Revue générale de droit

The Semantics of Repression: Linking, Opposing, and Linking again Rehabilitation and Protection of Society

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Volume 36, numéro 2, 2006

URI : https://id.erudit.org/iderudit/1027109ar
DOI : https://doi.org/10.7202/1027109ar

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Éditeur(s)

Éditions Wilson & Lafleur, inc.

ISSN

0035-3086 (imprimé)
2292-2512 (numérique)

Découvrir la revue

Citer cet article

Piñero, V. B. (2006). The Semantics of Repression: Linking, Opposing, and Linking again Rehabilitation and Protection of Society. *Revue générale de droit*, *36*(2), 189–263. https://doi.org/10.7202/1027109ar

Résumé de l'article

À partir de l'étude de la législation criminelle portant sur les mineurs et adoptée par le gouvernement canadien entre les années 1857 et 2005, l'auteur s'emploie à démontrer que la justice criminelle envers les jeunes est passée de la notion de « protection de l'enfance » à celle de « protection de la société ». Il faut en fait voir dans ce changement le passage d'une intervention privilégiant les concepts de « réintégration » et d'« inclusion » à une autre intervention centrée, elle, sur les concepts de « dissuasion » et d'« exclusion ». Dans cet article, l'auteur analyse d'abord les facteurs sociaux qui ont amené les parlementaires canadiens à adopter la *Loi sur les Jeunes Délinquants* en 1908. Dans la foulée, elle examine attentivement un amendement voté en 1924, amendement qui « augmenta » le nombre de comportements criminalisés. L'auteur retrace ensuite les circonstances ayant entouré l'adoption par le législateur de la *Loi sur les Jeunes Contrevenants* (1982) et de la *Loi sur le Système de Justice Pénale pour les Adolescents* (2002). Elle en profite pour souligner la passation en 1995 d'un amendement qui, par l'introduction de la notion de « prévention du crime », vint modifier la déclaration de principe de la *Loi sur les Jeunes Contrevenants*. Enfin, l'auteur analyse une décision judiciaire rendue en 2003 par la Cour d'Appel du Québec, *Québec* c. *Canada*. Cette décision a déclaré inconstitutionnels certains articles du *Projet de loi C-7* (*Loi sur le Système de Justice Pénale pour les Adolescents*), articles qui permettent la diffusion de renseignements privés sur les jeunes contrevenants et renversent la charge de la preuve pour pouvoir leur infliger des peines d'adultes. Même si elles ont été jugées inconstitutionnelles, les dispositions de ces articles s'inscrivent, selon l'auteur, dans la logique des tendances théoriques qui dominent actuellement dans le champ de l'intervention criminelle auprès de la jeunesse.

The Semantics of Repression : Linking, Opposing, and Linking again Rehabilitation and Protection of Society[1]

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RÉSUMÉ

À partir de l'étude de la législation criminelle portant sur les mineurs et adoptée par le gouvernement canadien entre les années 1857 et 2005, l'auteur s'emploie à démontrer que la justice criminelle envers les jeunes est passée de la notion de « protection de l'enfance » à celle de « protection de la société ». Il faut en fait voir dans ce changement le passage d'une intervention privilégiant les concepts de

ABSTRACT

Having explored the youth criminal legislation enacted by the Canadian federal government from the year 1857 to the year 2005, the author attempts to demonstrate that youth criminal intervention has moved from the notion of "child protection" to the notion of "protection of society." The significance of this theoretical shift is that, while the former sort of intervention is mostly

1. I am very grateful to my supervisors, Professor Rachel Grondin (Faculty of Law, Civil Law Section, University of Ottawa) and Professor Alvaro Pires (Canadian Research Chair in Legal Traditions and Penal Rationality, C.I.R.C.E.M., University of Ottawa) for their valuable comments and suggestions. I am very grateful as well to Professor Susan Binnie (Faculty of Law, Common Law Section, University of Ottawa) for her comments on the first section of this research and to Gérald Pelletier (C.I.R.C.E.M., University of Ottawa) for translating into French the abstract of this paper. As always, I am very grateful to my mum, Nilda Di Croche, for all her support. The notion of "modern penal rationality", which is a fundamental theoretical concept for this research, belongs to Alvaro Pires. A. PIRES, "A racionalidade penal moderna, o público e os directos humanos", (2004) 68 *Novos Estudos*, 39. Finally, I am also very grateful for the financial support provided both by the Social Sciences and Humanities Research Council and the Canadian Research Chair in Legal Traditions and Penal Rationality (summer research scholarship, may-august 2005, 2006).

« réintégration » et d'« inclusion » à une autre intervention centrée, elle, sur les concepts de « dissuasion » et d'« exclusion ». Dans cet article, l'auteur analyse d'abord les facteurs sociaux qui ont amené les parlementaires canadiens à adopter la Loi sur les Jeunes Délinquants *en 1908. Dans la foulée, elle examine attentivement un amendement voté en 1924, amendement qui « augmenta » le nombre de comportements criminalisés. L'auteur retrace ensuite les circonstances ayant entouré l'adoption par le législateur de la* Loi sur les Jeunes Contrevenants *(1982) et de la* Loi sur le Système de Justice Pénale pour les Adolescents *(2002). Elle en profite pour souligner la passation en 1995 d'un amendement qui, par l'introduction de la notion de «prévention du crime», vint modifier la déclaration de principe de la* Loi sur les Jeunes Contrevenants. *Enfin, l'auteur analyse une décision judiciaire rendue en 2003 par la Cour d'Appel du Québec,* Québec *c.* Canada. *Cette décision a déclaré inconstitutionnels certains articles du* Projet de loi C-7

concerned with the notions of "reintegration" and "inclusion", the latter is concerned with the notions of "deterrence" and "exclusion." For this study, the author first analyzes the societal factors that led Canadian parliamentarians to enact the Juvenile Delinquents Act *(1908). In addition, she focuses on a specific amendment enacted in the year 1924 that "increased" the number of behaviors to be controlled through criminal law legislation. Second, the author discusses the circumstances that led parliamentarians to enact the* Young Offenders Act *(1982) and the* Youth Criminal Justice Act *(2002). Moreover, she examines an amendment enacted in the year 1995 that modified the declaration of principles of the* Young Offenders Act *by introducing the notion of "crime prevention." Finally, she analyzes a case law released in the year 2003 by the Quebec Court of Appeal,* Québec *v.* Canada. *This decision declared the unconstitutionality of some specific sections of* Bill C-7 *(current* Youth Criminal Justice Act*) that allow the disclosure of young offenders'*

(Loi sur le Système de Justice Pénale pour les Adolescents), *articles qui permettent la diffusion de renseignements privés sur les jeunes contrevenants et renversent la charge de la preuve pour pouvoir leur infliger des peines d'adultes. Même si elles ont été jugées inconstitutionnelles, les dispositions de ces articles s'inscrivent, selon l'auteur, dans la logique des tendances théoriques qui dominent actuellement dans le champ de l'intervention criminelle auprès de la jeunesse.*

private information and reverse the onus probandi *for the imposition of adult sentences on young offenders. The position of the author is that, even though those sections can be unconstitutional, they are coherent with current theoretical trends in the area of youth criminal law intervention.*

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> It is quite impossible psychologically to hate the sin and love the sinner. We are very much given to cheating ourselves in this regard. We assume that we can detect, pursue, indict, prosecute, and punish the criminal and still retain toward him the attitude of reinstating him in the community as soon as he indicates a change in social attitude himself, that we can at the same time watch for the definite transgression of the statute to catch and overwhelm the offender, and comprehend the situation out of which the offense grows. But the two attitudes, that of control of crime by the hostile procedure of the law and that of control through comprehension of social and psychological conditions, cannot be combined. To understand is to forgive and the social procedure seems to deny the very responsibility which the law affirms, and on the other hand the pursuit by criminal justice inevitably awakens the hostile attitude in the offender and renders the attitude of mutual comprehension practically impossible. The social worker in the court is the sentimentalist, and the legalist in the social settlement in spite of his learned doctrine is the ignoramus.
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> George Mead, "The Psychology of Punitive Justice" (1918), p. 592.

INTRODUCTION

In 1918, George Mead drew a significant distinction between the adult criminal court and the juvenile criminal court. He noted that :

> [i]t is in the juvenile court that we meet the undertaking to reach and understand the causes of social and individual breakdown, to mend if possible the defective situation and reinstate the individual at fault. This is not attended with any weakening of the sense of the values that are at stake, but a great part of the paraphernalia of hostile procedure is absent.[2]

One of the longstanding characteristics of the youth criminal justice system has been its goal to maintain the moral values selected by the criminal law and to identify the objective of "young offender protection" (rehabilitation and reintegration) with the objective of "protection of society". In Canada, it is possible to identify the above-mentioned objectives in the *Juvenile Delinquents Act (1908)*.[3] This piece of legislation was intended to address both youth criminal behaviour and youth problematic behaviour by subjecting juvenile offenders to "wise care, treatment and control".[4]

Such an approach had an important change after the enactment of the *Young Offenders Act (1982)*.[5] The *Young Offenders Act* would not be so concerned about identifying the objective of young offender protection (rehabilitation and reintegration) with the objective of "protection of society", but about stressing the importance of the latter, and opposing the objective of "young offender protection" to the objective of "protection of society". In addition, the *Young Offenders Act* was only intended to address youth criminal behaviour, leaving the regulation of youth problematic behaviour to provincial legislatures. In addition, this Act was more concerned with holding young offenders accountable for their actions than with child welfare regulations.[6]

The *Youth Criminal Justice Act (2002)* would continue the approach of the *Young Offenders Act* : it would stress the

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2. G. MEAD, "The Psychology of Punitive Justice", (1918) 23 *Am. J. Soc.* 577, 594.

3. *An Act respecting Juvenile Delinquents*, enacted as S.C. 1908, c. 40. Assented to on July 20, 1908. Subject to several minor amendments over the years, finally *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3 (hereinafter "Juvenile Delinquents Act"). This statute was repealed by the *Young Offenders Act*.

4. *Juvenile Delinquents Act*, *op. cit.*, note 3, preamble.

5. *Young Offenders Act*, R.S.C. 1985, c. Y-1 (hereinafter "Young Offenders Act"). This statute was repealed by the *Youth Criminal Justice Act*.

6. N. BALA, *Youth Criminal Justice Law*, Toronto, Irwin Law, 2003, p. 66.

importance of the objective of "protection of society", and it would not identify such an objective with the objective of "young offender protection". Moreover, it would put more emphasis on holding young offenders accountable for their actions than on regulating child welfare.[7] Nevertheless, both the *Young Offenders Act* and the *Youth Criminal Justice Act* would highlight the importance of the objectives of "young offender protection" and "protection of society" for the design of a youth criminal justice policy. However, one question arises : is it true to affirm that in the area of youth criminal law intervention these two principles are considered to be at the same level?[8]

On March 2003, the Quebec Court of Appeal ruled that some sections of *Bill C-7*,[9] current *Youth Criminal Justice Act*, violated section 7 of the *Canadian Charter of Rights and Freedoms.*[10] The problematic identified sections allow the imposition of adult sentences to young offenders who were 14 years old or older by the time they committed the offences of first degree murder or second degree murder, attempt to commit murder, manslaughter, aggravated sexual assault, or a serious violent offence for which an adult is liable to imprisonment for a term of more than two years ("presumptive offences").[11] In addition, these sections reverse the *onus*

7. *Youth Criminal Justice Act*, S.C. 2002, c. 1 ("Youth Criminal Justice Act").

8. N. BALA, *op. cit.*, note 6, p. 68. See also J. TRÉPANIER, « La loi canadienne sur les jeunes contrevenants : principes et objectifs guidant le choix des mesures ordonnées par les tribunaux », (1990) 3 *Revue Internationale de Criminologie et de la Police Technique* 273, 304.

9. This Bill received Royal Assent on February 19, 2002 and came into force on April 1, 2003.

10. *Minister of Justice of Quebec and Attorney General of Quebec* v. *Minister of Justice of Canada and Attorney General of Canada*, [2003] R.J.Q. 1118, p. 1172, 1173 (C.A.). (hereinafter "Reference re Bill C-7"). Section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11(hereinafter "*Charter*") states : "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".

11. Section 2 of the *Youth Criminal Justice Act* defines the notion of "presumptive offence" :

> "Presumptive offence" means :
>
> a) an offence committed, or alleged to have been committed, by a young person who has attained the age of fourteen years, or, in a province where the lieutenant governor in council has fixed an age greater than fourteen years under section 61, the age so fixed, under one of the following provisions of the *Criminal Code* :

probandi by stating that the young offender who has committed a "presumptive offence" should prove the reasons for imposing a youth sentence instead of an adult sentence. The Quebec Court of Appeal noted that sections 62, 63, 64(1), 64(5), 70, 72(1), 72(2), 73(1) of *Bill C-7* "violate section 7 to the extent that a young person who has committed a presumptive offence must prove the factors justifying the imposition of a youth sentence rather than an adult sentence".[12] Besides, the Quebec Court of Appeal ruled that sections 75 and 110(2.b) of *Bill C-7*, which allow the disclosure of a young person's identity if she[13] committed a presumptive offence, "violate section 7 of the Charter to the extent that they impose on a young person the burden of justifying maintenance of the ban [confidentiality of the young offender information] rather than imposing on the prosecutor the burden of justifying its lifting".[14]

The objective of this paper is to explore the theories and rationalities that have underlied the implementation of youth criminal justice in Canada, and to argue that, even though the above-identified sections of the *Youth Criminal Justice Act* can be contrary to section 7 of the *Canadian Charter of Rights and Freedoms*, they are consistent with a criminal law philosophy that stresses the value of "punishment" and puts an emphasis on the "exclusion of the offender" as a medium for "protecting society". This criminal law philosophy, which has characterized the modern adult criminal justice system

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(i) section 231 or 235 (first degree murder or second degree murder within the meaning of section 231),

(ii) section 239 (attempt to commit murder),

(iii) section 232, 234 or 236 (manslaughter), or

(iv) section 273 (aggravated sexual assault); or

b) a serious violent offence for which an adult is liable to imprisonment for a term of more than two years committed, or alleged to have been committed, by a young person after the coming into force of section 62 (adult sentence) and after the young person has attained the age of fourteen years, or, in a province where the lieutenant governor in council has fixed an age greater than fourteen years under section 61, the age so fixed, if at the time of the commission or alleged commission of the offence at least two judicial determinations have been made under subsection 42(9), at different proceedings, that the young person has committed a serious violent offence. *Youth Criminal Justice Act, précitée*, note 7, s. 2.

12. *Reference re Bill C-7*, précitée, note 10, p. 1172, 1173.

13. For this research, the *masculine pronoun* is included in the *feminine pronoun*.

14. *Reference re Bill C-7, précitée*, note 10, p. 1172, 1173.

since the middle of the XVIII century, has been gradually introduced in the area of youth criminal intervention since the second half of the XX century. Such an intervention strategy is characterized by an emphasis on the sort of criminal behavior committed by the young offender and on "the paraphernalia of hostile procedure" instead of on the concept of "protection of the youth" (rehabilitation and reintegration). In addition, this research is interested in highlighting that the identified constitutional-problematic sections of the *Youth Criminal Justice Act* are not a recent intervention strategy. They were already in the Canadian youth criminal justice system, some of them since the enactment of the first Canadian piece of legislation that addressed youth criminal misbehaviour, the *Juvenile Delinquents Act.*

The first section of this research analyzes the guiding theories, main ideologies, societal factors, and rhetoric in the area of youth criminal justice intervention that led Canadian parliamentarians to enact the *Juvenile Delinquents Act.* Section two explores the guiding theories and rhetoric that have justified the enactment of the *Young Offenders Act* and the *Youth Criminal Justice Act*, and the different amendments to the principles and objectives of the Canadian youth criminal justice legislation.[15] For both analyses, Canadian Parliamentary debates,[16] Canadian governmental reports, and scholarly literature constitute an important reference material. The third part of this research focuses on the problematic sections of the *Youth Criminal Justice Act* mentioned above. Moreover, this section tracks down their first implementation in the Canadian youth criminal justice system, and their subsequent amendments up to the present.

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15. The analysis of Canadian legislative proposals (bills) to amend or replace the youth criminal justice legislation that were not enacted is beyond the scope of this research. Concerning the *Young Offenders Act* and the *Youth Criminal Justice Act*, this research is concerned with the final wording of the adopted texts, unless the original wording as introduced originally in Parliament provides relevant information for accepting or rejecting the thesis statement of this paper.

16. Jean Trépanier et Françoise Tulkens refer to such a sort of source as "le discours public des acteurs officiels de la création de la loi". J. TRÉPANIER, F. TULKENS, *Délinquance & Protection de la jeunesse (aux sources des lois belge et canadienne sur l'enfance)*, Bruxelles, De Boeck-Wesmael S.A, 1995, p. 14.

1. THE ORIGINS OF THE YOUTH CRIMINAL JUSTICE SYSTEM IN CANADA: THE *JUVENILE DELINQUENTS ACT*[17]

Canada's first attempt to draw a distinction between adult and youth criminal justice systems dates from the mid-1800's. In 1857 the Canadian Province passed an act to give persons under 16 years old a special juridical status. The purposes of such a piece of legislation were to provide young persons with speedy interventions and increase the powers of judicial officials for intervening.[18] That same year the Canadian Province enacted *An Act for establishing prisons for young offenders — for the better government of Public Asylums, Hospitals and Prisons, and for the better construction of Common Goals*, which provided for two reformatories for young offenders to be built in Upper and Lower Canada.[19] The former piece of legislation, *An Act for the more speedy trial and punishment of juvenile offenders*, was replaced when the Canadian Federation came into existence.[20]

Nevertheless, the first Canadian comprehensive juvenile justice legislation that would draw a clear distinction between the regulation of youth and adult criminalized behavior was the *Juvenile Delinquents Act*, which came into force in 1908.[21] Its main aim was to identify individuals who were under the age of 16 years and had committed a behavior

17. The following analysis deals with Canadian federal legislation. The analysis of the enacted provincial legislation is beyond the scope of this research.

18. *An Act for the More Speedy Trial and Punishment of Juvenile Offenders*, Statutes of the Canadian Province 1857, c. 29.

19. *An Act for the Establishment of Prisons for Young Offenders — for the Better Government of Public Asylums, Hospitals and Prisons, and for the Better Construction of Common Gaols*, Statutes of the Canadian Province 1857, c. 28.

20. *An Act respecting the Trial and Punishment of Juvenile Offenders*, S.C. 1869, c. 33. The first Canadian Criminal Code, enacted in the year 1892, included a section providing for the in-camera and separate trial of persons under the age of 16 years if it was "expedient and practicable" to do so. See *Criminal Code*, S.C. 1892, c. 29, s. 550.

21. CANADA, *Debates of the Senate*, 1907-1908 (20 July, 1908), p. 1738. However, it is important to note that in the year 1894 the Canadian Parliament passed an act that provided special provisions for the separation of young offenders from contact with adult offenders during their arrest and trial. This act also provided the establishment of industrial school for children in conflict with the law. See *An Act respecting Arrest, Trial, and Imprisonment of Youthful Offenders*, S.C. 1894, c. 58.

forbidden by the Canadian Criminal Code or any other provincial or municipal piece of legislation. In addition, this act was intended to provide "wise care, treatment, and control" to address identified youth misbehavior.[22]

The *Juvenile Delinquents Act* would be strongly grounded on the notion of "child protection"[23] and, as Trépanier notes, parliamentarians would not perceive any contradiction between pursuing such an objective and the notion of "protection of society".[24] The socio-environmental approach in which the *Juvenile Delinquents Act* was grounded perceived the notion of "child protection" as a medium for granting "protection to society". Since the sources of youth delinquency were strongly associated to the child's socio-familial environment, any sort of intervention directed towards "removing the child" from a non-acceptable socio-familial environment would be seen as a way of "protecting the child". A child "removed" from such an undesirable environment and "introduced" to Canadian protestant middle-class moral values would become a law-abiding citizen and a useful member of society.[25]

For the *Juvenile Delinquents Act*, the main factor to decide the sort of criminal law measure or sanction to impose on a young person would be neither the seriousness of the offence nor the degree of responsibility of the youth, but her socio-familial environment and needs.[26] The *Juvenile Delinquents Act*, which was subject to several major and minor amendments over the years, was to regulate youth criminal misbehaviour until April 2, 1984, when the *Young Offenders Act* entered into force.

However, what were the reasons for the enactment of the *Juvenile Delinquents Act*? The preamble to the *Juvenile*

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22. *An Act respecting Juvenile Delinquents*, S.C. 1908, c. 40, preamble.

23. N. BALA, K.L. CLARKE. *The Child and the Law*, Toronto, McGraw-Hill Ryerson Limited, 1981, p. 207.

24. J. TRÉPANIER, *loc. cit.*, note 8, p. 276-277.

25. M. VALVERDE, *The Age of Light, Soap, and Water. Moral Reform in English Canada, 1885-1925*, Toronto, McClelland & Stewart Inc., 1991, p. 129-154.

26. J. TRÉPANIER, *loc. cit.*, note 8, p. 278. However, the *Juvenile Delinquents Act*, as enacted in 1908, would draw a distinction between some sorts of criminal behaviors, such as indictable and non-indictable offences. See *An Act respecting Juvenile Delinquents, précitée*, note 22, s. 7.

Delinquents Act, as enacted in 1908, highlighted the need to draw a distinction between the criminal procedure for young offenders and for adult offenders. The reason for such a distinction was an attempt to "protect the young offender" from the influence of adult offenders ("rescue the young offender"), and such an objective was seen as necessary for granting "protection to society". Moreover, for the *Juvenile Delinquents Act* both objectives were seen as going "hand in hand":

> [w]hereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts [...][27] [emphasis added]

Was the *Juvenile Delinquents Act* intended to only address behaviors forbidden by the criminal law or "dangerous/risky situations" as well? This piece of legislation was concerned with addressing situations or behaviors that could lead the young person to become a "young offender". Furthermore, in an attempt to "rescue the young person" the *Juvenile Delinquents Act* regulated "situations" that were not criminal offences. As well, the justification for such an intervention was to "protect society". The preamble to the *Juvenile Delinquents Act*, as enacted in 1908, also noted that:

> [w]hereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against association with crime and criminals, and *should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts* [...][28] [emphasis added]

In addition, section 31 of the *Juvenile Delinquents Act*, as enacted in 1908, stated that:

27. *Id.*, preamble.
28. *Id.*, preamble.

> [t]his Act shall be liberally construed to the end that its purpose may be carried out, to wit: That *the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by its parents, and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.*[29] [emphasis added]

What were the reasons why legislators decided to regulate "dangerous/risky situations" through legal intervention? Why did they specifically choose criminal law as the main sort of legal intervention? The purpose of this section is to analyze the 1908 *Juvenile Delinquents Act* and explore the main ideologies and societal factors that encouraged new intervention approaches to youth misbehavior. This section also looks at the reasons why parliamentarians preferred criminal law to other type of legal intervention (such as civil law) for controlling youth misbehavior and the theoretical framework that surrounded such an intervention. Finally, this section focuses on a specific amendment: *An Act to amend the Juvenile Delinquents Act*, S.C. 1924, c. 53.[30] One of the purposes of this amendment was to modify the definition of "juvenile delinquent" as stated in the *Juvenile Delinquents Act* as enacted in 1908. This amendment expanded the concept of juvenile delinquent to include "sexual immorality or any similar form of vice" as a ground for considering a child a juvenile delinquent. This section is concerned, as well, with exploring the societal factors that encouraged such an amendment.

1.1. THE *JUVENILE DELINQUENTS ACT*: SOCIETAL BACKGROUND AND UNDERLYING THEORIES

On July 20, 1908, the *Juvenile Delinquents Act* was enacted. Some scholars note that this Act received less than

29. *Id.*, s. 31.

30. *Juvenile Delinquents Act*, R.S.C. 1908, c. 40, as amended by *An Act to amend the Juvenile Delinquents Act*, S.C. 1924, c. 53 (hereinafter "An Act to Amend the Juvenile Delinquents Act, S.C. 1924, c. 53"). Assented to on July 19, 1924.

one hour's discussion in the House of Common;[31] however, it is important to remark that this Act was extensively debated in the Senate.[32] The *Juvenile Delinquents Act*, which set the tone for the Canadian approach to youth misbehavior for nearly 75 years, did not have a clear declaration of principles.[33] Nevertheless, it is manifest that it was philosophically grounded in the doctrine of *parens patriæ*.[34] This is evident in several sections of the Act :[35] the main concern of this piece of legislation was to subject young offenders to "wise care, treatment and control".[36]

The *Juvenile Delinquents Act* drew a distinction between adult delinquents and juvenile delinquents, and defined the latter as :

> any child who violates any provision of *The Criminal Code*, chapter 146 of the Revised Statutes, 1906, or of any Dominion or provincial statute, or of any by-law or ordinance or any municipality, for which violation punishment by fine or imprisonment may be awarded; or who, is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or provincial statute.[37]

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31. CANADA. DEPARTMENT OF JUSTICE, *The Evolution of Juvenile Justice in Canada — The Act of 1984*, The Evolution of Juvenile Justice in Canada — The International Cooperation Group. [online]. http://canada.justice.gc.ca/en/ps/inter/juv_jus_min/sec03.html; N. BALA, *op. cit.*, note 6, p. 9. See CANADA, *Debates of the House of Commons*, 1907-1908, p. 12399-12406.

32. CANADA. *Debates of the Senate*, 1906-1907, p. 804-808, 820-831, 876-902; and CANADA, *Debates of the Senate*, 1907-1908, p. 971-982, 1037-1046, 1149-1165.

33. J. TRÉPANIER, *loc. cit.*, note 8, p. 274.

34. The concept of the doctrine of "parens patriæ" is defined by Frederic L. Faust and Paul J. Brantingham as "[t]he legal provision through which the state may assume ultimate parental responsibility for the custody, care, and protection of children within its jurisdiction", F.L. FAUST, P.J. BRANTINGHAM, "Origins of the Juvenile Court. Introduction" in F.L. FAUST, P.J. BRANTINGHAM, (eds.), *Juvenile Justice Philosophy. Readings, Cases and Comments*, St. Paul, West Publishing Co., 1979, p. 27, at p. 32. Accord CANADA. DEPARTMENT OF JUSTICE, *The Evolution of Juvenile Justice in Canada — The Act of 1908*, The Evolution of Juvenile Justice in Canada — The International Cooperation Group [online]

http://canada.justice.gc.ca/en/ps/inter/juv_jus_min/sec02.html; N. BALA, K. CLARKE, *op. cit.*, note 23, p. 162-167.

35. *An Act respecting Juvenile Delinquents, précitée*, note 22, ss. 14, 16, 22, 31, and 32.

36. *Id.*, preamble.

37. *An Act respecting Juvenile Delinquents, précitée*, note 22, s. 2(c).

Accordingly, the *Juvenile Delinquents Act* defined "child" as "a boy or girl apparently or actually under the age of sixteen years".[38] One of the main innovations of this Act was the introduction of juvenile courts for dealing with juvenile delinquents.[39] The juvenile court was intended to provide children not only with a different sort of judicial environment that avoided the "paraphernalia of hostile procedure", but also with a special procedure more concerned about their needs.[40] In addition, in the case of a child proved to be a juvenile delinquent, the act established the possibility of committing the child "to the care or custody of a probation officer or of any other suitable person [...] [or] to the charge of any children's aid society [...] [or] if a boy, to an industrial school for boys, or, if a girl, to an industrial school or refuge for girls".[41]

The *Juvenile Delinquents Act* was introduced to the Senate of the Dominion of Canada as *Bill (FFF) An Act respecting juvenile delinquents* in the year 1907 by the Canadian Secretary of State, Hon. Mr. Scott. The bill died on Parliament's Order Paper when Parliament prorogued; however, it was reintroduced the following session as *Bill (QQ) An Act respecting Juvenile Delinquents* and assented to as *An Act respecting Juvenile Delinquents* on July 20, 1908.[42]

When first introduced, Hon. Mr. Scott addressed his audience about the purposes of the bill. It is interesting to note the "semantics" of his speech during the second reading of the bill. He did not draw a clear distinction between two groups of problematic situations with regard to children : 1) "neglected children" and "abused children", and 2) "children in conflict with

38. *Id.*, s. 2(a).
39. *Id.*, s. 4.
40. *Id.*, ss. 5, 7, 10-14, 22, 31.
41. *Id.*, s. 16(1).
42. Leon notes that, when Senator Scott introduced *Bill (FFF)* in the Senate, he "failed to consult with the Minister of Justice, Mr. Aylesworth. Taking offence, Aylesworth refused to support the proposed legislation and it was over a year before he consented, under much pressure, to introduce the Bill to the House of Commons. However, Senator Scott was permitted to introduce the Bill to the Senate in April 1907 as a means of generating discussion, on the condition that it did not go beyond second reading". J.S. LEON, "New and old themes in Canadian juvenile justice : the origins of delinquency legislation and the prospects of recognition of children's right", in H. BERKELEY, C. GAFFIELD, W. GORDON WEST, (eds.), *Children's Rights. Legal and Educational Issues*, Toronto, The Ontario Institute for Studies in Education, 1978, p. 35, at p. 45.

law". While the former represents children who have been victimized either by a lack of care or by physical, emotional, or psychological aggression, the latter represents children who have committed a behaviour forbidden by the criminal law. Indeed, it seems that Hon. Mr. Scott tried to deal with both categories of problematic situations by the same sort of intervention (criminal law):

> [t]he bill now in the hands of hon. gentlemen proposes to deal with another question, one that is not entirely new, still, in my judgment an important Bill. *It is for the betterment of a large class of the community, the children who are surrounded by an environment that leads to evil, and the purpose of the Bill is to lay down such methods of procedure as may at all events minimize the tendency to crime of children who happen to be unfortunately situated either in houses where the examples before them are not of a high order, or other causes that are tending in the direction of evil.* The principle of the Bill is probably well explained in the opening paragraph, which reads as follows: "Whereas it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts".[43] [emphasis added]

This misunderstanding over these two categories of problematic situations with regard to children was present both in the discussions held in the Senate in the 1906-1907 and in the 1907-1908 parliamentary sessions.[44] In addition,

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43. CANADA, *Debates of the Senate*, 1906-1907 (19 April, 1907), p. 804.

44. See generally J.H. HYLTON, "Get Tough or Get Smart? Options for the Canada's youth justice system in the twenty-first century", in T. FLEMING, P. O'REILLY, B. CLARK, (eds.), *Youth Injustice. Canadian Perspective*, 2nd ed., Toronto, Canadian Scholar's Press Inc., 2001, p. 561, at p. 563; J. W. MACK, "The Juvenile Court" in F.L. FAUST, P.J. BRANTINGHAM, (eds.), *Juvenile Justice Philosophy. Readings, Cases and Comments*, 2nd ed., St. Paul, West Publishing Co., 1979, p. 97, at p. 99 (reprinted from Julian W. MACK, "The Juvenile Court", (1909) 23 *Harvard Law Review* 104); A. PLATT, "The Rise of the Child-Saving Movement: a Study in Social Policy and Correctional Reform", in F.L. FAUST, P.J. BRANTINGHAM, (eds.), *Juvenile Justice Philosophy. Readings, Cases and Comments*, 2nd ed., St. Paul, West Publishing Co., 1979, p. 115, at p. 125 (reprinted from A. PLATT, "The Rise of the Child Saving Movement: A Study in Social Policy and Correctional Reform", (1969) 381 *The Annals of the American Academy of Political and Social Science*).

the confusion between 1) "neglected children" and "abused children", and 2) "children in conflict with law" would bring into question who had the legislative authority for enacting legislation with regard to this issue. While Parliament had (and have) exclusive legislative powers for regulating all matters coming within the classes of subjects of criminal law, provincial legislatures had (and have) exclusive legislative powers for enacting regulation related to the protection and welfare of children.[45]

The absence of distinction between these two categories of problematic situations with regard to children was found within Canadian society as well.[46] Trépanier notes that XIX century Canadian society faced several transformations with regard to the socio-legal status of children.[47] He points out that urbanization and the development of the national economy had an impact on the typical family structure : gender specific roles led women to focus on children's education within and outside the family structure. Middle-class women formed associations for discussing what the best interests of the child were, and how to achieve such a goal. In addition, philanthropic institutions and social purity movements started to focus on children as the main subjects of intervention, in an attempt to "mold the nation".[48] Moreover, labour legislation started to exclude children from factories, and communities started to invest in children's education in an attempt to produce useful children, well-fitted to their

45. J. TRÉPANIER, F. TULKENS, *op. cit.*, note 16, p. 14. Nevertheless, in *A.G. (Quebec)* v. *Lechasseur et al.*, [1981] 2 S.C.R. 253, the Supreme Court of Canada held the supremacy of federal "youth criminal" legislation over provincial "child protection" legislation. It noted that, even though both pieces of legislation were valid, the solution offered by the federal legislation was paramount. Therefore, if federal and provincial legislation offer different solutions to a same situation, the federal solution should be preferred to the provincial solution. In this case, the Supreme Court of Canada did not declare the unconstitutionality of the provincial legislation, but its courting inoperability.

46. P. BENNETT, "Taming 'Bad Boys' of the 'Dangerous Class' : Child Rescue and Restraint at the Victoria Industrial School", (1988) 21 :41 *Social History* 72. See also J. LEON, *loc. cit.*, note 42, p. 37-40; N. BALA, K. CLARKE, *op. cit.*, note 23, p. 164.

47. J. TRÉPANIER, F. TULKENS, *op. cit.*, note 16, p. 19.

48. M. VALVERDE, *op. cit.*, note 25, p. 166-167.

future role in society.[49] Middle-class ideology of childhood would lead the movements mentioned above.[50] These movements would be interested both in regulating morality, especially sexual morality, and young people's welfare, in an attempt to achieve a certain kind of human life.[51] "Save the children and you mold the nation" : this was one of the three mottoes of the Moral Education Department of the Woman's Christian Temperance Union (WCTU) stated in 1910.[52] This language of "social motherhood" will be present in most of the interventions directed towards children during this period, both in the discourse of the political sphere and the social purity activists.

During the debate at the Senate, Hon. Mr. Scott seemed to have a strong environmentalist perspective with regard to the sources of youth criminal behavior, and therefore, the sort of intervention required : "[c]hildren are not born criminals; they are made criminals by the environment by which they happen to be surrounded. Remove the environment and the child grows up an entirely different character".[53] "Child rescue institutions", such as industrial schools, would be seen by moral reformers not only as effective interventions for preventing children from committing criminal behaviors, but

49. W. NELSON, "'Rage against the Dying of Light' : Interpreting the Guerre des Eteignoirs", (2000) 81 :4 *The Canadian Historical Review* 551. Alison Prentice notes that "[t]he movement to send all children to school was, above all, a movement to bring sanctity and order to human affairs" in *The School Promoters. Education and Social Class in Mid-Nineteenth Century Upper Canada*, Toronto, McClelland and Stewart, 1977, p. 25. See also C. GAFFIEL, W.G. WEST, "Children's Rights in the Canadian Context", in H. BERKELEY, C. GAFFIELD, W.G. WEST, (eds.), *Children's Rights. Legal and Educational Issues*, Toronto, The Ontario Institute for Studies in Education, 1978, p. 4-5.

50. For a discussion about the role of middle-class interests in the legislative process (*formal social control*) see J. HAGAN, J. LEON, "Rediscovering Delinquency : Social History, Political Ideology and the Sociology of Law", (1977) 42 *American Sociological Review* 587.

51. M. VALVERDE, *op. cit.*, note 25, p. 24.

52. M. VALVERDE, *op. cit.*, note 25, p. 60.

53. *Id.*, p. 806. Bennett notes that child-saving reformers in late Victorian Canada held a social environmental view of youth criminality. P. BENNETT, *loc. cit.*, note 46, p. 75.

also for "implanting a sense of 'home feeling' and 'habits of industry and obedience' in their charges".[54]

With regard to the question stated above about the reasons why parliamentarians chose criminal law as the main sort of legal intervention for dealing with youth misbehavior, Hon. Mr. Scott addressed this point, but he did not provide a clear response. He noted that :

> [i]t is necessary that legislation should be had here for parliament, of course, deals with the criminal law, and the criminal law is under the jurisdiction of this parliament. The limited operation it has had outside of the criminal law has been confined to those minor offences that are recognized as penalties and punishments under provincial statutes.[55]

This was the position of Hon. Mr. Lougheed as well : "[t]his is a bill that comes peculiarly within the legislative authority of the parliament of Canada [...] parliament is charged with providing the necessary legislation incident to the criminal law of Canada".[56] Trépanier argues that the reason why parliamentarians turned to criminal law for regulating youth misbehavior was an issue of jurisdiction. Since child welfare and child protection legislation was under the exclusive legislative power of provinces, the only way Parliament could enact constitutionally valid regulations for addressing this issue was through criminal law legislation.[57] Consequently, parliamentarians would assimilate the situation of "neglected children" and "abused children" (provincial jurisdiction), to the situation of "criminal children" (federal jurisdiction), and therefore, they would be able to regulate all these situations through criminal law.[58]

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54. W.H. HOWLAND, quoted by P. BENNETT, *loc. cit., note* 46, p. 72. See P. BENNETT, "Turning 'Bad Boys' into 'Good Citizens' : the Reforming Impulse of Toronto's Industrial Schools Movements, 1883 to the 1920s", (1986) 78 :3 *Ontario History* 209.

55. CANADA, *Debates of the Senate*, 1906-1907 (19 April, 1907), p. 807.

56. CANADA, *Debates of the Senate*, 1906-1907 (22 April, 1907), p. 820.

57. J. TRÉPANIER, F. TULKENS, *op. cit.*, note 16, p. 21, 33.

58. In *Attorney General of British Columbia* v. *Smith*, [1967] S.C.R. 702, it was argued that the *Juvenile Delinquents Act* was *ultra vires* legislation since it related to the welfare of children, and such a matter was under the authority of provincial legislatures. The Supreme Court of Canada held the validity of the *Juvenile Delinquent Act* on the grounds that the Act "is genuine legislation in relation to criminal law in its comprehensive sense". *Ibid*, at para. 713. See also J.E. MAGNET, *Constitutional Law of Canada. Cases, Notes and Materials*, 8th ed., vol. 1, Edmonton, Juriliber Limited, 2001, p. 649-650.

Another reason for turning to criminal law for regulating youth misbehavior was that some of the behaviors that parliamentarians wanted to address through youth legislation were already regulated ("criminalized") by the Canadian criminal code. As a result, parliamentarians could use the existing criminal norms (regulation of behaviors) while avoiding the "paraphernalia of hostile procedure" through the use of youth courts (regulation of procedure and sanction).

Bill FFF died on Parliament's Order Paper when Parliament prorogued; nevertheless, it was reintroduced with minor amendments in the Senate during its following session as *Bill QQ*.[59] Several petitions were brought up to the House of Commons during the 1907-1908 session "praying for the enactment of a Juvenile Delinquents Act, similar to that introduced in the Senate by the Honorable Secretary of State, in 1907".[60] Among these requests, which came from all over Canada, we can find the petition of Reverend W. Saunders, Rural Dean, St. Edward's Church, and others of Montreal;[61] W.N. Kelly and others, of Medicine Hat and vicinity, Alberta;[62] H. Rowe and others, of Claresholm, Alberta;[63] Charles E. Tanner and others, of the Town of Pictou, Nova Scotia;[64] Lois R. Killam, President of the W.C.T.U., and others, of Yarmouth, Nova Scotia;[65] Peter McIntyre and others, of the City of St. John, New Brunswick;[66] E.C.

59. CANADA. *Debates of the Senate*, 1907-1908 (21 May, 1908), p. 971.

60. CANADA, *Journals of the House of Commons of the Dominion of Canada*, 1907-1908, p. 219. We can find an affinity between these requests and Howard Becker's notion of "moral enterprise" : "the process involved in creating an awareness of issues and following them through into the statute-book". G. MARSHALL, (ed.), *Oxford Dictionary of Sociology*, 2nd ed., Oxford, Oxford University Press, 1998, p. 430-431.

61. CANADA, *Journals of the House of Commons of the Dominion of Canada*, 1907-1908 (5 March, 1908), p. 219.

62. CANADA, *Journals of the House of Commons of the Dominion of Canada*, 1907-1908 (29 May, 1908), p. 477.

63. CANADA, *Journals of the House of Commons of the Dominion of Canada*, 1907-1908 (29 May, 1908), p. 477.

64. CANADA, *Journals of the House of Commons of the Dominion of Canada*, 1907-1908 (15 June, 1908), p. 526.

65. CANADA, *Journals of the House of Commons of the Dominion of Canada*, 1907-1908 (22 June, 1908), p. 544.

66. CANADA, *Journals of the House of Commons of the Dominion of Canada*, 1907-1908 (24 June, 1908), p. 548.

Whitman and others, of Censo, Nova Scotia;[67] and Reverend J.W. Porter, Superintendent of Baptist Home Missions, Guysborough, Nova Scotia.[68]

This sort of method was not an unusual practice. Private bodies, and among them social purity movements, relied very heavily on federal and provincial governmental institutions for implementing their reforms.[69] For instance, it is interesting to note that Mr. Scott, who first introduced this bill in the Senate and who addressed its audience about the need to "save the children", expressly declared that he was familiar with child saver institutions since his own son had been the president of one of these societies for years.[70] Mariana Valverde notes that "by the 1880s both the federal and provincial states seem to have acquired an almost unshakeable legitimacy in the eyes of the educated Anglophone middle classes".[71] She notes that social purity activists relied in their work, among other procedures, on letters to politicians. She continues :

> [t]hese private bodies interacted heavily with the state, however. They organized their work with a view to influencing state legislation and policy, as well as setting up pilot projects in public education and rescue work that might then be taken over, or at least funded, by the state. The state in turn responded to the pressure from these organizations and from public opinion as moulded by the moral reformers by taking moral initiatives with greater or lesser enthusiasm. The private bodies were much more powerful than their successors of today : in the absence of large government bureaucracies and associations of professionals, churches and women's groups

67. CANADA, *Journals of the House of Commons of the Dominion of Canada*, 1907-1908 (2 July, 1908), p. 568.

68. CANADA, *Journals of the House of Commons of the Dominion of Canada*, 1907-1908 (2 July, 1908), p. 568.

69. M. VALVERDE, *op. cit.*, note 25, p. 26.

70. CANADA, *Debates of the Senate*, 1907-1908 (4 June, 1908), p. 1044. His son was W. L. Scott, Local Master for the Supreme Court of Ontario and President of the Ottawa Children's Aid Society.

71. M. VALVERDE, *op. cit.*, note 25, p. 26.

commanded a great deal of respect and were in many ways treated as experts, not as opinionated interest groups.[72]

Moral and welfare language can be found as well in the speech pronounced by the Hon. Mr. Beique at the Senate during the second reading of *Bill QQ* : "active children are full of mischief, and vicious tendencies are easily developed if any occasion is afforded to them";[73] "still more desirable is to spare no efforts in coming to the rescue of the poor, and especially of children".[74]

Much of the discussion in the Senate about *Bill QQ* was devoted to the regulation of juvenile courts and the required personal characteristics of juvenile court judges.[75] With regard to the former, several members of the Senate were concerned about the fact that the regulation of such courts by the federal government would infringe subsection 6 of section 92 of the *British North America Act*.[76] This subsection notes that provinces have exclusively the right to "[t]he establishment, maintenance, and management of public and reformatory prisons, in and for the province". However, such an argument was rejected by noting that the clauses of *Bill QQ* were drafted in such a way to prevent both the federal government from invading provincial jurisdiction and the provincial institutions from being interfered with.[77]

In addition, it was pointed out that the drafted legislation dealt with criminal law regulation, and subsection 27 of section 91 of the *British North America Act*[78] states that the

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72. *Id.*, p. 52. With regard to the concept of interest groups, it has been highlighted that, from a democratic perspective, their limitation is that "they tend to represent mainly the wealthier and better educated sections of the public, leaving the poor and minorities largely unrepresented". G. MARSHALL, *op. cit.*, note 60, p. 322.

73. CANADA, *Debates of the Senate*, 1907-1908 (21 May, 1908), p. 975.

74. *Id.*

75. For an analysis of the development of youth courts in the United States see A.M. PLATT, *The Child Savers — The Invention of Juvenile Delinquency*, 2nd ed., Chicago, University of Chicago, 1977.

76. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92 (6), reprinted in R.S.C. 1985, App. II, No. 5 (referred during the debates of the Senate as the *British North America Act*, now the *Constitution Act, 1867*).

77. CANADA, *Debates of the Senate*, 1907-1908 (16 June, 1908), p. 1153.

78. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(27), reprinted in R.S.C. 1985, App. II, No 5 (referred during the debates of the Senate as the *British North America Act*, now the *Constitution Act, 1867*).

Parliament of Canada has exclusive jurisdiction for enacting criminal law legislation and its procedure. Therefore, the drafted legislation, which was intended to regulate the criminal behavior of young population, was a matter coming within the classes of subjects assigned exclusively to the Parliament of Canada and for which it had exclusive legislative authority.[79] Nevertheless, it was noted that the provincial legislatures were exclusively empowered under the *British North America Act* to constitute, maintain, and organize the juvenile courts.[80] Consequently, the Parliament of Canada was the authority to regulate these sorts of courts, but provincial legislatures were the authority to decide their constitution, maintenance, and organization.[81]

Concerning the required personal characteristics of juvenile court judges, their paternal role is well remarked by Hon. Mr. Coffey in his speech :

> [n]o matter what standing the applicant may hold in the community — no matter how persistently and how ardently his friends may sue for his appointment as juvenile court judge, it were but a crime to fill out a parchment for him unless he possessed a well balanced mind and a warm, sympathetic nature — firm where needs be, but ever recognizing in the little waif before him a child of nature who has wandered from the path of rectitude but who should be directed homeward to the ideal once again.[82]

Bill QQ was read a third time in the Senate on June 16, 1908[83] and passed to the House of Commons for its concurrence on June 18, 1908.[84] The *Bill* was first read in the House of Commons on June 19, 1908[85] and it received its second and

79. CANADA, *Debates of the Senate*, 1907-1908 (16 June, 1908), p. 1160.

80. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(14), reprinted in R.S.C. 1985, App. II, No 5 (referred during the debates of the Senate as the *British North America Act*, now the *Constitution Act, 1867*).

81. CANADA, *Debates of the Senate*, 1907-1908 (16 June, 1908), p. 1160.

82. CANADA, *Debates of the Senate*, 1907-1908 (21 May, 1908), p. 976.

83. CANADA, *Debates of the Senate*, 1907-1908 (16 June, 1908), p. 1149-1165.

84. CANADA, *Journals of the House of Commons of the Dominion of Canada*, 1907-1908 (18 June, 1908), p. 538.

85. CANADA, *Debates of the House of Commons*, 1907-1908 (19 June, 1908), p. 10915-10916.

third reading on July 8, 1908.[86] During the second reading of the *Bill*, the Minister of Justice, Hon. A.B. Aylesworth, addressed his audience about the purposes of the drafted legislation. It is interesting to note that the "semantics" of his speech are very different from the "semantics" of the speech pronounced by the Secretary of State (Hon. Scott) when first introduced the *Bill* in the Senate. The speech of the former had a pragmatic approach to the issue, while the speech of the latter was strongly grounded in moral and welfare language. Hon. A. B. Aylesworth noted that "[t]he general effect of this Bill I think I may summarize by saying that it is intended to obviate the necessity for children, when accused of crime, being tried before the ordinary tribunals".[87]

Bill QQ was assented to as *An Act respecting Juvenile Delinquents* on July 20, 1908.[88] Even though it has been argued that the House of Commons did not consider the *Bill* sufficiently,[89] it seems that there was a strong pressure from the Minister of Justice to pass the *Bill* through the House of Commons within that parliamentary session.[90] This can be corroborated by Mr. Lancaster's speech in the House of Commons :

> [h]ere is a statute which is going to affect the character and the liberty of every little child, and I protest most seriously against the levity that is going on in this chamber. [...] Here is an Act respecting juvenile delinquents, a brand new law, brought in during the dying hours of the session by the Minister of Justice, containing thirty-five sections, and after midnight we are asked to pass, but not consider it. It affects the liberty, the character and the treatment of every little child in this country. I am not going to stand for this Bill going through with this most uncalled for haste, and I think the

86. CANADA, *Debates of the House of Commons*, 1907-1908 (8 July, 1908), p. 12399-12406.

87. CANADA, *Debates of the House of Commons*, 1907-1908 (8 July, 1908), p. 12399.

88. CANADA, *Debates of the Senate*, 1907-1908 (20 July, 1908), p. 1738.

89. CANADA, DEPARTMENT OF JUSTICE, *précitée*, note 31.

90. *Bill QQ* was read the third time on July 8, 1908. The Fourth Session of the Tenth Parliament of the Dominion of Canada was to close on July 20, 1908. If the bill was not read third time before July 20, the bill would have had to be reintroduced again the next parliamentary session.

> Minister of Justice is not doing his duty in trying to rush it through in this way. [91]

The *Juvenile Delinquents Act* was to regulate youth criminal misbehaviour until the year 1984, when the *Young Offenders Act* came into force abrogating the former.[92] Nevertheless, an amendment enacted in the year 1924 would increase the sorts of behaviours subjected to youth criminal intervention by incorporating "status offences" to the *Juvenile Delinquents Act.* These "offenses", involving such matters as sexual immorality and truancy, were only offences if committed by a young person. The same kind of behaviour committed by an adult, however, was not an offence under any federal or provincial statute.[93]

1.2. *AN ACT TO AMEND THE JUVENILE DELINQUENTS ACT*, S.C. 1924, C. 53

In the previous subsection it was noted that the main reasons for enacting the *Juvenile Delinquents Act* were, on the one hand, compelling aspirations to regulate children's misbehavior avoiding the "paraphernalia of hostile procedure" ("rescue" the young person from an undesirable socio-familial environment, and from both the "adult criminal trial" and the "adult sanctions"), and on the other hand, a situation of distribution of legislative powers. Parliament was required to turn to criminal law in order to have legislative jurisdiction for regulating children's misbehavior.

During the explored seventy-seven year period of amendments to the *Juvenile Delinquents Act* that goes from July 20, 1908, when this Act received Royal Assent, to April 2, 1984, date in which the *Young Offenders Act* entered into force, the

91. CANADA, *Debates of the House of Commons*, 1907-1908 (8 July, 1908), p. 12400-12401.

92. *Juvenile Delinquents Act, précitée*, note 3.

93. Bala and Clarke note that the concept of "status offences" refers to certain acts that are only offenses for persons having a certain status. In the case under analysis, such a status is "childhood". N. BALA, K. CLARKE, *op. cit.*, note 23, p. 168.

Juvenile Delinquents Act was amended thirteen times.[94] Even though some of these amendments had significant consequences, this study focuses on a specific amendment: *An Act to amend the Juvenile Delinquents Act*, S.C. 1924, c. 53. For instance, with regard to the importance of the amendments that were enacted during the explored period, the amendment assented to on June 4, 1921[95] modified the definition of "child" stated on subsection 2(a) by raising the age limit: a "child" would be a boy or a girl apparently or actually under the age of eighteen years, and not under the age of sixteen. This definition would be modified again by the amendment assented to on June 14, 1929:[96]

> 'child' means a boy or girl apparently or actually under the age of sixteen years: Provided, that in any province or provinces as to which the Governor in Council by proclamation has directed or may hereafter direct, "child" means any boy or girl apparently or actually under the age of eighteen years: Provided further, that any such proclamation may apply either to boys only or to girls only or to both boys and girls.

By proclamation of the Governor General in Council assented to March 12, 1930, for the Province of Alberta the term "child" was to be defined, in the case of girls only, as a

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94. These amendments are: *An Act to Amend the Juvenile Delinquents Act*, S.C. 1912, c. 30 (assented to on March 12, 1912); *An Act to Amend the Juvenile Delinquents Act*, S.C. 1914, c. 39 (assented to on June 12, 1914); *An Act to Amend the Juvenile Delinquents Act*, S.C. 1921, c. 37 (assented to on June 4, 1921); *An Act to Amend the Juvenile Delinquents Act*, S.C. 1924, c. 53 (assented to on July 19, 1924); *An Act to respecting Juvenile Delinquents Act*, S.C. 1929, c. 46 (assented to on June 14, 1929); *An Act to Amend the Juvenile Delinquents Act*, S.C. 1932, c. 17 (assented to on April 14, 1932); *An Act to Amend the Juvenile Delinquents Act*, S.C. 1935, c. 41 (assented to on June 28, 1935); *An Act to Amend the Juvenile Delinquents Act, 1929*, S.C. 1936, c. 40 (assented to on June 23, 1936); *An Act to Amend the Juvenile Delinquents Act, 1929*, S.C. 1947, c. 37 (assented to on June 27, 1947); *An Act to Amend the Statute Law*, S.C. 1949, c. 13, s. 25 (assented to on March 25, 1949); *An Act to Amend The Juvenile Delinquents Act, 1929*, S.C. 1951, c. 30 (assented to on June 20, 1951); *An Act to Change the Names of the Territorial Court of the Yukon Territory and the Territorial Court of the Northwest Territories*, S.C. 1972, c. 17 (assented to on June 30, 1972); and *An Act to Amend the Judges Act, to Amend An Act to Amend the Judges Act and to Amend certain other Acts in respect of the Reconstitution of the Courts in New Brunswick, Alberta and Saskatchewan*, S.C. 1979, c. 11, s. 10 (assented to on March 8, 1979).

95. *An Act to Amend the Juvenile Delinquents Act*, S.C. 1921, c. 37.

96. *An Act to respecting Juvenile Delinquents Act*, S.C. 1929, c. 46.

child apparently or actually under the age of eighteen years.[97] This definition would be modified again for the Province of Alberta on May 9, 1935 by proclamation of the Governor General in Council : the term "child" was to be defined, in the case of girls and boys, as a child apparently or actually under the age of eighteen years.[98] Finally, the definition of "child" stated on the *Juvenile Delinquents Act* would be modified again by the amendment assented to on June 20, 1951 : "'child' means any boy or girl apparently or actually under the age of sixteen years, or such other age as may be directed in any province pursuant to subsection two".[99] Accordingly, that same amendment modified section 2 of the *Juvenile Delinquents Act* :

> The Governor in Council may from time to time by proclamation
>
> (a) direct that in any province the expression 'child' in this Act means any boy or girl apparently or actually under the age of eighteen years, and any such proclamation may apply either to boys or to girls only or to both boys and girls; and
>
> (b) revoke any direction made with respect to any province by a proclamation under this section, and thereupon the expression 'child' in this Act in that province means any boy or girl apparently or actually under the age of sixteen years.[100]

Concerning the focus of this subsection, *An Act to amend the Juvenile Delinquents Act*, S.C. 1924, c. 53, this piece of legislation modified four sections of the *Juvenile Delinquents Act*, among them the definition of "juvenile delinquent" as stated in 1908. This amendment expanded the concept of juvenile delinquent as stated in section 2 to include "sexual immorality or any similar form of vice" as a ground for considering a child a young offender :

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97. L.S., WILLINGDON, "Proclamation", 12 March, 1930, Can. Gaz. 1930.63.3504-3505.

98. L.S., BESSBOROUGH, "Proclamation", 9 May, 1935, Can. Gaz. 1935.68.2485.

99. *An Act to Amend the Juvenile Delinquents Act, 1929*, S.C. 1951, c. 30, s. 1.

100. *Id.*, s. 2.

> "juvenile delinquent" means any child who violates any provision of the *Criminal Code*, chapter one hundred and forty-six of the Revised Statutes, 1906, or of any Dominion or provincial statute, or of any by-law or ordinance of any municipality, for which violation punishment by fine or imprisonment may be awarded, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provisions of any Dominion or provincial statute; [emphasis added]

Mariana Valverde argues that in the 1920s there was a decline of social purity education in Canada that "did not result in the establishment of scientific sex education but rather simply in a vacuum".[101] However, it is interesting to highlight that in this same period Parliament passed an amendment to the *Juvenile Delinquents Act* that was clearly intended to regulate sexual behavior. Indeed, this is the only amendment plainly intended to regulate sexual behavior that was passed in the 1908-1983 period.

Bill No. 27, An Act to amend the Juvenile Delinquents Act, was first introduced in the House of Common on April 2, 1924.[102] The purpose of this *Bill*, as stated by the Minister of Justice, Hon. Ernest Lapointe, was "to make some minor changes in the existing act [...] [which] have been asked for by the various associations interested in child welfare, and by the various courts that deal with juvenile delinquents".[103] As was later highlighted by one Parliamentarian, one of these "minor" changes would completely modify the definition of juvenile offender by adding such a vague clause[104] as "who is guilty of sexual immorality or similar form of vice" to the original definition.[105] One of the

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101. M. VALVERDE, *op. cit.*, note 25, p. 75.

102. CANADA, *Debates of the House of Commons*, 1924 (2 April, 1924), p. 940.

103. CANADA, *Debates of the House of Commons*, 1924 (23 June, 1924), p. 3507.

104. For a discussion of the notion of "vagueness" and its consequences in legal language, see H. HART, *El Concepto de Derecho*, trans. by G. CARRIÓ, Buenos Aires, Abeledo Perrot, 1963, p. 155-191; G. CARRIÓ, *Notas sobre Derecho y Lenguaje*, 4th ed., Buenos Aires, Abeledo Perrot, 1994, p. 17-48.

105. The Minister of Justice declared that he had a letter from the Toronto League of Women Voters suggesting an amendment to the *Juvenile Delinquents Act* by adding the wording "or who is guilty of sexual immorality or any other form of vice" to the definition of "juvenile delinquent". These sorts of associations identified themselves as "associations for the protection of children". CANADA, *Debates of the House of Commons*, 1924 (23 June, 1924), p. 3509.

immediate consequences of this amendment was to increase the number of "controlled" behaviors, or, as stated by Mr. Meighen during the debate at the House of Commons, to virtually create a new offence.[106] Another immediate consequence was to increase the discretion of magistrates for deciding "what constitutes a vice on the part of a juvenile delinquent".[107]

Nevertheless, the Minister of Justice rejected the idea that this provision was likely to be abused. In addition, he noted that "the amendment is in the interest of the children themselves and for the proper administration of the act".[108] Criminal law would be seen by parliamentarians as a tool of moral and welfare reform as well. While discussing the amendment to the definition of the notion of "juvenile delinquent", Sir Henry Dayton asked the Minister of Justice whether "the term 'or other form of vice' would be confined to offences under the *Criminal Code*".[109] He answered "no".[110] The implications of such an answer were not only to allow magistrates to assume the role of Parliament and decide whether certain behavior was a criminal offence, but also to leave aside the conception of the rule of law in its procedural (formal) sense.[111]

As a result of the discussion in the House of Commons, the original wording stating "or who is guilty of sexual immorality or any other form of vice" was changed to or who is

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106. CANADA, *Debates of the House of Commons*, 1924 (23 June, 1924), p. 3508. A similar phenomenon was observed by Anthony Platt in his study of the development of juvenile courts in the United States :

> The juvenile court movement went far beyond a humanitarian concern for the special treatment of adolescents. It brought within the ambit of governmental control a set of youthful activities that had been previously ignored or handled informally. It was not by accident that the behavior selected for penalizing by the child savers — drinking, begging, roaming the streets, frequenting dance-halls and movies, fighting, sexuality, staying out late at night, and incorrigibility — was primarily attributable to the children of lower-class migrant and immigrant families. A. PLATT, *op. cit.*, note 75, p. 139.

107. CANADA, *Debates of the House of Commons*, 1924 (23 June, 1924), p. 3508.

108. *Id.*

109. CANADA, *Debates of the House of Commons*, 1924 (23 June, 1924), p. 3508.

110. *Id.*

111. J. RAZ, *The Authority of the Law : Essays on Law and Morality*, Oxford, Clarendon Press, 1979, p. 210-229.

guilty of "sexual immorality or any similar form of vice".[112] It seems that the intention of legislators by requiring such a change was to restrict the notion of "vice" to sexual behaviors. After receiving its third reading, *Bill no. 27, An Act to amend the Juvenile Delinquents Act*, was passed to the Senate.[113] On June 30, 1924, the bill received its third reading at the Senate without being discussed in any of its readings.[114] The bill was assented to on July 19, 1924.[115] This sort of criminal intervention would last until 1984, when the *Young Offenders Act* came into force.

1.3. SUMMARY

The purpose of this section was to explore the origins and rhetoric of the Canadian youth criminal justice intervention. As noted, this intervention was originally strongly grounded in the notion of "child protection". The purpose of such an intervention was to "rescue" the child, both from an undesirable socio-familial environment and the "paraphernalia of hostile procedure", in an attempt to "prevent" her from becoming a delinquent. If the child was already a "juvenile delinquent", the purpose of the criminal intervention was to "convert" her into a law abiding citizen who would observe society's norms. Because of this, any attempt to "protect the child" was seen as a strategy "to protect society". Consequently, parliamentarians and governmental officials did not

112. CANADA, *Debates of the House of Commons*, 1924 (23 June, 1924), p. 3510, 3512. Hagan and Leon explore this amendment; however, they analyze the original wording as if it was the final wording. They do not acknowledge the debate whose outcome was a modification of this vague phrase. J. HAGAN, J. LEON, *loc. cit.*, note 50, p. 593 [footnote 5]. Bala notes that "[u]nder the *Juvenile Delinquents Act*, relatively few females were charged, although girls were far more frequently charged with the vague status offence of 'sexual immorality' and 'unmanageability' than boys. Some girls were charged with these delinquent acts for prostitution-related activities, and it was quite common for parents to have this type of charge brought when their daughters were perceived as being 'out of control' or merely sexually active". N. BALA, *op. cit.*, note 6, p. 53.

113. CANADA, *Debates of the House of Commons*, 1924 (23 June, 1924), p. 3519.

114. CANADA, *Debates of the Senate*, 1924 (30 June, 1924), p. 515.

115. CANADA, *Debates of the House of Commons*, 1924 (19 July, 1924), p. 4874-4875.

perceive any conflict between the implementation of "child protection measures" and "measures to protect society".

The approach mentioned above was strongly grounded in an environmental understanding of crime : children were not born criminals, but they would become criminals if their socio-familial environment did not provide them with suitable moral standards. Consequently, parliamentarians and policy-makers recognized the identification of "problematic situations" that could lead to crime as a compelling concern. In addition, due to a matter of constitutional federal-provincial division of powers, parliamentarians only had jurisdiction to implement intervention strategies through criminal law. As a result, parliamentarians resorted to criminal law (through a special child-oriented procedure) to regulate "problematic situations" that, from an environmental perspective, could lead to crime. Situations like the "abused child", the "neglected child", the "criminal child", and, after the 1924 amendment to the *Juvenile Delinquents Act*, the "sexually immoral child", were identified as "dangerous/risky situations" that could lead to crime, and therefore, requiring intervention (criminal law intervention). The aim of such an intervention was "to mend if possible the defective situation and reinstate the individual at fault"[116] without resorting to "a great part of the paraphernalia of hostile procedure".[117]

The next section explores the theoretical changes that have taken place in the Canadian youth criminal law intervention since the repeal of the *Juvenile Delinquents Act* and the enactment of both the *Young Offenders Act* and the *Youth Criminal Justice Act.*

2. TOWARDS AN INTERVENTION TO "PROTECT SOCIETY" : THE *YOUNG OFFENDERS ACT* AND THE *YOUTH CRIMINAL JUSTICE ACT*[118]

Having been given Royal Assent in the year 1982, the *Young Offenders Act* introduced a new approach to youth

116. G. MEAD, *loc. cit.*, note 2, p. 594.

117. *Id.*

118. The following analysis deals with Canadian federal legislation. The analysis of the enacted provincial legislation is beyond the scope of this research.

criminal law intervention.[119] Such an approach can be considered as a breaking point within the Canadian youth criminal justice system. On the one hand, the *Young Offenders Act* would move away from the previous approach to youth crime based on a unified concept of protection were the notions of "child protection", "protection of society", and "rehabilitation and reintegration" went "hand in hand". From now on, the youth criminal justice system would give greater weight to the notions of "youth accountability", "deterrence", and "protection of society". Such an approach would be opposed to the notion of "protection of the young", and would lead the youth criminal justice system to become closer to the penal rationality of the adult criminal justice system.

As Trépanier notes, the *Young Offenders Act* in its declaration of principles would place the criminal behaviour committed by the young person as the main factor for deciding the type of intervention to implement.[120] This piece of legislation would see the notions of "child protection" and "protection of society" as opposed and co-existing objectives that in some situations may lead to different types of interventions. In addition, this Act would place more emphasis on society's right to be protected from crime than on the child welfare approach that characterized the *parens patriæ* philosophy in which the *Juvenile Delinquents Act* was grounded.

On the other hand, the *Young Offenders Act* would be designed to meet the standards embodied in the *Canadian Charter of Rights and Freedoms*. This latter instrument,

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119. S.W. BARON, T. F. HARTNAGEL, "'Lock'em up': Attitudes toward Punishing Juvenile Offenders", in T. FLEMING, P. O'REILLY, B. CLARK, (eds.), *Youth Injustice. Canadian Perspective*, 2nd ed., Toronto, Canadian Scholar's Press Inc., 2001, p. 371, at p. 372.

120. J. TRÉPANIER, *loc. cit.*, note 8, p. 278-279; N. BALA, *op. cit.*, note 6, p. 66. See *Young Offenders Act, précitée*, note 3, s. 3. See also *R. v. M. (S.H.)*, [1987] 35 C.C.C. (3d) 515 (Alta. C.A.), 524 :

> The enactment of the *Young Offenders Act* marked a profound change in the philosophy of dealing with youthful offenders. The *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, previously in force required (s. 38) that the youthful offender "be treated, not as a criminal, but as a misdirected and misguided child and one needing aid, encouragement, help and assistance". The declaration of principle in section 3 of the *Young Offenders Act* (partly quoted) places much greater emphasis on the responsibility of young persons for their own actions while also prescribing that they should not "in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults".

which was enacted in 1982, guarantees individuals minimum standards of due process that both the Canadian adult and youth criminal justice systems have to observe. Since the *Juvenile Delinquents Act* was incapable of addressing some due process rights, its revision was a compelling issue.[121]

The *Youth Criminal Justice Act* was enacted in 2002. This *Act*, which came into force on April 1, 2003, replaced the *Young Offenders Act*. Nevertheless, it kept a similar criminal law philosophy to the *Young Offenders Act* : the *Youth Criminal Justice Act* would also put a strong emphasis on the notion of "protection of society" and would perceive such a notion as in conflict with the notion of "child protection". The purpose of the *Youth Criminal Justice Act* was to address some problematic issues underlying the *Young Offenders Act*, such as the transfer of cases to adult courts, the overuse of youth courts for minor cases, and the high rate of incarceration, not only at the sentencing stage of the process, but also at the pre-trial detention stage.[122] Moreover, this new act would encourage the use of extrajudicial measures to address problematic behaviour. Even though these sorts of diversion measures existed in the *Young Offenders Act*, they were not sufficiently regulated, nor did the act provide enough guidance for their use.

This section explores, up to the present, the guiding theories and rhetoric that have justified the different modifications to the principles and objectives of the Canadian youth criminal legislation since the repeal of the *Juvenile Delinquents Act*. This section explores both the *Young Offenders Act* and the *Youth Criminal Justice Act*.

2.1. THE *YOUNG OFFENDERS ACT*

Having been given Royal Assent on July 7, 1982, the *Young Offenders Act* came into force on April 2, 1984. Nevertheless, the provision referring to the minimum uniform age of under 18 for people dealt with under this Act would not

121. J.H. HYLTON, *loc. cit.*, note 44, p. 566-567; N. BALA, *op. cit.*, note 6, p. 11.

122. R. BARNHORST, "The Youth Criminal Justice Act : New Directions and Implementation Issues", (2004) 46:3 *Canadian Journal of Criminology and Criminal Justice* 231, p. 232-233, 240.

become mandatory until April 1, 1985.[123] This new act was to address several problematic issues of the *Juvenile Delinquents Act*, among them the divergence between provinces with regard to the maximum age for a person to be considered a juvenile delinquent, which varied all across Canada from under 16 to under 18.[124]

The *Young Offenders Act* would only deal with offences against the *Criminal Code* and other federal statutes and regulations, leaving minor behavioural problems to the provinces under child welfare and youth protection laws. Therefore, offences such as infractions of provincial statutes and municipals by-laws, and status offences were excluded. In addition, the *Young Offenders Act* reduced the scope of the concept of "delinquency" to criminal offences. Moreover, the assimilation of delinquency cases to neglect and abuse cases disappeared.[125] Because of this, Hylton notes that "unlike the JDA [*Juvenile Delinquents Act*], the YOA [*Young Offenders Act*] [was] clearly criminal law".[126] In addition, the *Young Offenders Act* put a strong emphasis on the notion of "protection of society" and perceived such a notion as in conflict with the notion of "child protection."[127] The *Young Offenders Act* also diminished the power of child welfare authorities in the administration of sentences. Moreover, in order to address the standards guarantee in the *Charter*, the *Young Offenders Act* introduced extensive due process rights (for instance, right to counsel, right to participate in hearings, right to have a disposition reviewed, etc.).[128]

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123. CANADA, SOLICITOR GENERAL, *Highlights of the Young Offenders Act*, Ottawa, Queen's Printer, 1982, p. 3.

124. *Id.*, p. 6. The age level in the various provinces and territories was as follows : under 18 years in Quebec and Manitoba, under 17 years in British Columbia, and under 16 years in all remaining provinces and territories. In Newfoundland, where the *Juvenile Delinquents Act* did not apply, the age under provincial legislation was 17 years. See CANADA, *Debates of the House of Commons*, 1980-1983 (29 May, 1981), p. 10086.

125. J. TRÉPANIER, "Juvenile Courts after 100 Years : Past and Present Orientations", (1999) 7 *European Journal on Criminal Policy and Research* 303, p. 320; J. DESROSIERS, L. LEMONDE, « Les centres de réadaptation : protéger les uns et punir les autres (1869-) » (2000) 34 *R.J.T.* 435.

126. J.H. HYLTON, *loc. cit.*, note 44, p. 568. See N. BALA, *op. cit.*, note 6, p. 66.

127. CANADA, SOLICITOR GENERAL, *précitée*, note 123, p. 2, 4-5; *R.* v. *T. (V.) [V.T.]*, [1992] 1 S.C.R. 749, 765; *R.* v. *M. (J.J.) [J.J.M.]*, [1993] 2 S.C.R. 421, 429.

128. N. BALA, *op. cit.*, note 6, p. 65-66.

The purpose of this subsection is to analyse the principles setting out the philosophy of the *Young Offenders Act*, and to highlight the differences between this act and the *Juvenile Delinquents Act*. This subsection also explores a twenty-year period of amendments to the *Young Offenders Act* (1983-2002) and focuses on a specific amendment : *An Act to amend the Young Offenders Act and the Criminal Code*, S.C. 1995, c. 19, ss. 1-36.[129] One of the purposes of this amendment was to modify the declaration of principles as stated in the *Young Offenders Act* as enacted in 1982 by incorporating the notion of "crime prevention" into them.

2.2. THE *YOUNG OFFENDERS ACT* : TOWARDS A DIFFERENT NOTION OF YOUTH CRIMINAL JUSTICE INTERVENTION

In the year 1961 the Department of Justice appointed an advisory committee for evaluating the problem of juvenile delinquency in Canada, which released its report four years later.[130] The terms of reference of such a committee were to :

a) inquire into and report upon the nature and extent of the problem of juvenile delinquency in Canada;

b) hold discussions with appropriate representatives of provincial governments with the object of finding ways and means of ensuring effective co-operation between federal and provincial governments acting within their respective constitutional jurisdiction; and

c) make recommendations concerning steps that might be taken by the Parliament and Government of Canada to meet the problem of juvenile delinquency in Canada.[131] [emphasis added]

With regard to the latter term of reference, this committee released 100 recommendations, all of them very much

129. *An Act to Amend the Young Offenders Act and the Criminal Code*, S.C. 1995, c. 19, ss. 1-36 (hereinafter "*An Act to Amend the Young Offenders Act and the Criminal Code*, S.C. 1995, c. 19"). Assented to on June 22, 1995.

130. CANADA, DEPARTMENT OF JUSTICE, REPORT OF THE COMMITTEE ON JUVENILE DELINQUENCY, *Juvenile Delinquency in Canada*, Ottawa, Queen's Printer, 1965.

131. *Id.*, p. 2.

oriented towards the notion of "child protection". Among these recommendations, the committee stated that "[j]uvenile law enforcement responsibilities of detection, apprehension and deterrence should be accomplished in such a way as not to compromise effective principles of rehabilitation or to neglect preventive functions".[132] With regard to this principle, it is possible to identify in its "semantics" the notions of "protection of society" (detection, apprehension, and deterrence of criminal behaviour) and "protection of the child" (rehabilitation and prevention). In addition, it is possible to note that the committee decided that the latter notion would take priority over the former. Consequently, for this committee, the purpose of youth criminal law intervention was still very much oriented towards the notion of "child protection", and such a notion was given priority over the notion of "protection of society". The recommendations released by this report, which suggested some minor and major changes to the *Juvenile Delinquents Act*, did not result in any amendment of the Act.[133] However, they did result in the introduction of *Bill C-192 The Young Offenders Act* in the House of Commons on November 16, 1970.[134] Nevertheless, this *Bill* died on the Order Paper at the end of the 1970-1972 Parliament Session.[135]

In the year 1973 the Solicitor General of Canada established a committee for undertaking "a review of the developments that had taken place in the field since Bill C-192".[136] In addition, "this Committee was to consider the deliberations of a Federal/Provincial Joint Review Group [...] for the purpose of reviewing the programs, services and financial implications as well as the legislation involving young persons in conflict with

132. *Id.*, p. 288 [recommendation No 30].

133. For an enumeration of the amendments to the *Juvenile Delinquents Act*, see *précitée*, note 94.

134. CANADA, *Debates of the House of Commons*, 1970-1971 (16 November, 1970), p. 1171.

135. CANADA, *Debates of the House of Commons*, 1980-1983 (15 April, 1981), p. 9312.

136. CANADA, SOLICITOR GENERAL, REPORT OF THE SOLICITOR GENERAL'S COMMITTEE ON PROPOSALS FOR NEW LEGISLATION TO REPLACE THE JUVENILE DELINQUENTS ACT, *Young Persons in Conflict with the Law*, Ottawa, Queen's Printer, 1975, at p. 6.

the law in Canada".[137] The report released in the year 1975 had a different approach to the issue of youth criminal behaviour from the report released in the year 1965. First of all, this report did not recommend a modification of the *Juvenile Delinquents Act*, but the enactment of a new piece of legislation.[138] The recommended piece of legislation, *An Act respecting young persons in conflict with the law and to repeal the Juvenile Delinquents Act*, would become the *Young Offenders Act* after some minor and major modifications.[139] Second, the report expressly and openly started to recognize the notions of "child protection" and "protection of society" as issues that sometimes may conflict between each other.[140] Finally, the report released by the Solicitor General of Canada began to show some concerns about the observance of the child's rights to due process.[141]

In the year 1977 the Solicitor of General Canada released a new report based on the proposals, recommendations, objections, and amendments put forward in the course of the consultations of the 1975 report.[142] The 1977 report also proposed that a new piece of legislation, the *Young Offenders Act*, replaces the *Juvenile Delinquents Act*.[143] However, the proposed piece of legislation was not a novel draft, but an amended version of the 1975 *An Act respecting young persons in conflict with the law and to repeal the Juvenile Delinquents Act*. The 1977 version addressed the recommendations that provincial and territorial governments, as well as interested groups and individuals, made to the 1975 version.

The conflict between the notions of "child protection" and "protection of society" in the 1977 version is much more evident than in the 1975 version. For instance, both drafts had a

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137. *Id.*

138. *Id.*, p. 7.

139. *Id.*, p. 84-104.

140. *Id.*, p. 3, p. 59-60, 70.

141. *Id.*, p. 3, p. 11, 15, 33-36. This study is not interested in analyzing whether there is any sort of association or correlation between the recognition of the child's rights to due process, and the movement from the notion of "child protection" to the notion of "protection of society". Nevertheless, this study recognizes that such a theoretical analysis is extremely relevant.

142. CANADA, SOLICITOR GENERAL, *Highlights of the Proposed New Legislation for Young Offenders*, Ottawa, Queen's Printer, 1977.

143. *Id.*, p. 12.

declaration of principles in their preamble, but their approach to youth crime would be different. The first paragraph of the preamble in the 1975 version stated that :

> [y]oung persons in conflict with the law should bear responsibility for their contraventions but should not be held accountable therefor in the same manner, or suffer the same consequences thereof, as adults, but, rather, should be considered as persons who, because of their state of dependency and level of development and maturity, have special needs and require aid, encouragement and guidance and, where appropriate, supervision, discipline and control.[144]

On the other hand, the first three paragraphs of the preamble to the 1977 version would put more emphasis on the notion of "protection of society" than on the notion of "child protection" :

> [y]oung persons who commit offences should bear responsibility for their contraventions and while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, society must nonetheless be afforded the necessary protection for such illegal behaviour.
>
> In affording society protection from illegal behaviour, it is to be recognized that young persons require supervision, discipline and control, but also, because of their state of dependency and level of development and maturity, young persons have special needs and require guidance and assistance.
>
> Where not inconsistent with the protection of society consideration should be given to using alternative social and legal measures for dealing with young persons who have committed offences, which come within the jurisdiction of this Act.[145] [emphasis added]

The preamble to the *Young Offenders Act*, after some minor amendments, would follow this latter version. The 1977 version would be introduced in Parliament as *Bill C-61,*

144. CANADA, SOLICITOR GENERAL, REPORT OF THE SOLICITOR GENERAL'S COMMITTEE ON PROPOSALS FOR NEW LEGISLATION TO REPLACE THE JUVENILE DELINQUENTS ACT, *précitée*, note 136, p. 84.

145. CANADA, SOLICITOR GENERAL, *précitée*, note 142, p. 12.

the *Young Offenders Bill*, by the Solicitor General, Hon. Bob Kaplan, on February 16, 1981.[146] This *Bill* would receive Royal Assent on July 7, 1982.[147]

During the second reading of the bill the Solicitor General noted that :

> The proposed legislation blends three principles. The first is that young people should be held more responsible for their behaviour, but not wholly accountable since they are not yet fully mature and are dependent on others. The second point is that society has a right to protection from illegal behaviour, even though committed by a minor. The third point is that young persons have the same rights to due process of law, natural justice and fair and equal treatment as adults, and that these rights must be guaranteed by special safeguards. Thus, the bill is intended to strike a reasonable and acceptable balance between the needs of young offenders and the interests of society.[148] [emphasis added]

It is interesting to note that, for the Solicitor General, the notions of "child protection" and "protection of society" were compelling principles, but at the same time, principles that can conflict with each other (besides, the notion of "child protection" started to be left without content). Similar position was held by Hon. Marcel Lambert :

> [w]e have to look to the protection of society. The state has a duty toward its citizens. Citizens have a right to live their peaceful lives uninjured. It is not a hazard of my life that I must run the risk of being robbed, of being mugged, of my life being taken or having my property vandalized. That is not the role of our citizens. It is the duty of the state to protect them. It is the duty of the remaining citizens not to inflict those damages upon their fellow citizens.[149]

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146. CANADA, *Debates of the House of Commons*, 1980-1983 (16 February 1981), p. 7258. A similar bill (*Bill C-411, An Act to amend the Criminal Code*) was introduced in the House of Commons on October 30, 1978. However, it died on the Order Paper when Parliament prorogued. See CANADA, *Debates of the House of Commons*, 1978-1979 (30 October, 1978), p. 583.

147. CANADA, *Debates of the House of Commons*, 1980-1983 (7 July, 1982), p. 19115.

148. CANADA, *Debates of the House of Commons*, 1980-1983 (15 April, 1981), p. 9308.

149. CANADA, *Debates of the House of Commons*, 1980-1983 (15 May, 1981), p. 9657.

Hon. Arnold Malone also had alike point of view with regard to the purposes of youth criminal justice intervention :

> [m]y criticism is that I do not believe the bill goes far enough. For example, I believe that the concept of retribution might well be followed with respect to youth. A youth involved in a misdemeanor or a crime should repay the debt he owes to society and to the person or persons against whom he has committed his crime.[150]

Hon. Albert Cooper had a similar position as well :

> I would now like to turn to the contents of the bill which, as I have stated, has many substantive changes within its pages which are badly needed. In Bill C-61 [*Young Offenders Bill*] we see that the over-all philosophy has shifted from one of parental responsibility in the Juvenile Delinquents Act to the more acceptable and practical approach of a youth being held responsible to some degree for his actions.[151]

The shift from the notion of "child protection" to the notion of "protection of society" as the main goal of youth criminal justice intervention was as well plainly recognized during the discussions held in Parliament :

> [i]t has been suggested by the drafters of the legislation that there is a shift in emphasis away from the important principle of 1908. In fact, one policy analyst of the Department of the Solicitor General, Mr. Tom Sterritt, has been very actively involved in drafting the bill. He stated that the new bill changes the focus of the law and that it may not be the needs or the welfare of the child that are paramount any more; it may be the protection of society. Indeed, the protection of society is and must be of great importance, but one must question whether by substituting a Criminal Code for children we in any way enhance the protection of society. I suggest the

150. CANADA, *Debates of the House of Commons*, 1980-1983 (29 May, 1981), p. 10079.

151. CANADA, *Debates of the House of Commons*, 1980-1983 (12 May, 1981), p. 9521.

> evidence is very much to the contrary. [Hon. Svend J. Robinson].[152] [emphasis added]

Nevertheless, there was also a position that tried to reconcile the notion of "child protection" with the notion of "protection of society". Hon. Waddell noted that "we can set a couple of goals in a progressive juvenile system; we can protect society and the welfare of the child. Those two goals are not mutually exclusive".[153] Nevertheless, concerning the *Young Offenders Act bill*, he noted that "[t]he bill before us today by contrast is not very progressive. Basically, it provides a criminal code for juveniles. There is some mention of diversion but it is really a criminal code for juveniles".[154]

Bill C-61 was read third time in the House of Commons on May 17, 1982[155] and passed to the Senate for its concurrence, where it was first read on May 18, 1982.[156] During the second reading of the *Bill*, Hon. Joan Neiman addressed her audience about the purposes of the drafted legislation :

> [t]he new legislation is aimed at providing a comprehensive process for dealing with juvenile crime that encourages respect for the law and promotes the well being of both young offenders and society. The key principles which underlie the proposed Young Offenders Act are :
>
> That young persons should be held more responsible for their behaviour, but not wholly accountable since they are not yet fully mature;
>
> That society has a right to protection from illegal behaviour;
>
> That young persons have the same rights to due process of law and fair and equal treatment as adults, and that these rights must be guaranteed by special safeguards; and

152. CANADA, *Debates of the House of Commons*, 1980-1983 (15 April, 1981), p. 9316.
153. CANADA, *Debates of the House of Commons*, 1980-1983 (15 May, 1981), p. 9648.
154. CANADA, *Debates of the House of Commons*, 1980-1983 (15 May, 1981), p. 9649.
155. CANADA, *Debates of the House of Commons*, 1980-1983 (17 May, 1982), p. 17495.
156. CANADA, *Debates of the Senate*, 1980-1983 (18 May, 1982), p. 4131.

> That young persons have special needs because they are dependents at varying levels of development and maturity and, therefore, also require guidance and assistance.
>
> These principles reflect the federal government's intent to strike a reasonable and acceptable balance between the needs of young offenders and the interests of society.[157] [emphasis added]

The *Bill* was read third time in the Senate on July 6, 1982[158] and received Royal Assent on July 7, 1982.[159] The final declaration of principles, as enacted in 1982, read:

> 3(1) It is hereby recognized and declared that
>
> (a) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;
>
> (b) society must, although it has the responsibility to take reasonable measures to prevent criminal conduct by young persons, be afforded the necessary protection from illegal behaviour;
>
> (c) young persons who commit offences require supervision, discipline and control, but, because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance;
>
> (d) where it is not inconsistent with the protection of society, taking no measures or taking measures other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;
>
> (e) young persons have rights and freedoms in their own right, including those stated in the *Canadian Charter of Rights and Freedoms* or in the *Canadian Bill of Rights*, and in particular a right to be heard in the course of, and

157. CANADA, *Debates of the Senate*, 1980-1983 (25 May, 1982), p. 4181. See also *id.*, p. 4184.

158. CANADA, *Debates of the Senate*, 1980-1983 (6 July, 1982), p. 4556.

159. CANADA, *Debates of the House of Commons*, 1980-1983 (7 July, 1982), p. 19115.

to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms;

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

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

(h) parents have responsibility for the care and supervision of their children, and, for that reason, young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.[160] [emphasis added]

This declaration of principles allowed the implementation of deterrence and retribution theories within the youth criminal justice system. In addition, it did not solve the problem about whether the implementation of the youth criminal law should give priority to the notion of "child protection" or "protection of society".[161] Moreover, it seems that the *Young Offenders Act* gave priority to the notion of "protection of society" over the notion of "protection of the child" (see subsection 3.1.d).

2.3. *AN ACT TO AMEND THE YOUNG OFFENDERS ACT AND THE CRIMINAL CODE*, S.C. 1995, C. 19, SS. 1-36

During the twenty year period that goes from April 2, 1984, when the *Young Offenders Act* entered into force, to

160. *Young Offenders Act*, S.C. 1980-81-82-82, c. 110, s. 3.

161. M. PRATTE, R. GRONDIN, "Victime ou Accusé : Le jeune et le procès pénal. "Présentation". (1996) 27 *R.G.D.* 173. See also *R.* v. *M. (S.H.), précitée*, note 120, p. 524-525 : "Section 3 [*Young Offenders Act*] contains some statements which directly conflict with other declarations of principle in the same section. The balance between these conflicting principles is, in the individual case, not easy". See also *R.* v. *T. (V.) [V.T.]*, précitée, note 120, p. 765 and *R.* v. *M. (J.J.) [J.J.M.]*, précitée, note 127, p. 422, 426 as examples of the influence of the notion of "protection of society" on the implementation of section 3 of the *Young Offenders Act*.

April 1, 2003, when the *Youth Criminal Justice Act* entered into force, the *Young Offenders Act* was amended 20 times.[162] However, only one of these amendments would introduce a

162. These amendments are : *An Act to Amend the Financial Administration Act in Relation to Crown Corporations and to Amend other Acts in Consequence thereof*, S.C. 1984, c. 31, s. 14 (assented to on June 29, 1984); *An Act to Amend the Criminal Code, and to amend the Combines Investigation Act, the Customs Act, the Excise Act, the Food and Drugs Act, the Narcotic Control Act, the Parole Act and the Weights and Measures Act, to Repeal certain other Acts and to Make other Consequential Amendments*, S.C. 1985, c. 19, s. 187 (assented to on June 20, 1985); *An Act to Amend the Young Offenders Act, the Criminal Code, the Penitentiary Act and the Prisons and Reformatories Act*, S.C. 1986, c. 32 (assented to on June 27, 1986); *An Act to Correct Certain Anomalies, Inconsistencies, Archaisms and Errors and to Deal with other Matters of a Non-Controversial and Uncomplicated Nature in the Statutes of Canada*, S.C. 1988, c. 2, ss. 60-65 (assented to on February 4, 1988); *An Act to Amend the Criminal Code (Mental Disorder) and to Amend the National Defence Act and the Young Offenders Act in Consequence thereof*, S.C. 1991, c. 43, ss. 31-33 (assented to on December 13, 1991), *An Act to Correct Certain Anomalies, Inconsistencies, Archaisms and Errors in the Statutes of Canada, to Deal with other Matters of a Non-Controversial and Uncomplicated Nature therein and to Repeal Certain Provisions thereof that Have Expired or Lapsed or otherwise Ceased to Have Effect*, S.C. 1992, c. 1, s. 143 (assented to on February 28, 1992); *An Act to Amend the Young Offenders Act and the Criminal Code*, S.C. 1992, c. 11 (assented to on April 9, 1992); *An Act respecting Contraventions of Federal Enactments*, S.C. 1992, c. 47, ss. 81-83 (assented to on October 15, 1992); *An Act to Establish a Territory to Be Known as Nunavut and Provide for its Government and to Amend certain Acts in Consequence thereof*, S.C. 1993, c. 28, s. 144 (assented to on June 19, 1993); *An Act to Amend the Criminal Code and the Young Offenders Act*, S.C. 1993, c. 45, s. 15 (assented to on June 23, 1993); *An Act to Correct certain Anomalies, Inconsistencies and Errors in the Statutes of Canada, to Deal with other Matters of a Non-Controversial and Uncomplicated Nature in those Statutes and to Repeal certain Provisions of those Statutes that Have Expired, Lapsed or otherwise Ceased to Have Effect*, S.C. 1994, c. 26, ss. 76 and 77 (assented to on June 23, 1994); *An Act to Amend the Young Offenders Act and the Criminal Code*, S.C. 1995, c. 19, ss. 1-36 (assented to on June 22, 1995); *An Act to Amend the Criminal Code (sentencing) and other Acts in Consequence thereof*, S.C. 1995, c. 22, s. 16 (assented to on July 13, 1995); *An Act to Amend the Criminal Code and the Young Offenders Act (Forensic DNA Analysis)*, S.C. 1995, c. 27, s. 2 (assented to on July 13, 1995); *An Act respecting Firearms and other Weapons*, S.C. 1995, c. 39, ss. 177-187 (assented to on December 5, 1995); *An Act respecting the Control of Certain Drugs, their Precursors and other Substances and to Amend Certain other Acts and Repeal the Narcotic Control Act in Consequence thereof*, c. 19, s. 93.1 (assented to on June 20, 1996); *An Act to Amend the Nunavut Act and the Constitution Act, 1867*, c. 15, s. 41 (assented to on June 11, 1998); *An Act to Amend the Nunavut Act with respect to the Nunavut Court of Justice and to Amend other Acts in Consequence*, c. 3, ss. 86-89 (assented to on March 11, 1999); *An Act to Replace the Yukon Act in order to Modernize it and to Implement certain Provisions of the Yukon Northern Affairs Program Devolution Transfer Agreement, and to Repeal and Make Amendments to other Acts*, c. 7, s. 252 (assented to on March 27, 2002); and *An Act to Amend the Criminal Code and to Amend other Acts*, c. 13, ss. 89-90 (assented to on June 4, 2002).

modification to the stated legislative principles of the youth criminal justice system : *An Act to amend the Young Offenders Act and the Criminal Code*.[163] This amendment modified several sections of the *Young Offender Act*, among them the principles of this piece of legislation as stated in 1982. This amendment introduced two modifications to the declaration of principles of the *Young Offenders Act* :

1) Paragraph 3(1)(a) was modified by introducing the notion of "crime prevention" into the objectives of the youth criminal justice system :

> 3(1)(a) crime prevention is essential to the long-term protection of society and requires addressing the underlying causes of crime by young persons and developing multi-disciplinary approaches to identifying and effectively responding to children and young persons at risk of committing offending behaviour in the future;
>
> (a.1) while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults, young persons who commit offences should nonetheless bear responsibility for their contraventions;[164] [emphasis added]

2) Subsection 3(1)(c.1) was added to subsection 3(1)(c) :

> 3(1)(c.1) the protection of society, which is a primary objective of the criminal law applicable to youth, is best served by rehabilitation, wherever possible, of young persons who commit offences, and rehabilitation is best achieved by addressing the needs and circumstances of a young person that are relevant to the young person's offending behaviour;[165] [emphasis added]

The consequence of this amendment was an important modification of the objectives of the declaration of principles of the *Young Offenders Act*, which ended up being very much oriented to the notion of "protection of society" than to the

163. *An Act to Amend the Young Offenders Act and the Criminal Code*, S.C. 1995, c. 19, ss. 1-36 (assented to on June 22, 1995).

164. *An Act to Amend the Young Offenders Act and the Criminal Code*, S.C. 1995, c. 19, at 5.1(1).

165. *An Act to Amend the Young Offenders Act and the Criminal Code*, S.C. 1995, c. 19, at 5.1(2).

notion of "child protection". Not only was the notion of "protection of society" expressly stated in the amendment, but also the measures to be implemented were directed towards achieving this goal. In addition, the notion of "child protection" was only to be seen as a medium for achieving the objective of "protection of society".

This amendment was introduced and read first time in the House of Commons as *Bill C-37, An Act to amend the Young Offenders Act and the Criminal Code* on June 2, 1994 by the Minister of Justice and Attorney General, Hon. Allan Rock.[166] During the second reading of the *Bill*, he noted that:

> [b]y introducing Bill C-37 the government addressed the very real public concerns about crimes of violence by youths in Canada. The government recognizes the importance of public protection in the justice system, but it recognizes that protection of the public is best achieved through the rehabilitation of offenders wherever possible. The government emphasized the accountability aspect of the justice system and at the same time, it fulfilled commitments it had given to the electorate last year during the election campaign [crime prevention policies for reducing crime rates].[167] [emphasis added]

The notion of "protection of society" was present as well in the discourse pronounced by other members of Parliament: "[t]he juvenile justice system in its operation should mirror the adult system as much as possible if it is to be understandable by the community and develop general deterrents".[168] [emphasis added] Nevertheless, there was a strong opposition to this bill as well: "the Minister of Justice has finally caved in to pressures from the most conservative elements of his party. Bill C-37, which proposes to amend the Young Offenders Act and the Criminal Code, draws its inspiration from a philosophy

166. CANADA, *Debates of the House of Commons*, 1994-1996 (2 June, 1994), p. 4733.

167. CANADA, *Debates of the House of Commons*, 1994-1996 (6 June, 1994), p. 4872.

168. CANADA, *Debates of the House of Commons*, 1994-1996 (6 June, 1994), p. 4886 (Hon. Paul E. Forseth).

that is repressive".[169] [emphasis added] Hon. Pierrette Venne, referring to the modification to the objectives of the declaration of principles of the *Young Offenders Act* noted that : "[c]lause 1 [proposed amendments to sub-sections 3(1)(a) and 3(1)(c)] marks the end of the rehabilitation philosophy. It signs its death warrant, making sure that it will be bogged down in correctional red tape. It is a smoke screen".[170] [emphasis added] She continued : "[b]y seeking to repress, the minister is putting in place mechanisms which are bound to make the law itself challenged. Rehabilitation will no longer be a goal; social reintegration is now only a remote objective. The key word now is protection of society".[171] [emphasis added]

Bill C-37, An Act to amend the Young Offenders Act and the Criminal Code received its third reading in the House of Common on February 28, 1995, and was passed to the Senate for its concurrence.[172] *Bill C-37* was assented to on June 22, 1995 as *An Act to amend the Young Offenders Act and the Criminal Code*, S.C. 1995, c. 19.[173]

2.4. THE *YOUTH CRIMINAL JUSTICE ACT*

On June 2, 1994, the then Minister of Justice, Hon. Allan Rock, wrote to the chair of the House of Commons Standing Committee on Justice and Legal Affairs, Hon. Warren Allmand asking

> to undertake a comprehensive review of the Young Offenders Act and of the youth justice system in Canada in general; to look at present social circumstances; to examine our experience with the Young Offenders Act during the past 10 years; to engage Canadians in the discussion; to hear from a wide spectrum of persons with experience with the act; to examine how

169. CANADA, *Debates of the House of Commons*, 1994-1996 (6 June, 1994), p. 4875 (Hon. Pierrette Venne).

170. CANADA, *Debates of the House of Commons*, 1994-1996 (6 June, 1994), p. 4876.

171. CANADA, *Debates of the House of Commons*, 1994-1996 (6 June, 1994), p. 4877.

172. CANADA, *Debates of the House of Commons*, 1994-1996 (28 February, 1995), p. 10174.

173. CANADA, *Debates of the House of Commons*, 1994-1996 (22 June, 1995), p. 14481.

> the youth justice system in general could be improved; to look at the cost, the purpose and the principles of the present act; to determine how to weave our priority for crime prevention into the system; to comment on how the youth justice system should reflect the changes we are considering in connection with special program review, on how we can get parents more involved in juvenile justice, and on how best to restore and enhance public confidence in the youth justice system.[174] [emphasis added]

On April 1997, the House of Commons Standing Committee on Justice and Legal Affairs released its report entitled "Renewing Youth Justice".[175] This report, which was very much oriented towards the notion of "protection of society", had 14 recommendations. Among them, the Committee recommended the amendment of the *Young Offenders Act* to address some compelling matters, such as the reduction of the minimum age of criminal responsibility for some serious offences (criminal offences causing death or serious harm) from 12 to 10,[176] and the possibility for youth court judges to allow general publication of the name of young offenders when public authorities consider that such a measure is important for the "public safety".[177] With regard to the purposes and principles of youth criminal intervention, recommendation No 2 noted that :

> [t]he Committee recommends that the *Young Offenders Act* be amended by replacing the present declaration of principle with a statement of purpose and an enunciation of guiding principles for its implementation in all components of the youth justice system. The statement of purpose should establish that protection of society is the main goal of criminal law and that

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174. CANADA, *Debates of the House of Commons*, 1994-1996 (6 June, 1994), p. 4874 (Hon. Allan Rock). See also CANADA, *Debates of the House of Commons*, 1994-1996 (15 June, 1994), p. 5386-5390 (Hon. Warren Allmand); Letter from Hon. Allan Rock to the Hon. Warren Allmand (2 June, 1994); CANADA, HOUSE OF COMMONS, *Thirteen Report of the Standing Committee on Justice and Legal Affairs : Renewing Youth Justice*, at appendix A, Ottawa, Ministry of Supply and Services, 1997. House of Commons Committees. [online]
http ://www.parl.gc.ca/committees352/jula/reports/13_1997-04/chap1-e.html

175. CANADA, HOUSE OF COMMONS, *précitée*, note 174.

176. *Id.*, recommendation 9.

177. *Id.*, recommendation 13.

> protection of society, crime prevention and rehabilitation are mutually reinforcing strategies and values that can be effectively applied and realized in dealing with youth offending.[178] [emphasis added]

On May 12, 1998 the Federal Government released a report to respond to the House of Commons Standing Committee on Justice and Legal Affairs' report.[179] The Federal Government report, which also was oriented towards the notion of "protection of society"[180], recommended several strategies in order to reduce youth crime rates, among them, the enactment of a new piece of legislation to replace the *Young Offenders Act.*[181]

Bill C-68, An Act in respect of criminal justice for young persons and to amend and repeal other acts, would be introduced in the House of Commons by Hon. Anne McLellan, Minister of Justice and Attorney General of Canada, on March 11, 1999.[182] Nevertheless, this *Bill* died on Parliament's Order Paper when Parliament prorogued. *Bill C-68* would be reintroduced in the next parliament session as *Bill C-3, An act in respect of criminal justice for young persons and to amend and repeal other acts.*[183] However, this *Bill* would have a similar fate to the former. Having an alike text to the two previous *Bills*, *Bill C-7, An Act in respect of criminal justice for young persons and to amend and repeal other acts*, would be introduced on February 5, 2001.[184] This *Bill* would be enacted as *An Act in respect of criminal justice for young persons and to amend and repeal other Acts* [*Youth Criminal Justice Act*] on February 19, 2002.

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178. *Id.* See also N. BALA, *op. cit.*, note 6, p. 21.

179. CANADA, DEPARTMENT OF JUSTICE. *A Strategy for the Renewal of Youth Justice*, Ottawa, Ministry of Supply and Services, 1998.

180. "The objective of this strategy is the protection of society by reducing youth crime". *Id.*, p. 2.

181. *Id.*, s. 17.

182. CANADA, *Debates of the House of Commons*, 1997-1999 (11 March, 1999), p. 12714.

183. CANADA, *Debates of the House of Commons*, 1999-2000 (14 October, 1999), p. 109.

184. CANADA, *Debates of the House of Commons*, 2001-2002 (5 February, 2001), p. 227.

During the second reading of *Bill C-7*, Hon. Anne McLellan, Minister of Justice and Attorney General of Canada, addressed her audience by noting that the purposes of this *Bill* were to link the notions of rehabilitation and reintegration in order to attain the objective of "protection of society" :

> Canadians want a system that prevents crime by addressing the circumstances underlying a young person's offending behaviour, that rehabilitates young people who commit offences and safely reintegrates them into the community, and ensures that a young person is subject to meaningful and appropriate consequences for his or her offending behaviour. Canadians across the country know that this is the most effective way to achieve the long term protection of society. Bill C-7 constructs a youth justice system which will do just that.[185] [emphasis added]

Moreover, she noted that "[u]nlike the YOA, the proposed youth criminal justice act provides guidance on the priority that should be given to key principles".[186] The *Youth Criminal Justice Act* has a more clear declaration of principles than the *Young Offenders Act*; however, it did not solve the conflict about which principle ("child protection", "protection of the society") should prevail in case of conflict :[187]

> 3(1) The following principles apply in this Act :
>
> (*a*) the youth criminal justice system is intended to
>
> (i) prevent crime by addressing the circumstances underlying a young person's offending behaviour,
>
> (ii) rehabilitate young persons who commit offences and reintegrate them into society, and
>
> (iii) ensure that a young person is subject to meaningful consequences for his or her offence

185. CANADA, *Debates of the House of Commons*, 2001-2002 (14 February, 2001), p. 703.

186. CANADA, *Debates of the House of Commons*, 2001-2002 (14 February, 2001), p. 704.

187. N. BALA, *op. cit.*, note 6, p. 75 : "Those charged with the application and interpretation of the YCJA face a challenge in determining what the principles and priorities of the Act are".

in order to promote the long-term protection of the public;

(*b*) the criminal justice system for young persons must be separate from that of adults and emphasize the following :

(i) rehabilitation and reintegration,

(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

(*c*) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

(i) reinforce respect for societal values,

(ii) encourage the repair of harm done to victims and the community,

(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and

(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

(*d*) special considerations apply in respect of proceedings against young persons and, in particular,

(i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,

(iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and(ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,

(iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

(2) This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).[188] [emphasis added]

It is interesting to note the different philosophical and normative message of the legislation enacted in the year 1908, the *Juvenile Delinquents Act*, and the legislation enacted in the year 2001, the *Youth Criminal Justice Act*. Even though the former did not have a declaration of principles, it is evident from its text that it was philosophically grounded in the notion of *parens patriæ*. The purpose of this piece of legislation was to "protect the child", and such a measure and the notion of "protection of society" were seen as going "hand in hand". In addition, the purpose of the enacted youth criminal legislation clearly was "to mend if possible the defective situation and reinstate the individual at fault [...] [without resorting to] a great part of the paraphernalia of hostile procedure".[189] On the other hand, the *Youth Criminal Justice Act* will have an explicit declaration of principles, which will clearly oppose the notion of "protection of society" to the notion of "protection of the child". In addition, it will expressly state the priority of the former over the latter.[190]

To present (June 2006), the *Youth Criminal Justice Act* has been amended four times; however, none of these

188. *Youth Criminal Justice Act*, précitée, note 7, s. 3.
189. G. MEAD, *loc. cit.*, note 2, p. 594.
190. *Youth Criminal Justice Act, précitée*, note 7, s. 3.

amendments has modified the declaration of principles as stated on the 2002 version.[191]

2.5. SUMMARY

The repeal of the *Juvenile Delinquents Act (1908)* and the enactment of the *Young Offenders Act (1982)* considerably changed the Canadian approach to youth criminal justice intervention. The emphasis of the *Young Offenders Act* was not the "socio-familial situation" of the child, but the seriousness of the criminal behaviour committed. In addition, the *Young Offenders Act* did not have a unified notion of "protection", in which "protection of the child" did not conflict with the notion of "protection of society". Moreover, this piece of legislation opposed both notions and gave priority to the notion of "protection of society" over the notion of "protection of the child". On the other hand, the *Young Offenders Act* introduced due process rights to the youth criminal procedure and reduced the authority of child-welfare agencies. Moreover, this *Act* eliminated "status offences". Nevertheless, the *Young Offenders Act* was unable to address some problematic issues, such as the overuse of incarceration for dealing with serious and non-serious offences. The *Youth Criminal Justice Act* was enacted to address some of them. This act will have a similar theoretical approach to youth crime to the former piece of legislation: it will as well be more concerned with the seriousness of the criminal behaviour committed than with the notion of "child protection". Furthermore, the concept of "child protection" will be left aside by the notion of "protection of society".

In conclusion, we can see that in the Canadian context, the problem of juvenile misbehaviour was originally dealt with a paternalistic approach strongly grounded in the notion of "child

191. These amendments are: *An Act to Replace the Yukon Act in order to Modernize it and to Implement Certain Provisions of the Yukon Northern Affairs Program Devolution Transfer Agreement, and to Repeal and Make Amendments to other Acts*, S.C. 2002, c. 7, s. 274; *An Act to Amend the Criminal Code and to Amend other Acts*, S.C. 2002, c. 13, ss. 91-92, *An Act to Establish the Library and Archives of Canada, to Amend the Copyright Act and to Amend Certain Acts in Consequence*, S.C. 2004, c. 11, ss. 48-49 and *An Act to Amend the Criminal Code (mental disorder) and to Make Consequential Amendments to other Acts*, S.C. 2005, c. 22, s. 63.

protection". Besides, the notion of "child protection" was fully compatible with the notion of "protection of society". Such a theoretical approach, which guided the Canadian youth criminal justice policy for more than 70 years, would be completely modified with the enactment of both the *Young Offenders Act (1982)* and the *Youth Criminal Justice Act (2002)*. The main concern of both pieces of legislation would be the seriousness of the criminal offence committed, and how to prevent society from the dangers that such behaviour implies. It is quite possible to affirm that current tendency in the area of youth criminal legislation has two main characteristics: on the one hand, a discourse powerfully grounded in the concepts of legality and due process rights. On the other hand, an emphasis on the seriousness of the act committed and the dangerousness that such a behaviour represents to society, and an emphasis as well on more repressive theories of criminal law intervention, such as deterrence and retribution. Young people in conflict with the law are not dealt with as "children in need of protection", but as children who should be held responsible and accountable for their acts. The discourse of legality and due process appears as a sort of "compensation" for an explicit philosophical approach centered on punishment. In some way, youth criminal law intervention, originally grounded in the notion of "child protection", has moved towards an intervention strongly grounded in the theoretical approach of adult criminal law intervention.[192] The main concern of the latter is not the personal circumstances that led someone to commit a crime, but the seriousness of the committed behaviour and how to prevent further attempts that may jeopardize society.[193]

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192. Trépanier notes that

"[a] brief summary of current trends in juvenile justice policies suggests that, at least in the North American context, the dominant mood seems to be in the direction of a sharp distinction between young offenders and children in need of protection. For the former group, juvenile justice is increasingly closer to adult criminal justice, both in adopting some of its philosophy and practices and in waiving more juveniles to adult courts and corrections". J. TRÉPANIER, *loc. cit.*, note 125, p. 321.

193. For an analysis of similar trends in France, see D. YOUF, "Repenser le droit pénal des mineurs", (2000) 10 *Esprit*, 87. Referring to the French youth criminal law, Youf notes that "[d]epuis quelques années, le jeune délinquant n'est plus considéré comme un enfant, comme un mineur devant bénéficier d'un statut de protection et d'éducation, il est de nouveau un adulte en miniature". [emphasis added] *Id.*, p. 100.

The next section explores the problematic sections of the *Youth Criminal Justice Act* identified by the Quebec Court of Appeal in *Reference re Bill C-7*[194] and tracks down their first implementation in the Canadian youth criminal justice system and their subsequent amendments up to the present.

3. Privacy rights of and adult sentences for young offenders in the Canadian youth criminal justice system

The purpose of the previous sections was to explore the origins and the development of the Canadian youth criminal justice system and the rhetoric that surrounded such an intervention. As noted, the very first concern of parliamentarians when enacting youth criminal law intervention was to "protect children", and by that way, to "protect society", and both notions were not seen as a dichotomy. Such a message changed with the enactment of the *Young Offenders Act*, and such a modification continued with the enactment of the *Youth Criminal Justice Act* : youth criminal justice intervention introduced the theories of "deterrence" and "retribution" within its rhetoric. From this moment, governmental reports, parliamentarians, and legislative texts gave (and give) priority to the notion of "protection of society" over the notion of "protection of the child".

As pointed out in the introduction, on March 2003, the Quebec Court of Appeal ruled that some sections of *Bill C-7* (current *Youth Criminal Justice Act*) violate section 7 of the *Canadian Charter of Rights and Freedoms*.[195] Sections 62, 63, 64(1), 64 (5), 70, 72(1), 72(2), 73(1) of *Bill C-7* reverse the *onus probandi* by stating that the young offender who has committed a "presumptive offence" should prove the reasons for imposing a youth sentence instead of an adult sentence. In addition, sections 75 and 110(2.b) of *Bill C-7* allow the disclosure of a young person's identity if she committed a presumptive offence. Moreover, the young offender must justify the reasons for maintenance of the ban of publication. This section

194. *Reference re Bill C-7, précitée,* note 10, p. 1172, 1173.
195. *Reference re Bill C-7, précitée,* note 10, p. 1172, 1173.

focuses on both sorts of problematic measures, privacy rights of young offenders and the imposition of adult sentences to young offenders that have committed some specific criminal offences, and tracks down their first implementation in the Canadian youth criminal justice system. In addition, this section tracks their subsequent amendments up to the present. This analysis is limited to the federal legislation enacted since the year 1857 to the year 2006; an analysis of the bills tabled in Parliament that did not receive Royal Assent or an analysis of provincial legislation is beyond the scope of this study.

3.1 PRIVACY RIGHTS IN THE CANADIAN YOUTH CRIMINAL JUSTICE SYSTEM

The first Canadian federal act to regulate the privacy of young offenders was *the 1892 Canadian Criminal Code*.[196] This piece of legislation noted that "[t]he trials of all persons apparently under the age of sixteen years shall, so far as it appears expedient and practicable, take place without publicity, and separately and apart from that of other accused persons and at suitable times to be designated and appointed for that purpose".[197]

Before this act, the enacted federal acts were mostly concerned with the procedure to observe during the trial of young offenders, and that young people found guilty of some sorts of offences were imprisoned in reformatory prisons instead of provincial penitentiaries and separated from adult offenders.[198]

196. *Criminal Code, 1892,* S. C. 1892, c. 29.

197. *Criminal Code, 1892,* S.C. 1892, c. 29, s. 550.

198. *An Act for the Establishment of Prisons for Young Offenders – for the Better Government of Public Asylums, Hospitals and Prisons, and for the Better Construction of Common Gaols,* Statutes of the Canadian Province 1857, c. 28; *An Act for the More Speedy Trial and Punishment of Juvenile Offenders,* Statutes of the Canadian Province 1857, c. 29; *An Act respecting the Trial and Punishment of Juvenile Offenders,* Statutes of the Canadian Province 1859, c. 106; *An Act respecting Prisons for Young Offenders,* Statutes of the Canadian Province 1859, c. 107; *An Act respecting Penitentiaries, and the Directors thereof, and for other Purposes,* S.C. 1868, c. 75, ss. 29-30; *An Act respecting the Trial and Punishment of Juvenile Offenders,* S.C. 1869, c. 33; *An Act respecting the Trial and Punishment of Juvenile Offenders within the Province of Quebec,* S.C. 1869, c. 34; *An Act to Empower the Police Court in the City of Halifax to Sentence Juvenile Offenders to be Detained in the Halifax Industrial School,* Statutes of Canada 1870, c. 32; *An Act respecting Penitentiaries and the Inspection thereof, and for other Purposes,* S.C. 1875, c. 44, ss. 32-33; *An Act respecting the Reformatory for Juvenile Offenders in Prince Edward Island,* S.C. 1880, c. 41.

Moreover, the benefits provided by these acts to young offenders were restricted to: 1) young persons not exceeding the age of sixteen years at the period of the commission or attempted commission of the offence, and 2) young persons who committed the offence of theft (larceny) or another offence punishable as theft.[199] However, the trial of young offenders had to take place in "open courts".[200]

The provision stated in the *Canadian Criminal Code* was amended in the year 1894: "[t]he trials of young persons apparently under the age of sixteen years, shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose".[201] [emphasis added] This amendment suppressed the sentence "so far as it appears expedient and practicable" from the 1892 version. The purpose of such an amendment was that the privacy of young offenders would not be conditioned to the discretion of public authorities.

The *Juvenile Delinquents Act*, as enacted in the year 1908, followed the provisions stated in the amended version of *the 1892 Criminal Code* concerning the privacy of young offenders:

> The trials of children shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose.
>
> 2. Such trials may be held in the private office of the judge or in some other private room in the court house or municipal building, or in the detention home, or if no such room or place

199. The only exception to this is *An Act respecting the Trial and Punishment of Juvenile Offenders within the Province of Quebec*, S.C. 1869, c. 34, at s. 5. The special procedure granted to young people was extended to "any person apparently under the age of sixteen years, arrested on a charge of having committed any offence not capital". [emphasis added].

200. *An Act for the More Speedy Trial and Punishment of Juvenile Offenders*, Statutes of the Canadian Province 1857, c. 29, s. 1.; *An Act respecting the Trial and Punishment of Juvenile Offenders*, Statutes of the Canadian Province 1859, c. 106, s. 1.; and *An Act respecting the Trial and Punishment of Juvenile Offenders*, S.C. 1869, c. 33, s. 2.

201. *An Act respecting Arrest, Trial and Imprisonment of Youthful Offenders*, S.C. 1894, c. 58, s. 1.

> is available, then in the ordinary court room; provided that when held in the ordinary court room, an interval of half an hour must be allowed to elapse between the close of the trial or examination of any adult and the beginning of the trial of a child.
>
> 3. No report of the trial or other disposition of a charge against a child, in which the name of the child or of its parent or guardian is disclosed, shall, without the special leave of the judge, be published in any newspaper or other publication.[202] [emphasis added]

This section was not deeply discussed in Parliament, neither in the Senate nor in the House of Commons.[203] Nevertheless, it is very clear in the text that parliamentarians were very concerned about preventing the information related to a young person involved in a trial from being made public.

During the period that goes from the year 1908, when the *Juvenile Delinquents Act* entered into force, to the year 1984, when the *Young Offenders Act* entered into force abrogating the former, this section was amended only once. In the year 1929 Parliament passed *An Act respecting Juvenile Delinquents*, S.C. 1929, c. 46. This act introduced two amendments to the regulation of privacy of juvenile delinquents:

1) Paragraph 3 was modified by introducing more situations under which the name of a child involved in a criminal procedure could not be disclosed:

> 3. No report of a delinquency committed, or said to have been committed, by a child, or of the trial or other disposition of a charge against a child, or of a charge against an adult brought in the Juvenile Court under section thirty-three or under section thirty-five of this Act, in which the name or the child or of its parent or guardian or of any school or institution which the child is alleged to have been attending or of which it is alleged

202. *An Act Respecting Juvenile Delinquents,* S.C. 1908, c. 40, at s. 10.

203. The only two times parliamentarians made comments concerning the privacy of young offenders were to point out the negative consequences of avoiding such a policy (one was referring to the criminal legal history of the province of Ontario and the other was referring to the reasons why young offenders should not be dealt with by trial by jury). See CANADA, *Debates of the Senate*, 1906-1907 (24 April, 1907), p. 896 (Hon. Mr. Cloran) and CANADA, *Debates of the House of Commons,* 1907-1908 (8 July, 1908), p. 12404 (Hon. Mr. Aylesworth), respectively.

> to have been an inmate is disclosed, or in which the identity of the child is otherwise indicated, shall without the special leave of the Court, be published in any newspaper or other publication.[204]

2) Paragraph 4 was added to the regulation of privacy of juvenile delinquents. It is interesting to note that the amendment stated that even if the *Juvenile Delinquents Act* was not in force in some part of Canada, this subsection would nonetheless apply to such a place in order to protect the privacy of young persons involved in criminal procedures:

> 4. Subsection three of this section shall apply to all newspapers and other publications published anywhere in Canada, whether or not this Act is otherwise in force in the place of publication.[205]

As noted in the previous section, in the year 1965 the Department of Justice released a report about the state of juvenile delinquency in Canada.[206] This report addressed the issues of privacy rights of juvenile delinquents and noted that "publicity in regard to the juvenile offender is to be avoided".[207] The committee members noted that such a philosophy should be extended to court hearings as well.[208] In addition, they noted that

> we recommend that the Act be amended [the *Juvenile Delinquents Act*] to provide specifically that no person shall be present at any hearing of a charge against a child or young person in the juvenile court except: members of the court and necessary court personal; parties to the case, their counsel and other persons having a direct interest in the proceeding; a maximum of three representatives of the press or other news media; and such other persons having an interest in the work of the court as the court specially authorizes to be present.[209]

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204. *An Act respecting Juvenile Delinquents*, S.C. 1929, c. 46, s. 12.

205. *Id.*

206. CANADA, DEPARTMENT OF JUSTICE, REPORT OF THE COMMITTEE ON JUVENILE DELINQUENCY, *précitée*, note 130.

207. *Id.*, p. 139. See also N. BALA, K. CLARKE, *op. cit.*, note 23, p. 186.

208. CANADA, DEPARTMENT OF JUSTICE, REPORT OF THE COMMITTEE ON JUVENILE DELINQUENCY, *précitée*, note 130, p. 140-141.

209. *Id.*, p. 141-142.

Both the *Juvenile Delinquents Act* and the report released by the Department of Justice highlighted the importance of protecting the privacy of juvenile delinquents. Such a policy harmonized with the unified notion of protection that underlay the *Juvenile Delinquents Act*: for "protecting society" it was required to "protect the child", both from an undesirable familial environment and "the paraphernalia of criminal procedure". The report of the Department of Justice recommended that

> [l]egislation should provide also that the identification of a child is prohibited in any criminal proceedings involving a child, whether brought in the juvenile court or the adult court, where the proceedings arise out of an offence against, or conduct contrary to, decency or morality. The prohibition against identifying any such child should be reinforced by adequate penalty provisions under the law.[210]

The report released by the Ministry of Solicitor General in the year 1975 had a similar approach to privacy of youth court proceedings to both the *Juvenile Delinquents Act* and to the report released in the year 1965: the trials of young offenders should take place without publicity.[211] The report released in the year 1977 by the Solicitor General had an alike approach to privacy of youth court proceedings to the report released in the year 1975.[212]

On July 7, 1982 the *Young Offenders Act* received Royal Assent. With regard to the privacy of young offenders, this act introduced important changes to the regulation of the *Juvenile Delinquents Act* that would completely modify the system. First of all, concerning the privacy of youth court proceeding, this new piece of legislation opened up youth court hearings to "ensure public scrutiny and monitoring of the youth court system".[213] It seems that in this case the notions of "due process" and "accountability" had priority to the

210. *Id.*, p. 290 [recommendation No 46]. See also recommendations No 47 and 48.

211. CANADA, SOLICITOR GENERAL, REPORT OF THE SOLICITOR GENERAL'S COMMITTEE ON PROPOSALS FOR NEW LEGISLATION TO REPLACE THE JUVENILE DELINQUENTS ACT, *précitée*, note 136, p. 59-60.

212. CANADA, SOLICITOR GENERAL, *précitée*, note 142, p. 23.

213. CANADA, SOLICITOR GENERAL, *précitée*, note 123, p. 20.

notion of "protection of the child". In addition, the *Young Offenders Act* allowed the publication of information concerning a young person who had been transferred to an ordinary court and found guilty of the alleged offence. Again, the notion of "protection of the child" was opposed to the notion of "protection of society". On the other hand, except the situation mentioned above, the *Young Offenders Act* criminalized the reporting by the press that did not respect the anonymity of the young person involved, whether as an accused, as a victim, or as a witness.[214]

On June 27, 1986, Parliament passed *An Act to amend the Young Offenders Act, the Criminal Code, the Penitentiary Act and the Prisons and Reformatories Act*.[215] This Act introduced several amendments to the *Young Offenders Act*, among them, an amendment to the regulation of privacy of young persons. This amendment increased the circumstances under which identifiable information of a young offender could be made public:

> 38(1.2) A youth court judge shall, on the *ex parte* application of a peace officer, make an order permitting any person to publish a report described in subsection (1) that contains the name of a young person, or information serving to identify a young person, who has committed or is alleged to have committed an indictable offence, if the judge is satisfied that
>
> (a) there is reason to believe that the young person is dangerous to others; and
>
> (b) publication of the report is necessary to assist in apprehending the young person.[216]

As noted in the previous section, the *Young Offenders Act* introduced a marked shift to the philosophy of the youth criminal intervention, and especially in the area of privacy. Such a shift in the area of youth privacy would be more evident after each subsequent amendment to the *Young*

214. *Young Offenders Act*, S.C. 1980-81-82-82, c. 110, s. 38(2). CANADA, SOLICITOR GENERAL, *précitée*, note 123, p. 20.

215. *An Act to amend the Young Offenders Act, the Criminal Code, the Penitentiary Act and the Prisons and Reformatories Act*, S.C. 1986, c. 32.

216. *Id.*, s. 29.

Offenders Act. On April 9, 1992 Parliament enacted another piece of legislation that would set up new changes to the regulation of the privacy of young offenders: *An Act to amend the Young Offenders Act and the Criminal Code.*[217] This piece of legislation introduced amendments to the regulation of privacy of young offenders by increasing the number of situations under which youth court information could be disclosed to third parties, such as schools and other authorities.[218]

On April 1997 the Standing Committee on Justice and Legal Affairs released the report entitled "Renewing Youth Justice", which, among other matters, examined the issues of privacy of young offenders.[219] The Committee explored two alternatives: 1) to retain the regulation of the *Young Offenders Act*; or 2) to allow for publication of the names of serious, violent, chronic, and/or repeat young offenders. The Committee recommended amending the *Young Offenders Act* "to provide Youth Court judges with discretion to allow the general publication of the name of a young offender in circumstances where persons are at risk of serious harm and where for safety reasons, the public interest requires that this be done".[220] Once more, the notion of "child protection" would be left aside by the notion of "protection of society".

On May 12, 1998 the report of the Department of Justice was released.[221] This report addressed the issues of privacy of young offenders as well. The Committee noted that the *Young Offenders Act* should be amended "to provide youth court judges with the discretion to allow general publication of the name of a young offender in circumstances where people are at risk of serious harm and where, for safety reasons, the public interest requires that this be done".

On February 19, 2002, the *Youth Criminal Justice Act* received Royal Assent. Even though the rhetoric of this act recognizes the importance of protecting the privacy of young offenders, it allows open youth court proceedings.[222] In addition,

217. *An Act to amend the Young Offenders Act and the Criminal Code,* S.C. 1992, c. 11.
218. *Id.,* ss. 21(1), 21(2), and 21(3).
219. CANADA, HOUSE OF COMMONS, *précitée*, note 174.
220. *Id.,* recommendation 13.
221. CANADA, DEPARTMENT OF JUSTICE, *précitée,* note 179.
222. *Youth Criminal Justice Act, précitée,* note 7, s. 132.

although this piece of legislation prohibits the publication of identifying information about youths involved in the justice system, it permits the publication of information that identifies young offenders that have received an adult sentence, who have been convicted of very serious offences, or who pose a serious risk to the public:[223]

> 110(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.
>
> (2) Subsection (1) does not apply
>
> (a) in a case where the information relates to a young person who has received an adult sentence;
>
> (b) subject to sections 65 (young person not liable to adult sentence) and 75 (youth sentence imposed despite presumptive offence), in a case where the information relates to a young person who has received a youth sentence for an offence set out in paragraph (a) of the definition "presumptive offence" in subsection 2(1), or an offence set out in paragraph (b) of that definition for which the Attorney General has given notice under subsection 64(2) (intention to seek adult sentence); and
>
> (c) in a case where the publication of information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community. [...][224]

Even though the rhetoric of the *Youth Criminal Justice Act* in the area of privacy of young offenders is slightly different to the rhetoric of the *Young Offenders Act*, the underlying normative regulation has not changed. To present (June 2006), the *Youth Criminal Justice Act* has been amended four times; however, none of these amendments

223. *Youth Criminal Justice Act, précitée,* note 7, s. 110. See N. BALA, *op. cit., note* 6, p. 59, 383-384.

224. *Youth Criminal Justice Act, précitée*, note 7, s. 110.

has modified the regulation of privacy of young offenders as stated on the 2002 version.[225]

3.2. IMPOSITION OF ADULT SENTENCES TO YOUNG OFFENDERS IN THE CANADIAN YOUTH CRIMINAL JUSTICE SYSTEM

Even though it is possible to argue that the legislation enacted before the *Juvenile Delinquents Act (1908)* drew a distinction with regard to 1) the sort of procedure to observe depending on the age of the young offender, and 2) the sort of offence committed or attempted to commit, the *Juvenile Delinquents Act* would make such a difference more notorious than its previous regulations.[226] The *Juvenile Delinquents Act* would draw a distinction between 1) young offenders who were over 14 years old and had committed a summary conviction offence and 2) young offenders who were over 14 years old and had committed an indictable offence. Concerning the latter, the *Juvenile Delinquents Act* regulated the possibility for juvenile judges to proceed against such juvenile offenders in ordinary courts instead of juvenile courts ("waiver of jurisdiction"), and consequently, impose adult sentences on these juvenile offenders:

> [w]here the act complained of is, under the provisions of *The Criminal Code* or otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of *The Criminal Code* in that behalf; but such course shall in no case be followed unless the court is of the opinion that the good of the child and the interest of the

225. These amendments are: *An Act to Replace the Yukon Act in order to Modernize it and to Implement Certain Provisions of the Yukon Northern Affairs Program Devolution Transfer Agreement, and to Repeal and Make Amendments to other Acts,* S.C. 2002, c. 7, s. 274 (assented to on March 27, 2002); *An Act to Amend the Criminal Code and to Amend other Acts,* S.C. 2002, c. 13, ss. 91-92 (assented to on June 4, 2002), *An Act to Establish the Library and Archives of Canada, to Amend the Copyright Act and to Amend Certain Acts in Consequence,* S.C. 2004, c. 11, ss. 48-49 (assented to on April 22, 2004), and see note 191.

226. For instance, see *Criminal Code, 1892,* S.C. 1892, c. 29, s. 814.

> community demand it. The court may, in its discretion, at any time before any proceeding has been initiated against the child in the ordinary criminal courts, rescind an order so made.[227]

This section would not be further discussed in Parliament, nor in the Senate or in the House of Commons.[228] Besides, the only time in which it was amended was in the year 1929; however, this amendment would only incorporate minor changes in the text, and therefore, it would not alter its structure.[229]

In the year 1965 the Department of Justice released a report about the state of juvenile delinquency in Canada, and one of the addressed topics was the possibility for juvenile courts to waive jurisdiction in favour of the ordinary criminal courts for some sorts of offences committed by young offenders.[230] The report noted that "[n]otwithstanding a general acceptance of the juvenile court approach to the problem of the juvenile offender, legislators have been unwilling, as any review of juvenile court statutes makes plain, to exempt all offenders under the juvenile age from criminal prosecution in the ordinary courts".[231] In addition, while discussing the different proposed amendments to the *Juvenile Delinquents Act* concerning the matter of waiver of jurisdiction, the committee members noted that "[w]e are unable to accept the suggestion that there are no cases within the age range of juvenile court jurisdiction that should not be brought, by one means or another, before the ordinary criminal courts".[232] Besides, the committee members considered the need to amend the original wording of the *Juvenile Delinquents Act* to provide more discretion to the youth court judges for waiving jurisdiction:

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227. *An Act respecting Juvenile Delinquents,* S.C. 1908, c. 40, s. 7.

228. CANADA, *Debates of the Senate*, 1907-1908 (31 May, 1908), p. 973 (Hon. Mr. Beique); and CANADA, *Debates of the House of Commons,* 1907-1908 (8 July, 1908), p. 12404 (Hon. Mr. Aylesworth and hon. Mr. Lancaster). However, none of these remarks deeply discussed this issue.

229. *An Act respecting Juvenile Delinquents,* S.C. 1929, c. 46, ss. 9, 12.

230. CANADA, DEPARTMENT OF JUSTICE, REPORT OF THE COMMITTEE ON JUVENILE DELINQUENCY, *précitée*, note 130.

231. *Id.*, p. 77.

232. *Id.*, p. 78.

> [t]he Act should be amended to remove the requirement that waiver of jurisdiction by the juvenile court is possible only where the alleged offence is indictable, and waiver of jurisdiction should be permitted in any case where the accused is over the age of 14 years and the allegation is one that would, if proved, support a finding that he is a young offender.[233]

The report released by the Ministry of Solicitor General in the year 1975 had a more restricted approach to the possibility of transferring young offenders to adult courts than the report released in the year 1965: "the Committee believes that transfers to adult court should be limited to young persons of at least 16 years of age, on the basis that the maturity and development of young persons between ages 14 and 16 are not sufficient to warrant their being dealt with in adult court".[234] Then it continued: "[t]ransfers should be considered only with respect to serious offences. Our proposals provide for transfer to be ordered only for the most serious category of indictable offences and not for any summary conviction offences or for any offences mentioned in Section 483 of the Criminal Code, such as theft under $200.00".[235] Finally, the Committee also proposed that "the judge be required to file, as part of the record of the Youth Court proceedings, written reasons for his decision to transfer a young person to adult court".[236]

The report released in the year 1977 by the Solicitor General had a different approach to the report released in the year 1975 concerning the possibility of transferring young offenders to adult courts. First of all, the report released in the year 1977 did not state a minimum age under which a young person can not be transferred to adult courts (the 1975 report suggested the minimum age of 16 years old). Second, it suggested the possibility of transferring young people of 12 and 13 years old to adult courts if the Attorney General approved such an intervention.[237]

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233. *Id.*, p. 286 [recommendation No 18]. See also recommendations No 14, 16, 17, 19, and 20.
234. *Précitée*, note 136, p. 38.
235. *Id.*
236. *Id.*, p. 39.
237. *Précitée*, note 142, p. 17-18.

On July 7, 1982 the *Young Offenders Act* received Royal Assent. With regard to the transfer of young offenders to adult courts, the *Young Offenders Act* would restrict such an alternative to 1) young persons who were older than 14 years old, and 2) young persons who committed a serious indictable offence (the *Juvenile Delinquents Act* had a more severe directive since it regulated the waiver of jurisdiction for young persons who committed "an indictable offence"):[238]

> 16(1) At any time after an information is laid against a young person alleged to have, after attaining the age of fourteen years, committed an indictable offence other than an offence referred to in section 483 of the *Criminal Code* but prior to adjudication, a youth court may, on application of the young person or his counsel, or the Attorney General or his agent, after affording both parties and the parents of the young person an opportunity to be heard, if the court is of the opinion that, in the interest of society and having regard to the needs of the young person, the young person should be proceeding against in ordinary court, order that the young person be so proceeded against in accordance with the law ordinarily applicable to an adult charged with the offence.[239] [emphasis added]

On April 9, 1992 Parliament enacted *An Act to amend the Young Offenders Act and the Criminal Code*.[240] This piece of legislation introduced an important modification to the regulation of transfer of young persons alleged to have committed an indictable offence to ordinary courts since it changed the modal "may" into the modal "shall". In contemporary English grammar, the latter has a more compulsory connotation. Therefore, the youth court would have a stronger duty to decide whether to waive jurisdiction in the case of a young offender who was 14 years of age or older and have committed an indictable offence. Besides, this amendment would make more evident the opposition between the

238. *Id.*, p. 12. *Young Offenders Act*, S.C. 1980-81-82-82, c. 110, s. 16(2)(a).

239. *Young Offenders Act*, S.C. 1980-81-82-82, c. 110, s. 16(1).

240. *An Act to amend the Young Offenders Act and the Criminal Code*, S.C. 1992, c. 11.

notions of "protection of society" and "protection of the child", and the priority of the former over the latter:

> 16(1) At any time after an information is laid against a young person alleged to have, after attaining the age of fourteen years, committed an indictable offence other than an offence referred to in section 553 of the *Criminal Code* but prior to adjudication, a youth court shall, on application of the young person or the young person's counsel or the Attorney General or the Attorney General's agent, after affording both parties and the parents of the young person an opportunity to be heard, determine, in accordance with subsection (1.1), whether the young person should be proceeded against in ordinary court.
>
> (1.1) In making the determination referred to in subsection (1), the youth court shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be reconciled by the youth remaining under the jurisdiction of the youth court, and if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall order that the young person be proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence.[241] [emphasis added]

On June 22, 1995 Parliament enacted *An Act to amend the Young Offenders Act and the Criminal Code*.[242] This Act, among several amendments, introduced modifications to the regulation of transfer of young persons to ordinary courts. The consequence of these amendments was that a young person who was sixteen or seventeen years of age at the time of the alleged commission of certain serious offences had to prove the factors justifying the trial in youth courts rather than in ordinary courts. This *Act* reversed the *onus probandi*; the youth court would not be required to determine whether a young person should be proceeded against in ordinary courts,

241. *Id.*, s. 2(1).

242. *An Act to amend the Young Offenders Act and the Criminal Code*, S.C. 1995, c. 19.

but the young person would be required to make an application for being proceeded against in a youth court:

> 16(1) Subject to subsection (1.01), at any time after an information is laid against a young person alleged to have, after attaining the age of fourteen years, committed an indictable offence other than an offence referred to in section 553 of the *Criminal Code* but prior to adjudication, a youth court shall, on application of the young person or the young person's counsel or the Attorney General or an agent of the Attorney General, determine, in accordance with subsection (1.1), whether the young person should be proceeded against in ordinary court.
>
> (1.01) Every young person against whom an information is laid who is alleged to have committed
>
> (a) first degree murder or second degree murder within the meaning of section 231 of the *Criminal Code*,
>
> (b) an offence under section 239 of the *Criminal Code* (attempt to commit murder),
>
> (c) an offence under section 232 or 234 of the *Criminal Code* (manslaughter), or
>
> (d) an offence under section 273 of the *Criminal Code* (aggravated sexual assault),
>
> and who was sixteen or seventeen years of age at the time of the alleged commission of the offence shall be proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence unless the youth court, on application by the young person, the young person's counsel or the Attorney General or an agent of the Attorney General, makes an order under subsection (1.04) or (1.05) or subparagraph (1.1)(a)(ii) that the young person should be proceeded against in youth court.
>
> [...]
>
> (1.1) In making the determination referred to in subsection (1) or (1.03), the youth court, after affording both parties and the parents of the young person an opportunity to be heard, shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be

reconciled by the youth being under the jurisdiction of the youth court, and

(a) if the court is of the opinion that those objectives can be so reconciled, the court shall

(i) in the case of an application under subsection (1), refuse to make an order that the young person be proceeded against in ordinary court, and

(ii) in the case of an application under subsection (1.01), order that the young person be proceeded against in youth court; or

(b) if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall

(i) in the case of an application under subsection (1), order that the young person be proceeded against in ordinary court in accordance with the law ordinarily applicable to an adult charged with the offence, and

(ii) in the case of an application under subsection (1.01), refuse to make an order that the young person be proceeded against in youth court.[243] [emphasis added]

On April 1997 the Standing Committee on Justice and Legal Affairs released the report entitled "Renewing Youth Justice", which, among other matters, examined the issues of transfer of young offenders to ordinary courts.[244] The committee explored several possibilities: 1) to retain the regulation of the *Young Offenders Act*; 2) to repeal the transfer provisions in their entirety; 3) to repeal the presumptive transfer/"reverse onus" provisions added by Bill C-37 (the last analyzed amendment); 4) to add more offences to the presumptive transfer/ "reverse onus" provisions; 5) that there should be automatic transfer to ordinary/adult court of young people, no matter what their age, alleged to have committed such serious offences as murder or sexual assault; or 6) to replace the present pre-adjudicative system by a post-adjudicative system. The Committee recommended adopting this last alternative.[245] The regulation of the *Young Offenders Act* allowed the transfer

243. *Id.*, s. 8(1).
244. CANADA, HOUSE OF COMMONS, *précitée*, note 174.
245. *Id.*, recommendation 11.

of young offenders who were 14 years of age or older and who have committed an indictable offence to adult courts. The Committee considered that the youth court should deal with such offenders, and if they were found guilty of the alleged offence, the youth court should impose an adult sentence.

On May 12, 1998 the report of the Department of Justice was released.[246] This report addressed the issue of transfer of young offenders to ordinary courts as well. The Committee noted that there were two alternatives for such an approach: "transferring the young person to adult court (the current system) or, as is proposed below, allowing the original trial court to impose an adult sentence".[247] In addition, the Committee noted that

> [w]e propose that the category of offences where this would be presumed to happen be extended from the offences of murder, attempted murder, manslaughter and aggravated sexual assault to a fifth category of young persons who have a pattern of convictions for serious, violent offences. The presumptions currently apply to only 16- and 17-year-olds. This would be extended to 14- and 15-year-olds for the five categories of offences. Presumptions can be rebutted where youth court sentences are deemed appropriate.[248] [emphasis added]

On February 19, 2002, the *Youth Criminal Justice Act* received Royal Assent. Concerning the imposition of an adult sentence, the *Youth Criminal Justice Act* allows such a measure for young people who have committed a presumptive offence or who have committed another serious offence for which "a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that an adult sentence be imposed".[249] Moreover, concerning the age limit for the imposition of an adult sentence, this *Act* notes that "[t]he lieutenant governor in council of a province may by order fix an age greater than fourteen years but not

246. CANADA, DEPARTMENT OF JUSTICE, *précitée*, note 179.
247. *Id.*, p. 25.
248. *Id.* See also recommendation 11.
249. *Youth Criminal Justice Act*, *précitée*, note 7, s. 72(1)(b).

more than sixteen years for the purpose of the application of the provisions of this *Act* relating to presumptive offences".[250]

> 62. An adult sentence shall be imposed on a young person who is found guilty of an indictable offence for which an adult is liable to imprisonment for a term of more than two years in the following cases:
>
> (a) in the case of a presumptive offence, if the youth justice court makes an order under subsection 70(2) or paragraph 72(1)(b); or
>
> (b) in any other case, if the youth justice court makes an order under subsection 64(5) or paragraph 72(1)(b) in relation to an offence committed after the young person attained the age of fourteen years.[251]

To present (June 2006), the *Youth Criminal Justice Act* has been amended four times; however, none of these amendments has modified the regulation of the imposition of adult sentences as stated on the 2002 version.[252] The current regulation allows the imposition of adult sentences to young offenders who were 14 years old or older by the time they committed the offences of first degree murder or second degree murder, attempt to commit murder, manslaughter, aggravated sexual assault, or a serious violent offence for which an adult is liable to imprisonment for a term of more than two years ("presumptive offences").[253] In addition, the current system reverses the *onus*

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250. *Id.*, s. 61.

251. *Id.*, s. 62.

252. These amendments are: *An Act to Replace the Yukon Act in order to Modernize it and to Implement Certain Provisions of the Yukon Northern Affairs Program Devolution Transfer Agreement, and to Repeal and Make Amendments to other Acts,* S.C. 2002, c. 7, s. 274 (assented to on March 27, 2002); *An Act to Amend the Criminal Code and to Amend other Acts,* S.C. 2002, c. 13, ss. 91-92 (assented to on June 4, 2002), *An Act to Establish the Library and Archives of Canada, to Amend the Copyright Act and to Amend Certain Acts in Consequence,* S.C. 2004, c. 11, ss. 48-49 (assented to on April 22, 2004), and see note 191.

253. Section 2 of the *Youth Criminal Justice Act* defines the notion of "presumptive offence":

> "Presumptive offence" means:
>
> a) an offence committed, or alleged to have been committed, by a young person who has attained the age of fourteen years, or, in a province where the lieutenant governor in council has fixed an age greater than fourteen years under section 61, the age so fixed, under one of the following provisions of the *Criminal Code*:

probandi by stating that the young offender who has committed a "presumptive offence" should prove the reasons for imposing a youth sentence instead of an adult sentence.

3.3. SUMMARY

The purpose of this section was to explore the origins of the problematic sections identified by the Quebec Court of Appeal. As noted above, both sorts of provisions are not a recent intervention strategy. Moreover, with regard to the possibility of imposing adult sentences on young offenders, it is possible to identify the origins of such an intervention on the wording of the *Juvenile Delinquents Act* as enacted in the year 1908. This *Act* already allowed juvenile court judges to waive jurisdiction in favour of the ordinary criminal courts concerning young offenders who committed some sorts of offences.

In relation to the regulation of the privacy of young offenders, this section noted that before the enactment of the *Canadian Criminal Code (1892)* there were no regulations governing such an issue. Both the *Canadian Criminal Code* and the *Juvenile Delinquents Act (1908)* introduced regulations to prevent the information related to juvenile offenders from being made public, and therefore, prevent the iatrogenic effects[254] associated to such a publication. The *Young*

(i) section 231 or 235 (first degree murder or second degree murder within the meaning of section 231),

(ii) section 239 (attempt to commit murder),

(iii) section 232, 234 or 236 (manslaughter), or

(iv) section 273 (aggravated sexual assault); or

b) a serious violent offence for which an adult is liable to imprisonment for a term of more than two years committed, or alleged to have been committed, by a young person after the coming into force of section 62 (adult sentence) and after the young person has attained the age of fourteen years, or, in a province where the lieutenant governor in council has fixed an age greater than fourteen years under section 61, the age so fixed, if at the time of the commission or alleged commission of the offence at least two judicial determinations have been made under subsection 42(9), at different proceedings, that the young person has committed a serious violent offence. *Youth Criminal Justice Act, précitée*, note 7, s. 2.

254. David Hicks and Michael Petrunik have defined iatrogenesis, following S. Cohen, as "a term derived from the medical field [that] refers to a condition in which a given disease is caused by, or exacerbated by, the intervention which ostensibly tries to alleviate or remedy the problem". In "The Best Intentions Are Not Enough: Drug Prohibition as a Failed Intervention Strategy", (1997) 40 *Canadian Review of Social Policy*, 1, at p. 13. Accord G. MARSHALL, *op. cit.*, note 60, p. 292.

Offenders Act introduced a modification to such an approach: not only were youth trials opened to the public, but also the personal information of young offenders could be made public when the authorities considered that such a measure could protect the "public interest". This regulation continued with the enactment of the *Youth Criminal Justice Act*. Even though the "perceptions" about the undesirable effects of making public the information of young offenders have not changed, it has been noted that legislators have been able to "tolerate" this effect, in an attempt to protect society from the "dangerous young offenders".

4. CONCLUSION. THE IMPLEMENTATION OF YOUTH CRIMINAL JUSTICE IN CANADA: FROM THE *JUVENILE DELINQUENTS ACT* TO THE *YOUTH CRIMINAL JUSTICE ACT*

The purpose of this research was to explore the principles and objectives that have underlain the youth criminal justice system in Canada. In addition, this research was interested in exploring the societal factors and rhetoric that led parliamentarians to enact youth criminal law legislation. Finally, this research was interested in exploring whether the sections of *Bill C-7* (current *Youth Criminal Justice Act*) identified by the Quebec Court of Appeal as contrary to the *Canadian Charter of Rights and Freedoms* were a recent legal intervention strategy or have been in the Canadian youth criminal system for some time.

As noted in sections one and two, the origins of youth criminal law intervention are strongly grounded in a moral and welfare discourse whose main purpose was to "protect the child" in order to "protect society". Such a kind of intervention dominated the Canadian approach to youth criminal misbehaviour until the 1980's, when the *Young Offenders Act* was enacted. This piece of legislation modified the underlying purposes of the Canadian youth criminal law intervention by putting more emphasis on the concept of "protection of society" and on the idea that young offenders should suffer the consequences of the criminal law sanction. In some way, it is possible to affirm that the Canadian youth criminal law intervention moved from a model based on the notion of

"protection of the child" to "protect society", to a model based on the idea that we should "punish and expose" the young offender to the public for the well-being of society. For the "child protection model" that underlay the *Juvenile Delinquents Act*, criminal behaviour was not seen as a cost/benefit (rational) decision, but as the consequence of a situation of neglect, abuse, and/or immorality from which young people should be protected. The underlying theories of the *Juvenile Delinquents Act* were strongly grounded in a social environmental approach to youth criminality: for preventing youth crime, we should try to modify the conditions that lead to criminal behaviour (neglect, abuse, immorality, etc.). The *Young Offenders Act* would oppose the notion of "protection of the child" to the notion of "protection of society", and would stress the importance of the latter over the former. In addition, as noted in subsection 2.3, after the year 1995 emphasis was put on the notion of "crime prevention." For this act, the notion of "crime prevention" was seen as a medium for introducing deterrence theories into the youth criminal justice system, and not as a medium for encouraging the socio-environmental approach to youth crime. The *Youth Criminal Justice Act*, the current criminal law that regulates young criminal misbehaviour, has adopted a similar approach to youth criminal law intervention to the *Young Offenders Act.*

Section three pointed out that the problematic sections identified by the Quebec Court of Appeal, the possibility of making a young offender's personal information available to society and the reverse of the *onus probandi* for the imposition of an adult sentence to a young offender who has committed a presumptive offence, are not recent intervention strategies: they already existed in the *Young Offenders Act.* In addition, the reverse of the *onus probandi* for the imposition of an adult sentence to a young offender who committed some specific (serious) offences already existed in the *Juvenile Delinquents Act.* Moreover, even before the enactment of the *Juvenile Delinquents Act* there were some sorts of limitations (type of criminal behaviour committed) for young offenders to be dealt with a special procedure: only young offenders who committed the offence of theft or another offence punishable as theft would benefit from the special summary procedure regulated for young people.

As noted in the introduction, George Mead draws a distinction between adult and youth criminal justice systems by highlighting that one of the differences between both sorts of interventions is the kind of objective that each of them is intended to achieve. He points out that while the adult criminal justice system is more concerned with the notions of "enemy of society" and punishment,[255] the youth criminal justice system is more concerned with the ideas of reintegration and rehabilitation.[256] In his 1918 writing he supposes that the adult criminal justice system would evolve from the "repression and punishment" model to the "rehabilitation and reintegration model" designed for young offenders.[257] As analyzed in this paper, there has been a movement within criminal justice system: the paradox is that the adult criminal justice system has not moved from a model based on the notions of "enemy and punishment" to a model based on "citizenship and inclusion", but that the youth criminal justice system has moved from the model based on the notions of "rehabilitation and inclusion" to a model based on "exclusion and punishment". If George Mead was alive, it would be very interesting to see his reaction to such an irony.

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255. "I refer to the attitude of hostility to the lawbreaker as an enemy to the society to which we belong. In this attitude we are defending the social structure against an enemy with all the animus which the threat to our own interests calls out. It is not the detailed operation of the law in defining the invasion of rights and their proper preservation that is the center of our interest but the capture and punishment of the personal enemy, who is also the public enemy". G. MEAD, *loc. cit.*, note 2, p. 585.

256. "In the place of the emotional solidarity which makes us all one against the criminal there appears the cumulation of varied interests unconnected in the past which not only bring new meaning to the delinquent but which also bring the sense of growth, development, and achievement". G. MEAD, *loc. cit.*, note 2, p. 597.

257. G. MEAD, *loc. cit.*, note 2, p. 594, 602.