under subsection 29(1) cause a copy of the notice to be given to the review board.**

(4) ***Notice of decision of review board.*—A review board shall cause notice of any decision made by it in respect of a young**

person pursuant to section 28 or 29 to be given forthwith in writing to the young person, his parents, the Attorney General or his agent and the provincial director, and a copy of the notice to be given to the youth court.

(5) *Decision of review to take effect where no review.*—Subject to subsection (6), any decision of a review board under this section shall take effect ten days after the decision is made unless an application for review is made under section 31.

(6) *Decision respecting release from custody and probation.*—Where a review board decides that a young person should be released from custody and placed on probation, it shall so recommend to the youth court and, if no application for a review of the decision is made under section 31, the youth court shall forthwith on the expiration of the ten day period referred to in subsection (5) release the young person from custody and place him on probation in accordance with section 23, and shall include in the probation order such conditions referred to in that section as the court considers advisable having regard to the recommendations of the review board.

(7) *Form of notice of decision of review board.*—A notice of a decision of the review board under this section may be in Form 15.

SECTION 31

31.(1) *Review by youth court.*—Where the review board reviews a disposition under section 30, the youth court shall, on the application of the young person in respect of whom the review was made, his parents, the Attorney General or his agent or the provincial director, made within ten days after the decision of the review board is made, forthwith review the decision.

(2) *Subsections 28(5), (7) to (10) and (12) to (18) apply.*—Subsections 28(5), (7) to (10) and (12) to (18) apply, with such modifications as the circumstances require, in respect of reviews made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

Composition and duties of review boards: subsections 30(1) and (2)

Section 30 of the Y.O.A. permits a province to set up a "review board" to carry out the responsibilities of a youth court in regard to review of custodial dispositions of young persons. If a province chooses to have a review board, it must determine its composition, either establishing a completely new tribunal, or

designating an existing body as a "review board". Subsection 30(1) provides that the board shall, "subject to this section, carry out ... the duties and functions of a youth court under sections 28 and 29 other than releasing a young person from custody and placing him on probation."

A review board may hold a review hearing under s. 28 (automatic and optional review) and confirm the original custodial disposition or direct that where a young person has been in secure custody be instead placed in open custody (paras. 28(17)(a) and (b)). The board cannot directly order the release of a young person from custody and place him on probation as a youth court may do under para. 28(17)(c). The review board may only make a recommendation to this effect to the youth court which is bound to follow the recommendation for release, unless a request for review is made. In implementing a recommendation for release, the court may impose such conditions of probation as it considers advisable, having regard to the recommendations of the board (s-s. 30(6)).

Where a province has established a review board, it would also have jurisdiction under s. 29. In exercising this jurisdiction, the board would have to assess a provincial director's recommendation for release, and would, upon receipt of an application, conduct a review hearing pursuant to s-s. 29(2). The board cannot, however, order the release of a young person and place him on probation; the release must be effected by the youth court pursuant to s-s. 30(6).

Subsection 30(2) provides that "[s]ubject to this Act, a review board may carry out any duties or functions that are assigned to it by the province ...". Thus, in addition to the board's review jurisdiction, a province may assign other duties falling within the jurisdiction of provincial authorities.

The duties of a review board include ensuring that a progress report is prepared and is considered by the board, and that all those entitled are given a copy and an opportunity to cross-examine the person who prepared the report (s-ss. 28(7) to (10)). The board must also ensure that the notice provisions of s-ss. 28(11) to (16) are complied with.

Section 11 of the Y.O.A. applies to review board hearings, thus a young person must be advised of his right to obtain counsel and must be given a reasonable opportunity to obtain counsel.

Furthermore, if a young person wishes to obtain counsel but is unable to do so, either on his own or after reference to a legal aid or assistance program, the board must make a direction for the appointment of counsel.

A review board has a "duty to act fairly" and it seems clear that a review board has a duty to comply with the rules of natural justice: see *Re Abel and Advisory Review Board* (1980), 31 O.R. (2d) 520, 119 D.L.R. (3d) 101 (C.A.). Thus, a young person should have a right in proceedings before a review board to challenge evidence, cross-examine witnesses and call his own evidence. Any legislation, whether federal or provincial, which governs review boards is subject to the *Charter of Rights*, in particular s. 7 of the *Charter* which provides: "Everyone has the right . . . to liberty and security of person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Notice: subsection 30(3)

To ensure that any review board which is set up is kept informed about development in regard to young persons in custody, s-s. 30(3) requires the provincial director to cause a copy of any notice given under s-s. 29(1) to be given to the review board. Subsection 29(1) requires that the provincial director give notice to various persons of his recommendations that a young person be released from custody and placed on probation. If no request is made under s-s. 29(2) for a review hearing, the young person must be released pursuant to the recommendation of the provincial director, although the terms of probation may be varied by the youth court.

Notice of decision of review board: subsection 30(4)

Subsection 30(4) provides that notice of any decision made by the review board under s. 28 or 29 must be given "forthwith in writing to the young person, his parents, the Attorney General or his agent and the provincial director." The youth court is also to receive a copy of the notice.

Effect of decision of review board: subsections 30(5) and (6)

The recommendation of the review board goes into effect ten days after the decision is made, according to s-s. 30(5), unless an

application for a review hearing by a youth court is made under s. 31. Thus, for example, if the board recommends release from secure custody into open custody, the order will take effect ten days after the board's decision unless review is sought under s. 31. Subsection 30(6) provides an exception to the s-s. 30(5) procedure where the decision of the review board is to recommend the young person's release from custody to probation. In such a case s-s. 30(6) provides that the youth court must follow the board's recommendation and release the young person unless an application for a review hearing concerning the board's decision is made within ten days. In making the probation order, however, the court may impose such conditions as it "considers advisable having regard to the recommendations of the review board." If a request for review is made, the provisions of s. 31 apply. Notice of a decision of a review board may be in Form 15.

SAMPLE FORM

FORM 15
THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ATHABASKA

NOTICE OF DECISION BY REVIEW BOARD

Canada
Province of Athabaska
County of Kings

To: Jacques Labonte of 1880 Rue Regent Street, Centreville, Athabaska , being a young person within the meaning of the *Young Offenders Act*:

Whereas on the 30th day of September 19 82 , you were found guilty of the following offence:

Indecent Assault: to wit Jacques Labonte on the 6th day of August, 1982, at Centreville, in the Province of Athabaska, did indecently assault Anne Bennett, a female person, contrary to Section 149 of the *Criminal Code of Canada*:

And whereas on the 13th day of October 19 82 , it was ordered that Jacques Labonte be committed to custody for a period of eighteen months commencing on the 13th day of October 19 82 .

And whereas on the 17th day of October 19 83 , the Review Board ordered:

that the disposition contained in the order dated the 13th day of October 1982 be confirmed.

This is therefore to notify you that, unless you or any other party entitled thereto, applies to the Youth Court for a review of the decision within ten days after the date of the decision the order of the Review Board will take effect on the expiration of the ten days or, where Jacques Labonte is to be placed on probation, on the endorsement by the Youth Court of the Review Board's decision.

Dated this 17th day of October 19 83 , at Centreville in the Province of Athabaska.

"Bradley St. Clair"

.....

Chairman
Province of Athabaska
Disposition Review Board

Review by youth court: subsections 31(1) and (2)

If any of those involved in the process are dissatisfied with the review board's decision, review may be requested pursuant to s-s. 31(1). The persons who may request a review are the young person, his parents, the Attorney General or his agent, or the provincial director. The provisions adopted by s-s. 31(2) include the requirements of s-ss. 28(7) to (10) concerning a progress report, including provision for cross-examination of the person who prepared it. It would seem that a progress report prepared and submitted to the review board may be used again for the youth court's review hearing. Subsection 31(2) also adopts the provisions of s-ss. 28(12) to (16) governing notice of the youth court's review hearing, and in addition, provides that notice be given to the provincial director. Section 11 ensures the rights of the young person in regard to counsel, including the right to have counsel appointed by direction of the court under s-s. 11(4). See discussion above concerning s-ss. 28(5), (7) to (10) and (12) to (18) concerning conduct of youth court hearings.

The Y.O.A. does not specify the nature of "the review" of a review board's decision which a youth court is to undertake pursuant to s. 31; it would seem, however, that it is not simply a

review of the transcript of the review board's proceedings which is contemplated. Subsection 31(2) adopts s-s. 28(17) which imposes on a youth court a duty to render a decision only after affording the young person, his parents, the Attorney General or his agent, and the provincial director or his agent "an opportunity to be heard". Subsection 28(17) gives the youth court a broad discretion to render a decision "having regard to the needs of the young person and the interests of society." The general scheme of the Y.O.A. contemplates that review boards should conduct intermediary hearings, and that their decisions concerning release be final unless a review thereof is required by any of the parties. All of this suggests that in conducting a review under s. 31, a youth court may refer to the proceedings before a review board and its decision, but should be able to make a fresh decision. Further, those involved should be free to again adduce evidence already heard by the review board. For example, s-s. 31(2), adopting s-s. 28(10), which in turn adopts s-s. 14(6), assures the young person and any adult assisting him and the prosecutor a right to cross-examine the makers of the progress report at a youth court hearing reviewing a board decision.

In seeking a review by the youth court of the review board's decision pursuant to s. 31, a party involved might wish to have access to documents used by the review board. It can be argued that since the review board is carrying out the "duties and functions" of a youth court, its records, by necessary implication, are governed by s. 40 of the Y.O.A. As these boards, for the purposes of reviewing a custodial disposition, are given analogous powers to those of a youth court and will be making similar decisions, a liberal and remedial approach, consistent with the spirit of the Y.O.A., would suggest that this view should prevail. Hence, those involved would have a right of access to any documents used by the board. The jurisprudential concept of "procedural fairness" also lends support to this conclusion.

In the absence of explicit legislative provision, however, it may be argued that these are not technically youth court records and that therefore s. 40 does not apply. If this argument is accepted, it follows that s. 43 will govern review board records and will ensure that such records are not improperly disclosed and are eventually destroyed. Section 43 does not guarantee the young person, his counsel or his parents access to the records. However, if there is a review by a youth court of the review board's deci-

sion, the young person would have access under s. 40 to any documents sent by the review board for consideration by the youth court. This would include documents which a review board might initially have withheld from the young person (subject to para. 13(6)(b) allowing withholding of medical and psychological reports from a young person). If s. 43 does apply, existing jurisprudence suggests that in the absence of valid legislation to the contrary, the review board must act fairly and at least counsel for a young person should have access to all documents on which the board relies in making its decision; see *Re Abel and Advisory Review Board* (1980), 31 O.R.(2d) 520, 119 D.L.R. (3d) 101 (C.A.).

Review of non-custodial dispositions: section 32

Review of dispositions which do not involve custody are made pursuant to s. 32, and may only be conducted by a youth court. There is a right to a review six months after a disposition is made, and earlier with leave of the court. A progress report may be ordered by the court, although it is not mandatory. The youth court must conduct a hearing at which the provisions of s. 11 regarding representation for the young person apply, including the obligation of the court to direct that counsel be appointed if the young person wishes to obtain counsel but is unable to do so, either on his own or through a legal aid or assistance program.

As a general rule, except with the consent of the young persons, a disposition "more onerous" than the remaining portion of the original disposition cannot be imposed on the young person as a result of a review under s. 32. A more onerous disposition may only be imposed under s. 33, where it has been proven beyond a reasonable doubt that there has been "wilful failure or refusal to comply" with a disposition.

The purpose of a s. 32 review is to ensure that a disposition remains relevant and to allow a disposition to be altered so that a young person can take advantage of new programs or opportunities.

SECTION 32

32. (1) ***Review of dispositions not involving custody.*****—Where a youth court has made a disposition in respect of a young person but has not committed him to custody, the youth court shall, on**

the application of the young person, his parent, the Attorney General or his agent or the provincial director, made at any time after six months from the date of the disposition or, with leave of a youth court judge, at any earlier time, review the disposition if the court is satisfied that there are grounds for review under subsection (2).

(2) *Grounds for review.*—A review of a disposition may be made under this section

(a) on the ground that the circumstances that led to the disposition have changed materially;

(b) on the ground that the young person in respect of whom the review is to be made is unable to comply with or is experiencing serious difficulty in complying with the terms of the disposition;

(c) on the ground that the terms of the disposition are adversly affecting the opportunities available to the young person to obtain services, education or employment; or

(d) on such other grounds as the youth court considers appropriate.

(3) *Progress report.*—The youth court may, before reviewing under this section a disposition made in respect of a young person, require the provincial director to cause to be prepared, and to submit to the youth court, a progress report on the performance of the young person since the disposition took effect.

(4) *Subsections 28(8) to (10) apply.*—Subsections 28(8) to (10) apply, with such modifications as the circumstances require, in respect of any progress report required under subsection (3).

(5) *Subsections 28(5) and (12) to (16) apply.*—Subsections 28(5) and (12) to (16) apply, with such modifications as the circumstances require, in respect of reviews made under this section and any notice required under subsection 28(12) shall be given to the provincial director.

(6) *Compelling appearance of young person.*—The youth court may, by summons or warrant, compel a young person in respect of whom a review is to be made under this section to appear before the youth court for the purposes of the review.

(7) *Decision of the youth court after review.*—Where a youth court reviews under this section a disposition made in respect of a young person, it may, after affording the young person, his parents, the Attorney General or his agent and the provincial director or his agent an opportunity to be heard,

(a) confirm the disposition;

(b) terminate the disposition and discharge the young person from any further obligation of the disposition; or

(c) vary the disposition or make such new disposition listed in section 20, other than a committal to custody, for such period of time, not exceeding the remainder of the period of the earlier disposition, as the court deems appropriate in the circumstances of the case.

(8) ***New disposition not to be more onerous.*****—Subject to subsection (9), where a disposition made in respect of a young person is reviewed under this section, no disposition made under subsection (7) shall, without the consent of the young person, be more onerous than the remaining portion of the disposition reviewed.**

(9) ***Exception.*****—A youth court may under this section extend the time within which an order to perform personal or community service is to be complied with by a young person where the court is satisfied that the young person requires more time to comply with the order, but in no case shall the extension be for a period of time that expires more than twelve months after the date of the disposition reviewed would expire.**

(10) ***Form of disposition.*****—A disposition made under subsection (7) may be in Form 13.**

(11) ***Form of summons or warrant.*****—A summons referred to in subsection (6) may be in Form 16 and a warrant referred to in that subsection may be in Form 17.**

Review of non-custodial dispositions: subsections 32(1) and (2)

Review of non-custodial dispositions is dealt with under s. 32 of the Y.O.A. and is a matter for the youth court only. A review board has no jurisdiction to hear such a review. Review may be sought under s. 32 by the young person, his parents, the Attorney General or his agent, or the provincial director. Review is available as of right after six months from the date of the disposition, or earlier with leave of a judge if he is satisfied that there are grounds for review. The grounds for a review pursuant to s. 32 are as follows: a material change in circumstances, an inability or serious difficulty in complying with the disposition, adverse effects of the disposition on the opportunities available to the young person to obtain services, education or employment, or "such other grounds as the youth court considers appropriate."

It is clear from these grounds that a disposition should be altered if it imposes excessive hardship on the young person. The Y.O.A.'s provisions for review ensure that dispositions continue to be relevant; they also afford the young person an opportunity to have the disposition altered so that advantage may be taken of new programs.

Progress reports: subsections 32(3) to (5)

A progress report may be required during review of a non-custodial disposition. Unlike the situation regarding review of custodial dispositions, progress reports are not mandatory, and they should only be required where such a report would be helpful in reviewing the disposition. Subsection 32(4) adopts the provisions of s-ss. 28(8) to (10), with such modifications as the circumstances require, establishing the procedure to be followed with respect to progress reports. A number of detailed provisions are summarized briefly below. A more complete commentary can be found in the comments on s. 28.

The progress report "on the performance of the young person since the disposition took effect" may also include personal information and material on the young person's family history and his present environment. As a general rule, the report is to be in writing; with leave of the court, however, an oral report may be submitted. Oral reports are likely to be appropriate when the parties indicate that the contents of the report do not appear contentious. The report is a part of the youth court record. The young person, a parent (if in attendance at the proceedings), his counsel and the prosecutor must receive copies of the report. The court may cause a copy of the report to be given to a parent not in attendance if the parent, in the court's opinion, is taking an active interest in the proceedings. Cross-examination of the author of the report is specifically provided for. Copies of the progress report shall, on request, be supplied to other courts dealing with the young person and to the youth worker assigned to the young person's case. Copies may be supplied to any person who, in the opinion of the court, has a valid interest in the proceedings; for example, a person supervising the young person or directly assisting in his care or treatment may have access to progress reports. Any statement made by the young person in the preparation of a progress report may not be used in civil or criminal proceedings except under s. 16 (transfer), s. 20 (disposition) or ss. 28 to 33 (disposition review) of the Y.O.A.

Subsection 32(5) adopts the provisions of s-s. 28(5), which stipulate that no review of a disposition that is being appealed is permitted "until all proceedings in respect of any such appeal have been completed." As well, s-s. 32(5) adopts s-ss. 28(12) to (16), provisions respecting notice. Where review is requested by the young person, his parents or the Attorney General or his agent, the person requesting the review must comply with these notice requirements. Subsection 32(5) specifically makes provision for notice to the provincial director in accordance with the requirements of s-s. 28(12). Such notice must be in accordance with the rules of court, if no rules of court have been made, there must be at least five clear days' notice. Notice to the young person and to a parent must include a statement of the young person's right to counsel (s-ss. 11(9) and 28(13)); notice may be served personally or sent by registered mail. The right to notice may be waived. Where notice has not been given as required by the Y.O.A., the youth court may order an adjournment so that notice may be given as directed, or the court may dispense with notice altogether. Notice to a young person may be in Form 11. Notice to a parent, the Attorney General or his agent, the provincial director or any other person may be in Form 12.

Compelling appearance of young person: subsection 32(6)

As it is in most instances desirable for the young person to be present at a review hearing, the youth court has the power to compel the young person's appearance by summons or warrant if the young person fails to attend voluntarily after receiving notice of a review hearing. If the young person is arrested pursuant to a warrant, the release provisions of s. 453.1 of the *Criminal Code* would apply, allowing the officer in charge of the station where the young person was taken to release him where the warrant is endorsed pursuant to s-s. 455.3(6). If the young person was to be detained in custody pending the review hearing, such detention should be in accordance with the provisions of ss. 7 and 8 of the Y.O.A., requiring a judicial decision to detain, usually made by a youth court judge, and requiring detention separate from adults, except under unusual circumstances.

Although the young person has a right to have an opportunity to be heard before a review decision is made, a youth court may review his disposition without the young person being present. If there is a likelihood that the youth court is planning to terminate

the disposition, it may be unnecessary to compel his attendance under s-s. 32(6). Indeed, if the young person is making satisfactory progress, it may not be felt necessary to compel his attendance. In such cases, a youth court worker may convey the views of the young person to the court.

Decision of the youth court: subsections 32(7) to (9)

Subsection 32(7) requires the youth court to afford the young person, his parents, the Attorney General or his agent, and the provincial director or his agent, an opportunity to be heard. Subsection 32(7) provides the youth court with three options: to confirm, terminate or vary the disposition. In deciding whether to confirm, terminate or vary the original disposition, the youth court should consider the grounds for review set out in s-s. 32(2): material change in circumstances, inability or serious difficulty in complying with disposition, adverse effect of disposition on opportunities to obtain services, education or employment, or other "appropriate" grounds. If the court terminates the disposition, it will discharge the young person from any further obligation respecting the disposition. There is no requirement that the young person be placed on probation following review as there is in the case of release from custody under s. 28 or 29. In varying the disposition, the youth court may impose any disposition listed in s. 20, except committal to custody. A new disposition under s-s. 32(7) may not exceed "the remainder of the period of the earlier disposition."

An important limitation is placed on the power to vary the disposition by s-s. 32(8), which forbids the imposition of a "disposition more onerous than the remaining portion of the disposition reviewed," unless the young person gives his consent or unless s-s. 32(9) applies. This means that the new disposition cannot be more onerous than the remaining unfulfilled obligations imposed by the initial disposition, unless agreed to by the young person. Generally the only means of imposing a more severe disposition is review pursuant to s. 33, where there has been a wilful failure or refusal to comply with a disposition or an escape or attempted escape. The young person cannot be subjected to a harsher disposition at any review under the Y.O.A without such a finding.

The variety of dispositions in s. 20 may cause difficulty in determining when a disposition is "more onerous." It is easy to

see that a term of probation of nine months duration is more onerous than one six months long, but it is not obvious how to evaluate one disposition, for example, a community service order, in comparison with another, such as a fine. To avoid this very problem, s-s. 32(8) makes provision for the young person to consent to a more onerous disposition. Thus, where the court is in any doubt as to whether a variation of the original disposition might be "more onerous", it should secure the consent of the young person.

There is one exception to the rule laid down by s-s. 32(8): s-s. 32(9) provides for an extension of the time in which the young person has to perform personal or community services. No extension may last more than 12 months after the date on which the disposition was originally scheduled to expire. Subsection 32(9) permits an extension of time only; it does not permit the imposition of a greater amount of time to be spent performing community or personal services.

Forms: subsections 32(10) and (11)

A disposition under s-s. 32(7) may be in Form 13 (see p. 239 for sample). A summons referred to in s-s. 32(6) may be in Form 16 and a warrant referred to in s-s. 32(6) may be in Form 17. See sample forms below.

SAMPLE FORM

FORM 16
THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO

SUMMONS FOR APPEARANCE ON REVIEW

Canada
Province of Ontario
County of Queens

To: David Smith of 25 First Avenue, Anytown, Ontario, being a young person within the meaning of the *Young Offenders Act*:

Whereas on the 28th day of June 19 82, you were 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 whereas by probation order dated the 8th day of July 19 82 , it was ordered:

1. that David Smith be placed on probation commencing on the date of that order for a period of twenty months and subject to the conditions therein prescribed; and
2. that David Smith perform, at the Anytown Community Centre, two hours per week of community service as described in the order.

And whereas it has been made to appear to me by information supplied by Janet Carter, the youth worker assigned to your case , that you should be brought back before the Youth Court for a review of the disposition because the informant says she has reasonable and probable grounds to believe and does believe:

1. that David Smith has failed to report to Janet Carter, the youth worker assigned to his case on the first Monday of October 1982, and November 1982 as required by condition prescribed in the probation order dated 8 July 1982; and
2. that David Smith has failed to attend Sir John A. MacDonald High School during the months of October and November of 1982, as required by condition prescribed in the probation order dated 8 July 1982; and
3. that David Smith has failed to perform the community service as ordered by the Youth Court in the order dated 8 July, 1982.

This is therefore to command you to appear before the Youth Court at 100 Main Street, Anytown, Ontario on Tuesday the 16th day of December 19 82 , at 10:00 o'clock in the fore noon, for the purpose of this review and to be dealt with according to the *Young Offenders Act*.

You have the right to be represented by counsel on your appearance.

Dated this 1st day of December 19 82, at Anytown in the Province of Ontario.

"Thomas Brown"
.....
A Judge of the Youth Court

SAMPLE FORM

FORM 17
THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO

WARRANT TO COMPEL APPEARANCE ON REVIEW

Canada
Province of Ontario
County of Queens

To the peace officers in the County of Queens .

Whereas on the 28th day of June 19 82, David Smith of, 25 First Avenue, Anytown, Ontario , a young person within meaning of the *Young Offenders Act*, was 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 whereas by probation order dated the 8th day of July 19 82 , it was ordered:

1. that David Smith be placed on probation commencing on the date of that order for a period of twenty months and subject to the conditions therein prescribed; and
2. that David Smith perform, at the Anytown Community Centre, two hours per week of community service as described in the order.

And whereas it has been made to appear to me by information supplied by Janet Carter, the youth worker assigned to his case , that he should be brought back before the Youth Court

for a review of the disposition because the informant says she has reasonable and probable grounds to believe and does believe;

1. that David Smith has failed to report to Janet Carter, the youth worker assigned to his case on the first Monday of October 1982, and November 1982 as required by condition prescribed in the probation order dated 8 July 1982; and
2. that David Smith has failed to attend Sir John A. MacDonald High School during the months of October and November of 1982, as required by condition prescribed in the probation order dated 8 July 1982; and
3. that David Smith has failed to perform the community service as ordered by the Youth Court in the order dated 8 July, 1982;
4. that David Smith failed to appear at the Youth Court at 100 Main Street, Anytown, Ontario, on Tuesday the 16th day of December, 1982, as required by the Summons for Appearance on Review (Form 16) dated 1st day of December, 1982.

This is therefore to command you forthwith to arrest David Smith and bring him before the Youth Court at 100 Main Street, Anytown, Ontario for the purpose of this review and to be dealt with according to the *Young Offenders Act*.

And you are also required, on arresting David Smith to inform him that he has the right to be represented by counsel on his appearance.

Dated this 16th day of December 19 82 , at Anytown in the Province of Ontario.

"Thomas Brown"

.....

A Judge of the Youth Court

Review of disposition for failure to comply: section 33

Section 33 allows for a youth court review where there has been a wilful failure or refusal to comply with a disposition, or where a young person committed to custody has escaped or attempted to escape. Section 33 governs both custodial and non-custodial dispositions; it is the principal review provision of the Y.O.A. allowing for the imposition of a more onerous disposi-

tion as a result of a breach. As the young person may be penalized as a result of a s. 33 review, certain protections are afforded him. The court must be satisfied beyond a reasonable doubt of the wilful failure or refusal to comply with the disposition, or of the escape or attempted escape from custody. A progress report must be prepared for the consideration of the court, and there is a right of appeal. The young person is also assured of his s. 11 right to counsel, including the right to have the court make a direction for the appointment of counsel under s-s. 11(4), if the young person is unable to obtain counsel.

SECTION 33

33. (1) ***Review of disposition where failure to comply.*****—Where a youth court has made a disposition in respect of a young person and the Attorney General or his agent or the provincial director or his delegate lays an information alleging that the informant, on reasonable and probable grounds, believes that the young person has**

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

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

the youth court shall, on application of the informant made at any time before the expiration of the disposition or within six months thereafter, by summons or warrant, require the young person to appear before the court and shall review the disposition.

(2) ***Subsections 28(7) to (10) apply.*****—Subsections 28(7) to (10) apply, with such modifications as the circumstances require, in respect of reviews made under this section.**

(3) ***Notice of review from the provincial director.*****—Where the provincial director or his delegate applies for a review of a disposition under subsection (1), he shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the parents of the young person in respect of whom the disposition was made and to the Attorney General or his agent.**

(4) ***Notice of review from the Attorney General or his agent.*****—Where the Attorney General or his agent applies for a review of a disposition under subsection (1), the Attorney General or his**

agent shall cause such notice as may be directed by rules of court applicable to the youth court or, in the absence of such direction, at least five clear days notice of the review to be given in writing to the parents of the young person in respect of whom the disposition was made and to the provincial director or his delegate.

(5) *Subsections 28(13) to (16) apply.*—Subsections 28(13) to (16) apply, with such modifications as the circumstances require, in respect of notices given under subsection (3) or (4).

(6) *Decision of the youth court after review.*—Where the youth court reviews under this section a disposition made in respect of a young person, it may, subject to subsection (8), after affording the young person, his parents, the Attorney General or his agent and the provincial director or his agent an opportunity to be heard, and if it is satisfied beyond a reasonable doubt that the young person has

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

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

vary the disposition or make any new disposition listed in section 20 that the court considers appropriate.

(7) *Limitation on custody.*—No disposition shall be made under this section committing a young person to custody

(a) for a period in excess of six months, where the disposition under review was not a committal to custody or was a committal to custody that has expired; or

(b) for a period that expires more than six months after the disposition under review was to expire, where the disposition under review was a committal to custody that has not expired.

(8) *Postponement of performance of previous dispositions.*—Notwithstanding any other provision of this Act, where a young person is committed to custody under this section, the youth court may order that the performance of any other disposition made in respect of the young person be postponed until the expiration of the period of custody.

(9) *Prosecution under section 132 or 133 of Criminal Code.*—Where a disposition is reviewed under this section on the ground set out in paragraph (1)(b), the young person may not be prosecuted under section 132 or 133 of the *Criminal Code* for the same act and, where a young person is prosecuted under either of those sections, no review may be made by the youth court under this section by reason of the same act.

(10) *Appeals.*—An appeal from a disposition of the youth court under this section lies as if the order were a disposition made under section 20 in respect of an offence punishable on summary conviction.

(11) *Form of disposition.*—A disposition made under subsection (6) may be in Form 13.

(12) *Form of summons or warrant.*—A summons referred to in subsection (1) may be in Form 16 and a warrant referred to in that subsection may be in Form 17.

(13) *Form of information.*—An information referred to in subsection (1) may be in Form 18.

Review of disposition where failure to comply: subsection 33(1)

Review under s. 33 can result in the imposition of a new disposition that is more onerous than the original disposition. This is the principal provision of the Y.O.A. which permits the imposition of a more severe disposition where there has been a breach (see also s-ss. 32(8) and (9)). Section 33 applies to all dispositions, custodial and non-custodial alike.

A young person is subject to review if an informant lays an information that he has reasonable and probable grounds for believing that the young person has "wilfully failed or refused to comply with the disposition or any term or condition" or that the young person has "escaped or attempted to escape custody." The informant must be one of the following: the Attorney General or his agent, or the provincial director or his delegate. Upon receiving an information under s. 33, the youth court must require the young person to appear before the court for review of the disposition. An information may be in Form 18 (see sample at end of discussion of this section).

The youth court can require the young person to attend by having a summons issued to him, commanding the young person to appear in youth court at a specified time. Subsection 455.5(2) of the *Code* requires the summons to be personally served on the young person, or if he cannot conveniently be found, it may be left for him at his last or usual place of residence with a person who appears to be at least 16 years of age. A summons may be in Form 16.

A warrant for the arrest of the young person may be issued if he refuses to comply with the summons. The judge may initially issue a warrant instead of a summons if he is satisfied on "reasonable and probable grounds ... that it is necessary in the public interest" (*Criminal Code*, s. 455.3(4)), for example to ensure his attendance. If a young person is arrested pursuant to a warrant issued under s. 33 of the Y.O.A., the provisions of s. 453.1 of the *Code*, governing release by the officer in charge of the police station where the young person is brought, are applicable provided the warrant has been endorsed in accordance with s-s. 455.3(6) of the *Code*. If it is necessary to detain the young person in custody pending a review, such detention must be in accordance with the provisions of ss. 7 and 8 of the Y.O.A., requiring detention separate from adults, except under unusual circumstances. A warrant issued under s-s. 33(1) may be in Form 17. Any summons or warrant issued pursuant to s-s. 33(1) must comply with s-s. 11(9) and include a statement that the young person has a right to be represented by counsel.

If the young person is already in custody prior to a s. 33 review, an order may be made pursuant to s. 460 of the *Code* by the youth court judge, ordering his custodians to bring the young person before the court for the review.

An application for a s. 33 review may be made at any time before the expiration of the disposition, or within six months thereafter.

Progress report: subsection 33(2)

Subsection 33(2) adopts the provisions of s-ss. 28(7) to (10) with regard to progress reports. A progress report must be prepared and submitted to the youth court before a decision is made on a s. 33 review. Except with leave of the court, the report must be in writing. Generally the young person, his counsel, the prosecutor, and a parent attending the proceedings will receive a copy of the report. The parties generally have a right to cross-examine the maker of the report. Statements made by a young person "in the course of the preparation" of a progress report are not admissible "in evidence against him in any civil or criminal proceedings except in proceedings under section 16 or 20 or sections 28 to 32": see s-s. 14(10), adopted through s-s. 28(10). The purpose of s-s. 14(10) is to promote the confidence of the

young person and ensure his cooperation in the process of preparing the progress report. The statements made by the young person are not to be "admissible in evidence against him." It is submitted that in the context of s. 33, this means a statement made by the young person *cannot* be used to prove that the young person wilfully failed or refused to comply with a disposition, or escaped or attempted to escape custody. It is, however, submitted that if a court is satisfied that such a breach occurred, then the court can use the statements of the young person for the purpose of deciding on an appropriate course of action, as s-s. 33(6) allows the court to make "any *new* disposition listed in section 20 that the court considers appropriate." It is submitted that such statements would then be admissible in accordance with s. 20, not s. 33. If such use could not be made of the statements of the young person, it would effectively reduce the value of any interview with the young person for the purpose of preparing a progress report for the s. 33 hearing, and would be taking an unnecessarily broad view of the meaning of the phrase "admissible in evidence against him."

Notice: subsections 33(2) and (4) to (6)

Pursuant to s-ss. 33(3) and (4), notice of a review hearing must be given in accordance with the rules of court, if the rules of court do not specify any notice requirements, a minimum of five clear days' notice must be given in writing. Notice must go to the young person's parents, the Attorney General or his agent, and the provincial director; it would seem that notice should be given to all parents within the Act's definition of "parent," unless further direction is given by the court (see s-s. 28(16)). If the provincial director brings the application for review, he is responsible under s-s. 33(3) to see that notice is given to the parents and the Attorney General or his agent. Conversely, if the application is brought by the Attorney General, it is his responsibility to ensure that notice is given pursuant to s-s. 33(4) to the young person's parents and the provincial director or his delegate.

Subsections 28(13) to (16) are also made applicable to review under s. 33 by s-s. 33(5). Notice to parents must include a statement of the young person's right to counsel and may be served personally or sent by registered mail. The right to notice may be waived. Where notice has not been given in accordance

with the Act, the youth court may order an adjournment so that notice may be given as directed, or the court may dispense with notice altogether (s-s. 28(16)). Notice to a parent, the Attorney General or his agent, the provincial director or his delegate, or any other person may be in Form 12. See discussion of s-ss. 28(13) to (16) for further comments.

The young person will receive notice of the proceedings pursuant to a summons or warrant issued under s-s. 33(1).

Decision of the youth court: subsections 33(6) to (8)

When a youth court conducts a review under s. 33, it has an obligation to afford the young person, his parents, the Attorney General or his agent, and the provincial director or his agent, "an opportunity to be heard" (s-s. 33(6)). The court has a duty under s. 11 to advise the young person of his right to obtain counsel, give the young person a reasonable opportunity to obtain counsel, and, if the young person wishes to obtain counsel but is unable to do so, either on his own or through a legal aid or assistance program, must direct that counsel be appointed to represent the young person under s-s. 11(4).

Subsection 33(6) requires that before varying a disposition or making a new one under s. 20, the court must be satisfied "beyond a reasonable doubt" that the young person has wilfully failed or refused to comply with the disposition of any term or condition thereof, or if committed to custody has escaped or attempted to escape custody. The Y.O.A. does not specify what type of hearing must be conducted under s-s. 33(6). It is submitted, however, that in general the rules of evidence and procedure which are applicable at trial should govern the proceedings. This view follows from a consideration of the consequences of the proceedings, from the fact that a s. 33 review may take place instead of charges under the *Criminal Code* (s. 132 or 133) or that a s. 33 review may occur in the place of charges under various provisions of Part XX of the *Code*. In addition, the nature of the standard of proof specified in s-s. 33(6) is "proof beyond a reasonable doubt," the criminal standard of proof. Thus the onus should be on the prosecution to prove its case; the prosecution may be conducted by the Attorney General or his agent, or the provincial director or his agent. It is submitted that the young person should not be compelled to give evidence against himself

at this stage of the proceeding, although he should, of course, have the right to testify and call witnesses. Witnesses should give evidence under oath and should be subject to cross-examination. Evidence should be taken in accordance with the rules of evidence applicable for trials.

A s. 33 review must be based on a wilful failure or refusal to comply with a disposition or an escape or attempted escape from custody. A failure or refusal to comply with a disposition could arise out of a refusal to pay a fine, or a breach of the terms of probation. It may be argued that if a young person is placed in open custody, and wilfully refuses to follow the rules governing the facility in which he is placed, this may constitute a violation of para. 33(6)(a). A breach of the terms of a temporary release granted under s. 35 of the Y.O.A., for example, by failing to return to custody when required, would probably constitute a violation of para. 33(6)(a), rather than para. 33(6)(b), as it would not constitute an "escape."

If the court is satisfied beyond a reasonable doubt that one of the conditions of para. 33(6)(a) or (b) has occurred, it may "vary the disposition or make any new disposition in section 20 that the court considers appropriate", the court may also decide to confirm the original disposition. It is submitted that at this stage of a s. 33 review, the youth court can modify its procedure and generally adopt the procedure applicable at a disposition hearing under s. 20. Thus, at this stage it is appropriate for the court to give the parents an opportunity to be heard, and the court may receive the progress report (see s-s. 33(2) comments above concerning progress reports).

If the court is not satisfied beyond a reasonable doubt that the young person has violated para. 33(6)(a) or (b), the information must be dismissed. The young person will continue with the original disposition, though the judge may make some informal remarks to the young person, just as he could do if the young person were required to appear under para. 23(1)(b). If the court is satisfied a violation has occurred, it has a broad discretion to vary the original disposition. A custodial disposition made under s-s. 33(6) is limited to a maximum of six months under s-s. 33(7), whether the disposition is a new committal to custody or in addition to an original committal. Subsection 33(8) allows the court to commit a young person to custody under s. 33 and postpone the performance of any other disposition, such as a

period of probation, until the expiration of the period of custody.

In reviewing a disposition under s. 33, a court might conceivably order a less onerous disposition. For example, a court might be satisfied beyond a reasonable doubt that a young person committed a minor breach of a term of probation, but on balance is of the view that the period of probation should be reduced or terminated — the court has discretion to do this under s. 33.

Prevention of double jeopardy: subsection 33(9)

Prison breach and escape from lawful custody are punishable under ss. 132 and 133 of the *Criminal Code*. Subsection 33(9) makes clear that the Crown must elect whether to prosecute a young person under the *Code* or to proceed with review under s. 33: the young person may not be subject to both provisions because that amounts to double jeopardy. A prosecution under s. 132 or 133 of the *Code* could be initiated either by the Crown or by a private prosecutor; for example, the provincial director could start proceedings under the *Code* provisions, if he so desired, if no charges were laid by the Crown.

A young person who fails to comply with a non-custodial disposition can only be dealt with under the Y.O.A., by means of s. 32 and where the default is wilful, by s. 33. Subsection 20(8) of the Y.O.A. provides that Part XX of the *Criminal Code*, which governs punishments, fines, probation and other sentences in regard to adult offenders, does not apply to proceedings under the Y.O.A. Hence, a failure to pay a fine, a breach of probation and other failures to comply with non-custodial dispositions made under the Y.O.A., can only be dealt with under that Act.

Appeals: subsection 33(10)

Subsection 33(10) permits an appeal from a disposition made under s. 33 as if it were a disposition under s. 20 for an offence punishable on summary conviction. A general right to appeal from a finding of guilt, an order dismissing an information, or a disposition made under s. 20, is provided for in s. 27 of the Y.O.A. An appeal from a disposition made pursuant to s. 33 is provided for specifically in s-s. 33(10). By way of contrast, no right of appeal is given with respect to dispositions made pursuant to ss. 28 to 32 (see s-s. 27(6)), as only s. 33 allows a disposition more onerous than the original disposition.

It is also submitted that the young person may rely on s. 27 to appeal the finding that he has wilfully failed or refused to comply with a disposition, or escaped or attempted to escape custody, and the prosecutor may appeal a dismissal of the information. The terms "finding of guilt" and "order dismissing the information" in s-s. 27(1), seem to apply to this type of finding. Furthermore, it should be noted that the exclusion contained in s-s. 27(6) relates only to the reviews under ss. 28 to 32, thereby clearly implying that s. 27 applies to a review under s. 33.

In view of the maximum disposition and s-ss. 33(10) and 27(2), it is suggested that any appeal of the finding of the court be treated as an appeal from a conviction of a summary conviction offence.

Forms: subsections 33(11) to (13)

A disposition made in accordance with s-s. 33(6) may be in Form 13 (see p. 239). A summons may be in Form 16 (see p. 260). A warrant may be in Form 17 (see p. 262). An information may be in Form 18 (see the sample Form 18 on the following page).

SAMPLE FORM

FORM 18
THE YOUNG OFFENDERS ACT
IN THE YOUTH COURT FOR ONTARIO

INFORMATION

Canada
Province of Ontario
County of Queens

This is the information of Janet Carter , of The Department of Youth Services , being a delegate of the provincial director, hereinafter called the informant:

The informant says that she has reasonable and probable grounds to believe and does believe that David Smith of, 25 First Avenue, Anytown, Ontario , a young person within meaning of the *Young Offenders Act*, wilfully failed to or refused to comply with a disposition of the Youth Court ordered on the 8th day of July 19 82 , or with a term or condition thereof, as follows:

1. that David Smith has failed to report to Janet Carter, the youth worker assigned to his case on the first Monday of October 1982, and November 1982 as required by condition prescribed in the probation order dated 8 July 1982; and
2. that David Smith has failed to attend Sir John A. MacDonald High School during the months of October and November of 1982, as required by condition prescribed in the probation order dated 8 July 1982; and
3. that David Smith has failed to perform the community service as ordered by the Youth Court in the order dated 8 July, 1982.

Sworn before me this 15th day of December 19 82 at Anytown in the Province of Ontario.

"Janet Carter"
.....
Informant

"Susan A. Barber"
.....
A Justice of the Peace in and for the County of Queens

Disposition on review: section 34

SECTION 34

34. *Sections 20 to 26 apply to dispositions on review.*—Subject to sections 28 to 33, subsections 20(2) to (8) and sections 21 to 26 apply, with such modifications as the circumstances require, in respect of dispositions made under sections 28 to 33.

Section 34 provides that the dispositions imposed as a result of a review under ss. 28 to 33 are subject to the same limitations and conditions that apply to original dispositions as a result of s-ss. 20(2) to (8) and ss. 21 to 26. For example, where a young person is released from custody pursuant to s. 29 and placed on probation, the mandatory terms set out in s-s. 23(1) apply to the probation order, as well as any other terms the judge chooses to impose under s-s. 23(2). The new disposition may not exceed the maximum duration of disposition prescribed by s-s. 20(3). See the earlier discussion of ss. 20 to 26.

TEMPORARY RELEASE FROM CUSTODY
(Section 35)

Introduction

Legislation governing adults in correctional facilities allows for temporary release programs: see s. 26 of the *Penitentiary Act*, R.S.C. 1970, c. P-6, permitting temporary absence, and the similar provisions enacted in s. 36 of the *Prisons and Reformatories Act*, R.S.C. 1970, c. P-21. Day parole is permitted under the *Parole Act*, R.S.C. 1970, c. P-2. Provincial legislation in most provinces allows adults confined in provincial correctional institutions to enjoy the same privileges. The *Y.O.A.* contains equivalent provisions for the temporary release of young persons for limited periods of time. The young person may be released for up to 15 days for medical, compassionate or humanitarian reasons, or for the purpose of rehabilitation or re-integration into the community. Release for a specified number of hours on a daily basis is also provided for so that the young person may work, attend school, or participate in a training program.

The specific provisions for temporary release in the Y.O.A. are new to the juvenile corrections system, the *J.D.A.* gave the authority to determine the terms of the young person's committal to the provinces. In many places, some form of temporary release has in fact been used by provincial authorities. By virtue of s. 35, temporary release for young offenders has now received legislative sanction.

Temporary release is a non-judicial process. The person responsible for the program is the provincial director; the circumstances in which release is available are set out in s. 35. Unless policy directives are issued to define in greater detail when temporary release is available, each case will be considered and assessed on it own merits. Additional policy restrictions could include a minimum time spent in custody before eligibility for release and limits on the number of temporary leaves per person.

SECTION 35

35. (1) *Temporary absence or day release.*—The provincial director of a province or his delegate may, subject to any terms or

conditions that he considers desirable, authorize a young person committed to custody in the province pursuant to a disposition made under this Act

(a) to be temporarily released for a period not exceeding fifteen days where, in his opinion, it is necessary or desirable that the young person be absent, with or without escort, for medical, compassionate or humanitarian reasons or for the purpose of rehabilitating the young person or re-integrating him into the community; or

(b) to be released from custody on such days and during such hours as he specifies in order that the young person may

(i) attend school or any other educational or training institution,

(ii) obtain or continue employment or perform domestic or duties required by the young person's family, or

(iii) participate in a program specified by him that, in his opinion, will enable the young person to better carry out his employment or improve his education or training.

(2) *Limitation.*—A young person who is released from custody pursuant to subsection (1) shall be released only for such periods of time as are necessary to attain the purpose for which the young person is released.

(3) *Revocation of authorization for release.*—The provincial director of a province or his delegate may, at any time, revoke an authorization made under subsection (1).

(4) *Arrest and return to custody.*—Where the provincial director or his delegate revokes an authorization for a young person to be released from custody under subsection (3) or where a young person fails to comply with any term or condition of his release from custody under this section, the young person may be arrested without warrant and returned to custody.

(5) *Prohibition.*—A young person who has been committed to custody under this Act shall not be released from custody before the expiration of the period of his custody except in accordance with subsection (1) unless the release is ordered under sections 28 to 33 or otherwise according to law by a court of competent jurisdiction.

Temporary absence and day release: subsections 35(1) to (3)

The provincial director or his delegate is authorized by s-s. 35(1) to release a young person from custody for a temporary

absence or day release. There is no right to temporary absence; it is an administrative matter, and there is no recourse to the courts if it is not granted. Temporary release includes a release of up to 15 days, without the young person returning to custody at night. Day release may be for such part of a day as the circumstances require.

Under para. 35(1)(a), a young person may be released temporarily for up to 15 days, where, in the provincial director's opinion, it is necessary or desirable to release the young person "for medical, compassionate or humanitarian reasons or for the purpose of rehabilitating the young person or re-integrating him into the community." Release under para. 35(1)(a) would be appropriate for attendance at a funeral, or where the young person needs medical treatment, or to prepare the young person for the end of his custodial term. Temporary release may be with or without an escort.

Day release, governed by para. 35(1)(b), allows for release of a young person "on such days and during such hours" as the provincial director specifies. Such day release may be for the purpose of allowing the young person to attend "school or any other educational or training institution." It may also be to allow a young person to "obtain or continue employment" or to "perform domestic or other duties required by the young person's family"; this last category might include caring for young siblings, or a child or an elderly relative, or working on a family farm. Day release may also be granted to allow a young person to participate in a program to improve the employment, education or training prospects of the young person. There is no legislative provision for providing an escort for a young person on day release. Although theoretically an escort might be provided, it is felt that a young person who requires an escort is not ready for day release.

Subsection 35(1) allows the imposition of any "terms or conditions" considered desirable in regard to temporary absence or day release. For example, the young person could be restricted as to his method of travel, required not to associate with certain persons outside the custodial facility and prohibited from consuming drugs or alcohol. In regard to temporary absence, a young person might be required to report to a local police station.

Subsection 35(1) applies to all young persons serving a custodial disposition under the Y.O.A., whether the young person is

detained in custody in open or secure facilities for young persons, or whether an order has been made under s-s. 24(14) of the Y.O.A. to place the young person in a provincial correctional facility for adults. Subsection 24(14) expressly provides that a young person so transferred remains subject to the Y.O.A.; hence the temporary release provisions of the Y.O.A. would apply.

Subsection 35(2) provides that the young person is to be at liberty only "for such periods of time as are necessary to attain the purpose for which the young person is released." Although there are no restrictions on the granting of multiple continuous temporary absence permits, there is no reason to believe that the authorities would abuse these provisions. If permanent release of the young person was desired, the provincial director may use s. 29 of the Y.O.A. to recommend the release of the young person from custody and his placement on probation. The review provisions of s. 28 are also available to the provincial director, as well as to the young person, his parents and the Attorney General.

With the exception of these provisions for temporary release, young persons are not to be released from custody under the Y.O.A. unless released pursuant to the review provisions of ss. 28 to 33 or "otherwise according to law by a court of competent jurisdiction."

Revocation of temporary absence or day release: subsections 35(3) and (4)

According to s-s. 35(3) an authorization made under s-s. 35(1) may be revoked at any time. If the authorization for temporary release is revoked, or if the young person fails to comply with any term or condition of his release, s-s. 35(4) provides that the young person may be arrested without warrant and returned to custody.

A young person absent from custody without authorization may be subject to prosecution under s. 133 of the *Criminal Code* for being at large without lawful excuse. It should first be noted that the young person must have knowledge of the revocation of his temporary release pursuant to s-s. 35(3) before a charge under para. 133(1)(b) of the *Code* will stand. Moreover, cases such as *R. v. Seymour* (1980), 52 C.C.C. (2d) 305 (Ont. C.A.) should be noted. There, an adult released temporarily from a

provincial correctional institution was prosecuted under para. 133(1)(b) of the *Code*. In this case, Seymour had been drinking in violation of one of the conditions of his temporary release. Despite the provisions of the provincial enactment authorizing temporary releases, Seymour was not convicted; the judge held that it was only a wilful breach of a condition which shows an intention by the inmate to withdraw himself from the control (in the sense of custody) of the correctional authorities that renders him unlawfully at large without lawful excuse.

EFFECT OF TERMINATION OF DISPOSITION
(Section 36)

Introduction

In the Declaration of Principle, the Y.O.A. recognizes 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." Various provisions in the Act provide for more lenient treatment of young offenders than adults and offer young persons some special protections. It is hoped that these provisions will minimize the negative impact on young persons of their involvement in the juvenile justice system. One such provision is s. 36 of the Y.O.A.; it provides that for many purposes, a young person shall be deemed not to have been convicted upon completion of his disposition.

Section 36 is designed to give the young person an incentive to complete his disposition and to thus promote the rehabilitation of the young offender. In light of the young person's age, it is felt that after completion of his diposition, he should not have his previous mistakes held against him; this is particularly important in regard to employment opportunities, as otherwise the young person may be denied the benefit of job experience.

Section 36 is not a complete prohibition on the subsequent use of a conviction under the Y.O.A. For example, even after the completion of a disposition, a previous conviction may be used in subsequent transfer applications, disposition and sentencing hearings, and bail applications. Section 45 of the Y.O.A. provides a much broader prohibition against use of a previous conviction under the Y.O.A. Section 45 requires the destruction of the young person's record following a certain period of time after completion of the disposition, provided the young person has not subsequently been convicted of another offence. Section 36 is available in the interim between completion of disposition and the time when destruction is required under s. 45. Once the provisions of s. 45 become applicable, s-s. 45(5) provides that for all purposes, a young person shall be deemed not to have

committed the offence and the fact of previous conviction cannot be used for any purpose. The requirements for destruction under s. 45 are intentionally more onerous, and thus will serve as a long-term incentive for the rehabilitation of the young offender.

SECTION 36

36. (1) *Effect of absolute discharge or termination of dispositions.*—Subject to section 12 of the *Canada Evidence Act*, where a young person is found guilty of an offence, and

(a) a youth court directs under paragraph 20(1)(a) that the young person be discharged absolutely, or

(b) all the dispositions made under this Act in respect of the offence have ceased to have effect,

the young person shall be deemed not to have been found guilty or convicted of the offence except that,

(c) the young person may plead *autrefois convict* in respect of any subsequent charge relating to the offence;

(d) a youth court may consider the finding of guilt in considering an application for a transfer to ordinary court under section 16;

(e) any court or justice may consider the finding of guilt in considering an application for judicial interim release or in considering what dispositions to make or sentence to impose for any offence; and

(f) the National Parole Board or any provincial parole board may consider the finding of guilt in considering an application for parole.

(2) *Disqualifications removed.*—For greater certainty and without restricting the generality of subsection (1), an absolute discharge under paragraph 20(1)(a) or the termination of all dispositions in respect of an offence for which a young person is found guilty removes any disqualification in respect of the offence to which the young person is subject pursuant to any Act of Parliament by reason of a conviction.

(3) *Applications for employment.*—No application form for or relating to

(a) employment in any department, as defined in section 2 of the *Financial Administration Act*,

(b) employment by any Crown corporation as defined in Part VIII of the *Financial Administration Act*,

(c) enrolment in the Canadian Forces, or

(d) employment on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada,

shall contain any question that by its terms requires the applicant to disclose that he has been charged with or found guilty of an offence in respect of which he has, under this Act, been discharged or has completed all the dispositions.

(4) *Punishment.*—Any person who uses or authorizes the use of an application form in contravention of subsection (3) is guilty of an offence punishable on summary conviction.

(5) *Finding of guilt not a previous conviction.*—A finding of guilt under this Act is not a previous conviction for the purposes of any offence under any Act of Parliament for which a greater punishment is prescribed by reason of previous convictions.

Effect of discharge or termination of disposition: subsections 36(1) and (2)

Where the youth court gives an absolute discharge or imposes a disposition and it has been completed, the young person is deemed by s-s. 36(1) "not to have been found guilty or convicted of the offence." The effect of this provision is limited by the exceptions included in s-s. 36(1).

The first exception set out in s-s. 36(1) applies to preserve the effect of s. 12 of the *Canada Evidence Act*, which provides that if a person testifies at his own trial or at the trial of another person, he may be questioned regarding previous convictions under the Y.O.A. This provision is in accordance with the decision of the Supreme Court of Canada in *Morris v. The Queen*, [1979] 1 S.C.R. 405, 6 C.R. (3d) 36, 43 C.C.C. (2d) 129, 91 D.L.R. (3d) 161, 23 N.R. 109 which held that the cross-examination of a witness on his record as a juvenile was admissible in evidence under s. 12 of the *Canada Evidence Act* for the purpose of establishing or attacking credibility. It should be noted, however, that when the s. 45 provisions for destruction of the young person's record come into effect, he is deemed not to have committed the offence. If questioned about his record during court proceedings pursuant to s. 12 of the *Canada Evidence Act*, he may properly deny a conviction under the Y.O.A., once the record is required to be destroyed under s. 45.

Subsection 36(1) provides for the use of a conviction under the Y.O.A. in judicial and other proceedings. Paragraph 36(1)(c)

allows the young person to enter a special plea of *autrefois convict* based on the conviction for an offence for which he has completed the disposition or received an absolute discharge. This special plea prevents the young person from being twice convicted of the same offence (see s. 535 of the *Criminal Code*). In view of the *Canadian Charter of Rights and Freedoms*, para. 11(h), providing that if a person has been found guilty of an offence and punished, he shall not be tried for it again, it also seems that a young person could use the conviction as the basis of the common law defence of *res judicata* ("the issue has been decided"), which technically is somewhat broader than *autrefois convict* (see *Kienapple v. The Queen*, [1975] 1 S.C.R. 729, 15 C.C.C. (2d) 524, 26 C.R.N.S. 1, 1 N.R. 322, 44 D.L.R. (3d) 351).

Paragraph 36(1)(d) provides that in considering an application to transfer the young person to ordinary court under s. 16 of the Y.O.A., the deeming provision is of no effect; the youth court may consider the previous conviction. Under para. 36(1)(e), the finding of guilt may also be considered during a court's consideration of an application for judicial interim release (whether a young person or adult), before the imposition of disposition under the Y.O.A., or before the imposition of sentence in ordinary court. See, however, s-s. 36(5) of the Y.O.A. which provides that a finding of guilt is not to be treated as a previous conviction for the purpose of any offence for which a greater punishment is automatically prescribed by reason of a previous conviction. Under para. 36(1)(f), the National Parole Board or any provincial parole board may consider the finding of guilt in considering an application for parole, which may be made after the young person becomes an adult. To facilitate subsequent use of a record, a court pursuant to paras. 40(3)(f) and (g), and a parole board pursuant to para. 40(3)(d), are given access to the young person's record on request.

Subsection 36(2) of the Y.O.A. confirms that the effect of s-s. 36(1) is to ensure that even after an absolute discharge or the completion of all dispositions, a young person is not to suffer "any disqualification in respect of the offence to which the young person is subject pursuant to any Act of Parliament by reason of a conviction." An example of a disqualification to which a young person would be subject if this provision was not included in the Y.O.A. is found in s-s. 682(3) of the *Criminal Code*, which disqualifies persons convicted of certain offences from contracting with the Crown.

Employment applications: subsections 36(3) and (4)

Subsection 36(3) of the Y.O.A. protects young persons by prohibiting specified employers from asking certain questions on job applications that relate to past involvement in proceedings under the Y.O.A. This should ensure that a person's opportunities for finding employment are not hindered by previous involvement in the juvenile justice system. Subsection 36(3) provides that the application forms concerning specified employment shall not contain "any question that by its terms requires the applicant to disclose that he has been charged with or found guilty of an offence" under the Y.O.A., in respect of which he has received an absolute discharge or completed all dispositions. The prohibition of s-s. 36(3) governs applications concerning employment in any federal department or any federal Crown corporation, or for "employment on or in connection with the operation of any work, undertaking or business that is within the legislative authority of the Parliament of Canada"; this last category extends to railways, banks and all other enterprises within federal jurisdiction. The prohibition of s-s. 36(3) also applies to application forms for enrolment in the Canadian Forces.

The federal government lacks the legislative authority to forbid the disclosure of a conviction under the Y.O.A. on application forms for employment in enterprises outside the federal jurisdiction. Provincial governments and enterprises within the provincial jurisdiction may continue to ask such questions, unless the provinces enact similar provisions.

The penalty for requiring disclosure contrary to s. 36 is set out in s-s. 36(4), using or authorizing the use of an application form in contravention of s-s. 36(3) is a summary conviction offence. Punishment for summary conviction offences is provided for in the *Criminal Code*, and is currently six months in jail, a $500 fine or both.

Finding of guilt not a previous conviction: subsection 36(5)

Further legislative recognition of the principle that a young person's mistakes should not be held against him indefinitely can be found in s-s. 36(5), which provides that a young person's conviction for an offence under the Y.O.A. is not a "previous conviction" for the purposes of any offence under any Act of Parliament. For certain offences, the enacting legislation specifies

that a heavier penalty must be imposed for a second, or subsequent, convictions. For example, para. 234(1)(b) of the *Criminal Code* provides that a person convicted of a second offence of impaired driving is subject to a mandatory minimum of 14 days' imprisonment, while subsequent impaired driving offences are punishable by a minimum of at least three months' imprisonment. Subsection 36(5) is an example of a situation where the young person is not held as strictly accountable as an adult; in effect the young person may be given a second chance.

Paragraph 36(1)(e) specifically allows a court to make use of a previous conviction under the Y.O.A. for the purpose of imposing a disposition in youth court or a sentence in ordinary (adult court). The effect of s-s. 36(5) is only to free a court from the mandatory requirement of imposing a more severe sanction if there has been a previous conviction. Once a record of conviction is required to be destroyed in accordance with s. 45, however, it cannot be used for any purpose.

YOUTH WORKERS
(Section 37)

Introduction

The Y.O.A. creates a new classification of personnel within the juvenile justice system, "the youth worker". These workers will perform many of the functions carried out by juvenile probation officers under ss. 30 and 31 of the *J.D.A.*

SECTION 37

37. *Duties of youth worker.*—The duties and functions of a youth worker in respect of a young person whose case has been assigned to him by the provincial director or his delegate include

(a) where the young person is bound by a probation order that requires him to be under supervision, supervising the young person in complying with the conditions of the probation order or in carrying out any other disposition made together with it;

(b) where the young person is found guilty of any offence, giving such assistance to him as he considers appropriate up to the time the young person is discharged or the disposition of his case terminates;

(c) attending court when he considers it advisable or when required by the youth court to be present;

(d) preparing, at the request of the provincial director or his delegate, a pre-disposition report or a progress report; and

(e) performing such other duties and functions as the provincial director requires.

Youth workers: section 37

According to the definition in s-s. 2(1) of the Y.O.A., youth workers are "to perform, either generally or in a specific case . . . any of the duties or functions of a youth worker under this Act." A certain class of persons may be designated by the province as youth workers. This designation may be made by an Act of the provincial legislature or by the Lieutenant Governor in Council (provincial Cabinet) or his delegate. Persons not so designated or

appointed may also qualify as a "youth worker", if they are carrying out any of the duties or functions of a youth worker, as the definition is a functional one.

Section 37 of the Y.O.A. outlines four specific tasks that may be performed by a youth worker: supervising the young person in complying with the conditions of the probation order or in carrying out any other disposition made in conjunction with the probation order; assisting the young person until his disposition has been completed; attending court proceedings "when he considers it advisable or when required by the youth court to be present"; and preparing pre-disposition and progress reports. Section 37 also authorizes a youth worker to perform "such other duties and functions as the provincial director requires."

Youth workers are provincial employees, the exact nature of their duties may depend upon provincial directives. Various officers may act in the capacity of youth workers regardless of the title of their positions; for example, probation officers or child welfare workers may assume the responsibilities of a youth worker. Especially in remote areas, the practice of dividing a worker's time between other duties such as supervising adult probationers or doing child welfare work, and young offenders work, may continue to be commonplace. It is not essential that a youth worker be employed full time in assisting young offenders.

PROTECTION OF PRIVACY OF YOUNG PERSONS
(Sections 38 and 39)

Introduction

Sections 38 and 39 of the Y.O.A. are designed to protect the young person's privacy during youth court proceedings by forbidding publication of information serving to identify the young person and by allowing exclusion of the public from the court in certain circumstances. The court's concern goes beyond privacy, however, as an exclusionary order may be made in order to protect the young person from harm, or in the interests of public morals, the maintenance of order, or the proper administration of justice.

The approach to the issue of privacy adopted in the Y.O.A. differs significantly from that taken in the *Juvenile Delinquents Act*, particularly as that Act was interpreted in recent judicial pronouncements. Subsection 12(1) of the *J.D.A.* provides that trials shall take place "without publicity". In *C.B. v. The Queen* (1981), 62 C.C.C. (2d) 107, 24 R.F.L. (2d) 225, 127 D.L.R. (3d) 482, [1981] 6 W.W.R. 701 (S.C.C.), the Supreme Court of Canada overturned a number of lower court decisions and held that s-s. 12(1) of the *J.D.A.* means that trials are to be held *in camera*. As a result, reporters and other members of the public may not attend trials involving *J.D.A.* prosecutions. The *J.D.A.* does not give a judge any discretion to allow members of the public to attend. Further s-s. 12(3) of the *J.D.A.* prohibits the publication of any report revealing the identity of any child charged with a delinquency, except with special leave of the court.

The Y.O.A. reverses the effect of the Supreme Court's decision in *C.B. v. The Queen*. The general rule under the Y.O.A. is that like adult proceedings, youth court proceedings are to be open to the public. Young persons are to be seen to be responsible for their acts, and in this respect these provisions are consistent with para. 3(1)(a) of the Act. The shift from *in camera* proceedings to open court is considered both necessary and desirable

for a number of reasons, notably: to help maintain public confidence in the juvenile justice system, to safeguard the rights of young persons by conducting proceedings openly, and to foster community awareness and involvement in juvenile corrections and justice. However, in recognition of the special status of young persons, under specified circumstances, the youth court judge has a discretion to exclude the public from the proceedings.

Specific provisions have been included in the Y.O.A. to maintain the special status of young persons and to ensure that their needs are not jeopardized by proceedings in open court. These provisions recognize that young people should not in all instances be treated exactly as adults. Such is the aim of s. 38, which forbids the publication of any report of an offence or of proceedings involving a young person that names or contains information serving to identify the young person charged with the offence. This section provides similar protection for any young person or child involved in the proceedings, either as a victim or a witness.

SECTION 38

38. (1) *Identity not to be published.*—No person shall publish by any means any report

(a) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or

(b) of a hearing, adjudication, disposition or appeal concerning a young person who committed or is alleged to have committed an offence

in which the name of the young person, a child or a young person aggrieved by the offence or a child or a young person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person or child, is disclosed.

(2) *Contravention.*—Every one who contravenes subsection (1)

(a) is guilty of an indictable offence and is liable to imprisonment for not more than two years; or

(b) is guilty of an offence punishable on summary conviction.

(3) *Magistrate has absolute jurisdiction on indictment.*—Where an accused is charged with an offence under paragraph (2)(a), a

magistrate has absolute jurisdiction to try the case and his jurisdiction does not depend on the consent of the accused.

No publication of identity: subsection 38(1)

Subsection 38(1) provides that no person shall publish any report of an offence committed by a young person, which names or in any way identifies the young person charged, or a child (under 12 years of age) or young person "aggrieved by the offence", or a child or young person appearing as a witness. The prohibition covers reports of both the actual offence and any hearing, adjudication, disposition or appeal under the Y.O.A. The effect of s-s. 38(1) terminates in regard to the young person charged with the offence once an order has been made transferring the young person to ordinary (adult) court under s. 16 of the Y.O.A. Although s-s. 38(1) ceases to have effect if a transfer order is made, an order banning publication of information presented at the transfer hearing pursuant to s. 17, will continue in effect until the trial in adult court has ended (see s. 17 and following discussion).

The rationale behind preventing publicity is based on a recognition that a young person involved in the criminal justice system may be stigmatized or "labelled" if his involvement becomes known to his peers or the community at large. An American case involving an 11-year-old boy charged with committing second degree murder provides some evidence that publicity associated with the proceedings can cause serious psychological harm. The boy's picture appeared once in the newspaper and television footage showed him leaving the courthouse; as well, his name was published frequently in news reports until the date of a court order restraining publication. The conclusion of the study was that "publicity placed additional stress on [the youth] during a difficult period of adjustment in the community, and it interfered with his adjustment at various points when he was otherwise proceeding adequately." See D. C. Howard, J. T. Grisso and R. Neems, "Publicity and Juvenile Court Proceedings" (1977), 11 Clearinghouse Review 203.

"A young person aggrieved": subsection 38(1)

Subsection 38(1) refers to a "child or young person aggrieved." This clearly includes a victim, but may be broader: see

subpara. 39(1)(a)(iii) referring to a "young person who is aggrieved by or the victim of the offence." A young person aggrieved by an offence might, for example, include the child of a rape victim.

"Publish": subsection 38(1)

The use of the word "publish" in s-s. 38(1) creates some uncertainty, as it normally has two different meanings. The word "publish" may mean either (see *Random House Dictionary*, 1969, p. 1162):

> to issue or cause to be issued, in copies made by printing or other processes for sale or distribution to the public, as a book, periodical, map, piece of music, engraving or the like.
>
> or
>
> to make publicly or generally known

The first definition limits "publish" to the printed word: the second is broader and would take in any medium through which information is disseminated. As this section creates an offence, it must be construed narrowly. Moreover, s. 38 contrasts with the wording of s. 17 of the Y.O.A., which states that "information . . . shall not be published in any newspaper or broadcast . . .". The use of both "publish" and "broadcast" in s. 17 might suggest that the term "publish", as used in the Y.O.A., should be given a narrow meaning. However, direct comparison of s. 17 of the Y.O.A. and s. 38 might not be appropriate as in s. 38 "publish" is modified by the expansive phrase, "by any means".

The term "publish" is also used in s. 263 of the *Criminal Code*. However, since libel is restricted to printed matter, the definition of publishing in s. 263 and the case law on the issue do not resolve the problem that has been identified in s. 38.

In *Re A.-G. Man. and Radio OB Ltd.* (1976), 70 D.L.R. (3d) 311, 31 C.C.C. (2d) 1, [1976] 4 W.W.R. 147 (Man. Q.B.), Solomon J. held that in regard to a radio broadcast concerning a juvenile charged with murder, the radio announcer "breached s-ss. 12(1) of the [*Juvenile Delinquents*] Act by publishing, during his radio programme, information which could easily identify the juvenile" (at p. 316 D.L.R.), the issue of the meaning of "publish" was not directly addressed by Solomon J. but the court clearly intended it to have a very broad meaning. In *Smith v. Daily*

Mail Publishing, 99 S. Ct. 2667, 443 U.S. 97 (1979), the United States Supreme Court considered legislation dealing with publication of identifying information at juvenile trials, and specifically distinguished electronic media from newspapers. The implications of *Smith* are considered further below, suffice it to note that if "publish" in s. 38 of the Y.O.A. is given a narrow meaning so as to restrict the print medium only, the section may be subject to challenge under the *Canadian Charter of Rights and Freedoms*.

On balance, the broader definition of "publish" is more logical and preferable. The addition of the words "by any means" to s-s. 38(1) is meant to confirm that the broader meaning was intended. Further, and more importantly, the purpose of s. 38, including its intended protection of young persons and children, would be entirely undermined if "publish" was confined to the print media.

Procedure: subsections 38(2) and (3)

Subsection 38(2) provides that offences created by s-s. 38(1) are hybrid: the Crown has an election, and may choose to prosecute by way of summary conviction or indictment. Subsection 38(3) provides that all charges under s-ss. 38(1) are within the absolute jurisdiction of a magistrate in adult court, thus eliminating any choice for the accused regarding manner of trial. This simplifies and expedites the procedures for this type of prosecution.

Contempt of court

The offence created by s-s. 38(2) for contravening the publication restrictions found in ss. 17 and 38 of the Y.O.A. is supplementary to the more general provisions of the law of contempt. Reports in the media may also constitute criminal contempt if they are "calculated to prejudice mankind against the accused before the case is heard": see *Re A.-G. Man. and Radio OB Ltd.*, [1976] 4 W.W.R. 147, 70 D.L.R. (3d) 311, 31 C.C.C. (2d) 1 (Man. Q.B.).

A Charter of Rights challenge to section 38?

It is possible that the validity of s. 38 of the Y.O.A. may be challenged as an infringement of "freedom of the press and other

media communication", as guaranteed by para. 2(b) of the *Canadian Charter of Rights and Freedoms*.

In one American case, such a challenge was successful, although its applicability to Canada is debatable. In *Smith v. Daily Mail Publishing*, 99 S. Ct. 2667, 443 U.S. 97 (1979) the United States Supreme Court held unconstitutional state legislation making it an offence if the name of any child involved in a juvenile court proceeding was "published in any newspaper without a written order of the court"; the legislation violated the First Amendment of the American Constitution, guaranteeing freedom of the press. Chief Justice Burger, delivering the opinion of the Court, recognized that the state had an interest in protecting the anonymity of the juvenile offender "because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences" (at p. 104 U.S.), but he concluded that the state interest could not justify the imposition of criminal sanctions. Justice Rehnquist, in a concurring opinion, held that the state's interests in preserving the anonymity of juvenile offenders was of the "highest order", and "far outweighs any minimal interference with freedom of the press that a ban on publication of the youths' names entails" (at p. 107 U.S.). Although Justice Rehnquist ruled the statute unconstitutional, as it restricted only newspapers and not the electronic media, he concluded that "a generally effective ban on publication that applied to all forms of mass communication, electronic and print media alike, would be constitutional" (at p. 111 U.S.).

The approach of Canadian courts to the *Charter* is still in its intitial stages of development, but it would seem that the approach of Justice Rehnquist, with its balancing of interests, will be adopted in view of s. 1 of the *Charter*, which explicitly recognizes that the freedoms of the *Charter* are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This would suggest that s. 38 of the Y.O.A. could not be successfully challenged under the *Charter*, provided the words "publish by any means" are given a broad interpretation.

In *R. v. J.(R.)*, [1982] W.D.F.L. 791, 7 W.C.B. 507 (Ont. Prov. Ct.), it was held that s-s. 12(1) of the *J.D.A.*, with its requirement that hearings occur *in camera*, was unconstitutional for violating the *Charter* and that a reporter could be present

during a juvenile trial. However, Genest Prov. J. expressly held that the provisions of s-ss. 12(3) and (4) prohibiting the publication of information identifying the juvenile was reasonable and justified and hence permissible under s. 1 of the *Charter*. A limitation on the freedom of the press guaranteed by s. 2 of the *Charter* is justified in the interest of protecting youths from the harmful effects of public identification in the media.

See S. D. Cohen, "Reconciling Media Access with Confidentiality for the Individual in Juvenile Court" (1980), 20 Santa Clara Law Review 405; and *Re F. P. Publications (Western) Limited and The Queen* (1979), 2 Man. R. (2d) l, 108 D.L.R. (3d) 153, 51 C.C.C. (2d) 110, [1980] 1 W.W.R. 504 (C.A.). See also the discussion under s. 39 of the Y.O.A. concerning challenges to that section based on para. 11(d) of the *Charter* guaranteeing a "fair and public hearing".

Exclusion from hearing: section 39

SECTION 39

39. (1) *Exclusion from hearing.*—Subject to subsection (2), where a court or justice before whom proceedings are carried out under this Act is of the opinion

(a) that any evidence or information presented to the court or justice would be seriously injurious or seriously prejudicial to

(i) the young person who is being dealt with in the proceedings,

(ii) a child or young person who is a witness in the proceedings,

(iii) a child or young person who is aggrieved by or the victim of the offence charged in the proceedings, or

(b) that it would be in the interest of public morals, the maintenance of order or the proper administration of justice to exclude any or all members of the public from the court room,

the court or justice may exclude any person from all or part of the proceedings if the court or justice deems that person's presence to be unnecessary to the conduct of the proceedings.

(2) *Exception.*—A court or justice may not, pursuant to subsection (1), exclude from proceedings under this Act

(a) the prosecutor;

(b) the young person who is being dealt with in the proceedings, his parent, his counsel or any adult assisting him pursuant to subsection 11(7);

(c) the provincial director or his agent; or

(d) the youth worker to whom the young person's case has been assigned.

(3) *Exclusion after adjudication or during review.*—The youth court, after it has found a young person guilty of an offence, or the youth court or the review board, during a review of a disposition under sections 28 to 33, may, in its discretion, exclude from the court or from a hearing of the review board, as the case may be, any person other than

(a) the young person or his counsel,

(b) the provincial director or his agent,

(c) the youth worker to whom the young person's case has been assigned, and

(d) the Attorney General or his agent,

when any information is being presented to the court or the review board the knowledge of which might, in the opinion of the court or review board, be seriously injurious or seriously prejudicial to the young person.

Exclusion from youth court hearing: subsection 39(1)

The youth court judge may exclude any person from the courtroom, with the exception of a limited number of participants specifically mentioned in s-s. 39(2), or in the case of a dispositional hearing or review, those mentioned in s-s. 39(3). Subsection 39(1) establishes two sets of criteria for exclusion. The youth court judge is empowered to order exclusion to protect a young person or child from serious prejudice or harm; as well, a judge may make an order for exclusion in the interests of public morals, the maintenance of order, or the proper administration of justice. A person may only be excluded if his presence is "unnecessary to the conduct of the proceedings."

The first set of criteria in para. 39(1)(a) allows exclusion if any evidence or information presented to the court or justice would be "seriously injurious" or "seriously prejudicial" to a young person or child in any of three categories: the young person charged with the offence, a child or young person appearing as a

witness, and a child or young person "aggrieved by or the victim of the offence." For a discussion of the word "aggrieved" see comments under s-s. 38(1).

The test to be satisfied in s-s. 39(1) is a stringent one — harm must be "seriously injurious" or "seriously prejudicial." Two types of harmful communications are covered by these words. The situation where a young person is harmed by hearing information which is shocking, distasteful or delicate is covered by the word "injurious." The conveying of information to someone other than the young person so that the young person is indirectly harmed is included in "prejudicial." The fact that injury or prejudice may result, is not sufficient to justify an exclusionary order; the use of the word "would" suggests that the likelihood of harm must be reasonably probable or certain. Further, the harm must be a serious harm before any person may be excluded pursuant to s-s. 39(1).

The second set of criteria for exclusion is broadly worded in para. 39(1)(b); exclusion is permitted in the interest of "public morals, the maintenance of order or the proper administration of justice." Since s-s. 39(1) uses the same words as s. 442 of the *Criminal Code*, the jurisprudence which has developed in relation to s. 442 may be relevant. Exclusion of the public on the basis of the "proper administration of justice" is not justified solely because of the embarrassment of witnesses: *R. v. Quesnel and Quesnel* (1979), 51 C.C.C. (2d) 270 (Ont. C.A.). The discretion to exclude the public must be exercised cautiously and only as circumstances demand: *R. v. Warawuk* (1978), 42 C.C.C. (2d) 121, [1978] 5 W.W.R. 389, 10 A.R. 541 (C.A.).

The power to exclude under s-s. 39(1) exists in addition to the usual rules regarding the exclusion of witnesses. The trial judge has a discretion to make an order excluding all or any of the witnesses for the Crown or the defence (except the accused). However, even where a witness has intentionally disregarded the court's exclusion order, a witness cannot be prevented from testifying although refusal to leave the courtroom may affect the weight given to the witness's testimony: *R. v. Wilson* (1973), 6 N.S.R. (2d) 395, 25 C.R.N.S. 47, 14 C.C.C. (2d) 258 (C.A.); leave to appeal to S.C.C. refused 14 C.C.C. (2d) 258*n* (S.C.C.).

Persons who may not be excluded: subsection 39(2)

Subsections 39(2) and (3) provide that certain persons may not be excluded from proceedings under the Y.O.A., these two subsections should be considered together. Subsection 39(2) provides that the persons specified may not be excluded from the proceedings, prior to disposition; those mentioned in s-s. 39(2) have an unfettered right to be present at a pre-trial detention hearing, transfer proceedings and until the judge renders an ajudication at trial. Subsection 39(3) provides that the specified persons may not be excluded from a disposition hearing or a disposition review. The list in s-s. 39(3) is somewhat narrower than that in s-s. 39(2); there are some persons who have the right to be present until adjudication is completed, under s-s. 39(2), but who may be excluded thereafter as they are not mentioned in s-s. 39(3).

Those who may not be excluded prior to disposition because they are mentioned in s-s. 39(2) are: the prosecutor, the young person, his parent, his counsel or an adult assisting the young person pursuant to s-s. 11(7), the provincial director or his agent, and the youth worker assigned to the young person's case. The prosecutor includes a "private prosecutor", as defined in the *Criminal Code*.

Exclusion at disposition or review: subsection 39(3)

Subsection 39(3) permits exclusion during review or after adjudication if there is information being presented, "the knowledge of which might . . . be seriously injurious or seriously prejudicial to the young person." Certain individuals may not be excluded: the young person; his counsel; the provincial director or his agent; the young person's youth worker; and the Attorney General or his agent. Note that this list is shorter than that in s-s. 39(2). Following adjudication, a private prosecutor, the young person's parents and an adult assisting the young person under s-s. 11(7) may be excluded. The provisions of s-s. 39(3) reflect a concern that the wide range of information, including reports containing personal information, presented at a dispositional hearing or review not be broadly disseminated. For example, a young person who has had an abortion without the parents knowing might be seriously prejudiced if her parents were to learn of the abortion. Similarly, an adult relative assisting the

young person under s-s. 11(7) might learn something, knowledge of which could be injurious to the young person. Subsection 39(3) requires the court or review board to be of the opinion that "the knowledge ... *might* ... be *seriously* injurious or *seriously* prejudicial to the young person." This suggests that the potential injury must be substantial, and not slight, but that there need not be certainty that the injury will occur; the risk of injury is sufficient. Subsection 39(3) may be contrasted with s-s. 39(1); the latter requires the court to be of the opinion that the information "*would* be *seriously* injurious or *seriously* prejudicial", and imports a much greater degree of certainty that injury will occur.

Presence of young person: subsections 39(2) and (3)

The combined effect of s-ss. 39(2) and (3) is to recognize the young person's right to be present throughout the proceedings. Although the general rule is that attendance is required, para. 577(2)(b) of the *Criminal Code* states that the court may "permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper." This provision of the *Code* is applicable to youth court proceedings pursuant to s-s. 52(3) of the Y.O.A. Moreover, it contemplates the court acceding or responding to a request from the young person to be absent; the court should not respond to requests from third parties such as the prosecutor or a parent, unless the latter makes the request on behalf of the young person. If the young person is not represented, however, it would seem that the judge should not exercise his discretion to allow the young person to be out of court except in very limited circumstances. If the young person is represented, a request to be absent from the court can only be made with the young person's approval or authority. See *R. v. Page*, [1969] 1 C.C.C. 90, 64 W.W.R. 637 (B.C.C.A.) where a conviction in an adult proceeding was quashed because counsel for the accused waived his client's right to be present without the client's express authorization, there was no need to demonstrate prejudice nor was it necessary for the accused to object at trial.

See also para. 577(2)(c) of the *Code* allowing a judge to order exclusion of a young person during the trial of the issue of whether he is unfit to stand trial by reason of insanity, if the judge is satisfied that the presence of the young person might have an "adverse effect" on his "mental health". Consider also

the discussion of s-ss. 13(5) and (6) of the Y.O.A. above, where it was suggested these provisions of the Y.O.A. might be interpreted so as to allow exclusion of a young person during cross-examination of the author of a medical or psychological report, if the presence of the young person "would be likely to be detrimental to 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 Charter of Rights challenge to section 39?

Section 39 of the Y.O.A., which gives a youth court discretion to exclude members of the public from proceedings may be challenged as violating rights guaranteed in the *Charter of Rights*. Paragraph 2(b) of the *Charter* guarantees freedom of "expression, including freedom of the press and other media of communication," while para. 11(d) of the *Charter* provides that "any person charged with an offence has the right ... to be presumed innocent until proven guilty ... in a fair and *public* hearing." Thus, s. 39 may be challenged either by a young person claiming his right to a "public hearing" is being violated, or by a person excluded from the hearing. It is submitted that s. 39 should withstand constitutional challenge.

There are a few recent Canadian cases decided under the *Charter* which are directly relevant and some American decisions which are, as well, of considerable assistance.

In *Reference re Constitutional Validity of Section 12 of The Juvenile Delinquents Act* (1982), 38 O.R. (2d) 748, 70 C.C.C. (2d) 257, 29 R.F.L. (2d) 1 (H.C.); affd 3 C.C.C. (2d) 515, 41 O.R. (2d) 113 *sub nom. Re Southam Inc. and The Queen (No. 1)* (C.A.), a declaration was made that s-s. 12(1) of the *J.D.A.* which provides for an absolute prohibition on public attendance at juvenile trials, was unconstitutional as a violation of "freedom of expression including freedom of the press and other media" as guaranteed by s. 2 of the *Charter of Rights*. The court focussed on the fact that s-s. 12(1) of the *J.D.A.* gave the court no discretion, and stated that while there are circumstances in which an exclusion of the public is justifiable, there is a presumption that the public should be present: see *MacIntyre v. A.-G. N.S.* (1982), 40 N.R. 181, 65 C.C.C. (2d) 129, 26 C.R. (3d) 193, 132 D.L.R. (3d) 385, 49 N.S.R. (2d) 609 (S.C.C.). In *obiter dicta*, Smith J. (at p.

754 O.R.) specifically compared the constitutional validity of provisions of the *J.D.A.* and the *Y.O.A.*:

> That the courts possess an inherent jurisdiction to forbid access in certain narrow instances, is beyond dispute. The question is whether, since the enactment of the Charter, a legislature or Parliament may pre-empt an entire field by enacting legislation that provides *in camera* hearings for certain classes of cases regardless of circumstances. . . . It is of significance that the new legislation to be shortly proclaimed [the Y.O.A.] lifts the present broad legislative restriction on public proceedings and confers a discretion on the court. The new provisions will be consonant with the *Canadian Charter of Rights and Freedoms* which is designed to remove all potential for abuse and arbitrariness. The basic rights in the Charter are those of all citizens regardless of age.
>
> The courts may be called upon to develop the parameters for the exercise of discretion where children are involved whether that discretion is exercised pursuant to the common law to present statutory provisions such as those found in the *Criminal Code* or to the new *Young Offenders Act* . . . when it shortly comes into force. But the state has not satisfied me that a blanket denial of a public hearing without any cause being shown other than general social purposes can be justified. And when dealing with a legislative violation of a fundamental freedom . . . the burden of persuasion rests with the legislators.

It is submitted that the comments of Smith J. in regard to the validity of s. 39 of the Y.O.A. are correct. The accused young person and the public both have a presumptive constitutional right to attend a hearing under the Y.O.A. However, these rights may be restricted if it is necessary to do so to protect a child or young person from the trauma or harm of a public hearing, or to protect the public interest in the administration of justice or the public morals. See *Globe Newspaper Company v. Superior Court for the County of Norfolk*, 102 S.Ct. 2613 (1982) where the United States Supreme Court suggested that there is a compelling state interest which would justify legislation restricting public access to trials where the victim of a sexual offence is a minor, provided the legislation allows a court to determine on a case-by-case basis whether the state's legitimate concern for the minor victim's well-being necessitates closure. See also *R. v. J.(R.)*, [1982] W.D.F.L. 791, 7 W.C.B. 507 (Ont. Prov. Ct.) and *Richmond Newspapers v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814 (1980).

MAINTENANCE AND USE OF RECORDS
(Sections 40 to 46)

Introduction

The *Young Offenders Act* establishes a procedure for the compiling and maintaining of records concerning a young person dealt with under the Act, including those of the youth court, police, government departments and agencies, and private individuals and agencies; the Act also governs fingerprints and photographs of young persons. The Y.O.A. protects the privacy of young persons by ensuring that access to these records is limited, and also offers the young person an incentive to avoid further criminal activity by providing for the automatic destruction of records, if the young person has no further convictions for a specified period.

The *Juvenile Delinquents Act* is silent about records. Under the *J.D.A.*, record keeping practice has varied across the country, and conflicting jurisprudence has developed around such issues as obtaining fingerprints from children. The desire for standardized practice and for clearer legislative direction regarding access to the young person's record has led to the enactment of the detailed provisions in ss. 40 to 46 of the Y.O.A.

Concern has been expressed about the constitutionality of these new provisions. It has been suggested that ss. 40 to 46 are *ultra vires* the federal government, since records could be classified as coming within the provincial power of the "administration of justice" under s-s. 92(14) of the *Constitution Act, 1867*. However, a sounder approach is to regard these provisions as *intra vires* the jurisdiction of the federal government as "criminal law and procedure" under s-s. 91(27) of the *Constitution Act, 1867*. See *A.-G. B.C. v. Smith*, [1967] S.C.R. 702, 2 C.R.N.S. 277, [1969] 1 C.C.C. 244, 61 W.W.R. 236, 65 D.L.R. (2d) 82 and *R. v. Hauser et al.*, [1979] 1 S.C.R. 984, 98 D.L.R. (3d) 193, 8 C.R. (3d) 89, [1979] 5 W.W.R. 1, 26 N.R. 541, 46 C.C.C. (2d) 481.

Youth court records: section 40

SECTION 40

40. (1) *Clerk of youth court to keep records.*—**The clerk of every youth court shall keep, separate from records of cases in ordinary court, a complete record of every case arising under this Act that comes before the youth court.**

(2) *Records to be made available to specified persons and bodies.*—**A record of a case kept pursuant to subsection (1) shall, during the course of proceedings in the case and during the term of any disposition made in the case, be made available for inspection on request to**

(a) counsel for or a parent of the young person to whom it relates;

(b) the prosecutor;

(c) any judge who hears the case on appeal;

(d) any member of a department or agency of a government in Canada that is engaged in the supervision or care of the young person or in the administration of a disposition relating to the young person; and

(e) any other person who is deemed by a youth court judge to have a valid interest in the proceedings against the young person or in the work of the youth court, to the extent directed by the judge.

(3) *Idem.*—**A record of a case kept pursuant to subsection (1) shall, on request, be made available for inspection at any time before or after proceedings in the case are completed to**

(a) the young person to whom it relates, subject to subsection (4);

(b) counsel acting on behalf of the young person;

(c) the Attorney General of the province in which the youth court hearing the case has jurisdiction or any person authorized in writing by the Attorney General for the purposes of this section;

(d) the National Parole Board or any provincial parole board, for the purpose of considering an application for parole made by the young person after he has become an adult;

(e) any peace officer, for the purpose of investigating any offence that the young person is, on reasonable and probable grounds, suspected of having committed;

(f) any court that is dealing with the young person pursuant to provincial child welfare or youth protection legislation;

(g) any court or justice, for the purpose of sentencing the young person after he becomes an adult, if the young person is found guilty of an offence under an Act of Parliament or the legislature of a province or a regulation made thereunder;

(h) any provincial detention or correctional centre or any penitentiary in which the young person is held in custody after he becomes an adult or is transferred to ordinary court under section 16;

(i) the provincial director, if the young person is being dealt with pursuant to provincial child welfare or youth protection legislation that authorizes the provincial director to obtain the information in the record;

(j) any person, for the purpose of determining whether to grant security clearances required by the Government of Canada or the government of a province for the purposes of employment or the performance of services;

(k) any person who is deemed by a youth court judge to have a valid interest in the record, for research or statistical purposes, if the judge is satisfied that the disclosure is desirable in the public interest; and

(l) any other person who is deemed, or any person within a class of persons that is deemed, by a youth court judge to have a valid interest in the record, if the judge is satisfied that the disclosure is desirable in the interest of the proper administration of justice.

(4) *Non-disclosure of reports to young person.*—Where a youth court has withheld the whole or a part of a report from a young person, his parents or a private prosecutor, pursuant to subsection 13(6) or 14(7), the record or part thereof shall not be made available for inspection under this section to the young person, his parents or the private prosecutor, as the case may be.

(5) *Disclosure of information in records and copies of records.*—Any person to whom a record is required to be made available for inspection on request under this section may be given any information contained in the record and may be given a copy of any part of the record.

(6) [*Record of copies*].—The youth court shall keep a record of all copies given under subsection (5) and the persons to whom they are given.

(7) *Introduction into evidence.*—Nothing in paragraph (3)(f) or (g) authorizes the introduction into evidence of any part of a record that would not otherwise be admissible in evidence.

(8) *Disclosure for research or statistical purposes.*—Where a record is made available for inspection to any person under paragraph (3)(k), that person may subsequently disclose any information contained in the record, but may not disclose the information in any form that could reasonably be expected to identify the young person to whom it relates.

Youth court records: subsection 40(1)

Subsection 40(1) states that the clerk of every youth court shall keep a "complete record of every case" before the youth court. The section is mandatory — a record must be kept of every case that comes before the youth court, and these records must be kept separate from those kept for ordinary court (adult court). Youth court records are distinct from police records (ss. 41 and 42) and government and private records (s. 43).

Definition of "record": section 40

The Y.O.A. does not specify what constitutes a "complete record." Subsection 552(2) of the *Criminal Code* requires the ordinary court to "keep a record of every arraignment and of proceedings subsequent to arraignment"; the wording of the Y.O.A. is broader.

For the purposes of the Y.O.A. the "complete record" should include such items as the information, a written notation concerning each time the case was before the court and indicating the plea, adjudication, and disposition, if any. Certain provisions of the Y.O.A. specify that some documents are part of the "record": s-s. 13(9), a medical or psychological report, s-s. 14(4), a pre-disposition report, and subpara. 44(5)(a)(i), fingerprints and photographs received into evidence. Subsection 16(5) provides that the reasons for a youth court's decision on a s. 16 transfer application should form part of the record. Similarly under s-s. 20(6) reasons for disposition form part of the record. Oral reasons for a transfer or disposition decision, or an oral pre-disposition report given under s. 14(3), must be "recorded," but need not be transcribed; it is sufficient to keep a mechanical or stenographic recording. It would also seem that other docu-

ments, court forms and exhibits would constitute part of the "complete record" required by the Y.O.A.

There must be a stenographic or mechanical recording of the evidence of witnesses testifying in proceedings under the Y.O.A. This is a result of the incorporation of the summary conviction procedures of the *Criminal Code* in s. 52 of the Y.O.A.: see s-s. 736(3) and s. 468 of the *Code*. Though there must be a stenographic or mechanical recording, neither the *Code* nor Y.O.A. require the entire recording to be transcribed; transcription may be requested by a party in conjunction with an appeal.

It may be argued that since the Y.O.A. does not specifically refer to such stenographic or mechanical recordings, they are not within the "complete record" of s. 40. If this argument is accepted, then while it is necessary to have recordings of youth court proceedings, they need not be destroyed, as s. 45 of the Y.O.A. does not apply. Notwithstanding the above argument, however, it is submitted that a stenographic or mechanical recording does form part of the "complete record" of s. 40, and hence is subject to the limited access and destruction provisions of ss. 40 and 45. This approach is based on a policy of ensuring that a young person is adequately protected and access to the recordings of the proceedings is limited, and in due course the record is destroyed as required by s. 45. Accordingly, youth court clerks and youth court reporters will have to ensure that appropriate measures are taken in regard to the storage and destruction of mechanical and stenographic recordings of the proceedings.

The content of the "complete record" may perhaps be further defined under s. 67 of the Y.O.A., which empowers the Governor in Council to make regulations generally for carrying out the purposes and provisions of the Act. In addition, this section permits the Governor in Council to make regulations establishing uniform rules of court for youth courts across Canada, including rules regulating the practice and procedure to be followed by youth courts. Such regulations would be applicable uniformly across Canada.

Similarly, but on a provincial level, s. 68 allows judges of the youth court to make rules to regulate the duties of the officers of the youth court in the province and any other matter considered expedient to attain the ends of justice and carrying into effect the

provisions of the Act. Thus, judges in each province may have the power to define the content of the record, where it has not specifically been dealt with in the Y.O.A. or by federal regulation.

Rules and regulations under s. 67 or 68 are not to be inconsistent with the Y.O.A., and could specify the manner in which records are to be kept. If judicial interpretation should result in a narrow view being taken of the meaning of a "complete record," rules or regulations could elaborate on record keeping requirements, but they could not cut down on the scope of the Act.

Appeal court records

The records of an ordinary court hearing an appeal or review of a decision of a youth court are not directly governed by s. 40 of the Y.O.A. Paragraphs 40(2)(a) and (b) allow the parties to have access to the youth court record which permits preparation of an appeal, and para. 40(2)(c) specifically allows the appellate court to have access to the youth court record. Any portions of the youth court record which come into the records of an appellate court are not to be disclosed, by virtue of s-s. 46(2), and s. 45 further requires the destruction of copies of those portions of the youth court record acquired by the appellate court. Thus, some parts of the appellate records may technically be exempt from the Y.O.A., but some portions will be subject to the access and destruction provisions of the Act. Those responsible for record keeping in the appellate courts will have to handle their records in such a manner as to comply with the provisions of the *Young Offenders Act*.

Review board records

Under s. 30 of the Y.O.A. provincial governments may decide to establish review boards to carry out the "duties and functions of a youth court" in regard to review of custodial dispositions. It is submitted that as such boards are carrying out the "duties and functions" of a youth court, by necessary implication the records of such boards are to be treated as youth court records and are governed by s. 40. However, in the absence of explicit legislative provision, it could be argued that it is more appropriate to consider that these are not technically youth court records and are not governed by s. 40. If this argument is accepted, then review

board records would be governed by s. 43 of the Y.O.A. See also the discussion under ss. 31 and 43.

Disclosure: subsections 40(2) and (3)

Section 40 sets out detailed rules relating to disclosure of records. Subsection 40(2) is the more limited provision, since it deals only with requests for disclosure "during the course of proceedings and during the term of any disposition." Essentially s-s. 40(2) is directed to those persons directly involved in the proceedings. Subsection 40(3), a broader provision than s-s. 40(2), states that disclosure may be made "at any time before or after proceedings in the case are completed." The wording of s-s. 40(3) is broad enough to include a request for disclosure made during the proceedings. Thus, a young person has a right of access to his court record at any time under s-s. 40(3).

Disclosure to whom: paragraphs 40(2)(a) to (d)

Subsection 40(2) provides a list of persons who may obtain access to the court record "during the course of the proceedings" and who pursuant to s-s. 40(5) may obtain copies of any part of the record. Counsel for the young person or a parent has this right under para. 40(2)(a). Paragraph 40(2)(b) gives this right to the prosecutor; the definition of prosecutor found in s. 2 of the *Criminal Code* includes a private prosecutor. Paragraph 40(2)(c) allows access to the court record by any judge who hears the case on appeal.

Paragraph 40(2)(d) permits access to a member of "a department or agency of a government" supervising or caring for the young person or administering a disposition relating to the young person and clearly directs the release of records to youth court workers and training school administrators. This raises the issue whether Children's Aid Societies in Ontario, Nova Scotia and Manitoba come within para. 40(2)(d) as an "agency of a government." While these agencies are government funded and are subject to a large degree of control, both through their budgets and through government regulation, they are distinct legal entities with community based boards of directors. In any event, if a Children's Aid Society is not an "agency of a government," it could apply for access to court records pursuant to paras. 40(2)(e) and (3)(l).

Disclosure, who decides: paragraphs 40(2)(a) to (d)

Disclosure under paras. 40(2)(a) to (d) is an administrative matter within the clerk's powers. As long as the clerk is satisfied as to the identity of the person seeking disclosure, it must be made to a person qualified under these paragraphs.

Disclosure to "any other person" having a "valid interest": paragraph 40(2)(e)

Paragraph 40(2)(e) extends disclosure to "any other person ... deemed by a youth court judge to have a valid interest in the proceedings ... or in the work of the youth court." This provision contrasts with the immediately preceding paragraphs because a determination by a youth court judge is required. The Y.O.A. does not require a judge to hold any kind of a hearing before rendering a decision; the Act will be satisfied by an informal process. It is left to the discretion of each judge to determine an appropriate procedure, subject to any rules or regulations which may be promulgated. The judge, in his discretion, will determine whether the young person or any other persons should be given notice of any application, and whether anyone will be permitted to make representations. For example, if an individual wants access to the record of a particular young person, but the validity of his interest is borderline, it might be appropriate to give the young person notice of this before making a decision. On the other hand, if a newspaper reporter doing a background story on the youth court wishes to examine all the records of the youth court for a particular month, a judge may decide to allow this without giving notice to any the young people involved; of course the reporter would be subject to s. 38 concerning disclosure of the identity of young persons. If the circumstances require, a judge might consider appointment of an *amicus curiae* to represent the interests of a class of young persons, rather than giving each notice. Disclosure under para. 40(2)(e) may be limited to the extent directed by the judge, such that only relevant and necessary portions of the record will be disclosed.

The requirement that a person have a "valid interest" appears to narrow the class of people who will have access to the young person's record during the course of proceedings, although the Act does not define this term. The section includes a person with "an interest in the proceedings" or "in the work of the court."

Examples of persons who may have an interest in the proceedings are the victim, close relatives of the victim, and possibly the child's doctor.

Disclosure under subsection 40(3)

Subsection 40(3) gives a specified list of persons a right to access to court records, and to obtain copies under s-s. 40(5), at any time before, after and during a proceeding.

Paragraph 40(3)(a) gives the young person a right to access, thus ensuring that the young person is able to use the records in preparation for and during any legal proceedings. Counsel for the young person is included in para. 40(3)(b), but only to the extent that he is acting "on behalf of the young person." "Counsel" is defined in s. 2 of the *Criminal Code* as a "barrister or solicitor". This definition does not, therefore, seem to extend to articling students or clerks, nor does it include other agents or representatives of the young person. Unlike para. 40(2)(a), which allows for disclosure of records to a parent, or counsel for a young person, para. 40(3)(b) does not include reference to parents. The parents' right to disclosure is more limited than the young person's, as no specific right to access records is given to them after the completion of disposition; parents may seek access under para. 40(3)(l).

Some of the provisions of s-s. 40(3) limit the circumstances under which access can be obtained. For example, the National Parole Board has a right of access, in the case of an application for parole made by the young person after he has become an adult (para. 40(3)(d)). Similarly, any institution in which the young person is held in custody after he becomes an adult may request disclosure (para. 40(3)(h)). Access is also granted under para. 40(3)(j) for the purpose of determining whether to grant security clearances required by the provincial or federal government.

Under para. 40(3)(c), the provincial Attorney General or any person authorized in writing by him has a right to access to the record, without the need to specify a reason.

Disclosure to police investigator: paragraph 40(3)(e)

Paragraph 40(3)(e) provides for access to an investigating peace officer with "reasonable and probable grounds" for sus-

pecting the young person of having committed an offence. The person who determines whether reasonable and probable grounds exist has not been specified. It seems that the youth court clerk is given this responsibility; note that paras. 40(3)(k) and (l) specify that certain questions of access must be determined by the judge. As with paras. 40(2)(a) to (d), it seems that paras. 40(3)(a) to (j) are to be administered by the clerk of the youth court.

Disclosure for other proceedings: paragraphs 40(3)(f), (g) and (i)

Disclosure of the youth court record is also available to any court for the purpose of sentencing the young person after he has become an adult (para. 40(3)(g)). The purpose of this provision is to make available to the sentencing judge information revealing a pattern of crime before, and continuing into, adulthood. Any court dealing with the young person under provincial child welfare or youth protection legislation also has a right to disclosure (para. 40(3)(f)). As well, where such legislation authorizes the provincial director to obtain the information in the record, if the provincial director is dealing with the young person under such legislation, he may have access to the record (para. 40(3)(i)). Note, however, that s-s. 40(7) clearly states that neither para. 40(3)(f) nor (g) renders admissible evidence that would otherwise not be admissible according to the rules of evidence in the court proceedings. A previous youth court record cannot be used for any purpose after the time prescribed by s. 45 of the Y.O.A. requiring destruction of the records has elapsed: see s-s. 45(5). See also paras. 36(1)(c) to (f) concerning use of a record of conviction in subsequent proceedings.

Disclosure to researchers or persons having a "valid interest": paragraphs 40(3)(k) and (l)

Any person "deemed by a youth court judge to have a valid interest in the record, for research or statistical purposes" may have access to youth court records pursuant to para. 40(3)(k), provided the disclosure is in the "public interest". Paragraph 40(3)(l) extends disclosure to any other person deemed by a youth court judge to have a valid interest in the record, provided disclosure "is desirable in the interest of the proper administration of justice."

Anyone seeking disclosure under para. 40(3)(k) or (l) must satisfy a youth court judge that he has a "valid interest." This term is also used in para. 40(2)(e). What constitutes a "valid interest"? Clearly in these situations a valid interest must be consistent with either the public interest (para. 40(3)(k)) or the interest of the proper administration of justice (para. 40(3)(l)).

An example of a "person" wanting disclosure under para. 40(3)(l) might be one operating an alternative measures (diversion) program under s. 4. The disclosure of youth court records might be required to enable the program operators to ascertain whether destruction of their own records is required under s-s. 45(2).

In assessing an application for access under para. 40(3)(k) the judge should consider the nature of the research being conducted. The objectives of the researcher and his qualifications (high school student vs. post-graduate university work) are to be assessed. Note that s-s. 40(8) permits a researcher obtaining information under para. 40(3)(k) to disclose this information, but not in "any form that could reasonably be expected to identify the young person to whom it relates." The researcher is also exempted under s-s. 45(3) from the destruction of records provisions of the Y.O.A.; this saves the researcher from the difficulties associated with destruction and allows long-term studies to be conducted, subject to s-s. 40(8).

Subsection 46(2) generally prohibits the disclosure of information by those who have access to records.

The Y.O.A. does not require a judge to hold a formal hearing before rendering a decision under para. 40(3)(k) or (l). An informal procedure will satisfy the Act: see discussion on para. 40(2)(e).

In deciding an application under s-ss. 40(2) or (3), the judge should consider the fundamental principles articulated in s. 3 of the Y.O.A. Paragraph 3(1)(e) provides that the young person has rights and freedoms in his own right. Indiscriminate disclosure of the young person's record without a determination of the presence of a sufficient degree of public interest may violate the young person's right to privacy.

Limitation on disclosure: subsection 40(4)

Subsections 13(6) and 14(7) provide that medical, psychological or pre-dispositional reports may, under specified circum-

stances, be withheld from a young person, his parents or a private prosecutor. Where this has been done, even though these reports constitute part of the youth court record, they shall not be available for inspection under s-ss. 40(2) and (3) to a person from whom they have been withheld under s-ss. 13(6) and 14(7). This will require some special precautions on the part of youth court clerks, some form of "red flagging" of these records will be necessary. Others who have obtained copies of these documents will have to exercise similar care.

Copies of records: subsections 40(5) and (6)

A person who has access to court records under s-s. 40(2) or (3) may be given a copy of any part of the record under s-s. 40(5). Presumably under s. 67 or 68 regulations or rules may be prescribed to set fees for providing copies. Under s-s. 40(6) the youth court must keep a record of all copies given out along with a list of the persons to whom copies are given. Such records facilitate the operation of the destruction provisions in s. 45. Note that apparently no record need be kept of persons who merely inspect the files and who might in the course of inspection make handwritten notes of the information in the file.

Police records: sections 41 and 42

The importance of the records of various local, provincial and national police forces to the enforcement and administration of justice is recognized by the Y.O.A. Section 41 deals with what is commonly referred to as a "criminal record," while s. 42 is somewhat broader and includes police records relating directly to the investigation of alleged offences. Note that s. 44 deals with fingerprints and photographs which could form an integral part of actual investigative police records. Records of ancillary police services and associated police agencies, such as forensic laboratories, fall under s. 43 dealing with government records.

Central repository records: section 41

SECTION 41

41. (1) ***Records in central repository.*****—A record of any offence of which a young person has been found guilty under this Act may be kept in such central repository as the Commissioner of**

the Royal Canadian Mounted Police may, from time to time, designate for the purpose of keeping criminal history files or records on offenders or keeping records for the identification of offenders.

(2) *Police force to provide record.*—Where a young person is found guilty of an offence under this Act, the police force responsible for the investigation of the offence shall provide a record of the offence for inclusion in any central repository designated pursuant to subsection (1).

(3) *Subsections 40(2) to (8) apply.*—Subsections 40(2) to (8) apply, with such modifications as the circumstances require, in respect of records kept pursuant to subsection (1).

"Record": section 41

"Record" and "criminal history files" are not defined in the Act, although the record in s. 41 is clearly different from the youth court records in s. 40. The "record" which may be kept pursuant to s. 41 could include such factual information about the young person, the offence, and the disposition as the following:

— young person — identifying information including:
- name, address, school, etc.
- date and place of birth
- physical description
- parents' names and addresses
- finger print section (F.P.S.) number

— offences — nature of offence
— Act and section number
— date of conviction

— disposition — jurisdiction and court
— nature of disposition
— date of completion

Subsection 41(1) uses the terms "criminal history files", "records on offenders" and "records for the identification of offenders"; these terms would appear to be roughly synonymous. The use of these synonyms ensures that terminology employed by different law enforcement agencies is included. Further, the words seem susceptible to broad interpretation, and the records

can be expanded to include additional information which may be considered relevant.

Subparagraph 44(5)(a)(ii) requires that where a young person accused of committing an indictable offence is found guilty of that offence, the original or a copy of any fingerprints and print of any photograph of the young person shall be kept as part of the s. 41 record in the central repository.

Records of offence: section 41

Records maintained under s. 41 relate only to offences of which a young person has been found guilty. "Offence" is limited by the definition in s-s. 2(1) to the Y.O.A. to "an offence created by an Act of Parliament or by any legislation, rule, order, by-law or ordinance made thereunder other than an ordinance of the Yukon Territory or the Northwest Territories."

It appears that the wording of s. 41 does not allow the central repository to retain fingerprints which are sent for a fingerprint search prior to conviction. After a search and a reply to the submitting force has been made, the prints will have to be returned or destroyed, as there is no authority for their retention in these circumstances (see para. 44(5)(a)).

"Central repository": subsection 41(1)

The Commissioner of the Royal Canadian Mounted Police is given authority to designate a facility for the purpose of storage and retrieval of these records. No doubt this repository will be patterned on the existing adult storage facility and will likely be located at the R.C.M.P. headquarters in Ottawa. Such a centralized repository incorporates the following advantages:

— it will promote effective investigation of crime and identification of criminals in the interests of public protection and the effective administration of justice;

— it will ensure access to information in a young person's record for those persons so entitled (see s-s. 41(3)); and

— it will enable a young person to obtain, at any time, a complete summary of his record and allow him to verify that destruction has in fact occurred (see s-s. 41(3) and s. 45).

Record provided to central repository: subsection 41(2)

Subsection 41(2), in conjunction with s-s. 41(1), contemplates a scheme whereby the investigating police department, upon conviction of the young person, shall furnish the designated central repository with the information which constitutes the "record of the offence." Prior to the conviction of a young person, a record will exist and will be available only at the police department responsible for, or participating in, the investigation of the offence, as provided for under s. 42.

Since the investigating department must provide the information subsequent to a conviction, the Act ensures that the information available in the central repository will be complete. Where more than one department has been involved in the investigation, the department which was responsible for the carriage of the prosecution must comply with providing the record.

Access to the central repository: subsection 41(3)

Subsection 41(3) adopts s-ss. 40(2) to (8), with such changes as the circumstances require, in respect of the records kept in the central repository. Thus, certain persons have a right to disclosure, some have a right under specified circumstances, and others may make an application to youth court to have access to the records. There is to be no disclosure of records other than in the circumstances specified in s-ss. 40(2) and (3) (see s-s. 46(2)). Under para. 40(3)(c), the young person has a right of access to his record at any time and, pursuant to s-s. 40(5), may have a copy of his record; this will allow the young person to ensure that his record has been destroyed as required by s. 45.

For paras. 40(2)(a) to (d) and 40(3)(a) to (j), the keeper of the central repository is to satisfy himself as to identity and eligibility of the person seeking access. If access is sought under para. 40(2)(e) or 40(3)(k) or (l), the issue must be decided by a youth court judge. The Y.O.A. does not require that any person be given notice of such an application or that a formal hearing be held. Before allowing access to the records of the central repository under s. 41 pursuant to para. 40(2)(e) or 40(3)(k) or (l), a judge might consider giving notice to the Commissioner of the Royal Canadian Mounted Police. See also discussion of para. 40(2)(e).

The record kept pursuant to s. 41 might be referred to as the young person's "criminal record". Subject to s-ss. 36(1) and 45(5) it may be used in subsequent proceedings in youth court and adult court: see also para. 40(3)(g). It may also be used in a child welfare or youth protection hearing: see para. 40(3)(f). Admissibility of the record in subsequent court proceedings is subject to the rules of evidence, see s-s. 40(7). In practice such records are introduced by certified copy and identification of the accused person is made by testimony of a police officer or by fingerprint evidence.

Police records: section 42

SECTION 42

42. (1) *Police records.*—A record of any offence alleged to have been committed by a young person may be kept by any police force responsible for, or participating in, the investigation of the offence.

(2) *Records available to members of police force.*—A record kept pursuant to subsection (1) may be made available for inspection at any time to any member of the police force keeping the record.

(3) *Records may be made available to specified persons.*—A record kept pursuant to subsection (1) may, in the discretion of the police force keeping the record, be made available for inspection to any person or body referred to in subsection 40(2) or (3) for the purposes and in the circumstances set out in those subsections.

(4) *Subsections 40(4) to (8) apply.*—Subsections 40(4) to (8) apply, with such modifications as the circumstances require, in respect of records kept pursuant to subsection (1).

(5) *Police records may be made available to peace officers.*—A record kept pursuant to subsection (1) may be made available for inspection at any time to a peace officer if access to the record is necessary in the investigation of any offence that a person is suspected of committing or in respect of which a person has been arrested or charged, whether as a young person or as an adult.

"Record of any offence alleged": subsection 42(1)

It should be noted that "record" as used in this section is broader than "record" in s. 41. Since the record in s. 42 is not

dependent upon conviction, but relates to the investigation of the offence, the scope of information which can be included is not as restricted as in s. 41. The record in s. 42 apparently refers to all of the documentation compiled by the police force in the investigation of an offence and would include general investigation reports, complaints, occurrence reports, as well as any forensic laboratory reports. This record may also contain personal information about the young person suspected of being involved. Section 42 does not require a police force to maintain a record but it does govern the maintenance of, access to, and destruction of any documents and other material which form part of the "record of any alleged offence."

As the term "record" is not defined, it is not clear whether it can be so broadly interpreted as to include the notes and notebook used by a policeman in the investigation of an offence alleged to have been committed by a young person. The statute refers to records kept by a "police force," rather than those of a peace or police officer, which suggests the individual officer's notes are not included. Further, as an officer's personal notes are of a more private nature than an official file at a police station, and as such are not available to the public, one might argue that the potential for prejudice to young persons from the existence of such notes is relatively minimal. On the other hand, any notes made by a police officer would be made in the course of his official duties and arguably are a part of the records of the "police force." One of the main objectives of the record provisions in the Act is the protection of young persons from unauthorised release of information and this suggests that a police officer's notes should be included in the s. 42 record. It would seem anomalous to allow an individual police officer to keep a personal record of the offence when all other records are required to be destroyed. If it is accepted that an officer's notes are included, he will have to comply with the provisions of s. 45 regarding destruction of records. For example, if the notes were taken in connection with an offence where the accused is a young person, the officer would have to destroy the relevant portion of his notes where the youth is acquitted or where the charge has been withdrawn or stayed; other provisions of s. 45 may require destruction at a later date even if the young person is convicted.

It would not seem that physical evidence would constitute part of a police "record" but tape recordings, videotapes or photo-

graphs would be considered part of this record. Fingerprints and photographs of the young person are part of the s. 42 record, but are also subject to the additional constraints of s. 44.

Section 42 has no application until it is "alleged" that an offence has been committed by a young person. An information does not have to be laid for a young person to be "alleged" to have committed an offence; it is sufficient if the young person is a suspect in a case. A young person who is merely a witness or is otherwise named in the record (although not as a suspect), is not entitled to access pursuant to s-s. 42(3); nor, for example, is there a requirement for the destruction of a police record concerning an offence committed by an adult and naming a young person as a witness.

Participating police force: subsection 42(1)

The nature of criminal investigation often necessitates a number of police forces being involved in a single investigation. Where more than one force is participating in the investigation of an offence alleged to be committed by a young person, each force may keep a record, and each is subject to the Act.

It would appear from para. 44(5)(b) that fingerprints and photographs can be kept only by "the police force responsible for the investigation leading to the laying of the information against the young person," and a police force merely "participating in" the investigation of an alleged offence would be precluded from keeping fingerprints or photographs.

Police access to police records: subsections 42(2) and (5)

Pursuant to s-s. 42(2), the files maintained by the police force are accessible to members of the same force, subject only to any internal policy which is within the discretion of the force to implement. This is contrasted with what appears to be a higher test for access for members of another force under s-s. 42(5).

Subsection 42(5) provides for access to police officers from forces other than the force keeping the record. This subsection does not appear to impose as high a test for access as is the case with police officer's access to court records (see para. 40(3)(e)), although the use of the word "necessary" suggests that the information sought from the record must have a measure of impor-

tance related to the investigation. It is for the record keeper of the force to determine the issue of necessity, with any uncertainty being resolved by the chief of the force.

Subsection 42(5) allows access in situations where charges are not yet laid; mere suspicion is enough to justify the request for access.

Discretionary access to police records: subsections 42(3) and (4)

Subsection 42(3) allows a person or body referred to in s-s. 40(2) or (3) to seek access to the police record, but it is in the discretion of the police force keeping the record to refuse access. This means that the young person does not have a right of access to the police record although such a right exists with respect to the record of conviction maintained under s. 41. Subsection 42(3) is generally consistent with the protection of personal information provisions of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, subpara. 53(b)(iii) whereby police investigative files are exempt from the general access provisions of that legislation (see also *Access to Information Act Bill*, S.C. 1980-81-82-83, c. 111).

The effect of s-s. 42(3) of the Y.O.A. is to place the integrity of the investigation of an offence ahead of the right to access of a s. 42 record. More specifically police may be concerned about the disclosure of information concerning the following:

(i) police investigative methods;

(ii) witness names and information identifying witnesses;

(iii) an investigation of co-accused or suspects who were not charged.

Thus, although a person has satisfied a youth court judge that he should have access to police records under para. 40(2)(e) or 40(3)(k) or (l), access to these records may still be denied by the police. This subsection also may operate to deny access to the courts as provided for under paras. 40(3)(f) and (g).

Subsection 42(4) is similar to s-s. 41(3) and makes these subsections of s. 40 dealing with the process of disclosure and provision of copies applicable to police records. The right to receive a copy pursuant to s-s. 40(5) is also within the discretion of the police force, and it would seem that a copy of the record may be

denied although a force may choose to make the record available for inspection.

The police have an absolute discretion as to whether to allow access to their records to statutorily authorised persons. Given the sensitive nature of material in police files, the concern about the release of information about investigative methods and a fear that information in the records might ultimately be revealed to the individuals named, it was felt necessary to give the police control over their records.

Apparently, the only constraint upon the police right to refuse access to their records is a requirement of good faith.

Police files and records have generally not been subject to subpoena in court proceedings on the basis of Crown privilege: see however, *Smerchanski v. Lewis* (1980), 31 O.R. (2d) 705, 117 D.L.R. (3d) 716, 18 C.P.C. 29 (C.A.) which limits the scope of the doctrine. Any right to subpoena police files for various proceedings exists in addition to those rights of disclosure created by the Y.O.A.

Government and private records: section 43

Section 43 deals with a range of records kept by government agencies and departments and by private individuals and organizations, in connection with a young person being dealt with under the Y.O.A. Any records within s. 43 are subject to the provisions of the Act limiting access and requiring disclosure and destruction.

SECTION 43

43. (1) ***Government records.*****—A department or agency of any government in Canada may keep records containing information obtained by the department or agency**

(a) for the purpose of an investigation of an offence alleged to have been committed by a young person;

(b) for use in proceedings against a young person under this Act;

(c) for the purpose of administering a disposition;

(d) for the purpose of considering whether, instead of commencing or continuing judicial proceedings under this Act

against a young person, to use alternative measures to deal with the young person; or

(e) as a result of the use of alternative measures to deal with a young person.

(2) *Private records.*—Any person or organization may keep records containing information obtained by the person or organization

(a) as a result of the use of alternative measures to deal with a young person alleged to have committed an offence; or

(b) for the purpose of administering or participating in the administration of a disposition.

(3) *Record may be made available to specified persons and bodies.*—Any record kept pursuant to subsection (1) or (2) may, in the discretion of the department, agency, person or organization keeping the record, be made available for inspection to any person or body referred to in subsections 40(2) or (3) for the purposes and in the circumstances set out in those subsections.

(4) *Subsections 40(4) to (8) apply.*—Subsections 40(4) to (8) apply, with such modifications as the circumstances require, in respect of records kept pursuant to subsections (1) and (2).

Government records: subsection 43(1)

Subsection 43(1) covers records of any government agency or department at any level — federal, provincial or municipal — other than those governed by ss. 40 to 42 and 44. Subsection 43(1) permits the government department or agency to keep records for the following specified purposes:

(a) investigation of an offence,

(b) use in proceedings against a young person,

(c) purposes of administering a disposition,

(d) consideration of use of alternative measures, under s. 4 or

(e) dealing with a young person by alternative measures.

Any records within this definition are subject to the access and destruction provisions of Y.O.A. Subsection 43(1) authorizes the keeping of records by the provincial director, Crown attorneys, probation officers, training schools and other treatment or custody facilities. Medical and psychiatric facilities directly operated by provincial health departments would also seem to fall within the scope of this provision. Naturally records of govern-

against a young person, to use alternative measures to deal with the young person; or

(e) as a result of the use of alternative measures to deal with a young person.

(2) *Private records.*—Any person or organization may keep records containing information obtained by the person or organization

(a) as a result of the use of alternative measures to deal with a young person alleged to have committed an offence; or

(b) for the purpose of administering or participating in the administration of a disposition.

(3) *Record may be made available to specified persons and bodies.*—Any record kept pursuant to subsection (1) or (2) may, in the discretion of the department, agency, person or organization keeping the record, be made available for inspection to any person or body referred to in subsections 40(2) or (3) for the purposes and in the circumstances set out in those subsections.

(4) *Subsections 40(4) to (8) apply.*—Subsections 40(4) to (8) apply, with such modifications as the circumstances require, in respect of records kept pursuant to subsections (1) and (2).

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Subsection 43(1) covers records of any government agency or department at any level — federal, provincial or municipal — other than those governed by ss. 40 to 42 and 44. Subsection 43(1) permits the government department or agency to keep records for the following specified purposes:

(a) investigation of an offence,

(b) use in proceedings against a young person,

(c) purposes of administering a disposition,

(d) consideration of use of alternative measures, under s. 4 or

(e) dealing with a young person by alternative measures.

Any records within this definition are subject to the access and destruction provisions of Y.O.A. Subsection 43(1) authorizes the keeping of records by the provincial director, Crown attorneys, probation officers, training schools and other treatment or custody facilities. Medical and psychiatric facilities directly operated by provincial health departments would also seem to fall within the scope of this provision. Naturally records of govern-

ment departments or agencies which do not relate to matters specified in s-s. 43(1) are not within the Act. For example, if a young person who is convicted under the Y.O.A. is a ward of a Department of Social Services, the records of the Department concerning the ward do not generally become subject to the access, disclosure and destruction provisions of the Y.O.A. These records, however, would be subject to the Y.O.A. provisions to the extent that they were obtained for use in proceedings under the Act, or for the purposes of administering a disposition.

"Department or agency": subsection 43(1)

The term "department or agency of any government in Canada" is not defined in the Y.O.A., and its exact scope is not clear (see the discussion of Children's Aid Societies under paras. 40(2)(a) to (d), above). The definition is important, for the types of records encompassed by s-s. 43(1) are much broader than those of s-s. 43(2); any records within the provisions of the Y.O.A. are subject to the disclosure and destruction provisions of the Act. Accordingly, in each case where an agency or department purports to have authority to maintain records concerning a young person, its status as a government agency or department must be determined. If it is not a government agency or department, its authority for maintaining such records must be found in s-s. 43(2).

Records of persons or organizations: subsection 43(2)

The records of persons or organizations containing information obtained as a result of the use of alternative measures, or for the purpose of administering or participating in the administration of a disposition are subject to the provisions of the Y.O.A.

The Y.O.A. does not, however, govern other records of private persons or organizations. Thus records of a community agency which counselled a young person prior to the commission of an offence are not subject to the Act, but if the agency becomes involved in supervising a disposition of the young person, those portions of the young person's file obtained as a result of supervising the disposition are subject to the Act. Similarly, the records of a store's security service used in the prosecution of a young person are *not* governed by the Y.O.A., though the police files on the same case are governed by s. 41.

Discretionary disclosures: subsections 43(3) and (4)

Subsection 43(3), like its counterpart s-s. 42(3), gives discretion to the record keeper in deciding whether to give disclosure to the persons designated in s-ss. 40(2) and (3) to the record in question. Presumably the record keeper has a discretion to allow disclosure of part of a record, while retaining the right to withhold other parts. Pursuant to s-s. 46(2), disclosure of information and access to records is only to be given to those specified in s-ss. 40(2) and (3). Application can be made to a youth court under paras. 40(2)(e) and 40(3)(k) and (l) for permission to have disclosure of the records, but the record keeper retains final discretion to refuse disclosure, even after court approval.

It was not felt necessary to give a right to dislosure of records governed by s. 43, even though these include such records as those used for alternative measures and by review boards, as:

— every young person is given access to court records (s. 40) and criminal records (s. 41), and this is thought sufficient to allow a young person to conduct court proceedings and enforce rights under the Act,

— much of the information contained in records governed by s. 43 is obtainable pursuant to other provisions in the Act,

— in regard to records of individuals, agencies and organizations involved in alternative measures, it was felt that these records are limited in scope and usefulness, and further, the young person only participates in alternative measures voluntarily,

— the agencies, organizations and individuals referred to in s. 43 are not usually considered part of the judicial system, and it was felt inappropriate to impose the costs and inconveniences mandatory disclosure might involve.

Naturally, any person mentioned in s-s. 40(2) or (3) might use other legislation to obtain disclosure. The provinces may enact legislation, or in some situations Part IV of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33 might apply (see also *Access to Information Act*, S.C. 1980-81-82-83, c. 111).

Review board records

There may be potential difficulties in regard to access to documents and records used by the review boards, which individual

provinces may choose to establish to deal with review of custodial dispositions under s. 30 of the Y.O.A. It can be argued that since the review boards are carrying out "the duties and functions" of a youth court, it is the necessary implication of the legislation that the review board's records are governed by s. 40. As these boards, for the purposes of reviewing a custodial disposition, are given analogous powers to those of a youth court and will be making similar decisions, a liberal and remedial approach, consistent with the spirit of the Y.O.A., would suggest that this view should prevail. Hence those involved would have a right of access to any document used by the board. The jurisprudential concept of "procedural fairness" also lends support to this conclusion.

In the absence of explicit legislative provision, however, it may be argued that these are not technically youth court records and therefore that s. 40 does not apply. If this argument is accepted, it follows that s. 43 will govern review board records and ensure that such records are not improperly disclosed and are eventually destroyed. Section 43, however, does not guarantee the young person, his counsel or his parents access to the records. However, if there is a review by a youth court of the review board's decision, under s. 40 the young person must have access to any documents sent by the review board for consideration by the youth court. This would include documents which a review board might initially have withheld from the young person (subject to para. 13(6)(b) allowing withholding of medical and psychological reports from a young person). If s. 43 applies, existing jurisprudence suggests that in the absence of valid legislation to the contrary, the review board must act fairly and at least counsel for a young person should have access to all documents on which the board relies in making its decision: see *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.).

A young person, his parents, the Attorney General or his agent or the provincial director have a right to review by the court of a review board decision (s. 31).

Fingerprints and photographs: section 44

Under the *Juvenile Delinquents Act* there have been conflicting judicial pronouncements concerning the fingerprinting and photographing of youths in connection with police investigations,

and practices have varied considerably across the country. Section 44 of the Y.O.A. clarifies the law, giving police the same legislative authority to take fingerprints and photographs of young persons in cases where adults can be subjected to such a procedure with special protections to ensure that access will be strictly controlled. Fingerprints and photographs of young persons can only be taken with legislative authority, and not on the basis of consent. As well as the general destruction provisions of s. 45, there are specific and more stringent requirements in s-s. 44(4) regarding fingerprints and photographs. Although fingerprinting and photographing are an integral part of police investigative work, it is important to note that they are regarded as particularly sensitive and are accorded different treatment from that given other police records under ss. 41 and 42.

SECTION 44

44. (1) ***Identification of Criminals Act applies.*****—Subject to this section, the *Identification of Criminals Act* applies in respect of young persons.**

(2) ***Limitation.*****—No fingerprints or photograph of a young person who is accused of committing an offence shall be taken except in the circumstances in which an adult may, under the *Identification of Criminals Act*, be subjected to the measurements, processes and operations referred to in that Act.**

(3) ***Subsections 40(2) to (8) apply.*****—Subsections 40(2) to (8) apply, with such modifications as the circumstances require, in respect of fingerprints or photographs taken pursuant to this section.**

(4) ***Destruction of fingerprints and photographs.*****—Any fingerprints or photograph of a young person taken pursuant to this Act, and all copies, prints or negatives thereof, shall be destroyed forthwith**

(a) where the young person is acquitted, on the expiration of the time allowed for the taking of an appeal or, where an appeal is taken, when all proceedings in respect of the appeal have been completed; or

(b) where a young person is not charged with an offence or where the charge against the young person is dismissed for any reason other than an acquittal, withdrawn or stayed and no proceedings are taken against him for a period of three months, on the expiration of the three months.

(5) *Records kept where a young person is found guilty.*—Where a young person accused of committing an indictable offence is found guilty of the offence, the original or a copy of any fingerprints and a print of any photograph of the young person taken by or on behalf of a peace officer

(a) shall be kept

(i) as part of the youth court record of the young person where the fingerprints or a print of the photograph has been received in evidence by the youth court in any proceeding relating to the offence, and

(ii) as part of any record of the offence kept in the repository referred to in subsection 41(1); and

(b) may be kept by the police force responsible for the investigation leading to the laying of the information against the young person.

Legislative authority: subsections 44(1) and (2)

Subsection 44(1) authorizes police officers to fingerprint and photograph young persons in the same way as adults, pursuant to the provisions of the *Identification of Criminals Act*, R.S.C. 1970, c. I-1. That Act authorizes these procedures when a person is charged with or convicted of an indictable offence, or has been apprehended under the *Extradiction Act*, R.S.C. 1970, c. E-21 or the *Fugitive Offenders Act*, R.S.C. 1970, c. F-32.

Subsection 44(2) provides that fingerprints and photographs can *only* be taken pursuant to the provisions of the *Identification of Criminals Act*. Unlike with adults, the police cannot fingerprint or photograph a young person solely on the basis of his consent, there must be legislative authority. It might be argued that if fingerprints or photographs are taken in violation of s-s. 44(2) of the Y.O.A., they should be excluded from evidence at subsequent proceedings pursuant to the *Canadian Charter of Rights and Freedoms*, as violating rights under para. 11(d) and "bringing the administration of justice into disrepute" (s-s. 24(2) of the *Charter*).

Access to fingerprints and photographs: subsection 44(3)

Subsection 44(3) provides that s-ss. 40(2) to (8) governing access to records apply to fingerprints and photographs taken by the police. Thus, for example, under para. 40(3)(e) any peace

officer having reasonable and probable grounds for suspecting that a young person has committed *any* offence, may have access to any fingerprints or photographs already taken of the young person, unless they have been destroyed pursuant to the provisions of the Y.O.A. Similarly, under para. 40(3)(a) the young person has a right to access. Notice that unlike in regard to police records (s. 42) and government and private records (s. 43), the keeper of fingerprints or photographs must disclose them to an authorized person.

It would seem unlikely that circumstances would justify a judicial disclosure of fingerprints or photographs under para. 40(2)(e), or 40(3)(k) or (l). Sufficient information should be available in the youth court records (s. 40) and police records (s. 41) for most researchers and other persons having a "valid interest" in the young person or the proceedings of the youth court.

Unauthorized disclosure is an offence under s-s. 46(2).

Destruction of fingerprints and photographs: subsection 44(4)

Subsection 44(4) requires the destruction of fingerprints and photographs when a young person is not convicted. Paragraph 44(4)(a) requires destruction upon acquittal. Paragraph 44(4)(b) deals with situations where the young person is not charged or proceedings are stayed or withdrawn, or there is a dismissal for any reason other than an acquittal (for example, quashing an information for a technical defect) and no new proceedings are taken for three months; in these situations fingerprints or negatives must be destroyed three months from the cessation of proceedings. Paragraph 44(4)(b) is subject to the *Extradition Act* and *Fugitive Offenders Act* which do not require that a charge be laid before fingerprints or photographs are taken.

When fingerprints or photographs have been taken and the young person is convicted, they may be stored pursuant to s-s. 44(5) and must be destroyed pursuant to s. 45.

Although s-s. 44(4) does not specifically deal with included offences, it would seem clear that where a young person is convicted of an included indictable offence, the fingerprints and photograph could be retained as per s-s. 44(5). Where a young person is originally charged with an indictable offence and his

fingerprints or photograph are taken pursuant to s-s. 44(1) but is only convicted of an included summary conviction offence, his fingerprints and photograph would have to be destroyed.

Subsection 44(4) requires the destruction of all originals, as well as copies, prints and negatives.

Storage of fingerprints and photographs: subsection 44(5)

Subsection 44(5) provides for the storage of fingerprints and photographs in the following manner where a young person is found guilty of an indictable offence:

— where the prints/photos were used in court they shall form part of the court record and be stored accordingly under s. 40 (subpara. 44(5)(a)(i));

— they shall form part of any record kept in the central repository under s. 41 (subpara. 44(5)(a)(ii); and

— they may be kept by the police force responsible for the investigation (para. 44(5)(b)).

It is noteworthy that para. 44(5)(a) is mandatory whereas para. 44(5)(b) is permissive.

Although s-s. 42(1) provides for participating police forces to maintain a record, para. 44(5)(b) makes it clear that it is only the police force which was "responsible for the investigation leading to the laying of an information" which may retain fingerprints and photographs in their record. In a joint investigation, more than one force might have this responsibility, in which case both would qualify under para. 44(5)(b).

It also seems that the central repository must destroy or return to the submitting police force, fingerprints and photographs of young persons that are submitted prior to conviction for the purposes of criminal record checks. There is no authority in ss. 41 to 44 for the central repository to retain fingerprints and photographs until the young person has been convicted, and s. 46 makes it clear in these circumstances that they may not be kept.

Destruction of records: section 45

The philosophy of accountability and responsibility articulated in the Declaration of Principle found in s. 3 of the Y.O.A.

does not extend to the point that young persons are treated exactly as adults. The record destruction provisions of the Y.O.A. recognize that a young person should not be subject to consequences as severe as those imposed on an adult.

Section 45 gives a young person convicted of an offence an incentive to refrain from further involvement in illegal activity by providing for automatic destruction of records after a certain period of time if the young person has no further convictions. It is recognized that a young person should be given a second chance to begin life with a "clean record". Similar policy concerns are reflected in s. 36, which provides that for many purposes a young person will be deemed not to have been convicted of an offence under the Y.O.A. once any disposition made under the Act has ceased to have effect.

SECTION 45

45. (1) ***Destruction of records.*****—Where a young person is charged with an offence and**

(a) is acquitted, or

(b) the charge is dismissed for any reason other than acquittal, withdrawn or stayed and no proceedings are taken against him for a period of three months,

all records kept pursuant to sections 40 to 43 and records taken pursuant to section 44 that relate to the young person in respect of the alleged offence and all copies, prints or negatives of such records shall be destroyed.

(2) ***Idem.*****—Where a young person**

(a) has not been charged with or found guilty of an offence under this or any other Act of Parliament or any regulation made thereunder, whether as a young person or an adult,

(i) for a period of two years after all dispositions made in respect of the young person have been completed, where the young person has at any time been found guilty of an offence punishable on summary conviction but has never been convicted of an indictable offence, or

(ii) for a period of five years after all dispositions made in respect of the young person have been completed, where the young person has at any time been convicted of one or more indictable offences, or

(b) has, after becoming an adult, been granted a pardon under the *Criminal Records Act*,

all records kept pursuant to sections 40 to 43 and records taken pursuant to section 44 that relate to the young person and all copies, prints or negatives of such records shall be destroyed.

(3) *Copy given for research or statistical purposes.*—Subsections (1) and (2) do not apply in respect of any copy of a record or part thereof that is given to any person pursuant to paragraph 40(3)(k), but does apply in respect of copies of fingerprints or photographs given pursuant to that paragraph.

(4) *Destruction on acquittal, etc.*—Any record that is not destroyed under this section because the young person to whom it relates was charged with an offence during a period referred to in that subsection shall be destroyed forthwith

(a) where the young person is acquitted, on the expiration of the time allowed for the taking of an appeal or, where an appeal is taken, when all proceedings in respect of the appeal have been completed;

(b) where no proceedings are taken against him for a period of six months, on the expiration of the six months; or

(c) where the charge against the young person is dismissed for any reason other than acquittal, withdrawn or stayed and no proceedings are taken against him for a period of six months, on the expiration of the six months.

(5) *Young person deemed not to have committed offence.*—A young person shall be deemed not to have committed any offence in respect of which records are required to be destroyed under subsection (1), (2) or (4).

(6) *Records not to be used.*—No record or copy, print or negative thereof that is required under this section to be destroyed may be used for any purpose.

(7) *Request for destruction.*—Any person who has under his control or in his possession any record that is required under this section to be destroyed and who refuses or fails, on a request made by or on behalf of the young person to whom the record relates, to destroy the record commits an offence.

(8) *Application to delinquency.*—This section applies, with such modifications as the circumstances require, in respect of records relating to the offence of delinquency under the *Juvenile Delinquents Act* as it read immediately prior to the coming into force of this Act.

Destruction if no conviction: subsection 45(1)

All records kept in connection with an alleged offence by a young person must be destroyed if he is acquitted of the charge, para. 45(1)(a). Records included would be youth court records (s. 40), police records (s. 42), and government and private records (s. 43); central repository records only arise after conviction (s. 41) and destruction of fingerprints and photographs is governed by s-s. 44(4) where the young person is acquitted. There is no specification of how soon after acquittal the records must be destroyed; presumably this must be done after the expiration of the time allowed for taking an appeal or, where an appeal is taken, when all proceedings in respect of the appeal have been completed.

Paragraph 45(1)(b) has similar provisions dealing with situations where a charge is withdrawn or stayed, and proceedings are not brought for three months. This paragraph also applies where a charge is dismissed for reasons other than acquittal, for example if there has been a dismissal because of the non-appearance of the prosecutor (*Criminal Code*, s. 734) or an information is quashed for a technical defect.

There is no express provision in s-s. 45(1) for the destruction of the record of an investigating police force which suspects a young person of having committed an offence, but has not laid any charges. Further, there is no express provision in the Act for the destruction of police records with respect to a young person suspected of an offence where no charge is laid *if* there is no conviction for a subsequent offence. This would suggest a force may keep its investigating records active indefinitely (contrast para. 44(4)(b) which specifies that fingerprints or photographs are to be destroyed if no charges are brought within three months). While one might reach this conclusion, it should be noted that it would be inconsistent with the effect of para. 45(2)(a).

Where a young person is suspected of committing an offence but not charged, subsequently is convicted of another offence, and then satisfies the requirements of para. 45(2)(a) for a "clean period", "*all* records kept pursuant to sections 40 to 43" shall be destroyed. In this instance, it would seem that "all records" includes records of an investigating force which has previously suspected a young person of an offence and not laid any charges.

The records of an agency administering a program of alternative measures in regard to a young person alleged to have committed an offence, but not formally charged (no information laid), are governed by the same legislative provisions as govern police investigating files regarding offences for which no charges are laid. While s-s. 45(1) does not require destruction, s-s. 45(2) will require destruction if there has been a conviction in regard to a subsequent charge and the required "clean period". This leads to the anomalous result that the records of a young person who has only been involved in alternative measures could be kept indefinitely whereas the records of a youth who has performed alternative measures, is convicted of a subsequent offence, and then satisfies the requirements for destruction will be destroyed. Notwithstanding this apparent gap in the legislation, it is suggested that, as a matter of practice, records from alternative measures involvement be destroyed if the young person has no further convictions, after two years if the original offence was summary, and after five years if the original offence was indictable.

Destruction after finding of guilt: subsections 45(2) and (4)

If a young person has been convicted under the *Young Offenders Act*, s-s. 45(2) provides that if there are no further charges for a specified time, then all records kept under ss. 40 to 44 are to be destroyed. The time specified is two years after the completion of the disposition of an offence if the original offence was summary, and five years after the completion of the disposition if the offence was indictable. Destruction will also be required if, after becoming an adult, the young person secures a pardon under the *Criminal Records Act*, R.S.C. 1970 (1st Supp.), c. 12.

If there are further charges before a record is destroyed under s-s. 45(2), but no conviction results, then s-s. 45(4) requires the ultimate destruction of the records. The destruction is suspended until the charges are dismissed, or there has been a reasonable period (six months) for their resolution.

If a young person is convicted of another offence before the period specified in s-s. 45(2) has expired, the records need not be destroyed; however, if there is a subsequent period free of further convictions, all records are to be destroyed. For example, if a 13-year-old boy is convicted of a summary conviction offence in January, 1990 and given six months' probation, then as a

14-year-old of an indictable offence in January, 1991 and given 12 months' probation and then has no further charges, in January, 1997, all of the records relating to both offences are to be destroyed — January, 1997 is five years after the completion of the last disposition.

Method of destruction: sections 44 and 45

The Act does not provide a specific mechanism for destruction. The word "destroy" suggests there is an onus on the record keeper to see that records are shredded, burned or otherwise mutilated so that they are no longer in a readable form. In the case of computer tapes, the recordings must be erased. Merely throwing records out as waste paper may not meet the requirements of the Act. There are frequent media reports of supposedly confidential government files which were to have been destroyed, but were only thrown out and ultimately discovered in a public place due to some unfortunate event like the rupture of a garbage bag.

At least initially, agencies and individuals with records, or copies of records, may have some difficulty in complying with the destruction provisions of the Y.O.A. It is in part because of anticipated difficulties that s-s. 45(7) limits criminal liability for failure to comply with the destruction of records requirements of the Act.

Copies: subsection 45(3)

As a rule, if a record is to be destroyed under s. 45, all copies of the record are to be destroyed. The requirement to keep a list of those who have received copies of records pursuant to s-s. 40(6), facilitates keeping track of those who have copies. An exception to this rule exists under s-s. 45(3) for researchers who obtain copies of records under para. 40(3)(k); this will facilitate long-term research and preserve potentially valuable research data. Even researchers must destroy copies of fingerprints and photographs, as these only serve identification purposes.

Effect of destruction: subsections 45(5) and (6)

Whenever records are required to be destroyed under s. 45, as a result of s-s. 45(5) a young person is deemed not to have committed any offence, even if the record is not in fact de-

stroyed. Similarly, under s-s. 45(6) no record and no copy, print or negative thereof which is required by s. 45 to be destroyed, may be used for any purpose; in particular, they may not be used in subsequent proceedings. Subsections 45(5) and (6) protect the young person if there should be a failure to destroy records or copies.

Sanctions for failure to destroy: subsection 45(7)

Subsection 45(7) makes it an offence for any person who has under his control or in his possession, any record that is required under s. 45 to be destroyed, but *only* if that person has refused or failed to destroy the records *after* a request to do so, by or on behalf of the young person to whom the record relates. The penalty provision is found in s-s. 46(4).

The offence created by s-s. 45(7) is limited to situations of a specific request, as it is recognized that some agencies and individuals may have some difficulty in totally complying with all of the destruction provisions, particularly in the first few years of implementation of the Y.O.A. It is expected that in due course adequate methods and procedures will be developed to facilitate compliance with the Act.

Records, and copies of records, may be kept by the youth court, different police forces, a range of government departments and agencies, and private organizations and individuals. The destruction requirements of the Y.O.A. are further complicated by the fact that a person in possession of records may have some difficulty in ascertaining whether the young person in question has been charged with or convicted of further offences, and hence knowing when destruction is required under s-s. 45(2) or (4) as the case may be. Record keepers may choose to minimize these difficulties by destroying records within the periods specified by s-s. 45(2), unless they definitely have knowledge of subsequent convictions. Alternatively, a record keeper may seek access to the records of criminal history contained in the central repository pursuant to s. 41; such a record keeper would clearly seem to be a person having a "valid interest" under para. 40(3)(1).

Except in the case of a refusal or failure to comply with a request for destruction (s-s. 45(7)), there is no direct sanction in the Y.O.A. for a failure to destroy records as required by the Act.

However, if a record keeper fails to comply, it might be possible in some circumstances for a third party to obtain a prerogative writ of "*mandamus*" compelling compliance. Further, there might be circumstances in which a record keeper who fails to comply with the Act might be liable for damages, including the possibility of punitive damages if the failure is a result of a wilful refusal to attempt to comply. There might also be political or administrative pressures brought to bear on those who make no effort to comply. It also may be possible that charges could be brought under s. 115 of the *Criminal Code* for disobeying a statute.

Juvenile Delinquents Act records: subsection 45(8)

Subsection 45(8) provides that the provisions of s. 45 regarding destruction apply to records relating to the offence of delinquency under the *Juvenile Delinquents Act*, "with such modifications as the circumstances require." The intention is to make the new procedures apply to all existing records pertaining to delinquents. As the *J.D.A.* has been in force for over 70 years, it is recognized that it may not be realistic to destroy all records amassed under that Act. It is clear, however, that any records which should be destroyed, but are not, cannot be used for any purposes, and in particular, are not to be used in any court proceedings, s-s. 45(6). Further, if a young person or any person acting upon his behalf requests that specific records be destroyed, it will be an offence under s-s. 45(7) to refuse. In general, one would expect record keepers to make reasonable good faith efforts to comply with the Y.O.A.

Offence: section 46

Section 46 creates offences for failure to comply with the provisions of the Y.O.A. prohibiting disclosure, and in some circumstances provides for the punishment of those who fail to destroy records as required. The aim of creating offences is to encourage respect for and discourage abuse of the law.

SECTION 46

46. (1) *Prohibition against possession of records.*—No person shall knowingly have in his possession any record kept pursuant to sections 40 to 43 or any record taken pursuant to section 44, or any copy, print or negative of any such record, except as authorized or as required by those sections.

(2) *Prohibition against disclosure.*—Subject to subsection (3), no person shall knowingly

(a) make available for inspection to any person any record referred to in subsection (1), or any copy, print or negative of any such record,

(b) give any person any information contained in any such record, or

(c) give any person a copy of any part of any such record

except as authorized or required by sections 40 to 44.

(3) *Exception for employees.*—Subsection (1) does not apply, in respect of records referred to in that subsection, to any person employed in keeping or maintaining such records, and any person so employed is not restricted from doing anything prohibited under subsection (2) with respect to any other person so employed.

(4) *Offence.*—Any person who fails to comply with this section or commits an offence under subsection 45(7)

(a) is guilty of an indictable offence and liable to imprisonment for two years; or

(b) is guilty of an offence punishable on summary conviction.

(5) *Absolute jurisdiction of magistrate.*—The jurisdiction of a magistrate to try an accused is absolute and does not depend on the consent of the accused where the accused is charged with an offence under paragraph (4)(a).

Possessing records: subsection 46(1)

Subsection 46(1) forbids any person from knowingly having in his possession any "record," within the definitions of ss. 40 to 44, or any copies of any such records, except as authorized or required by the Act. It is an essential element of the offence that a person have knowledge of the existence of the records, but ignorance of the provisions of the Y.O.A. is no defence: see *Criminal Code*, s. 19. "Person" is defined in the *Interpretation Act*, R.S.C. 1970, c. I-23, s. 28 to include a corporation.

Disclosure of records: subsection 46(2)

Subsection 46(2) creates an offence for any person to knowingly make available a record, or a copy of a record, or any information contained in a record, except as authorized by the

Act. As with s-s. 46(1) knowledge is an essential element of the offence, and person includes a corporation.

It would seem that the disclosure must in some way be related to the compilation or maintenance of the record. Thus it would be an offence for a court clerk to reveal to an insurance adjuster that a young person had been convicted of impaired driving, as the clerk would be giving information contained in a record, the court record, which he had a duty to maintain. On the other hand, the young person himself could inform the adjuster of this fact with impunity.

Protection for employees: subsection 46(3)

Subsection 46(3) has two clauses dealing with two distinct situations, and providing that persons in those situations are not violating the provisions of the Y.O.A.

The first clause of s-s. 46(3) modifies the effect of s-s. 46(1), so that any person "employed in keeping or maintaining" records is exempt from s-s. 46(1). A very broad interpretation of this provision would suggest that any person who is an employee, and who in the course of his employment keeps records as defined by ss. 40 to 44, is exempt from the provisions of s-s. 46(1), whether or not the employer is authorized to have such records. A narrower, and more reasonable interpretation is that any employee of a person authorized to keep records, may in the course of his employment keep these records. It would seem unreasonable for a person to raise as a defence to a criminal charge the mere fact that it was his employer who directed him to do the act.

The second clause of s-s. 46(3) authorizes one person employed in keeping records to release those records to another person employed in keeping records. Clearly, this provision at least authorizes the transfer of records and exchange of information from one person employed in keeping records for a particular employer to another employee of the same employer. But no limitation has been placed on disclosure from one person to another person "so employed", and it would seem that one person employed in record keeping could disclose records to another person employed in record keeping by a different employer, provided both employers were authorized to keep the type of records in question.

Procedure: subsections 46(4) and (5)

Subsection 46(4) provides that the offences created by s-s. 45(7) and s. 46 are hybrid, and therefore the Crown must elect to proceed by summary conviction or by indictment.

Subsection 46(5) states that these offences are within the absolute jurisdiction of a magistrate, thus eliminating any choice for the accused regarding the manner of trial. This simplifies and expedites the procedure for this type of prosecution.

CONTEMPT OF COURT
(Section 47)

Introduction

Broadly defined, criminal contempt of court is conduct which obstructs or tends to obstruct the due administration of justice, or which tends to undermine the authority and discipline of the court. Criminal contempt also consists of behaviour which prejudices the ability of the court to conduct a fair trial. Examples of criminal contempt include the misconduct of fighting in court, interference with officers of the court, refusal by a witness to be sworn or to answer questions once sworn, the imputation of false motives to the court and the publication of information relating to proceedings before the court which would prejudice the outcome of the trial.

Criminal contempt may be committed "in the face" of the court, in which case it is usually dealt with summarily by the presiding judge. It may also be committed "constructively", that is "other than in the face of the court." Contempt in the face of the court is distinguished from constructive contempt on the basis that all the circumstances of the former are within the personal knowledge of the court. The refusal of a witness to be sworn and disruptive behaviour in the courtroom are examples of such contempt. Constructive contempt occurs when the facts of the alleged contempt are not within the direct knowledge of the court and where it is necessary for there to be testimony of witnesses or affidavit evidence to prove the occurrence of the contempt.

Constructive contempt is usually dealt with in proceedings commenced by an information or indictment. Contempt in the face of the court is normally proceeded against summarily, since the presiding judge can do so without unnecessarily having to call witnesses of issues of fact. By dealing with constructive contempt by information or indictment, the judge can avoid placing himself in the position of accuser, witness and adjudicator. However, constructive contempt may also be dealt with summarily if an emergency exists in which the dignity and authority of the court

must be vindicated immediately. For a discussion of the distinction between contempt "in the face of the court" and constructive contempt, see *McKeown v. The Queen*, [1971] S.C.R. 446, 16 D.L.R. (3d) 390, 2 C.C.C. (2d) 1.

Subsection 5(5) of the *Y.O.A.* makes the youth court a "court of record". Consequently, it has the inherent power to punish for contempt committed in the face of the court. Moreover, s-s. 47(1) of the *Y.O.A.* considerably expands the traditional contempt jurisdiction of an inferior court of record by statutorily granting the youth court the same jurisdiction and power to deal with contempt as a superior court of criminal jurisdiction. A superior court has the inherent power, apart from statute, to punish contemptuous acts committed constructively against itself or another court.

The present juvenile court, in addition to any inherent power it may have to deal with contempt by virtue of the *J.D.A.*, s-s. 36(1) has the power to control order while it is sitting. The juvenile court does not have the jurisdiction to deal with constructive contempt against itself, nor can it punish a juvenile for contempt against another court, unless charges are laid pursuant to the *J.D.A.* The *Y.O.A.*, s. 47, gives a considerably greater jurisdiction and authority to the youth court in dealing with contempt committed by young persons.

SECTION 47

47. (1) ***Contempt against youth court.*****—Every youth court has the same power, jurisdiction and authority to deal with and impose punishment for contempt against the court as may be exercised by the superior court of criminal jurisdiction of the province in which the court is situated.**

(2) ***Exclusive jurisdiction of youth court.*****—The youth court has exclusive jurisdiction in respect of every contempt of court committed by a young person against the youth court whether or not committed in the face of the court and every contempt of court committed by a young person against any other court otherwise than in the face of that court.**

(3) ***Concurrent jurisdiction of youth court.*****—The youth court has jurisdiction in respect of every contempt of court committed by a young person against any other court in the face of that court and every contempt of court committed by an adult**

against the youth court in the face of the youth court, but nothing in this subsection affects the power, jurisdiction or authority of any other court to deal with or impose punishment for contempt of court.

(4) *Dispositions.*—Where a youth court or any other court finds a young person guilty of contempt of court, it may make any one of the dispositions set out in section 20, or any number thereof that are not inconsistent with each other, but no other disposition or sentence.

(5) *Section 636 of Criminal Code applies in respect of adults.*—Section 636 of the *Criminal Code* applies in respect of proceedings under this section in youth court against adults, with such modifications as the circumstances require.

(6) *Appeals.*—A finding of guilt under this section for contempt of court or a disposition or sentence made in respect thereof may be appealed as if the finding were a conviction or the disposition or sentence were a sentence in a prosecution by indictment in ordinary court.

Contempt jurisdiction of youth court: subsections 47(1) and (2)

Subsection 47(1) of the Y.O.A. provides that every youth court has the same power, jurisdiction and authority to deal with criminal contempt against the court as may be exercised by a superior court of criminal jurisdiction. As a result of s-s. 47(1), the youth court will have the statutory jurisdiction to deal with all contempts committed by young persons or adults against the youth court.

Concurrent contempt jurisdiction of the youth court: subsections 47(2) and (3)

Subsection 47(2) grants the youth court exclusive jurisdiction over all criminal contempts of court committed by a young person, other than those committed in the face of another court. The exclusive jurisdiction granted by s-s. 47(2) to deal with constructive contempts committed by young persons against other courts accords with the grant of superior court jurisdiction over contempt provided by s-s. 47(1). Subsection 47(3) further provides that the youth court will have jurisdiction in respect of every contempt of court committed by a young person against any other court. This jurisdiction of the youth court over young

persons who commit contempt in the face of other courts will be concurrent with the jurisdiction of the other courts to deal with the contempt since s-s. 47(3) of the Y.O.A. provides that nothing in s-s. 47(3) affects the jurisdiction or power of any other ordinary court to deal with or impose punishment for contempt. Thus jurisdiction over adults who commit constructive contempt against the youth court will be shared between the youth court and the superior court of criminal jurisdiction. One should note the decision of *R. v. Marsden* (1977), 40 C.R.N.S. 11, 37 C.C.C. (2d) 107 (Que. S.C.) wherein it was held that a superior court has no jurisdiction over contempts committed in the face of an inferior court.

Disposition of young persons: subsection 47(4)

Where any court finds a young person guilty of criminal contempt of court, s-s. 47(4) of the Y.O.A. restricts the sanction to any one or more of the dispositions found in s. 20 of the Y.O.A. No other form of disposition or sentence is allowed; if more than one disposition under s. 20 is made they must be consistent with each other.

Application of section 636 of the Criminal Code: subsection 47(5)

Subsection 47(5) of the Y.O.A. only applies to adults. It specifically makes s. 636 of the *Criminal Code* applicable against adults in proceedings taken in youth court but allows for modifications as the circumstances require. Section 636 of the *Criminal Code* provides that any person who is required by law to attend or remain in attendance for the purpose of giving evidence, and without lawful excuse fails to attend or remain in attendance, is guilty of contempt of court; it provides that such a person may be proceeded against summarily and limits the punishment to a fine of $100 or imprisonment for 90 days or both. Moreover, a person found guilty pursuant to s. 636 of the *Criminal Code* may be ordered to pay the costs that are incident to the service of process or to the detention. Section 636 of the *Code* is exhaustive; that is, no other punishment may be imposed: *Re Helik*, [1939] 3 D.L.R. 56, 72 C.C.C. 76, [1939] 2 W.W.R. 123, 47 Man. R. 179 (K.B.).

Appeals: subsection 47(6)

Subsection 47(6) provides that for the purpose of an appeal, a finding of guilt, disposition or sentence for contempt of court under s. 47 of the *Y.O.A.* will be treated as a conviction or sentence respectively, of an indictable offence in ordinary court. Therefore, pursuant to the provisions of the *Criminal Code*, Part XVII, appeals will be to the "court of appeal" of the province in which the contempt was committed.

FORFEITURE OF RECOGNIZANCES
(Sections 48 and 49)

Introduction

Sections 51 and 52 of the Y.O.A. provide for the application of the *Criminal Code* where it is not inconsistent with the Y.O.A. Therefore, recognizances may be entered into by young persons pursuant to the provisions of ss. 453, 453.1, 457, and 745 of the *Code*. Sections 453.1 and 453 apply to an accused arrested with or without warrant, and if the conditions of each section are met, provide for his release from detention by the officer in charge of the police station; the accused may be required to enter into a recognizance to secure his release. Section 457 of the *Code* provides for the release of an accused by a justice if the accused was not released by the officer in charge; an accused person may be required to enter into a recognizance under s. 457. Generally these provisions of the *Code* are applicable to a young person after arrest, although s. 8 of the Y.O.A. stipulates that a justice will only deal with the judicial interim release of a young person if a youth court judge is not reasonably available. Section 745 of the *Code* provides that a recognizance may be required from a person to ensure that he keeps the peace and is of good behaviour. In some circumstances, these provisions of the *Code* may require a deposit (cash or other valuable security) or surety (guarantor) of the recognizance.

The object of a recognizance is to secure the performance of some act by a person. Thus, where a youth court requires an assurance that a young person will appear in court at a specified time, it may, as a condition of his release, require him to enter a recognizance, with or without deposit or sureties. Where sureties are required, the sureties also enter the recognizance as an added guarantee that the acts will be performed. For example, in a recognizance under s. 457, the surety's prime obligation is to ensure the appearance of the accused at the proper time and place. Theoretically, when bail is granted on the basis of a recognizance with sureties, the effect is not to set the accused free, but to transfer his custody from the officers of the law to the custody of the sureties. Bail, therefore, frees the accused from imprisonment prior to trial

by having his sureties undertake that the accused will fulfill any conditions incident to his release and will appear at the time required.

A recognizance is a voluntary acknowledgement of an existing debt owing to the Crown, by which the principal (accused) and his sureties admit their respective liability to pay the Crown a certain sum of money, unless the principal (accused) fulfills certain conditions. Where the conditions are fulfilled and, for example, the accused appears in court as required, the recognizances are discharged; however, if the accused fails to appear at the time specified, the recognizances become subject to forfeiture. A hearing is held which allows the principal (accused) and the sureties an opportunity to show cause why the sum should not be forfeited. When a youth court judge orders forfeiture, the principal and his sureties become judgment debtors of the Crown, each in the amount the judge orders him to pay.

In addition to forfeiture proceedings, a young person could face criminal charges for breach of his recognizance. A young person who enters a recognizance to fulfill conditions and to appear for trial as a precondition of his release on bail may be charged under s. 133 of the *Code* if a breach of his recognizance occurs. Similarly, s. 746 of the *Criminal Code* provides that breach of a recognizance entered to keep the peace pursuant to s. 745 of the *Criminal Code* is an offence punishable on summary conviction.

SECTION 48

48. *Applications for forfeiture of recognizances.*—Applications for the forfeiture of recognizances of young persons shall be made to the youth court.

Jurisdiction of youth court: section 48

If a young person breaches a recognizance issued under ss. 453, 453.1 or 457 of the *Code* by failing to appear as required, or by breaching the peace or violating other conditions of a recognizance given pursuant to s. 745 of the *Code*, the young person and any of his sureties may be subject to forfeiture. Section 48 of the Y.O.A. provides that applications for forfeiture of recognizances given by young persons must be made to the youth court; both the young person and any sureties are subject to forfeiture in the youth court. Applications for forfeiture are usually submitted by

the Crown. Part XXII of the *Criminal Code*, governing the "Effect and Enforcement of Recognizances," generally applies to proceedings under the Y.O.A., except as expressly modified by s. 48 or 49.

When a young person breaches his recognizance, a "certificate of default" pursuant to s. 704 of the *Code* is endorsed on the back of the recognizance by the presiding youth court judge or justice. The endorsement in Form 29 of the *Code* sets out the nature of the default, the reason for the default, if known, and whether the ends of justice have been defeated or delayed by the default. It also gives the names and addresses of the principal and any sureties of the recognizance. The certificate is evidence of the default to which it relates.

SECTION 49

49. (1) *Proceedings in case of default.*—Where a recognizance binding a young person has been endorsed with a certificate pursuant to subsection 704(1) of the *Criminal Code*, a youth court judge shall,

(a) on the request of the Attorney General or his agent, fix a time and place for the hearing of an application for the forfeiture of the recognizance; and

(b) after fixing a time and place for the hearing, cause to be sent by registered mail, not less than ten days before the time so fixed, to each principal and surety named in the recognizance, directed to him at his latest known address, a notice requiring him to appear at the time and place fixed by the judge to show cause why the recognizance should not be forfeited.

(2) *Order for foreiture of recognizance.*—Where subsection (1) is complied with, the youth court judge may, after giving the parties an opportunity to be heard, in his discretion grant or refuse the application and make any order with respect to the forfeiture of the recognizance that he considers proper.

(3) *Judgment debtors of the Crown.*—Where, pursuant to subsection (2), a youth court judge orders forfeiture of a recognizance, the principal and his sureties become judgment debtors of the Crown, each in the amount that the judge orders him to pay.

(4) *Order may be filed.*—An order made under subsection (2) may be filed with the clerk of the superior court or, in the

province of Quebec, the prothonotary and, where an order is filed, the clerk or the prothonotary shall issue a writ of *fieri facias* in Form 30 set out in the *Criminal Code* and deliver it to the sheriff of each of the territorial divisions in which any of the principal and his sureties resides, carries on business or has property.

(5) *Where a deposit has been made.*—Where a deposit has been made by a person against whom an order for forfeiture of a recognizance has been made, no writ of *fieri facias* shall issue, but the amount of the deposit shall be transferred by the person who has custody of it to the person who is entitled by law to receive it.

(6) *Subsections 704(2) and (4) of Criminal Code do not apply.*—Subsections 704(2) and (4) of the *Criminal Code* do not apply in respect of proceedings under this Act.

(7) *Sections 706 and 707 of the Criminal Code apply.*—Sections 706 and 707 of the *Criminal Code* apply in respect of writs of *fieri facias* issued pursuant to this section as if they were issued pursuant to section 705 of the *Criminal Code*.

Proceedings in case of default: section 49

Paragraph 49(1)(a) of the Y.O.A. provides that when a recognizance binding on a young person has been endorsed with a certificate of default pursuant to s-s. 704(1) of the *Code*, the Attorney General or his agent may request that a youth court judge fix a time and place for a hearing of the application for forfeiture of the recognizance. When requested the judge must fix a time and a place for a hearing and send a notice to the principal (young person) and every surety named in the recognizance. The notice, as provided in para. 49(1)(b), must be directed to the principal and sureties at their latest known addresses and must inform them that they are to appear at that time and place to show cause why the recognizance should not be forfeited. The notice must be sent by registered mail, not less than ten days before the date for the hearing. Subsection 49(2) of the Y.O.A. clearly implies that a failure to comply with the notice requirements of s-s. 49(1) will result in a lack of jurisdiction over the application (see *R. v. Policha; Ex parte Pawlivsky*, [1970] 5 C.C.C. 172, 11 C.R.N.S. 199 *sub nom. Re Pawlivsky*, 73 W.W.R. 74 *sub nom. Pawlivsky v. The Queen* (Sask. Q.B.)).

Pursuant to s-s. 49(2) of the Y.O.A., the youth court judge hearing the forfeiture application, after giving the parties an op-

portunity to be heard, may either grant or refuse the application for forfeiture. The youth court judge may make any order with respect to the forfeiture of the recognizance as he considers proper. Though there will usually be a forfeiture if the conditions of the recognizance are not satisfied, this is not always the case. See *R. v. Lauder*, [1963] 2 C.C.C. 142 at p. 147, 39 C.R. 380, 41 W.W.R. 505 (Alta. Dist. Ct.) where the court stated there should not be a forfeiture in regard to a recognizance given to assure appearance in court if the accused has satisfied the court that "he had good and sufficient excuse for not appearing [at the time stipulated]", for example, due to accident or illness.

Subsection 49(3) of the Y.O.A. provides that where a recognizance is ordered forfeited, the principal and his sureties become judgment debtors of the Crown, each in the amount that the judge orders him to pay.

Where an order is made under s-s. 49(2) of the Y.O.A., it may be filed with the clerk of the superior court of the province, or in the province of Quebec, with the prothonotary. The clerk or the prothonotary shall issue a writ of *fieri facias* in Form 30, set out in the *Criminal Code*. (A writ of *fieri facias*, or "fi fa" — Latin meaning "to cause to be made" — instructs the sheriff to cause a sum of money to be produced by seizing property.) The writ of *fieri facias* is to be delivered to the sheriff of each territorial division in which property is owned by the principal or surety. The sheriff must then seize and sell sufficient property, both real and personal, of the principal and sureties to satisfy the order of forfeiture.

Subsection 49(5) of the Y.O.A. provides that no writ of *fieri facias* shall issue if a deposit of money or other valuable property was made when the recognizance was entered into and the deposit is sufficient to cover the forfeiture. Instead, the deposit is to be transferred to the person "entitled by law to receive it" (usually the provincial government, see *Code*, s. 651).

Subsection 49(7) of the Y.O.A. provides that ss. 706 and 707 of the *Criminal Code* apply in respect of writs of *fieri facias* issued pursuant to s. 49 of the Y.O.A., as if they were issued pursuant to s. 705 of the *Code*. Subsection 706(1) of the *Code* provides that such a writ of *fieri facias* may be executed by the sheriff to whom it is delivered and the property seized dealt with in the same manner as a writ of *fieri facias* issued out of a superior

court. Subsection 706(2) of the *Code* entitles the Crown to the costs of execution in accordance with the tariff of the superior court of the appropriate province. Section 707 of the *Code* provides a procedure for the committal to custody or discharge of the sureties if their property is insufficient to cover the amount forfeited. In accordance with s. 707, and after appropriate notice, a time and place will be fixed for the sureties to show cause why they should not be committed if the forfeiture is not satisfied.

Subsection 49(6) provides that s-ss. 704(2) and (4) of the *Criminal Code* do not apply in respect of proceedings under the Y.O.A. The provisions of s-ss. 704(2) and (4) of the *Code* are adequately provided for in s-ss. 49(4) and (5) of the Y.O.A. respectively.

Liability of sureties: section 49

Subsection 698(1) of the *Criminal Code* applies to bind the sureties to a bail recognizance until the accused is either discharged or sentenced. Section 697 of the *Code* provides that the sureties continue to be bound to assure the appearance of the accused as required, regardless of trial adjournments or changes in the place of the trial. Section 699 of the *Code* provides that sureties are not discharged in their duty on the basis of the accused being re-arrested on the same or additional charges. A surety who wishes to discharge his obligation prior to the disposition of the young person can do so by virtue of ss. 701 and 702 of the *Code* in conjunction with ss. 49 and 51 of the Y.O.A., by bringing the young person and delivering him into the custody of the court. Similarly, s. 700 of the *Code* provides for the surety to apply to the youth court to relieve him of his obligation to ensure that a young person attends court; in this case a warrant for the arrest of the young person is issued, and upon the young person being placed in detention, the surety is discharged.

A surety's prime obligation under a bail recognizance is to ensure the appearance of the accused, and in the case of a peace bond under s. 745 of the *Criminal Code* is to ensure the good behaviour of the accused; the surety's recognizance is to effect these duties. The granting of bail on a recognizance with a surety is technically to change the custody of the accused from the officers of the law to the surety. Thus, if the accused fails to appear at the time required or he breaches a condition of the recognizance, the surety may be subject to forfeiture. The surety

is responsible for the production of the young person or his good behaviour, as the case may be, and if the conditions are violated, the courts do not look favourably upon relieving the surety from forfeiture.

Subsection 49(2) of the Y.O.A. provides that the youth court judge has the discretion, after hearing the parties, to grant or refuse the forfeiture of the recognizance and to make any order in respect to the recognizance that he considers proper. If the surety "connived at the disappearance of the accused man, or aided it or abetted it, it would be proper to forfeit the whole of the sum. If he or she was wanting in due diligence to secure his appearance, it might be proper to forfeit the whole or a substantial part of it depending on the degree of fault. If he or she was guilty of no want of diligence and used every effort to secure the appearance ... it might be proper to remit it entirely." See *R. v. Southampton Justices, Ex parte Green*, [1975] 2 All E.R. 1073, at pp. 1077-78 (C.A.); also *R. v. Andrews* (1975), 34 C.R.N.S. 344, 9 Nfld. & P.E.I.R. 168 (Nfld. S.C.).

Subsection 11(9) of the Y.O.A. provides that when a young person enters into a recognizance before an officer in charge (pursuant to s. 453 or 453.1 of the *Code*), a statement must be included in the recognizance that the young person has the right to be represented by counsel. Subsection 698(4) of the *Code* provides that the provisions of s. 697 and s-ss. 698(1), (2) and (3), which outline a surety's obligations, should also be endorsed on any recognizance.

Young persons as sureties

A young person cannot act as a surety for the recognizance of another person.

When a person undertakes to act as a surety for the recognizance of another, the surety contracts to forfeit the sum specified if the principal fails to satisfy the terms of the recognizance (fails to appear or breaches the peace). An infant (a minor, in Canada a person under 18) cannot validly sign a recognizance as a surety since the contract, not being for the benefit of the infant, is void. See *R. v. Leduc*, [1972] 1 O.R. 458, 5 C.C.C. (2d) 422 (Dist. Ct.); *R. v. Shrupka*, [1977] 5 W.W.R. 233 (Man. Prov. Ct.).

INTERFERENCE WITH DISPOSITIONS
(Section 50)

Introduction

The purpose of s. 50 of the Y.O.A. is to ensure, through the use of criminal law and penal sanctions, that dispositions made pursuant to s. 20 of the Act are not interfered with by unauthorized persons.

SECTION 50

50. (1) ***Inducing a young person, etc.*****—Every one who**

(a) induces or assists a young person to leave unlawfully a place of custody or other place in which the young person has been placed pursuant to a disposition,

(b) unlawfully removes a young person from a place referred to in paragraph (a),

(c) knowingly harbours or conceals a young person who has unlawfully left a place referred to in paragraph (a),

(d) wilfully induces or assists a young person to breach or disobey a term or condition of a disposition, or

(e) wilfully prevents or interferes with the performance by a young person of a term or condition of a disposition

is guilty of an indictable offence and is liable to imprisonment for two years or is guilty of an offence punishable on summary conviction.

(2) ***Absolute jurisdiction of magistrate.*****—The jurisdiction of a magistrate to try an adult accused of an indictable offence under this section is absolute and does not depend on the consent of the accused.**

Interference with dispositions: section 50

Section 50 of the Y.O.A. creates a number of offences for the purpose of ensuring that no one interferes with a disposition imposed by a youth court under s. 20. Thus, if a young person wilfully breaches a term of his own disposition, he may be charged under s. 33 of the Y.O.A., or if appropriate, under s. 132

or 133 of the *Criminal Code* (prison breach or escape and being unlawfully at large without excuse). Any other person (adult or young person) who induces or assists in the breach may, if appropriate, be charged under s. 50 of the Y.O.A.

Presently s. 34 of the *J.D.A.* makes it a summary conviction offence to induce or attempt to induce a child to leave, or remove or attempt to remove a child from an institution where the child had been placed pursuant to the *J.D.A.* It is also an offence under that section to knowingly harbour or conceal a child who had escaped lawful custody. Section 34 of the *J.D.A.* provides that contravention can result in a fine not exceeding $100 or imprisonment not exceeding one year, or both. In comparison s. 50 of the Y.O.A. provides that if the Crown elects to proceed by indictment, the maximum sentence is two years' imprisonment; if the Crown elects to proceed summarily, the maximum sentence is a fine of $500, or six months' imprisonment or both.

Paragraphs 50(1)(a), (b) and (c) deal with interference with dispositions under which a young person has been committed to custody or placed in a residence pursuant to a disposition. Examples of places other than custody include a residential placement by the court or provincial director as a condition of probation under para. 23(2)(e) or (f).

Offences analogous to those under paras. 50(1)(a), (b) and (c) are contained in ss. 134 and 135 of the *Criminal Code* (permitting or assisting escape; and rescue or permitting escape). In appropriate cases, reference may be made to the jurisprudence under corresponding sections of the *Code*. For example, a prisoner is said to have escaped custody contrary to para. 133(1)(a) of the *Code* when he "without permission ... departed from the ... limits of his custody and it matters not if he remained on the prison property": *R. v. Piper*, [1965] 3 C.C.C. 135, 51 D.L.R. (2d) 534 at p. 537 (Man. C.A.). Thus it may be argued that para. 50(1)(a) or (b) of the Y.O.A. is violated even if the young person has not left the property on which he is in custody. In appropriate cases, it may be possible to charge those who assist a young person in escaping custody either under the *Code* or s. 50 of the Y.O.A., subject to the rules preventing "double jeopardy".

Section 50 of the Y.O.A. is a broader penal provision than the comparable sections of the *Criminal Code* pertaining to interference with adults in custody. For example, para. 50(1)(a) makes it

an offence to "induce" a young person to unlawfully leave custody; this is broader than the *Code* notions of permitting, assisting or facilitating escape. Paragraph 50(1)(c) makes it an offence to "harbour or conceal" a young person who has unlawfuly left custody; this is also broader than the provisions of the *Code*, and may well require parents to report to the authorities the presence of their child in their home if he has unlawfully left custody. (See s. 250 of the *Code*, abduction of child under 14, which uses similar concepts of enticing and harbouring.)

Paragraphs 50(1)(d) and (e) of the Y.O.A. deal with interference with conditions of disposition not relating to custody or placement of a young person. There are no analogous provisions of the *Code* relating to interference with probation or other non-custodial adult sentences. These paragraphs also demonstrate the concern of the Y.O.A. with protecting young persons who are subject to dispositions from improper interference; the Act recognizes that young persons are more immature than adults, and perhaps more easily led astray.

As s. 50 of the Y.O.A. creates a number of criminal offences, no person can be convicted of violating s. 50 unless it is proven beyond a reasonable doubt that he had the requisite mental intention to commit the offence (the so-called *mens rea* — guilty mind). Paragraphs 50(1)(c), (d) and (e) set out the specific statutory mental requirements to be proved against the accused in order for a conviction; the accused must have been acting "knowingly" for para. 50(1)(c) and "wilfully" for paras. 50(1)(d) and (e). Paragraph 50(1)(a) will at least require evidence from which it can be inferred beyond a reasonable doubt that the accused not only committed the prohibited act (assisting escape), but that the accused additionally had the requisite *mens rea*. It seems clear that knowledge of the disposition, to the extent that the young person was in custody, must be proved for a conviction under para. 50(1)(a). Similarly para. 50(1)(b) creates an offence requiring *mens rea*. Mistake of fact will therefore operate as a defence to a charge under s. 50; in appropriate circumstances mistake of law might also be a defence, though never ignorance of the law.

Section 50 creates a hybrid offence, one for which the Crown may elect to proceed summarily or by indictment. Subsection 50(2) provides that if the Crown elects to proceed by indictment, the offence is within the absolute jurisidiction of a magistrate,

thus eliminating any choice for the accused regarding the manner of trial. This simplifies and expedites the procedure for this type of prosecution.

An adult violating s. 50 of the Y.O.A. will be prosecuted only in ordinary (adult) court. A young person interfering in the disposition of another young person and thereby violating s. 50 of the Y.O.A. will, of course, be subject to prosecution in youth court, unless the case is transferred to ordinary court under s. 16.

APPLICATION OF THE CRIMINAL CODE
(Section 51)

SECTION 51

51. *Application of Criminal Code.*—Except to the extent that they are inconsistent with or excluded by this Act, all the provisions of the *Criminal Code* apply, with such modifications as the circumstances require, in respect of offences alleged to have been committed by young persons.

Application of the Criminal Code

By virtue of s. 51, all provisions of the *Criminal Code* apply to the Y.O.A., except to the extent that they are "inconsistent with or excluded by" the Y.O.A. While the Y.O.A. is a fairly comprehensive statute, it is by no means an exhaustive code of substantive or procedural law, and accordingly it adopts the provisions of the *Criminal Code* to fill the gaps. Section 51 not only allows for the application of the substantive and procedural provisions of the *Code*, but also, by virtue of s. 7 of the *Code*, allows for the application of all of the common law not modified by legislation.

Thus, the following are all applicable in respect of offences alleged to have been committed by young persons:

- all of the substantive offences created by the *Code*, except those excluded by the Y.O.A. (see e.g. s-s. 20(8) of the Y.O.A. rendering inapplicable various offences arising out of a breach of sentence, such as breach of probation, s. 666 of the *Code*);
- any defences available at common law (see s-s. 7(3) of the *Code*) or under the *Code* (some of which are available only to young persons — see e.g. s. 147 of the *Code* providing that certain types of sexual offences cannot be committed by a male under 14; though note the repeal of ss. 12 and 13 of the *Code*, governing incapacity on account of age, by s. 72 of the Y.O.A.);
- the evidentiary law applicable to prosecutions under the *Code*, subject to such modifications as are found in ss. 56 to 63 of the Y.O.A.;

— statutory and common law rules governing burden and onus of proof (e.g. s-s. 16(4) of *Code*, regarding presumption of sanity).

Section 51 of the Y.O.A. does not provide for the strict application of provisions of the *Code* in all cases, but rather allows for modifications in accordance with the circumstances and in accordance with the provisions of the Y.O.A. The provisions of the *Code* must be applied within the overall scheme of the Y.O.A. and are subject to its specific provisions.

The application of the *Criminal Code* to proceedings under the Y.O.A. is further amplified by provisions of the Y.O.A. dealing with jurisdiction and procedure. Sections 5 and 6 of the Y.O.A. give youth court judges the jurisdiction and powers of magistrates under the *Code*, and allow justices to deal with certain matters in regard to proceedings under the Act. Sections 52 to 55 of the Y.O.A. provide a procedural framework for the operation of the youth court, generally adopting the procedures established in the *Code* for summary offences, though retaining the distinction between summary and indictable offences.

The application of the provisions of the *Criminal Code* to proceedings under the Y.O.A. thus requires a knowledge and understanding of both pieces of legislation.

In regard to some matters, the *Criminal Code* is applied without modification. For example, if a young person raises the defence of insanity to a charge under the Y.O.A., the provisions of the *Code* dealing wih insanity (ss. 16, 542, 545 and 547) apply to young persons. The Y.O.A. makes no mention of insanity as a defence, and the combined effect of ss. 5, 51 and 52 of the Y.O.A. is to render the provisions of the *Code* applicable (note that in regard to insanity at the time of trial, s. 13 of the Y.O.A. modifies some of the *Code* procedures).

In regard to certain matters, the provisions of the *Code* have been somewhat modified to accommodate concerns or problems which are unique to the juvenile justice system. For example, a young person is arraigned and enters a plea as an adult would. However, there are special provisions which ensure that a young person understands the significance of his plea, and which require a youth court judge to satisfy himself that the facts support a guilty plea (ss. 11, 12 and 19 of the Y.O.A.). Another example of the modification of *Code* provisions by the Y.O.A. is in regard

to pre-trial detention; in general, the substantive features of the *Code*'s pre-trial detention sections apply, but there are special protections in the Y.O.A. to ensure that young persons are usually detained separately from adults and dealt with by youth court judges (ss. 7 and 8 of the Y.O.A.).

There are certain matters for which the provisions of the Y.O.A. completely replace the *Criminal Code*. For example, in regard to disposition, the scheme created by the Y.O.A. excludes the operation of the sentencing provisions of the *Code* (ss. 20 to 26, 28 to 34 of the Y.O.A.).

PROCEDURE
(Sections 52 to 55)

Introduction

Sections 52 to 55 of the Y.O.A. govern certain procedural matters in regard to proceedings under the Act. Section 52 is by far the most important, providing a general procedural framework for proceedings under the Act. As a general rule, the summary conviction procedures of the *Criminal Code* are to apply to proceedings under the Y.O.A., for both summary conviction and indictable offences (s-s. 52(1)). However, offences are to retain their distinct character as summary or indictable (s-s. 52(2)), and this distinction is significant for such matters as disposition and appeals. Other provisions of ss. 52 to 55 deal with a range of procedural issues such as ensuring the attendance of the young person at trial, limitation periods, issuing subpoenas and the effect of warrants.

SECTION 52

52.(1) *Part XXIV and summary conviction trial provisions of Criminal Code to apply.*—Subject to this section and except to the extent that they are inconsistent with this Act,

(a) the provisions of Part XXIV of the *Criminal Code*, and

(b) any other provisions of the *Criminal Code* that apply in respect of summary conviction offences and relate to trial proceedings

apply to proceedings under this Act

(c) in respect of a summary conviction offence, and

(d) in respect of an indictable offence as if it were defined in the enactment creating it as a summary conviction offence.

(2) *Indictable offences.*—For greater certainty and notwithstanding subsection (1) or any other provision of this Act, an indictable offence committed by a young person is, for the purposes of this or any other Act, an indictable offence.

(3) *Attendance of young person.*—Section 577 of the *Criminal Code* applies in respect of proceedings under this Act, whether the proceedings relate to an indictable offence or an offence punishable on summary conviction.

(4) *Limitation period.*—In proceedings under this Act, subsection 721(2) of the *Criminal Code* does not apply in respect of an indictable offence.

(5) *Costs.*—Section 744 of the *Criminal Code* does not apply in respect of proceedings under this Act.

Summary conviction procedures to apply: subsection 52(1)

The *Criminal Code* divides offences into two categories, summary and indictable, with some offences being "hybrid", either summary or indictable at the election of the Crown. Summary conviction offences are generally less serious offences, with lower maximum penalties. The procedures governing proceedings for summary conviction offences are largely found in Part XXIV of the *Code*, ss. 720 to 772; these procedures are generally simpler and more expeditious than those which apply to indictable offences.

Subsection 52(1) of the Y.O.A. provides that in regard to proceedings under the Y.O.A., the procedure which will be followed will be that which governs summary conviction offences, regardless of whether the enactment creating the offence specifies that the offence is summary, indictable or hybrid. The applicable procedure is thus found in Part XXIV of the *Code* and other parts of the *Code* applicable to summary conviction offences, except to the extent that these provisions are modified by the specific provisions of the Y.O.A. As will be discussed below, the distinction between summary conviction and indictable offences is retained by s-s. 52(2) of the Y.O.A., and is most important for certain purposes, such as appeals and maximum dispositions, but generally the procedure for both types of offences is summary.

Thus, proceedings under the Y.O.A. will include the following:

- commencement of proceedings by information (a sworn written statement laid before a justice), ss. 723 and 724 of the *Code*;
- compelling attendance of the accused young person by means of summons or warrant, s. 728 of the *Code* adopts Parts XIV and XV of the *Code*;
- right of accused to object to form of information and right of prosecutor to amend, ss. 729 to 732 of the *Code*;

— arraignment of accused, s. 736 of the *Code* (see also ss. 11, 12 and 19 of the Y.O.A., imposing special duties on youth court);

— right of accused to make full answer and defence, s. 737 of the *Code*; and

— adjudication, ss. 739 to 743 of the *Code* (see also s. 19 of the Y.O.A.)

A proceeding under the Y.O.A. will never include an indictment, a preliminary trial or a jury trial, as these are features of proceedings by indictment.

For a fuller description of the procedure applicable to summary conviction proceedings, see Salhany, *Canadian Criminal Procedure*, 3rd ed. (1978), Chapter 7, "Summary Conviction Proceedings".

It is important to recognize the significance of the fact that s-s. 52(1) of the Y.O.A. adopts the summary conviction procedures "except to the extent that they are inconsistent with this Act." In effect, proceedings under the Y.O.A. combine procedures applicable in summary conviction proceedings faced by adults with certain unique provisions introduced by the Y.O.A. Some of the *unique features* of proceedings in youth court include:

— limited jurisdiction of a justice ss. 6 and 8;

— detention generally separate from adults, s. 7;

— notice to parents and order for attendance of parents, ss. 9 and 10;

— rights in regard to counsel, s. 11;

— duty of court in regard to arraignment and receiving plea, ss. 12 and 19;

— medical and psychological reports, s. 13;

— pre-disposition reports, s. 14;

— disposition provisions, ss. 20 to 26;

— disposition review, ss. 28 to 34;

— restrictions on publicity, s. 38;

— provision for exclusion of public, s. 39;

— provisions governing youth court records, ss. 40, 45 and 46; and

— provisions modifying laws of evidence, ss. 56 to 63.

There are also certain provisions of the Y.O.A. which modify the procedures applicable in summary conviction proceedings; these provisions of the Y.O.A. include those found in ss. 52 to 55 (specifically governing procedure) and other provisions such as those governing:

— appeals, s. 27;
— contempt, s. 47;
— substitution of judges, s. 64; and
— clerks, s. 65.

Thus, proceedings in youth court are not an exact replica of summary conviction proceedings in adult court; nor are they totally unique. Reliance must be placed on both the *Criminal Code* and the Y.O.A. to determine the correct procedure for youth court proceedings.

Indictable offences: subsection 52(2)

Subsection 52(2) of the Y.O.A. provides that notwithstanding the fact that s-s. 52(1) adopts the procedures applicable to summary conviction offences for offences which are defined in the enacting legislation to be indictable, for the purpose of the Y.O.A. or any other Act, the offence is an indictable offence. Thus, for all purposes other than procedure at trial, an indictable offence retains its character and nature. Classification of an offence as indictable is significant for:

— arrest and pre-trial detention, ss. 7 and 8;
— transfer to adult court, s. 16;
— consequences of defence of insanity (see discussion of s. 13);
— maximum duration of disposition, see s-s.20(7);
— appeal procedures, s. 27;
— requirements for destruction of records, s. 45; and
— limitation periods, s-s. 52(4).

Thus, in regard to "hybrid" offences, for which the prosecutor has an election to proceed by summary conviction or by indictment, the election retains significance with respect to the character of the offence. The *Interpretation Act*, R.S.C. 1970, c. I-23, para. 27(1)(a) provides that as a general rule a hybrid offence is deemed to be indictable unless an election is made by the prosec-

utor to treat the offence as summary. The Y.O.A. in s-s. 27(2), however, provides that for the purposes of an appeal, where no election is made in respect of a hybrid offence, it is deemed to be summary.

Attendance of young person: subsection 52(3)

Section 577 of the *Code* generally requires the presence in court of an accused person in regard to indictable offences, but not for summary offences. Subsection 52(3) of the Y.O.A. provides that s. 577 of the *Code* applies in respect to *all* offences dealt with under the Y.O.A., thus generally requiring the presence of a young person at court, regardless of whether the offence is summary or indictable. This ensures the attendance of young persons who may not always appreciate the significance of a court proceeding; thus their rights can be more fully protected, and they will receive the full benefit of the court experience.

The applicability of s. 577 of the *Code* to all proceedings under the Y.O.A. also provides for the absence of the young person under limited circumstances. Subsection 577(2) gives the youth court authority to exclude the young person where he disrupts the proceedings (para. 577(2)(a)), or during the trial of the issue of whether a young person is unfit on account of insanity to stand trial where his presence might have an adverse effect on his mental health (para. 577(2)(c)). The power to exclude under para. 577(2)(c) cannot be used for any other purpose; see comments concerning s-ss. 13(5) and (6) of the Y.O.A. which provide a broader jurisdiction to exclude the young person during cross-examination concerning a medical or psychological report, in order to prevent detriment to the treatment or recovery of the young person or to prevent harm to a third person.

Under para. 577(2)(b) of the *Code*, the youth court may *permit* the young person to be absent from the court, during the whole or any part of his trial on such conditions as the court considers proper; it is submitted that as a rule, this should occur only when the young person is represented by counsel or assisted by an adult. Paragraph 577(2)(b) applies only when the young person himself expresses a wish to be absent: see *R. v. Page*, [1969] 1 C.C.C. 90, 64 W.W.R. 637 (B.C.C.A.).

Limitation period: subsection 52(4)

Subsection 721(2) of the *Code* limits the institution of proceedings (the laying of an information) under Part XXIV of the *Code* (summary convictions) to six months after the occurrence of the offence. Subsection 52(4) of the Y.O.A. provides that although indictable offences are generally to be dealt with under the Y.O.A. pursuant to Part XXIV of the *Code*, the limitation of s-s. 721(2) does not apply to indictable offences.

Based on the common law principle, *nullum tempus occurrit regi* — "time does not run against the Crown" — there is generally no limitation on the prosecution of indictable offences under the Y.O.A. There are a few specific statutory exceptions, such as treason, s. 48 of the *Code*, and an array of sexual offences listed in ss. 141 and 195 of the *Code*, these exceptions also apply in proceedings under the Y.O.A. In regard to summary conviction offences dealt with under the Y.O.A., the six-month limitation of s-s. 721(2) of the *Code* continues to apply.

Costs: subsection 52(5)

Section 744 of the *Code* allows a summary conviction court to award a successful party costs to compensate for legal expenses; by virtue of s-s. 52(5) of the Y.O.A., this provision of the *Code* does *not* apply in respect of any proceedings under the Y.O.A. Subsection 52(5) does not in any way limit the youth court's authority to order the young person to pay compensation by way of a restitution order under paras. 20(1)(c), (d), (e) or (f). In such situations the youth court is awarding compensation for losses arising out of the commission of the offence, whereas s. 744 involves compensation for the costs of the prosecution or of the defence.

SECTION 53

53. *Counts charged in information.*—Indictable offences and offences punishable on summary conviction may under this Act be charged in the same information and tried jointly.

Joinder of summary and indictable offences: section 53

In adult court, it is clear that an accused person cannot be tried on an indictable offence and a summary offence together, there

must be separate trials. Further, there has been some conflict in the jurisprudence as to whether it is even possible to charge an adult with an indictable offence and a summary conviction offence on the same information, though this practice now seems acceptable (see Salhany, *Canadian Criminal Procedure*, 3rd ed. (1978), p. 158). Section 53 of the Y.O.A. alters the law in regard to this matter for proceedings under the Act.

Section 53 makes clear that a young person can be charged on a single information with indictable and summary offences, and further alters practices applicable in adult proceedings by allowing the charges to be tried jointly. The Y.O.A. contemplates situations where it is practicable and non-prejudicial to proceed with summary conviction and indictable offences together, and where expediency supports dealing with them together.

Thus, in proceedings under the Y.O.A., it is acceptable for a single information to contain:

(1) more than one alleged offence, provided that each offence is set out in a separate count (paragraph), para. 724(1)(b) of the *Code*; and

(2) both summary conviction and indictable offences, provided each is set out in a separate count, s. 53 of the Y.O.A.

However, the fact that two or more counts are contained in the same information, or that an indictable offence and an offence punishable on summary conviction are contained on the same information, does not mean they must necessarily be tried together. Subsection 736(4) of the *Code* provides that a youth court "may, before or during a trial, where it is satisfied that ends of justice require it, direct that the [young person] be tried separately upon one or more of the counts in the information." This provides protection for the young person in that he can apply for separate trials where it is either impracticable or prejudicial to proceed with both or all at the same time. Since s-ss. 736(4) and 520(3) of the *Code* contain similar provisions, the jurisprudence under both of these subsections would apply to motions to a youth court under s-s. 736(4) (see Salhany, *Canadian Criminal Procedure*, 3rd ed. (1978), pp. 159-61).

Procuring the attendance of witnesses: section 54

SECTION 54

54. (1) *Issue of subpoena.*—Where a person is required to attend to give evidence before a youth court, the subpoena directed to that person may be issued by a youth court judge, whether or not the person whose attendance is required is within the same province as the youth court.

(2) *Service of subpoena.*—A subpoena issued by a youth court and directed to a person who is not within the same province as the youth court shall be served personally on the person to whom it is directed.

Issue of a subpoena: subsection 54(1)

Part XIX of the *Criminal Code*, ss. 625 to 643, governs procuring the attendance of witnesses, through the issue of and execution of a subpoena. A "subpoena" (Latin for "under punishment") is issued by a court, and orders a person to attend and give testimony; if a witness fails to attend court, he may be arrested under warrant, and if necessary detained until he gives evidence. Pursuant to para. 52(1)(b) of the Y.O.A., the provisions of Part XIX of the *Code* apply to proceedings under the Y.O.A., except as modified by s. 54.

In proceedings in adult court, by virtue of s-s. 630(2) of the *Code*, a subpoena issued by a justice or magistrate has effect only in the province in which it is issued. However, s-s. 54(1) of the Y.O.A. extends the authority of a youth court judge so that a subpoena issued by a youth court judge has effect throughout Canada. A subpoena in a proceeding under the Y.O.A. may be issued by a youth court judge, or by a justice acting under s. 6 of the Y.O.A.. The provisions of s-s. 54(1) do not apply to a subpoena issued by a justice in regard to Y.O.A. proceedings, and it has effect only in the province in which it is issued.

Service of a subpoena: subsection 54(2)

Subsection 629(1) of the *Code* normally allows a subpoena to be served personally on a potential witness by a peace officer, or to be left for the potential witness at his last or usual place of residence with a person who appears to be at least 16 years of age.

Subsection 54(2) of the Y.O.A. provides that if a subpoena is issued by a youth court judge and pursuant to s-s. 54(1) of the Act is directed to a person outside the province of issue, it must be served personally on the person to whom it is directed. Subsection 54(2) of the Y.O.A. is consistent with s-s. 629(2) of the *Code*, as both require personal service of a subpoena on a person outside the province of issue.

SECTION 55

55. ***Warrant.*—A warrant that is issued out of a youth court may be executed anywhere in Canada.**

Warrant: section 55

Generally under the *Criminal Code*, a warrant for the arrest of an accused person, or for the arrest of a witness who has failed to comply with a subpoena, can only be enforced in the province in which it is issued (s. 456.3 and s-s. 631(2) of the *Code*). In regard to adult proceedings there are procedures which can be used to render a warrant effective in other provinces (see s. 461 and s-ss. 631(1) an 633(3) of the *Code*). By virtue of s. 55 of the Y.O.A. any warrant issued by a youth court judge has effect throughout Canada. A warrant issued by a justice acting pursuant to the Y.O.A., under s. 6 of the Act, has effect only in the province in which it is issued, unless by virtue of the *Code* it has wider effect (see s. 461 and s-ss. 631(1) and 633(3) of the *Code*).

EVIDENCE
(Sections 56 to 63)

Statements of the young person: section 56

Introduction

At common law, the fundamental rule governing the admissibility of statements is that they must be made "voluntarily"; it is important to note that in this context, "voluntary" has a specific legal meaning. The classic statement of this rule was made in the English case of *Ibrahim v. The King*, [1914] A.C. 599 at p. 609 (P.C.):

> It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

This statement has found judicial approval in Canada, and the numerous court decisions interpreting and applying this statement are incorporated into the Y.O.A. by way of reference in para. 56(2)(a).

In Canada, the ascertainment of truth, forms the basis for the admissibility of statements. A voluntary confession is admissible because, if voluntary, common sense dictates that it is likely to be true. A confession which is induced by some promise or threat is involuntary, and may be untrue, and therefore is excluded from evidence. Hence, the reliability or truthfulness of the statement is the primary concern when excluding involuntary statements.

In the United States, the principle of fairness to the accused — the protection of his constitutional right to remain silent and the privilege against self-incrimination — has been used as a basis for excluding statements. In addition, some American cases have excluded confessions because they were obtained in circumstances which would place the due administration of justice into disrepute. In these cases, truth or trustworthiness of the particular confession has not been the primary consideration of the

court, and this is in direct contrast with the prevailing decisions of the Canadian courts.

The *Canadian Charter of Rights and Freedoms* will undoubtedly have an effect on the existing law relating to the admissibility of statements. In particular, the following rights granted by the *Charter* are likely to have evidentiary implications: the right not to be deprived of "life, liberty and security of the person" except in accordance with the principles of fundamental justice (s. 7); the right to be secure against unreasonable search or seizure (s. 8); the right to be informed promptly upon arrest or detention of the reasons therefor and to retain and instruct counsel without delay (paras. 10(a) and (b)); the right not to be compelled to be a witness against oneself (para. 11(c)); and the right to be tried according to law in a fair and public hearing (para. 11(d)). It may take some time before the application of the *Charter* is clarified by the higher courts.

When a statement is made by an accused person to a person in authority, it is now clear that a *voir dire* must be held by the judge to determine whether the statement is to be admissible in the trial of that person. A *voir dire* has been called a "trial within a trial", during which the judge hears evidence about the circumstances surrounding the making of the statement, for the sole purpose of deciding whether the statement was "voluntarily" made and hence, admissible. The burden of proving that such statements were made voluntarily lies upon the prosecution. In the case of adult trials with a jury, the jury is excluded from the courtroom during the *voir dire*. Although the judge hears the evidence at a *voir dire*, if he subsequently rules the statement to be "involuntary", he must exclude from his mind all the evidence received at the *voir dire*.

It has long been recognized that the confessions of children should not be treated in the same manner as adult confessions: see *R. v. Jacques* (1958), 29 C.R. 249 (Que. S.W.C.) and *R. v. Yensen* (1961), 36 C.R. 339, 130 C.C.C. 353, 29 D.L.R. (2d) 314, [1961] O.R. 703 (H.C.). This judicial attitude is reflected in the following quotation from *Regina v. R. (No. 1)* (1972), 9 C.C.C. (2d) 274 (Ont. Prov. Ct.) at p. 275:

> Recognition of the child's reduced capability of understanding his rights and his reduced capacity to protect himself in his contacts with the adult world has led the Courts to be particularly diligent

when deciding whether a juvenile's statements meet the required test of voluntariness.

In particular, it is recognized that children and young persons are especially susceptible to being influenced by authority figures such as a police officer in uniform, a probation officer, a social worker or school principal; young persons are open to suggestion and may easily adopt a statement offered by a person in authority as their own. A young person who is arrested and placed in detention without being able to talk to his parents or a friend may be induced to confess merely to relieve his anxiety. In such circumstances, a police warning is unlikely to be fully understood and appreciated: see A. B. Ferguson and A. C. Douglas, "A Study of Juvenile Waiver" (1970), 7 San Diego Law Rev. 38. As a result, the truthfulness or reliability of a young person's statement may become an issue and the statement may be excluded.

A number of judicial guidelines have been developed in relation to police questioning in the many cases decided pursuant to the *J.D.A.*, and these will continue to apply under the *Y.O.A.* In *Re A*, [1975] 5 W.W.R. 425 at p. 428, 23 C.C.C. (2d) 537 *sub nom. R. v. A.* (Alta. S.C.) the following guidelines were set out:

(1) Require that a relative, preferably of the same sex as the child to be questioned, accompany the child to the place of interrogation;

(2) Give the child, at the place or room of the interrogation, in the presence of the relative who accompanies him, the choice of deciding whether he wishes his relative to stay in the same room during the questioning;

(3) Carry out the questioning as soon as the child and his relative arrive at headquarters;

(4) Ask the child, as soon as the caution is given, whether he understands it and if not, give him an explanation which he understands and which points out to the child the consequences that may flow from making the statement;

(5) Detain the child, if it is impossible to proceed according to (3) above, in a place designated by the competent authorities as a place for the detention of children;

(6) Explain to a child over the age of 14 years that, while the only charge that can be laid against him is that of being a juvenile delinquent, there is a chance that the juvenile court judge may send him to trial in the higher court, and that he may there be

charged with an offence as an adult, and that offence should be explained to him.

The general law relating to the admissibility of statements made by accused persons (which at the present time consists solely of case law) is made applicable to young persons by virtue of s-s. 56(1) of the Y.O.A. Consequently, reference should be made not only to the cases decided under the former Act, but also to the jurisprudence, articles and relevant texts dealing with this subject-matter generally.

The Y.O.A. goes further, however, in that it establishes certain minimum safeguards which must be met before any statement made by a young person to a person who is, in law, a person in authority, is admissible. These safeguards contained in s-s. 56(2) provide that oral and written statements would be admissible only if:

- the statement was "voluntary" (as defined by the existing jurisprudence);
- before any statement was made, it was clearly explained to the young person that
  - there is no obligation to make a statement,
  - the statement could be used in evidence in proceedings against the young person,
  - the young person has a right to consult counsel, a parent, a relative or appropriate adult, and
  - any statement to be made must be made in the presence of the person consulted unless the young person desires otherwise;
- before any statement was made, a reasonable opportunity was given to consult counsel, a parent, a relative or another appropriate adult person; and
- where a person is consulted, the young person was given a reasonable opportunity to make the statement in the presence of such person.

Subsection 56(4) provides that the young person may waive those rights specified in paras. 56(2)(c) and (d) (right to consult with counsel, parents, relative or adult person), provided such waiver is in writing. The waiver must also contain a statement by the young person that he has been apprised of the rights being waived.

An exception relating to "spontaneous statements" is set out in s-s. 56(3). Thus, a statement made spontaneously to a person in authority before that person had a reasonable opportunity to comply with the s. 56 safeguards, will be admissible provided it is otherwise voluntary.

Subsection 56(2) establishes a number of minimum safeguards, each of which must be present in order for a young person's statement to be admissible against him. It is important to note that these safeguards apply only where a statement is made to a person in authority. Subsection 56(5) extends the protection offered to young persons under the Act by providing that where a young person satisfies the judge that his statement was given under duress imposed by a person not in law "a person in authority", the statement will be inadmissible.

SECTION 56

56. (1) ***General law on admissibility of statements to apply.*****— Subject to this section, the law relating to the admissibility of statements made by persons accused of committing offences applies in respect of young persons.**

(2) ***When statements are admissible.*****—No oral or written statement given by a young person to a peace officer or other person who is, in law, a person in authority is admissible against the young person unless**

(a) the statement was voluntary;

(b) the person to whom the statement was given has, before the statement was made, clearly explained to the young person, in language appropriate to his age and understanding, that

(i) the young person is under no obligation to give a statement,

(ii) any statement given by him may be used as evidence in proceedings against him,

(iii) the young person has the right to consult another person in accordance with paragraph (c), and

(iv) any statement made by the young person is required to be made in the presence of the person consulted, unless the young person desires otherwise;

(c) the young person has, before the statement was made, been given a reasonable opportunity to consult with counsel or a parent, or in the absence of a parent, an adult relative, or

in the absence of a parent and an adult relative, any other appropriate adult chosen by the young person; and

(d) where the young person consults any person pursuant to paragraph (c), the young person has been given a reasonable opportunity to make the statement in the presence of that person.

(3) *Exception in certain cases for oral statements.*—The requirements set out in paragraphs (2)(b), (c) and (d) do not apply in respect of oral statements which are made spontaneously by the young person to a peace officer or other person in authority before that person has had a reasonable opportunity to comply with those requirements.

(4) *Waiver of right to consult.*—A young person may waive his rights under paragraph (2)(c) or (d) but any such waiver shall be made in writing and shall contain a statement signed by the young person that he has been apprised of the right that he is waiving.

(5) *Statements given under duress are inadmissible.*—A youth court judge may rule inadmissible in any proceedings under this Act a statement given by a young person in respect of whom the proceedings are taken if the young person satisfies the judge that the statement was given under duress imposed by any person who is not, in law, a person in authority.

Common law applies: subsection 56(1)

Subsection 56(1) makes applicable to the young person the general law on the admissibility of statements, which consists of a large body of Canadian and English judicial decisions. It includes not only those decisions relating to statements made by adults, but also the relevant jurisprudence contained in cases decided under the *J.D.A.* American court decisions are of limited relevance on the issue of the admissibiltiy of statements because the primary purpose of the exclusionary rule in the United States is to protect the constitutional rights of the accused. It is expected that the enactment of the *Canadian Charter of Rights and Freedoms*, however, may give these American decisions a greater significance in Canada.

The basic requirement governing the admissibility of statements at common law is that they must be made "voluntarily" — without "fear of prejudice or hope of advantage exercised or held out by a person in authority." (See the discussion in reference to

Ibrahim v. The King, *supra*, at p. 367). Although the legal definition of "voluntary" is a complex one, it focusses primarily on reliability and truthfulness. It is only when a statement has been "induced" and thus the reliability or truthfulness of the statement has been cast in doubt, that this evidence will be excluded. The application of the rule, however, is not straightforward as it goes beyond mere threats or inducements and often focusses on police practices. If an atmosphere of compulsion has been created during the arrest, detention or interrogation, the statement may be held to be "induced" and thus "involuntary". In such circumstances, there may be some doubt as to whether the statement is true, and hence it is inadmissible.

The admissibility of a statement is determined during a *voir dire* — a trial within a trial — during which the prosecution attempts to prove, beyond a reasonable doubt, that the statement was "voluntary" in a legal sense. During the *voir dire*, the Crown must call as witnesses all persons who were present during the questioning, or make them available to the defence for cross-examination. In the event that any witness is absent, this absence must be explained to the satisfaction of the court. A *voir dire* must be held, even if the statement appeared to be exculpatory at the time it was made, as such statements may also be made involuntarily. The accused is entitled to call witnesses and to cross-examine on the issues raised in the *voir dire*. He may also give evidence himself, and if he does so, the cross-examination must be confined to those matters in issue in the *voir dire*; he may, however, be cross-examined on his conviction record for the purpose of testing his credibility. In *DeClercq v. The Queen*, [1968] S.C.R. 902, [1969] 1 C.C.C. 197, 70 D.L.R. (2d) 530, 4 C.R.N.S. 205, the Supreme Court of Canada held that an accused testifying on a *voir dire* may be questioned as to the truth or falsity of the statement as that question is relevant to the issue of credibility. The law on this point is different in England: see *R. v. Brophy*, [1981] 3 W.L.R. 103. Both the prosecution and defence counsel are entitled to make submissions relating to the voluntariness of the statement at the conclusion of the *voir dire*.

It is now well established that the court must consider all of the surrounding circumstances, what was said, where it was said, who was present and other factors including the mental state of the accused person.

In Canada, there are no Judges' Rules as in England, to guide the court as to proper and improper police investigative tactics of questioning. These rules have, however, found judicial favour as rules of common sense (*R. v. Fitton*, [1956] S.C.R. 958, 116 C.C.C. 1, 6 D.L.R. (2d) 529, 24 C.R. 371) and are set out in *R. v. Voisin*, [1918] 1 K.B. 53; Schiff, *Evidence in the Litigation Process* (1978), Vol. 2, at p. 88; P. K. McWilliams, *Canadian Criminal Evidence* (Aurora: Canada Law Book Inc., 1974), at p. 657.

The English Judges' Rules confirm that a police officer is entitled to question a person, but require the police to warn the person of his right not to give a statement at the point when the police officer has evidence which would afford reasonable grounds for suspecting that the person has committed an offence. Recent versions of the English Judges' Rules (1964) outline procedures for the taking of statements by police and provide guidelines for police in respect of recording the interview and offering comfort and refreshment to persons interviewed. Procedures applicable to children and young persons are also set out in Appendix B of the English Judges' Rules:

> As far as practicable children (whether suspected of a crime or not) should only be interviewed in the presence of a parent or guardian, or, in their absence, some person who is not a police officer and is of the same sex as the child. A child or young person should not be arrested, nor even interviewed, at school if such an action can possibly be avoided. Where it is found essential to conduct the interview at school, this should only be done with the consent, and in the presence, of the head teacher, or his nominee.

The law as to the use of physical pieces of evidence obtained as a result of a statement is quite different from that applicable to statements, but is totally consistent with the "reliability" or "truthfulness" principle. The basic rule is that physical evidence is admissible, regardless of how it was obtained, whether by force, fraud, trickery, promise or threat. McWilliams in *Canadian Criminal Evidence* at p. 278 discusses the so-called *St. Lawrence* rule:

> Where articles are found as a result of information contained in a confession which is inadmissible as being involuntary, the finding of the articles and such part of the confession as is confirmed by the finding of the articles are admissible. Thus the Crown may prove that the accused told the police where to find stolen goods

> and how he knew of their location but the Crown cannot prove that the accused said he put them there because that is not confirmed by the finding . . .

See *R. v. St. Lawrence*, [1949] O.R. 215, 93 C.C.C. 376, 7 C.R. 464 (H.C.).

While those involved in obtaining physical evidence in an illegal or unlawful manner may be subject to criminal prosecution or civil suit, the evidence is admissible in the trial of the accused. This situation can be contrasted with that in the United States, where constitutional requirements provide that illegally obtained evidence is normally inadmissible in criminal trials. Subsection 24(2) of the *Canadian Charter of Rights and Freedoms* now provides that if a "court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

On a *voir dire*, the judge must also consider whether the statement was made to "a person in authority" — see *Ibrahim v. The King*, [1914] A.C. 599 (P.C.). As this concept is also referred to in s-s. 56(2) of the Y.O.A., it will be discussed separately.

Person in authority: subsection 56(2)

According to the rule in *Ibrahim v. The King*, *supra*, mere evidence of inducement is insufficient to render a statement inadmissible; it must be shown, in addition, that the promise or threat was made by a "person in authority". Similarly, the Y.O.A., s-s. 56(2), provides that only those statements made to peace officers or other persons who are, in law, persons in authority, are inadmissible unless the safeguards listed in that subsection have been met. If the person to whom the statement is made is not such a person in authority, s-s. 56(5) may be applicable; this subsection places the onus on the young person to prove the existence of duress. Obviously, the definition of "a person in authority" is of great importance.

According to *Cross on Evidence*, 5th ed. (1979), at p. 541, a person in authority is "anyone whom the prisoner might reasonably suppose to be capable of influencing the course of the prose-

cution." Another definition which has found judicial favour can be found in *R. v. Todd* (1901), 13 Man. R. 364 at p. 376, 4 C.C.C. 514 (C.A.): "A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him."

McWilliams in *Canadian Criminal Evidence* (1974), at pp. 248-49 presents the following list of persons in authority:

(i) a master in relation to his servants,

(ii) an employer,

(iii) the complainant,

(iv) the informant,

(v) the prosecutor,

(vi) the police,

(vii) a gaoler,

(viii) a magistrate,

(ix) others including a ship's captain, an insurance adjuster, licence or building inspector and an attorney engaged in investigation.

Until recently it was not established whether the test is an objective or a subjective one; more recently, the Supreme Court of Canada in *Rothman v. The Queen* (1981), 59 C.C.C. (2d) 30, held that the test was subjective, that is, whether the *accused* regarded the person to be a person in authority. This suggests that the issue must be determined upon the facts of each case, and opens up the possibility of a parent being held a "person in authority". In *The Queen v. Midkiff* (1980), 3 Can. J. Fam. L. 307 (Ont. H.C.), the court left open the issue whether a parent can be a person in authority, but did state that the parent or relative present at the taking of the confession *must* be called by the Crown during the *voir dire*.

As the test is a subjective one, at the *voir dire* the court must consider the inducement on the mind of the young person and whether it was reasonable for him to believe that the person making the promise or threat had the authority to follow through on it. Thus, if a person dresses up like a policeman and the accused falsely believes him to be one, that person is a person in authority. Conversely, if a policeman dresses up like a prisoner, and occupies the cell with the accused, the policeman will not be a person in authority: see *Rothman v. The Queen, supra*.

It is now generally accepted that one who makes a threat or inducement to an accused in the presence of a person in authority is himself considered to be a person in authority: see McWilliams, *Canadian Criminal Evidence* (1974) at p. 248. Similarly, a statement made in the presence of but not to a person in authority, must be considered made to a person in authority and must be proved voluntary.

It is unclear whether a teacher or a youth worker as defined under the Act would be a person in authority. However, s-s. 14(10) of the Y.O.A. provides protection for the young person in respect of statements made in the course of the preparation of a pre-disposition report, by prohibiting admission of such statements in any proceedings except those under ss. 16, 20 or 28 to 32. This means that the protection against self-incrimination, in its broadest sense, does not extend to any transfer, disposition or review hearing.

Restrictions on admissibility: subsection 56(2)

The common law governing the admissibility of statements made by young persons to persons who are, in law, persons in authority, is restricted by s-s. 56(2) and in particular, by paras. 56(2)(b), (c) and (d). While para. 56(2)(a) merely restates the common law requirement of voluntariness, the remaining paragraphs impose additional safeguards as prerequisites to admissibility. Before any statement would be admissible, it must be clearly explained to the young person that:

- there is no obligation to make a statement (subpara. 56(2)(b)(i));
- the statement can be used in proceedings against the young person (subpara. 56(2)(b)(ii));
- the young person has the right to consult another person (subpara. 56(2)(b)(iii)); and
- any statement to be made must be made in the presence of the person consulted unless the young person desires otherwise (subpara. 56(2)(b)(iv)).

In addition, the young person must be given a reasonable opportunity to consult with counsel, a parent, adult relative or other adult chosen by the young person (para. 56(2)(c)). Where such a person is consulted, the young person must be given a reasonable

opportunity to make the statement in the presence of the person consulted (para. 56(2)(d)).

These safeguards are consistent with the special guarantee of rights and freedoms and with the young person's right to be informed as to what his rights and freedoms are, as set out in the Declaration of Principle, paras. 3(1)(e) and (f) of the Y.O.A. It is clear that these safeguards go beyond the minimum prescribed in the *Canadian Charter of Rights and Freedoms* and in the *Canadian Bill of Rights*.

Where the Crown proposes to enter into evidence the statement of an accused young person, a *voir dire* must be held and the Crown must demonstrate compliance with the safeguards to the court. This obligation is subject to the exception relating to spontaneous oral statements (s-s. 56(3)) and to any waiver of the right to consult with counsel or other persons (s-s. 56(4)).

Voluntary statement: paragraph 56(2)(a)

Paragraph 56(2)(a) restates the requirement that statements made by a young person to a person who, in law, is a person in authority, must be voluntary. It has already been observed that the adoption of the common law relating to the admissibility of statements by s-s. 56(1) include the requirement of voluntariness. Voluntariness is a legal concept and should be distinguished from the ordinary meaning of the word. It has already been pointed out that the obligation to prove that a statement is voluntary lies on the Crown and that the standard of proof is "beyond a reasonable doubt" (see discussion in the *Introduction* to s. 56).

The determination of whether a particular statement is "voluntary" or has been improperly induced is often a difficult question, dependent on all the facts and circumstances. In *Boudreau v. The King*, [1949] S.C.R. 262 at p. 267, 94 C.C.C. 1, [1949] 3 D.L.R. 81, 7 C.R. 427, the Supreme Court of Canada stated:

> The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the othr hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the pres-

ence or absence of a warning will be a factor, and in many cases, an important one.

In determining whether a particular statement is "voluntary", the court will consider all the surrounding circumstances: what was said, where it was said, who was present, time of day, period of time over which questioning took place, and the physical state and mental capacity of the accused person. Police must be allowed to ask questions but, in particular circumstances, a question prefaced by an admonition that a youth "better tell the truth" may be construed as an inducement or threat resulting in the inadmissibility of the statement.

Caution: paragraph 56(2)(b)

Paragraph 56(2)(b) provides that no statement made to a person in authority is admissible against a young person unless a caution is given. The person to whom the statement is to be given must clearly explain to the young person, in language appropriate to his age and understanding, that:

(i) the young person is under no obligation to give a statement;

(ii) any statement given by him may be used as evidence in proceedings against him;

(iii) the young person has the right to consult a lawyer or other person referred to in para. 56(2)(c); and

(iv) any statement made by the young person is required to be made in the presence of the person consulted, unless the young person desires otherwise.

It is essential, therefore, for a police investigator to explain each of the rights listed in subparas. 56(2)(b)(i) to (iv) to the young person, or else the statement is not admissible against the young person.

The requirement that the young person be given a clear explanation in "language appropriate to his age and understanding" confirms that a mere recital of words is not sufficient under para. 56(2)(b). It would also appear that the duty on the police under s-s. 56(2) is greater than the duty to advise the young person of his right to be represented by counsel pursuant to s-s. 11(2). The object of s-s. 56(2) is not merely to comply with the statutory requirement but rather to ensure that a young person under-

stands his rights. This means that the person taking the statement must take time using simple language to go over the rights listed in para. 56(2)(b). He must, if necessary, repeat the warning using whatever approach is necessary to ensure comprehension. He must also be prepared to testify in court as to the steps he took to ensure compliance with this subsection; the exact words used should be recorded as they will normally be of particular importance in the case of a younger "young person".

In order to properly explain subpara. 56(2)(b)(iii) to a young person, the person taking the statement must indicate that the consultation can be with a lawyer or a parent, or in the absence of a parent, with an adult relative or adult person. The obligation to clearly explain to the young person in language appropriate to his age and understanding that the young person has a right to consult with counsel suggests that some reference to the availability of legal services should be made.

Opportunity to consult: paragraph 56(2)(c)

Subparagraph 56(2)(b)(iii) requires that the person, to whom the statement is made, explain to the young person that he has a right to consult with another person in accordance with para. 56(2)(c). Paragraph 56(2)(c) goes further by requiring that the young person be given "a reasonable opportunity to consult with counsel or a parent, or in the absence of a parent, an adult relative, or in the absence of a parent or an adult relative, any other appropriate adult chosen by the young person."

A discussion of reasonable opportunity to consult with counsel is included in the comments above on s. 11. The police have an obligation to facilitate contact with counsel and with other persons mentioned in para. 56(2)(c) (*Brownridge v. The Queen*, [1972] S.C.R. 926, 18 C.R.N.S. 308, 7 C.C.C. (2d) 417, 28 D.L.R. (3d) 1) and to allow a young person as many phone calls as required over a reasonable length of time (*R. v. Giesbrecht*, [1975] 5 W.W.R. 630 (Man. Co. Ct.). Should the young person so request, consultation with counsel and other persons in para. 56(2)(c) should be in private (*R. v. Penner*, [1973] 6 W.W.R. 94, 39 D.L.R. (3d) 246, 22 C.R.N.S. 35, 12 C.C.C. (2d) 468 (Man. C.A.) and *R. v. Paterson* (1978), 39 C.C.C. (2d) 355 (Ont. H.C.)).

The young person is given the choice of consulting either with counsel or a parent, it should be emphasized that the young

person is given the right to make this choice. The right to consult an adult relative or other adult person is given only in the absence of a parent. Thus, where a parent attends at the police station and the young person does not wish to consult him, it may be argued that as the parent is present, there is no further right to consult an adult relative or other adult person. It could also be argued, however, that a parent whom the young person does not wish to consult, is unavailable for consultation, and therefore the young person is entitled to consult with counsel, an adult relative or other adult person. Such an interpretation is consistent with the increased rights and responsibilities given to young persons by the Act. In any event, the young person is entitled to consult with counsel, whether or not the parent is present, pursuant to s-s. 11(1) of the Act and s.10 of the *Charter*. In determining the admissibility of a statement made by a young person, the youth court judge will evidently have to address these issues.

Presence of the person consulted: paragraph 56(2)(d)

Subparagraph 56(2)(b)(iv) requires that the young person be advised of his right to have the person consulted under para. 56(2)(c) present during the time when the statement is made, unless he desires otherwise. Where the young person exercises his right to consult with another person, he must be given a reasonable opportunity to make his statement in the presence of that person (para. 56(2)(d)). Both of these requirements are preconditions to the admissibility of any subsequent statement; the young person may, however, waive the right under para. 56(2)(d) pursuant to s-s. 56(4). What constitutes a "reasonable opportunity" to make the statement in the presence of the person consulted will ultimately be decided by the court; where the young person asks for the presence of such person and his request is denied, there will be a heavy onus on the person taking the statement to demonstrate why it was unreasonable to accede to the young person's wishes.

Spontaneously made oral statements: subsection 56(3)

Subsection 56(3), which applies only to oral statements, recognizes the common law doctrine relating to "spontaneous confessions"; since this term is not defined in the Y.O.A., the existing case law will be applicable. *Dupuis v. The Queen* (1952), 104 C.C.C. 290, 15 C.R. 309, [1952] 2 S.C.R. 516, states that a

spontaneous confession to police in response to a casual question, made voluntarily and without any inducement, before the accused is apprehended or warned, is admissible in evidence. Thus, a statement blurted out by a suspect during the arrest, or upon being questioned about some unrelated matters, before the young person can be cautioned and advised of his rights pursuant to s-s. 56(2), may be admissible. Furthermore, the statement may be made after the para. 56(2)(b) warnings have been given, but prior to consultation with an adult (para. 56(2)(c)), or prior to the statement being taken in the presence of the person consulted (para. 56(2)(d)), and still qualify as being "spontaneous". Presumably a spontaneous statement is one which is volunteered, and not made in response to a direct question or as a result of interrogation. Although a statement is made spontaneously and falls within the s-s. 56(3) exception, it may still be ruled involuntary and inadmissible due to the presence of other circumstances, such as the mental or physical state of the accused or the circumstances of his environment.

It is important to note that the s-s. 56(3) exception is narrower than the corresponding common law rule. The Y.O.A. requires both that the statement be spontaneous *and* that it be made before a person in authority had a reasonable opportunity to comply with the statutory requirements. Failure to meet both requirements would result in the statement being ruled inadmissible. In similar circumstances, the common law rule would give the judge a discretion as to whether to admit the statement, depending on whether it was "voluntary."

An important issue which arises for investigating police officers is at what point must an officer give the warnings provided for by s-s. 56(2). In questioning adults, this decision is not a critical one because the courts have considered the absence of a warning as only one of the factors to consider in determining whether a statement was voluntary. Moreover, the courts have recognized that police questioning must be flexible and that police should not be placed in a strait-jacket of artificial rules (see *Boudreau v. The King*, [1949] S.C.R. 262, 7 C.R. 427, 94 C.C.C. 1, [1949] 3 D.L.R. 81, 7 C.R. 427). In the case of the Y.O.A. the decision as to when to caution a young person is extremely important, because the failure to adhere to the s-s. 56(2) requirements would render the statement inadmissible. It is submitted that the English Judges' Rules should be followed in this regard:

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

Waiver of rights: subsection 56(4)

Subsection 56(4) provides that any waiver of rights to consult or to make a statement in the presence of the person consulted must:

— be in writing, and

— contain a statement by the young person that he has been apprised of the right being waived.

The use of the word "apprised" indicates that there must be an adequate explanation and therefore that rights under paras. 56(2)(c) and (d) cannot be waived if the young person doesn't understand the rights and his access to them. An American study (A. B. Ferguson and A. C. Douglas, "A Study of Juvenile Waiver" (1970), 7 San Diego Law Rev. 39) concluded that a large majority of juveniles who were cautioned as to their rights to remain silent and to consult counsel, waived these rights without fully understanding them. This study emphasizes the need to explain such rights to a young person carefully and in language he can understand. Defence counsel would be well advised to examine carefully all the circumstances surrounding an alleged waiver in order to determine whether a challenge should be made; similarly, judges should be aware of the frailties of waivers given by young persons. The young person must have the mental capacity to understand and to waive his rights pursuant to s-s. 56(4); in addition, American cases such as *United States v. Indian Boy X*, 565 F. 2d 585 (1977) state that such a waiver must be a "voluntary" one, in the same sense as a statement must be voluntary in order to be admissible.

It should be noted that the obligation to caution the young person pursuant to para. 56(2)(b) cannot be waived; moreover, a waiver does not affect the requirement that the statement be voluntary (para. 56(2)(a)), or otherwise admissible according to the general law relating to the admissibility of statements (s-s. 56(1)).

Duress: subsection 56(5)

Subsection 56(5) deals with statements given to persons who are not, in law, persons in authority and to which the provisions of s-s. 56(2) do not apply. Where a young person is able to satisfy the judge that a statement was made under duress, the judge may rule the statement inadmissible.

The *Encylopedia of Words and Phrases: Legal Maxims (Canada)*, 3rd ed., Vol. 1, p. 564, states, citing *Rogers v. Rogers*, [1938] 1 D.L.R. 99, 12 M.P.R. 321: "By 'duress' is meant the compulsion under which a person acts through fear of personal suffering, as from injury to the body or from confinement [whether] actual or threatened." Although duress would include psychological and emotional trauma, it contemplates a degree of compulsion which would be fairly difficult to prove in these instances, except in exceptional circumstances. Moreover, even when it is proved, the statement is not automatically inadmissible; rather, the court has a discretion whether to exclude such a statement. The legislation does not provide any guidelines for the exercise of this discretion. Clearly, a statement given under duress should be excluded if its truthfulness or reliability has been cast in doubt. Thus, if a parent (assuming that a parent is *not* a person in authority) physically threatens a young person "to own up" and a statement is given, the judge may rule it inadmissible if he concludes that the threat by the parent constituted "duress". The young person who is threatened in such a way may prefer the strong arm of justice to the wrath of his parent, and confess to something he did not do; therefore, the statement runs a high risk of being unreliable and may be excluded pursuant to s-s. 56(5).

It is clear that a young person's rights and protections in relation to oral or written statements are largely dependent on the person to whom the statements are made. If a statement is given to a person who is, in law, a person in authority, a *voir dire* must be held and the Crown must prove that the statement was voluntarily given, according to common law principles; in addition, the protections provided by s-s. 56(2) apply. However, if the person is not a person in authority, the onus lies on the young person to satisfy the court that the statement was given under duress. The existing jurisprudence substantially narrows the scope of application of s-s. 56(5). For example, one who makes a threat or inducement to an accused in the presence of a person in authority may himself be considered to be a person in authority; moreover,

if a statement is made in the presence of, but not to, a person in authority, it must be proved voluntary by the Crown (McWilliams, *Canadian Criminal Evidence* (1974), at p. 248). Thus, as a general rule, s-s. 56(5) will be applicable only in limited circumstances where no person in authority was present either at the time of making the threat or when the actual statement was made.

Proof of age: section 57

The jurisdiction of the youth court is dependent on establishing that the accused is a "young person" within the meaning of the definition found in s-s. 2(1) (see earlier discussion of this definition under s. 2). The purpose of s. 57 is to expand and clarify the ways by which the age of the young person can be proven.

The case law under the *J.D.A.* has not definitively resolved the issue whether proof of age is an essential element of the Crown's case. Some authorities suggest that failure to prove age results in proceedings that are merely a nullity and that a new trial may be ordered: *R. v. Sorenson*, [1965] 2 C.C.C. 242, 46 C.R. 251, 50 W.W.R. 116 (B.C.S.C.). Other cases have held that age is an essential element of the case to be proven by the Crown and that failure to prove age results in an acquittal: *R. v. Crossley* (1950), 10 C.R. 348, [1950] 2 W.W.R. 768, 98 C.C.C. 160 (B.C.S.C.); *R. v. P.* (1979), 48 C.C.C. (2d) 390 (Ont. Prov. Ct.); *R. v. L.* (1981), 59 C.C.C. (2d) 160 (Ont. Prov. Ct.). The view expressed in the more recent cases is that age is an essential ingredient of the offence and a finding that the accused is a young person must be made by the trial court.

Proof of the actual age of a juvenile accused pursuant to the *J.D.A.* has created some problems because of the hearsay evidence objection. Strictly speaking, the evidence of the child as to his age, or the evidence of a father who did not attend the birth could be objected to as being "hearsay", as the person giving the evidence must necessarily rely on information told to him. Situations where there has been a failure to properly prove age by evidence normally considered admissible have often occurred when the Crown is represented by a police officer who may not be fully aware of the intricacies of the law of criminal evidence. The reluctance to see a case dismissed on such a "technicality" often results in the practice of the judge "rescuing" the Crown by asking the child his age; this procedure, however, would be con-

sidered improper if one accepts that age is an ingredient of the offence which must be proven by the Crown.

In the absence of proof of actual age, some courts have relied on the physical appearance and demeanour of the juvenile accused in order to establish that the child is "apparently" under the age of 16 (or such other age directed by the province) pursuant to s. 2 of the *J.D.A.* (*R. v. Pilkington* (1968), 5 C.R.N.S. 275, 67 W.W.R. 159, [1969] 3 C.C.C. 327 (B.C.C.A.); *R. v. D.* (1976), 27 R.F.L. 298 (Ont. Prov. Ct.)). By relying on apparent age, some of the problems associated with proving actual age may be avoided, although in many cases it may not be "apparent" whether the person charged falls within the upper age limit — many 15-year-old children look 17 years old and many 17-year-old children may be several years younger in appearance.

Section 57 of the *Y.O.A.* facilitates the proof of age by allowing into evidence a parent's testimony, a birth certificate or other record and any other reliable information relating to age. As well, inferences may be drawn from the young person's appearance or from statements made by the young person. The definition of "young person" in s-s. 2(1) of the *Y.O.A.* has continued the concept of findings of age based on appearance, although the wording has been changed to suggest that "appearance" should only be relied upon in the absence of evidence to the contrary. Subsection 57(4) specifically permits the court to draw inferences as to the age of a person from that person's appearance, and presumably this provision is directed at proving actual age as well as apparent age.

While these provisions make clear how age is to be proven, some question remains as to how the issue of age is brought before the court. As age goes to the jurisdiction of the court, many judges took the view that, under the *Juvenile Delinquents Act*, it was their responsibility to establish jurisdiction at the earliest opportunity and to treat it as a preliminary matter. On the other hand, in *R. v. L.* (1981), 59 C.C.C. (2d) 160 at p. 162 (Ont. Prov. Ct.), the court held that: "the finding of age should be part of the trial process in which the trial judge should stand impartial". In any event, it would seem desirable for the Crown to deal with the issue as part of his case. The definition of "young person" in the *Y.O.A.* has been changed from the corresponding definition of "child" in the *J.D.A.* and s-s. 57(4) of the *Y.O.A.*

clearly permits the youth court to draw inferences as to the age of a person from the person's appearance. It was the intention of the drafters, in changing the definition of "young person" and in including s-s. 57(4), to provide that the youth court judge must, in the absence of evidence to the contrary, address the question as to whether or not an inference of age can be drawn, and where feasible, make a finding of age based on appearance.

SECTION 57

57. (1) *Testimony of a parent.*—In any proceedings under this Act, the testimony of a parent as to the age of a person of whom he is a parent is admissible as evidence of the age of that person.

(2) *Evidence of age by certificate or record.*—In any proceedings under this Act,

(a) a birth or baptismal certificate or a copy thereof purporting to be certified under the hand of the person in whose custody such records are held is evidence of the age of the person named in the certificate or copy; and

(b) an entry or record of an incorporated society that has had the control or care of the person alleged to have committed the offence in respect of which the proceedings are taken at or about the time the person came to Canada is evidence of the age of that person, if the entry or record was made before the time when the offence is alleged to have been committed.

(3) *Other evidence.*—In the absence, before the youth court, of any certificate, copy, entry or record mentioned in subsection (2), or in corroboration of any such certificate, copy, entry or record, the youth court may receive and act upon any other information relating to age that it considers reliable.

(4) *When age may be inferred.*—In any proceedings under this Act, the youth court may draw inferences as to the age of a person from the person's appearance or from statements made by the person in direct examination or cross-examination.

Testimony of a parent: subsection 57(1)

Subsection 57(1) makes "the testimony of a parent as to the age of a person of whom he is a parent" admissible as evidence of the age of that person. Thus, any person coming within the wide definition of parent in s-s. 2(1) may give evidence of the age of his child. As the term "parent" is defined very broadly under the

Act, the weight given to the evidence may depend on the relationship of the parent to the young person. For example, it would seem that the evidence of a biological parent who was present at the birth would be difficult, if not impossible, to refute, while evidence of a step-parent, a welfare agency or director of a residential facility might be given less weight or discounted entirely if it is considered unreliable. The evidence of an adoptive parent who had custody of the young person from infancy would obviously have credibility.

This provision for admissibility of a parent's testimony regarding age extends the liberal approach currently taken in some cases under the *J.D.A.* Although the testimony of a biological parent present at birth has been preferred because no hearsay objection can be made to it, the evidence of a natural parent who did not actually witness the birth was admitted in *R. v. D.* (1976), 27 R.F.L. 298 (Ont. Prov. Ct.). In another case, an adoptive parent was permitted to give testimony as to her son's age (*R. v. A.M.P.* (1977), 2 Fam. L. Rev. 58 (Ont. Prov. Ct.)); the judge held that the evidence was trustworthy and represented the best available evidence and that therefore an exception to the hearsay rule was justified. The Y.O.A. makes clear that an adoptive parent's testimony would be admissible, although the weight to be given to such evidence will depend on the circumstances of the case.

Birth certificates and records of societies: subsection 57(2)

Proof of age is further facilitated by s-s. 57(2), which permits the admission into evidence of birth or baptismal certificates and records of an incorporated society in certain situations where children have been admitted into Canada in the care or control of that society. These provisions extend the admissibility of documentary evidence as proof of age. Under the *J.D.A.*, birth certificates could only be admitted to prove age in accordance with s. 24 of the *Canada Evidence Act*. However, it will still be necessary to prove that the person named in the document is the person appearing before the court, and this may require additional supportive evidence. In corroboration of any such certificate or document, the youth court may receive any other information that it considers reliable (s-s. 57(3)). Presumably, a similarity of names would be some proof of identity, and this could be supported by the similarity of the names of the parents.

Paragraph 57(2)(b) permits the proof of age by allowing into evidence the records of an incorporated society "that has had the control or care of the person alleged to have committed the offence ... at or about the time the person came to Canada." This provision has limited application as it applies only in the narrow situation where children, often refugees, are brought into Canada for adoption. It is assumed that the incorporated society, relief agency or provincial society such as the Children's Aid Society in Ontario, will record the child's age as accurately as possible, as it would have no reason to do otherwise; so long as the entry or record has been made before the time when the offence is alleged to have been committed, it may be admitted into evidence. Paragraph 57(2)(b) is substantially the same as s-s. 585(1) of the *Criminal Code*.

Other evidence: subsection 57(3)

Subsection 57(3) makes a broad range of information about age admissible, provided the youth court considers it reliable, thus giving the court a great deal of flexibility in receiving proof of age. The court may allow into evidence photocopies of documents, for example, or any other evidence that is technically hearsay. Subsection 57(3) provides for the reception of other evidence "in the absence... of any certificate, copy, entry or record mentioned in subsection (2), or in corroboration [thereof] ...". If evidence has been admitted under s-s. 57(2), the youth court may receive and act upon any other corroborative evidence which it considers reliable, whether or not it is admissible according to the common law rules of evidence.

Although s-s. 57(3) substantially enlarges the scope of admissibility in youth court proceedings, it only applies to evidence relating to the age of the young person. Evidence by a witness that he knew the parent of the young person, and that they had told him the young person's birth date, could be considered admissible as "other information relating to age." Any statement made by the young person himself to a third party may be admissible in the first instance, as an "admission" but also under s-s. 57(3) as reliable other information. Where the third party is a "person in authority", however, it is not clear whether the provisions of s. 56 supersede s-s. 57(3), notwithstanding that the statement relates to age and is considered to be reliable by the youth court. It could be argued that if this statement is "volun-

tary", and hence "reliable", the statement should be admitted even though the para. 56(2)(b) cautions were not given and the young person was not given an opportunity to consult with or make the statement in the presence of the persons mentioned in para. 56(2)(c). On the other hand, s-s. 56(2) appears to apply to all statements made by the young person, whether relating to guilt or to jurisdiction, and accordingly s-s. 57(3) should not be interpreted so as to create an exception to it.

Apparent age: subsection 57(4)

The *Y.O.A.*, like the *J.D.A.*, permits proof of age by a finding of apparent age. Unlike the *J.D.A.*, however, a finding of apparent age may only be made under the *Y.O.A.* "in the absence of evidence to the contrary." Therefore, apparent age is not to be relied upon where other evidence of age is before the court (see *R. v. Sorensen*, [1965] 2 C.C.C. 242, 46 C.R. 251, 50 W.W.R. 116 (B.C.S.C.) interpreting a similar provision in the *Criminal Code*). Subsection 57(4) permits inferences to be drawn "as to the age of a person from the person's appearance or from statements made by the person in direct examination or cross-examination." A finding of apparent age may be based on a person's size, demeanour and dress (see *R. v. Pilkington* (1968), 5 C.R.N.S. 275, 67 W.W.R. 159, [1969] 3 C.C.C. 327 (B.C.C.A.)).

It should be noted that s-s. 57(4) is permissive, the court may draw inferences as to age from the person's appearance or from statements made by the person in direct examination or cross-examination. The court may also draw inferences as to age from other reliable information admitted pursuant to s-s. 57(3), or use such evidence to corroborate any inferences made from the young person's appearance or testimony.

If the youth court accepts jurisdiction on the basis of apparent age, a finding of fact must be made to that effect: *Re Kelly*, [1929] 1 D.L.R. 716, 51 C.C.C. 113 (N.B.C.A.); *R. v. Harford*, [1965] 1 C.C.C. 364, 43 C.R. 415, 48 W.W.R. 445 (B.C.S.C.).

Admissions: sections 58 and 59

Sections 58 and 59 allow the parties to dispense with proof of facts or proof of evidence on a consent basis, thus expediting proceedings and avoiding unnecessary costs and delays.

SECTION 58

58. (1) *Admissions.*—A party to any proceedings under this Act may admit any relevant fact or matter for the purpose of dispensing with proof thereof, including any fact or matter the admissibility of which depends on a ruling of law or of mixed law and fact.

(2) *Other party may adduce evidence.*—Nothing in this section precludes a party to a proceeding from adducing evidence to prove a fact or matter admitted by another party.

SECTION 59

59. *Material evidence.*—Any evidence material to proceedings under this Act that would not but for this section be admissible in evidence may, with the consent of the parties to the proceedings and where the young person is represented by counsel, be given in such proceedings.

Admission: subsections 58(1) and (2)

Subsection 58(1) provides that a party may admit "any relevant fact or matter" in order to dispense with proof of the fact or matter. Subsection 58(1) is similar to s. 582 of the *Criminal Code*, which also allows admissions; s. 582 of the *Code* provides that the accused may admit any fact alleged against him. Subsection 58(1) of the Y.O.A. appears to be broader, as it permits "a party to any proceedings" to make an admission. The subsection also specifically includes "any fact or matter the admissibility of which depends on a ruling of law or of mixed law and fact."

Examples of facts that could be admitted are the age of the accused or the fact that stolen property did indeed belong to someone else. The opposing party may choose to prove the fact none the less. Subsection 58(2) provides that evidence may be adduced "to prove a fact or matter admitted by another party."

It is unclear whether s. 582 of the *Code* is authority for permitting the accused to waive a *voir dire* as to the voluntariness of a confession, as its truth or voluntariness is a question of law which must be decided by the trial judge. In *R. v. Le Brun* (1954), 110 C.C.C. 262, 19 C.R. 286, 13 W.W.R. 192 (B.C.S.C.) it was held that a confession could not be admitted. Section 582 of the *Criminal Code* was also given a restricted interpretation in *R. v.*

Dietrich (1970), 1 C.C.C. (2d) 49, 11 C.R.N.S. 22, [1970] 3 O.R. 725 (C.A.); leave to appeal to S.C.C. refused 1 C.C.C. (2d) 68*n*, [1970] 3 O.R 744*n* (S.C.C.), although a right to waive a *voir dire* was held to exist apart from the *Code* provision. In *Park v. The Queen*, [1981] 2 S.C.R. 64, 59 C.C.C. (2d) 385, 122 D.L.R. (3d) 1, it was held that no particular words or formula need be used by defence counsel to waive a *voir dire*, as long as the trial judge is satisfied that counsel understands the matter and has made an informed decision to waive the *voir dire*. It should be noted that s-s. 58(1) of theY.O.A. is considerably broader than s. 582 of the *Code* and appears to specifically allow for the admission of statements, confessions on consent.

Material evidence: section 59

Section 59 provides that, with consent, any material evidence "that would not but for this section be admissible in evidence" may be given, provided the young person is represented by counsel; an unrepresented young person has no right to consent to the admission of evidence which would not otherwise be admissible.

Examples of evidence that may be admitted pursuant to this section are a letter from a doctor to prove age or a document from the owner of property indicating his ownership. Although it is likely that this section will be employed sparingly in contested cases, it permits material information of a non-controversial nature to be admitted without resorting to the expense of calling witnesses and unnecessarily taking up the time of the court. This section could also be used at dispositional hearings to admit uncontested documentary evidence.

Evidence of children and young persons: sections 60 and 61

At common law, no evidence could be received in criminal proceedings except upon oath. A child, even under the age of seven years, could be sworn provided the court was satisfied that the child possessed a sufficient knowledge of the nature and consequences of an oath (*R. v. Brasier* (1779), 1 Leach 199, 168 E.R. 202). Until *R. v. Bannerman* (1966), 55 W.W.R. 257, 48 C.R. 110 (Man. C.A.); affd [1966] S.C.R. v, 57 W.W.R. 736*n*, 50 C.R. 76*n*, it was generally accepted that this test involved an understanding of the theological significance of telling a lie and of

divine retribution as a consequence of lying under oath. Moreover, it has been held that the child may be instructed as to the nature and meaning of the oath, and even where this was done only a few days before trial, the child's evidence could be received under oath (*R. v. Armstrong* (1907), 12 C.C.C. 544, 15 O.L.R. 47 (C.A.)).

In Canada, the common law has been altered by statute to permit the reception of unsworn evidence of children. The *Canada Evidence Act*, R.S.C. 1970, c. E-10 provides:

> 16. (1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
>
> (2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

Section 19 of the *Juvenile Delinquents Act* is to the same effect, and a similar provision is found in s. 586 of the *Criminal Code*.

Consequently, children could give evidence in criminal proceedings by qualifying as a sworn witness and taking an oath (or an affirmation pursuant to s. 14 of the *Canada Evidence Act*) or, if the child was not competent, the child could give unsworn evidence pursuant to s-s. 16(1). In order to determine whether a minor may be sworn, an inquiry into his capacity to understand the nature of the oath must be held. When the child has not demonstrated an adequate understanding of the nature of the oath, the court may admit the child's testimony unsworn. In this case, a further inquiry must be held to determine whether the child is possessed of sufficient intelligence to justify the reception of the evidence *and* understands the duty of speaking the truth. If the judge is satisfied that the child has such intelligence and understanding, the unsworn evidence of the child may be heard. If the unsworn evidence of the child is received, it must be corroborated in some material respect.

Where a child is not of "tender years", there is a presumption that he understands the nature of the oath, and therefore the court need not inquire into his capacity. The term "tender

years", however, has not been defined. In *R. v. Horsburgh*, [1966] 3 C.C.C. 240 (Ont. C.A.), the court stated that the test was a subjective one, not depending on the precise age of the child, but rather on his intelligence, his appreciation of the duty to tell the truth and on conclusions drawn by the presiding judge from observing the appearance, demeanour, manner of speaking and deportment of the witness. Other cases have referred to the presumption that children of 14 years and over understand the nature of the oath, but this is a rebuttable presumption which can be rebutted by circumstances indicating the contrary. It is clear, however, that before the unsworn evidence of a child can be accepted, there must be a judicial inquiry and the judge must form an opinion (see *Sankey v. The King*, [1927] S.C.R. 436, 48 C.C.C. 97, [1927] 4 D.L.R. 245). The inquiry, when it is made, must be in open court and not in the judge's chambers. Failure of counsel to object does not relieve the judge from making the inquiry prescribed by statute and from forming an opinion.

There is a further rule of practice which requires a judge to warn a jury (or to instruct himself) of the danger of convicting on the evidence of the child, even where that evidence is given under oath. This caution is based on the mental immaturity of the child from which can be generally inferred a limited capacity of observation, recollection and ability to understand questions and to frame intelligent answers. As well, the child's moral responsibility is often less developed.

The Y.O.A. changes the law with respect to the giving of evidence by minors in several important respects:

— the requirement of the oath is eliminated;
— all young persons are deemed to have the capacity to give evidence;
— the test for the capacity of children (under 12) to give evidence is identical to the statutory requirement permitting the reception of unsworn evidence under the *Canada Evidence Act*, s-s. 16(1);
— a form of solemn affirmation is specified which must be used in the case of all children or young persons who give evidence (s-s. 60(2));
— all evidence taken under solemn affirmation will have the same effect as if taken under oath (s-s. 60(3));

— all evidence of children must be corroborated by some other material evidence, but evidence of young persons does not require corroboration (s-s. 61(2)); and

— the judge must instruct all child witnesses and young persons, where he deems it necessary, as to the duty of the witness to speak the truth and the consequences of failing to do so (paras. 60(1)(a) and (b)).

The change from oath to affirmation clarifies the existing jurisprudence relating to the test of capacity. One line of cases requires an understanding of the nature and consequences of the oath, thus demanding that a child demonstrate belief in a Supreme Being who will reward and punish. In *R. v. Bannerman* (1966), 55 W.W.R. 257, 48 C.R. 110 (Man. C.A.); affd [1966] S.C.R. v, 57 W.W.R. 736*n*, 50 C.R. 76*n*, the requirement of an understanding of both the nature and consequences of the oath was abandoned in favour of an inquiry into the child's understanding of the nature of the oath alone; the judge must be satisfied that the child understands the moral obligation of telling the truth. This test, although approved, was treated inconsistently in cases following *Bannerman*. In *R. v. Taylor* (1970), 1 C.C.C. (2d) 321, 75 W.W.R. 45 (Man. C.A.), it was held unnecessary to examine the child upon his religious beliefs, while in *R. v. Budin* (1981), 32 O.R. (2d) 1, 20 C.R. (3d) 86, 58 C.C.C. (2d) 352, 120 D.L.R. (3d) 536 (C.A.), the majority held that it is essential to establish whether or not the child believes in God or another Almighty, and that he appreciates that, in taking the oath, he is telling God he will tell the truth. Therefore, by dispensing with the oath, ss. 60 and 61 of the Y.O.A. clarify the law in this area. The test of capacity under the Y.O.A. does not require any religious belief and is based solely on sufficiency of intelligence and an understanding of the duty to speak the truth.

Under the Y.O.A. there is a presumption that a young person is sufficiently intelligent to testify and there is no need for the judge to question a young person about his understanding of the duty to speak the truth unless the judge deems it necessary. On the other hand, s. 60 makes the judge's instruction of a child (under 12) mandatory and s. 61 requires that a judge satisfy himself as to the child's intelligence and his understanding of the duty to speak the truth. Thus, to a limited extent, the case law on the capacity of a child of tender years to give unsworn evidence remains significant. Furthermore, s-s. 61(2) requires the corrob-

oration of a child's evidence and therefore the existing jurisprudence relating to "corroboration" continues to be relevant. No similar requirement of corroboration exists for evidence of young persons, in accordance with the Y.O.A.'s recognition of the increased responsibility of young persons. It would be inconsistent to consider a young person mature enough to be held responsible for his criminal actions but to hold him too immature to testify without corroboration.

SECTION 60

60. (1) *Evidence of a child or young person.*—In any proceedings under this Act where the evidence of a child or a young person is taken, it shall be taken only after the youth court judge or the justice, as the case may be, has

(a) in all cases, if the witness is a child, and

(b) where he deems it necessary, if the witness is a young person,

instructed the child or young person as to the duty of the witness to speak the truth and the consequences of failing to do so.

(2) *Solemn affirmation.*—The evidence of a child or a young person shall be taken under solemn affirmation as follows:

> **I solemnly affirm that the evidence to be given by me shall be the truth, the whole truth and nothing but the truth.**

(3) *Effect of evidence under solemn affirmation.*—Evidence of a child or a young person taken under solemn affirmation shall have the same effect as if taken under oath.

SECTION 61

61. (1) *Evidence of a child.*—The evidence of a child may not be received in any proceedings under this Act unless, in the opinion of the youth court judge or justice, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) *Corroboration.*—No case shall be decided on the evidence of a child alone, but must be corroborated by some other material evidence.

Instruction of child or young person by a judge: subsection 60(1)

Subsection 60(1) provides that the judge or justice must instruct a child on the duty to speak the truth and on the consequences of his failure to do so. If the judge considers it necessary, he shall instruct a young person as well, although in many cases young persons will be sufficiently intelligent and mature to render instruction unnecessary.

The nature of the judge's instruction may differ depending on whether the judge is instructing a child or a young person and upon the intelligence and understanding of the person being instructed. The extent to which a judge should instruct a child is not clear, nor is the form of his instruction. The requirements of the Act might be met by merely stating the obligation as set out in s-s. 60(1); on the other hand, a judge may wish to discuss the matter with the child at some length. The instruction could take the form of a series of questions posed by the judge. Where, after instruction, the judge is not satisfied that the child is possessed of sufficient intelligence to justify the reception of the evidence and that he understands the duty of speaking the truth, the evidence may not be received. On the other hand, where the witness is a young person, the evidence must be received regardless of the actual capacity of the witness to understand the obligation to tell the truth; presumably any such lack of capacity can be accounted for in the weight which will be subsequently given to this evidence.

Since s-s. 60(2) requires that children and young persons shall give evidence only under solemn affirmation, there is no longer any need for such witnesses to appreciate the spiritual consequences of not telling the truth. Accordingly, the judge need not instruct the child or young person of these impending consequences, for example, by warning that lying on the stand is a sin and that divine retribution may result.

Solemn affirmation: subsection 60(2)

Subsection 60(2) provides that the evidence of a child or young person shall be taken only under solemn affirmation, the precise wording of which is set out in the subsection. Subsection 60(3) provides that the "evidence of a child or a young person

taken under solemn affirmation shall have the same effect as if taken under oath."

The removal of the oath in favour of the affirmation will substantially simplify the procedure for taking evidence from children and young persons. Furthermore, the affirmation itself will presumably be more easily understood by them. In today's society, the requirement that a child understand the theological implications of taking an oath is meaningless in many cases, and the use of the affirmation is more likely to impress upon the witness his obligation to tell the truth.

As a result of the provisions of ss. 60 and 61, it is clear that the evidence of a young person must be accepted; however, there is some authority at common law that retardation or mental illness may render an otherwise competent person incompetent as a witness. Presumably, this common law rule of general application has not been extinguished, for otherwise the principle of reliability underlying the taking of evidence would be undermined. In cases of mental illness, a person insane on one matter may be competent to give evidence on matters not connected with his insanity, if his delusion does not affect his perception, memory or articulation of the events in question: see *R. v. Hill* (1851), 5 Cox C.C. 259. A person suffering from a mental disease rendering him incapable of interpreting observed events, or of understanding questions asked of him in court, or of communicating, is incompetent to testify. See J. Sopinka and S. N. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974), p. 450.

It is not obligatory to inquire as to the young person's understanding of the duty to speak the truth, although the power to do so is granted to the judge by s-s. 60(1); nor is corroboration of the young person's evidence required. Defence counsel would be allowed to expose the young person's inability to understand the obligation to tell the truth in cross-examination, and this could be accounted for by the judge's discretion in weighing the evidence.

Evidence of a child: section 61

Section 61 provides that the evidence of a child may not be accepted unless the child is "possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty

of speaking the truth." This is the test presently used to determine whether a minor who does not understand the nature of an oath can give unsworn evidence: see s. 16 of the *Canada Evidence Act*, and s. 19 of the *Juvenile Delinquents Act*.

At present an inquiry as to whether a child understands the nature of an oath is a condition precedent to a child giving unsworn testimony, pursuant to s. 16 of the *Canada Evidence Act*: *R. v. McKay* (1975), 23 C.C.C. (2d) 4, 31 C.R.N.S. 224, [1975] 4 W.W.R. 235 (B.C.C.A.).

There is little case law on the meaning of "sufficient intelligence to justify the reception of the evidence." In *Nemeth v. Harvey* (1975), 7 O.R. (2d) 719 (H.C.), the defendant applied for permission to examine the infant plaintiff for discovery. It was held that (at p. 720): "[t]he child must have an awareness of the purpose of the examination, its general meaning, a general understanding of its significance and of the sum insight into the importance of what might be said by him on such an examination." The court concluded that the five-year-old child in question did not meet these requirements.

Corroboration: subsection 61(2)

Subsection 61(2) provides that "no case shall be decided on the evidence of a child alone, but must be corroborated by some other material evidence." Section 16 of the *Canada Evidence Act*, s. 19 of the *J.D.A.*, and s. 586 of the *Criminal Code* all contain similar provisions requiring corroboration of the evidence of children of tender years. This corroboration requirement recognizes the inherent mental and developmental immaturity of the child and states that some additional evidence is necessary to strengthen the evidence of the child witness. A judicial definition of corroboration is found in *R. v. Baskerville*, [1916] 2 K.B. 658 at p. 667, 86 L.J.K.B. 28 (Ct. of Crim. App.), a case involving the evidence of accomplices:

> ... evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. ... The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged.

Thus, if a child's evidence is part of the Crown's case, independent evidence confirming the child's testimony in some material

particular is required for there to be a conviction. Query whether the unsworn evidence of a child would in itself suffice to raise a reasonable doubt and thereby result in an acquittal: see McGillivray C.J.A. (dissenting) in *R. v. Dubois* (1979), 49 C.C.C.(2d) 501 (Alta C.A.); see also 52 C.C.C.(2d) 64*n*, [1980] 2 S.C.R. 21.

Although a sworn child has been permitted to give evidence as corroboration of an unsworn child, unsworn children cannot corroborate each other: *Paige v. The King*, [1948] S.C.R. 349, 92 C.C.C. 32, 6 C.R. 93; *Morris v. A.-G. N.B.* (1975), 12 N.B.R. (2d) 520, 63 D.L.R. (3d) 337 (C.A.)

For a further discussion of the concept of corroboration, and the type of evidence which can constitute corroboration: see *R. v. Vetrovec* (1982), 67 C.C.C. (2d) 1, 27 C.R. (3d) 304, 41 N.R. 606 (S.C.C.), and McWilliams, *Canadian Criminal Evidence* (1974), pp. 406-442.

Proof of service: section 62

SECTION 62

62. (1) *Proof of service.*—For the purposes of this Act, service of any document may be proved by oral evidence given under oath by, or by the affidavit or statutory declaration of, the person claiming to have personally served it or sent it by mail.

(2) *Proof of signature and official character unnecessary.*—Where proof of service of any document 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.

Proof of service: section 62

The manner of proof of service of documents is set out in s. 62. Service of documents such as a summons to a young person or a notice to parents under s. 9 of the Y.O.A. may be proved by oral evidence, by affidavit or by statutory declaration of the person claiming to have served it personally or mailed it. This provision is similar to that set out in the *Criminal Code*, s-s. 455.5(3). A person claiming to have served a document by mail, whether by ordinary or registered mail, need only swear that he mailed it — proof of delivery is not required.

Subsection 62(2) provides that, in the case where affidavit evidence or a statutory declaration is offered as proof of service, "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."

SECTION 63

63. ***Seal not required.*****—It is not necessary to the validity of any information, summons, warrant, minute, disposition, conviction, order or other process or document laid, issued, filed or entered in any proceedings under this Act that any seal be attached or affixed thereto.**

Seal not required: section 63

A seal is not necessary to the validity of any process or document related to proceedings under the Y.O.A., unlike, for example, s-s. 627(4) of the *Criminal Code* which provides that a seal is necessary to the validity of a subpoena or warrant issued by a court under Part XIX of the *Code*.

SUBSTITUTION OF JUDGES
(Section 64)

Introduction

As a general rule, a judge who receives the plea of an accused will proceed to hear the evidence, if any, render an adjudication, and impose a disposition, if any. The judge is said to be "seized" of a case after plea, and will continue to deal with the case until final disposition, this ensures fairness and continuity.

Subsection 725(4) of the *Code*, which by virtue of s. 52 of the Y.O.A. is applicable to proceedings in youth court, provides that if one judge accepts a plea, but does not hear any evidence, any other youth court judge having jurisdiction to try the young person may proceed to hear the case and render an adjudication or disposition, if any.

There may be circumstances where the judge who has commenced to deal with a matter is unable to attend court at the time the case is scheduled to proceed. If the original judge's absence is temporary, under s-s. 725(3) of the *Code*, a second judge may simply adjourn the matter until a date when the original judge will be available. In the absence of the youth court judge seized of the case, the matter may be adjourned by a justice (Y.O.A., s. 6, *Criminal Code*, s. 725) or by a clerk of the youth court (Y.O.A., para. 65(b)). There may also be situations in which a youth court judge proceeds beyond taking a plea, and the judge dies "or is for any reason unable to continue the trial"; this situation is governed by s. 726 of the *Code*, to some extent modified by s. 64 of the Y.O.A. Jurisprudence under s. 726 of the *Code* has held that valid reasons for a judge not continuing include a serious illness or an indication by the trial judge of a conflict of interest (*R. v. Holden* (1974), 15 C.C.C. (2d) 70 (Sask. Q.B.)). It is recognized, however, that once a judge has begun to hear evidence, there must be "weighty reasons" for his not continuing to final disposition. The fact that a judge has a heavy docket is not sufficient cause for him to remand a young person convicted of an offence to another judge for disposition (*R. v. Lochard* (1973), 12 C.C.C (2d) 445, 22 C.R.N.S. 196 (Ont. C.A.)). A trial judge who has

heard inadmissible evidence is not for that reason alone unable to continue (*R. v. Huard* (1962), 133 C.C.C 349, 39 C.R. 67, 39 W.W.R. 674 (B.C.S.C.)).

SECTION 64

64. (1) *Powers of substitute youth court judge.*—A youth court judge who acts in the place of another youth court judge pursuant to subsection 726(1) of the *Criminal Code* shall,

(a) if an adjudication has been made, proceed with the disposition of the case or make the order that, in the circumstances, is authorized by law; or

(b) if no adjudication has been made, recommence the trial as if no evidence had been taken.

(2) *Transcript of evidence already given.*—Where a youth court judge recommences a trial under paragraph (1)(b), he may, if the parties consent, admit into evidence a transcript of any evidence already given in the case.

Substitution of youth court judges: section 64

The effect of s. 64 of the Y.O.A. and s. 726 of the *Code* is that where a youth court judge dies or is "for any reason unable to continue" a trial, another youth court judge having jurisdiction in the same territorial jurisdiction may deal with the case. If an adjudication has been made, para. 64(1)(a) provides that the second judge may proceed with the matter. This will usually mean making a disposition under s. 20, though in some cases there may be other action required; for example in a s. 745 recognizance (peace bond) situation, the first judge may be satisfied that a recognizance should be entered into, and the second judge will impose the conditions of the recognizance.

Paragraph 64(1)(b) of the Y.O.A. provides that if the first judge begins to hear evidence, but does not render an adjudication before being unable to continue the trial, a second judge must recommence the trial as if no evidence had been taken. However, s-s. 64(2) provides that in this situation, the second judge may admit into evidence a transcript of any evidence already given in the case before the first judge, provided the parties consent. Subsection 64(2) differs from the provisions of s. 726 of the *Code* which governs in ordinary (adult) court and does not allow for the use of a transcript. Subsection 64(2) is intended to

permit witnesses to be saved the time and inconvenience of a second appearance and to expedite proceedings before the second judge. Subsection 64(2) is discretionary, and the second judge may refuse to allow use of a transcript, even if the parties consent.

It should be noted that a dispositional review under s. 28, 29, 31, 32 or 33 of the Y.O.A. need not be conducted by the youth court judge who made the original disposition, though frequently as a matter of practice it may, where feasible, be desirable for the original judge to deal with the matter.

FUNCTIONS OF CLERKS OF COURT
(Section 65)

SECTION 65

65. *Powers of clerks.*—In addition to any powers conferred on a clerk of the court by the *Criminal Code*, a clerk of the youth court may exercise such powers as are ordinarily exercised by a clerk of a court, and, in particular, may

(a) administer oaths or affirmations in all matters relating to the business of the youth court; and

(b) in the absence of a youth court judge, exercise all the powers of a youth court judge relating to adjournment.

Functions of youth court clerks: section 65

Section 65 of the Y.O.A. confers on a clerk of the youth court all the powers conferred by the *Criminal Court* on a clerk of a court. It also provides that a clerk of the youth court may exercise such powers as are ordinarily exercised by a clerk of a court, including powers in regard to the administration of oaths or affirmations and in regard to the adjournment of youth court proceedings in the absence of a judge.

Section 2 of the *Criminal Code* defines the term "clerk of the court" to include a "person, by whatever name or title he may be designated, who from time to time performs the duties of a clerk of the court." A clerk of the court has extensive powers to sign various forms issued pursuant to the *Code*, for example Form 7, a warrant for arrest. A youth court clerk also has the power to sign a number of designated forms under the Y.O.A., such as Form 1, a notice to parent issued under s. 9 of the Act.

Paragraph 65(b) of the Y.O.A. empowers a clerk of the youth court to exercise all the powers of a youth court judge relating to adjournments. The clerk of the youth court may not exercise the power conferred by para. 65(b) if a youth court judge is available. The need to exercise this power of adjournment may arise if a youth court judge scheduled to deal with a matter is ill or otherwise unavailable. A justice may also adjourn pursuant to s.

6 of the Y.O.A. and s-s. 725(3) of the *Code*. (In some places, it is common practice for a clerk of the court to also be a justice of the peace.)

Section 65 of the Y.O.A. authorizes a youth court clerk to generally "exercise such powers as are ordinarily exercised by a clerk of the court"; this might include responsibility for announcing the presence of the judge, marking exhibits, keeping a court calendar, arranging court dockets, ensuring that parties receive notice of hearings, and carrying out a variety of administrative functions.

Section 40 of the Y.O.A. gives the youth court clerk special responsibilities in regard to youth court records. The clerk shall keep, separate from records of cases in ordinary court, a complete record of every case coming before the youth court; the clerk must ensure that access to these records is limited to those individuals named in s-ss. 40(2) and (3) of the Act, and that these records are ultimately destroyed in accordance with s. 45. See the discussion following ss. 40, 45 and 46 for a fuller description of a clerk's responsibilities in this regard.

FORMS, REGULATIONS AND RULES OF COURT
(Sections 66 to 68)

Introduction

Various sections of the Y.O.A. make specific provision for forms, and these are set out in the Schedule following the Act. However, use of these forms is not mandatory, and they may be modified to meet local needs or circumstances. There are many situations where it may be useful for youth courts and others involved in Y.O.A. proceedings to develop forms not specifically provided for in the Act; this may be done, where appropriate, using forms set out as part of the *Criminal Code*. Nevertheless, these model forms serve to promote uniformity, particularly where documentation is required to give effect to the rights of the young person.

SECTION 66

66. (1) *Forms.*—The forms set out in the schedule, varied to suit the case, or forms to the like effect, are valid and sufficient in the circumstances for which they are provided.

(2) *Where forms not provided.*—In any case for which forms are not set out in the schedule or prescribed under section 67, the forms set out in Part XXV of the *Criminal Code*, with such modifications as the circumstances require, or other appropriate forms, may be used.

Forms: subsection 66(1)

In order for a form to give legal effect to the purpose for which it is designed, it must be valid and sufficient in law in relation to the statute section which governs its issuance. Subsection 66(1) of the Y.O.A. stipulates that the forms set in the Schedule after the Act are valid and sufficient in the circumstances for which they are provided; thus the forms in the Schedule give legal effect to the purposes for which they are designed. Subsection 66(1) allows for forms to be "varied to suit the case, or forms to the like effect." Obviously, it may be necessary to have minor modi-

fications and changes to suit the details of a particular case or locality, and such variation is specifically permitted by s-s. 66(1). As long as a form is to "the like effect" as a form in the Schedule, it will be valid.

There are specific statutory provisions in the Y.O.A. concerning the contents of documents, some of which are contained in the Schedule. In particular, s-s. 9(6) requires notices to parents and other adults (Forms 1 and 2) to include the name of the young person, the charge against the young person, the time and place of appearance, and a statement that the young person has a right to be represented; further s-s. 11(9) requires that a summons (Form 16), a warrant for arrest (Form 17), and a notice of a dispositional review (Form 11) to include a statement that the young person has the right to be represented by counsel.

The words of s-s. 66(1) of the Y.O.A. are very similar to the words of s-s. 773(1) of the *Code*, which governs the forms in the *Code*; both provide for flexibility in the modification of documents.

Where forms not provided: subsection 66(2)

The Schedule of forms attached to the Y.O.A. will address most of the requirements created by the Act. There are, however, many situations in which documents and notices will be required to give effect to the Y.O.A. and which are not included in the Schedule. Subsection 66(2) allows other forms to be used; these forms may be developed from a number of sources, including:

- the Governor in Council (federal Cabinet) may make regulations prescribing additional forms, or varying existing ones, s. 67 of the Y.O.A.;
- if the Governor in Council does not prescribe forms, this may be done in provincial youth court rules, made pursuant to s. 68 of the Y.O.A.; and
- those responsible may design their own forms, provided they are "appropriate", s-s. 66(2). Subsection 66(2) specifically suggests those designing forms make use of the forms set out in Part XXV, at the end of the *Criminal Code*; these include information (Form 2), summons (Form 6), warrant to arrest (Form 7), appearance notice (Form 8.1), promise to appear (Form 8.2), recognizance (Form 8.3), and subpoena to a witness (Form 11).

Examples of forms which will have to be designed include an undertaking of a responsible person given pursuant to s-s. 7(4), and a youth court order transferring a young person from open to secure custody pursuant to s-s. 24(7).

By virtue of s-s. 11(9) of the Y.O.A., the following forms, whatever their source, must include a statement that a young person has a right to be represented by counsel: 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 by the young person before an officer in charge, and any notice of a review of disposition given to a young person.

SECTION 67

67. *Regulations.*—The Governor in Council may make regulations

(a) varying the forms set out in the schedule or prescribing additional forms;

(b) establishing uniform rules of court for youth courts across Canada, including rules regulating the practice and procedure to be followed by youth courts; and

(c) generally for carrying out the purposes and provisions of this Act.

Regulations: section 67

Section 67 of the Y.O.A. allows the Governor in Council (federal Cabinet) to make regulations:

- varying the forms set out in the Schedule or prescribing additional forms, para. 67(a);
- establishing uniform rules of court for youth courts across Canada, including rules regulating the practice and procedure to be followed by youth courts, para. 67(b); and
- generally for carrying out the purposes of the Y.O.A., para. 67(c).

Section 67 allows the federal government to ensure that an undesirable degree of variation does not develop in practices in youth courts across the country; such variation would be inconsistent with the federal government's exclusive jurisdiction in matters of criminal law and procedure. As well, it permits the

federal Cabinet to fill any gaps which may only become apparent upon implementation of the Act.

Section 438 of the *Criminal Code* provides the making of rules in regard to certain proceedings under the *Code*, with the Governor in Council (federal Cabinet) being given the authority to make uniform rules to prevail over any other rules. Paragraph 67(b) grants the Governor in Council a similar rule-making authority in regard to proceedings in youth court. The rules may deal with such matters as the duties of the officers of the youth court, sittings of the court, form of applications to the court, preparation of transcripts and so on (see s. 438 of the *Code*). Paragraph 67(c) of the Y.O.A. also grants a broader authority to make regulations "generally for carrying out the purpose and provisions of this Act." This would, for example, appear to allow for the making of regulations governing the method of destruction of various records as required under s. 45 of the Y.O.A. Although the regulation-making power is broad, it is clear that it does not extend so far as to permit the amendment of the legislative provisions of the Act itself.

Regulations made pursuant to s. 67 of the Y.O.A. must comply with the *Statutory Instruments Act*, S.C. 1970-71-72, c. 38, and in particular s. 6, which requires that regulations be registered with the Clerk of the Privy Council, and s. 11 of that Act requires the publication of any such regulations in the *Canada Gazette*, Part II.

SECTION 68

68. (1) *Youth court may make rules.*—Every youth court for a province may, at any time with the concurrence of a majority of the judges thereof present at a meeting held for the purpose and subject to the approval of the Lieutenant Governor in Council, establish rules of court not inconsistent with this or any other Act of Parliament or with any regulations made pursuant to section 67 regulating proceedings within the jurisdiction of the youth court.

(2) *Rules of court.*—Rules under subsection (1) may be made

(a) generally to regulate the duties of the officers of the youth court and any other matter considered expedient to attain the ends of justice and carry into effect the provisions of this Act;

(b) subject to any regulations made under paragraph 67(b), to regulate the practice and procedure in the youth court; and

(c) to prescribe forms to be used in the youth court where not otherwise provided for by or pursuant to this Act.

(3) *Publication of rules.*—Rules of court that are made under the authority of this section shall be published in the appropriate provincial gazette.

Youth court rules: section 68

Section 68 allows for the formulation of rules of court on a provincial basis to govern the practice and procedure of the youth courts in a province. Rules established under s. 68 require the approval of a majority of the youth court judges of a province and of the Lieutenant Governor in Council (provincial Cabinet); the rules are to be published in the appropriate provincial gazette, s-s. 68(3).

Any rules formulated under s. 68 of the Y.O.A. must be consistent with the provisions of the Y.O.A. and other federal legislation, such as the *Criminal Code*. Any regulations or rules made under s. 67 will prevail over rules made under s. 68.

The rules of court made under s. 68 may deal with the duties of the officers of the youth court, hours of sitting of the court, form of applications to the court, preparation of transcripts and similar matters (see s. 438 of the *Code*); the rules may also prescribe forms for use in the youth courts.

YOUTH JUSTICE COMMITTEES
(Section 69)

SECTION 69

69. *Youth Justice Committees.*—The Attorney General of a province or such other Minister as the Lieutenant Governor in Council of the province may designate, or a delegate thereof, may establish one or more committees of citizens, to be known as youth justice committees, to assist without remuneration in any aspect of the administration of this Act or in any programs or services for young offenders and may specify the method of appointment of committee members and the functions of the committees.

Youth justice committees: section 69

Section 69 of the Y.O.A. empowers the Attorney General of a province, or such other Minister of a province as the Lieutenant Governor in Council (Cabinet) of the province may designate, to establish one or more committees of citizens to be known as "youth justice committees". A youth justice committee is to assist, without remuneration, in any aspect of the administration of the Y.O.A. or in any program or service for young offenders. The power to create youth justice committees is permissive, and it is not necessary that they be established. It is within the discretion of the Attorney General or other designated minister to specify the method of appointment of committee members and the functions of the committee.

Section 27 of the *Juvenile Delinquents Act* required a "juvenile court committee" to be established in connection with the juvenile court, and ss. 28 and 29 specified certain duties for the committees. In fact, the appointment of juvenile court committees pursuant to the *J.D.A.* has varied from province to province and in some provinces the practice has been sporadic. Section 69 of the Y.O.A. allows for juvenile court committees which have been serving a useful function to be continued as youth justice committees, provided there is appropriate ministerial authorization.

In addition to carrying out monitoring functions, youth justice committees might, for example, become involved in administering programs of alternative measures, under s. 4 of the Y.O.A., or in supervising the operation of pre-trial detention facilities for young persons.

When s. 27 of the *J.D.A.* was first enacted in 1908, it was felt necessary to require that juvenile court committees be established to ensure community involvement and promote the objectives of that Act. Since that time, Canada has seen the creation of a highly-trained group of professionals to operate its juvenile justice and corrections systems. The Y.O.A. specifically provides that youth court proceedings will ordinarily be open to the public (contrast s. 39 of the Y.O.A. with s. 12 of the *J.D.A.*), and for community involvement in alternative measures and certain dispositions. Thus, it was not felt necessary to make mandatory provision in the Y.O.A. for the creation of formal institutions to allow for community involvement, but s. 69 gives the provinces the flexibility to establish such bodies in response to local needs and pressures. As the province may specify the method of appointment of committee members, the method could include a direct appointment or election by the community.

AGREEMENTS WITH PROVINCES
(Section 70)

SECTION 70

70. *Agreements with provinces.*—Any Minister of the Crown may, with the approval of the Governor in Council, enter into an agreement with the government of any province providing for payments by Canada to the province in respect of costs incurred by the province for care of and services provided to young persons dealt with under this Act.

Federal-provincial agreements: section 70

The responsiblity for enacting legislation to deal with young persons who commit violations of criminal law is federal, under the *Constitution Act, 1867*, s-s. 91(27), criminal law and procedure. On the other hand, the responsibility for providing the services necessary to implement the Y.O.A. lies principally with the provinces. These services include judicial, legal and administrative services for youth courts, pre-trial detention facilities, alternative measures programs, youth court workers to prepare reports and supervise probation, and various dispositional services, including custodial facilities. The provincial jurisdiction arises out of the power given provinces under the *Constitution Act, 1867*, s-s. 92(6) , public reformatories, and s-s. 92(14), the administration of justice.

Section 70 of the Y.O.A. authorizes the federal government to enter into agreements with the provinces to provide payments in respect of the care of young persons and for services provided pursuant to the Act. Such payments may allow adequate funding to ensure an appropriate level of services to young persons in all parts of Canada, and will generally assist the provinces with the financial impact of implementing the *Young Offenders Act*.

Section 70 provides flexibility by allowing any federal minister to be involved in the process of negotiating agreements with provincial governments. Thus the Minister of Justice may be involved in an agreement concerning payments to cover increased costs for legal aid services resulting from s. 11 of the

Y.O.A., while the Solicitor General might negotiate an agreement concerning payments for pre-trial detention facilities. It is also possible for there to be a single agreement, covering all payments arising out of the Y.O.A., perhaps negotiated jointly by the Ministers of two or more government departments. Any agreement requires the approval of the Governor in Council (federal Cabinet).

CONSEQUENTIAL AMENDMENTS
(Sections 71 to 78)

Introduction

Sections 71 to 78 of the Y.O.A. contain a number of amendments to different pieces of federal legislation which are a consequence of the enactment of various provisions of the *Young Offenders Act*.

SECTION 71

71. Subsection 4(2) of the *Canada Evidence* Act is repealed and the following substituted therefor:

"(2) *Idem.*—The wife or husband of a person charged with an offence against subsection 50(1) of the *Young Offenders Act* or with an offence against any of sections 143 to 146, 148, 150 to 155, 157, 166 to 169, 175, 195, 197, 200, 248 to 250, 255 to 258, 289, paragraph 423(1)(c) or an attempt to commit an offence under section 146 or 155 of the *Criminal Code*, is a competent and compellable witness for the prosecution without the consent of the person charged."

Testimony of spouse, Canada Evidence Act subsection 4(2): section 71

Section 71 of the Y.O.A. amends s-s. 4(2) of the *Canada Evidence Act*, R.S.C. 1970, c. E-10 (C.E.A.) by repealing it and substituting a new s-s. 4(2) in its place.

Subsection 4(2) of the C.E.A. deals with the competence and compellability of one spouse to give testimony in a case in which the other spouse is accused of a criminal offence. At common law, various rules developed to limit the extent to which one spouse could testify for or against the other in a criminal case. This was in part based on concerns about undermining a marital relationship by allowing such testimony, and also on the views about "unity of legal personality" of a husband and wife. These rules have been modified by statute. Subsection 4(1) of the

C.E.A. makes a spouse a competent witness for the defence in any criminal case. Subsection 4(2) of the C.E.A. makes one spouse a competent and compellable witness for the prosecution in a charge against the other spouse, if the offence is one listed in s-s. 4(2); the offences listed involve sexual crimes, crimes of violence, and crimes by one spouse against the other or against children. The effect of s-s. 4(2) of the C.E.A. is that if one spouse is charged with a listed offence, the prosecution can require the other to testify against the accused spouse. The rationale for s-s. 4(2) of the C.E.A. is to ensure that a person, accused of crimes of violence involving the other spouse or children, cannot be protected against conviction by notions of spousal privilege.

The effect of s. 71 of the Y.O.A. is to delete the reference in s-s. 4(2) of the C.E.A. to offences under ss. 33 and 34 of the *Juvenile Delinquents Act*, and to include charges under s. 50 of the Y.O.A. in the list of offences with which one spouse may be charged and the other spouse may be a competent and compellable witness for the prosecution. Section 80 of the Y.O.A. repeals all of the *J.D.A.*, including s. 33, contributing to delinquency, and s. 34, interfering with a juvenile disposition. Section 50 of the Y.O.A. creates offences for interfering with a disposition of a young person, imposed under the Y.O.A.; it roughly replaces s. 34 of the *J.D.A.*

Nothing in s-s. 4(2) of the *Canada Evidence Act*, as amended, makes one spouse compellable by the prosecution if the spouses are jointly charged under s. 50 of the Y.O.A.; that is, if spouses are jointly charged with interfering with the disposition of a young person, the prosecution cannot require one spouse to testify against the other.

Amendments to the Criminal Code: sections 72 to 75

SECTION 72

72. Sections 12 and 13 of the *Criminal Code* are repealed and the following substituted therefor:

> **"12. *Child under twelve.*—No person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of twelve years."**

Children under twelve: section 72

Section 72 of the Y.O.A. repeals the sections of the *Criminal Code* dealing with the minimum age of criminal liability, and replaces them with a section setting the age of 12 as the minimum age for criminal responsibility. Children under 12 who engage in illegal behaviour may be dealt with under provincial legislation.

To understand the full significance of s. 72, it is necessary to consider the common law defence of *doli incapax* (incapacity to form criminal intent), which came to be codified in ss. 12 and 13 of the *Code*.

The common law rule of *doli incapax* was comprised of two parts. First, it established a rebuttable presumption that a child under 14 did not have capacity to know the moral significance of his actions. As a result, a child under 14 unless it was proved that he was competent, could not be held criminally responsible for any act that formed the basis for an alleged criminal offence. Secondly, the common law rule provided that a child under seven lacked the necessary capacity and, thus could not be convicted of an offence.

In 1892 the common law rule of *doli incapax* was codified, and apart from inconsequential changes, remains the same today in the *Criminal Code* as it did in its original statutory form. Sections 12 and 13 presently found in the *Code* provide that:

> 12. No person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of seven years.
>
> 13. No person shall be convicted of an offence in respect of an act or omission on his part done while he was seven years of age or more, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.

Under s. 13 of the *Code*, therefore, there is a rebuttable presumption that a child between seven and 14 is incompetent to commit a crime, while under s. 12 a child under seven is absolutely deemed incompetent. Therefore, in cases under the *J.D.A.*, the prosecutor has the onus of proving beyond a reasonable doubt that a juvenile between the ages of seven and 14 is not incompetent; see *R. v. M.S. and C.S.* (1979), 2 Fam. L. Rev. 66 (Ont. Prov. Ct., Fam. Div.). As a juvenile approaches the age of

14, other things being equal, the presumption against capacity weakens.

Section 72 of the Y.O.A. repeals ss. 12 and 13 of the *Criminal Code*. In their place, it substitutes the new provision as s. 12 of the *Code* that: "No person shall be convicted of an offence in respect of an act or ommission on his part while he was under the age of twelve years." The purpose of s. 72 of the Y.O.A. is to raise the minimum age of criminal responsibility from seven to 12, and to totally remove the rebuttable presumption of *doli incapax*. The repeal and substitution provided by s. 72 of the Y.O.A. was intended to effect a state of full criminal responsibility, within the overall philosophy of the Y.O.A., for young persons 12 and older.

Although not expressly stated, it is submitted that the effect of the rules of statutory interpretation is such that young persons between the ages of 12 and 14 can no longer rely on the common law rule of *doli incapax*. Section 72 repeals that portion of the *doli incapax* rule which creates a rebuttable presumption of incapacity for children aged seven to 11 years inclusive. Thus, it could be argued that, by not expressly repealing the common law rule of *doli incapax* along with ss. 12 and 13 of the *Code*, that part of the rule dealing with the rebuttable presumption of incompetence from age 12 to 14 has somehow "survived" or perhaps more accurately "revived".

It is, however, submitted that the common law rule of *doli incapax* was supplanted by the original codification in 1892 and, hence, does not exist as common law at the present time. Paragraph 35(a) of the *Interpretation Act* provides that "where an enactment is repealed in whole or in part, the repeal does not revive any enactment or anything not in force or existing at the time when the repeal takes effect." The defence of *doli incapax*, although based on a prior common law rule is, under the *Criminal Code*, a statutory defence and its repeal will not revive a historic rule that was "not in force or existing when the repeal takes place."

Further, the manifest purpose of the repeal of ss. 12 and 13, when read in conjunction with the overall scheme of the Y.O.A. is to raise the minimum age of criminal responsibility from seven to 12 and to remove the *doli incapax* rule. (For analogous examples of repeal of statutory provisions superseding common law,

see *R. v. Firkins* (1977), 37 C.C.C. (2d) 227, 80 D.L.R. (3d) 63, 39 C.R.N.S. 178 (B.C.C.A.), leave to appeal to S.C.C. refused, 37 C.C.C. (2d) 227*n*, 80 D.L.R. (3d) 63*n*, 17 N.R. 119*n* (S.C.C.), and *R. v. Camp* (1977), 17 O.R. (2d) 99, 39 C.R.N.S. 164, 36 C.C.C. (2d) 511, 79 D.L.R. (3d) 462 (C.A.).)

Although a young person cannot rely on the old statutory or common law rule of *doli incapax*, a young person who truly lacks mental capacity may be found not guilty by reason of insanity, or unfit on account of insanity to stand trial: see discussion under s.13 of the *Y.O.A.* Further, alternative measures may be invoked in circumstances where the young person, although competent, is very young and immature, and the alternative measures program appears to be a good response to the young person's situation.

SECTION 73

73. Section 441 of the said Act is repealed.

Repeal of section 441 of the Criminal Code: section 73

Section 441 of the *Criminal Code* at present provides that where an accused is under the age of 16, and as a result of transfer is dealt with in adult court, his trial in adult court is to "take place without publicity." Section 441 accords with the general philosophy of private trials for juveniles, found in s. 12 of the *J.D.A.* The repeal of s. 441 of the *Code* is consistent with the new open court provisions of the *Y.O.A.*

Subsection 17(1) of the *Y.O.A.* provides for a court ordered ban on the publication of any information presented at a transfer hearing, until such time as the trial has ended in ordinary court.

SECTION 74

74. Subsection 442(1) of the said Act is repealed and the following substituted therefor:

"442. (1) *Exclusion of public in certain cases.*—Any proceedings against an accused shall be held in open court, but where the presiding judge, magistrate or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room for all or part of the proceedings, he may so order."

Amendment to subsection 442(1) of the Criminal Code: section 74

Subsection 442(1) of the *Code* presently provides for trials in "open court" when the accused is 16 years of age or more, unless the court is of the opinion that it "is in the interest of public morals, the maintenance of order or the proper administration of justice" to exclude all or any members of the public. Section 74 of the Y.O.A. amends s-s. 442(1) by providing that all trials in the ordinary criminal courts will be in open court, unless the court is of the opinion that it "is in the interest of public morals, the maintenance of order or the proper administration of justice" to exclude all or any members of the public. The amendment of s-s. 442(1) of the *Code* accords with the repeal of s. 441 of the *Code* by s. 73 of the Y.O.A., and is also consistent with the requirement of the Y.O.A. that proceedings be generally open to the public.

The provisions of s-s. 442(1) of the *Code*, as amended, will apply to all young persons transferred to the ordinary courts under s. 16 of the Y.O.A., as well as to adults who normally appear in those courts.

SECTION 75

75. The said Act is further amended by adding thereto, immediately after section 660 thereof, the following section:

"660.1 (1) ***Transfer of young persons to place of custody.*****— Where a young person is sentenced to imprisonment under this or any other Act of Parliament, the young person may, with the consent of the provincial director, be transferred to a place of custody for any portion of his term of imprisonment that expires before two years after the young person becomes an adult.**

(2) ***Removal of young person from place of custody.*****— Where the provincial director certifies that a young person transferred to a place of custody under subsection (1) can no longer be held therein without significant danger of escape or detrimentally affecting the rehabilitation or reformation of other young persons held therein, the young person may be imprisoned during the remainder of his term of imprisonment in any place where he might, but for subsection (1), have been imprisoned.**

(3) *Definitions*.—For the purposes of this section, the expressions "young person", "provincial director" and "adult" have the meanings assigned to them by subsection 2(1) of the *Young Offenders Act* and the expression "place of custody" means "open custody" or "secure custody" within the meaning assigned by subsection 24(1) of that Act."

Young persons sentenced in ordinary court after transfer: section 75

Section 75 of the Y.O.A. adds a section to the *Criminal Code* which will allow correctional authorities to place a young person who was transferred to ordinary (adult) court under s. 16 of the Y.O.A. in facilities for young persons, rather than in adult facilities. Subsection 660.1(1) of the *Code* will allow the correctional authorities to transfer a young person sentenced to imprisonment in ordinary court to a "place of custody" (open or secure custody facility for young persons); the transfer may be for any portion of the term of imprisonment that "expires before two years after the young person becomes an adult" (where the maximum age is under 18, the transfer can last until the person is 20).

The purpose of s. 660.1 of the *Code* is to allow a person who has been transferred to ordinary court, and convicted and sentenced in that court, to still benefit from programs geared to specific age groups at a place of custody reserved for young persons, and at the same time be segregated from adult offenders.

The procedure created by s. 660.1 of the *Code* is strictly administrative. The young person has no right to seek such a transfer. Nor can the sentencing judge in ordinary court order such a transfer as part of the sentence; he can merely make a recommendation in this regard and it is for the correctional authorities to make a decision (see *R. v. Deans* (1977), 39 C.R.N.S. 338, 37 C.C.C. (2d) 221 (Ont.C.A.)).

A transfer under s-s. 660.1(1) of the *Code* requires the approval of the adult correctional authorities, and the consent of the "provincial director" (defined by s-s. 2(1) of the Y.O.A.).

Subsection 660.1(2) of the *Code* provides that where a provincial director certifies that a young person who has been transferred to facilties for young persons pursuant to s-s. 660.1(1) can "no longer be held therein without significant danger of escape",

he may be transferred back to any place of imprisonment which could have contained him prior to transfer under s-s. 660.1(1). Similarly, the young person may be transferred back to an adult facility on a provincial director's certificate, if the young person is "detrimentally affecting the rehabilitation or reformation of other young persons" held in a youth facility. This latter power to transfer those who interfere with the reformation of other young persons provides an avenue to correct a situation whereby under s-s. 660.1(1) of the *Code* an offender has grown too old for detention in an youth facility. The discretion provided by s-s. 660.1(2) allows the juvenile correctional authorities the flexibility to alter custodial arrangements in accordance with changes in the circumstances of the case.

Subsection 660.1(3) of the *Code* provides that the terms "young person", "adult" and "provincial director", used in s. 660.1, will have the same meaning as defined by s-s. 2(1) of the Y.O.A. A young person is transferred under s-s. 660.1(1) to a "place of custody", as defined in s-s. 24(1) of the Y.O.A.

It should be noted that a person transferred to a youth facility under s. 660.1 of the *Code* continues to be dealt with under the legislative provisions governing adults, for such matters as temporary absence and parole. The various provisions of the Y.O.A., such as review of dispositions, will *not* apply to such young persons.

SECTION 76

76. Section 120 of the *Indian Act* is repealed.

Repeal of section 120 of the Indian Act: section 76

Section 76 of the Y.O.A. repeals s. 120 of the *Indian Act*, R.S.C. 1970, c. I-6. This section of the *Indian Act* provides that an Indian child who is expelled or suspended from school or who refuses or fails to attend school regularly shall be deemed to be a "juvenile delinquent" within the meaning of the *J.D.A.* Section 120 of the *Indian Act* is repealed since it is highly discriminatory. A non-Indian child is not deemed to be a juvenile delinquent under the same circumstances. Consequently the section impinges on the provisions of the *Canadian Bill of Rights*: see *Re B. (F.J.)*, [1982] W.D.F.L. 364 (Ont. Prov. Ct.); it would also violate s. 15 of the *Canadian Charter of Rights and Freedoms*,

dealing with "equality rights", when that provision comes into force (April, 1985). Further, as s. 120 of the *Indian Act* appears tantamount to conviction without a trial, it may violate ss. 7 and 11 of the *Charter*.

SECTION 77

77. The definition "inmate" in section 2 of the *Parole Act* is repealed and the following substituted therefor:

" 'inmate' means a person who is under a sentence of imprisonment pursuant to an Act of Parliament or imposed for criminal contempt of court but does not include

(a) a child within the meaning of the *Juvenile Delinquents Act*, as it read immediately prior to the coming into force of the *Young Offenders Act*, who is under sentence of imprisonment for an offence known as a delinquency under the *Juvenile Delinquents Act*,

(b) a young person within the meaning of the *Young Offenders Act* who has been committed to custody under that Act, or

(c) a person in custody solely by reason of imprisonment that has been ordered to be served intermittently pursuant to section 663 of the *Criminal Code*."

Definition of "inmate" in the Parole Act: section 77

Section 77 of the Y.O.A. changes the definition of "inmate" in the *Parole Act*, R.S.C. 1970, c. P-2, as amended by S.C. 1976-77, c. 53, s-s. 17(1), so that a young person receiving a custodial disposition under the Y.O.A. is *not* governed by the provisions of the *Parole Act*. At present, the definition of "inmate" under the *Parole Act* provides that a delinquent dealt with under the *J.D.A.* is *not* subject to the *Parole Act*, so this amendment to the definition simply has the effect of continuing the present system of restricting the applicability of the *Parole Act* to those sentenced to imprisonment in adult proceedings. Paragraph (a) of the definition makes clear that delinquents dealt with under the *J.D.A.* will not be caught within the definition of "inmate" during the transitional stage — after repeal of the *J.D.A.* and replacement of it with the Y.O.A. (see also s. 79 of the Y.O.A.).

Young persons placed in custody under the Y.O.A. will not be subject to the provisions of the *Parole Act*. However, their dispo-

sitions will be subject to review under the more flexible provisions of ss. 28 to 31 of the Y.O.A. Similarly, where a young person placed in custody under the Y.O.A. is transferred to a provincial correctional facility for adults pursuant to a court order under s-s. 24(14) of the Y.O.A., the review procedures of the Y.O.A. continue to apply. If, however, a young person is transferred to ordinary court under s. 16 of the Y.O.A., convicted, and sentenced to a term of imprisonment in that court, he may still be transferred to a youth facility pursuant to s. 660.1 of the *Criminal Code* (see s. 75 of the Y.O.A.); in this case he would continue to be dealt with under the *Parole Act*, and not under the Y.O.A.

SECTION 78

78. The definition "prisoner" in section 2 of the *Prisons and Reformatories Act* is repealed and the following substituted therefor:

" 'prisoner' means a person, other than

(a) a child within the meaning of the *Juvenile Delinquents Act*, as it read immediately prior to the coming into force of the *Young Offenders Act*, with respect to whom no order pursuant to section 9 of that Act has been made, or

(b) a young person within the meaning of the *Young Offenders Act* with respect to whom no order pursuant to section 16 of that Act has been made,

who is confined in a prison pursuant to a sentence for an offence under an Act of Parliament or any regulations made thereunder."

Definition of "prisoner" in the Prisons and Reformatories Act: section 78

Section 78 of the Y.O.A. amends the definition of "prisoner" in the *Prisons and Reformatories Act*, R.S.C. 1970, c. P-21, as amended by S.C. 1976-77, c. 53, s. 45 so that a young person receiving a custodial dispositionis *not* governed by the *Prisons and Reformatories Act*. At present, the definition of "prisoner" under the *Prisons and Reformatories Act* provides that a delinquent child under the *J.D.A.* is *not* subject to the *Prisons and Reformatories Act*, so that this amendment to the definition simply has the effect of continuing the present system of restricting the applica-

bility of the *Prisons and Reformatories Act* to those sentenced to imprisonment in adult proceedings. Paragraph (a) of the definition makes clear that delinquents dealt with under the *J.D.A.* will not be caught within the definition of "prisoner" during the transitional stage after repeal of the *J.D.A.* and replacement of it with the Y.O.A. (see also s. 79 of the Y.O.A.).

Young persons placed in custody under the Y.O.A. will not be subject to the provisions of the *Prisons and Reformatories Act*. Even if a young person placed in custody under the Y.O.A. is transferred to a provincial correctional facility for adults pursuant to a youth court order under s-s. 24(14) of the Y.O.A., he will continue to be dealt with under the Y.O.A. If, however, a young person is transferred to ordinary court under s. 16 of the Y.O.A., convicted and sentenced to a term of imprisonment in that court, he will be subject to the *Prisons and Reformatories Act*; he will continue to be subject to the *Prisons and Reformatories Act* for such matters as temporary absence, even if transferred to a youth facility pursuant to s. 660.1 of the *Code* (see s. 75 of the Y.O.A.).

TRANSITIONAL
(Section 79)

Introduction

Section 79 deals with a variety of transitional problems arising out of the repeal of the *Juvenile Delinquents Act* and the proclaiming into force of the *Young Offenders Act*. See s. 80 concerning repeal of the *J.D.A.* and s. 81 for proclaiming into force of the Y.O.A.

If a young person commits an offence on or after the day the Y.O.A. comes into force, he is dealt with solely under the Y.O.A. or complementary provincial legislation. The *J.D.A.* clearly has no applicability.

If a young person commits a delinquency while the *J.D.A.* is in force, but proceedings are not commenced before the Y.O.A. is proclaimed in force, s-ss. 79(1), (3) and (4) provide he will not be dealt with under the *J.D.A.*, but rather under the new legislation.

If a young person commits a delinquency while the *J.D.A.* is in force and proceedings are commenced under the *J.D.A.*, the effect of s-s. 79(2) of the Y.O.A. is essentially to continue the proceedings under the *J.D.A.*, but to apply some of the provisions of the Y.O.A., particularly in regard to disposition.

It should be noted that by virtue of s-s. 45(8) of the Y.O.A., the destruction of records provisions of the Y.O.A. apply "with such modifications as the circumstances require, in respect of records relating to the offence of delinquency under the *Juvenile Delinquents Act*"; this applies regardless of when the adjudication of delinquency occurs.

SECTION 79

79. (1) *Transitional.*—On and after the coming into force of this Act, no proceedings may be commenced under the *Juvenile Delinquents Act* in respect of a delinquency as defined in that Act.

(2) *Idem.*—Where, before the coming into force of this Act, proceedings are commenced under the *Juvenile Delinquents Act* in respect of a delinquency as described in that Act alleged to have been committed by a person who was at the time of the delinquency a child as defined in that Act, the proceedings and all matters consequent thereon may be dealt with in all respects as if this Act had not come into force except that

(a) no court may, after the coming into force of this Act, make an order under section 9 of the *Juvenile Delinquents Act* in respect of a person who in any such proceedings has been adjudged a juvenile delinquent;

(b) where an adjudication of delinquency is made under the *Juvenile Delinquents Act*, all subsequent proceedings shall be taken under this Act as if the adjudication were a finding of guilt under section 19; and

(c) where a disposition is made under section 20 of the *Juvenile Delinquents Act*, sections 28 to 33 of this Act apply in respect of the disposition as if it were made under section 20 of this Act unless the young person may, pursuant to subsection 21(1) of the *Juvenile Delinquents Act*, be dealt with under the laws of a province.

(3) *Idem.*—Any person who, before the coming into force of this Act, commits an offence under a provincial statute or a by-law or ordinance of a municipality in respect of which proceedings are not commenced under the *Juvenile Delinquents Act* may be dealt with under provincial law as if the *Juvenile Delinquents Act* had not been in force when the person committed the offence.

(4) *Idem.*—Any person who, before the coming into force of this Act, while he was a young person committed an offence in respect of which no proceedings were commenced before the coming into force of this Act may be dealt with under this Act as if the offence occurred after the coming into force of this Act.

(5) *Proceedings commence with information.*—For the purposes of this section, proceedings are commenced by the laying of an information.

Where proceedings NOT commenced under the J.D.A.: subsections 79(1), (3), (4) and (5)

Subsection 79(1) of the Y.O.A. provides that where a youth is alleged to have committed an act which is defined under the J.D.A. to be a "delinquency" and no proceedings are commenced

until the Y.O.A. comes into force, no proceedings may be commenced thereafter under the *J.D.A.* The definition of "delinquency" found in s-s. 2(1) of the *J.D.A.* is much broader than the definition of "offence" in the Y.O.A. Part of the *J.D.A.* definition includes violations of federal statutes which roughly corresponds to "offences" under the Y.O.A., but also includes violations of provincial statutes, municipal by-laws and "status offences" such as "sexual immorality and any similar form of vice."

Subsection 79(5) stipulates that for the purposes of s. 79, proceedings are commenced by the laying of an information, and thus, no information can be laid under the *J.D.A.* once the Y.O.A. comes into force.

Subsection 79(4) provides that if a "young person" is alleged to have committed an "offence" (i.e. violation of federal law) while the *J.D.A.* was in force, and no proceedings were commenced under the *J.D.A.* (no information laid), the young person may be dealt with under the Y.O.A., as if the Y.O.A. had been in force when the act was alleged to have occurred. The young person is entitled to all the benefits of the Y.O.A., and subject to all the rigours of the Act.

The definition of "juvenile delinquent" in s-s. 2(1) of the *J.D.A.* includes a juvenile who violates any "provincial statute, or any by-law or ordinance of a municipality." Such violations are not, however, "offences" under the Y.O.A., and the provinces will have to enact complementary legislation, to take effect upon the repeal of the *J.D.A.*, to deal with "children" (under 12) and young persons (12 to 15, 16 or 17, inclusive) who violate provincial and municipal laws. This legislation may be "quasi-criminal", or take a child welfare approach. Subsection 79(3) of the Y.O.A. provides that "any person" who is alleged to have committed an offence under a provincial statute, or a by-law or ordinance of a municipality in respect of which no proceedings were commenced under the *J.D.A.* (no information laid), that person may be dealt with under "provincial law as if the *Juvenile Delinquents* Act had not been in force when the person committed the offence."

The effect of s-s. 79(3) will be to allow children and young persons to be dealt with under provincial law for violations of provincial or municipal law committed while the *J.D.A.* was in force.

It may be asked whether s-s. 79(4) of the Y.O.A. or similar provincial legislation might violate para. 11(g) of the *Charter of Rights*, which provides that:

> 11. Any person charged with an offence has the right
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> . . . . .
>
> (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian . . . law . . .

It is submitted that s-s. 79(4) of the Y.O.A. does not violate the *Charter*. This is because s-s. 79(4) does not retroactively penalize a young person for conduct which was not criminal when it occurred; rather it simply changes the manner in which a particular offence is dealt with by the courts. As Pratte J. stated in *Morris v. The Queen*, [1979] 1 S.C.R. 405 at p. 426, 43 C.C.C. (2d) 129, 91 D.L.R. (3d) 161, 6 C.R.(3d) 36, 23 N.R. 109:

> . . . the *Juvenile Delinquents Act* does not prescribe any special rule of human conduct for juveniles; the *Criminal Code*, and other statutes . . . are applicable to juveniles and non-juveniles alike. Essentially, the *Juvenile Delinquents Act* does not create any offence; the offence results from the violation of another statute . . . But, when the offence is committed by a juvenile, a particular method of enforcement is prescribed . . .

This makes clear that neither the *J.D.A.* nor the Y.O.A. create an offence, and thus, para. 11(g) of the *Charter* is not violated by s-s. 79(4) of the Y.O.A.

Paragraph 11(i) of the *Charter* may have applicability in transitional situations, however. It provides that:

> 11. Any person charged with an offence has the right
>
> . . . . .
>
> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Paragraph 11(i) thus requires that in rendering a disposition in proceedings regarding offences committed while the *J.D.A.* was in force, courts cannot, pursuant to the Y.O.A., impose a greater penalty than would have been possible under the *J.D.A.* For any given offence under the *J.D.A.*, the court has the discretion to impose any measure listed in s. 20 thereof, which could include a committal to custody of indefinite duration or in excess of that

allowed under the Y.O.A. By way of contrast, the Y.O.A. limits the duration of custodial dispositions to two or three years, depending on the offence. However, whether a disposition under the Y.O.A. is "lesser punishment" than a disposition under the *J.D.A.*, is to be determined in the circumstances of each case.

Special problems arise in regard to status offences ("sexual immorality or any similar form of vice") and delinquencies committed by children under 12 which occurred while the *J.D.A.* was in force but in respect of which proceedings were not commenced — these problems are considered further below.

Where proceedings commenced under the J.D.A.: subsection 79(2)

Subsection 79(2) of the Y.O.A. creates a procedure to deal with delinquencies alleged to have been committed while the *J.D.A.* was in force, in respect of which proceedings were commenced under the *J.D.A.* Subsection 79(2) provides that, subject to specified exceptions, proceedings shall continue to be dealt with "in all respects" as if the Y.O.A. had not come into force. This means that all of the provisions of the *J.D.A.* apply, and further that the various laws and practices applicable to proceedings under the *J.D.A.*, for example, in regard to the provision of counsel and the admissibility of evidence, continue to apply.

Paragraph 79(2)(a) prohibits a transfer to adult court being ordered under s. 9 of the *J.D.A.*, after the Y.O.A. comes into force, in respect of a youth who has been adjudged a juvenile delinquent. The effect of para. 79(2)(a) is to prevent a *J.D.A.* transfer from occuring after adjudication. Under s. 9 of the *J.D.A.*, a transfer can occur before or after adjudication. Subsection 20(3) of the *J.D.A.* allows a transfer to be ordered in the context of a disposition review, which can occur at any time before a juvenile reaches 21. Section 16 of the Y.O.A. allows a transfer order to be made only before adjudication; hence, para. 79(2)(a) gives a young person the benefit of the Y.O.A. in this regard. If a proceeding is commenced under the *J.D.A.* and continued after the Y.O.A. comes into force, a transfer order can still be made prior to adjudication. Such a transfer is only to be made if the criteria of s. 9 of the *J.D.A.* are satisfied; the "good of the child and the interest of the community" must "demand it".

Paragraph 79(2)(b) provides that if proceedings commenced under the *J.D.A.* are continued when the Y.O.A. is in force,

"where an adjudication of delinquency is made under the *Juvenile Delinquents Act*, all subsequent proceedings shall be under this Act as if the adjudication [of delinquency] were a finding of guilt under section 19 of the Y.O.A.". Thus, pre-trial detention, and all evidentiary, procedural and substantive matters leading up to adjudication are dealt with under the *J.D.A.*, but if a finding of guilty is made, disposition, disposition review, the effect of disposition and all other matters after disposition are dealt with under the Y.O.A. The effect of para. 79(2)(b) may be modified by para. 11(i) of the *Charter of Rights*, which provides that:

> 11. Any person charged with an offence has the right
>
> . . . . .
>
> (i) if found guilty of the offence and if the punishment has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Thus, at a disposition hearing held under the Y.O.A. in regard to an offence committed while the *J.D.A.* was in force, all of the procedural aspects of the disposition hearing will be determined by the Y.O.A., but in rendering a disposition, the judge must not assess a greater penalty than would have been possible under the *J.D.A.* The young person must be given the benefit of the "lesser punishment". However, whether a disposition made under the *J.D.A.* actually constitutes a "lesser punishment" than one under the Y.O.A., is to be determined in the circumstances of each case.

Paragraph 79(2)(c) of the Y.O.A. provides that where a disposition has been made under s. 20 of the *J.D.A.*, once the Y.O.A. comes into force, disposition review will occur pursuant to ss. 28 to 33 of the Y.O.A. rather than under s-s. 20(3) of the *J.D.A.* Paragraph 79(2)(c) does not, however, apply when the youth is dealt with under provincial law pursuant to s-s. 21(1) of the *J.D.A.* Subsection 21(1) of the *J.D.A.* provides that if a juvenile has been committed to the care of a Children's Aid Society or to an industrial school pursuant to s. 20 of the *J.D.A.*, he shall, if so ordered by the provincial secretary, thereafter be dealt with under provincial law, and not by way of dispositional review under s-s. 20(3) of the *J.D.A.* Thus, the dispositional review provisions of the Y.O.A. will only be applied in regard to the review of dispositions made under the *J.D.A.* where there has not been a transfer of jurisdiction by the provincial secretary.

The remarks made above with respect to the effect of para. 11(i) of the *Charter* on para. 79(2)(b) of the Y.O.A. apply

equally to para. 79(2)(c). In any disposition review under the Y.O.A., occurring in accordance with para. 79(2)(c), the youth is entitled to the benefit of the "lesser punishment" under the Y.O.A. or the *J.D.A.*

Status offences in the transitional period

As well as dealing with violations of federal, provincial or municipal laws, the definition of "juvenile delinquent" in s-s. 2(1) of the *J.D.A.* includes a youth 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." For the sake of compendious reference in this text, this will be referred to as the "status offence" provision of the *J.D.A.*, as it creates an offence for which a juvenile may be adjudged delinquent but for which an adult may not suffer sanction; those in a particular "status", childhood, are subject to particular sanction. The Y.O.A. abolishes "status offences"; a young person can only be charged with an offence for which an adult may be charged.

If a juvenile commits a "status offence" under the *J.D.A.*, but proceedings are not commenced under the *J.D.A.* before the Y.O.A. comes into force, no charges can be laid under the *J.D.A.* by virtue of s-s. 79(1) of the Y.O.A.; further, no charges can be laid pursuant to the Y.O.A. under s-s. 79(4), as a status offence is not an " offence" under the Y.O.A. Accordingly, unless a province has enacted legislation continuing to make "status offence" conduct a provincial offence, no proceedings can be taken against the young person. Where provincial legislation makes the "status offence" conduct an offence, s-s. 79(3) of the Y.O.A. would apply.

Where proceedings have been started under the *J.D.A.* respecting a status offence, the *Charter of Rights* may affect how a status offence is dealt with after the Y.O.A. comes into force. Paragraph 11(i) of the *Charter* provides that where a person is convicted of an offence for which the punishment has varied between its occurrence and the time of sentencing, the person is entitled to the "lesser punishment". As status offences are eliminated under the Y.O.A., there is of course no punishment provided for the commission of such an offence. It may therefore be argued that no sanction can be imposed at the time of disposition, and it follows that proceedings commenced under the

J.D.A. concerning status offences will be withdrawn if no disposition has been made before the Y.O.A. comes into force.

Where a disposition has been made in regard to a status offence under the *J.D.A.* while that Act is still in force, but the disposition continues to be in effect when the Y.O.A. is in force, there may be grounds for a disposition review under ss. 28 to 33 of the Y.O.A.. The review provisions of the Y.O.A. are applicable due to para. 79(2)(c) of the Y.O.A.

It should be noted that it may be possible to argue that a charge of "sexual immorality or any similar form of vice" under the *J.D.A.* may be subject to direct challenge under the *Charter*. It may be argued that such charge is so vague that it contravenes the "principles of fundamental justice", and hence violates s. 7 of the *Charter*.

Offences committed by a child

A person between the ages of seven and 11 may be charged under the *J.D.A.*, subject to raising a defence under s. 13 of the *Criminal Code* of *doli incapax* — incapacity due to age to form an intent to do wrong. Under the Y.O.A., a "child", being a person under the age of 12, is not subject to prosecution. Thus, it will be up to each province to enact legislation to deal with the illegal conduct of "children".

In regard to dealing with conduct by children under 12 which would constitute a violation of federal or provincial law if it involved an older person, a province may choose one of two approaches: an offence oriented approach or a child welfare approach.

An offence oriented approach would involve the enactment of some form of provincial "Child Offender Act" applicable to matters within the purview of provincial jurisdiction. This approach would involve focussing on the misconduct of children. There may be some constitutional problem with provinces taking an offence approach in regard to conduct otherwise dealt with by federal criminal law, particularly in the light of s. 12 of the *Criminal Code*, as amended by s. 72 of the Y.O.A., which provides that: "No person shall be convicted of an offence [under any federal statute] in respect of an act or omission on his part while he was under the age of twelve years." In any event, if a province creates a certain class of offences for children under 12,

s-ss. 79(2) and (3) of the Y.O.A. are available to deal with transitional problems.

A child welfare approach would have offences committed by children under 12 dealt with in the context of provincial welfare legislation. The fact that a child committed an act which would be an offence if he were 12 years or older would be a ground for finding him in "need of protection", but a disposition would involve a consideration of all aspects of a child's life and would be based primarily on his "best interests". Legislation taking a welfare approach might well provide for greater involvement of parents and child welfare authorities than is required under the Y.O.A.

If a province adopts a child welfare approach in regard to the misconduct of children under 12, upon the repeal of the *J.D.A.* it will not be possible to say that a child who commits an act which would be an offence if he were older is committing an "offence under a provincial statute". This raises certain transitional issues similar to those arising in regard to status offences under the *J.D.A.*, as s-s. 79(3) is not applicable. If proceedings regarding an offence committed by a child under 12 while the *J.D.A.* was in force have not been commenced prior to the Y.O.A. coming into force, they cannot be commenced under the Y.O.A.: s-ss. 79(1), (3) and (4). If proceedings have been commenced and no disposition has been made, para. 11(i) of the *Charter* would probably require their discontinuance, as the child is entitled to the benefit of the lesser punishment available at the time of sentencing, and "no punishment" is available after the repeal of the *J.D.A.* It would seem that if a child were already subject to a disposition under the *J.D.A.* when the Y.O.A. comes into force, this would be a factor which would be considered by the youth court on reviewing the disposition.

Another transitional problem may occur when a child under 12 commits an offence under the *J.D.A.* prior to the coming into force of the Y.O.A. In this instance, the Y.O.A. will not apply to the child; however, reference should be made to any relevant provincial legislation for possible retroactive effect.

REPEAL
(Section 80)

SECTION 80

80. The *Juvenile Delinquents Act* is repealed.

Section 80 repeals the *Juvenile Delinquents Act*, effective the date that the *Young Offenders Act* is proclaimed in force. Section 79 of the Y.O.A. deals with a variety of transitional issues which may arise.

COMMENCEMENT
(Section 81)

SECTION 81

81. *Commencement.*—This Act shall come into force on a day to be fixed by proclamation.

The *Young Offenders* Act received Royal Assent on July 7, 1982 and was proclaimed in force on April 2, 1984.

The uniform maximum age provisions do not become manadatory until April 1, 1985, and accordingly the maximum age in individual provinces may by proclamation of the Governor in Council, at the request of a province, remain at 16, 17 or 18 as the case may be; thereafter, it will be under 18 in all provinces. The timing of the uniform maximum age provision will coincide with the coming into force of s. 15 of the *Canadian Charter of Rights and Freedoms*, governing equality rights.

A delay in proclamation is required to allow the provinces time to enact complementary legislation, and establish various programs to implement the Act. It may also give the federal and provincial governments time to make financial arrangements for the implementation of the Act.

Finally, the delay will give those who must work with the Act an opportunity to study and understand it. Hopefully, the preceding materials have been of assistance in this regard.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

CANADIAN BILL OF RIGHTS

Introduction

All of the provisions of the Y.O.A. and all proceedings involving young persons, are subject to the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*. This is clear from a reading of these constitutional documents, and confirmed by para. 3(1)(e) of the Y.O.A., which recognizes the principle 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*."

Reference has been made in the discussion of various sections of the Y.O.A. to situations in which the *Charter* or the *Bill of Rights* may appear particularly applicable to proceedings under the Y.O.A. Of course, if the *Charter* or the *Bill of Rights* is held by the courts to affect more general criminal legislation, this may also affect proceedings under the Y.O.A.

All of those involved in the administration of juvenile justice will have to keep abreast of judicial developments in regard to the *Charter* and *Bill of Rights*. Useful reference tools in this regard are such looseleaf services as *The Canadian Charter of Rights Annotated*, edited by J. B. Laskin, E. L. Greenspan *et al.* (Aurora: Canada Law Book), and *Canadian Rights Reporter*, edited by C. Ruby and Edward (Toronto: Butterworths).

Some of the provisions of the *Charter* and *Bill of Rights* which are most applicable to proceedings under the Y.O.A. are set out here.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Guarantee of Rights and Freedoms

1. *Rights and freedoms in Canada.*—The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

2. *Fundamental freedoms.*—Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

. . . . .

Legal Rights

7. *Life, liberty, and security of person.*—Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. *Search or seizure.*—Everyone has the right to be secure against unreasonable search or seizure.

9. *Detention or imprisonment.*—Everyone has the right not to be arbitrarily detained or imprisoned.

10. *Arrest or detention.*—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.

11. *Proceedings in criminal and penal matters.*—Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

12. *Treatment or punishment.*—Everyone has the right not be subjected to any cruel and unusual treatment or punishment.

13. *Self-incrimination.*—A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

14. *Interpreter.*—A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

15. (1) *Equality before and under law and equal protection and benefit of law.*—Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) *Affirmative action programs.*—Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[Note: Due to s-s. 32(2) of the *Charter*, s. 15 of the *Charter* will not come into force until April 17, 1985.]

. . . . .

Enforcement

24. (1) *Enforcement of guaranteed rights and freedoms.*—Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) *Exclusion of evidence bringing administration of justice into disrepute.*—Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

CANADIAN BILL OF RIGHTS

1. *Recognition and declaration of rights and freedoms.*—It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) freedom of religion;

(d) freedom of speech;

(e) freedom of assembly and association; and

(f) freedom of the press.

2. *Construction of law.*—Every law of Canada shall, unless it is expressly declared by an Act of Parliament that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self incrimination or other constitution safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

INDEX

Absolute discharge
. *see* Disposition

Accused
. *see* Young person

Adjournment, 39

Admissions
. by party to proceedings, 391
. *see also* Evidence

Admissibility
. *see* Evidence

Adjudication, 167

Adult
. assistance by, 76, 88
. definition of, 2, 4
. interference with disposition, 351

Adult court
. *see* Ordinary court

Affirmations
. *see* Oath

Age
. apparent age, 387, 390
. children under twelve, 417, 418
. for custodial disposition, 207, 208, 210
. for transfer to ordinary court, 146, 148
. for transitional transfer of jurisdiction, 164
. jurisdiction of youth court, 34, 37
. of adult, 2, 4
. of child, 2, 6
. of young person, 3, 11
. proof by birth certificate, 387
. proof of, 385

Agency
. records of, *see* Records

Agreements
. with provinces, 414

Alternative measures
. declaration of principle, 14, 17
. definition of, 2, 6
. general, 21
. part of pre-disposition report, 125, 129
. *see also* Disposition

Amendments
. consequential, 416
. of the *Criminal Code*, 420-423
. of the *Indian Act*, 423
. of the *Parole Act*, 424
. of the *Prisons and Reformatories Act*, 425

Appeal
. appeal court records, 306
. from an order dismissing the information, 223
. from indictable offence, 222
. from review of disposition, 223
. from summary conviction offence, 222
. of disposition, 223
. general, 222
. no review where appeal pending, 228, 232
. of contempt conviction, 341, 343
. right of, 222
. *see also* Review; Review board; Review of disposition

Appearance
. first, 93
. general, 93

Application of *Criminal Code*
. *see Criminal Code*

Arraignment
. *see* First appearance

Arrest
. appearance notice instead of, 44
. duty of arresting officer, 45
. notice to parents of, 46
. powers in general, 44
. rights upon, 75, 80
. temporary restraint, 42, 49

Autrefois convict
. *see* Plea

Bail
. *see* Detention prior to disposition

Birth date
. *see* Age

Birth certificates
. see Age

INDEX

Absolute discharge
. *see* Disposition

Accused
. *see* Young person

Adjournment, 39

Admissions
. by party to proceedings, 391
. *see also* Evidence

Admissibility
. *see* Evidence

Adjudication, 167

Adult
. assistance by, 76, 88
. definition of, 2, 4
. interference with disposition, 351

Adult court
. *see* Ordinary court

Affirmations
. *see* Oath

Age
. apparent age, 387, 390
. children under twelve, 417, 418
. for custodial disposition, 207, 208, 210
. for transfer to ordinary court, 146, 148
. for transitional transfer of jurisdiction, 164
. jurisdiction of youth court, 34, 37
. of adult, 2, 4
. of child, 2, 6
. of young person, 3, 11
. proof by birth certificate, 387
. proof of, 385

Agency
. records of, *see* Records

Agreements
. with provinces, 414

Alternative measures
. declaration of principle, 14, 17
. definition of, 2, 6
. general, 21
. part of pre-disposition report, 125, 129
. *see also* Disposition

Amendments
. consequential, 416
. of the *Criminal Code*, 420-423
. of the *Indian Act*, 423
. of the *Parole Act*, 424
. of the *Prisons and Reformatories Act*, 425

Appeal
. appeal court records, 306
. from an order dismissing the information, 223
. from indictable offence, 222
. from review of disposition, 223
. from summary conviction offence, 222
. of disposition, 223
. general, 222
. no review where appeal pending, 228, 232
. of contempt conviction, 341, 343
. right of, 222
. *see also* Review; Review board; Review of disposition

Appearance
. first, 93
. general, 93

Application of *Criminal Code*
. *see Criminal Code*

Arraignment
. *see* First appearance

Arrest
. appearance notice instead of, 44
. duty of arresting officer, 45
. notice to parents of, 46
. powers in general, 44
. rights upon, 75, 80
. temporary restraint, 42, 49

Autrefois convict
. *see* Plea

Bail
. *see* Detention prior to disposition

Birth date
. *see* Age

Birth certificates
. see Age

Broadcast
. *see* Protection of privacy

Burden of proof
. alternative measures, further proceedings, 25 ,31
. generally, 170

Canadian Armed Forces
. *see* Jurisdiction

Canadian Bill of Rights, 14, 18, 74, 84, 377, 423, 439
. text of, 442

Canadian Charter of Rights and Freedoms
. application to Y.O.A., 14, 18, 439
. general 14, 18, 292, 299, 376, 372, 377
. sections
. . s. 1, 293, 294
. . s. 2, 293, 294, 299
. . s. 7, 117, 246, 434
. . s. 10, 45, 59, 74, 84, 86, 91
. . s. 11, 32, 36, 64, 180, 283, 294, 299, 326, 430, 432, 433, 435
. . s. 15, 11, 423, 437
. . s. 24, 30, 91, 326, 375
. text of, 439

Central repository, 312
. *see also* Records

Child (Children)
. affirmation by, 396
. corroboration of evidence of, 396, 399
. definition of, 2, 6
. evidence of, 392, 396, 398
. instruction by judge for testimony of, 397
. oath by, 396, 397
. *see also* Evidence

Civil damages
. *see* Disposition

Citation
. of Y.O.A., 1

Clerk of the court
. definition of, 405
. discretion of with respect to disclosure of records, 307
. functions of, 405
. to keep records, 301, 304

Commencement (Y.O.A. in force), 437

Commissioner of the R.C.M.P., 312, 314

Common law
. application to evidence, 372

Community service order
. *see* Disposition

Confession
. *see* Evidence

Consent
. of parent may be dispensed with, 178, 187
. of person to be compensated, 177, 185
. of young person to alternative measures, 23, 26
. of young person to be placed in care of responsible adult, 43, 51
. of young person to treatment order, 177, 186
. re disqualification of judge, 140, 142

Consequential amendments
. *see* Amendments

Contempt of court, 39, 339
. appeal of contempt conviction, 341, 343
. for violation of protection of privacy, 292

Conviction
. effect of, concerning employent applications, 281-282, 284

Counsel
. role of, 78
. *see also* Right to counsel

Court
. *see* Ordinary court; Youth court

Criminal Code
. application of definitions, 2
. general applicability of, 355
. ss. 132–133 (prison breach, escape), 265, 271
. ss. 457–459 (judicial interim release), 46
. s. 636 (contempt), 341, 342

Cross-examination
. of medical and psychological reports, 117
. of pre-disposition report, 134

Custody
. amendments to *Criminal Code*, 417–423
. for the purposes of medical or psychological report, 100, 109
. general, 205
. open, 206, 209
. release by provincial director, 240, 241

Custody (cont'd)
. review for escape or attempt to escape, 263, 264, 266
. secure, 206, 209
. separate from adults, 208, 212
. temporary release from, 275

Declaration of principle, 13–20

Definitions
. application of *Criminal Code* definitions, 2
. under the Y.O.A., 2–4

Department of government
. *see* Records

Destruction of records, 328
. *see also* Records, destruction of

Detention
. *see* Custody; Detention prior to disposition; Disposition; Medical and psychological reports

Detention prior to disposition
. application of *Bail Reform Act*, 41
. basic philosophy, 41
. congruence with *J.D.A.*, 41
. designation of authority, 52, 54
. judicial interim release
. . determined by youth court judge, 46, 47, 53, 54
. . onus to show cause, 46
. . release upon conditions, 47
. . show cause hearing, 47
. placement with responsible person
. . agreement of young person, 43, 52
. . generally, 43, 51
. . responsible person, 43, 51
. place of temporary detention, 42, 48
. review
. . by order of justice, 53, 55
. . of youth court orders, 53, 55
. separate from adults, 41, 43, 48, 50
. transfer between facilities, 43, 52
. youth court judge to determine, 52, 54

Director
. *see* Provincial director

Discharge
. *see* Disposition

Disclosure
. of medical or psychological reports, 101, 111
. of pre-disposition reports, 126, 127, 134, 136
. *see also* Records

Disposition
. absolute discharge, 174, 180
. . effect of, 281, 282
. appeal from disposition made under s. 33 of Y.O.A., 266, 271
. application of *Criminal Code* to, 176, 192
. civil damages not applicable, 182
. coming into force of, 175, 189
. community service order, 174, 177, 185
. compensation, 174, 176, 177, 182
. compensation of innocent purchaser, 174, 176, 177, 184
. conditions, 175, 188
. custody
. . definitions, 206, 209
. . general, 205
. . pre-disposition report, 208, 213
. . release from, by provincial director, 240
. . separate from adults, 208, 212
. defined, 2
. detention, *see* Custody; Detention prior to disposition
. . for treatment, 174, 177, 187
. duration of, 175, 189
. effect of termination, 280, 281
. employment applications after, 281, 284
. exclusion of person at disposition, 295, 297
. fine, 174, 176, 181
. for contempt, 339
. form for order, 176, 214
. general, 172
. hearing, 178
. interference with, 351
. limitation on power to vary, 255, 256, 259
. offence for interference with, 351
. . violation by adult, 351, 354
. personal services, 174, 177, 184
. previous disposition, 190
. principles, 13, 172
. probation, 174, 193
. prohibition, 174, 186
. reason for, 175, 191
. restitution, 174, 177, 183
. review of non-custodial disposition, 254, 256
. review where failure to comply, 263, 266
. rules of evidence at hearing, 178
. transfer of, 217
. . agreements governing transfer of, 219
. when young person becomes adult, 175, 191
. *see also* Disposition on review

Disposition, review of, 226
. automatic review, 227, 230
. no appeal of, 223
. notice of, 229, 234
. optional review, 228, 231
. progress reports, 229, 232
. youth court hearing to review custody, 227

Disposition report
. *see* Pre-disposition report

Diversion
. *see* Alternative measures

Doli incapax, 418, 419, 420, 434

Double jeopardy
. prevention of, 271

Duress
. statement made under, 384

Effect of termination of disposition
. *see* Disposition

Election
. deemed, 223, 225

Employment application
. effect of disposition on, 281, 284

Evidence
. admissions by party to proceeding, 391
. admissions not to be received in, 24, 30
. application of common law to, 371, 372
. caution, 371, 379
. general, 367
. inadmissibility of statements in pre-disposition report, 127, 138
. in proof of age, 385, 389
. material, 392
. of a child, 396, 398
. of children and young persons, 392
. person in authority, 375
. right to consult parents, 59
. rules at disposition hearing, 178
. spontaneously made oral statements, 372, 381
. statements of young person, 367
. voluntary statement, 372, 378

Examination
. *see* Medical and psychological reports

Exclusion from hearing
. *see* Protection of privacy

Exclusion of young person
. during cross-examination, 119

Fine
. *see* Disposition

Fingerprints and photographs
. compliance with *Identification of Criminals Act*, 45
. destruction of, 325, 327
. disclosure of, 326
. records of, 324
. storage of, 328

Fitness to stand trial, 99, 104

Forfeiture
. *see* Recognizance, forfeiture of

Forms
. general, 407
. including statement of right to counsel, 77, 90
. table of, xxv
. where forms not provided, 407, 408

Functions of court clerks
. *see* Clerk of the court

Gaol
. *see* Disposition; Detention prior to disposition

Government department
. *see* Record

Imprisonment
. *see* Disposition

"In camera"
. *see* Protection of privacy

Indeterminate sentence
. *see* Disposition

Indian child, 423

Indictable offence, 358, 361

Information
. for review of disposition, 263, 271, 273

Inmate
. definition of, 424

Insanity, 102, 104
. application to *Criminal Code*, 356
. unfit to stand trial on account of, 105
. *see also* Fitness to stand trial

Interference with disposition, 351
. *see also* Disposition

Interim release
. *see* Detention prior to disposition

Judge
. *see* Youth court; Youth court judge

Judicial interim release
. *see* Detention prior to disposition

Jurisdiction
. contempt, 339–342
. of *National Defence Act*, 34, 36
. of the youth court, 34, 345
. transfer of, 163, 164

Justice
. appointment of counsel by, 87
. powers of, 406

Juvenile Delinquents Act
. records of conviction under *J.D.A.*, 330, 335
. repeal of, 436

Juvenile delinquency
. concept of, 13

Juvenile offender
. *see* Young offender

Lawyer
. *see* Right to counsel

Legal representation of young persons
. *see* Right to counsel

Limitation period
. barred at law, 23, 28
. for proceeding, 38, 359, 363

Medical and psychological reports, 99
. cross-examination, 101, 117
. custody for the purpose of, 100, 109
. disclosure of, 101, 111, 117, 118
. exclusion of young person, 119
. purposes of, 102, 103
. qualified person, 121
. remand in custody for, 43, 46, 48

Mental examination
. *see* Medical and psychological reports

Naitonal Parole Board, 281, 283

Newspaper
. defined, 160
. *see also* Protection of privacy

Notice
. contents of, 58, 60, 62
. court order, 57, 61, 64
. direction by youth court judge or justice of, 56, 59, 61–65
. dispensing with, 57, 62, 64
. failure to give, 58, 62, 63
. . adjournment to effect, 58, 63, 64
. . effect of generally, 58, 63, 64
. . oral, 56, 60, 62
. . validity of subsequent proceedings, 58, 63
. . written, 56, 62, 65–67
. general, 56
. of application for review of s. 457.5 or 547.6 order, 53
. of application for review of transfer order, 148, 159
. of application for review, 229, 234
. of arrest, 56, 59
. of decision of review board, 248, 250
. of review of disposition, where failure to comply, 268
. other adults or relatives where parents unavailable, 57, 60, 61, 64, 65
. service of
. . by mail, 58, 60
. . personal, 58, 60
. . proof of, 63, 64
. . promptness, 56, 57, 59, 60, 62
. spouses, 57, 61
. to parents of young person, 56, 57, 58

Oath
. affirmation, 396, 397
. instruction by judge, 397

Offences
. committed before/after Y.O.A. in force, 427
. committed by child, 428, 434
. created by Y.O.A.
. . for improper detention of young person, 43, 52
. . for publication of information at s. 16 hearing, 160
. . for requesting improper information on employment application, 284
. . failure to comply with record provisions, 335
. . for failure to destroy records, 330, 334
. . for violation of protection of privacy, 289, 292
. . interference with disposition, 351
. . . violation by adult, 351, 354
. . procedure, 289, 292
. definition of, 2, 9
. for transfer to ordinary court, 146, 149
. joinder of, 363
. record of, 313, 314
. record of any alleged, 315, 316
. status offences in the transitional period, 433

Onus
. *see* Burden of proof

Orders
. compelling parental attendance, 68
. detention, 52, 54, 55
. for release, 46, 47, 53, 54
. prohibiting broadcasting or publishing, 52

Ordinary court
. definition of, 2
. proceedings in, 162
. sentence in, 421
. transfer to, 144

Parent
. attendance at hearing, 68
. compelling attendance of, 56, 60, 68
. definition of, 2, 10, 58
. notice of arrest of young person, 44, 56, 58, 59
. not a party, 56
. release of young person to "responsible person", 43, 51
. right to be heard at transfer hearing, 146, 149
. right to counsel independent of, 77, 89

Parental responsibility
. *see* Declaration of principle

Parole Act
. *see* National Parole Board

Penalties
. *see* Disposition

Penitentiary
. confinement in, 151, 425
. separation of young persons, 43, 50, 212, 219

Photographs
. *see* Fingerprints and photographs

Placement with responsible person, 43, 51

Plea, 92, 94
. *autrefois acquit*, 29, 94
. *autrefois convict*, 29, 94
. judicial inquiry upon, 92, 95
. *see also* Adjudication

Police
. arrest powers, 44
. disclosure of court records, 302, 309
. . *see* Record
. duty to inform young person of right to counsel, 76, 80
. fingerprinting of young person by, 324
. participating forces, 316, 318
. photographs of offender by, 324
. records, 312

Practice
. *see* Procedure

Pre-disposition reports, 124
. considered at transfer hearing, 148, 155
. contents of, 125, 129
. cross-examination, 127, 134, 136
. defined, 3
. disqualification of judge, 140–143
. for custodial disposition, 208, 213
. part of the record, 126, 133
. withholding of report, 127, 135

Previous conviction
. effect of, 281

Principles of *Young Offenders Act*
. *see* Declaration of principle

Prisoner
. definition of, 425

Probation
. *see* Disposition

Procedure
. application of Pt. XXIV *Criminal Code*, 358, 359
. for offences created in Y.O.A., 292
. general, 288, 358
. joinder of offences, 363
. limitation period, 359, 363
. proceeding unique to Y.O.A., 360
. subpoena, service, 365
. summary conviction procedure, 358, 359
. warrants, 366

Proceeding
. *in camera*, *see* Protection of privacy

Proclamation of Y.O.A., 437

Progress report
. definition of, 3
. for use at review, 228–230, 232
. use for review of non-custodial disposition, 255, 257
. where review for failure to comply, 263, 267

Proof
. *see* Burden of proof; Standard of proof

Prosecution
. private, 24, 32

Protection of privacy
. at transfer hearing, 160
. ban on publication of evidence, 160

Protection of privacy (cont'd)
. ban on publication of identity of accused and others, 289
. disclosure of records of youth court, 309
. . exceptions, 309
. exclusion at disposition or review, 295, 297
. exclusion from hearing of any person, 294
. of young persons, general, 288
. . identity, 289
. offence for failure to comply, 289, 292

Provincial director
. approval for transfer, 421
. definition of, 3, 10
. disclosure of report by, 127, 138
. release from custody by, 241

Psychiatric reports
. *see* Medical and psychological reports

Psychological, psychiatric disorders
. *see* Disposition

Psychological reports
. *see* Medical and psychological reports

Publication
. in ordinary court, 161, 162
. of young person's identity, 289
. restriction at transfer hearing, 160
. *see also* Newspapers; Protection of privacy

Publicity, 420

Publish, 289, 291

Punishment
. *see* Disposition

Qualified persons
. definition of, 102
. disclosure by qualified persons, 102, 121
. examination by, 100, 102
. to prepare medical and psychological report, 102, 121

Recognizance
. before judge, 45, 47
. before officer in charge, 45
. forfeiture of, 344
. proceedings for default of, 344
. *see also* Arrest; Release

Records
. criminal history file, 313
. criminal record, 312
. definition, 304, 313
. destruction of records, 328
. . copies, 330, 333
. . effect of, 333
. . method, 333
. . offence for failure to, 330, 334
. fingerprints and photographs, 324
. . destruction of, 325, 327
. . disclosure, 326
. . storage of, 328
. . records of, 326
. function of clerk, 302, 304
. government and private records, 320
. . disclosure, 323
. maintenance and use of records, general, 301
. medical, psychological report to form part of, 114, 120
. offence for failure to comply with provisions, 335
. offences in respect of records, 336
. . disclosure, 336
. . possession, 335
. . procedure, 338
. of *Juvenile Delinquents Act*, 330, 335
. of societies as proof of age, 387, 388
. police records, 312, 316
. . central repository, 312, 314
. . definition, 313
. . of offence, 314, 316
. . participating forces, 318
. . police access to, 316, 318
. pre-disposition report to form part of, 126, 133
. . review board record, 306
. youth court record, 302, 304
. . appeal court records, 306
. . copies, 303, 312
. . definition of complete, 304
. . disclosure of, 302, 307
. . . for other proceeding, 303, 310
. . . for research, 303, 312
. . . to police, 302, 309
. . . to young person, 302, 309

Regulations
. establishing uniform Rules of Court, 409
. generally for purposes of the Act, 409

Release from custody
. *see* Custody; Detention prior to disposition; Disposition

Repeal
. of s. 120 *Indian Act*, 423
. of *Juvenile Delinquents Act*, 436

Reports
. *see* Medical and psychological reports; Pre-disposition reports; Progress reports

Representation by articling or law student, 86, 89

Represented by counsel, 75, 84
. *see also* Right to counsel

Restitution
. *see* Disposition

Review
. appearance of young person for, 255, 258
. by youth court, 248, 252
. exclusion of persons at review, 294, 297
. form for disposition on, 239, 260
. grounds for review of non-custodial disposition, 255
. information, 271, 272, 273
. limitation on power to vary disposition on, 259
. notice of, 229, 234
. of custodial disposition, 227
. . automatic, 227, 230
. . optional, 228, 231
. of disposition for failure to comply, 264
. of non-custodial disposition, 256
. of transfer orders, 147, 157
. procedure on, 242
. progress report, 232, 257, 267
. recommendation by provincial director for, 240, 241
. rehearing by youth court, 53, 55
. right to counsel on, 229
. summons for appearance on, 255, 260
. warrant for appearance on, 255, 262
. where appeal pending, 228, 232

Review Board, 246
. appeal of review, 266, 271
. decision, 248, 250
. definition of, 3
. general, 246, 248
. notice of decision of, 247, 250
. records, 306, 323
. *see also* Review

Rights of young person
. to access to records, 304, 309
. waiver of rights, 372, 383
. *see also* Declaration of principle; Records; Right to counsel; Young person

Right to be informed
. *see* Declaration of principle

Right to counsel, 73
. appointment of counsel by justice, 76, 87
. independant of parents, 76, 89
. on alternative measures, 23, 27
. on arrest or detention, 75, 80
. on first appearance, 93
. on giving statement, 371, 380
. right to retain counsel, 75, 76
. statement of, in forms, 77, 90

Royal Canadian Mounted Police
. central repository, 313, 314

Rules of court
. for youth court, 410
. for records, 301, 305

Sentence
. *see* Disposition

Service
. of subpoena, 365
. proof of, 401

Special needs
. *see* Declaration of principle

Spouse
. assistance by, 88
. testimony of, 416

Standard of proof, 30

Statements of young persons
. *see* Evidence

Status of offences
. *see* Offence

Subpoena
. issue, 365

Substitution of judges
. *see* Youth court judge

Summary conviction
. *see* Procedure

Summons
. for appearance on review, 255, 260
. for first appearance, 45
. notice to parent in case of summons to appear, 56, 59, 60

Sureties
. liability of, 349
. young persons as, 350

Temporary release from custody, 275
. revocation of, 276, 278
. *see also* Detention

Termination of disposition
. *see* Disposition

Testimony
. of child, 392, 396, 398

Testimony (cont'd)
. of parent, 387
. of spouse, 416
. *see also* Evidence

Title
. short title, 1

Transfer of disposition
. agreements governing, 219
. general, 217

Transfer of jurisdiction, 163

Transfer to ordinary court, 144
. application for, 148
. disqualification of judge upon hearing application, 140
. factors to be considered by court, 152
. order, 156
. previous transfers, 155
. reasons for, 156
. restriction on publication, 160
. review, 157
. sentence in ordinary court, 421
. under the *J.D.A.*, 144

Transitional provisions, 427

Treatment
. of psychological disorder, 187

Trial, 168
. right to counsel at, 83
. trial to determine fitness, 106
. *see also* Fitness to stand trial

"Voir dire", 368

Warrant
. issued by youth court, 365
. to compel appearance on review, 255, 262

Witness
. procuring attendance of, 365

Young offender
. definition of, *see definition* young person, offence, 8, 11

Young person
. age of, 3
. "aggrieved", 290
. as sureties, 350
. attendance of, 362
. definition of, 3, 11
. evidence of (*see also* Evidence), 392, 396
. fingerprints and photographs of, 324
. instruction by judge for testimony, 397
. presence of, 298
. right to access to records, 302, 309, 315, 322

Youth court
. decision on review of disposition, 255, 259
. decision on review of disposition, where failure to comply, 265, 269
. definition of, 3
. issuance of subpoena or warrant, 365
. jurisdiction of, 35, 348
. review by, 248, 252
. transfer of jurisdiction, 163

Youth court judge
. definition of, 3
. disqualification of, 140
. powers of, exercised by clerk, 405
. role at dispositional hearing, 178

Youth justice committees, 412

Youth workers
. definition of, 3
. general, 286