

THE EVOLUTION OF JUVENILE JUSTICE IN CANADA

1 Juvenile justice before 1908

2 The Act of 1908

3 The Act of 1984

4 The Act of 2003

Bibliography

Notes

1 JUVENILE JUSTICE BEFORE 1908

The evolution toward a distinct regime for young offenders has been a long one. It will be useful to view the current Canadian system within the social and historical contexts of its development¹.

The *doli incapax* defence, "the incapacity to do wrong", was developed under English common law. A child under the age of seven was deemed incapable of committing a criminal act. This same immunity from prosecution was extended to children aged seven to thirteen inclusive, but the presumption of incapacity could be rebutted by establishing that the child had sufficient intelligence and experience to know the nature and consequences of the conduct and to appreciate that it was wrong. Thus, while the *doli incapax* defence afforded certain protections to children, it could not be applied in every case. As a final result, children who were convicted faced the same penalties as did adult offenders, including hanging and incarceration in prisons for adults.

Because of the nature of the developing society in early Canada, an unusually high percentage of children were at risk for delinquency. Up to the turn of the nineteenth century and even into the early years of the twentieth century, large numbers of orphaned, neglected or abused children could be found in many communities. An immediate cause for this situation was the means of travel on which the country's growth depended. Before the advent of steamships, the sailing-time from Europe was about two and a half months. The long voyage, overcrowded ships and disease all took a heavy toll, and many children who had embarked with their parents arrived in the new world as orphans. One shipload of 100 colonists coming from France in the mid-seventeenth century lost 33 of their number during the voyage and shortly after their arrival. A ship that landed in Halifax in 1752 had eight orphans on board whose parents had died during the voyage ; additional deaths – no doubt all due to ship-board ailments – soon increased this number to fourteen.

Another source for children at risk was the special social conditions of every military garrison to be found at every major settlement. In a 1761 report, Jonathan Belcher, the Acting Governor of Nova Scotia, made a special note of the number of children who had been deserted by their

parents due to the great concourse of dissolute abandoned women, the regular followers of the Camp, Army and Navy. As settlement progressed, the number of children at risk only worsened because of public health and social problems. For example, between 1832 and 1834 a single agency cared for 535 orphans in the town of York, which later became Toronto. Soon after, in the greatest public health crisis in Canada's history, the Irish famine immigration brought fresh waves of orphaned children during the mid-1840s. The ranks of the Irish immigrants were decimated by typhus, and one estimate suggested that the epidemic had left 500–600 orphans in Montreal alone.

Significant numbers of young people immigrated to Canada on their own or were sent by agencies or the criminal courts. New France attracted the younger sons of well-to-do French families. They were sometimes troublesome youths who had been sent over to carve out a career in Canada. For a long time, the colonies were also the dumping grounds for society's unwanted members, ranging from criminals to poor and abandoned children. The inhabitants of slums, jails, poorhouses and orphanages were often shipped to the colonies, frequently as indentured servants. A 1684 report from Quebec tells of 60 indentured servants who had been sent from France that year ; the oldest was 16, and most were between 12 and 15 years old. The export of children continued into the early years of the twentieth century. For example, between 1873 and 1903 over 95,000 children came to Canada under the sponsorship of British child immigration agencies.

There was thus a very wide pool of children at risk, since the youth population as a whole was large, and orphaned, neglected and abandoned children were plentiful across the country. Unfortunately, surviving court records are not sufficiently detailed to permit a formal assessment of contemporary rates of delinquency. Nevertheless, there is no question that youth crime was common and ranged widely from petty theft and vandalism to murder. Throughout the history of New France, young people broke the law. However, the general level of delinquency appears to be low, and documented crimes consist primarily of vandalism, petty theft, acts of immorality, the breaking of local ordinances, the abandonment of indentured service contracts, brawling and swearing. But there were also isolated incidents of more serious crimes. For example, in 1672 a 13-year-old girl helped her parents murder her husband. She had married the man when she was 12, against her will. When he turned out to be a

heavy drinker and violent, she persuaded her parents to help her get rid of him.

Abortion and infanticide were also regarded as serious offences and, on occasion, were committed by teenage servant girls. Servants who became pregnant were frequently dismissed and had great difficulty in finding either re-employment or a husband. The pressure was therefore great to have an abortion rather than bear social stigma and economic hardship.

Possibly the most widespread source of juvenile delinquency in the eighteenth and early nineteenth centuries was to be found in the fur trade, which often engaged teenage boys. The business was a lucrative one, and offered many farm boys an easy opportunity to supplement their regular livelihood. A feature of the fur trade was the use of liquor as a medium of exchange with the natives. Apart from its use as currency in fair payment for goods, liquor was often used to separate the natives from their furs without compensation. The volatile combination of fierce competition for furs together with the generous consumption of liquor created a situation wherein theft, assault, brawls and murder were common features. Consequently, teenage boys often became involved in the harsh dealing to which the fur trade regularly exposed them.

The patterns of delinquency early established in New France were replicated in English Canada as settlement spread. Most juvenile crime was petty in nature but interspersed with some serious offences. For example, most of the 300 young people put in prison in New Brunswick over the period 1846–1857 were convicted of drunkenness, theft and vagrancy. The High Bailiff's report for Toronto for the months of February to December 1847 listed 39 convictions of teenage boys. Their crimes included larceny, assault, trespass and disorderly conduct. A similar pattern can be seen in the records from Halifax's Rockhead Prison for the period from April to December 1860. The 53 young people incarcerated during that period were convicted of crimes such as assault, being drunk and disorderly, vagrancy, larceny and vandalism. On occasion, however, young people showed they were capable of serious crime. In 1843 Grace Marks, a 16-year-old servant girl working on a farm outside Toronto, helped a male servant murder the housekeeper and their employer. In 1849 an 11-year-old adopted boy living on a farm in the County of Peterborough hacked his 5-year-old adopted sister to death with a hoe because of jealousy of the attention paid to the little girl by the adoptive parents.

By the late 1860s, juvenile delinquency had long since taken on certain distinguishing characteristics. Much of the crime was minor in nature ; it was manifested in urban more than in rural areas ; and boys committed crime in larger numbers than girls. The one common denominator among many young offenders was parental neglect. In any large community young boys and girls were to be found loitering around the streets, idle, neglected and undisciplined. Many children suffered from a lack of proper diet, malnutrition, unsanitary living conditions, drunken and dissolute parents and inadequate or no medical care. Parental neglect also contributed to such personal and social problems as truancy, lack of interest in schooling, mental and emotional difficulties, and crime.

The treatment of delinquents

As befits a country founded by immigrants, the treatment of delinquent children in early Canada was based upon the attitudes, customs and laws that prevailed in the mother countries of France and England, subject to modification under the special circumstances and realities of a pioneer society. In both the old countries and the new colonies, childhood was considered to be a very short step on a direct path to adulthood. Throughout the seventeenth and eighteenth centuries, childhood ended at a young age. Life in general was harsh for everyone, and little effort was made to make it easier for children. Children were expected to accept the difficulties of life very early on, and to take on the responsibilities of adults as soon as possible. They were in fact considered as little adults. The brutality of the parents was paralleled by the brutality of the state. In eighteenth century England, according to law and custom, the child was held to be adult if above the age of seven, and therefore responsible for his crimes. Up to 1780, the penalty in England for over two hundred offences was death by hanging, and many children were hanged for trivial offences. There are, in fact, instances recorded of children younger than seven being executed². In Canada, children were subject to the everpressing physical demands of a primitive and struggling society. They were expected to share the burden of survival. Part of their importance was that they provided hands for the many tasks necessary simply to subsist. Consequently, the behaviour of children was governed by adult standards. This view applied in matters of crime. The prevailing attitude held that a juvenile delinquent was simply a miniature criminal. Accordingly, the punishments that English courts prescribed for children seem exces-

sively harsh by any modern standard. For example, in one session in London's Old Bailey court in February 1814, five children – one eight years old, one nine, one eleven and two twelve – were sentenced to death for burglary and stealing a pair of shoes.

These and other old-world beliefs and attitudes, together with the laws they gave rise to, were carried to the new world by the immigrants. It is therefore no surprise to find that strict standards governed many aspects of children's lives. These were the standards not only of the law but also the church. The Roman Catholic Church was a highly influential body in New France. Its precepts regulated sexual practices, dress, language and many other aspects of life for both young and old. The church even influenced the law, which took up matters of morality and formally prohibited a variety of offences, such as swearing.

Penal practices and conditions in New France were harsh. On 19 January 1649 a young girl of 15 or 16 was hanged for theft in the town of Quebec. Punishments were freely handed out for every type of infraction. For swearing a person could be fined or put in detention. Repeat offenders could be put in an iron collar and subjected to public ridicule, while chronic recidivists could have their lower lip cut. Those put in jail were given a diet of bread and water. Jails were poorly ventilated, humid in the summer and cold in the winter. In 1686 Governor Denonville reported having to cut the feet off certain prisoners in Quebec for purely medical reasons : they had developed gangrene from the cold. Sentencing was given little uniformity by either principle or practice, and severe punishments were handed out for both major and minor crimes.

To discourage servants from breaking their service contracts, authorities in 1676 announced that offenders, many of whom were teenage girls, would be put in an iron collar. For a second offence, the servant would be beaten with rods and branded with the fleur-de-lis. Juveniles were also kept in detention for their crimes. André Lachance, in a study of female crime in New France between 1712 and 1759, tells of a 13-year-old girl being confined for three months and a 14-year-old female being held for six years³.

While many children were subjected to harsh punishments, justice was frequently tempered with mercy. The governing councils in New France sometimes set aside sentences and reduced the punishments handed

down by the courts. For example, instead of executing children who committed crimes normally punishable by death, it was customary to whip them. In a case tried in Quebec in the summer of 1695, a mother and daughter were jointly convicted of theft. While the mother was put in the pillory to be ridiculed in the public square, the girl was let off by the council with a reprimand.

Punishments for juvenile offenders in both English and French Canada were a mixture of harsh laws, severe retribution and justice tempered with mercy. It was generally established that children under seven, regardless of the crime, could not be punished because they were not yet capable of discerning the nature of their acts. It was also common, in the case of offenders up to the age of 14, to withhold severe penalties except when justified by special circumstances. In practice, however, these guidelines were not always observed or uniformly applied. As a result, justice was uneven, and many children were subjected to treatment that was harsh in the extreme.

Whipping of young offenders was a common practice, especially in communities without jails. In some cases, juveniles were punished with the whip instead of incarceration. Although Halifax by 1815 had a jail together with a courthouse and a regular police court, juvenile offenders frequently received the straightforward physical chastisement of 39 lashes at the public whipping post. Parsimonious public officials preferred corporal punishment to detention since it avoided the use of public funds to provide board and lodging.

Across the country as more communities built jails, young offenders were either whipped or incarcerated, or sometimes both. When jailed, they were mixed indiscriminately with adults and shared the same cells as drunks, prostitutes, hardened criminals, the indigent and the mentally ill. The physical facilities themselves, once built and in operation, were of little concern. They quickly became run down and neglected. They were too hot in summer and too cold in winter. Jailers could be cruel, the food was both inadequate and poor, bedding was scarce, and laundry and hygiene were neglected. Prisoners spent their time either in idleness or in performing extremely hard labour. For young and old alike, justice continued to be uneven and, on occasion, out of all proportion to the offence. In 1813, for example, a 13-year-old boy was hanged in Montreal for stealing a cow.

As the population grew and more jails were built, children continued to be incarcerated with regularity. Even when Upper Canada (as the province of Ontario was then known) opened its first prison at Kingston in 1835, authorities did not hesitate to commit the young to confinement. Most sentences at Kingston Prison ranged from one to six years. They often lacked uniformity : for a crime such as grand larceny one person might be committed for a year while another might be sentenced to five years. Significant numbers of young boys were sent to Kingston. In 1839 the records listed 6 boys between 12 and 15, and 24 between 16 and 20. The attitude of the warden in his report for that year no doubt reflects the prevailing view of other officials of the day. He recommended that convicts released from prison be sentenced to life if they committed another crime.

This prison, the first – as opposed to a jail – to be established in Upper Canada, was far from a model institution. The problems in its operation and administration were so numerous that the government in 1848 appointed a commission headed by George Brown, publisher of the *Globe* newspaper, to investigate. The Brown Commission submitted its report in 1849 and documented a variety of serious problems, especially the extreme practices in punishment, which made no distinction between juveniles and adults in either the men's or women's sections of the prison.

Punishments were meted out frequently for simple disciplinary offences, often of the most innocuous kind, and whippings were administered before an assembly of the inmates. One 10-year-old boy, committed on 4 May 1845 for a seven-year term, was publicly lashed 57 times in the space of eight and a half months. His offences were staring and laughing, which although in contravention of prison rules, were normal behaviour for a boy of that age. An eight-year-old child, admitted on 7 November 1845 for a three-year term, received the lash within the first week of his arrival. Over a nine-month period he was similarly punished 47 times. An 11-year-old French-Canadian boy received 12 lashes on Christmas Eve 1844 for speaking French.

In the prison's female quarters young girls experienced similar treatment. The records show that one 14 year-old was whipped seven times in four months, while a 12 year-old was similarly punished five times over another four-month period. Both boys and girls were sentenced to the same

terms as adults for the various crimes, and in prison they were subject to the same rules and conditions. At the time of the Brown Commission investigation, three children under 12, including one eight year-old, and 12 under 16 were serving time in Kingston Prison.

Children for some time continued to be put in jails and prisons across the country, and they endured the same treatment and foul conditions that characterised the criminal justice system as a whole. As the population and the number of settlements increased across the country, so did the incidence of youth crime. More children were brought before the courts and sent to jail. However, as soon became apparent, this form of punishment was accomplishing very little. Rather, many juveniles were corrupted by older offenders, and instead of being turned away from crime, returned to society schooled in the latest lawbreaking techniques. As a result, many young people went on to more serious offences following their incarceration and, all too often, ended up back in jail.

The reform impulse

Although children were subjected to adult legal standards, there were growing signs early in the nineteenth century that attitudes were changing. The reform movement that emerged in Canada owed an intellectual debt to the eighteenth-century Age of Enlightenment. The eighteenth century witnessed a great intellectual ferment in science and philosophy as a new generation of thinkers challenged long-standing ways of looking at and explaining society. People such as Voltaire, Rousseau, Diderot and Montesquieu in France ; Jeremy Bentham, David Hume and Adam Smith in Great Britain ; and Cesare Beccaria in Italy sparked an intellectual revolution and reform movement that had worldwide repercussions. Enlightenment thinkers were absorbed with an interest in humanity and a belief that society could be improved. They sought reform of economics, of ethics, of religion, of government and of society. Some called for the abolition of slavery ; some demanded education for the masses ; some campaigned for democratic government ; and some, such as Beccaria, called for an end to the cruel practices and injustices that characterised the penal system throughout the world.

Early penal reform ideas found a ready reception in Canada. For example, an 1816 Act of the Nova Scotia Legislature acknowledged that putting people in jail for minor criminal offences was a useless expense. The

Act also included the reformation rather than simply the punishment of the offender as an objective for those in jail.

A more comprehensive expression of reformist ideas was contained in an 1836 report by Charles Duncombe to the House of Assembly of Upper Canada. Duncombe was a physician and politician elected to the Legislature of Upper Canada in 1834. He was chairman of a commission appointed to report on the subject of prisons and penitentiaries. He held the view that prisons should not be merely for punishment but places of reformation and of moral and intellectual improvement.

Condemning the corrupting effects of indiscriminately grouping together persons of all ages and degrees of guilt, Duncombe called for an effective system for the classification of convicts. He made a special point of calling for dramatic changes in the treatment of young offenders.

Every person that frequents the streets of this city must be forcibly struck with the ragged and uncleanly appearance, the vile language, and the idle and miserable habits of numbers of children, most of whom are of an age suitable for schools, or for some useful employment. The parents of these children, are, in all probability, too poor, or too degenerate to provide them with clothing fit for them to be seen in at school ; and know not where to place them in order that they may find employment, or be better cared for. Accustomed, in many instances, to witness at home nothing in the way of example, but what is degrading ; early taught to observe intemperance, and to hear obscene and profane language without disgust ; obliged to beg, and even encouraged to acts of dishonesty to satisfy the wants induced by the indolence of their parents – what can be expected, but that such children will in due time, become responsible to the laws for crimes, which have thus, in a manner, been forced upon them? – Can it be consistent with real justice that delinquents of this character should be consigned to the infamy and severity of punishments, which must inevitably tend to perfect the work of degradation, to sink them still deeper in corruption, to deprive them of their remaining sensibility to the shame of exposure, and establish them in all the hardihood of daring and desperate villainy? Is it possible that a Christian community can lend its sanction to such a process, without any effort to rescue and to save?

Duncombe argued that municipal governments had an obligation to help and protect unfortunate children and that these juveniles should be able to look upon the authorities as fathers. He extended this responsibility to the entire community, suggesting that everyone should be concerned with the problem of juvenile delinquency. He closed his remarks with the proposal that the community help the law enforcement agents in rescuing those pitiable victims of neglect and wretchedness from the melan-

choly fate that almost inevitably results from an apprenticeship in common prisons.

Duncombe's attitude was a distinct departure from the philosophy that prevailed at the time, which blamed individual character defects for human distress. He was among the first of the early Canadian reformers to suggest publicly and officially that the roots of juvenile delinquency lay outside the person and that the entire community bore a responsibility in dealing with the problem. Although he did not offer a specific remedial plan, he made it clear that treating young offenders like adult criminals was not a proper solution. He was equally clear on the issue of keeping delinquents out of jail.

For advocates of reform in the treatment of juvenile delinquents, another early source of encouragement came from the report of the 1849 commission headed by George Brown. The commissioners devoted a section of their report to the treatment of juveniles, observing that in waging war with crime, there is no department so satisfactory, so encouraging, as the rescue and reformation of the young ; and there it is the battle should be fought with utmost warmth. In this spirit they recommended the construction of houses of refuge for young offenders, suggesting that one be established at either Montreal or Quebec City in Lower Canada and another at Toronto or Hamilton in Upper Canada. The refuges, according to the commissioners, should be divided into two departments, one to accommodate neglected or undisciplined children and the other to house those convicted of a crime. The Brown Commission further recommended that the centres be put under the control of the penitentiary inspectors and that a board of managers be appointed to make weekly visits, look after the apprenticing of the children and oversee the philanthropic activities of the institution. The young people would be offered educational and vocational instruction, and they could be apprenticed out for trades training. The commissioners envisaged a system that would be a combination of education, labour and healthful exercise. The children apprenticed out would remain under the authority of the board of managers and could be taken back to the house of refuge if they misbehaved.

Reformist ideas did not go unchallenged, nor did they generate immediate action. In contrast to views such as those expressed by Charles Duncombe, many still believed that all offenders, including the young, should be punished. They argued that lenient treatment would simply

encourage the young to more crime. Consequently, the progress of reform was held up by debate over questions of treatment. On the one hand, there were those who, upset that current sanctions were ineffective, called for even harsher penalties. On the other hand, a growing constituency argued that it was morally detrimental for children to be put in penal facilities, and that under no circumstances should they be incarcerated for minor offences.

There were also some practical difficulties. Since there were no social agencies or welfare services, officials faced a choice of either putting young offenders in jail, returning them to oftentimes bad home situations or turning them loose to fend for themselves. Also, communities were reluctant to spend money on separate facilities for the young. In New Brunswick, for example, as early as 1845 politicians and officials expressed concern over the treatment of juveniles, and there were periodic discussions in the House of Assembly on such matters as schooling, segregation and separate facilities. But it is only in 1895 that the province opened its first industrial home. Between 1846 and 1857, more than 300 youngsters under 18 years of age were sentenced to the New Brunswick prison. Throughout the country even rudimentary changes, such as schooling for children in prison, were not without controversy. Some argued that, since the majority of children in jail and prisons came from the lower classes, too much education would encourage ideas of rising above their situation. In Upper Canada in the early 1850s, prison inspectors favoured a program at the common school level but not beyond, so that – in their words – undue aspirations will not be entertained nor will ambition lead astray.

In spite of ambivalence and even opposition to changes in the treatment of young offenders, signs of progress emerged. Possibly one of the most significant catalysts was the changing attitude towards children. As the nineteenth century progressed and the country became more civilised, society gradually turned from treating children as little adults to viewing them separately in their own right. Many people now recognised the special needs of children and emphasised the need for loving care in their upbringing. The former stern attitudes began to soften in many quarters, and the churches, benevolent and charitable societies, reformers, school officials and others reflected the change and encouraged it. The more humane attitude set the stage for some significant developments in the treatment of delinquents. Among the first innovations was a move to

separate the young from adult offenders by establishing juvenile institutions. The first of these early reformatories were Isle-aux-Noix, opened in October 1858 on the Richelieu River, and Penetanguishene, on Georgian Bay, the former to serve the Eastern part of the country and the latter the Western one.

The early institutions offered a program of work, discipline, vocational and academic education and religious services. But while the intentions were good, both reformatories were classic examples of the lack of foresight and proper planning that characterised government's approach to penal facilities. Isle-aux-Noix was a converted old army barracks dating from the War of 1812 and Penetanguishene was also a former army barracks. Both institutions were plagued with problems. One major mistake was allowing too broad a spread in ages. Inmates as old as 24 were included among the detainees, with the result that young children were still being mixed with adult criminals. There were escapes, discipline problems and a lack of training programs. Neither centre put any great effort into education or reform, and both functioned for a long time as institutions primarily of work and punishment rather than rehabilitation.

But despite these and other disappointments of some early experiments, reformers were not discouraged. Society was becoming progressively more concerned with child welfare. A growing constituency was agitating for reforms and child protective legislation. Reformers were urged on by the appalling conditions in which some young offenders were placed. For example, the 1862 Inspector's Report on the Montreal jail described how, on opening the door of some of the wards, "one is horror-stricken at seeing little boys in rags and older offenders almost in a state of nudity, commingling together, with matted hair and countenances bedaubed with filth."

Such scenes urged reformers on, and small victories were gradually won through the 1860s and 1870s. Nova Scotia, for example, passed legislation limiting the term of imprisonment for juveniles to 90 days. Many reformers and even correction officials began to call for new approaches or even to oppose altogether the imprisonment of young people. For example, E.A. Meredith, a member of the board of inspectors of asylums and prisons for the Province of Canada, submitted a report in 1862 calling for alternative institutions. He argued that imprisonment in jail tends to complete the ruin of the unfortunate child, and that the jails

were nurseries of vice and hotbeds of crime. He acknowledged that the separate reformatories at Isle-aux-Noix and Penetanguishene were a step in the right direction. However, he criticised them for being remedial rather than preventive. Meredith argued that what was needed were facilities that would take in not only convicted offenders but also neglected children who were at risk. He reasoned that early intervention with proper care, education, and trades training might prevent many youngsters from developing criminal careers. He maintained that crime prevention was a better course because it is more agreeable, more hopeful, more economical, more humane and more socially responsible.

Among the first institutions to reflect such an approach was the Halifax Protestant Industrial School, which opened in the Nova Scotia capital in 1864. The school was designed to provide a home, along with scholastic and technical education, for homeless and neglected young street urchins. In this respect, its aim was prevention and help. However, the courts soon began sending convicted juveniles to the school for rehabilitation. The institution was run by a group of community volunteers. Moral education and character development were stressed in the secure, clean and good, homelike atmosphere. Discipline was not harsh, and residents were allowed considerable freedom, including the right to leave if they so desired. Unfortunately, the school suffered from inadequate funding and, as a consequence, limited programs and staff. The boys did most of the maintenance chores at the school and took odd jobs in the community to raise revenue.

The Halifax experiment was a forerunner of a host of new ideas and approaches that emerged across the country in the second half of the nineteenth century. They included industrial schools, the promotion of free public school education, foster care and progressive legislation. Behind these initiatives stood a growing reform community that collectively became known as the child savers. Individually they were diverse, but as a group they came mainly from the middle and upper classes. The majority were church members, civil servants, clergy, small-business people, public-spirited women and students. They volunteered their time in support of a variety of reforms and in lobbying governments for child protection legislation. Volunteer ranks were buttressed by a growing number of professionals such as social workers. Reform activities were also supported by an elite group of philanthropists who used their influence and

gave their money in support of the endeavours of the child-saving movement.

The industrial school movement was one of the beneficiaries of the efforts of reformers. As the philosophy behind institutionalisation shifted from punishment to the rescue of children, the preferred model changed from reformatories such as Isle-aux-Noix to schools along the lines pioneered in Halifax. In 1874 Ontario passed the *Industrial Schools Act*⁴, which provided for the opening of institutions to serve neglected and problem children. These institutions were meant to fill the gap between public schools and reformatories. In 1884 the Act was amended to allow the incarceration in an industrial school of any child under 14 found guilty of petty crime who, in the opinion of the judge or magistrate before whom he has been convicted, should be sent to an industrial school instead of to a reformatory.

The first industrial school in Ontario, the Victoria Industrial School for Boys, was opened in 1887 in the small community of Mimico, near Toronto. In 1892 the Alexandra Industrial School for Girls was established in Toronto. By 1894, almost 200 children were housed in Ontario industrial schools. The province of New Brunswick opened an industrial home for boys in 1893 and a reformatory for girls in 1896. All such institutions emphasised child rescue, reform through character development, moral and academic education, and vocational training.

Some of the best-run reformatories for both boys and girls were in Quebec. By the late 1880s seven institutions were operating in the province, many run by religious orders. Officials had the power to apprentice or hire out the young people, with such working time deducted from their sentences. One of the most prominent of the Quebec juvenile institutions was the reformatory school run by the Brothers of Charity in Montreal. The Brothers worked side-by-side with the boys in the workshops, functioned as counsellors and teachers and interacted in all places of daily life. The school placed strong emphasis on trades training so that the boys would be equipped to find good jobs on their release. The school enjoyed a reputation for turning out quality products, and their leather goods especially enjoyed a ready market.

Although industrial schools and refuges enjoyed widespread support among reformers, some argued that an emphasis on formal schooling

could be a more effective reform and prevention program. Known as the School Promoters, proponents of this view argued that the high correlation between juvenile offenders and illiteracy suggested a causal relationship. The conviction that a lack of academic and moral education was at the root of crime, idleness and poverty went far back in time. For much of the century reformers, churches and philanthropists had been campaigning for free and compulsory schooling.

One of the most influential and persistent school promoters was Egerton Ryerson, a Methodist minister, journalist and teacher, who in 1844 was appointed chief superintendent of Common Schools in Canada West. Holding the office until 1876, he established a firm foundation for the school promotion movement. He also strongly influenced its direction. Ryerson argued that if more convicts had received the benefit of more schooling the number of people in jail would have been substantially reduced, money would have been saved and crime prevented. He maintained that schools could be the source not only of academic instruction but also of moral and religious education. He believed that people were fundamentally moral beings and that this characteristic overrode all other considerations. The schools could turn out morally educated students and therefore diminish crime and poverty.

By the last decade of the nineteenth century, a consensus had been reached on a fairly broad-based reform agenda. The Prisoner's Aid Association of Canada, for example, although primarily concerned with adults, had by 1890 developed a detailed set of proposals for the treatment of juveniles. The organisation supported a program that included special courts for young offenders, limited use of detention for those under 14, qualified staff for reformatories and industrial schools and the use of indefinite sentences. Members maintained that it was not the term itself of a sentence that was important but the opportunity it provided for rehabilitation ; thus, the period of detention should depend on the time it took to bring about a meaningful change in attitude.

Another impetus to reform came from the report of the 1891 Ontario inquiry into the prison and reformatory system. During its deliberations, the commission examined a cross-section of the latest theories in penology, visited a number of institutions in the United States, interviewed a host of jail and prison officials and listened to a wide variety of testimony

from individuals. The commission had much to say about juvenile delinquency : 16 of its 48 recommendations touched directly on the subject.

The report advocated measures to prevent delinquency and changes in the treatment of young offenders. Among the preventive measures were suggestions for strict enforcement of school attendance laws, municipal curfews to keep young people off the streets at night, inspection and regulation of second-hand stores and pawnshops, and assistance for child welfare agencies. In the area of improved treatment, the commission recommended that :

- every city and large town should have one or more industrial school
- children under 14 should not be publicly arrested and detained
- children under 14, when it is necessary to hold them, should not be detained in a common jail but in a place entirely away from the police station
- all children under 14 should be tried in special courts
- convicted children under 14 should never be incarcerated in a common jail, and should be sent to a reformatory or refuge only as a last resort
- more use should be made of suspended sentences
- a probation system should be introduced
- earned remission for good conduct should be offered
- a parole system should be adopted, as well as apprenticeship programs and boarding out
- an association should be formed in every region of the province for the after-care of released juveniles
- changes in the law should give more power to provincial officials over such things as pardon, parole and the general supervision of delinquent children

Though the report dealt with Ontario, it had a national impact. It heightened public awareness and focused attention on the juvenile reform campaign. It gave further impetus and encouragement to those working in the child-saving movement.

Among the specific strategies implemented during the period was greater use of foster care. Many reformers criticised the industrial schools and reformatories as inappropriate for dealing with problem youth. They favoured a non-institutional approach that would emphasise rescue and reform and treat young people not as criminals or potential delinquents but as children in need of help and guidance. It was a social welfare phi-

losophy as opposed to a judicial one. Its supporters advocated foster care, children's courts, the intervention of welfare agencies and legislation that would be more protective than punitive.

A leading advocate of foster care and one of the most prominent reformers of the period was John Joseph Kelso. He began his career as a reporter in Toronto and devoted much of his adult life to helping needy children. Recognising his dedication and ability, the Ontario government appointed him in 1893 as the first superintendent of neglected and dependent children for the province. Throughout the 1890s Kelso carried on a scheme with the warden of the central prison in Toronto to redirect convicted juveniles and keep them out of institutions. It was the practice for the courts to send some convicted youths to the central prison in Toronto before placing them in a reformatory or industrial school. The warden would inform Kelso of incoming boys, and he would then try to find placements for them in foster homes. The diversion was a contravention of regulations, but both officials conspired in the practice for a number of years.

Kelso and people like him in many parts of the country were able to use their influence and powers of persuasion to bring about a wide variety of humanitarian developments at both the provincial and federal levels. In response to such advocacy, on 23 July 1894, Parliament passed the first piece of federal legislation pertaining to juvenile delinquents, the *Act respecting Arrest, Trial and Imprisonment of Youthful Offenders*⁵. This legislation was the culmination of a series of enactments touching on the treatment of juveniles that dated back to 1857. In that year the Legislative Assembly of Canada passed an act providing for the more speedy trial and punishment of juvenile offenders. In 1875 the federal government made a significant amendment to the *Act Respecting Procedure in Criminal Cases*⁶ that permitted ordinary courts to send 16 year-olds to a reformatory instead of prison for terms of not less than two years and not more than five.

Legislation was also being introduced at the provincial levels. In 1890, for example, the British Columbia legislature passed a *Reformatory Act*⁷ that applied to male offenders under the age of 16. It allowed for the establishment of a reformatory that would provide education, industrial training and moral reclamation. The institution admitted three categories of boys sentenced by the courts : those serving sentences of two to five

years, boys transferred from jails and incorrigible or misbehaving youngsters between 10 and 13 who needed supervision. Boys in the incorrigible category could be confined for an indefinite period of not less than two years. Also, with the consent of a Supreme Court judge, on reaching the age of 12 a boy could be released and bound over as an apprentice for five years. On the other hand, boys could earn remission of their sentences for good conduct and could be released on probation at the end of one year.

In 1892 the federal Parliament passed the *Criminal Code*⁸, which included a short section pertaining to juvenile delinquents, *Trial of Juvenile Offenders for Indictable Offences*, that dealt mainly with the trial process. A number of other sections also touched on young offenders. Section 9 provided that no one under the age of seven years could be convicted of an offence. Section 10 restricted convictions of children under 14 to cases where the offender was competent to know the nature and consequences of his conduct and to appreciate that it was wrong. At least on paper this section was a significant limitation and a victory for reformers who had been struggling for years to have children treated more benignly before the courts. Finally, section 550 provided that, where appropriate and practical, trials of persons under 16 be held apart from adult offenders and without publicity.

Although such pieces of legislation were steps in the right direction, they fell far short of the comprehensive provisions that reformers wanted. Thus, the *Act respecting Arrest, Trial and Imprisonment of Youthful Offenders* of 1894 was a particularly significant development. The Act provided for the separation of youthful offenders from contact with older offenders and habitual criminals during their arrest and trial, and for their commitment to places where they may be reformed and trained to useful lives, instead of their being imprisoned. The Act also provided that the trials of young persons apparently under the age of 16 years shall take place without publicity and separately and apart from the trials of other accused persons ; that young persons shall be kept in custody separate from older persons charged with criminal offences and separate from all persons undergoing sentences of imprisonment ; and that young persons shall not be confined in lock-ups or police stations with older persons charged with criminal offences or with ordinary criminals.

The *Act respecting Arrest, Trial and Imprisonment of Youthful Offenders* included special arrangements for Ontario that recognised the new role to be played by the children's aid societies. It provided that instead of imprisonment, children could be placed by the courts in the care of homes for neglected or destitute children or in charge of the Children's Aid Society. Also, when any boy under 12 or girl under 13 was charged with an offence, the court was to notify an officer of the society for the purpose of conducting an investigation and offering advice. After such consultation, the court could use a variety of options for sentencing. They included placing the child in foster care, levelling a fine, suspending the sentence or sending the child to the reformatory or to an industrial school.

The 1894 Act encompassed many of the changes that reformers had sought since at least the early part of the century. Children would now be kept away from the corrupting influence of adult criminals, afforded more privacy and processed separately by the courts. The essence of the legislation was that delinquents would be treated not as criminals in need of punishment but as young people requiring help and understanding. Instead of sentencing strictly based on the nature of the offence, background information would be provided to enable magistrates to channel delinquents in a direction that would be appropriate to their needs. Agencies outside the correctional system could now intervene and bring a different philosophy and perspective to the treatment of young people in trouble with the law.

Progressive legislation, the evolution of reformatories, industrial schools, free education and more use of foster care represented substantial progress. Yet the changes fell far short of solving or even reducing the problem of delinquency and its treatment. The entire system suffered from a host of problems including underfunding, poor facilities, inadequate programs and untrained staff. Many institutions continued to be custodial and punitive, and too many young people were still being put in jail or prison. The continued high rates of recidivism suggested that the treatment goals of rehabilitation and prevention were still not being achieved.

By the turn of the century many child welfare advocates were convinced that troublesome youth were more often victims than perpetrators. They argued that many young people suffered from the results of neglect and a poor home environment. Over a century of evidence gave strong support

to this view. Survey after survey of young offenders revealed a common denominator of family problems and parental neglect. For example, out of 166 boys in residence at the Penetanguishene reformatory in September 1869, 24 had lost both parents, 39 had a deceased father and 27 had a deceased mother. Fourteen of the boys had parents who were heavy drinkers, 41 where the father was intemperate, and nine where the mother was a chronic drinker. Youth workers regularly observed, as did the Brothers who ran the Montreal Industrial School, that the majority of young delinquents were more to be pitied than blamed.

As a result, many reformers sought legislation and changes that would amount to a completely new approach. They wanted a system that viewed a young offender not as a criminal but as a troubled child in need of understanding and help. Instead of processing children through a judicial system, they sought a process more akin to the working of a social welfare program.

The new century, reformers hoped, would bring success to their campaign for improved treatment of child offenders. For many, the key to reform was new legislation that would change judicial practices. A key component of the package of changes that were being sought was the children's court. Supporters argued that a separate court system for the processing of accused juveniles would open the door to an entirely new approach in the treatment of delinquency. Buttressed by this belief, reformers mounted a broad-based campaign for new legislation.

Under the strong leadership of J. J. Kelso and W. L. Scott, a lawyer and President of the Ottawa Children's Aid Society, the reform community mounted a widespread lobbying and public relations campaign. There was still opposition, however, from some who opposed any more benign treatment of delinquents. For example, one outspoken critic, Inspector David Archibald of the Toronto police, dismissed reformers like Kelso and Scott as superficial and sentimental faddists. He complained that he did not want to be put in a position in which he would have to kiss and coddle a class of perverts and delinquents who require the most rigid disciplinary and corrective methods to ensure the possibility of their reformation. But despite such opposition, the efforts of Kelso, Scott and others came to fruition with the passage of the *Juvenile Delinquents Act* in 1908.

2 THE ACT OF 1908

Reformers persuaded the federal government to enact the *Juvenile Delinquents Act*⁹ in 1908, the spirit of which was to make the treatment of accused delinquents more of a social welfare exercise than a judicial process. The *Juvenile Delinquents Act* was philosophically grounded in the doctrine of *parens patriae*, which held that the state could intervene as a "kindly parent" in situations where a family could not provide for the needs of its children. The juvenile justice system was now governed by the overarching principle of the best interests of the child ; consequently, due process rights were minimised in the interests of an informal process and the promotion of the welfare of children.

The *Juvenile Delinquents Act* stated that "every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child". In keeping with this approach, the Act provided for separate courts and that all cases involving children be brought before juvenile court. The Act, however, also provided that children over the age of 14 and accused of an indictable offence, such as murder or treason, be transferred to ordinary courts. Transfers were at the discretion of a juvenile court judge. Young persons detained pending a hearing had to be placed in detention homes or shelters exclusively for juveniles. Proceedings were also to be private, and neither the names of the accused nor their parents could be published. The Act provided greater sentencing options and placed restrictions on the punishment of young children. With the exception of juveniles transferred to adult courts, no convicted youth could be put in custody in any place "in which adults are or may be imprisoned".

The *Juvenile Delinquents Act* was a significant piece of legislation that set the tone for the Canadian justice system's approach for nearly 75 years. The juvenile justice system created by the *Juvenile Delinquents Act* was an enormous improvement over the previous treatment of children and adolescents. Nonetheless, the *Juvenile Delinquents Act* was still considered an imperfect solution and was often criticised.

In the 1960s, the federal Department of Justice reassessed its long-range plan for the development of federal correctional services, and a committee was set up to study the matter. As part of its mandate, the committee

released a report entitled *Juvenile Delinquency in Canada*, in 1965. The report drew attention to the many shortcomings of the system by pointing out the lack of uniformity across Canada in terms of types or sizes of institutions, the number and qualifications of staff and the policies to be administered in the operation of training schools. Committee members noted that, within the provinces, seldom did any one government department have charge of children's services, that many centres had inadequate facilities and that some of these were poorly located. The report placed even more emphasis than the *Juvenile Delinquents Act* did on the non-judicial treatment of delinquents, called for stricter limitations on the exercise of court powers, and recommended the use of more sentencing options. Moreover, the report called for more standardisation of services and programs, equal application of the *Juvenile Delinquents Act* across Canada, better training for judges and other court officials, and mandatory pre-sentence reports. It also recommended that the court be obliged to inform the accused of his or her rights to retain counsel, that provisions be made for more formal procedures and protection of the accused's rights, and that broader rights of appeal be instituted.

The 1965 report was the beginning of a lengthy period of debate and gradual reform. Some provinces, most notably Quebec, took steps to change their juvenile justice system by, for example, ensuring that young persons had access to lawyers and establishing a formal system of juvenile diversion. Other provinces lagged behind.

In 1970, the federal government introduced Bill C-192, the *Young Offenders Act*. While this bill restricted the jurisdiction of the proposed Act to federal criminal offences in order to appease provincial concerns, it nonetheless generally adhered to the approach and substantive proposals recommended by the 1965 committee. As a result of resistance from the provinces and opposition parties in Parliament, as well as opposition by interest groups (it was criticised as too legalistic and punitive and as a "*Criminal Code* for children" by welfare and treatment interest groups), the Bill could not be adopted before the end of the session of Parliament in 1972.

In response to the failure of Bill C-192, the federal Solicitor General in 1973 established a committee to review developments that had taken place in the field. That committee released its report, entitled *Young Persons in Conflict with the Law*, in 1975. The report included 108 recom-

mendations concerning various issues such as recognising the right of a young person to have legal representation or assistance from a responsible person, setting the minimum age at 14 years and affording more protection to young persons in relation to statements made to authorities.

3 THE ACT OF 1984

In early 1981, Bill C-61, the *Young Offenders Act*, was introduced in Parliament. The Bill, unlike the 1908 *Juvenile Delinquents Act*, which received less than one hour's discussion in the House of Commons, was the subject of extensive study and debate in Parliament. More than 40 interest groups made representations to the parliamentary subcommittee studying the Bill. Although critical of particular aspects of the Bill, these groups generally supported it. The philosophical direction of the proposed legislation, in sharp contrast to the failed 1970 *Young Offenders Act*, was hardly debated at all. The legal rights orientation of the Bill went virtually unchallenged ; what was really at issue in this regard was not the rights in themselves but nuances of their implications. The two dominant political parties of the time (the Liberal Party and the Conservative Party) seemed to agree on the fundamental direction of juvenile justice reform, while a third party (the New Democratic Party) criticised certain aspects of the Bill but remained relatively quiet in its criticism of the legislation's philosophical direction.

In 1982, the federal government enacted the *Canadian Charter of Rights and Freedoms*, which has become a fundamental part of the country's Constitution. The Charter protects, among other things, legal rights such as the right to life, liberty and security of the person. The integration in the Constitution of the Charter of Rights and Freedoms provided a strong impetus to federal reform efforts. Many of the provisions of the *Juvenile Delinquents Act* appeared to ignore the legal rights guaranteed in the Charter. Further, the provincial disparities invited challenge under section 15 of the Charter, which guarantees equality rights. Thus, in 1982, with the support of all political parties, the *Young Offenders Act* received parliamentary approval. The *Young Offenders Act* came into force on 2 April 1984, replacing the 1908 *Juvenile Delinquents Act*.

The *Young Offenders Act* of 1984 was designed to remedy many of the shortcomings in the treatment of juvenile delinquents ; in particular, it addressed the issue of offenders' rights. The Act continued to make a distinction between youth and adult crime, and to provide for a substantially different and much more benign approach to dealing with youth. At the

same time, it attempted to make young people more accountable for their actions. The legislation ended the paternalistic handling of delinquents by providing young people the same basic rights and freedoms before the law as those enjoyed by adults, such as the right to legal counsel and the right to appeal a conviction. It also set out a new range of penalties that included the options of financial restitution or compensatory work for the victim. One of the more significant changes, in keeping with the Act's benevolent approach, was the provision raising the minimum age for prosecution to 12 years and setting a new, Canada-wide maximum age of 17. The uniform maximum age provision of the Act came into force on 1 April 1985.

The Act initially stipulated that detention could not exceed two years, except where the crime would ordinarily incur a life sentence, in which case the maximum period of commitment could not exceed three years. Although the Act permits transfer to adult court in certain situations, its intent was that most cases be tried in youth court. There have been a number of amendments to the Act since it came into force. For example, there were amendments to the transfer process, amendments increasing the penalty for first-degree murder to 10 years, and amendments increasing the penalty for second-degree murder to 7 years.

Despite the considerable amount of criticism it has received, the *Young Offenders Act* was clearly an improvement over the *Juvenile Delinquents Act* since it represented a balance of the due process rights of young people, the protection of society and the special needs of young offenders. While many Canadians thought the Act was too lenient on young offenders, children's advocates were concerned about the overuse of incarceration as a method for dealing with troubled youths. A further criticism was that the principles enumerated in the *Young Offenders Act* lacked any indication of priority or order of importance.

In July 1995, the House of Commons Standing Committee on Justice and Legal Affairs initiated a broad review of the *Young Offenders Act*. In order to properly assess the situation, a wide range of groups were consulted, including criminal justice professionals, children's services organizations, victims, parents, young offenders, educators, advocacy groups and social-policy analysts. In its report entitled *Renewing Youth Justice*, the federal committee formulated in April 1997 14 suggestions for change, such as providing youth courts the jurisdiction to deal with 10 and 11

year-olds in certain circumstances, to allow judges the discretion to permit publication of young offenders' names, and replacing the Act's declaration of principles with a statement of purpose and an enunciation of guiding principles for its implementation.

On 12 May 1998, the federal government released its response to the 1997 *Renewing Youth Justice* report in a document entitled *A Strategy for the Renewal of Youth Justice*. This document addressed each of the recommendations made by the 1997 report and outlined how the government intended to reform juvenile justice. The strategy focused on three areas : youth crime prevention, providing young people with meaningful consequences for their actions, and the rehabilitation and reintegration of young offenders.

4 THE ACT OF 2003

On 11 March 1999, the government introduced Bill C-68, the first version of the *Youth Criminal Justice Act*. The bill was reintroduced in October 1999 as Bill C-3. An election call in late 2000 prevented Parliament from passing the Bill. Consequently, the federal government reintroduced before Parliament on 5 February 2001 Bill C-7, the *Youth Criminal Justice Act*. Bill C-7 contained over 160 amendments in response to suggestions and concerns raised in relation to Bill C-3. The Bill was adopted and received Royal Assent on 19 February 2002. Following the time allotted to the provinces to prepare for its implementation, the *Youth Criminal Justice Act* came into force on 1 April 2003, replacing the *Young Offenders Act*.

The *Youth Criminal Justice Act* strives to remedy the perceived problems of the *Young Offenders Act* by, among other things, using the formal justice system more selectively, reducing the overreliance on incarceration and increasing reintegration of young people into the community following custody. The *Youth Criminal Justice Act* contains a Declaration of Principle applicable to the entire Act, which reflects Canada's new policy respecting young persons. The Act further aims to achieve its objectives by stating principles that are specific to certain provisions of the Act. For example, there is a substantial difference between the *Youth Criminal Justice Act* and the *Young Offenders Act* on the issue of youth sentencing. The *Young Offenders Act* principally relied upon its general Declaration of Principle to guide all provisions of that Act, including sentencing. The *Youth Criminal Justice Act* explicitly states the purpose, principles and factors to be considered when youth courts sentence young persons. In addition to creating a number of new sentencing options, the *Youth Criminal Justice Act* replaced transfers to adult court with a system of adult sentencing. Though all trials will take place in a youth court under the *Youth Criminal Justice Act*, for certain offences and in certain circumstances a youth may receive an adult sentence. The *Youth Criminal Justice Act* also outlines in separate sections the purposes, principles and factors to be used in sentencing, custody and supervision, and extrajudicial measures.

As a part of Canada's *A Strategy for the Renewal of Youth Justice*, the *Youth Criminal Justice Act* seeks to provide the legislative direction needed to achieve a more effective and fairer youth justice regime. Along with its non-legislative elements such as federal funding for programs, crime prevention and education, the *Youth Criminal Justice Act* should contribute to the improvement of the youth justice system.

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NOTES

- ¹ The historical overview that follows is based on a paper prepared for the International Co-operation Group by historian Owen Carrigan.
- ² Ivy Pinchbeck and Margaret Hewitt, *Children in English Society*, volume 2, page 352. More generally, this two-volume history provides a particularly well researched account of the evolution of the attitude to children in England.
- ³ André Lachance, "Women and crime in Canada in the early eighteenth century, 1712-1759", in R. C. Macleod (editor), *Lawful Authority*, pages 9-21, at page 15.
- ⁴ *An Act respecting Industrial Schools*, Statutes of the Province of Ontario, 1874, chapter 29.
- ⁵ *An Act respecting Arrest, Trial and Imprisonment of Youthful Offenders*, Statutes of Canada, 1894, volume 1, chapter 58.
- ⁶ *An Act to amend the Act respecting Procedure in Criminal Cases and other matters relating to Criminal Law*, Statutes of Canada, 1875, volume 1, chapter 43.
- ⁷ *An Act for establishing a Juvenile Reformatory*, Statutes of British Columbia, 1889-1890, chapter 21.
- ⁸ *The Criminal Code, 1892*, Statutes of Canada, 1892, volumes 1 and 2, chapter 29.
- ⁹ *The Juvenile Delinquents Act*, Statutes of Canada, 1908, chapter 40.