

**TRANSFORMATIONS IN THE CANADIAN YOUTH JUSTICE SYSTEM
CREATION OF STATUTES AND THE JUDICIAL WAIVER IN QUEBEC**

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ABSTRACT

The objectives of this thesis were to observe how the Canadian youth justice system has dealt with the regulation of the transfer of young offenders to the adult court and how the Canadian statutes have regulated the imposition of adult offences for young offenders.

For this, I drew a distinction between two levels of observation: first, I observed the process of "creation of statutes" by the political system. Second, I observed the process of "understanding and interpretation of statutes" by the judicial system. The notion of "political system" includes the legislation enacted by Parliament, parliamentary debates, and reports published by the Government of Canada. The notion of "judicial system" includes the decisions of the Montreal Youth Court.

For the first level of observation ("creation of statutes"), I observed and analyzed the work of the political system for the period 1842 to 2012. Starting in 1857, many statutes regulated different aspects of the criminal law system as it applied to young people. The first statute to deal with youth offenders comprehensively and different from adult offenders was the *Juvenile Delinquents Act* (1908); this statute was replaced by the *Young Offenders Act* (1982). The current statute is the *Youth Criminal Justice Act* (2002).

With regard to the *Juvenile Delinquents Act* (1908) and the *Young Offenders Act* (1982), I observed how the political system regulated the mechanism of transferring a young person to the adult court. This mechanism allowed the youth court to decide a question of

jurisdiction: whether the young person would be processed and sentenced within the youth justice system, or whether the young person would be sent to the adult court for him to be dealt with and sentenced therein. With regard to the *Youth Criminal Justice Act* (2002), I observed how the political system has regulated the imposition of adult sentences by the youth court. This statute replaced the mechanism of transfer under the two previous statutes by the imposition of adult sentences within the youth justice system.

For the second level of observation ("the understanding and interpretation of statutes"), I observed how the Montreal Youth Court had understood and interpreted the statutory provision that allowed the youth court to transfer a young person to the adult court for the young person to be dealt with and sentenced therein. My period of observation is from 1911 to 1995.

I argue that both the political and the judicial systems have been strongly influenced by the theories of deterrence, denunciation, retribution, and rehabilitation. The influence that each theory has exercised on each system varies. The political system, originally focused on the rehabilitation of young people, has been slowly "contaminated" by the most punitive theories, such as deterrence and denunciation. This shift started in the 70's and slowly increased over the years. Conversely, while the judicial system does not seem to have been originally influenced by the theories of rehabilitation, its focus has slowly shifted towards this objective as the primary goal of their intervention towards young offenders since the 70's. However, the "successful rehabilitation" of a young person has

become a goal in itself, where “unsuccessful offenders” have been transferred to the adult court and dealt with the adult punitive justice system.

KEYWORDS: transfer to the adult court; imposition of adult sentences; youth criminal justice system; Canada; creation of laws; Montreal Youth Court; theories of punishment; rehabilitation; Quebec; understanding and interpretation of statutes.

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INTRODUCTION

Before looking to an uncertain future we must first come to terms with the forgotten past. Many of today's seemingly unprecedented problems in the theory and practice of juvenile justice, such as the transfer of adolescents from juvenile court to criminal court, have histories that can offer useful perspectives on present concerns.¹

The study of the history of the criminal law system and how its practices have operated in the Canadian society is a popular subject among many scholars from different academic fields. In the last few years there has been an increased focus on structures such as race/ethnicity, gender/sex, and class/social status, which have highly contributed to a more realistic approach to how the criminal law has actually operated.² However, even though these structures have unveiled inegalitarian systems, there are still some structures that have been kept in the dark, such as age.³

The study of children as defendants in the criminal law system has been left aside most of the time. Even though there have been many attempts to expose how the Canadian law practices actually affected children and dealt with them, the study of the history of some of the harshest measures imposed on children in Canada has been so far ignored.⁴ This thesis attempts to address part of this vacuum, and analyzes how the transfer of young offenders to the adult court -

¹ David S Tanenhaus, "The Evolution of Transfer out of the Juvenile Court" in Jeffrey Fagan & Franklin E Zimring, eds, *The Changing Borders of Juvenile Justice. Transfer of Adolescents to the Criminal Court* (Chicago and London: The University of Chicago Press, 2000) 13 at 14.

² Donald Fyson, *Magistrates, Police, and People. Everyday Criminal Justice in Quebec and Lower Canada, 1764-1837* (Toronto, Buffalo and London: University of Toronto Press, 2006) at 273-309.

³ For an analysis of the race/ethnicity, gender, and class axes in English Canada see Mariana Valverde, *The Age of Light, Soap and Water. Moral Reform in English Canada, 1885-1925* (Toronto: McClelland & Stewart Inc, 1991).

⁴ On the other hand, these measures have been extensively studied in the United States; see Barry C Feld, *Bad Kids. Race and the Transformation of the Juvenile Court* (New York, Oxford: Oxford University Press, 1999).

Juvenile Delinquents Act (1908) and *Young Offenders Act* (1982) - and the imposition of adult sentences to young offenders - *Youth Criminal Justice Act* (2002) have been regulated in Canada, and particularly understood and implemented in the province of Quebec.⁵ This study attempts to tell a history of childhood in Canada, the history about how “bad children” have been dealt with.⁶

In this thesis I aim at exploring and bringing some light into two main questions. The first question is how the Parliament of Canada has regulated the transfer of young offenders to adult courts and the imposition of adult sentences to young offenders. The second question is how the Montreal Youth Court has understood and implemented the regulation of the transfer of young offenders to the adult court. As Platt points out, most of the studies of deviant behavior have focused on “the socialization or treatment of delinquents”⁷ rather than on “how laws, law-makers, and law-enforcement contribute to the ‘registration’ of delinquency.”⁸ In other words, the analysis of the process by which the political and law systems identify and deal with people as “delinquents” has not received as much attention as the research in the fields of corrections or

⁵ *An Act respecting Juvenile Delinquents*, SC 1908, c 40 [*Juvenile Delinquents Act* (1908)]; *An Act respecting young offenders and to repeal the Juvenile Delinquents Act*, SC 1980-81-82-83, c 110 [*Young Offenders Act* (1982)]; *An Act in respect of criminal justice for young persons and to amend and repeal other Acts*, SC 2002, c 1 [*Youth Criminal Justice Act* (2002)].

⁶ Neil Sutherland’s book, *Children in English-Canadian Society. Framing the Twentieth-Century Consensus*, is considered a Canadian classic in social history of childhood. The problem is that his analysis explicitly excludes Quebec. As he notes in the preface to his book, “I use ‘English-Canadian Society’ to refer to all the non-French-speaking population of Canada. Since I include native Canadians, ‘third-force’ immigrants, and even many Francophones outside of Quebec within this group, I may seem to be extending very considerably the notion of ‘English-speaking’; Neil Sutherland, *Children in English-Canadian Society. Framing the Twentieth-Century Consensus* (Toronto, Buffalo, London: University of Toronto Press, 1976) at vii. His analysis briefly comments the transfer of juvenile delinquents to adult courts by discussing the jurisdiction of the Juvenile Delinquents’ Court: “[f]irst, no matter how serious the case, the juvenile court had exclusive jurisdiction over it. Only the court itself could decide to order that an indictable offence be tried before an adult court.” *Ibid* at 122. Renée Joyal has explored Quebec social-legal-history of childhood; however, her work briefly discusses the matter of youths transferred to adult courts in Quebec. Renée Joyal, *Les Enfants, la société et l’État au Québec, 1608-1989. Jalons* (Montréal: Éditions Hurtubise HMH, 1999) at 115, 284.

⁷ Anthony Platt, *The Child Savers. The Invention of Delinquency*, 2d ed (Chicago and London: The University of Chicago Press, 1977) at 13.

⁸ *Ibid*.

the offender's effective social/psychological intervention. This research aims at exploring Platt's concerns and bringing some light into the creation of deviancy, specifically "child delinquency".

There is a paradoxical matter in this inquiry: youths accused of serious criminal offences may receive harsh penalties despite their reduced moral responsibility. The origins of a youth criminal law system different from an adult criminal law system was the recognition that youths have distinctive moral responsibility than adults due to the former's lack of maturity for understanding the short and long term consequences of their wrongdoings. As a result, the youth criminal law system was focused on this lack of moral responsibility rather than on the seriousness of the offence committed. In other words, for the youth criminal law system the standard was the individual young person (subjective standard) rather than the offence committed (objective standard). The kind offence committed was just an indication of the young person's rehabilitation needs – and not the measure of the punishment. Based on this, how can we explain a youth criminal law system that imposes harsh penalties only because of the sort of offence committed leaving aside the young person's diminished moral responsibility? A youth criminal law system that allows youths to be punished as adults only because of the sort of offence committed and ignores their reduced moral responsibility contradicts its own origins.⁹ Such a system leaves aside the principle of reduced moral responsibility and focuses on the traditional theories of punishment, such as deterrence, denunciation and retribution. These theories, which have governed sentencing in the adult criminal law system since the XVIII

⁹ Bernuz argues that in these cases "the role of the youth justice system is mistaken for and similar to the role of the adult justice system." María José Bernuz, "¿Tienen Derecho los Menores? Mitos y Realidades" in César Manzanos, ed, *Infancia y Juventud Marginadas. Políticas Sociales y Criminales* (Vitoria-Gasteiz: Asociación Ikusbide, 2006) at 96 [translated by author].

century, put an emphasis on the gravity of the criminal behavior committed and on the infliction of suffering on the wrongdoer, rather than on the rehabilitation of the offender.¹⁰

In order to address the above two main questions, I have pursued two parallel tasks in this thesis. Even though much has been written about the transfer of young offenders to adult courts in the United States, there are still many unanswered questions in Canada: when were these measures first introduced? Why were they passed into law? Which was the justification for their use?¹¹ The first task is to examine how the transfer of young offenders to adult courts and the imposition of adult sentences to young offenders have been regulated by the Parliament of Canada. Historically, it was not until 1857 that young offenders were “statutorily perceived” to be different from adult offenders by the Parliament of the Province of Canada and dealt with differently. For this first task, I explore the enacted statutes in the area of the youth criminal law system in the Province of Canada (1840-1856) and in Canada (1857-2012) for the period 1841-2012 (both years included), and identify the statutes that have regulated this matter. Since my interest lie on exploring the given reasons for using these measures, I use the debates of the Legislative Assembly and Legislative Council (Province of Canada), and the debates of the House of Commons and the Senate (Canada) that have discussed issues related to the transfer of young offenders to the adult court or the imposition of adult sentences to young offenders for identifying the reasons for the enactment of these measures. For exploring this subject from

¹⁰ Álvaro Pires, “Aspects, traces et parcours de la rationalité pénale moderne” in Christian Debuyst, Françoise Digneffe & Álvaro Pires, eds, *Histoire des savoirs sur le crime & la peine. La rationalité pénale et la naissance de la criminologie*, vol 2 (Bruxelles: Groupe De Boeck sa, 2008) 23.

¹¹ Indeed, when comparing juvenile probation in the U.S. and in Canada, Hagan and Leon warn us that “differences of philosophy and history suggest the dangers of precipitously applying American or any other foreign frameworks to the Canadian scene”; John Hagan & Jeffrey Leon, “The Rehabilitation of Law: a Social-Historical Comparison of Probation in Canada and the United States” (1980) 5:3 *Canadian Journal of Sociology* 235 at 235. There are two kinds of dangers here: one is to think that everything is the same, the other is to think that everything is different. Not only do we have to be aware of differences, but as well we need to be aware of similarities. I am very thankful to Professor Alvaro Pires for his comments on this matter.

different perspectives, I also rely on reports of the Canadian federal government and scholars' research that have addressed the Canadian youth criminal law system.

The second task is to look at how the Montreal Youth Court has understood and implemented the regulation of the transfer of young offenders to the adult court for the period 1911-1995 (both years included). This thesis does not deal with the sentencing, but rather with how the Montreal Youth Court decided to keep a young person within its jurisdiction or to transfer the young person to the adult court. In other words, the question about "transfer" is a question of *jurisdiction*. The *Juvenile Delinquents Act* (1908), which regulated the creation of juvenile courts and juvenile court judges in Canada, was enacted on 20th July 1908, and the first juvenile delinquents' court in Quebec (the Montreal Juvenile Delinquents' Court) was established in November 1911.¹² This Court operated as Quebec's only juvenile court until 1940, when a second court was opened in Quebec City.¹³ This means that for almost 30 years the Montreal Youth Court was the only juvenile court in the province of Quebec. However, its jurisdiction was limited to delinquencies occurred within the city of Montreal. Delinquencies occurring outside the city of Montreal were regulated and dealt with by the *Criminal Code*. For this second task my focus is no longer on the practices of the political system, but rather on the practices of the criminal law system: whether and why the court transferred young offenders to the adult court. Specifically, I focus the research on the sorts of offences the court dealt with, how they punished youths found guilty of these offences, whether the court transferred youths to the adult court, and the reasons given by the court for this. I consulted the decisions of the Montreal

¹² Minute-book from the Montreal Juvenile Delinquents' Court for the period 28th October 1911 to 31st December 1913, Montreal, Archives Nationales du Québec (TL483, S45, SS7; place: 20 0 010 07-01-001B-01; content: 2004-03-001\499). See *Loi relative aux jeunes délinquants*, SQ 1910, c 26; OIC 1911/1127 (*Juvenile Delinquents Act*).

¹³ *La Loi instituant la Cour des jeunes délinquants de Québec*, SQ 1940, c 53. See Tamara Myers, *Caught. Montreal's Modern Girls and the Law, 1869-1945* (Toronto: University of Toronto Press, 2006).

Youth Court for this purpose. In order to have a more general view of the ideas debated about these questions, I also consulted other sources for better understanding the context of the research, such as the legislation enacted by the National Assembly of Quebec on the issue of children/youths for the period 1840-2008 (both years included), the Quebec government reports on the subject, and scholarly publications in this area.

In this thesis I argue that the enactment of the transfer of young offenders to adult courts is by the political system is based on theories of punishment indifferent to social inclusion, such as deterrence, denunciation and retribution. This is confirmed by the enactment of the mechanism of adult sentences for young offenders as enacted in 2002. According to both measures, youths accused of having committed serious offences should be dealt with the adult court or adult punishment. This influence of the theories of punishment applicable to young offenders has existed in Canada since 1857, when the first statute drawing a distinction between young and adult offenders was enacted.

On the other hand, and from the perspective of the judicial system, I argue that while the Montreal Youth Court accepted this punitive perspective during the first years of the court, since 1970's it has reacted to them by specifically opposing to the transfer of young offenders to the adult court unless the young person cannot be rehabilitated within the youth justice system. From the origins of the Montreal Youth Court to 1970's, the court followed the underlying theories of the transfer of young offenders to the adult court. Youths were transferred to adult courts if they committed indictable offences. However, starting in 1970s the Montreal Youth

Court has only transferred a young person to the adult court if the youth is not amenable to rehabilitation.

The notion of “amenability to rehabilitation” is complex as it encompasses two circumstances: 1) a youth justice system with fewer possibilities of treatment available than the adult justice system - at least as perceived by the Montreal Youth Court, and 2) a young person who, according to professional experts, does not respond to rehabilitation. The Montreal Youth Court mostly faced the first circumstance in the 1970s. The second circumstance has been identified for the period 1980 to 1990.

In addition to this, the enactment of the transfer of young offenders to the adult court and how this measure has been implemented by the Montreal Youth Court show the incompatibility between the federal and the provincial spheres of power, and the practical difficulties faced by the courts in certain circumstances, such as the variety of rehabilitative treatment available within the youth criminal law system.

CHAPTER 1

Elements of History and Methodology

Notons que Simmel dit bien « plus objectif », « plus libre », etc. Il fait référence aussi à une liberté *pratique* et *théorique*. On peut interpréter cette dernière notamment comme la capacité de se détacher, au besoin, à différents degrés, *d'une seule perspective* épistémologique, *d'une seule façon* de concevoir les différents objets, *d'un seul courant* théorique et *d'un seul type* de recherche empirique. On doit être prêt à voyager dans toutes les directions.¹⁴

If we intend rationally to assess the nature and purposes of correctional policies, it is of considerable importance to understand how laws and legislation are passed; how changes in penal practices are implemented, and what interests are served by such reforms.¹⁵

It is my central thesis that empirical research goes beyond the passive role of verifying and testing theory: it does more than confirm or refute hypotheses. Research plays as active role: it performs at least four major functions which help shape the development of theory. It *initiates*, it *reformulates*, it *deflects* and *clarifies* theory.¹⁶

1.1. Introduction

The creation and regulation of youth misbehavior in Canada have been long and complex practices. As mentioned in the introduction to this thesis, Platt argues that most of the studies on deviant behavior focus on “the socialization or treatment of delinquents”¹⁷ rather than on “how laws, law-makers, and law-enforcement contribute to the ‘registration’ of delinquency.”¹⁸ The

¹⁴ Álvaro Pires, “De quelques enjeux épistémologiques d’une méthodologie générale pour les sciences sociales” in Jean Poupart et al, eds, *La recherche qualitative. Enjeux épistémologiques et méthodologiques* (Montreal: gaëtan morin éditeur, 1997) 3 at 44-45.

¹⁵ Anthony Platt, “The Rise of the Child-Saving Movement: A Study in Social Policy and Correctional Reform” (1969) 381: January The Annals of The American Academy of Political and Social Science 21 at 21.

¹⁶ Robert Merton, “The Bearing of Empirical Research upon the Development of Social Theory” (1948) 13:5 American Sociological Review 505 at 506.

¹⁷ Platt, *supra* note 7 at 13.

¹⁸ *Ibid.*

data I collected and analyzed tries to address this vacuum. The data is split into two directions, including two complex social systems: the political and the judicial systems.

From one side, the data focus on the creation of criminal statutes by Parliament and the Federal Government, which could be denominated the political system or the political sphere of power. Having decided to focus this study on the creation of statutes, I decided that a study only focused on the examination of the statutes would be insufficient. This would have only provided this research with “photo shots” of how statutory sections have changed during a certain period of time. Even though such an analysis would have allowed the identification of “legislative trajectories” in the regulation of youth criminal behavior – and maybe underlying perceptions into the use of criminal law as a way of solving conflict - it would still have been very difficult to capture the ideologies and given reasons underlying these changes. Because of this, this study focuses on the federal statutes enacted dealing with youth criminal behavior and the parliamentary debates that took place during the creation and major amendments of the youth criminal law system. The debates that take place when a bill is introduced in Parliament until it is enacted as a statute provide this study - at least - with some “insider” understanding of Parliamentarians’ reasons for supporting or rejecting certain draft legislation.

Nonetheless, it is well known that claims about social problems precede the enactment of a particular statute that attempts to address them. As a result, the analysis of federal reports regarding the youth criminal law system has been identified as another key component of this study for a better understanding of the creation of youth criminal statutes in Canada. Despite the extent of the above mentioned research (this thesis explores 172 years of enacted legislation,

parliamentary debates and federal reports) the analyzed data only provides this study - of course – with a partial description of how the political system has created youth criminal statutes in Canada. As we know, it is futile to have an expectation of obtaining a full view of a complex social system (or of reality). In spite of this, the data still provided this study with some light about “what’s going on” in the political system. Yet, this remains an incomplete picture of the creation of statutes within the political system.

From another side, I collected other kind of data for the purpose of observing the understanding and implementation of the legislation by Canadian courts: the study of the judicial system or the judicial sphere of the criminal law system. As presented later, the main objective of this data on the criminal law system is to explore under which circumstances young offenders were transferred to the adult court. This complements this research and provides a more sensitive approach to the object of this study: how the political system and the judicial system conceive the intervention in the case of “youth delinquency” in Canada.¹⁹

The methods for collecting data from both the political and the judicial systems are described below. However, before this, it is necessary to provide the readers with a brief introduction to Canadian history for their understanding of the reasons for how I collected the data on the political system. This study starts with legislation enacted in 1841, and concludes with legislation enacted in 2012. During the 172 year period of analysis many changes have occurred

¹⁹ Doob and Sprott refer to this as “the history of two parallel, but separate, youth justice systems: the political youth justice system (the system as it is seen and discussed in the political realm) and the operational youth justice system (the system as it operates on a daily basis)”; Anthony Doob & Jane Sprott, “Youth Justice in Canada” in Michael Tonry & Anthony Doob, eds, *Youth Crime and Youth Justice. Comparative and Cross-National Perspectives* (Chicago and London: The University of Chicago Press, 2004) 185 at 186.

within Canadian political institutions and these changes affect the methodology for collecting the data.

1.2. Historical Background

Canada, before becoming the country we know nowadays, underwent several territorial divisions and unifications. This information is significant for understanding how the empirical data (statutes and parliamentary debates) relevant to the discussion about the political system were identified and collected.

The narrative starts with the capitulation of Quebec on 18th September 1759, when French and Canadians were defeated by British troops at the Battle of the Plains of Abraham.²⁰ Montreal fell nearly a year later and the capitulation was signed on 8th September 1760. In 1763 France transferred its colonies in “Canada” (current provinces of Quebec and Ontario) to Britain, which became part of the British North America colonies.²¹ Another area of British settlement and control was in the Atlantic coast in the form of the three maritime colonies of Nova Scotia, New Brunswick, and Prince Edward Island (the region known as “Acadia” by the French).²² In 1791 the British divided Canada into Lower and Upper Canada to solve some political and administrative problems that arose due to the movement of English-speaking population into the country west of Montreal:²³

²⁰ McRoberts notes “[t]he terms *Canadien* and *habitant* were developed to distinguish the colony’s established residents from metropolitan Frenchmen”; see Kenneth McRoberts, *Quebec. Social Change and Political Crisis*, 3d ed (Toronto: McClelland & Stewart Ltd, 1988) at 41.

²¹ *Treaty of Paris*, United Kingdom and France, 1763.

²² Gordon Stewart, *Canada Before 1867* (Washington DC: The Association for Canadian Studies in the United States, 1996) at 21.

²³ *Ibid.*

Lower Canada (so named because it was lower down the St. Lawrence Valley) consisted of the old French heartland between Montreal and Quebec and included nearly all the French-speaking population, although by this time there was a significant English minority presence in the Montreal region. Upper Canada ran from the Ottawa River west to the Detroit River and initially was largely loyalist in make-up.²⁴

In 1840 the Union of Canada, also known as the Province of Canada, was constituted by the unification of Lower and Upper Canadas into one administrative territory.²⁵ The first assembly of the Parliament of the Province of Canada took place on 14th June 1841 in the city of Kingston (former Upper Canada). According to Stewart, the political policy of “unification” was aimed at assimilating French Canadians into English Canadians:

Durham [Governor General of British North America from 1838 to 1839] had proposed that Upper and Lower Canada should be joined into one large colony. Durham’s investigation of conditions in the Canadas had convinced him that French-Canadian society was too traditional. He reasoned that as long as the French Canadians lived in a separate colony in which they formed the overwhelming majority of the population, they would not adapt to the ways of modern, commercial society. Bringing the French Canadians into a single enlarged colony would in the long run force the French Canadians to assimilate the values of the dominant English community (he assumed the Anglophone population would eventually outnumber the French Canadians).²⁶

On 1st July 1867 the Provinces of Canada, Nova Scotia and New Brunswick constituted the confederated Dominion of Canada, which remained a British colony:²⁷

[t]he British government conducted foreign policy, made treaties, and declared war. A British cabinet minister, the colonial secretary, handled relations with Canada. His local representative, the governor general of Canada, was a British aristocrat, usually with political connections, enough, at any rate, to

²⁴ *Ibid.*

²⁵ *An Act to Re-unite the Provinces of Upper and Lower Canada, and for the Government of Canada*, SPC 1840, c 35. On 10th February 1841 Lower and Upper Canada ceased to have separate Legislatures, and they formed the Province of Canada.

²⁶ Stewart, *supra* note 22 at 29. See Desmond Morton, *A Short History of Canada*, 5th ed (Toronto: McClelland & Stewart Ltd, 2001). Dent argues that not only were British policy makers interested in assimilating French Canadian into the English Canadian population, but as well they were interested in the fiscal revenues from imports collected at Montreal and Quebec that were chiefly paid by Upper Canada (where a majority of the consumers resided); John Charles Dent, *The Last Forty Years. The Union of 1841 to Confederation. Abridged and with an Introduction by Donald Swainson* (Toronto: McClelland & Stewart Ltd, 1972).

²⁷ *An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5 [*Constitution Act* (1867)].

qualify for what was considered to be a prestigious but undemanding post. The governor general might influence government, but he did not run it. That was the business of elected Canadian politicians, who occupied themselves with raising revenue, dispensing patronage, and defining internal policy. Only in the broadest sense was the governor general part of 'the government.'²⁸

From 1870 to 1999 other territories became part of the Dominion of Canada. On 15th July 1870 the North-Western Territory and Rupert's Land joined Canada.²⁹ These vast regions, which approximately comprised all non-confederation Canada except the British colonies of British Columbia, Prince Edward Island, and Newfoundland and Labrador, were styled and known as the "North-West Territories."³⁰ That same day the province of Manitoba was formed out of the North-West Territories.³¹ On 20th July 1871 British Columbia joined Canada,³² and so did Prince Edward Island on 1st July 1873.³³ The north-west part of the North-West Territories became the Territory of Yukon on 13th June 1898 and the south part of the North-West Territories ("the Prairies") was divided into the provinces of Alberta and Saskatchewan on 1st September 1905.³⁴ Newfoundland and Labrador joined Canada on 31st March 1949, and the eastern part of the North-West Territories officially separated to form the Territory of Nunavut on 1st April 1999.

²⁸ Robert Bothwell, *History of Canada since 1867* (Washington DC: The Association for Canadian Studies in the United States, 1996) at 4.

²⁹ *Rupert's Land and the North-Western Territory*, Order in Council at the Court of Windsor at the 23rd June 1870.

³⁰ *An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada*, SC 1869, c 3, s 1.

³¹ *An Act to amend and continue the Act 32 and 33 Victoria, chapter 3; and to establish and provide for the Government of the Province of Manitoba*, SC 1870, c 3, s 1.

³² *An Act respecting the force and effect of the Acts of the Parliament of Canada, in and in relation to the Province of Manitoba, and the Colony of British Columbia when it becomes a Province of the Dominion*, SC 1871, c 13, s 10-13; *The Province of British Columbia*, Order in Council at the Court of Windsor, the 16th day of May, 1871.

³³ *An Act respecting the admission of the Colony of Prince Edward Island as a Province of the Dominion*, SC 1873, c 40; *Prince Edward Island*, Order in Council at the Court of Windsor, the 26th day of June, 1873.

³⁴ *An Act to establish and provide for the Government of the Province of Alberta*, SC 1905, c 3; *An Act to establish and provide for the government of the Province of Saskatchewan*, SC 1905, c 42.

1.3. The Political System and the Creation of Criminal Law Statutes

One of the major areas of this research is the enactment of statutes in the youth criminal law system. This has been one of the main modalities of political intervention in the case of youth delinquency. According to section 91(27) of the *Constitution Act* (1867), criminal law is a subject matter under the exclusive power of the Parliament of Canada. Consequently, for exploring this area of research, the main sources are federal government documents.

1.3.1. Enacted Federal Legislation (1841-2012)

Canadian scholars have identified 1857 as the year in which legislation drawing a distinction between youth and adult offenders was first enacted;³⁵ my previous research confirms this date.³⁶ According to the historical background detailed above, the Parliament of the Province of Canada (1841-1867) - which was a bicameral body comprised of the Legislative Assembly and the Legislative Council - was the legislative body for the Province of Canada.³⁷ For the purpose of studying how young offenders were dealt with before 1857, this study explores some of the legislation enacted before that date. The “departing” point for this research is the date when the first assembly of the Parliament of the Province of Canada took place (14th June 1841). The data for the period 1841-1857 is analyzed in Chapter 2.

³⁵ Jean Trépanier & Françoise Tulkens, *Délinquance & Protection de la jeunesse (aux sources des lois belge et canadienne sur l'enfance)* (Bruxelles: De Boeck-Wesmael SA, 1995); Sylvie Ménard, *Des enfants sous surveillance. La rééducation des jeunes délinquants au Québec (1840-1950)* (Montreal: VLB Éditeur, 2003).

³⁶ Verónica B Piñero, “The Semantics of Repression: Linking, Opposing, and Linking again Rehabilitation and Protection of Society” (2006) 36:2 RGD 189.

³⁷ While members of the Legislative Assembly were elected, members of the Legislative Council were appointed by the Sovereign for life; *An Act to Re-Unite the Provinces of Upper and Lower Canada, and for the Government of Canada* (UK), 3 & 4 Vict, c 35, s iv-v, xii-xiii. In 1856 vacancies in the Legislative Council became elected positions (and not Sovereign-appointed positions).

In 1867 the Provinces of Canada, Nova Scotia, and New Brunswick constituted the Dominion of Canada; as a result, the legislative procedure was slightly amended. The *Constitution Act* (1867) regulated the creation of a federal government and provincial governments, and organized the exclusive legislative powers of both the federal Parliament and the provincial legislative assemblies.³⁸ Regarding the federal sphere of power, the *Constitution Act* (1867) regulates the constitution of the Parliament of Canada, which has exclusive legislative power for regulating criminal law and procedure in criminal matters.³⁹ As noted above, from 1870 to 1999 other territories became part of the Dominion of Canada – or Canada, as it is known nowadays – and they accepted the political organization of the *Constitution Act* (1867). The Parliament of Canada is also a two chamber legislative authority comprised of the House of Commons, the Senate, and the Queen.⁴⁰

This research explores 172 years of federal statutes intended to regulate youth offending in the Province of Canada (1841-1867) and in Canada (1867-2012). For this, I explored every statute enacted during the 172-year-period for identifying legislation intended to regulate youth offending.⁴¹ I reviewed the identified statutes and analyzed them to single out legislation that drew a distinction between young and adult offenders in areas such as criminal procedure, detention facilities and penalties. The identified legislation was organized chronologically, and I paid special attention to the “semantics” of the wordings of the legal texts and their amendments. As some amendments had relevant implications regarding the regulation of the transfer of young

³⁸ *Constitution Act* (1867), *supra* note 27, s 91-92 (respectively).

³⁹ *Ibid*, s 91(27).

⁴⁰ *Ibid*, s 17.

⁴¹ Trépanier and Tulkens refer to this methodology as a “genealogical approach”: the use of historical data for understanding theoretical trends and not for researching the history of an institution such as the youth justice system; Jean Trépanier & Françoise Tulkens, “Juvenile justice in Belgium and Canada at the beginning of the century: two models or one?” (1993) 1:2 *The International Journal of Children’s Rights* 189 at 190.

offenders to the adult court or the imposition of adult sentences to young offenders, I also consulted the discussions held in the Parliament of the Province of Canada (1841-1867) and in the Parliament of Canada (1867-2011) regarding those amendments. As already mentioned, for this thesis I also explored governmental reports, scholarly literature and additional sources. None the less, there is little scholarly research in the area of Canadian legal history concerning the transfer of young offenders to the adult court (1908-2003). On 1st April 2003 the *Youth Criminal Justice Act* came into force and repealed the regulation of the “transfer of young offenders to the adult court”.⁴² However, this statute introduced the imposition of adult sentences in youth courts to young offenders found guilty of having committed serious offences. This new regulation has been broadly discussed by legal and social sciences scholars.

1.3.2. Parliamentary Discussion

As mentioned above, one of the main areas of analysis of this research is the “creation of statutes” within the Canadian youth criminal justice system. Parliamentary debates can provide a partial insight into the reasons and circumstances for a bill and its subsequent amendments until it is enacted as a statute. However, for an effective use of parliamentary debates it is important to understand some basic elements of the Canadian legislative process.⁴³

In Canada, as in all legislative assemblies based on the British model, a bill must go through a number of specific stages in both the House of Commons and the Senate before being enacted as

⁴² *Youth Criminal Justice Act* (2002), *supra* note 5.

⁴³ House of Commons of Canada, *Legislative Process*, online: Parliament of Canada <<http://www.parl.gc.ca>>; Senate of Canada, *Making Canada's Laws*, online: Parliament of Canada <<http://www.parl.gc.ca>>.

a statute.⁴⁴ A bill regulating matters within Parliament's legislative powers can be introduced either in the House of Commons or in the Senate by the Canadian government (Government bills) or by Members of the House of Commons or Senators (Private bills).⁴⁵ The only exception to this rule is bills for appropriating any part of the public revenue or tax bills, which have to originate in the House of Commons.⁴⁶

A bill goes through certain formal stages in each house ("three readings") and then the Governor General – representing the Queen – gives it Royal Assent for the bill being made law. Once a bill is introduced in one house, it will receive its first reading and circulate without debate, amendment or question put. The bill will be placed on the Order Paper for second reading.

During the second reading, members of the house will have an opportunity to debate the principles of the bill, and the text of the bill can be amended before being read a second time and referred to committee.⁴⁷ Most bills are referred to standing committees where the text of the bill will be reviewed, and approved or modified. At this stage Parliamentarians may invite witnesses to appear before the committee to present their views and answer Parliamentarians' questions. After this, the standing committee proceeds to study the bill clause-by-clause, and members of the standing committee may propose amendments. Once all parts of the bill have been considered and adopted, with or without amendment, the standing committee votes on the bill as

⁴⁴ For an analysis of the process of proposal, formulation, and drafting a bill, see House of Commons, *Drafting of Bills*, online: Parliament of Canada <<http://www.parl.gc.ca>>.

⁴⁵ When a Senator introduces a private bill in the Senate, the bill will be classified as a "Private Senator Public Bills" or a "Private Senator Private Bills" depending on the scope of the bill. This sub-classification does not apply to the bills introduced in the House of Commons by Members.

⁴⁶ *Constitution Act* (1867), *supra* note 27, s 53. See Senate of Canada, *Taking the Legislative Initiative*, online: Parliament of Canada <<http://www.parl.gc.ca>>.

⁴⁷ Sometimes a bill can be referred to committee before second reading; see House of Commons, *Referral of a Bill to Committee Before Second Reading*, online: Parliament of Canada <<http://www.parl.gc.ca>>.

a whole. If necessary – depending on the number of amendments adopted – the bill is reprinted for the use of parliamentarians during the report stage of the bill. The report stage takes place in the whole house and more amendments can be proposed.

The third reading of the bill is the final stage: while amendments are still admissible, Parliamentarians must decide whether the bill should be adopted. The third reading and passage of a bill are moved in the same motion: the bill will be sent to the other house with a message requesting that it consider the bill.

A very similar procedure as described above will follow in the other house. If the bill is adopted by the other house without amendment, the bill will be passed and Royal Assent is normally granted shortly thereafter.⁴⁸ If no date of commencement is provided in the statute, the act will come into force when it receives Royal Assent. In sum, a bill can become law only when the same text has been approved by the House of Commons and the Senate, and received Royal Assent by the Governor General representing the Queen.

1.3.3. Federal Reports

It is well known that claims about social problems precede the enactment of legislation that attempts to address them. In Canada, problematic situations within the jurisdiction of the Federal Government are researched by its ministries. In the case of problematic situations within the criminal law and/or the correctional services, investigative duties are performed by the

⁴⁸ It is not unusual that amendments be introduced to the bill after being passed to a chamber; see House of Commons, *House Consideration of Senate Amendments to Bills*, online: Parliament of Canada <<http://www.parl.gc.ca>>; House of Commons, *Conferences between the Commons and the Senate Regarding Amendments to Bills*, online: Parliament of Canada <<http://www.parl.gc.ca>>; Senate of Canada, *Defeating Bills*, online: Parliament of Canada <<http://www.parl.gc.ca>>.

Department of Justice or by the Department of Public Safety.⁴⁹ The study and analysis of federal reports help identifying problematic situations and the suggested measures for addressing them. Generally, the report indicates the scope of the study, whether a special commission for analyzing the matter was created, the findings of the inquiry, and the recommendations for addressing the problematic situation. These recommendations address the Federal Minister who requested the inquiry and they generally provide the Minister with data for drafting a bill that is aimed at regulating the problematic situation (which later will be tabled and discussed in Parliament).

1.4. The Judicial System: Quebec

As mentioned above, the second major part of this study is the analysis of how the legislation enacted by the “political system” has been understood and implemented by the “judicial system”. This is the field of criminal law system intervention. Being the purpose of this thesis to analyze the regulation of youth delinquency in Canada - and in particular the transfer of young offenders to the adult court (waiver of jurisdiction) and the imposition of adult sentences - it is important to observe how the legislation enacted by Parliament has been understood and implemented by courts.

While Canada is a federation consisting of ten provinces and three territories, I only selected the province of Quebec for conducting this research. The reason for this is that Quebec is known for having constructed a distinctive youth criminal law system that, compared to the adult criminal

⁴⁹ The Ministry of Public Safety and Emergency Preparedness Canada was nominally created in 2003 and it incorporated as part of its functions the responsibilities associated with the position of Solicitor General of Canada. In 2005 the creation of the Ministry of Public Safety was formalized and the position of Solicitor General of Canada was abolished.

law system, takes less into account the theories of punishment oriented towards social exclusion or indifferent towards social inclusion (deterrence, denunciation and retribution). Consequently, the study of this Canadian province should provide this study with the “minimum” criminal law approach to youth offending.⁵⁰ In other words, for analyzing the “state” of youth justice intervention in Canada it is important to acknowledge that Canadian provinces and territories have different “philosophical degrees of distance” between youth and adult philosophies in terms of intervention and punishment.⁵¹ Consequently, if data regarding the implementation of the youth criminal law system in every province is collected and analyzed, the final result will be three groups of provinces. The first group has a minimum emphasis on deterrence, denunciation and retribution theories. The second group highly emphasizes deterrence, denunciation and retribution theories. The third group has an approach to criminal law intervention in between the two above mentioned groups and can be characterized as a medium emphasis on deterrence, denunciation and retribution theories.⁵² Therefore, if we want to know the state of youth justice intervention in Canada, we need to acknowledge these divergences.

If it is true that Quebec is one of the provinces that has the most distinctive criminal justice philosophy for youths, the analysis of the Quebec youth criminal law system should provide me with the most original approach to youth offending and the minimum influence of the theories of deterrence, retribution and denunciation:

⁵⁰ Doob & Sprott, *supra* note 19; Québec, Groupe de travail chargé d’étudier l’application de la loi sur jeunes contrevenants au Québec, *Au Nom... et au-delà de la loi* (Québec: ministère de la Santé et des Services sociaux et ministère de la Justice, 1995); Mélanie Roy, *Le renvoi des jeunes contrevenants aux tribunaux pour adultes : la loi et les pratiques* (LLM mémoire, Université de Montréal, 2003) [unpublished].

⁵¹ Doob and Sprott’s study of the interprovincial variation of the use of youth courts illustrates the point about how youth justice legislation is implemented differently in each Canadian province: Anthony Doob & Jane Sprott, “Interprovincial variation in the use of the youth court” (1996) 38:4 Can J Crim 401.

⁵² I am thankful to Professor Alvaro Pires for his comments and insights regarding this distinction.

Quebec is not ideal in the context of the world but in the Canadian context what has been done in Quebec with young offenders could serve as a model for the rest of Canada. There exists in that province an integration of service between young offenders and children who need protection. The province is exemplary in terms of its allocation of resources, as well as the financial support it provides to parents on the birth of their children. There are many ways in which Quebec is a model for dealing with children and youth. The transfer rate in Quebec is much lower. If we had the same level across the country as a whole we would be talking about 10 or 20 young people. We can learn a lot from Quebec. [Nicholas Bala, academic]⁵³

Yet, this “minimum” influence is still a criminal law approach, but it is a distinctive “model of thinking” as to how intervention should be conceived by the criminal law system. For this reason, the study of the Quebec youth justice provides me with the “minimum” use of the criminal law rationality system that is dominant in the adult criminal law system.

Having selected Quebec as a case study for the understanding and implementation of youth criminal law legislation, my next step was to select a specific jurisdiction within Quebec for exploring under which circumstances young offenders were transferred to the adult court. As mentioned above, the first legislation aimed at regulating young offenders differently from adult offenders was enacted in 1857 (Canadian Province).⁵⁴ As discussed in Chapter 3, the first Canadian youth criminal law system emerged in 1908 with the enactment of the *Juvenile Delinquents Act* (1908).⁵⁵ This statute required provincial legislative assemblies to put the legislation “in force in any province, or in any portion of a province.”⁵⁶ In Quebec, the *Juvenile Delinquents Act* (1908) was put into force in 1910 and the first Juvenile Delinquents’ Court was

⁵³ Senate, *Standing Senate Committee on Legal and Constitutional Affairs*, 35th Parl, 1st Sess, No 26 (3 April 1995) at 26:23 (Nicholas Bala). See Doob & Sprott, *supra* note 19.

⁵⁴ *An Act for establishing Prisons for Young Offenders – for the better government of Public Asylums, Hospitals and Prisons, and for the better construction of Common Gaols*, SPC 1857, c 28; *An Act for the more speedy trial and punishment of juvenile offenders*, SPC 1857, c 29.

⁵⁵ *Juvenile Delinquents Act* (1908), *supra* note 5.

⁵⁶ *Ibid*, s 35. *Constitution Act* (1867), *supra* note 27, s 92(14):

[i]n each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, [...] 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts. See Joyal, *supra* note 6.

open in the city of Montreal in 1911.⁵⁷ A second Juvenile Delinquents' Court was established in the city of Quebec in 1940.⁵⁸ Consequently, I selected the Montreal Juvenile Delinquents' Court for this study as it has the longest history of youth justice intervention in the province of Quebec.

The name and jurisdiction of the Montreal Youth Court changed many times.⁵⁹ When the Court was originally opened in 1911, it was known as the "Juvenile Delinquents' Court".⁶⁰ In 1950 the name of the Court changed to the "Social Welfare Court" (Cour de bien-être social) – as well as its jurisdiction was expanded to intervene in different matters, such as adoption.⁶¹ In 1977, when the *Youth Protection Act* (*Loi sur la protection de la jeunesse*) was enacted, the name of the Court was changed again: "Youth Court" (Tribunal de la jeunesse).⁶² The last amendment took place in 1988; the Youth Court became the "Youth Division" (Chambre de la jeunesse) within the Quebec Court.⁶³ In this study I use the general expression "Montreal Youth Court" for referring to the data concerning the functioning of these courts.

The analysis of how the legislation enacted by the political system has been understood and implemented by the Montreal Youth Court also includes decisions from the Supreme Court of Canada. The common law principle of the doctrine of precedent requires provincial courts to abide themselves by the decisions of the Supreme Court of Canada: "Canadian courts accept the

⁵⁷ *Loi relative aux jeunes délinquants*, SQ 1910, c 26; OIC 1911/1127 (*Juvenile Delinquents Act*) (respectively).

⁵⁸ *La Loi instituant la Cour des jeunes délinquants de Québec*, SQ 1940, c 53.

⁵⁹ Ignace-J Deslauriers, "Histoire des tribunaux et de la magistrature du Québec. La Cour des jeunes délinquants, la Cour de bien-être social, le Tribunal de la jeunesse" (1983) 52 *Bulletin du Comité général des juges de la Cour supérieure de la Province de Québec* 3; Ignace-J Deslauriers, *Les tribunaux du Québec et leurs juges. Cour provinciale, Cour des sessions de la paix, Tribunal de la jeunesse, Cour municipale* (Cowansville: Les Éditions Yvon Blais Inc, 1987).

⁶⁰ *Loi relative aux jeunes délinquants*, SQ 1910, c 26, s 1.

⁶¹ *An Act to establish the Social Welfare Court*, SQ 1950, c 10, s 1.

⁶² *Loi sur la protection de la jeunesse*, SQ 1977, c 20, s 138.

⁶³ *Joyal*, *supra* note 6 at 263.

doctrine of precedent (or stare decisis), under which the decisions of a court are binding on courts lower in the judicial hierarchy.”⁶⁴ Because of this, these decisions are important for understanding the decisions of the Montreal Youth Court. With regard to the Supreme Court of Canada, the decisions presented here include the decisions from 1875 – when this Court was created – to present (May 2012).⁶⁵

The records used for analyzing how the judicial system has understood and implemented the legislation enacted by the political system are located in two different archives: 1) the Quebec National Archives in Montreal (period 1911-1977) and 2) the Quebec Court in Montreal, Youth Division (period 1978-1995). Before presenting and describing each archive, I mention some preliminary remarks in terms of the collection of data below.

1.4.1. The Constitution of the Sample – Youth Criminal Law System

Table 1, below, provides an overview of the data regarding the youth criminal law system. Every record I consulted identifies a particular individual. If two individuals were indicted for the same offence, there were two different record numbers. In terms of collecting the data, if a certain record contained more than one “most serious offence” committed by the same individual, only the most serious offence was recorded. For this, I considered the offence of first degree murder as the most serious offence. If the offence was other than first degree murder, then I followed this order for determining what offence was the most serious offence: second

⁶⁴ Peter W Hogg, *Constitutional Law of Canada. 2009 Student Edition* (Toronto: Carswell, 2009) at 264. I am thankful to Professor Rachel Grondin for her comments on this matter.

⁶⁵ *Supreme and Exchequer Courts Act*, SC 1875, c 11. See now *Supreme Court Act*, RSC 1985, c S-26. The Supreme Court of Canada became Canada’s final court of appeal in 1949: *An Act to Amend the Supreme Court Act*, SC 1949, c 37, s 3. Before that date, the decision of the Supreme Court of Canada could be revised by the Privy Council in London (England).

degree murder, manslaughter, attempted murder, aggravated sexual assault, and aggravated assault. This procedure allowed me to identify the amount of records instead of the amount of offences committed. If I had counted offences rather than records, I would not have been able to verify the accuracy of the final result because of the large amount of records consulted. As well, as the data was obtained from the minute-book, I could only identify how the offence was originally registered. Because of this, I could not check if during the process the Crown had decided to reduce the charges (for instance, from first degree murder to second degree murder) or withdraw them (Crown discretion).

Table 1, below, summarizes the data obtained from the Montreal Youth Court. The first column from the left indicates the “general principle” or the “year as planned” for collecting data for that year. The only exception is the first ten years of the history of the Court (1911-1921). For this period, it was important to observe every case that was recorded to have a better overview of these “founding years” of the Montreal Youth Court. The second column states the years that were effectively observed. The third column states, shortly, the reason for the change between the planed and the effective year of observation. The fourth and last column gives some additional information concerning the sampling. For example, it indicates if all the transfer decisions in the year were recorded, the numbers of files consulted for additional information, etc. The table also indicates the modification in the “name” of the Court during this period. The changes in the name are important as far as they also reflect some change in the overall philosophy of intervention concerning the youth in “criminal affairs”. These changes have also had some practical consequences over the sampling sometimes.

Table 1 – Data regarding the Youth Criminal Law System (Summary)

Year as Planned	Year used	Reason for the Change	Additional Information
1911 – 1949 - JUVENILE DELINQUENTS' COURT			
1911-1921	1911-1921	the court first opened	every case was recorded (n = 12,765) all transfers (n = 110) plumitif: delinquency and protection (n= 12,765)
1924	1924	amendment of the definition of “juvenile delinquent” (<i>Juvenile Delinquents Act</i>)	all transfers (n = 1) plumitif: delinquency and protection (n= 1,108)
1930	1929	increased the circumstances for transfers (<i>Juvenile Delinquents Act</i>)	all transfers (n= 3) plumitif: delinquency and protection (n= 1,070)
1936	1936		all transfers (n= 6) plumitif: delinquency and protection (n = 1,680)
1942	1942		all transfers (n = 17) plumitif: delinquency and protection (n = 2,903)
1948	1948		sample of transfers (n = 9) plumitif: delinquency and protection (n = 2,209)
1950 – 1977 - MONTREAL SOCIAL WELFARE COURT			
1954	1954		sample of transfers (n = 6) plumitif: ONLY delinquency cases (n = 2,015)
1960	1960		sample of transfers (n = 15) plumitif: ONLY delinquency cases (n = 5,785)
1966	1966		all transfers (n = 9) plumitif: delinquency and protection (n = 10,826)
1972	1972		Court Office in Verdun (1964) separated all transfers (n = 26) plumitif: delinquency and protection (n = 10,129) Court Offices in Pointe-Claire (1970) and Longueuil (1972) separated
1977-1988 – MONTREAL YOUTH COURT			
1978	1978		all transfers for first months of the year (n = 24) plumitif: ONLY delinquency cases for first months of the year (n = 1,799)
1984	1984	<i>Young Offenders Act</i> entered into force	all transfers (n = 46) plumitif: ONLY delinquency cases and criminal law offences (n = 2,390)
1988-present – QUEBEC COURT IN MONTREAL, YOUTH DIVISION			
1990	1992	“interest of society” primary objective	all transfers (n = 15) plumitif: ONLY criminal law offences (n = 2,874)
1996	1995	introduction of the “presumptive transfer”	all transfers (n = 16) plumitif: ONLY criminal law offences (n = 2,856)

1.4.1.1. Data from the Quebec National Archives in Montreal⁶⁶

The Quebec National Archives in Montreal includes – among other judicial archives – the archives of the Montreal Juvenile Delinquents’ Court (1911-1950) and the archives of the Montreal Social Welfare Court (1950-1977).⁶⁷ These records are available to the general public, but there exists restrictions for their use: for instance, the defendants’ name or information that can identify a defendant as having been dealt with by these courts cannot be published. While most of the records have been preserved, some records are labeled as “destroyed” because a pardon has been granted.⁶⁸ Consequently, in these cases access to the defendant’s name or the offence committed is unavailable.

The purpose of consulting these archives was to inquire under which circumstances the Montreal Youth Court transferred juvenile delinquents to the adult court according to section 7 (1908-1929) and section 9 (1929-1984) of the *Juvenile Delinquents Act* (1908).⁶⁹ In addition to this, I consulted the archives for exploring whether the most serious indictable offences – such as first- and second-degree murder, manslaughter, attempted murder, and aggravated sexual assault⁷⁰ were always transferred to the adult court. For this, the first step was to consult the *plumitifs*. These are minute-books where the court clerks register the most relevant information of a certain offence chronologically. Every time an offence is officially communicated to the court, there is an entry that identifies - at least – the official record number, the alleged offence, the name of the

⁶⁶ For a detailed explanation of how the judicial archives are organized in Quebec, see Evelyn Kolish, *Guide des archives judiciaires* (December 2000), online: Archives nationales du Québec <<http://www.banq.qc.ca>>.

⁶⁷ These archives are available through the search engine “Pistard”, and the codes “TL483, S45” and “TL484, S2”, respectively.

⁶⁸ *Criminal Records Act*, RSC 1985, c C-47.

⁶⁹ This statute was re-enacted in 1929 and section 7 became section 9: *An Act respecting Juvenile Delinquents*, SC 1929, c 46, s 9 [*Juvenile Delinquents Act* (1929)].

⁷⁰ The tripartite structure of sexual offences was introduced in 1983. Before that date, the most serious sexual offence was “rape”. See Julian Roberts & Álvaro Pires, “Le renvoi et la classification des infractions d’agression sexuelle” (1992) 25:1 *Criminol* 27.

defendant, the date,⁷¹ and the most relevant decisions regarding the defendant (such as the measure taken, including a transfer to the adult court). If there was a particular entry of interest – either because of the kind of offence committed or the record having been transferred to the adult court – I requested the individual record for having access to further information that may be contained therein.⁷²

1.4.1.1.1 – Period 1911-1921

For the first 11 years of operation of the Montreal Youth Court (1911-1921 inclusive) I recorded all the official records in the plumitif (no sample). This includes the age and sex of the defendant, the kind of offence committed, and the measure taken.⁷³ If more than one offence was committed, only the most serious offence was registered. If the offences were equally serious (such as status offences), only the first offence was registered. For example, if a youth was accused of vagrancy and drunkenness – two status offences - I only registered the status offence of “vagrancy” as it was the first offence in the plumitif. I collected all this information for two main reasons: (1) to identify the methodology of the court when dealing with offences, and (2) to identify the population of the court in the first 11 years of its history. Regarding the former, I was interested in identifying what kind of information was available in the plumitifs, how that information was recorded, how the court proceeded with a “transfer” and a “non-transfer”, what was the “pattern” of activity of the court. With regard to the “court’s population”, I was interested in identifying the gender and age of the young people, what kinds of offences were committed and how they were dealt with.

⁷¹ With regard to the date, sometimes it was recorded the date when the record was created and sometimes the date when the alleged offence was committed. Both dates do not necessarily coincide.

⁷² However, in the case where a pardon had been granted, I was not able to access any information regarding that entry.

⁷³ For the year 1911 there were only three entries in the minute-book.

Many times some of the information mentioned above was not provided in the plunitif – especially during the first two years of the court. As 12,765 entries were recorded for the first 11 years of functioning of the court, the missing information was recorded as not available (n/a). The reason for this is that, as mentioned above, my purpose for this period was to identify the methodology and population of the court. Given the amount of information consulted, it would have been extremely demanding for me to check an individual record every time information such as “age” or “gender” was missing. Nevertheless, if the final measure was missing in the minute-book, and from the kind of offence committed and the age of the young person it may appear that the record could have been transferred to the adult court, I requested the individual record.

For the purposes of this research the notion of “adult court” refers to the Police Court (Tribunal de la police), the Court of the Sessions of the Peace (Cour des sessions de la paix) or the Recorder’s Courts (Cour du recorder).

As a final note, as Trépanier reports, the officers at the Montreal Youth Court exercised an informal diversion of cases - not all cases brought to the attention of the court were recorded and dealt with:

Ces données créent l’impression qu’une forme de filtre existait, qui retenait un certain nombre d’affaires et ne laissait passer que moins d’un cas sur deux pour en faire des causes traitées formellement. Les cas traités informellement ne semblaient faire l’objet d’aucun dossier et leur existence ne semble pas avoir été consignée d’une manière qui se prête à un traitement statistique le moins précisément. Le fonctionnement du tribunal tel que Gouin le décrit porte à croire que cette opération de filtrage était peut-être menée par le juge lui-même.⁷⁴

⁷⁴ Jean Trépanier, “Protéger pour prévenir la délinquance. L’émergence de la Loi sur les jeunes délinquants de 1908 et sa mise en application à Montréal” in Renée Joyal, ed, *Entre surveillance et compassion. L’évolution de la*

1.4.1.1.2. The Year 1924 – The Amendment of the Definition of “Juvenile Delinquent”

For the rest of the period (1922-1984) and starting in 1924, I constructed a non-random sample taking into account the same theoretical and methodological criteria. While this sample is non-random, I took some measures to assure its theoretical and empirical representativeness. I started with the idea of making a sample on the basis of the number of years and observing the whole year. As I said, I decided to select each six years and then I adjusted the six year period to other considerations, such as legislative reform. Only information regarding youths transferred to adult court was collected.

The reason for starting in 1924 is that in that year there was an important legislative amendment to the *Juvenile Delinquents Act* (1908) that enlarged the definition of “juvenile delinquent” by criminalizing “sexual immorality or any similar form of vice”.⁷⁵ For the cases that started in 1924, I collected information regarding all the decisions transferring a juvenile delinquent to the adult court: only one case was transferred (n = 1). The plumeitif from which that information was identified contained both protection and delinquency cases. This means that all the cases of criminal behavior, and abuse and neglect were recorded in the same book.

1.4.1.1.3. The Year 1929 – Increasing the Circumstances for a Transfer

According to my original plan of collecting information regarding the transfer of juvenile delinquents to the adult court, the next year should have been 1930. However, in 1929 the *Juvenile Delinquents Act* (1908) was amended and this amendment increased the circumstances

protection de l'enfance au Québec. Des origines à nos jours (Montréal : Presses de l'Université du Québec, 2000) 49 at 75-76.

⁷⁵ *An Act to amend The Juvenile Delinquents Act, 1908*, SC 1924, c 53, s 1 [*Amendment to Juvenile Delinquents Act* (1924)].

under which a young person who was a ward of the court could be transferred to the adult court. Judges were allowed to transfer to the adult court young offenders who were under their jurisdiction until they reached 21 years of age (before this amendment the Court ceased to have jurisdiction on the young people the moment they turned 16 years of age). Because of this, the year 1930 was substituted for the year 1929.⁷⁶ For the cases that started in 1929, I collected information regarding all the decisions transferring a juvenile delinquent to the adult court (N = 3), and the plunitif from which that information was identified contained both protection and delinquency cases.

1.4.1.1.4. The Year 1936

The next year was 1936 and no significant circumstances were identified to modify it. For the cases that started in 1936, I collected information regarding all the decisions transferring a juvenile delinquent to the adult court (n = 6), and the plunitif from which that information was identified contained both protection and delinquency cases.

1.4.1.1.5. The Year 1942

The next year was 1942. By a proclamation of 28th November 1942 the province of Quebec increased the maximum age of the definition of “child” from under the age of 16 years to under the age of 18 years (17 years included). For the cases that started in 1942, I collected information regarding all the decisions transferring a juvenile delinquent to the adult court (n = 17), and the plunitif from which that information was identified contained both protection and delinquency cases.

⁷⁶ *Juvenile Delinquents Act* (1929), *supra* note 69, s 20(3).

1.4.1.1.6. The Year 1948

The next year was 1948 and no significant circumstances were identified to modify it. From all the cases that started in 1948, there were 90 decisions transferring juvenile delinquents to the adult court. Because of this large number, I used a non-random representative sample for examining the reasons provided by the Montreal Youth Court for transferring young people to the adult court. These decisions were arranged chronologically and numbered. I selected a case every 10: 10, 20, 30, 40, 50, 60, 70, 80 and 90 ($n = 9$). In 1948 four pardons were granted and because of this the whole records were destroyed. As a result, I do not know what decisions were made concerning these delinquency cases. The plunitif in which this information was identified contained both protection and delinquency cases.

1.4.1.1.7. The Year 1954

The next year was 1954 and no significant circumstances were identified to modify it. In 1950 the Juvenile Delinquents' Court was renamed the Montreal Social Welfare Court. From all the cases that started in 1954, there were 67 decisions transferring a juvenile delinquent to the adult court. Again, because of this large number, I used a representative sample for examining the reasons provided by the Montreal Youth Court for transferring young people to adult court. These decisions were arranged chronologically and numbered. I selected a case every 10: 10, 20, 30, 40, 50, 60 ($n = 6$). In 1954 eight pardons were granted and because of this the whole records were destroyed. As a result, I do not know what decisions were made concerning these delinquency cases. The plunitif in which this information was identified contained only delinquency cases. While the Montreal Juvenile Delinquents' Court (1911-1950) did not draw a distinction between protection and delinquency cases, and both situations were registered in the

same plunitif,⁷⁷ the Montreal Social Welfare Court (1950-1977) sometimes registered protection and delinquency cases together, and sometimes apart.⁷⁸ For the period 1950-1951 and 1962-1976, protection and delinquency cases were registered in the same plunitif.⁷⁹ On the other hand, for the period 1952-1961 and the year 1977, delinquency cases and protection cases were registered in different plunitifs.⁸⁰ This information is relevant for quantitative purposes: as mentioned above, for my research I collected samples every six years. With regard to the Social Welfare Court, I have collected information regarding the years 1954, 1960, 1966 and 1972. While the years 1954 and 1960 are recorded in plunitifs that only registered delinquency cases, the years 1966 and 1972 are recorded in plunitifs that registered protection and delinquency cases together. Because of this, the years 1954 and 1960 cannot be compared to other years as their total numbers only represent delinquency cases. On the other hand, while this affects the gross number of the population, it does not affect the representativeness of the sample.

1.4.1.1.8. The Year 1960

The next year was 1960 and no significant circumstances were identified to modify it. From all the cases that started in 1960, there were 150 decisions transferring a juvenile delinquent to the adult court. Again, because of this large number, I used a non-random representative sample for examining the reasons provided by the Montreal Youth Court for transferring young people to the adult court. These decisions were arranged chronologically and numbered. I selected a case

⁷⁷ Plunitifs Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec (TL483, S45).

⁷⁸ Personal communication with Ms. Carole Ritchot (Archives Nationales du Québec a Montréal) (9 July 2008). For information regarding the composition and jurisdiction of the Social Welfare Court see Marie-Louise Beaulieu, "La Cour de bien-être social" (1950) 10:8 La Revue du Barreau de la Province du Québec 345; Raoul Barbe, "La Cour de bien-être social: son origine, son évolution" (1965) 8 :1 Can Bar J 119; Raoul Barbe, "Le statut de juges de la Cour de bien-être social" (1965) 25 R du B 280.

⁷⁹ Plunitifs Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (TL484, S2, SS45).

⁸⁰ Plunitifs Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (TL484, S2, SS45 and TL484, S2, SS46, respectively).

every 10: 10, 20, 30, 40, 50, 60, 70, 80, 90, 100, 110, 120, 130, 140 and 150 (n = 15). In 1960 two pardons were granted and because of this the whole records were destroyed. As a result, I do not know what decisions were made concerning those delinquency cases. Similar to 1954, the plunitif in which this information was identified only contained delinquency cases.

1.4.1.1.9. The Year 1966

The next year was 1966 and no significant circumstances were identified to modify it. I collected information regarding all the decisions transferring a juvenile delinquent to the adult court for the cases that started in 1966 (n = 9). In this year 68 pardons were granted and because of this the whole records were destroyed. As a result, I do not know what decisions were made concerning these delinquency cases. The plunitif from which this information was identified contained both protection and delinquency cases. As a final point, the Court Clerk's office of Verdun separated from the Court Clerk of the Montreal Youth Court in 1964.⁸¹ While this fact affects the gross number of the population, it does not affect the representativeness of the sample.

1.4.1.1.10. The Year 1972

The next year was 1972 and no significant circumstances were identified to modify it either. I collected information regarding all the decisions transferring a juvenile delinquent to the adult court for the cases that started in 1972 (n = 26). In this year 279 pardons were granted and because of this the whole records were destroyed. As a result, I do not know what decisions were made concerning these delinquency cases. The plunitif from which this information was identified contained both protection and delinquency cases. In 1972 the Court Clerk of the

⁸¹ Plunitifs Montreal Social Welfare Court (Verdun), Montreal, Archives Nationales du Québec (TL484, S143).

Montreal Youth Court was modified again: the Court Clerk's office of Pointe-Claire separated in 1970 and the Court Clerk's office of Longueuil separated in 1972.⁸² Again, while this fact also affects the gross number of the population, it does not affect the representativeness of the sample.

1.4.1.2. Data from the Quebec Court in Montreal, Youth Division

Access to the records in the Quebec Court in Montreal, Youth Division is restricted and the publication of information that can identify a young person as having been dealt with the youth criminal law system is criminalized.⁸³ Because of this, I had to request personal authorization for research purposes for having access to the records located therein.⁸⁴

The purpose of consulting these archives was to inquire under which circumstances the Montreal Youth Court (1977-1988) and the Quebec Court in Montreal, Youth Division (1988 to present) transferred juvenile delinquents to the adult court according to *Juvenile Delinquents Act* (1908-1984) and *Young Offenders Act* (1984-1995). I did not analyze any decision for the period 1995 to 2003: the Montreal Youth Court had changed the way it recorded transfer decisions (from written records to audio records) so it became very difficult for me to identify these decisions.⁸⁵

⁸² Plumitifs Montreal Social Welfare Court (Pointe-Claire), Montreal, Archives Nationales du Québec (TL484, S84) and Plumitifs Montreal Social Welfare Court, Montreal (Longueuil), Archives Nationales du Québec (TL484, S42), respectively.

⁸³ *Young Offenders Act* (1982), *supra* note 5, s 38(2); *Youth Criminal Justice Act* (2002), *supra* note 5, s 110, 138. There are exceptions to this: young people transferred to the adult court or young people who received an adult sentence are not protected by the ban on publication.

⁸⁴ Personal communication with Chief Justice Paule Gaumond (Cour du Québec, Chambre de la Jeunesse) (5th November 2007).

⁸⁵ In Chapter 6 I analyze two decisions dealing with the *Youth Criminal Justice Act* (2002): one from the Court of Appeal for Quebec and one from the Supreme Court of Canada.

While observing the data from this archive, I was also interested in exploring whether the most serious indictable offences – such as first- and second- degree murder, manslaughter, attempted murder and aggravated sexual assault – have always been transferred to the adult court.⁸⁶

1.4.1.2.1. The Year 1978

According to my plan, the next year was 1978 and no significant circumstances were identified to modify it. For this year I created a non random sample of the first 1,799 records, from which I recorded all the transfers (the total number of records was 7,902).⁸⁷ While some offences are more prone to be committed during certain time of the year - such as vagrancy – the kind of offences I was interested in (first- and second- murder, attempted murder, manslaughter, and aggravated sexual assault) do not observe any seasonal pattern.⁸⁸ The plunitif from which this information was identified contained only delinquency cases. From all the cases that started in 1978, 24 cases were transferred to the adult court.

1.4.1.2.2. The Year 1984 – The *Young Offenders Act* (1982) Comes into Force

In April 1984 the *Young Offenders Act* came into force in Canada. For this year, I recorded all the decisions in which a young person was transferred to the adult court. As a result, the first three months (January, February and March) were under the *Juvenile Delinquents Act* (1908) and the rest of the months (April to December) were under the *Young Offenders Act* (1982). As discussed below, the *Young Offenders Act* (1982) put an emphasis on criminal law offences and

⁸⁶ The notion of “seriousness” of the offence is further discussed in Chapter 7.

⁸⁷ Plunitifs Montreal Youth Court, Montreal, Chambre de la Jeunesse (code 500 003, boxes 1 to 5).

⁸⁸ Mary Anne Poutanen, “The Homeless, the Whore, the Drunkard, and the Disorderly: Countours of Female Vagrancy in the Montreal Courts, 1810-1842” in Kathryn McPherson, Cecilia Morgan & Nancy M Forestell, eds, *Gendered Pasts: Historical Essays in Femininity and Masculinity in Canada* (Toronto: Oxford University Press, 1999) 29.

abrogated status offences. Consequently, the word “delinquency” was substituted for the word “offence”. Similarly, the term “juvenile delinquent” was substituted for the term “young offender”, which is still the term mostly used today. The plunitif from which this information was identified contained only delinquency cases (January, February and March) and criminal law offences (April to December).⁸⁹ From all the cases that started in 1984, 46 cases were transferred to the adult court.

1.4.1.2.3. The Year 1992 – The Amendment of the Transfer Requirements

According to my original plan to collect information regarding the reasons for transferring young offenders to the adult court, the next year should have been 1990. However, in 1992 the criterion for transferring a young person to the adult court was amended and the protection of society became the key factor to take into consideration when making a transfer decision.⁹⁰ In 1992 I collected information regarding all the decisions transferring a young offender to the adult court and the plunitif from which this information was identified contained only criminal law offences.⁹¹ From all the cases that started in 1992, 15 cases were transferred to the adult court.

⁸⁹ Plunitifs Montreal Youth Court, Montreal, Chambre de la Jeunesse (code 500 003, boxes 15 and 16). In April 1984 the *Young Offenders Act* came into force partially and decriminalized status offences. This may explain why the number of records had considerably diminished compared to the 1978 sample. As well, in April 1984 delinquency and protection cases were completely dealt with separately. On the other hand, there had been a reduction of the amount of records since 1979: in 1979 there were 2494 records, in 1980 there were 4222 records, in 1981 there were 4826 records, in 1982 there were 3711 records and in 1983 there were 3340 records (Plunitifs Montreal Youth Court, Montreal, Chambre de la Jeunesse (code 500 003, boxes 6 to 15). Another explanation could be the formal implementation of a diversion program; see Dany Gauthier, *Les jeunes déferés à la cour pour adultes* (MA Thesis, University of Ottawa, 1984) [unpublished]; Marie-José Lavigueur V, *L'utilisation au Tribunal de la Jeunesse de la demande de déferé* (MSc Thesis, École de Criminologie, Université de Montréal, 1982) [unpublished].

⁹⁰ *An Act to amend the Young Offenders Act and the Criminal Code*, SC 1992, c 11, s 2(1) [Amendment to the Young Offenders Act (1992)].

⁹¹ Plunitifs Montreal Youth Court, Montreal, Chambre de la Jeunesse (code 500 003, box 24).

1.4.1.2.4. The Year 1995 – The Introduction of the “Presumptive Transfer”

Again, as originally planned, the next year to explore should have been 1996. Nevertheless, in 1995 the *Young Offenders Act* (1982) was amended by introducing the presumptive transfer to the adult court for the offences of murder, attempted murder, manslaughter and aggravated sexual assault.⁹² This meant that if young offenders were accused of having committed any of these offences, they had to demonstrate why they should be dealt with the youth criminal law system rather than with the adult criminal law system. As further discussed below, in the adult criminal law system the young offender could face more punitive sentencing than in the youth criminal law system. In 1995 I collected information regarding all the decisions transferring a young offender to the adult court and the plunitif from which this information was identified contained only criminal law offences.⁹³ From all the cases that started in 1995, 16 cases were transferred to the adult court.

1.4.1.2.5. The Year 2003 – The *Youth Criminal Justice System* (2002) Comes into Force

On 1st April 2003, the *Youth Criminal Justice Act* (2002) came into force in Canada modifying the regulation of the transfer of young offenders to the adult court as regulated under the *Juvenile Delinquents Act* (1908) and the *Young Offenders Act* (1982). From now on, a young offender accused of having committed certain serious offences (first and second degree murder, manslaughter, attempted murder, aggravated sexual assault, third determination of serious violent offence) can receive an adult sentence within the youth criminal law system rather than being transferred to the adult court. The *Youth Criminal Justice Act* (2002) regulated that young people accused of having committed these offences (“presumptive offences”) had to demonstrate

⁹² *An Act to amend the Young Offenders Act and the Criminal Code*, SC 1995, c 19, s 8(1) [*Amendment to the Young Offenders Act* (1995)].

⁹³ Plunitifs Montreal Youth Court, Montreal, Chambre de la Jeunesse (code 500 003, box 27; code 525 003 box 28).

why a youth sentence rather than an adult sentence should be imposed (reverse onus). Furthermore, young people accused of having committed presumptive offences were not protected by the ban on publication.

One day prior to the coming into force of this statute, the Quebec Court of Appeal released its decision *Quebec v. Canada*.⁹⁴ This decision substantially modified the implementation of the imposition of adult sentences to young offenders in Quebec. Moreover, because of the common law principle of *stare decisis*, the decision from the Quebec Court of Appeal bound Quebec lower courts. According to this decision, the Crown rather than the young offender has to demonstrate why a presumptive offence should be imposed on a particular case. In addition, since a publication ban is part of the young offender's sentence, it is consequently subject to the same presumption as the rest of the sentence.

1.4.2. The Constitution of the Sample – The Adult Criminal Law System

During the first years of operation of the Montreal Youth Court, every time a juvenile delinquent was transferred to the adult court, the content of the whole record of the Montreal Youth Court was sent along with the decision ordering the transfer to the Police Court (minor offences), the Court of Sessions of the Peace (serious offences) or the Recorders' Court (municipal offences) - depending on the offence committed. As a result, even though the binders of the individual records were still within the Montreal Youth Court records, the binders were empty as all the paperwork had been sent to the court with jurisdiction to decide in the particular case. Most of the time there was a written phrase on the cover of the binder stating that the defendant had been

⁹⁴ *Québec (Ministre de la Justice) c Canada (Ministre de la Justice)*, [2003] RJQ 1118, 175 CCC (3d) 321 (CA) [*Quebec v Canada*].

transferred to the adult court and the date of the decision (the same information that was available in the plumeitif). Consequently, for accessing those records I had to consult the records of the Police Court, the records of the Court of Sessions of the Peace or the Recorders' Court. Nevertheless, if a pardon had been granted, the information regarding that particular record would not have been available.

For the period 1911-1919, the records of the Police Court and the records of the Court of Sessions of the Peace are located at the Montreal Courthouse as archivists were still in the process of sorting them out by the time I collected my sample (summer of 2008). However, some of the records of the Police Court and the Court of Sessions of the Peace are incomplete and ineligible.

With regard to the records of the Police Court and the Court of Sessions of the Peace for the period 1920-1972, these records have already been sorted out and are located in the Quebec National Archives in Montreal. Most of the records of the Police Court and the Court of Sessions of the Peace for the period 1920-1972 (except period 1923-1928) have been subjected to a representative sample: only records ending in "0" and odd numbers (10, 30, 50, 70, 90) have been conserved as the plumeitifs for the whole periods are available. On the other hand, all the records of the Police Court and the Court of Sessions of the Peace for the period 1923-1928 have been conserved.⁹⁵ The reason for this is that the plumeitifs for the Police Court and the Court of Sessions of the Peace for the period are missing.

⁹⁵ Personal communication with Ms. Carole Ritchot (Archives Nationales du Québec a Montréal) (26th June 2008).

Finally, the records of the Recorders' Court are located in the basement of the Hôtel de ville de Montréal and were consulted therein.

As noted above, for the first years of the operation of the Montreal Youth Court the young person's whole record was transferred to the adult court. As a result, I had to check the records at the adult court (Police Court, Court of Sessions of the Peace and Recorders' Court) to identify the reasons justifying the transfer. None the less, by 1936 the Montreal Youth Court started to keep all the documents regarding the juvenile delinquent, including the judicial decision ordering the transfer. In fact, by 1942 all the documents were kept within the Montreal Youth Court, but this does not mean that the records contained the reasons relied upon for ordering the transfer of a young person to the adult court. Many times a transfer was decided without having to provide reasons for it. As the documents remained within the Montreal Youth Court, I did not need to continue consulting the records of the adult court for finding the reasons for ordering the transfer of young people therein.

PART I. THE FEDERAL LEGISLATIVE PRACTICE IN CANADA

1841-2012

INTRODUCTION

In this first part of the thesis (Part I) I discuss the legal regulation of both the waiver of jurisdiction to the adult court and the imposition of adult sentences to young offenders as regulated in the Province of Canada and in Canada since 1857. The year 1857 is widely accepted by scholars as the first time legislation specifically intended to address youth offending was enacted in the Province of Canada.⁹⁶ As previously discussed in the methodology section, for this analysis I first identified the pool of legislation explicitly intended to regulate youth criminal misbehavior for the period 1857-2012. Then, I selected the legislation and amendments that directly or indirectly have had an impact on the regulation of the transfer of young offenders to the adult court or on the imposition of adult sentences. In order to show the reader how youths who committed criminal offences were dealt with before 1857, I also present the state of the situation for a 16 year period (1841-1856).

For analyzing the semantics of the identified legislation and amendments, I use four different instruments: 1) the statutes enacted by the Legislative Assembly and the Legislative Council of the Province of Canada (1841-1867), and the Parliament of Canada (1867-2011); 2) the debates that took place at the Legislative Assembly and the Legislative Council of the Province of Canada since the first reading of the bill until the bill received Royal Assent (1841-1867), and the debates that took place at the House of Commons and Senate of Canada (Parliament of Canada) since the first reading of the bill until the bill received Royal Assent (1867-2012); 3) the

⁹⁶ Trépanier & Tulkens, *supra* note 35 at 20; Ménard, *supra* note 35 at 44; Piñero, *supra* note 36 at 197; Véronique Strimelle, *La gestion de la déviance des filles et les institutions du Bon Pasteur à Montréal* (PhD Thesis, Université de Montréal, 1998) [unpublished] at 2.

federal governmental reports released addressing the subject; and 4) the scholarly literature that has commented and discussed this matter.

The analyzed data is presented through five periods: 1841-1907, 1908-1964, 1965-1981, 1982-2001, and 2002-2012. The first period addresses the state of criminal law before youth offending legislation was ever enacted in Canada, the first enactment of legislation aimed at addressing youth offending (1857), and the legislation enacted until the *Juvenile Delinquents Act* (1908) was enacted (1857-1907). The second period includes the enactment of the *Juvenile Delinquents Act* (1908) and the implementation of this Act until 1964. The *Juvenile Delinquents Act* (1908) created a youth criminal justice system different and quasi-independent from the existing adult criminal justice system. This statute regulated the creation of juvenile courts and the election of a new public officer: the juvenile court judge. The third period starts with the abrogation of the death penalty for young people (1961), including the release of the report of the Department of Justice on Juvenile Delinquents, and finishes with the abrogation of the *Juvenile Delinquents Act* (1908) in 1982. This report is the first of a series of reports that fundamentally modified the criminal approach to youths by assimilating it to the adult justice system. The fourth and fifth periods include the enactment of the *Young Offenders Act* (1982) and the *Youth Criminal Justice Act* (2002), respectively. These statutes brought specific particularities to the Canadian youth criminal justice system that did not exist under the *Juvenile Delinquents Act*. Consequently, each piece of legislation deserves special attention and analysis. The results are presented and discussed below.

CHAPTER 2

Beginning by the End: the Emergence of the Distinction between Youths and Adults in the

Canadian Criminal Justice System

1841-1907

2.1. Introduction

During the period 1841 to 1856 no statute was identified that dealt with young offenders differently from adult offenders.⁹⁷ Moreover, as presented below regarding the regulation of apprenticeship, the legislation enacted during the period 1841-1856 did not draw a distinction between adults and youths in terms of conditions of detention, procedure or punishment. On the other hand, this does not mean that judges did not take into consideration the offender's age when sentencing: as also noted below, there is not enough data to draw a conclusion on judicial perception of youth offending.

Conversely, the notion that the criminal law system should treat *certain* young offenders differently from adult offenders started to appear in 1857. From an organizational perspective, the idea of a different intervention started in the prison and then moved to the tribunals. First, parliamentarians decided to remove certain young offenders from the penitentiary where they were detained and treated along with adults. Then, parliamentarians decided to conduct the young offenders' procedure separately from the adult offenders' procedure. Consequently, the

⁹⁷ *Fyson, supra* note 2; André Morel, "La réception du droit criminel anglais au Québec (1760-1892)" (1978) 13:2-3 *RJT* 449; Douglas Hay, "The Meaning of the Criminal Law in Quebec, 1764-1774" in Louis A Knafla, ed, *Crime and Criminal Justice in Europe and Canada* (Waterloo: Wilfried Laurier University Press, 1981) 77; Jean-Marie Fecteau, "Between the Old Order and Modern Times: Poverty, Criminality, and Power in Quebec, 1791-1840, in Jim Phillips, Tina Loo & Susan Lewthwaite, eds, *Essays in the History of Canadian Law* (Toronto: University of Toronto Press, 1994) 293; Peter Oliver, "'Terror to Evil-Doers': Prisons and Punishment in Nineteenth-Century Ontario" (Toronto: University of Toronto Press, 1998).

first distinction is in between penitentiary/reform school and the second distinction is in between a procedure for young offenders/procedure for adult offenders (both procedures conducted by the same kind of judge).

From a theoretical perspective the fact of “being a young person” was perceived as insufficient for being granted a different procedure during the period 1857-1907. The possibility of drawing a distinction between the “good young offender” and the “bad young offender” remained. The latter had to be treated as an adult. As young offenders were mixed with adult offenders, the possibility of “transferring” a young offender was undertaken on both directions: from the penitentiary to the reform school and from the reform school to the penitentiary. The distinction between corrigible/incorrigible young offender was also taken into account as a legal criterion for transferring young offenders from one direction to the other.

It can be argued that the difference as to how young offenders were treated was based on the theory of rehabilitation. Nevertheless, the theory of deterrence was still applied to young offenders by the legislator and this theory prevented young offenders from being completely separated from adult offenders. By the time the young offenders’ process was separated from the adult offenders’ process, the debate about the publicity or non-publicity of the process emerged. However, this debate is not only linked to a liberal idea of controlling the arbitrariness of the judicial process; rather, the debate was linked to the theory of deterrence. The process should be open and transparent for it to have a stronger deterrent effect on the offender and the population at large.

2.2. Period 1841-1856

During the period 1841-1856 the statutes enacted by the Canadian Province did not draw a distinction between youth and adult offenders, and this is exemplified through the regulation of apprenticeship. In the XVIII and XIX centuries, the apprenticeship institution was the predominant mean of learning skills in North America. Traditionally, the apprentices were under the supervision of the master for a certain period of time, and after that time they were able to perform a trade or profession by themselves. On 2nd August 1851, *An Act to amend the Law relating to Apprentices and Minors* received Royal Assent.⁹⁸ This statute was aimed at shortening the terms of apprenticeships and defining the law that applies to them clearly. According to this statute, no person under the age of 14 years could be lawfully bound as an apprentice; consequently, this regulation only applied to individuals 14 years of age and older.⁹⁹ Furthermore, Hamilton reports that for the period 1791-1820 the average apprentice began at the age of 15 years in the city of Montreal.¹⁰⁰

Despite not being a criminal law statute, *An Act to amend the Law relating to Apprentices and Minors* allowed the imprisonment of apprentices in the event the masters complained about the apprentices' inobservance of their obligations:

any of the said Justices, Mayor, or Police Magistrate shall have power also, on complaint of any Master against his Apprentice for refusal to obey his commands, for waste or damage to property, or for any other improper conduct, to cause such Apprentice to come before him, and to hear and determine such complaint, and on conviction, to order such Apprentice to be imprisoned in any common gaol or house of correction for any time not exceeding one month.¹⁰¹

⁹⁸ Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 3rd Parl, 4th Sess (2 August 1851) at 152.

⁹⁹ *An Act to amend the Law relating to Apprentices and Minors*, SPC 1851, c 11, preamble.

¹⁰⁰ Gillian Hamilton, "Enforcement in Apprenticeship Contracts: Were Runaways a Serious Problem? Evidence from Montreal" (1995) 55:3 *The Journal of Economic History* 551 at 557, 562-563.

¹⁰¹ *An Act to amend the Law relating to Apprentices and Minors*, *supra* note 99, s VI [emphasis added].

If the apprentices were punished by incarceration, they would be placed in a common jail or house of correction, where adult offenders were also held. Even though no physical record of the discussions held in the Selected Committee at the Legislative Assembly of the Province of Canada could be found, the transcripts of the different readings of the bill both in the Legislative Assembly and in the Legislative Council, as well as the report from the Selected Committee at the Legislative Council, do not document that incarcerating youths and adults together was a matter that could be perceived as “harsh” or “inappropriate”.¹⁰²

None the less, this does not mean that the judiciary did not take into consideration the age of an individual when sentencing. Regarding the American courts, Platt argues that even though there is a general impression that children were treated by criminal courts as if they were adults, there is insufficient evidence to sustain those claims. Moreover, he contends that all criminal courts in the United States did take into consideration the age of the defendant.¹⁰³ Similarly, with regard to the death sentences passed at the Old Bailey (England) upon children under 14 years old for the period 1801-1836, Knell found that maybe one 13 year old child may have been executed. While 103 children were reported as having been sentenced to death, most of them for the

¹⁰² Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 3rd Parl, 4th Sess (2 June 1851) at 43; Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 3rd Parl, 4th Sess (16 June 1851) at 88; Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 3rd Parl, 4th Sess (27 June 1851) at 119; Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 3rd Parl, 4th Sess (19 July 1851) at 176; Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 3rd Parl, 4th Sess (22 July 1851) at 183; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 3rd Parl, 4th Sess (23 July 1851) at 126-127; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 3rd Parl, 4th Sess (24 July 1851) at 129-130; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 3rd Parl, 4th Sess (30 July 1851) at 144; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 3rd Parl, 4th Sess (31 July 1851) at 146; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 3rd Parl, 4th Sess (2 August 1851) at 152. On the other hand, Strimelle reports that in 1843 some members of the Legislative Assembly wanted to implement detention facilities (“asylums”) specially aimed at young offenders who had committed minor offences, while others did not favor such an approach; *Strimelle, supra* note 96 at 62-66.

¹⁰³ *Platt, supra* note 7 at 193, 212.

offence of theft, none of them was actually executed. According to Knell, the law in capital offences (*Bloody Code*) in which defendants were children younger than 14 years in the XIX century was a dead letter.¹⁰⁴ Moreover, he traces back five cases of children who are alleged to have been hanged in the XIX century in England, and he concludes that there is only evidence for one case to sustain the claims, and in that case the defendant was a 13 years old child.¹⁰⁵ On the other hand, there is evidence that children younger than 14 years of age were executed in the XVIII century, but Knell argues that this was not a common practice.¹⁰⁶

In Canada, it was not until the enactment of the *Canadian Criminal Code* in 1892 that the age of criminal responsibility was explicitly regulated. According to the *Canadian Criminal Code* persons younger than seven years of age were deemed incapable of committing a criminal offence.¹⁰⁷ On the other hand, persons between the age of seven and 14 years of age could be convicted of an offence if “he was competent to know the nature and consequences of his conduct, and to appreciate that it was wrong.”¹⁰⁸ Before 1892, Blackstone’s *Commentaries* served as a model for contemporary common law jurists, which applied to both English and French Canada regarding criminal law matters.¹⁰⁹ As stated in Blackstone’s chapter *Of the*

¹⁰⁴ BEF Knell, “Note. Capital Punishment: Its Administration in Relation to Juvenile Offenders in the Nineteenth Century and its Possible Administration in the Eighteenth” (1965) 5:2 *Brit J Criminology* 198 at 202.

¹⁰⁵ *Ibid* at 200-201. Actually, a Canadian working document published by the International Cooperation Group of the Department of Justice of Canada refers to these capital sentences as (*wrong*) evidence to (*wrongly*) demonstrate how harsh the English courts were; Owen Carrigan, *The Evolution of Juvenile Justice in Canada* (Department of Justice of Canada, 2004) 4-5.

¹⁰⁶ Knell, *supra* note 104 at 203.

¹⁰⁷ *An Act respecting the Criminal Law*, SC 1892, c 29, s 9 [*Criminal Code* (1892)].

¹⁰⁸ *Ibid*, s 10.

¹⁰⁹ After the British conquest of the French territories (1759) and the signature of the Treaty of Paris (1763), the British criminal law started to be applied (1764) to the habitants of the recent conquered territories (Quebec); Morel, *supra* note 97 at 464, 470. On the differences between the French criminal law (inquisitorial) and the British criminal law (accusatorial) see Hay, *supra* note 97. According to Morel, Blackstone’s *Commentaries* (1765-1769) were first translated into French in Europe in 1776; however, a French translation was not available in Lower Canada until 1842 (translated by Jacques Crémazie, published in Quebec by Fréchette); Morel, *supra* note 97 at 525.

persons capable of committing crimes, minors were classified in three categories: “*infantia*, from the birth till seven years of age; *pueritia*, from seven to fourteen; and *pubertas*, from fourteen upwards.”¹¹⁰ Regarding *pubertas*, the maximum age was different in every country, but it could include minors under the age of 25 years.¹¹¹ The period of *pueritia* was divided into two sub-periods: *aetas infantiae proxima*, from seven to ten and a half years old, and *aetas pubertati proxima*, from ten and a half to 14 years old. While the former group was not punishable for any crime, the latter could be punished if capable of mischief.¹¹² However, as noted below, this distinction did not operate regarding capital crimes.

Minors had different levels of criminal responsibility depending on the kind of offence committed. For instance, infants under the age of 21 years could escape a fine or imprisonment in cases of common misdemeanor. However, in cases such as “breach of peace, riot, battery or the like”¹¹³ infants older than 14 years of age could be punished as adults. The age of criminal responsibility differed greatly regarding capital crimes, in which “the law [was] still more minute and circumspect.”¹¹⁴ While infants seven years of age and younger were incapable of committing a capital offence “for then a felonious discretion [was] almost an impossibility in nature,”¹¹⁵ infants 14 years old and older were fully liable to capital punishment. On the other

On the other hand, Blackstone’s Commentaries (as originally published in English) were already available in Upper Canada by 1809; *ibid*.

¹¹⁰ William Blackstone, *Commentaries on the Laws of England*, vol 5 (South Hackensack, New Jersey: Rothman Reprints Inc, 1969) at 21-22 [Oxford: Clarendon Press: 1765-1769].

¹¹¹ *Ibid* at 22.

¹¹² *Ibid*.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*.

¹¹⁵ *Ibid* at 23.

hand, infants younger than 14 years old but older than seven years old were presumed to be incapable, but this presumption could be left aside by the principle *malitia supplet aetatem*.¹¹⁶

yet, if it appears to the court and jury, that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. [...] But in all such cases, the evidence of that malice, which is to supply age, ought to be strong and clear beyond all doubt and contradiction.¹¹⁷

Oliver argues that the age of the defendant could have an impact upon the execution of the punishment imposed by the Canadian courts. His study of early XIX century Upper Canada reports that age – as well as health and family status - was a ground for requesting clemency with regard to whipping as a punishment.¹¹⁸ However, these requests were not always granted: Oliver found that in 1818 a 11 years old child, Mary Smith, “convicted of stealing, was sentenced to a month in gaol, during which time she was to be publicly whipped twice in the presence of at least two women.”¹¹⁹ According to him, there was an absence of any public outcry against the whipping of women and children in Upper Canada.

The data presented corroborates the position that it was not until 1857 that criminal law regulation specifically intended to apply to young offenders was enacted in the Province of Canada. On the other hand, this does not necessarily mean that criminal courts in the Province of Canada dealt with children as if they were adults. According to Blackstone’s *Commentaries*, courts were supposed to take into consideration the age of the minor defendant. Unfortunately, at the time of writing this dissertation there is very little scholarship that explores how children

¹¹⁶ *Black’s Law Dictionary*, 8th ed, *sub verbo* “malitia supplet aetatem”: “Malice makes up for age.” Lucien A Beaulieu & Carla Cesaroni, “The Changing Role of the Youth Court Judge” (1999) 7 Eur J Crim Pol’y & Research 363 at 371.

¹¹⁷ *Blackstone*, *supra* note 110 at 23.

¹¹⁸ *Oliver*, *supra* note 97 at 22.

¹¹⁹ *Ibid*, at 23.

as defendants were dealt with by the courts of the Province of Canada.¹²⁰ Moreover, this little evidence only seems to indicate that youths' conditions of detention did not differ from adults' conditions of detention (prison sentences).¹²¹

2.3. Period 1857-1907

The first legislation that regulated youth delinquency differently from adult delinquency was passed in 1857, and from that date to 1907 many other similar statutes were enacted. The period 1857-1907 is characterized by an *initial* awareness of the detrimental effects of the traditional criminal justice system on youths and the subsequent attempts to avoid these consequences for some youths. Different statutes aimed at regulating a more “integrative” approach to young offenders (criminal law procedure, punishment and conditions of detention) were enacted during this period - yet with many reservations and hesitations.¹²² Since no legal scholar has reconstructed the legislation enacted during this period, exploring and analyzing these statutes was like fitting together a big *puzzle* for which the final image was not available.

¹²⁰ Most of the literature for this period regarding minors as defendants in the criminal justice system focuses on conditions of detention, but not on the procedure at criminal courts *per se*: Ménard, *supra* note 35; Véronique Strimelle, “Les origines des premières institutions d’enfermement pour filles au Québec (1857-1869). Émergence de nouveaux enjeux politiques?” (1998) 6:2 *Bulletin d’histoire politique* 30 at 32; Strimelle, *supra* note 96 at 62-73.

¹²¹ Fecteau brings an illustrative example: he reports that the proportion of prisoners younger than 25 years of age in the Quebec Prison rose from 22% in 1824 to 49% in 1832. Indeed, he reports that for a similar period (1825 to 1833) the number of general entries in the register of the Quebec Prison increased by 238.28% (350 entries in 1,825 vs. 834 entries in 1833). While during the period 1823-1825 258 persons were incarcerated for offences against the public order (33% of the total of entries), during the period 1832-1834, the number of persons incarcerated for these sorts of offences rose to 1,329 (65% of the total of entries): Fecteau, *supra* note 97 at 310-311, 322. It is quite plausible that the reason for the increase in the youth prison population was their overcriminalization for offences such as vagrancy or soliciting.

¹²² The reader is advised to consult the summary table at the end of this chapter. This table briefly characterizes all the statutes enacted in this period regarding youth offending. As well, for the scope of clarity, a subtitle identifying each statute, year of enactment, and area of regulation has been added.

2.3.1. The *Prison Inspection Act* (1857) [conditions of detention]

In 1857 the Parliament of the Province of Canada enacted two statutes that, for the first time, drew a distinction between young and adult offenders on the issues of place of detention (conditions of detention), criminal law procedure and punishment. The first statute, the *Prison Inspection Act* (1857), was intended to provide young offenders with special detention facilities where they could receive instruction and discipline “as shall appear most conducive to their reformation and the repression of crime.”¹²³ One can see by these last two terms (reformation and repression) that the theory of rehabilitation continues to be attached to the theories of deterrence and eventually to the theory of retribution. This statute was introduced in the Legislative Assembly on 17th April 1857 and assented to on 10th June 1857.¹²⁴ No discussion on the issues of childhood or why young offenders were incarcerated in a different place from adult offenders was identified in the journal of the Legislative Assembly or in the journal of the Legislative Council.¹²⁵

¹²³ *An Act for establishing Prisons for Young Offenders – for the better government of Public Asylums, Hospitals and Prisons, and for the better construction of Common Gaols*, SPC 1857, c 28, preamble [*Prison Inspection Act* (1857)]. This statute was consolidated and slightly amended in 1859: *An Act respecting Prisons for Young Offenders*, RSPC 1859, c 107.

¹²⁴ Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 5th Parl, 3rd Sess (17 April 1857) at 223; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 5th Parl, 3rd Sess (10 June 1857) at 589 (respectively).

¹²⁵ Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 5th Parl, 3rd Sess (17 April 1857) at 223; Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 5th Parl, 3rd Sess (5 May 1857) at 338; Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 5th Parl, 3rd Sess (8 May 1857) at 372; Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 5th Parl, 3rd Sess (19 May 1857) at 454; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 5th Parl, 3rd Sess (22 May 1857) at 373; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 5th Parl, 3rd Sess (26 May 1857) at 388; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 5th Parl, 3rd Sess (27 May 1857) at 404; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 5th Parl, 3rd Sess (28 May 1857) at 414; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 5th Parl, 3rd Sess (10 June 1857) at 589.

The *Prison Inspection Act* (1857) regulated the construction of two reformatory prisons, one in Lower Canada and the other in Upper Canada, and distinguished between three groups of young offenders.¹²⁶ Two kinds of criteria were employed to make this distinction: 1) the age of the young person and 2) the *type of the offence* (maximum penalty). The first group were youths who did not exceed the age of 21 years and had committed an offence punishable in the Penitentiary.¹²⁷ This group could be incarcerated in the Reformatory Prison for the period of their sentence instead of in the Penitentiary if their prison sentence ranged from six months to five years.¹²⁸ The second group were youths under 21 years sentenced to more than five years. This group was to remain within the adult penitentiary. In this second group we can already find the idea that the “severity of the crime” should be taken into account as a *criterion* for a “non-differentiation” between young/adult offenders. This appears as a partial neutralization of the criterion of age. The third group were young offenders under the age of 16 years who had committed a summary conviction offence and could be sent to common jails for at least 14 days.¹²⁹ This group, after a judge had examined and inquired “into the circumstances of such case and conviction,” could be sent to the Reformatory Prison either forthwith or at the expiration of their sentences for a period between six months to two years.¹³⁰ This seems to be a “supplement of incarceration” for the purpose of rehabilitation.

The Governor had discretion for discharging the third group of young offenders from the Reformatory Prison at any time.¹³¹ The Governor also had discretion for transferring young

¹²⁶ *Prison Inspection Act* (1857), *supra* note 123, s I.

¹²⁷ *Ibid.*, s V.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*, s VI.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

offenders who did not exceed the age of 21 years from the Penitentiary to the Reformatory Prison for the remainder of their sentences,¹³² and to transfer a young offender from one Reformatory Prison to other Reformatory Prison “and at pleasure to re-transfer such offender.”¹³³ The implicit idea in this disposition seems to have been that the distinction between corrigible/incorrigible young offenders may justify this “bidirectional authorization” for transfers. The Governor’s decision was political (governor) rather than juridical (court).

The *Prison Inspection Act* (1857) also explicitly regulated the possibility of removing “incorrigible offenders” from the Reformatory Prison and sending them to the Penitentiary. According to section IX, young offenders who did not exceed the age of 21 years and had committed an offence punishable in the Penitentiary (first group of offenders) could be removed from the Reformatory Prison and sent to the Penitentiary for the remainder of their sentences if identified as “incorrigible”:

[i]t shall be lawful for the Governor at any time, on report of the Inspectors, in his discretion, to order any offender sentenced under the fifth section of this Act, to be removed from either of the said Reformatory Prisons, as incorrigible; and in every such case, the offender shall be liable to be confined in the Provincial Penitentiary for the remainder of the term of imprisonment for which such convict had been originally sentenced in such Reformatory Prison.¹³⁴

This section worked as “built-in safety valve” that allowed the Governor to remove “incorrigible” young offenders (first group) from the Reformatory Prison and send them to the

¹³² *Ibid*, s VII. Section VII was amended in 1858, allowing the Governor to transfer young offenders convicted in the Provincial Penitentiary from this detention centre to either Reformatory Prisons, and not necessarily to the Reformatory Prison for the section of the Province (Lower or Upper Canada) within which the young offender had been tried and convicted: “[i]t shall be lawful for the Governor, at any time, in his discretion, to cause any convict in the Provincial Penitentiary whose age may appear to the Inspectors not to exceed the age of twenty-one years, to be transferred to either of the Reformatory Prisons of this Province, for the remainder of the term of imprisonment for which such convict had been sentenced;” *An Act to amend “The Prison Inspection Act, 1857”*, SPC 1858, c 88.

¹³³ *The Prison Inspection Act* (1857), *supra* note 123, s VIII.

¹³⁴ *Ibid*, s IX [emphasis added].

Penitentiary. Not only did the *Prison Inspection Act* (1857) constitute the first attempt to provide young offenders with special detention facilities, but it also contemplated the possibility of transferring supposed “incurable” young offenders to Penitentiaries. This sort of “transfer” first appeared within the criterion of “incurable young offenders,” which was a distinguishable criterion for denying some young offenders the advantages statutorily provided for most young offenders.

2.3.2. The *Speedy Trial Act* (1857) [criminal procedure, punishment]

The *Speedy Trial Act* (1857), enacted on the same date the *Prison Inspection Act* (1857) was enacted, was the second attempt to draw a distinction between young and adult offenders in the criminal justice system.¹³⁵ This statute, aimed at improving the procedure in criminal courts and reducing imprisonment sentences when youths were defendants, was introduced at the Legislative Assembly on 17th April 1857 and received Royal Assent on 10th June 1857.¹³⁶ Again, no discussion on the issue of childhood or why young offenders were dealt with a criminal law procedure and sentencing different from the traditional criminal law system was identified either in the journals of the Legislative Assembly or on the journals of the Legislative Council.¹³⁷ The

¹³⁵ *An Act for the more speedy trial and punishment of juvenile offenders*, SPC 1857, c 29, preamble [*Speedy Trial Act* (1857)]. This statute was consolidated and slightly amended in 1859: *An Act respecting the trial and punishment of juvenile offenders*, RSPC 1859, c 106, and repealed in 1869.

¹³⁶ Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 5th Parl, 3rd Sess (17 April 1857) at 222; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 5th Parl, 3rd Sess (10 June 1857) at 587(respectively).

¹³⁷ Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 5th Parl, 3rd Sess (17 April 1857) at 222; Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 5th Parl, 3rd Sess (5 May 1857) at 341; Province of Canada, Legislative Assembly, *Journals of the Legislative Assembly of the Province of Canada*, 5th Parl, 3rd Sess (16 May 1857) at 437; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 5th Parl, 3rd Sess (20 May 1857) at 363; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 5th Parl, 3rd Sess (23 May 1857) at 379; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 5th Parl, 3rd Sess (27 May 1857) at 402; Province of Canada, Legislative Council, *Journals of the Legislative Council of the Province of Canada*, 5th Parl, 3rd Sess (10 June 1857) at 587.

purpose of the legislation was only found in the preamble to the *Speedy Trial Act* (1857), which stated that the purpose of the legislation was mostly aimed at reducing the pre-sentencing detention period and its undesirable consequences:

[w]hereas in order in certain cases to ensure the more speedy trial of juvenile offenders, and to avoid the evils of their long imprisonment previously to trial, it is expedient to allow, of such offenders being proceeded against in a more summary manner than is now by law provided, and to give further power to bail them.¹³⁸

The *Speedy Trial Act* (1857) regulated an expedited procedure in open courts for young offenders who did not exceed the age of 16 years and were charged with the offence of simple larceny or an offence punishable as simple larceny, and a reduced punishment for these same offenders.¹³⁹ The maximum sanction a young person could receive was three months imprisonment (with or without hard labor) or forfeiture of property not exceeding five pounds. This constituted a major change to the traditional punishment for the offence of simple larceny. In 1856 simple larceny was punishable by imprisonment at hard labor in the provincial penitentiary for any term not less than seven years or by imprisonment in any other prison for a term not exceeding two years.¹⁴⁰ In addition to this, the defendant could be sentenced to solitary confinement.¹⁴¹

¹³⁸ *Speedy Trial Act* (1857), *supra* note 135, preamble [emphasis added].

¹³⁹ *Ibid*, s I.

¹⁴⁰ *An Act for consolidating and amending the Laws in this Province, relative to Larceny and other Offences connected therewith*, SPC 1841, c 25, s III. See GW Wicksteed, *Index to the Statutes in Force in Lower Canada at the End of the Session of 1856, Including a Classification thereof, a Revision of the Public General Acts, and an Index to the Statutes not in force. Prepared by order of the Legislative Assembly* (Toronto: Stewart Derbishire & George Desbarats, 1857) at 226-230.

¹⁴¹ *An Act for consolidating and amending the Laws in this Province, relative to Larceny and other Offences connected therewith*, *supra* note 140, s IV.

The *Speedy Trial Act* (1857) also allowed the possibility of depenalisation, but this was not “new” in itself. Indeed, this option already existed in other criminal law statutes. Acting judges were allowed to waive the sanction if they considered the offence insignificant.¹⁴² However, this possibility was limited to summarily convicted first-time young offenders.¹⁴³

Young offenders being dealt with under the *Speedy Trial Act* (1857) still had the option of being tried by a jury (and as a result, the expedited procedure did not apply) or outside the expedited procedure (and therefore, face the same trial procedure as an adult).¹⁴⁴

Moreover, the *Speedy Trial Act* (1857) drew a distinction between two sorts of young offenders, this time taking into consideration the seriousness of the criminal offence committed. The expedited procedure did not apply if the judges were of the opinion that the case should be prosecuted by indictment (serious offences).¹⁴⁵ The notion of “serious offence” was the distinguishable criterion for denying criminal law procedure and sentencing advantages to some young offenders.

In summary, both the *Prison Inspections Act* (1857) and the *Speedy Trial Act* (1857) constituted a turning point in the criminal justice system as a different perception of childhood made its way through criminal law. At least some young offenders started to be seen as different from adult offenders and therefore, deserving a treatment more focused on rehabilitation. However, as presented above, according to these statutes some young offenders could not benefit from the

¹⁴² *Speedy Trial Act* (1857), *supra* note 135, s I.

¹⁴³ *An Act for consolidating and amending the Laws in this Province, relative to Larceny and other Offences connected therewith*, *supra* note 140, s LX.

¹⁴⁴ *Speedy Trial Act* (1857), *supra* note 135, s II.

¹⁴⁵ *Ibid*, s I.

special regulations. These statutes drew a distinction between two groups of young offenders taking into consideration the sort of criminal offence committed (“serious offences”) and/or the evaluation made of the young offenders’ behavior during detention (“incurability”). Young offenders who did not behave as expected, either because of the sort of offence committed or their behavior during detention, lost the special advantageous regulation and were dealt with the traditional criminal law.

2.3.3. The *Penitentiary Act* (1868) [conditions of detention]

In 1868, following the enactment of the *Constitution Act* (1867), the Canadian Parliament enacted the *Penitentiary Act* (1868).¹⁴⁶ This statute implemented subsection 91(28) of the *Constitution Act* (1867), under which the Parliament of Canada had exclusive legislative authority concerning “[t]he Establishment, Maintenance, and Management of Penitentiaries.”¹⁴⁷ The provinces of Ontario, Quebec, New Brunswick and Nova Scotia had just formed the Dominion of Canada (1867), and different matters had to be organized - among them, the transfer of the power to administrate the penitentiary system to the new federal government. The *Penitentiary Act* (1868) did not abrogate the *Prison Inspection Act* (1857): both statutes were in force simultaneously, the latter having been slightly amended and consolidated in 1859.¹⁴⁸ One major difference between both statutes is that while the *Penitentiary Act* (1868) was aimed at regulating the directors of the penitentiaries’ and the Governor’s duties, the *Prison Inspection Act* (1857) was aimed at regulating the judges’ and the Governor’s duties.

¹⁴⁶ *An Act respecting Penitentiaries, and the Directors thereof, and for other Purposes*, SC 1868, c 75, s 29 [*Penitentiary Act* (1868)].

¹⁴⁷ *British North America Act* (1867), *supra* note 27, s 91(28).

¹⁴⁸ *An Act respecting Prisons for Young Offenders*, SPC 1859, c 107 [*Prison Inspection Act* (1859)].

The *Penitentiary Act* (1868), as the *Prison Inspection Act* (1857), allowed the Governor to transfer alleged “incorrigible” young offenders from the Reform Prison to the Penitentiary.¹⁴⁹ As well, the Governor had discretion for transferring to the Reformatory Prison (for the period of their sentences) young offenders who were 15 years of age and younger, and who had been sentenced to the Penitentiary.¹⁵⁰ This was a kind of “regression” from the 1857 statute: according to the *Prison Inspection Act* (1857) the Governor could transfer young offender who were 20 years old or younger from the Penitentiary to the Reform Prison.¹⁵¹ The *Penitentiary Act* (1868) added two more requisites for a young offender to be transferred to a Reform Prison. First, the young offender had to have been sentenced for at least two years (without stating a maximum period of confinement).¹⁵² This criterion clearly shows that treatment was considered necessary for the youths perceived as the most “dangerous”. Second, the young offender had to be “susceptible of reformation”.¹⁵³ This requirement, inexistent in the previous statute, is related to the theory of rehabilitation in itself. This theory of punishment employs the distinction between corrigible/incorrigible offenders to select the offenders that are eligible for treatment, “abandoning” the others to punishment.

There is a plausible explanation for these changes allowing a special place for young offenders: during this period a social environmental view of youth criminality developed in English

¹⁴⁹ *Penitentiary Act* (1868), *supra* note 146, s 29. Before becoming part of the Dominion of Canada, each province had its own penitentiary: Ontario and Quebec had the Penitentiary of Kingston (Kingston, Ontario), New Brunswick had the Penitentiary of St. John (St. John, New Brunswick), and Nova Scotia had the Penitentiary of Halifax (Halifax, Nova Scotia); see *Penitentiary Act* (1868), *supra* note 146, s 11.

¹⁵⁰ *Penitentiary Act* (1868), *supra* note 146, s 30.

¹⁵¹ *Prison Inspection Act* (1859), *supra* note 148, s 5.

¹⁵² *Penitentiary Act* (1868), *supra* note 146, s 30. According to the *Prison Inspection Act* (1857), for being transferred from the Penitentiary to the Reform Prison a young offender’s sentence had to be for more than six months and less than 5 years.

¹⁵³ *Ibid.*

Canada.¹⁵⁴ Children and youths were perceived as not having been “born criminals”, but rather as individuals that could (or had) become criminals because they were in a criminogenic environment.¹⁵⁵ If these young people were placed in a supposed non-criminogenic environment (Reform Prison), they could be “treated”. Furthermore, only children and youths were “malleable”: that is one of the reasons for the maximum age for being transferred from the Penitentiary to the Reformatory Prison was reduced to 15 years. Besides, as the purpose of the Reformatory Prison was the improvement of these youths for the prevention (in the sense of rehabilitation) of crime, there was no reason for having a maximum period of confinement as limit for a young person to qualify for being transferred to the Reformatory Prison. The more time the young people spent in the Reformatory Prison, the better for their upbringing into law abiding citizens. The same justification applies for having increased the minimum time of imprisonment from six months to two years to qualify for being transferred to the Reformatory Prison: it may have been considered that a period of detention of less than two years could not be conducive to the young person receiving a successful intervention

Nevertheless, there was also at least one distinguishable criterion for excluding young offenders from this beneficial condition of detention: youths had to be prone to reformation. Again, a criterion for exclusion, this time being “susceptible to reformation”, continued making its way through the theory of rehabilitation and through the Canadian young offenders’ legislation.

¹⁵⁴ Paul Bennett, “Taming ‘Bad boys’ of the ‘Dangerous Class’: Child Rescue and Restraint at the Victoria Industrial School” (1988) 21:41 *Social History* 72 at 75.

¹⁵⁵ *Sutherland*, *supra* note 6 at 91-92.

2.3.4. The *Procedure in Criminal Cases Act* (1869) [conditions of detention]

In 1869 the *Procedure in Criminal Cases Act* (1869) was enacted for the purpose of consolidating criminal law procedure along the Dominion of Canada.¹⁵⁶ None the less, as noted above, this period is highly characterized by redundant and contradictory legislation: this statute coexisted with both the *Prison Inspection Act* (1857) and the *Penitentiary Act* (1868). However, the *Procedure in Criminal Cases Act* (1869) introduced different regulation to young offenders from both the *Prison Inspection Act* (1857) and the *Penitentiary Act* (1868). According to the *Procedure in Criminal Cases Act* (1869) the Court had discretion for detaining 15-year-old offenders and younger sentenced to more than six months but less than five years imprisonment in the Reformatory Prison (instead of in the Penitentiary) for the period of their sentence.¹⁵⁷ The additional requisite of being “susceptible of reformation” was eliminated; nevertheless, the minimum sentence period of six months and maximum sentence period of five years was restored as eligibility criterion. This means that a young person had to have been sentenced to at least six months of detention but not more than five years of detention for being eligible for a transfer to the Reform Prison. It can be argued that the legislator perceived that a successful intervention should start early on the young person’s criminal career. At the same time, the legislator perceived that young people sentenced to more than five years (either because they were recidivists or had committed serious offences) were beyond the possibilities of successful interventions.

¹⁵⁶ *An Act respecting Procedure in Criminal Cases, and other matters relating to Criminal Law*, SC 1869, c 29 [*Procedure in Criminal Cases Act* (1869)]. The regulation of the criminal law procedure has been an exclusive legislative power of the Parliament of Canada since 1867: *Constitution Act* (1867), *supra* note 27, s 91(27).

¹⁵⁷ *Procedure in Criminal Cases Act* (1869), *supra* note 156, s 98.

2.3.5. The Trial and Punishment of Juvenile Offenders Act (1869) [criminal procedure, punishment]

The *Trial and Punishment of Juvenile Offenders Act* (1869), also enacted in 1869, applied to the provinces of the Dominion of Canada and had priority over all the cases involving minors in the criminal justice system.¹⁵⁸ This statute was introduced in the Senate of Canada on 7th June 1869 and received Royal Assent on 22nd June 1869,¹⁵⁹ abrogating the *Speedy Trial Act* (1857).¹⁶⁰ Again, no discussion about childhood issues or reasons for enacting special legislation for dealing with youth offending was identified in the Debates of the Senate or of the House of Commons.¹⁶¹ Nor did the preamble to this statute highlight its purposes.¹⁶²

The *Trial and Punishment of Juvenile Offenders Act* (1869), like the *Speedy Trial Act* (1857), continued drawing a distinction between two main groups of young offenders: only young

¹⁵⁸ *An Act respecting the Trial and Punishment of Juvenile Offenders*, SC 1869, c 33 [*Trial and Punishment of Juvenile Offenders Act* (1869)]. On the priority of applying the *Trial and Punishment of Juvenile Offenders Act* (1869) over other criminal law regulation, see *An Act respecting the prompt and summary administration of Criminal Justice in certain cases*, SC 1869, c 32, s 31. This regulation was still in force when the statute was consolidated in 1886: *An Act respecting the Summary Administration of Criminal Justice*, RSC 1886, c 176, s 35.

In the date in which this statute was enacted, the Dominion of Canada comprised the provinces of Ontario, Quebec, New Brunswick, and Nova Scotia. Manitoba and the Northwest Territories became part of Canada on 15th July 1870 (*Rupert's Land and The North-Western Territory*, Order in Council dated on 23rd June 1870). British Columbia joined Canada on 20th July 1871 (*Order in Council respecting the Province of British Columbia*, Order in Council dated on 16th May 1871) and Prince Edward Island also became a Canadian province on 1st July 1873 (*Prince Edward Island*, Order in Council dated on 26th June 1873). On 13th June 1898 a portion of the Western Territories became the Yukon Territories. Because of political reasons, on 1st September 1905 the south part of the Western Territories became the provinces of Alberta and Saskatchewan; see *Morton*, *supra* note 26. Newfoundland joined Canada on 31st March 1949 and on 1st April 1999 the eastern portion of the Northwest Territories became the Territory of Nunavut.

¹⁵⁹ *Debates of the Senate*, 1st Parl, 2nd Sess (7 June 1869) at 287; *Debates of the Senate*, 1st Parl, 2nd Sess (22 June 1869) at 392 (respectively).

¹⁶⁰ *Trial and Punishment of Juvenile Offenders Act* (1869), *supra* note 158, s 29. The *Speed Trial Act* (1857) was again repealed in 1869 by *An Act respecting the Criminal Law, and to repeal certain enactments therein mentioned*, SC 1869, c 36, s 1.

¹⁶¹ *Debates of the Senate*, 1st Parl, 2nd Sess (7 June 1869) at 287; *Debates of the Senate*, 1st Parl, 2nd Sess (8 June 1869) at 288; *Debates of the Senate*, 1st Parl, 2nd Sess (9 June 1869) at 292-293; *House of Commons Debates*, 1st Parl, 2nd Sess (11 June 1869) at 732; *House of Commons Debates*, 1st Parl, 2nd Sess (18 June 1869) at 881; *House of Commons Debates*, 1st Parl, 2nd Sess (19 June 1869) at 899; *Debates of the Senate*, 1st Parl, 2nd Sess (22 June 1869) at 392.

¹⁶² *Trial and Punishment of Juvenile Offenders Act* (1869), *supra* note 158, preamble. This statute was consolidated in 1886: *An Act respecting Juvenile Offenders*, RSC 1886, c 177.

offenders who committed less severe offences and did not exceed the age of 16 years were dealt with expeditiously. As we can see, the severity of the offence continues to be the criterion for making exceptions to age, and this can be attributed to the influence of the theories of punishment, such as deterrence and retribution. This does not preclude the fact that this statute, as the *Speedy Trial Act* (1857) did, contemplated a lesser amount of punishment and more discretion about the presence/absence of hard labour than the traditional criminal law did. Youths who had committed the offence of simple larceny or an offence punishable as simple larceny were imprisoned in the Reformatory Prison instead of in the Penitentiary¹⁶³ “with or without hard labour, for any term not exceeding three months.”¹⁶⁴ In 1869 simple larceny was punishable by imprisonment in the Penitentiary “for any term not exceeding three years, and not less than two years, or [...] in any other gaol [jail] or place of confinement for any term less two years, with or without solitary confinement.”¹⁶⁵ As usual, the *Trial and Punishment of Juvenile Offenders Act* (1869) also allowed justices to depenalise young offenders if it was “not expedient to inflict any punishment.”¹⁶⁶ This possibility also existed under *An Act respecting Larceny and other similar Offences*; however, it was limited to first-time offenders who were summarily convicted.¹⁶⁷

¹⁶³ The concept of “common gaol” as used in the *Trial and Punishment of Juvenile Offenders Act* (1869) actually included Reformatory Prisons:

the expression “the Common Gaol or other place of confinement,” shall in the case of any offender whose age at the time of his conviction does not in the opinion of the Magistrate exceed sixteen years, include any Reformatory Prison provided for the reception of juvenile offenders in the Province in which the conviction referred to takes place, and to which by the law of that Province the offender can be sent. *An Act respecting the prompt and summary administration of Criminal Justice in certain cases*, *supra* note 158, s 1.

¹⁶⁴ *Trial and Punishment of Juvenile Offenders Act* (1869), *supra* note 158, s 3.

¹⁶⁵ *An Act respecting Larceny and other similar Offences*, SC 1869, c 21, s 4.

¹⁶⁶ *Trial and Punishment of Juvenile Offenders Act* (1869), *supra* note 158, s 4.

¹⁶⁷ *An Act respecting Larceny and other similar Offences*, *supra* note 165, s 119.

As noted above, some young offenders did not benefit from this speedy procedure and reduced punishment: youths accused of having committed an indictable offence were dealt with through the traditional criminal law procedure.¹⁶⁸ As well, young offenders convicted of simple larceny twice (or any offence punishable like simple larceny) lost their special status under the *Trial and Punishment of Juvenile Offenders Act* (1869) and were dealt with the traditional criminal law procedure.¹⁶⁹ These two exceptions show again the relevant role played by theories centered on social exclusion (deterrence and retribution). As presented above when examining the legislation enacted in 1857 regarding criminal law procedure and punishment (*Speedy Trial Act*), the criminal justice system reproduced again the distinction between two sorts of young offenders taking into consideration the sort of criminal offence committed. But the *Trial and Punishment of Juvenile Offenders Act* (1869) added a second criterion: according to this statute, young offenders could not commit more than two offences for them to be dealt with the expeditious procedure. This means that in 1869 young offenders were supposed to commit mild criminal offences and not become “recidivists.” If they committed severe offences or a third mild criminal offence, they would be removed from the special system and dealt with the traditional criminal justice system. In conclusion, youths were dealt with as youths if: 1) they were 15

¹⁶⁸ *Trial and Punishment of Juvenile Offenders Act* (1869), *supra* note 158, s 5. Young offenders could also object to having their procedure dealt with this statute. In this case, their procedures were dealt with the traditional criminal law procedures; *ibid*. Both these youths and the youths who had committed indictable offences could choose between being tried by a magistrate or a jury; *ibid*, s 3.

¹⁶⁹

Whosoever commits the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been twice summarily convicted of any of the offences punishable upon summary conviction under the provisions contained in this Act, or in any former Act or law relating to the same subjects or in the *Act respecting the prompt and summary administration of Criminal Justice in certain cases*, or other Act for like purposes or in the *Act respecting the trial and punishment of Juvenile Offenders*, or in the *Act respecting malicious injuries to property* (whether each of the convictions has been in respect of an offence of the same description or not, and whether such convictions or either of them has been before or after the passing of this Act,) is guilty of felony, and shall be liable to be imprisoned in the Penitentiary for any term not exceeding seven years, and not less than two years, or to be imprisoned in any other gaol or place of confinement, for any term less than two years, with or without hard labour, and with or without solitary confinement. *An Act respecting Larceny and other similar Offences*, *supra* note 165, s 9 [emphasis added].

years or younger (“chronological” youths); 2) they committed mild offences; and 3) they did not commit more than two mild offences. The young offender’s age appears more as a kind of “favorable preconditions for special treatment under certain conditions” than as a clearly distinctive representation of young people or “young psychic system” in terms of criminal responsibility (theory of retribution) or capacity for “rational calculation” of pleasure and pain (theory of deterrence).

2.3.6. The Juvenile Offenders in Quebec Act (1869) [conditions of detention, criminal procedure]

On 7th June 1869, a somewhat curious statute was enacted: the *Bill respecting juvenile offenders in the Province of Quebec* received its first reading in the House of Commons of Canada.¹⁷⁰ As Hon. Sir John A. Macdonald explained during the second reading of the bill, “the necessity of this measure [enactment of this statute] arose from there being a reformatory school in Quebec, which did not exist in the other Provinces.”¹⁷¹ He was referring to the Reformatory School at *Saint-Vincent-de-Paul*, which had first opened in 1858 at the Île-aux-Noix (Lower Canada), and moved in 1862 to the ancient convent of the sisters of Sacré-Cœur in Montreal, where it operated until 1872.¹⁷² The bill received Royal Assent on 22nd June 1869.¹⁷³ The purpose of this statute

¹⁷⁰ *House of Commons Debates*, 1st Parl, 2nd Sess (7 June 1869) at 625.

¹⁷¹ *House of Commons Debates*, 1st Parl, 2nd Sess (15 June 1869) at 798. Similar legislation was enacted later on as the different Canadian Provinces started to have reformatory or industrial schools in their jurisdictions; see, for instance: *An Act to Empower the Police Court in the City of Halifax to Sentence Juvenile Offenders to be Detained in the Halifax Industrial School*, SC 1870, c 32, s 1; *An Act respecting the “Andrew Mercer Ontario Reformatory for Females”*, SC 1879, c 43; *An Act respecting the Ontario Reformatory for Boys*, SC 1880, c 39; *An Act respecting “The Industrial Refuge for Girls,” of Ontario*, SC 1880, c 40; *An Act respecting the Reformatory for Juvenile Offenders in Prince Edward Island*, SC 1880, c 41; *An Act respecting a Reformatory for certain Juvenile Offenders in the County of Halifax, in the Province of Nova Scotia*, SC 1884, c 45. All these statutes were consolidated in one piece of legislation in 1886: *An Act respecting Public and Reformatory Prisons*, RSC 1886, c 183. In 1906 this legislation was revised: *An Act respecting Public and Reformatory Prisons*, RSC 1906, c 148.

¹⁷² *Ménard*, *supra* note 35 at 46-47. In 1873 the Frères de la Charité took care of the administration of this Catholic reformatory school, which was moved from the Institute of Saint-Vincent-de-Paul to the Institute of Saint-Antoine, both in the city of Montreal; *ibid* at 92.

¹⁷³ *Debates of the Senate*, 1st Parl, 2nd Sess (22 June 1869) at 393.

was to regulate through *federal* legislation the certified reformatory schools in Quebec,¹⁷⁴ which were only regulated by the Quebec Legislative Assembly.¹⁷⁵

This statute introduced different youth criminal legislation in the Province of Quebec from the legislation in force in the rest of Canada regarding conditions of detention. Young offenders in Quebec who were 15 years old or younger and who had been sentenced to imprisonment – no matter for how long or for which offence - were detained in Certified Reformatory Schools.¹⁷⁶

This regulation was more inclusive than the previous one: the only qualifying requirements for young offenders to be detained in Certified Reformatory Schools were 1) being under 16 years of age and 2) having been sentenced to prison. Young offenders were detained in Certified Reformatory Schools for a period between two to five years.¹⁷⁷ Judges in Quebec were allowed to decide when to apply imprisonment in the Certified Reformatory School: young offenders could be sent to the Certified Reformatory Schools either as punishment for the committed offence or at the expiration of their sentence as a “plus” to their original punishment.¹⁷⁸ In the latter case, young offenders could be

first imprisoned in the Common Gaol for a period not in any case exceeding three month, and at the expiration of his sentence to be sent to a Certified Reformatory School, and to be there detained for a period of not less than two years, and not more than five years.¹⁷⁹

¹⁷⁴ *An Act respecting Juvenile Offenders within the Province of Quebec*, SC 1869, c 34, preamble [*The Juvenile Offenders in Quebec Act* (1869)]. In the province of Quebec Reformatory Prisons were held to be “Certified Reformatory Schools”; *ibid*, s 9.

¹⁷⁵ *Acte concernant les écoles de réforme*, SQ 1869, c 18. See Renée Joyal, “L’Acte concernant les écoles d’industrie (1869). Une mesure de prophylaxie sociale dans un Québec en voie d’urbanisation” in Renée Joyal, ed, *L’évolution de la protection de l’enfance au Québec. Des origines à nos jours* (Québec: Presse de l’Université de Québec, 2000) at 35-48.

¹⁷⁶ *The Juvenile Offenders in Quebec Act* (1869), *supra* note 174, s 2.

¹⁷⁷ *Ibid*.

¹⁷⁸ *Ibid*.

¹⁷⁹ *Ibid*. The word “common gaol” in this sentence has to be read according to *An Act respecting the prompt and summary administration of Criminal Justice in certain cases*, *supra* note 158, s 1:

Here we can see how the statute accommodated different theories of punishment: from one side rehabilitation, and from the other side deterrence and retribution. The idea of increasing the time of detention can hardly be motivated by the idea of reform. There is no logical reason for keeping in prison an already reformed young offender. On the contrary, this change seems to indicate the presence of others theories of punishment centered only on the idea of “inflicting suffering” (deterrence and retribution). The Governor continued having discretion for discharging any offender detained in such reformatory school.¹⁸⁰

This statute also amended the criminal law procedure applicable to young offenders in Quebec: while awaiting trial for a non-capital offence, youths 15 years old and younger were detained in Certified Reformatory Schools instead of in common jails as long as the former were close by. This federal statute seemed to have acknowledged that different Canadian provinces could implement different criminal law philosophies in dealing with young offenders and Quebec announced from that time a philosophy less centered on social exclusion theories (retribution and deterrence) than other Canadian provinces.

As regulated in previous statutes, the *Juvenile Offenders in Quebec Act* (1869) allowed the Governor to remove “incorrigible” young offenders detained in Certified Reformatory Schools and send them to the Penitentiary for the remainder of their sentences.¹⁸¹ This statute also had two criteria of distinction: the young offender’s “incorrigibility” (rehabilitation) and the

the expression “the Common Gaol or other place of confinement,” shall in the case of any offender whose age at the time of his conviction does not in the opinion of the Magistrate exceed sixteen years, include any Reformatory Prison provided for the reception of juvenile offenders in the Province in which the conviction referred to takes place, and to which by the law of that Province the offender can be sent.

¹⁸⁰ *The Juvenile Offenders in Quebec Act* (1869), *supra* note 174, s 3.

¹⁸¹ *Ibid*, s 4.

“severity” of the alleged committed offence (deterrence and retribution). As noted above regarding criminal law procedure, youths accused of capital offences were detained in common gaols and not in Certified Reformatory Schools while awaiting trial.

2.3.7. The Amendment to the Procedure in Criminal Cases Act (1875) [conditions of detention]

In 1875 an amendment to the *Procedure in Criminal Cases Act* (1869) introduced two major reforms. First, the minimum sentence of six month imprisonment for a youth to be transferred from the Penitentiary to the Reform Prison was eliminated.¹⁸² This seems to be an indication of a more radical change in the idea of separation between young/adult offenders than previous legislation. Second, the minimum period of detention in the Reform Prison was increased from six months to two years.¹⁸³ Yet, the five year maximum detention period remained: youths sentenced for more than five years were detained in the Penitentiary and not in the Reform Prison. This second change contributes to the interpretation that the theories of punishment centered on retribution and deterrence were still in place and that the first change was solely due to the principle of separation between adult and young offenders (as opposed to a more accentuated acceptance of the rehabilitation theory). We can see this in Hon. Mr. Scott’s statement (who seems to have been the sponsor of the bill) during the debate in the Senate. He was asked about the amendment that increased the minimum period of detention from six months to two years. According to him, “[p]unishment in the reformatories was so light that very little good could be accomplished in a less time than two years, for six months in a reformatory was no punishment at all.”¹⁸⁴ As already remarked for previous statutes, the purpose of this new

¹⁸² *An Act to amend the Act respecting Procedure in Criminal Cases and other matters relating to Criminal Law*, SC 1875, c 43, s 1 [emphasis added].

¹⁸³ *Ibid.*

¹⁸⁴ *Debates of the Senate*, 3rd Parl, 2nd Sess (2 March 1875) at 227-228.

legislation was to provide young offenders with education in reformatory schools for preventing crime instead of sending them to penitentiaries. Hon. Mr. Scott's position on this issue is similar to the previous enacted statutes, which accommodated the rehabilitation philosophy with deterrence and retribution.

Other parliamentarians endorsed the position that the detention of young offenders in Reformatories was for providing them with education and preventing crime. During the debate, Hon. Mr. Dickey correctly noted that "the substitution of the reformatory for the jail or the penitentiary was not so much the punishment of young offenders as their reformation."¹⁸⁵ But one cannot understand the increase of the minimum requirement from six month to two years without the argument presented by Mr. Scott: the necessity of increasing the amount of suffering (deterrence and/or retribution) in order to "compensate" for a supposed less suffering conditions of incarceration in a Reformatory.

Neither do the Debates of the House of Commons nor the Debates of the Senate provide us with further information into the reasons for this amendment.¹⁸⁶ The preamble to this amendment does not contain any information either.¹⁸⁷ As mentioned above, one possibility for this amendment could have been the perception that young offenders' criminal behavior and antisocial attitudes would only be reduced by a combination of rehabilitation and deterrence theories.

¹⁸⁵ *Debates of the Senate*, 3rd Parl, 2nd Sess (2 March 1875) at 228.

¹⁸⁶ *Debates of the Senate*, 3rd Parl, 2nd Sess; *House of Commons Debates*, 3rd Parl, 2nd Sess.

¹⁸⁷ *An Act to amend the Act respecting Procedure in Criminal Cases and other matters relating to Criminal Law*, *supra* note 182, preamble.

Again, the fact of not allowing the transfer of young offenders whose prison sentences were longer than five years from penitentiaries to reform prison continued highlighting the legislator's distinction between two kinds of young offenders. The criterion of gravity of the offence made these young offenders appear as adult offenders and, therefore, they had to be dealt as adults within an adult environment.

However, there was still a leeway for young offenders who had been sentenced to more than five years in a penitentiary and - according to the *Amendment to the Procedure in Criminal Cases Act* (1875) - could not be detained in the Reformatory Prison. The *Penitentiary Act* (1868), still in force, provided the Governor with discretion for transferring from the Penitentiary to the Reform Prison any young offender 15 years of age or younger whose sentence was for at least two years. Nevertheless, the young offender had to be "susceptible of reformation."¹⁸⁸ As well, the *Penitentiary Act* (1868) regulated the possibility of transferring young offenders from the Reformatory Prison to the Penitentiary if they became "incurable."¹⁸⁹

¹⁸⁸ *Penitentiary Act* (1868), *supra* note 146, s 30. This statute was slightly amended in 1875; however, this requirement was not modified: *An Act respecting Penitentiaries and the Inspection thereof, and for other purposes*, SC 1875, c 44, s 33. This statute was consolidated and slightly amended in 1883; however, the wording of this section did not change either; see *An Act to amend and consolidate the Laws relating to Penitentiaries*, SC 1883, c 37, s 48 [*The Penitentiary Act* (1883)]. The statute was consolidated again in 1886: *An Act respecting Penitentiaries*, RSC 1886, c 182. The statute was reenacted in 1906 (*An Act respecting Penitentiaries*, SC 1906, c 38) and as well revised some months later (*An Act respecting Penitentiaries*, RSC 1906, c 147).

¹⁸⁹ *Penitentiary Act* (1868), *supra* note 188, s 29.

2.3.8. The *Criminal Code* (1892) [criminal procedure, punishment]

In 1892 the *Criminal Code* (1892) was enacted.¹⁹⁰ As Hon. Sir John Thompson noted at the House of Commons in 1891, “[t]he object of this Bill is fully expressed by its title. It is intended to be a codification of the Criminal Law as well as of the Statutes relating to the Criminal Law of Canada, and it has been prepared principally on the model of the Imperial codification.”¹⁹¹ The bill died on Parliament’s Order Paper when Parliament prorogued, and was reintroduced the following parliament session as *Bill (No. 7) Respecting the Criminal Law*.¹⁹² The bill was enacted as *An Act respecting the Criminal Law* on July 9, 1892.¹⁹³

The *Criminal Code* (1892) introduced three novelties on the regulation of youth offending. First, as noted in the previous chapter, it stated a uniform minimum age of criminal responsibility for all jurisdictions in Canada: a person *under* the age of seven years was categorically considered as incapable of committing a criminal offence.¹⁹⁴ The *Criminal Code* (1892) regulated that young people between the ages of seven and 13 years could be found guilty of an offence; however, that was left to the discretion of the magistrate in charge. A young person could be convicted of an offence if “he was [considered] competent to know the nature and consequences of his conduct, and to appreciate that it was wrong.”¹⁹⁵ In addition to this, a young offender older than 13 years

¹⁹⁰ *Criminal Code* (1892), *supra* note 107. André Cellard & Gérald Pelletier, “Le Code criminel canadien 1892-1927 : Étude des acteurs sociaux” (1998) 79:2 *The Canadian Historical Review* 261 at 263; André Cellard & Gérald Pelletier, “La construction de l’ordre pénal au Canada, 1892-1927: Approches méthodologiques et acteurs sociaux” (1999) 23:4 *Déviance et Société* 367 at 370-371; Gérald Pelletier, “Le Code criminel canadien, 1892-1939 : Le contrôle des armes à feu” (2002) *Crime, Histoire & Sociétés* 51 at 52; Álvaro Pires, André Cellard & Gérald Pelletier, “L’énigme des demandes de modifications législatives au Code criminel canadien” in Pedro Fraile, ed, *Modelar Para Gobernar. El Control de la población y el territorio en Europa Y Canadá. Una perspectiva histórica. Régulation et gouvernance. Le contrôle des populations et du territoire en Europe et au Canada. Une perspective historique* (Barcelona: Publications Universitat de Barcelona, 2001) 195.

¹⁹¹ *House of Commons Debates*, 7th Parl, 1st Sess (12 May 1891) at 156.

¹⁹² *House of Commons Debates*, 7th Parl, 2nd Sess (8 March 1892) at 106.

¹⁹³ *House of Commons Debates*, 7th Parl, 2nd Sess (8 March 1892) at 4734.

¹⁹⁴ *Criminal Code* (1892), *supra* note 107, s 9. *Joyal*, *supra* note 6 at 114-115.

¹⁹⁵ *Criminal Code* (1892), *supra* note 107, s 10.

of age was criminally responsible of an offence committed. Second, the *Criminal Code* (1892) included the *Trial and Punishment of Juvenile Offenders Act* (1869) (as originally enacted)¹⁹⁶ as a special part of the Code, which was denominated “Trial of Juvenile Offenders for Indictable Offences”.¹⁹⁷ Third, the *Criminal Code* (1892) introduced a special section for dealing with the trial of persons under 16 years of age and younger. The novelty of this last change is that it was not the question of “speed” that was taken into account. The main purpose here was to control the bad effects of publicity and to trial young offenders between 13 and 15 years of age separately from offenders 16 years old and older:

[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.¹⁹⁸

There appears to be a contradiction between the amendment just referred above and the part entitled the “Trial of Juvenile Offenders for Indictable Offences”. While the former allowed judges to conduct trials without publicity, and separately and apart from other trials, the latter required that the trials of young offenders take place in “open court”:

Every person charged with having committed, or having attempted to commit any offence which is theft, or punishable as theft, and whose age, at the period of the commission or attempted commission of such offence, does not, in the opinion of the justice before whom he is brought or appears, exceed the age of sixteen years, shall, upon conviction thereof in open court, upon his own confession or upon proof, before any two or more justices, be committed to the common gaol or other place of confinement within the jurisdiction of such justices, there to be imprisoned, with or without hard labour, for any term not exceeding three months, or, in the discretion of such justices, shall forfeit and pay such sum, not exceeding twenty dollars, as such justices adjudge.¹⁹⁹

¹⁹⁶ *Trial and Punishment of Juvenile Offenders Act* (1869), *supra* note 158. This statute was consolidated in 1886: *An Act respecting Juvenile Offenders*, RSC 1886, c 177.

¹⁹⁷ *Criminal Code* (1892), *supra* note 107, Title VII, Part LVI.

¹⁹⁸ *Criminal Code* (1892), *supra* note 107, s 550 [emphasis added].

¹⁹⁹ *Ibid*, s 810 [emphasis added].

Parliamentary debates may explain the reason for this contradiction. Neither was section 550 nor the regulation of the “Trial of Juvenile Offenders for Indictable Offences” discussed in the House of Commons or the Senate.²⁰⁰ The bill only regulated the trial of juvenile offenders. The trial of minors without publicity did not exist in the original bill; it was introduced by Sir John Thompson in the House of Commons the day the bill received its third reading: “[f]or the purposes of providing as nearly as possible for the separate trial of children, I propose a clause which will come in conveniently as 550½.”²⁰¹ Sutherland argues that this article was enacted because of the Canadian child welfare movements’ influence.²⁰² Indeed, he reports that for the period 1886 to 1900 a series of meetings by American Societies on public health, corrections, education, and advancement of women took place in Toronto. These meetings “certainly served not only to make many Canadians aware for the first time of new ways of looking at social conditions but also stimulated the morale of the nation’s small corps of professionals in each field.”²⁰³ As well, Platt reports that by 1892 the New York courts were already hearing children’s cases separately from adults’.²⁰⁴ It can be argued that this may have inspired the Canadian child welfare movements, who were familiar with the policies of the U.S. child welfare movements, and their lobby underlies the enactment of section 550 of the *Criminal Code* (1892). The contradiction between article 550 and the regulation of the “Trial of Juvenile Offenders for Indictable Offences” was not perceived by the parliamentarians at that time. Since article 550

²⁰⁰ *House of Commons Debates*, 7th Parl, 2nd Sess; *Debates of the Senate*, 7th Parl, 2nd Sess.

²⁰¹ *House of Commons Debates*, 7th Parl, 2nd Sess (28 June 1892) at 4348. According to Leon, this article was the result of J.J. Kelso’s – president of the Toronto Children’s Aid Society – lobby of the Minister of Justice and Attorney General (Sir John Thompson) when the latter visited Toronto; Jeffrey Leon, “The Development of Canadian Juvenile Justice: a Background from Reform” (1977) 15 Osgoode Hall L J 71 at 87.

²⁰² Sutherland, *supra* note 6 at 94.

²⁰³ *Ibid* at 26.

²⁰⁴ Platt, *supra* note 7 at 129-130.

left to the magistrates' discretion the implementation of the special hearing, it seems that most of them declined to observe it, which turned the regulation into an exceptional practice.²⁰⁵

2.3.9. The Arrest, Trial, and Imprisonment of Youthful Offenders Act (1894) [criminal procedure]

The *Arrest, Trial, and Imprisonment of Youthful Offenders Act* was enacted in 1894 in an attempt to address different problems regarding youths in the criminal justice system.²⁰⁶ This statute introduced four amendments: 1) section 550 of the *Criminal Code* (1892) was amended so it became compulsory for magistrates to hold the trial of minors without publicity; 2) young offenders' pre-trial detention had to be carried out separately from adult offenders; 3) in Ontario, young offenders 13 years and younger had to be detained in homes for destitute and neglected children;²⁰⁷ and 4) authorities had to respect the child's religion during placement decisions. For this research, we focus on the two first amendments.²⁰⁸

The *Arrest, Trial, and Imprisonment of Youthful Offenders Act* was first introduced in the Senate in 1893.²⁰⁹ During the second reading of the bill Hon. Mr. Allan highlighted how difficult it was to leave the implementation of section 550 of the *Criminal Code* (1892) to the magistrates'

²⁰⁵ *Debates of the Senate*, 7th Parl, 4th Sess (1 May 1894) at 303.

²⁰⁶ *An Act respecting Arrest, Trial and Imprisonment of Youthful Offenders*, SC 1894, c 58 [*The Arrest, Trial, and Imprisonment of Youthful Offenders Act* (1894)].

²⁰⁷ At the end of the XIX century there were two opposite child welfare movements in Ontario: the industrial school promoters, like William H. Howland and Beverly Jones, and the child savers, like J. J. Kelso. While the former believed in a publicly supported institutional reform, the latter emphasized the role of private citizens and voluntary organizations. As well, the latter was an anti-institutionalization movement that believed in a foster home system as the best intervention for protecting children from crime and poverty. By the early XX century Kelso's movement to deinstitutionalize children prevailed. See Paul W 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.

²⁰⁸ The discussion on the first amendment introduced in 1894 follows our previous research on young offenders' privacy rights in the Canadian criminal justice system; see Verónica B Piñero, "Child Protection vs Crime Prevention: The Regulation of Young Offenders' Private Information in Canada" (2009) 17:1 *The International Journal of Children's Rights* 111.

²⁰⁹ *Debates of the Senate*, 7th Parl, 3rd Sess (7 March 1893) at 263 [*Bill (M) An Act respecting the trial of Juvenile Offenders*].

discretion. The proposed amendment was aimed at two major issues: 1) to make compulsory that young offenders' trials take place without publicity and 2) to make compulsory that the trials of young offenders younger than 16 years of age be held apart from the trials of offenders 16 years of age and older.

The proposed amendment was aimed at increasing the maximum age young offenders would benefit from these special trials from under 16 years of age to under 17 years of age.²¹⁰ Hon. Mr. Allan was convinced that the procedure enacted in 1892 that had given a discretionary power to the judge was wrong and could seriously affect the reformation of youths:

I can scarcely imagine anything more unwise and injudicious, not to say cruel, that a girl or boy of twelve or thirteen or fourteen years of age, who has been for the first time arrested, it may be on some trivial charge, perhaps some petty larceny or other slight offence, being placed in the dock in the midst of the class of spectators who constantly throng police courts, and in the company of old and hardened offenders, and being tried there publicly. I am quite convinced that very often this public disgrace entails an entire loss of self-respect on the part of the unfortunate boy or girl, and may be the very first step towards the downward course in the path of wrong doing.²¹¹ [Hon. G. W. Allen, Senator]

The distinction he mentioned between young and adult offenders reduces the probability that observers may see the publicity of the trial as bad for adult offenders; this was only bad for young offender under the age of 16 years old. However, "publicity" was also observed as being "positive" in the sense of avoiding arbitrariness. This seems to have been an expression of the old concern with trials during the "Ancient Régime":

²¹⁰ *Debates of the Senate*, 7th Parl, 3rd Sess (14 March 1893) at 296-297.

²¹¹ *Debates of the Senate*, 7th Parl, 3rd Sess (14 March 1893) at 297. Senator G. W. Allen was the president of the Toronto Working Boy's Home and a well-known Canadian "child saver." He was concerned about children's welfare and exercised pressure for the enactment of federal legislation; see Jeffrey Leon, "New and Old Themes in Canadian Juvenile Justice: The Origins of Delinquency Legislation and the Prospects for Recognition of Children's Rights" in Heather Berkeley, Chad Gaffield & W Gordon West, eds, *Children's Rights. Legal and Educational Issues* (Toronto: The Ontario Institute for Studies in Education, 1978) 35 at 42.

[u]nder this Bill, if it becomes law, one can imagine a case where a lad between sixteen and seventeen could be tried in secret and sent to prison without having had a proper opportunity to defend himself or without the circumstances of the case being properly understood, and without giving the parents of the boy a proper opportunity to look after his interests.²¹² [Hon. Mr. Power, Senator]

There were also more punitive concerns – strongly focused on retribution theories - about altering the age limit within the Senate:

I do not see why the age should be increased from 16 to 17. It is in the public interest, in some cases, that those juvenile offenders should not be examined and punishment inflicted entirely in private. In country places especially, it sometimes has a cautionary effect on other children that they must not commit similar offences.²¹³ [Hon. Mr. Kaulbach, Senator]

I do not see why in this Bill now before us it is proposed to alter the age from sixteen to seventeen. The age of sixteen runs through all our legislation with respect to juvenile offenders, and I do not see why a change is made in that respect. It is liable to lead to confusion. Then, to my mind the section as it stands now in the Code goes quite far enough.²¹⁴ [Hon. Mr. Power, Senator]

The bill was withdrawn and reintroduced the following session with minor amendments.²¹⁵ One of these amendments was the reduction of young offenders' maximum age limit from under 17 years old to under 16 years old - as regulated in 1892.²¹⁶ However, by the time the bill was being discussed at the Senate during the second reading, the maximum age limit was increased again from under 16 years old to under 17 years old.²¹⁷ This was agreed to and the clause as amended was adopted.²¹⁸ The bill received its third reading in the Senate and it was passed to the House of Commons for its concurrence.²¹⁹ During the second reading in the Committee of the House of Commons, Hon. Mulock noted that “[t]here is probably no objection to young people, sixteen or

²¹² *Debates of the Senate*, 7th Parl, 3rd Sess (14 March 1893) at 298 [Hon Mr Power].

²¹³ *Debates of the Senate*, 7th Parl, 3rd Sess (14 March 1893) at 299 [Hon Mr Kaulbach].

²¹⁴ *Debates of the Senate*, 7th Parl, 3rd Sess (14 March 1893) at 298 [Hon Mr Power].

²¹⁵ *Debates of the Senate*, 7th Parl, 3rd Sess (24 March 1893) at 424; *Debates of the Senate*, 7th Parl, 4th Sess (24 April 1894) at 277 (respectively).

²¹⁶ *Debates of the Senate*, 7th Parl, 4th Sess (10 May 1894) at 348.

²¹⁷ *Debates of the Senate*, 7th Parl, 4th Sess (1 May 1894) at 302.

²¹⁸ *Debates of the Senate*, 7th Parl, 4th Sess (10 May 1894) at 348.

²¹⁹ *Debates of the Senate*, 7th Parl, 4th Sess (11 May 1894) at 360; *House of Commons Debates*, 7th Parl, 4th Sess (15 May 1894) at 2783 (respectively).

under [under 17 years of age], being so tried, but I hope this measure will not be made a precedent, and the age extended to adult persons.”²²⁰ This section was not further discussed and received its third reading that same day.²²¹ Consequently, it would seem that parliamentarians’ intentions were not only to make avoidance of publicity compulsory, but as well to raise the age limit from under 16 years to under 17 years. Surprisingly, the final text – as enacted - stated that the age limit for applying section 550 was “under the age of sixteen years”. This must have been a typographical mistake that no one identified. The age limit of under 16 years became the maximum age limit for separate and private (without publicity) trials:

The 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.²²²

The new procedure did not distinguish between young offenders under 16 years old: as long as a young offender was this age and she was facing a criminal trial – no matter the sort of offence committed - section 550 of the Criminal Code (as amended in 1894) had to be observed. The reasons for this regulation were mostly based on concerns about the well-being of young offenders.²²³ Indeed, this time no exception for excluding young offenders under 16 years of age from this special procedure was introduced in the legislation. However, this does not mean that the old distinction between the two categories of young offenders was not present during the discussion of the bill. Deterrence and eventually retribution were still motivations for creating exceptions to a more integrative approach. Actually, as we will see, concerns about the deterrent

²²⁰ *House of Commons Debates*, 7th Parl, 4th Sess (25 June 1894) at 4940 [emphasis added].

²²¹ *House of Commons Debates*, 7th Parl, 4th Sess (25 June 1894) at 4941.

²²² *The Arrest, Trial, and Imprisonment of Youthful Offenders Act* (1894), *supra* note 206, s 1 [emphasis added].

²²³ *Debates of the Senate*, 7th Parl, 4th Sess (1 May 1894) at 301.

effects in the case of a serious offence - and particularly capital crimes - were expressed in connection with the argument of “transparency” of criminal procedures:

[b]ut a question may arise with regard to the private trial of youthful offenders as to the class of crime committed; it may be a serious offence of a capital character, and in such cases publicity should be given to it, and it would act as a deterrent upon other people. It is therefore questionable whether the trial should be held in private, because youths should see the results of crime and a warning would be salutary to them and to the general public which would not be the case if the examination were entirely private. I think a great deal depends upon the nature of the offence. If it were a very heinous one I think a private trial would not be suitable for youthful offenders; punishment should be blended with the greater object of reform under moral and religious influence.²²⁴ [Hon. Mr. Kaulbach, Senator]

With regard to the young offenders’ pre-trial detention amendment, young offenders under the age of 16 years – no matter the sort of offence committed – had to be detained separately from adult offenders when awaiting trial or imprisonment.²²⁵ Again, no distinction was drawn regarding these young offenders either. This was the last statute to draw a distinction between young offenders and adult offenders, and to regulate differential treatment for the former for this period.

2.4. Summary

In Canada, youth justice legislation different from adult criminal law was first enacted in 1857, even though many restrictions were introduced for restraining this integrative approach through the 1857-1907 period. The legislation enacted during this period drew a distinction between adult offenders and young offenders regarding conditions of detention, punishment and criminal procedure. Nevertheless, this favorable approach did not apply to every young offender: the criteria such as “incorrigibility”, “serious offence”, “susceptibility to reformation”, or

²²⁴ *Debates of the Senate*, 7th Parl, 4th Sess (1 May 1894) at 305 [Hon Mr Kaulbach] [emphasis added].

²²⁵ *The Arrest, Trial, and Imprisonment of Youthful Offenders Act* (1894), *supra* note 206, s 2.

“recidivism” were used to keep some young offenders within the traditional criminal justice system.²²⁶ On the other hand, all the enacted youth justice legislation was still within the adult justice system. A youth justice system different and almost independent from the adult justice system did not emerge until 1908 with the enactment of the *Juvenile Delinquents Act*.²²⁷ This statute and its subsequent amendments are analyzed in the following section.

As to 1907, young offenders younger than 16 years of age had to be tried without publicity and their trial had to take place apart from adult offenders. As well, these young people were to be detained in Reform Schools rather than Penitentiaries. Nevertheless, if the young person was considered to be “incorrigible” or had received a sentence of imprisonment for more than five years, he could be detained in the Penitentiary. Again, the Governor still had the power for transferring this young person back to the Reform School.

²²⁶ Hatch and Griffiths report a similar situation in Vancouver for this period of analysis; Alison J Hatch & Curt T Griffiths, “Child Saving Postponed: The Impact of the Juvenile Delinquents Act on the Processing of Young Offenders in Vancouver” in Russell Smandych, Gordon Dodds & Alvin Esau, eds, *Dimensions of Childhood. Essays on the History of Children and youths in Canada* (Manitoba: University of Manitoba, 1991) 233 at 239.

²²⁷ *Juvenile Delinquents Act* (1908), *supra* note 5.

Table 2 – Overview of Legislation - Period 1857-1907

Year	Statute	Area of regulation	Age limit (inc.)	Sentence min. (inc.)	Sentence max. (inc.)	Additional requisites	Characteristics
1857	<i>Prison Inspection Act</i>	conditions of detention	20 years	six months	five years	offence punishable in the penitentiary	a) incarcerated in the reformatory instead of in the penitentiary; b) transferred from the penitentiary to the reformatory; c) transferred from one reformatory to the other; <u>d) transferred from the reformatory to the penitentiary if deemed “incorrigible”.</u>
	<i>Prison Inspection Act</i>	conditions of detention	15 years	14 days		summary conviction offence	a) incarcerated in the reformatory instead of in the penitentiary for a period between 6 months and two years; b) be transferred from the penitentiary to the reformatory; c) they can be discharged from the reformatory if the Governor decided so.
1857	<i>Speedy Trial Act</i> [abrogated in 1869]	procedure punishment	15 years			a) offence of simple larceny or punishable as simple larceny <u>b) indictable offences excluded</u>	a) expedited procedure; b) reduced punishment; c) possibility of depenalisation; d) trial in open courts.
1868	<i>Penitentiary Act</i>	conditions of detention	15 years	two years		<u>susceptible of reformation</u>	a) incarcerated in the reformatory instead of in the penitentiary; b) <u>transferred from the reformatory to the penitentiary if deemed “incorrigible”.</u>
1869	<i>Procedure in Criminal Cases Act</i>	conditions of detention	15 years	six months	five years		a) incarcerated in the reformatory instead of in the penitentiary.

Year	Statute	Area of regulation	Age limit (inc.)	Sentence min. (inc.)	Sentence max. (inc.)	Additional requisites	Characteristics
1869	<i>Trial and Punishment of Juvenile Offenders Act</i> [became part of the Criminal Code in 1892]	procedure punishment	15 years			a) offence of simple larceny or punishable as simple larceny <u>b) indictable offences excluded</u> <u>c) only be dealt with this procedure twice</u>	a) expedited procedure; b) reduced punishment; c) possibility of depenalisation; d) trial in open courts.
1869	<i>Juvenile Offenders in Quebec Act</i>	conditions of detention procedure	15 years				a) incarcerated in the reformatory instead of in the penitentiary for 2 to 5 years; <u>b) only non capital offences awaited trial in certified reformatory schools instead of common gaols;</u> c) <u>transferred from the reformatory to the penitentiary if deemed "incorrigible";</u> d) pre-trial detention in certified reformatory schools when possible
1875	<i>Amendment to the Procedure in Criminal Cases Act</i>	conditions of detention	15 years		five year		a) incarcerated in the reformatory instead of in the penitentiary for 2 to 5 years;
1892	<i>Criminal Code</i>	procedure	15 years				a) criminal procedures to be held without publicity, and separately and apart from that of other accused persons as long as possible.
	<i>Criminal Code</i>	punishment	6 years				a) children this age and younger could not be held criminal responsible.

Year	Statute	Area of regulation	Age limit (inc.)	Sentence min. (inc.)	Sentence max. (inc.)	Additional requisites	Characteristics
	<i>Criminal Code</i>	punishment	13 years			a) demonstrate that the child was competent to know the nature and consequences of the conduct and to appreciate that it was wrong.	a) children this age and younger (but older than 6 years) in principle were not criminally responsible.
	<i>Criminal code</i>	procedure punishment	15 years			a) offence of simple larceny or punishable as simple larceny <u>b) indictable offences excluded</u> <u>c) only be dealt with this procedure twice</u>	a) expedited procedure; b) reduced punishment; c) possibility of depenalization; d) trial in open courts.
1894	<i>Arrest, Trial, and Imprisonment of Youthful Offenders Act</i>	procedure conditions of detention	15				a) criminal procedures to be held without publicity, and separately and apart from that of other accused persons; b) pre-trial detention in certified reformatory schools when possible

CHAPTER 3

The Legal Creation of a Youth Criminal Law System in Canada

1908-1960

3.1. Introduction

Different social perceptions of childhood made their way into legislation during the 1857-1907 period. Society, in general, was still developing during this period and it had different views of the role of youths with regard to a vision of the State. As a result, parliamentarians started to perceive children as different from adults: this in terms of malleability for changes in their behavior, and capacity for rational thought and moral reasoning. Young people were also strongly perceived as “more vulnerable than adults”, “members” of the group, and being “the future of the Nation”. From this perspective, the adult criminal law - at least in principle – was perceived as not being appropriate for “young people”. Young people’s moral reasoning was still immature, so they could not be deterred by fear of punishment. Moreover, because of this, young people had reduced moral responsibility compared to adults. Young people also were particularly receptive to changes in behavior, which made them for the most part good candidates for rehabilitation. Because the “Nation” may need them in the future, any “investment” in their rehabilitation could be justified. Finally, as young people were “vulnerable”, they required “care” rather than “punishment”.

Even though the legislation enacted during the period 1857-1907 was still unsystematic, difficult to identify and sometimes incoherent, it constituted the roots of the youth criminal law system

that emerged in 1908. In the period starting in 1908 many important legal changes took place; specifically, it was recommended that:

- procedures be speedy for preventing the bad consequences arising from detention during the process (preventive incarceration);
- Parliament create and implement a special court for young people with special judges;
- the court hold hearings in private for protecting young people against stigmatization by the media and the public opinion;
- these “special judges” bring a different approach to the court, judging as “parents” rather than “magistrates”. Their goal should be that the (criminal) young remain, at least in principle, a vulnerable member of the group who could benefit from rehabilitation;
- the “special judges” implement the principles of rehabilitation, rather than the theories of deterrence and retribution;
- young people in conflict with the law or in need of protection be dealt with in special institutions, apart from adult offenders;
- despite these principles, the “special judges” be expected to “identify” the youths that “did not fit” this “integrative justice” and send them – or *transfer them* - to the traditional (adult) criminal justice system: these were the youths deemed incorrigible, “evil”, or “adults” despite their chronological age.

While parliamentarians did not change their perspective regarding the appropriateness of traditional criminal law theories of punishment for adults, they considered these theories inappropriate for youths in conflict with the law. Because of this, the possibility of transferring a young person to the adult court was perceived as an appropriate solution for those youths who

did not fit parliamentarians' perception of youthful behaviour – such as youth who behaved like adults or were incorrigible.²²⁸

Parliamentarians' concerns about protecting children were particularly present during the 1894 amendment to the *Criminal Code* (1892) regarding the trial of young people without publicity. However, even then, parliamentarians still drew a distinction between two groups of young offenders: 1) the “good child”, and 2) the “incorrigible child”, the “child who committed severe offences”, and the “recidivist child” – all of whom did not observe social-legal expectations as to how youths should behave. Consequently, these children were excluded from the special protection mechanisms that had been available to “conforming” young offenders regarding the criminal law procedure, conditions of detention, and punishment since 1857. This possibility of excluding these youths from this “rehabilitative system” and redirecting them into the traditional justice system, which was systematically regulated in the *Juvenile Delinquents Act* in 1908, already existed in the Canadian justice system before this statute was ever enacted. This distinction continued to exist during this period.²²⁹

This period is characterized by an autonomous youth criminal law system that originated with the enactment of the *Juvenile Delinquents Act* (1908). Despite its distinctive features, this system kept a procedural connection with the adult justice system through the discretionary judicial power of transferring juvenile delinquents who had committed indictable offences to

²²⁸ Álvaro Pires, “Tomber dans un piège? Responsabilisation et justice des mineurs” in Françoise Digneffe & Thierry Moreau, eds, *La responsabilité et la responsabilisation dans la justice pénale* (Bruxelles: De Boeck & Larcier, 2006) 217.

²²⁹ Tanenhaus reports a similar phenomenon at the beginning of the XX century in the U.S. youth justice system: “Almost every state’s law also permitted the juvenile court to transfer cases to the criminal justice system. The option of transferring cases to the criminal justice system served as a built-in safety valve, which a judge could use to relieve political pressure on his court by expelling a controversial case”; *Tanenhaus, supra* note 1 at 21.

ordinary courts (waiver of jurisdiction). This Chapter introduces the main characteristics of the *Juvenile Delinquents Act* (1908), and discusses legislative amendments and debates (Parliament of Canada) that had an impact on the waiver of jurisdiction in Canada, but in Newfoundland and Labrador. This province joined Canada in 1949 and because of the terms of the union, the *Juvenile Delinquents Act* (1908) never applied therein: juvenile delinquency was regulated through youth protection legislation, an exclusive provincial legislative power.²³⁰

3.2. The *Juvenile Delinquents Act* (1908)

The *Juvenile Delinquents Act* (1908) was a statute different from other statutes; instead of merely amending existing statutes regulating youth offending and youth protection, this statute stimulated the creation of a new criminal law system in Canada: the Juvenile Delinquents' Court. I refer to the notion of "stimulus" because Parliament did not have subject-matter jurisdiction for directly creating these courts within the provinces.²³¹ Consequently, the decision of whether to constitute these courts in the provinces rested within the provincial Legislative Assemblies and their subsequent political decision solely. In other words, through the *Juvenile Delinquents Act* (1908) the whole political system was self-stimulated for constituting a new organization for the criminal law system: the youth criminal law sub-system.

In Canada, as mentioned before, the constitution of this new organization was complex, lengthy, and sometimes "contradictory" or "incoherent" as a result of the distribution of legislative powers between Parliament and the Legislative Assemblies. Parliament's political willingness to constitute this youth criminal law system did not immediately meet the Legislative Assemblies'

²³⁰ *The Welfare of Children Act*, RSNL 1952, c 60.

²³¹ *Constitution Act* (1867), *supra* note 27, s 92(14).

political willingness. The constitution of the youth criminal law system within the provinces was slow and partial. The reasons for this were provincial demographic distribution, the sharing of resources between the provincial and federal governments, and the difficulties for differentiating this new youth criminal law system from the traditional criminal law system. For example, in one province Juvenile Delinquents' Court judges could be exclusively appointed for this position. This would have allowed them to develop and maintain a new penal rationality less focused on retribution, deterrence, and denunciation. In another province Juvenile Delinquents' Court judges could be jointly appointed to this position and to the adult court. The same situation may have happened regarding Crown prosecutors. In addition to this, each Legislative Assembly could regulate different conditions or criteria for having access to the Juvenile Delinquents' Court, such as age. Moreover, as presented below, the Legislative Assembly could react regarding other aspects of the situation of juvenile delinquents. In addition to this, the detention centers could – virtually or effectively - impose important limits to the functioning of the Juvenile Delinquents' Court (where they existed) or extend Parliament's initiative.

3.2.1. Rules of Behavior

The *Juvenile Delinquents Act* (1908) adopted the notion of “delinquency” for stimulating the creation of the Juvenile Delinquents' Court and for authorizing a different criminal law intervention for young people. How did the *Juvenile Delinquents Act* (1908) define the notion of “delinquency”?

The *Juvenile Delinquents Act* (1908) gave the notion of “delinquency” a meaning that was used during the end of the XIX century and beginning of the XX century. The notion of “delinquency” was used to refer to:

- youths exclusively (in contrast to adults);
- the problem of the official control of criminal offences regulated in the *Criminal Code* (1892), federal statutes, provincial statutes, and municipal bylaws – which applied both to youths and adults;
- a grey area of rules regulating behavior that applied to youths exclusively (in contrast to adults) and that were characterized by reference to the vague notions of “vices” and “immorality”.²³²

In fact, according to the *Juvenile Delinquents Act* (1908),

“juvenile delinquent” means any child who violates [1] 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 of any municipality, for which violation punishment by fine or imprisonment may be awarded; or, [2] 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;²³³

The first part of the legal definition of “juvenile delinquent” (after [1]) referred to criminal and penal offences that could be committed by youths and adults; the second part (after [2]) enlarged the definition of “juvenile delinquent” by including infractions that could only be committed by youths. In 1924 the second part of the definition of “juvenile delinquent” was increased by including the behavior of “sexual immorality” or “similar form of vice”:

²³² The constitutionality of this “grey area” was upheld by the Supreme Court of Canada: *Attorney General of British Columbia v Smith*, [1967] SCR 702, 65 DLR (2d) 82 [Smith].

²³³ *Juvenile Delinquents Act* (1908), *supra* note 5, s 2(c).

“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, [2] 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.²³⁴

The *Juvenile Delinquents Act* (1908) specifically stated that all the behaviors indicated in the above citation would be deemed “delinquencies”:

[t]he commission by a child of any of the acts enumerated in paragraph (c) of section 2 of this Act, shall constitute an offence to be known as a delinquency and shall be dealt with as hereinafter provided.²³⁵

Again, the federal *Juvenile Delinquents Act* (1908) did not deal specifically with situations of “protection of youths from adults” (negligence, abuse, abandonment, violence) or where it was necessary to protect youths from certain unfortunate events (such as their parents’ death when there was no family left to intervene). The *Juvenile Delinquents Act* (1908) could criminalize certain parents or guardians, but only if they had contributed to a young person becoming a juvenile delinquent.²³⁶ Without reference to the notion (and the behavior) of “delinquency”, the *Juvenile Delinquents Act* (1908) could not be used.

The *Juvenile Delinquents Act* (1908) – and specially after the 1924 amendment - dealt with criminal and penal offences, vices, sexual immorality, and legal situations under which a young person could be committed to an industrial school or juvenile reformatory. In other words, the four circumstances allowed the Juvenile Delinquents’ Court to intervene under the notion of

²³⁴ *Amendment to the Juvenile Delinquents Act* (1924), *supra* note 75, s 1 [emphasis added].

²³⁵ *Juvenile Delinquents Act* (1908), *supra* note 5, s 3.

²³⁶ *Ibid*, s 29.

“delinquency”. All these circumstances – except criminal and penal offences - were “undetermined”. As result, the discretion for intervening and committing a young person to detention was almost unlimited and could be seen by an external observer as excessive. This unlimited discretion has been much criticized since 1960 to present.

As presented below, Parliament eventually derogated this judicial discretion for intervening based on the vague notions of vice and sexual immorality. The notion of “delinquency” eventually became stricter and only applicable to criminal and penal offences – offences for which adults could also be liable.

In summary, the *Juvenile Delinquents Act* (1908) only dealt with “delinquencies”, which included criminal and penal offences, vices, sexual immorality, and legal situations under which a young person could be committed to an industrial school or juvenile reformatory, and this notion of “delinquency” exclusively applied to young people up to a certain age limit.

Before introducing the next point, it is worth noting that during this period the term most used to refer to a young person was “child” rather than “youth”. The choice of the term “child” has semantic consequences: it highlights the “younger youths” or the “youngest”. A young person 15, 16, or 17 years of age had higher chances of not being seen as a “child”. This had important criminal consequences, especially if this young person was accused of having committed a serious or hideous offence, or if she was seen as a recidivist that had not benefited from previous institutional intervention. “Children” have always been seen – and even more back then – as more malleable than adults. Moreover, a youth 15, 16 or 17 year old accused of having

committed a serious offence or several offences had a bigger chance than other youths of not been seen as a “child”: he was not as young as a child and his behavior contradicted the traditional image of a “child”.²³⁷ If Parliament or the law system had been interested in legally protecting these youths, they would have established “unconditional criteria” or criteria that did not rely on the representation of malleability.

The notion of “delinquency” in the *Juvenile Delinquents Act* (1908) had another meaning for the purpose of criminal theories and legal intervention, which is more important for the purpose of this research than the previous legal definition and also more difficult to present. This other meaning has been already identified by Trépanier and Tulkens, and is especially explicit in the Parliamentary debates.²³⁸ The *Juvenile Delinquents Act* (1908) introduced the distinction between delinquency/criminality, or even youth in condition of delinquency/criminal. According to subsection 3(2) of the 1929 revision of the *Juvenile Delinquents Act* (1908)

[w]here a child is adjudged to have committed a delinquency [which can be a crime under the *Criminal Code* (1892)] he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.²³⁹

What does this mean? This means that the young person could not be seen or presented as, or be dealt with the same way we see, present or deal with a criminal adult. Everything occurred as if the statute said: “if a young person commits murder, she is not a criminal; she is in a condition of

²³⁷ In the second part of this thesis I discuss that until 1960 the Montreal Youth Court did not hesitate to transfer to the adult court a 14, 15, 16 or 17 year old youth. Maybe the Montreal Youth Court at that time saw itself as a court for “children” rather than for “youths”.

²³⁸ Trépanier & Tulkens, *supra* note 35; *Debates of the Senate*, 10th Parl, 3rd Sess (19 April 1907) at 806 (Hon Mr Scott).

²³⁹ *Juvenile Delinquents Act* (1929), *supra* note 69, s 3(2).

delinquency and should be dealt with differently.” We need to do what is necessary to “remove her from that condition.” What was this different treatment about?

It is important not to think about penal intervention through the theories of retribution, deterrence or denunciation. The reason for this is that not only these theories are strictly negative, but as well they are indifferent to social inclusion and put an emphasis on the infliction of pain by authorities. The notion of “negative theories” refers to the theories of punishment that do not consider the individual who contravenes the law as an individual and as a member of society, and rely on the distinction between criminal/society: the criminal is an enemy (and not a member) within society. These theories require authorities to choose between the guilty individual and society. Authorities do not realize that they can jointly and simultaneously deal with the individual who contravenes the law and protect society in such a way that both parties’ interests can be met.

The *Juvenile Delinquents Act* (1908) chose a theory of punishment aimed at positively affecting the person (rather than only inflicting punishment) and taking into consideration her future wellbeing. Because of this, the *Juvenile Delinquents Act* (1908) did not consider as punishment the death penalty, life imprisonment, minimum sentencing (focused on retribution, denunciation and deterrence), or long periods of incarceration (10, 15, 20, 25 or 30 years). The “agreement” with the other theories (based on the possibility of transferring the young person to the adult courts) exposed young people to the risk of the death penalty, life imprisonment, and long periods of incarceration. The political system decided to reduce this risk in the Juvenile Delinquents’ Court by creating legislative obstacles to the application of the theories of

deterrence, denunciation, and retribution. Worth noting, the theory of neutralization was accepted to a certain point. The Juvenile Delinquents' Court could incarcerate a young person as long as this incarceration was perceived as necessary for his rehabilitation (and not only for his segregation) or for the protection of society as long as his acts of delinquency were serious. This is how the *Juvenile Delinquents Act* (1908) integrated both concerns: the young person and the rest of society. The young person's rehabilitation was the main and the most favourable goal for both the young person and society; neutralization was an effective way of achieving the young person's rehabilitation and protecting the rest of society.

Unfortunately, the theory of rehabilitation had two main problems back then. First, this theory was so "convinced" of its social superiority to the other theories of punishment that it underestimated classic due process guarantees that were available within the adult court. This problem has been highlighted by many scholars.²⁴⁰ This gave rise to a paradox (see Chapter 5): many observers, who were worried about the absence of these due process guarantees in the youth criminal law system, wanted to offer these guarantees to young people and reintroduced the theories of punishment that put an emphasis on social exclusion (deterrence, retribution, denunciation) at the same time. They did not draw a distinction between due process guarantees and the theories that put an emphasis on social exclusion when dealing with a serious offence.

The second problem with the theory of rehabilitation predominant at the beginning of the XX century is that, even if it favored the dejudicialization of a person because of her age or the kind of offence committed, this theory put a strong emphasis on incarceration without identifying its

²⁴⁰ On the other hand, the *Juvenile Delinquents Act* (1908) was focused on protecting the identity of the young person from the public during and after the process. This concern was absent in the adult court.

detrimental effects – even if the offence was a minor offence. As a result, even if the offence was a minor offence, the sanction of incarceration of the Juvenile Delinquents’ Court could become – when applied – even more severe than in the adult court (for the same offence). The theory of retribution - and under certain circumstances the theory of deterrence - put an emphasis on the proportionality of the offence and this could be therefore perceived as “more favourable to shorter periods of incarceration” than the theory of rehabilitation. Of course, if the offence was a serious crime, this “accidental” consequence of the theories of retribution and deterrence would disappear.

Section 3 – and especially subsection 3(2) - of the *Juvenile Delinquents Act* (1908), as reenacted in 1929, shows how the statute excluded the theories of deterrence, denunciation, and retribution by drawing a distinction between delinquency/criminality and favored the theory of rehabilitation:

3. (1) The commission by a child of any of the acts enumerated in paragraph (g) of section two of this Act [see quote above], shall constitute an offence to be known as a delinquency, and shall be dealt with as hereinafter provided.

(2) Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.²⁴¹

Because the *Juvenile Delinquents Act* (1908) combined the theory of rehabilitation with dejudicialization (prevention) and neutralization (if this was necessary), this statute did not perceive “the protection of society” as opposed to the protection of the young person’s future wellbeing as a member of society. The *Juvenile Delinquents Act* (1908) designed a global theory of criminal intervention that protected society without sacrificing the offender (death penalty, life

²⁴¹ *Juvenile Delinquents Act* (1929), *supra* note 69, s 3 [emphasis added].

imprisonment, long period of incarceration, minimum sentencing, etc.). Some observers, such as Mead, saw in this model of youth justice a new approach to the whole criminal law system (of course, with some changes for the purpose of enforcing due process guarantees).²⁴²

Despite this different philosophy in terms of the theories of punishment and criminal intervention, the *Juvenile Delinquents Act* (1908) still kept a mechanism foreign to this approach. This mechanism was the transfer of young people to the adult court. The *Juvenile Delinquents Act* (1908) allowed the Juvenile Delinquents' Court to transfer certain youths to the adult court for being judged and potentially sentenced according to the theories of punishment and sanctions available at that court (death penalty, life imprisonment, long term of imprisonment, etc.). This will be further discussed below. This mechanism of transfer accepted or introduced an implied proposition, which is the following paradox: youths who are youths/ youths who are adults. The youths who were perceived as adults could be transferred to the adult court and treated as adults therein. In short, this is referred as the youth-youth/youth-adult paradox.

3.2.2. Rules of Inclusion in/Exclusion from the Legislative Program of the *Juvenile Delinquents Act* (1908)

The notion of rules of inclusion in/exclusion from a legislative program refers to rules that establish the conditions under which a court could deal with and eventually sentence a person. These rules made reference to two main areas: maximum age and kind of offence committed.

²⁴² George Mead, "The Psychology of Punitive Justice" (1918) 23 American Journal of Sociology 577.

3.2.2.1. Maximum Age

With regard to the maximum age, the *Juvenile Delinquents Act* (1908) as enacted in 1908 specifically stated that the court only had jurisdiction for dealing with young people 15 year old and younger:

“child” means a boy or girl apparently or actually under the age of sixteen years.²⁴³

The maximum age of 15 year old was increased to 17 year old for a young person to remain within the Juvenile Delinquents’ Court in 1921:

“child” means a boy or girl apparently or actually under the age of eighteen years;”²⁴⁴

The maximum age of 17 year old was decreased to 15 years of age again in the 1929 reenactment of the *Juvenile Delinquents Act*. However, provinces were given discretion to choose the maximum age that better fit them – but this maximum age could not exceed 17 years of age:

“child” means any 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;”²⁴⁵

The last amendment to the maximum age for a child to be within the jurisdiction of the Juvenile Delinquents’ Court was passed in 1951. This amendment simplified the 1929 amendment by

²⁴³ *Juvenile Delinquents Act* (1908), *supra* note 5, s 2(a).

²⁴⁴ *An Act to amend The Juvenile Delinquents Act*, SC 1921, c 37, s 1(1).

²⁴⁵ *Juvenile Delinquents Act* (1929), *supra* note 69, s 2(a).

stating that unless the provinces directed otherwise, the maximum age for a young person to remain within the Juvenile Delinquents' Court was 15 years of age:

1. a. "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.
2. 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, and any such proclamation may apply either to boys only 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.²⁴⁶

The *Juvenile Delinquents Act* (1908) gave provinces discretion to implement the maximum age that they considered the most appropriate and the provinces in fact did so: the maximum age for a youth to be within the jurisdiction of the *Juvenile Delinquents Act* (1908) varied all over Canada from 15 to 17 years of age.

3.2.2.2. Seriousness of Offence Committed

As a matter of principle, the *Juvenile Delinquents Act* (1908) did not exclude any offence from the jurisdiction of the court. In fact, the *Juvenile Delinquents Act* (1908) had an exclusive jurisdiction for dealing with behaviors that were included within the definition of "delinquencies". This is specifically stated in section 4:

4. The Juvenile Court shall have exclusive jurisdiction in cases of delinquency except as provided in section 7 of this Act [reference to the transfer to adult court provision].²⁴⁷

²⁴⁶ *An Act to amend The Juvenile Delinquents Act, 1929*, SC 1951, c 30, ss 1, 2.

²⁴⁷ *Juvenile Delinquents Act* (1929), *supra* note 69, s 4.

This means that once the young person was considered a “child” for the purpose of the *Juvenile Delinquents Act* (1908), the Juvenile Delinquents’ Court had jurisdiction to intervene. For the purpose of the court jurisdiction it did not matter the kind of offence committed: a “vice”, an act of sexual immorality, or a murder. In other words, the seriousness of the offence was not an absolute legal criterion for excluding a young person from the jurisdiction of the court.

3.2.2.3. Mechanism of Transfer

Even though the *Juvenile Delinquents Act* (1908) provided the court with jurisdiction for dealing with all kinds of offences, the statute also created a mechanism of “transfer”. This mechanism is referred to as *odd* for the purpose of discussing what was going on at the level of the ideas underlying it.

For the purpose of identifying the *bizarre nature* of this mechanism, it is important to highlight that this mechanism does not exist in every occidental legal system that created a special court for young offenders. The statute could not just say: “if the court is of the opinion that the good of the child and the interest of the community require that the young person be dealt with in the adult court.” For instance, as discussed in Chapter 6, the *Youth Criminal Justice Act* (2002) does not provide the youth court with this authority any longer: all youths will be sentenced in the youth court without exception, unless the young person elects otherwise.²⁴⁸

It is worth pointing out that this mechanism was “unidirectional” and did not exist in the adult court. The adult court could not transfer an adult person to the Juvenile Delinquents’ Court by expressing the same motivation: “the good of the adult and the interest of the community require

²⁴⁸ *Youth Criminal Justice Act* (2002), *supra* note 5.

that the adult person be dealt with in the youth court.” Unless we take into consideration the theories of retribution, deterrence and denunciation, and the real possibility of the death penalty and long term imprisonment, this mechanism is odd: why would the *Juvenile Delinquents Act* (1908) allow the Juvenile Delinquents’ Court to transfer a young person to the adult court?

One of the objectives of this thesis is to reflect about this question: what are, in fact, the ideas or circumstances that motivated the creation of the mechanism of the transfer of young people to the adult court? The hypothesis that I will explore in this thesis is the following: at the level of the underlying ideas, the motivation for favoring this mechanism of transfer lies on the theories of punishment that do not take into account the wrongdoer’s future and her social inclusion. I will examine in this thesis if the empirical research conducted supports this hypothesis.

From a retrospective point of view, I have (also) identified other reasons or motivations for stimulating or supporting the practice of transferring young people to the adult court. These reasons can be summarized as follows:

- the existence of other statutes that create specific difficulties for the Juvenile Delinquents’ Court to take a decision it deems appropriate to the case it is dealing with. For example, we could assume that the Juvenile Delinquents’ Court is dealing with a young person who is soon to be 18 years of age, who has committed a very serious offence, and who – according to the pre-sentence report ordered by the court – may reoffend. We could also assume that there is another federal or provincial statute that does not allow a young person to remain within a youth detention center once she turns 18 years of age and that this statute does not allow the transfer of a detained youth to the

adult detention center. In these circumstances, if the court considers that the young person needs treatment for a period longer than a few months and that the young person can be dangerous to the community unless she receives extended treatment, the court will have a stimulus - *because of the existence of this statute* – to transfer the young person to the adult court.

- The detention centers already know this young person and state that they are not interested in her for specific reasons: the detention centers state that she jeopardizes other youths' rehabilitation, she does not participate in the program, the resources at the detention center have been exhausted, she has already ran away and the detention center does not have security measures to prevent this from happening in the future, etc.
- The young person or her counsel request that the Juvenile Delinquents' Court transfer her to the adult court. For instance:
 - based on the fact that the offence committed is a minor offence, the young person is advised that if she is sentenced in an adult court she will not be sentenced to incarceration. On the other hand, if she is sentenced to incarceration in the adult court, the term of incarceration will be shorter than if she is sentenced in the Juvenile Delinquents' Court. The reason for this is a characteristic of the theory of rehabilitation that does not limit the time of intervention proportionally to the severity of the offence.
 - The young person's counsel considers that due process rights available in the adult court are conducive to the young person's effective defence by leading to a verdict of not guilty or a more favourable sentence than in the Juvenile Delinquents' Court.

- o The young person already knows the detention centers (and their counselors) and finds their intervention practices extremely intrusive. The counselors do not leave her alone and compel her to participate in activities she is not interested in. The detention centers may also have rules that do not exist in the adult detention centers (such as a ban on smoking). If the Juvenile Delinquents' Court cannot send the young person to an adult detention center, this may become a stimulus for transferring her to the adult court.

As I will present below, these are insufficient situations for transferring a young person to the adult court and can be addressed without having to transfer the young person to the adult court.

The statutory norm that created the transfer mechanism can be observed as a procedural norm and as a norm regulating the inclusion/exclusion of the young person in the youth criminal law system. For the purpose of this thesis I will deal with the transfer mechanism as a norm regulating the inclusion/exclusion of the young person in the youth criminal justice system.

Section 7 created the transfer mechanism and required three conditions for it to apply:

1. the offence must be regulated in the Criminal Code and must be an offence to be proceeded against by indictment in the ordinary courts (indictable offence),
2. the young person must be 14 years of age or older,
3. the transfer must be motivated for "the good of the child and the interest of the community".²⁴⁹

²⁴⁹ *Juvenile Delinquents Act* (1908), *supra* note 5, s 7.

Not every delinquency allowed the Juvenile Delinquents' Court to transfer the young person to the adult court, for instance: a) sexual immorality and vices that did not constitute criminal offences for which an adult could be criminalized could not be transferred; b) offences that could only be prosecuted as summary conviction offences could not be transferred either.

The two first criteria present a situation that has to be "identified" by the person observing and taking the decision. In plain language, it could be said that these are "objective criteria": the offence is/is not an indictable offence; the young person is/is not 14 years old. The third criterion is complex: at a first level, it depends on ideas or representations that the observer selects for observing the case. For instance, if the observer considers that a severe "retributive sanction" is for the good of the child [his moral upbringing] and for the interest of the community, she will find a reason for transferring the young person to the adult court. Similarly, if she considers that a severe sanction can "deter" the young person and other youths from committing offences and this is "for the good of the child [to prevent reoffending] and the interest of the community", she will also find a reason for transferring the young person to the adult court. On the other hand, if the observer finds that rehabilitation within the youth criminal law system is "for the good of the child [his moral upbringing] and for the interest of the community", she will not transfer the young person to the adult court. The theories of punishment can underlie this third criterion and influence the observer's decision.

It is possible to identify an objective element in this third criterion. This occurs when the young person or his lawyer requests the transfer to the adult court. It can be assumed that the young person or his lawyer will ask for what is on the young person's best interest. If the lawyer

considers that the young person can be found not guilty in the adult court rather than in the Juvenile Delinquents' Court because of the due process guarantees available in the former, she will ask for a transfer to the adult court (even if eventually she is wrong about the outcome). The objective element in this case is the difference between the procedural rules and the practice. The young person may also think that he will have easy access to parole in the adult justice system because of the existing rules and practices (again, even if he is eventually wrong about the outcome). The young person may also know to which detention center he will be sent to by the Juvenile Delinquents' Court and may not want to go there, etc. With regard to this third criterion (the good of the child), the objective element for asking the transfer to the adult court seems to only exist when it is the young person who asks his own transfer to the adult court or when he agrees with the transfer. In this case the theories of punishment do not underlie the request for the transfer to the adult court: the young person will not request the transfer for deterring other people (or himself) from committing offences, or for denouncing his behavior through a severe sanction.

This is how the text of the *Juvenile Delinquents Act* (1908) creates these three criteria (in between square brackets):

7. Where the act complained of is, [1] under the provisions of *The Criminal Code* or otherwise, an indictable offence, and [2] 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 [3] the good of the child and the interest of the 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.²⁵⁰

²⁵⁰ *Juvenile Delinquents Act* (1908), *supra* note 5, s 7.

In the following discussion I will focus on the first and the third criteria. These two criteria give rise to a number of questions and interpretation problems. The questions are the following:

1. what are the underlying reasons for the mechanism of transferring young people to the adult court?

2. Why is the seriousness of the offence a criterion for authorizing the transfer to the adult court?

If the “good of the child and the interest of the community” are central motivating criteria for transferring a young person to the adult court, why does the statute do not authorize the transfer of young people in the case of summary convicted offences?

3. If the Juvenile Delinquents’ Court was created for the “the good of the child and the interest of the community”, how or under which circumstances a young person can be transferred to the adult court “for the good of the child”? How is the phrase “the good of the child and the interest of the community” going to be understood? Is this one criterion or two criteria that have to be “balanced” one against the other?

The first comprehension problem that these two criteria have is the following: if these two criteria are observed closely, they seem to be contradictory. Whereas the normative criterion (indictable offence) puts an emphasis on the seriousness of the offence, the second criterion (“the good of the child and the interest of the community”) seems to require that the transfer be for the interest of the child. Or, why did Parliament combine both criteria? Or why would Parliament want to prevent the Juvenile Delinquents’ Court from transferring a young person who has committed a summary conviction offence if that transfer is, in the particular case, “for the good of the child and the interest of the community”?

This contradiction seems to indicate that Parliament was unsuccessful in creating a coherent intervention philosophy. In other words, Parliament did not clearly abandon the theories of retribution, deterrence, and denunciation that put an emphasis on the severity of the offence when the offences were deemed to be “serious” – even when committed by young people. The first criterion (indictable offence) was based on the theories of punishment that favored social exclusion. According to these theories, if a person committed a serious offence, she should receive a severe punishment for publicly denouncing her behavior, providing retribution for the offence she committed (bad for bad), or deterring her or other people from offending. This criterion worked like a “concession” that the system of ideas of the youth criminal law system made to the system of ideas of the adult justice system.

The second criterion (good of the child and the interest of the community) was ambivalent. On the one hand, it could reduce the impact of the concession the system of ideas of the youth criminal law system made to the theories of punishment that favored severe punishment for serious offences. According to this criterion, it was not enough that a young person committed a serious offence for her to be transferred to the adult court. The Juvenile Delinquents’ Court could, if it wanted to, leave aside from a theoretical perspective an automatic criterion of transfer and the system of ideas of the adult justice system. On the other hand, this second criterion could also stimulate the transfer of a young person to the adult court if the Juvenile Delinquents’ Court focused on the theories of deterrence, retribution, and denunciation. The Juvenile Delinquents’ Court could argue that severe sanctions were for the “good of the child and the interest of the community” or that there had to be a balance between rehabilitation (identified as “the good of the child”) and deterrence, retribution or denunciation (identified as “the interest of

the community”). With regard to this last example, it can be argued that the community is not satisfied by a sanction that seeks the young person’s rehabilitation and that the community needs to impose additional suffering for the purpose of “doing justice”, deterring or denouncing the offence. The degree of disapproval is confused with the intensity of the repression.

The second comprehension problem arises from the expression “good of the child”: how can a child benefit from her transfer to the adult court? Parliament created a youth criminal law system because it argued that the adult justice system was unable to deal with youths in conflict with the law. This question will be dealt with in the second part of this thesis.

The questions mentioned above are not easy to answer. The existence of a mechanism of transfer seems to suggest that Parliament did not succeed in completely leaving aside the theories of deterrence, denunciation, and retribution. The criterion of the severity of the offence, along with the criterion of age (14 years old or older), reinforces this hypothesis.

A major amendment to this system was introduced in 1929. According to the 1929 amendment to the *Juvenile Delinquents Act* (1908), young people who were wards of the Juvenile Delinquents’ Court could be brought back to the court and transferred to the adult court without the young person having committed a new indictable offence. In other words, the 1929 amendment expanded the power of the court by allowing it to transfer a young person to the adult court if the court deemed that appropriate – even though the young person may have already been punished. For this the court had to observe the three criteria identified above: 1) the young person was 14

years of age or older, 2) the young person committed an indictable offence, and 3) the good of the child and the interest of the community demanded this.²⁵¹

3.2.3. Rules of Sanction

From the perspective of the system of ideas that the Juvenile Delinquents' Court applied to sentencing, the *Juvenile Delinquents Act* (1908) chose the theory of rehabilitation – along with the theory of neutralization - when the young person became dangerous to society. Many sections of the act support this proposition. The notions used to refer to the place of detention for young offenders were “industrial school”, “juvenile reformatory”, “reformatory institution”, “refuge for children”, etc.²⁵²

Section 3 of the *Juvenile Delinquents Act* as amended in 1929 specifically stated that the commission of acts of delinquency required that young people receive “help and guidance and proper supervision.”²⁵³ The *Juvenile Delinquents Act* (1908) as originally enacted also wanted to protect young people from publicity, which was identified as a source of stigmatization – this was also a concern for the theory of rehabilitation.²⁵⁴ On the other hand, the theories of deterrence and retribution put an emphasis on the publicity of the process as this was perceived to contribute to the deterrence of potential offenders. For the purpose of fostering social inclusion the *Juvenile Delinquents Act* (1908) favored informal procedures as long as possible.²⁵⁵

The sanctions enumerated by the statute, maybe with the exception of the fine, were inspired by

²⁵¹ *Juvenile Delinquents Act* (1929), *supra* note 69, s 20(3).

²⁵² *Juvenile Delinquents Act* (1908), *supra* note 5, s 2(h).

²⁵³ *Juvenile Delinquents Act* (1929), *supra* note 69, s 3.

²⁵⁴ *Juvenile Delinquents Act* (1908), *supra* note 5, s 10.

²⁵⁵ *Ibid*, s 14.

the theory of rehabilitation.²⁵⁶ This can be observed through the sanctions, measures or restrictions excluded by the *Juvenile Delinquents Act* (1908), such as:

- the statute did not contemplate the death penalty or life imprisonment;
- the statute did not have minimum sentencing requirements or minimum parole requirements;
- the young person stop being a ward of the court the moment she turned 21 years of age and could not be subject to any penalty then;
- all sanctions and all measures were available for the Juvenile Delinquents' Court for all delinquencies, including the possibility of diversion.

Section 16 of the *Juvenile Delinquents Act* (1908) modified the logic of sentencing for the Juvenile Delinquents' Court completely. This statute left aside the principle of strict logic underlying the theories of retribution and deterrence according to which "each offence has its own punishment". The statute deconstructed this logic radically:

- all sanctions and all measures, including absolute discharge, were available for all offences;
- imprisonment was not listed underlying each offence for the Juvenile Delinquents' Court to take it as the maximum penalty to be imposed for the offence (severity of punishment increasing according to the seriousness of the offence);
- the principle of cumulative punishment applicable to each offence was replaced by the notion of global punishment that took into consideration the wellbeing of the young person;

²⁵⁶ *Ibid*, s 16.

- there was no minimal or single punishment, even for first degree murder.

The *Juvenile Delinquents Act* (1908) regulated a variety of sanctions. For instance, the statute contemplated the imposition of fines for any offence as an independent sanction and the Juvenile Delinquents' Court could establish the period of time during which it had to be paid. The statute also regulated home detention as a sanction as long as it did not endanger the public. Restitution and damages were also regulated as independent sanctions to be imposed on a young person. In addition to this, the *Juvenile Delinquents Act* (1908) attempted to prevent youths younger than 12 years of age from being detained in an industrial school unless they could not be placed in their own home, in foster home, or in charge of a children's aid society.²⁵⁷ All this specifically demonstrates that the youth criminal law system put in place by the *Juvenile Delinquents Act* (1908) favored a system that promoted the social inclusion of the youth or that did not create major problems of social exclusion, such as the fine as a sanction.

As presented above, the *Juvenile Delinquents Act* (1908) major explicit ambivalence regarding its philosophy of social inclusion was the transfer mechanism. Along the years, external observers have pointed out other ambiguities in the system: 1) the absence of a maximum period of incarceration and 2) the little due process guarantees available to young people.

3.2.4. Rules of Procedure

The *Juvenile Delinquents Act* (1908), under the excuse that informal procedures were in the best interest of young people, regulated little due process guarantees. Actually, the only statutory due

²⁵⁷ *Ibid*, s 21.

process guarantee was the requirement that the young person's parents be notified of the hearings of any charge of delinquency.²⁵⁸

On the other hand, the *Juvenile Delinquents Act* (1908) was specifically concerned on the protection of the young person's privacy. The act specifically required that procedures affecting young people take place "without publicity and separately and apart from the trial of other accused persons."²⁵⁹ Moreover, the act prohibited the publication of information that could lead to the identification of a young person as having been dealt with by the Juvenile Delinquents' Court.²⁶⁰

Finally, the *Juvenile Delinquents Act* (1908) prohibited the detention of youths during procedure in a jail or other place where adults could also be detained.²⁶¹ This prohibition also applied to the young person's detention following the conviction for an offence.²⁶²

3.3. The Enactment of a New Youth Criminal Law System in Parliament

The emergence of an autonomous youth criminal law system different from the traditional (adult) criminal law system took place with the enactment of the *Juvenile Delinquents Act* in 1908. The *Juvenile Delinquents Act* was first introduced in the Senate by Hon. Mr. Scott on 4th April 1907.²⁶³ According to Hagan and Leon, the bill had been drafted by Hon. Mr. Scott's son, W. L. Scott – the president of the first Children's Aid Society in Ottawa, and other Canadian

²⁵⁸ *Ibid*, s 8.

²⁵⁹ *Ibid*, s 10.

²⁶⁰ *Ibid*.

²⁶¹ *Ibid*, s 11.

²⁶² *Ibid*, s 22.

²⁶³ *Debates of the Senate*, 10th Parl, 3rd Sess (4 April 1907) at 556 (Hon Mr Scott) [*Bill (FFF) An Act respecting juvenile delinquents*].

“child savers”.²⁶⁴ During the second reading of the bill, when the members of the Senate were discussing the principles of the statute, Hon. Mr. Scott stated that the statute was aimed at improving the welfare of children who were perceived as possible “offenders”:

[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.²⁶⁵ [Hon. Mr. Scott, Senator]

This quote seems to suggest that the “evil” was external to the child and the child could be “rescue” from it. This philosophical and explanatory approach to youth misbehavior was already implicit in the 1894 amendment to section 550 of the *Criminal Code* (1892). According to Hon. Mr. Scott, “[t]he principle of this Bill was recognized, I may say, as far back as 1894, when the late government placed on the statute-book an Act under the name of ‘The arrest, trial and imprisonment of youthful offenders’.”²⁶⁶ Children started to be perceived as victims of an environment that led them to a life of crime rather than as rational actors who willingly committed offences or *born criminals*.²⁶⁷ Moreover, even if a child committed a crime, the child would remain as a member of the group “in need of some help and protection” instead of becoming “an enemy of society.” Being “victims of the circumstances”, children - as malleable individuals - could be “saved” and become law-abiding citizens. Hon. Mr. Scott made this very clear when he noted that “[c]hildren are not born criminals; they are made criminals by the

²⁶⁴ John Hagan & Jeffrey Leon, “Rediscovering Delinquency: Social History, Political Ideology and the Sociology of Law” (1977) 42:4 *American Sociological Review* 587. For an analysis of the discussions held in the Senate back in 1907-1908 see Jean Trépanier, “Juvenile Delinquency and Youth Protection: The Historical Foundations of the Canadian Juvenile Delinquents Act of 1908” (1999) 7:1 *European Journal of Crime, Criminal Law and Criminal Justice* 41.

²⁶⁵ *Debates of the Senate*, 10th Parl, 3rd Sess (19 April 1907) at 804 (Hon Mr Scott) [emphasis added].

²⁶⁶ *Ibid* at 805.

²⁶⁷ Valverde, *supra* note 3; Platt, *supra* note 7.

environment by which they happen to be surrounded. Remove the environment and the child grows up an entirely different character.”²⁶⁸ Having supported an environmental approach to crime, Hon. Mr. Scott was convinced that children could be reformed: “[t]hey [children] are plastic, like clay, and can be modeled in any direction. It simple depends on those who have the care and charge of them.”²⁶⁹ Hon. Mr. Scott also pointed out that crime prevention was more cost-effective than incarceration: “[i]t is very much cheaper to reform a child than to keep him in prison as a criminal.”²⁷⁰

The distinction between two groups of young offenders deserving different intervention was present in society and in Parliament. When discussing one clause of the bill according to which no juvenile delinquent could be sentenced or incarcerated in a penitentiary, Hon. Mr. Power noted “[t]hat is a very good general rule; but there are exceptions.”²⁷¹ And here he introduced the notion of “incorrigible offenders”: “[a] lad of sixteen may be utterly perverse and unmanageable, and it may be absolutely necessary that an incorrigible of that kind should be sent to the penitentiary.”²⁷² The presence of this way of thinking supports the proposition that what made politicians reflect regarding the creation of a new kind of criminal justice system for young people was not necessarily new ideas about criminal law in general, but instead new ideas about “young people”, their value for the Nation, and how to deal with them.

²⁶⁸ *Debates of the Senate*, 10th Parl, 3rd Sess (19 April 1907) at 806 (Hon Mr Scott).

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid* at 805.

²⁷¹ *Debates of the Senate*, 10th Parl, 3rd Sess (19 April 1907) at 828 (Hon Mr Power).

²⁷² *Ibid.*

This bill died on Parliament's Order Paper when Parliament prorogued, but it was reintroduced with minor amendments in the Senate during its following session as *Bill QQ*.²⁷³ According to Leon, this bill caused a political controversy: Hon. Mr. Scott - who was serving as Secretary of State - introduced in the 1906 Speech from the Throne an early recognition of youth delinquency legislation. However, he did so without consulting it first with the Minister of Justice, Mr. Aylesworth. Mr. Aylesworth took offence and refused to support that legislation. One year later (1907), under much pressure, Mr. Aylesworth consented to introduce the bill to generate discussion, on the condition that it did not go beyond second reading. Once the bill was withdrawn after the second reading in 1907, many persons and organizations all over Canada requested and lobbied Parliament to reintroduce and enact the bill during the following session of Parliament (1907-1908).²⁷⁴

After a long discussion in the Senate, mostly about whether the bill was within the exclusive legislative power of Parliament, and a brief debate in the House of Commons, *Bill QQ* was assented to as *An Act respecting Juvenile Delinquents* on 8th July 1908.²⁷⁵

The *Juvenile Delinquents Act* (1908) brought several amendments to the traditional criminal justice system, especially regarding the purpose of youth justice intervention. Not only did the statute create new rules of procedure, but it also organized its own sentencing principles. The main principle of this statute was to “help” children become law abiding individuals in an attempt to “protect” them as members of society. In this context the word “protection” was

²⁷³ *Debates of the Senate*, 10th Parl, 4th Sess (21 May 1908) at 971.

²⁷⁴ Leon, *supra* note 211; Pierre Dubois & Jean Trépanier, “L’adoption de la Loi sur les Jeunes délinquants de 1908. Étude comparée des quotidiens montréalais et torontois” (1999) 52:3 *Revue d’histoire de l’Amérique française* 345; Piñero, *supra* note 36.

²⁷⁵ *Juvenile Delinquents Act* (1908) *supra* note 5.

opposed to the notion of deterrence. Young people who committed offences were not ordinary criminals and society did not need to punish them for protecting itself:

[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 ...²⁷⁶
[preamble to the *Juvenile Delinquents Act* (1908)]

Because this new youth criminal law system had been created for the betterment of children, there was a perception that the role of the State was that of a protective parent (*parens patriae*).²⁷⁷ Therefore, Parliamentarians perceived that there was no need to safeguard youths' rights against State intervention because this intervention was aimed at protecting them. As a result, the procedure in the Juvenile Delinquents' Court was informal and due process guarantees quite limited:

31. [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.²⁷⁸ [*Juvenile Delinquents Act* (1908)]

14. [o]n the trial of a child the proceedings may, in the discretion of the judge, be as informal as the circumstances will permit, consistently with a due regard for a proper administration of justice.²⁷⁹
[*Juvenile Delinquents Act* (1908)]

²⁷⁶ *Ibid*, preamble.

²⁷⁷ For the history of the English juridical doctrine of *parens patriae*, see Jean Trépanier, "Les démarches législatives menant à la création des tribunaux pour mineur en Belgique, en France, aux Pays-Bas et au Québec au début du XXe siècle," (2003) 5 *Revue de l'histoire de l'enfance irrégulière* 109.

²⁷⁸ *Juvenile Delinquents Act* (1908) *supra* note 5, s 31.

²⁷⁹ *Ibid*, s 14. The 1929 reenactment of the *Juvenile Delinquents Act* (1908) amended this section, providing the juvenile judge with further informal proceedings:

17(1) Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be as informal as the circumstances will permit, consistently with a due regard for a proper administration of justice.

(2) No adjudication or other action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interest of the child. [...] *Juvenile Delinquents Act* (1929), *supra* note 69, ss 17(1), (2).

In these circumstances, the following questions arise:

1. What kinds of ideas does society bring in general - and the political and juridical systems in particular – when thinking and creating an inclusionary youth criminal law system as opposed to an exclusionary adult criminal law system?
2. What kinds of ideas does society bring in general - and the political and juridical systems in particular – when thinking that *not all* youths deserve an inclusionary criminal law system and then creating a transfer mechanism?
3. What kinds of ideas does society bring in general - and the political and juridical systems in particular – when thinking that an inclusionary youth criminal law system does not really need due process guarantees even though the criminal intervention takes time and rights that belong to youths?

During this period children were perceived as being the future of the nation: “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 1910.²⁸⁰ The language of “social motherhood” was present in most of the interventions directed towards children during this period, and this phenomenon went beyond the Canadian border. As the American judge Julian Mack wrote in 1909, the role of juvenile courts was to inquiry into the circumstances of the offence for bringing children back to the “right path”, and not to punish them as criminal courts used to do:

²⁸⁰ Valverde, *supra* note 3. See also Tannis Peikoff & Stephen Brickey, “Creating Precious Children and Glorified Mothers: A Theoretical Assessment of the Transformation of Childhood” in Elizabeth Comack & Stephen Brickey, ed, *The Social Basis of Law. Critical Readings in the Sociology of Law*, 2d ed (Halifax: Garamond Press, 1991) 71.

[t]oday, however, the thinking public is putting another sort of question. Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.²⁸¹ [Judge Mack]

This perception of children as “future of the nation” had a strong impact on criminal intervention. While the adult justice system was oriented towards an adversarial and exclusionary model – the notion of the offender as the enemy of society - the youth criminal law system was based on the notion of “reintegration”. For the latter, protection of the child was a mean of achieving the protection of society: according to Trépanier and Tulkens, “[b]y protecting the child one makes a good citizen of him, and thus prevents crime.”²⁸² The American sociologist George Mead perfectly identified the distinction between the adult system and the youth system in 1918 when referring to the role of the juvenile courts:

[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.²⁸³ [George Mead]

The American judge Julian Mack had a similar perception regarding the role of the youth court:

[a]nd it is this thought – the thought that the child who has begun to go wrong, who is incorrigible, who has broken a law or an ordinance, is to be taken in hand by the state, not as an enemy but as a protector, as the ultimate guardian, because either the unwillingness or inability of the natural parents to guide it toward good citizenship has compelled the intervention of the public authorities [...].²⁸⁴ [Judge Mack]

²⁸¹ Julian W Mack, “The Juvenile Court” (1909) 23 Harv L Rev 104 at 107.

²⁸² Trépanier & Tulkens, *supra* note 41 at 197.

²⁸³ Mead, *supra* note 242 at 594.

²⁸⁴ Mack, *supra* note 281 at 107.

The notion of the “child as the future of the nation” was applied not only as a goal for implementing Canada’s approach to delinquent, neglected and abused children, but also as a welfare principle for evaluating parents’ fitness to carry out their responsibilities according to middle-class standards of child-rearing.²⁸⁵ For this perception, healthy societies needed law abiding citizens who conducted themselves according to middle-class values.²⁸⁶ Since children were malleable individuals, their wrongdoings or inappropriate upbringing could be improved by State intervention.²⁸⁷ In fact, the *Juvenile Delinquents Act* (1908) regulated parents’ and guardians’ criminal responsibility for neglecting doing what could have prevented a child from becoming a delinquent.²⁸⁸ Of course, this kind of intervention was oriented towards the ideal of an heterosexual middle-class English-speaking Protestant family in which the gender roles of the husband as the breadwinner and the wife as house-keeper were deeply rooted.²⁸⁹ These gender roles were so strongly embedded in Parliament that, when discussing physical education for girls in reformatory schools, this activity was only identified as helping girls achieve a good figure for the purpose of becoming “attractive” wives:

[i]f any inmate should manifest special talent, that will be cultivated. Then there will be physical training. Where those institutions are under the control of boards of education, they can be, and will be well managed, and the proper course of instruction will be observed. Then, connected with this, there are some esthetic teachers. On this Prof. Huxley was very strong. He thought physical education was very important for boys, though he did not see so much need of it for girls, except to

²⁸⁵ Dorothy E Chum, *From Punishment to Doing Good. Family Courts and Socialized Justice in Ontario 1880-1940* (Toronto, Buffalo, London: University of Toronto Press, 1992); Mack, *supra* note 281.

²⁸⁶ Mack, *supra* note 281; Valverde, *supra* note 3; Joyal, *supra* note 6; John Bullen, “J.J. Kelso and the New Child-Savers: The Genesis of the Children’s Aid Movement in Ontario” in Russell Smandych, Gordon Dodds & Alvin Esau, eds, *Dimensions of Childhood. Essays on the History of Children and Youths in Canada* (Manitoba: University of Manitoba, 1991) 135.

²⁸⁷ Jean Trépanier, “The Origins of the *Juvenile Delinquents Act* of 1908: Controlling Delinquency Through Seeking Its Causes and Though Youth Protection” in Russell Smandych, Gordon Dodds & Alvin Esau, eds, *Dimensions of Childhood. Essays on the History of Children and youths in Canada* (Manitoba: University of Manitoba, 1991) 205.

²⁸⁸ *Juvenile Delinquents Act (1908)*, *supra* note 5, ss 18(1), 18(2), 18(4), 29.

²⁸⁹ Chum, *supra* note 285; Susan B Boyd, “Child Custody Law and the Invisibility of Women’s Work” in Elizabeth Comack & Stephen Brickey, eds, *The Social Basis of Law. Critical Readings in the Sociology of Law*, 2d ed (Halifax: Garamond Press, 1991) 190. On similar trends in the United States see Platt, *supra* note 15.

give them a good gait and a good figure, and there cannot be a better endowment for a young woman than a good gait and a good figure.²⁹⁰ [Hon. Mr. Sullivan, Senator]

The youth criminal law system established by the *Juvenile Delinquents Act* (1908) was complemented by the creation of a Juvenile Delinquents' Court and a new public servant, the "juvenile court judge". Before this, youths and adults were both dealt with the same magistrate in criminal courts. According to the *Juvenile Delinquents Act* (1908) – and in an attempt to avoid interfering with Legislative Assemblies' exclusive legislative powers - only provinces had jurisdiction for putting the statute into force in a province or portion of a province, establishing juvenile courts, and designating juvenile court judges - who exercised the powers conferred by the act.²⁹¹ The members of the Senate had great expectations regarding the role to be performed by juvenile court judges, who were supposed to behave as "parents" rather than "magistrates":

[i]n the appointment of juvenile court judges, when such appointments are deemed advisable, it were difficult to undervalue the importance of keeping out of mind all considerations save those of entire fitness for the position. No 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.²⁹² [Hon. Mr. Coffey, Senator]

Where this act was not in force, youth misbehavior was regulated by the *Criminal Code* (1892), the statutes referred to in Chapter 2, and other federal statutes specially aimed at children (such as statutes regulating reformatory and industrial schools). All this legislation was applied by magistrates in criminal courts, who had to observe section 550 of the *Criminal Code* (1892) in their proceedings: children's trials had to take place separate and apart from adults' trials, and without publicity.

²⁹⁰ *Debates of the Senate*, 10th Parl, 3rd Sess (24 April 1907) at 877 (Hon Mr Sullivan) [emphasis added].

²⁹¹ *Juvenile Delinquents Act* (1908), *supra* note 5, s 7.

²⁹² *Debates of the Senate*, 10th Parl, 4th Sess (21 May 1908) at 976 (Hon Mr Coffey) [emphasis added].

As previously mentioned, youths accused of “delinquencies” were considered “juvenile delinquents.”²⁹³ A possible reason for this policy approach in federal legislation is Canadian constitutional law: in Canada, the federal government could only legislate on matters affecting young people through criminal law as this is a subject matter that has been exclusively assigned to Parliament.²⁹⁴ In contrast, if cases of child delinquency, neglect and abuse had been regulated in terms of civil status or welfare, they would have fell under the exclusive powers of provincial legislatures.²⁹⁵

Houston argues that for Canadian reformers the dual distinction between 1) neglected and abused children, and 2) delinquent children was inexistent. Society and parliamentarians saw the “neglected children” and the “delinquent children” as a continuum and not as two different situations requiring different kind of intervention. Moreover, in both cases, the solution was the same - they needed an “experience of restraint”:

[t]he distinction between *neglected* and *criminal* in effect translated as *potentially* vs. *actually* criminal. From the reformers’ point of view, the neglect and destitution from which these children suffered stemmed not so much from a want of material resources as of the exercise of proper parental authority and the virtues of order, diligence, and obedience on which the social fabric depended. They were destitute, as they were ignorant, or that experience of restraint so necessary to the development of moral character and without which a man’s social and personal life would remains mired in anarchy of indulgence.²⁹⁶ [Susan Houston]

²⁹³ *Juvenile Delinquents Act (1908)*, *supra* note 5, s 2.

²⁹⁴ *Constitution Act (1867)*, *supra* note 27, s 91(27). See also Trépanier, *supra* note 287.

²⁹⁵ *Constitution Act (1867)*, *supra* note 27, ss 92 (7), (13), and (14).

²⁹⁶ Susan E Houston, “Victorian Origins of Juvenile Delinquency: A Canadian Experience” (1972) 12:3 *History of Education Quarterly* 254 at 263-264.

As I have discussed in a previous research, parliamentarians perceived criminal law as the only effective and constitutional approach for having jurisdiction to “protect” youth from victimization and misbehavior.²⁹⁷

Wherever the *Juvenile Delinquents Act* was in force, juvenile delinquents were under the exclusive jurisdiction of the Juvenile Delinquents’ Court. Despite the *Criminal Code* (1892) regulating the age of seven years old as minimum age of criminal responsibility, since the notion of “delinquent child” comprised both abused and neglected children, the frontier between the two situations remained unclear. As a result, there was actually no minimum age for the Juvenile Delinquents’ Court to intervene. The report of the Department of Justice Committee on Juvenile Delinquency released in 1965 considered that children under seven years of age could not be found to be juvenile delinquents according to the statutory age limit regulated in the *Criminal Code* (1892). The Committee acknowledged that some Juvenile Delinquents’ Courts had found children under the age of seven years to be delinquent, and that this way of proceeding “was socially unsound and that, in any event, it was illegal.”²⁹⁸ My empirical research at the Montreal Juvenile Delinquent’s Court allows me to conclude that children younger than seven years old were dealt with by this court, most of them being in need of protection. However, as the *Juvenile Delinquents Act* (1908) did not draw a distinction between delinquent children and children in need of protection, the latter - such as orphans - were in fact deemed to be ‘juvenile delinquents’. Houston points out the paradox of this intervention: reformers “created for themselves a complex and ambiguous figure of a blameless child who [was] nevertheless

²⁹⁷ Piñero, *supra* note 36. This legislative approach was upheld by the Supreme Court of Canada in 1967: *Smith*, *supra* note 232.

²⁹⁸ Canada. Department of Justice, *Juvenile Delinquency in Canada* (Ottawa: Roger Duhamel Queen’s Printer, 1965) at 41 [1965 *Department of Justice Report*].

guilty.”²⁹⁹ Indeed, I would add, guilty of every misfortune in their young lives. Children proved to be juvenile delinquents - whether released on probation, placed in foster homes, reformatory or industrial schools - remained wards of the Juvenile Delinquents’ Court until discharged or they reached the age of 21 years old. During the period of wardship children could be returned to the court for further or other proceedings, “including discharge upon parole or release from detention.”³⁰⁰ Indeed, the Juvenile Delinquents’ Court could take new measures at any time during this period, even in the absence of any new infraction.³⁰¹ Every action taken was guided by the principles of “the child’s own good and the best interests of the community.”³⁰² On the other hand, in some situations the Juvenile Delinquents’ Court had discretion for transferring children to criminal courts and declining jurisdiction – this was the transfer mechanism.³⁰³ Youth were assessed through the distinction delinquent/criminal or non-genuinely criminal/genuinely criminal. If they were placed in the second half of the distinction, they most probably would be sent to the adult court.

The *Juvenile Delinquents Act* (1908) provided juvenile court judges with discretion for transferring to the adult court youths with 14 years of age and older accused of having committed indictable offences.³⁰⁴ The juvenile court judge had to be of the opinion that the good of the child and the interest of society required that sort of action:

²⁹⁹ *Houston, supra* note 30 at 265.

³⁰⁰ *Juvenile Delinquents Act* (1908), *supra* note 5, s 16(3).

³⁰¹ *Trépanier, supra* note 286.

³⁰² *Juvenile Delinquents Act* (1908), *supra* note 5, s 16(5).

³⁰³ *Juvenile Delinquents Act* (1908), *supra* note 13, s 4. Justice Adamson of the Manitoba Court of Appeal held that once a juvenile court judge ordered a juvenile to be proceeded against by indictment in criminal courts and the proceedings had been initiated, the juvenile court judge had no jurisdiction thereafter to make an order returning the juvenile to the Juvenile Court for trial; *Re R v Paquin and De Tonnancourt*, [1955] 21 CR 162, 111 CCC 312 (Man CA) [*Paquin*].

³⁰⁴ *R v M* [1963] 2 CCC 135 (Man QB); *R v Sawchuk*, [1967] 1 CR 139 (Man QB) [*Sawchuk*]. Canadian jurisprudence was not uniform whether this provision was available as well in cases involving hybrid offences,

[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 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.³⁰⁵ [*Juvenile Delinquents Act* (1908)]

This section points out the emergence of a new problem: the Juvenile Delinquents' Court was invited to "harmonize" the "good of the child" with the "interest of society" constructed through theories of punishment centered on retribution, deterrence and denunciation. How could the adult court achieve the "good of the children" when the Juvenile Delinquents' Court was specifically created for this purpose? Despite this, the Crown, the juvenile delinquent, and even the juvenile court judge could initiate the transfer proceedings. Indeed, it was never held as improper that juvenile court judges initiated transfer hearings, even though the risk of them sitting in judgments in their own cases.³⁰⁶

Juvenile court judges were not statutorily required to conduct an inquiry into the matter or to justify their decisions regarding a transfer to the adult court. However, sometimes there were exceptions. In *Rex v. Newton*, the Alberta Supreme Court quashed an indictment because it found that the only record of the proceedings that read "I ordered this child to be proceeded against by indictment in the ordinary court, in accordance with the provisions of the Criminal Code in that behalf" was not an exercise of discretion. According to Justice Clinton, "[t]his [above record] in my opinion is a record and not in itself an order, and no formal order was

which are punishable by indictment or on summary conviction at the option of the Crown; see Larry Wilson, *Juvenile Courts in Canada* (Toronto, The Carswell Company Limited: 1982); Marjorie Montgomery Bowker, "Waiver of Juveniles to Adult Court Under the Juvenile Delinquents Act: Applicability of Principles to Young Offenders Act", (1987) 29 Crim LQ 368.

³⁰⁵ *Juvenile Delinquents Act* (1908), *supra* note 5, s 7.

³⁰⁶ *Wilson, supra* note 304; *contra R v Metz*, [1977] 5 WWR 374, 36 CCC (2d) 22 (Man CA), O'Sullivan JA, dissenting.

made.”³⁰⁷ The notions of “good of the child” and “interest of the community” were apparently contradictory concepts that did not provide juvenile court judges with clear signification of their meaning. Moreover, these phrases could more easily be used for keeping the young person in the Juvenile Delinquents’ Court rather than transferring her to the adult court. Due to the lack of clear meaning and the absence of statutory guidelines regarding these notions, Canadian jurisprudence identified relevant factors to take into consideration when deciding whether to transfer juvenile delinquents to the adult court, such as the character of the juvenile,³⁰⁸ school background,³⁰⁹ records of past delinquencies,³¹⁰ family background,³¹¹ state of maturity,³¹² age of the child at the time of the offence,³¹³ seriousness of the charge,³¹⁴ circumstances surrounding the offence,³¹⁵ public sentiment arising from the offence and the offender,³¹⁶ resources and corrective treatments available in the Juvenile Court for dealing with the delinquent,³¹⁷ among others. This jurisprudence constitutes the emergence of the criteria used to decide whether juvenile delinquent was/was not a “genuinely criminal” or should/should not be treated through the theories of punishment in existence in the adult court. For this reason, we can consider these criteria as “transitional criteria” whose finality was to modify and construct a different way of

³⁰⁷ *R v Newton*, [1949] 1 WWR 790 at 424, 7 CR 422 (Alta SC) at 424.

³⁰⁸ *Re Liefso*, [1965] 2 OR 625, 1965 CarswellOnt 157 (HCJ) [*Liefso*]; *R v Simpson*, [1964] 2 CCC 316, 1963 CarswellOnt 310 (Juvenile and Family Cour) [*Simpson*]; *R v Pagee* (1962), 41 WWR 189, 39 CR 329 (Man QB) [*Pagee*]; *R v Trodd (No 1)*, 47 CR 365, 1966 CarswellBC (SC) [*Trodd*].

³⁰⁹ *Liefso*, *supra* note 308; *Simpson*, *supra* note 308; *Pagee*, *supra* note 308.

³¹⁰ *Liefso*, *supra* note 308; *Simpson*, *supra* note 308; *Pagee*, *supra* note 308; *Trodd*, *supra* note 308.

³¹¹ *Liefso*, *supra* note 308; *Simpson*, *supra* note 308; *Pagee*, *supra* note 308.

³¹² *Liefso*, *supra* note 308; *Simpson*, *supra* note 308; *Pagee*, *supra* note 308.

³¹³ *Simpson*, *supra* note 308; *Re Ly (No 1)*, [1944] 2 WWR 36, 82 CCC 105 (Man CA) [*Ly*]; *Sawchuk*, *supra* note 304.

³¹⁴ *Simpson*, *supra* note 308; *Ly*, *supra* note 313; *R v DPP (A Juvenile)*, [1948] 2 WWR 891, 6 CR 326 (Man KB) [*DPP*]; *Pagee*, *supra* note 308; *Sawchuk*, *supra* note 304; *Trodd*, *supra* note 308; *R v Cline* (1963) 45 WWR 184, CCC 38 (BCSC) [*Cline*].

³¹⁵ *Sawchuk*, *supra* note 304; *Trodd*, *supra* note 308.

³¹⁶ *Simpson*, *supra* note 308; *Ly*, *supra* note 313; *Cline*, *supra* note 314.

³¹⁷ *Ly*, *supra* note 313; *R v Shoemaker* (1965), 54 WWR 635, 3 CCC 79 (BCSC); *Trodd*, *supra* note 308; *Reference Re Juvenile Delinquents Act* (1966), 47 CR 369, 55 WWR 41 (BCSC).

observing for the observer (Juvenile Delinquents' Court): a juvenile delinquent could become to be seen, through the use of these criteria, as an "adult offender".

When the transfer to adult court provision - section 7 of the *Juvenile Delinquents Act* (1908) - was discussed in the House of Commons, the only person who addressed it and supported it was Hon. Mr. Lancaster. However, he was not interested in punishing children harsher because of them being accused of having committed indictable offences; his intention was to provide them with the "right" to trial by jury. The trial by jury has been considered a fundamental Anglo-Saxon criminal law guarantee according to which a guilty verdict is rendered by the defendant's peers instead of a magistrate. The *Juvenile Delinquents Act* (1908) eliminated the option for children to choose to be tried by a magistrate or a jury, and for Mr. Lancaster this was contrary to an accountable and transparent trial:

[m]y objection is to denying to that child the inherent right to trial by jury which we have all enjoyed since Magna Charta, and which cannot be denied to even a hardened criminal. The right to elect as to trial by jury should be vested in the person accused and not in some other person, in this case this level-headed judge.³¹⁸ [Hon. Mr. Lancaster, Senator]

Why not to give young people access to this right *inside* the youth criminal justice system? Hon. Mr. Lancaster's statement presents a well known paradox of the criminal justice system: in order to give "procedural rights", one should "give" at same time a bigger opportunity for harsher punishment.

With regard to Hon. Mr. Lancaster's concerns, Hon. Mr. Aylesworth (Minister of Justice) had a different opinion regarding the "right to a jury" for young people. The objection to trial by jury

³¹⁸ *Debates of the Senate*, 10th Parl, 4th Sess (8 July 1908) at 12403-12404 (Hon Mr Lancaster).

was the publicity attached to such procedures: “[t]he objection to the trial by jury is the publicity; the whole idea is to avoid that. There is even a provision to prohibit the publication of offences of young people in the newspapers.”³¹⁹ Again, the same problem: a trial by jury is not “inherently” or “by nature” attached to publicity. However, it seems that at this time it was very difficult to draw a distinction between the existence of a jury panel and lack of publicity.

The *Juvenile Delinquents Act* (1908), for avoiding the undesirable consequences attached to the publicity of juvenile court proceedings - such as stigmatization - prohibited the publication of information that could identify children as having been dealt with the juvenile court.³²⁰ Even though the *Juvenile Delinquents Act* (1908) did not proscribe “open trials”, the Canadian jurisprudence developed in such a way over the years.³²¹ The *Juvenile Delinquents Act* (1908) regulated trials “without publicity and separately and apart from the trials of other accused persons”, but not “closed” or “in camera” trial.³²² The wording of this regulation was identical to section 550 *Criminal Code* (1892).³²³ In 1981 the Supreme Court of Canada, after several conflicting decisions at the provincial level, interpreted the concept of “without publicity” as “in camera” trials.³²⁴ The “accountability and transparency” movement, which in 1908 was a minority movement, became stronger and a majority by 1982, and led the “openness” of the juvenile courts to the general public.³²⁵

³¹⁹ *Debates of the Senate*, 10th Parl, 4th Sess (8 July 1908) at 12404 (Hon Mr Aylesworth).

³²⁰ *Juvenile Delinquents Act* (1908), *supra* note 5 at s 10. For a history of the regulation of young offenders’ private information, see Piñero, *supra* note 208.

³²¹ *R v X* (1958), 25 WWR 97, 1958 CarswellMan 20 (CA); *contra R v X* (1958), 25 WWR 97, 1958 CarswellMan 20 (CA), Adamson CJ dissenting.

³²² *Juvenile Delinquents Act* (1908), *supra* note 5, s 10(1)

³²³ *Criminal Code* (1892), *supra* note 107, s 550.

³²⁴ *R v B(C)*, [1981] 2 SCR 480, 127 DLR (3d) 482; *see Re s 12(1) of the Juvenile Delinquents Act (Canada)* (1983), 41 OR (2d) 113, 3 CCC (3d) 515 (CA).

³²⁵ See Chapter 5.

Some juvenile court judges transferred children to criminal courts for them to have the possibility of being tried before a jury, especially when children were accused of having committed very serious offences. The argument was that an acquittal by a jury on a serious charge would be much more for the good of the accused – and in the best interest of the child – than an *in camera* trial before a single judge.³²⁶ The problem was that back in 1908 some offences – such as first and second degree murder – were punishable by death, and children transferred to adult courts and found guilty of capital crimes could be executed. In other words, in case of a guilty verdict, these children had to be sentenced to death. Moreover, the *Juvenile Delinquents Act* (1908) regulated a limited revision of juvenile judges’ decisions governed by the Criminal Code and the decision ordering the transfer of a young person to the adult court could not be appealed to a superior court. It was not until 1929 that a procedure of appeals to a superior court by special leave was established that included the appeal of a transfer to the adult court. In light of this fact, it is difficult to see how a juvenile court judge could justify the transfer of a youth to the adult court in “the best interest of a child” when the death penalty was a possible sentence.

The case of Steven Murray Truscott provides us with an appealing example about transferring youths to the adult court for “their best interest” – and exposing them to the death penalty. Steven Murray Truscott was 14 years old when he was sentenced to death in 1959 for the alleged rape and murder of a classmate, despite the jury’s recommendation for mercy. His sentence was commuted to life imprisonment in 1960 by the Government of Canada, and in 1969 he was

³²⁶ *R v T (SM)*, 31 CR 76, 1959 CarswellOnt 30 (SC) (rape and murder); *Ly*, *supra* note 313 (murder); *DPP*, *supra* note 314 (murder); *Paquin*, *supra* note 303 (murder). See also Benoît Henry, *Renvoi des mineurs délinquants devant les tribunaux pour adultes* (M Sc Thesis, École de Criminologie, Université de Montréal, 1978) [unpublished] at 12.

released on parole. In 1967 his guilty verdict was confirmed by the Supreme Court of Canada (majority vote) in a referral brought by the Governor General in Council (1966) because of an amendment in the Criminal Code that increased the circumstances under which capital sentences could be appealed (1961).³²⁷ In 2007 his conviction was declared a miscarriage of justice and he was formally acquitted of the crime. Because DNA evidence was not available from the victim, he could not be found “not guilty”. According to Montgomery Bowker, “this appears to be the only case recorded in Canada in the 20th century where, following waiver, a juvenile, aged 14, was sentenced to be hanged.”³²⁸ Capital punishment as penalty for juvenile offenders was abolished in Canada only in 1961 (and in 1976 for adult offender).³²⁹ In 1961 the Minister of Justice for Canada reported that Canadian courts had commuted all the sentences in which juvenile delinquents under the age of 18 years had been sentenced to death.³³⁰

Another reason provided by Juvenile Delinquents’ Courts for transferring youths to the adult court was that youths had access to more defenses in the adult court than in the youth court. Again, this transfer was presented as being in the “best interest of the child”:

[t]he charge is manslaughter, another boy having died under circumstances requiring investigation. It is hardly possible that there could be appreciated in the proceedings in the Juvenile Court the fine points of the defences available to a person accused of manslaughter that are readily available in trials upon indictment in the usual way, and there niceties are of the utmost importance to the child in his jeopardy under the charge laid against him.³³¹ [Justice Wootton, British Columbia Supreme Court Chambers]

³²⁷ *R v Truscott*, [1967] SCR 309, 62 DLR (2d) 545.

³²⁸ *Montgomery Bowker*, *supra* note 304 at 382.

³²⁹ This matter is further discussed in Chapter 4.

³³⁰ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (30 mai 1961) at 5779 [Hon. Mr. Fulton].

³³¹ *Cline*, *supra* note 314 at para 11. See *Ly*, *supra* note 313; *Henry*, *supra* note 326; Lucien Beaulieu, “A Comparison of Judicial Roles under the JDA and YOA” in Alan W Leschied, Peter G Jaffe & Wayne Willis, eds, *The Young Offenders Act: A Revolution in Canadian Juvenile Delinquency* (Toronto: University of Toronto Press, 1991) 129.

This seems to suggest it was easier to transfer a young person to the adult court rather than providing the Juvenile Delinquents' Court and the youth criminal law system back then with access to more due process rights and resources. The observer in this case, Justice Wootton, does not seem to see that if the procedural rights were not sufficient to obtain a not guilty verdict, the young person would be exposed to the harsh punishment and stigmatization of the adult court.

Another claim for transferring a young person to the adult court was that it was very much in the interest of the community that there should be an open trial in the case of serious offences (one of the two factors to evaluate for deciding whether to transfer a juvenile to adult courts):

[i]n the circumstances also it is very much in the public interest that there should be an open trial of this child who is considered to be a grown person and, in many respects, a man according to the evidence tendered before the learned judge in the juvenile court upon the charge laid.³³² [Justice Wootton, British Columbia Supreme Court Chambers]

This quote brings back two points mentioned above: first, the distinction between youth/youth, youth/adult. Second, the need to expose the crime and the punishment is a requirement of the deterrence theory.

However, these positions were not unanimous: other juvenile court judges held that it did not follow that in every case in which children were accused of having committed serious offences they should be tried by indictment in the adult court:

³³² *Cline, supra* note 314 at para 11.

[i]n considering the interest of the community, I would agree that in most cases this element would dictate trial by indictment in such a serious offence. However, the information placed before me, and the position taken by the Crown Attorney, do not dictate that such applies in the instant case. In any event, this requirement is necessarily coupled with the opinion of the Court as to the good of the child. It cannot in itself dictate the exercise of the discretion. One case has indicated that creating a deterrent to others is one of the elements prompting that such cases should be tried in the ordinary Courts. I do not find that any of the circumstances in the instant case bring it within the field where such reasoning should apply.³³³ [Justice Wallace, Ontario Juvenile and Family Court]

The juvenile court judge may try the most serious cases of delinquency, including rape, robbery and manslaughter, committed by persons up to 18 years of age.³³⁴ [Chief Justice Adamson, Manitoba Court of Appeal]

10. From the point of view of the juvenile, there appear to be clear advantages to his case remaining in the Juvenile Court against the event of his eventual conviction. Section 3(2) of the statute provides:

3(2) Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.

11. The penalties provided by s. 30 are accordingly lenient and s. 38 provides:

38. This Act shall be liberally construed to the end that its purpose may be carried out, namely, 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 criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

12. On the other hand, the reformation of a prisoner is only one of the factors in sentencing that may be considered by an ordinary court.

13. The presumption must be that an accused will receive a fair trial before a Juvenile Judge and I do not think there can be any presumption that he will have a better or fairer trial before a Supreme Court Judge and jury.

14. I therefore conclude there were not any sufficient facts before the learned Judge in the present case for the judicial exercise of his discretion under s. 9. I think the trial should proceed in the Juvenile Court unless and until cogent circumstances appear affecting both the good of the accused and the interest of the community and demanding, in both interests, the trial of the accused in the ordinary Courts.³³⁵ [Justice Jessup, Ontario High Court of Justice]

The quotes from parliamentarians and the Canadian jurisprudence suggest three main groups of explicit reasons for transferring a young person to the adult court:

³³³ *Simpson*, *supra* note 308 at para 31 (murder).

³³⁴ *R v X*, *supra* note 321 at para 51, Adamson CJ dissenting.

³³⁵ *Liefso*, *supra* note 308 (murder).

- reasons for increasing punishment: the young is incorrigible, she is a recidivist, her crime is “like an adult crime” or the youth is “already an adult”, she should be made more “accountable” for what she did, etc.
- reasons for increasing due process guarantees: the youth has rights to a jury; he has rights to more defenses than the defences provided by the youth criminal law system, he has right to be punished proportionally to the crime he committed (this is specially the case if it was a minor offence); and
- reasons for considering the needs of society: society has a right to know what happened and how the offender was dealt with.

All these reasons hide the consequences in terms of punishment if a young person is dealt with as an adult in the adult court (severity of punishment and stigmatization).

3.4. An Act to Amend *The Juvenile Delinquents Act* (1924)

Even though the *Juvenile Delinquents Act* was amended many times from 1908 to 1982, the two most relevant amendments for this study are the statutes enacted in 1924 and in 1929.³³⁶

Bill 27, *An Act to amend The Juvenile Delinquents Act, 1908*, assented to on 19th July 1924, introduced a major modification to the definition of “juvenile delinquent” - new behavior was

³³⁶ The other amendments are: *An Act to amend the Juvenile Delinquents Act, 1908*, SC 1912, c 30; *An Act to amend The Juvenile Delinquents Act, 1908*, SC 1914, c 39; *An Act to amend The Juvenile Delinquents Act*, SC 1921, c 37; *An Act to amend The Juvenile Delinquents Act*, SC 1932, c 17; *An Act to amend the Juvenile Delinquents Act*, SC 1935, c 41; *An Act to amend The Juvenile Delinquents Act, 1929*, SC 1936, c 40; *An Act to amend The Juvenile Delinquents Act, 1929*, SC 1947, c 37; *An Act to amend the Statute Law*, SC 1949, c 6, s 25; *An Act to amend The Juvenile Delinquents Act, 1929*, SC 1951, c 30; *An Act to change the names of the Territorial Court of the Yukon Territory and the Territorial Court of Northwest Territories*, SC 1972, c 17, s 2; *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*, SC 1979, c 11, s 10(1).

included in the definition of “juvenile delinquent.”³³⁷ As a result, this definition was enlarged and any child who committed a “sexual immorality” or any “similar form of vice” was also considered to be a juvenile delinquent. This bill was introduced in the House of Commons by request of “various associations interested in child welfare, and by the various courts that deal with juvenile delinquents.”³³⁸ According to the original wording of the bill - as introduced in the House of Commons - the proposed amendment was to add the words “[o]r who is guilty of sexual immorality or any other form of vice” to the definition of “juvenile delinquent.”³³⁹ As Hon. Mr. Meighen correctly stated, this amendment introduced “a new offence.”³⁴⁰ Worth noting, it was only presented as a bill “to make some minor changes in the existing act.”³⁴¹ The major problem with this amendment was that the vague phrase “or other form of vice” may not be confined to offences under the Criminal Code and this would authorize magistrates to apply a new and indeterminate offence. Some parliamentarians expressed their concern that this amendment vested magistrates with Parliament’s functions:

[t]his bill will take the matter out of the hands of parliament and the judge will be made the arbiter. Are we not going to get into a condition where we will have a rather variegated system of jurisprudence under which we will have a Nova Scotia magistrate deciding a thing is all right, and a Manitoba magistrate deciding it is all wrong?³⁴² [Hon. Mr. Meighen, Member of Parliament]

[t]hen we are not permitting magistrates – some of whom may be and undoubtedly are very estimable men, although they are not all of that class – to assume the functions of parliament and to say that such and such an act is not an offence? ... In other words before the Criminal Code is invoked against any individual should it not be plain that it is in connection with some offence we already know about, some statutory offence which is already defined, and which will limit the possible intervention of a busybody?³⁴³ [Hon. Sir Henry Drayton, Member of Parliament]

³³⁷ *Amendment to Juvenile Delinquents Act* (1924), *supra* note 75.

³³⁸ *House of Commons Debates*, 14th Parl, 3rd Sess (23 June 1924) at 3507 (Hon Mr Lapointe). For a historical context of the individuals who introduced and lobbied this requirement of regulation in Parliament see Bruno Théoret, “Régulation juridique pénale des mineur-es et la discrimination à l’égard des filles: la clause de 1924 amendement la *Loi sur les jeunes délinquants*” (1991) 4 *Canadian Journal of Women and the Law* 539.

³³⁹ *Debates of the House of Commons*, 14th Parl, 3rd Sess (23 June 1924) at 3508 (Hon Mr Lapointe).

³⁴⁰ *Ibid.*

³⁴¹ *House of Commons Debates*, 14th Parl, 3rd Sess (23 June 1924) at 3507.

³⁴² *House of Commons Debates*, 14th Parl, 3rd Sess (23 June 1924) at 3508 (Hon Mr Meighen).

³⁴³ *House of Commons Debates*, 14th Parl, 3rd Sess (23 June 1924) at 3508-3509 (Hon Sir Henry Drayton).

Because of this, the proposed amendment was modified and the phrase “or any other form of vice” was struck out.³⁴⁴ An amended version was introduced later during the debate in the House of Commons, and the final phrase “sexual immorality or any similar form of vice” was adopted.³⁴⁵ Consequently, the definition of “juvenile delinquent” assented to in 1924 read as follows:

“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.³⁴⁶

This definition lasted unchanged until 1984, when the *Young Offenders Act* (1982) entered into force and derogated the *Juvenile Delinquents Act* (1908). This amendment does not deal with norms of procedure or punishment, but rather with norms of inclusion in the legal program (jurisdiction of the Juvenile Delinquents’ Court).

3.5. An Act respecting Juvenile Delinquents (1929)

The *Juvenile Delinquents Act* (1908) was reenacted in 1929 in an attempt to incorporate much of the recommendations that professional workers had proposed.³⁴⁷ This bill, as the *Amendment to*

³⁴⁴ *House of Commons Debates*, 14th Parl, 3rd Sess (23 June 1924) at 3510. Despite the fact that the phrase “or any other form of vice” was explicitly struck out by parliamentarians, some scholars have misunderstood the legislative process and reported the phrase as having received Royal assent: Joan Sangster, “Creating Social and Moral Citizens. Defining and Treating Delinquent Boys and Girls in English Canada, 1920-65” in Robert Adamoski, Dorothy E Chum & Robert Menzies, eds, *Contesting Canadian Citizenship. Historical Readings* (Peterborough: Broadview Press Ltd, 2002) 337 at 350; Myers, *supra* note 13 at 181.

³⁴⁵ *House of Commons Debates*, 14th Parl, 3rd Sess (23 June 1924) at 3512. The Senate did not introduce any further amendments; see *Débats du Sénat*, 14th Parl, 3rd Sess (26 juin 1924) at 500; *Débats du Sénat*, 14th Parl, 3rd Sess (27 juin 1924) at 508; *Débats du Sénat*, 14th Parl, 3rd Sess (30 juin 1924) at 515.

³⁴⁶ *Amendment to Juvenile Delinquents Act* (1924), *supra* note 75, s 1 [emphasis added; amended version underlined].

³⁴⁷ Sutherland, *supra* note 6.

Juvenile Delinquents Act (1924), was the result of the lobby of several individuals concerned with child welfare. The Minister of Justice, Hon. Lapointe, explicitly recognized this:

this bill arises entirely out of recommendations made at a conference of the Canadian Council on Child Welfare, held in October last and attended by persons from all parts of Canada, representing the various agencies connected with the enforcement of the *Juvenile Delinquents Act* throughout the Dominion.³⁴⁸ [Hon. Mr. Lapointe, Minister of Justice]

For our analysis, there are two key articles: 1) the regulation of the right to appeal to a Superior Court a decision ordering the transfer of a young person to the adult court, which until then was inexistent,³⁴⁹ and 2) a new circumstance under which a juvenile delinquent could be transferred to the adult court.³⁵⁰

Until 1929 juvenile delinquents did not have a right to appeal a juvenile court judge's decision to a superior court. Juvenile delinquents had to obtain leave to appeal from a Superior Court judge, which was given only where it was "essential in the public interest and for the due administration of justice."³⁵¹ Worth noting, the statute only required the judge to observe one circumstance and not both: "it is essential in the public interest or for the due administration of justice."³⁵² Even though the right to appeal provided by the *Juvenile Delinquents Act* (1929) was a limited appeal, the amendment had several results. The amendment replaced the jurisdiction of the inferior court (Juvenile Delinquents' Court) with that of a superior court (Superior Court of Justice or Queen's Bench). It also ruled out frivolous or routine appeals as the party had to seek leave to appeal. In addition to this, it removed from child witnesses the burden of testifying first in the

³⁴⁸ *House of Commons Debates*, 16th Parl, 3rd Sess (16 May 1929) at 2568-2569 [Hon Mr Lapointe].

³⁴⁹ The right to appeal to a superior court was further regulated in the following years.

³⁵⁰ *Juvenile Delinquents Act* (1929), *supra* note 69, ss 37 and 20(3), respectively.

³⁵¹ *R v Singh (No 2)* (1949), 1 WWR 260, 7 CR 280 (BCSC) at 283; *Joyal*, *supra* note 6.

³⁵² *Juvenile Delinquents Act* (1929), *supra* note 69, s 37(2) [emphasis added].

Juvenile Court and a second time in the District Court during a trial *de novo*.³⁵³ A decision from a superior court judge could be further appealed to the Court of Appeal by a special leave.³⁵⁴

The other major change introduced by the *Juvenile Delinquents Act* (1929) was an amendment to the regulations of wards of the Juvenile Delinquents' Court. This amendment provided juvenile court judges with discretionary power for transferring juvenile offenders to the adult court until they reach 21 years even if these youths had not reoffended.

According to the *Juvenile Delinquents Act* (1908) as originally enacted, juvenile delinquents remained as wards of the juvenile court unless they had reached the age of 21 years or had been discharged as such by order of the court. During the period 1908-1929, a juvenile delinquent could be returned to the court for further proceedings, "including discharge upon parole or release from detention."³⁵⁵ This regulation was amended by the *Juvenile Delinquents Act* (1929) and the power of the Juvenile Delinquents' Court expanded: juvenile court judges were now also allowed to bring juvenile delinquents who were wards of the court and transfer them to the adult court even if they had not reoffended:

[w]here a child has been adjudged to be a juvenile delinquent and whether or not such child has been dealt with in any of the ways provided for in subsection one of this section, the court may at any time, before such juvenile delinquent has reached the age of twenty-one years and unless the Court has otherwise ordered, cause by notice, summons, or warrant, said delinquent to be brought before the court, and the court may then take any action provided for in subsection one of this section, or may make an order with respect to such child under section nine hereof [transfer to the adult court], or may discharge the child on parole or release it from detention [...]³⁵⁶ [*Juvenile Delinquents Act* (1929)]

³⁵³ *Rex v Curtiss* (1948), 7 CR 63, 2 WWR 863 (Alta Dist Ct).

³⁵⁴ *Ibid* at 65.

³⁵⁵ *Juvenile Delinquents Act* (1908), *supra* note 5, s 16(3).

³⁵⁶ *Juvenile Delinquents Act* (1929), *supra* note 69, s 20(3).

Despite this amendment having been very much opposed by scholars because of the serious potential for abuse, neither was it debated in the House of Commons nor in the Senate.³⁵⁷ For instance, this amendment allowed a Juvenile Delinquents' Court who had sent a young person to a reformatory for an indictable offence and was not satisfied by the outcome of the intervention, to send the young person to the adult court even if the young person completed her term in the reformatory. There was as well the question whether a judge could transfer a juvenile delinquent in situations where subsequent offences were not indictable offences. In *R. v. Gray* a juvenile committed an indictable offence, for which he was placed on probation. When he breached the terms of probation, he was brought back to the juvenile court and transferred to criminal courts, even though the second offence was a summary conviction offence.³⁵⁸

According to Wilson, this amendment provided juvenile court judges with discretionary power for transferring juvenile offenders to adult courts until they reached adulthood even though the young person had already been sentenced to another measure. This amendment raised the inquiry whether the court could subject juvenile delinquents to double jeopardy, a procedure prohibited in the adult justice system:

where a child has been adjudged delinquent and sentenced, even when no further offence has been committed, he may be returned to juvenile court, transferred to adult court and charged with the original offence. In the case of *R. v. Chamberlain*, Schroeder J.A., of the Ontario Court of Appeal, considered this problem. He commented that, in the interests of finality, it may be better for a juvenile to be transferred to adult court. Even if the case was dealt with under the provisions of the Act, the action provided for by section 9(1) would remain suspended over the juvenile's head until he attained the age of twenty-one years.³⁵⁹ [Larry Wilson]

³⁵⁷ *House of Commons Debates*, 16th Parl, 3rd Sess (16 May 1929) at 2573; *Debates of the Senate*, 16th Parl, 3rd Sess (28 May 1929) at 299 (respectively).

³⁵⁸ *R v Gray* (1971), 3 WWR 478, 3 CCC (2d) 289 (BCSC).

³⁵⁹ *Wilson*, *supra* note 304 at 227-228.

The discretion provided to juvenile court judges was also opposed by some magistrates on the grounds of possible abuse. Wilson J.A., for the British Columbia Court of Appeal, held that

[t]he powers given to the Juvenile Court Judges by s. 20 are indeed extraordinarily wide. For instance, and this of course is purely an *obiter dictum*, I can see no reason why a judge could not sentence a boy guilty of delinquency to a substantial term in an industrial school and later, on the termination of that incarceration, send him to trial in a criminal court, where he could again be punished for what, under another name, would be the same misconduct. It is to be wondered whether or not Parliament intended to make this consequence possible.³⁶⁰ [Justice Wilson, British Columbia Court of Appeal]

When this bill was discussed in the House of Commons there was a proposal for providing the Attorney General of the province with sole discretion for deciding whether a young person should be transferred to the adult court (sole prosecutorial discretion). According to this proposal, “[i]n such a case where the attorney general thought it advisable he would simply make application to the judge, and the judge would be bound to commit that child by way of indictment.”³⁶¹ Section 7 of the *Juvenile Delinquents Act* (1908)³⁶² - which became section 9 when the *Juvenile Delinquents Act* (1929) was assented to – regulated that the decision to transfer a juvenile delinquent was under the sole discretion of the juvenile judge (sole judicial discretion). This amendment was not supported because it was perceived as being against the welfare principles of the regulation: “[t]he principle upon which the act is based is that even when children break the law they are still children and should be treated as such rather than as adult offenders.”³⁶³ Moreover, upon a parliamentarian’s insistence on loosening the transfer to ordinary courts of juvenile delinquents 14 years and older who had committed indictable offences, the Minister of Justice opposed to this and insisted on maintaining the welfare principles of the statute, and the distinction between punishment and rehabilitation:

³⁶⁰ *Regina v Lalich* (1963), 40 CR 133, 41 WWR 562 (BCCA) at 137.

³⁶¹ *House of Commons Debates*, 16th Parl, 3rd Sess (16 May 1929) at 2572 (Hon Mr McQuarrie).

³⁶² *Juvenile Delinquents Act* (1908), *supra* note 5, s 7.

³⁶³ *House of Commons Debates*, 16th Parl, 3rd Sess (16 May 1929) at 2572 (Hon Mr Lapointe).

[i]f our minds are centred on punishment probably my hon. friend is right; his view is no doubt sound if we are thinking of punishment rather than of reform and improvement. I think however that the judge of the juvenile court is better situated to know whether it is more in the interests of the child and even of society that a boy should not be sent to an ordinary prison. I really cannot see that it would be in any way advisable to change the law.³⁶⁴ [Hon. Mr. Lapointe, Minister of Justice]

While the proposal of sole prosecutorial discretion for transferring young people to the adult court was rejected, the Juvenile Delinquents' Court was given with discretion for transferring wards of the juvenile court to the adult court even though these young people may have already completed their measures.

After the 1924 and 1929 amendments, the *Juvenile Delinquents Act* (1929) remained almost substantially unchanged until its derogation in 1984.³⁶⁵

3.6. Young People cannot be Sentenced to Death: *An Act to amend the Criminal Code (Capital Murder)* (1961)

On 14th July 1976 the death penalty was abolished in Canada, with the exception of certain offences under the *National Defence Act* – these exceptions were abolished in 1998.³⁶⁶ A bill had been passed in 1967 placing a moratorium on the use of the death penalty for capital crimes, except in cases involving the murder of a law enforcement agent.³⁶⁷ However, a major

³⁶⁴ *Ibid.* The philosophy underlying this statement clearly reflects Mead's distinction between the adult and the juvenile justice systems; *Mead*, *supra* note 242 at 594.

³⁶⁵ In 1965 the Department of Justice Committee on Juvenile Delinquency recommended deleting this provision because it infringed the principle against double jeopardy; *1965 Department of Justice Report*, *supra* note 298 at 84, 89. Indeed, a Solicitor General's report published in 1981 considered this provision as exposing the young offender to double jeopardy; Canada. Solicitor General, *Highlights of the Young Offenders Act* (Ottawa: Minister of Supply and Services Canada, 1981) at 13 [*Solicitor General 1981*].

³⁶⁶ *An Act to Amend the National Defence Act and to make consequential amendments to other Acts*, SC 1998, c 35.

³⁶⁷ "Fact Sheet: Capital Punishment in Canada", online: Department of Justice Canada <<http://www.justice.gc.ca>>. The Department of Justice reports that "[b]efore the death penalty was abolished in Canada, 1481 people were sentenced to death, and 710 of these were executed. Of the 710 executed, 697 were men, and 13 were women." *Ibid.* For a historical analysis of the death penalty in Canada (but Newfoundland), see C W Topping, "The Death Penalty in Canada" (1952) 284:1 *The Annals of the American Academy of Political and Social Science* 147.

amendment mostly neglected by scholars was passed some years before.³⁶⁸ Bill C-92, *An Act to amend the Criminal Code (Capital Murder)*, which excepted from the death penalty individuals who were under 18 years old at the time they committed a capital offence, was assented to on 13th July 1961. The consequence of this amendment was that juvenile delinquents transferred to the adult court no longer faced the possibility of being sentenced. Before this statute was passed, young people transferred to the adult court, and found guilty of first or second degree murder were sentenced to death.

The joint report of the House of Commons and the Senate on capital punishment, corporal punishment and lotteries was released in 1956.³⁶⁹ This joint report recommended that the Canadian law be amended so the death penalty for young people 18 years old and younger at the time of the offence did not apply. In other words, according to this joint report young people transferred to the adult court should not be sentenced to capital punishment – a sanction that was still applicable to adult offenders accused of first or second degree murder. The framework of this joint report seems to suggest that it was the image of the young person rather than the theories of punishment that led this Committee to recommend that young people be excluded from the application of capital punishment. It was the offender's age by itself and in itself that was deemed to be a mitigating factor by the adult court (on the request for clemency) and the federal government (political system) when deciding whether to commute the death sentence. The joint report demonstrates that for the Committee the death penalty was still a valuable punishment (in the name of deterrence, retribution, and denunciation), but that the image of the

³⁶⁸ Wilson, *supra* note 304 at 242; Henry, *supra* note 326 at 142.

³⁶⁹ Joint Committee of The Senate and the House of Commons, *Report on Capital Punishment, Corporal Punishment, and Lotteries* (1956).

young person as different and distinct from the image of the adult offender was still quite present. In fact, in the words of the Committee:

[t]he Committee noticed that the invariable practice has been to commute the sentence of all persons under 18 and that, since 1945, the sentence has rarely been executed against a person 20 years and under. The Committee balanced the consideration, that youth must always be a mitigating factor, against the fact that some of the most callous crimes are committed by young offenders showing a total disrespect for life or property. The Committee noted that the United Kingdom Royal Commission on Capital Punishment unanimously favoured the retention of the present United Kingdom law prohibiting the execution of offenders under 18 but was almost equally divided in considering whether the exemption should be raised to 21. The Committee concluded that it would be proper to amend the law to provide that the death penalty should not apply to a person of the age of 18 years or less at the time of the commission of the offence and recommends strongly that, except in extraordinary cases, the present practice of commuting most death sentences passed on persons under 21 years be continued.³⁷⁰ [Joint Committee on Capital Punishment]

The federal government did not follow this recommendation immediately: it was not until 1961 that the statute modifying the Criminal Code and abolishing the death penalty for young offenders was passed.³⁷¹ It is difficult to interpret this inertia. It can be argued that the theories of punishment indifferent to social inclusion (deterrence, denunciation, retribution) predominant in Parliament and in the criminal law system played a leading role in delaying the adoption of the Committee's recommendations. There does not seem to have existed a consensus on this matter. It was not until 1960 that these recommendations were addressed by Parliament. However, it is important to highlight that the theory of rehabilitation was not the leading theory for 1) youths transferred to the adult court for the offence of murder and 2) having been found guilty of murder. The leading theories were deterrence, denunciation, and retribution. This can be seen from the fact that the sanction of capital punishment was substituted for the sanction of life imprisonment. Section 206 of the Criminal Code, as amended, read:

³⁷⁰ *Ibid* at para 76.

³⁷¹ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (23 mai 1961).

206. (1) Every one who commits capital murder is guilty of an indictable offence and shall be sentenced to death.

(2) Every one who commits non-capital murder is guilty of an indictable offence and shall be sentenced to imprisonment for life.

(3) Notwithstanding subsection (1), a person who appears to the court to have been under the age of eighteen years at the time he committed a capital murder shall not be sentenced to death upon conviction therefore but shall be sentenced to imprisonment for life.

(4) For the purposes of Part XX, the sentence of imprisonment for life prescribed by this section is a minimum punishment.³⁷²

The statute used an improper language for referring to the sentence of life imprisonment in subsection 206(4). Life imprisonment is not a mandatory minimum penalty but instead a flat penalty: the tribunal does not have a choice between a minimum and a maximum sentence.³⁷³

This is not a “not less than” disposition, but rather a legal disposition that does not give room for judicial discretion when sentencing.

When *Bill C-92, to amend the Criminal Code (Capital Murder)* was presented by the Minister of Justice in the House of Commons during the second reading, the amendment excepting juvenile delinquents from the death penalty was the last item to be mentioned. The Minister only noted that “personne ne sera exécuté à moins d’avoir atteint un certain âge.”³⁷⁴ As presented above, the Committee had recommended that young people be excluded from the death penalty. For the Committee, young people may have grown up in an environment leading to crime but were still susceptible of reformation; as a result, they should be excluded from execution.³⁷⁵ However, there was an underlying paradox in this reform: while young people were excluded from the death penalty, they had to be sentenced to life imprisonment. Such a sentence was indifferent to whether the young person was susceptible to reformation.

³⁷² *An Act to amend the Criminal Code (Capital Murder)*, SC 1961, c 44, s 2.

³⁷³ M R Machado & A P Pires, “Intervention politique dans la sentence du droit? Fondements culturels de la peine minimale” (2010) 43 *Criminol* 89.

³⁷⁴ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (23 mai 1961) at 5420 (Hon Mr Fulton).

³⁷⁵ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (23 mai 1961) at 5436.

Despite the severity of this disposition, not all parliamentarians shared the perception that juvenile delinquents should not be executed. For instance, Hon. Mr. Caron noted that the death penalty was an effective deterrent to juvenile delinquents from murdering: “[e]t je crois que la peine capitale peut souvent susciter chez les jeunes, à cause de leur famille, une réaction qui les empêcherait d’aller jusqu’à commettre un meurtre.”³⁷⁶ The role that deterrence played for the argument against the abolition of the death penalty for young people is quite clear. Another parliamentarian, Hon. Mr. Paul proposed to reduce the age for a juvenile delinquent to be excluded from the death penalty from younger than 18 years to younger than 17 years – and even younger than 16 years:

[l]e projet de loi édicte qu’une personne âgée de moins de 18 ans ne pourra être accusée du crime de meurtre qualifié. Personnellement, je me demande si, prenant en considération l’évolution de notre jeunesse d’aujourd’hui, et les nombreux crimes dont la « délinquance » juvénile est la cause, si l’âge ne devrait pas être abaissé à 16 ou 17 ans?
J’appuie avec empressement quand même le projet de loi tel qu’il est rédigé. Toutefois, il y aurait peut-être avantage à examiner l’opportunité de substituer l’âge de 16 ou de 17 ans à celui de 18 ans.³⁷⁷
[Hon. Mr. Paul, Member of Parliament]

Hon. Mr. Johnson suggested reducing this age even more since gang-related homicides (mostly committed by older youths) started to be perceived as a dangerous problem - juvenile delinquents older than 14 years old should be executed if found guilty of murder:

[d]e toute façon, il serait nécessaire que l’on diminue l’âge à 14 ans tant pour le meurtre non qualifié que pour le meurtre qualifié. Et la raison en est bien simple, car à notre époque de « délinquance » à l’état aigu, il est à se demander s’il ne deviendrait pas dangereux d’exempter les jeunes de moins de 18 ans des rigueurs de la peine capitale étant donné le nombre de délinquants qui se groupent par bandes de voyous et n’hésitent pas à commettre un meurtre qu’ils ne prennent pas la peine de jauger pour savoir s’il constitue un meurtre qualifié ou un meurtre non qualifié.³⁷⁸ [Hon. Mr. Johnson, Member of Parliament]

³⁷⁶ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (23 mai 1961) at 5436 (Hon Mr Caron).

³⁷⁷ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (23 mai 1961) at 5468 (Hon Mr Paul).

³⁷⁸ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (24 mai 1961) at 5509 (Hon Mr Johnson).

Hon. Mr. Denis also suggested that only juvenile delinquents younger than 14 years should be excluded from execution.³⁷⁹ His argument was that according to the *Criminal Code*, persons between the age of seven and 13 years (both inclusive) could be convicted of an offence if they were competent to know the nature and consequences of their conduct, and to appreciate that it was wrong. If Parliamentarians excluded people younger than 18 years from capital punishment, they would legislate many different age groups for juvenile delinquents. The age groups referred to by Hon. Mr. Denis in 1961 were the following: according to the *Criminal Code*, children younger than seven years were incapable of committing a crime while children between the age of seven and 13 years (both included) could be convicted if they were competent to understand the consequences of their conducts. As well, the *Juvenile Delinquents Act* (1908) provided provinces with discretion for regulating the maximum age for a youth to be considered a juvenile delinquent, which ranged from under 16 to under 18 years of age.

When the Committee in the House of Commons studied this clause, two main topics were discussed: 1) how to probe juvenile delinquents' age in the event that there was no birth certificate,³⁸⁰ and 2) whether the maximum age for a juvenile delinquent to be excluded from execution should be reduced to younger than 16 years.³⁸¹ With regard to the latter, since some provinces had regulated that the definition of juvenile delinquents included children under the age of 16 years, several parliamentarians suggested unifying the age to less than 16 years:

[j]e me demande pourquoi nous aurions une disposition dans ce bill visant à modifier le Code criminel, selon laquelle la peine prévue pour el meurtre qualifié ne sera pas applicable à un enfant qui semble n'avoir pas 18 ans quand nous avons dans nos recueils de lois, la loi sur les jeunes délinquants, aux termes de laquelle un enfant est défini comme étant une personne de moins de 16 ans. Ne

³⁷⁹ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (30 mai 1961) at 5509 (Hon Mr Denis).

³⁸⁰ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (29 mai 1961) at 5754-5755, 5759-5760.

³⁸¹ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (30 mai 1961) at 5778-5781.

conviendrait-il pas d'appliquer les mêmes normes à l'article 206 du Code criminel relatif au meurtre qualifié?³⁸² [Hon. Mr. Johnson, Member of Parliament]

There was also a question regarding how this matter had been regulated in other countries, such as England. According to the Minister of Justice, juvenile delinquents younger than 18 years had been excluded from execution since 1933 in England, and since 1937 in Scotland.³⁸³ In fact, Knell reports that the death penalty for juvenile offenders younger than 16 years of age had been abolished by a statute of Edward VII (The Children Act) in 1908: "Sentence of death shall not be pronounced on or recorded against a child or young person, but in lieu thereof the court shall sentence the child or young person to be detained during His Majesty's pleasure." According to him, the last youth to be sentenced to death (hang) was John Smaills in 1836, who was aged 12 and accused of having robbed another child. He was pardoned and "[a]fter 1836 many of the offences for which children were sentenced to death ceased to be capital ones."³⁸⁴

The Minister of Justice reported that young offenders 20 years old and younger had been rarely executed in Canada since 1945, and that Canadian courts had commuted all the sentences in which people younger than 18 years had been sentenced to death.³⁸⁵ In light of this argument, Hon. Mr. Crestohl suggested increasing the age for exclusion from execution to under 21 years. He noted that only youths 21 years of age could vote in elections because at that age it was understood that they reach maturity. Since youths younger than that age were held to be immature for exercising political rights, they should also benefit from this "immatureness" when sentenced to death and consequently excluded from capital punishment:

³⁸² *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (30 mai 1961) at 5778 (Hon Mr Johnson).

³⁸³ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (30 mai 1961) at 5778 (Hon Mr Fulton).

³⁸⁴ Knell, *supra* note 104 at 202.

³⁸⁵ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (30 mai 1961) at 5779 (Hon Mr Fulton).

[e]n instituant divers groupes d'âge, afin d'établir la culpabilité à l'égard de certaines crimes, par exemple, 7 ans, 14 ans, 16 ans, et maintenant 18 ans, nous combinons un grand nombre de difficultés qu'on crée les différentes limites d'âge. Je me demande alors comment nous allons envisager la question de la maturité des Canadiens, si les gens ne sont pas jugés assez mûrs pour voter avant d'avoir 21 ans. Si l'on veut changer l'âge où une personne peut être mise à mort, je soutiens que les individus devraient pouvoir bénéficier de leur immaturité, pour ainsi dire, jusqu'à ce qu'ils aient 21 ans.³⁸⁶ [Hon. Mr. Crestohl, Member of Parliament]

The debates surrounding the problem of the minimum age limit for the death penalty – younger than 16 vs. younger than 18 years old - clearly show that the main factor for excluding youths younger than 18 years old from the death penalty was centered on the image of young people itself and not on changing representations of the theories of punishment or even the sanctions to apply for punishing offenders (death sentence or life imprisonment). When the amendment for lowering the minimum age limit for the death penalty to younger than 16 years old was voted in committee, it was rejected by 41 to five votes.³⁸⁷ It is possible to argue that this reaction was due to the majority's perception about the difference between youth and adult offenders. The minority's position can probably be explained not only by the fact that they kept in mind the ordinary criminal law justice theories of punishment, but also that they were afraid of a progressive movement towards the full abolition of the death penalty:

[s]i on veut abolir la peine de mort, qu'on le dise donc simplement et qu'on abolisse, au lieu de faire toutes sortes de chichis et de dire à la population qu'on abolit la peine de mort ou bien qu'on ne l'abolit plus, qu'on est pour la protection du meurtrier ou qu'on ne l'est pas assez.³⁸⁸ [Hon. Mr. Denis, Member of Parliament]

No amendment was introduced to this clause and the bill was sent to the Senate for their concurrence. Despite the general principles of this bill having been welcomed in the Senate, the

³⁸⁶ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (30 mai 1961) at 5780 (Hon Mr Crestohl).

³⁸⁷ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (30 mai 1961) at 5781. The parliamentary debates for this period do not indicate the parliamentarians' political caucus.

³⁸⁸ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (30 mai 1961) at 5781 (Hon Mr Denis).

exception for juvenile delinquents from being sentenced to death was also opposed by some senators as they thought punishment for severe crimes would become too lenient:

[a]nother point that bothers me in this bill is that a person charged with and convicted of capital murder, if under the age of 18 years at the time he committed the offence, cannot be sentenced to death.³⁸⁹ [Hon. Mr. Hayden, Senator]

we are making a grave error when we write into the legislation the fact that no person under the age of 18 who has committed a capital murder shall upon conviction be sentenced to death. These young men under 18 are just as mentally capable of understanding the nature of the crime they are about to commit as are many adults in their thirties, forties, and later years.³⁹⁰ [Hon. Mr. Smith, Senator]

[i]t is not time for sentimentality. It is high time to protect society against bad elements that we find in all age groups. It is stupefying to think that young men in their teens are acting as badly and as viciously as professional thugs, and therefore an example should be a minimum age limit for punishment. I think that all who commit murder should suffer capital punishment.³⁹¹ [Hon. Mr. Pouliot, Senator]

It is interesting to see how ardently Hon. Mr. Pouliot (the last quote above) believed in the death penalty as a way of ‘protecting society’:

I must extend my appreciation to my honourable colleagues for listening to my views. My last word is that there is no hurry in passing this bill [minimum age limit for capital offences]. It should be reconsidered because, in the meantime, we have the protection of the Criminal Code as it now is, and it is enough to protect society, provided one is not too lenient with a diehard criminal.³⁹² [Hon. Mr. Pouliot, Senator]

This seems to have been a “shared” feeling within Parliament; the Department of Justice reports that when *Bill C-84* (to abolished the death penalty) was assented to in 1976, it passed by a narrow margin on a free vote.³⁹³

³⁸⁹ *Debates of the Senate*, 24th Parl, 4th Sess (6 June 1961) at 861 (Hon Mr Hayden).

³⁹⁰ *Debates of the Senate*, 24th Parl, 4th Sess (14 June 1961) at 863 (Hon Mr Smith).

³⁹¹ *Debates of the Senate*, 24th Parl, 4th Sess (15 June 1961) at 888 (Hon Mr Pouliot).

³⁹² *Debates of the Senate*, 24th Parl, 4th Sess (15 June 1961) at 890 (Hon Mr Pouliot) [emphasis added].

³⁹³ “Fact Sheet: Capital Punishment in Canada”, online: Department of Justice Canada <<http://www.justice.gc.ca>>.

Why were these reactions both in the House of Commons and in the Senate? The registered vote in the House of Commons reported above shows that very few parliamentarians opposed to excluding youths from the death penalty, yet they were an eloquent minority. This also reflects the situation in the Senate: even though most senators agreed to exclude juvenile delinquents from the death penalty, there was a group of senators who zealously opposed to such an amendment. According to Hon. Mr. Hayden, the death penalty was a deterrent to older youths (16, 17 and 18 years old) and these older youths could still ask the adult court for clemency if convicted of a capital crime:

[i]n my view the fact that they cannot be sentenced to death may make them just a little bit more cocky, daring and reckless, which could result in the death of some innocent person. They might be more careful if the penalty of death were provided for such an offence. In deserving cases let the Minister of Justice exercise clemency [Hon. Mr. Hayden, Senator].³⁹⁴

Indeed, Mr. Pouliot's remarks (quoted above) denote a request for general deterrence – “we have the protection of the Criminal Code as it now is [death penalty for capital offences applicable to all offenders], and it is enough to protect society, provided one is not too lenient with a diehard criminal”- and retribution - “all who commit murder should suffer capital punishment” - as sentencing guidelines for juvenile delinquents accused of severe crimes. Both principles have governed the adult criminal law justice system.

Similarly as Beccaria (1764) did in the eighteenth century for all offenders,³⁹⁵ senators who opposed to the death penalty also mentioned general deterrence as one of the theories of punishment for supporting its abolition at least when sentencing juvenile delinquents:

³⁹⁴ *Debates of the Senate*, 24th Parl, 4th Sess (6 June 1961) at 861 (Hon Mr Hayden).

³⁹⁵ Cesare Beccaria, *An Essay on Crimes and Punishment* (Nabu Press, 2010) [1764].

[o]f course, it is true that young thugs may be guilty of horrible crimes, and also that they may be quite capable of appreciating the heinousness and horrible character of their acts. But what I think the honourable senator overlooked was the fact that life in prison may be a worse penalty than hanging, and a greater deterrent to others of similar age.³⁹⁶ [Hon. Mr. Roebuck, Senator]

This clause was not amended in the Senate either, and the bill received royal assent on 13th July 1961.³⁹⁷

3.7. Summary

The roots of the first Canadian youth criminal law system are strongly embedded in the need to protect children from environmental circumstance that could lead them to crime. As a result, the “abused” child, the “neglected” child, and the “criminal” child all belonged to a category of childhood that could be saved if adequate intervention was put into place. Consequently, the Juvenile Delinquents’ Court and its judges were aimed at protecting the future of the nation: protect the child and you protect society.

However, society and Parliament were very clear that not every child deserved their “protection”. Children 14 years of age and older accused of having committed indictable offences could be transferred to adult courts if the “best interest of the child and the interest of community” so required. This phrase was quite vague and provided much discretion to judges to decide when to transfer a young person to the adult court. The problem was that the adult court was governed by the principles of retribution, deterrence, and denunciation. In such a situation, the principle of rehabilitation lost its central and unique place, and became a theory of punishment among others that the adult court could to apply.

³⁹⁶ *Debates of the Senate*, 24th Parl, 4th Sess (20 June 1961) at 916 (Hon Mr Roebuck).

³⁹⁷ *Débats de la Chambre des Communes*, 24th Parl, 4th Sess (13 juillet 1961) at 8340.

This image of the “child” to be protected led parliamentarians to abrogate the death penalty for youths younger than 18 years of age found guilty of first or second degree murder in 1961. However, and again, parliamentarians drew a distinction between “corrigible” and “incorrigible” youths twice. First, the vocal minority opposed to this amendment argued that some children were capable of horrendous crimes and – as such – should not be protected. Second, the majority substituted the punishment of death penalty with the punishment of life imprisonment – both sort of punishment theoretically opposed to the notion of rehabilitation.

CHAPTER 4

The Emergence of a Political Ambivalence: Between Young and Adult Philosophies of

Punishment

1961-1981

4.1. Introduction

This period is usually perceived as a “progressive” period with regard to the reform ideas in the area of the criminal law justice system. The Canadian Committee on Corrections and the Law Reform Commission of Canada are two of the Canadian federal commissions that criticized the overuse of incarceration and proposed that punishment not be centered on incarceration. The Canadian Committee on Corrections went a step further by adopting a theory of rehabilitation not focused on incarceration.³⁹⁸

This period also presents an ambivalent political reaction with regard to amending the youth criminal law system. This ambivalent reaction is observed in the following areas:

- a new representation of young people according to which they are more similar to adults - young people become or can become adults sooner;
- the notion of “responsibilization” – according to the theories of retribution and deterrence in criminal law, the notion of responsibilization is closely connected to the notion of punishment (and gives less place to rehabilitation). The theories of retribution and deterrence start playing a stronger role in the youth criminal law system;

³⁹⁸ Richard Dubé, *Système de Pensée et Réforme du Droit Criminel: Les Idées Innovatrices du Rapport Ouimet* (1969) (PhD Thesis, Université du Québec à Montréal, 2008) [unpublished].

- the notion of “protection of society”, which starts being understood in the sense of the theories of deterrence and retribution;
- the need to make youth criminal procedures public – this need observes two different requirements: 1) to deter potential abuses within the youth justice system, and 2) to observe the theories of deterrence and denunciation. While *in camera* procedures originally developed as a way of preventing the stigmatization of young people, public procedures will be presented as a requirement for observing due process rights within the youth justice system;
- the requirement that youths be provided with due process rights and that the criminal process observe these rights. The major concern of the youth justice system will become that due process rights be observed and respected. While this concern already existed in the adult justice system, it will move towards the youth justice system slowly.

In this Chapter, I present four federal government reports and one bill that were aimed at restructuring the youth criminal law system during a period that has been characterized as politically and juridically “progressive” with regard to the criminal law reform ideas. As further discussed below, these four reports present an ambivalent position towards young offenders. While they recognize the importance of their rehabilitation, they highlight the relevance of other theories of punishment with regard to the sentencing of the category of youths “who should be dealt with as adults”.

4.2. The Report of the Department of Justice Committee on Juvenile Delinquency (1965)

In 1961 an advisory committee of the Department of Justice was appointed to consider the problem of juvenile delinquency in Canada, to consult with provincial governments on this issue, and to make recommendations for addressing this matter to Parliament and the Government of Canada. The Committee was composed of five members representing four divisions of the Department of Justice: criminal law section, the Royal Canadian Mounted Police, Penitentiaries and Parole. Surprisingly, none of them specialized in juvenile delinquency. This was specially highlighted by the Committee when they noted that “[s]ince none of the Committee members had worked in the juvenile field we were not entirely aware of the complexity of the problems that the subject presents”³⁹⁹ The Committee did not conduct empirical research; rather, it interviewed youth justice practitioners (police, court, and detention centers) and individuals having an interest in juvenile delinquents (academics and organizations). One of the main problems faced by the Committee was the lack of consistent statistical information – youth court procedure and detention. As a result, the Committee deemed parts of the inquiry as “preliminary in nature.”⁴⁰⁰ The Committee researched several domains, among them the transfer of young offenders to the adult court (waiver of jurisdiction), and reported their findings in 1965.

The Committee did not explore the underlying reasons for the existence of a mechanism for transferring young offenders to the adult court. This is an interesting absence given that this period is characterized by a critical opposition to the over-reliance on incarceration in the Canadian criminal law justice system.

³⁹⁹ 1965 *Department of Justice Report*, *supra* note 298 at 4.

⁴⁰⁰ *Ibid* at 3.

The analysis of the waiver of jurisdiction started with the question whether there were “situations in which a child should be tried not in the juvenile court but in the ordinary adult court.”⁴⁰¹ The Committee was affirmative on this; according to them, there were cases where the waiver of jurisdiction to the adult court was necessary:

[w]e are unable to accept the suggestion that there are no cases within the age range of the juvenile court jurisdiction that should not be brought, by one means or another, before the ordinary criminal courts. There are situations in which it is clear that the juvenile court and its powers of disposition are inadequate.⁴⁰² [1965 Department of Justice Report]

The situations mentioned by the Committee were the cases where youths were unresponsive to treatment within the youth criminal law system:

[w]e think it [is] important to recognize, as even enthusiastic proponents of the juvenile court idea have done, that a not inconsiderable percentage of young offenders will continue to prove unresponsive to the rehabilitative efforts of the juvenile court, however extensive may be the resources placed at its disposal. For there are, in fact, problems associated with some juvenile misconduct that are beyond the power of any court to solve.⁴⁰³ [1965 Department of Justice Report]

As further discussed in the second section of this thesis, this explanation was also used by the Montreal Youth Court for justifying the transfer of young people to the adult court. However, this explanation gives rise to more questions than answers: why were these young offenders transferred to the adult court? Did the resources at the adult justice system were different from the resources at the youth justice system? If yes, why were these resources not available in the youth justice system? The belief that young people who are “unresponsive to rehabilitation” in the youth justice system will become “responsive to rehabilitation” in the adult justice system seems to hide other reasons for transferring these youths.

⁴⁰¹ *Ibid* at 40.

⁴⁰² *Ibid* at 78 [emphasis added].

⁴⁰³ *Ibid* at 80 [emphasis added].

The image of the young person as the “future of the Nation” was never strong enough for questioning the underlying reasons for transferring young people to the adult court, and this situation remained unchallenged even during the strong movement opposing to incarceration that developed in the 1960s. The Committee identified some cases that could be transferred, such as juvenile offenders who have proved unresponsive to rehabilitation and dangerous juvenile offenders who constituted a threat to the juvenile justice system: “[d]oubt has been expressed whether the emphasis on individual rehabilitation that characterizes the juvenile court approach could be retained in the face of the challenge that a large number of dangerous offenders would pose to the juvenile court and its attendant services.”⁴⁰⁴ The Committee did not provide any reason for this. It could be argued that the concerns of the Committee were not the young offender's welfare, but rather on the youth justice practitioners' welfare. In light of this, how would a transfer to the adult court modify or treat a dangerous person? Basically, the transfer would *transfer or move* the problem from the youth court and the youth court practitioners to the adult court and the adult court practitioners. On the other hand, the Committee was opposed to waivers of jurisdiction that only focused on the seriousness of the offence. The argument was that this kind of criterion reflected retributive goals rather than “individualized justice”, which the Committee identified as the governing principle of the juvenile justice system:

[t]he problem with any test for waiver that focuses on the character of the offence without more, is that it is especially difficult to reconcile this test with the state objectives of the juvenile court concept. For the idea of “individualized justice”, which lies at the heart of the juvenile court approach, carries with it, as possibly its most essential element, the implication that a child should be dealt with according to his needs, rather than be subjected to punitive measures proportionate to the nature of offence.⁴⁰⁵
[1965 Department of Justice Report]

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Ibid.*

And then the Committee pointed out that the seriousness of an offence by itself, despite being an important factor, was not the only aspect of the offence to take into consideration when assessing a waiver of jurisdiction. Why would the seriousness of the offence be an important factor within the youth justice system? The seriousness of the offence, along with the culpability of the offender, are the traditional criteria relied on by the adult court for sentencing adults. However, the youth justice system does not deem the seriousness of the offence an “important” factor to take into consideration. The Committee specifically rejected the factor of “seriousness of the offence” for excluding a young person from the jurisdiction of the youth court:

[c]ertainly it does not follow from the fact alone that an offence is one that the law regards as particularly heinous, including on occasion even murder or rape, that an offender is not amenable to the treatment approach of the juvenile court, however much public sentiment may be aroused. Indeed, the preferable inference may sometimes be quite the opposite. As the Superior Court of Pennsylvania has observed: “There is as much, if not more, reason for applying the (juvenile court) law so such a child, (one charged with homicide) ... as to one whose delinquency arises from less serious violations.” This is not to say, of course, that the seriousness of the offence is not a matter to be given great weight in considering whether waiver is indicated.⁴⁰⁶ [1965 Department of Justice Report]

The Committee recommended some amendments to the regulation of waiver of jurisdiction. First, more adequate guidance had to be provided to youth court judges since the notions of “the good of the child” and “the interest of the community” were hard concepts to assess.⁴⁰⁷ Indeed, the decision of transferring juvenile delinquents to the adult court should rest exclusively in the responsiveness to rehabilitation: “the determination concerning who is and who is not an appropriate subject to be dealt with in the juvenile court should focus on the question of ‘treatment’ potential”.⁴⁰⁸ Again, the notion of the “incorrigible” child, which originally appeared in the legislation enacted in 1857,⁴⁰⁹ was kept by the Committee as a criterion for drawing a

⁴⁰⁶ *Ibid* at 79 [emphasis added].

⁴⁰⁷ *Ibid*.

⁴⁰⁸ *Ibid* at 80.

⁴⁰⁹ *Prison Inspection Act* (1857), *supra* note 123.

distinction between juvenile delinquents who could be dealt with by the youth court vs. those who had to be transferred to the adult court. With regard to this, it seems that the concern of the Committee was on the welfare of the “theory of rehabilitation” rather than on the “young person's welfare.” This brings a paradox: it seems that the youth justice system was more interested in itself than in the welfare of its clients, the young persons. The Committee also recommended that the waiver of jurisdiction be used as an exceptional measure and that the criterion for transferring to the adult court be the possibility of rehabilitation. Because “amenability to rehabilitation” was the criterion for transferring youths to the adult courts rather than “seriousness of the offence”, the former criterion should apply to both summary conviction and indictable offences.⁴¹⁰ This seems to suggest that the Committee was trying to “purify” the youth justice system from all the youths who did not react well to rehabilitation, rather than to addressing their specific needs. In addition, the Committee recommended that the *Juvenile Delinquents Act* (1908) be amended and that the decision whether to transfer a juvenile delinquent rest exclusively with the youth court judge, although the young person should have a right to insist upon her trial in the adult courts.⁴¹¹ While this situation already existed in the practice of the youth court, the fact that the young person could decide whether to be transferred to the adult court did not exist as a *vested* right for her.

Not only were the Committee's suggestions left aside, but also – as presented in subsequent chapters - the *Young Offenders Act* (1982) and the *Youth Criminal Justice Act* (2002) regulated the waiver of jurisdiction in an opposite direction.

⁴¹⁰ 1965 *Department of Justice Report*, *supra* note 298 at 82-83.

⁴¹¹ *Ibid* at 80, 82 (respectively).

4.3. Bill C-192 The Young Offenders Act (1970)

On 16th November 1970 *Bill C-192* respecting young offenders and to repeal the *Juvenile Delinquents Act* (1908) was introduced in the House of Commons by the Solicitor General, Hon. Mr. McIlraith.⁴¹² *Bill C-192*, an earlier draft of the *Young Offenders Act* (1982), maintained part of the *parens patriae* principle governing the *Juvenile Delinquents Act* (1908). Clause 4 of *Bill C-192* read:

[t]his Act shall be liberally construed to the end that where a young person is found under section 29 to have committed an offence, he will be dealt with as a misdirected and misguided young person requiring help, guidance, encouragement, treatment and supervision and to the end that the care, custody and discipline of that young person will approximate as nearly as may be that which should be given by such a young person's parents.⁴¹³ [*Bill C-192*]

This interpretation clause of the bill was quite similar to the interpretative guidelines of the *Juvenile Delinquents Act* (1908), which remained unchallenged until the *Juvenile Delinquents Act* (1908) was abrogated in 1982.

On the other hand, *Bill C-192* put a strong emphasis on the notion of “accountability” regulating youth offending differently from the *Juvenile Delinquents Act* (1908). *Bill C-192* was a complex piece of legislation that regulated the procedure to observe in the youth court, restricted the notion of “offences” to behaviours prohibited by the *Criminal Code*, eliminated status offences, and required that the youth court observe young offenders’ due process rights.⁴¹⁴ Clause 26(3) did not allow the youth court judge to accept a young offender’s admission of the offence when

⁴¹² *House of Commons Debates*, 28th Parl, 3rd Sess (16 November 1970) at 1171; *Bill C-192, An Act respecting young offenders and to repeal the Juvenile Delinquents Act*, 3rd Sess, 28th Parl, 1970 [*Bill C-192*]. See also Michèle Rivet & Bruno Marceau, “Le tribunal pour jeunes délinquants : sa juridiction et sa procédure” (1975) 53 *La revue du Barreau Canadien* 302.

⁴¹³ *Bill C-192*, *supra* note 412, cl 4.

⁴¹⁴ *Ibid*, cl 2(m), 26.

the youth was accused of an offence for which an adult “if tried by indictment, be sentenced to death or to imprisonment for life as a minimum sentence [...].”⁴¹⁵ There is a mistake in the interpretation of the state of the law back in 1971. As noted in Chapter 3, the 1961 amendment to the *Criminal Code* excluded persons under 18 years from being sentenced to death. As a result, young people found guilty of capital offences could not be sentenced to death.

Bill C-192 also increased to 16 years (inclusive) the maximum age for a person to be considered as having reduced criminal responsibility and allowed provinces to increase this maximum age to 17 years (inclusive) by proclamation.⁴¹⁶ *Bill C-192* defined the notion of “young person” as “a child apparently or actually ten years of age or more, and where the context requires, includes a person who is found, under section 29, to have committed an offence, until he reaches the age of twenty-one years.”⁴¹⁷ As a result, according to *Bill C-192*, the minimum age of criminal responsibility would have been increased from seven years to 10 years. Because the *Juvenile Delinquents Act* (1908) confused the notions of “criminality” and “protection”, it applied to all youths, no matter their age. If a six-year-old child killed a person, he would be dealt with the *Juvenile Delinquents Act* (1908) even though he was not responsible under criminal law. The reason for this is that such behaviour indicated a problem with this child that had to be addressed through protection measures – which, of course, were also regulated by the *Juvenile Delinquents Act* (1908). *Bill C-192* was aimed at excluding this kind of behavior from the criminal law intervention *per se* and having it dealt with through provincial protection legislation.

⁴¹⁵ *Ibid*, cl 26(3).

⁴¹⁶ *Ibid*, cl 2(c).

⁴¹⁷ *Ibid*, cl 2(s).

Bill C-192 introduced some major modifications to the regulation of the waiver of jurisdiction. First, young persons 14 years old and older could be transferred to the adult court regarding both summary conviction and indictable offences.⁴¹⁸ This was an important modification to the existing regulation: as noted above, the *Juvenile Delinquents Court* (1908) only allowed the waiver of jurisdiction regarding indictable offences. In 1965 the Department of Justice Committee on Juvenile Delinquency had recommended the transfer to the adult court of all offences as the ground for a transfer rested exclusively in the responsiveness to rehabilitation rather than in the seriousness of the offence committed; this amendment seemed to be inspired in such an approach. Second, and as well seemingly taking into consideration the recommendations of the 1965 Department of Justice Committee on Juvenile Delinquency, *Bill C-192* required the youth court judge to conduct a preliminary report into the young offender's background and the circumstances of the alleged offence before ordering a transfer to the adult court.⁴¹⁹ Third, the youth court judge had to make a finding that the young person was not "suitable for committal to an institution designed for the care and treatment of young person" for the young person to be transferred to the adult court.⁴²⁰ While this followed the recommendation of the 1965 Department of Justice Committee on Juvenile Delinquency, this was not the only criterion that the youth court judge had to observe. The "protection of the community" was also retained as a factor for deciding whether a young person should be transferred to the adult court. In other words, the youth court judge could also transfer young offenders to the adult court if the safety of the community required "that the young person continue under restraint for a period longer than the judge would be authorized to order if it were found that the young person committed the

⁴¹⁸ *Ibid*, cl 24(1).

⁴¹⁹ *Ibid*, cl 24(2).

⁴²⁰ *Ibid*, cl 24(2)(c)(i).

alleged offence.”⁴²¹ *Bill C-192* stated that if young offenders were accused of having committed capital (indictable) offences, the youth court judge had to transfer them to the adult court once they were 21 years of age. Even though the youth court judge had discretion for dealing with young offenders who had committed capital offences through committal to training school instead of transferring them to the adult court, *Bill C-192* regulated that these young offenders had to be taken to the adult court upon reaching 21 years old. For instance, the youth court could send a 16 year old accused of second-degree murder to a training school. Once she was 21 years old, the youth court had to send her to the adult court, even if she had been sentenced to the training school for five years and had completed her measure. *Bill C-192* read:

30(1)(k) Where he [the youth court judge] finds that the young person committed an offence for which he might, if he had been tried by indictment, have been sentenced to death or to imprisonment for life as a minimum sentence, he may, in his discretion, commit the young person to a training school until he has reached the age of twenty-one years, to be thereupon dealt with under section (4), but no young person shall be so committed unless the judge has first considered a pre-disposition report in respect of the young person.

...

30(4) A person who has been committed to a training school under paragraph (k) of subsection (1) shall, on reaching the age of twenty one years, be taken before a superior court of criminal jurisdiction before which he, but for this Act, might have been indicted under Part XVII of the *Criminal Code*; and that court shall thereupon sentence or otherwise deal with him as if he had then and there been convicted of the offence that he was found to have committed and as if he were thereupon liable to imprisonment for life.⁴²² [*Bill C-192*]

There were two problems with this regulation: first, it automatically sent to the adult court young people accused of having committed serious offences. It seems as if for *Bill C-192* the youth court was not able to deal with serious offences and required the adult court to “double check” the measure that the youth court had adopted. The second problem was that the regulation of this mechanism was contrary to the principle against double jeopardy. In the words of the Barreau

⁴²¹ *Ibid*, cl 24(2)(c)(ii).

⁴²² *Ibid*, cls 30(1)(k), 30(4).

du Québec, this measure was “un déni de justice”.⁴²³ This clause would have allowed the youth and the adult courts to punish young people found guilty of serious offences twice: once in the youth court through committal to training schools and another time in the adult court.⁴²⁴

Finally, the test in *Bill C-192* for transferring young offenders to the adult court retained the test of the “best interest of the young person” and the “best interest of the community”.⁴²⁵

Bill C-192 died on Parliament’s Order Paper when Parliament prorogued, but it was eventually reintroduced after many substantial amendments and enacted as the *Young Offenders Act* in 1982.

4.4. Report of the Solicitor General (1975)

The 1975 Report of the Solicitor General, *Young Persons in Conflict with the Law*, contained considerations and recommendations for legislation to replace the *Juvenile Delinquents Act* (1908), along with a draft bill implementing them.⁴²⁶ The purpose of this report was to review the state of the youth criminal justice system since *Bill C-192* had been tabled in Parliament:

[the purpose of this report was] to undertake a review of the developments that had taken place in the field since Bill C-192. In addition, this Committee was to consider the deliberations of a Federal/Provincial Joint Review Group, which was established at the Conference of Corrections Ministers held in Ottawa in December 1973, for the purpose of reviewing the programs, services and financial implications as well as the legislation involving young persons in conflict with the law in Canada.⁴²⁷ [1975 Report of the Solicitor General]

⁴²³ Barreau du Québec, *Mémoire ou gouvernement fédéral sur le projet de loi concernant les jeunes délinquants et abrogeant l’ancienne loi sur les jeunes délinquants (bill C-192)* (Avril 1971) at 5.

⁴²⁴ Martin Tadman, “A Critical Analysis of Bill C-192: The Young Offenders Act” (1971) 4:2 *Manitoba Law Journal* 372.

⁴²⁵ *Bill C-192*, *supra* note 412, cl 24(2)(d).

⁴²⁶ Canada. Solicitor General, *Young Persons in Conflict with the Law. A Report of the Solicitor General’s Committee on Proposals for new legislation to replace the Juvenile Delinquents Act* (Ottawa: Ministry of the Solicitor General, 1975) [Solicitor General 1975].

⁴²⁷ *Ibid* at 6.

The 1975 Report of the Solicitor General expressed some concerns about punitive theories of punishment “filtrating” the youth court system. The report noted that, despite best intentions, the youth court could not avoid “the development of characteristics similar to the adult criminal process” such as “deterrence, punishment, detention and the resulting stigma.”⁴²⁸ Consequently, the report suggested that the court system be used as a last resort after having exhausted alternative resources (diversion) and that the scope of the youth legislation be limited by excluding non-criminal behaviour from the jurisdiction of the court (status offences).⁴²⁹ Following the Report of the Canadian Committee on Corrections (1969), the report recommended that “the goals of decriminalization and destigmatization should be pursued by excluding from the application of the law conduct which is not sufficiently serious that it could not be dealt with satisfactorily by other social or legal means.”⁴³⁰ The recommendation to decriminalize “status offences” was reiterated the following year by the Law Reform Commission of Canada (1976). According to this Commission, immoral behavior that did not cause harm should be decriminalized. In the case of the youth justice system, this referred to “status offences”:

[n]or is the business of the criminal law the enforcement of morality. Through wrong behaviour is the target, its wrongfulness or immorality is only a necessary condition, not a sufficient one. First, no one can *make* another person moral. The criminal law certainly cannot. Indeed the state and its legal institutions cannot really handle morality. Second, not all individual behaviour concerns the law. The state has no place in some activities of the nation. Its place concerns activities harmful to other individuals and to society itself.⁴³¹ [Law Reform Commission of Canada]

⁴²⁸ *Ibid.* For the notion of stigma and the management of discredited/discreditable personalities, see Erving Goffman, *Stigma. Notes on the Management of Spoiled Identity* (New York, Simon & Schuster, Inc., 1963).

⁴²⁹ *Solicitor General 1975, supra* note 426 at 4.

⁴³⁰ *Ibid* at 18. The reference is to the report released by the Canadian Committee on Corrections: Canada, Canadian Committee on Corrections, *Report of the Canadian Committee on Corrections. Toward Unity: Criminal Justice and Corrections* (Ottawa: The Queen’s Printer, 1969). See *Dubé, supra* note 398.

⁴³¹ Law Reform Commission of Canada, *Report 3. Our Criminal Law* (Ottawa: Minister of Supply and Services Canada, 1976) at 16.

This recommendation was also pursued by the reports of the Solicitor General released the following years (1977 and 1979).

The 1975 Report of the Solicitor General pointed out the need to find a balance between protecting young people and protecting society: “[t]he Committee is conscious of the need to develop measures that will foster an appropriate balance between rights and responsibilities of society and those of young persons in conflict with the law”.⁴³² Worth noting, the report did not refer to the need to “protect young people” as it had done in the past, but rather to the need to “protect young offenders”. This was one of the consequences of the recommendation of drafting legislation that excluded non-criminal law offences: the only youths to be dealt with in the new legislation were “young offenders.” As a result, the notion of “protecting young people” was replaced with the notion of “protecting young offenders”. One of the consequences of this change of semantics is that the notion of “protection of society” was opposed to a very specific category of youths (rather than *all* youths): *those* who had committed criminal offences. In addition to this, the Report presented the notion of “protection of young offenders” as strongly linked to the observance of their substantive and procedural safeguards. In other words, the main concern of the 1975 Report of the Solicitor General with regard to the “protection of young offenders” was the prevention of the disregard of their due process rights like it had happened in the past: “[i]n attempting to fulfill its obligation as a kindly parent and to determine the best interests of the children who come before it, the court has sometimes abridged the rights of these children.”⁴³³ On the other hand, the notion of the “protection of society” was associated to the long-term prevention of crime through young people receiving effective rehabilitative measures:

⁴³² *Ibid* at 7.

⁴³³ *Ibid* at 3.

“[s]ociety may best be protected and levels of crime and delinquency reduced by positively promoting the development and well-being of children.”⁴³⁴

At this point in time it is possible to see two different changes in the relationship between the principles of “protection of young offenders” and “protection of society”. One is a change in the semantics. The need to protect *youths* was restricted to *those* youths in conflict with the law. The second change is a movement in the relationship between the principles of “protection of young offenders” and “protection of society”: while both principles were still related to each other, they were not interrelated any longer. The priority of the “protection of young offender” was the observance of young people’s rights during youth court intervention (rather than their well-being as members of society), and the priority of the “protection of society” was the well-being of these youths as law abiding members of society.

The 1975 Report of the Solicitor General brought many recommendations regarding young offenders’ age groups. For instance, they recommended increasing the minimum age for a child to be held criminally responsible from seven years to under 14 years and to apply the age of 17 years (inclusive) uniformly across Canada as the maximum age for being dealt with by the youth court. Children 13 years and younger who committed criminal offences would be better dealt with under provincial child welfare legislation rather than criminal law legislation.⁴³⁵

Additionally, the 1975 Report of the Solicitor General suggested modifying the regulation of the waiver of jurisdiction. For instance, according to the Report, the minimum age for transferring

⁴³⁴ *Ibid* at 4.

⁴³⁵ *Solicitor General 1975, supra* note 426 at 8-9.

young offenders to the adult court should be 16 years because younger persons were “too young to be subjected to the full weight of the adult criminal justice process.”⁴³⁶ On the other hand, the report of the Canadian Criminology and Corrections Association (1976) recommended retaining 14 years as the minimum age for transferring a young person to the adult court since “some young persons under the age of 16 are beyond the kind of control provided in institutions for young persons and should be transferable to the adult court.”⁴³⁷ The 1975 Report of the Solicitor General was of the opinion that only “the most serious category of indictable offences” should be transferred to the adult court and that summary conviction offences should not be transferred.⁴³⁸ For assessing a transfer to the adult court, the youth court judge had to evaluate “the characteristics of the young person, the circumstances of the alleged offence and the dispositions and services available in the adult system.”⁴³⁹ The 1975 Report of the Solicitor General seems to be pointing out two *subsequent* factors that the youth court had to assess for transferring a young person to the adult court: first, the offence had to be a serious indictable offence; second, the young person accused of a serious indictable offence should not be amenable to rehabilitation. As it is evident from this formulation, the 1975 Report of the Solicitor General restricted the interpretation of the 1965 report of Department of Justice Committee on Juvenile Delinquency with regard to which young people could be transferred to the adult court. Still the former report left the same unanswered question: what was the difference between the youth court and the adult court in terms of rehabilitation for transferring youths “not amenable” to rehabilitation to the latter? Were untreatable youths more prone to rehabilitation in the adult court? The “non-

⁴³⁶ *Ibid* at 38.

⁴³⁷ Canadian Criminology and Corrections Association, *Comments on Young Persons in Conflict with the Law* (1976) at 19.

⁴³⁸ *Solicitor General 1975*, *supra* note 426 at 38.

⁴³⁹ *Ibid*.

amenability” to rehabilitation does not seem to be a sufficient reason for excluding young people from the youth court system.

The recommendation of the 1975 Report of the Solicitor General with regard to the regulation of transfer read:

We recommend

37. that the Youth Court judge should render his or her decision regarding transfer to the adult court after considering a number of factors, including the following:

- (a) the degree of seriousness of the alleged offence and the circumstances in which it was allegedly committed;
- (b) the age, maturity, character and previous history of the young person;
- (c) the comparative adequacy of the dispositions available under the Criminal Code, the new legislation and any other federal act, for dealing with the case;
- (d) the nature of any community services rendered to the young person in the past, whether pursuant to this or any other federal or provincial act and his response to this services;
- (e) the contents of a pre-disposition report; and
- (f) any representations made by or on behalf of the young person or the Attorney General or his agent.⁴⁴⁰ [1975 Report of the Solicitor General]

Finally, the 1975 Report of the Solicitor General also recommended providing young persons 16 years old and older with the right to request the youth court judge to be transferred to adult courts for being tried there by a judge and jury,⁴⁴¹ and the right to appeal a transfer order.⁴⁴²

These recommendations were never adopted, as it was the case regarding the 1965 report of the Department of Justice Committee on Juvenile Delinquency.

⁴⁴⁰ *Ibid.*

⁴⁴¹ *Ibid* at 39.

⁴⁴² *Ibid* at 74.

4.5. Reports of the Solicitor General (1977 and 1979)

The office of the Solicitor General released two more reports recommending new legislation for replacing the *Juvenile Delinquents Act* (1908) in 1977 and 1979. Albeit these reports placed strong emphasis on young offenders' due process rights, they had different perceptions regarding the notion of "protection of society" or *what society needed to be protected from*. For the 1977 Report of the Solicitor General, society had to be protected "from the effects of juvenile crime".⁴⁴³ For the 1979 Report of the Solicitor General, "society must ... be afforded the necessary protection from such illegal behaviour."⁴⁴⁴ Moreover, the latter report considered the notion of "public protection" as a synonym of "protection of society" and deemed these notions to be superior to the needs of "young offenders": "[a]s long as it is consistent with public protection, reliance will be placed on social and community based solutions to the problems of young offenders."⁴⁴⁵ Tanenhaus reports a similar trend in the United States where the youth court started using the transfer provisions for the purpose of "protecting the public":

[t]here was, however, a major change in the rhetoric of waiver. The early judge, at least in Chicago, had discussed waiver as something they were forced to do to ensure the safety of children in reform schools. Now the proponents of judicial waiver openly acknowledged the active participation of judges in transferring hard cases. This frank acknowledgment of intercourt transfer suggested that they also accepted the existence of a class of children who were not amenable to reform within juvenile justice. The threat to public safety, no longer the safety of children in reform schools, had become the justification for waiver.⁴⁴⁶

The legislation introduced by the 1977 Report of the Solicitor General to replace the *Juvenile Delinquents Act* (1908) was eventually assented to as the *Young Offenders Act* (1982) in 1982.

This report, as previous documents did, specifically linked the notion of the "protection of young

⁴⁴³ Canada. Solicitor General. *Highlights of the proposed new legislation for young offenders*. (Ottawa: Ministry of the Solicitor General, 1977) at 2 [*Solicitor General 1977*].

⁴⁴⁴ Canada. Solicitor General. *Legislative Proposals to Replace the Juvenile Delinquents Act* (Ottawa: Ministry of the Solicitor General, 1979) at 2 [*Solicitor General 1979*].

⁴⁴⁵ *Ibid* [emphasis added].

⁴⁴⁶ Tanenhaus, *supra* note 1 at 29 [emphasis added].

offenders” to the observance of their due process rights. However, at the same time, the “due process rights” discourse came along with the need to “protect society” from young offenders: “[i]t is also held that existing procedures fail to protect society and fail to bring about the salutary acceptance of responsibility for delinquent acts that should be part of the educational experience of the young offender.”⁴⁴⁷ Such an approach is even more evident in the preamble to the proposed legislation, where the semantics of “child protection” were almost eliminated. The following quotation clearly shows how the 1977 Report of the Solicitor General associated the notion of “protection of society” with the idea of intentionally inflicting suffering (punishment) on the young offender, as in the adult criminal justice system:

[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 from such illegal behaviour.⁴⁴⁸ [1977 Report of the Solicitor General]

The 1977 Report of the Solicitor General had a different approach to youth offending from the 1975 Report of the Solicitor General. First, while the 1975 report had suggested excluding from criminal responsibility persons younger than 14 years, the 1977 report set the minimum age of criminal responsibility at 12 years.⁴⁴⁹ Second, regarding the transfer of young offenders to the adult court, the 1977 report did not suggest a minimum age for a youth to be transferred to adult courts. Indeed, youths as young as 12 years could be subject to a waiver of jurisdiction: “in cases involving a young person aged 12 or 13, an application by the prosecutors to transfer a young person to the adult court must have the approval of the Attorney General.”⁴⁵⁰ As recommended in the 1975 report, the 1977 report suggested that only serious indictable offences

⁴⁴⁷ *Solicitor General 1977*, *supra* note 443 at 1.

⁴⁴⁸ *Solicitor General 1977*, *supra* note 151 at 12.

⁴⁴⁹ *Ibid* at 5.

⁴⁵⁰ *Ibid* at 9.

could be waived and that written reasons should filed.⁴⁵¹ Similarly, both reports agreed to the factors that had to be evaluated when deciding a transfer: seriousness and circumstances of the offence, characteristics of the young person, dispositions available both in the youth and adult justice systems, and services rendered to the youth in the past.⁴⁵² Finally, alike the 1975 report, young offenders were provided with the right to appeal transfers to adult courts.⁴⁵³

The 1979 Report of the Solicitor General supported all the recommendations and suggestions of the 1977 Report of the Solicitor General. The movement from a “balanced approach” to youth justice – where the protection of the young person led to the protection of society - to an approach centered on the notion of “protection of society” is also present in this report:

the proposed legislation represents [*Young Offenders Act* (1982)] a shift in basic philosophy from a ‘*parens patriae*’, social welfare and treatment oriented approach to juvenile delinquency, to a responsibility model whereby young persons will be held accountable for their behavior. As long as it is consistent with public protection, reliance will be placed on social and community based solutions to the problems of young offenders.⁴⁵⁴

As further discuss in Chapter 5, the *Young Offenders Act* (1982) introduced a new model of youth justice where young offenders should be held accountable for their behaviours. While the *Juvenile Delinquents Act* (1908) also recognized the importance of young people being held accountable for their wrongdoing, the notion of “accountability” in the *Young Offenders Act* (1982) is presented in the 1979 Report of the Solicitor General as a “penal” accountability (punishment) rather than a “social” accountability (assistance).

⁴⁵¹ *Ibid* at 17-18.

⁴⁵² *Ibid*.

⁴⁵³ *Ibid* at 28.

⁴⁵⁴ *Solicitor General 1979, supra* note 444 at 2 [emphasis added].

With regard to the waiver of jurisdiction, the 1979 Report of the Solicitor General increased the minimum age for being transferred to adult courts from 12 years – as suggested in the 1977 Report of the Solicitor General – to 14 years.⁴⁵⁵ Similar to both the 1975 and 1977 reports, the 1979 report called for explicit guidelines and procedures for the transfer of young offenders to adult courts, and detailed factors to be assessed by the youth court judge when considering a transfer.⁴⁵⁶ However, and similar to previous reports, the 1979 Report of the Solicitor General did not give any reason for continuing transferring young offenders to the adult court. Finally, the 1979 report highlighted the importance of due process rights.⁴⁵⁷

4.6. Summary

The analysis of the reports released by the Federal Government during the period 1965-1979 clearly shows that the notion of “protecting the child” for “protecting society” started to disappear during this period. The notion of the “protection of the child” was substituted by the notion of the “protection of the young offender”, and while the latter continued existing as an important principle of the Canadian justice system, it lost its priority or unique place to the “protection of society”. The ambiguous principle of “protection of society” became the paramount principle to govern Canadian justice system, including the youth justice system.⁴⁵⁸ This principle led the way to youth justice legislation characterized by two main components: 1) the observance of due process rights and 2) the severity of the offence (indictable offences) as the main factor to take into consideration for transferring a young person to the adult court.⁴⁵⁹

⁴⁵⁵ *Ibid* at 9.

⁴⁵⁶ *Ibid*.

⁴⁵⁷ *Ibid*.

⁴⁵⁸ “In Canada youth justice legislation has moved from a child welfare orientation to a criminal justice/due process model.” *Beaulieu & Cesaroni, supra* note 116 at 370.

⁴⁵⁹ Marjorie Montgomery Bowker, “Juvenile Court in Retrospect: Seven Decades of History in Alberta (1913-1984) (1986) 24:2 Alberta Law Review 234 at 273.

CHAPTER 5

Welcoming the Harshest Theories of Punishment:

the Enactment of the *Young Offenders Act*

1982-2001

5.1. Introduction

The *Young Offenders Act* (1982), enacted in 1982, introduced a “new” approach to the Canadian youth justice system⁴⁶⁰, but while the qualification of “new” is easy to recognize, it is hard to describe. The approach introduced by this statute to youth justice intervention was different from the tradition of the *Juvenile Delinquents Act* (1908) and moved the youth justice system towards two directions. One direction can be observed as a step forward and the other direction can be observed as step backward, a sort of social regression from the perspective of the philosophy of criminal intervention. At the same time, somehow, the *Young Offenders Act* (1982) kept some line of continuity with the philosophy of the *Juvenile Delinquents Act* (1908) – it is this situation that is hard to describe. For the scope of clarity and comprehension I will first introduce the regulation of the *Young Offenders Act* (1982) and then discuss each aspect in detail.

The *Young Offenders Act* (1982) moved a step forward by 1) introducing due process rights that existed in the adult criminal justice system to the youth criminal justice system and 2) drawing a clear distinction between *criminal offences* and *youth protection measures* as they applied to young people. These youth protection measures can be divided into two major groups: (a) problems of morality and discipline, and (b) problems of distress, parental neglect, parental

⁴⁶⁰ Stephen W Baron & Timothy F Hartnagel, “‘Lock'em up': Attitudes toward Punishing Juvenile Offenders” in Thomas Fleming, Patricia O'Reilly & Barry Clark, eds, *Youth Injustice. Canadian Perspective*, 2d ed (Toronto: Canadian Scholar's Press Inc, 2001) 371.

physical or psychological violence. The old notion of “delinquency”, which used to draw the attention of the youth court, mixed the concepts of youth *criminal behavior* and youth “uncontrolled and immoral behavior”. The term “delinquency” was not as antagonistic as the term “criminal” – which was used to refer to adult offenders. So *delinquency*, as originally understood, was *not* a synonymous of *criminal behavior*. Sutherland presents this previous picture of the word “delinquent” quite clearly:

[t]he words “delinquent child” include: (a) A child who has violated any law of the state or any ordinance or regulation of a subdivision of the state. (b) A child who by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian or custodian. (c) A child who is habitually truant from school or home. (d) A child who habitually so departs himself as to injure or endanger the morals or health of himself or others.⁴⁶¹

Had the *Young Offenders Act* (1982) kept the word “delinquency”, it would have given it a meaning similar to the word “criminal”. The *Young Offenders Act* (1982) excluded from its field of intervention problems of morality and discipline, and problems where children were victims of distress, parental neglect, parental physical or psychological violence. This had, of course, the advantage of establishing additional limits to the intervention of the youth court in the life of a child. As mentioned above, the *Young Offenders Act* (1982) also provided young people with the same procedural guaranties available at the adult court. Even though these movements look like a “step forward” in the youth justice system, it could be suggested that both *approximations* with the adult criminal justice system had their own risks. This risk was that these approximations opened up a space for bringing along the theories of punishment that were used in the adult justice system and that are indifferent to social inclusion (deterrence, denunciation, retribution). The focus of these theories is on the supposed “necessity” of inflicting pain on the

⁴⁶¹ Edwin H Sutherland, *Principles of criminology*, 4th ed (Philadelphia: JB Lippincott, 1947) at 305.

offender for bringing accountability or justice. Thus, it is argued that these approximations increased the risk of *infecting* the youth justice system with the punitive approach of the adult court at least in some circumstances. In the old philosophy of youth intervention of the *Juvenile Delinquents Act* (1908) *all cases* (criminal, indiscipline, and abuse or neglect) were *in need of protection*. After the enactment of the *Young Offenders Act* (1982), what happened to the terms of “delinquency” and “criminal behavior” as they moved closer to each other? Was the “delinquent child” still seen as in “need of protection” or was her need transferred to society (adult theories of punishment)?

The notion of “*parens patriae*” as referred to in the *Juvenile Delinquents Act* (1908) was used to express at least two different philosophical aspects of the Act. One aspect of the notion of “*parens patriae*” expresses the idea that the underlying philosophy was unable to think its own limits. Because the objectives of the *Juvenile Delinquents Act* (1908) were “to protect the young person” and “to hold the young person” for the future of the Nation, the necessity for the *Juvenile Delinquents Act* (1908) to establish its own limits was not perceived as an important issue. A “parent” thinks about his child and establishes his own limits. For instance, he will not think in terms of “death” or “life imprisonment” for punishing his child (unless he decides to abandon the child through the mechanism of transfer). But even the notion of “taking care” has its own limits. Because the doctrine of “*parens patriae*” does not stimulate any limits, it can be seen as having a negative influence on the practice of the youth court intervention. The second aspect of the notion of “*parens patriae*” has a positive insight. It means a concern about the *quality* of the criminal law intervention. With regard to this, the *parens patriae* philosophy *stimulates social inclusion and discourage social exclusion* as a “good” or “appropriate” way of

dealing with criminal behavior. In other words, the doctrine of *parens patriae* goes *against* the philosophies and ideas of the theories of retribution, deterrence and denunciation. When people react *against* the doctrine of *parens patriae*, it is not always clear whether they are reacting only against the negative sense (over intervention) or against both senses. If the reaction is against the latter, one is favoring the punitive and repressive approach of the adult justice system within the youth justice system.

Another difficulty with the history of the juvenile court movement is that, from its beginning, the procedures and measures varied from one jurisdiction to the other.⁴⁶² Some jurisdictions were effectively constructed in their ideal form, others were not. The youth jurisdiction in its ideal form, the “protection of the youth model”, does not admit the transfer of young offenders to the adult court or the imposition of adult sentences to young offenders. Young offenders are protected from the kind of (philosophy of) sentencing that applies to adult offenders. In this sense, the Canadian approach to the youth justice system has *never* adopted the ideal model of youth protection. In other words, *the positive aspect* of the doctrine of *parens patriae* was never fully implemented in the Canadian (youth) criminal legislation. The reaction towards the *negative* aspects of the doctrine of *parens patriae* also included a reaction towards the positive aspects of this doctrine. This is what is difficult to describe and visualize in the *Young Offenders Act* (1982).

The second way the approach of the *Young Offenders Act* (1982) differentiates from the approach of the *Juvenile Delinquents Act* (1908) (the “step backward”) is 1) its ambiguity with regard to the meaning of the term “protection of society” and 2) its revalorization of the

⁴⁶² *Ibid.*

mechanism of transfer. In both situations there is a revalorization of the old theories of punishment that put an emphasis on social exclusion (at least for the most serious offence): retribution, deterrence and denunciation. These theories are, by themselves, completely “negative”. This means that they are completely indifferent to social inclusion and they indicate only one “possible” (idea) of intervention: inflicting suffering on the offender for her offence or in proportion to her offence. The *Young Offenders Act* (1982), as further presented below, presents this ambiguity through the notion of “protection of society”. The *Young Offenders Act* (1982) will eventually emphasize the importance of the provisions of transferring a young person to the adult court. This is a *negative* “new” difference with the *Juvenile Delinquents Act* (1908). While it is new, it is kind of social regression: this new approach is not qualitatively desirable. The *Young Offenders Act* (1982) also *excluded* one important procedural guarantee: the guarantee against public stigmatization during trial. As presented in Chapter 3, the common law under the *Juvenile Delinquents Act* (1908) required that court hearings be held *in camera*. The suppression of this guarantee is frequently presented in a paradoxically and unilateral way, as a kind of “pure positive implementation” to strengthen the procedural guarantees for the young person. The notion of “youth accountability” was partially employed to introduce the most negatives theories of punishment that were conceived for inflicting suffering on adult offenders and the justification of the exposition of the young person to stigmatization during the process (with the exception of the publication of the names of the young people who remained within the youth justice system).

Despite these different “points of demarcation” with the *Juvenile Delinquents Act* (1908), the *Young Offenders Act* (1982) still stressed the importance of the rehabilitation philosophy and the

social inclusion of all young offenders who *remained* within the jurisdiction of the youth court. The ambiguity concerning the notion (and medium) “protection of society” may have provided youth justice operators (crown, defence counsels, judges) with a justification for introducing punitive measures. However, it is still possible to argue that social inclusion and rehabilitation remained the paramount principles of the *Young Offenders Act* (1982) for the young offenders were kept within the youth court jurisdiction.

Trépanier points out that the *Young Offenders Act* (1982) placed, in general, the criminal behaviour committed by the young person as the main factor to consider when sentencing.⁴⁶³ This distinction between the *Young Offenders Act* (1982) and the *Juvenile Delinquents Act* (1908) was also pointed out by Canadian courts:

[t]he 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 s. 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".⁴⁶⁴

This is the case because, if the youth court is dealing with a serious crime or a youth who is in a problematic situation, the youth court must first consider whether it should transfer the case to the adult court. This new situation seems to be stimulated by the fact that, for the *Young Offenders Act* (1982), the notions of “protection of the young person” and “protection of society” were not seen as going “hand in hand” any longer. Thus, what used to be co-existing and

⁴⁶³ Jean 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 at 278-279; Nicholas Bala, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2003) at 66.

⁴⁶⁴ *R v M (SH)* (1987), 78 AR 309, 35 CCC (3d) 515 (CA) at 524.

collaborative objectives under the *Juvenile Delinquents Act* (1908) became objectives that could lead to different interventions (transfer for severe offences / no transfer and more inclusive philosophy of intervention and punishment for other offences).

The *Young Offenders Act* (1982) was designed to meet the standards embodied in the *Canadian Charter of Rights and Freedoms* (1982), which guarantees individuals' rights and freedoms that both the Canadian adult and youth justice systems have to observe.⁴⁶⁵ Because the *Juvenile Delinquents Act* (1908) was incapable of addressing some standard safeguards and guarantees of legal rights, its amendment was a compelling issue.⁴⁶⁶ The Supreme Court of Canada had already recognized some due process rights in the youth justice system back in 1959, such as the right to full answer and defence, the requirement of voluntariness for alleged statements or confessions, the right to fair trials, among others.⁴⁶⁷ Nevertheless, some due process abuses had been highly documented. For instance, in the following transcript, a youth accused of indecent assault in a Juvenile Court had the "bizarre" idea of being represented by a lawyer during the court proceeding. The lawyer (Mr. Crawford) presented himself as the juvenile delinquent's lawyer and sustained a conversation with the juvenile court judge. Not only did the juvenile court judge find his presence an affront to the "court", but as well a "factor" that may influence his decision to transfer the case to the adult court. This, once the *Charter* was enacted, would

⁴⁶⁵ *Canadian Charter on Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; Canada, Solicitor General, *Highlights of the Young Offenders Act* (Ottawa: Queen's Printer, 1982) [*Solicitor General 1982*].

⁴⁶⁶ John H Hylton, "Get Tough or Get Smart? Options for the Canada's youth justice system in the twenty-first century" in Thomas Fleming, Patricia O'Reilly & Barry Clark, eds, *Youth Injustice. Canadian Perspective*, 2d ed (Toronto: Canadian Scholar's Press Inc, 2001) 561; *Bala*, *supra* note 463.

⁴⁶⁷ *R v X*, [1959] SCR 638, 22 DLR (2d) 129.

have been considered an infringement of the defendant's right to make a full answer and defence, and as a result, a violation of section 10(b) of the *Charter*.⁴⁶⁸

Mr. Crawford: Your Honour, might I intercede here?

Judge: Yes...

Mr. Crawford: I haven't had a chance to see this boy yet, there are certain enquires been made to the people who were involved, and before anything is read to him I would like to have the privilege of going into this matter with him.

Judge: Well it's rather a very unusual – the first place is you haven't asked permission to be even here.

Mr. Crawford: I beg your pardon?

Judge: You haven't as yet asked permission to represent this boy.

Mr. Crawford: I just naturally presumed...

Judge: Probably natural presumption on your part Mr. Crawford is just putting it a little bit mildly isn't it?

Mr. Crawford: It may be. If your Honour wishes me not to represent him I will retire.

Judge: You are perfectly welcome to be here but I will be very frank with you, I think you are *gumming the works up* and you are going to make it considerably more difficult than the present situation. As far as I know this – we have dealt with this pretty fully and gone into it pretty fully and this boy as far as I know is equally responsible with the other boys who were involved in this, and the other boys have been dealt with. If we are going to now have a trial for this lad, which I haven't decided we are going to, then I am very much inclined to think I am going to transfer it to the adult court.⁴⁶⁹

This “feeling” that legal counsel was not welcomed within the youth court had already been documented in the 1965 Department of Justice on Juvenile Delinquency report: “[w]e think it important to take note of the fact that there has long been a feeling among many persons involved in juvenile court work that lawyers are unnecessary in the juvenile court, and perhaps even undesirable.”⁴⁷⁰

Nevertheless, this was not a generalized situation: while the Supreme Court of Canada never referred to the right to counsel within the youth court under the *Juvenile Delinquents Act* (1908), there is evidence that some due process guarantees were sometimes followed by lower courts:

⁴⁶⁸ *Charter*, *supra* note 465 at section 10(b): “Everyone has the right on arrest or detention ... (b) to retain and instruct counsel without delay and to be informed of that right.”

⁴⁶⁹ *Regina v X (or GS)*, [1958] 28 CR 100 at 108, 121 CCC 103 (Man CA) (Adamson CJM's dissenting) [emphasis in the original].

⁴⁷⁰ 1965 *Department of Justice Report*, *supra* note 298 at 143.

[i]n contrast to the activism of the American Supreme Court, there were no Supreme Court decisions in Canada clarifying the rights of juvenile delinquents. Furthermore, due process principles were inconsistently applied by the lower courts. For example, while some courts decided that accused juveniles had a right to be heard and make a full defence, a right to cross-examine and bring witnesses, and a right to proof beyond a reasonable doubt, in other cases the courts came to the opposite conclusion.⁴⁷¹

This quote specifically refers to the decisions of the United States Supreme Court in *Kent* (1966), *Gault* (1967) and *Winship* (1970), and their impact on the reform and administration of the juvenile justice system in the United States.⁴⁷² On the other hand, the Supreme Court of Canada may have indirectly affirmed the need for due process safeguards when it recognized the seriousness of a juvenile court “conviction” in 1979.⁴⁷³

This chapter examines the *Young Offenders Act* (1982), and its 1992 and 1995 amendments, which modified the regulation of the mechanism of transfer.⁴⁷⁴ These amendments – among other reforms - increased the circumstances under which a young offender could be transferred to the adult court and have been identified as the most punitive amendments to the *Young Offenders Act* (1982):

‘Getting tough’ on youth crime has become successful fodder for political pundits. Certainly amendments that were made to the YOA in 1986, 1992 and 1995 would seem to support this argument as they largely dealt with increases in the maximum sentence for murder and provisions regarding transfer to the adult court. Some of the most virulent criticisms have come from police organizations or victims’ rights groups and have included: lowering the minimum criminal age of responsibility, lifting the publication ban on the names of young offenders and more frequent and automatic transfers to the adult court.⁴⁷⁵

⁴⁷¹ Janet Bolton et al, “Note. The Young Offenders Act: Principles and Policy – The First Decade in Review” (1992-1993) 38 McGill LJ 939 at 958.

⁴⁷² *Kent v United States*, 383 US 541 (1966) [*Kent*]; *In re Gault*, 387 US 1 (1967) [*Gault*], *In re Winship*, 397 US 358 (1970) [*Winship*].

⁴⁷³ *The Queen v Morris*, [1979] 1 SCR 405, 43 CCC (2d) 129.

⁴⁷⁴ *An Act to amend the Young Offenders Act and the Criminal Code*, SC 1992, c 11, s 2; *An Act to amend the Young Offenders Act and the Criminal Code*, SC 1995, c 19, ss 7-10 (respectively).

⁴⁷⁵ *Beaulieu & Cesaroni*, *supra* note 116 at 377.

Even though the 1986 amendment to the *Young Offenders Act* (1982) introduced a ‘get tough’ approach to youth offending, this amendment did not modify the substance of the regulation of the transfer of young offenders to adult courts. This amendment repealed subsection 16(14) of the *Young Offenders Act* (1982), which gave discretion to the youth court judge to use Form no. 6 annexed to the Act when making a decision with regard to transferring a young person to the adult court.⁴⁷⁶ Because of this, the 1986 amendment is beyond the scope of this study.

5.2. The *Young Offenders Act*

The *Young Offenders Act* (1982) was enacted in 1982 to replace the *Juvenile Delinquents Act* (1908). The purpose of the former Act was to establish a clear distinction between youth criminal offending and youth protection, leaving the regulation of the latter exclusively to the provinces. As presented above, many bills were tabled during the period 1970-1980 to replace the old *Juvenile Delinquents Act* (1908), which was considered archaic in terms of youth justice intervention and due process rights.

The *Young Offenders Act* (1982) introduced a Declaration of Principles to the Act – this was inexistent under the *Juvenile Delinquents Act* (1908). This Declaration of Principles put a strong emphasis on the notions of ‘responsibility’, ‘protection of society’ and ‘punishment’. Not only did this declaration allow the implementation of the theory of deterrence within the youth justice system,⁴⁷⁷ but as well it did not solve the problem about whether the implementation of youth

⁴⁷⁶ *An Act to amend the Young Offenders, the Criminal Code, the Penitentiary Act and the Prisons and Reformatories Act*, SC 1986, c 32, s 12.

⁴⁷⁷ *R v M (JJ)*, [1993] 2 SCR 421, 20 CR (4th) 295 [R v M].

criminal law should give priority to the notion of “child protection” or “protection of society.”⁴⁷⁸

The 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 measure other than judicial proceedings under this Act should be considered for dealing with young persons who have committed offences;

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

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

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

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

(2) This Act shall be liberally construed to the end that young persons will be dealt with in accordance with the principles set out in subsection (1). (section 3) (emphasis added)

The Declaration of Principles in the *Young Offenders Act* (1982) attempted to implement diverse – and sometimes contradictory – principles. The Canadian courts eventually interpreted the references to “responsibility” and “protection of society” as requiring the youth court to take the adult court approach when dealing with young offenders. In other words, Canadian courts recognized the prevalence of the “protection of society” over the “protection of youths”:

[s]ection 3(1) attempts to balance the need to make the young offenders responsible for their crimes while recognizing their vulnerability and special needs. It seeks to chart a course that avoids both the harshness of a pure criminal law approach applied to minors and the paternalistic welfare approach

⁴⁷⁸ Marie Pratte & Rachel Grondin, “Victime ou Accusé : Le jeune et le procès pénal. Présentation” (1996) 27 RGD 173.

that was emphasized in the old *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3. Society must be protected from the violent and criminal acts committed by the young as much as from those committed by adults. The references to responsibility contained in s. 3(1)(a) and to the protection of society in paras. (b), (d) and (f) suggest that a traditional criminal law approach should be taken into account in the sentencing of young offenders. Yet we must approach dispositions imposed on young offenders differently because the needs and requirements of the young are distinct from those of adults.⁴⁷⁹ [Supreme Court of Canada]

5.2.1. Rules of Behavior

The *Young Offenders Act* (1982) brought a significant and ambivalent shift to the youth justice system under the *Juvenile Delinquents Act* (1908). On the one hand, while the *Juvenile Delinquents Act* (1908) dealt with both youth in need of protection and young offenders through the notion of “juvenile delinquency”, the *Young Offenders Act* (1982) only focused on youths who had committed offences contrary to municipal and provincial regulations, and the *Criminal Code*. On the other hand, as presented below, the *Young Offenders Act* (1982) opened the door for the acceptance of the most punitive theories of punishment (deterrence, retribution, and denunciation) for the most serious offences.

The *Young Offenders Act* (1982) brought a “minimum” age and a “maximum” age for a young person to be dealt with the Act. First, with regard to the “minimum” age, the *Juvenile Delinquents Act* (1908) did not regulate a minimum age for a person to be dealt with the youth justice system. As the *Juvenile Delinquents Act* (1908) dealt with cases of youth protection and youth penal misbehaviour altogether through the notion of “delinquency”, the youth justice system had broad jurisdiction for intervening. On the other hand, the *Young Offenders Act* (1982) focused on the notion of youth criminal behaviour, leaving the notion of youth protection to the provinces. Therefore, the *Young Offenders Act* (1982) limited a young person’s minimum age to be dealt with the Act to 12 years old (inclusive). In other words, children younger than 12

⁴⁷⁹ *R v M*, *supra* note 477 at para 14.

years of age were excluded from the youth justice system, even though accused of very severe offences such as first-degree murder. These youths were dealt with provincial protection systems rather than the criminal justice system.

The *Young Offenders Act* (1982) also required provinces to establish the maximum age of 17 years old (inclusive) for a young person to be dealt with the youth justice system. The *Juvenile Delinquents Act* (1908) had provided provinces with discretion for determining a young person's maximum age to be dealt with by the youth justice system. As such, this maximum age varied all over Canada: for instance, while the maximum age in Ontario was 15 years of age (inclusive), the maximum age in Quebec was 17 years of age (inclusive). This meant that a 16 year old youth who committed an offence in Hull (Quebec) was dealt with the youth justice system, while if the same youth had committed the same offence just across the Royal Alexandra Interprovincial Bridge in Ottawa (Ontario), she would have been dealt with the adult justice system. The *Young Offenders Act* (1982) defined the notions of "offence" and "young person" accordingly:

"offence" means an offence created by an Act of Parliament or by any regulation, rule, order, by-law or ordinance made thereunder other than an ordinance of the Yukon Territory or the Northwest Territories; (subsection 2(1))

"young person" means a person who is or, in the absence of evidence to the contrary, appears to be
(a) twelve years of age or more but
(b) under eighteen years of age or, in a province in respect of which a proclamation has been issued under subsection (2) prior to April 1, 1985, under sixteen or seventeen years, whichever age is specified by the proclamation,
and, where the context requires, includes any person who is charged under this Act with having committed an offence while he was a young person or is found guilty of an offence under this Act; (subsection 2(1)).

In addition to this, the *Young Offenders Act* (1982) abrogated the notion of “statutory offences” through which the *Juvenile Delinquents Act* (1908) had regulated behaviors such as vagrancy and sexual misconduct. This meant that youths and adults were criminally liable for the same kinds of offences.

The *Young Offenders Act* (1982) also amended the court system as regulated under the *Juvenile Delinquents Act* (1908). As previously noted, under the *Juvenile Delinquents Act* (1908) provinces had statutory power for establishing a youth court within their jurisdictions. If a province decided to adopt the *Juvenile Delinquents Act* (1908), the province had jurisdiction for organizing the administration of justice within that court. If the province decided not to adopt the *Juvenile Delinquents Act* (1908), young people were dealt with the *Criminal Code*. Nonetheless, the province had to still observe certain provisions in the *Criminal Code* specifically dealing with young people in conflict with the law, such as having youth criminal trials separate and apart from adult criminal trials. While the provincial constitutional jurisdiction regarding the administration of justice has remained unchanged, the *Young Offenders Act* (1982) clearly established that a “youth court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he was a young person and any such person shall be dealt with as provided in this Act” (subsection 5(1)). This meant that young people could only be dealt with through the youth court. So, for a province to deal with youth criminal offending, the province *had* to establish a youth court.

The *Young Offenders Act* (1982) maintained the mechanism through which certain young offenders could be transfer to the adult court. This meant that, in the case of a transfer, the

procedure applicable to these youths and their sentencing would be governed by the adult justice system rather than the youth justice system. Similar to the *Juvenile Delinquents Act* (1908), the *Young Offenders Act* (1982) kept the distinction between *youths who are youths/youths who are adults* for the purpose of criminal law intervention. The latter group, despite still being youths, would be dealt with as adults.

5.2.2. Rules of inclusion in/exclusion from the legislative program of the *Young Offenders Act* (1982)

The notion of rules of inclusion in/exclusion from a legislative program refers to rules that establish the conditions under which a court could deal with and eventually sentence a person. These rules refer to two main areas: maximum age and kind of offence committed.

5.2.2.1. Maximum age

The *Young Offenders Act* (1982) brought into place a system through which all Canadian provinces had to implement the same age limits for a youth to be dealt with the youth justice system. Young people younger than 12 years of age were excluded from the youth justice system no matter the severity of the offence. This group would be dealt with provincial protection systems. Similarly, young people older than 17 years of age were dealt with the adult justice system rather than the youth justice system. Consequently, the youth justice system under the *Young Offenders Act* (1982) only dealt with youths 12 to 17 years of age (both age included).

5.2.2.2. Seriousness of the offence committed

The *Young Offenders Act* (1982) had jurisdiction for dealing with municipal, provincial and criminal offences committed by young people. If the young person committed any of these offences, the youth court would deal with the young person, no matter the severity of the offence. Even if the *Young Offenders Act* (1982) continued the mechanism of transferring young people to the adult court, Parliament did not exclude any offence from the jurisdiction of the youth court. The only procedures through which a youth could be excluded from the youth court were through 1) the transfer of the young person to the adult court (by the youth court itself) or 2) if the youth was a member of the Canadian forces and committed an offence for which the Canadian forces had exclusive disciplinary jurisdiction:

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

5.2.2.3. Transfer of young people to the adult court

Similar to the *Juvenile Delinquents Act* (1908), the *Young Offenders Act* (1982) had a procedure through which young people could be transferred to the adult court. This statute explicitly regulated that the only parties who could request a transfer were 1) the young person or her counsel, or 2) the Attorney General or its agent. Parties could only apply for a transfer before adjudication (subsection 16(1)). Thus, the youth court could not, by its own initiative, start the procedure for transferring a young person. Moreover, as Bala, Lilles and Thompson note, any transfer proceeding initiated by the judge would violate section 11(d) of the *Charter* that

guarantees a right to a fair hearing “by an independent and impartial tribunal.”⁴⁸⁰ The *Juvenile Delinquents Act* (1908) had not regulated this matter and youth court judges used to apply for these transfers, even though by so doing they risked sitting in judgments in their own cases.

The decision of the youth court ordering or rejecting a transfer could be reviewed by a superior court (subsection 16(9)). The decision from the superior court could be appealed to the court of appeal with leave of the court of appeal (subsection 16(10)). The *Young Offenders Act* (1982) explicitly regulated that in the case the youth court judge had refused to make a transfer order in respect to an alleged offence, no further application could be made in respect of that offence.⁴⁸¹

The *Young Offenders Act* (1982) required the youth court to provide the young person with explicit reasons when deciding a transfer to the adult court: “the court is required to state the reasons for its decision to transfer and these reasons will form part of the record of the proceedings in the youth court.”⁴⁸² The *Juvenile Delinquents Act* (1908) had been seriously criticized for its vagueness regarding the procedure to follow, and the *Young Offenders Act* (1982) attempted to address this:

[s]triking, then, is the contrast between s. 9 of the *Juvenile Delinquents Act* and s. 16 of the *Young Offenders Act* – the former being vague as to procedure and guidelines; the latter more explicit, detailed and precise. In most respects the new Act reflects the judicial philosophy which had evolved in waiver hearings under the earlier Act.”⁴⁸³ [Montgomery Bowker]

⁴⁸⁰ Nicholas Bala, Heino Lilles & George Thompson, *Canadian Children’s Law. Cases, Notes and Materials* (Toronto: Butterworths, 1982) at 591.

⁴⁸¹ *Young Offenders Act* (1982), *supra* note 5 at s 16(6).

⁴⁸² *Wilson*, *supra* note 304 at 245; *Young Offenders Act* (1982), *supra* note 5 at s 16(5).

⁴⁸³ *Montgomery Bowker*, *supra* note 304 at 371.

Section 16 of the *Young Offenders Act* (1982) regulated the transfer of a young person to the adult court. There were three conditions for a judge to order a transfer. These conditions will be observed through the distinction between *external (or strictly factual)* and *cognitive* criteria. Two of these conditions are external or strictly factual and do not require any kind of assessment from the youth court; they are “two preliminary preconditions” for the court to order a transfer. The third condition is “cognitive” in the sense that the youth court had to assess the case for taking a decision; it is a question of “substantive matter” that requires judicial reasoning. The distinction between strictly factual conditions/cognitive conditions will be used to observe the legislative practice and – on the second section of this thesis – the judicial practice. These are the three conditions:

- 1) the youth had to be 14 years of age or older;
- 2) the offence had to be an indictable offence; and
- 3) the judge ordering the transfer had to be of the opinion that “in the interest of society and having regard to the needs of the young person, the young person should be proceeded against in adult courts”.

Condition no. 1 is an external or strictly factual condition: the young person was either younger than 14 years of age, or he was 14 years of age or older. The youth court judge only had to check whether the age requirement existed. With regard to condition no. 2, sometimes the Crown has discretion to decide how to prosecute an offence. Most of the offences in the *Criminal Code* are “hybrid offences”. This means that the Crown can prosecute them as “summary conviction” offences or as “indictable” offences. Indictable offences have a more severe regulation than summary conviction offences both in terms of criminal sanction and

eligibility for pardon. So, for the Crown this condition is cognitive but, for the youth court judge this condition is strictly factual or external in the sense that her possibility of decision-making depends on the previous decision taken by the Crown. For condition no. 2 to exist for the youth court judge, the charge had to be filed as an indictable offence or a hybrid offence that the Crown had chosen to prosecute as an indictable offence. While there are compelling questions as to why the Crown may choose to prosecute a specific offence as an indictable offence rather than as a summary conviction offence when a young person is charged, this analysis is beyond the scope of this study.

Condition no. 3 is complex because it relies on the youth court judge's understanding of the expressions "interest of society" and "needs of the young person". For example, if the youth court judge considers that the sanction should be influenced by the principle of "deterrence", "denunciation" or "retribution" to express the "interest of society", her decision will follow one direction. Conversely, if the youth court judge considers that the punishment of the young person should be guided exclusively by the idea of social inclusion (rehabilitation) to express the "interest of society", the decision-making process will take another direction and will reduce or eliminate the use of the mechanism of transfer. It is in this regard that it can be argued that this condition is "cognitive" as it highly depends on someone's ideas about punishment and justice.

On the other hand, and as discussed on the second part of this thesis, there are situations in which young people specifically requested to be transferred to the adult court. These requests were mostly based on procedural or personal reasons. The main procedural reason for a young person to request a transfer to the adult court was that the young person, if sentenced in the adult court,

would have access to parole - which may reduce the time of incarceration. The personal reasons for a youth to request a transfer to the adult court included - in the case of a highly possible guilty verdict – that the youth would not be forced to undertake treatment, the inexistence of rules prohibiting the youth from smoking while in detention, and the existence of “acquaintances” already detained in the adult justice system. In this case, it could be argued that condition no. 3 was “objective” for the youth court judge.

This is how the *Young Offenders Act* (1982) – as enacted in 1982 – regulated and presented the three conditions (identified in the text in between brackets):

[a]t any time after an information is laid against a young person alleged to have, [1] after attaining the age of fourteen years, [2] 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, [3] if the court is of the opinion that, in the interest of society and having regard to the needs of the young person, the young person should be proceeded against in accordance with the law ordinarily applicable to an adult charged with the offence. (subsection 16(1))

The *Young Offenders Act* (1982) also enumerated some of the factors that the youth court judge had to assess for considering an application to transfer a young person to the adult court. These factors included, among others, the seriousness and circumstances of the offence; the young offender’s age, maturity, character, background and recidivism; the availability of treatment and correctional resources.⁴⁸⁴ The youth court judge had to evaluate how these factors affected the “interest of society and having regard to the needs of the young person.”⁴⁸⁵ However, there was

⁴⁸⁴ *Young Offenders Act* (1982), *supra* note 5 at s 16(2).

⁴⁸⁵ *Ibid.*

a catch-22 situation in this procedure:⁴⁸⁶ youth court judges could order psychiatric assessments for determining the “character” of the youth and whether the resources at the youth justice system met the young offender’s needs.⁴⁸⁷ This predisposition report was compulsory – and not discretionary - if the youth court judge was considering transferring the young person to the adult court.⁴⁸⁸ The problem (inconsistency) was that as the young person was at the beginning of the procedure and the presumption of innocence applied, and her testimony to the psychiatric or the psychologist could be used in court, the young person was advised by counsel not to talk about the offence or to negate responsibility. This behaviour, from the psychiatric point of view, was seen as a lack of remorse. As a result, the young person was diagnosed as being intractable within the youth justice system or requiring a longer treatment period than the period provided within the youth court sentence.⁴⁸⁹ Both diagnoses would strongly recommend a youth court judge to order a transfer to the adult court for providing the young person with better treatment. The second problem of the transfer procedure was that, despite the *Young Offenders Act* (1982) having put a strong emphasis on procedural guarantees such as the presumption of innocence, at the end of the day the youth court judge had to *presume* that the young person was guilty for deciding a transfer. In other words, the judge had to assume that every single fact that was alleged by the Crown had been proven beyond a reasonable doubt.⁴⁹⁰ Because of this, Bala, Lilles and Thompson argue that the interests of the young person had been subjugated to the

⁴⁸⁶ Joseph Heller, *Catch-22* (New York: Simon & Schuster Paperbacks, 1955). Indeed, this procedure had a sinister similarity to the ordeal Heller’s fictional hero John Yossarian was faced with when trying to be relieved as a bombardier during the Second War World.

⁴⁸⁷ *Young Offenders Act* (1982), *supra* note 5 at s 13(1)(a).

⁴⁸⁸ *Solicitor General 1981*, *supra* note 365.

⁴⁸⁹ *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 34th Parl, 2nd Sess (18 October 1990) at 4:8 and 4:11 (Mr Robert Nuttall’s witness testimony) and *Debates of the Senate, Standing Senate Committee on Legal and Constitutional Affairs*, 34th Parl, 3rd Sess (18 March 1992) at 10:8 (Mr Robert Nuttall’s witness testimony). See also Rachel Grondin, “Le renvoi des jeunes contrevenants devant une juridiction compétente pour adultes” (1996) 27 RGD 475.

⁴⁹⁰ *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 34th Parl, 2nd Sess (18 October 1990) at 4:8 (Mr Robert Nuttall’s witness testimony); Grondin, *supra* note 489.

interest of society. Indeed, these authors further inquire as to whether, if the interest of society was the most important interest to consider, it was easier to transfer a young offender to ordinary courts under the *Young Offenders Act* (1982) “in the case of serious or reprehensible offences that arouse community anger.”⁴⁹¹ During the debate of the 1992 Amendment to the *Young Offenders Act* (1982) in the House of Commons (further discussed below), Mr. Weagant argued that the only way of addressing these problems was by abolishing the transfer provisions.⁴⁹²

The *Young Offenders Act* (1982) also attempted to regulate how young persons who had been transferred to the adult court on an earlier offence and later appeared in the youth court on a subsequent offence not included in the transfer application were to be dealt with. Montgomery Bowker argues that “[s]ection 16(4) makes it clear that a further [transfer] hearing is not required.”⁴⁹³ Indeed, she notes that even though the *Juvenile Delinquents Act* (1908) was uncertain regarding this matter, by the time this statute was abrogated a judicial practice had emerged of ordering waiver without a full hearing.⁴⁹⁴ Bala, Lilles and Thompson have an opposite opinion. They submit that Parliament had provided youth courts judges with discretion as to this matter:⁴⁹⁵ “the youth court may make a further order [...] without a hearing and without considering a pre-disposition report”.⁴⁹⁶ Still, the authors advert that “[t]his is reasonable if it is assumed that the youth court system has been exhausted and has nothing further to offer the young offender. However, it is possible that this procedure conflicts with the *Charter of Rights*,

⁴⁹¹ Bala, Lilles & Thompson, *supra* note 480 at 610.

⁴⁹² *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 34th Parl, 2nd Sess (18 October 1990) at 4:12 (Mr Weagant’s witness testimony).

⁴⁹³ Montgomery Bowker, *supra* note 304 at 379.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ Bala, Lilles & Thompson, *supra* note 480 at 610.

⁴⁹⁶ *Young Offenders Act* (1982), *supra* note 5 at s 16(4) [emphasis added].

in particular s. 7 and 15.”⁴⁹⁷ A similar concern was expressed by Hon. Robinson in Parliament in 1982.⁴⁹⁸

The wording of the test for transferring young people to the adult court as enacted in 1982 (“interest of society” and “needs of the young person”) remained in force until 1992. The 1992 amendment to the *Young Offenders Act* (1982) identified as part of the “interest of society” the “protection of the public”, replaced the notion of the “needs of the young person” for the notion of the “rehabilitation of the young person”, and gave statutory priority to the notion of “protection of the public” over the notion of “rehabilitation of the young person”. This amendment brought a fourth condition to the transfer of young offenders to adult courts:

- 1) the youth had to be 14 years of age or older;
- 2) the offence had to be an indictable offence;
- 3) the judge ordering the transfer had to consider “the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person”;
- 4) if the objectives mentioned in no. 3 could not be reconciled with the youth remaining within the youth justice system, the “protection of the public” would be paramount and the young person would be transferred to the adult court.

Similar to condition no. 3, condition no. 4 is also cognitive. When would a judge reach the decision that the “rehabilitation of the young person” and the “interest of society” cannot be reconciled by the young person remaining within the youth justice system? Does this mean that these objectives could be reconciled by transferring the young person to the adult court? Could

⁴⁹⁷ Bala, Lilles & Thompson, *supra* note 480 at 610.

⁴⁹⁸ *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 32nd Parl, 1st Sess (31 March 1982) at 71:19 (Hon Mr Robinson).

the public be better protected by having the young person transferred to the adult court? Again, the answer to these questions will depend on the underlying theory of punishment that guided the decision of the youth court. A youth court that strongly held the principle of rehabilitation would be more prone to find that both principles could be reconciled within the youth justice system than a youth court that was influenced by the principles of retribution, deterrence or denunciation. It is important to keep in mind that one of the consequences of transferring a young person to the adult court was her exposure to harsher sentencing than in the youth justice system, this including longer periods of detention. As a result, it seems that the protection of the public would not be afforded by rehabilitating the youth, but rather by segregating the youth from society (neutralization). Overall, the 1992 amendment to the *Young Offenders Act* (1982) opposed the notion of the “interests of society” to the notion of the “rehabilitation of the youth”. As can be perceived, the “interests of society” were strongly focused on the most punitive theories of punishment, which required the judge to “exclude” the young person from the youth justice system for her to be dealt with the adult justice system.

This is how the *Young Offenders Act* (1982) – as amended in 1992 – regulated and presented conditions no. 3 and no. 4 (identified in the text in between brackets):

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), [3] 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 [4] 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. [emphasis added]

A further amendment to the transfer of young people to the adult court was enacted in 1995. This amendment introduced a presumption of transfer for youths 16 and 17 years of age who had committed first- or second-degree murder, attempted murder, manslaughter, or aggravated sexual assault. Unless the youth court judge made an order that the youth person be proceed against in the youth court, the young person would be transferred to the adult court. The youth court judge, for deciding that the young person remain within the youth court, had to consider that this decision was in the interest of society, which included the protection of the public, and for the rehabilitation of the young person. Again, if these two objectives could not be reconciled, the interest of society was paramount and the young person would be transferred to adult courts. It can be argued that the presumption of transfer is a clear stimulus from the negative theories of punishment where the offence committed determines the sanction that the young person will receive, without taking into consideration the individual factors.

For a youth to remain within the youth justice system (note the intentional wording for highlighting the inverse onus provision), there were four conditions to satisfy:

- 1) the youth had to be 16 or 17 years of age or older;
- 2) the offence had to be first- or second- degree murder, attempted murder, manslaughter, or aggravated sexual assault;
- 3) the judge ordering the transfer had to consider “the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person”;
- 4) if the objectives mentioned in no. 3 could be reconciled with the youth remaining within the youth justice system, the young person would not be transferred to adult courts.

Condition no. 1, again, is external or strictly factual: the young person was 16 or 17 years of age. Condition no. 2 could also be considered as an external or strictly factual condition if we take into consideration that the youth court judge used the indictment filed by the Crown for assessing whether the youth should remain within the youth court. In other words, the Crown had certain level of discretion (cognitive condition) for deciding how to describe the alleged offence for the purpose of arguing a transfer. For instance, the Crown could describe an intentional infliction of body harm to a third party as “attempted murder” or as “aggravated assault” (of course, depending on the characterization, the Crown would have different elements of the offence to prove). If the behaviour was described as “attempted murder”, the young person would have to demonstrate why she should remain within the youth court. On the other hand, if the behaviour was described as “aggravated assault”, the Crown would have to demonstrate why the young person should be transferred to the adult court. Conditions no. 3 and 4, as presented above, are cognitive conditions.

This is how the *Young Offenders Act* (1982) – as amended in 1995 – regulated and presented conditions no. 1 to 4 (identified in the text in between brackets):

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 the 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 [2]
(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 [1] 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 the 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 [regular transfer]

(ii) in the case of an application under subsection (1.01), order that the young person be proceeded against in youth court; or [section transcribed above] [presumptive transfer]

(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 [regular transfer]

(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. [section transcribed above] (subsection 16 (1.1)) [emphasis added]

After this amendment, there were two different transfers within the youth justice system. First, the “regular” transfer of youths 14 to 17 years of age accused of having committed indictable offences where the interest of society, which included the protection of the public, and the rehabilitation of the young person could not be reconciled by the youth remaining in the youth court. Second, the “presumptive” transfer that included youths 16 and 17 years of age accused of having committed first- and second-degree murder, attempted murder, manslaughter, and aggravated sexual assault where the judge had not order that they remain within the youth justice system.

Conditions no. 2 (in both kinds of transfers), 3 and 4 challenge our understanding of the underlying principles that differentiate criminal intervention in the case of youth and adults:

- 1) Why did the *Young Offenders Act* (1982) keep the transfer provision originally enacted in the *Juvenile Delinquents Act* (1908)? What were the reasons for the 1992 and 1995 amendments to the statute?
- 2) Why was the severity of the offence included as a statutory condition for transferring a young person to the adult court? Moreover, why did the 1995 amendment made the severity of the offence the principal factor for imposing an inverse onus provision on a young person for her to remain within the youth justice system?
- 3) If the youth court was originally established for the creation of a different kind of criminal intervention, why or under which circumstances can a transfer to the adult court be for the “rehabilitation of the young person” or in “the interests of society”?

The empirical material for the period during which the *Young Offenders Act* (1982) was in force does not contain any example for the proposition that the adult court could reject a decision ordering the transfer of a young person to the adult court. As presented above, the *Young Offenders Act* (1982) allowed both the young person and the Attorney General to request that a decision ordering or rejecting a transfer be reviewed by a superior court. Moreover, the decision of the superior court could be appealed to a court of appeal with leave from the court of appeal. If the transfer decision was not overturned by the superior court or the court of appeal, the adult court “receiving” the young person would not have jurisdiction for rejecting the transfer.

5.2.3. Rules of sanction

It has been argued that the *Young Offenders Act* (1982) moved the Canadian youth justice system closer to the adult criminal law system by “opening” the penal intervention to the different

theories of punishment. The *Juvenile Delinquents Act* (1908), as previously presented, put an emphasis on the rehabilitation of the young person through a criminal intervention different from the adult criminal law system. The youth criminal intervention was assimilated to the kind of treatment a misbehaved youth could receive at home:

[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. [*Juvenile Delinquents Act* (1908), section 31]

On the other hand, while the *Young Offenders Act* (1982) recognized the special needs of youths in conflict with the law and their different penal responsibility (compared to adults), the Act also identified the need to hold young people accountable for their behaviour. It is the discourse of “accountability” as opposed to the discourse of “treatment” that shows the different approach to youth intervention in the *Young Offenders Act* (1982):

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; (paragraph 3(1)(a))

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; (paragraph 3(1)(c))

The *Young Offenders Act* (1982) brought the principle of the “protection of society” as an objective to observe when applying the statute. This principle or any similar formulation was inexistent under the *Juvenile Delinquents Act* (1908):

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; (paragraph 3(1)(b))

In addition to this, the *Young Offenders Act* (1982) explicitly recognized the principle of diversion – which before had been unofficially used by the police through the *Juvenile Delinquents Act* (1908). However, the implementation of diversion was subjected to the observance of the principle of “protection of society”:

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; (paragraph 3(1)(d))

The Declaration of Principles of the *Young Offenders Act* (1982) was amended in 1995. The 1995 amendment included “crime prevention” as a principle to observe when implementing the Act. Furthermore, “protection of society” was recognized as the main principle of the youth justice system. While the amendment recognized the importance of rehabilitating the young person for the purpose of protecting society, it explicitly recognized that the latter was not always possible. This constitutes a fundamental change to the underlying philosophy of the Canadian youth justice system. While in 1908 the notion of “rehabilitating the youth” was understood as *the* way of protecting society, by 1995 “protection of society” was placed as a paramount principle that, “wherever possible” should include the rehabilitation of the young person:

1) Paragraph 3(1)(a) was modified by introducing the notion of “crime prevention” as one of the objectives of the youth 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; [emphasis added]

2) Subsection 3(1)(c.1) was added to subsection 3(1)(c), making the “protection of society” the primary goal of the youth justice system, but this expression gave priority to rehabilitation when this was possible:

3(1)(c.1) the protection of society, which is 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; [emphasis added]

The *Young Offenders Act* (1982), as originally enacted, regulated different sorts of sanctions that the youth court could impose on youths found guilty of offences: fine; restitution; compensation; community service; orders of prohibition, seizure or forfeiture; probation; and detention. In addition to this, the youth court could impose other reasonable and ancillary conditions as it deemed advisable and in the best interests of the young person and the public (paragraph 20(1)(l)).

With regard to detention, the *Young Offenders Act* (1982) regulated two different maximum times of detention: two years and three years. The maximum of three year detention could only apply to youths who had committed offences that if committed by an adult, the adult would have been sentenced to imprisonment for life. The maximum of two year detention applied to any other offences committed by a young person. This explicitly illustrates the implications for a young person to be sentenced in the youth court vs. being sentenced in the adult court. For instance, if a young person 16 years of age was found guilty of first-degree murder within the youth court, the maximum time of imprisonment would be three years. On the other hand, if the

youth was transferred to the adult court and found guilty of the alleged offence, the youth would be sentenced to imprisonment for life (sections 235 of the Criminal Code).

Under these circumstances, it is possible to argue that a youth court judge deciding whether to transfer a young person to the adult court may not necessarily have a punitive state of mind if deciding such a transfer. For instance, in the example presented above, the youth court judge may be of the opinion – based on the pre-decisional report – that three years are not enough for a youth to be fully rehabilitated. In other words, the circumstances underlying the criminal offence presented a “damaged” individual who needed long-term intervention in excess of three years. Under such circumstances, the only available treatment was within the adult court as the detention in the youth court could not exceed three years. The only option available for this youth court judge – even if she wanted to keep the young person within the youth justice system – was to transfer the young person to the adult court for the youth to receive adequate treatment therein.

This is the wording of the provision as originally enacted in the *Young Offenders Act* (1982):

subject to section 24, commit the young person to custody, to be served continuously or intermittently, for a specified period not exceeding
(i) two years from the date of committal, or
(ii) where the young person is found guilty of an offence for which the punishment provided by the Criminal Code or any other Act of Parliament is imprisonment for life, three years from the date of committal; (paragraph 20(1)(k))

The maximum time of imprisonment was amended in 1992 by allowing the youth court judge to add to the maximum three years of committal two years of conditional supervision to be served within the community. Both measures, to a maximum of five years less a day, could only be

applied to a youth found guilty of first- or second-degree murder. Youth found guilty of other offences could be sentenced to imprisonment and community conditional supervision, but both dispositions together could not exceed the maximum of three years.

The maximum time of imprisonment and community conditional supervision were increased again in 1995 for the offences of first- and second-degree murder. If a young person was found guilty of first-degree murder, the young person could serve a disposition of up to ten years. This disposition was comprised of community conditional supervision and imprisonment, and the latter could not exceed six years. Similarly, a young person found guilty of second-degree murder could be sentenced to seven years. The disposition was comprised of community conditional supervision and imprisonment, the latter to a maximum of four years.

As discussed below, Parliamentary debates seem to suggest that the underlying reasons for increasing the maximum time of imprisonment of young people within the youth justice system were punitive in nature. Paradoxically, these amendments may have allowed the youth court judge mentioned above to keep the 16 year old young person accused of first-degree murder within the youth justice system as the *Young Offenders Act* (1982) may now have afforded the youth court judge enough time for the young person to receive adequate rehabilitation within the youth court.

The *Young Offenders Act* (1982), even after these amendments, never regulated minimum sanctions or imprisonment without a maximum period of detention.

5.2.4. Rules of procedure

One of the alleged reasons for replacing the *Juvenile Delinquents Act* (1908) with the *Young Offenders Act* (1982) was the need to provide young people with the same due process rights and procedural guarantees available within the adult justice system. Moreover, the *Charter* was enacted in 1982 bringing into force legal and procedural rights to every person within Canada. As the *Juvenile Delinquents Act* (1908) did not contemplate these rights, its inobservance could be deemed contrary to constitutional guarantees. The *Young Offenders Act* (1982) not only regulated legal and procedural rights, but as well made reference to them as part of the objectives of the Act:

young persons have rights and freedoms in their own right, including those stated in the Canadian Charter of Rights and Freedoms or in the Canadian Bill of Rights, and in particular a right to be heard in the course of, and to participate in, the processes that lead to decisions that affect them, and young persons should have special guarantees of their rights and freedoms; (paragraph 3(1)(e))

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; (paragraph 3(1)(g))

As noted in Chapter 3, the common law rule of the privacy of the procedure developed under the *Juvenile Delinquents Act* (1908). According to this, the youth court judge had discretion to exclude from the court any individual who was not directly involved with the youth justice process. This common law rule disappeared with the enactment of the *Young Offenders Act* (1982). The youth court was open to everybody:⁴⁹⁹ “[t]he youth court hearings have been opened up under the new Act, so that justice will not only be done but also will be seen to be done.”⁵⁰⁰ The notions of “due process” and “accountability” were used to justify the elimination of this *guarantee* against public stigmatization. It seems that the theories of deterrence and

⁴⁹⁹ *Solicitor General 1982, supra* note 465 at 20.

⁵⁰⁰ *Solicitor General 1981, supra* note 365 at 16.

denunciation played a role in this change. In addition, the *Young Offenders Act* (1982) – as previously regulated in the *Juvenile Delinquents Act* (1908) - allowed the publication of information concerning a young person who had been transferred to the adult court and found guilty of the alleged offence. On the other hand, the *Young Offenders Act* (1982) strictly enforced the rule prohibiting the reporting of the identity of the young person involved in the procedure, whether as an accused, a victim, or a witness.⁵⁰¹ While such a prohibition existed under the *Juvenile Delinquents Act* (1908), the Act did not criminalize its inobservance. The *Young Offenders Act* (1982) modified this regulation by criminalizing any reporting of a young person's identity with up to two years imprisonment. It is possible to perceive an ambivalent position with regard to the new way of dealing with young people: even the youth that stays in the youth court is first submitted to a public exposure and then to a stronger protection of her identity. On the other hand, the youth who is transferred to the adult court is, as usual, as exposed as an adult: she is a criminal (and no more a *delinquent* in the old sense of the word).

5.2.5. Rules governing the detention of young offenders

Both the *Juvenile Delinquents Act* (1908) and the *Young Offenders Act* (1982) stated that if a young person was transferred to adult courts and found guilty of an offence therein, the young person would be detained in an adult detention center rather than in a youth detention center. The young person could not apply to the adult or the youth courts for being detained within a youth detention center.

The 1992 Amendment to the *Young Offenders Act* (1982) amended the regulation of the detention of young people transferred to the adult court. According to this amendment, young persons under the age of 18 years who were to be proceeded against in the adult court and were

⁵⁰¹ *Young Offenders Act* (1982), *supra* note 5, s 38(2). *Solicitor General 1981*, *supra* note 365.

to be in custody during the proceedings had to be held separate and apart from detained adults. However, the 1992 Amendment allowed youth court judges to hold these young persons in custody along with adults as long as the young persons “cannot be detained in a place of detention for young persons ... having regard to the best interests of the young person and the safety of others”. The amendment seems to be dealing here with a problem of material resources concerning security centers for youth. The 1992 Amendment also regulated young offenders’ placement upon conviction by ordinary courts. Young offenders successfully transferred to adult courts who were found guilty of the offences could be imprisoned with other young offenders, in a provincial correctional facility for adults, or – where the sentence was for two years or more – in a penitentiary. Courts were provided with diverse factors to evaluate when deciding the place of custody, such as the safety of the young person and the safety of the public – among others.⁵⁰²

The *Convention on the Rights of the Child*, to which Canada is a state party, entered into force in 1990.⁵⁰³ This Convention defines as a child every person younger than 18 year of age and regulates the rights of a child as they apply to different aspects of his life. With regard to the involvement of a child in the criminal process, the Convention specifically requires State Parties that children and adults be detained separately. Canada, while signing this convention, made a specific reservation for this regulation not to apply within its jurisdiction. This is the text of the Convention on the Rights of the Child that applies to the detention of young people:

⁵⁰² *Ibid.* According to the parliamentary debates, the original bill did not regulate custodial matters. This seems to have been added after expert witness’ submissions as to the need to provide clear guidelines as to where young offenders convicted in adult courts had to serve their sentences. *House of Commons Debates. Standing Committee on Justice and Legal Affairs*, 34th Parl, 2nd Sess (30 October 1990) at 7A:3 and 7A:18 (Appendix “C-58/4”: submission of the Canadian Council on Children and Youth).

⁵⁰³ *Convention on the Rights of the Child*, 20 November 1989, UNGA Resolution 44/25, Can TS 1992 No 3 (entered into force on 2 September 1990; entered into force for Canada 12 January 1992).

State Parties shall ensure that: ...

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances ... (subsection 37(c)) [emphasis added]

Canada has been a party to the *International Covenant on Civil and Political Rights* since 1976, which also requires that young offenders be detained apart from adult offenders.⁵⁰⁴ With regard to the Covenant, Canada did not make any reservation while accessing it. As a result, this has been an international commitment that Canada signed to since 1976 to present. In other words, this Covenant has been in force internationally (and applying to Canada) while the Juvenile Delinquents Act (1908) (last period) and the Young Offenders Act (1982) were in force. Article 10(3) of the Covenant reads:

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status. [emphasis added]

As a result, Canada has been required under this Covenant to segregate young offenders from adult offenders since 1976. The inobservance to this requirement could be considered an inobservance of international law that Canada is party to.

5.3. The enactment of the *Young Offenders Act* in Parliament

Having received Royal Assent on 7th July 7 1982, the *Young Offenders Act* (1982) came into force on 2nd April 1984. The provisions referring to the minimum uniform age of less than 18

⁵⁰⁴ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, arts 9-14, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976).

years for people to be dealt with under this Act did not become mandatory until 1st April 1985.⁵⁰⁵ This new Act was to address several problematic issues of the *Juvenile Delinquents Act* (1908), 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 18.⁵⁰⁶ 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 limit under provincial legislation was 17 years.⁵⁰⁷ This was deemed contrary to the equality right embodied in the recently enacted *Charter*: section 15 of the *Charter*, which guarantees that there should be no discrimination based on age, came into force in April 1985.⁵⁰⁸ Consequently, provinces had until 1st April 1985 to adjust the maximum age limit of their youth justice system to less than 18 years. After that date, provinces had to make the necessary changes to their programs and services for coping with the shift in caseloads and population.

The *Young Offenders Act* (1982) excluded the assimilation of illegal misbehavior to indiscipline, neglect or abuse.⁵⁰⁹ From now on, the youth court would only deal with criminal and penal offences committed by youths 12 to 17 years of age inclusive. Behavioral problems, situations of abuse or neglect, and criminal and penal offences committed by children younger than 12 years old were dealt with by provincial welfare and youth protection laws.

⁵⁰⁵ *Solicitor General 1982, supra* note 465 at 3.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ *House of Commons Debates*, 32nd Parl, 1st Sess (29 May 1981) at 10086.

⁵⁰⁸ *Solicitor General 1982, supra* note 465; *Charter, supra* note 465, section 15; *Beaulieu & Cesaroni, supra* note 116.

⁵⁰⁹ Jean Trépanier, “Juvenile Courts after 100 Years: Past and Present Orientations” (1999) 7 *European Journal on Criminal Policy and Research* 303; Julie Desrosiers & Lucie Lemonde, “Les centres de réadaptation : protéger les uns et punir les autres (1869-)” (2000) 34 *RJT* 435.

The draft legislation annexed to the 1977 Solicitor General Report⁵¹⁰ was introduced in Parliament as *Bill C-61, the Young Offenders Bill*, by the (then) Solicitor General (Hon. Bob Kaplan) on 16th February 1981.⁵¹¹ A similar bill (*Bill C-411, An Act to amend the Criminal Code*) had been introduced in the House of Commons on 30th October 1978; however, it died on the Order Paper when Parliament prorogued.⁵¹² For the Solicitor General the notions of “child protection” and “protection of society” were compelling principles, but at the same time, principles that could be in conflict with each other:

[t]he 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.⁵¹³ [Hon. Bob Kaplan, Solicitor General]

We can see this ambiguity when the minister says that “young people should be held *more responsible* for their behavior”. What does this mean? Is the minister equating “being held more responsible” with “receiving more punishment”? Is this an open door for the more repressive theories of punishment such as deterrence, retribution or denunciation? According to the *Juvenile Delinquents Act* (1908), society also had “a right to protection against illegal behavior”. Society never abdicated or lost this right. Consequently, why is the minister insisting on this aspect? What is “new” concerning this point? And, maybe more important, what does it mean an “acceptable balance” between the “needs of young offenders” and the “interests of society”? What is the *difference* between these two aspects? The *Juvenile Delinquents Act* (1908), except

⁵¹⁰ *Solicitor General 1977, supra* note 443.

⁵¹¹ *House of Commons Debates*, 32nd Parl, 1st Sess (16 February 1981) at 7258.

⁵¹² *House of Commons Debates*, 30th Parl, 4th Sess (30 October 1978) at 583.

⁵¹³ *House of Commons Debates*, 32nd Parl, 1st Sess (15 April 1981) at 9308 [emphasis added] (Hon Mr Kaplan). See also *Solicitor General 1981, supra* note 365 at 4.

for the cases of transfer, drew no distinction between these supposed “two interests”. Why does there appear a difference now? And what is the difference? Is it an interest of society in deterrence, denunciation and retribution?

Other parliamentarians held similar positions regarding “protection of society” being the main role of the youth justice system and the new role of the repressive theories of punishment within the youth justice system. In the following extract it is possible to see how the actor relies and implicitly refers to the theory of deterrence, even if the theory is not named:

[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.⁵¹⁴ [Hon. Marcel Lambert, Member of Parliament]

The next extract is not philosophically related to the idea of “protection of society” (in the theories of deterrence and rehabilitation) but rather to the simple idea of retribution (proportionality between crime and punishment). The commercial concept of a “debt” that should be paid is clearly present in the message:

[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.⁵¹⁵ [Hon. Arnold Malone, Member of Parliament]

⁵¹⁴ *House of Commons Debates*, 32nd Parl, 1st Sess (15 May 1981) at 9657 (Hon Mr Marcel Lambert) [emphasis added].

⁵¹⁵ *House of Commons Debates*, 32nd Parl, 1st Sess (29 May 1981) at 10079 (Hon Mr Arnold Malone) [emphasis added].

The next extract also shows how the statement about “accountability” is strictly attached to the idea of (increasing) “punishment” (infliction of pain) conveyed by the more repressive theories of punishment:

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 action.⁵¹⁶ [Hon. Albert Cooper, Member of Parliament]

The *Young Offenders Act* (1982), at least with regard to some aspects, seems to introduce or suggest a break between the notion of “child protection” and the notion of “protection of society”. In other words, what used to be a single unified notion became two opposite notions. The next two extracts from Members of Parliament show that some politicians clearly saw this *break* and took a position against it. For them, the introduction in the youth court of the most repressive aspects of the adult criminal law system was not the best way of protecting society and it was a step back regarding the *Juvenile Delinquents Act* (1908):

[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 evidence is very much to the contrary.⁵¹⁷ [Hon. Svend J. Robinson, Member of Parliament]

⁵¹⁶ *House of Commons Debates*, 32nd Parl, 1st Sess (12 May 1981) at 9521 (Hon Mr Albert Cooper) [emphasis added].

⁵¹⁷ *House of Commons Debates*, 32nd Parl, 1st Sess (15 April 1981) at 9316 (Hon Mr Svend J Robinson) [emphasis added].

According to Beaulieu and Cesaroni, a false sense of insecurity seems to have been one of the reasons for the enactment of the *Young Offenders Act* (1982) and the repeal of the *Juvenile Delinquents Act* (1908):

The impetus for reform in Canada were the many criticisms which lay at the feet of the JDA. Recorded levels of juvenile crime were rising dramatically as the post-war baby boom generation moved into adolescence, the peak years for crime. The Act did not seem to be able to lower rates of delinquent behaviour through rehabilitation, and was increasingly considered too 'soft' on youth crime.⁵¹⁸ [Beaulieu & Cesaroni]

The following extract also shows how a Member of Parliament tried to keep the philosophy of intervention under the *Juvenile Delinquents Act* (1908), which did not create a fictitious break between the notions of “child protection” and “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 goals are not mutually exclusive.”⁵¹⁹ With regard to the *Young Offenders Act* (1982) 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.”⁵²⁰

Bill C-61 was read a third time in the House of Commons on 17th May 1982 and passed to the Senate for its concurrence, where it was first read on 18th May 1982.⁵²¹ During the second reading of the bill, Hon. Joan Neiman presented the purposes of the drafted legislation. One can see that the Act recognized young offenders’ due process rights, but this statement is also a condensed version of the ambiguity in the *Young Offenders Act* (1982) presented above:

⁵¹⁸ Beaulieu & Cesaroni, *supra* note 116 at 373-374.

⁵¹⁹ *House of Commons Debates*, 32nd Parl, 1st Sess (15 May 1981) at 9648.

⁵²⁰ *House of Commons Debates*, 32nd Parl, 1st Sess (15 May 1981) at 9650.

⁵²¹ *House of Commons Debates*, 32nd Parl, 1st Sess (17 May 1982) at 17495; *Debates of the Senate*, 32nd Parl, 1st Sess (18 May 1982) at 4131 (respectively).

[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 wellbeing 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
 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.⁵²²

While the *Young Offenders Act* (1982) introduced some amendments to the regulation of the waiver of jurisdiction - specifically regarding the procedure to follow, most requisites remained unchanged. As regulated in the *Juvenile Delinquents Act* (1908), only young offenders 14 years of age and older could be transferred to adult courts, where they could be sentenced to the severe penalties in the *Criminal Code*. The decision to keep this age limit – and not to increase it to 16 years old – was certainly motivated by the theories of punishment (retribution, deterrence and denunciation). Consequently, not only was the trial held in adult courts where young offenders' privacy was no longer protected, but as well young persons were subjected to the range of sentences available to the adult court, with maximum (and *flat*) sentences of life imprisonment. There was an unsuccessful attempt to increase the minimum age for transferring a young offender to adult courts to 16 years of age. The purpose of such an amendment, as expressed by Mr. Robinson, was to try “to keep as many young people as possible in the youth court system.”⁵²³ On the other hand, the *Young Offenders Act* (1982) explicitly stated that the minimum age of 14 years applied to at the moment of the commission of the offence and not at the moment the young offender was first brought to the youth court. This had not been explicitly

⁵²² *Debates of the Senate*, 32nd Parl, 1st Sess (25 May 1982) at 4181 [emphasis added]. See also *Debates of the Senate*, 32nd Parl, 1st Sess (25 May 1982) at 4184.

⁵²³ *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 32nd Parl, 1st Sess (31 March 1982) at 71:10 (Hon Mr Robinson).

regulated by the *Juvenile Delinquents Act* (1908) and, as a result, some youth court judges transferred young offenders who were 14 years of age or older at the time of their first appearance, despite the offence having been committed when they were younger than 14 years of age.⁵²⁴

The *Young Offenders Act* (1982) kept the same ambiguity that existed in the *Juvenile Delinquents Act* (1908) for the criteria to assess when transferring a young person to the adult court, but reversed the order of presentation of the terms. The *Juvenile Delinquents Act* (1908), for deciding a transfer, required the youth court judge to evaluate “the good of the child and the interest of the community”.⁵²⁵ On the other hand, according to the *Young Offenders Act* (1982) the standard to meet for deciding a transfer was the “the interest of society and having regard to the needs of the young person.” While both ideas are still there (interest of society and appropriate intervention for the youth), now the interest of society appears in the first place without any clarification about this shift. Should we interpret this as a preference for a more repressive philosophy of intervention in the case of serious offences or rather as a simple indication that the interest of society cannot *exclude* the needs of the young person? It seems clear that Parliament left to the criminal law system, in the case of serious offence, the choice between an inclusive (rehabilitation) and an exclusive (retribution, deterrence and denunciation) philosophy of intervention. It is also sure that even in the case of the worst offences the youth court could select an inclusive philosophy of intervention (rehabilitation) if this choice would not jeopardize the interest of society (public security) in the particular case. The youth court could also select the option of transferring a young person to the adult court in the most exceptional

⁵²⁴ Nicholas Bala & Heino Lilles, *La loi sur les jeunes contrevenants annotée* (Ottawa: Solicitor General of Canada, 1982).

⁵²⁵ *Juvenile Delinquents Act* (1908), *supra* note 5, s 7.

circumstances when this was the young person’s choice. The table below shows both criteria side by side:

Reasons for retaining a young person within the youth court or transferring her	
<i>Juvenile Delinquents Act</i> (1908)	<i>Young Offenders Act</i> (1982)
“The good of the child and the interest of the community”	“The interest of society and having regard to the needs of the young person.”

Bala argues that the test under the *Juvenile Delinquents Act* (1908) was a complicated standard to meet because it was difficult to argue that transferring young persons to the adult court could be on their best interest.⁵²⁶ It is submitted that the same argument applies to the standard under the *Young Offenders Act* (1982). If the decision maker focuses her attention on the concept of “the good of the child” or “the needs of the young person”, and if she carefully avoids any rationalization in the sense of convincing herself that “severe punishment is the best approach for the young person” (how can a life sentence be the best approach for a young person for addressing his needs?), both wordings have the same strength (and the same weakness) as a barrier for transferring and for applying the punitive theories of punishment. Of course, it is possible to say that the wording of the test for transfer in the *Young Offenders Act* (1982) was more ambiguous or more open to “harsher treatment” than the wording of the test in the *Juvenile Delinquents Act* (1908). However, it is also possible to argue that the former only tried to influence the youth court towards this direction without intending to impose this explicitly through a statutory mandate.

⁵²⁶ *Debates of the Senate. Standing Senate Committee on Legal and Constitutional Affairs*, 34th 3rd Sess (31 March 1992) at 12:36 (Mr Nicholas Bala’s witness testimony).

During the debate in the House of Commons, a Member of Parliament pointed out the contradiction that existed between both notions and that transferring a young person to the adult court was not considering his *needs*. This objection shows that this reference can be understood as a barrier for transfer empirically. The point he made was that a transfer to the adult court could never be done in the name of the young person's needs. In his view, a young person could be transferred to the adult court only if the decision-maker focused on the “interest of society” (if one understands the interest of society as referring to the theories of deterrence, retribution or denunciation and not to the theory of rehabilitation) rather than the young person's needs. In his view, this wording was contradictory. How could a young person “need” an adult court that can (or shall) sentence him to life imprisonment? At the same time, this wording of the test for the transfer appears as a contradiction only because the Member of Parliament dismissed at least two other possibilities of understanding it. First, “the interest of society” may be understood as only referring to the rehabilitation of the youth (without endangering public security) and without reference to harsh sentencing. If this wording is given this meaning, there is no contradiction between both concepts and the mechanism of transfer should be eliminated. It can be argued that a limited transfer may remain only in the circumstances where there are problems of resources in the youth correctional system or when it is the young person who requests being transferred and this seems reasonable to the court. Second, even if the decision-maker understands the notion of “the interest of society” taking into consideration the most repressive theories of punishment (retribution, deterrence, denunciation), the second part of the statement (“having regard to the needs of the young person”) may not be there for “justifying” the transfer but rather for limiting the cases to be transferred to the adult court. For these reasons, there is not necessarily a contradiction in this statement. For this statement to be contradictory, one has to identify the

interest of society with repression and not read the “needs of the young people” as a barrier or limit for a transfer decision. This is how Hon. Mr. Kilgour argued that there was a contradiction in the statement and that the needs of the young person could never direct the youth court judge to transfer him to the adult court:

You cannot choose the interest of society, I suggest to you, and the needs of the young person. When you use totally contradictory terms like this, you compel the court, in my experience, to choose between the needs of society and the needs of the young person. It is self-evident nonsense to say it is the needs of the young person to go to adult court.⁵²⁷ [Hon. Mr. Kilgour, Member of Parliament]

The Solicitor General agreed with the fact that (usually) a young person could not be transferred to the adult court for addressing his needs, but he also noted that it took the Government over 13 years for developing the wording of section 16 (regulation of transfer) and that he did not think that they “should allow the perceived inadequacy of the language to deter us from proceedings.”⁵²⁸ Actually, as discussed above, this was less of a question of inadequacy of the language than a question of conflicting philosophies of criminal intervention. If one wants to increase repression, the wording also appears contradictory; on the other hand, if one does not want to abolish the transfer proceedings but only strictly limit the cases where a transfer to the adult court should be allowed, the wording is neither contradictory nor inadequate.

Hon. Mr. Kilgour was not interested in preventing youths from been transferred to the adult court. On the contrary, his aim was to strengthen the principle of “protection of society.” While the bill was being discussed at the Standing Committee on Justice and Legal Affairs, Hon. Mr. Kilgour unsuccessfully proposed an amendment to the regulation of the mechanism of transfer in

⁵²⁷ *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 32nd Parl, 1st Sess (9 February 1982) at 61:35-36 (Hon Mr Kilgour).

⁵²⁸ *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 32nd Parl, 1st Sess (9 February 1982) at 61:36 (Hon Mr Kaplan) [emphasis added].

the *Young Offenders Act* (1982) aimed at enforcing the priority of the “protection of society” over the “needs of the young person.” According to him, the test to apply when deciding to transfer a young person to the adult court should first answer the question whether such a decision was in “the interest of society”. In other words, the youth court should ask whether the transfer was for the “interest of society” rather than trying to balance principles that – according to his reading of the statement – were contradictory and would not allow the transfer of a young person to the adult court. It can be argued that this motion was punitive in nature: only by reading the “interest of society” as including the most punitive theories of punishment could Hon. Mr. Kilgour argue that the statement was contradictory. These were his arguments during the debate of the bill in committee:

[o]ur motion would simply try to give pre-eminence – as it is clear, I think – primarily to the protection of society. That is, I guess, the balancing interest, the one to which we should pay the most attention, especially in 1982 and presumably for the next 10 years.⁵²⁹ [Hon. Kilgour, Member of Parliament]

The notion of “balancing interest”, referred above by Hon. Mr. Kilgour, is a curious statement. First, the notion of “balancing interests” necessarily assumes (or presupposes) that we are dealing with opposing interests. In other words, there is a presumption that the interest of society cannot be fully fulfilled by punishment that gives priority to rehabilitation. Second, the amendment proposed by Hon. Mr. Kilgour is contrary to the idea of “balancing the (presupposed opposite) interest”: Hon. Mr. Kilgour’s intention was to give priority to repression over rehabilitation - *de-balancing the interests*. Moreover, Hon. Mr. Kilgour was quite concerned that

⁵²⁹ *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 32nd Parl, 1st Sess (31 March 1982) at 71:14 (Hon Mr Kilgour).

if the statute did not state this explicitly, some youth court judges would always find a way to leave the protection of society aside and only focus on the needs of the young person:

there are judges who are going to find more often – or perhaps all the time – on the side of the interests of the juvenile. This is never, I suggest, or virtually never, to send him or her to adult court. There are other judges who, as we all know, tend to think the protection of society is the most important factor.

What you are doing, I suggest, with your amendment is just simply saying to the judges, who we might call, in rough language, the doves.... The doves are always going to find they will not waive.⁵³⁰ [Hon. Kilgour, Member of Parliament]

Hon. Mr. Kilgour observed the decisions of the youth court drawing a distinction between dove/falcon and considered the youth court judges who did not waive young people to the adult court as “doves”. Of course, by drawing this distinction Hon. Mr. Kilgour could not see that we are probably here in the presence of two opposite philosophical conceptions of the meaning of the notion of “in the interest of society”.

5.4. *An Act to amend the Young Offenders Act and the Criminal Code (1992)*⁵³¹

On 9th April 1992 Parliament enacted the *1992 Amendment to the Young Offenders Act (1982)*. Originally introduced in the House of Commons on 20th December 1989 as *Bill C-58, An Act to amend the Young Offenders Act and the Criminal Code*, this bill was aimed at reviewing the *Young Offenders Act (1982)*.⁵³² The bill died when Parliament prorogued in 1991, but it was reinstated at the report stage the following parliamentary session as *Bill C-12* and enacted shortly thereafter.⁵³³

⁵³⁰ *Ibid* [emphasis added].

⁵³¹ *An Act to amend the Young Offenders Act and the Criminal Code*, SC 1992, c 11, s 2 [1992 Amendment].

⁵³² *House of Commons Debates*, 34th Parl, 2nd Sess (30 May 1990).

⁵³³ *House of Commons Debates*, 34th Parl, 3rd Sess (29 May 1991) at 778.

According to Hon. Mr. Nicholson, the amendment to the transfer of young offenders to the adult court in the *Young Offenders Act* (1982) seems to have originated in a meeting of minister responsible for juvenile justice held on 9th and 10th June 1989 at which all provincial attorney generals and the Minister of Justice for the Northwest Territories unanimously endorsed a resolution that the *Young Offenders Act* be amended in a number of ways, including amendments to the transfer provisions.⁵³⁴ Indeed, it seems that amending the regulation of the transfer provision was one of the main issues at the heart of that meeting:

Bill C-58 addresses the three aspects of the act which lie at the heart of the concerns identified in our consultations. The first is the test to be applied by the court in determining whether to transfer a case to adult court. The second is the sentence available in youth court for youth convicted of murder. The third is the sentence and parole eligibility period for youth who have been transferred to adult court and convicted of murder.⁵³⁵ [Hon. Mr. Nicholson, Member of Parliament]

This bill modified the standard to apply when deciding the transfer to the adult court of a young person alleged to have committed indictable offences by introducing a two-part test. At the first stage of the test the youth court judge had to consider “the interest of society”, which included the objectives of “protection of the public” and “rehabilitation of the offender.” The youth court judge had to assess whether both objectives could be reconciled by keeping the young offender in youth courts. Neither did the *Young Offenders Act* (1982) nor the *1992 Amendment* define the expression “protection of the public” or state the philosophies (theories) of punishment underlying it. From its textual meaning it is possible to argue that the expression does not include deterrence, retribution or denunciation, but only the eventual dangerousness of the young person combined with the absence of security resources in the youth correctional facilities. At the second stage of the test, if both objectives *could not* be reconciled, the youth court judge had

⁵³⁴ *House of Commons Debates*, 34th Parl, 2nd Sess (30 May 1990) at 12067 (Hon Nicholson).

⁵³⁵ *Ibid* [emphasis added].

to give priority to the “protection of the public” and decide whether a transfer to adult courts was in the best interest of society. This would be a very exceptional situation if the reasons provided by the theories of retribution, denunciation or deterrence are excluded. In other words, the *1992 Amendment* expressly confirmed that in the case of dangerous young people and in the absence of correctional facilities in the youth justice system “protection of the public” (as opposed to deterrence, retribution and denunciation theories) was the paramount objective within the youth justice system:

Where the court determines that these objectives [protection to the public and rehabilitation of the young person] cannot be so reconciled, Bill C-58 states that the protection of the public is paramount and the youth’s case shall be transferred.

This test, while remaining consistent with the principles of the act, provides clear direction for the court and states that ultimately the protection of the public is paramount.⁵³⁶ [Hon. Mr. Nicholson, Member of Parliament]

The major problem with the *1992 Amendment* was at the level of its understanding: the decision-maker (youth court judge) was required to draw a distinction between *interest/protection of society* and also between *interest of society/protection of the public*. The expression “interest” is larger than the expression “protection” and includes *both* objectives: “protection of the public” *and* “rehabilitation of the young person”. Society has an interest in protecting the public *and* in rehabilitating the young offender. If both objectives can be accomplished *within* the youth court and the youth correctional facilities, there will be absolute no reason for transferring the young person to the adult court. The other usual expression “protection of society” can be understood either as equivalent of “interest of society” or as equivalent of “protection of the public”. In the first sense, both the *Juvenile Delinquents Act* (1908) and the *Young Offenders Act* (1982) kept the same general philosophy of intervention, a philosophy that excluded the possibility of

⁵³⁶ *Ibid* [emphasis added].

“severe punishment” with the sole purpose of deterring the young person, denouncing his behaviour, or making him suffer in proportion to his offence. In the second sense, the expression “protection of society” takes the same sense it usually has in the adult justice system and becomes far more repressive. It is in the latter sense, and only when the expression “protection of society” replaces the expression “interest of society” that this two-step test became quite problematic: the standard for transfer remained “dependant on the court’s view of how the ‘protection of society’ [was] best achieved”.⁵³⁷

This problem of comprehension is important because, as Anthony Doob reports, not only judges do not agree as to the meaning of “interest of society”, but some of them do not know what this notion means: “[a]s one judge pointed out, we have no idea – or at least judges do not agree – of what the words ‘in the interest of society’ mean.”⁵³⁸ Some of them may not have seen that this expression, in this amendment, *included* rehabilitation and *excluded* retribution, deterrence and denunciation as a guide for deciding a transfer to the adult court. Bala and Lilles report that provincial jurisdiction most focused on rehabilitation understood that the notion of “protection of society” was best achieved by keeping the young offender within the jurisdiction of the youth court.⁵³⁹ In this case, the expression “protection of society” was a synonym of the expression “interest of society” in the *1992 Amendment to the Young Offenders Act* (1982). On the other hand, in provincial jurisdictions where the notion of “protection of society” was tainted by the principles of retribution, deterrence and denunciation, the “protection of society” required the

⁵³⁷ Bolton *et al*, *supra* note 471 at 1019.

⁵³⁸ Anthony Doob, “Dispositions under the *Young Offenders Act*: Issues Without Answers?” in Lucien A Beaulieu, ed, *Young Offenders Dispositions. Perspectives on Principles and Practice* (Toronto: Wall & Emerson, 1988) 193 at 219.

⁵³⁹ Nicholas Bala & Heino Lilles, “Transfer to Adult Court: The Most Serious Disposition” in Lucien A Beaulieu, ed, *Young Offenders Dispositions. Perspectives on Principles and Practice* (Toronto: Wall & Emerson, 1988) 119 at 140; Nicholas Bala, “What’s wrong with the YOA Bashing? What’s wrong with the YOA? Recognizing the Limits of the Law” (1999) 36:3 Can J Crim 247.

youth court judge to transfer the young person to adult courts. If Bala and Lilles' observations are correct, there is some evidence that some youth courts in Canada have been influenced, at least sometimes, by the theories of deterrence and retribution:

[t]hese judgments have been premised on the view that the lengthy periods of incarceration available after transfer serve to protect society by deterring youths from committing offences and by incapacitating the offender in question. These decisions also emphasize the need to hold youths accountable for serious offences.⁵⁴⁰ [Bala & Lilles]

Some of the Members of Parliament who opposed to this amendment were in favor of *not stimulating* the transfer of young people to the adult court in the name of retribution, deterrence or denunciation. The point of view of this group is particularly useful to show the philosophical ambiguity of the *1992 Amendment* and the *Young Offenders Act* (1982) in terms of philosophies of punishment and to show, in another way, the problem of comprehension mentioned above:

[t]he effect of this legislation will be to ensure that more young people are transferred into the adult prison system and ultimately ensure that the level of crime in communities across this land will increase as a result of the demonstrated failure of society to deal with the prevention of crime among young people, instead of just dumping them into the adult criminal justice system.⁵⁴¹ [Hon. Mr. Robinson, Member of Parliament]

For this minority, the principle in the *Juvenile Delinquents Act* (1908) of “protecting the child” for “protecting society” was still a valid approach. This minority was against a criminal law intervention philosophy that implicitly or explicitly draws a distinction between *total/partial society* to favor the side of “partial society” *against* the (young) offender such as the theories of deterrence, denunciation and even retribution do in the adult criminal justice system. It seems that for this minority a system of criminal law, at least for young people, cannot leave aside the

⁵⁴⁰ Bala & Lilles, *supra* note 539 at 136.

⁵⁴¹ *House of Commons Debates*, 34th Parl, 2nd Sess (30 May 1990) at 12069 (Hon Robinson).

fact that society, for being totally protected, cannot be subdivided (by excluding the young offender):

[w]e have an opportunity and a responsibility to protect our total society. The only way to protect our total society is to ensure that our children are protected – the criminal element and the victim.⁵⁴²
[Hon. Mr. Barret, Member of Parliament]

The original wording of the bill read “the youth court shall consider the interest of society, which includes the objectives of affording protection to the public and *serving the needs of the young person*.” The substitution of the phrase “serving the needs of the young person” for the phrase “*rehabilitation of the young person*” seems to have been influenced by the submission of the Canadian Council on Children and Youth.⁵⁴³ Despite best intentions, this was not an advantageous substitution because the word “rehabilitation” is sometimes understood by the court in a limited sense. For example, the courts can say “this young does not need to be rehabilitated”, “cannot be rehabilitated”, etc. If the youth court has to take into account the *needs* of the young offender, then it appears a universal statement applicable in *all* situations and to *all* offenders. For example, when the penalty is life imprisonment, it would be difficult to say that the transfer of a young person to the adult court could respond to the *needs of the young person*. The old semantic of “rehabilitation” sometimes introduces comprehension problems that make the court refer to theories of punishment that are inappropriate for young offenders, such as retribution, deterrence and denunciation.

⁵⁴² *House of Commons Debates*, 34th Parl, 2nd Sess (30 May 1990) at 12077 (Hon Barrett).

⁵⁴³ *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 34th Parl, 2nd Sess (30 October 1990) at 7A:22 (Appendix “C-58/4”: submission of the Canadian Council on Children and Youth).

There are empirical indicators that the minority in Parliament who opposed to this amendment of the *Young Offenders Act* (1982) would have eliminated the regulation of the transfer of young offenders to the adult court (of course, without introducing the regulation of adult sentences in the youth court). While the bill was being discussed in both House of Commons and Senate Committees, there were unsuccessful attempts to abrogate the transfer provisions since most of the expert witnesses had so suggested.⁵⁴⁴ In addition to this, while the amendment to the *Young Offenders Act* (1982) was being discussed in the Senate, Hon. Senator Hastings proposed that the Senate vote against the bill.⁵⁴⁵ This vocal minority was not strong enough to lead a change and as a result the bill was enacted, keeping the transfer mechanism in the youth justice system and even trying to reinforce this judicial practice.

5.6. An Act to amend the Young Offenders Act and the Criminal Code (1995)⁵⁴⁶

During the 20 year period in which the *Young Offenders Act* was in force, this statute was amended 20 times.⁵⁴⁷ From all these amendments, the *1995 Amendment* is considered the

⁵⁴⁴ *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 34th Parl, 2nd Sess (26 November 1990) at 10:19 (Hon Mr MacLellan).

⁵⁴⁵ *Debates of the Senate*, 34th Parl, 3rd Sess (9 April 1992) at 1385-1387 (Hon Hastings).

⁵⁴⁶ *An Act to amend the Young Offenders Act and the Criminal Code*, SC 1995, c 19, ss 1, 7-10 [1995 Amendment].

⁵⁴⁷ These amendments are: *An Act to Amend the Financial Administration Act in Relation to Crown Corporations and to Amend other Acts in Consequence thereof*, SC 1984, c 31, s 14; *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*, SC 1985, c 19, s 187; *An Act to Amend the Young Offenders Act, the Criminal Code, the Penitentiary Act and the Prisons and Reformatories Act*, SC 1986, c 32; *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*, SC 1988, c 2, ss 60-65; *An Act to Amend the Criminal Code (Mental Disorder) and to Amend the National Defence Act and the Young Offenders Act in Consequence thereof*, SC 1991, c 43, ss 31-33; *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*, SC 1992, c 1, s 143; *An Act to Amend the Young Offenders Act and the Criminal Code*, SC 1992, c 1; *An Act respecting Contraventions of Federal Enactments*, SC 1992, c 47, ss 81-83; *An Act to Establish a Territory to Be Known as Nunavut and Provide for its Government and to Amend certain Acts in Consequence thereof*, SC 1993, c 28, s 144; *An Act to Amend the Criminal Code and the Young Offenders Act*, SC 1993, c 45, s 15; *An Act to Correct certain Anomalies, Inconsistencies and Errors in the Statutes of Canada, to Deal with other Matters of a Non-Controversial and*

embodiment of the “get tough” approach to youth offending.⁵⁴⁸ This amendment introduced the expression “crime prevention” as one of the objectives of the youth justice system, specifically stated that “protection of society” was the primary goal of the youth justice system, and substantially modified the transfer of young people to the adult court by introducing a reverse onus provision.⁵⁴⁹

The 1995 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 2nd June 1994 by the (then) Minister of Justice and Attorney General, Hon. Allan Rock.⁵⁵⁰ During the second reading of the bill, he highlighted the importance of “protecting the public” within the justice system - which is usually best done through rehabilitating young people:

[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].⁵⁵¹ [Hon. Mr. Rock, Minister of Justice and Attorney General of Canada]

Uncomplicated Nature in those Statutes and to Repeal certain Provisions of those Statutes that Have Expired, Lapsed or otherwise Ceased to Have Effect, SC 1994, c 26, ss 76 and 77; *An Act to Amend the Young Offenders Act and the Criminal Code*, SC 1995, c 19, ss 1-36; *An Act to Amend the Criminal Code (sentencing) and other Acts in Consequence thereof*, SC 1995, c 22, s 16; *An Act to Amend the Criminal Code and the Young Offenders Act (Forensic DNA Analysis)*, SC 1995, c 27, s 2; *An Act respecting Firearms and other Weapons*, SC 1995, c 39, ss 177-187; *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*, SC 1996, c 19, s 93.1; *An Act to Amend the Nunavut Act and the Constitution Act, 1867*, SC 1998, c 15, s 41; *An Act to Amend the Nunavut Act with respect to the Nunavut Court of Justice and to Amend other Acts in Consequence*, SC 1999, c 3, ss 86-89.

⁵⁴⁸ Trépanier, *supra* note 511.

⁵⁴⁹ 1995 Amendment, *supra* note 546 at ss 7-10. In 1994 there was a minor reformulation of the French version of s 16.2(1)(b) (originally enacted in 1992): *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*, SC 1994, c 26, s 77.

⁵⁵⁰ *House of Commons Debates*, 35th Parl, 1st Sess (2 June 1994) at 4733.

⁵⁵¹ *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1994) at 4872 (Hon Alan Rock) [emphasis added].

Nevertheless, despite this official presentation of the bill, other Members of Parliament understood this project in a far more repressive way. This seems to have some relation to the fact that the bill not only increased the maximum penalties for some offences but also introduced a presumption of transfer regarding a group of serious offences. The notion of “protection of society” was then employed as the very reason for enacting harsher measures to deter young people from offending and putting in danger other individuals:

Canadians have reached the point at which they are demanding safety for women, children and ordinary people on the streets and in their own homes. One of the fastest growing categories of crime is that committed by young offenders. It is not uncommon to hear of the door of a home being kicked down and the family terrorized, beaten and robbed. Throughout the country people are being beaten, stabbed, kicked and murdered by juveniles. We hear the authorities saying to people things like do not take matters into your own hands, leave it to the police. Instead of people being more secure the wave of youth crime continues to rise, with sentences young people receive from the courts being a poor reflection of the severity of the crime.⁵⁵² [Hon. Mr. Mayfield, Member of Parliament]

The rhetoric and secondary question about “rising crime rates” and “decrease crimes rates through hard punishment” guided the discussion of the bill in the House of Commons (but not in the Senate). This rhetoric missed the central point of the debate, this is how to deal with young offenders without believing that hard punishment is an effective solution for behavioral problems. We can see this old justification for increasing punishment in the following statement: “[w]e found in the press that crime itself does not seem to be rising but we know that youth crime itself has skyrocketed.”⁵⁵³

The previous statement had a double paradox: youth crime was not increasing and harsh punishment has been demonstrated to be ineffective for preventing crime. With regard to the

⁵⁵² *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1994) at 4900 (Hon Philip Mayfield) [emphasis added].

⁵⁵³ *House of Commons Debates*, 35th Parl, 1st Sess (15 June 1994) at 5380 (Hon Chuck Strahl) [emphasis added].

first point, Statistics Canada reports that the crime category “violent crime” for the period 1993-1994 rose 6.8%. However, for the period 1994-1995 “violent crime” had decreased 2.4%, and for the period 1995-1996 it had decreased a further 0.8%. So, for the period 1992-1993 to 1995-1996 “violent crime” had risen 3.5%. Nonetheless, when the methodology of this study is consulted, the crime category of “violent crime” includes offences such as “murder”, but as well minor offences such as “assault level 1 (minor assault)” and “criminal negligence”. The study does not explain the incidence (occurrence) of each of the offences listed under the category “violent crime.” For instance, when Jean Trépanier appeared before the House of Commons Standing Committee on Justice and Legal Affairs, he presented governmental statistics demonstrating that for the period 1974-1992 not only youth homicides had not increased, but that indeed they had decreased:

according to the Canadian Center for Justice Statistics, the number of homicides committed by young people from 12 to 17 years of age between 1974 and 1992 has not only not increased but has in fact decreased. [...] This does not include only murders, but does necessarily include murders.⁵⁵⁴ [Jean Trépanier’s witness testimony]

In addition to this, Ms. Cécile Toutant presented statistics to the Senate Standing Committee on Legal and Constitutional Affairs according to which “in 1993, we had the lowest level of murders by young people in about the last 20 years”.⁵⁵⁵

The last statistical document published by Statistics Canada reports that the youth crime rate decreased by 2% in 2007. On the other hand, this document reports that “the rate of violent youth crime has been steadily increasing since the mid-1980’s”. But at the same time, the

⁵⁵⁴ *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 35 Parl, 1st Sess (18 October 1994) at 39:5-6 (Mr Jean Trépanier’s witness testimony) [emphasis added].

⁵⁵⁵ *Debates of the Senate, Standing Committee on Legal and Constitutional Affairs*, 35th Parl, 1st Sess (29 March 1995) at 24:9 (Ms Cécile Toutant’s witness testimony).

document warns that “[t]he rise in violent crime can be largely attributed to increases in common assault, which comprises approximately 6 in 10 violent incidents committed by youth”.⁵⁵⁶ So, the question is whether “common assault” has in fact increased or whether authorities have implemented a zero tolerance policy as to aggression involving youths. The Department of Justice Canada raised this concern:

Today, the amount of youths accused of common assault is larger than in 1986. We are not able to determine whether this increase is due to a real increase in common assaults or to other factors such as the police’s willingness to charge youths accused of common assaults or the victims’ willingness to deal with these conducts through the police.⁵⁵⁷ [Department of Justice Canada]

In other words, while some years ago a “schoolyard fight” was dealt with by school authorities, the alternative hypothesis is that nowadays police are called more often to intervene in these situations. This was actually confirmed by defence counsel Brian Scully when presenting before the Senate Standing Committee on Legal and Constitutional Affairs. The matter being discussed was the higher statistics trends regarding violent crime - specifically common assault - among younger teenagers (12 and 13 years of age):

I touched earlier on peer mediation program. In my school days, a minor assault or a minor sexual touching would be handled by the principal who would involve the victim, the perpetrator and the parents. Together they would deal with problem recognition and solution, usually including face-to-face apology.

Unfortunately, that system seems to be disappearing. The numbers of 12 and 13 years old being charged presently reflects that “fighting in the schoolyard” is now termed “assaultive behaviour” and forwarded to the criminal justice system. I am worried that schools are losing their authorities.⁵⁵⁸ [Mr Brian Scully’s witness testimony]

⁵⁵⁶ Statistics Canada. *Juristat. Crime Statistics in Canada, 2007* (Canadian Centre for Justice Statistics) (Ottawa: Minister of Industry, 2008) at 8.

⁵⁵⁷ Ministère de la Justice, *Objectif : sécurité communautaire. Lutte contre la violence et la récidive des jeunes* (Ottawa : Ministère de la Justice, 1993) at 3 [author’s translation].

⁵⁵⁸ *Debates of the Senate, Standing Committee on Legal and Constitutional Affairs*, 35th Parl, 1st Sess (1 May 1995) at 28:17 (Mr Brian Scully’s witness testimony) [emphasis added].

On the other hand, for the period 1993-1994, property crime had decreased 6.3%. Property crime continued to fall for the following years: 2.4% for the period 1994-1995 and 0.8% for the period 1995-1996. Overall, for the period 1992-1993 to 1995-1996 property crime had decreased 18.1%.⁵⁵⁹

The second paradox is that harsher sentences are ineffective in deterring youths from offending.⁵⁶⁰ This misinformed perception of youth crime and the misinformed solution offered to address it guided a misdirected bill aimed at (un)effectively addressing declining youth offending trends.⁵⁶¹

There was a small but strong opposition to this bill within the House of Commons. One opponent explained the repressive aspects of the bill as a consequence of the pressure coming from the most conservative elements of the party. Of course, this explanation touches, at best, only the surface of the problem, but shows the reaction against the punitive philosophy of the amendment:

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

⁵⁵⁹ Statistics Canada. *Juristat. Youth Court Statistics 1995-1996 Highlights* (Canadian Centre for Justice Statistics) (Ottawa: Minister of Industry, 1997) at 10-11.

⁵⁶⁰ *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 35th Parl, 1st Sess (27 September 1994) at 39:5-6 (Mr Nicholas Bala's witness testimony); *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 35th Parl, 1st Sess (4 October 1994) at 44:4 (Mr Anthony Doob's witness testimony); *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 35th Parl, 1st Sess (27 October 1994) at 54:38 (Hon Justice JR Omer Archambault's witness testimony); *Grondin*, *supra* note 489. A parliamentarian acknowledged that "filing our jails" was not a good deterrent for reducing youth offending. Because of this, he suggested "to examine the possibility of bringing back corporal punishment as a very effective deterrent"; *House of Commons Debates*, 35th Parl, 1st Sess (10 February 1995) at 9481 (Hon Leon Benoit).

⁵⁶¹ Sanjeev S Anand, *Sentencing and the Prevention of Youth Crime: A Multi-Disciplinary, Multi-Institutional Approach* (D Jur Thesis, York University, 1999) [unpublished].

its inspiration from a philosophy that is repressive”.⁵⁶² [Hon. Ms. Pierrette Venne, Member of Parliament]

Hon. Ms. Pierrette Venne, with some exaggeration, affirmed that the modification of the objectives of the Declaration of Principles of the *Young Offenders Act* (1982) meant that the theory of rehabilitation within the youth justice system had been sentenced to death. While it is clear that this amendment was tabled in Parliament for stimulating the transfer of young people to the adult court and for increasing the maximum sanctions within the youth court, this amendment did not abrogate the absolute priority of the theory of rehabilitation for dealing with the youths who remained within the youth court.

[c]lause 1 [proposed amendments to subsections 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 ... By 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.⁵⁶³ [Hon. Ms. Pierrette Venne, Member of Parliament]

This amendment also modified the transfer of young offenders to adult courts. As stated above, young persons 16 and 17 years of age at the time of the alleged commission of certain serious offences – first- and second-degree murder, attempted murder, manslaughter and aggravated sexual assault - were sent to adult courts unless they provided the youth court judge with reasons for being dealt with in youth courts.

⁵⁶² *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1994) at 4875 (Hon Pierrette Venne) [emphasis added].

⁵⁶³ *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1994) at 4877 (Hon Pierrette Venne) [emphasis added]. See also *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1994) at 4891 (Hon Michel Bellehumeur); *House of Commons Debates*, 35th Parl, 1st Sess (16 June 1994) at 5440 (Hon Suzanne Tremblay); *House of Commons Debates*, 35th Parl, 1st Sess (16 June 1994) at 5449 (Hon Antoine Dubé).

The bill had the explicit purpose of sending, as a general rule, young people accused of having committed serious offence to the adult court for them to receive severe sentencing and this was not aimed at their rehabilitation. This was clearly stated during the debate in the House of Commons:

[t]he bill would adjust the present transfer provisions in dealing with those young persons so as to obligate them to satisfy the youth court judge that their trials should be held in youth court.⁵⁶⁴ [Hon. Mr. Allan Rock, Minister of Justice and Attorney General of Canada]

Despite the Minister of Justice highlighting that this was not an automatic transfer but rather a reverse onus for the test for a transfer, the fact of reversing the onus meant a reverse of philosophy of punishment as well. It would become very difficult for a young person accused of having committed a serious offence to justify why she should remain within the jurisdiction of the youth court.⁵⁶⁵ There were several reasons provided for this amendment. A great number of the reasons were strictly connected to the theories of retribution, deterrence and denunciation: the seriousness of the committed offence,⁵⁶⁶ the age of the offenders,⁵⁶⁷ the need to protect society from “older offenders”.⁵⁶⁸ Other reasons were of a secondary nature and only gave an apparent support to the same philosophies, such as “the need to protect “younger” young offenders from this subgroup of harsh young offenders.”⁵⁶⁹ There is a significant theoretical contradiction in this amendment: the youth justice system has been characterized for its emphasis on the young

⁵⁶⁴ *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1995) at 4872 (Hon Allan Rock, Minister of Justice and Attorney General of Canada) [emphasis added].

⁵⁶⁵ *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1995) at 4873 (Hon Allan Rock). Indeed, Grondin argues that, as the transfer was legislated by Parliament, this was in fact an automatic transfer; *Grondin*, *supra* note 489.

⁵⁶⁶ *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1995) at 4873 (Hon Allan Rock); *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1995) at 4887 (Hon Hedy Fry); *House of Commons Debates*, 35th Parl, 1st Sess (16 June 1995) at 5470 (Hon John Maloney).

⁵⁶⁷ *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1995) at 4873 (Hon Allan Rock).

⁵⁶⁸ *House of Commons Debates*, 35th Parl, 1st Sess (15 June 1994) at 5380 (Hon Chuck Strahl).

⁵⁶⁹ *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1995) at 4883 (Hon Paul E Forseth).

offenders' needs and for its adoption of a distinct philosophy of intervention that is not focused on the gravity of the offence. Indeed, the kind of offence committed should not be used as a measure of punishment – as occurs in the adult justice system – but very much as a criterion indicating the kind of treatment needed. This amendment introduced an “adult criminal law mentality” for dealing with the transfer of young offenders 16 and 17 years of age accused of having committed severe offences. In other words, the amendment was aimed at trying to reduce the jurisdiction of the youth criminal justice system.

This amendment faced two major *Charter* challenges: as the *Young Offenders Act* (1982) regulated “youths”, drawing a distinction between youths 16 and 17 years old on one hand, and youths 14 and 15 years old on the other, treating the former harsher than the latter could be contrary to section 15 equality rights.⁵⁷⁰ The second *Charter* problem was the operation of this amendment vs. the presumption of innocence and a possible infringement of sections 7 and 11(d) of the *Charter*: young people 16 and 17 years old could be tried for a crime as adults despite not having reach 18 years of age.⁵⁷¹ As discussed above, for young offenders to be dealt with in adult courts, the youth court judge had to presume they were guilty of the alleged offence. According to Mr. Peter Harris’ testimony in the House of Commons Standing Committee on Justice and Legal Affairs – representing the Criminal Lawyer’s Association - the proposed amendment was contrary to the principles of fundamental justice embodied in section 7 of the *Charter*:

⁵⁷⁰ *Charter*, *supra* note 465, 15(1). See *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1994) at 4877 (Hon Pierrette Venne); *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1994) at 4891 (Hon Michel Bellehumeur)

⁵⁷¹ *Charter*, *supra* note 465 at ss 7 and 11(d). *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1994) at 4895 (Hon Michel Bellehumeur).

[t]he combination of the presumption of guilt and the presumption that the young person should be treated and tried in the adult system constitutes what we believe to be such an unfair proceeding and a violation of fundamental justice principles that, in our view, the legislation wouldn't survive a challenge under section 7 of the Charter because of the intrinsically unfair aspect of the proceeding.⁵⁷²
[Mr. Peter Harris]

Nevertheless, the Department of Justice took a position similar to the Government's and sustained a different perspective: the shift of onus onto the young offender's shoulders was in accordance with the Charter.⁵⁷³ The Supreme Court of Canada never decided on this matter.

The *1995 Amendment* did not modify the transfer procedure regarding youths 14 and 15 years of age. *Bill C-37* was assented to on 22nd June 1995 as *An Act to amend the Young Offenders Act and the Criminal Code*, S.C. 1995, c. 19.⁵⁷⁴ This was the last amendment to the regulation of the transfer to the adult court until the *Young Offenders Act* (1982) was repealed in 2003.

5.6. Summary

The repeal of the *Juvenile Delinquents Act* (1908) and the enactment of the *Young Offenders Act* (1982) changed the Canadian approach to youth criminal justice intervention. On the one hand, the *Young Offenders Act* (1982) introduced safeguards and guarantees of legal rights to the youth criminal procedure, reduced the authority of child-welfare agencies and eliminated "status offences". However, on the other hand, the statute changed its intervention emphasis from the young person's "socio-familial situation" to the "seriousness" of the criminal behaviour committed by the young person. In other words, there was a stronger emphasis on the notion of "protection of society" than on the notion of the "protection of the child". Such an emphasis

⁵⁷² *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 35th Parl, 1st Sess (26 October 1994) at 53:7 (Mr Peter Harris' witness testimony).

⁵⁷³ *Debates of the Senate, Standing Committee on Legal and Constitutional Affairs*, 35th Parl, 1st Sess (23 March 1995) at 23:12 (Ms Mary-Anne Kirvan's witness testimony representing the Department of Justice).

⁵⁷⁴ *House of Commons Debates*, 35th Parl, 1st Sess (22 June 1995) at 14481.

was clearly reflected in the regulation of the transfer to adult court. While the *1992 Amendment* explicitly opposed the notions of “protection of society” and “protection of the child” giving priority to the former, the *1995 Amendment* introduced the reverse onus provisions for young offenders 16 and 17 years of age accused of having committed serious offences. It seems as if the main concern of Parliament when enacting the *Young Offenders Act* (1982) in 1982 was to separate the youth justice system from the youth protection system, and such a focus created a *blind spot* through which the most punitive theories of punishment infiltrated the youth justice system. This approach guided the youth justice system until 2003, when the *Young Offenders Act* was repealed and the *Youth Criminal Justice Act* came into force.⁵⁷⁵

⁵⁷⁵ *Youth Criminal Justice Act* (2002), *supra* note 5.

CHAPTER 6

Maintaining the Harshest Theories of Punishment:

the Enactment of the *Youth Criminal Justice Act*

2002-2012

6.1. Introduction

On 2nd June 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 him to undertake a general review of the *Young Offenders Act* (1982).⁵⁷⁶ This review was divided into phases I and II: while most of the amendments to the *Young Offenders Act* (1982) were considered within phase I – among them the previously discussed *1995 Amendment* - the general review of the youth justice system in Canada was considered within phase II. As part of phase II, in April 1997 the House of Commons Standing Committee on Justice and Legal Affairs released its report entitled “Renewing Youth Justice”, which had 14 recommendations.⁵⁷⁷ Among them, the Committee recommended the amendment of the *Young Offenders Act* (1982) to address some compelling matters, for instance the reduction of the minimum age of criminal responsibility for some serious offences (criminal offences causing death or serious harm) from 12 to 10 years of age,⁵⁷⁸ and the possibility that youth court judges allow general publication of the name of young offenders when authorities consider that such a measure was important for “public safety.”⁵⁷⁹ As well, the Committee recommended that the declaration of principles be

⁵⁷⁶ *House of Commons Debates*, 35th Parl, 1st Sess (6 June 1994) at 4874 (Hon Allan Rock). See also *House of Commons Debates*, 35th Parl, 1st Sess (15 June 1994) at 5386-5390 (Hon Warren Allmand); Letter from Hon Allan Rock to the Hon Warren Allmand (2 June 1994).

⁵⁷⁷ Canada, House of Commons. *Thirteen Report of the Standing Committee on Justice and Legal Affairs: Renewing Youth Justice* (Ottawa: Ministry of Supply and Services, 1997) [1997 *Renewing Youth Justice*].

⁵⁷⁸ *Ibid* at recommendation 9.

⁵⁷⁹ *Ibid* at recommendation 13.

amended and replaced with a statement of purpose so the “protection of society” would become the main goal of the criminal justice system:

[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 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.⁵⁸⁰

In fact, as discussed in the previous chapter, “the protection of society” had already been recognized as the main goal of the criminal justice system in the *1995 Amendment to the Young Offenders Act* (1982).⁵⁸¹ It is submitted that it is impossible to know what each individual actor (for instance, each Member of Parliament) thinks when she refers to the expression “protection of society”. It is possible to imagine that for some individuals this means giving an absolute priority to the theory of rehabilitation and resorting to the theory of neutralization only and as far as the youth represents an imminent and serious danger to other people. In this sense, “protection of society” has always been the paramount principle of the three statutes that have been enacted for regulating the youth criminal justice system in Canada (1908, 1982 and 2002). But it is also possible that some individual operators of the political system used the notion of “protection of society” to refer to the most hostile theories of punishment - such as deterrence, retribution, and denunciation. At this point it is not possible to exclude the possibility, for example, that some individuals still believe that the severity of punishment is effective for “protecting society” or that “denunciation” *through severity of punishment* is very important for keeping the values of society “alive” – for example, as if hate was necessary for maintaining love

⁵⁸⁰ *Ibid* at recommendation 2 [emphasis added]. See also *Bala*, *supra* note 463.

⁵⁸¹ *1995 Amendment*, *supra* note 546.

alive. If this is the case, we will face a political and philosophical regression in terms of philosophy of intervention in criminal matters.

On 12th May 1998 the Federal Government released a report to respond to the report of the House of Commons Standing Committee on Justice and Legal Affairs.⁵⁸² The report of the Federal Government, also focused on the vague and all embracing notion of “protection of society” (“[t]he objective of this strategy is the protection of society by reducing youth crime”),⁵⁸³ recommended several strategies for reducing youth crime rates - among them the enactment of a new piece of legislation to replace the *Young Offenders Act* (1982).⁵⁸⁴ On 11th March 1999 the government introduced *Bill C-68, An Act in respect of criminal justice for young persons and to amend and repeal other acts*.⁵⁸⁵ The bill died on Parliament’s Order Paper when Parliament prorogued and was reintroduced the following parliamentary session as *Bill C-3, An act in respect of criminal justice for young persons and to amend and repeal other acts*, which also died when Parliament prorogued.⁵⁸⁶ On 5th February 2001 the government introduced *Bill C-7, An Act in respect of criminal justice for young persons and to amend and repeal other acts*, which was similar to the two previous bills.⁵⁸⁷ According to the Minister of Justice, *Bill C-7* integrated “all 160 amendments that had been earlier submitted [to the previous bill].”⁵⁸⁸ This bill was enacted as *An Act in respect of criminal justice for young persons and to amend and*

⁵⁸² Canada. Department of Justice. *A Strategy for the Renewal of Youth Justice* (Ottawa: Ministry of Supply and Services, 1998) [1998 Strategy].

⁵⁸³ *Ibid* at 2.

⁵⁸⁴ *Ibid* at 17.

⁵⁸⁵ *House of Commons Debates*, 36th Parl, 2nd Sess (14 October 1999) at 12714.

⁵⁸⁶ *House of Commons Debates*, 36th Parl, 2nd Sess (14 October 1999) at 109.

⁵⁸⁷ *House of Commons Debates*, 37th Parl, 1st Sess (5 February 2001) at 227.

⁵⁸⁸ *Debates of the Senate, Standing Senate Committee on Legal and Constitutional Affairs*, 37th Parl, 1st Sess (4 October 2001) at 11:10 (Hon. Anne McLellan).

repeal other Acts [*Youth Criminal Justice Act*] on 19th February 2002.⁵⁸⁹ This Chapter examines the *Youth Criminal Justice Act* (2002) and the modifications it introduced to the Canadian youth justice system, along with the amendments to this legislation as 1st May 2012. These amendments include the amendment to the *Youth Criminal Justice Act* (2002) in the *Safe Streets and Communities Act* (2012), which received Royal Assent on 13th March 2012.⁵⁹⁰ This amendment has not come into force yet; as a result, it will not be presented as the law in Canada at the time of writing. This Chapter also presents the decision of the Court of Appeal for Quebec in *Quebec v Canada* (2003) and the decision of the Supreme Court of Canada in *R. v. D.B.* (2008). The former declared the unconstitutionality of the presumption of adult sentences (including the non-applicability of the ban on publication) in the *Youth Criminal Justice Act* (2002) in Quebec before the *Youth Criminal Justice Act* (2002) came into force. The latter extended this declaration of unconstitutionality to all over Canada.

6.2. The *Youth Criminal Justice Act* (2002)

The *Youth Criminal Justice Act* (2002) was enacted in 2002 to replace the *Young Offenders Act* (1982). The *Youth Criminal Justice Act* (2002) keeps the same ambivalent position concerning youths and the youth justice system in the sense that it preserves the same distinctions that have served for opposing two kinds of youths: 1) youths who deserve being treated as youths and 2) youths who should be treated as if they were adults. If we were to observe what the Act has accomplished, it could be argued that its main purpose has been to replace the old mechanism of transfer for a new mechanism of “adult sentencing” *within* the youth criminal courts. So, it is

⁵⁸⁹ *Youth Criminal Justice Act* (2002), *supra* note 5.

⁵⁹⁰ *An Act to enact the Justice for the Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts*, SC 2012, c 1 (the amendment to the *Youth Criminal Justice Act* (2002) had not come into force by the time this thesis was submitted for evaluation) [*Safe Streets and Communities Act* (2012)].

possible to inquiry about the purpose of this amendment: what was Parliament trying to achieve with a change that, at least apparently, is a “distinction without a difference”? Of course, at the same time, the Act amended some aspects of the previous legislation – the *Young Offenders Act* (1982) - and maintained the same direction concerning others. This section presents a general overview of the *Youth Criminal Justice Act* (2002).

The *Youth Criminal Justice Act* (2002) has a Declaration of Principles that expressly states that the object of the youth justice system is the “long-term protection of the public.”⁵⁹¹ For achieving this, the youth justice system is intended to prevent crime, rehabilitate and reintegrate young offenders, and subjects young offenders to “meaningful” consequences for their offences. This statement is ambiguous: it can be understood as a need for severe punishment (“meaningful consequence”) and as well as “mixing” the less hostile youth criminal intervention philosophy with the old hostile adult criminal philosophy. Not surprising, the *Youth Criminal Justice Act* (2002) emphasizes the need to promote rehabilitation and reintegration, fair and proportionate accountability, observance of due process rights, and timely intervention and sentencing. The measures taken under the *Youth Criminal Justice Act* (2002) should reinforce societal values, protect the victims of crimes, be sensitive to the young offender’s need and respect the young person’s specific circumstances (gender, culture, language, ethnicity, special needs and aboriginality). The statute reinforces the protection of legal and procedural rights, victims’ rights within the process and the participation of the young offenders’ parents. Finally, the Act is to be liberally construed for observing all the above-mentioned principles:

⁵⁹¹ *Debates of the Senate, Standing Senate Committee on Legal and Constitutional Affairs*, 37th Parl, 1st Sess (18 October 2001) at 12:66 (Hon Lorna Milne).

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 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,
 - (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,
 - (iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and
 - (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).⁵⁹²

While the *Youth Criminal Justice Act* (2002) has a clearer declaration of principles than the *Young Offenders Act* (1982) did – even though more complex too - Bala argues that the *Youth Criminal Justice Act* (2002) still has not solved the conflict as to which principle - “protection of

⁵⁹² *Youth Criminal Justice Act*, *supra* note 5 at s 3 [emphasis added].

the child” vs. “protection of society” - should prevail in case of conflict.⁵⁹³ When these two expressions are opposed to each other, the notion of “protection of society” suggests a philosophical approach that gives hierarchy to the theories of deterrence, denunciation and retribution over the theory of rehabilitation.

It is submitted that the *Youth Criminal Justice Act* (2002) still considers the theory of rehabilitation as having a general priority over the other three theories. Nevertheless, the overreliance on imprisonment in the Act can only be explained by the fact that the hostiles theories of punishment (deterrence, denunciation and retribution) have been granted a stronger role than the one they had under the *Juvenile Delinquents Act* (1908) and the *Young Offenders Act* (1982). Thus, it can be argued that the idea of “protecting the youth” during sentencing has lost part of the primary role it used to have in the past. Moreover, while the bill was being discussed in the Senate, Hon. Lorna Milne expressed her disbelief regarding whether the rehabilitation of the young person was still the primary purpose of the bill: “[r]eally this bill is built around the long-term protection of the public and not the rehabilitation of the young person.”⁵⁹⁴

The *Youth Criminal Justice Act* (2002) explicitly states that the enumerated principles in paragraph 3(1)(a) are aimed at promoting “the long-term protection of the public.” The addition of the qualification “*long-term* protection” may imply that rehabilitation is more important than deterrence because the emphasis is not on the young person. Of course, one wonders which of

⁵⁹³ *Bala, supra* note 463 at 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.”

⁵⁹⁴ *Debates of the Senate, Standing Senate Committee on Legal and Constitutional Affairs*, 37th Parl, 1st Sess (18 October 2001) at 12:66 (Hon. Lorna Milne).

the compelling, competing and conflicting senses of the expressions “protection of society” and “protection of the public” will prevail and be retained by the youth justice court.⁵⁹⁵ During the discussion of *Bill C-7* in the Senate, Hon. Pierre Nolin stressed how vague the principles were: “[f]ar from clarifying the broad principles which should underlie the youth criminal justice system, Bill C-7 is vaguer than ever about what the bill’s primary purpose should be.”⁵⁹⁶ At the end, as Carrington and Schulenberg note, “the fate of the YCJA [*Youth Criminal Justice Act*] lies in the hands of those responsible for its implementation.”⁵⁹⁷

It is worth noting the different philosophical and normative message of the *Juvenile Delinquents Act* (1908) and the *Youth Criminal Justice Act* (2002). Even though the former did not have a declaration of principles, it is evident from its text that it was philosophically grounded in a less hostile philosophy of punishment and in the notion of “*parens patriae*.” The purpose of this statute was to interpret the principles of “protection of society” and “protection of the child” together for both principles to go “hand in hand.” Moreover, the kind of offence committed (“proportionality and accountability”) was not the most relevant factor to consider under the *Juvenile Delinquents Act* (1908). The most important principles were rehabilitation of the young person, the absence of stigmatization, and the protection of the public from the eventual serious danger of reoffending. As such, the purpose of the youth justice system was to address the circumstances that led to criminal behaviour avoiding the traditional hostile environment of the adult criminal justice system. According to Mead, the purpose of the youth justice system back then was “to mend if possible the defective situation and reinstate the individual at fault [...]

⁵⁹⁵ Chris Giles & Margaret Jackson, “Bill C-7: The New Youth Criminal Justice Act: A Darker Young Offenders Act?” (2003) 27:1 *International Journal of Comparative and Applied Criminal Justice* 19.

⁵⁹⁶ *Debates of the Senate*, 37th Parl, 1st Sess (25 September 2001) at 1275.

⁵⁹⁷ Peter J Carrington and Jennifer L Schulenberg, “Introduction: The Youth Criminal Justice Act – A New Era in Canadian Juvenile Justice?” (2004) 46:3 *Canadian Journal of Criminology and Criminal Justice* 219 at 220.

[without resorting to] a great part of the paraphernalia of hostile procedure.”⁵⁹⁸ On the other hand, the *Youth Criminal Justice Act* (2002) explicitly puts an emphasis on the kinds of offences committed rather than on the young person’s needs. To present (April 2012), the *Youth Criminal Justice Act* (2002) has been amended four times; however, none of these amendments has modified the declaration of principles as originally enacted.⁵⁹⁹

6.2.1. Rules of Behavior

Similar to the *Young Offenders Act* (1982), the *Youth Criminal Justice Act* (2002) draws a clear distinction between 1) measures aimed at protecting young people from abuse and neglect, and 2) measures aimed at addressing youth criminal offending. With regard to the latter, the *Youth Criminal Justice Act* (2002) also excludes statutory offences from its jurisdiction and makes young people liable for the same offences an adult can be liable to.

The *Youth Criminal Justice Act* (2002), alike the *Young Offenders Act* (1982), only applies to youths 12 to 17 years of age (both inclusive). Youths younger than 12 years of age are dealt with the provincial protection system (non-criminal intervention). This means that if a 10 year-old child is accused of a very severe offence, such as first- or second-degree murder, the child will receive assistance from the provincial youth protection agency rather than from the youth court. Youths 18 years of age and older are dealt with the adult court system. Thus, this has not

⁵⁹⁸ Mead, *supra* note 242 at 594.

⁵⁹⁹ 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*, SC 2002, c 7, s 274; *An Act to Amend the Criminal Code and to Amend other Acts*, SC 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*, SC 2004, c 11, ss 48-49 and *An Act to Amend the Criminal Code (Mental Disorder) and to Make Consequential Amendments to other Acts*, SC 2005, c 22, s 63.

changed from the previous legislation. For this purpose the *Youth Criminal Justice Act* (2002) defines the notions of “child”, “young person”, and “adult”:

“child” means a person who is or, in the absence of evidence to the contrary, appears to be less than twelve years old. (ss. 2(1))

“young person” means a person who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old and, if the context requires, includes any person who is charged under this Act with having committed an offence while he or she was a young person or who is found guilty of an offence under this Act. (ss. 2(1))

“adult” means a person who is neither a young person nor a child. (ss. 2(1))

6.2.2. Rules of inclusion in/exclusion from the legislative program of the *Youth Criminal Justice Act* (2002)

As stated in previous Chapters, the notion of rules of inclusion in/exclusion from a legislative program refers to rules that establish the conditions under which a court could deal with and eventually sentence a person. These rules refer to two main areas: maximum age and kind of offence committed.

6.2.2.1. Maximum age

The *Youth Criminal Justice Act* (2002) maintains the system brought into place by the *Young Offenders Act* (1982) according to which all Canadian provinces have to implement the same age limits for a youth to be dealt with by the youth justice system. Young people younger than 12 years of age are excluded from the youth justice system no matter the severity of the offence. The provincial protection systems deal with this group of youths. Similarly, young people older than 17 years of age are dealt with the adult justice system rather than with the youth justice system. Consequently, the youth justice system under the *Youth Criminal Justice Act* (2002) deals with youths 12 to 17 years of age (both age included).

The *Youth Criminal Justice Act* (2002) amended the administration of youth justice by allowing young persons accused of having committed very serious offences (“presumptive offences”) and facing the possibility of receiving an adult sentence to elect to be tried by a youth court judge without a jury, an adult court judge without a jury, or an adult court judge with a jury (subsection 67(2)). This possibility applies to youths 14 years of age and older accused of having committed first or second degree murder, manslaughter, attempted murder, or aggravated sexual assault, and to youths facing a third judicial determination of serious violent offence – all these offences known as “presumptive offences” (subsection 2(1)). This section also applies to youths 12 and 13 years of age accused of having committed first or second degree murder (subsection 67(1)), even if they cannot receive an adult sentence because the notion of “presumptive offences” only applies to youths 14 years of age and older. The given reason for this is that in all these circumstances the maximum sanction to be imposed on the young offender exceeds five years imprisonment. Section 11(f) of the *Charter* requires that individuals facing trial for an offence that has a maximum penalty in excess of five years be provided with the right to choose to be tried by jury. This is how the *Youth Criminal Justice Act* (2002) provides the trial election to the young person:

The youth justice court shall put the young person to his or her election in the following words:
You have the option to elect to be tried by a youth justice court judge without a jury and without having had a preliminary inquiry, or you may elect to be tried by a judge without a jury; or you may elect to be tried by a court composed of a judge and jury. If you do not elect now, you are deemed to have elected to be tried by a court composed of a judge and jury. If you elected to be tried by a judge without a jury or by a court composed of a judge and jury or if you are deemed to have elected to be tried by a court composed of a judge and jury, you will have a preliminary inquiry only if you or the prosecutor requests one. How do you elect to be tried? (subsection 67(2))

6.2.2.2. Seriousness of offence committed

The *Youth Criminal Justice Act* (2002) has exclusive jurisdiction in respect of offences alleged to have been committed by a “young person” (as defined in the Act). This exclusive jurisdiction is subject to the *Contraventions Act* and the *National Defence Act*. While the *Contraventions Act* as it applies to a young person is not in force yet, the *National Defence Act* is. This means that a youth would only be excluded from the youth justice system if the youth was a member of the Canadian forces and committed an offence for which the Canadian forces had exclusive disciplinary jurisdiction. Otherwise, the young person will *always* be dealt with by the youth justice system:

[d]espite any other Act of Parliament but subject to the *Contraventions Act* and the *National Defence Act*, a youth justice court has exclusive jurisdiction in respect of any offence alleged to have been committed by a person while he or she was a young person, and that person shall be dealt with as provided in this Act. (subsection 14(1))

In this respect there is also no change concerning the previous legislation.

6.2.2.3. Imposition of adult sentences

The *Youth Criminal Justice Act* (2002) maintains a distinction between youths who should be dealt with as youths and youths who should be dealt with as adults, similar to the two previous statutes. Nevertheless, the new Act replaces the transfer of young offenders to the adult court with the imposition of “adult sentences” by the youth court. While both the *Juvenile Delinquents Act* (1908) and the *Young Offenders Act* (1982) allowed the youth court to transfer to the adult court youths accused of having committed indictable offences, the *Youth Criminal Justice Act* (2002) requires that these youths remain within the youth justice system. It can be argued that this Act introduces the logic of the adult sentencing within the youth justice court.

If a youth is accused of having committed a very serious offence, the *Youth Criminal Justice Act* (2002) has a mechanism in place according to which the Crown can request the youth court judge to sentence the youth to an adult sentence rather than to a youth sentence. Adult sentences are more severe than youth sentences in the sense that youths can be imprisoned for longer periods of time, and are subject to flat and minimal penalties. They can also receive “radical penalties” such as life imprisonment and very long sentences (10 years or more).⁶⁰⁰ For instance, let’s suppose that a young person is found guilty of second-degree murder. If the young person receives a youth sentence, the young person will be imprisoned for a period not exceeding four years - in addition to being sentenced to placement under conditional supervision in the community for a period not exceeding three years (paragraph 42(2)(q)). On the other hand, if the young person receives an adult sentence, the young person will be sentenced to imprisonment for life (section 235 of the *Criminal Code*). This new technique of punishment may also virtually affect (at least in the long term) how the operators of the youth court think when sentencing youths. The *Juvenile Delinquent Act* (1908) was aimed at creating a non-punitive new kind of youth court judge. For protecting judges from the punitive and hostile influence of the adult theories of punishment (deterrence, retribution and denunciation), the *Juvenile Delinquent Act* (1908) provided them with the option of transferring youths to the adult courts. Conversely, the *Youth Criminal Justice Act* (2002) introduces the possibility of this hostile influence within the youth court not only for judges but also for the Crown.

The *Youth Criminal Justice Act* (2002) contemplates two circumstances under which the Crown can request that a young person receive an adult sentence rather than a youth sentence:

⁶⁰⁰ Álvaro Pires, “Les peines radicales: Construction et « invisibilisation » d’un paradoxe”, in Italo Mereu, *La mort comme peine. Essai sur la violence légale* (Bruxelles: Larcier, 2012) (in press).

1. If the young person is accused of having committed a presumptive offence. The Supreme Court of Canada in *R. v. D.B.* held that the onus is on the Crown to demonstrate that a young person should receive an adult sentence. Before this decision, the original enactment of the *Youth Criminal Justice Act* (2002) put the onus on the young offender found guilty of a presumptive offence to demonstrate why he should receive a youth sentence rather than an adult sentence. The decision *R. v. D.B.* is further explored below at 6.4.

2. If the young person is 14 years of age or older and accused of an offence for which an adult could be liable to imprisonment for a term of more than two years.

The first circumstance arises if the young person is charged with or found guilty of a “presumptive offence”. The notion of “presumptive offence” is statutorily defined as an offence committed by a young person 14 years of age or older, and includes the offences of first- and second-degree murder, attempted murder, manslaughter and aggravated sexual assault (subsection 2(1)). The statutory definition of presumptive offence also includes a third judicial determination of serious violent offence: “an offence in the commission of which a young person causes or attempts to cause serious bodily harm”.⁶⁰¹ After a young person has been found guilty of a very serious violent offence for which an adult is liable to imprisonment for a term of more than two years (such as aggravated assault), the Attorney General can apply to the youth court for it to make this determination. The court, after hearing the Attorney General and the young person, will make its decision (subsection 42(9)). So, for a young person to receive a third determination of serious violent offence, the young person should have been at least 14 year of age at the time of the commission of the serious violent offence and must already have had two

⁶⁰¹ *Youth Criminal Justice Act*, *supra* note 5 at s 2.

previous determinations of very serious violent offence. The problem is that the statute does not specify how to count the determinations of serious violent offences. In other words, it is not clear whether the young offender should have committed the three offences after having reached the age of 14 years old or only the third offence should have been committed when the young person was at least 14 years of age. This is how the *Youth Criminal Justice Act* (2002) defines “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:

(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. (ss. 2(1))

The second circumstance under which the Crown can request that a young person receive an adult sentence arises if the young person is 14 years of age or older and accused of an offence for which an adult could be liable to imprisonment for a term of more than two years. It can be argued that the *Youth Criminal Justice Act* (2002) is slowly introducing the idea of the gravity of the offence as the most important criterion for adult sentencing – and this is very dangerous for the youth court sentencing philosophy. This is different from the *Young Offenders Act* (1982) and the *Juvenile Delinquents Act* (1908) in the sense that the offence does not have to be an

“indictable offence”, but rather an offence for which the maximum time imprisonment exceeds two years. In other words, this regulation can also include summary conviction offences.

If a young person is accused of any of these offences, the Crown can request that the young person receive an adult sentence rather than a youth sentence. According to the *Youth Criminal Justice Act* (2002) the Crown is the only person allowed to make such a request (section 64). The judicial test to apply is whether a youth sentence is appropriate to hold the young person “responsible for her behavior.” For this statute, the notions of “responsibility and accountability” are strictly attached to the severity of punishment, such as in the adult philosophy of punishment. When evaluating the Crown’s submission, the youth court will take into consideration six factors:

- 1) whether the person is 14 years of age or older;
- 2) the kind of offence committed;
- 3) the seriousness and circumstances of the offence;
- 4) the age, maturity, character, background, previous record of offending, and other factors the court deems relevant;
- 5) the principle of fair and proportionate accountability; and
- 6) the purposes and principles of youth sentencing.

Taking these factors into consideration, if the youth court is of the opinion that a youth sentence would be of sufficient length to hold the young person accountable for his offending, the young person will be sentenced according to the penalties and principles of the *Youth Criminal Justice Act* (2002). On the other hand, if the youth court is of the opinion that the youth sentence will

not be of sufficient length to hold the young person accountable for his offending, the young person will receive an adult sentence and be sentenced according to the penalties and principles of the *Criminal Code*. It can be argued that the current test for deciding the imposition of an adult sentence comes from the theory of retribution and this introduces a contradiction in relation to the general purposes and principles of the Act. The imposition of an adult sentence means longer imprisonment terms, and the observance of a priority given to the theories of denunciation, deterrence and punishment (retribution or proportionality between crime and penalty) when sentencing. There exists a presumption that the young person should receive a youth sentence and the Crown has the onus to rebut such a presumption. This is the test as originally enacted:

[i]n making its decision on an application heard in accordance with section 71, the youth justice court shall consider the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant, and

(a) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) [principle of fair and proportionate accountability] and section 38 [purposes and principles of youth sentencing as regulated in the *Youth Criminal Justice Act* (2002)] would have sufficient length to hold the young person accountable for this or her offending behaviour, it shall order that the young person is not liable to an adult sentence and that a youth sentence must be imposed; and

(b) if it is of the opinion that a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that an adult sentence be imposed.

With regard to the procedure under the *Youth Criminal Justice Act* (2002), the determination of whether a young person is liable to an adult sentence is moved to the end of the trial, after the finding of guilty (conviction) but before the sentencing hearing. A person facing an adult sentence is entitled to pre-trial notice that the Crown intends to seek an adult sentence, and to

elect to have a preliminary inquiry and a jury trial.⁶⁰² The imposition of an adult sentence is considered a severe matter: if young persons receive adult sentences, this means that they will receive harsher penalties, that their identifying information will no longer be protected, and that they will have a criminal record.⁶⁰³ The youth justice court judge must state the reasons when deciding whether an adult sentence should be applied and this decision can be appealed.⁶⁰⁴ The onus of satisfying the youth justice court as to whether a youth sentence is of sufficient length to hold the young person accountable for the offending behaviour is with the applicant.⁶⁰⁵ This means that the onus will be with the Crown.

The *Youth Criminal Justice Act* (2002) allows provinces to opt to keep the minimum age for this purpose at 16 years or set it at any age between 14 and 16 years: “[t]he lieutenant governor in council of a province may by order fix an age greater than fourteen years but not more than sixteen years for the purpose of the application of the provisions of this Act relating to presumptive offences.”⁶⁰⁶ For instance, the Quebec government adopted Order in Council 476-2003 (31st March 2003) establishing 16 years of age as the requisite age for the application of the presumption of adult sentence. However, the Quebec Court of Appeal declared the unconstitutionality of the presumption of adult sentence on 31st March 2003.⁶⁰⁷ As the order in council only made reference to the presumption of adult sentence – which no longer exists - the age of 14 years still applies for the application of adult sentences in Quebec.

⁶⁰² *Ibid*, ss 64, 67.

⁶⁰³ *Ibid*, ss 110(2) and 117, respectively.

⁶⁰⁴ *Ibid*, ss 72(4) and (5), respectively.

⁶⁰⁵ *Ibid*, s 72(2).

⁶⁰⁶ *Ibid*, s 61. I am thankful to Professor Rachel Grondin for having directed me to these sources.

⁶⁰⁷ *Quebec v Canada*, *supra* note 94.

There is a paradox with regard to having youth court judges impose adult sentences on young offenders: the origin of the figure of the “youth court judges” (or juvenile court judges, as were called in the *Juvenile Delinquents Act* (2002)) was that “police magistrates, at the turn of the century, were considered too imbued with a repressive penology whose effectiveness was being challenged.”⁶⁰⁸ Indeed, during the discussion of the *Juvenile Delinquents Act* in the Senate, Hon. Mr. Coffey expressly stated that police magistrates, because of their training and exposure to the traditional criminal law system, were unfit to address the needs of young offenders:

Nor is it advisable that the police magistrate should in all cases be empowered to adjudicate upon the crimes charged to the young. While some of these men are by nature and acquirements well equipped for work of this character it is nevertheless a fact that many are quite unfit for the handling of cases of criminality amongst the young. They have pinned their faith to methods of the harsh order. To them kindness is almost an unknown quality.⁶⁰⁹ [Hon. Mr. Coffey, Senator]

Because of this, parliamentarians decided to create a “judicial official” that not only had not been exposed to the traditional justice system, but as well had a skilled personality for dealing with young people:

[i]n the appointment of juvenile court judges, when such appointments are deemed advisable, it were difficult to undervalue the importance of keeping out of mind all considerations save those of entire fitness for the position. No 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.⁶¹⁰ [Hon. Mr. Coffey, Senator]

The *Youth Criminal Justice Act* (2002) requires youth court judges, rather than adult court judges, to sentence young offenders to adult sentences taking into consideration the purposes and

⁶⁰⁸ Trépanier, *supra* note 264.

⁶⁰⁹ *Debates of the Senate*, 10th Parl, 4th Sess (21 May 1908) at 976 [emphasis added].

⁶¹⁰ *Ibid* [emphasis added].

principles of sentencing in the *Criminal Code* within the youth justice system. According to the *Criminal Code*, the main purpose of sentencing is not rehabilitation, but rather “to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives.”⁶¹¹ The objectives enumerated therein – as they appear – are denunciation, deterrence, neutralization, rehabilitation, reparation of the harm done to the victim and promotion of a sense of responsibility.⁶¹² It is important to point out that the penalties in the *Criminal Code* have minimum and flat sanctions, which can be quite severe. Moreover, when sentencing under the *Criminal Code*, the theories of punishment centered on retribution, deterrence and/or denunciation have a strong role, which leads to severe penalties. A consequence of imposing adult sentences within the youth court system is that this may eventually lead to the “contamination” of youth court judges with the punitive mentality of the adult court system.

6.2.3. Rules of sanction

The Declaration of Principles of the *Youth Criminal Justice Act* (2002) is organized in four main axes: (i) the official and explicit purposes of the youth justice system, (ii) how these purposes will be achieved, (iii) the purpose of the measures taken against young offenders, and (iv) an statement about the protection of young offenders’ due process rights and victims’ rights. The *Youth Criminal Justice Act* (2002) recognizes the promotion of the *long-term protection* of the public as the main objective of the youth justice system. This statement seems to give high priority to rehabilitation because this theory of punishment presents itself as the best way of

⁶¹¹ *Criminal Code*, *supra* note 107 at ss 718, 718.1.

⁶¹² *Ibid.*

protecting the public. This is also a stimulus for other social programs centered on social prevention (as opposed to the repressive prevention sustained by the theory of deterrence). For the *long-term protection* of the public, the statute requires the (social) prevention of crime, the rehabilitation and protection of the young person, and that young offenders receive meaningful measures (paragraph 3(1)(a)). The *Youth Criminal Justice Act* (2002) also states that the long-term protection of the public requires a youth justice system separate from the adult justice system, the former emphasizing the rehabilitation and reintegration of the young person, her fair and proportionate accountability, timely intervention, and enhanced procedural protection (paragraph 3(1)(b)). In this context, the meaning of the expression “proportionate accountability” is not at all clear. One possibility would be to read this expression as requiring that the intervention not be *more severe* than the case requires, but this principle does not prevent the intervention from being less severe than the gravity of the offence. Nevertheless, as presented below, the *Youth Criminal Justice Act* (2002) requires for the first time that some offences be punished by imprisonment. It appears that, at least for these offences, Parliament gave more value to the theories of punishment of retribution and deterrence than to the theory of rehabilitation. The criterion of the “gravity of the crime” now plays a direct role in the choice of punishment: the selection of prison.

The *Youth Criminal Justice Act* (2002) - unlike the *Young Offenders Act* (1982) – has a part dedicated to the Purpose and Principles of Sentencing, which identifies certain objectives that the youth court has to observe when imposing youth sentences. First, youth sentences should reinforce respect for societal values and be meaningful regarding the young person's needs. These measures should also be sensitive to gender, ethnic, cultural and linguistic differences, and

take specifically into account the needs of aboriginal youths and youths with special needs. Moreover, these measures should encourage the repair of harm done to victims and to the community (paragraph 3(1)(c)). Finally, the Act requires that the proceedings observe the young person's due process rights and the victims' rights. None of these criteria favors in themselves the severity of the sanction.

Victims have new rights under the *Youth Criminal Justice Act* (2002): they are specifically entitled to have access to information regarding the proceedings against the young person (paragraph 3(1)(d)). This is a very interesting way of integrating victims in the process without stimulating them towards the direction of the severity of punishment.

The *Youth Criminal Justice Act* (2002) specifically excludes the *Criminal Code* principles when sentencing young people to youth sentences (section 50). However, if the young person receives an adult sentence, that sentence will be imposed taking into consideration the *Criminal Code* sentencing principles. As previously mentioned regarding the *Juvenile Delinquents Act* (1908) and the *Young Offenders Act* (1982), these three statutes have kept the distinction of youths who are youths/ youths who are adults alive for the purpose of criminal law intervention. The latter group, despite still being youths, is dealt with as adults.

The purpose and principles of sentencing with regard to youth sentences have been the object of some controversial discussion in the literature. Roberts argues that the sentencing objectives of denunciation, deterrence and incapacitation have no place in the youth justice system as Parliament did not include them within the sentencing principles explicitly:

[a]s a number of commentators (e.g. Bala 2002; Doob and Sprott 2004) have remarked, no reference is made in s. 38(1) to the utilitarian sentencing objectives of denunciation, deterrence, and incapacitation. This omission creates the clearest distinction between sentencing at the youth and adult court levels.⁶¹³

On the other hand, Roberts argues that the phrase of “just sanctions” in section 38(1) of the *Youth Criminal Justice Act* (2002) may inadvertently introduce the principle of retribution through the need of “proportionality” within the youth justice sentencing principles: “[t]he reiteration of the retributive reference to ‘just sanctions’ reminds judges of the need for proportionality, while the latter phrase [rehabilitation and reintegration into society] suggests that rehabilitation is equally important.”⁶¹⁴ Section 38(1) reads:

[t]he purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.⁶¹⁵

The main problem with the notion of “just sanctions” is that there are different ways of interpreting it because “just sanctions” are not only retributive sanctions.⁶¹⁶ The theory of retribution does not have the monopoly of what is just, even if the theory pretends it does. The need for “proportionality” can be understood in different ways. For example, when the legal system says that a sanction for being *just* may not *exceed* the gravity of the offence but may be *less severe* than the gravity of the offence, this *is not* a the principle of retribution but it can rather be understood as applying the non-retributive concept of proportionality and being a “just sanction”. What characterizes the retributive concept of proportionality and the retributive *sense*

⁶¹³ Julian V Roberts, “Harmonizing the Sentencing of Young and Adult Offenders: A Comparison of the Youth Criminal Justice Act and Part XXIII of the Criminal Code” (2004) 46:3 Canadian Journal of Criminology and Criminal Justice 301 at 306.

⁶¹⁴ *Ibid.*

⁶¹⁵ *Youth Criminal Justice Act* (2002), *supra* note 5 at s 38(1) [emphasis added].

⁶¹⁶ I am very thankful to Professor Pires for pointing out this discussion to my attention.

given to the expression “just sanctions” is the fact that there are two limits, and not just one, to the sanction: the sanction can neither exceed the gravity of the offence nor be below it. The *Youth Criminal Justice Act* (2002) emphasizes the principles of rehabilitation, reintegration into society, “proportionate accountability that is consistent with greater dependency of young persons and their reduced level of maturity (subparagraphs 3(1)(b)(i) and (ii)), and the priority of non-custodial sanctions. Based on these principles, it can be argued that at least at the level of principles there is no clear place for interpreting the notion of “just sanctions” only from a retributive perspective. Yet this does not mean that the *Youth Criminal Justice Act* (2002) is consistent with the principles it states. While some scholars and youth justice judges may approach the notion of “just sanctions” with a retributive approach, others may also see within this notion the principles that establish superior limits to the intervention without any intention of strict and classical retribution.

If the notion of “just sanctions” and similar principles are read within the theory of retribution, there will be a need to solve the contradiction that appears by the fact that the theory of retribution is not the primary purpose or principle of youth sentencing within the *Youth Criminal Justice Act* (2002). How can we put the emphasis on rehabilitation and reintegration (“long term protection of the public”) if one seeks to punish by giving priority to the gravity of the offence? Youth justice courts are not asked to send young offender to prison “*because this punishment appears proportional to the offence*”. Furthermore, the *duration of the intervention* in the youth justice system should not depend on the dangerousness of the offender. Again, the ambiguity of the Act *does not preclude* a retributive interpretation of it, but this interpretation is achieved by *forcing* the Act towards a direction contrary to the purposes and principles of the Act.

According to the theory of retribution, which has traditionally belonged to the adult justice system, the severity of the offence and the offender's degree of culpability are the main factors to assess when deciding what kind of punishment should be inflicted on the offender. According to the theory of retribution as originally formulated, the circumstances of the offence and the social reintegration of the offender do not play a fundamental or principal role when sentencing.⁶¹⁷ When the *Youth Criminal Justice Act* (2002) refers to "proportionality" as a principle, the interpreter is invited to look for a non-retributive understanding of this notion. In the past, one of the main problems identified in the youth criminal justice system with regard to the theory of rehabilitation was that a youth could receive "*too much punishment*" in comparison to an adult for the same crime (e.g., status offences). This problem has been explicitly recognized by section 38 of the *Youth Criminal Justice Act* (2002). As a result, it is a very plausible interpretation that the principle of proportionality was introduced to the Act *to correct* this identified problem (and not for introducing retributive ideas within the youth justice system). Proportionality in this context means that the sanctions will not be just if they inflict more *severe* punishment than the adult justice system would do. Moreover, "proportionality" also means that the sanctions would not be fair if the central objectives of rehabilitation, reintegration and the *long-term* protection of the public are left aside. Last, the purpose of youth sentences clearly seems to be the promotion of "just sanctions" *that do not deviate from the project of* rehabilitation and reintegration for protecting the public:

[t]he purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the

⁶¹⁷ Alvaro Pires, "Kant face à la justice criminelle" in Christian Debuyst, Françoise Digneffe & Alvaro Pires, eds, *Histoire des savoirs sur le crime & la peine. La rationalité pénale et la naissance de la criminologie*, vol 2 (Paris and Bruxelles: De Boeck & Larcier sa, 1998) 145.

young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.⁶¹⁸

Section 38 of the *Youth Criminal Justice Act* (2002) also enumerates the principles of sentencing that apply along with the principles in section 3 mentioned above and their overall purpose: “the long-term protection of the public.”⁶¹⁹ With regard to the sentencing principles, the Act requires youth court judges to observe certain guidelines: that the punishment *not be greater than* the punishment to be inflicted to an adult in similar circumstances, that there not be significant sentencing differences in the region, that sentences be proportionate to (and this means “not to exceed”) the seriousness of the offences and the young offenders’ responsibility, that judges prioritize non-custodial and less restrictive sentences that emphasize rehabilitation, and that the sentence promote a sense of responsibility in the young offender:

A youth justice court that imposes a youth sentence on a youth person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:

- (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
- (b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;
- (c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
- (d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons; and
- (e) subject to paragraph (c), the sentence must
 - (i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
 - (ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
 - (iii) promote a sense of responsibility in the young person, and an acknowledgment of the harm done to victims and the community.⁶²⁰

⁶¹⁸ *Youth Criminal Justice Act*, *supra* note 5 at s 38(1).

⁶¹⁹ Jean Trépanier, “Les transformations du régime canadien visant les jeunes contrevenants: les frontières de la justice des mineurs en mutation” (2005) 85:6 *Revue de Droit Pénal et de Criminologie* 559.

⁶²⁰ *Youth Criminal Justice Act* (2002), *supra* note 5 at s 38(2).

Finally, the *Youth Criminal Justice Act* (2002) enumerates some of the factors that youth justice courts should consider when sentencing, such as the degree of participation, the level of harm, reparations done to the victims, time spent in detention, recidivism. These ancillary factors, and how they should be understood and taken into consideration are far more difficult to understand than the notions of “just sanctions” and “proportionality” because there is (at least) an apparent contradiction between them and the logic of a just (rehabilitative) sanction:

In determining a youth sentence, the youth justice court shall take into account

- (a) the degree of participation by the young person in the commission of the offence;
- (b) the harm done to victims and whether it was intentional or reasonably foreseeable;
- (c) any reparation made by the young person to the victim or the community;
- (d) the time spent in detention by the young person as a result of the offence;
- (e) the previous findings of guilt of the young person; and
- (f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.⁶²¹

These criteria are presented in the Act as they are usually employed in the adult logic of sentencing that is inspired on the theory of retribution, and that is compatible with the theories of deterrence and denunciation (but fully incompatible with the logic of rehabilitation). As such, the contradiction is evident. The theory of rehabilitation also takes these criteria into consideration but only for making the appropriate decisions with regard to the choice of sanction for the rehabilitation of the young person and the long-term protection of the public. The theory of rehabilitation does not employ these criteria for assessing the severity of the sentence *per se*, or for increasing or decreasing the severity of the sanction taking into consideration one or more of these criteria. As a result, the following question arises: how can we coherently understand the presence of these separate criteria in the Act that addresses the youth justice system? There seems to be at least two answers to this question. First, we may think that these principles have

⁶²¹ *Ibid.*

been introduced here only because Parliament introduced in the Act the mechanism of “adult sentences” to be imposed by the youth justice court. Then, these adult criteria are here *only* for the court sentencing a young person to an adult sentence. The problem with this interpretation is that these criteria are in a section that only deals with the imposition of youth sentences. Second, we may also consider that these principles should be taken into account together within the logic of the theory of rehabilitation and also for preventing previous mistakes committed in the name of rehabilitation. These mistakes were punishing youths more severe than adults for the same kinds of offences or even for less severe types of offences. Because the main principles to consider when sentencing youths are their rehabilitation and reintegration for the long-term protection of the public, a youth court judge would not leave these principles aside for complementary criteria whose only purposes are to improve and prevent collateral problems or distortions of the principles of rehabilitation and reintegration, and not to replace them.

It is submitted that some dispositions of the *Youth Criminal Justice Act* (2002) are not coherent with the general statement in the Act concerning rehabilitation. The interpretation presented above is not incompatible with Trépanier’s that the *modifications* introduced to the youth justice system by the *Youth Criminal Justice Act* (2002) moved the system closer to the adult justice system.⁶²² In fact, some of the dispositions of the *Youth Criminal Justice Act* (2002), such as the regulation of adult sentences, presumptive offences, consecutive custodial sentences, etc. disregard the main principles and push the youth justice system towards the direction of the adult justice system. With regard to the possibility of consecutive custodial sentences that exceed the maximum time of detention established in the Act, the *Youth Criminal Justice Act* (2002) allows

⁶²² Jean Trépanier, « L’avenir des pratiques dans un nouveau cadre légal visant les jeunes contrevenants » (2002-2003) 34 RDUS 47.

the youth justice court to do this without any consideration of the young person's dangerousness. All these ideas and changes promote a "philosophical and practical distortion" within the Act.

The *Youth Criminal Justice Act* (2002) regulates different sorts of sanctions that the youth court could impose on youths found guilty of offences: reprimand the young person, absolute discharge, conditional discharge, fine, compensation, restitution, community service, mandatory prohibition order, probation, intensive support and supervision program, non-residential program, deferred custody and supervision order, incarceration, and intensive rehabilitative custody and supervision. In addition to this, the court can impose other reasonable and ancillary conditions as it deems advisable, and in the best interests of the young person and the public (subsection 42(2)). The *Youth Criminal Justice Act* (2002) does not have minimum sentences or offences without a maximum penalty.

Worth noting, the *Youth Criminal Justice Act* (2002) specifically states that the punishment for certain offences *has to be incarceration*. This is different from the *Juvenile Delinquents Act* (1908) and the *Young Offenders Act* (1982); while both statutes contemplated imprisonment as a sanction, neither of them directed the judge to impose imprisonment as a sanction for certain offences. This presents itself as a clear indication of a shift towards the most hostiles philosophies of punishment, a kind of "political (and eventually juridical) regression" towards retribution, deterrence and denunciation.

The *Youth Criminal Justice Act* (2002) specifically states that a youth court judge, when imposing youth sentences for first- or second-degree murder, has to sentence the young person to

1) imprisonment, and to 2) intensive rehabilitative custody and supervision. While, as mentioned before, imprisonment may provide the judge with the non-criminogenic environment where to address the young person's offending behaviour, the statute has eliminated judicial discretion for providing an alternative to incarceration. Paradoxically, one of the official reasons for replacing the *Young Offenders Act* (1982) with the *Youth Criminal Justice Act* (2002) was the overreliance on incarceration of the former. As we can see, the *Youth Criminal Justice Act* (2002) relies more on incarceration for dealing with murder offences than the *Young Offenders Act* (1982) did:

[w]hen a youth justice court finds a young person guilty of an offence and is imposing a youth sentence, the court shall, subject to this section, impose any one of the following sanctions or any number of them that are not inconsistent with each other and, if the offence is first degree murder or second degree murder within the meaning of section 231 of the Criminal Code, the court shall impose a sanction set out in paragraph (q) [imprisonment] or subparagraph (r)(ii) or (iii) [intensive rehabilitative custody and supervision] and may impose any other of the sanctions set out in this subsection that the court considers appropriate. (ss. 42(2)) [emphasis added]

The *Youth Criminal Justice Act* (2002) regulates four different maximum times of detention when sentencing a young person to incarceration: two, three, four and six years, with a possibility of combining incarceration with other sanctions after it. The “general” maximum time of detention is two years (clause 42(2)(r)(i)(A)). The maximum time of three year incarceration applies if the young person is found guilty of an offence for which the punishment provided by the *Criminal Code* is imprisonment for life (clause 42(2)(r)(i)(B)). With regard to the offences of first- and second-degree murder, the statute specifically states that the maximum time of intervention is 10 and 7 years (respectively), and this should comprise committal to intensive rehabilitative custody *and* placement under conditional supervision in the community. The maximum time of committal to intensive rehabilitative custody cannot exceed six years for the offence of first-degree murder (subparagraph 42(2)(q)(i)) and four years for the offence of second-degree murder (subparagraph 42(2)(q)(ii)). If the youth court judge imposes the young

offender the maximum time of detention, the maximum time of placement under conditional supervision in the community will be four years for first-degree murder and three years for second-degree murder. For example, if a young person is found guilty of first-degree murder and receives a youth sentence, the youth court judge has to sentence her to intensive rehabilitative custody and placement under conditional supervision in the community. If the youth court judge sentences this young person to three years of intensive rehabilitative custody, the youth court judge will be able to sentence the young person to seven years of placement under conditional supervision. The reason for this is that the total sentence (both measures) cannot exceed 10 years; however, they can also be for less than 10 years. It can be argued that the *Youth Criminal Justice Act* (2002) forces the youth court judge to impose a particular kind of sanction on young offenders (incarceration) and limits the judicial discretion for selecting less intrusive sanctions. This did not exist in the *Juvenile Delinquents Act* (1908) or in the *Young Offenders Act* (1982).

While the periods of incarceration mentioned above are the maximum periods of incarceration that a youth can receive for her offending as a matter of “principle”, there is an exception in the Act that allows the youth court to incarcerate the youth for a period *in excess of these maximum periods*. This occurs when the young person commits an offence after she has commenced her prison sentence but before she completes it. In this situation the *Youth Criminal Justice Act* (2002) allows the youth court to exceed the maximum periods of detention and *makes compulsory* the adoption of a *consecutive sentence of incarceration*. For instance, let’s see the following scenario: a 15 year old youth found guilty of first-degree murder is sentenced to five year imprisonment and four years of conditional supervision. The following year, while in

prison, the young person is found guilty of another count of first-degree murder committed while in detention, and is sentenced to six years imprisonment and four years of conditional supervision. In this case her total sentence will be for 11 years of incarceration and eight years of conditional supervision. This is the situation in which the continuous combined duration of the youth sentence can exceed ten years. Section 42(16) reads:

- [i]f a youth sentence is imposed in respect of an offence committed by a young person after the commencement of, but before the completion of, any youth sentences imposed on the young person,
- (a) the duration of the sentence imposed in respect of the subsequent offence shall be determined in accordance with subsections (14) and (15);
 - (b) the sentence may be served consecutively to the sentences imposed in respect of the previous offences; and
 - (c) the combined duration of all the sentences may exceed three years and, if the offence is, or one of the previous offences was,
 - (i) first degree murder within the meaning of section 231 of the Criminal Code, the continuous combined duration of the youth sentences may exceed ten years, or
 - (ii) second degree murder within the meaning of section 231 of the Criminal Code, the continuous combined duration of the youth sentences may exceed seven years. (ss. 42(16)) [emphasis added]

6.2.4. Rules of procedure

Similar to the *Young Offenders Act* (1982) and also in observance of the *Charter*, the *Youth Criminal Justice Act* (2002) regulates extensive due *process* rights. The young person's right to counsel is one of the most broadly regulated rights (section 25). These rights have been specifically recognized in the Declaration of Principle.

Similar to the *Young Offenders Act* (1982), the common law rule of privacy of the procedure developed under the *Juvenile Delinquents Act* (1908) disappeared with the enactment of the *Youth Criminal Justice Act* (2002). The youth court is open to everybody. Moreover, the preamble to the current statute specifically states that information about the youth justice system,

the offence, and the effectiveness of the measures taken regarding youth offending should be publicly available.

On the other hand, the *Youth Criminal Justice Act* (2002) strictly enforces the rule prohibiting the reporting of the identity of a young person alleged to have committed an offence and criminalizes its inobservance with a maximum penalty of two year imprisonment (subsections 110(1) and 138(1)). This rule only applies regarding young offenders who have received “youth sentences”. If the young person has received an adult sentence, stigmatization is allowed and the information that can lead to him being identified as a young offender is not longer protected (subsection 110 (2)).

The *Youth Criminal Justice Act* (2002) implements a different system regarding the incarceration of young offenders. According to the Act, all young offenders younger than 18 years of age should be incarcerated in a youth custody facility. This applies whether the young person has received a youth sentence or an adult sentence (section 84 and subsection 76(2)). The Act also allows young people to remain within a youth custody facility after turning 18 years of age, no matter whether they have received a youth sentence or an adult sentence (subsections 93(1) and 76(9)). Moreover, the Act allows in both circumstances young people to remain in the youth custody facility after they turn 20 years of age if the youth court is satisfied that the young person’s remaining in the youth custody facility will be in her best interest and would not jeopardize the safety of others (subsections 93(1) and 76(9)).

6.3. The enactment of the *Youth Criminal Justice Act* in Parliament

The obscure need to repeal the *Young Offenders Act* (1982) and address its unclear perceived inadequacies became a compelling matter for the Federal Government. Some of the reasons enumerated by the (then) Minister of Justice (Hon. Anne McLellan) in 2001 were the lack of a coherent youth justice policy, a declaration of principles that was difficult for the courts to apply, the use of the court system for dealing with minor offences, high rates of youth incarceration, and a disregard for the victims of crime's right to participate in the process.⁶²³ However, there was no unanimity with regard to the proposed legislation, maybe because the problems to be addressed were not clear enough from the beginning: while some groups supported the youth justice bill claiming that it was the "right" legislation to replace an outdated *Young Offenders Act* (1982),⁶²⁴ others responded that there was nothing wrong with the implementation of the *Young Offenders Act* (1982) and, therefore, no need to replace it.⁶²⁵ At the same time, while some Members of Parliament complained that the new bill was not "severe" enough to "tackle" youth crime,⁶²⁶ others highlighted the "extreme" severity of the proposed legislation.⁶²⁷ This is an expected reaction towards the ambiguity of the all-embracing expression "protection of society". As had happened before regarding the 1995 Amendment to the *Young Offenders Act* (1982), a misinformed public opinion who believed that crime rates were increasing – when in fact they

⁶²³ *House of Commons Debates*, 37th Parl, 1st Sess (14 February 2001) at 704; *Debates of the Senate, Standing Senate Committee on Legal and Constitutional Affairs*, 37th Parl, 1st Sess (4 October 2001) at 11:7-9; *Debates of the Senate*, 37th Parl, 1st Sess (5 June 2001) at 1008-1010 (Hon Landon Pearson); Nicholas Bala & Sanjeev Anand, "The First Months under the Youth Criminal Justice Act: A Survey and Analysis of Case Law" (2004) 46:3 *Canadian Journal of Criminology and Criminal Justice* 251.

⁶²⁴ *House of Commons Debates*, 37th Parl, 1st Sess (14 February 2001) at 703 (Hon Anne McLellan); *House of Commons Debates*, 37th Parl, 1st Sess (14 February 2001) at 722 (Hon Carole-Marie Allard).

⁶²⁵ *House of Commons Debates*, 37th Parl, 1st Sess (14 February 2001) at 709 (Hon Michel Bellehumeur).

⁶²⁶ *House of Commons Debates*, 37th Parl, 1st Sess (14 February 2001) at 706 (Hon Vic Toews); *House of Commons Debates*, 37th Parl, 1st Sess (26 March 2001) at 2210 (Hon Darrel Stinson).

⁶²⁷ *House of Commons Debates*, 37th Parl, 1st Sess (14 February 2001) at 714 (Hon Bill Blaikie).

were also decreasing this time⁶²⁸ – guided the debate and the enactment of the *Youth Criminal Justice Act* (2002).⁶²⁹ It can be pointed out that what makes public opinion even more misinformed is not only the lack of information concerning decreasing crime rates, but as well the old belief that the increase of punishment favors public safety by reducing crime (deterrence theory). In this case both kind of misinformation (crime rates and punishment as a solution) contributed to the proposals that were tabled at the House of Commons. Worth point out, while this represents the situation in the House of Commons, the Senate acknowledged that youth crime rates had been decreasing.

One of the main amendments introduced by the *Youth Criminal Justice Act* (2002) is the substitution of the provisions regarding the transfer of young offenders to the adult court with the imposition of adult sentences within the youth justice system. Despite the official explanation for these changes, the reasons for this amendment are still not clear. The official explanation attributes this decision to a problem of “reducing the time for conviction and sentencing” exclusively. Under the *Juvenile Delinquents Act* (1908) and the *Young Offenders Act* (1982), once the Crown or the young person requested a transfer or opposed to a “presumptive” transfer, the youth court judge had to decide whether the goals of public protection and rehabilitation of the young person could be appropriately reconciled within the youth justice system (what is, of course, expected and normal). If the youth court judge decided that these goals could not be reconciled within the youth justice system, the youth court judge would order a transfer and the adult justice system would have jurisdiction to start the trial. The “time” of one system was

⁶²⁸ Statistics Canada. *Juristat. Youth Court Statistics 2001-2002 Highlights* (Canadian Centre for Justice Statistics) (Ottawa: Minister of Industry, 2003) at 9; Julian Roberts, “Public Opinion and Youth Justice” in Michael Tonry & Anthony Doob, eds, *Youth Crime and Youth Justice. Comparative and Cross-National Perspectives* (Chicago and London: The University of Chicago Press, 2004) 495.

⁶²⁹ Doob & Sprott, *supra* note 19; Beaulieu & Cesaroni, *supra* note 116.

added to the time of the other system, even though each system had its own “speed”. Cases that were transferred to the adult court generally took, at least in a number of cases, many years to be tried and sentenced because of the need to produce evidence in each instance and the different speed of each system: “much of the evidence adduced at a transfer hearing [had] to be adduced again at the trial or at the sentencing hearing.”⁶³⁰ As a result, according to the official explanation, young offenders – if convicted - were sentenced many years after the offence had occurred. This had been highly criticized as being contrary to a timely intervention and, as a result, also contrary to an effective rehabilitation.

There are no reasons not to believe this official explanation; however, the question that arises is whether the problem of the length of the proceedings was the appropriate explanation or reason for substituting the transfer to adult courts with the imposition of adult sentences within the youth court. One cannot help thinking that the joint abolition of the mechanism of transfer and the imposition of adult sentences would have been the best option for dealing with the problem of the excessive time of the proceedings. Moreover, the abolition of these measures would have promoted the effective rehabilitation of young people. Neither does the transfer mechanism nor the imposition of adult sentences have the problem of excessive court time or the effective rehabilitation of young people as their main concern and objective. Moreover, these measures also require time. As a result, it is very difficult to be satisfied with the official explanation for introducing adult sentences within the youth justice system. The problem of the excessive time of the proceedings is an ancillary or secondary argument rather than a reason for introducing adult sentences within the youth justice system.

⁶³⁰ David Goetz, *Bill C-7: The Youth Criminal Justice Act* (Ottawa: Library of Parliament, 2001) at 44.

As noted above, in April 1997 the Standing Committee on Justice and Legal Affairs released the report entitled “Renewing Youth Justice”. This report, among other matters, examined the issue of transferring young offenders to the adult court.⁶³¹ The committee explored several possibilities: 1) to retain the regulation of the *Young Offenders Act* (1982); 2) to repeal the transfer provisions in their entirety; 3) to repeal the presumptive transfer/ “reverse onus” provisions added by Bill C-37 (1995 Amendment); 4) to add more offences to the presumptive transfer/“reverse onus” provisions; 5) to add an automatic transfer to ordinary/adult court of young people, no matter their age, alleged to have committed serious offences such as murder or sexual assault; or 6) to replace the present pre-adjudicative system by a post-adjudicative system (such as adult sentences). From these options it is evident the slight opportunity for the complete abolition of the transfer to the adult court or the imposition of adult sentences and the high chances for continuing reproducing the same dichotomy between the distinction youths that are youths / youths that are adults. The Committee recommended the adoption of the mechanism of adult sentences within the youth justice system (option number 6).⁶³² The Committee considered that the youth court should deal with young offenders 14 years of age and older accused of having committed indictable offences, and if they were found guilty of the alleged offence, the youth court should impose them an adult sentence.

On 12th May 1998 the report of the Department of Justice was released, which also addressed the issue of transferring young offenders to ordinary courts.⁶³³ The Committee noted that there were (only) 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

⁶³¹ 1997 *Renewing Youth Justice*, *supra* note 577.

⁶³² *Ibid* at recommendation 11.

⁶³³ 1998 *Strategy*, *supra* note 582.

sentence.”⁶³⁴ From this quote it is clear that the Committee eliminated from the beginning any discussion about the *founding reasons* for transferring youths to the adult criminal justice system (with all its radical forms of punishment) or sentencing them to severe (adult) sanctions. The Committee suggested that all youths be kept within the youth court system; however, youths who committed certain offences would be presumed to deserve “adult sentences” instead of “youth sentences.” It can be argued that this recommendation is clearly influenced by the retributive ideas and the utilitarian ideas attached to the theories of deterrence and denunciation.

The recommendation of the Committee meant that the sentencing of young offenders receiving adult sentences would not be governed by the youth legislation centered on rehabilitation and reintegration but rather on *Criminal Code*. We can see here again an overreliance on imprisonment and/or on the severity of punishment, an overreliance that can only be sustained by the theories of punishment indifferent to social inclusion. With regard to the kind of offences that were presumed to deserve adult (severe) sentences, the Committee kept the offences of first and second degree murder, attempted murder, manslaughter and aggravated sexual assault. At the same time, the Committee suggested the enactment of harsher legislation: not only did access to adult sentences was expanded to include the fifth category of “youths repeatedly convicted of serious violent offences”, but as well it applied to youths 14 and 15 years of age. Under the *Young Offenders Act*, the reverse onus regarding the transfer of young offenders to the adult court only applied to youths 16 and 17 year old. This also demonstrates a strong influence of the theories of punishment indifferent to social inclusion that put an emphasis on severe punishment:

⁶³⁴ *Ibid* at 25.

[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.⁶³⁵ [Department of Justice]

Finally, the Committee suggested that if the youth court judge considered that a young person deserved an adult sentence, that young person would be treated as an adult for other purposes, such as the publication of identity and record-keeping.⁶³⁶ The full expansion of collateral forms of hostility was also recommended.

From another angle of observation, the perceptions of the new legislation varied considerably within Parliament. There was a vocal minority in the House of Commons who strongly opposed to the abrogation of the *Young Offenders Act* (1982) and the enactment of the new statute. This was the approach of the Bloc Québécois, who argued that the *Young Offenders Act* (1982) was a successful intervention strategy in Quebec, so there was no need to replace it.⁶³⁷ Despite this, the bill received third reading in the House of Commons and was passed to the Senate. On February 19, 2002, the *Youth Criminal Justice Act* (2002) received Royal Assent and new legislation for youths accused of having committed indictable offences came into force.

To present (May 2012), the *Youth Criminal Justice Act* (2002) has been amended four times; however, none of these amendments has modified the regulation of the imposition of adult sentences as stated in the 2002 version. On the other hand, as presented below, this regulation has been substantially modified by the Supreme Court of Canada's decision in *R. v. D.B.*

⁶³⁵ *Ibid* [emphasis added]. See also recommendation 11.

⁶³⁶ *Ibid* at 27.

⁶³⁷ Jean Trépanier, "What Did Quebec Not Want? Opposition to the Adoption of the Youth Criminal Justice Act in Quebec (2004) 46:3 Canadian Journal of Criminology and Criminal Justice 273.

6.4. The Constitutionality of the Presumption of Adult Sentences in the *Youth Criminal Justice Act* (2002)

Two decisions have delineated the application of the *Youth Criminal Justice Act* (2002) in Quebec: *Quebec v Canada* (2003) and *R. v. D.B.* (2008).⁶³⁸ The former declared the unconstitutionality of the presumption of adult sentences (including the non-applicability of the ban on publication) in the *Youth Criminal Justice Act* (2002) in Quebec before the *Youth Criminal Justice Act* (2002) came into force. The latter extended this declaration of unconstitutionality to all over Canada.

6.4.1. The decision of the Quebec Court of Appeal: *Quebec v. Canada*

On 31st March 2003, one day before the coming into force of the *Youth Criminal Justice Act* (2002), the Quebec Court of Appeal released its unanimous decision in *Quebec v. Canada*, which substantially modified the implementation of the *Youth Criminal Justice Act* (2002) in Quebec.⁶³⁹ The Quebec Court of Appeal held that the regulation of presumptive offences, according to which a young person accused of very serious offences had the onus of demonstrating why he should receive a youth sentence rather than an adult sentence, was unconstitutional. As already mentioned in Chapter 6, the notion of “presumptive offences” includes first- and second-degree murder, manslaughter, attempted murder, aggravated sexual assault, and a third determination of serious violent offence. In addition to this, the Quebec Court of Appeal held that the ban on publication was part of the sentence and because of this it was the Crown - rather than the young person - who had to demonstrate why the ban should be lifted and the young offender’s private information would not be protected.

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⁶³⁹ *Quebec v Canada*, *supra* note 94.

It is no surprise that certain groups in Quebec were opposed to replacing the *Young Offenders Act* (1982) by the *Youth Criminal Justice Act* (2002). As Trépanier reports, the Quebec youth justice system had implemented the *Young Offenders Act* (1982) successfully and perceived the change in legislation as reinforcing the punitive aspects of the youth criminal justice system rather than rehabilitating young people.⁶⁴⁰ As part of this opposition, the Quebec government asked the Quebec Court of Appeal to decide whether *Bill C-7*, which became the *Youth Criminal Justice Act* (2002), was in accordance with international human rights law and Canadian constitutional law:

to study a number of questions concerning compliance of certain legislative provisions in Bill C-7 [current *Youth Criminal Justice Act* (2002)] with the International Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and the rights guaranteed under section 7 and subsection 15(1) of the Canadian Charter of Rights and Freedoms.⁶⁴¹

The Quebec Court of Appeal identified as matters in dispute (issues) 1) the validity of certain provisions in view of the constitutional division of legislative jurisdiction, 2) whether the impugned provisions complied with international treaties that Canada had ratified, and 3) whether the impugned provisions were in compliance with section 7 and subsection 15(1) of the *Charter*.⁶⁴²

With regard to the first issue, the terms of the reference required the Quebec Court of Appeal to consider whether *Bill C-7* infringed the provincial legislative powers under subsections 92(13), 92(14) and 92(16) of the *Constitution Act* (1867).⁶⁴³ The underlying argument was that these

⁶⁴⁰ Trépanier, *supra* note 637.

⁶⁴¹ *Quebec v Canada*, *supra* note 94.

⁶⁴² *Charter*, *supra* note 465.

⁶⁴³ *Constitution Act* (1867), *supra* note 27, ss 92(13), (14), (16):

legislative provisions did not allow the expression of the particular characteristics of the various provinces in the exercise of their responsibility for child protection and the administration of justice in regard to young people.⁶⁴⁴ The specific contended provisions were:

Section 6(1), to the extent that it delegates to police officers the power to refer young persons to a program or agency in the community;

Section 18, to the extent that it gives the Attorney General of Canada the power to establish youth justice committees in a province;

Section 19 and 41, concerning conferences;

Section 35, concerning the referral by the court to a child welfare agency;

Section 157, to the extent that it gives the Attorney General of Canada the power to establish community-based programs as alternative measures.⁶⁴⁵

The Attorney General of Quebec argued that these provisions were ultra vires because they encroached on the powers of the provinces in matters of child protection and the administration of justice. After examining the provisions, the Court referred to *Smith*, where the Supreme Court of Canada had ruled on the jurisdiction of the federal government over crime prevention and the treatment of juvenile delinquents, and held that the provisions as criminal legislation were within the federal jurisdiction.⁶⁴⁶ Referring to *Smith*, the Quebec Court of Appeal held that the words criminal law in subsection 91(27) of the *Constitution Act* (1867) should be interpreted in their widest sense as including the above mentioned provisions.⁶⁴⁷ This means that Parliament had jurisdiction for enacting these provisions as it did.

In each province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of subjects next hereinafter enumerated; that is to say, [...]

13. Property and Civil Rights in the Province,

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts,

16. Generally all Matters of merely local or private Nature in the Province.

⁶⁴⁴ *Quebec v Canada*, *supra* note 94.

⁶⁴⁵ *Ibid* at para 59.

⁶⁴⁶ *Smith*, *supra* note 232. The Quebec Court of Appeal made also reference to *R v S(S)*, [1990] 2 SCR 254, 57 CCC (3D) 115.

⁶⁴⁷ *Constitution Act* (1867), *supra* note 27 at ss 91(27):

The second issue was whether certain provisions of *Bill C-7* were incompatible with international human rights law that Canada had ratified or signed, specifically the *Convention on the Rights of the Child*, the *International Covenant on Civil and Political Rights*, the *Beijing Rules*, the *Riyadh Guidelines*, and the *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*.⁶⁴⁸ The Quebec Court of Appeal was asked to examine the provisions dealing with the principles of *Bill C-7*, the regulation of extrajudicial measures and sanctions, the imposition of adult sentences, and the protection of the young person's identifiable information.

After examining the legal effects in domestic law of the ratification of international human rights law, the Quebec Court of Appeal held that international human rights law does not have a coercive effect on a State. As a result, the Court decided to rule regarding the "incompatibility" of certain clauses in *Bill C-7* with international human rights law rather than on whether *Bill C-7* was "invalid" with regard to international human rights law. According to the Court, *Bill C-7* gave decision-makers the discretion and power required to apply the above mentioned provisions in a manner that was compatible and reconcilable with these treaties, and also in accordance with the philosophy undermining the international treaties. Consequently, the provisions of *Bill C-7* were compatible with international human rights law.

It shall be lawful for the Queen, by an with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislature of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

⁶⁴⁸ *Quebec v Canada*, *supra* note 94 at para 58.

The third issue was whether certain provisions of *Bill C-7* violated the rights guaranteed under section 7 and subsection 15(1) of the *Charter*, considering in particular the presumption regime leading young people to the criminal justice system applicable to adults as soon as they reached the age of 14.⁶⁴⁹ Section 7 and subsection 15(1) read, respectively:

7. 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.⁶⁵⁰

15(1). Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁶⁵¹

The Attorney General of Quebec argued that certain provisions of *Bill C-7*, including the purpose and principles of sentencing, the imposition of adult sentences, and the lift on the ban on publication regarding youths receiving youth sentences for presumptive offences, infringed the young person's rights to freedom and psychological security. On the other hand, the Attorney General of Quebec did not impugn the measures allowing publication of the identity of a young person who has received an adult sentence, because "[i]n his opinion, that is an exceptional measure in the sentencing regime that concerns only particularly serious offences and that is no longer applicable after the young person is charged."⁶⁵² The Attorney General of Canada did not contest whether the sentences provided for in *Bill C-7* infringed the section 7 liberty interest; rather, he contended that the legislative provisions were in accordance with the principles of fundamental justice. With regard to section 7 psychological security interest, the Attorney

⁶⁴⁹ *Quebec v Canada*, *supra* note 94 at para 58.

⁶⁵⁰ *Charter*, *supra* note 465, s 7.

⁶⁵¹ *Ibid*, s 15(1).

⁶⁵² *Quebec v Canada*, *supra* note 94 at para 203.

General of Canada argued that publishing of a young person's identity did not constitute an intervention of the State that seriously compromised a person's fundamental choices.⁶⁵³

A unanimous Court held that the provisions regulating the presumption of adult sentences for presumptive offences and the exception to the principle of confidentiality were likely to compromise young people's psychological security, which constituted an infringement of section 7 of the *Charter*.⁶⁵⁴ In addition to this, the Court held that these provisions compromised liberty interests, thus another infringement of section 7 of the *Charter*.

Following a section 7 *Charter* analysis, the Court found that the presumption of adult sentences for presumptive offences and the lift on the ban of publication for presumptive offences offended substantive and procedural principles of fundamental justice. The Court identified as substantive principles of fundamental justice 1) that young offenders be dealt with separately from adults; 2) that rehabilitation, rather than suppression and dissuasion, be at the heart of young people legislative and judicial intervention; 3) that the justice system for minors limit the disclosure of the minor's identity to prevent stigmatization that can limit rehabilitation; and 4) that the justice system for minors consider the best interest of the child. With regard to the procedural principles of fundamental justice, the Court held that the regime of presumption of the imposition of an adult sentence and the disclosure of the identity of young people sentenced to youth sentences for presumptive offences infringed the presumption of innocence guaranteed in subsection 11(d) of the *Charter*. The presumption of innocence has been recognized by the Supreme Court of Canada as a fundamental principle of justice protected by section 7 of the *Charter*. The

⁶⁵³ *Ibid* at paras 204-205.

⁶⁵⁴ *Ibid* at para 212.

consequence of this is that the Crown, rather than the young person, should assume the burden of demonstrating beyond a reasonable doubt aggravating factors, such as the imposition of an adult sentence and the exception to the rule of confidentiality.⁶⁵⁵

The Court concluded that the infringements to section 7 of the *Charter* could not be justified under the first section of the *Charter*. Because of this, the Court considered that it was not necessary to proceed with a judicial examination of whether these sections also infringed section 15 of the *Charter*.⁶⁵⁶

The immediate consequence of this decision is that the regime of the presumption of adult sentences for presumptive offences never operated in Quebec. Because this decision was released one day before the *Youth Criminal Justice Act* (2002) came into force in Canada, the Quebec Crown – rather than the young person – has always had to demonstrate why a young person should receive an adult sentence rather than a youth sentence and whether the protection of the young person's should be lifted.

6.4.2. The decision of the Supreme Court of Canada: *R. v D.B.*

As presented above, in 2003 the Quebec Court of Appeal held that the presumption of adult sentences for presumptive offences and the exception to the rule of confidentiality for these offences were contrary to section 7 of the *Charter* as they infringed young people's liberty and psychological security interests. Similarly, in 2006 the Ontario Court of Appeal held that these provisions infringed the liberty interests as guaranteed by section 7 of the *Charter*. The Ontario

⁶⁵⁵ *Ibid* at paras 244-262.

⁶⁵⁶ *Ibid* at para 293.

Court of Appeal did not examine whether the young person's security interests as regulated in section 7 of the *Charter* were also infringed.⁶⁵⁷ On the other hand, also in 2006, the British Columbia Court of Appeal held that the regulation of adult sentences and the exception to the rule of confidentiality was in accordance with the *Charter*.⁶⁵⁸ Because of this discrepancy in the application of the *Youth Criminal Justice Act* within Canada, the Supreme Court of Appeal gave leave to the Crown for appealing the 2006 decision of the Ontario Court of Appeal.

The majority of the Supreme Court of Canada, in a highly divided vote (5/4), held that the presumption of adult sentences for presumptive offences and the exception to the rule of confidentiality affected a young person's liberty interest as guaranteed by section 7 of the *Charter*. This infringement was contrary to two principles of fundamental justice: 1) that young people are entitled to a presumption of diminished moral blameworthiness or culpability and 2) that the Crown is obliged to prove any aggravating factors in sentencing on which it relies beyond a reasonable doubt. This infringement could not be saved under section 1 of the *Charter*. In contrast, the minority vote held that this regulation was in accordance with the *Charter*.⁶⁵⁹

According to Justice Abella, for the majority of the Supreme Court of Canada, the issues of this case were whether the presumption of adult sentences for presumptive offences and the exception to the rule to confidentiality affected a young person's liberty interest as regulated by section 7 of the *Charter*, and whether such an infringement was in accordance with principles of fundamental justice. With regard to the first issue, and following the decisions from the Quebec Court of Appeal and Ontario Court of Appeal, Justice Abella concluded that these regulations

⁶⁵⁷ *R v DB* (2006), 208 OAC 225, 206 CCC (3d) 289.

⁶⁵⁸ *R v KDT*, 2006 BCCA 60, 206 CCC (3d) 44.

⁶⁵⁹ *R v DB*, 2008 SCC 25, [2008] 2 SCR 3 [*R v DB*].

infringed a section 7 liberty interest.⁶⁶⁰ She noted that as the Crown had conceded this, her analysis was focused on whether this deprivation was in accordance with the principles of fundamental justice.

With regard to the principles of fundamental justice – the second issue to be decided - Justice Abella made reference to the 2003 decision of the Quebec Court of Appeal and the substantive principles of fundamental justice identified therein: 1) that young offenders be dealt with separately from adults; 2) that rehabilitation, rather than suppression and dissuasion [punishment and deterrence], be at the heart of young people legislative and judicial intervention; 3) that the justice system for minors limit the disclosure of the young person’s identity to prevent stigmatization that can limit rehabilitation; and 4) that the justice system for minors consider the best interest of the child.⁶⁶¹ While she recognized these principles as important for the administration of youth justice, she did not uphold them as principles of fundamental justice. Rather, she focused her analysis on “what” the onus provisions for the imposition of adult sentences and the exception to the rule of confidentiality engaged. According to her, the reason for having a separate legal and sentencing system for young people was their age: “young people have heightened vulnerability, less maturity and reduced capacity for moral judgment”.⁶⁶² She identified the presumption of diminished moral blameworthiness or culpability as the principle at issue here, “a presumption that has resulted in the entire youth sentencing scheme, with its

⁶⁶⁰ *Ibid* at para 36.

⁶⁶¹ *Ibid* at para 32.

⁶⁶² *Ibid* at para 41.

unique approach to punishment.”⁶⁶³ However, she pointed out that this was a presumption that could be rebutted.⁶⁶⁴

After reviewing the history of the Canadian youth justice system and the international human rights conventions ratified by Canada, Justice Abella upheld the principle of “presumption of diminished moral blameworthiness” as a principle of fundamental justice. According to her, this principle was an identifiable legal principle and there existed consensus as it been fundamental to the way in which the legal system ought to fairly operate.

Having identified the “presumption of diminished moral blameworthiness” as a principle of fundamental justice, along with the pre-existing principle of fundamental justice that the Crown has the burden to demonstrate why a more severe sentence is necessary and appropriate in any given case, Justice Abella’s next question was whether the infringement of the liberty interest was in accordance with these principles.⁶⁶⁵ Not only was the regulation of the presumption of adult sentence for presumptive offences and the exception to the rule of confidentiality contrary to principles of fundamental justice, but as well such a regulation could not be saved under section 1 of the *Charter*. As a result, these regulations were contrary to the *Charter*.

The fundamental problem of the vote of the majority of the Supreme Court of Canada is that the diminished criminal responsibility of young people is not a “presumption”, but a “fact.” As presented in Justice Abella’s reasoning leading to her conclusions, young people do not possess sufficient cognitive capacity to understand the full consequences of their behaviour and are quite

⁶⁶³ *Ibid.*

⁶⁶⁴ *Ibid* at para 45.

⁶⁶⁵ *Ibid* at para 82.

amenable to peer-pressure (lack of volitional control).⁶⁶⁶ Such a finding should have led her to the conclusion that young people who commit offences deserve less severe penalties than do mature offenders as a matter of fact rather than a presumption.⁶⁶⁷ Unfortunately, that was not Justice Abella's conclusion for the majority of the Court. Had the Supreme Court of Canada recognized this, the implications of such a decision would have meant a clear distinction between the adult and youth systems. Young people could not receive adult sentences, no matter the evidence brought before the trial judge; they are psychologically unable to fully understand the future consequences of their conduct.

Justice Rothstein, for the minority of the Supreme Court of Canada, disagreed with Justice Abella's finding that the presumption of diminished moral blameworthiness created a presumption of youth sentences lower and of a publication ban.⁶⁶⁸ According to Justice Rothstein, the issues in this case were whether 1) the regulation of presumptive offence sentencing and confidentiality provisions constituted a deprivation of *Charter* section 7 interests, 2) there existed applicable principles of fundamental justice, and 3) the deprivation of *Charter* section 7 interests was in accordance with the principles of fundamental justice.⁶⁶⁹

With regard to the first issue, and only regarding the regulation of presumptive offence sentencing, Justice Rothstein held that the Crown had recognized that a liberty interest as regulated by section 7 of the *Charter* was compromised. Because of this he moved to the second issue – the applicable principles of fundamental justice. Whereas he agreed with Justice Abella

⁶⁶⁶ *Ibid* at paras 61-67.

⁶⁶⁷ Barry C Feld, "Competence, culpability, and punishment: implications of *Atkins* for executing and sentencing adolescents" (2003) 32:2 Hofstra Law Review 463 at 498.

⁶⁶⁸ *R v DB*, *supra* note 659 at para 106.

⁶⁶⁹ *Ibid* at para 120.

that the presumption of reduced moral blameworthiness was a principle of fundamental justice, he disagreed on whether the presumption of youth sentences for young offenders was a necessary attribute of this principle. According to him,

it must follow that if, as they hold [Abella J. and Goudge J.A.], the principle of reduced moral blameworthiness leads inevitably to the presumption of youth sentence, the presumption of youth sentences must also be a principle of fundamental justice. In other words, fundamental justice requires that there always be a presumption of youth sentences.⁶⁷⁰

The problem here, as Justice Rothstein identified it, is that the concept of “youth sentence” was not an “identifiable” legal principle or a principle that society accepted as vital to the notion of justice, so the “presumption of youth sentences” could not be a principle of fundamental justice.⁶⁷¹

On the other hand, Justice Rothstein identified as a principle of fundamental justice the Crown’s burden of proving aggravating sentencing factors beyond a reasonable doubt.⁶⁷²

Having identified as principles of fundamental justice the reduced moral blameworthiness of young people and the Crown’s burden of proving aggravating sentencing factors beyond a reasonable doubt, Justice Rothstein found that the deprivation of the *Charter* section 7 liberty interest was in accordance with these principles. According to him, the principles of fundamental justice were concerned with both the interests of the individual and the interests of society. Justice Rothstein found that the presumption of reduced moral blameworthiness should also be concerned with societal interest; thus, longer sentences for young offenders who commit

⁶⁷⁰ *Ibid* at para 129.

⁶⁷¹ *Ibid* at para 138.

⁶⁷² *Ibid* at para 139.

the most serious offences was in accordance with these societal interests.⁶⁷³ With regard to the second principle of fundamental justice (Crown's burden of proving aggravating sentencing factors beyond a reasonable doubt), Justice Rothstein found that the imposition of adult sentences was not "automatic"; rather, the legislation provided the young person with the right to argue why they should not apply. This regulation was in accordance with the above mentioned principle of fundamental justice.⁶⁷⁴ This meant that the presumption of adult sentences for presumptive offences was not contrary to the principles of fundamental justice and therefore, not contrary to the analytical framework of section 7 of the *Charter*.

With regard to the exception to the rule of confidentiality, Justice Rothstein found that a section 7 liberty interest was not engaged as a publication ban was not part of the sentence. The *Youth Criminal Justice Act* (2002) only "deemed" the publication ban as part of the sentence for appeal purposes. In other words, there was no *Charter* issue to argue.⁶⁷⁵

In conclusion, Justice Rothstein held that the regulation of the presumption of adult sentences for presumptive offences in the *Youth Criminal Justice Act* (2002) and the non-applicability of the ban on publication for young people accused of having committed these offences did not infringe the *Charter*. Consequently, youth people should be subject to the presumptive regime in the *Youth Criminal Justice Act* (2002) as it was originally enacted.

There are two problems with the decision of the minority of the Supreme Court of Canada: the first is the logic of the argument and the second problem relates the underlying philosophy of the

⁶⁷³ *Ibid* at para 146.

⁶⁷⁴ *Ibid* at para 162.

⁶⁷⁵ *Ibid* at para 171.

youth justice system. The first problem (logic of the argument) is that the vote of the minority confuses a finding of a principle of fundamental justice with its immediate consequences. In other words, both the applicable sentence (youth sentence) and the conditions of detention (youths detained separate and apart from adults) are consequences of Justice Abella's principle of "presumption of reduced moral blameworthiness" (cause). When sentencing, before imposing a sanction the trial judge assesses the offender's moral blameworthiness. It is not the sanction that determines the moral blameworthiness of the accused, but rather the other way around: the moral blameworthiness –among other factors - will determine the sanction. This means that Justice Rothstein was right that a "presumption of youth sentence" cannot be a principle of fundamental justice; however, this is a consequence – and not a cause – of Justice Abella's principle of presumption of reduced moral blameworthiness. The "presumption of youth sentence" does not need to be a principle of fundamental justice. In other words, while a youth sentence is a consequence of the presumption of reduced moral blameworthiness, this does not mean that the former is a principle of fundamental justice too (or needs to be). The second problem (underlying philosophy of the youth justice system) is that the vote of the minority clearly leaves aside the rehabilitation of the young person as the fundamental objective of the youth justice system, and replaces it with the most punitive theories of punishment (deterrence, retribution and denunciation). By allowing youth court judges to sentence youths accused of serious offences to long-term sentences and publish their names, the vote of the minority accepts the punitive approach embedded in the *Youth Criminal Justice Act* (2002). The vote of the minority would have clearly erased any distinction between the philosophies of punishment applicable to young offenders found guilty of serious offences and adult offenders.

6.5. The amendments of the *Safe Streets and Communities Act* (2012) to the *Youth Criminal Justice Act* (2002)

On 13th March 2012 Parliament enacted the *Safe Streets and Communities Act* (2012), which has a specific section amending the *Youth Criminal Justice Act* (2002). According to the *Safe Streets and Communities Act* (2012), the amendment to the *Youth Criminal Justice Act* (2002) will come into force on the day fixed by order of the Governor in Council. The order had not been enacted by the time this thesis was deposited for evaluation.

The amendment to the *Youth Criminal Justice Act* (2002) is included in an omnibus bill that contains punitive amendments to the adult justice system. These amendments create new mandatory minimum sentences, increase mandatory imprisonment and the maximum penalty for certain offences, create new offences related to child sexual exploitation, restrict the use of conditional sentences and house arrest, etc. In other words, the amendments to the *Youth Criminal Justice Act* (2002) are included within a massive criminal law statute that contains major amendments to the *Criminal Code*. This legislative procedure strongly undermines the rehabilitative principles in the youth criminal legislation by including this legislation with pure criminal law legislation. As stated by Hon. Mr. Guy Caron in the House of Commons, the fact of including the amendments of the *Youth Criminal Justice Act* (2002) within the *Safe Streets and Communities Act* (2012) was like using a sledgehammer to kill a fly.⁶⁷⁶ In fact, it can be argued that the *Safe Streets and Communities Act* (2012) moves the *Youth Criminal Justice Act* (2002) even closer to the penal philosophy of traditional criminal law. The official purpose of the *Safe Streets and Communities Act* (2012) is to strengthen how the *Youth Criminal Justice Act*

⁶⁷⁶ *House of Commons Debates*, 41st Parl, 1st Sess, No 18 (22 September 2011) (Hon Guy Caron).

(2002) handles violent and repeat young offenders.⁶⁷⁷ However, these amendments contaminate the *Youth Criminal Justice Act* (2002) and compromise the notion of rehabilitation by eliminating the notion of “long-term protection of the public” in the declaration of principle, and introducing the theories of denunciation and deterrence as principles of sentencing. In addition to this, the statute amends the test for the imposition of adult sentences, defines the notions of “violent offences”, “serious offences” and “serious violent offences”, and increases the circumstances under which a young person can be detained during process.

The major amendment that the *Safe Streets and Communities Act* (2012) introduces to the *Youth Criminal Justice Act* (2002) is the “contamination” of the principle of rehabilitation by expressly introducing the theories of deterrence and denunciation within the Purpose and Principles of Sentencing. As mentioned above, scholars argue that the *Youth Criminal Justice Act* (2002) does not include these principles within the imposition of youth sentences as Parliament did not mention them in the Act. Indeed, these principles have been understood as reflecting the most punitive values of the traditional justice system. The *Safe Streets and Communities Act* (2012) read:

(f) subject to paragraph (c) [the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence], the sentence may have the following objectives:

- (i) to denounce unlawful conduct, and
- (ii) to deter the young person from committing offence.⁶⁷⁸

The non-retributive reading of the notion of “proportionality” referred to above may be seriously compromised. According to this amendment, the youth court can give the notion of

⁶⁷⁷ *House of Commons Debates*, 41st Parl, 1st Sess, No 17 (22 September 2011) (Hon Rob Nicholson, Minister of Justice and Attorney General of Canada).

⁶⁷⁸ *Safe Streets and Communities Act* (2012), *supra* note 590, s 172 [emphasis added].

“proportionality” a non-rehabilitative meaning by seeking through the imposition of youth sentence the individual deterrence of the young person and the general denunciation of the behavior. Despite the existence of a judicial discretion for the imposition of these punitive purposes (“the sentence may have”), these principles are now part of the youth justice system and there is a risk of them being referred to. Moreover, the fact that they have been specifically introduced to the *Youth Criminal Justice Act* (2002) shows the new direction the Act is moving towards:

[t]he amendments add specific deterrence and denunciation as principles to guide a judge in sentencing young offenders. Right now, deterrence and denunciation are not even included as objectives in youth sentencing decisions, even though many Canadians believe that young offenders’ sentences should be designed to deter further offending and to send a message to that particular young offender before the court that criminal behavior is simply not acceptable.⁶⁷⁹ [Hon. Mr. Stephen Woodworth, Member of Parliament]

In addition to this, the *Safe Streets and Communities Act* (2012) replaces the principle of “long-term protection of the public” by the principle “public protection”.⁶⁸⁰ The notion of “long-term protection” presents itself as a measure that, while not specifically having the young person in mind, contemplates the young person as part of society (reintegration).⁶⁸¹ The long-term protection of the public recognizes that sanctions are of temporal duration and eventually the young person will be back to society. As such, these measures are aimed at providing the young person with “meaningful” consequences for her reintegration within society; in other words, rehabilitation is the main goal of the sanction. On the other hand, the notion of “public protection” seems to suggest an immediate and compelling measure where the welfare of the

⁶⁷⁹ *House of Commons Debates*, 41st Parl, 1st Sess, No 21 (27 September 2011) (Hon Stephen Woodworth).

⁶⁸⁰ *Safe Streets and Communities Act* (2012), *supra* note 590, s 168(1).

⁶⁸¹ *Debates of the Senate, Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl, 1st Sess, No 14 (27 February 2012).

young person and her eventual reintegration in society is not longer a principal concern of the youth justice system.

The *Safe Streets and Communities Act* (2012) also amends the test to apply by youth court judges for the imposition of adult sentences. In *R. v. D.B.* the Supreme Court of Canada held that the regulation of “presumptive offences” was unconstitutional because young people were presumed to have a reduced moral culpability.⁶⁸² The *Safe Streets and Communities Act* (2012) answers this decision through two fronts. First, the Act derogates the definition of “presumptive offences”.⁶⁸³ Unfortunately this is only a change of face rather than a change of mentality. Most of the offences previously included within the notion of “presumptive offences” are now included within the notion of “serious violent offences”: first- and second-degree murder, manslaughter, attempted murder and aggravated sexual assault.⁶⁸⁴ Second, it introduces the test of “presumption of diminished moral blameworthiness” as part of the test for the youth court to impose an adult sentence on a young person. As a result, the new requirements for a young person to receive an adult sentence have changed. The applicable test for imposing an adult sentence requires the youth court to ascertain that a young person committed an offence that has a maximum penalty of more than two years, that the Crown proved beyond a reasonable doubt that the young person should not be presumed to have a diminished moral blameworthiness, and that the youth sentence – taking into consideration the amended principles mentioned above – are not of sufficient length to hold the young person accountable for the crime. In other words, the test is mostly based on the kind of offence committed rather than on the young offender’s culpability. Indeed, because of the amendments introduced to the Declaration of Principles

⁶⁸² *R v DB*, 2008 SCC 25, [2008] 2 SCR 3 [*R v DB*].

⁶⁸³ *Safe Streets and Communities Act* (2012), *supra* note 590, s 167(1).

⁶⁸⁴ *Ibid*, s 167(2).

(“short term” protection of society) and the Principles and Purposes of Sentencing (deterrence and denunciation), at the end of the day the question will be whether the maximum penalty available in the youth justice system “fits the crime”:

The youth justice court shall order that an adult sentence be imposed if it is satisfied that:

(a) the presumption of diminished moral blameworthiness or culpability of the young person is rebutted; and

(b) a youth sentence imposed in accordance with the purpose and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not be of sufficient length to hold the young person accountable for his or her offending behaviour.⁶⁸⁵

Under the current test, as noted above, the youth court judge has to assess whether a youth sentence will hold the young person accountable for the offending behaviour.⁶⁸⁶ Moreover, the *Youth Criminal Justice Act* (2002) as originally enacted does not require the youth justice court judge to take into consideration deterrence, denunciation, and the short-term “protection of society” into consideration when making this determination.

The *Safe Streets and Communities Act* (2012) introduces the notions of “serious violent offences”, “violent offences”, and “serious offences”, and the consequences for the behaviors included within these categories. The notion of “serious violent offence”, as presented above, includes first- and second-degree murder, attempt to commit murder, manslaughter and aggravated sexual assault.⁶⁸⁷ The *Safe Streets and Communities Act* (2012) defines “serious offences” as “an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more”.⁶⁸⁸ The new category of “violent offence” is also defined in the Act:

⁶⁸⁵ *Ibid*, s 183(1).

⁶⁸⁶ *Youth Criminal Justice Act* (2002), *supra* note 5 at s 72(1).

⁶⁸⁷ *Safe Streets and Communities Act* (2012), *supra* note 590, s 167(2).

⁶⁸⁸ *Ibid*, s 167(3).

“violent offence” means

- (a) an offence committed by a young person that includes as an element the causing of bodily harm;
- (b) an attempt or a threat to commit an offence referred to in paragraph (a); or
- (c) an offence in the commission of which a young person endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm.⁶⁸⁹

Each of the definitions mentioned above will have punitive consequences within the *Youth Criminal Justice Act* (2002). The notion of “serious violent offence” replaces the regulation of “presumptive offence” in the *Youth Criminal Justice Act* (2002). In other words, the regime of “presumptive offences” – except for the presumption of an adult offence – remains in the Act. Moreover, the notion of “violent offences” has consequences with regard to the protection of a young person’s identifiable information. According to the amendment brought by the *Safe Streets and Communities Act* (2012), if a young person is found guilty of a “violent offence” and despite having received a youth sentence, the youth court can still order that the ban on publication be lifted. For this the youth court has to take into consideration the Declaration of Principle and the Sentencing Purpose and Principles in the *Youth Criminal Justice Act* (2002), whether the young person poses a significant risk of committing another violent offence, and whether the lifting of the ban is necessary for protecting the public against that risk.⁶⁹⁰ The Crown has the onus of satisfying the youth court of the appropriateness of lifting the ban on publication.⁶⁹¹ According to the proposed amendment, a young person convicted of having threatened a person to inflict a minor assault could qualify for the lifting of the ban on publication.

The last amendment brought by the *Safe Streets and Communities Act* (2012) is the reversal of the principle that a young person should not be detained during trial; this is done through the

⁶⁸⁹ *Ibid.*

⁶⁹⁰ *Safe Streets and Communities Act* (2012), *supra* note 590, s 185

⁶⁹¹ *Ibid.*

definition of “serious offence”. This Act modifies the presumption stated in current s. 29(2) that the pre-trial detention of a young person is unnecessary. According to current s. 29(2):

In considering whether the detention of a young person is necessary for the protection or safety of the public under paragraph 515(10(b) [substantial likelihood – commit an offence or interfere with the administration of justice] of the Criminal Code, a youth justice court or a justice shall presume that detention is not necessary under that paragraph if the young person could not, on being found guilty, be committed to custody on the grounds set out in paragraphs 39(1)(a) to (c) [restrictions on committal to custody].⁶⁹²

The *Safe Streets and Communities Act* abrogates this presumption and regulates a “justification for pre-trial detention” for young offenders charged with “serious offences”.

In conclusion, if this statute comes into force, this will mark the end of the youth justice system as a system based on rehabilitative principles. All these proposed amendments moved the youth justice system closer to the adult justice system, to the point that if this legislative trend continues, the youth justice system will soon disappear as a distinctive system for regulating youth criminal misbehavior.

6.6. Summary

The *Youth Criminal Justice Act* (2002) has continued with the punitive criminal law intervention philosophy originally enacted in the *Young Offenders Act* (1982) and intensified through the 1992 and 1995 Amendments. Indeed, the *Youth Criminal Justice Act* (2002) – as originally enacted – exacerbated the punitiveness of the 1995 Amendment and drew a distinction between two groups of offenders. Young persons 14 years old and older accused of having committed very serious crimes or have a history of violent offending are presumed to deserve harsher

⁶⁹² *Youth Criminal Justice Act* (2002), *supra* note 5 at s 29(1) [emphasis added].

penalties (“adult sentences”). On the other hand, young persons accused of having committed minor offences may receive lenient sentences (“youth sentences”) or may even be diverted from the youth justice system. Overall, the punishment and intervention strategies in the *Youth Criminal Justice Act* (2002) are aimed at addressing to the kind of the offence committed and leaving the young person's needs as a secondary matter.

As mentioned above, the Supreme Court decision in *R. v. D.B.* left aside the presumption of harsher penalties; however, it held that adult sentences may apply to serious offences. In the meanwhile, the *Youth Criminal Justice Act* is still focused on the notion of “accountability” and “proportionality” for “protecting society”. Indeed, at the time of writing this dissertation there are four bills in the House of Commons that are aimed at increasing the severity with which young offenders are punished. For this, these bills place the protection of society as a paramount objective, introduce deterrence and denunciation as principles of sentencing, and abrogate the presumption that pre-trial detention is unnecessary. In conclusion, the legislative system is turning the youth justice system into part of the adult justice system where the age of the offender is another mitigating factor when sentencing.

SUMMARY TO SECTION I

The first time the transfer of young offenders to the adult court was explicitly regulated in Canada was with the enactment of the *Juvenile Delinquents Act* (1908) in 1908. Even though a similar procedure had been enacted in 1857, it was not until the enactment of the *Juvenile Delinquents Act* (1908) that this measure was fully regulated and became part of the newly created youth justice system. As previously discussed, the *Juvenile Delinquents Act* (1908) was amended in 1929 allowing juvenile court judges to send juvenile offenders under their jurisdiction to the adult court until they reached 21 years of age. Even though this measure was seriously criticized, it remained in force until the *Juvenile Delinquents Act* (1908) was abrogated in 1984. While the test for transferring juvenile delinquents to the adult court was offence-based – only indictable offences could be transferred – youth court judges had to evaluate whether “the good of the child and the interest of the community” demanded such a transfer. Indeed, as the statute was embodied in the “*parens patriae*” philosophy, the general understanding was that the “interest of the community” required first “addressing the good of the child”. In other words, by addressing the good of the child youth court judges were also addressing the interest of the community.

One important distinction between the *Young Offenders Act* (1982) and the *Juvenile Delinquents Act* (1908) is that the former excluded non-criminal behavior from the jurisdiction of the youth court. While this amendment was well-received, it operated like a *blind-spot*: the focus on the need to draw a distinction between criminal offences and non-criminal circumstances seems to have *opened the door* to a full range of criminal law intervention. The most punitive theories of

punishment (deterrence, retribution, denunciation) started infiltrating the youth justice system. This can be identified in the new intervention philosophy of the *Young Offenders Act* (1982): the notion of the “need” to protect society started to be developed and confronted against the “needs of the young person”. In other words, the emphasis shifted from “the protection of the child for protecting society” to “protecting society from the child”. While both objectives were perceived as important, the “protection of society” began to be identified as the paramount principle.

The *Young Offenders Act* (1982) modified the wording of the test for transferring young offenders to the adult court: “in the interest of society and having regard to the needs of the young person.” The *Young Offenders Act* (1982) regulated some matters that had been left to the discretion of the youth court judge in the *Juvenile Delinquents Act* (1908), such as the list of factors to take into account when considering an application for transferring a young offender to the adult court, who was entitled to file a request for a transfer to the adult court, whether the decision could be appealed, etc.

The 1992 and 1995 amendments to the *Young Offenders Act* (1982) exacerbated the conflict between the “protection of society” and the “needs of the young person”. Moreover, both principles started to be perceived as dichotomies. In general terms, two main trends can be identified: first, Parliament began to identify the “protection of society” as the paramount interest to look after. Second, Parliament increased the circumstances under which young offenders could be transferred to the adult court.

The *1992 Amendment* introduced a two-step test for determining whether a young person could be transferred to adult courts. The test, as originally enacted in 1982, required youth court judges to determine whether “the protection of society” and the “needs of the young person” required the young person to be tried in the adult court. The question that arose is how the “needs of the young person” could require the youth court to transfer the young person to the adult court where he would be sentenced according to the *Criminal Code* punitive objectives. The *1992 Amendment* required youth court judges to first evaluate whether the “rehabilitation of the young offender” and the “protection of society” could be conciliated within the youth court. If this was not possible, the second step of the test required youth court judges to assess what kind of intervention was best suited for the “the protection of society”. Interesting, “the protection of society” required “accountability” and “responsibility”. These measures were oriented towards a punitive intervention that stressed the value of punishment and the exclusion of the offender as a medium for protecting society. This criminal law philosophy, which has characterized the modern adult criminal justice system since the middle of the XVIII century, gradually began to play a stronger role in the youth justice system.

The *1995 Amendment* introduced the harshest measures to the *Young Offenders Act* (1982), both to the declaration of principles and to the transfer of young persons to the adult court. Regarding the former, “protection of society” became the “primary objective of the criminal law applicable to youths”, which was best served by rehabilitation “wherever possible”. Crime prevention also became part of the declaration of principles of the statute. These two additions clearly presented “young offenders” as individuals that society had to be protected against. According to this amendment, young offenders 16 and 17 years old accused of having committed

very serious offences would be dealt with by the adult court unless they justified why the youth court was better fitted for dealing with them. This amendment was clearly focused on “accountability” and “proportionality”: it identified the kind of offence committed as the only factor for the preliminary assessment regarding which jurisdiction was best suited for dealing with the young person.

In 2002 the *Youth Criminal Justice Act* (2002) was enacted, coming into force the following year. This statute, which currently regulates youth offending in Canada, modified the regulation of the waiver of jurisdiction. Even though the statute still draws a distinction between youths who should be dealt with as youths/youths who should be dealt with as adults, both sorts of youths are proceeded against in the youth court. The *Youth Criminal Justice Act* (2002) introduced “adult sentences” within the youth justice court for punishing young offenders who committed very serious offences. Not only did this regulation increase the number of offences to be dealt with harsh measures by incorporating the category of “pattern of violent offences”, but as well reduced the age limit for applying the “presumption” of adult sentences. Young persons 14 and 15 years of age could be presumed to deserve adult sentences if they were proven guilty of serious offences. Again, the basis for this presumption is the kind of offence committed and not the circumstances that led the young person to commit the crime. Even though this “presumption” was stricken down by the Supreme Court of Canada because it was held to be contrary to section 7 of the *Charter*, adult sentences are still available for young persons convicted of serious offences. The unfortunate side of this new policy is that, while under the “waiver of jurisdiction” adult court judges sentenced young offenders as “adults” in an “adult environment,” now youth court judges sentence young offenders with “adult sentences” in a

“youth environment.” There is a serious risk of contaminating the youth justice system with the punitive mentality of the adult justice system.

Finally, the *Safe Streets and Communities Act* (enacted but not yet into force) is aimed at introducing harsher measures to the *Youth Criminal Justice Act* (2002) by explicitly stating that “protection of society” is the paramount principle of the act, introducing the principles of deterrence and denunciation as principles applicable to youth sentences, and rebutting the presumption that pre-trial detention is unnecessary. This amendment, if it comes into force, will move the youth justice system closer to the adult justice system, to the point in which if this legislative trend continues, the youth justice system will soon disappear as a distinctive system for regulating youth criminal misbehavior within a rehabilitative philosophy.

The next section analyzes how the Montreal Youth Court interpreted and implemented the transfer tests in the *Juvenile Delinquents Act* (1908) and the *Young Offenders Act* (1982). I am especially interested in exploring how the pattern of punitiveness created by the political system has been received by the judicial system.

PART II. THE JUDICIAL PRACTICE IN THE MONTRAL YOUTH COURT

1911-1995

INTRODUCTION

Courts cannot turn their role of construction into one of naked legislating, however well-disposed they may be to solutions proposed for problems which arise under deficient legislation. The proper recourse in such situations is to the legislature to repair the deficiencies in its statute.⁶⁹³

The primary role of the judiciary is to interpret and apply the law, whether procedural or substantive, to the cases brought before it.⁶⁹⁴

In this second part of the thesis (Part II) I observe a phenomenon that falls under the notion of “transfer”. The main objective of this introduction is to give an overview of this second part and to make two general remarks: the first one is methodological, and the second one is about the notion and the phenomenon of transfer that will be observed in this second part.

The second part is divided into four chapters. The first chapter of this second part, Chapter 7, gives an overview of my findings: this is crucial for understanding the detailed account presented in subsequent chapters without losing sight of the main results of the general picture of the transfer. Chapter 7 also presents how the phenomenon of transfer has been used by the Montreal Youth Court. Chapter 8 presents a detailed account of the “starting” or “formation period” of the Montreal Youth Court from 1911 (when the first juvenile delinquents court was established in the city of Montreal) to 1942 (included). On 28th November 1942 the Quebec Government increased the maximum age for a young person to be dealt within the jurisdiction of the youth court (from under 16 years old to under 18 years old). The year 1942 is only an approximate date because the period 1943-1947 was not observed. Chapter 9 presents what is referred to as a “transition period” (1948-1960/65). The observation of these two decades requires further in-

⁶⁹³ *Peel (Regional Municipality) v Viking Houses*, [1979] 2 SCR 1134 at 1139, 49 CCC (2d) 103.

⁶⁹⁴ *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 50, [2005] 2 SCR 473.

deep research for clarifying *what was going on* in terms of decisions from the Montreal Youth Court transferring a young person to the adult court. Again, the period 1960-65 is an approximate date because only the year 1960 was observed. Chapter 10 covers the last period of the mechanism of transfer that I observed (1966-1995). We should remember that the mechanism of transfer disappears in Canada in 2002/2003 and is replaced by a functional equivalent mechanism of “adult sentencing” *within* the youth court by the *Youth Criminal Justice Act* (2002).

Some methodological remarks

From a methodological point of view, it is worth highlighting that my observations will sometimes be constructed *with the help of numbers*, but I am not concerned about the notion of *frequency* nor I am looking for a precise quantitative description of the phenomenon of transfer. For example, the scope of my research is not to assess whether the global number of transfers has increased or decreased over time, whether the Montreal Youth Court has changed the kind of offences for which a young person would be transferred to the adult court, etc. This sort of research would require a quite different research design. This second part of my research is exploratory in nature, but at the same time I try to identify some qualitative insights into this phenomenon and open new questions or hypotheses for further qualitative or quantitative research. These are the kinds of questions I will address in the second part of this research:

- Is there enough evidence to claim that the youths who have been transferred to the adult court are youths accused of having committed crimes that are *prima facie* considered “serious”, such as murder, manslaughter, attempted murder or aggravated sexual assault? In other words, during the first part of this thesis the notions of “gravity of the offence”

and “public security” were identified as main concerns for the youth justice system; is there evidence that the *formal* gravity of the *offense* was one important factor to consider when transferring a young person to the adult court?

- What role has the criterion of age played over time as a factor for a transfer decision?
- From the data collected for this second section, is it possible to say anything else about the gender of the young person besides the expected fact that males will be (apparently) transferred more often than females?
- What can we say about the reasons for transferring a young person to the adult court when we observe all the existing documents within the file (such as the reports of the professional experts)?
- How does the Crown operate regarding a transfer decision? Is there evidence that the Crown acts with “a youth philosophy of intervention” in mind exclusively or, on the contrary, is there evidence that the Crown adopts, at least during some periods of time, an “adult way of thinking” concerning the way to react towards youth crime?
- Do we have any indication that professional experts or youth detention practitioners are actively participating in the transfer decision-making process?

While some other marginal information will be presented, these are the questions that I will explore in order to propose some insights about the phenomenon of transfer, which still rests quite unknown in Canada.

The mechanism for transferring young people to the adult court

Before entering the specific topic of the “transfer of young people”, it is worth presenting an overview of the different political strategies that have been adopted in Western societies, as far as I know, *to shrink the jurisdiction of the juvenile courts*.⁶⁹⁵ Following Feld, and supplementing his remarks, it is possible to identify at least four ways of *shrinking* the jurisdiction of the youth court. The last method, presented below, is a particular method because the jurisdiction of the youth court is shrunk by the operation of sentencing; during the time of this operation the youth court becomes an “adult court”. These are the four cases:

1. the legislative automatic exclusion of some offences or circumstances (such as committing an offence with a firearm);
2. the prosecutorial choice of forum (presented below);
3. the judicial waiver or transfer;
4. some kind of “adult sentence” given by the youth court.

I will observe the third case of shrinking of the youth jurisdiction in the second part of this thesis. Nevertheless, the overview of the strategies adopted by the political system is important because it permits us to highlight two fundamental points. First, all four strategies adopted are inspired and based on the most punitive theories of punishment (retribution, deterrence and denunciation). There is no exception to this. So we can see that the theories of punishment are not only used for “imposing a sanction”: they are also used to construct the *frame of the criminal justice* system itself. Second, we are now able to observe “adult sentences” *as a peculiar form of shrinking the jurisdiction of the youth court*. In the same way that in the past the adult court was pushed to

⁶⁹⁵ Feld, *supra* note 4.

impose “youth sentences” on youths⁶⁹⁶ – and for this it did not act as an adult court – now the youth court is asked or pushed to be itself an adult court for sentencing certain young offenders. When Feld indicated the modalities of shrinking the youth court jurisdiction, he was unable to observe the adult sentences as being one of these possibilities.⁶⁹⁷

The following remarks are aimed at identifying some general statements regarding the mechanism of transfer and indicating some of its main features.

1. The first thing to be aware about the mechanism of transfer (at least in Canada) is that this mechanism is completely *taken for granted* not only in the governmental reports recommending amendments to the youth justice system and in the parliamentary debates, but also in the scholarly literature that I read. I could not find any *in-deep* discussion about this. We seem to assume that it is “reasonable” to have this kind of solution *handy*. The governmental reform reports released during the 60’s and 70’s refer to the possibility of choosing an intervention strategy towards a “youth justice for *all* youths”. However, I am unable to find any sign of a serious thought about this scenario and, consequently, a convincing argument for following a different direction than transferring young people to the adult court. The reports state that they took this option into account; nevertheless, we do not know how far they did this or why they dismissed a youth justice system without transfers (or adult sentences) so easily and quickly. The silence regarding this discussion is quite complete.

⁶⁹⁶ *Speedy Trial Act* (1857), *supra* note 135.

⁶⁹⁷ *Feld*, *supra* note 4.

The existence of adult sentences for replacing the transfer mechanism has also been taken for granted. *Why did we go for adult sentences?* What can we get from this option after all we currently know – or are supposed to know – about the negative effects of prison and particularly *long-term incarceration sentences*? Even if the discourse about the *overreliance on incarceration* is present in the governmental documents, the reformers never questioned the transfer mechanism in itself.

2. The transfer to the adult court (or the imposition of adult sentences) is not a *necessity*, but rather only one of the five main options conceived for the construction of a youth justice system. These models are:

- Model 1: for some offences the adult court has *absolute* jurisdiction for dealing with the young person without any decision from the youth court. This is the first strategy indicated above for shrinking the jurisdiction of the youth court. According to this model, the political system excludes the jurisdiction of the youth court for dealing with some offences. In other words, the youth court does not have jurisdiction for dealing with some criminal behavior. Clearly, the intention is to address some situations of youth offending through severe sanctions. This is an inflexible model and improperly deals with complex situations mechanically. It is based on the theories of punishment that are indifferent to social reintegration (retribution, deterrence and denunciation).

- Model 2: the Crown is the operator identified by the legislation as having absolute discretion for deciding the choice of forum (or where the Crown will prosecute the offence). The Crown decides by itself whether the young person will be dealt with in the youth court or in the adult court. In some States of the United States – where this model applies – the State Attorney

General who is in charge of delineating the State prosecutorial policies is democratically-elected. It is easy to see how this mechanism can turn into a repressive policy through the influence of the theories of punishment indifferent to social reintegration. In this case “public opinion” (maybe under the influence of the theories of punishment) also appears as a motivation for the severity of the decisions.

- Model 3: the youth court has full jurisdiction for dealing with all offences committed by young people but, under some circumstances (type of offence, characteristics of the offender, practical considerations, etc.) the youth court can “*abandon*” some offenders and the adult court *will have to deal with* them. We refer to this model when discussing about the “mechanism of transferring young offenders to the adult court.” The youth court *withdraws* from the young person. The youth court has *legal power* to keep young people within its jurisdiction but decides not to do this: the youth is *kicked out* (or authorized to leave if it is the youth who requests his transfer) from the jurisdiction of the youth court and sent to the adult court. When this operation is completed, the protection or the juridical guarantees that the youth has *inside* the youth justice system are not sent along: he loses these guarantees and is *fully exposed* to the adult ideas, norms and principles of sentencing. Of course, it is possible to conceive a model of transfer where the young person does not lose these guarantees. There are two types of transfers within this model. According to the first type, the transfer is coercive; according to the second type, the young person – for some reason – requests his transfer. Regarding the latter, there is the assumption that – at least in some instances – the choice may be favorable for the youth. Even if the choice is not favorable, the possibility of requesting the transfer remains as a right for the young person. According to this model the youth court selects, under some conditions, the cases that will shrink its jurisdiction. The youth court will then “abandon” some cases to the adult court. This model

is also inspired by the same theories of punishment indifferent to social reintegration. I have observed the operation of this particular model in the Montreal Youth Court.

- Model 4: according to this model the political system either constraints or strongly stimulates the youth justice system for modifying its way of operating when sentencing some youths. The youth justice system is asked to drop its youth juridical logic and philosophy of intervention, and to replace it by the adult (far more repressive) juridical logic and philosophy of sentencing. This model breaks into different “pieces of ideas” the homogeneity of thinking (eventually existent) of the youth justice system. And, of course, this can affect the approach to youth intervention that is centered on rehabilitation rather than on the punitive sanctions. This model will teach the Crown or the youth court judge, who have been stimulated in the past to think outside the repressive logic of adult sentencing, to “mix” the youth and the adult philosophies of intervention and to revalorize (again) the old classical way of thinking about punishment. This model was introduced in Canada in 2002/2003; I did not examine the judicial decisions regarding this model.

In recent times youth justice systems in the United States have implemented other variations to this model through the notion of “blended sentences”. This notion refers to different ways of combining youth and adult sentencing philosophies; it can be argued that “blended sentences” are also introducing punitive philosophies within the youth justice system (maybe with the exception of options no. four and five presented below). Redding and Howell report five main options for blended sentences: 1) the youth court may impose a youth or an adult sentence, 2) the youth court may impose both a youth and an adult sentence leaving the latter suspended under conditions, 3) the youth court may impose a sentence past the normal limit of the juvenile court jurisdiction, 4) the adult court may impose a youth or an adult sentence, or 5) the adult court may

impose both a youth and an adult sentence leaving the latter suspended under conditions. Option no. 3 allows the youth court to sentence young offenders for a period exceeding the maximum age for a young person to remain within the youth justice institutions or detention centers. For instance, a 15 year old youth can be sentenced to seven years even though once she turns 18 years of age she becomes an adult.⁶⁹⁸ Options 4 and 5 can be observed as an attenuation of the strategies of shrinking the jurisdiction of the youth justice system because they give the adult court the opportunity to adopt the philosophies of punishment of the youth justice system.

- Model 5: this model is far more innovative than the models presented above, which are basically strategies for reducing the youth court jurisdiction. It conceives the youth justice system as a *full and complete alternative* to the adult justice system. As a result, there is (a) no automatic jurisdiction for the adult court regarding some offences, (b) no transfer to the adult court (in the hands of the prosecutor alone or through the youth court judge), and (c) no adult sentences (or blended sentences) within the youth court. In the beginning of the XX century this model was observed as a kind of “laboratory” or “experience” for the construction of a new system of criminal law, both for adult and youths, despite some small differences.⁶⁹⁹ According to this model, as typically imagined, there is no room for capital punishment, life imprisonment, minimum punishment, cumulative sentencing, long-term imprisonment, etc. Moreover, the youth court should have access to non-custodial sentences even for serious offences such as murder. This model is the only one that does not operate under the influence of theories of punishment indifferent to social inclusion (retribution, deterrence, denunciation). In contrast to the adult model, where “one element of the crime” can automatically determine the selection of a

⁶⁹⁸ Richard E Redding & James C Howell, “Blended Sentencing in American Juvenile Courts” in Jeffrey Fagan & Franklin E Zimring, eds, *The Changing Borders of Juvenile Justice. Transfer of Adolescents to the Criminal Court* (Chicago: The University of Chicago Press, 2000) 145.

⁶⁹⁹ Mead, *supra* note 242.

repressive option (for example, being in possession of a firearm when committing an offence), this model will never attach a procedural or sentencing decision to an isolated factor.⁷⁰⁰

The binary distinction presence/absence of theories of retribution, deterrence and/or denunciation distinguishes the first four models from the last model (no. five). In the models one to four the theories of punishment play the role of “*premises for decisions*”. The “raison d’être” of these models is given by one or more of these theories. For example, the fact of introducing the automatic jurisdiction of the adult court for youths accused of some serious offences cannot be satisfactorily explained or justified without reference to them. The same principle applies to the second model: the fact that we *leave aside all the existing protections for* the young person when he is transferred to the adult court is the clearest evidence that we are valorizing punishment, incarceration and the ideas conveyed by the theories of punishment that are indifferent (and do not give a priority) to rehabilitation. The objective of rehabilitation is subsumed into repressive objectives that valorize the idea of “severe punishment” for certain cases. Finally, the idea of adult sentences within the youth court can only be understood within the framework of the most repressive theories of punishment.

We can also visualize the fundamental role played by these theories of punishment for accepting the mechanism of transfer when this mechanism is observed from the perspective of these theories. For example, if one accepts the retributive thesis that “*it is necessary to increase punishment for increasing accountability*” or that “*a lesser/greater degree of culpability (or*

⁷⁰⁰ Sutherland, *supra* note 461.

responsibility) deserves a lesser/greater punishment”, one will not resist the idea of the transfer. The operator will even be stimulated to decide in favor of transferring the young person to the adult court or imposing an adult sentence. Similarly, if one accepts the naïve thesis of the deterrence theory that the severity of the sentence is necessary for serious offences for achieving proportionality or for persuading other people not to commit offences, again one will see the transfer mechanism or the adult sentences as a “necessity”. The same applies regarding the denunciation theory. If the operator does not distinguish between *denunciation and repression* and believes she “needs a strong repression to send a strong and clear message of disapproval”, the operator will also stimulate herself in favor of these mechanisms.⁷⁰¹

In all these instances, the political and the law systems believe that they should take the offender’s behavior as an example: if the offender causes severe harm to her victim, the system will follow the offender’s behavior but this time against the offender. The “general inspiration” for how the system will behave (“sentencing”) is influenced by the offender’s behavior.

3. In the absence of an in-deep discussion about the mechanism of transfer (and of adult sentences), it is important to identify a starting point. The precise sense of the word “transfer” (in our case) is not easy to elucidate. We know that one may “transfer” many things from one place to another and for very different reasons. I will propose a preliminary discussion of the sense of the word “transfer” when this word is used in the context of transferring young people to the adult court. What kind of transfer do we have here and what are the ideas underlying this practice? In trying to answer this question, I will propose some *structural elements* of the

⁷⁰¹ Álvaro Pires, *Critiques à la prison et principe de modération. Rapport de recherche à l’intention de la Commission canadienne sur la détermination de la peine* (Ottawa, 1985).

transfer of young people from the youth court to the adult court. And I will also presume that these structural elements, with some adaptations, are valid for the mechanism of adult sentences.

4. One of the most important features of the mechanism of transfer is that it comes to our perception in a *unified form*. We are usually pushed to see the transfer as a decision making-process *undertaken by* a youth court judge. In the procedural sense, this perception fits the reality because the final decision about transferring a young person to the adult court is taken by the youth court judge (when this decision is not taken by the Crown). But one cannot assume from this unified form that the youth court judge will make her decision on the basis of just one set of reasons, namely the “(implicit) adult principles of sentencing” for young people found guilty of an offence (inspired by the theories of punishment such as retribution, deterrence and denunciation). My data, as we will see, does not support this presumption. When we see the transfer mechanism from the point of view of the judicial practice (as opposed to the legislative practice), we observe that there are sometimes *non-judicial operators* participating in the decision-making process as professional experts, probation officers or youth detention practitioners. Moreover, law operators can also introduce other organizational or professional reasons for transferring youths to the adult court that are closer to “procedural and organizational reasons” than to sentencing reasons. Consequently, this feature can be most accurately described as “*a collective unified form (of decision-making) that takes into account one or more set of reasons for transferring*”.

The first consequence of this characterization is that it is useless to “blame the youth court judge” or to look for more “mechanical ways” of constructing the “judge’s” decision-making

process. We can also say that the problem *lays in the existence itself* of the mechanism, not in its application.

The second consequence of this characterization is that we need to achieve a better way of mapping this decision-making process. On the base of my empirical observations, I will take the risk of proposing a first attempt to describe the structure of this process. For doing this, I will first draw a distinction between the situation in which the young person requested his transfer and the situation in which the youth court judge decided to transfer the young person without his participation. I will refer to the former as “the voluntary transfer” and to the latter as the “the coercive transfer.” I will focus on the latter for the following analysis and go back to the “voluntary transfer” at the end of this introduction.

With regard to “the coercive transfer”, I will draw a secondary distinction between two main groups of principles, criteria or reasons for the decision-making process: 1) the (implicit) adult sentencing principles and philosophies based on the theories of retribution, deterrence or denunciation (for instance, the gravity of the offence or the circumstances of the offence - such as being in possession of a firearm, the ends of deterrence, etc.), and 2) other legitimate professional or organizational reasons (or accepted distinctions) for transferring young people to the adult court. Then, among the second group of principles (non-sentencing reasons for transferring), I will draw a first distinction between the “professional experts’ reasons” and the “juridical reasons”. Among the professional experts’ reasons, I will identify four sub-sets of apparent legitimate reasons for requesting a transfer or deciding to transfer a young person. The criteria for distinguishing each of these four reasons from the other reasons are not clearly set

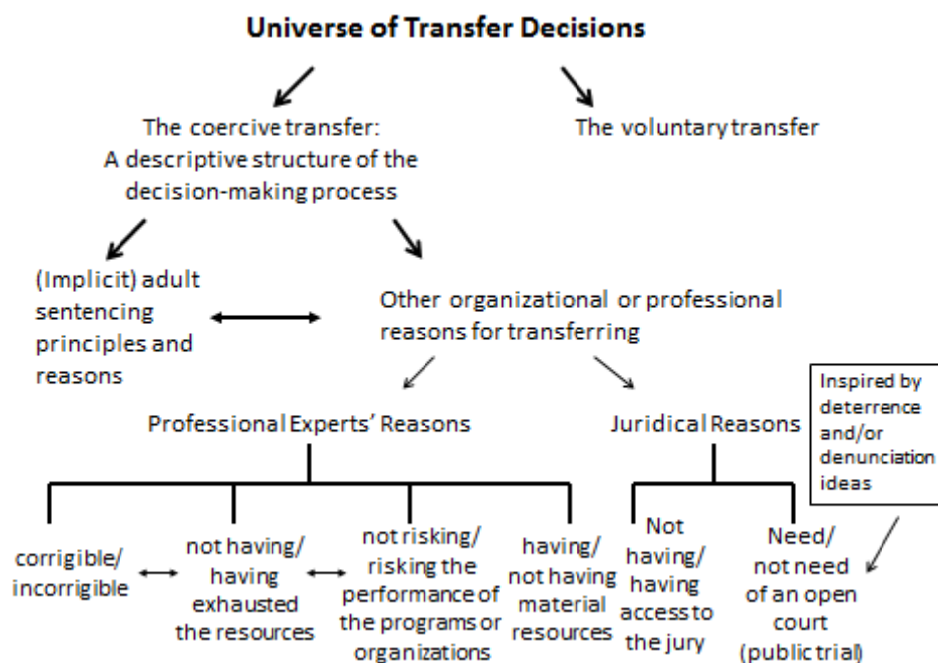
and are also hard to observe. These are three of the four sub-sets of reasons: (i) corrigible/incorrigible; (ii) not having/having exhausted the resources within the youth court; and (iii) not risking/risking the (overall) performance of the programs or of the organizations. If the youth is observed by the professional experts (detention centers, counselors, psychologists, etc.) as being corrigible, as not having exhausted the resources within the youth court, or as not risking the performance of the programs for other youths or the organization, there will be a predisposition report regarding this young person that will advise the youth court judge to keep him within the youth justice system. On the contrary, if the youth is observed as being incorrigible, as having exhausted all the resources within the youth court, or as risking the performance of the programs or of the organization, the predisposition report regarding this young person will be negative and there will be a high probability that the young person be transferred to the adult court. The youth court judge will be advised that the necessary material resources are not available within the youth court. The problem is that the youth court judge may not necessarily realize whether these resources are in fact available within the adult justice system. It seems that this problem appears because, on one side, the youth court cannot try the young person (using youth legislation) and *only then* sends the young person to the adult center for being detained therein. On the other side, the adult court that will try the case cannot adopt the youth legislation for dealing with the young person within the adult court.

Observing the files, one finds that the decision to transfer a young person to the adult court in some circumstances can be stimulated by what appears to be a simple question of (iv) “material resources” (fourth sub-set of reasons). This can be, for instance, the absence of commodities for a youth who seems to require a secure detention center. The absence of material resources then

becomes a motivation for transferring this young person from the youth court to the adult court. The protection of the young person afforded by the youth justice system is lost by the absence of material resources.

One last remark: I also identified two main juridical reasons for motivating the transfer of a young person to the adult court that fall within the general set of “other organizational or professional reasons for transferring”. These reasons are: not having/having access to jury during trial and need/not need of an open court during the trial. As we will see below, some other minor administrative reasons may also appear. The need for an “open court” seems to be inspired by the theories of deterrence and/or denunciation.

The schema below presents this descriptive structure:



With regard to the coercive transfer, on the right side of this descriptive model, there are “other official reasons” that do not appear on the left side of the distinction. So, for example, if a professional expert states that she *exhausted all the resources* concerning a particular offender, her statement may be accepted as an institutional reason for transferring the young person to the adult court. If the professional expert employs the distinction between corrigible/incorrigible and considers a young offender as incorrigible, this can also count as a reason for transferring. In all these cases the central point of the decision is not the set of “sentencing principles”, but rather something else that the youth court judge may accept as an eventual reason for a transfer decision.

The left side of the descriptive model presents the reasons that are explicitly or implicitly attached to the theories of punishment adopted by the adult criminal justice system. There we find a *presumed necessity* for harsh punishment that is independent of what the individual operators think at the moment of taking their decision. The principles of sentencing and the theories of punishment (retribution, deterrence and denunciation) play a double role: first, they help us to understand the *existence* of the mechanism *itself*. We cannot explain the creation of the transfer without taking into consideration that this mechanism has been taken for granted during the creation of the statutes (and after by the governmental reports). The second role is at the level of the decision-making process in the “everyday decision” *of the court* concerning the transfer (or the imposition of adult sentences). At this level, the adult philosophy of punishment may go along (or not) with the second set of reasons.

These two main sets of reasons (sentencing/organizational) do not have the same importance for all the operators participating in the decision-making process. And the same can be said concerning the professional experts' reasons and the juridical reasons. The Crown, for instance, has more chances of focusing on the theories of punishment that are indifferent to social reintegration (retribution, deterrence or denunciation) than the professional experts have. This also applies regarding the reason having "an open court" during the trial. And conversely, professional experts are more likely to value keeping their working place in "good order" and their programs as they are established than to take into account the objectives of deterrence, retribution or denunciation. Of course, because the Crown is always present in the youth court judge's decision-making process (the contrary is not true), each one of these two sets of reasons can operate alone or in conjunction with the other. So, it is possible to say that there are two different kinds of reasons in the decision-making process: both help understand the reasons and ideas that were given to justify why one should abandon some youths to a more repressive system, but just one of them can help us understand why the mechanism of transfer has not been abolished and why it was created.

5. Another important feature of this mechanism is that it is a kind of "abandonment mechanism" that makes invisible for us (a sort of "blind spot") what we are really doing with the young person when we decide to transfer him to the adult court. And this applies to both sets of reasons for transferring (sentencing/organizational); however, they do not arrive at the same result ("the blind spot") by the *same way*. It is a curious case of "collective action" *against the young person* that does not see or realize the consequences of this kind of decision and how they affect the young person. We should notice that a young person is transferred to the adult court

not because this court has *better knowledge* of the young offender's situation than the youth court. A lawyer, for instance, may transfer a potential client to another colleague because the case does not fall within her field of expertise. The phenomenon of transfer that we are observing here is not this kind of situation: it is not, properly speaking, a transfer for "reasons of expertise/non-expertise". I would like to suggest that this situation is similar to a transfer of a case that a person does not want to take care of for some other reasons than her field of expertise. She "abandons" the case to an authority that may (and sometimes will have to) deal with it severely (minimum or flat sentences of incarceration, severe logic of thinking about the punishment, etc.). Nevertheless, the transfer is always observed as being a "good" or "appropriate" decision.

Now, how do the theories of punishment hide the fact that what we are doing here is bad for the young person and, at same time, *for society*? The *focus* of the theories of punishment that are indifferent to social reintegration *is not* on the youth and *is not* on the *means* that we are selecting for addressing the problem: the focus is on *abstract* principles or on "valuable ends" such as the gravity of the crime, the proportionality between crime and punishment, the objective of deterrence or denunciation, etc. The fact that the "means" used to supposedly achieve these abstract principles or "valuable ends" are life imprisonment or long-term incarceration make us lose sight of the *radicalism and the severity of the resorted* means in light of such *important ends*. The focus on the great value of the ends or – conversely - on the seriousness of the crime makes invisible how radical the means are: the reaction appears as proportional - and maybe it is, but the focus of the reaction and the goal of this proportionality are to inflict suffering on the young person while believing this is good *for someone or something*. So, not only the transfer

here *is not* intended to *do the best for the young person*, but also the reasons we give to ourselves hide what we are really doing to the others. We should note that the quality of the procedure can also hide the negative potential consequences of the transfer for the youth: one may find the “access to jury” an important right and forget that at the end of the day, if the young person is found guilty, this will result in a sentence of death penalty or life imprisonment.

In the case of the professional experts, the problem takes another form. My observations allowed me to identify that professional experts working on the “rehabilitation of the young person” will participate in the transferring decision-making process. Sometimes the young person becomes a “very difficult case” and this case is observed by the professional experts or the organizations (youth centers) as a “cumbersome” or a “nuisance” for the program or the institution. This situation, which is not directly related to the gravity of the crime itself, becomes a reason for transferring the young person to the adult court. The youth “does not fit” the intervention strategies we had in mind for dealing with him. The Crown can recognize this problem and join forces with the professional experts. Then, pressure can be exercised for “abandoning” the young person to the adult (punitive) system of justice.⁷⁰² Both sides (professional experts and the Crown) will give *institutional* reasons for the transfer and these reasons can come from one or from both sets of reasons indicated above. Now, compare this situation to a case of a transfer of a patient from a hospital to another institution when the sending institution believes it cannot give an appropriate treatment to the patient, but the *institution receiving the patient can*. In this case, the transfer is not an expression of renouncing to take care of someone. On the contrary, we are looking for the best way to take care of a

⁷⁰² For an analogous situation concerning the problems that arise in mental health institutions see Danielle Laberge et al, *Maladie mentale & délinquance. Deux figures de la deviance devant la justice pénale* (Bruxelles: De Boeck-Wesmael sa, 1995) at 23-25.

person, even if the care will be palliative. The general focus is still on the patient and does not lose sight of him. In our cases, the situation is more complicated. The youth creates problems for the institution where he is placed and even when the youth is transferred because he does not *fit* within the resources in place, the “new situation” for him in the institution of reception (adult detention) is, at least potentially, worst. In addition to this, the young person will be tried and sentenced by the adult court, and this creates the possibility of more severe sanctions than those imposed by the youth court. While this fact is well known, this *does not* mean that the operators who reject the youth and recommend his transfer necessarily have this “worst situation” in mind – or in the center of their attention – when they decide towards this direction. The professional experts, for example, are doing good *for their institutions*, for the performance of their programs or even, as they sometimes believe, for the *other* youths within the institution (as far as they can be afraid of “bad influences”). Again, the “worst situation” waiting for the youth to be transferred remains invisible or is out of the field of consideration for the professional expert’s decision. And the legislation does not authorize the adult court to apply the same set of norms of sanction that the youth court can apply.

6. To say, as I did, that the transfer is a kind of collective action *against the young person* is not a sufficient account. As mentioned and presented in the diagram above, there is at least one very important exception to this: it is the case when the youth himself *demand*s to be transferred to the adult court (“voluntary transfer”). This possibility adds a new dimension to the complexity of our topic and introduces a new enigma: why would young offenders expose themselves to an eventual harsher punishment than in the youth court? Are there cases where it may appear better to go to the adult court rather than to remain within the youth court? Which

are these cases? We will see how these situations appear in the empirical material. Now it is important to highlight that this particular situation does not characterize the transfer mechanism appropriately. If the offender asks his transfer, we will be in the presence of a number of situations where the youth person believes that the judgment (sentencing) or the placement in an adult institution is best for him. This possibility of voluntary transfer disappeared when the *Youth Criminal Justice Act* (2002) was enacted and the transfer was replaced by the imposition of adult sentences within the youth court.

7. Now we need to clearly distinguish this (last) kind of *voluntary transfer* from a sub-set of juridical organizational reasons sometimes found in the decisions of the Montreal Youth Court for justifying the transfer of a young person that refer to the young person's best interest. For example, Montgomery Bowker, a former Alberta youth judge, highlights that British Columbia courts used to allow the transfer of young offenders to the adult court for them to have access to "greater availability of defences in the criminal system and [to] the advantage of a reporting service in the event of appeal."⁷⁰³ These eventual advantages (including the last one that is strictly administrative and could be solved easily with changes at this level) *hides* for the youth court itself the enormous disadvantages that this operation creates for the youth if we take into account the eventual sentence that he may receive for a serious offence. Similarly, Montgomery Bowker notes that Ontario youth courts used to transfer to the adult court youths charged with very serious offences, such as murder and aggravated sexual offences, for the young person to have access to a jury trial and *for the public to know how the case was dealt with*.⁷⁰⁴ One of the objectives of the youth justice system under the *Juvenile Delinquents Court* (1908), as developed

⁷⁰³ Montgomery Bowker, *supra* note 304 at 384.

⁷⁰⁴ *Ibid.*

through the common law, was *to protect the youth* from public stigmatization during trial. Why would “public exposure” become important for the court? Who would benefit from this? Moreover, Montgomery Bowker reports similar trends in the Manitoba Court of Appeal for the period 1955-1982.⁷⁰⁵ The Manitoba Court of Appeal would uphold the transfer of a young person to the adult court for the need of an open court. We can observe, here too, the same motivation towards exposure of the case to a public audience, something that we also observed in the reform reports in the 70s. This criterion seems to have operated against the protection of the young offender’s private information and following the ideas underlying the theories of deterrence (“intimidating other people”) or denunciation. The diagram above presents these insights.

The observer should note that all these reasons are also a kind of “other organizational reasons” for transferring, and *not direct principles or reasons of sentencing actualizing the theories of punishment*. Nevertheless, the idea of “opening the court for the public” may sometimes appear directly and explicitly attached to deterrence. This arrives because the theory of deterrence has expressed itself through some (marginal) “procedural ideas” as well since the XVIII century. I have also decided to keep a clear distinction in the above diagram between the reasons that have been observed mainly in connection with other professional experts (“professional experts’ reasons”) and the reasons advanced by the juridical way of thinking (“juridical reasons”).

Finally, according to Montgomery Bowker another reason for transferring young offenders to the adult court for the period 1910-1950 was the widespread belief that youth courts *were deemed*

⁷⁰⁵ *Ibid.*

*inadequate for the trial of serious offences.*⁷⁰⁶ These comments also confirm the idea that this perception of inadequacy *originates in the theories of punishment adopted by the adult justice system*, namely retribution, deterrence and, later, denunciation. The same “two side-idea” appears again: on the one hand, the youth court did not provide the young person with a right to a jury trial or due process guarantees; on the other hand, the public did not have access to the trial so they did not know how severely the offences were dealt with. The same “blind spot” appears here: the youth court does not see that the transfer will be disadvantageous for the youth if the youth is found guilty, and that they will be jeopardizing the social reintegration of this young person. We should remember that until 1961 the death penalty could be imposed on young people found guilty of capital offences in the adult court.

8. I will turn now to the *only three* studies I found – three graduate theses – concerning how the Montreal Youth Court transferred youths to the adult court. Two theses focus on the reasons provided by the Montreal Youth Court on their transfer decisions, and one thesis focuses on youth court judges’, Crown prosecutors’ and youth defence counsels’ perceptions about the mechanism for transferring young people to the adult court (interviews). The two theses that are focused on the reasons provided by the Montreal Youth Court on their transfer decisions cover the periods 1972-1975 (Henry, 1978) and 1977-1980 (Lavigueur, 1982).⁷⁰⁷ I have not been able to identify research that explores the reasons provided for the Montreal Youth Court in their transfer decisions for the periods previous to 1970 and after the 1980. The third thesis on the Montreal Youth Court (Roy, 2003) conducted interviews focusing on the impact of the 1992 *Amendment* and 1995 *Amendment* to the *Young Offenders Act* (1982) on the transfer of young

⁷⁰⁶ *Ibid.*

⁷⁰⁷ Henry, *supra* note 326; Lavigueur, *supra* note 89.

people to the adult court.⁷⁰⁸ In addition to this, concerning other regions of Quebec, I identified a graduate thesis that focused on the reasons that the probation agents working at the Youth Court of the Outaouais identified for a young person to be transferred to the adult court in 1984 (Gauthier, 1984).⁷⁰⁹

i. Benoît Henry (1978) focused his research on all the youths transferred to the adult court by the Montreal Social Welfare Court (Montreal Youth Court) for the period 1972-1975.⁷¹⁰ He researched the youth files and identified 60 young people (*not decisions*) transferred to the adult court. According to him, the “*absence of rehabilitation measures*” at the Montreal Social Welfare Court was *the most used reason* by youth court judges for deciding to transfer young people to the adult court.⁷¹¹ The precise sense that Henry attributes to this expression is not clear, but we can understand this reason as being located, first, among “professional experts’ reasons” and second, imprecisely, closer to “having exhausted resources” rather than to “not heaving material resources”, or both. In any case, we can see the blind spot and the consequences of the existence of the mechanism of transfer for the youths: professional experts *and* the youth court do not see the worst consequence of the transfer for the youth. They do not see that the absence of resources is not a good enough reason for modifying the youth philosophy and norms of sentencing, going from a youth to an adult philosophy of punishment, the latter stressing deterrence, retribution and denunciation. They do not see that there is probably *an equal absence of resources within the adult institution* where the youth will be sent. All these are “blind spots” in the decision-making process.

⁷⁰⁸ Roy, *supra* note 50.

⁷⁰⁹ Gauthier, *supra* note 89.

⁷¹⁰ Henry, *supra* note 326.

⁷¹¹ *Ibid.*

With regard to Henry's observations, he found that judges referred to the inadequacies of the rehabilitation measures available at the Montreal Social Welfare Court 47 times (78%), to the failure of previous measures 39 times (65%), and to the young person having rejected the proposed rehabilitative measures 37 times (61%).⁷¹² These percentages seem to indicate that some reasons are overlapping on other reasons. These results are important for us because all these three reasons indicate the presence of a "professional expert's" evaluation: an assessment coming from the youth centers, probation officers, etc. The rejection of the proposed rehabilitative measures is also producing the same "blind spot": this is not a good enough reason, for instance, for increasing the severity of sentencing or the eventual length of the sanction. If an adult rejected the proposed rehabilitative measures in an adult institution, she is neither transferred to another court nor going to a trial operating with more severe norms of sentencing than the adult court.

Henry reports as additional reasons for the Montreal Social Welfare Court to transfer young people to the adult court the number of offences committed and the existence of a previous transfer decision. Youth court judges transferred to the adult court young people who had committed several offences (multi-recidivists); he identified 17.23 as the average number of offences for a young person to be transferred to the adult court.⁷¹³ We can also observe this result as a mixture of adult criteria for sentencing (deterrence, retribution) and a reinforcement of the reason of "having exhausted the resources". We can also see here how the mechanism of transfer operates: it facilitates a policy of "abandoning the case" in favor of adult philosophy and norms of sentencing.

⁷¹² *Ibid* at 106.

⁷¹³ *Ibid* at 68.

In addition to this, Henry reports that the fact that the young person had already been transferred to the adult court was seen as a reason for deciding to transfer the current case to the adult court. He notes that the Montreal Social Welfare Court did not allow young offenders to “accumulate” further offences in youth courts after a first decision ordering a transfer. In other words, once a young person had been transferred to the adult court, any subsequent offending was transferred immediately: “[c]es chiffres nous laissent croire qu’après un premier renvoi les juges de mineurs ne tolèrent plus l’accumulation des accusations comme avant. Un seul délit amènera la plupart du temps un nouveau renvoi.”⁷¹⁴ This recurrent practice is not astonishing: the first transfer reproduces transfer and confirms the first transfer.

Henry lists other reasons for the Montreal Social Welfare Court to decide to transfer a young person to the adult court. This includes the young offenders’ parents’ lack of interest in the process despite several notifications, the family environment not being appropriate for the young person’s rehabilitation, the lack of remorse exhibited by the young person, evidence of premeditation of the offence, and whether the offence had received large publicity from the media.⁷¹⁵ Except by the last reason, Henry’s observations confirm Montgomery Bowker’s; the reason for this may be the influence of theories of deterrence and denunciation. The rest of the reasons seem to be an expression of our category “not risking the performance of the programs or organizations” or – as well - “having exhausted resources”. The difficulties in a young person’s life (such as parental lack of interest in the process) rather than being perceived as a strong motivation for keeping the young person within the youth court become a motivation for abandoning him. As we can see, overall, Henry’s research results are very important for us, not

⁷¹⁴ *Ibid* at 78.

⁷¹⁵ *Ibid* at 129-130.

only because they confirm the results of this research, but as well because they add additional evidence and information.

Henry does not make any reference to the presence of women in his data concerning the decisions transferring a young person to the adult court. While it could be argued that he did not focus on the gender qualities of his sample, I submit that – based on my own observations during similar periods – that he did not find any woman being transferred to the adult court. In Chapter 7 I recommend that the young person's gender regarding the transfer decisions in Quebec for the period 1966-1995 be further researched.

ii. Marie-José Lavigueur focused her research on the youths who were represented by the Centre Communautaire Juridique de Montreal (Division Jeunesse) and who were transferred to the adult court by the Montreal Social Welfare Court for the period 1977-1980.⁷¹⁶ She researched the youth files and identified 198 requests for transferring a young person to the adult court. Worth noting, while Henry's research focused on the amount of youths transferred to the adult court, Lavigueur focused her research on the amount of decisions ordering that a youth be transferred to the adult court. According to Lavigueur, the Montreal Youth Court referred to three main reasons for transferring a young person to the adult court for the years 1977 and 1978: 1) the young people's previous records, 2) young people's *lack of collaboration* regarding the process (factors taken into account were whether the young person had *ran away* from a detention center or whether the young person had *already been transferred* to the adult court), and 3) the *lack of resources* within the Montreal Youth Court for dealing with the young

⁷¹⁶ Lavigueur, *supra* note 89.

person.⁷¹⁷ Lavigueur's research presents a similar scenario; my remarks about Henry's results concerning recidivism and previous transfer decisions also apply here. The "lack of collaboration" expressed through the behavior of "running away" and the lack of resources fall within the category identified above of "not risking the performance of the programs or the organization" or "having exhausted the resources". Both reasons are a kind of "complaint" coming from the professional experts or the youth detention centers. Once again: the blind spot is the same. Professional experts and the court do not observe the negative potential consequences of the transfer concerning the youth's social reintegration. This seems a kind of intriguing "lawful case of abandonment of a patient". Of course, the exposure here is not to malpractice, but to severe official and legitimate norms of sentencing.

On the other hand, Lavigueur reports that for the period 1977-1980 the severity of the offence *was not a main factor* for the Montreal Youth Court to transfer a young person to the adult court.⁷¹⁸ As presented in Chapter 7, this is (also) an overall result for the complete period of my observations (1911-1995), but with one important qualification: the sense or notion of "gravity" can shift considerably from one observer to the other. When Lavigueur and I refer to the fact that the "severity of the offence is not a main factor", we are referring, first of all, to two kinds of reinforcing observations: we almost did not find that youths accused of *formal serious crimes* – such as first- and second-degree murder, manslaughter, attempt murder and aggravated sexual assault – were transferred to the adult court. On the contrary, we found a large number of transfers that can hardly be presented in a credible way as being a "severe offence". As a result, contrary to the current situation in the political system, the gravity of the offence, *in this sense*,

⁷¹⁷ *Ibid* at 168.

⁷¹⁸ *Ibid* at 114.

does not play a relevant role. The reasons for transferring a young person to the adult court seem to be far more related to “other organizational or professional reasons for transferring” than to the gravity of the offence in the sense of adult theories of punishment.

Nevertheless, this is not a sufficient account: the notion of the “seriousness of the offence” can be “enlarged” in a way that it helps us understand at least what happens with the Crown when it operates within the adult philosophy of punishment in mind. An offence can be observed as “serious” because some elements of the problematic situation are observed by themselves as a sign of seriousness. For example, when the youth carries a firearm, when there is a threat considered as serious, when there is a break and enter in a residence at night, when the victim is an older person, etc. All these factors are susceptible of affecting the interpretation of the seriousness of the offence because this is the usual way of thinking within the adult criminal justice system and its operators (such as the Crown) have “assimilated” these forms of assessing the seriousness of the offence. In any case, when a decision is made referring to the gravity or seriousness of the offence, we are in the presence of what I refer to the “(implicit) adult sentencing principles and reasons”.

Lavigueur’s results with regard to the gender of the youths transferred to the adult court are similar to Henry’s: she reports that during the years 1977 and 1978 98% of the decisions of the Montreal Youth Court ordering the transfer of a young person to the adult court affected male youths.⁷¹⁹ Again, my data points to similar conclusions with regard to the “gender” of the transfer decisions.

⁷¹⁹ *Ibid* at 219.

iii. Mélanie Roy (2003) conducted interviews with Montreal Youth Court Judges, Crown Prosecutors, and Youth Defence Counsels for identifying the factors taken into account by the Montreal Youth Court for transferring a young person to the adult court in 2003.⁷²⁰ The focus of her research was the impact that the 1992 and 1995 amendments to the *Young Offenders Act* (1982) had on the transfer of young offenders to the adult court. However, she tried to observe this impact through conducting interviews, which is not the most accurate way for observing what the youth court and its operators really do. With regard to the interviews conducted with the Montreal Youth Court judges, one of her interviewees mentioned that the *amenability to rehabilitation* was the leading factor to be taken into account when deciding to transfer a young person to the adult court: “[l]’espoir de réhabilitation demeure quand même le critère. Le critère c’est ‘est-ce que le jeune est capable de se réhabiliter dans le réseau qui a été mis en place pour les moins de dix-huit ans? Cela demeure toujours le critère” [youth court judge].⁷²¹ This is a similar observation to Henry’s and Laviguer’s, which was based on their research of the youth court decisions. In addition to this, this observation is similar to my own research of the youth court files for the same period, which I identified as the most important factor to take into consideration when transferring a young person to the adult court.

iv. Dany Gauthier (1984) also conducted research on the reasons provided by the Outaouais Youth Court for transferring young people to the adult court. She focused her research on six male young people dealt with by the services sociaux of the Outaouais region whose transfer to the adult court was ordered by the Outaouais Youth Court in 1984. From her methodology it is not clear whether these six files are all the files for 1984 or only represent some of the files for

⁷²⁰ Roy, *supra* note 50.

⁷²¹ *Ibid* at 92.

1984. For the purpose of her analysis, she also completed her research with interviews to six youth parole officers from the Centre de services sociaux of the Outaouais region.⁷²² She reports that the factors taken into account by the Outaouais Youth Court for transferring a young person to the adult court were the *nature of offence* committed, the young person's previous record, the young person's *prognostic regarding rehabilitation*, and the young person's age.⁷²³ According to her interviews, it seems that the young person's prognosis regarding the possibility of rehabilitation within the youth justice system was the main factor taken into account for a judicial waiver.⁷²⁴ It is not clear what she means by the notion of the "kind of offence" committed, but this motivation may fall within my category "(implicit) adult principles and reasons for sentencing". Gauthier's identified reason of "the prognostic regarding rehabilitation" falls within my category of "not risking the performance of the programs or organization". Her findings are similar to Henry's, Lavigueur's, and mine.

The following chapters identify and analyze the reasons provided by the Montreal Youth Court for transferring young people to the adult court.

⁷²² Gauthier, *supra* note 89 at 43.

⁷²³ *Ibid.*

⁷²⁴ *Ibid* at 68.

CHAPTER 7

An Overview of the Transfer Decisions in the Montreal Youth Court (1911-1995)

7.1. Introduction

The main objective of this chapter is to give, in a summary form, a unified overview of the Montreal Youth Court decisions transferring a young person to the adult court for the full period of observation: 1911-1995. As we will see, my observations start at the end of the year 1911 – when the court was established – but during that time only three young people were dealt with by the court and none of them was transferred to the adult court. The overview presented in this chapter takes three variables into consideration: the young person's age, the formal seriousness of the offence, and the young person's gender. These variables will assist us for observing the existence and the operation of the mechanism of transfer in the Montreal Youth Court.

7.2. The observation of the young person's age

The young person's *age* is a very important variable because it plays different roles for the youth justice system. First of all, the young person's age plays a *primary structuring normative role* in the sense that it indicates where the political system wants to separate the youth justice system from the adult justice system. In this sense, age is one of the norms for a young person to be included within the youth justice system or excluded from it. In other words, a young person's age is a criterion for inclusion in/exclusion from the youth justice program. That something is a *norm* does not mean that things will always present themselves in the way a norm would like. However, the more the system operator (here, the youth court) accepts the norm for itself, the more the norm reaffirms the boundary of the youth justice program as indicated by the norm

(here, the distinction between the youth and the adult systems based on age). The federal political system provided provinces with discretion for establishing this frontier between the ages of 15 and 17 years old (inclusive). The original definition of child stated that a “child” meant “a boy or girl apparently or actually under the age of sixteen years.”⁷²⁵ The definition of “child” was first amended in 1921, according to which a “child” was a “boy or a girl apparently or actually under the age of eighteen years” (it increased the definition of child from under 16 years to under 18 years).⁷²⁶ This definition was amended again in 1929: the Governor in Council, by proclamation, could direct that a child was “a boy or a 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.”⁷²⁷ The definition of “child” was last amended in 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.”⁷²⁸ During the period 1911-1942 Quebec fixed the frontier between the youth justice system and the adult justice system at the age of 15 (inclusive). Following this criterion, a 16 year-old-youth accused of having committed an offence should be tried by the adult justice system. It was only in 1942 that this normative frontier was enlarged by including within the youth justice program young people 17 years of age (included): by a proclamation of 28th November 1942, the Quebec political system increased the maximum age of the definition of “child” from under the age of 16 years to under the age of 18 years.

⁷²⁵ *Juvenile Delinquents Act* (1908), *supra* note 5, s 2(a).

⁷²⁶ *An Act to amend the Juvenile Delinquents Act*, SC 1921, c 37, s 1.

⁷²⁷ *Juvenile Delinquents Act* (1929), *supra* note 69, s 2(a).

⁷²⁸ *An Act to amend The Juvenile Delinquents Act*, 1929, SC 1951, c 30, s 1.

The young person's age can also play a *secondary structuring normative role* when the political system decides to "open (normative and eventual) exceptions" to the full jurisdiction of the youth court. In this sense, age can appear as an additional criterion for the (coercive and/or voluntary) mechanism of transfer or for adult sentences. Age continues being a norm of inclusion in/exclusion from the legislative and judicial programs. The system operator (the youth court) presents these "exceptions to the norm" as a "pragmatic choice". This, of course, is an illusion: the practical problems can be solved without reference to this kind of exception (mechanism of transfer or adult sentences) and the choice of opening these two specific kinds of exceptions is guided by (theoretical) ideas and representations (adult theories of punishment indifferent to social reintegration), not just by the "practical problem itself". In other words: the practical problems of the youth criminal justice system can be solved *within* the system without having to adopt philosophies of punishment, and sentencing principles and norms from the adult justice system. The adult justice system *keeps* all the cases that are brought to its attention, with or without "practical" problems.

In its social dimension, age introduces a very serious problem of representation and attribution: what makes an adult to be an adult and what makes a youth to be a youth? Can a 14 or 15 year old person be considered an "adult"? Is the fact that a presumed "youth person" (by his age) commits a serious crime a sign that he is "truly" an adult (disguised as a youth)? From one side, the social representations of youth/adult is temporally displaced within the environment of the youth criminal justice system and that will have an effect on how the youth system observes what is/is not a youth. On the other side, *some types of crimes* - such as murder, aggravated assault committed against other kids or older people, etc. - tend to "break" the image of who is a

“youth”. How can a youth do such a thing? The social dimension of “age” increases the probabilities that the most repressive philosophies of adult sentencing will infiltrate the area reserved to the youth justice system. When this happens, the “political and juridical protections of the youth” fail. They fail because there is a strong possibility that they be replaced by *other ideas*, that is, philosophies of punishment based on the theories of retribution, deterrence and denunciation.

As a result, “age” not only can be “counted”, but as well it can be “attributed”. A young person can/cannot be an adult and a young person can/cannot be his age. For instance: “he is already an adult”, “he seems older than his age”, “even though his age, he *is still young*”, etc. For human beings – specially in the youth justice system – age appears more related to the capacity for moral judgment (“mental age”) than to the biological time of an organism (“objective measure”). We can now better understand the reasons for so much discussion about a young person’s age when we accept – on the one side - the old fashioned theories of punishment (retribution, deterrence and denunciation) and – on the other side - we decide to create a new justice system where people are less punished *in function of their age*. If the old fashioned theories of punishment were already absent (or, at least, did not play such a strong role even regarding serious offences) *in the adult criminal justice system*, this discussion about age and the severity of punishment would probably not exist. The court can observe a 14 or 15 year old youth as an “adult” when the mechanism of transfer or the adult sentences exist and apply to this. As well, we will see that sometimes the youth court ignored the *normative criterion* regarding “age” and attributed the status of “youth” to a person older than the maximum age for remaining within the youth court jurisdiction. For example, the youth court has jurisdiction for dealing with youths 15

year old and younger, and accepts to try 16 or 17 year old youths. The reverse situation is more difficult to exist because the youth court needs the acceptance of the adult court: the youth court cannot transfer a 12 year old as an “adult” person if this is not normatively allowed or accepted by the adult court.

Table 3 gives a first overview of all the cases transferred to the adult court by the Montreal Youth Court taking into account the variable “age”. As we will see, even though the simplicity of the appearance, these observations are not so easy to understand.

Table 3

Age of the Offender Transferred to Adult Courts,
Total of Transfer Decisions for the period 1911-1995,
Montreal Youth Court

YEAR	TRANSFERRED							TOTAL
	AGE							
	12	13	14	15	16	17	18 AND 18+	
1911								
1912				12	2	1		15+1 ⁷²⁹ =16
1913				6				6+1=7
1914			1	2 ⁷³⁰				3+1=4
1915			1	6	4			11
1916			1	5				6
1917		1		7	1	1		10+4=14
1918		2	1	5	2			10+2=12
1919				3	1	1	1	6
1920			2	5	3	1	1	12
1921		1	2	13	3	3		22
1924				1				1
1929				1		2		3
1936				1	4		1	6
1942								+17
1948			1	7	24	47	6	85+5=90
1954			1	8	19	23	1	52+12=67
1960	1		11	19	37	63	5	136+14=150
1966						6	1	7+2=9
1972					2	19	5	26
1978					2	22		24
1984						44	2	46
1992				7	1	6	1	15
1995						5	11	16
TOTAL	1	4	21	108	105	244	35	580

⁷²⁹ The number “+n” represents a decision transferring a young person to the adult court, but the age of the young person affected by that decision was not available.

⁷³⁰ One youth was transferred back to the Montreal Youth Court.

The first (vertical) circle that includes the years 1911-1965 presents at least two things: first, compared to the period starting in 1966, youth people are still transferred below the normative age limit (12 and 13 year old youths) and at a young age (14 and 15 year old youths). The most significant shift towards the transfer of older youths (16 and 17 year old youths) can be first observed in 1960, even if in 1992 there are seven *decisions* ordering the transfer of 15 year old youths to the adult court. Second, in 1960 we can see one decision transferring a 12 year old youth to the adult court; this can be seen as a sort of “blind spot” at the time.

During the period 1911-1921 (included) there are 23 decisions from the youth court transferring youths 16 and 17 years old to the adult court. As mentioned above, until 1942 the normative age limit was 15 years (included). As a result, a spontaneous interpretation for the reason for transferring the 16 and 17 year old youths is to think that the youth court applied an automatic application of the normative age limit. Table 4, however, shows that this interpretation is not necessarily correct. The reason for this is that the youth court intervened in a great number of cases involving youths 16 (total 717) and 17 (total 67) years old during the period 1911-1921. If the youth court *accepted* youths who were older than the normative age limit, it would be very risky (or even wrong) to presuppose that the decisions transferring some young people to the adult court were solely motivated on their age. Other observations may be suitable to clarify this point. In any case, on the basis of our current knowledge, it is possible to say that the philosophy of rehabilitation suffered some strong limitations even for younger youths during the period 1911-1960.

Table 4

**Older Youths who remained within the Montreal Youth Court,
Number of Decisions of the Montreal Youth Court,
Montreal Youth Court, 1911-1921**

YEAR	REMAINED						TOTAL
	AGE						
	16	17	18	19	20	21 AND 21+	
1911							
1912	75	6		1		1	83
1913	78	6					84
1914	40	1					41
1915	55	4					59
1916	49	6		1			56
1917	61	4		2			67
1918	60	5		1			66
1919	134	10	2	1			147
1920	97	20	4				121
1921	68	5	3				76
TOTAL	717	67	9	6		1	800

If we go back to Table 3, the horizontal circle that includes the period 1943-1965 (approximately) brings to our attention the fact that we are in a period of transition. On the one side, there are still many decisions transferring 14 year old youths to the adult court (even there is a decision transferring a 12 year old youth). On the other side, the increased of the normative age limit to 17 year old youths (including 16 and 17 year old youths within the youth justice system) in November 1942 allows the youth justice system to receive older youths. The amount of *decisions* ordering the transfer of a young person to the adult court during this period (1948-1960) also seems anomalously high ($n = 307$). Further in-deep research for the reasons provided

by the Montreal Youth Court for transferring young people to the adult court is recommended. The number of decisions transferring 16- and 17-year-old youths to the adult court ($n = 212$) is also difficult to interpret. On the one hand, it can be argued that this was a time period during which the Montreal Youth Court started to be adapted to dealing with older youths. However, as presented in Table 4, we know that the court was *already* adapted to dealing with these youths, at least to a certain extent. Why is the court apparently deciding to transfer more 16- and 17-year-old youths than before? Is the philosophy of social reintegration already within the Montreal Youth Court? Table 5 shows that the severity of the offence has never been an appropriate reason for explaining why the Montreal Youth Court transferred young people to the adult court.

Table 5

**Most Severe Offences Committed by Transferred Youths,
Number of Transfer Decisions
Montreal Youth Court, 1911-1995**

	1 st M	2 nd M	M S L	A M	A S A	O T H		Additional information or comments
1911							0	1st M = first degree murder 2nd M = second degree murder MSL = manslaughter AM = attempted murder ASA = aggravated sexual assault OTH = other offences
1912						15	15+1 ⁷³¹	
1913		1				6	7	
1914						4	4	
1915						11	11	
1916				1		5	6	
1917						14	14	
1918						12	12	
1919						6	6	
1920						12	12	
1921						22	22	
1924						1	1	
1929						3	3	
1936						6	6	
1942						17	17	Order in Council: 16- + 17-year-old youths included in November 1942
1948						90	90	Adaptation period?
1954						67	67	
1960		1		1		148	150	
1966						9	9	
1972					2	23	25+1	(12 youths)
1978						24	24	(8 youths)
1984						46	46	(11 youths)
1992	2					13	15	(7 youths)
1995	1				1	14	16	(8 youths)
TOTAL	3	2	0	2	3	552	578+2	

⁷³¹ The number “+n” represents a decision ordering the transfer of a young person to the adult court, but the kind of offence committed is not available.

The triangle in Table 3 that includes the period 1966-1995 attempts to indicate the displacement of transfer decisions to older youths. The decisions of the Montreal Youth Court ordering the transfer of a young person to the adult court during the period 1966-1995 was concentrated in terms of age and including older youths. During the period 1966-1995, youth people younger than 16 years of age were less “abandoned” to the adult philosophy of punishment prevalent in the adult court than during the previous periods. However, the transfer mechanism was still operating; the Montreal Youth Court did not stop transferring young people to the adult court. The blind spot remained there and the Montreal Youth Court continued drawing a distinction between youths who are youths/youths who are adults.

7.3. The observation of the formal seriousness of the offence

Contrary to what would have been expected having in mind the discourse of the political system, the seriousness of the offence was not an important factor for the Montreal Youth Court when deciding to transfer a young person to the adult court. The notion of “seriousness” in itself presents one of the greatest difficulties. This notion is highly selective. The observer can focus her attention on the whole situation with its overall serious consequences (such as the offence of murder) or only on one micro-element or component of the situation (such as committing an offence with a firearm, breaking and enter in a home residence at night, assaulting elders, etc.). The notion of “seriousness” in the latter situation becomes highly flexible; very few observers specifically state the meaning of the word “seriousness” when they are employing it. For this overview I will use the notion of seriousness to refer to the five offences that the 1995 *Amendment to the Young Offenders Act* (1982) selected for the application of the presumption of transfer of youths 16- and 17-years-old to the adult court: first- and second-degree-murder,

manslaughter, attempted murder, and aggravated sexual assault. Table 5, above, shows how many times the Montreal Youth Court decided to transfer to the adult court a “serious offence” during the period 1911-1995. It becomes evident that it is impossible to attribute to the offences considered “serious offences” an important place for explaining the reasons for the Montreal Youth Court to transfer a young person to the adult court. If the “seriousness” of the offence is actually playing a role in the Montreal Youth Court decision-making process, at least we know that it was not *this kind* of “seriousness” that the court was taking into consideration. Even during the period 1943-1965, where we can observe a great number of decisions transferring young people to the adult court, these five serious offences cannot be considered as a significant reason. During the period 1911-1995 there were only 10 decisions where the Montreal Youth Court transferred a young person to the adult court.

7.4. The observation of the young person’s gender

The most interesting and intriguing data that I was able to collect from my empirical material is presented in Table 6: from 1960 to 1995 I could not find any decision from the Montreal Youth Court transferring a female young person to the adult court. One thing seems to be clear: after 1960 female youths have been more protected against a transfer decisions than male youths. I do not have an explanation for this; I can only speculate about these findings. Maybe these positive results can be at least partially attributed to feminism movements and to the special attention the youth justice system has given to female youths for preventing their exposure to the punitive theories of punishment.

Table 6

Number of Transfer Decisions per Gender

Montreal Youth Court, 1911-1995

YEAR	TRANSFERRED - MALES							TOTAL	TRANSFERRED - FEMALES						TOTAL
	AGE								AGE						
	12	13	14	15	16	17	18 AND 18+		13	14	15	16	17	18 AND 18+	
1911															
1912				12	1	1		14+1				1			1
1913				5				5+1			1				1
1914			1	1				2+1			1 ⁷³²				1
1915			1	5	4			10			1				1
1916			1	5				6							0
1917				6	1	1		8+4	1		1				2
1918		2	1	4				7+2			1	2			3
1919				3	1	1		5						1	1
1920			2	5	3		1	11					1		1
1921		1	2	12	3	3		21			1				1
1924				1				1							0
1929				1		2		3							0
1936				1	4		1	6							0
1942								+17							0
1948			1	7	24	47	5	84+4						1	1+1
1954			1	6	18	23	1	49+16			2				2
1960	1		11	19	37	63	5	136+14							0
1966						6	1	7+2							0
1972					2	19	5	26							0
1978					2	22		24							0
1984						44	2	46							0
1992				7	1	6	1	15							0
1995						5	11	16							0
TOTAL	1	3	21	100	101	243	33	502+62	1	0	8	3	1	2	15+1

⁷³² The youth was transferred back to the Montreal Youth Court.

I do not know if the adult sentences introduced by the *Youth Criminal Justice Act* (2002) have produced or not a regression in political and judicial policies concerning female young offenders; this matter should be further researched.

On the following chapters I focus on the reasons provided by the Montreal Youth Court for transferring young people to the adult court.

CHAPTER 8

The Montreal Youth Court as a Court of Protection and Punishment:

1911-1942

8.1. Introduction

On 28th December 1911 the Montreal Youth Court was established in the city of Montreal⁷³³ and Mr. Francis Xavier Choquet – the president of the Montreal Children’s Aid Society – became its first judge.⁷³⁴ This court was the first of its kind in Quebec until 1940, when a second Juvenile Delinquents’ Court was established in Quebec City.⁷³⁵ Soon after, Juvenile Delinquents’ Courts were established in other cities in Quebec.⁷³⁶ The Montreal Youth Court only had jurisdiction for delinquency cases (criminal offences and protection cases) committed within the city of Montreal; these cases were dealt with by a Juvenile Court Judge applying the *Juvenile Delinquents Act* (1908).

Quebec cities that had not implemented the *Juvenile Delinquents Act* (1908) locally dealt with criminal offences and protection cases separately. Criminal offences that occurred beyond the jurisdiction of the city of Montreal were dealt with by the adult court applying the *Criminal Code*, federal statutes, and provincial statutes (such as the *Reformatory Schools Act* (1869)).⁷³⁷ On the other hand, cases of abuse and neglect (protection cases) that occurred outside the jurisdiction of the Montreal Youth Court were dealt with by Quebec provincial statutes, such as

⁷³³ OIC 1911/1127 (*Juvenile Delinquents Act*). See Kolish, *supra* note 66.

⁷³⁴ Sylvie Ménard, “Les Églises et la prise en charge de l’enfance au Québec : le cas des institutions d’enfermement pour les jeunes délinquants ou en danger (1858-1950)” (2003) 69 *Études d’histoire religieuse* 69.

⁷³⁵ *La Loi instituant la Cour des jeunes délinquants de Québec*, SQ 1940, ch 3.

⁷³⁶ Trépanier, *supra* note 74.

⁷³⁷ *An Act respecting Reformatory Schools*, SQ 1869, c XVIII [*Reformatory Schools Act* (1869)]; I am thankful to Lucie Quevillon for her thoughtful comments regarding the application of the *Juvenile Delinquents Act* in Quebec during the early XX century.

the *Reformatory Schools Act* (1869) and the *Industrial Schools Act* (1869).⁷³⁸ While the former was intended to deal with children in conflict with the law, the latter was aimed at protecting children in danger. Nonetheless, Trépanier notes that at the end of the day the distinction between both statutes was quite slim as “the children for whom the industrial schools were aimed at were, most of the time, children perceived as potential delinquents. Protection of children in danger and crime prevention was a joint enterprise.”⁷³⁹

The Quebec Legislative Assembly continued enacting legislation for dealing with cases of abuse and neglect even though the *Juvenile Delinquents Act* (1908) started to be implemented in other Quebec cities, and cases of abuse and neglect were eventually brought within the jurisdiction of the Juvenile Delinquents’ Courts. In 1944 the Quebec Legislative Assembly enacted the *Children’s Protection Act* and Child Protection Schools were also established.⁷⁴⁰ In 1950 the *Reformatory Schools Act* (1869), the *Industrial Schools Act* (1869) and the *Children’s Protection Act* (1944) were repealed and replaced by an *Act respecting Youth Protection Schools*; this statute created youth protection schools for dealing with the youth population the other three statutes used to deal with.⁷⁴¹ In 1977 the *Youth Protection Act* was enacted and replaced the *Act respecting Youth Protection Schools*.⁷⁴² This statute is still in force in Quebec.

⁷³⁸ *Reformatory Schools Act* (1869), *supra* note 737; *An Act respecting Industrial Schools*, SQ 1869, c XVII [*Industrial Schools Act* (1869)], respectively.

⁷³⁹ Trépanier, *supra* note 74 at 54 [my translation]. See Desrosiers & Lamonde, *supra* note 509; Ginette Durand-Brault, *La Protection de la jeunesse au Québec* (Quebec: Éditions du Boréal, 1999).

⁷⁴⁰ *An Act respecting the Protection of Children*, SQ 1944, c 33 and *An Act respecting Child Protection Schools*, SQ 1944, c 16, respectively.

⁷⁴¹ *An Act respecting Youth Protection Schools*, SQ 1950, c 11, s 3; Ménard, *supra* note 698. For a historical analysis of the regulation of youth protection in Quebec, see Oscar D’Amours, “Survол historique de la protection de l’enfance au Québec, de 1608 à 1977” (1986) 35:3 *Service Social* 386; Durand-Brault, *supra* note 739.

⁷⁴² *Loi sur la protection de la jeunesse*, *supra* note 62, s 146.

In this chapter I present and analyze the data regarding how the Montreal Youth Court applied and interpreted the *Juvenile Delinquents Act* (1908) during the period 1911-1942. For this analysis I will present all the cases of young people who were transferred to the adult court during the period 1911-1921, and the years 1924, 1929, 1936 and 1942. This first period is identified as the “formation period” of the Montreal Youth Court. During this period the Montreal Youth Court had jurisdiction for dealing with all young people younger than 16 years of age who had committed a “delinquency”. The maximum age for the Montreal Youth Court to intervene in cases of delinquency was increased to 17 years (inclusive) on 28 November 1942.

All the transcripts regarding the decisions made by the Montreal Youth Court for transferring a young person to the adult court will be presented in the language in which they were originally written.

8.2. The Montreal Youth Court (1911-1921)

The Montreal Youth Court was established in December 1911. This court had jurisdiction for intervening in cases of “delinquency” committed by children and young people under the age of 16 years. According to the *Juvenile Delinquents Act* (1908), “‘child’ meant a boy or girl apparently or actually under the age of sixteen years.”⁷⁴³ The *Juvenile Delinquents Act* (1908) also defined who was a “juvenile delinquent”:

“juvenile delinquent” means 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 of 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.⁷⁴⁴

⁷⁴³ *Juvenile Delinquents Act* (1908), *supra* note 5, s 2(a).

⁷⁴⁴ *Ibid*, s 2(c).

For the first 11 years of operation of the court, the minute-books of the Montreal Youth Court state that the court intervened in 12,765 cases.⁷⁴⁵ However, Trépanier argues that the Court implemented an informal diversion system through which 50% of the cases were diverted:

[c]es données créent l'impression qu'une forme de filtre existait, qui retenait un certain nombre d'affaires et ne laissait passer que moins d'un cas sur deux pour en faire des causes traitées formellement. Les cas traités informellement ne semblaient faire l'objet d'aucun dossier et leur existence ne semble pas avoir été consignée d'une manière qui se prête à un traitement statistique le moins précisément. Le fonctionnement du tribunal tel que Gouin le décrit porte à croire que cette opération de filtrage était peut-être menée par le juge lui-même.⁷⁴⁶

Consequently, the numbers presented in Table 7 may represent only half of the cases that passed through the Court. According to the data collected at the Archives Nationales du Québec à Montréal, during the period 1911-1921 the Montreal Youth Court dealt with 10,467 cases involving male clients, 1,911 cases involving female clients, and 387 cases involving clients whose gender was not stated in the minute-book. These numbers represent the total of the (formal) recorded cases involving infants, children and young people who were brought to the attention of the Montreal Youth Court. This total number of cases may account for a same young person twice or even more often: a young person may have been brought several times to the attention of the court (recidivists). Overall, the numbers presented in Table 7 represent the total number of cases formally recorded at the Montreal Youth Court for the period 1911-1921 (and not necessarily the total amount of youths).

⁷⁴⁵ Minute-book from the Montreal Juvenile Delinquents' Court for the period 28th October 1911 to 31st December 1913, Montreal, Archives Nationales du Québec (code: TL483, S45, SS7; place 20 0 010 07-01-001B-01; content 2004-03-001\499); Minute-book from the Montreal Juvenile Delinquents' Court for the period 1914 to 1917, Montreal, Archives Nationales du Québec à Montréal (code: TL483, S45, SS7; place 20 0 010 07-01-002B-01; content 2004-03-001\500); Minute-book from the Montreal Juvenile Delinquents' Court for the period 1918 to 1921, Montreal, Archives Nationales du Québec à Montréal (code: TL483, S45, SS7; place 20 0 010 07-01-003B-01; content 2004-03-001\5000).

⁷⁴⁶ Trépanier, *supra* note 74 at 75-76.

Table 7

**Number of Cases in which the Court Formally Intervened per gender,
Montreal Youth Court, 1911-1921**

Gender/Year	Males	Females	N/A	Total
1911	3	0	0	3
1912	815	97	21	933
1913	908	123	14	1045
1914	904	119	42	1065
1915	866	128	14	1008
1916	847	141	30	1018
1917	1002	193	53	1248
1918	1144	269	55	1468
1919	1429	309	33	1771
1920	1392	287	33	1712
1921	1157	245	92	1494
Total	10,467	1911	387	12,765

The Montreal Youth Court dealt with very diverse offences for the period 1911 to 1921: criminal offences, provincial infractions, abuse and neglect situations, and status offences. As presented in Tables 8 and 9, the Court intervened in very few cases in which the offence was deemed to be a “serious offence” - according to the definition of “seriousness” provided in Chapter 7 - for the period 1911-1921: four cases involving males and no cases involving females.

Because the tri-level series of sexual assault offences were introduced in 1983 and this section deals with the period 1911-1921, the pre-1983 offences do not contain the same elements as the post-1983 offence of “aggravated sexual assault”.⁷⁴⁷ Even if inaccurate in terms of the elements of the criminal offence, the ancient offence of “rape” is recorded as “aggravated sexual assault.” While “rape” only focuses on the sexual nature of the misconduct, “aggravated sexual assault”

⁷⁴⁷ *Roberts & Pires, supra* note 70; David Watt, *The New Offences against the Person. The Provisions of Bill C-127* (Toronto: Butterworths, 1984). I am very thankful to Professor Rachel Grondin for having recommended me Watt’s book.

focuses on the sexual nature of the offence and the physical aggression suffered by the victim. The reason for treating both offences similarly is that *rape* victims most of the time suffer injuries during the sexual attack and these injuries could have been included within a "rape" charge before the 1983 amendment. Nevertheless, this criterion may result in cases of over-inclusion: a rape victim may have suffered bodily harm but not of the type required by the full offence of "aggravated sexual offence" but of the intermediate offence of "sexual assault causing bodily harm". The minute-books for the period 1911-1921 do not register any case of rape.⁷⁴⁸ Of course, as we know, this does not permit us to say that no rape offences occurred during this period. Because there is a strong stigma associated with being the victim of a sexual offence, a more confident hypothesis is that no complaint was brought to the attention of the Montreal Youth Court during this period. Being the criminal justice system a heterosexual male environment, most of rape victims would have been reluctant to bring a complaint before justice and many times these criminal offences were dealt outside the court system informally.⁷⁴⁹

⁷⁴⁸ Cliché's research of how incest was dealt with by the Montreal Juvenile Delinquents' Court for the period 1912-1965 confirms these numbers: "L'inceste apparaît dans 0,1 p. cent des dossiers de la CJD [Cour de jeunes délinquants] en 1915 (1 sur 690), 1,2 p. cent en 1925 (14 sur 1213) et 1,6 p. cent en 1945 (34 sur 2158)." Marie-Aimée Cliché, "Du péché au traumatisme: L'inceste, vu de la Cour des jeunes délinquants et de la Cour de bien-être social de Montréal, 1912-1965" (2006) 87:2 *The Canadian Historical Review* 199 at 201. Cliché includes within the notion of "incest" both indecent assault and rape: "[d]ans une cinquantaine de cas, l'inceste se limite donc à des attouchements et s'arrête avant la pénétration vaginale ou anale." *Ibid* at 206.

⁷⁴⁹ Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: The Osgoode Society, 1991); Karen Dubinsky, *Improper Advances. Rape and Heterosexual Conflict in Ontario, 1880-1929* (Chicago: The University of Chicago Press, 1993).

Table 8

**Most Serious Offences Committed by Males,
Montreal Youth Court, 1911-1921**

Offence	Number
Murder (1 st and 2 nd)	1
Manslaughter	0
Attempted Murder	3
Aggravated Sexual Assault (rape)	0
Other Offences	10,463
Total	10,467

Table 9

**Most Serious Offences Committed by Females,
Montreal Youth Court, 1911-1921**

Offence	Number
Murder (1 st and 2 nd)	0
Manslaughter	0
Attempted Murder	0
Aggravated Sexual Assault (rape)	0
Other Offences	1911
Total	1911

With regard to the object of this study – the transfer of young offenders to the adult court – during the period 1911-1921 the Montreal Youth Court did not provide reasons for applying the transfer provisions. The youth court judge could transfer to the adult court young people 14 year of age and older accused of having committed an indictable offence as long as the “good of the

child and the interest of the community demand[ed] it”. This is the text of the section regulating the transfer of young people to the adult court in the *Juvenile Delinquents Act* (1908):

7. Where the act complained of is, under the provisions of *The Criminal Code* or otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of *The Criminal Code* in that behalf; but such course shall in no case be followed unless the court is of the opinion that the good of the child and the interest of the community demand it. 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.⁷⁵⁰

During the period 1911-1921 the only way to know that a case had been transferred to the adult court was a brief annotation in the minute-book that read something to this effect: “[t]heft. Referred to Police Court”⁷⁵¹, “[p]apers sent to Court of Sessions”⁷⁵² or “[r]eferred to Recorderis Court August 29, 1912”.⁷⁵³

During the first years of operation of the Montreal Youth Court each case brought to the court was kept in an individual envelope made of hard cardboard in which the officer of the court wrote the case number, the name of the young people being charged with the offence, the offence committed, and the final measure taken regarding the young person. The court officer kept all the documents related to the offence inside the envelope. If the record was transferred to the adult court, the envelope remained in the Montreal Youth Court and its content was sent to the adult court jurisdiction. As a result, the envelope where the young person’s documents should

⁷⁵⁰ *Juvenile Delinquents Act* (1908), *supra* note 5, s 7 [emphasis added].

⁷⁵¹ Case of L.B., 15 years, arrested for theft, Record no. 145 from the Montreal Juvenile Delinquents’ Court, 18th April 1912, Montreal, Archives Nationales du Québec (code: TL483, S45, SS1; located in 20 0 008 02-01-001A-01; content: 2004-03-001\1).

⁷⁵² Case of B.M., 16 years, arrested for vagrancy, Record no. 154 from the Montreal Juvenile Delinquents’ Court, 24th April 1912, Montreal, Archives Nationales du Québec (code: TL483, S45, SS1; located in 20 0 008 02-01-001A-01; content: 2004-03-001\1).

⁷⁵³ Case of D.G., no age stated, arrested for vagrancy, Record no. 451a from the Montreal Juvenile Delinquents’ Court, 17th August 1912, Montreal, Archives Nationales du Québec (code: TL483, S45, SS1; located in 20 0 008 02-01-002A-01; content: 2004-03-001\2).

have been available in the Montreal Youth Court was most of the time empty. These empty envelopes often had marginal notes on their covers indicating that the case had been sent to the adult court.

During the period 1911-1921, 98 files dealing with male juvenile delinquents and 12 files dealing with female juvenile delinquents were transferred to the adult court. These numbers represent the total of transfer decisions and not the total number of young people transferred to the adult court. Because a juvenile delinquent could have been transferred to the adult court for more than one offence, I recorded each decision ordering a transfer rather than the amount of people that was actually transferred. As presented in Tables 10 and 11, the measure of transferring juvenile delinquents to the adult court was mostly used for dealing with male rather than female juvenile delinquents. In fact, according to Table 11, the year 1918 is the year that the Montreal Youth Court had the highest number of transfer decisions involving female juvenile delinquents and this represents three transfer decisions. On the other hand, Table 10 shows that the year 1921 is the year that the Montreal Youth Court had the highest number of transfer decisions involving male juvenile delinquents and this represents 21 transfer decisions.

Table 10

**Number of Decisions involving Males Transferred to the Adult Court per Year,
Montreal Youth Court, 1911-1921**

Year	Total Cases – Males	Cases Transferred
1911	3	0
1912	815	15
1913	908	6
1914	904	3
1915	866	10
1916	847	6
1917	1002	12
1918	1144	9
1919	1429	5
1920	1392	11
1921	1157	21
Total	10467	98

Table 11

**Number of Decisions involving Females Transferred to the Adult Court per Year,
Montreal Youth Court, 1911-1921**

Year	Total Cases - Females	Cases Transferred
1911	0	0
1912	97	1
1913	123	1
1914	119	1
1915	128	1
1916	141	0
1917	193	2
1918	269	3
1919	309	1
1920	287	1
1921	245	1
Total	1911	12

The decisions ordering the transfer of young people to the adult court for the period 1911-1921 never mentioned the test of the “good of the child and the interest of the community” as stated in section 7 of the *Juvenile Delinquents Act* (1908). The Montreal Youth Court sometimes only referred to section 7 when deciding a transfer:

Referred to Police Court under clause #7 of Juvenile Act. May 20-13.⁷⁵⁴ [15 years, accused of murder]

The Montreal Youth Court also made reference to the fact that the young person was accused of an indictable offence for deciding a transfer:

V. case referred to police court under clause 7 of the Juvenile Act to be prosecuted as an indictable offence.⁷⁵⁵ [17 years, accused of theft]

1912. July 23. Accused [through] interprete[r] pleads not guilty. Referred to be prosecuted as an indictable offence, clause 7 Juvenile Act.⁷⁵⁶ [15 years, accused of theft]

1926. 402. Plaide non coupable le 18 mai 14. Referred to be tried as an indictable offence under clause 7 of the Juvenile Act. Accused to go to Police Court. Choquet.⁷⁵⁷ [no age stated, accused of theft]

1311. Pleads not guilty. April 6.14. Referred to Police Court to be tried as an indictable offence. Clause 7 Juvenile Act. Choquet.⁷⁵⁸ [14 years, accused of theft]

However, not every young person accused of having committed an indictable offence was transferred to the adult court. In 1913 there were 434 counts of theft committed by male juvenile

⁷⁵⁴ Case of E.M., 15 years, accused of murder, Record no. 341 from the Montreal Courthouse, 20th May 1912, Montreal, Archives Nationales du Québec (code: TL483, S45, SS1; located in 20 0 008 02-01-002B-01; content: 2004-03-001\5).

⁷⁵⁵ Case of J.V., 17 years, accused of theft, Record no. 190 from the Montreal Juvenile Delinquents' Court, 17th May 1912, Montreal, Archives Nationales du Québec (code: TL483, S45, SS1; located in 20 0 008 02-01-001A-01; content: 2004-03-001\1).

⁷⁵⁶ *The King vs. H.*, 15 years, accused of theft, Record no. 2395 from the Montreal Courthouse, 17th July 1912, Montreal, Palais de la Justice de Montréal (document named “The information and complaint of” from the Office of the Police Magistrate).

⁷⁵⁷ *Le Roi vs. C.B.*, no age stated, accused of theft, Record no. 1926 from the Montreal Courthouse, 4th June 1914, Montreal, Palais de la Justice de Montréal (document named “The information and complaint of” from the Montreal Juvenile Delinquents' Court).

⁷⁵⁸ *Le Roi contre W.O.*, 14 years, accused of theft, Record no. 1311 from the Montreal Courthouse, 6th April 1914, Montreal, Palais de la Justice de Montréal (document named “The information and complaint of” from the Montreal Juvenile Delinquents' Court).

delinquents according to the Montreal Youth Court minute-books; however, in that year there were only six decisions ordering the transfer of a male juvenile delinquent to the adult court. Similarly, in 1914 there were 445 offences of theft committed by male juvenile delinquents and there were only three decisions transferring male juvenile delinquents to the adult court. There are similar findings for the whole period 1911-1921. Consequently, the argument that every indictable offence was transferred to the adult court is not plausible. Because of this, it is difficult to argue that the Montreal Youth Court only kept within its jurisdiction minor offences (summary convictions offences) and transferred to the adult court all indictable offences.

The juvenile delinquents' age was also referred to by the Montreal Youth Court as a ground for transferring young people to the adult court:

E.M.L. referred to Police Court to be tried as an indictable offence. 25 Feb 1913. Judge Choquet. The girl being over 16 years may be tried summarily for offence charge. Should be tried at Police Court as I have no jurisdiction under Juvenile Acts.⁷⁵⁹ [17 years, accused of vagrancy]

28 Nov. 1917. Accused being over 16 years old [is] referred to the Police Court. Nov. 28.17.⁷⁶⁰ [no age, accused of break and enter]

Oct. 2. 18. Accused being over 16 years of age case is referred to Police Court to be tried according to law. 5 months. Choquet.⁷⁶¹ [16 years, accused of vagrancy]

Accused being over 14 years is referred to Police Court to be tried as an indictable offence. Oct. 7.18. Choquet.⁷⁶² [13 years, accused of escaping lawful custody]

⁷⁵⁹ *The King against E.M.L.*, 17 years, accused of vagrancy, Record no. 693 from the Montreal Courthouse, 27th February 1912, Montreal, Palais de la Justice de Montréal (document named "The information and complaint of" from the Montreal Juvenile Delinquents' Court).

⁷⁶⁰ *The King against J.L.*, no age stated, accused of break and enter, Record no. 3326 from the Montreal Courthouse, 11th September 1917, Montreal, Palais de la Justice de Montréal (document named "The information and complaint of" from the Montreal Juvenile Delinquents' Court).

⁷⁶¹ *The King vs. B.G alias N.W.*, 16 years, accused of vagrancy, Record no. 3682 from the Montreal Courthouse, 2nd October 1918, Montreal, Palais de la Justice de Montréal (document named "The information and complaint of" from the Montreal Juvenile Delinquents' Court).

⁷⁶² Case of P.T., 13 years, accused of escaping lawful custody, Record no. 3758 from the Montreal Courthouse, 7th October 1918, Montreal, Palais de la Justice de Montréal (document named "The information and complaint of" from the Montreal Juvenile Delinquents' Court).

The study of the minute-books for the period 1911-1921 demonstrates that not every juvenile delinquent older than 15 years of age was necessarily transferred to the adult court because the Montreal Youth Court did not have jurisdiction for intervening.⁷⁶³ Table 12 shows that during the period 1911-1921 more than 2/5 of the transfers were decided for the group aged 16 years and older (n = 34). Furthermore, according to the Montreal Youth Court minute-books, juvenile delinquents of both sexes aged 16, 17, 18 and 19 years of age were still dealt with within the youth court jurisdiction.⁷⁶⁴ As presented in Chapter 7 (Table 4), during the period 1911-1921 the Montreal Youth Court kept 717 cases of youth delinquency committed by youths 16 years old and 67 cases of youth delinquency committed by youths 17 years old. Even though the Montreal Youth Court did not have jurisdiction for dealing with these youths, the court kept these youths within the youth justice system. This seems to suggest that the Montreal Youth Court implicitly

⁷⁶³ Minute-book from the Montreal Juvenile Delinquents' Court for the period 28th October 1911 to 31st December 1913, Montreal, Archives Nationales du Québec (code: TL483, S45, SS7; place 20 0 010 07-01-001B-01; content : 2004-03-001\499); Minute-book from the Montreal Juvenile Delinquents' Court for the period 1914 to 1917, Montreal, Archives Nationales du Québec à Montréal (code: TL483, S45, SS7; place 20 0 010 07-01-002B-01; content 2004-03-001\500); Minute-book from the Montreal Juvenile Delinquents' Court for the period 1918 to 1921, Montreal, Archives Nationales du Québec à Montréal (code: TL483, S45, SS7; place 20 0 010 07-01-003B-01; content 2004-03-001\5000).

⁷⁶⁴ Case no. 658, male, 16 years, accused of theft, sentenced to the Reformatory School for two years in 1912; Case no. 708, male, 16 years, accused of vagrancy, sentenced to parole in 1912; Case no. 770, male, 17 years, accused of vagrancy, sentenced to parole in 1912; Case no. 777, female, 16 years, accused of desertion, sentenced to the Reformatory School for three years in 1913; Case no. 874, male, 17 years, accused of theft, sentenced to parole in 1913; Case no. 940, male, 17 years, accused of assault, sentenced to parole in 1913; Case no. 1318, female, 16 years, accused of vagrancy, sentenced to the Reformatory School for two years in 1913; Case no. 1404, male, 17 years, accused of selling papers without licence, sentenced to parole in 1913; Case no. 2149, female, 16 years, accused of vagrancy, sentenced to probation in 1914; Case no. 2370, female, 17 years, accused of vagrancy, sentenced to probation in 1915; Case no. 2766, male, 17 years, accused of trespassing, sentenced to reformatory school in 1915; Case no. 3040, female, 19 years, accused of vagrancy, sentenced to probation in 1916; Case no. 3504, male, 17 years, accused of trespassing, sentenced to probation in 1916; Case no. 3376, male, 17 years, accused of theft, sentenced to probation in 1917; Case no. 4599, male, 17 years, accused of vagrancy, sentenced to probation in 1918; Case no. 4891, female, 16 years, accused of committing an indecency, sentenced to probation in 1918; Case no. 5808, female, 18 years, accused of vagrancy, sentenced to probation in 1919; Case no. 4063, male, 16 years, accused of vagrancy, sentenced to the Reformatory School for three years in 1919; Case no. 5503, female, 16 years, accused of vagrancy, sentenced to the Reformatory School for three years in 1920; Case no. 7232, male, 17 years, accused of vagrancy, sentenced to probation in 1920; Case no. 7966, male, 17 years, accused of vagrancy, sentenced to foster home in 1921; Case no. 8454, male, 16 years, accused of playing ball on the street, sentenced to a 1\$ fine in 1921; among others.

modified its jurisdiction despite the legal norm that limited its jurisdiction to youths 15 years old and younger (included).

Table 12
Age of the Offender in the Records Transferred to the Adult Court,
Montreal Youth Court, 1911-1921

Age of the Young Person	Males	Females	Total
13 years	3	1	4
14 years	8	0	8
15 years	58	6	64
16 years	13	3	16
17 years	6	1	7
18 years	1	1	2
n/a	9	0	9
Total	98	12	110

What were the reasons for transferring juvenile delinquents to the adult court during the period 1911-1921? As noted above, the Montreal Youth Court seldom made reference to this. During the period 1911-1921 there was only one count of “murder”, which was transferred to the adult court. On the other hand, during this period there were three counts of “attempted murder”, and only one count was transferred to the adult court. During the period 1911-1921 from the 110 decisions ordering a transfer to the adult court only 2 decisions are related to offences that are considered “serious offences”. Most of the offences transferred to the adult court were minor offences such as “breaking a contract of apprenticeship” and “vagrancy.” As presented in Table 13, the offences of theft (48 decisions), vagrancy (13 decisions), and shop breaking (14 decisions) were the offences for which most transfer decisions were held

Table 13

**Offences Transferred to the Adult Court,
Montreal Youth Court, 1911-1921**

Offences Referred to the Adult Court	Males	Females	Total
Murder	1	-	1
Attempted murder	1	-	1
Aggravated assault	1	-	1
Assault	3	-	3
Being at large while under sentence of imprisonment	1	-	1
Break and enter	1	-	1
Breaking contract of apprenticeship	1	-	1
Burglary	1	1	2
Damage	3	-	3
Desertion	1	1	2
Escaping lawful custody	1	-	1
Found in disorderly house	1	-	1
House breaking	9	-	0
Indecent assault	1	-	1
Inmate of a disorderly house	-	1	1
Intimidation	1	-	1
Receiving stolen goods	4	-	4
Sale of obscene objects	1	-	1
Shop breaking	12	-	12
Stealing a ride	1	-	1
Theft	45	3	48
Vagrancy	7	6	13
Not available	1	-	1
Total	98	12	110

As a final note, it is worth discussing how the cases transferred to the adult courts were decided (sentencing). As mentioned in Chapter 1 there are many records that unfortunately are not available because they are either lost or have been destroyed. Table 14 presents the amount of records that were identified at the Palais de la Justice (“adult court”) that were sent from the Montreal Youth Court.

Table 14
Number of Records Available in which an Adult Court Rendered a Decision,
Montreal Palais de la Justice, 1911-1921

Sentencing in Adult Court	Males	Females	Total
Available	69	7	76
Not Available	29	5	34
Total	98	12	110

Even if the record was available in the adult court, this does not mean that the final disposition regarding how the young person was dealt with was still available. As presented in Table 15 there were 17 records for which we do not have information about how the young person was dealt with. With regard to the records for which we have a final decision (59) cases, we know that there are 15 records with a non-guilty verdict. This means that for these people it was more beneficial being dealt with by the adult court than by the Montreal Youth Court: once a non-guilty verdict was reached, the adult court ceased to have jurisdiction over the young person. Had the Montreal Youth Court dealt with these young people, the court would have kept them as wards of the court. The reason for this is that only the fact of having come to the attention of the Montreal Youth Court meant that these young people were in need of protection. As such, they

may have been subject to probation. In conclusion, for these young people the adult court provided them with the least restrictive final disposition.

Table 15
Final Disposition at the Adult Court,
Montreal Palais de la Justice, 1911-1921

Sentencing in Adult Court	Males	Females	Total
Guilty	39	5	44
Non-guilty	13	2	15
Not Available	17	0	17
Total	69	7	76

On the other hand, young people who came to the attention of the adult court could be sentenced to longer terms of incarceration than in the Montreal Youth Court, and as well detained with adult offenders. Table 16 presents how the records where there was a guilty verdict were dealt with (n = 44). While the records where there was a male young offender were dealt with a variety of measures, all the records where there was a female young offender for which a sentence was available were dealt with incarceration (n = 5). If we recall from Table 13 above, half of the offences for which women were transferred to the adult court during the period 1911-1921 were “vagrancy”. Unfortunately, the records do not show the reasons for having sentenced these female offenders to the prison. While it can be suggested that during this period the adult court system did not tolerate this behavior and dealt with female vagrancy harshly, this also may suggest a social-welfare approach of the adult court for dealing with vagrant women. Poutanen’s research on how the Montreal justice system dealt with female vagrancy during the period 1810-

1842 suggests that the court system incarcerated female vagrants as a way of protecting them from the inclemency of the Montreal winter. In fact, according to her, the women themselves requested to be incarcerated:

[m]any vagrant women in Montreal used imprisonment during the winter months as a survival strategy either by requesting detention themselves or by committing petty crimes in order to be arrested. Eleonore Galarneau, Catherine Corkan, Mary Boyle, and Sarah Kennedy threatened to break the windows at the Palais de la Justice if their request for imprisonment was denied. The police claimed in an 1836 affidavit that these women risked perishing from cold and hunger if they were not incarcerated.⁷⁶⁵

In any event, the fact of having to resort to the prison as a medium for inflicting punishment or as a way of providing women with facilities for protecting them from the winter conditions demonstrates the limits of the adult justice system in terms of rehabilitation and reintegration of young people.

Table 16
Sentence received at the Adult Court,
Montreal Palais de la Justice, 1911-1921

Sentencing in Adult Court	Males	Females	Total
Penitentiary	1	0	1
Prison	5	5	10
Reform School	10	0	10
Fine	3	0	3
Parole	3	0	3
Suspended Sentence	14	0	14
Not Available	3	0	3
Total	39	5	44

⁷⁶⁵ Poutanen, *supra* note 88 at 43.

8.3. Year 1924

In 1924 Parliament enlarged the definition of “juvenile delinquents” to include young people accused of having committed a sexual immorality “or any similar sort of vice”. According to the *1924 Amendment*, section 2(c) read as follows:

“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.⁷⁶⁶

In 1924 the Montreal Youth Court recorded 1108 cases of delinquency.⁷⁶⁷ While for the period 1911-1921 I manually counted all the records at the Montreal Youth Court, for the years 1924, 1929, 1936, 1942, 1948, 1954, 1960, 1966, 1972 and 1978 I used the numbers provided by the official records. Again, it is important to keep in mind that most of the time the numbers provided by these official records are lower than the actual number of young people dealt with by the Montreal Youth Court. The reason for this is a change on the way of operating of the Montreal Youth Court by 1924: the court started recording “incidents of juvenile delinquency” rather than “juvenile delinquents”. For instance, if five young people were involved in an incident of delinquency, all these five people would be identified by the same record number. As a result, in this case there would be “one” incident of delinquency that involved “five” juvenile delinquents. Thus, the number of incidents of delinquency most probably is lower than the amount of juvenile delinquents who were dealt with by the Montreal Youth Court. Nevertheless,

⁷⁶⁶ *Amendment to the Juvenile Delinquents Act* (1924), *supra* note 75, s 1 [emphasis added; amended version underlined].

⁷⁶⁷ Records 1 to 200 (1924) Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 02-06-003A-01; content 2004-03-001\44); Records 881 à 1108 (1924) Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 02-07-001A-01; content 2004-03-001\48).

these numbers are still useful for having an approximate idea of how many young people were dealt with by the Montreal Youth Court.

In 1924 there was only one decision transferring a young person to the adult court: this was the case of E.H., a 15-year-old male accused of theft. The minute-book of the Montreal Youth Court for this year only reads that the young person was transferred to the adult court because of his age: “Référé Police Court au age.”⁷⁶⁸ Unfortunately, the plunitifs of the Peace Officer (Greffé de la Paix) for the period 1923-1928 (inclusive) are missing and the name of the defendant does not appear in the Index of Defendants either. Consequently, there is no data that can provide further information regarding the reasons for the transfer of E.H. to the adult court in 1924. Nevertheless, the reason of age in this situation is strange for two reasons. First, a 15-year-old young person was still within the normative age limit of the jurisdiction of the Montreal Youth Court. The Montreal Youth Court could specifically deal with all young people 15-year-old and younger. The second reason is that, as discussed in Chapter 7, the Montreal Youth Court was used to dealing with young people older than the maximum normative age limit for the court to have jurisdiction. During the period 1911-1921 the Montreal Young Court systematically kept within its jurisdiction young people 16-year-old, even though this age group had been excluded from the youth court by the political system.

While there were very little reasons (if any) for justifying the transfer of this young person to the adult court, the Montreal Youth Court kept most of the records regarding this young person

⁷⁶⁸ Case of E.H., 15 years, arrested for theft, Record no. 675 from the Montreal Juvenile Delinquents' Court, 12th-13th August 1924, Minute-book from the Montreal Juvenile Delinquents' Court for the period 1922 to 1925, Montreal, Archives Nationales du Québec (code TL483, S45, SS7; place 20 0 010 07-01-004B-01; content 2004-03-001\501).

within its jurisdiction. It seems that by 1924 the judiciary practice may have changed and more records were left within the court despite a transfer decision. This information “remaining” in the Montreal Youth Court will become useful for this analysis when, later on, there will appear transfer decisions where the Montreal Youth Court actually provided reasons for transferring the young person to the adult court. These records will allow me to identify and highlight the role of professional experts within the transfer decisions.

A final point: while for the period 1911-1921 all the annotations in the records were either in French or in English, by 1924 almost all annotations were made in French. The effect of this change of practice will be reflected below, where most of the extracts from the transfer decisions are presented in French.

8.4. Year 1929

As noted in Chapter 1, for the period 1924-1995 I have identified samples every six years for analyzing the reasons provided by the Montreal Youth Court for transferring juvenile delinquents to the adult court. While, after having examined the year 1924, the following year should have been 1930, in 1929 Parliament re-enacted the *Juvenile Delinquents Act* (1908) introducing significant amendments to the statute.⁷⁶⁹ For the purpose of this chapter there are two major amendments that are worth highlighting. First, the *1929 Amendment* enlarged the circumstances under which a juvenile delinquent could be transferred to the adult court. Young people who had come to the attention of the Juvenile Delinquents’ Court became wards of the court, and as such, the court could impose on them any measure they considered appropriate, including their transfer to the adult court:

⁷⁶⁹ *Juvenile Delinquents Act* (1929), *supra* note 69.

Where a child has been adjudged to be a juvenile delinquent and whether or not such child has been dealt with in any of the ways provided for in subsection one of this section, the court may at any time, before such juvenile delinquent has reached the age of twenty-one years and unless the Court has otherwise ordered, cause by notice, summons, or warrant, said delinquent to be brought before the court, and the court may then take any action provided for in subsection one of this section, or may make an order with respect to such child under section nine hereof, or may discharge the child on parole or release it from detention [...]⁷⁷⁰

The second major amendment was that provinces were provided with discretion for enlarging the jurisdiction of the Juvenile Delinquents' Court by increasing the maximum normative age limit for a young person to be brought to the attention of the court. In other words, provinces could mandate that young people 16- and 17-year-old (inclusive) be considered "children" for the purposes of the *Juvenile Delinquents Act* (1908):

"child" means any 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.⁷⁷¹

It was only in 1942 that Quebec increased the normative age limit of the definition of "child" from under the age of 16 years to under the age of 18 years (17 years included).

In 1929 the Montreal Youth Court recorded 1070 cases of delinquency.⁷⁷² From all these cases there were three decisions transferring a young people to the adult court, and these decisions dealt with three male juvenile delinquents: G.B. (17 years), S.G. (17 years) and S.B. (15 years). As presented in Table 17, G.B. was a 17-year-old-male accused of vagrancy who - according to

⁷⁷⁰ *Ibid*, s 20(3).

⁷⁷¹ *Ibid*, s 2(a).

⁷⁷² Records no. 2468 to 2613 (1928) and no. 1 to 88 (1929) Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 07-06-001A-01; content 2004-03-001\68); Records no. 828 to 1070 (1929) Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec, (code TL483, S45, SS1; located in 20 0 009 07-06-002B-01; content 2004-03-001\72).

the minute-book - did not have a previous record.⁷⁷³ The only reference in this case that shows that the case was transferred to the adult court is a phrase in the complaint presented before the police officer that states that the case was referred to the adult court: “[c]ause référé à la Cour des Session.”⁷⁷⁴ The minute-book from the Peace Officer does not contain further information either.⁷⁷⁵

The second case is that of S.G., a 17-year-old-male accused of theft who does not seem to have had any previous record (Table 17).⁷⁷⁶ The binder for this record seems to indicate that S.G. was too old for being dealt with by the Montreal Youth Court: “Referred to Police Court as the accused was over the age of 16 years.”⁷⁷⁷ The minute-book from the Peace Officer does not contain further information regarding the reasons for the transfer either.⁷⁷⁸

The third and last case is that of S.B., a 15-year-old-male accused of selling liquor. According to the minute-book from the Montreal Youth Court, he did not have any previous criminal record either. The minute-book mentions that the case was referred to the Police Court: “1929 Oct. 21.

⁷⁷³ Case of G.B., 17 years, arrested for vagrancy, Record no. 80 from the Montreal Juvenile Delinquents’ Court, Minute-book from the Montreal Juvenile Delinquents’ Court for the period 24th July to 31st December 1928 – 2nd January to 31st December 1929, Montreal, Archives Nationales du Québec (code TL483, S45, SS7; place 20 0 010 07-01-004B-01; content 2004-03-001\501).

⁷⁷⁴ Records no. 2468 to 2613 (1928) and no. 1 to 88 (1929) Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 07-06-001A-01; content 2004-03-001\68).

⁷⁷⁵ C.A. vs. B.G., Record no. 729 from the Montreal Courthouse, Minute-book from the Peace Officer for the period 1st January 1929 to 6th August 1929, Montreal, Archives Nationales du Québec (code TP12, S2, SS9, SSS7; place 520 0 004 14-04-001B-01; content 2003-06-001\849).

⁷⁷⁶ Case of S.G., 17 years, arrested for theft, Record no. 93 from the Montreal Juvenile Delinquents’ Court, Minute-book from the Montreal Juvenile Delinquents’ Court for the period 24th July to 31st December 1928 – 2nd January to 31st December 1929, Montreal, Archives Nationales du Québec (code TL483, S45, SS7; place 20 0 010 07-01-004B-01; content 2004-03-001\501).

⁷⁷⁷ Case of S.G., 17 years, arrested for theft, Record no. 93 from the Montreal Juvenile Delinquents’ Court, Records no. 89 to 347 (1929) Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 07-06-002A-01; content 2004-03-001\69).

⁷⁷⁸ M.K. W. C.P.R. v. G.S., Record no. 861 from the Montreal Courthouse, Minute-book from the Peace Officer for the period 1st January 1929 to 6th August 1929, Montreal, Archives Nationales du Québec (code TP12, S2, SS9, SSS7; place 520 0 004 14-04-001B-01; content 2003-06-001\849).

Cause referred [to] Police Court”.⁷⁷⁹ Like the previous record, it seems that S.B. was too old for being dealt with by the Montreal Juvenile Delinquents’ Court: “Referred to Police Court being as the accused was over the age of 16 years.”⁷⁸⁰ The minute-book from the Peace Officer does not contain further information either.⁷⁸¹

None of these cases provide much insight regarding the reasons referred to by the Montreal Youth Court for transferring these young people to the adult court. As presented in Table 17, two of these youths were past the maximum age for the Montreal Youth Court to have jurisdiction to intervene and one youth – who was within the age range for the court to intervene – was rejected as being too old. At this point the practice of the Montreal Youth Court regarding the reasons for transferring a young person to the adult court still remains unclear. The main and only factor identified is the age of the young person. In addition to this, the three young people were males.

The only available records regarding these youths at the adult court are the sentencing records, which indicate that the three of them were found guilty of the offences that they were accused of and sentenced to imprisonment.

⁷⁷⁹ Case of S.B., 15 years, arrested for selling liquor, Record no. 954 from the Montreal Juvenile Delinquents’ Court, Minute-book from the Montreal Juvenile Delinquents’ Court for the period 24th July to 31st December 1928 – 2nd January to 31st December 1929, Montreal, Archives Nationales du Québec (code TL483, S45, SS7; place 20 0 010 07-01-004B-01; content 2004-03-001\501).

⁷⁸⁰ Case of G.B., 17 years, arrested for vagrancy, Record no. 80 from the Montreal Juvenile Delinquents’ Court, Records no. 828 to 1070 (1929) Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec, (code TL483, S45, SS1; located in 20 0 009 07-06-002B-01; content 2004-03-001\72).

⁷⁸¹ *L. vs. B.,S.*, Record no. 8681 from the Montreal Courthouse, Minute-book from the Peace Officer for the period 7th August to 31st December 1929, Montreal, Archives Nationales du Québec (code TP12, S2, SS9, SSS7; place 520 0 004 14-04-002B-01; content 2003-06-001\850).

Table 17

**Decisions involving Males Transferred to the Adult Court,
Montreal Youth Court, 1929**

Juvenile Delinquent	G.B.	S.G.	S.B.
Offence	Vagrancy	theft	selling liquor
Age	17	17	15
Sentence in Adult Court	Detention (no duration specified)	Detention (1 month)	Detention (no duration specified)

8.5. Year 1936

In 1936 there were 1680 cases of delinquency brought to the attention of the Montreal Youth Court.⁷⁸² From all these cases, there were six decisions transferring male juvenile delinquents to the adult court; three of these decisions refer to one young offender (Tables 18 and 19).

L.R., a 16-year-old male accused of having committed one count of theft and two counts of break and enter, was transferred to the adult court for each count (Table 18). In addition to this, he had already come to the attention of the court for previously having committed the offences of theft, and break and enter.⁷⁸³ According to the document “Procès Sommaire”, L.R. was a ward

⁷⁸² Records no. 1731 to 1751 (1935) and no. 1 to 198 (1936) Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 008-06-002B-01; content 2004-03-001/114); Records 1573 to 1680 (1936) and no. 1 to 85 (1937) Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 008-07-003B-01; content 2004-03-001/121).

⁷⁸³ Case of L.R., 16 years, arrested for theft, and break and enter, Records no. 408, 409 and 410 from the Montreal Juvenile Delinquents’ Court, Records 396 to 628 (1936) Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 008-07-001A-01; content 2004-03-001/116).

of the Montreal Youth Court and as such had been sent to the Reformatory School for three years, from which he had recently ran away:

L.R. a déjà été jugé jeune délinquant et pupille de la Cour jusqu'à l'âge de vingt-et-un ans. Il était confié au Mont-Saint-Antoine pour trois ans, d'où il a déserté le 4 avril dernier. Depuis le 4 avril dernier, il a commis trois (3) vols avec d'autres garçons. Il est référé, en vertu de l'article neuf (9) de la Loi des jeunes délinquants, à la Cour des Juges des Sessions de la Paix, pour être poursuivi par voie de mise en accusation, conformément aux dispositions du Code Criminel.⁷⁸⁴

As mentioned above, in 1929 the Parliament of Canada provided Juvenile Court Judges with discretion for deciding the measures to take regarding young people younger than 21 years who were wards of the court. Despite scholars having argued that this regulation seriously infringed young people's due process rights (double-jeopardy), it remained in force until the derogation of the *Juvenile Delinquents Act* (1908) in 1984. While the Montreal Youth Court could have sent L.R. to the adult court because of this regulation, it seems that in this case he ordered a traditional transfer due to L.R.'s previous and new offending. This is the first time that some kind of reasoning appears in the record - beyond the young person's age and the fact that he committed an indictable offence. The reference to the young person having been detained in the reformatory school, to him running away from this center and then committing further offending seems to indicate an emerging set of reasons where the young person's behaviour – rather than the seriousness of the offence – constitute the main ground for deciding his transfer. It can be argued that these are the roots of the “professional experts' reasons” mentioned in the Introduction to Section II. At this point the criteria of incorrigibility, having exhausted all the resources, and risking the performance of the programs or organizations seem to underlie the Montreal Youth Court's decision to transfer L.R. to the adult court. Moreover, this decision does

⁷⁸⁴ *Le Roi contre L.R. & al.*, Record no. 408/36 from the Montreal Juvenile Delinquents' Court, Records 396 to 628 (1936) Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 008-07-001A-01; content 2004-03-001/116).

not make any reference to L.R.'s age or the seriousness of the offence, but rather to his previous offending, the fact that he had escaped from the reformatory school and that he had committed new offences while being at large.

Table 18
Decisions involving Males Transferred to the Adult Court,
Montreal Youth Court, 1936

Juvenile Delinquent	L.R.	L.R.	L.R.
Offence	Theft	break and enter	break and enter
Age	16	16	16
Sentence in Adult Court	N/A	N/A	N/A

Unfortunately the minute-book of the Peace Officer for the year 1936 was unavailable; consequently, there is no information with regard to whether L.R. was found guilty of the offences in the adult court and which sentence he received.⁷⁸⁵

In 1936 there were three other decisions transferring young people to the adult court (Table 19). The first case is that of G.B., a 15-year-old male accused of theft who apparently did not have a previous record of offending.⁷⁸⁶ Unfortunately, the only record available regarding his transfer is the transcript of the Procès Sommaire that states that he had been transferred to the adult court:

⁷⁸⁵ By the time this research was conducted, the researchers at the Archives Nationales du Québec a Montréal were in the process of updating the minute-books by incorporating pardon decisions. As the year 1936 had not been processed, access to that document was not allowed.

⁷⁸⁶ Case of R.M., 15 years, arrested for theft, Record no. 559 from the Montreal Juvenile Delinquents' Court, Minute-book from the Montreal Juvenile Delinquents' Court for the period 3rd January to 9th July 1936, No. 1 to 809, Montreal, Archives Nationales du Québec (code TL483, S45, SS7; place 20 0 010 07-02-007B-01; content 2004-03-001\512).

“R.M. référé à la Cour des Juges des Sessions de la Paix.”⁷⁸⁷ The second case is that of C.G., an 18-year-old male accused of theft too. According to the minute-book, he did not have a previous criminal record either.⁷⁸⁸ In this case, it seems that the reason for him to be transferred to the adult court was his age:

C.G. alias A.G. aye [âgé] maintenant de 18 ans sera retourné à la Cour des Sessions de la paix pour être poursuivi par voie de mise en accusation conformément aux dispositions du Code Criminel.⁷⁸⁹

The last case is that of P.B., 16 year-old male, accused of theft.⁷⁹⁰ According to the transcript of the Procès Sommaire, P.B. had previous records of offending, and taking this into consideration along with the new offending, the Montreal Youth Court decided to transfer him to the adult court. What is interesting from this decision is that it is the first time I found that the Montreal Youth Court referred to the “interest of society” for transferring P.B to the adult court. As we recall from Chapter 3, the youth court could transfer to the adult court youths 14 years old or older accused of having committed indictable offences and if “the good of the child and the interest of the community” required this:

La Cour considérant le passé de P.B. les délits au’ [qu’] il a commis et le présent délit qui lui est reproché, et vu l’art. 9 de la Loi des jeunes délinquants, et vue que l’intérêt de la société l’[e]xige, il

⁷⁸⁷ *Le Roi contre R.M.*, Record no. 559 from the Montreal Juvenile Delinquents’ Court, Records 396 to 628 (1936) Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 008-07-001A-01; content 2004-03-001/116).

⁷⁸⁸ Case of C.G., 18 years, arrested for theft, Record no. 903 from the Montreal Juvenile Delinquents’ Court, Minute-book from the Montreal Juvenile Delinquents’ Court for the period 9th July to 29th December 1936, No. 810 to 1680, Montreal, Archives Nationales du Québec (code TL483, S45, SS7; place 20 0 010 07-03-001B-01; content 2004-03-001/513).

⁷⁸⁹ *Le Roi contre H.V.*, Record no. 903 from the Montreal Juvenile Delinquents’ Court, Records 871 to 1112 (1936) Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 008-07-003A-01; content 2004-03-001/118).

⁷⁹⁰ Case of P.B., 16 years, arrested for theft, Record no. 1582 from the Montreal Juvenile Delinquents’ Court, Minute-book from the Montreal Juvenile Delinquents’ Court for the period 9th July to 29th December 1936, No. 810 to 1680, Montreal, Archives Nationales du Québec (code TL483, S45, SS7; place 20 0 010 07-03-001B-01; content 2004-03-001/513).

est ordonné que le dit accusé soit poursuivi par voie de mise en accusation dans les cours ordinaires, conformément aux dispositions du Code Criminel à ce sujet.⁷⁹¹

Unfortunately, the minute-book of the Peace Officer for the year 1936 is not available.

Consequently, there is no information as how these cases were dealt with in the adult court.

Table 19

**Decisions involving Males Transferred to the Adult Court,
Montreal Youth Court, 1936**

Juvenile Delinquent	R.M.	C.G	P.B.
Offence	Theft	theft	Theft
Age	15	18	16
Sentence in Adult Court	N/A	N/A	N/A

8.6. Year 1942

As noted above, the 28th November 1942 proclamation increased the maximum age for a child to be brought to the attention of a Quebec Juvenile Delinquents' Court from 15 years (inclusive) to 17 years (inclusive). Therefore, the jurisdiction of the Montreal Youth Court was enlarged to deal with older youths accused of having committed cases of delinquency.

In 1942 the Montreal Youth Court recorded 2903 cases of delinquency, 17 of which were transferred to the adult court.⁷⁹² Table 20 shows that these 17 decisions represent nine male

⁷⁹¹ *Le Roi contre P.B.*, Record no. 1582 from the Montreal Juvenile Delinquents' Court, Records 1573 to 1680 (1936) and no. 1 to 85 (1937) Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 008-07-003B-01; content 2004-03-001/121) [emphasis added].

juvenile delinquents; in other words, some young offenders were transferred to the adult courts several times (such as R.B., who was transferred four times in 1942).

Despite the large amount of documents available in each record, information such as age of the offender and previous criminal record was unavailable. Moreover, while some records contained the reasons for transferring a young person to the adult court, four of these records only mentioned that the young person had been sent to the adult court.⁷⁹³

With regard to the records that provided reasons for transferring a young person to adult courts, six of them only made reference to the age of the young offender as being older than “16 years”.⁷⁹⁴ The other seven records provided some reasons for transferring the young people to the adult court.

The first decision refers to the offences committed by R.H. and J.L.: these two young people committed their offences together so the transfer decision was the same for each of them. Moreover, as presented in Table 19, these two people received a total of five transfer decisions (together) and these five decisions are identical. As stated in the record, each young person had previously been sent to the reformatory school, where they were always running away.

⁷⁹² Records no. 2734 to 2793 (1941) and no. 1 to 106 (1942), Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 11-05-003A-01; content 2004-03-001/178); Records no. 2785 to 2903 (1942) and no. 2904 to 2948 (1943), Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 008 01-01-002A-01; content 2004-03-001/195).

⁷⁹³ *The King vs. H.S., C.R.*, Records no. 1282 and 1283; *The King vs. K.H.*, Record 1310 and *Le Roi contre R.T., P.T., M.R.*, Record no. 1426, all from the Montreal Juvenile Delinquents’ Court, Records 1256 to 1424 (1942) Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 11-06-002B-01; content 2004-03-001/186).

⁷⁹⁴ *Le Roi contre R.B.*, Records 826, 829, 831 and 832, and *Le Roi contre A.L.*, Records 829 and 832, all from the Montreal Juvenile Delinquents’ Court, Records 769 to 934 (1942) Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 11-06-002A-01; content 2004-03-001/183).

Moreover, they had pleaded guilty to the offences with which they had been charged. So, for the Montreal Youth Court “the good of the child and the interest of the society” – and this is the first time in which the whole test in the *Juvenile Delinquents Act* (1908) was referred to - demanded that these young people be dealt with by adult courts:

Vu l'article 9 de la Loi des jeunes délinquants, et vu l'acte criminel dont il se reconnait coupable et vue ses nombreuses désertions sans cause ni raison de l'école de réforme, Mont S.-Antoine, où il avait été confié par cette Cour, il est ordonné que cet inculpé soit poursuivi par voie de mise en accusation dans les Cours ordinaires conformément aux dispositions du Code criminel à cet sujet, cette Cour étant d'avis que le bien de cet enfant et l'intérêt de la société l'exigent.⁷⁹⁵

The Montreal Youth Court identified a similar pattern of reasons in 1936 and 1942: running away from the reformatory school and committing new offences. Again, these emerging reasons – now fully associated to the test of “the good of the child and the interest of society” in 1942 – indicate that the post-delictual behaviour of the young person rather than the “seriousness” of the offence was the factor that the Montreal Youth Court was taking into consideration for transferring young people to the adult court.

Two more decisions are available for the year 1942. The case of H.S. is similar to the previous cases: a young person who had a previous history of offending and did not adjust well to the rules of the reformatory school. According to the Montreal Youth Court, the good of the child and the interest of the community demanded that this young person be transferred to the adult court:

⁷⁹⁵ *Le Roi contre R.H.*, Records 1384, 1386 and 1387, and *Le Roi contre J.L.*, Records 1386 and 1387, all from the Montreal Juvenile Delinquents' Court, Records 1256 to 1424 (1942) Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 11-06-002B-01; content 2004-03-001/186) [emphasis added].

L'inculpé comparut devant la Cour des jeunes délinquants et reconnaît le bien fondé de la plainte et reconnaît qu'il a comparu plusieurs jours devant la Cour des Jeunes Délinquants pour vols par effraction, qu'il ne peut être gardé dans la maison de Détention de la Cour, à cause de sa conduite.

Vu l'article 9 de la loi des Jeunes délinquants et vu qu'il est âgé de plus de quatorze ans, la Cour ordonne que l'inculpé soit poursuivi par voie de mise en accusation devant la Cour des Sessions de la Paix, à Montréal, conformément aux dispositions du Code Criminel.

La Cour étant d'avoir que le bien de l'enfant et l'intérêt de la Société l'exigent.

[signature]

Référé à la Cour des Sessions de la Paix, Montréal.

[signature]⁷⁹⁶

It seems that in all these situations the Montreal Youth Court was dealing with young people who not only had previous convictions, but as well who had not responded well to the programs available at the reform schools. In addition to this, in this case H.S.'s behaviour while in detention seems to have played a role for transferring him to the adult court. The specific reference to the young person's behaviour seems to point out the notion of incorrigible/corrigible, which we know was first used in 1857 by the political system for dealing with young offenders.⁷⁹⁷

The last decision ordering a transfer of a young person to the adult court is different from the previous decisions because in this case it was the young person - M.C. - who requested being transferred. It is not clear why he asked for that kind of measure, one reason could be that he had already been detained in the reformatory school and did not adjust to its rules:

Le 7 décembre 1942, le Juge J.A. Robillard. Les parents absents. Le plaignant est présent. L'inculpé plaide coupable xxx qu'il s'est enfui du Mt. St. Antoine où il avait été confié le 8 oct. 1942 pour 3 ans et qu'il est xxx de l'y retourner qu'il s'en xxx encore, qu'il préfère la prison à l'École de Reforme. En conséquence la Cour est d'opinion qu'il vaut mieux, en vertu des dispositions de l'art. 9 de la Loi des Jeunes Délinquants ordonner que l'inculpé soit poursuivi par voie de mise en accusation devant la

⁷⁹⁶ *Le Roi contre H.S.*, Record 1423 from the Montreal Juvenile Delinquents' Court, Records 1256 to 1424 (1942) Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 009 11-06-002B-01; content 2004-03-001/186) [emphasis added].

⁷⁹⁷ *Speedy Trial Act* (1857), *supra* note 135.

Cour des Sessions de la Paix, la Cour étant d'avis que le bien de l'enfant et l'intérêt de la société l'exigent.⁷⁹⁸

One month later this young person was brought back to the Montreal Youth Court as it seems that he had difficulties adjusting to the life in adult prison.⁷⁹⁹ Consequently, the Montreal Youth Court left aside this decision and sentenced him to be detained in the reformatory school.⁸⁰⁰ Some days after the Director of Mt. St. Antoine, where M.C. had been detained, wrote to the Montreal Youth Court asking him to place M.C. in a different detention center as he had already ran away with other three boys. Moreover, in this letter the Director refers to M.C. as being incorrigible and requiring stricter supervision than what was available at the Mt. St. Antoine for M.C.'s own well-being:

Monsieur le Juge,

Re : M.C.

Je viens vous exposer ce qui suit concernant M.C.

a) Le 22 janvier 1942, M.C. été confié au Mont-Saint Antoine, pour trois ans. Il s'est évadé.

b) Le 8 octobre 1942, il était de nouveau confié au Mont-Saint Antoine. Il s'est encore évadé.

c) Le 20 janvier 1943, malgré toutes les objections que nous pouvions avoir de l'accepter encore au Mont-Saint Antoine, sur vos supplications, nous avons consenti à le recevoir; or, le même jour, il s'évadait de notre institution, entraînant avec lui trois autres de nos élèves.

D'ailleurs pendant ses séjours chez nous, M.C. s'est avéré un enfant absolument incorrigible, intraitable et incontrôlable, refusant de se soumettre au règlement et à la discipline de l'institution.

Pour nous, nous avouons être incapables de le garder et nous vous demandons, avec instance, qu'il soit transféré dans une autre institution plus stricte et plus sûre et où sa présence sera moins nuisible que chez nous et où il y aura peut-être, pour lui, une chance de revenir dans le droit chemin.

Veuillez agréer, Monsieur le Juge, l'expression de mes meilleurs sentiments et me croire,

Votre tout dévoué,

[signature]

Dir.⁸⁰¹

⁷⁹⁸ *Le Roi contre M.C.*, Record 2815 from the Montreal Juvenile Delinquents' Court, Records 2758 to 2903 (1942) and no. 2904 to 2948 (1943) Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 008 01-01-002A-01; content 2004-03-001/195) [emphasis added].

⁷⁹⁹ *Ibid.*

⁸⁰⁰ *Ibid.*

⁸⁰¹ *Ibid* [emphasis added].

There is no further information about whether M.C. was sent back to the adult court. However, the letter sent to the Montreal Youth Court by the reform school (detention center) points out certain reasons that have been identified in the introduction to this section as “professional experts’ reasons” that will eventually be referred to by the Montreal Youth Court when deciding a transfer: M.C. was incorrigible, he ran away from the detention center (having exhausted the resources), and when running away, he induced other young people to run away with him (risking the performance of the program).

Table 20**Number of Decisions involving Males Transferred to the Adult Court,
Montreal Youth Court, 1942**

Name	Offence	Reasons for Transfer
(1) R.B.	theft	(1) “older than 16”
(1) R.B.	theft	(2) “older than 16”
(1) R.B.	theft	(3) “older than 16”
(1) R.B.	theft	(4) “older than 16”
(2) A.L.	theft	(5) “older than 16”
(2) A.L.	theft	(6) “older than 16”
(3) C.R.	break and enter	(7) n/a
(3) C.R.	break and enter	(8) n/a
(4) R.H.	fake document	(9) indictable offences; escaped from reform school; “good of the child and interest of society”
(4) R.H.	theft	(10) indictable offences; escaped from reform school; “good of the child and interest of society”
(4) R.H.	theft	(11) indictable offences; escaped from reform school; “good of the child and interest of society”
(5) J.L.	theft	(12) indictable offences; escaped from reform school; “good of the child and interest of society”
(5) J.L.	theft	(13) indictable offences; escaped from reform school; “good of the child and interest of society”
(6) K.H.	break and enter	(14) n/a
(7) H.S.	theft	(15) previous offending; young person’s behavior; “good of the child and interest of society”
(8) R.T.	theft	(16) n/a
(9) M.C.	theft	(17) young person requests his transfer; did not want to be detained in the reform school any longer; “good of the child and interest of society”

8.7. Summary

In Montreal, before the establishment of the Juvenile Delinquents' Court, children in need of protection and in conflict with the law were dealt with by adult courts. Once the Montreal Youth Court started to operate in 1911, this court dealt with most of these situations. However, there were times when the court declined its jurisdiction and transferred the young people to the adult court. Even though this measure was not broadly used, it meant that the young person was subject to a harsh penal system in which, if found guilty, could be placed in an adult detention facility. During the period 1911-1921 the reasons for deciding a transfer to adult courts are not clear. It seems that being older than 15 years of age and/or having committed an indictable offence were the main reasons invoked by the courts for so deciding; however, these reasons were not systematically used.

The first time that the test of the “interest of the child and the interest of society” was enunciated for transferring a young person to adult courts was in 1942. During this period the “good of the child” seems to be understood as providing the young people with a stricter regime than that available in the reform schools for preventing their desertion from the place of detention. Similarly, the “interest of the community” was understood as implementing a stricter intervention than that available in the juvenile justice system for preventing the young person from further offending. In other words, it can be argued that the interest of the child was understood as preventing the child from deserting from the place of detention and the interest of society was understood as preventing the young person from reoffending.

CHAPTER 9

The Montreal Youth Court as a Court of Punishment

1948-1960

9.1. Introduction

The period 1948-1960 presents two particularities that distinguish it from the period 1911-1942: first, the normative age limit of the Montreal Youth Court was enlarged to include 16- and 17-year old youths. Second, during this period the Montreal Youth Court sent a great number of cases to the adult court. In fact, during the period 1911-1995 I identified 580 decisions in which the Montreal Youth Court transferred a young person to the adult court. During the period 1948-1960 the Montreal Youth Court transferred 307 cases to the adult court. This represents more than half of the transfer decisions for the entire period I observed (1911-1995).

In this chapter I identify the cases transferred to adult courts in 1948, 1954, and 1960 to assess how the transfer mechanism in the *Juvenile Delinquents Act* (1908) was implemented by the Montreal Youth Court.

9.2. Year 1948

In 1948 the Montreal Youth Court recorded 2209 cases of delinquency, 90 of which were transferred to the adult court.⁸⁰² Because of this large number, I used a sample for examining the reasons provided by the Montreal Youth Court for transferring young people to the adult

⁸⁰² Records no. 1741 to 1897 (1947) and no. 1 to 17 (1948), Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 008 04-05-002A-01; content 2004-03-001/261); Records no. 2177 to 2209 (1948) and no. 1 to 159 (1949), Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 008 04-07-003A-01; content 2004-03-001/274).

court.⁸⁰³ Nevertheless, I recorded the gender, offence and age of all the cases that were transferred to adult courts. As presented in table 21, two female and 88 male juvenile delinquents were dealt with a transfer decision. Theft is the offence for which most young people were transferred to adult courts, followed by the offence of break and enter. These two offences represent more than 70% of all the transfers for the year 1948. No “serious” offence was transferred to the adult court during this period.

Table 21
Offences Transferred to the Adult Court,
Montreal Youth Court, 1948

Offences Referred to Adult Court	Males	Females	Total
Aggravated Assault	1	0	1
Assault	1	0	1
Attempted Break and Enter	6	0	6
Attempted Theft	1	0	1
Break and Enter	32	0	32
Carrying Offensive Weapon	1	0	1
Conspiracy	2	0	2
Damage	2	0	2
Loitering by night	4	0	4
Possession of Stolen Goods	1	0	1
Theft	34	1	35
Theft with Violence	3	0	3
Vagrancy	0	1	1
Total	88	2	90

⁸⁰³ As mentioned above, 90 decisions transferring a young person to adult courts were identified. These cases were arranged chronologically and numbered. I selected a case every 10: 10, 20, 30, 40, 50, 60, 70, 80 and 90. As presented below, these cases saturated the sample. Worth noting, during the year 1948 there were four pardons granted and – as a result - the whole records were destroyed. Consequently, I do not know what decision was made concerning those delinquency cases.

In 1948 most of the young people transferred to adult courts were 17 years of age, followed by the age group of 16 years of age. These two groups represent more than 80% of all the transfers decided for the year 1948 (Table 22).

Table 22
Age of the Offender in the Records Transferred to the Adult Court,
Montreal Youth Court, 1948

Age of the Young Person	Males	Females	Total
14 years	1	0	1
15 years	7	0	7
16 years	24	0	24
17 years	50	0	50
18 years	4	1	5
19 years	0	0	0
20 years	1	0	1
N/A	1	1	2
Total	88	2	90

With regard to the reasons provided by the Montreal Youth Court for transferring young people to the adult court, all the decisions but one (incomplete decision) make reference to the legal requirements stated in the *Juvenile Delinquents Act* (1908) (statutory requirements): 1) the young person being 14 years old or older, 2) the offence being an indictable offence and 3) that the good of the child and the interest of the community demand that the young person be transferred to the adult court. As presented in Table 23, the Montreal Youth Court also referred to other factors as reasons for the transfer decision, these factors mostly giving “content” or “meaning” to the test of the good of the child and the interest of the community (non-statutory factors).

Table 23

**Reasons for Transferring Youths to the Adult Court,
Montreal Youth Court, 1948**

Young Person	Gender	Age	Offence	Non Statutory Reasons (in addition to the statutory reasons)
1) M.F.	M	16	Loitering by Night	* recidivist * deserted reform school * committed new offences while being at large
2) M.F.	M	17	Break and Enter	* recidivist *deserted reform school * committed new offences while being at large * already sent to the adult court
3) M.S.	M	17	Theft	* recidivist
4) G.L.	M	17	Theft	-
5) L.R.	F	18	Vagrancy	* recidivist
6) J.C.	F	n/a	Theft	incomplete decision
7) J.C.	M	17	Theft	* recidivist
8) M.L.	M	15	Theft	* recidivist * deserted reform school * committed new offences while being at large
9) Y.P.	M	17	Theft	* recidivist * already sent to reform school

M.F., a 16-year-old-male arrested for loitering at night, had been brought to the attention of the court many times, every time pleading guilty to the offence. M.F. had been placed in a reformatory school, from where he deserted and committed new offences:

Sachez que l'inculpé a déjà comparu plusieurs fois devant cette court pour divers offenses criminelles auxquelles il a plaidé coupable.

Sachez que le 25 septembre 1945 l'inculpé a été confié pour trois ans au Mont Saint-Antoine d'où il s'est évadé commettant par là un délit.

Et attendu que ce jour; savoir : le 12^{ième} jour de février 1948, le dit enfant a été traduit devant moi pour l'audition de cette accusation;⁸⁰⁴

In the following case M.F. – the same young person mentioned above but now 17 years of age - was brought to the attention of the court again for the offence of break and enter. This time the Montreal Youth Court not only mentioned that M.F. was a recidivist who had deserted from reform school and committed new offences, but as well that he had already been transferred to adult courts in the previous record:

Que l'inculpé a comparu plusieurs fois devant cette cour pour diverses offenses criminelles auxquelles il a plaidé coupable, savoir: vol à l'étalage, vol par effraction dans une automobile, vol par effraction, vol d'automobile, vol par effraction et recel.

Que l'inculpé, le 12 février 1948, a été déféré à la Cour de police pour diverses offenses criminelles, savoir : assaut grave, port d'arme illégal, vol par effraction et recel, flâné la nuit.

Que l'inculpé est déféré ce jour à la Cour de police sur six plantes de vol par effraction et recel et une plainte de vol et recel de bicycle.

Que le 25 septembre 1946 l'inculpé a été confié pour trois ans au Mont Saint-Antoine d'où il s'est évadé, commettant par là plusieurs délits.

Et attendu que ce jour, savoir : le 4 mars 1948, le dit enfant a été traduit devant moi pour l'audition de cette accusation;⁸⁰⁵

The case of M.F. is similar to the case of M.L.: a 15-year-old male sent to reformatory school accused of having committed numerous offences. M.L. deserted the reformatory school and committed further offences:

Be it known that the accused has appeared before this Court on repeated instances, to with fifteen times, for various criminal offences, the majority of which were theft and receiving stolen goods, Whereas the said accused was in October 1944 committed to Mont Saint-Antoine, of which institution the said accused deserted, thereby committing several offences.

And whereas at this day to with on the 9th day of November 1948, the said child has been taken before me for the hearing of this charge;⁸⁰⁶

⁸⁰⁴ Records no. 196 to 361 (1948), Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 008 04-05-001B-01; content 2004-03-001/263) [emphasis added].

⁸⁰⁵ Records no. 196 to 361 (1948), Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 008 04-05-001B-01; content 2004-03-001/263) [emphasis added].

⁸⁰⁶ Records no. 1984 to 2176 (1948), Montreal Juvenile Delinquents' Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 008 04-07-002A-01; content 2004-03-001/273) [emphasis added].

While in the case of G.L. the Juvenile Court Judge did not make specific reference beyond the statutory reasons for transferring him to adult courts,⁸⁰⁷ on the other four cases the Juvenile Court Judge transferred the young people to adult courts because they were “recidivists”:

Sachez que l’inculpé a déjà comparu plusieurs fois devant cette cour pour diverses offenses criminelles savoir le 8 mars 1948 pour vol et recel d’auto dont il a plaidé coupable, et le 27 décembre 1945 pour vol et recel dont il a plaidé coupable;⁸⁰⁸

Vu les antécédents de l’inculpée...⁸⁰⁹

J.C. [...] enfants au sens de la loi des Jeunes Délinquants ont à Montréal, district de Montréal, le ou vers le 28 octobre 1948, illégalement volé une automobile [...] De plus, qu’en la cité de Montréal, district de Montréal, le 6 octobre 1948 J.C. [...] ont illégalement volé une automobile...⁸¹⁰

Sachez que l’inculpé a déjà comparu plusieurs fois devant cette cour pour diverses offenses criminelles auxquelles il a plaidé coupable...⁸¹¹

Most of the young people transferred to adult courts in 1948 were deemed to be “recidivists”. This may have been understood as evidence that the young people were either “incorrigible” or that the “resources within the youth justice system” had been exhausted. Moreover, while most juvenile delinquents in the sample were 17 and 18 years old at the moment of being transferred, the two cases in which the juvenile delinquents transferred to the adult court were 15 and 16 years of age were cases in which the young people had deserted the reform school and committed further offences while being at large. Having these young people not adjusted to the

⁸⁰⁷ Records no. 699 to 870 (1948), Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 008 04-06-001A-01; content 2004-03-001/266) [emphasis added].

⁸⁰⁸ Case of M.S., 17 years, accused of theft, Records no. 362 to 530 (1948), Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 008 04-05-002B-01; content 2004-03-001/264) [emphasis added].

⁸⁰⁹ Case of L.R., 18 years, accused of vagrancy, Records no. 1241 to 1447 (1948), Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 008 04-06-001B-01; content 2004-03-001/269) [emphasis added].

⁸¹⁰ Case of J.C., 17 years, accused of theft, Records no. 1819 to 1983 (1948), Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 008 04-07-001A-01; content 2004-03-001/272) [emphasis added].

⁸¹¹ Case of Y.P., 17 years, accused of theft, Records no. 2177 to 2209 (1948) and no. 1 to 159 (1949), Montreal Juvenile Delinquents’ Court, Montreal, Archives Nationales du Québec (code TL483, S45, SS1; located in 20 0 008 04-07-003A-01; content 2004-03-001/274).

life within the reform school, the Montreal Youth Court may have seen their transfer as the only available alternative back then. These transcripts permit two remarks: first, the young person's behaviour in itself was taken as a factor for the Montreal Youth Court to transfer the young person; second, the seriousness of the offence was not identified as a factor for transferring the young person to the adult court.

9.3. Year 1954

In 1954 the Montreal Youth Court recorded 2015 cases of delinquency, 67 of which were transferred to the adult court.⁸¹² As noted in Chapter 1, the cases of protection and delinquency were registered in different minute-books for the years 1954 and 1960. Therefore, these 2015 cases only dealt with “offending behaviour” - the cases of abuse and neglect were recorded in a different minute-book. Because of the large number of cases transferred to the adult court I used a sample for examining the reasons provided by the court for transferring young people to the adult court.⁸¹³ Nevertheless, I recorded the gender, offence and age of all the cases that were transferred to the adult court. In 1954 there were two cases of female delinquency and 65 cases of male delinquency that were transferred to the adult court (Table 24). Theft (n = 27), and break and enter (n = 24) are the offences for which most young people were transferred to the adult court in 1954; no serious offences was transferred.

⁸¹² Records no. 1 to 200 (1954), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 008 06-01-001B-01; content 2004-03-001/347); Records no. 1801 to 2015 (1954), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 008 06-02-003B-01; content 2004-03-001/355).

⁸¹³ As mentioned above, 67 transfer decisions cases were identified. These cases were arranged chronologically and numbered. I selected a case every 10: 10, 20, 30, 40, 50 and 60. As presented below, these cases saturated the sample. Worth noting, during the year 1954 there were eight pardons granted and – as a result - the whole records were destroyed. Consequently, I do not know what decision was made concerning those delinquency cases.

Table 24

**Offences Transferred to the Adult Court,
Montreal Youth Court, 1954**

Offences Referred to Adult Court	Males	Females	Total
Aggravated Assault	1	0	1
Assault	1	0	1
Attempted Break and Enter	4	0	4
Attempted Theft	4	0	4
Break and Enter	24	0	24
Disturbing the Peace	0	1	1
Indecency	1	0	1
Possession of Stolen Goods	1	0	1
Theft	26	1	27
Theft with Offensive Weapon	2	0	2
Theft with Violence	1	0	1
Total	65	2	67

Similar to 1948, most of the young people transferred to the adult court in 1954 were 17 years of age (n = 23), followed by the age group of 16 years of age (n = 19). On the other hand, the minute-books did not provide further information as to the age of 15 males (Table 25).

Table 25

**Age of the Offender in the Records Transferred to the Adult Court,
Montreal Youth Court, 1954**

Age of the Young Person	Males	Females	Total
14 years	1		1
15 years	6	2	8
16 years	19		19
17 years	23		23
18 years	1		1
N/A	15		15
Total	65	2	67

Similar to 1948, all the decisions of the Montreal Youth Court transferring a young person to the adult court made reference to the statutory requirements of the *Juvenile Delinquents Act* (1908): 1) the young person being 14 years old or older, 2) the offence being an indictable offence, and 3) the good of the child and the interest of the community demanding that the young person be transferred to adult court. These statutory requirements were part of a pre-printed standard form named “Ordonnance en vertu de l’article 9 de la Loi des jeunes délinquants” where the Montreal Youth Court completed the date of the offence and the decision, the name of the person bringing the complaint, the name of the alleged defendant, and the circumstances of the offence. The Montreal Youth Court also added to non-statutory factors for transferring a young person to the adult court to the form; these factors mostly giving content to the test of the good of the child and the interest of the community (Table 26).

Table 26

**Reasons for Transferring Youths to the Adult Court,
Montreal Youth Court, 1954**

Young Person	Gender	Age	Offence	Non Statutory Reasons (in addition to the statutory reasons)
1) P.O.	M	16	Theft	* multiple rehabilitation attempts * already sent to adult courts
2) P.C.	M	16	Theft	* recidivist
3) M.A.	M	16	Break and Enter	-
4) T.D.	M	16	Theft	-
5) B.H.	M	16	Theft	-
6) F.L.	M.	17	Assault	* the youth assaulted two guardians from the detention center where he had been placed

In the case of P.O., a 16 year-old male accused of theft, the Montreal Youth Court mentioned that the court had attempted to rehabilitate P.O. many times. In addition, P.O. had been already transferred to the adult court for another offence:

Vu les multiples tentatives faites par la Cour pour la réhabilitation de l'enfant [...]
Attendu que l'enfant a déjà été déferé devant la cour ordinaire voir...⁸¹⁴

In the case of P.C., 16 year-old male also accused of theft, the pre-printed form that ordered his transfer to the adult court listed all the offences committed by the young person, which amounted

⁸¹⁴ Case of P.O., 16 years, accused of theft, Records no. 1 to 200 (1954), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 008 06-01-001B-01; content 2004-03-001/347).

to 12 non-serious indictable offences.⁸¹⁵ Similarly, in the case of F.L. – a 17 year-old male accused of assault - the pre-printed form made explicit reference to the fact that he had assaulted two guards of the detention center where he had been placed:

8 juin 1954, ledit accuse s'est illégalement porté à des voies de fait simples sur la personne de M.G.D., gardien à la Maison de Détention de la Cour de Bien-être Social, en le frappant avec son poing.

De plus, le 9 juin 1954, ledit accusé s'est illégalement porté à des voies de fait sur la personne de M.E.L., gardien à la Maison de Détention de la Cour de Bien-être Social, lui causant des lésions corporelles à la figure et à la jambe.⁸¹⁶

With regard to M.A., T.D. and B.H., the Montreal Social Welfare Court only referred to the statutory requirements for transferring the young person to the adult courts: age of the defendant, indictable offence, and interest of the child and the community.⁸¹⁷

All these records reaffirm my observations for the year 1948: the Montreal Youth Court did not transfer to the adult court cases dealing with serious offences and most of the decisions in which a young person was transferred made explicit reference to the young person's own behavior after the first intervention of the Montreal Youth Court. In fact, the professional experts' reasons can also be clearly identified: F.L., by attacking two guardians of the detention center, "risked the performance of the organization"; P.O. and P.C., by continue running away from detention and

⁸¹⁵ Case of P.C., 16 years, accused of theft, Records no. 201 to 400 (1954), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 008 06-01-002B-01; content 2004-03-001/348).

⁸¹⁶ Case of F.L., 17 years, accused of assault, Records no. 841 to 1050 (1954), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 008 06-02-002A-01; content 2004-03-001/351).

⁸¹⁷ Case of M.A., 16 years, accused of break and enter, Records no. 201 to 400 (1954), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 008 06-01-002B-01; content 2004-03-001/348); case of T.D., 16 years, accused of theft, Records no. 401 to 630 (1954), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 008 06-01-003B-01; content 2004-03-001/349); case of B.H., 16 years, accused of theft, Records no. 631 to 840 (1954), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 008 06-02-001A-01; content 2004-03-001/350); respectively.

committing offences, presented themselves as “incorrigibles” and as “having exhausted all the resources within the youth justice system”.

9.4. Year 1960

In 1960 the Montreal Youth Court recorded 5785 cases of delinquency, 150 of which were transferred to the adult court.⁸¹⁸ Because of this, I used a sample for examining the reasons provided by court for transferring young people to adult court.⁸¹⁹ Despite this, I still recorded the gender, offence and age of all the cases that were transferred to the adult court. In 1960 there were 150 cases of male juvenile delinquents transferred to the adult court - no case of female juvenile delinquent was transferred (Table 27). Theft was the offence for which most people were transferred to the adult court (n = 87); break and enter was the second offence for which most people were transferred to adult courts (n = 32). In 1960 one case of murder was transferred to the adult court.

⁸¹⁸ Records no. 1 to 210 (1960), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 01-01-001A-01; content 2004-06-001/106); Records no. 5561 to 5785 (1960), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 01-05-001A-01; content 2004-06-001/130).

⁸¹⁹ As mentioned above, 150 transfer decisions cases were identified. These cases were arranged chronologically and numbered. I selected a case every 10: 10, 20, 30, 40, 50, 60, 70, 80, 90, 100, 110, 120, 130, 140 and 150. These cases saturated the sample. During the year 1960 there were two pardons granted and – as a result - the whole records were destroyed. Consequently, I do not know what decision was made concerning those delinquency cases.

Table 27**Offences Transferred to the Adult Court,
Montreal Youth Court, 1960**

Offences Referred to Adult Court	Males	Females	Total
Murder	1	0	1
Assault	2	0	2
Attempted Break and Enter	7	0	7
Attempted Theft	6	0	6
Attempted Theft with Offensive Weapon	1	0	1
Break and Enter	32	0	32
Damage	4	0	4
Desertion	5	0	5
Disturbing the Peace	2	0	2
Loitering by Night	1	0	1
Theft	87	0	87
Theft with Offensive Weapon	2	0	2
Total	150	0	150

Similar to 1948 and 1954, most of the cases transferred to the adult court dealt with young people 17 years of age ($n = 64$), followed by the age group of 16 years of age ($n = 34$). Surprisingly, there was one case where the young person was 12 years old. As discussed in Chapter 3, the “age of transfer” was interpreted in the *Juvenile Delinquents Act* (1908) as the age at the time in which the court decided to transfer the young person to the adult court - and not the age at the time the offence was committed. This young person may have been transferred to the adult court once he reached 14 years of age. Unfortunately, the minute-books did not provide further information as to the age of 20 males (Table 28).

Table 28

**Age of the Offender in the Records Transferred to the Adult Court,
Montreal Youth Court, 1960**

Age of the Young Person	Males	Females	Total
12 years	1	0	1
14 years	9	0	9
15 years	19	0	19
16 years	34	0	34
17 years	64	0	64
18 years	3	0	3
N/A	20	0	20
Total	150	0	150

As noted above regarding the years 1948 and 1954, every decision that ordered the transfer of young people to the adult court used a pre-printed standard form in which the statutory requirements of the *Juvenile Delinquents Act* (1908) were enumerated. In 1960 the Montreal Youth Court also referred to other factors justifying the transfer of young people to the adult court, these factors mostly giving content to the test of the good of the child and the interest of the community (Table 29).

Table 29**Reasons for Transferring Youths to the Adult Court,
Montreal Youth Court, 1960**

Young Person	Gender	Age	Offence	Non Statutory Reasons (in addition to the statutory reasons)
1) H.M.	M	N/A	Theft	-
2) M.L.	M	18	Break and Enter	-
3) J.B.	M	16	Theft	-
4) J.M.	M	14	Desertion	-
5) Y.B.	M	14	Break and Enter	* recidivist
6) G.H.	M	16	Theft	* rehabilitative measures “exhausted”
7) J.L.	M	17	Theft	-
8) A.M.	M	17	Break and Enter	-
9) P.R.	M	17	Theft	-
10) G.L.	M	17	Attempted Theft	* recidivist
11) G.L.	M	17	Theft	-
12) J.P.	M	18	Theft	* recidivist
13) P.C.	M	17	Break and Enter	* rehabilitative measures “exhausted”
14) Y.G.	M	15	Theft	* recidivist
15) A.S.	M	18	Theft	* recidivist

The Montreal Youth Court identified two non-statutory reasons – in addition to the statutory requirements – for transferring young people to the adult court: 1) the young person having exhausted the rehabilitative measures available in the youth justice system and 2) the young person being a recidivist.

The Montreal Youth Court found that there was no further treatment available at the juvenile justice system for P.C. and because of this he had to be transferred:

Vu que la Cour a épuisé les moyens à sa disposition en vue de réhabiliter l'enfant, la Cour ordonne que l'enfant soit poursuivi par voie de mise en accusation dans les cours ordinaires, conformément aux dispositions de l'art. 9 de la loi des jeunes délinquants.⁸²⁰

The Montreal Youth Court decided similarly in the case of G.H.⁸²¹ It is not clear from the records whether this meant that the young people could not be rehabilitated (incorrigible) and consequently they were transferred to adult courts to be dealt with a punitive system, or that the Montreal Youth Court had the belief that the adult court had resources for dealing with these youths.

With regard to the second non-statutory factor for transferring a young person to adult courts – recidivism - the case of Y.B. specifically states that due to the number of delinquencies he had committed, he had to be dealt with by the adult court:

Vu les autres dossiers contre l'enfant, il est déféré à la Cour des Sessions de la paix dans la présente cause.⁸²²

The number of juvenile delinquencies committed was also used as a reason for transferring G.L., J.P., Y.G and A.S. to the adult court. Even though these cases do not refer to the amount of offences committed for ordering the transfer, the documents attached to the decision ordering the

⁸²⁰ Case of P.C., 17 years, accused of break and enter, Records no. 1101 to 1330 (1960), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 01-01-003B-01; content 2004-06-001/111).

⁸²¹ Case of G.H., 16 years, accused of theft, Records no. 891 to 1100 (1960), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 01-01-002B-01; content 2004-06-001/110).

⁸²² Case of Y.B., 14 years, accused of break and enter, Records no. 651 to 890 (1960), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 01-01-001B-01; content 2004-06-001/109).

transfer of the juvenile delinquents to adult courts list the number and kinds of offences committed.⁸²³

All these records confirm the assumptions presented above: that the Montreal Youth Court was reluctant to keep youths within its jurisdiction who were deemed to have exhausted the rehabilitative measures available at the youth court system. The non-statutory factors provided for these transfers were that these young people had either exhausted the rehabilitative measures available at the youth justice system or that they had committed too many offences. At the same time, according to Bélanger's testimony at the House of Commons Permanent Committee on Justice and Legal Affairs in 1982, it seems that the severity of the offence may have also had an impact on the decision as to whether to transfer a young person to adult courts. He states that "between 1965 and 1970, and even before 1965, each time a young person of less than 18 years committed murder, he was automatically transferred to an adult tribunal."⁸²⁴ While in 1960, according to my records, the Montreal Youth Court transferred a count of murder to the adult court, my own observation of the cases transferred to the adult court for the period 1911-1966 is that serious offences were rarely transferred. Furthermore, during the period 1911-1960 I only found two counts of murder that were transferred to the adult court (Table 5).

⁸²³ Case of G.L., 17 years, accused of attempted theft, Records no. 1331 to 1570 (1960), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 01-02-001A-01; content 2004-06-001/112) (20 offences listed); Case of J.P., 18 years, accused of theft, Records no. 1571 to 1780 (1960), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 01-02-002A-01; content 2004-06-001/113) (seven offences listed); Case of Y.G., 15 years, accused of theft, Records no. 1781 to 2010 (1960), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 01-02-003A-01; content 2004-06-001/114) (eight offences listed); Case of A.S., 18 years, accused of theft, Records no. 1781 to 2010 (1960), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 01-02-003A-01; content 2004-06-001/114) (seven offences listed).

⁸²⁴ *House of Commons Debates, Standing Committee on Justice and Legal Affairs*, 32nd Sess 1st Parl (16 February 1982) at 62:9 (Mr Marc Bélanger's witness testimony, Senior Advisor, Comité de la protection de la jeunesse, Québec).

9.5. Summary

During the period 1948-1960 the Montreal Youth Court started to provide both statutory and non-statutory reasons for transferring a young person to the adult court. While the statutory reasons referred to the requirements in the *Juvenile Delinquents Act* (1908), the non-statutory reasons were mostly related to whether the young person “had exhausted the resources within the youth court” and whether he was perceived by the court as being “incorrigible.” In fact, throughout this period the fact that the young person was a recidivists, that he had deserted from a place of detention, committed offences while being at large or had already been transferred to adult courts in different proceedings was used as reasons for arguing that the interests of the child and society required their offences being dealt with by adult courts.

CHAPTER 10

The Montreal Youth Court as a Court of Rehabilitation

1966-1995

10.1. Introduction

The Montreal Youth Court considerably reduced the amount of cases transferred to the adult court during the period 1966-1995 compared to the previous period (1948-1960). In addition to this, during the period 1966-1995 I did not find any decisions transferring a female young person to the adult court; in fact, it seems that the transfer to the adult court became a male “phenomenon”. We will observe that during this period the Montreal Youth Court placed a strong emphasis on rehabilitation for deciding whether to transfer a young person to the adult court. In fact, as long as the young person’s rehabilitation prognosis was favorable, the Montreal Youth Court kept young people within the youth justice system most of the time.⁸²⁵ This is no surprise: the prevailing Canadian judicial movement back then was strongly focused on rehabilitating juvenile delinquents rather than punishing them.⁸²⁶

There was a similar rehabilitation movement in the Quebec Legislative Assembly. According to the Quebec *Youth Protection Act* (1977), a director of youth protection in a social service centre had to be seized of an offence committed by a person under 18 years of age before the institution

⁸²⁵ As showed in the previous chapter, if the young person had already been in contact with the adult justice system, a favorable prognosis was not as relevant a factor for preventing the Judge from transferring the young person to adult courts. See the case of D.D., 16 years, accused armed robbery, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁸²⁶ *AG (Ont) and Viking Houses v Peel*, [1979] 2 SCR 1134 at 1138.

of any judicial proceeding.⁸²⁷ The director had authority for deciding how to proceed with the case, including whether to commit the young person to the care of the director for the application of voluntary measures, to seize the Court of the case or to close the record.⁸²⁸ In practice, this meant a provincial legislative dejudicialization of any criminal offence committed by young people within Quebec. This official dejudicialization was eventually stricken out by the Supreme Court of Canada on the grounds that section 455 of the *Criminal Code* and the *Juvenile Delinquents Act* (1908) - which regulated the judicial procedure to follow for commencing a complaint for an indictable offence - were paramount legislation in the case of a young person having been charged with an indictable offence.⁸²⁹ In fact, The Supreme Court of Canada had already upheld the validity of the *Juvenile Delinquents Act* (1908) as *intra vires* criminal legislation regarding its alleged interference with provincial child welfare legislation.⁸³⁰

In this chapter I identify the cases transferred to adult courts in 1966, 1972, 1978, 1984, 1992 and 1995 to assess how the transfer mechanism in the *Juvenile Delinquents Act* (1908) and in the *Young Offenders Act* (1982) was implemented by the Montreal Youth Court.

⁸²⁷ *Loi sur la protection de la jeunesse*, *supra* note 62, s 40. For an analysis of the purpose of the Quebec statute, see Jean Trépanier, “La justice des mineurs au Québec: 25 ans de transformations (1960-1985)” (1986) 19:1 *Criminologie* 189. See also Jean Trépanier, “The Quebec Youth Protection Act: Institutionalized Diversion” in Raymond R Corrado, Marc LeBlanc & Jean Trépanier, eds, *Current Issues in Juvenile Justice* (Toronto: Butterworths, 1983) 191. For an evaluation of the implementation of the *Youth Protection Act* for the period 1979-1981 in the city of Montreal by the Youth Protection Director, see Marc Le Blanc & Hélène Beaumont, “The Effectiveness of Juvenile Justice in Quebec: A Natural Experiment in Implementing Formal Diversion and a Justice Model” in Raymond R Corrado et al, eds, *Juvenile Justice in Canada. A Theoretical and Analytical Assessment* (Toronto: Butterworths, 1992) 283.

⁸²⁸ *Loi sur la protection de la jeunesse*, *supra* note 62, s 61.

⁸²⁹ *AG (Quebec) v Lechasseur*, [1981] 2 SCR 253.

⁸³⁰ *Smith*, *supra* note 232.

10.2. Year 1966

The Montreal Youth Court recorded 10,826 cases of delinquency in 1966.⁸³¹ From this, 68 cases were destroyed and nine cases were transferred to the adult court. Theft (n = 4), and break and enter (n = 3) were the offences for which most people were transferred to the adult court (Table 30).

Table 30

**Offences Transferred to the Adult Court,
Montreal Youth Court, 1966**

Offences Referred to the Adult Court	Males
Break and Enter	3
False Assumptions	1
Receiving Stolen Goods	1
Theft	3
Theft with Offensive Weapon	1
Total	9

Most of the cases transferred to the adult court in 1966 dealt with male young offenders 17 years of age (n = 6) or 18 years of age (n = 1). The minute-books did not provide further information regarding two male juvenile delinquents (Table 31

⁸³¹ Records no. 1 to 101 (1966), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 10-04-001A-01; content 2004-06-001/334); Records no. 10626 to 10826 (1966), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 11-06-001A-01; content 2004-06-001/388).

Table 31

**Age of the Offender in the Records Transferred to the Adult Court,
Montreal Youth Court, 1966**

Age of the Young Person	Males
17 years	6
18 years	1
N/A	2
Total	9

Similar to the previous period, every decision ordering the transfer of young people to adult court used a pre-printed standard form that enumerated the statutory requirements of the *Juvenile Delinquents Act* (1908). The Montreal Youth Court also referred to non-statutory factors when transferring a young person to the adult court (Table 32).

Table 32**Reasons for Transferring Youths to the Adult Court,
Montreal Youth Court, 1966**

Young Person	Age	Offence	Non Statutory Reasons (in addition to the statutory reasons)
1) G.G.	17	Theft with Offensive Weapon	* recently became 18 years old * insufficient restitution * deserted * assisted two juvenile delinquents in escaping from reform school
2) R.R.C.	17	Obtained Goods under False Pretences	
3) W.L.	17	Theft	* recidivist
4) W.L.	17	Theft	* recidivist
5) W.L.	17	Theft	* recidivist
6) W.L.	17	Break and Enter	* recidivist
7) P.L.	18	Receiving Stolen Goods	* court lacks jurisdiction due to age
8) L.S.	N/A	Break and Enter	
9) L.S.	N/A	Break and Enter	

The nine decisions transferring young people to the adult court dealt with five juvenile delinquents: G.G., R.R.C., W.L., P.L. and L.S; the Montreal Youth Court only offered non-statutory reasons in the decisions involving G.G., W.L. and P.L.

With regard to G.G., his record has extensive hand-written notes; unfortunately, most of the writing is illegible. Nevertheless, from some legible extracts it seems that the Montreal Social Welfare Court decided to keep him within the Court's jurisdiction as long as G.G. did not commit further offences, was well-behaved and restituted the stolen money. From a typed

judgment, G.G. not only did not observe the above-mentioned conditions, but as well had recently become 18 years of age. This seems to have influenced the Montreal Youth Court to transfer him to the adult court:

Le juge fait application de l'art. 9 de la Loi des Jeunes Délinquants, cette mesure étant prise, parce que le juge est d'avis que le bien du sujet (il a atteint 18 ans le 15 mai dernier) et l'intérêt de la société l'exigent et plus particulièrement parce que ayant comparu devant nous 7 janvier 1966 sur une accusation de vol à main armée, nous avons ajourné la comparution, sur la foi d'engagements pris par le sujet avec l'assentiment de ses père et mère et de son avocat (voir cette pièce du 2 février 1966); à ces raisons la Cour délibérait entre temps de l'opportunité de le déférer ou non, selon sa conduite. La victime du vol à main armée informa le tribunal que le sujet ne remboursa que \$40. (le vol était de \$1020).

De plus le sujet avait disparu, on ne savait où le trouver, le travailleur social et le greffe e notre Cour ne pouvaient l'atteindre.

De plus, le sujet participa à libérer deux détenus du Centre Saint-Vallier (dont l'un garçon, sujet du juge), affaire dont la Cour des Sessions est saisie.⁸³²

The second decision is in the matter of W.L.⁸³³ Even though the decision of the Montreal Youth Court does not explicitly mention the amount of offences the young person had committed when it ordered his transfer, the documents attached to the decision list the kinds of offences committed and date (seven offences). It seems that in this case the Montreal Youth Court was dealing with a recidivist.

Finally, with regard to the case of P.L., the court held that it did not have jurisdiction to continue intervening in the case as he had recently turned 18 years old:

⁸³² Case of G.G., 17 years, accused of theft with offensive weapon, Records no. 102 to 285 (1966), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 10-04-002A-01; content 2004-06-001/335) [emphasis added].

⁸³³ Case of W.L., 17 years, accused of break and enter, Records no. 651 to 876 (1966), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 10-04-002B-01; content 2004-06-001/338).

8 mars 1966. Présent juge St. J. Morisset Pour plus de détails voir dossier no. 1594/66. Vu que le jeune homme a donné un faux nom en P.L et que son vrai nom est G.F. et qu'il est né le 25 septembre 1944. En conséquence il a plus de 18 ans et le Tribunal décline sa juridiction.⁸³⁴

The non-statutory factors identified for the year 1966 are similar to the factors identified for previous years: the Montreal Youth Court did not keep within its jurisdiction recidivist youths or youths who escaped from lawful detention. It can be argued that this kind of behaviour was interpreted by the court as showing that the young person was incorrigible and that the resources within the youth court had failed to “rehabilitate” the young person.

10.3. Year 1972

In 1972 the Montreal Youth Court recorded 10129 cases of delinquency and 26 cases were transferred to adult courts.⁸³⁵ Worth noting, 279 cases were destroyed because a pardon was granted. Most of the decisions transferred to the adult court dealt with either theft (n = 8), robbery (n = 6), or break and enter (n = 5) (Table 33). Among the decisions sent to the adult court there were two counts of rape (serious offences).

⁸³⁴ Case of P.L., 18 years, accused of receiving stolen goods, Records no. 651 to 876 (1966), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; located in 20 0 007 10-04-002B-01; content 2004-06-001/338).

⁸³⁵ Records no. 1 to 190 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/778); Records no. 10008 to 10129 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/835).

Table 33

Offences Transferred to the Adult Court,

Montreal Youth Court, 1972

Offences Referred to Adult Court	Males	Total
Rape	2	2
Break and Enter	5	5
Hit-and-Run	1	1
Not Available	1	1
Possession of Offensive Weapon	2	2
Robbery	6	6
Theft	8	8
Theft with Offensive Weapon	1	1
Total	26	26

In 1972 the mechanism of transfer was used to deal with older offences: most of the cases transferred to the adult court involved 17-year-old males (n = 19) (Table 34).

Table 34

Age of the Offender in the Records Transferred to the Adult Court,

Montreal Youth Court, 1972

Age of the Young Person	Males	Total
16 years	2	2
17 years	19	19
18 years	5	5
Total	26	26

The 26 decisions ordering that the young people be dealt with in the adult court represent 12 young males. Even though the Montreal Youth Court was still using the pre-printed form for ordering the transfer of young people to the adult court, the court started to present their non-statutory reasons more detailed than in previous years. This is no surprise: the 1970 report of the Commission d'enquête sur l'administration de la justice en matière criminelle et pénale au Québec noted that Quebec Social Welfare Courts seemed to be most of the time ready to transfer young people to the adult court even though this was an exceptional measure:

Les Cours du Bien-Être social du Québec semblent souvent prêtes à remettre les jeunes délinquants entre les mains de tribunaux ordinaires. Une telle administration de la justice nous semble une interprétation excessivement craintive et même abusive de l'article 9 de la Loi concernant les jeunes délinquants. [...] L'article 9 de la Loi concernant les jeunes délinquants autorise assurément le tribunal à référer un jeune délinquant de plus de quatorze ans à un tribunal ordinaire lorsqu'il s'agit d'une offense criminelle. Pourtant, l'esprit de la loi est net : la procédure ne peut être utilisée qu'exceptionnellement et seulement si la Cour considère qu'il y va de l'intérêt de l'enfant et de la société.⁸³⁶

In fact, this Committee referred to such a practice as having been “abused” by the courts and needing to be “strictly limited”:

Recommandation no. 3:

19. La Commission considère qu'un certain nombre de Cours du Bien-Être social du Québec utilisent de façon abusive les dispositions de la loi qui permettent de confier les jeunes prévenus à un tribunal ordinaire.

20. Non seulement certains juges interprètent de façon restrictive l'article 9(1) de la Loi sur les jeunes délinquants qui permet certains dessaisissements, mais la loi elle-même dispense les juges de motiver leur décision de faire appel à un tribunal ordinaire.

[...]

Recommandation no. 4:

22. Que le juge en chef de la Cour du Bien-Être social use pleinement de ses pouvoirs et de sa juridiction afin que toutes les Cours du Bien-Être social exercent leur entière juridiction sur les jeunes contrevenants et n'invoquent que très rarement les permissions de dessaisissement accordées par l'article 9(1).⁸³⁷

⁸³⁶ Commission d'enquête sur l'administration de la justice en matière criminelle et pénale au Québec, *La société face au crime*, vol 4 :1 (Québec: Éditeur officiel du Québec, 1970) at 48-49 [emphasis added].

⁸³⁷ *Ibid* at 107-108 [emphasis added].

The Committee recommended that the Quebec Social Welfare Courts provide reasons for transferring young people to adult courts and, whenever possible, these reasons should be provided in writing and be as objective as possible:

Par ailleurs, si la Cour du Bien-Être social du Québec devraient exercer pleinement leur juridiction sur tous les jeunes de moins de dix-huit ans. (Nous souhaiterions même prolonger cette juridiction). Par ailleurs, si la Cour du Bien-Être social estime indispensable de remettre un jeune à une Cour ordinaire, elle devra révéler sa motivation et, autant que possible, l'écrire. [...] Pour éviter l'arbitraire, il faudrait des critères plus objectifs.⁸³⁸

Furthermore, according to the Committee, the seriousness of the offence by itself was not a sufficient reason for deciding to transfer a young person to the adult court:

Avant de rendre une telle décision [transferring the young person to the adult court], le tribunal pour mineurs devrait, en raison d'une obligation formelle, étudier les antécédents de l'inculpé. Le tribunal devrait également motiver sa décision par écrit. Enfin, cette motivation devrait se conformer aux objectifs que vise le tribunal pour enfants. Cette dernière précaution mérite des explications. Nous voulons surtout faire disparaître la confiance quasi absolue que l'on accorde à la *gravité de l'infraction* au moment de consentir au désistement. Il est regrettable (et il est malheureusement courant) que les désistements surviennent surtout lorsque les magistrats estiment se trouver en face d'un crime grave.⁸³⁹

For the scope of clarity, the reasons presented in the decisions ordering the transfer of a young person to the adult court during the year 1972 were organized in five major groups: (1) number of previous offences committed (recidivists), (2) the court having exhausted the rehabilitation measures (multiple rehabilitation attempts, rehabilitation measures “exhausted”, desertion, already sent to adult courts), (3) adulthood (age, behaved “as an adult”), (4) seriousness of the offence, and (5) the young person requesting the transfer (Table 35). These non-statutory reasons were provided in all decisions but one (case of A.L.).

⁸³⁸ *Ibid* at 49-50 [emphasis added].

⁸³⁹ *Ibid* at 115-116 [emphasis added]. See recommendation no. 21 at 115-116.

Table 35

Reasons for Transferring Youths to the Adult Court,

Montreal Youth Court, 1972

Young Person	Age	Offence	Non-Statutory Reasons (in addition to the statutory reasons)
1) N.L.	17	Possession of Offensive Weapon Theft (five counts) Hit and Run	* recidivist * multiple rehabilitation attempts * rehabilitation measures “exhausted” * desertion * age
2) P.G.	17	Theft (two counts)	* recidivist * rehabilitation measures “exhausted”
3) I.D.	18	Rape	* seriousness of the offence * recidivist
4) D.L.	18	Theft (two counts)	* already sent to adult courts * rehabilitation measures “exhausted” * age
5) T.M.	17	Theft with Offensive Weapon Theft (two counts)	* recidivist
6) S.B.	17	Theft (two counts) Possession of Offensive Weapon	* recidivist
7) M.W.	17	Rape	* recidivist
8) D.M.	16	Theft	* desertion * recidivist * rehabilitation measures “exhausted”
9) G.C.	17	Theft	* behaved “as an adult” * recidivist * desertion * seriousness of the offence
10) A.L.	16	N/A	
11) C.L.	17	Theft (two counts)	* desertion * request by the juvenile delinquent * seriousness of the offences * recidivist
12) B.B.	18	Theft (two counts)	* recidivist * seriousness of the offences * age * rehabilitation measures “exhausted”

The Montreal Youth Court identified the number of previous offences committed as a reason for transferring young people to the adult court:

La Couronne produit une série d'antécédents indiquant que l'enfant est un délinquant structuré et indiquant également que depuis l'année 1962 régulièrement chaque année, il a commis une série de vols, tantôt ordinaires tantôt avec effraction, et aussi d'autres délits.

...

Considérant également qu'à la suite de nombreuses récidives le Tribunal a effectivement confié l'enfant aux autorités du Mont St-Antoine pour fins de rééducation, et ce, dès les 18 mars 1970;

...

Considérant que malgré cette expérience, à son retour au foyer l'enfant a continué à récidiver et à commettre plusieurs autres délits; [N.L., 17 years; accused of possession of offensive weapon, theft (five counts) and hit and run]⁸⁴⁰

Vu nombreuses plaintes l'enfant déferé. [T.M., 17 years, accused of theft with offensive weapon and theft (two counts)]⁸⁴¹

Considérant, que pendant qu'il était recherché en vertu d'un mandat d'arrestation livré, à la suite de cette évasion, deux nouvelles plaintes de vol qualifié sont portées contre l'enfant; [D.M., 16 years, accused of theft]⁸⁴²

Alors, après avoir réfléchi et étudié les représentations qu'on m'a faites, j'ai délibéré sur le problème, et surtout examiné les antécédents de l'accusé, qui remontent à dix-neuf cent soixante-et-quatre... [G.C., 17 years, accused of theft]⁸⁴³

Me. Brault, agissant pour la Couronne verse au présent dossier les antécédents établissant les récidives de l'enfant. [C.L., 17 years, accused of theft (two counts)]⁸⁴⁴

Vu les antécédents de l'accusé. [Case of B.B., 18 years, accused of theft (two counts)]⁸⁴⁵

As well, young people were implicitly identified as "recidivists" by attaching a list of their delinquency cases to their records. This was the case of P.G. (27 cases),⁸⁴⁶ I.D. (14 cases),⁸⁴⁷

⁸⁴⁰ Case of N.L., 17 years; accused of possession of offensive weapon, theft (five counts) and hit and run; Records no. 1 to 190 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/778).

⁸⁴¹ Case of T.M., 17 years, accused of theft with offensive weapon and theft (two counts), Records no. 372 to 574 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/780).

⁸⁴² Case of D.M., 16 years, accused of theft, Records no. 1095 to 1286 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/784).

⁸⁴³ Case of G.C., 17 years, accused of theft, Records no. 1287 to 1428 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/785).

⁸⁴⁴ Case of C.L., 17 years, accused of theft (two counts), Records no. 1287 to 1428 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/785).

⁸⁴⁵ Case of B.B., 18 years, accused of theft (two counts), Records no. 1429 to 1616 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/786).

M.W. (8 cases)⁸⁴⁸ and S.B. (17 cases).⁸⁴⁹ Moreover, Henry's research on the Montreal Youth Court for the period 1972-1975 reports that Judges only transferred to the adult court youths who had committed a great number of offences: he identifies 17.23 as the average number of offences for a young person to be transferred to the adult court.⁸⁵⁰

The fact that the Montreal Youth Court had exhausted the rehabilitation measures within the youth court was also identified as a reason for transferring young people to the adult court. According to Henry, this was the reason most used by the Montreal Youth Court for deciding to transfer a young person to the adult court for the first time. For the period 1972-1975 Henry found that judges referred to the inadequacies of the rehabilitative measures available at the Montreal Social Welfare Court 47 times (78% of the decisions observed for the period 1972-1975), to the failure of previous measures 39 times (65% of the decisions observed for the period 1972-1975) and to the young person having rejected the proposed rehabilitative measure 37 times (61% of the decisions observed for the period 1972-1975).⁸⁵¹

In my analysis this second reason includes multiple rehabilitation attempts, the exhaustion of rehabilitation measures at the court, the desertion of the young person from the places of detention and the young person already having been transferred to the adult court.

⁸⁴⁶ Case of P.G., 17 years, accused of theft (two counts), Records no. 1 to 190 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/778).

⁸⁴⁷ Case of I.D., 18 years, accused of rape, Records no. 191 to 368 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/779).

⁸⁴⁸ Case of M.W., 17 years, accused of rape, Records no. 951 to 1093 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/783).

⁸⁴⁹ Case of S.B., 17 years, accused of theft (two counts) and possession of offensive weapon, Records no. 1791 to 1990 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/788).

⁸⁵⁰ Henry, *supra* note 326 at 68.

⁸⁵¹ *Ibid* at 106.

The Montreal Youth Court specifically referred to having unsuccessfully tried multiple rehabilitation attempts as a reason for transferring young people to the adult court:

Depuis, il apparaît également que l'enfant a été confié en détention à courts termes et à longs termes, soit au Centre d'Accueil, soit au Centre Berthelet.

Vu que ces sanctions se révélaient inutiles, le Tribunal a confié l'enfant au Mont St-Antoine, pour rééducation, mais son attitude devant les éducateurs a été tellement négative qu'ils ont dû le congédier.

...

Considérant également qu'à la suite de nombreuses récidives le Tribunal a effectivement confié l'enfant aux autorités du Mont St-Antoine pour fins de rééducation, et ce, dès le 18 mars 1970;

Considérant que dès le 25 mars 1970, les autorités du Mont St-Antoine refusaient de garder l'enfant vu son attitude négative et son refus catégorique d'accepter son placement et de coopérer avec ses éducateurs.⁸⁵² [N.L.; 17 years; accused of possession of offensive weapon, theft (five counts) and hit and run]

The Montreal Youth Court also made reference to having exhausted the rehabilitation measures available in the youth justice system as a reason for deciding a transfer:

Considérant également que la Cour a épuisé tous les moyens à sa disposition pour venir en aide à l'enfant. [N.L.; 17 years; accused of possession of offensive weapon, theft (five counts) and hit and run]⁸⁵³

[V]u son très grand nombre de récidives, la Cour considère avoir épuisé les moyens à sa disposition qui auraient dû assurer la réhabilitation de l'enfant.[P.G., 17 years, accused of theft (two counts)]⁸⁵⁴

[P]arce qu'elle [la Cour] considère ne plus pouvoir aider xxx l'enfant [D.L., 18 years, accused of theft (two counts)]⁸⁵⁵

La Cour n'hésite plus et considère qu'elle a épuisé les moyens à sa disposition susceptibles d'assurer la réhabilitation de l'enfant [D.M., 16 years, accused of theft]⁸⁵⁶

Vu que les Institutions à la disposition de la Cour ne répondent pas aux besoins de l'adolescent. [B.B., 18 years, accused of theft (two counts)]⁸⁵⁷

⁸⁵² Case of N.L.; 17 years; accused of possession of offensive weapon, theft (five counts) and hit and run; Records no. 1 to 190 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/778).

⁸⁵³ Case of N.L.; 17 years; accused of possession of offensive weapon, theft (five counts) and hit and run; Records no. 1 to 190 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/778).

⁸⁵⁴ Case of P.G., 17 years, accused of theft (two counts), Records no. 1 to 190 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/778).

⁸⁵⁵ Case of D.L., 18 years, accused of theft (two counts), Records no. 191 to 368 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/779).

⁸⁵⁶ Case of D.M., 16 years, accused of theft, Records no. 1095 to 1286 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/784).

In addition, young people's desertion from a place of detention and the incapability of the institution to guard him (lack of material resources) was identified as a reason for transferring them to the adult court:

Vu que l'enfant avait déjà été confié à l'Institut Notre-Dame de la Merci et qu'il avait déserté l'Institution et ce avec l'encouragement des parents. [N.L.; 17 years; accused of possession of offensive weapon, theft (five counts) and hit and run]⁸⁵⁸

Considérant que les nombreuses évasions de l'enfant et son xxx à ne pas s'engager dans son processus de réhabilitation au M.S.A. où la Cour l'avait finalement confié, ont amené la Cour à le libéré de cet endroit. [D.M., 16 years, accused of theft, Records no. 1095 to 1286 (1972)]⁸⁵⁹

Je pense bien que surtout, quand on pense aux évasions qui se produisent actuellement, en grand nombre, dans les pénitenciers, et que des individus parmi ceux-là – sont certainement dangereux, et qui menacent la société, et qui exposent les policiers dans leur vie. [G.C., 17 years, accused of theft]⁸⁶⁰

Considérant que Boscoville [place of detention] n'est pas une institution à sécurité maximum et qu'il y a une intention ferme de l'enfant de ne pas y demeurer et de déserté cette institution. [C.L., 17 years, accused of theft (two counts)]⁸⁶¹

Finally, the fact that the young person had already been transferred to the adult court was also seen as a reason for deciding to transfer him to the adult court. In fact, Henry reports that the Montreal Youth Court did not allow young offenders to “accumulate” further offences in youth courts after a first decision ordering a transfer:

Ces chiffres nous laissent croire qu'après un premier renvoi les juges des mineurs ne tolèrent plus l'accumulation des accusations comme avant. Un seul délit amènera la plupart du temps un nouveau

⁸⁵⁷ Case of B.B., 18 years, accused of theft (two counts), Records no. 1429 to 1616 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/786).

⁸⁵⁸ Case of N.L.; 17 years; accused of possession of offensive weapon, theft (five counts) and hit and run; Records no. 1 to 190 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/778).

⁸⁵⁹ Case of D.M., 16 years, accused of theft, Records no. 1095 to 1286 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/784).

⁸⁶⁰ Case of G.C., 17 years, accused of theft, Records no. 1287 to 1428 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/785).

⁸⁶¹ Case of C.L., 17 years, accused of theft (two counts), Records no. 1287 to 1428 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/785).

renvoi. L'analyse du nombre de délits renvoyés devant les tribunaux pour adultes selon le rang des renvois semble d'ailleurs justifier cette position.⁸⁶²

In other words, once a young person had been transferred to the adult court, any subsequent offending was transferred immediately. The case of G.C. exemplifies this:

Étant [donné] qu'il a atteint 18 ans, qu'une autre cause est déjà xxx contre lui en Cour des Sessions, la Cour juge justifiable de déférer l'enfant devant les Cours ordinaires pour son bien et dans l'intérêt de la société. [D.L., 18 years, accused of theft (two counts)]⁸⁶³

The third reason for which young people were transferred to the adult court was whether they were considered as adults, either because they were already 18 years of age or because they actually behaved "as an adult":

Considérant que l'enfant est maintenant âgé de 18 ans

...

Considérant que l'enfant est lui-même interrogé et proteste tout simplement de la décision du Tribunal, en invoquant qu'il a maintenant 18 ans. [N.L.; 17 years; accused of possession of offensive weapon, theft (five counts) and hit and run]⁸⁶⁴

Alors, après avoir réfléchi et étudié les représentations qu'on m'a faites, j'ai délibéré sur le problème, et surtout examiné les antécédents de l'accusé, qui remontent à dix-neuf cent soixante-et-quatre, il y a des gestes qui ont été posés depuis dix-neuf cent soixante-et-quatre qui, franchement, sont dignes d'un adulte. On peut dire que ça fait huit ans que l'accusé se conduit pratiquement comme un adulte. Les faits sont là. [G.C., 17 years, accused of theft]⁸⁶⁵

Étant [donné] qu'il a atteint 18 ans. [D.L., 18 years, accused of theft (two counts)]⁸⁶⁶

Vu que l'adolescent est âgé de plus de 18 ans. [B.B., 18 years, accused of theft (two counts)]⁸⁶⁷

⁸⁶² Henry, *supra* note 326 at 78.

⁸⁶³ Case of D.L., 18 years, accused of theft (two counts), Records no. 191 to 368 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/779).

⁸⁶⁴ Case of N.L.; 17 years; accused of possession of offensive weapon, theft (five counts) and hit and run; Records no. 1 to 190 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/778).

⁸⁶⁵ Case of G.C., 17 years, accused of theft, Records no. 1287 to 1428 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/785).

⁸⁶⁶ Case of D.L., 18 years, accused of theft (two counts), Records no. 191 to 368 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/779).

⁸⁶⁷ Case of B.B., 18 years, accused of theft (two counts), Records no. 1429 to 1616 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/786).

Fourth, the Montreal Youth Court also considered the “seriousness of the alleged offence” as a reason for transferring the young person to adult courts. However, with regard to this it is important to keep in mind, as presented in Chapter 7, that the notion of “seriousness” is a vague concept. The offence of “murder” can be considered as a serious offence because of the consequences of such offending; however, the use of firearms while committing an offence can also be considered as “serious”. In the remarks transcribed below the Montreal Youth Court does not make any reference to how the notion of “seriousness” is used. Given the offences for which the court made the following remarks, it seems that the court was referring to both senses of the notion of “seriousness”:

Considérant qu’après son placement et durant sa désertion l’enfant aurait commis des délits majeurs, soit un vol à mains armées et une conspiration pour vol à mains armées;
Considérant que l’enfant est devenu une menace pour la société, dans le meilleur intérêt tant de l’enfant pour le protéger contre sa violence et tant de la société menacée par les gestes qu’il pousse depuis de nombreuses années, il y a lieu de faire droit à la motion de déférer l’enfant à la Cour ordinaire, soit à la Cour Criminelle, pour y être jugé par voie indictable. [C.L., 17 years, accused of theft (two counts)]⁸⁶⁸

Vu la gravité de l’offense, le tribunal juge qu’il est dans l’intérêt de la société et pour le bien de l’enfant que ce dernier soit déféré à la Cour des Sessions. [I.D., 18 years, accused of rape]⁸⁶⁹

Vu le nombre et le genre de délits.

...

La Cour est d’opinion qu’il est pour le bien de l’enfant et dans l’intérêt de la Société, qu’il soit poursuivi en accusation dans les Cours ordinaires, en vertu de l’article 9 de la Loi des Jeunes Délinquants. [B.B., 18 years, accused of theft (two counts)]⁸⁷⁰

The fifth and final factor the Montreal Youth Court took into consideration for transferring young people to the adult court was their own requests; sometimes young people explicitly requested being transferred to adult courts:

⁸⁶⁸ Case of C.L., 17 years, accused of theft (two counts), Records no. 1287 to 1428 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/785).

⁸⁶⁹ Case of I.D., 18 years, accused of rape, Records no. 191 to 368 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/779).

⁸⁷⁰ Case of B.B., 18 years, accused of theft (two counts), Records no. 1429 to 1616 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/786).

L'enfant entendu de nouveau déclare qu'il a passé l'âge d'être confié dans une institution et que s'il a un traitement à suivre, c'est un traitement d'adulte qu'il veut suivre et il insiste pour être déféré. [C.L., 17 years, accused of theft (two counts)]⁸⁷¹

The non-statutory reasons identified by the Montreal Youth Court for transferring young people to the adult court in 1972 were the fact that the youth was a recidivist or that he was perceived as an adult, either by the way he behaved or by his chronological age. As well, youths who had committed serious offences or who did not adjust to the rehabilitation measures available at the youth justice system were transferred to the adult court. Finally, the Montreal Youth Court also transferred to the adult court youths who had so requested. Henry lists other reasons referred to by the Montreal Youth Court for transferring a young person to the adult court: the young offender's parents' lack of interest in the process despite several notifications, the family environment not being appropriate for the young person's rehabilitation, the lack of remorse exhibited by the young person, evidence of the premeditation of the offence and whether the offence had received large publicity from the media.⁸⁷²

10.4. Year 1978

In 1977 the manner in which the records were kept at the court house was modified: delinquency and protection cases were no longer recorded in minute-books, but in individual files in which clerks noted every step of the procedure. Moreover, most of the records in which there are decisions relating to a transfer contain detailed psychosocial evaluations of the young people and - if a transfer was decided – the decisions are highly motivated. Because of this, the way in which the information is presented and analyzed for the year 1978 differs from previous years

⁸⁷¹ Case of C.L., 17 years, accused of theft (two counts), Records no. 1287 to 1428 (1972), Montreal Social Welfare Court, Montreal, Archives Nationales du Québec (code TL484, S2, SS45, SSS1; content 2004-06-001/785).

⁸⁷² Henry, *supra* note 326 at 129-130.

(1911-1972). In addition, as noted in Chapter1, in 1978 there were 7902 records of delinquency (protection cases excluded). Because of the size of the population, I used as a sample the first 1799 records; consequently, every time I refer to the year 1978 I will be referring to this sample.⁸⁷³

According to the data collected, in 1978 there were 97 cases of female delinquency, 1701 cases of male delinquency, and 1 case in which the gender was not stated (Table 36).

Table 36
Gender,
Montreal Youth Court, 1978

Gender	Number
Females	97
Males	1701
N/A	1
Total	1799

In 1978 no female young person was charged with a serious offence and one male young person was charged with attempted murder.

In 1978 there were 76 decisions in which the transfer of a young person to adult courts was discussed; all these decisions involved male young people. However, by 1978 the judicial interpretation of the procedure for transferring a young person to the adult courts had been

⁸⁷³ Lavigueur V. explores the years 1977 to 1980 (included). However, her research only includes young offenders who were represented by the Centre Communautaire Juridique de Montréal, Division Jeunesse. As a result, her research also has a representative sample. *Lavigueur, supra* note 89 at 72-73.

modified. As previously noted, the 1970 report of the Commission d'enquête sur l'administration de la justice en matière criminelle et pénale au Québec recommended Social Welfare Courts (Youth Courts) recommended Quebec Youth Courts to restrict the transfer of young people to adult courts. Consequently, the Montreal Youth Court modified the procedure for transferring young people to the adult court. If the Montreal Youth Court considered that a young person should be transferred to the adult court, the court would order the transfer. However, the effective execution of the decision would be conditional on the young person not observing the conditions of the decision. In other words, in certain circumstances the Montreal Youth Court ordered the transfer of the young person to the adult court, but the transfer would not be executed as long as the young person did not reoffend, obtained work, attended school, etc. In addition, the Montreal Youth Court rejected requests of the Crown to transfer a young person to adult courts and the Crown itself desisted previous transfer requests provided that the young person's rehabilitation was favourable (Table 37). Indeed, according to Marc Bélanger's testimony at the House of Commons Committee on Justice and Legal Affairs and referring to the period 1977-1980, "out of 100 applications for transfer submitted to youth courts [Montreal Youth Court], no more than 25 to 30 per cent of cases were transferred."⁸⁷⁴

⁸⁷⁴ *Debates of the House of Commons, Standing Committee on Justice and Legal Affairs*, 32nd Parl, 1st Sess (16 February 1982) at 62:9 (Mr Marc Bélanger's witness testimony, Senior Advisor, Comité de la protection de la jeunesse, Québec).

Table 37

Decisions Related to Transfers of Male Youths to the Adult Court,

Montreal Youth Court, 1978

Age	Transfer Desisted	Transfer Rejected	Transfer Suspended	Transferred
15	0	1	0	0
16	2	0	6	2
17	0	16	27	22
Total	2	16	34	24

These 76 decisions in which there is a decision related to a transfer represent 15 young people. For the scope of clarity, I first discuss the cases in which the Crown left aside its request for a young person to be transferred (“Transfer Desisted”) and the cases in which the Montreal Youth Court rejected the Crown’s request for transferring a young person to adult courts (“Transfer Rejected”). Then, I present the cases in which the Montreal Youth Court decided to transfer a young person but never executed the decision (“Transfer Suspended”) and finally I discuss the cases in which the transfer to the adult court was actually executed (“Transferred”).

Transfer Desisted and Transfer Rejected

In 1978 the Crown desisted from transferring to adult courts two cases, and this represents one young person. The only existing resolution reads that Da.L. successfully completed his reeducation measure at the Berthelet Centre. This seems to have motivated the Crown to desist its original request. No more information is available.⁸⁷⁵

⁸⁷⁵ Da.L, 16 years, accused of robbery, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

On the other hand, in 1978 the Montreal Youth Court rejected 16 times the Crown's request for transferring young people to the adult court; all these decisions involve four young people. The first decision is that of John Doe I (his name does not appear in the record): according to the probation officer's testimony, John Doe I was working and assuming his responsibilities, he was turning 19 years old soon, and he had observed the conditions of his release. As a result, the Montreal Youth Court ordered that the transfer request be rejected and John Doe I's record adjourned sine die.⁸⁷⁶ The second decision is that of John Doe II, which – alike the former - is a brief decision. As stated in the record, because of the favourable report of the Berthelet Center and the consent of the Crown, the Montreal Youth Court rejected the transfer request.⁸⁷⁷ The third case in which a Crown's transfer request was rejected is that of Y.Q.: according to the records, the Crown had requested his transfer to the adult court and the Montreal Youth Court deferred the audience for deciding the transfer until he received the psychological report. According to this document, the transfer of the young person to the adult court would be detrimental for his well-being, given that he needed treatment and not punishment:

Procureur de la défense : Selon vous, madame L., est-ce que c'est un déferé si la Cour décidait de le déferer aujourd'hui, Y.Q., quel effet selon vous ça pourrait avoir? Est-ce que ce serait négatif ou positif, est-ce que c'est la seule solution, en d'autres mots, je voudrais que vous donniez à monsieur le juge, votre idée?

Madame L. (travailleuse sociale) : À mon avis ça serait négatif. Moi, je pense que de déferer un gars, c'est le criminaliser davantage. [Y.Q., 17 years, accused of car theft]⁸⁷⁸

As a result, the Montreal Youth Court ordered that the transfer request be rejected, even though Y.Q. had already been transferred to the adult court on another offence.⁸⁷⁹ This way of assessing

⁸⁷⁶ John Doe I, 17 years, accused of robbery, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁸⁷⁷ John Doe II, 17 years, accused of robbery, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁸⁷⁸ Y.Q., 17 years, accused of car theft, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

the factors for deciding the transfer of a young offender significantly left aside the juridical practice developed until 1972, where the existence of a previous transfer decision constituted a sufficient reason for ordering a new transfer to the adult court. The fourth and last decision is that regarding J.Q: the Montreal Youth Court noted that despite his previous offending pattern (29 offences) and the fact that J.Q. had reoffended after being released from treatment, his reoffending was not severe and - according to the court - this improvement was due to the rehabilitative measures received at the Shawbridge Center. In fact, as the reeducation measures had been successful and J.Q.'s prognosis was favourable, the Judge considered that J.Q.'s and the best interest of society required that he not be transferred to the adult court:

C'est pourquoi, même si l'accusé revient devant la Cour pour répondre à une accusation sérieuse, même si dans le passé il s'est soustrait par de nombreuses fugues au traitement ordonné, le Tribunal est d'avis que le bien de l'enfant et l'intérêt de la société n'exigent pas qu'il soit traduit devant les cours criminelles ordinaires conformément au code criminel.⁸⁸⁰

Consequently, the Judge rejected the Crown's request to transfer the young person to adult courts.

In all these cases it is quite clear that a favorable prognosis of the rehabilitation centers – in other words, the existence of resources – operated like a “shield” that prevented the transfer of the young person to the adult court. Moreover, the “power” of a favorable prognosis is quite evident when considering that sometimes the Crown itself requested that the young person not be transferred.

⁸⁷⁹ *Ibid.*

⁸⁸⁰ J.Q., 15 years, accused of break and enter, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

Transfer Suspended

In 1978 the Montreal Youth Court suspended the execution of a transfer in 34 decisions, and these decisions deal with two young people. In the first case the Montreal Youth Court transferred M.C. to the adult court, but his effective transfer was suspended as long as M.C. did not commit other offences. Unfortunately, M.C. was killed one year later.⁸⁸¹

In the second case, B.M. was brought to the Montreal Youth Court after having deserted from where he was detained and committed 27 new offences. While these circumstances would have meant B.M.'s immediate transfer to the adult court in 1972, the situation was different in 1978. The Montreal Youth Court confronted B.M. as to what were his intentions regarding his future and remarked that the purpose of the court was to do its best to prevent the young person from having a criminal record or continuing a life of crime as an adult:

Le rôle de la Cour de Bien Être Social, je te l'ai dit, je te le répète, c'est de faire tout ce qui est possible pour pas que le jeune homme ait un casier judiciaire et pour pas qu'il devienne justement un candidat à la prison quand il sera adulte.

À date, la Cour a fait beaucoup pour toi je pense. Et je suis obligé de te poser aujourd'hui une question très sérieuse.

Est-ce que tu veux vraiment sortir de ça? Ou bien donc si tu te fous de nous-autres? [B.M., 17 years, accused of robbery]⁸⁸²

Thanks to the favourable prognosis provided by the professional experts, B.M.'s transfer decision was suspended as long as he observed the reeducation measures: "Là, on a, on m'a répété devant moi que tu étais décidé, tu vas le décider par toi-même si tu vas être déféré, ça sera pas moi."⁸⁸³ However, the Judge clearly notified B.M. that if he deserted again, his transfer

⁸⁸¹ M.C., 16 years, accused of robbery, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁸⁸² B.M., 17 years, accused of robbery, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁸⁸³ *Ibid.*

decision would be executed immediately. Interesting, after being placed at Cité des Prairies for a couple of months, B.M. deserted, returning to the institution the following day. Again, while this situation would have meant B.M.'s transfer to the adult court in 1972, this was not the case in 1978. The social workers and psychologists at Cité de Praires recommended that B.M. be kept therein as the fact that he returned to the center meant that he understood his wrongdoing – this being part of his rehabilitation treatment:

Dans ces circonstances, le juge soumet l'affaire à Me. Valois proc. cour., qui après avoir communiqué avec les éducateurs de Cité de Praires, fait rapport au Tribunal qu'après avoir discuté du cas avec les éducateurs de cette institution, ces derniers sont d'avis que la dernière fugue de B.M. et les conséquences qui auraient pu en résulter pour lui et dont il est parfaitement conscient, constituent véritablement un tout définitif dans le processus de rééducation entrepris pour lui. [B.M., 17 years, accused of robbery]⁸⁸⁴

A few months later B.M. was released from Cité de Praires and his record at the Montreal Youth Court closed.

This last case also demonstrate the power of a positive prognosis: it seems that as long as the professional experts advised the Montreal Youth Court that they could continue working with the young person, he would not be transferred to the adult court.

Transferred

In 1978 the Montreal Youth Court transferred 24 cases to the adult court; this represents eight young people (Table 38).

⁸⁸⁴ *Ibid.*

Table 38**Reasons for Transferring Youths to the Adult Court,****Montreal Youth Court, 1978**

Age	Transferred	Reasons
16	M.L. (1)	* several desertions * committed severe offences while being at large * the rehabilitation center was unable to receive the young person again * age of the person
	D.D. (1)	* previously deferred to adult courts * detained in adult facilities for one year * committed new offences
17	J.P. (3)	* reoffending * the rehabilitation center was unable to receive the young person again
	F.L. (6)	*several desertions * committed severe offences while being at large * the rehabilitation center was unable to receive the young person again * age of the person
	De.L. (3)	*several desertions * committed severe offences while being at large * the rehabilitation center was unable to receive the young person again * age of the person
	D.Q. (4)	* there is no sentence or reports in the record
	P.B. (3)	* there is no sentence or reports in the record
	E.G. (3)	* there is no sentence or reports in the record * there is no sentence or reports in the record *several desertions * committed severe offences while being at large * the rehabilitation center was unable to receive the young person again * age of the person
Total	8 (24)	

M.L., a 16-year-old male accused of possession of illegal drugs, had a history of deserting from the places of detention and committing offences while being at large. Despite the frequencies of these behaviors, the reeducation centers maintained a positive attitude with regard to M.L.'s rehabilitation. As a result, the Montreal Youth Court kept on placing the young person in the reeducation centers instead of transferring him to adult courts. It was only when the reeducation center in which M.L. was detained – Cité des Prairies – reported that it was impossible for them to continue working with M.L. due to his attitude and behaviour that the court decided to transfer him to the adult court. In fact, the court clearly stated that it had “exhausted” all the available measures:

Attendu qu'en date du 29 décembre 1978, le Centre d'accueil La Cité des Prairies produisait un rapport à l'effet qu'il leur est impossible, vu l'attitude et le comportement du garçon, de poursuivre leur action et de le reprendre; Considérant que la Cour croit avoir épuisé toutes les ressources qui sont à sa disposition en vue de la réhabilitation du garçon, vu le refus de ce dernier d'accepter une réhabilitation dans les institutions de cette Cour; [M.L., 16 years, accused of possession of illegal drugs]⁸⁸⁵

In the case of J.P., a 17-year-old male accused of break and enter, there is a brief oral transcript in which the Court transfers him to the adult court after having received the report of a social worker stating a negative prognosis. In her report, the social worker referred to J.P. as a person who has “chosen a life of crime” and is content while being behind bars as he feels secure. She recommended his transfer to the adult court as there were no further rehabilitation measures available within the youth system:

I understand that J.P. has recently appeared in court with new charges, and in light of this it appears obvious to me that there are no further facilities for J.P. which I or my agency can now provide.
...

⁸⁸⁵ M.L., 16 years, accused of possession of illegal drugs, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003) [emphasis added].

J.P. has chosen a life of crime. He states recently when I visited with him in Parthenais that he would probably spend most of his life behind bars. I found him, during my visit, appearing relaxed and almost in peace with himself. This is a characteristic which I had always perceived in J.P. when he was in detention.

J.P.'s only expressed regret was that he had disappointed a few people such as yourself [referring to the Montreal Youth Court Judge], his lawyer, P.G., and myself. He knows that we have all tried so hard to provide him with the opportunity to choose an alternate way of life for himself.

It is my recommendation to the court, both for the protection of society and J.P.'s welfare, that he now be deferred with his charges to the adult criminal system. [J.P., 17 years, accused of break and enter]⁸⁸⁶

The next case is that of F.L. Similar to M.L.'s case, F.L. had a history of running away from detention and committing several offences while being at large. By the time the court decided to transfer him to the adult court, F.L. was already 18 years. Again, his transfer to the adult court was triggered by the negative prognosis of the rehabilitation center where F.L. had been placed:

That the accused instead of cooperating chose to run away to join his underworld companions and to resume his criminal behaviour. That the accused was extremely manipulative and thereby managed to avoid therapy and to resume his former pattern of behaviour. That he [the boy's social worker] conferenced this case with at least 10 other workers. It was the consensus of the group that because of his continuous running away, his obvious manipulations, having reached the age of 18 and the lack of resources available in the Juvenile set up, that they recommend his deferral to the adult court. [F.L., 17 years, accused of robbery]⁸⁸⁷

De.L., already 18 years old at the time his transfer was decided, had deserted from the places of detention many times and continued offending while being at large. Yet, his unsuccessful integration within the rehabilitative centers in which he had been placed was the major factor for deciding his transfer to the adult court:

la Cour prenait connaissance d'un rapport faisant état du refus catégorique de De.L. d'intégrer un centre de rééducation, que ce soit Boscoville ou le Mont St-Antoine...

⁸⁸⁶ J.P., 17 years, accused of break and enter, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003) [emphasis added].

⁸⁸⁷ F.L., 17 years, accused of robbery, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003) [emphasis added].

De.L. ne s'implique pas dans le programme qui lui était imposé au Centre Berthelet, que sa participation y était nulle, sa motivation inexistante et demandèrent sa libération... [De.L., 17 years, accused of car theft]⁸⁸⁸

The numerous unsuccessful rehabilitation measures implemented and the fact that the rehabilitation centers had a negative prognosis as to De.L.'s reeducation within the youth court system compelled the Montreal Youth Court to transfer him to the adult court:

Il ne fait pas aucun doute dans l'esprit du Tribunal que la Cour et ses services auxiliaires ont accordé à De.L. toute l'attention nécessaire et tout le support dont il avait besoin pour parvenir à sa réhabilitation. Compte tenu des ressources limitées mises à la disposition du Tribunal de la Jeunesse, il devient impossible de penser que les efforts de la Cour et ses différents services puissent produire des effets positifs sans la motivation de De.L. La cour se voit donc, dans l'obligation d'admettre l'échec.⁸⁸⁹

Alike the last four cases, E.G. was transferred to the adult court because of his unsuccessful prognosis with regard to rehabilitation:

[d]epuis 1966, le Tribunal de la Jeunesse et ses services à tous les niveaux ont investi une somme considérable de travail et d'énergie, et ont mis à la disposition de ce jeune homme toutes les ressources disponibles : placement à l'Accueil Vert-Pré, à Huberdeau, placement à l'École Mont Saint-Antoine, liberté surveillée, séjours de réflexion en centre d'accueil et environ 137 interventions du Tribunal sous forme de comparutions, entretiens et autres.

[...]

Considérant que dans l'optique du Tribunal, E.G. n'a pu ou n'a pas voulu profiter suffisamment des efforts considérables déployés par la Cour et ses services depuis dix ans;

Considérant que sauf la mesure probatoire suggérée, moyen déjà mis en œuvre sans succès dans le passé, les ressources de cette Cour ont atteint le point de saturation en l'espèce.⁸⁹⁰

The case of D.D. - a 16-year-old young person accused of robbery – offers a different perspective with regard to the reasons for transferring him to the adult court. D.D. had been

⁸⁸⁸ De.L., 17 years, accused of car theft, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁸⁸⁹ *Ibid.*

⁸⁹⁰ E.G., 17 years, accused of break and enter, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003). This decision was revoked by the Quebec Court of Appeal as it was held that the judge had erred in law: E.G. had not pleaded guilty to the alleged offences that gave rise to this transfer decision and there was no trial in which he had been found guilty of the offences. *Ibid.*

subject to a suspended transfer with strict conditions because, according to the rehabilitation center where he had been placed, there was a positive prognosis regarding his rehabilitation:

[l]e témoin est convaincu qu'il y a encore une lueur d'espoir pour ce jeune homme et que c'est au sujet lui-même à décider de son sort maintenant et qu'il a la motivation pour passer à travers la longue épreuve de Berthelet, long terme. Il ajoute que le Centre Berthelet serait disposé à accueillir de nouveau D.D. dès qu'une place sera disponible.⁸⁹¹

As stated in the quote, D.D. had to wait for a place to be available for him to be placed at Berthelet. In the meanwhile, while waiting for placement, he violated the conditions of his suspended transfer by committing a new offence. While in previous cases of “suspended transfers” the Montreal Youth Court had ignored this kind of inobservance as long as the young person was amenable to rehabilitation, it seems that in the case of D.D. the fact that he had already been transferred to the adult court and detained in the adult system played a major role for the effective execution of his transfer decision. Indeed, it seems that in cases in which there existed a previous decision transferring the young person to the adult court the Montreal Youth Court was less tolerant as to any possible inobservance of the conditions stated in the decision (zero tolerance policy).

The key circumstance for transferring a young person to the adult court was the inability of the rehabilitation centers to deal with the young person's treatment effectively. Indeed, as noted above, despite the young people deserting from the place of detention and committing new offences while being at large, as long as the rehabilitation centers were of the opinion that the young person was amenable to reeducation, the young person remained within the youth

⁸⁹¹ D.D., 16 years, accused robbery, Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

jurisdiction. The professional experts played a major role for deciding whether a young person could remain within the jurisdiction of the youth court. Their criteria were centered on the young person's behavior and whether the center would be able to rehabilitate him.

Moreover, with regard to the seriousness of the offence as a factor for considering the transfer of a young person to adult courts, Bélanger reports that this was not a primary reason for deciding a transfer. According to his report presented at the House of Commons, in 1977 the Montreal Youth Court had dealt with eight murder cases, from which only two cases had been transferred to the adult court.⁸⁹²

The study of the records for the year 1978 demonstrates that both the rehabilitation centers and the Courts were quite committed to the well-being of the young people and their successful rehabilitation within the juvenile justice system. Indeed, they tried to implement every measure available at the youth court system for reintegrating the young person back to society. A transfer decision was not executed unless the reeducation measures were completely unsuccessful. At that point, the Court recognized that it had "exhausted all the available measures" and that the required measures were not available at the juvenile justice system. As a result, the Court transferred the young person to the adult court. During 1978, the good of the child was understood as providing the young person with the rehabilitative measures required. Only when

⁸⁹² *Debates of the House of Commons, Standing Committee on Justice and Legal Affairs*, 32nd Parl, 1st Sess (16 February 1982) at 62:10 (Mr. Marc Bélanger's witness testimony, Senior Advisor, Comité de la protection de la jeunesse, Québec). Lavigueur V. reports similar findings: *supra* note 89 at 114; nevertheless, she argues that there was no reason that was univocally referred to by the Court for deciding a transfer:

[c]e qui inquiétait le plus les experts était l'impossibilité de tracer un ligne claire entre tous les cas de jeunes non déférés et tous les cas d'adolescents déférés, même à un seul point de vue. En effet, aucun élément ne ressort ni d'un côté ni de l'autre comme un motif sine qua non du jugement. *Ibid* at 170.
[emphasis in the original]

those measures where no longer available at the juvenile justice system, the young person was transferred to the adult court. This transfer was also made in the interest of society in the sense that society was better protected by providing the young person with an effective treatment in the adult system. I argue that this kind of decision was not only naïve, but as well disregarded a large amount of scientific evidence as to the physical, psychological and social detrimental effects of incarcerating a young person in an adult environment. If the required treatment was not available at the juvenile justice system, the best approach to this would have been to expand the resources available therein to include those treatments, and not to transfer the young person to the adult court.

10.5. Year 1984

The *Young Offenders Act* (1982) partially came into force in Canada on 2nd April 1984. As part of its enactment, the *Young Offenders Act* (1982) had a provision requiring provinces to establish a minimum uniform age of less than 18 years for young people to be dealt with under this statute. Some provinces were required to expand its youth justice system to include 16- and 17-year-old young offenders (for instance, in Ontario, this group was dealt with by the adult justice system under the *Juvenile Delinquents Act*). For this, the *Young Offenders Act* (1982) gave provinces one year term to establish the uniform age of less than 18 years of age (1st April 1985). On the other hand, the Quebec youth justice system had been dealing with 16- and 17-year-old young offenders since 1942. This meant that, in practice, the *Young Offenders Act* (1982) fully came into force in Quebec on 2nd April 1984.⁸⁹³

⁸⁹³ By then, Quebec had also established a formal diversion program, a system of open and close supervision, and due process rights (another requirement of the *Young Offenders Act*): Marc Leblanc & Hélène Beaumont, “The Quebec Perspective on the *Young Offenders Act*. Implementation before Adoption” in Joe Hudson, Joseph P

The enactment of the *Young Offenders Act* (1982) meant a clear statutory distinction between protection and criminal misbehavior.⁸⁹⁴ While under the *Juvenile Delinquents Act* (1908) the Montreal Youth Court dealt with both kind of behavior under the notion of “delinquency”, the *Young Offenders Act* (1982) only dealt with criminal misbehavior. The data presented below only deals with conduct contrary to penal legislation: federal and provincial offences, and municipal bylaw violations.

According to the data collected, in 1984 there were 120 cases of female delinquency and 2270 cases of male delinquency (Table 39).

Table 39
Gender,
Montreal Youth Court, 1984

Gender	Number
Females	120
Males	2270
N/A	0
Total	2390

In 1984 the Court intervened in very few cases in which the offence was considered to be a “serious” offence: no female young person was charged with these kinds of offences, and two

Hornick & Barbara A Burrows, eds, *Justice and the Young Offender in Canada* (Toronto: Wall & Thompson, 1988)

81.

⁸⁹⁴ *Ibid.*

males were charged with attempted murder and one male was charged with aggravated sexual assault (Table 40).

Table 40
Most Serious Offences Committed by Males,
Montreal Youth Court, 1984

Offence	Number
First Degree Murder	0
Second Degree Murder	0
Manslaughter	0
Attempted Murder	2
Aggravated Sexual Assault	1
Other Offences	2267
Total	2270

There were 10 decisions in 1984 where the transfer of a young person to adult courts was discussed. By 1984 the category of “transfer suspended” – as included for the year 1978 – disappeared. The remaining categories of “transferred”, “transfer desisted” and “transfer rejected” were still being used by the Montreal Youth Court (Table 41).

Table 41

Decisions Related to Transfers of Male Youths to the Adult Court,

Montreal Youth Court, 1984

Age	Transfer Desisted	Transfer Rejected	Transfer Suspended	Transferred
16	14	0	0	0
17	10	5	0	44
18	25	3	0	1
19	0	0	0	0
20	0	0	0	1
Total	49	8	0	46

These 103 decisions represent 32 male young offenders. I first discuss the cases in which the Crown left aside its request for a young person to be transferred (“Transfer Desisted”), then I discuss the cases in which the Montreal Youth Court rejected the Crown’s request for transferring a young person to adult courts (“Transfer Rejected”), and finally I discuss the cases in which the transfer to the adult court was actually executed (“Transferred”).

Transfer desisted

In 1984 the Crown desisted from transferring 49 cases to the adult court and this represents 18 young people (Table 42). From these 18 young people, there was not enough information regarding the reasons for the Crown to desist from transferring seven people, limited reasons regarding three people, and full reasons regarding eight people.

Table 42

**Reasons for Desisting a Transfer to the Adult Court,
Montreal Youth Court, 1984**

Age	Transfer Desisted	Non-statutory Reasons (in addition to the statutory reasons)
16	F.F. (9)	* there are still resources available within the youth system
	John Doe IV (1)	n/a
	John Doe VI (1)	n/a
	John Doe VIII (1)	n/a
	R.C. (1)	*there are still resources available within the youth system
	John Doe IX (1)	n/a
17	P.C. (2)	* plea bargaining
	G.D. (1)	* plea bargaining (no further information available)
	John Doe VII (1)	n/a
	G.C. (2)	* favourable prognosis
	D.P. (1)	* there are still resources available within the youth system
	John Doe X (1)	* favourable pre-sentence report (no further information available)
	R.L. (1)	* favourable prognosis
	F.J. (1)	* excellent prognosis
18	D.T. (15)	* pre-sentencing report recommended youth's plan be approved
	John Doe I (4)	n/a
	John Doe II (1)	n/a
	John Doe III (5)	* favourable pre-sentence report (no further information available)
Total	18 (49)	

The reasons provided by the Crown for desisting from transferring G.D., John Doe X and John Doe III to the adult court are limited. The only information available was side notes in the plunitifs indicating that in the case of John Doe X and John Doe III their pre-sentence reports were favorable to their effective rehabilitation. With regard to G.D., it seems that the Crown desisted from requesting his transfer to the adult court as part of a plea bargaining agreement with the defendant.

There are eight full decisions explaining why the Crown desisted from transferring these young people to the adult court. The first decision is that of F.F. As part of the court procedure for transferring a young person to the adult court, after the Crown's request for a transfer, the youth judge had to request a pre-sentencing report, along with psychological and psychiatric reports. In the case of F.F., the reporting agency suggested the judge to keep F.F. within the youth justice system for maximizing his chances of rehabilitation, even though by the time the Crown requested F.F.'s transfer he was accused of having committed nine offences:

[n]ous demeurons portés à penser qu'un retour à Cité des Prairies (une durée de 3 ans) soit encore préférable à un établissement de détention (F.F. n'a pas encore 17 ans) si l'on veut maximiser les possibilités de support d'une démarche de conscientisation et de responsabilisation sociale.⁸⁹⁵

The transcript of the court hearing notes that the Court desisted from transferring F.F. based on the content of the reports on file:

[l]a Couronne fait requête pour retirer sa motion de renvoi, vu le contenu des rapports qui lui ont été produits. La motion pour retrait présentée par la Couronne est accordée par le tribunal.⁸⁹⁶

⁸⁹⁵ F.F., 16 years, accused of armed robbery, receiving stolen goods, assault and conspiracy; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁸⁹⁶ *Ibid.*

The second case is that of R.C. While this young person was on probation when he committed the offences for which he was charged (conspiracy, armed robbery, receiving stolen goods, mischief, poisoning), his probation reports had been very satisfactory. Actually, this offending behaviour came out as a surprise to R.C.'s probation agent. When asked about R.C.'s prognosis, R.C.'s probation agent opposed to the transfer request and recommended that R.C. remain in the youth justice system as there were still resources that could be used for assisting R.C.:

[f]rankly his mother was surprised that the Crown has asked for a motion to defer R. before the adult court and based on his knowledge and relation with R. this worker would not support this motion at this time.

Not all juvenile resources have been attempted to help R. and R. has shown progress since September 1982 that this worker believes that the juvenile court resources could still be helpful.⁸⁹⁷

Based on the probation agent's report, the psychological report recommended that R.C. remain within the youth justice system as the system could still help him:

[t]he subject should continue to avail himself of rehabilitative opportunities offered by the juvenile system. He is 16,9 years and has sufficient time to grow socio-affectively and to acquire the necessary social and vocational skill to prevent delinquent behaviour and promote proper adjustment.⁸⁹⁸

Based on these reports, the Crown desisted from transferring R.C. to the adult court.

The third case is that of P.C., accused of armed robbery and receiving stolen goods. This is a different kind of case: the pre-sentencing reports from the detention centers where P.C. had been detained for previous offending were adverse to him returning to these places. According to

⁸⁹⁷ R.C., 16 years, accused of conspiracy, armed robbery, receiving stolen goods, mischief and poisoning; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁸⁹⁸ *Ibid.*

them, not only did P.C. not adjust to and was not interested in following the rules of the detention centers, but as well the professional experts working there did not want him to be back:

[c]ette unité ne constitue plus, à notre avis, une ressource positive pour le précité. Le personnel est désabusé et n'est plus motivé à investir dans le cas; quant à P., il n'est guère enthousiasmé par cette perspective. Nous aimerions de plus souligner qu'un mandat à long terme dans cette unité contredirait la mission de cette ressource à court terme. Finalement, le responsable des admissions du Centre La Cité des Prairies nous a informé que P. ne pourra être admis dans une unité à long terme du secteur francophone car on considère ne plus être en mesure de l'aider dans un environnement qu'il n'a jamais vraiment accepté.⁸⁹⁹

While in previous circumstances this would have given the Crown the reasons for supporting the transfer request, in this case the Crown desisted from transferring P.C. Moreover, the Crown signed a plea bargaining according to which it withdrew some charges as long as P.C. pleaded guilty to other charges. Having been detained during the process, P.C. was sentenced to probation for one year:

Me. M. demande la permission de retirer sa requête en déferé dans les 2 dossiers. Accordée par le Tribunal. [...] Le sujet, par son procureur, enregistre un plaidoyer de culpabilité dans le dossier [...], la Couronne retire le deuxième chef [...] Dans les circonstances, le Tribunal sentence l'accusé au temps passé en hébergement sécuritaire et ordonne une probation 1 an à compter des présentes.⁹⁰⁰

This way of dealing with a young offender is different from previous decisions. One interpretation for this is that the Crown would rather have the young person dealt with probation in the youth justice system than sending him to the adult justice system. According to this, the Crown's role of "representing and protecting society" would include its perception that society was better protected by having the youth court dealing with the young offenders rather than the adult court.

⁸⁹⁹ P.C., 17 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁰⁰ *Ibid.*

The fourth case is that of G.C., accused of conspiracy, armed robbery, receiving stolen goods and possession of weapon. Despite this offending, the detention agency completing the pre-sentencing report was positive regarding G.C.'s rehabilitation prognosis based on his social environment and his passive role during the commission of the offences. Consequently, it recommended that G.C. remain within the youth justice system and this recommendation was endorsed by the Crown who withdrew the transfer request:

[l]a collaboration apportée par l'adolescent; la présence des certains indices d'adaptation sociale (la fréquentation scolaire, la participation à certains loisirs et le maintien de relations avec son milieu familial); le rôle passif de l'adolescent dans la réalisation des délits dont il est accusé; l'absence de violence physique ou verbale de l'adolescent vis-à-vis des victimes actuelles; le fonctionnement global socialement satisfaisant présenté par l'adolescent de septembre 1983 à juin 1984; l'ensemble de ces éléments de même que la présence au niveau juvénile d'installations et de programmes permettant sa réadaptation, nous incitent à croire que la requête en renvoi ne devrait pas être accordée.⁹⁰¹

The fifth and the sixth cases are similar to the previous one: D.P. was accused of many counts of conspiracy, armed robbery, break and enter, receiving stolen goods and possession of weapon, and R.L. was accused of conspiracy, armed robbery and receiving stolen goods. Even though these charges, the professional experts were ready to continue working on the rehabilitation of these young people:

[e]n ce qui a trait aux ressources qui seraient disponibles au niveau juvénile, il appert que le centre d'accueil Cité-des-Prairies serait prêt à reprendre l'adolescent comme il est mentionnée dans leur rapport.⁹⁰²

[t]he worker recommends to the Court, on behalf of Shawbridge Youth Centres, in view of his lack of intellectual and emotional maturity, yet his slow but demonstrated progress at Shawbridge youth Centres, that R.L. be retained in the juvenile justice system. Should this be the decision of the Court, and should R. be found guilty of the offences with which he is currently charged, the worker is

⁹⁰¹ G.C., 17 years, accused of conspiracy, armed robbery, receiving stolen goods and possession of weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁰² D.P., 17 years, accused of conspiracy, armed robbery, receiving stolen goods and possession of weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

prepared to make further recommendations for continued treatment for R. at Shawbridge Youth Centers.⁹⁰³

The seventh case is that of F.J., accused of attempted murder and possession of dangerous weapon. After the Crown requested his transfer to the adult courts based on the severity of the offence, the judge ordered the pre-sentencing report. The pre-sentencing report came as a complete surprise: F.J. was a very collaborative young person who fully assumed responsibility for his offending. Moreover, he was attending high school while planning to pursue university studies and his social environment was quite supportive. The report emphasized F.J.'s favorable prognosis:

[a]près vérification de ses fréquentations, il ne semble pas associé en aucune façon à un groupe de jeunes ou milieu délinquant et ce, autant dans son environnement social que depuis le début de sa détention au Centre Cartier, il ne recherche pas la compagnie des éléments négatifs et il n'adhère pas non plus à des valeurs marginales, antisociales. Il semble très bien adapté socialement et ses perspectives d'avenir nous semblent bonnes.⁹⁰⁴

F.J. pleaded guilty to the lesser offence of aggravated assault, and was sentenced to probation for a year and a half.

The last case is an interesting perspective in the sense that the Montreal Youth Court was ready to accept the young person's sentencing proposal as long as the professional experts were of the opinion that D.T.'s proposal was conducive to his rehabilitation. Not only did the professional experts agree to the plan, but as well they were of the opinion that D.T.'s rehabilitation treatment depended on him taking control of the decisions affecting his life and the court accepting this:

⁹⁰³ R.L., 17 years, accused of conspiracy, armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁰⁴ F.J., 17 years, accused of attempted murder and possession of dangerous weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

[t]herefore, from an essentially clinical perspective, I recommend to the court to make a decision on the basis of D.'s desire to feel in control of himself and his environment. Concretely, this implies that the court would acquiesce to D.'s desire of doing six months in Cité des Prairies plus two years of probation and one hundred twenty hours of community work. It is to be noted here, that D.'s wish is slightly immature but it appears to be the only opening that he is capable to give to himself and others, to do something about his sense of powerlessness.⁹⁰⁵

The court in fact endorsed this proposal; however, it substituted the suggested 120 hours of community service for 240 hours.⁹⁰⁶

Transfer rejected

The Montreal Youth Court rejected eight Crown's request for transferring six young people to the adult court in 1984 (Table 43). There are full reasons for the Montreal Youth Court rejecting the transfer of three people to the adult court; however, the reasons regarding the remaining three people are missing.

⁹⁰⁵ D.T., 18 years, accused of conspiracy, break and enter and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁰⁶ *Ibid.*

Table 43
Reasons for Rejecting a Transfer to the Adult Court,
Montreal Youth Court, 1984

Age	Transfer Rejected	Reasons
17	R.L. (1)	* remained in youth justice system despite unfavorable reports
	John Doe V (1)	n/a
	P.B. (1)	* best interest of society requires him staying within the youth justice system * young person's commitment to rehabilitation
	M.M. (1)	* Crown did not demonstrate that the interest of society demanded the transfer to adult courts
	John Doe XI (1)	n/a
18	John Doe III (3)	n/a
Total	6 (8)	

The first case is that of R.L., accused of armed robbery and receiving stolen goods. Two pre-sentencing reports were submitted and both were unfavourable. The first one highlighted R.L.'s need for adult support and rules if he wanted to develop the capabilities for observing social norms:

[i]l a besoin de support et d'encadrement pour se développer des capacités qui lui permettront de vivre en société. Laissé à lui-même il risque de rester stagnant de contentant du niveau atteint. Il a même besoin physiquement de l'adulte. R. a eu besoin constamment du support de l'adulte pour prendre soin de sa maladie (diabète) principale.⁹⁰⁷

⁹⁰⁷ R.L., 17 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

However, it is not clear whether the detention center recommended the Montreal Youth Court that R.L. remain within the youth justice system. The report suggested the court to take into consideration R.L.'s special circumstances, the consequences of his behaviour, and the protection of society:

Nous recommandons donc

- compte-tenu de peu de motivation du garçon,
 - compte-tenu de peu de réalisme qu'il y a à émettre une troisième ordonnance dans la même institution
- que la Cour prenne un position qui tienne surtout compte de la conséquence à l'acte qu'il convient d'établir et de la protection de la société qu'il convient d'assumer.⁹⁰⁸

The second report recommended the court that R.L. be transferred to the adult court. R.L. had exhausted all the available measures at the youth justice system and it was necessary that he understand that violent behaviour would not be tolerated:

Si R. n'a pas selon toute évidence profité de l'aide apportée jusqu'ici, il est essentiel qu'à ce moment-ci de sa vie il puisse percevoir que des passages à l'acte agressifs ne seront pas tolérés. Qu'il veuille plutôt continuer de parasiter son entourage est de sa responsabilité maintenant, mais pas les 'hold-up' comme il le dit lui-même.⁹⁰⁹

Despite these negative reports, the court rejected the transfer request and placed R.L. in close detention for two years. It seems that R.L.'s need for care and attention – mentioned in the first report – had an overriding effect on the court's decision.

The second case is that of P.B., accused of conspiracy, armed robbery, receiving stolen goods and possession of weapon. Similar to the previous case, there were two pre-sentencing reports.

⁹⁰⁸ *Ibid.*

⁹⁰⁹ *Ibid.*

One report was sceptical to P.B. remaining within the youth justice system. Many resources had been tried and P.B. was not responsive to the treatment that had been offered:

compte tenu de son âge et de l'échec de son placement de 18 mois au Mont St-Antoine, nous croyons qu'aucun placement dans un centre pour mineurs ne peut quoique ce soit pour sa réhabilitation.⁹¹⁰

The second report was a little more positive. Despite acknowledging that the risk of recidivism was high and that the possibilities of rehabilitation were little, the professional experts highlighted that the court had not tried every measure for assisting P.B. Moreover, because there were still material resources for assisting the young person (secured detention), the professional experts recommended that the Montreal Youth Court keep the P.B. within its jurisdiction:

le Tribunal de la jeunesse n'a pas épuisé totalement, à ce jour, les ressources disponibles pour un essai éventuel de réadaptation. Compte tenu des besoins de Pierre et des dangers que son comportement pourrait présenter pour la société, le psychologue est d'avis qu'une garde en milieu fermé dans un établissement sécuritaire du type de la Cité des Prairies aurait peut-être encore quelque chance de lui être utile.⁹¹¹

According to P.B.'s sentence, during his trial the professional expert who completed the first report (the professional expert who was sceptical to P.B. remaining within the youth justice system) changed her mind. She stated that P.B. should not be transferred to the adult court because the best interest of society could be achieved by keeping him within the youth justice system. Consequently, P.B. remained within the youth court as all the experts agreed that there were still resources available therein. The judge held that even if P.B. was uncooperative, the interest of society would be better served if he was offered the services available at the youth justice system:

⁹¹⁰ P.B., 17 years, accused of conspiracy, armed robbery, receiving stolen goods and possession of weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹¹¹ *Ibid.*

l'intérêt de la société, dans le cas de P.B., sera mieux servi par les mesures que peut offrir le système de justice mineur même en envisageant la pire des éventualités: sa non collaboration aux mesures de rééducation mises en place pour répondre à ses besoins spécifiques.⁹¹²

The last case is that of M.M., accused of conspiracy, armed robbery, attempted murder, and break and enter. The pre-sentencing report was contrary to M.M. being transferred to the adult courts and recommended that he be placed in a youth detention center. The report noted that M.M. could easily relate and adjust to the environment where he was, and his detention in an adult environment could transform him into an adult offender:

tous sont d'avis qu'il faut éviter d'envoyer M. dans une prison car l'observation démontre, depuis août 1983 que 'M. se façonne au milieu dans lequel il est. C'est le milieu qui est sa frontière. C'est le milieu qui va déterminer ce qu'il va devenir (plus ou moins criminel) plus on va le mettre dans un espace criminel (prison) plus il va devenir criminel.'⁹¹³

On the other hand the Crown argued that, based on M.M.'s previous offending and the severity of the alleged offences, the interest of society required that he be transferred to the adult court:

suite à l'échec retentissant du processus rééducatif en cours à l'époque, compte tenu de la preuve reliée tant à la gravité du crime qu'aux antécédents de M. que celle décrivant ses traits de caractère, que seule une ordonnance de renvoi devant la juridiction normalement compétente peut satisfaire l'intérêt de la société.

The court rejected the transfer request on the grounds that the Crown had not proven that the interest of society required in this particular case that M.M. be transferred to the adult court. There seems to have been a link between the possibility of rehabilitation within the youth justice system (or the impossibility of rehabilitation within the adult justice system as highlighted by the pre-sentencing report) and society's best interest. In other words, as long as there was a

⁹¹² *Ibid.*

⁹¹³ M.M., 17 years, accused of conspiracy, armed robbery, attempted murder, and break and enter; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

possibility of rehabilitation within the youth justice system, the interest of society required that the youth not be transferred to the adult court. Joyal argues that there was no agreement in the Quebec jurisprudence as to how to interpret (or balance) the young person's needs and the interest of society. Moreover, whereas some decisions argue that both interests should be treated equally, other decisions argue that these interests are strongly linked and it is not possible to achieve the interest of society without addressing the young person's needs:

en ce qui concerne le Québec, il semble bien que l'argument décisif qui fasse pencher la balance des tribunaux en faveur du renvoi soit l'absence de ressources appropriées dans le réseau juvénile dans le cas d'adolescents 'multi-récidivistes' ou sérieusement engagés dans la carrière criminelle.⁹¹⁴

Finally, in this case, professional expert's reports stating that the system had not exhausted all the rehabilitation treatment available within the youth justice system seemed to have trumped the severity of the alleged offence (attempted murder). This position seems to have been prevalent in Quebec: in *R. v. B. (N.)* the majority of the Quebec Court of Appeal held that "the transfer is not automatic even where the indictable offence charged is murder, even first degree murder, and even where the young person is almost 18 years of age."⁹¹⁵

Cases transferred to the adult court

The Montreal Youth Court transferred 46 cases to the adult court in 1984 and this represents 11 young people (Table 44). There were full reasons for deciding all the transfers but one case (G.D.).⁹¹⁶

⁹¹⁴ Renée Joyal, "Le renvoi de l'adolescent à la juridiction normalement compétente: évolution récente au Québec" (1989) 49:4 *Le revue du Barreau* 692 at 696.

⁹¹⁵ *R v B (N)*, 21 CCC (3d) 374 at para 14, 1985 CarswellQue 266 (CA).

⁹¹⁶ G.D., 17 years, accused of armed robbery, receiving stolen goods and possession of weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

Table 44**Reasons for Transferring Youths to the Adult Court,****Montreal Youth Court, 1984**

Age	Name	Reasons
17	S.T. (4)	* young person requested the transfer
	R.L. (4)	* young person requested the transfer * exhausted all resources within youth justice system
	G.D. (3)	n/a
	A.P. (11)	* exhausted all resources within youth justice system * new offences * previously deferred to adult courts
	C.G. (12)	* number of offences committed (27) * currently detained in an adult penitentiary * 18 years of age * exhausted all resources within youth justice system * young person requested the transfer * young person wanted to have access to the Criminal Code
	S.H. (5)	* 18 years of age * exhausted all resources within youth justice system
	A.D. (3)	* young person requested the transfer
	E.B. (1)	* young person requested the transfer * exhausted all resources within youth justice system * severity of the offence
	D.P. (1)	* young person requested the transfer * exhausted all resources within youth justice system * young person wanted to have access to the Criminal Code
18	L.P. (1)	* exhausted all resources within youth justice system * number of offences committed
20	D.L. (1)	* age
Total	11 (46)	

From a general approach, all young people transferred to the adult court were 17 years of age and older. From a particular approach, the reasons found in the decisions ordering the transfer of a young person to the adult court can be grouped into six categories: 1) all the resources within the youth justice system had been exhausted, 2) the young person requested the transfer, 3) number and/or kind of offence committed, 4) age of the young person, 5) previous contact with the adult justice system, 6) the young person wanted access to the Criminal Code.⁹¹⁷

All resources within the youth justice system being exhausted

As presented in Table 41, this ground was referred to seven times. Moreover, as previously mentioned, this was the main reason for a young person to be transferred to the adult court in 1978. The notion that “all the resources within the youth justice system had been exhausted” encompasses two series of inter-related reasons: 1) the inexistence of treatment within the youth justice system for the young person and 2) the young person’s lack of motivation for pursuing treatment:

il n’existe plus d’autre ressource dans le réseau jeunesse pour répondre aux besoins particuliers de R.L.⁹¹⁸

nombreux essais qu’on a fait pour le réhabiliter⁹¹⁹

il n’existe plus de moyen de traitement ou de réadaptation en milieu carcéral juvénile pour ce jeune.⁹²⁰

ce dernier [le jeune homme] ne profite aucunement de l’aide qui lui est apportée. Même depuis son transfert dans une autre unité, il ne fait que se conformer pour diminuer le plus possible les risques d’extension de séjour après ses 18 ans.⁹²¹

⁹¹⁷ Gauthier identified as grounds for a transfer decision the kind of offence committed, the existence of previous records (recidivism), prognosis and the age of the young person; *Gauthier, supra* note 89 at 43.

⁹¹⁸ R.L., 17 years, accused of break and enter, conspiracy, receiving stolen goods and mischief; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹¹⁹ A.P., 17 years, accused of conspiracy, armed robbery, receiving stolen goods and possession of firearm; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹²⁰ C.G., 17 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹²¹ S.H., 17 years, accused of possession of illegal drugs; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

les prémisses de rééducation possible chez cet adolescent sont presque inexistantes et le rejet par celui-ci de tout mesure d'aide, il est impossible pour réseau actuel chez les juvéniles de lui offrir des services.⁹²²

le réseau juvénile n'est plus en mesure de répondre au besoin d'encadrement du sujet.⁹²³

[s]i nous avons encore des réticences face au renvoi de l'adolescent devant la juridiction normalement compétente, sa dernière fugue nous démontre que ni l'aide qui lui est apportée, ni la menace du Tribunal ne peuvent avoir de prise sur lui et que par ailleurs nous ne pouvons accorder aucune crédibilité aux bonnes intentions qu'il manifeste.⁹²⁴

The young person requested the transfer

As mentioned in Chapter 5 the enactment of the *Young Offenders Act* (1982) regulated the procedure to follow when transferring a young person to the adult court.⁹²⁵ This statute clearly regulated who could request the transfer of a young person to the adult court: the young people and their legal counsels, and the Crown.

Young people generally requested to be transferred to the adult court because they perceived that they were treated like adults rather than “kids” and, as a result, given more liberties than those available at the youth detention centers. One of these liberties was allowing them to smoke. As well, some older youths had friends in the adult justice system, and they perceived the transfer as an opportunity to “spend” time with their friends.⁹²⁶ A decision transferring a young person to the adult court meant that if the young person was found guilty and sentenced to imprisonment, the young person would be placed in an adult detention center.

⁹²² E.B., 17 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹²³ D.P., 17 years, accused of armed robbery, receiving stolen goods and possession of weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹²⁴ L.P., 18 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹²⁵ *Young Offenders Act* (1982), *supra* note 5.

⁹²⁶ These reasons were explained to me while conducting research at the Quebec Court in Montreal, Youth Division.

In 1984 there were six cases where young people requested to be transferred to the adult court:

Ainsi il n'est pas intéressé du tout à envisager un retour au Centre d'accueil Cité-des-Prairies et préfère davantage connaître le monde adulte que de se retrouver dans un milieu qu'il connaît déjà et qui ne le lui apportera rien [système de justice mineur]⁹²⁷

[e]nfin, par la voix de son procureur, R. non seulement déclare ne pas avoir de preuve à offrir à l'encontre de cette preuve déjà déposée devant la Cour mais, exprime la volonté claire et bien identifiée d'être effectivement l'objet d'un renvoi à la juridiction normalement compétente, reconnaissant qu'il est devenu imperméable à toutes formes d'aide offertes par le réseau jeunesse.⁹²⁸

[c]e jeune désire que ses causes soient déferées devant les tribunaux ordinaires.⁹²⁹

[v]u le consentement de l'enfant et de son procureur pour le déféré; le Tribunal ordonne que le sujet soit déferé à la Cour des Sessions de la Paix en vertu de l'article 16 de la loi des jeunes contrevenants.⁹³⁰

[c]onsidérant le fait même qu'E.B. ne conteste pas la motion de renvoi et que M. B. nous indique qu'E.B. est d'accord avec cette motion de renvoi.⁹³¹

[c]onsidérant le désir du sujet.⁹³²

The number and sort of offence committed

The number and sort of offence committed were also factors to take into consideration when deciding a transfer; however, they were not a main factor in themselves. In other words, according to the data for 1984 the number and sort of offence committed could only have an impact on the decision to transfer a young person to the adult court as long as the professional experts' were of the opinion that all the resources within the youth justice system had been exhausted or that there were no material resources for dealing with the young person. As

⁹²⁷ S.T., 17 years, accused of conspiracy, armed robbery, receiving stolen goods and possession of weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹²⁸ R.L., 17 years, accused of break and enter, conspiracy, receiving stolen goods and mischief; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹²⁹ C.G., 17 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹³⁰ A.D., 17 years, accused of conspiracy, armed robbery, receiving stolen goods and mischief; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹³¹ E.B., 17 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹³² D.P., 17 years, accused of armed robbery, receiving stolen goods and possession of weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

presented in previous examples, as long as the professional experts were of the opinion that the young person was amenable to treatment, the number or the sort of offences committed did not have a relevant role when the Montreal Youth Court was deciding whether to transfer him to the adult court.

In 1984 there were four decisions where there was a reference to the number and sort of offence committed:

[c]onsidérant les nombreux nouveaux délits commis;⁹³³

[c]e jeune est accusé de 23 vols qualifiés, commis avec un pistolet d'air, dans des commerces tels de cinémas et postes d'essence, de deux effractions domiciliaires, et d'une présence illégale dans une maison d'habitation, en plus d'une évasion.⁹³⁴

[c]onsidérant la gravité objective du délit reproché,⁹³⁵

[e]n conséquence, nous considérons qu'il présente un danger élevé de récidive et dans l'intérêt de la société, croyons qu'il serait préférable qu'il réponde de ses actes devant un Tribunal adulte.⁹³⁶

The age of the young person

As mentioned above, a general observation of the 1984 data shows that only older youths were transferred to the adult court. Age as a specific reason for a decision ordering the transfer of the young person to adult courts was mentioned three times:

[d]epuis le xx xx xxxx, il a 18 ans.⁹³⁷

⁹³³ A.P., 17 years, accused of conspiracy, armed robbery, receiving stolen goods and possession of firearm; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹³⁴ C.G., 17 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹³⁵ E.B., 17 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹³⁶ L.P., 18 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

[n]ous suggérons que Sylvain demeure en C.A. jusqu'à sa majorité et qu'ensuite il s'assume totalement lui-même.⁹³⁸

[l]a Couronne informe le Tribunal que si la mère était présente ce jour, elle déclarait que l'enfant est né le xx-xx-xx.⁹³⁹

Previous contact with the adult justice system

Similar to 1978, if the young person had been in contact with the adult justice system, a favourable prognosis may not have been sufficient for keeping the young person within the youth justice system. The notion of “previous contact with the adult justice system” refers to the young person having been transferred to the adult court on a previous offence or the young person having been detained in an adult detention facility. The latter specifically refers to a young person transferred to the adult court and found guilty of the alleged offence therein.

In 1984, a previous contact with the adult justice system was mentioned twice as a reason for transferring the young person to the adult court:

[c]onsidérant qu'il a déjà été déféré le 27 septembre 1983.⁹⁴⁰
[i]l purge actuellement une sentence de 3 ans pour des délits similaires commis dans la région de Toronto, et arrive devant la Cour du pénitencier à Collins Bay.⁹⁴¹

⁹³⁷ C.G., 17 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003). The date of birth has been truncated for avoiding any possibility of identification.

⁹³⁸ S.H., 17 years, accused of possession of illegal drugs; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹³⁹ D.L., 20 years, accused of conspiracy; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003). The date of birth has been truncated for avoiding any possibility of identification.

⁹⁴⁰ A.P., 17 years, accused of conspiracy, armed robbery, receiving stolen goods and possession of firearm; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁴¹ C.G., 17 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

The young person wanted access to the *Criminal Code*

Some young people requested being transferred to the adult court because, if convicted in the adult court, they would spend less time in detention than if convicted in the youth court. Because the main concern of the youth justice system was the rehabilitation of the young person rather than his punishment, a youth court sentence could be longer than an adult court sentence as the former was focused on the time that was required for implementing an effective measure. On the other hand, the adult court sentence was focused on inflicting a punishment proportional to the circumstances of the offence. However, young people detained in the adult justice system may qualify for early parole under certain circumstances. Consequently, some young people perceived being sentence within the youth justice system as being more onerous than being sentenced within the adult justice system based on their own personal circumstances. Most of the time these young people needed intensive rehabilitation treatment that required them to be detained many years in youth detention centers.

In 1984 two decisions made reference to young people who wanted to be dealt with the *Criminal Code* rather than the *Juvenile Delinquents Act* (1908) or *Young Offenders Act* (1982) as in force in 1984:

[I]a première chose que D. nous a dit au début de l'entrevue ça été : « moi, j'aime autant être déféré – si je ne suis pas déféré, j'vais à Cité un an ou 18 mois, si je vais l'autre bord, j'vais faire 4 ou 6 mois – moi j'ai une chance aux Sessions. J'ai appelé ben des avocats, ils m'ont dit que c'était le plus de temps que je peux pogner si je suis déféré. » Donc, il n'est pas question pour le sujet de retourner à Cité, d'ailleurs « si je retourne là, j'vais chrisser mon camps de Cité » nous prévient-il.⁹⁴²

[i]l est opportune de fournir à ce jeune les moyens de protection accrus qui lui seraient disponibles sous le Code Criminel. [plaidoyer signée par l'avocat du C.G.]⁹⁴³

⁹⁴² D.P., 17 years, accused of armed robbery, receiving stolen goods and possession of weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁴³ C.G., 17 years, accused of armed robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

10.6. Year 1992⁹⁴⁴

In 1989 the Supreme Court of Canada decided *R. v. M. (S.H.)* and *R. v. L. (J.E.)*, which had an impact on the judicial understanding of the burden for transferring a young person to the adult court.⁹⁴⁵ According to the majority of the Court, the test for transferring a young person to adult courts was not a “heavy” standard to meet. The fact that the Court mentioned that the burden should not be regarded as a “heavy” one has been criticized by Bala, who notes that this decision may have made easier for the Crown to transfer young people to the adult court:

[i]f there is one aspect of *M (SH)* which should make it easier for the Crown to obtain transfer orders, it is this rejection of the use of terms like “heavy onus”. However, the impact of this aspect of the judgment may be limited, as the Supreme Court decisions seems to rest more on the premise that it is not helpful to add gloss to the words of Parliament.⁹⁴⁶

The Supreme Court of Canada held that section 16 of the *Young Offenders Act* (1982) did not confine the transfer of a young person to the adult court to exceptional cases; in fact, the transfer should appear to the court as the right or proper solution. The question was whether the judge was satisfied, after weighing and balancing all the factors enumerated in section 16 and the principles enumerated in section 3 of the *Young Offenders Act* (1982), that the case should be transferred to ordinary courts (Chapter 5). The problem with this decision, as Bala highlights, is that the Supreme Court of Canada failed to provide guidelines as to how the “interest of society” and the “young person’s needs” should be interpreted given the different formulations about how to interpret them by provincial jurisdictions.⁹⁴⁷

⁹⁴⁴ In 1988 the name of the Court was modified from the Montreal Youth court to the Quebec Court in Montreal, Youth Division. This is the current name of the Court.

⁹⁴⁵ *R v M (SH)*, [1989] 2 SCR 446; *R v L (JE)*, [1989] 2 SCR 510, McLachlin J. This was an appeal from a judgment of the Alberta Court of Appeal.

⁹⁴⁶ Nicholas Bala, “*M. (S.H.) and L. (J.E.): The Supreme Court Fails to Resolve the Transfer Controversy*” (1989) 71 *Criminal Reports* (3d) 320 at 321.

⁹⁴⁷ *Ibid.*

There was a minority dissenting vote in *R. v. M. (S.H.)* and *R. v. L. (J.E.)*: in view of the history, purpose and basic philosophy of the legislation, a young person could only be transferred to the adult court in exceptional cases. Moreover, a transfer would only apply if the transfer presented itself to the Youth Court judge's mind as the only appropriate solution. The burden was on the applicant to persuade the Youth Court that "no other solution" other than the transfer was appropriate in the circumstances of the particular case – rather than the transfer being the "right or proper solution" for the specific case, as the majority proposed.⁹⁴⁸

The *Young Offenders Act* (1982) was amended in 1992, expressly stressing that the "protection of society" was the paramount objective of the youth justice system.⁹⁴⁹ This amendment modified the test to apply when deciding a transfer to adult courts by introducing a two-part test. At the first stage of the test the youth court judge had to consider "the interest of society", which included the objectives of "protection of the public" and "rehabilitation of the offender."⁹⁵⁰ The youth court judge had to assess whether both objectives could be reconciled by keeping the young person within the youth court. At the second stage of the test, if both objectives could not be reconciled, the youth court had to give priority to the "protection of society" and transfer the young person to the adult court if the "protection of society" so mandated. The *1992 Amendment* also substituted the notion of "the needs of the young offender" for the notion of "the rehabilitation of the young offender". It seems that Parliament attempted to limit the interpretation of the phrase "needs of young offenders" to the young offenders' effective rehabilitation:

⁹⁴⁸ *R v M (SH)*, [1989] 2 SCR 446; *R v L (JE)*, [1989] 2 SCR 510, L'Heureux-Dubé.

⁹⁴⁹ *An Act to amend the Young Offenders Act and the Criminal Code*, SC 1992, c 11, s 2.

⁹⁵⁰ Christianne Dubreuil & Claudyne Bienvenu, "Le transfert du jeune contrevenant devant les tribunaux pour adultes: qu'en est il de l'intérêt et des besoins de l'adolescent?" (1994) 26 *Ottawa L Rev* 285.

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. [emphasis added]

According to the data collected, in 1992 there were 250 cases of female criminal offending, 2560 cases of male criminal offending, and 64 cases where the young person's gender was not recorded (Table 45).

Table 45
Gender,
Montreal Youth Court, 1992

Gender	Number
Females	250
Males	2560
N/A	64
Total	2874

In 1992, compared to 1984, the Montreal Youth Court intervened in slightly more cases where the offence was deemed to be a serious offence. One female young person was charged with attempted murder, one male young person was charged with first degree murder, six male young

people were charged with second degree murder, and 13 male young people were charged with attempted murder (Tables 46 and 47 respectively).

Table 46
Most Serious Offences Committed by Females,
Montreal Youth Court, 1992

Offence	Number
First Degree Murder	0
Second Degree Murder	0
Manslaughter	0
Attempted Murder	1
Aggravated Sexual Assault	0
Other Offences	249
Total	250

Table 47
Most Serious Offences Committed by Males,
Montreal Youth Court, 1992

Offence	Number
First Degree Murder	1
Second Degree Murder	6
Manslaughter	0
Attempted Murder	13
Aggravated Sexual Assault	0
Other Offences	2532
Total	2560

In 1992 there were 15 decisions in which the Montreal Youth Court decided to transfer a young person to the adult court. By 1992 the method of the court for recording transfer related

decisions was modified: there were no stated reasons for the Crown desisting from transferring a young person or for the judge rejecting the Crown's request for a transfer to the adult court. Consequently, I only present and discuss decisions where a young person was effectively transferred to the adult court.

These 15 decisions ordering the transfer of a young person to the adult court represent seven male young offenders (Table 48).

Table 48

**Reasons for Transferring Young People to the Adult Court,
Montreal Youth Court, 1992**

Age	Name	Reasons
15	A.A. (7)	* exhausted all resources within youth justice system * only treatment available within adult courts * severity of the offences and previous offending * membership to a gang * risk to other young people detained if placed in youth detention * impact of the 1992 amendment for evaluating factors for deciding a transfer
16	F.B. (1)	* severity of the offences and previous offending * exhausted all resources within youth justice system
17	C.B. (2)	* exhausted all resources within youth justice system * previously detained in an adult prison * young person requested the transfer * the young person wanted access to the Criminal Code
	A.L. (1)	n/a
	Y.H. (2)	n/a
	M.C. (1)	* exhausted all resources within youth justice system * impact of the 1992 amendment for evaluating factors for deciding a transfer * severity of the offence and previous offending * risk to other young people detained if placed in youth detention
18	A.C. (1)	* severity of the offence and previous offending * age * exhausted all resources within the youth justice system * impact of the 1992 amendment for evaluating factors for deciding a transfer * currently detained in an adult penitentiary
Total	7 (15)	

Seven young people were transferred to the adult court in 1992; unfortunately, the reasons for transferring two young people to the adult court were missing. So, because of the small number of cases and for the scope of clarity, each young person's decision is presented individually.

The reasons provided in 1992 for transferring a young person to adult courts are similar to the reasons provided in 1984: 1) all the resources within the youth justice system had been exhausted, 2) the young person requested the transfer, 3) number and sort of offence committed, 4) age of the young person, 5) previous contact with the adult justice system, and 6) the young person wanted access to the *Criminal Code*. On the other hand, some new reasons were also considered: 7) the only treatment available was within the adult court, 8) membership to a gang, 9) risk to other young people detained if young person placed in youth detention, and 10) impact of the 1992 amendment for evaluating factors for deciding a transfer.

The first case is that of A.A., 15 years of age, accused of escaping from lawful detention.⁹⁵¹ According to the records in file, A.A. had extensive criminal records in which violent behaviour was predominant, including attempted murder. According to the Montreal Youth Court, the circumstances surrounding the last offence for which A.A. was charged demonstrated a high disregard for the life and security of fellow individuals:

[c]ertains de délits qui font l'objet du renvoi comptent parmi les plus graves du Code criminel. Le complot et la tentative de meurtre sont des crimes passibles de l'emprisonnement à perpétuité. Les circonstances entourant ce dernier délit sont particulièrement répugnantes et notent, si la preuve au procès venait à les confirmer, le peu de cas de la part de l'intimé pour la vie et la sécurité d'autrui. L'intimé a des antécédents judiciaires dont certains marqués de violence.⁹⁵²

⁹⁵¹ A.A., 15 years, accused of escaping from lawful detention; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁵² *Ibid.*

In addition to this, A.A. was a member of a gang, and this was perceived to contribute to his violent behaviour:

il fréquente un milieu fortement criminalisé et des indices sérieux démontrent son appartenance à une bande (« Thirteen Crew ») marquée par la brutalité et la violence.⁹⁵³

While previous reports noted that A.A. could still benefit from the rehabilitation programs available within the youth court, this perception changed after he committed his last offence. The professional experts were of the opinion that A.A. had exhausted all resources within the youth justice system and the only way of addressing his offending was through treatment only available within the adult justice system:

[s]ans aucune capacité d'introspection, l'intimée ne perçoit chez lui aucune agressivité ni violence. Aussi ne voit-il aucune raison pour amorcer un changement. Une telle structure de personnalité présente un danger pour la société, qui ira augmentant au fil des ans. C'est donc à cette structure qu'il faut s'attaquer si l'on veut éliminer cette dangerosité ou du moins la réduire. Pour ce faire, le psychiatre prescrit une thérapie où doivent alterner périodes d'incarcération et de traitement, la première destinée à faire naître la motivation sans laquelle la thérapie proprement dite serait futile. Cette mesure, la seule convenable, est inapplicable à l'intérieur du réseau juvénile. Le témoin écrit: « the only way his level of dangerousness could decrease is through a treatment program designed according to the guidelines described above and to my knowledge, no such program is currently available in the juvenile justice system. Furthermore, the duration of such rehabilitation intervention in order to be effective may have to extend beyond three years. »⁹⁵⁴

Furthermore, A.A.'s detention within a youth detention center could jeopardize the effective rehabilitation of other young people. In other words, the fact that A.A. remained within the youth justice system could risk the performance of the programs. Because of this, his transfer to the adult court was required:

⁹⁵³ *Ibid.*

⁹⁵⁴ *Ibid.*

[e]n résumé, le psychiatre est d'avis que le réseau institutionnel juvénile n'est pas en mesure de réhabiliter l'intimé qui, étant donné la structure de sa personnalité, représente un danger pour la société. Au surplus, il constituerait une entrave pour la réhabilitation des autres adolescents s'il devait être gardé dans un centre de réadaptation pour jeunes.⁹⁵⁵

All these factors strongly influenced the Montreal Youth Court to transfer A.A. to the adult court. As mentioned above, the *1992 Amendment to the Young Offenders Act* (1982) introduced a two-part test according to which if the rehabilitation of the young person and the protection of society were incompatible, the court had to give priority to the protection of society. According to the facts of this case, as presented by the court, the *Young Offenders Act* (1982) required the court to transfer A.A. to the adult court for the protection of society:

[l]e législateur utilise maintenant l'expression « la réinsertion sociale de l'adolescent » là où il parlait de ses « besoins ». Non pas que le législateur ait voulu ainsi que l'on ne tienne plus compte des besoins de l'adolescent mais a voulu plutôt en préciser la nature. Enfin, importe un coup de barre à droite, la protection du public devient prioritaire quand auparavant, l'intérêt de l'adolescent était un objectif d'importance légale.⁹⁵⁶

Worth noting, the amendment to the *Young Offenders Act* (1982) did not modify the reasoning of the Montreal Youth Court regarding a transfer decision. As presented above regarding the years 1978 and 1984, the Montreal Youth Court put a strong emphasis on the rehabilitation of the young person. If the professional experts were of the opinion that the young person was still susceptible to rehabilitation, the court would keep the young person within the youth justice system because this was understood to be the best measure for the protection of society. On the other hand, if the professional experts were of the opinion that the young person was not susceptible of rehabilitation, a transfer decision would be ordered most of the time. The *1992 Amendment* made youth court judges balance the possibility of rehabilitation and the protection

⁹⁵⁵ *Ibid.*

⁹⁵⁶ *Ibid.*

of the public, and if there was a conflict between both interests, the protection of the public prevailed. However, because of the dynamics of the Montreal Youth Court, if there was a possibility of rehabilitation according to the professional experts, the court would understand that it was on the best interest of society (including the protection of the public) that this chance of rehabilitation be pursued. So, in practice, the *1992 Amendment* required judges to follow a statutory procedure that was already a customary practice within the Montreal Youth Court.

The second case is that of F.B., 16 years of age, accused of robbery and receiving stolen goods.⁹⁵⁷ Similar to previous cases, F.B. had committed several offences that were characterized as highly disregarding the welfare of his victims:

[m]algré ses 16 ½ ans, F. est un multirécidiviste et un délinquant persistant grave. Les vols qualifiés qu'il commet démontrent clairement qu'il s'agit d'un adolescent dangereux. Sa conscience morale est douteuse et il ne présente aucun sentiment de culpabilité (« Je ne suis pas capable d'avoir de remords. Je n'aurais jamais de remords pour les vols qualifiés que j'ai faits »). Il n'éprouve aucune empathie envers les victimes et il leur manifeste même une indifférence affective.⁹⁵⁸

Based on his history of offending and the failure of previous rehabilitation treatments, the professional experts gave F.B. a negative prognosis. In fact, according to them, F.B. had exhausted all the resources within the youth justice system:

F. n'en était pas à sa première évasion. En juin 1991, il s'évadait du Centre Cartier en se livrant à des voies de fait sur le personnel. Il nous apparaît donc pertinent de se demander si les institutions du réseau juvénile sont en mesure de le réadapter, de le garder et de protéger par le fait même de la société.

Compte tenu de sa personnalité délinquante, de ses antécédents judiciaires, des mesures d'aide qui lui ont été offertes dans le passé et qui se sont soldées par des échecs, les chances qu'un programme de réadaptation puissent fonctionner s'avèrent très limitées.⁹⁵⁹

⁹⁵⁷ F.B., 16 years, accused of robbery and receiving stolen goods; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁵⁸ *Ibid.*

⁹⁵⁹ *Ibid.*

As a result, the Court transferred F.B. to the adult court.

The third case is that of C.B., 17 years of age, accused of obstruction of justice.⁹⁶⁰ C.B. did not want to stay within the youth justice system. In fact, he mentioned that if he was not transferred to the adult court, he would soon escape from the youth detention center:

C. trouve difficile d'être incarcéré dans le secteur des adolescents et il aimerait mieux être avec des adultes. Il considère que les conditions de détention sont plus sévères que celles qu'il a connues à Parthenais et à Bordeaux. Les lieux son exigus et il ne partage son secteur qu'avec un seul autre adolescent.

C. ne veut absolument pas revenir en centre de réadaptation pour jeunes contrevenants. Il nous mentionnait que, si le tribunal devait rejeter la requête de renvoi, il s'évaderait de l'institution à la première occasion. Il se considère plus mature que les autres adolescents des centres de réadaptation avec qui il estime avoir peu d'affinités. Il ne veut pas non plus recevoir l'aide des éducateurs et il est d'avis qu'il n'a pas besoin d'eux pour s'en sortir.⁹⁶¹

C.B. had already been detained in adult centers before and was familiar with the life within an adult prison. As presented above, this was perceived by the court as a factor for deciding to transfer him to the adult court:

C. n'en est pas à sa première expérience en milieu de détention pour adultes. Il a déjà été incarcéré au Centre Parthenais et à la prison de Bordeaux pour de courtes périodes en 1991-92. [...] C. connaît donc assez bien le régime de vie appliqué en milieu carcéral. Il a bien assimilé le jargon des prisons et il a appris un certain code de vie que partage les détenus. C. se sent relativement à l'aise dans une prison. Il ne vit aucun effet intimidant du fait qu'il soit dans une prison plutôt que dans un centre d'accueil.⁹⁶²

In addition to this, C.B. wanted to be transferred to the adult court for having access to the *Criminal Code* and the possibility of shortening his sentence through the possibility of parole:

⁹⁶⁰ C.B., 17 years, accused of obstructing justice; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁶¹ *Ibid.*

⁹⁶² *Ibid.*

[l]a gravité des infractions reprochées à C. ne justifie pas, selon nous, un renvoi à la juridiction normalement compétente. Cette demande de renvoi est l'initiative de l'adolescent et en la présentant, il n'a qu'un seul objectif, soit de pouvoir bénéficier de la Loi sur les libérations conditionnelles et de se soustraire à une mesure de la Chambre de la jeunesse.⁹⁶³

The professional experts, taking all these circumstances into consideration, provided the court with a negative prognosis regarding C.B.'s possibilities of rehabilitation. In fact, due to his explicit desire of being transferred to the adult court, the professional experts found impossible to work with him. Consequently, the professional experts considered that they had exhausted all the resources available within the youth justice system for C.B.'s rehabilitation:

[c]ompte tenu des constats soulignés dans le rapport, quant aux antécédents de C., quant aux ressources utilisées et boycottées de plus en plus par C., quant aux choix de vie que fait C., aux modèles d'identification et au milieu d'appartenance valorisés, et surtout du refus très clair de C. à être « aidé » par des intervenants du milieu juvénile, nous nourrissons peu d'espoir de réussite d'une contribution additionnelle du milieu juvénile.⁹⁶⁴

The fourth case is that of M.C., 17 years of age, accused of three counts of first degree murder and one count of attempted murder.⁹⁶⁵ According to the records in file, M.C. had extensive criminal records where violent behaviour was predominant.⁹⁶⁶ As stated in the records, the problem was that his level of violence had escalated, evidence of which were the circumstances surrounding M.C.'s latest charge:

[s]onnerie à la porte, échange de propos, quelqu'un va ouvrir, insouciant qu'il ouvre la porte aux meurtriers. Quelques instants plus tard, sur l'ordre des visiteurs, les quatre victimes se couchent face contre terre. Elles sont froidement exécutées de projectiles à la tête et dans le dos, une après l'autre. Il s'agit de crimes crapuleux, d'une violence inouïe, commis de sang-froid, d'une manière professionnelle. Trois types d'armes sophistiquées sont utilisées (un 9 millimètres, un 357 magnum

⁹⁶³ *Ibid.*

⁹⁶⁴ *Ibid.*

⁹⁶⁵ M.C., 17 years, accused of first degree murder and attempted murder; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁶⁶ *Ibid.*

et un calibre 22). Tout laisse croire à un règlement de comptes, à une opération préméditée plus ou moins reliée à une histoire de stupéfiants.⁹⁶⁷

While the severity of the offence was one of the factors to assess when deciding whether to transfer M.C. to the adult court, the court clearly stated that a very serious offence such as first degree murder was not in itself a sufficient reason for deciding a transfer to the adult court:

[m]ême pour des meurtres au premier degré, même dans une situation où un adolescent est devenu adulte au cours de l'audition de la demande de renvoi à son égard, il n'existe aucun automatisme.⁹⁶⁸

According to the court, the reports submitted by the professional experts attested that M.C. had already benefited from many rehabilitation treatments and nothing had worked. In fact, all the resources available within the youth justice system had been exhausted:

[e]n plus, il a été le sujet de nombreuses mesures de la Loi sur les jeunes contrevenants dont la mise sous garde fermée et mise sous garde ouverte. M. a tout connu et tout expérimenté des mesures d'aide prévues par la Loi sur les jeunes contrevenants afin de répondre à ses besoins spéciaux et assurer la protection de la société. Tous ces efforts ont donné de bien pauvres résultats.⁹⁶⁹

In addition to the lack of rehabilitative programs within the youth justice system, the professional experts considered that M.C.'s placement within a youth detention centered would endanger the effective rehabilitation of other young people (risk to the performance of the programs):

M. représente maintenant un danger même pour les autres jeunes contrevenants (caïdâge, influence négative). Tous les facteurs objectifs militent en faveur de son renvoi.⁹⁷⁰

⁹⁶⁷ *Ibid.*

⁹⁶⁸ *Ibid.*

⁹⁶⁹ *Ibid* [emphasis on the original].

⁹⁷⁰ *Ibid.*

Finally, M.C. was deemed to be dangerous and according to the court the protection of the public required M.C. to be transferred to the adult court. Consequently, taking into consideration the *1992 Amendment*, the court held that as M.C.'s rehabilitation and the protection of the public could not be reconciled, the protection of society was paramount. As a result, M.C. was transferred to adult courts:

M.C. est assurément un jeune homme de qui le public doit être protégé et c'est là l'élément qui l'emporte sur tous les autres. L'intérêt de la société, même dans une perspective à long terme, ne saurait être assuré par le maintien de cet adolescent dans le système juvénile. La protection du public et la réinsertion sociale de cet adolescent apparaissent totalement irréconciliables si M. est maintenu sous la juridiction de la Loi sur les jeunes contrevenants.

...

[s]elon le nouveau critère de l'article 16(1.1), le Tribunal pour adolescents doit donner préséance à la protection du public si les objectifs de la protection du public et de la réinsertion sociale de l'adolescent ne peuvent être conciliés en maintenant l'adolescent sous sa compétence.⁹⁷¹

The last case is that of A.C., 18 years of age, accused of first degree murder.⁹⁷² Similar to the previous case, A.C. was a recidivist young offender who was at that time detained in an adult detention facility:

[t]el que nous le signalions plus haut, deux mois à peine après sa sortie du centre d'accueil La Cité des Prairies, c'est-à-dire en décembre 1991, le jeune A.C. récidive dans des crimes très graves qui l'ont amené à purger une sentence de trente mois à la prison adulte...⁹⁷³

By the time the transfer to the adult court was decided, A.C. was already 19 years of age:

A.C. a maintenant 19 ans depuis le 19 mai dernier. Il est donc majeur depuis le 19 mai 1991.⁹⁷⁴

⁹⁷¹ *Ibid.*

⁹⁷² A.C., 18 years, accused of first degree; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003). This offence was committed in 1990, but it was not until 1992 that his transfer was decided. Because of this, while the decision ordering the transfer to adult courts was recorded for 1992, the offence of first degree murder belongs to the year 1990. Consequently, there is only one person accused of first degree murder for the year 1992 as presented in Table 49, and this is the case of M.C. (previous discussion).

⁹⁷³ *Ibid.*

⁹⁷⁴ *Ibid* [emphasis on the original].

According to the decision ordering A.C.'s transfer to the adult court, the professional experts were in favour of transferring him to the adult court. Despite several rehabilitation attempts, nothing worked. Consequently, the youth justice system was deemed to have exhausted all the measures available:

[e]n résumé, nous avons dans un premier temps les centres de jeunesse Shawbridge qui déclare avoir épuisé toutes formes d'aides qui pouvaient être apportées à A.C., et ce, dès décembre 1990, ce qui a amené le transfert du jeune au centre d'accueil La Cité des Prairies. Puis, en mars 1991, l'évaluation psychiatrique du Docteur C.N. est tout aussi pessimiste quant à l'avenir d'A.C. Le centre d'accueil La Cité des Prairies, qui accueille le jeune homme de décembre 1990 à septembre 1991, l'est tout autant. Enfin, le dernier rapport prédécisionnel, soumis pour la présente demande de renvoi et signé par madame C.D. en date du 6 mai 1992, est tout aussi pessimiste quant à l'avenir du jeune A.C. et suggère un transfert de ce jeune à la Cour criminelle adulte.⁹⁷⁵

Finally, the Montreal Youth Court referred to the *1992 Amendment* for deciding the transfer. As stated above, the test to apply was whether the rehabilitation of the young person and the protection of the public could be reconciled. If this was not possible, the latter would prevail:

[à] tout événement, dans le dossier qui nous occupe, nous le répétons, tout milite en faveur du renvoi. Nous n'avons même pas à nous demander si nous devons accorder priorité à la protection du public car tous les moyens de réhabilitation ont été épuisés dans le système juvénile et qu'ainsi, l'intérêt même à long terme de la société ne saurait être servi par le maintien du jeune homme dans le système juvénile. Et si tant est que la réinsertion sociale de l'adolescent pourrait être possible par une rééducation dans le système juvénile, ce que nous nions, l'intérêt de la société, notamment sa protection, commanderait le renvoi.⁹⁷⁶

In conclusion, while the *1992 Amendment* had an impact on the transfer decision, this impact can be considered as low. The *1992 Amendment* reinforced the procedure that the Montreal Youth Court had been observing for many years. Moreover, it did not modify the approach of the court for evaluating which factors should be taken into consideration when transferring a young person. For instance, while in 1992 a woman was accused of attempted murder, she was not

⁹⁷⁵ *Ibid.*

⁹⁷⁶ *Ibid.*

transferred to the adult court (Table 46). This means that the severity of the offence was one factor to consider for deciding a transfer, but not a determinative factor. The strongest factor was whether professional experts were of the opinion that the young person was susceptible of rehabilitation. This approach is confirmed by the interviews conducted by Roy with judges of the Montreal Youth Court in 2003 with regard to the impact of the 1992 *Amendment* on the transfer of young offenders to the adult court:

L'espoir de réhabilitation demeure quand même le critère. Le critère c'est 'est-ce que le jeune est capable de se réhabiliter dans le réseau qui a été mis en place pour les moins de dix-huit ans? Cela demeurera toujours le critère.⁹⁷⁷

The Supreme Court of Canada also confirmed the relevance of rehabilitating young people for the long term protection of society in 1993:

[t]he aim must be both to protect society and at the same time to provide the young offender with the necessary guidance and assistance that he or she may not be getting at home. Those goals are not necessarily mutually exclusive. In the long run, society is best protected by the reformation and rehabilitation of a young offender. In turn, the young offenders are best served when they are provided with the necessary guidance and assistance to enable them to learn the skills required to become fully integrated, useful members of society.⁹⁷⁸

10.7. Year 1995

The second and most punitive amendment to the *Young Offenders Act* (1982) came into force in 1995. This amendment introduced two major changes to the philosophy of the *Young Offenders Act* (1982). First, the “protection of society” became the primary principle of the statute and “crime prevention” became a valid principle of the *Young Offenders Act* (1982). Second, this

⁹⁷⁷ Roy, *supra* note 96 at 92.

⁹⁷⁸ *R v M (JJ)*, [1993] 2 SCR 421 at 16. This decision has been highly criticized because the Supreme Court also held that deterrence was a valid principle when sentencing young offenders – yet not as important as rehabilitation; Nicholas Bala, “*R. v. M. (J.J.): The Rehabilitative ideal for young offenders – back to the past?*” (1993) 20 CR (4d) 308. Regarding this point, the Quebec Court of Appeal had already accepted deterrence as a valid principle when sentencing young offenders by the time this decision was adopted: *R v L(S)*, 75 CR (3d) 94 (Que Ca).

amendment substantially modified the regulation of the transfer of young people to the adult court by introducing a reverse onus provision: young people 16 or 17 years of age at the time of the alleged commission of certain serious offences had to demonstrate why they should face trial in the youth court rather than in the adult court. In other words, rather than the youth court having to determine whether a young person should be proceeded against in the adult court, the young person was required to make an application for being proceeded against in the youth courts.

In 1995 there were 252 cases of female delinquency, 2,572 cases of male delinquency, and 32 cases in which the gender of the young person was not recorded (Table 48).

Table 48**Gender,****Montreal Youth Court, 1995**

Gender	Number
Females	252
Males	2,572
N/A	32
Total	2,856

In 1995 the Montreal Youth Court intervened in very few cases where the offence was deemed to be a serious offence: there was one charge of attempted murder involving one female youth, and two charges of first degree murder and eight charges of attempted murder involving two and eight male youths, respective (Tables 49 and 50, respectively).

Table 49**Most Serious Offences Committed by Females,****Montreal Youth Court, 1995**

Offence	Number
First Degree Murder	0
Second Degree Murder	0
Manslaughter	0
Attempted Murder	1
Aggravated Sexual Assault	0
Other Offences	251
Total	252

Table 50

**Most Serious Offences Committed by Males,
Montreal Youth Court, 1995**

Offence	Number
First Degree Murder	2
Second Degree Murder	0
Manslaughter	0
Attempted Murder	8
Aggravated Sexual Assault	0
Other Offences	2,562
Total	2,572

There were 16 decisions in 1995 where the Court decided to transfer a young person to adult courts. These 16 decisions represent eight male young offenders (Table 51).

Table 51

**Reasons for Transferring Young People to Adult Courts,
Male Young Offenders,
Montreal Youth Court, 1995**

Age	Name	Reasons
17	M.S.C. (1)	* young person and Crown requested the transfer * age * severity of the offence and previous offending * exhausted all resources within the youth justice system
	S.B. (1)	* young person requested the transfer
	M.D. (2)	* severity of the offence and previous offending * exhausted all resources within the youth justice system * membership to a gang * impact of the 1992 Amendment
	T.A. (1)	* young person requested the transfer * age * exhausted all resources within the youth justice system * severity of the offence and previous offending
18	G.B. (2)	* young person consented the transfer
	F.M. (6)	* risk to other young people detained if placed in youth detention * exhausted all resources within the youth justice system * severity of the offence and previous offending * age * the young person consented the transfer
	W.S.E. (1)	* risk to other young people detained if placed in youth detention * exhausted all resources within the youth justice system * age * membership to a gang * severity of the offence and previous offending
	R.B. (2)	* exhausted all resources within the youth justice system * impact of the 1992 Amendment
Total	8 (16)	

In 1995 eight young people were transferred to adult courts and all the reasons for those transfers are available. Because of this, the analysis is centered on the reasons provided by the Montreal Youth Court rather than on each individual decision.

With regard to the reasons provided for transferring a young person to the adult court, in all the transfers decided for cases originated in 1995 there appears 1) the young person's request or consent to the transfer, and/or 2) the Court's recognition that all the measures available within the youth justice system had been exhausted. The reasons provided in 1995 for transferring a young person to adult court are similar to the reasons provided in 1984 and 1992: 1) all the resources within the youth justice system had been exhausted, 2) the young person requested the transfer, 3) number and/or kind of offence committed, 4) age of the young person, 5) membership to a gang, 6) risk to other young people detained if young person placed in youth detention, and 7) impact of the 1992 Amendment.

All resources within the youth justice system being exhausted

This ground was referred to six times in 1995 and includes 1) the lack of rehabilitative treatment for a young person within the youth justice system and 2) the young person's lack of motivation for pursuing a rehabilitative treatment. Similar to 1984, this was the main reason for transferring a young person to the adult court according to the reasoning of the court:

[c]onsidérant qu'aucune des nombreuses mesures dont il a bénéficié devant cette Cour n'a pu convaincre l'adolescent de mettre fin à ses comportements délinquants [...] Considérant que l'adolescent refuse toutes nouvelles mesures que pourrait ordonner la Chambre de la jeunesse à son égard et qu'il réitère son désir de se soumettre à la juridiction criminelle adulte.⁹⁷⁹

⁹⁷⁹ M.S.C., 17 years, accused of possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

[l]e rapport d'évolution obtenu du Centre la Cité de Prairies constitue le bilan de séjour de M. dans cet établissement depuis deux ans. Le fait saillant de ce rapport est la faible progression de l'adolescent malgré un plan d'intervention qui nous semblait particulièrement bien adapté à sa situation et à ses besoins. M. stagne, il se conforme aux exigences de base, mais il n'est pas ouvert à la relation d'aide, il n'établit pas de contact significatif avec le personnel des éducateurs.⁹⁸⁰

[b]ecause the previous attempts of rehabilitation in the juvenile system have failed [...] Because of his refusal to engage in rehabilitation programs within the juvenile network...⁹⁸¹

[n]ous avons de plus considéré que le pronostic de réadaptation est très faible.⁹⁸²

[i]l nous apparaît difficile de croire que W.S.E. mettra fin à son agir délictuel d'autant plus que son mode de pensée actuel est plutôt basé sur la méfiance vis-à-vis à peu près tout le monde; ça nous laisse perplexe quant à l'avenir.⁹⁸³

[l]e réseau des institutions pour jeunes contrevenants ne peut plus rien lui offrir et, en ce sens, nos ressource d'aide son épuisées. [...] L'aspect d'insécurité qui résulte des explosions de violence que manifeste Réginald ainsi que les difficultés pour le milieu de réadaptation des mineurs de contourner ou de faire baisser ses résistances avaient amené le Comité de renvoi en mars 1995 à conclure qu'il devenait impossible de le rendre apte à profiter des ressources de ce milieu. Aussi, ce Comité recommandait-il que sa cause soit déferée à une Cour pour adultes.⁹⁸⁴

The young person requested the transfer

This ground was referred to five times in 1995 and, like the year 1984, this was the second main reason for transferring a young person to the adult court. This ground includes 1) the young person requesting the transfer, 2) the young person consenting to a transfer requested by the Crown, and 3) the young person and the Crown requesting the transfer together:

[c]onsidérant la demande conjointe du Ministère public et de l'adolescent en vertu de l'art. 16 L.J.C. afin que la Cour accorde son renvoi devant la juridiction adulte pour y comparaître sur les accusations.⁹⁸⁵

⁹⁸⁰ M.D., 17 years, accused of possession of prohibited weapon and firearm; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁸¹ T.A., 17 years, accused of robbery, possession of stolen property, possession of a weapon in a manner considered to be dangerous to public safety, possession of a restricted weapon (revolver) for which there was no registered certificate, and occupying a vehicle knowing it contained a restricted weapon (revolver); Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁸² F.M., 18 years, accused of robbery, conspiracy, possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁸³ W.S.E., 18 years, accused of possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁸⁴ R.B., 18 years, accused of threatening, assault, possession of weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁸⁵ M.S.C., 17 years, accused of possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

Me. B. [procureur défense], au nom de son client, renonce à la tenue de l'enquête et présente une demande en vertu de l'article 16 LJC.⁹⁸⁶

[t]he undersigned preceded to question T. as to what he felt about the motion for deferral to Ordinary Court and the possibility that he could end up in an adult jail and/or prison. T. was quick to respond with, "I don't want to stay in the juvenile system. I don't like the juvenile system. I want to be deferred. If I thought I would not be deferred, I would have acted up in here so I would have to be deferred. I don't fit in here. I fit more in the adult system. I don't want to work on changing while in the juvenile system. I don't want rehabilitation as they offer it here. I have changed on my own. Before, all I thought of was doing crime, now I don't. I want to go straight and lead a normal life. I am tired of being bossed around here. Doing a year in here would be too much for me to handle. I will do less time in the adult system. They will leave me alone there and let me do my time. I don't have to follow any programs there if I don't want to do so. I'm telling you to defer me!"⁹⁸⁷

Mr. J. [défense] déclare consentir au renvoi.⁹⁸⁸

[c]onsidérant que nonobstant le consentement de F.M. à son renvoi, la preuve convainc la Cour de la nécessité d'un tel renvoi compte tenu que la protection du public doit prévaloir sur toute autre considération.⁹⁸⁹

The number and sort of offence committed

The *1995 Amendment to the Young Offenders Act* (1982) put a strong emphasis on the sort of offence committed for deciding a transfer. According to that amendment, in addition to the traditional transfer, young people accused of having committed first- or second-degree murder, attempted murder, manslaughter or aggravated sexual assault were to be proceed against in the adult court unless they brought an application for being proceed against in the youth court. When deciding this application, the youth court judge was subjected to the test as enacted by the 1992 amendment.⁹⁹⁰ If the principles of rehabilitation and protection of society could be

⁹⁸⁶ S.B., 17 years, accused of conspiracy, robbery, using firearm, possession of weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁸⁷ T.A., 17 years, accused of robbery, possession of stolen property, possession of a weapon in a manner considered to be dangerous to public safety, possession of a restricted weapon (revolver) for which there was no registered certificate, and occupying a vehicle knowing it contained a restricted weapon (revolver); Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁸⁸ G.B., 18 years, accused of murder; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁸⁹ F.M., 18 years, accused of robbery, conspiracy, possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁹⁰ Roy reports that in Quebec the number of young people transferred to adult courts after the introduction of the 1995 amendment (period 1995-1996) was the same as for the previous period (1994-1995) (N = 11). However, she identifies an increase in the number of people transferred to adult courts for the period 1996-1997 (N = 26). On the

reconciled, the young person remained within the youth court. Nevertheless, if this was not possible, the young person was transferred to the adult court.

Despite the statutory enactment, the Montreal Youth Court did not refer to the seriousness of the offence as a statutory reason for transferring a young person to the adult court. According to the data obtained for the offences committed in 1995, as long as the professional experts were of the opinion that the young person was amenable to rehabilitation and the young person did not seek a transfer to the adult court, the court tried to keep the young person within its jurisdiction - no matter the seriousness of the offence. For instance, as presented in Table 50, in 1995 there were two cases of first degree murder and eight cases of attempted murder (all involving males). However, the judicial history of these charges shows that only one case of murder was transferred to adult courts. Moreover, according to the reasons in that decision, the young person was transferred to the adult court because he consented to his transfer.⁹⁹¹

The Groupe de travail sur l'évaluation de la Loi sur les jeunes contrevenants au Québec highlights that the seriousness of the offence played a secondary role for deciding a transfer. The report released in 1995 – before the coming into force of the *1995 Amendment* - notes that the main reasons for transferring a young person to the adult court were the young person's age, his history of criminal offending, and his possibility of rehabilitation. In fact, this report rejected the notion of a transfer decision solely based on the seriousness of the offence:

other hand, according to her data, the highest peak of transfers in Canada was for the period 1994-1995 (before the enactment of the 1995 amendment). She argues that the amendment of the *Young Offenders Act* in 1995 may not have had a strong impact on the judicial reasoning. *Roy, supra* note 96 at 74-75.

⁹⁹¹ G.B., 18 years, accused of murder; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

[o]n ne saurait prescrire de circonstances où les renvois devraient être ordonnés de façon automatique: chaque cas doit être jugé individuellement, en pondérant un ensemble de facteurs parmi lesquels l'âge, le cheminement délinquant du jeune et sa réaction aux tentatives d'intervention nous semblent se situer au premier plan. Si nous sommes favorables à un recours un peu moins rare aux renvois, nous estimons que les jeunes qui doivent être visés par l'accroissement ne sont pas ceux qui, étant amenés pour la première fois au tribunal, sont accusés d'une infraction très grave; nous pensons d'abord et avant tout à des adolescents qui, condamnés à de multiples reprises, ont fait l'objet d'interventions diverses dont l'échec est clairement constaté.⁹⁹²

Consequently, even though the seriousness of the offence was mentioned as a ground for transferring the young person to the adult court, this was not a ground *per se* for the Montreal Youth Court to transfer a young person to the adult court. Sometimes the circumstances surrounding the offence, such as the young person escaping detention and committing an offence, had a stronger impact on the decision to transfer the young person to the adult court than the seriousness of the offence committed:

[c]onsidérant que l'acte criminel qui fait l'objet de la présente demande aurait été commis alors que l'adolescent était encore sous le coup d'une mise sous garde;⁹⁹³

[l]'analyse de ses antécédents officiels révèle une délinquance précoce (premier délit officiel à l'âge de 13 ans), polymorphe, avec des pics de violence importants; on observe aussi de sa part une difficulté chronique à respecter les ordonnances judiciaires (nombreux bris de condition), en dépit de services que lui sont dispensés depuis 1992.⁹⁹⁴

[t]he escalating serious nature of his offences.⁹⁹⁵

[d]e plus, la gravité objective des délits et l'ampleur de sa carrière délinquante sont des facteurs qui définissent une activité délictuelle très structurée.⁹⁹⁶

[c]onsidérant la gravité, la répétition des crimes de même nature.⁹⁹⁷

⁹⁹² Québec, Groupe de travail chargé d'étudier l'application de la loi sur jeunes contrevenants au Québec, *supra* note 50 at 124 [emphasis added].

⁹⁹³ M.S.C., 17 years, accused of possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁹⁴ M.D., 17 years, accused of possession of prohibited weapon and firearm; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁹⁵ T.A., 17 years, accused of robbery, possession of stolen property, possession of a weapon in a manner considered to be dangerous to public safety, possession of a restricted weapon (revolver) for which there was no registered certificate, and occupying a vehicle knowing it contained a restricted weapon (revolver); Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁹⁶ F.M., 18 years, accused of robbery, conspiracy, possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

The age of the young person

The age of the young person as a specific reason for a decision ordering the transfer to adult courts was mentioned four times time:

[c]onsidérant l'âge de l'adolescent.⁹⁹⁸

[b]ecause T. has reached the age of majority.⁹⁹⁹

[l]e tribunal est saisi du cas d'un jeune adulte (18 ans et 7 mois) qui doit comparaître pour une demande de renvoi.¹⁰⁰⁰

[c]onsidérant l'âge de l'adolescent.¹⁰⁰¹

Membership to a gang

This and the following two reasons were first identified in the 1992 decisions ordering a transfer. Membership to a gang was perceived to be a negative factor that may lead a young person to be transferred to the adult court. The reason for this may have been the violence and criminal culture underlying these associations:

[q]ui plus est, on questionne sa transparence et sa congruence: il continue à entourer de secrets ses activités à l'extérieur (contenu de ses sorties dans la famille, refus de nommer les personnes fréquentées...). Notre présomption à l'effet qu'il a repris contact avec des membres, jeunes et adultes, de gangs criminalisés est très forte. Que cette association constitue un obstacle majeur au travail de réadaptation entrepris avec lui. M. devait, au cours de deux dernières années, faire des choix de vie clairs pour sortir de sa délinquance. Les-a-t-il faits?¹⁰⁰²

[c]onsidérant que preuve est faite que l'adolescent est membre d'un gang de rue.¹⁰⁰³

⁹⁹⁷ W.S.E., 18 years, accused of possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁹⁸ M.S.C., 17 years, accused of possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

⁹⁹⁹ T.A., 17 years, accused of robbery, possession of stolen property, possession of a weapon in a manner considered to be dangerous to public safety, possession of a restricted weapon (revolver) for which there was no registered certificate, and occupying a vehicle knowing it contained a restricted weapon (revolver); Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

¹⁰⁰⁰ F.M., 18 years, accused of robbery, conspiracy, possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

¹⁰⁰¹ W.S.E., 18 years, accused of possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

¹⁰⁰² M.D., 17 years, accused of possession of prohibited weapon and firearm; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

¹⁰⁰³ W.S.E., 18 years, accused of possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

Risk to other young people detained if young person placed in youth detention

Professional experts were reluctant to keep within their institutions youths who were not interested in pursuing rehabilitation measures, and whose personalities and criminal history could jeopardize the effective rehabilitation of other young people detained. As stated by the Groupe de travail sur l'évaluation de la Loi sur les jeunes contrevenants au Québec, professional experts were aware of their limitations and understood that not every young person was susceptible to rehabilitation.¹⁰⁰⁴ In addition to this, the professional experts were of the opinion that some young people could seriously put in danger the treatment of other young people detained:

[l]'intervention en centre de réadaptation a des limites: on ne peut tout y faire pour tous les jeunes. Certains d'entre eux sont non seulement très impliqués dans la délinquance; ils paralysent en plus le cheminement du groupe où ils sont insérés en centre de réadaptation et nuisent aux autres jeunes en raison de l'emprise qu'ils exercent sur le group.¹⁰⁰⁵

In 1995 this reason was referred to twice:

[n]ous avons de plus considéré que le pronostic de réadaptation est très faible, que la sécurité des adolescents placés en mise sous garde serait sûrement menacées et que l'effet négatif de Francis sur les autres adolescents placés en mise sous garde serait très dommageable pour eux.¹⁰⁰⁶

[d]'un autre côté, le réseau juvénile aurait à payer le prix d'un jeune adulte qui aurait sur les autres jeunes du centre d'accueil, une influence négative de par son expérience et son vécu en milieu carcéral adulte, de son état paranoïde actuel et de son association proche avec des amis faisant part du gang des B.O.¹⁰⁰⁷

¹⁰⁰⁴ Québec, Groupe de travail chargé d'étudier l'application de la loi sur jeunes contrevenants au Québec, *supra* note 50.

¹⁰⁰⁵ *Ibid* at 123.

¹⁰⁰⁶ F.M., 18 years, accused of robbery, conspiracy, possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

¹⁰⁰⁷ W.S.E., 18 years, accused of possession of prohibited weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

Impact of the 1992 Amendment

Finally, the impact of the 1992 Amendment was mentioned twice as a ground for transferring young people to adult courts. Both the 1992 and 1995 amendments put a strong emphasis on this factor for the youth court system to consider when evaluating the possibility of transferring a young person to adult courts:

[l]'évolution de l'adolescent après trois ans d'interventions, dont deux passés en centre d'accueil, n'a pas donné les résultats escomptés. Le psychologue (page 6) souligne le potentiel de dangerosité de l'adolescent dans la mesure où il dénie son agressivité, n'est pas conscient de la colère qui l'habite et qu'il ne maîtrise pas. Dans l'optique où la protection de la société doit prévaloir sur les besoins du jeune et de sa famille, cette variable doit être prise en considération dans la décision que le Tribunal doit prendre.¹⁰⁰⁸

R. continue toujours à démontrer qu'il représente un danger pour les autres et le pronostic demeure très inquiétant. Compte tenu de tous ces facteurs, nous recommandons pour une deuxième fois le renvoi de R. devant une cour de juridiction pour adultes.¹⁰⁰⁹

In conclusion, the data presented for the year 1995 is similar to the findings presented for the year 1992. While the statutory amendments emphasized the importance of the protection of the public, the Montreal Youth Court subjected the notion of "protection of the public" to the notion of the young person's effective rehabilitation. If professional experts gave the young person a favourable prognosis regarding his rehabilitation, the court would keep the young person within the jurisdiction. When the young person was not longer amenable to rehabilitation, the Montreal Youth Court would order the transfer to the adult court.

¹⁰⁰⁸ M.D., 17 years, accused of possession of prohibited weapon and firearm; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003) [emphasis on the original].

¹⁰⁰⁹ R.B., 18 years, accused of threatening, assault, possession of weapon; Montreal Youth Court, Montreal, Chambre de la Jeunesse de Montréal (code 500 003).

10.8. Summary

The period 1966-1995 is characterized by the impact professional experts had on the decisions of the Montreal Youth Court for transferring a young person to the adult court. As long as they were of the opinion that the young person could be rehabilitated within the youth justice system, they would recommend the court to keep him therein. In other words, professional experts' favourable prognosis regarding the rehabilitation of the young person constituted the major factor to be assessed. While this notion of "amenability to be rehabilitated" first appeared in 1972, it was part of other considerations to be evaluated holistically by the court when deciding a transfer. Nonetheless, even in 1978 the major reason of "amenability to be rehabilitated" did not trump every other reason. As previously stated, where young people had already been transferred to the adult court, a professional expert's favourable prognosis could be left aside if a new desertion from the place of detention or a new offending occurred.

SUMMARY TO SECTION II

The establishment of the Montreal Youth Court constituted a landmark in the youth justice system as it operated in Montreal. Before this court was open, children in need of protection and in conflict with the law were dealt with by the adult court. This changed once the Montreal Youth Court started to operate in 1911 as this court had jurisdiction over these youths.

However, not every young person remained within the jurisdiction of the Montreal Youth Court: there were times where the Court declined its jurisdiction and transferred young people to the adult court. Even though this measure was not broadly used, it meant that the young person was subjected to a punitive justice system where, if found guilty, he could be subject to harsh penalties and placed in an adult detention facility. During the first years of the court the reasons for transferring a young person to the adult court were not clear. It seems that being older than 15 years of age or having committed an indictable offence were the main reasons invoked by the Montreal Youth Court for transferring a young person to the adult court. Yet, these reasons were not systematically used.

The statutory test of the “interest of the child and the interest of society” was first referred to as a reason for transferring a young person to the adult court in 1942. However, the “interests test” only referred to the statutory factors enumerated in the *Juvenile Delinquents Act* (1908), turning into an automatic method for complying with the requirements of the Act. As presented above, I argued that by 1942 the interest of the child was understood as preventing the child from

deserting from the place of detention and the interest of society was understood as preventing the young person from reoffending.

During the period 1948-1972, the Montreal Youth Court started to provide statutory reasons and non-statutory reasons for transferring a young person to the adult court. While the statutory reasons made reference to the age of the offender and the kind of offence committed, the non-statutory reasons were used to fill in the “interests test”. Throughout this period, the fact that the young person was a recidivist, had deserted from a place of detention, committed offences while being at large, or had already been transferred to the adult court in different proceedings constituted non-statutory reasons for arguing that the “interest of the child” and “the interest of society” required that the offending be dealt with by the adult court.

The year 1978 constitutes a breaking point with regard to how the “interests test” was understood. As long as the professional experts within the youth justice system were of the opinion that the young person could be rehabilitated by the resources available at the Montreal Youth Court, the young person remained within the jurisdiction of the court. In other words, professional experts’ favorable prognosis regarding the young person’s rehabilitation constituted the major factor to be assessed. While this notion of “amenability to be rehabilitated” first appeared in 1972, it was part of other considerations to be evaluated holistically by the Montreal Youth Court when deciding a transfer. However, even in 1978 the major reason of “amenability to be rehabilitated” did not trump every other reason. If the young person had been previously transferred to the adult court, his sincere predisposition to follow treatment and his favourable prognosis would be left aside if a new desertion from the place of detention or a new offending

occurred. During the period 1978-1984 the decisions ordering a transfer to the adult court had a conditional effect - the observance of strict rules of good behavior. As a result, any violations of those rules triggered the execution of the decision and the effective transfer of the young person to the adult court. This means that while the young person's rehabilitation was the primary objective to be achieved, a young person's previous dealing with the adult court was a serious impediment for fully enjoying the chance of rehabilitation within the juvenile justice system.

During the period 1984-1995 the Montreal Youth Court used as the main factors for deciding whether to transfer a young person to the adult court the professional experts' positive prognosis and the young person's willingness to remain within the youth justice system – this despite the punitiveness of the 1992 and 1995 legislative amendments to the *Young Offenders Act* (1982). While the legislative amendments were aimed at emphasizing the “the protection of the public”, the “protection of society” and the “prevention of crime” within the youth justice system, the Montreal Youth Court redefined those terms in the sense of “rehabilitation”: the protection of society and the prevention of crime would be better served by rehabilitating young people. However, such a “possibility of rehabilitation” was subject to the professional experts' positive prognosis. In that sense, the Montreal Youth Court accepted that not every young person was amenable to rehabilitation. The Court continued transferring to adult courts youths whose rehabilitation was considered to be beyond the capabilities of the youth criminal justice system. From 1966 to 1995 the young people sent to the adult court were older male youths.

CONCLUSION

The purpose of my research was to address two main questions: 1) how the Parliament of Canada has regulated the transfer of young offenders to the adult court and the imposition of adult sentences to young offenders, and 2) how the Montreal Youth Court has understood and implemented the regulation of the transfer mechanism.

For answering these questions I undertook two different – but interrelated – empirical analyses. The first question was aimed at exploring enacted legislation in the domain of youth criminal law, parliamentary debates and different reports published by the Government of Canada (“political system”), and scholar literature that has discussed these data. For this, I identified the legislation enacted in the area of youth offending for the period 1841-2012. For the pre-1908 period (before the enactment of the *Juvenile Delinquents Act*) I analyzed all the enacted legislation that specifically addressed young offenders. For the post-1908 period I focused on the regulation of the transfer of young offenders to the adult court (*Juvenile Delinquents Act* (1908) and *Young Offenders Act* (1982)) and the imposition of adult sentences to young offenders (*Youth Criminal Justice Act* (2002)). After compiling all the legislation, I proceeded to identify the parliamentary debates that took place and the published governmental reports.

The second question was aimed at analyzing how the Montreal Youth Court, which open in 1911, understood and implemented the mechanism of transferring young people to the adult court (“judicial system”). For this, I explored the first 10 years of operation of the court (1911-1921) for the purpose of identifying the procedure of the court, the cases in which the court

intervened, and the circumstances under which the court would transfer a young person to the adult court. I analyzed the subsequent years (1924-1995) through a sample for the purpose of identifying and exploring the factors and circumstances under which a young person could be transferred to the adult court.

The notion of a youth criminal justice system different from an adult justice system was nonexistent in the period before 1857. While the common law recognized that children younger than seven years old could not be found guilty of any crime, children seven years of age and older could be brought to the adult court. There were no records available to inquiry whether the criminal justice system drew a distinction between children seven years of age and older, and adult offenders. Some authors argue that judges in fact took the offender's age into account when sentencing. In 1857 the Parliament of the Province of Canada first enacted legislation aimed at providing young offenders with procedure, conditions of detention and punishment different from adult offenders. In 1867 the legislative powers were transferred to the newly constituted Parliament of Canada. Parliamentarians attempted to provide young offenders with a more lenient sub-system than that available to adult offenders. However, these features were not aimed at every young offender: the category of the “incorrigible” young offender emerged and became an obstacle for a young offender to have access to this sub-system. This meant that young offenders deemed “incorrigible” remained within the adult system.

The *Juvenile Delinquents Act* (1908), enacted in 1908, brought into existence a youth justice system within the Canadian justice system. The *Juvenile Delinquents Act* (1908) was aimed at providing young people in conflict with the law an alternative system where the intervention was

not so much focused on punishment but rather on rehabilitation. However, the distinction between incorrigible/corrigible young offenders remained in the youth justice system through the procedure known as the transfer of young offenders to the adult court. The “transfer” remained unchanged for most of the period: in 1929 the legislation was amended to provide juvenile court judges with further discretion for transferring young offenders who were wards of the youth court to the adult court. While several bills and reports were tabled during this period, none of them was actually successful in amending the *Juvenile Delinquents Act* (1908). Worth noting, while the origins of the *Juvenile Delinquents Act* (1908) were strongly focused on the social reintegration of the young person, the reports and bills tabled after 1970 started to introduced deterrence, denunciation and retribution as theories of punishment applicable to young offenders. The culmination of these bills and reports was the enactment of the *Young Offenders Act* (1982) in 1982, which came partially into force in 1984.

The way the Montreal Youth Court understood and implemented the provisions allowing the transfer of young offenders to the adult court under the *Juvenile Delinquents Act* (1908) constantly changed during the period 1908-1984. During the first years of the Montreal Youth Court the young person's age constituted a ground for transferring him to the adult court; yet, this ground was not systematically applied. It was not until 1936 that the Montreal Youth Court started to make reference to the statutory test in the *Juvenile Delinquents Act* (1908) as a ground for transferring a young person to the adult court. While this constituted an advancement in terms of the Montreal Youth Court identifying the reasons for transferring a young person to the adult court, the “meaning and content” of the test remained quite vague. The records for the year 1942 show that for the Montreal Youth Court the “the good of the child” meant that young

people be provided with stricter detention facilities than those available in the juvenile justice system and “the interest of the community” meant the implementation of a stricter intervention than that available in the youth justice system for preventing the young offender from further offending. This content was further developed during the years until 1978, when the Montreal Youth Court focused the “good of the child and the interest of the community” on the notion of the young person’s effective rehabilitation for the long term protection of society. The notion of the rehabilitation of the young offender for the long term protection of society has remained since then the leading force underlying the transfer of young offenders to the adult court. This interpretation survived the abrogation of the *Juvenile Delinquents Act* (1908) and was implemented on the newly enacted *Young Offenders Act* (1982).

On the other hand, while the rehabilitation of the young person constituted an important objective for the *Young Offenders Act* (1982), this was not the only objective to follow. Shortly after the enactment of the *Young Offenders Act* (1982), Parliamentarians started to disassociate the notion of the “protection of society” from the notion of the “protection of the child” in such a way that the theory of rehabilitation was slowly overtaken by the theories of deterrence, denunciation and retribution. This transformation can be specifically perceived regarding the commission of very severe offences such as murder, attempted murder, manslaughter and aggravated sexual assault. One of the amendments brought forward to the *Young Offenders Act* (1982) in 1992 was the modification of the statutory test for transferring young offenders to the adult court. According to this amendment, if the intervening youth judge could not reconcile the principles of rehabilitation of the young person and protection of the public when deciding

whether to transfer a young person to the adult court, the principle of “protection of the public” would prevail.

The most punitive amendment to the *Young Offenders Act* (1982) was introduced in 1995: young offenders 16 years of age and older accused of having committed the above mentioned offences were automatically transferred to the adult court unless they could establish that both their effective rehabilitation and the protection of the public could be achieved if they remained within the youth justice system. The 1995 amendment also introduced the notions of “crime prevention” and “protection of society” as leading principles to follow when interpreting the *Young Offenders Act*. The parliamentary debates regarding this amendment highlight Parliamentarians’ concerns about deterring young people from committing serious offences and punishing them proportionally to the gravity of the offence. In other words, the theories of deterrence, denunciation and retribution became the leading philosophies of punishment with regard to young offenders accused of having committed very serious offences. In these cases the theory of rehabilitation was left aside with a limited role.

The underlying philosophy of the *Youth Criminal Justice Act* (2002) follows the deterrence-denunciation-retribution-rehabilitation cocktail first implemented by the *Young Offenders Act* (1982). Whereas the *Youth Criminal Justice Act* (2002) has substituted the transfer of young offenders to the adult court for the imposition of adult sentences, the punitive message remains: severe offences should be punished severely. According to the *Youth Criminal Justice Act* (2002), as originally enacted, young offenders fourteen years of age and older accused of murder, manslaughter, attempted murder and aggravated sexual assault, or who had received a

third determination of serious violent offence should automatically receive an adult sentence rather than a youth sentence. This, of course, unless young offenders could argue that they should receive a youth sentence instead. While this regulation was similar to the 1995 amendment to the *Young Offenders Act* (1982), it differed from it on three main aspects: the *Youth Criminal Justice Act* (2002) extended the application of severe sentencing to youths 14 and 15 years of age, the youth was to be sentenced in the youth court rather than in the adult court, and the category of third determination of very serious violent offence as a ground for requesting an adult sentence was added.

The regulation of the imposition of adult sentences to young offenders brought such a sentencing disparity among provincial courts that the Supreme Court of Canada had to intervene in 2008 for assessing whether this regulation was in accordance with the *Charter*. The majority of the Supreme Court of Canada held that the imposition of adult sentences – as originally enacted – infringed the *Charter*. The Quebec Court of Appeal had reached a similar conclusion – though by a unanimous decisions and through different reasoning – back in 2003.

Overall, the study of the Canadian youth legislation and how the Montreal Youth Court has understood and implemented this legislation highlights a big disparity in the processes of 1) creation of youth criminal law by Parliament, and 2) understanding and implementing youth criminal law by the Montreal Youth Court. While in my sample the former represents the “Canadian” approach to youth criminal legislation, the latter only represents the “Quebec” approach – or the “Montreal” approach – to youth criminal intervention. In spite of this, the data presented and analyzed in this thesis confirms the assertion of the existence of two different and

independent subsystems of youth criminal justice within Canada, the political system and the judicial system.

The political system has been strongly focused on the creation of laws regulating youth offending in Canada. While the theories of deterrence, denunciation and retribution have existed since the first legislation was enacted in 1857 – for instance, the notion of “incorrigible young offender” – and played a role on the design of criminal policy, the theory of rehabilitation tempered their original influence. The reader can refer to the debates that took place during the parliamentary readings of the *Juvenile Delinquents Act* in 1907 and 1908. According to these debates back then, a young offender was a person who could be rehabilitated and reintegrated into society. The scope and goal of youth criminal intervention was to “mold” children in an attempt to transform them into law abiding citizens. Criminal behavior was perceived as a sign that a child needed state-provided criminal law intervention for becoming part of the “future of the nation”. This explains why child neglect, child abuse and child offending were identified in the *Juvenile Delinquents Act* (1908) as “juvenile delinquency” giving rise to judicial intervention. On the other hand, there was the regulation of the transfer of young offenders to the adult court. This provision received very little attention during the debates of the *Juvenile Delinquents Act* (1908). Nevertheless, this provision represents the most punitive aspect of the youth justice system back in 1908. As mentioned above, this punitiveness was mitigated by the pro-rehabilitation philosophy of the Act. Yet, the reports and bills tabled after 1965 mostly focused on this punitive side of the legislation tempering the impact of the pro-rehabilitation philosophy. The 1992 and 1995 amendments to the *Young Offenders Act* (1982), and the enactment of the *Youth Criminal Justice Act* (2002) strongly represent this contention. While

rehabilitation still constitutes a strong principle in the current Act, its impact has been very much mitigated by the impact of deterrence, denunciation and retribution. This approach of the political system can be specifically identified when dealing with young offenders deemed “dangerous” because of the very severe offences they have committed. In these cases, it can be argued that the sentencing of young offenders is mostly governed by the theories of punishment of deterrence, denunciation and retribution.

On the other hand, the judicial system has observed a different trajectory. The Montreal Youth Court seems to have first started transferring young offenders to the adult court because of the young offenders’ age or the kind of offence committed (indictable). Once the Court started providing reasons for transferring young people to the adult court, the main reasons for this kind of decision were age, seriousness of the offence, recidivism and previous contact with the adult system. These justifications for transferring young offenders to the adult court – mostly based on theories of deterrence, denunciation and retribution – were slowly tempered by the notion of “possibility of rehabilitation.” Worth noting, the notion of “possibility of rehabilitation” when first used did not necessarily referred to “rehabilitation” as the main focus of the intervention. Rather, the notion of “possibility of rehabilitation” made reference to the psycho-psychological treatment available within the Montreal Youth Court – or the professional experts’ reports. It was not until the 70’s that the “possibility of rehabilitation” became the leading ground for deciding whether a young person should be transferred to the adult court. Similarly, by 1970’s the notion of “possibility of rehabilitation” became strongly grounded on the notion of rehabilitation and reintegration, leaving almost aside the reference to availability of treatment. Moreover, the notion of “possibility of rehabilitation” started to acknowledge the negative effect

that detention in an adult environment can have on a young person and because of this tried to maintain the young person within the youth court. The Montreal Youth Court's rehabilitative approach to "possibility of rehabilitation" survived the abrogation of the *Juvenile Delinquents Act* (1908) and continued being referred to while the *Young Offenders Act* (1982) was in force.

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