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The Development of Canadian Juvenile Justice: A Background for Reform
THE DEVELOPMENT OF CANADIAN JUVENILE JUSTICE: A BACKGROUND FOR REFORM

By JEFFREY S. LEON*

A. INTRODUCTION

The recent formulation of a draft Young Persons in Conflict with the Law Act¹ to replace the Juvenile Delinquents Act² as the statutory authority for 'special' processing and treatment of juvenile law-breakers highlights the need for on-going analysis of trends in Canadian juvenile justice. To appreciate fully 'new' concerns with the behaviour of children and 'new' procedures for responding to these concerns, it is useful to consider the origins of the attitudes and methods reflected in current delinquency legislation. This paper is designed to provide such an historical background by tracing the conceptual and legislative development of Canadian juvenile court procedures.³

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The Juvenile Delinquents Act, 1908⁴ may be viewed as a product of a diverse social reform movement dedicated to 'saving' or 'rescuing' children from what were perceived to be undesirable and harmful aspects of life in the increasingly urbanized and industrialized society of the nineteenth and early twentieth centuries.⁵ While this reform movement was instrumental in procuring a voluminous amount of legislation, some of which is reviewed below, the 1908 Act is distinguishable in certain aspects. Much of this early 'child-saving' legislation extended the incidents of the dependent status assigned to children at common law.⁶ As to criminal responsibility, the common law principle was established that in order to be convicted of a criminal offence, a child had to be of sufficient age to have the capacity to form a criminal intent. A child under seven years was presumed to be doli incapax, and hence not capable of distinguishing right from wrong. A child between the ages of seven and fourteen years was prima facie exempt from criminal responsibility, unless it could be proved "that he had the discretion to judge between good and evil."⁷

The legislative extension of the protected status of childhood centred on a perceived need for the protection of children — both from themselves and from others — as well as a perceived need for the protection of others from children. In drafting specific delinquency legislation, the reformers undertook the delicate task of attempting to design new procedures which promoted simultaneously the welfare and best interests of children through a philo-

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⁴ 1908, 7-8 Edw. VII, c. 40 (Can.).
⁷ Reniger v. Fogossa (1852), 1 Pl. 1 at 19; 75 E.R. 1 at 30-31 (K.B.). See also Marsh v. Loader (1863), 14 C.B. (N.S.) 535; 143 E.R. 555 (C.P.), and the cases reviewed in D. Mendes da Costa, “Criminal Law” in R. Graveson and F. Crane eds., A Century of Family Law (1857-1957) (London: Sweet and Maxwell, 1957). The first Canadian Criminal Code, 1892, 55-56 Vict., c. 29 (Can.) contained similar provisions, as applied in The King v. Carvery (1906), 11 C.C.C. 331 (N.S. Co. Ct. J. Crim. Ct.). It is important to note, however, that protecting children from being subject to the full impact of the criminal law power, as attempted through delinquency legislation, is a matter qualitatively distinct from considerations of criminal responsibility. "Parliament . . . has declared," noted Justice Hartt, "that children who break the criminal law are in fact to be treated differently than their adult counterparts. . . . In theory, the juvenile justice system is totally committed to rehabilitation and to "the best interests of the child," R. v. Haig, [1971] 1 O.R. 75 at 79 (H.C.).
sophistical approach similar to that of the parens patriae doctrine and prevented and controlled the misbehaviour of children in a criminal law context. However, distinctions between acts which served as indicia of neglect and acts which could be classified as crimes or delinquencies were not finely drawn.

8 Traditionally, and particularly in the United States, the philosophy of the modern juvenile court has been traced to the parens patriae jurisdiction of the English Chancery Court. For example, Chief Justice Schaefer of Illinois has characterized that State's Juvenile Court Act, ill. Rev. Stat., 1951, c. 23, as "a codification of the ancient equitable jurisdiction over infants under the doctrine of parens patriae," People ex rel. Houghland v. Leonard, 112 N.E. (2d) 697 at 699 (1953). The Court of Chancery would exercise a paternal jurisdiction to protect the "true interests of the child," per Lord Justice Kay in The Queen v. Gynghall, [1893] 2 Q.B. 232 at 248, thus meeting an "obvious necessity that the law should place somewhere the care of individuals who cannot take care of themselves..." Lord Chancellor Eldon in Wellesley v. The Duke of Beaufort (1827), 2 Russ. 1, 20-21; 38 E.R. 236 at 243. In Ontario, parens patriae is inherent in the jurisdiction of the Supreme Court of Ontario but not in the Family Court; see Ontario Law Reform Commission, Report on Family Law, Part V: Family Courts (Toronto: Queen's Printer, 1974) at 43. See also Re McMaster and Smith (1972), 23 D.L.R. (2d) 264 at 266-68 per Grant J. (Ont. H.C.). Resting with the Crown in right of a province, parens patriae could not be used as the 'legal basis for federal delinquency legislation, although the intention of the draftsmen was to incorporate the rationale of parens patriae into the 'spirit' of the juvenile court, which was to be "that of a wise and kind, though firm and stern father...[asking] not, 'What has the child done?' but, 'how can this child be saved?'" W. L. Scott, The Juvenile Delinquents Act (1908), 28 Can. Law Times and Rev. 892 at 892. For other considerations of parens patriae as it relates to delinquency, see K. Wang, The Continuing Turbulence Surrounding the Parens Patriae Concept in American Juvenile Courts (Part I) (1972), 18 McGill L. J. 219; K. Wang, The Continuing Turbulence Surrounding the Parens Patriae Concept in American Juvenile Courts (Part II) (1972), 18 McGill L. J. 418; M. Langley, Juvenile Justice: What Is It? (1975), 3 Crim. Made in Can. 17; E. Lemert, Social Action and Legal Change: Revolution Within the Juvenile Court (Chicago: Aldine, 1970) at 25; and S. Fox, Juvenile Justice Reform: An Historical Perspective (1970), 22 Stan. L. Rev. 1187 at 1192.

9 Those who promoted Canada's juvenile delinquency legislation assumed, not unjustifiably, that "delinquency" was a matter primarily related to criminal law, and therefore under federal jurisdiction, rather than being primarily related to property and civil rights in the province or to a matter of merely local or private nature in the province, and therefore under provincial jurisdiction. In order to fit within this interpretation of ss. 91 and 92 of the British North America Act, while still covering provincial and municipal offences as well as federal offences (see, infra, note 153), "delinquency" was defined as an "act" in order to make it an offence under s. 3 of the Juvenile Delinquents Act, 1908 (W. Scott, The Juvenile Court in Law and the Juvenile Court in Action, supra, note 3 at 1). Also, because the administration of justice, including the constitution of courts, was a provincial matter under s. 92 of the B.N.A. Act, s. 34 of the 1908 Act required that appropriate provincial legislation be enacted prior to the issuance of a federal proclamation putting the Act into force in that province. Subsequent to this legislation, the Supreme Court of Canada held that: "The responsibility of the state for the care of people in distress (including neglected children...), and for the proper education and training of youth, rests upon the Province..." in Reference re Adoption Act et al. (1938), 71 C.C.C. 110; [1938] 3 D.L.R. 497 at 498, per Duff C.J.C. However, the possible conflict with federal delinquency legislation was not discussed. In the Attorney-General of British Columbia v. Smith (1968), 65 D.L.R. (2d) 82, the Supreme Court of Canada held that the Juvenile Delinquents Act was intra vires the federal Parliament in that, in the words of Chief Justice Fauteux at 88, it dealt with juvenile delinquency "in its relation to crime and crime prevention." For a strong argument opposing this decision, see C. McNairn, Comment (1968), 46 Can. Bar Rev. 473.
The constitutional validity of the *Juvenile Delinquents Act* has been affirmed. However, the Act has been criticized for its deficiencies "in clarity of expression." As stated by Manson J. in *R. v. H. and H.*, it "is not a lawyer's Act, not a model of perfection in the matter of draftsmanship, not one to which it is easy to apply the ordinary rules of construction. Nevertheless, we must . . . despite some anomalies, give effect as best we can to its provisions."

It is suggested that 'problems' with this legislation stem largely from a conceptual mixing of the notions of protection of children and protection from children (neglect and delinquency) which led to a procedural scheme whereby the adjudication stage of the court process was not clearly distinguished from the disposition stage. That is, the 'trial' itself became an important aspect of the 'treatment.' This mixing also provided the conceptual underpinnings for the organizational forces that ultimately expanded the systematic use of probation as a key disposition for juvenile courts. The prevention of crime through protection of or from children by probationary supervision was a central theme for those who lobbied to secure delinquency legislation in Canada.

In sum, the goals expressed for the 1908 *Juvenile Delinquents Act* were essentially twofold. First, a change was to be effected in the dispositional treatment afforded juveniles, particularly through the use of an expanded system of organized probation. Second, although the *Criminal Code* provisions with respect to summary conviction procedures were incorporated *mutatis mutandis* into the Act, these procedures, according to the reformers, were to be adapted and modified, through their application in special courts by special judges, to become part of the rehabilitation process. In practice, this failure to distinguish adjudication from disposition and trial from treatment may have resulted in unnecessary infringements on the procedural rights and substantive safeguards traditionally afforded to persons in criminal and quasi-criminal proceedings.

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10 The 1908 *Juvenile Delinquents Act* has been amended several times. These amendments, some of which are noted below, were for the most part minor. The Act was revised and consolidated in 1929, 19-20 Geo. V, c. 46 (Can.). Because the substance of the provisions has remained the same, unless otherwise noted, references to the *Juvenile Delinquents Act* are to the original 1908 Act.


13 *Id.* at 11.


15 The legal validity of this point has been questioned in a recent consideration of the innovations introduced by delinquency legislation: B. Kaliel, *Civil Rights in Juvenile Courts* (1974), 12 Alta. L. Rev. 341 at 343 *et seq.*

B. THE WELFARE PHILOSOPHY AND CONCERN FOR CHILDREN: EARLY DEVELOPMENTS17

Concern for child welfare in Canada18 did not originate with the late nineteenth century reformers' 'discovery' of urban social problems.19 The family, as a unit for the socialization of children, had long been supplemented by state efforts. For example, early legislative measures provided for the care and protection of orphans and children who had been deserted by their parents. Under An Act to Provide for the Education and Support of Orphan Children,20 passed in 1799, town wardens, with the consent of two justices of the peace, were authorized to bind certain children out as apprentices. Subsequent legislation21 dealt with other related matters, including: provision of support for the children of soldiers killed in service (1813);22 the appointment of guardians for infants whose fathers had died, with the power to bind the infant out as an apprentice (1827);23 provision of support for illegitimate children by rendering putative fathers liable (1837);24 and provision of compensation for the families of persons killed by accident (1847).25

The concern for children without parents, and more specifically, without fathers, was also extended to children with 'inadequate' parents. Dr. Charles Duncombe, an early advocate of prison reform in Canada, was distressed by the number of Toronto children in 1836 with a "ragged and uncleanly ap-

17 For the historical aspects of this paper, reliance was placed on several primary sources of data, including the writings of, and the correspondence among, key proponents of special delinquency legislation; the proceedings of selected child welfare conferences; government reports; and legislative debates. Secondary accounts of related concerns with juvenile behaviour during various periods in Canadian history have also been utilized. The theoretical implications of the Canadian history of delinquency legislation for the sociology of law have been considered in J. Hagan and J. Leon, Rediscovering Delinquency: Social History, Political Ideology and the Sociology of Law (1977), 42 Am. Sociological Rev. n.p.

18 The following discussion deals with Canada in general, although the main focus of this and subsequent sections is on events that occurred primarily in Ontario. Ontario child-saving, as indicated below, is most significant in the emergence of both the philosophy and the organizations that formed the basis of early Canadian juvenile justice.


20 1799, 39 Geo. III, c. 3, s. 1 (Can.). Further, mothers of infant children who had been abandoned by their fathers could bind the children out as apprentices. There were two exceptions to these provisions: first, the town warden could not bind as apprentices children with relatives who were "able and willing to support and bring them up" (s. 3); and second, the consent of children over fourteen years of age was required.

21 See, generally, Splane, supra, note 19.

22 An Act to provide for the Maintenance of Persons Disabled and the Widows and Children of such persons as may be killed in His Majesty's Services, 1813, 53 Geo. III, c. 4 (Can.).

23 An Act respecting the appointment of Guardians, 1827, 8 Geo. IV, c. 6 (Can.).

24 An Act to make the remedy in cases of seduction more effectual, and to render the Fathers of illegitimate Children liable for their support, 1837, 7 Wm. IV, c. 8 (Can.).

25 An Act for compensating Families of Persons killed by Accident, and for other purposes therein mentioned, 1847, 10 & 11 Vict., c. 6 (Can.).
pearance," using "vile language," and displaying "idle and miserable habits." Their misbehaviour was due to a lack of control, with the blame being placed on their parents, who were "too poor, or too degenerate to provide them with clothing fit for them to be seen in school; and know not where to place them in order that they may find employment, or be better cared for. . . ."27

Because of the focus on control, or the lack thereof, in the family context, distinctions between behaviour attributed to parental absence or neglect, and behaviour characterized as criminal or delinquent, were not seen to be relevant. The rationale for the control of juvenile misbehaviour, and hence for the prevention of future criminal behaviour, mixed the perceived need for the protection of others from children with the perceived need for the protection of children from themselves and others. The question was not whether a child would be held accountable for his or her behaviour — criminal or otherwise — but rather how best to treat the child in order to effect adequate socialization before the child became a 'convicted criminal.' If the family was not capable, then the state would intervene to reform the child. In a series of letters published in the Montreal Gazette and also in pamphlet form in 1857 under the pseudonym "Philanthropy," it was suggested that the "evil must be reached at its source; the noxious weed must be nipped in the bud; the child must be separated from parents who would only train it up to vice."28

And while acknowledging the apparent harshness of such measures, the author queried whether it was "not much harder to allow such children to become actual criminals, and then be obliged to do the same thing with much less chance of success."29

For Victorian-age reformers, "the distinction in status between neglected and criminal in effect translated as potentially versus actually criminal."30 This attitude towards the prevention of criminality was reasserted by those who later drafted Canada's delinquency legislation in terms of the idea "that there should be no hard and fast distinction between neglected and delinquent children, but that all should be recognized as of the same class, and should be dealt with with a view to serving the best interests of the child."31 This perceived similarity facilitated protective and rehabilitative responses to children which ultimately worked to the detriment of the procedural rights recognized for children in the court process.

Dr. Duncombe's 1836 comment also highlights the fact that concern with controlling the delinquent behaviour of children would be part of a more

26 Cited in L. Johnson, History of the County of Ontario, 1615-1875 (Whitby, Ont.: Corporation of the County of Whitby, 1973) at 158.
27 Id.
29 Id. at 25.
extensive concern with 'child-saving' in general.\textsuperscript{32} As expressed by a later Canadian legislator, "'Satan finds some mischief still for idle hands to do,' is the crystallization of the idea that idleness begets delinquency." [quotation marks added]\textsuperscript{32} This notion was reflected in the early emphasis placed on both apprenticeship and the promotion of education.

Enacted in 1851, \textit{An Act to Amend the Law Relating to Apprentices and Minors}\textsuperscript{34} extended previous provisions for apprenticeship and outlined the rights and duties of masters and apprentices. During this period, private individuals and volunteer organizations were involved in organizing institutions whose directors had the power to bind out as apprentices children who were under their charge.\textsuperscript{35} These institutions, which later unsuccessfully attempted programmes of long-term care, provided a link between common schools and reformatories.\textsuperscript{36} As expressed in \textit{An Act to Incorporate the Boy's Industrial School of the Gore of Toronto}, there was a perceived need for "protect[ing] and reclaiming destitute youths, exposed either by the death or neglect of their parents to evil influences and the acquisition of evil habits, which in too many cases, lead to the commission of crime."\textsuperscript{37} The promotion of schooling, under the leadership of Egerton Ryerson, who was popularly regarded as the 'father' of Ontario's school system, was also associated with crime prevention and the effective preparation of children for productive roles in later life.\textsuperscript{38} The attitudes expressed by this movement continued to be voiced by later reformers. It was believed that deviation from an idealized view of family life, and the failure of children to attend school, would result in children "rapidly acquiring an education of the wrong kind."\textsuperscript{39}

Although these and later social reform efforts, intended to improve child welfare and the control of juvenile behaviour, had tenuous links through their "concern with the predicament of disadvantaged and delinquent children,"\textsuperscript{40} the development of special procedures for processing \textit{delinquent} children resulted from specific organizational forces. Still, the distinctions between neglect and delinquency were never well-defined; the modified treatment of children convicted of crimes had long reflected doubt as to the true 'criminality' of their behaviour.\textsuperscript{41}

\textsuperscript{32} \textit{Supra}, note 5.
\textsuperscript{33} \textit{Can.: H. of C. Deb.}, April 24, 1907, at 901.
\textsuperscript{34} 1851, 14 & 15 Vict., c. 11 (Can.).
\textsuperscript{35} Splane, \textit{supra}, note 19 at 223.
\textsuperscript{36} See Houston, \textit{supra}, note 19 and note 30.
\textsuperscript{37} 1862, 25 Vict., c. 82 (Can.).
\textsuperscript{38} For an extensive review of these activities, see A. Prentice, \textit{The School Promoters: Education and Social Class in Mid-Nineteenth Century Upper Canada} (unpublished Ph.D. dissertation, University of Toronto, 1974).
\textsuperscript{39} \textit{Proceedings of the Tenth Canadian Conference of Charities and Corrections} (Toronto: n. pub., 1909) at 99.
\textsuperscript{40} Morrison, \textit{supra}, note 5 at 4.
Two statutes enacted in Canada in 1857 were relevant to the treatment of children convicted of criminal offences. An *Act for Establishing Prisons for Young Offenders* provided for the construction of "reformatory prisons" in Upper and Lower Canada to which certain young offenders under the age of twenty-one years and convicted of an offence punishable by imprisonment — or those under sixteen years, convicted of a summary offence and sentenced to a common gaol for at least fourteen days — could be sent in order to "be detained and corrected, and receive such instruction and be subject to such discipline, as shall appear most conducive to their reformation and the repression of crime." During this period, then, lengthy sentences to special institutions were justified by the belief that reformation could be effected for the benefit of the child and society. The second statute, *An Act for the More Speedy Trial and Punishment of Young Offenders*, provided for special sum-
mary trial procedures, and increased powers to discharge juvenile offenders, in order “to avoid the evils of their long imprisonment previously to trial.”

With certain exceptions, persons under sixteen years charged with simple larceny or an offence punishable as simple larceny could be summarily convicted and punished by the imposition of up to three months imprisonment or a fine not exceeding five pounds. However, should the Justices deem the offence not proven, or punishment inexpedient, they could dismiss the accused, with or without sureties for his future behaviour.

While enthusiasm for the reformatory varied even in this period, later advocates of delinquency legislation expressed the desire to keep all but the most “serious cases” out of institutions such as juvenile reformatories and industrial schools, which were regarded as “no more than a necessary evil.”

As W. L. Scott, the principal draftsman of Canada’s delinquency legislation, reasoned, “What wise parent would place a naughty child with other naughty children in order to make him better?” However, restrictions on the type of children sent to institutions were not immediately forthcoming.

The failure to distinguish children who were before the courts because of their parents’ absence or inadequacy from children who had committed an ‘offence,’ all of whom were regarded as potential criminals and hence as subjects for preventative treatment, was also reflected in the provisions of An Act respecting Industrial Schools, passed in Ontario in 1874. This Act provided for the establishment of residential schools to which police magistrates could commit children apparently under the age of fourteen for as long as might be deemed proper for their “teaching and training,” but not beyond their attaining sixteen years of age. These schools, however, were not operational until 1887 for boys and 1891 for girls. In offering an alternative that

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45 1857, 20 Vict., c. 29 (Can.). It was noted in the Legislative Assembly by Mr. Cartier that the Act was a copy of two English Acts to the same effect (Can.: L. A. Deb., 1857, n.p.).

46 There was a further proviso to the effect that, if the Justices were of the opinion that the accused had made a defence, or that the charge should be prosecuted by indictment, or if the accused objected to the case being summarily disposed of, they were to deal with the case as if the Act had not been passed.

47 See Houston, supra, note 19 and note 30.

48 Scott, supra, note 8 at 897.

49 Id. Consider, for example, the following episode as related to the Canadian Club of Vancouver on February 18th, 1909 by J. J. Kelso:

... I successfully waylaid or intercepted some forty boys, all under sentence to the Reformatory, and all were spirited away to situations and foster homes before they had reached their legal destination. The Attorney-General one day asked me, ‘Look here, Kelso, where do you get the law for all this?’ ‘Law’, I replied, ‘there isn’t any law that I know of, but don’t you think it is the best thing for the boys?’ He agreed that it was, and kindly consented to shut his eyes to what was going on. Helping Erring Children (Toronto: Warwick, 1909) at 6.

50 1874, 37 Vict., c. 29 (Ont.).

51 Id., s. 5.

52 The first industrial school for boys in Ontario was opened at Mimico in 1887. The first such school for girls, Alexandria School, opened in 1891. For a historical review of the development of these institutions, and the associated legislation, see Weiler, supra, note 14 at 21-50.
was more severe than public school, but less severe than reformatory, the industrial school was to accept a variety of candidates, including any child:

(1) Who is found begging or receiving alms, or being in any street or public place for the purpose of begging or receiving alms;
(2) Who is found wandering, and not having any home or settled place of abode or proper guardianship, or not having any lawful occupation or business, or visible means of subsistence;
(3) Who is found destitute, either being an orphan or having a surviving parent who is undergoing penal servitude or imprisonment;
(4) Whose parent, step-parent or guardian represents to the police magistrate that he is unable to control the child, and that he desires the child to be sent to an industrial school under this Act;
(5) Who, by reason of the neglect, drunkenness or other vices of parents, is suffered to be growing up without salutary parental control and education, or in circumstances exposing him to lead an idle and dissolute life.

Added to this array of what were essentially incidents of neglect was a further category included in an 1884 consolidation:

(6) Who has been found guilty of petty crime, and 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 gaol or reformatory.

Thus, as more benign, treatment-oriented responses to the behaviour of children were developed, the perceived needs to protect children and to protect others from children dictated similar preventative measures. In the final decades of the nineteenth century, a period of rapid urbanization in Ontario, reform efforts directed towards children were gradually made more professional and bureaucratic. These developments provided the background for the eventual enactment of juvenile delinquency legislation in Canada.

It has been suggested that the reformers at the turn of the century focused on the disadvantaged and delinquent child as a symbol of their broader concern with the erosion of "traditional constraints over individual morality and social conduct." Businessmen-philanthropists provided funds and served as directors of various child-saving endeavors; lawyers, doctors, teachers, and clergy provided social analysis and suggestions for reform programmes; and housewives, nurses, social workers, and deaconesses administered the daily

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53 An Act respecting Industrial Schools, 1874, 37 Vict., c. 29, s. 4 (Ont.).
54 As indicated, infra, at notes 71 and 105, early 'child protection' legislation in Ontario essentially duplicated these provisions in the definition of neglect.
55 An Act to amend and consolidate the Acts respecting Industrial Schools, 1884, 47 Vict., c. 46, s. 7(6) (Ont.).
56 With the enactment of An Act respecting Truancy and Compulsory School Attendance, 1891, 54 Vict., c. 56 (Ont.), a further category, "any child between eight and fourteen years of age, who has been expelled from school for vicious and immoral conduct" was added by s. 6.
57 See Morrison, supra, note 5 and T. Morrison, "Their Proper Sphere": Feminism, the Family and Child-Centred Social Reform in Ontario, 1875-1900 (1976), 68 Ont. History 45.
58 Morrison, supra, note 5 at 47-48.
operations of organizations. These reformers idealized the family, emphasizing the natural home as the preferred child-rearing milieu.

With this emphasis, the industrial school was viewed as being supplementary to the family which lacked adequate control. Nevertheless, the view that "if a child can be saved from the industrial school it should be done" was destined to be popular among the principal advocates of delinquency legislation. In addition to their concern for children who might be institutionalized, these reformers realized the potentially undesirable results that might follow from a court's direct release of children to home environments where control was deficient. "Release on suspended sentence without more," wrote W. L. Scott, "is, in the majority of cases, equally or even more objectionable . . . [the child] goes back to what caused his downfall without anything extraneous to aid him in avoiding further lapses." As such, this disposition was "as a rule of little use in preventing juvenile crime." Thus, the major aim of the eventual delinquency legislation was to extend probation. Probation was designed to protect children through the prevention of 'crime' by keeping them out of institutions and providing them with supervision in their home environment. The conflict generated among the groups that supported and resisted this change is documented below. It would appear that the intent of the legislation, as suggested by its proponents, was to expand probation work as a significant alternative to the established dispositions of institutionalization in reformatories and industrial schools and discharge. In the words of W. L. Scott: "We wish to see the work spread."

C. THE EXPANSION OF ORGANIZED CHILD-SAVING

During the latter two decades of the nineteenth century, certain persons, who were eventually to take up the cause for the enactment of legislation for a specialized juvenile court with probation services, achieved prominence in the Canadian child-saving movement. In 1887, J. J. Kelso, a crusading newspaper reporter who went on to a long and influential career as Ontario's first Superintendent of Neglected and Dependent Children, brought together

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60 Id. at 81-86.
61 Id. at 92-112. As Kelso wrote in a pamphlet entitled Can Slums be Abolished or Must We Continue to Pay the Penalty? (Toronto: n. pub., n.d.) at 4-5:
   The best work is not that which, recognizing the imperiled condition of the child, marches it away to a place of safety — but the directing of all forces to the removal of the danger so that the child may remain in its natural environment, with all the thorns removed from its path. Prevention — that is, the prevention which purifies the home life and restores maternal care and affection, is the very highest form of child-saving work, and the ideal toward which all efforts should tend.
62 P.A.C., W. L. Scott Papers, vol. 6, W. L. Scott to W. J. Hanna, July 8, 1907.
63 Scott, supra, note 8 at 897.
64 Id. at 898.
65 P.A.C., W. L. Scott Papers, vol. 6, W. L. Scott to Judge Winchester, June 11, 1907.
several prominent men and women\textsuperscript{68} of the Toronto community to organize the Toronto Humane Society,\textsuperscript{67} an organization with a “broadly educational” mission: “better laws, better methods, [and] the development of the humane spirit in all the affairs of life.”\textsuperscript{68}

Generally consistent with such objectives, \textit{An Act for the Protection and Reformation of Neglected Children},\textsuperscript{69} prepared under Beverley Jones, a lawyer and philanthropist, was passed in Ontario in the following year.\textsuperscript{70} This Act allowed for the committal of neglected children\textsuperscript{71} under the age of fourteen years, or sixteen years in some cases, to certain institutions, including industrial schools and refuges, or to charitable societies authorized under the \textit{Apprenticeship and Minors Act}, to be “kept, cared for and educated” for a period not to exceed their attaining eighteen years of age.\textsuperscript{72} In addition to a provision that allowed for a parent, guardian, or other suitable person to appear in court on behalf of the child and show cause why the child should

\textsuperscript{68}Morrison has suggested that “most feminists involved in child welfare and education reform were married to professionals or businessmen ("Their Proper Sphere . . .", supra, note 57 at 46). Many women also assumed professional roles as social workers and nurses. Underlying their involvement in child-saving "was a belief that society would benefit in moral terms from an extension of woman's maternalism" (at 45). Thus, while the overall organization of reform efforts was carried out by men, women were involved in the daily administration of activities. With specific regard to the emergence of delinquency legislation, women generally assumed supportive roles, with the primary philosophical and organizational tasks initiated and conducted by men. However, after the enactment of the \textit{Juvenile Delinquents Act} in 1908, women in various parts of Canada (such as Helen Gregory MacGill in British Columbia and Emily Murphy in Alberta, both of whom became juvenile court judges) assumed dominant leadership roles in the organization and expansion of the juvenile courts and the probation system. See E. MacGill, \textit{My Mother the Judge: A Biography of Judge Helen Gregory MacGill} (Toronto: Ryerson Press, 1955); and B. Saunders, \textit{Emily Murphy: Crusader} (Toronto: Macmillan, 1945).

\textsuperscript{67}Among the elected officers of the Society were: Lieutenant-Governor Robinson (patron), Mayor Howland (honorary president), Hon. S. H. Blake (vice-president), Prof. Goldwin Smith (vice-president), Rev. D. J. Macdonnell (vice-president), Mr. W. R. Brock (vice-president), Lieut. J. I. Davidson (treasurer), and J. J. Kelso (secretary). The balance of the council was composed of fourteen men and ten women.


\textsuperscript{70}1888, 51 Vict., c. 40 (Ont.).

\textsuperscript{71}Neglected children were defined under 1888, 51 Vict., c. 40 s. 2 (Ont.) as including a child who “by reason of the neglect, crime, drunkenness, or other vices of its parent, or from orphanage, or any other cause, is growing up in circumstances exposing such child to bad or dissolute life”; or “being an orphan, has been found begging in any streets, high-way or public place.” Under s. 3, a child apparently under the age of sixteen years could also be committed to the specified institutions in s. 2 if “found frequenting, or being in the company of, reputed thieves or prostitutes, or frequenting, or being in a reputed house of prostitution or assignation, or living in such a house either with or without the parent or guardian of the child.”

\textsuperscript{72}Id., s. 2.
not be committed, there were two sections of the Act that applied to juvenile
offenders charged with provincial offences. First, the Act provided for the
appointment of “commissioners, each with the powers of a police magistrate,
to hear and determine complaints against juvenile offenders, apparently under
the age of sixteen years.” Second, persons under twenty-one years of age were “as far as practicable, [to] be tried, and their cases [to] be disposed of, separately and apart from other offenders, and at suitable times to be designated and appointed for this purpose.” Although ‘special’ court procedures were being introduced in legislation for some offenders, institutional commitment, rather than probation, was considered a necessary mode of care when the family home proved unable to meet this task. Yet, as Kelso repeatedly emphasized, “[t]he aim . . . is not to steal children from their parents and place heavy burdens upon the charitable, but by every available means to make the home and family all it ought to be.” And, as indicated, the close connections between neglect and delinquency remained.

In 1890, trends in Ontario child-saving were also furthered by the enactment of An Act respecting the Custody of Juvenile Offenders and An Act respecting the Commitment of Persons of Tender Years. These statutes prohibited the confinement of boys apparently under thirteen years of age in the Ontario Reformatory, except as a transitional measure, providing instead for their committal to industrial schools. Incorrigible offenders in industrial schools could, however, be sent to the Reformatory. In subsequent reflection on this change in attitude towards the use of reformatories, which he had helped to foster, Kelso noted the principle “that the family home is the best place in which to develop sturdy self-reliant character in children, whether good or bad.” The industrial schools had a “good showing,” he claimed, “considering the wretched home life from which many of the children were taken. . . .” On the other hand, “in studying the histories of lads in the Penetang Reformatory, many youths were found there for so-called crimes

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73 Id., s. 4.
74 Id., s. 7.
75 Id., s. 8.
76 See Morrison, supra, note 5 at 292; Morrison, supra, note 61; Splane, supra, note 19 at 266-67.
77 Annual Report of the Superintendent of Neglected and Dependent Children (Toronto: n.pub., 1895). Kelso’s successful efforts to regulate street trading by children had resulted in his being labelled “Kelso the Tagger” and “Mr. Fresh Blush Kelso” in the local newspapers (Bain, supra, note 68 at 52). Subsequently, Kelso was referred to, perhaps unjustly, as the “Honourable Provincial Kidnapper”; D. Ramsey, The Development of Child Welfare Legislation in Ontario (unpublished M.S.W. thesis, University of Toronto, 1949) at 33.
78 1890, 53 Vict., c. 75 (Ont.).
79 1890, 53 Vict., c. 76 (Ont.).
80 Id., s. 1 (Ont.).
81 1890, 53 Vict., c. 75, s. 1 (Ont.).
82 1890, 53 Vict., c. 76, s. 2 (Ont.).
83 Id., s. 4 (Ont.).
that almost every man in the country of any spirit has committed at some time or other in his boyhood.”

“These are cruelties and hardships,” Kelso prophesied, “that will not occur so frequently when we have a properly equipped Children’s Court and probation system.” Kelso ultimately played a major role in clearing the Reformatory of its juvenile population and placing the former inmates in foster homes.

Most significant to the trends in institutional treatment at the turn of the century were the findings of the Commission of Inquiry into the Prison and Reformatory System of Ontario. The Commissioners handed down a report in 1891 that criticized the methods previously used to control and reform children. The Ontario Reformatory for Boys was characterized as a “great mistake”: “[t]he new structure was but a more commodious prison.” Several recommendations were made which in many respects appear to have provided a general ‘blueprint’ for future responses to juvenile behaviour. These recommendations included: enforcing compulsory school attendance laws, in that the good education of children was the “foundation of all preventive measures”; establishing, through provincial aid, industrial schools in every city and large town; exercising caution with respect to child immigration in order that those with criminal parents or those who had lived in atmospheres of

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55 Id. at 101-02.
56 Id. at 102.
57 In the 1906 Report, Kelso noted that it had been three years since he undertook the work of emptying Penetang Reformatory and the “results have more than justified the experiment” (at 11). See also Toronto World, April 4, 1908. Further, it had been eighteen months since girls from the Ontario Refuge had been placed in “home situations” (at 15). Of related significance to these efforts was An Act to further amend the Act respecting Public and Reformatory Prisons, 1903, 3 Edw. VII, c. 51 (Can.), which stipulated that in all federal statutes the words “Ontario Reformatory for Boys” were to be construed to apply to and include all certified industrial schools in the province of Ontario and that any boy committed to or confined in the Reformatory could be transferred to an industrial school. In the same year, the Ontario Legislature enacted An Act to amend the Industrial Schools Act and for other purposes, 1903, 3 Edw. VII, c. 37 (Ont.). This Act raised the upper age limits for children eligible for committal, and provided for the transfer of boys then confined in the Reformatory to either the Central Prison or to an industrial school to complete their sentences (s. 11). Since 1896, when An Act respecting the Industrial Refuge for Girls, 1896, 59 Vict., c. 73 (Ont.), was enacted in Ontario, girls could be transferred from the Refuge to any certified industrial school. See also, supra, note 49.
59 Id. at 87-88. Of the eighty-five boys committed to the Reformatory in 1890, fifty-five, or approximately two-thirds, had been convicted of an offence involving some form of larceny (at 90). Of the nineteen girls committed to the Industrial Refuge in 1889, thirteen, or more than two-thirds, were either “destitute and without a home” or “incorrigible” (at 96).
60 Id. at 214-18.
61 An Act respecting Truancy and Compulsory School Attendance, 1891, 54 Vict., c. 56, ss. 24 and 4 (Ont.), made it compulsory for all children between the ages of eight and fourteen years to attend school for the full term, subject to certain exceptions.
vice and crime would be prevented from entering Ontario; encouraging charitable and philanthropic endeavours; removing the Reformatory School for Boys to a more suitable location, together with establishing a cottage system and earned remission; separating the refuge for girls from the Mercer Reformatory and the creation of an institution for girls under fifteen; making all those sent to industrial schools wards of the province; and introducing various after-care programmes and facilities.

Furthermore, several of the recommendations focused specifically on differential processing of juvenile offenders before, during, and after trial. The Commissioners recommended that, if avoidable, no child be arrested and taken through public streets; that if the offence was trivial, a summons be issued to the parents to produce the child in court; and that if the offence was serious, the child be detained separately from adult offenders. They also suggested that no child under the age of fourteen should be tried in public on any charge; instead, a special session of court should be held with only the child, the officers of the court, the necessary witnesses, the truant or probation officer, and the parents or guardians in attendance. It was further recommended that no child under fourteen be committed to a common gaol or to the Refuge or Reformatory before all other corrective methods were tried; that for first offenders convicted of trivial offences, a magistrate be able to grant a discharge with an admonition, particularly when parents or guardians would undertake closer supervision; that a system of suspended sentences under supervision of the police be used except where a child's home environment was extremely bad; and that certain powers be given to probation officers who could also serve as truant officers.

In sum, industrial schools were favoured over reformatories. These schools, if used, were to incorporate a cottage system as a simulated family environment. Special sessions of court were advocated; magistrates were to be empowered to grant discharges under parental supervision and suspended sentences under police supervision; and probation officers were to be involved in various roles. Shortly after the Commissioners submitted their Report in 1891, J. J. Kelso organized a public meeting, and with the support of the Commission's chairman, Mr. Langmuir, and one of its most influential mem-

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92 See An Act to Regulate the Immigration into Ontario of Certain Classes of Children, 1897, 60 Vict., c. 53 (Ont.). This Act contained provisions governing the activities of societies and agents involved in juvenile immigration. Child immigration was a particularly vexing problem for those concerned with the protection and control of children. On the one hand, the efforts of those bringing 'unfortunate' young people to Canada were regarded as both altruistic and important for the development of the country. See, generally, J. Bready, Doctor Barnardo: Physician, Pioneer, Prophet (London: George Allen and Unwin, 1930). But the view that much of Canada's criminal behaviour was being 'imported' from elsewhere remained popular. Kelso claimed that juvenile immigration caused him more concern than any other feature of child welfare work. The concern was also evident in the Western provinces, where, in the words of Chief Justice Howell of Manitoba, "we have so many poor people . . . with families of children, many of whom were foreigners, and this part of Canada peculiarly requires something for the protection of children. . . ." (P.A.C., W. L. Scott Papers, vol. 6, Chief Justice Howell to F. J. Billiarde, Mar. 28, 1908).
bers, Dr. Rosebrugh, the Toronto Children’s Aid Society and Fresh Air Fund was founded with Kelso as president. In the letter announcing the meeting, several possible objects of the proposed society, including “the separate trial of juvenile offenders and young girls,” were mentioned. Among the matters demanding attention was “[t]he appointment of a probation officer to ascertain and submit to the court full particulars of each child brought up for trial and to act in the capacity of the child’s next friend.” Kelso’s primary concerns were outlined in a letter to a local newspaper:

I happened to be at the Police Court the other day and the first thing that caught my attention was the presence before the bar of no less than seven boys, not one of whom was eighteen years of age. They were charged with larceny in various degrees, and one had even gone so far as to have served a term at Kingston Penitentiary. The number of boys who come up in the Police Court from day to day is a problem that calls for the most careful enquiry. . . . Should we not organize at once a society that will remove children from such unfortunate conditions and afford them an opportunity to grow up good men and women?

It was Kelso’s philosophy that the family home was the best location for prevention of juvenile misbehaviour. Some families, however, required assistance to effect this task:

The mission worker sent . . . into the home with the power and authority of a probation officer, may by kindly advice and practical aid remove the causes of wrongdoing and encourage the parents as well as the child to improve their habits and surroundings. Children should never be treated or spoken of as criminals, but should be studied and dealt with in exactly the same way that a sick or defective child is handled. Wherever there is an offence there is a cause behind it and our children’s court and probation system should be able to reach that cause and by some means or other remove it for the safety and protection of the children in the home.

As the organization of reform efforts developed into an expansive bureaucracy, there was a concomitant trend to rationalize child-saving efforts by supplementing, and to a degree replacing, the work done by volunteers and philanthropic citizens with that of paid professionals. “What is needed,” wrote Kelso, “is personal service, the complete organization of charitable forces, harmony of action, and the appointment of trained and experienced workers, instead of isolated action, rivalry, and jealousy and spasmodic and amateur administration.” With this shift in emphasis, it would appear that an increasing number of child-savers had reason to recognize their own interests as being linked with the development of a structured scheme of child welfare.

Increased activity also led to the formation of an effective lobby that

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83 Dr. Rosebrugh was the author of the “Rosebrugh Plan” which advocated temporary institutional placement for certain children, so that they could acquire the rudiments of education and discipline, followed by temporary foster home placement with a view towards permanent adoption (Morrison, supra, note 5 at 297).

84 Kelso, supra, note 68 at 69. The duties of J. Coleman, the first paid secretary of the Toronto Children's Aid Society, included attendance at court proceedings involving children.

85 Toronto News, April 15, 1891.

86 Supra, note 84 at 15.

87 J. Kelso, Can Slums Be Abolished or Must We Continue to Pay the Penalty? (Toronto: n.pub., n.d.) 20.
secured legislation at both provincial and federal levels to legitimize its programmes for reform. Reflecting on these efforts, Kelso indicated that "[a]ny defect in the work is not due to any defect in the law, for we have as much if not more law than we can assimilate, and the Governments are ready to give new measures whenever they are asked to do so. . . ."\textsuperscript{98}

For example, when Alderman John Baxter was appointed a Commissioner in 1890 by the provincial Attorney-General, his authority over children charged with criminal offences was challenged. Senator G. W. Allen, who was president of the Toronto Working Boys' Home, exerted pressure for the enactment of federal legislation. Kelso's somewhat lengthy letter of March 29, 1892, in which he outlined his proposals to Sir John Thompson, the Minister of Justice and Attorney-General, received only a formal reply. But when Thompson visited Toronto, a deputation met with him and apparently convinced him to comply with their requests.\textsuperscript{99} Consequently, the first Criminal Code\textsuperscript{100} of Canada, enacted in 1892, included a section providing for the in camera and separate trial of persons under the age of sixteen years if it was "expedient and practicable" to do so. The Code also contained a section entitled "Trial of Juvenile Offenders for Indictable Offences."\textsuperscript{101}

In 1893, the Ontario Legislature enacted a comprehensive Child Protection Act\textsuperscript{102} that gave explicit recognition and authority to children's aid societies and their agents or officers. These agents were given broad powers to apprehend and detain children in need of protection due to ill treatment or neglect.\textsuperscript{103} The court could also request that an authorized representative from the local society appear on behalf of an apprehended child.\textsuperscript{104} On finding a child to be neglected\textsuperscript{105} or dependent, a judge could order that the child be

\begin{itemize}
\item \textsuperscript{98}Proceedings of the Sixth Canadian Conference of Charities and Corrections (Ottawa: n.pub., 1903) at 21.
\item \textsuperscript{99}Bain, supra, note 68 at 72-76.
\item \textsuperscript{100}1892, 55-56 Vict., c. 29, s. 550 (Can.).
\item \textsuperscript{101}Part LXI thus incorporated the Juvenile Offenders Act, 1886, 49 Vict., c. 177 (Can.) into the Code. This Act was a consolidation of the Juvenile Offenders Act, 1869, 32 & 33 Vict., c. 33 (Can.), which had replaced An Act for the More Speedy Trial and Punishment of Juvenile Offenders, 1857, 20 Vict., c. 29 (Can.).
\item \textsuperscript{102}An Act for the Prevention of Cruelty to, and Better Protection of Children, 1893, 56 Vict., c. 45 (Ont.).
\item \textsuperscript{103}See, for example, id., ss. 5, 6, 7, 10, 13, 15, and 17.
\item \textsuperscript{104}Id., s. 4.
\item \textsuperscript{105}A neglected child was, in this Act, defined as any child under the age of fourteen years:
\begin{enumerate}
\item Who is found begging or receiving alms or thieving in any street, thoroughfare, tavern or place of public resort, or sleeping at night in the open air;
\item Who is found wandering about at late hours and not having any home or settled place of abode, or proper guardianship;
\item Who is found associating or dwelling with a thief, drunkard or vagrant, or who by reason of the neglect or drunkenness or other vices of the parents is suffered to be growing up without salutary parental control and education, or in circumstances exposing such child to an idle and dissolute life;
\item Who is found in any house of ill-fame, or in company of a reputed prostitute;
\item Who is found destitute, being an orphan or having a surviving parent who is undergoing imprisonment for crime.
\end{enumerate}
\end{itemize}
sent to the society's temporary home or shelter until placement in an approved foster home could be arranged.\textsuperscript{106} Further, the Act stipulated that it was the duty of the court, prior to initiating proceedings with respect to a boy under twelve years of age or a girl under thirteen years and charged with a provincial offence, to give written notice to the executive officer of the children's aid society, if one existed in the county. This officer was to investigate the charges, inquire into the child's family environment, examine all the facts and circumstances of the case, and report back to the court with his findings.\textsuperscript{107} Other provisions in the Act dealt with separate detention of children under sixteen years of age in common gaol\textsuperscript{108} and, in certain locations, provided for separate pre-trial custody and separate trial in private for those charged with provincial offences.\textsuperscript{109}

It was assumed, however, that these procedures could not encompass children charged with federal criminal offences. To this end, Senator Allen introduced \textit{An Act respecting Juvenile Offenders}\textsuperscript{110} to the Senate in 1893 "at the insistence of the Prison Reform Conference and Prisoner's Aid Societies of Ontario."\textsuperscript{111} This Bill was eventually withdrawn, but in the following year, at the request of "persons interested in the care of children,"\textsuperscript{112} \textit{An Act respecting Arrest, Trial and Imprisonment of Youthful Offenders}\textsuperscript{113} was enacted at the federal level. Section 550 of the \textit{Criminal Code} had become a "dead letter law," and Kelso had been conducting an active campaign, through petitions and in the press, for separate trials for young persons.\textsuperscript{114} The 1894 Act made it mandatory that persons under sixteen years of age be tried separately from other accused persons and without publicity,\textsuperscript{115} and provided

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  \item \textsuperscript{106} Although Kelso originally emphasized the need to assist the \textit{natural} family in their task of supervising children, his preferred locale for treatment was ultimately expanded to include foster homes. This legislation marked the beginning of a preference for foster home placement over institutional commitment in Ontario.
  \item \textsuperscript{107} 1893, 56 Vict. c. 45 s. 24 (Ont.). The court or magistrate, after consultation with the officer and upon proof of the offence charged, could:
    \begin{itemize}
      \item [make] an order . . . for the return of such child to his or her parents, guardian or friends, or the court may authorize the said officer to take such child and bind him or her out to some suitable person until he or she shall have attained the age of 21 years, or for any less time, or impose a fine, or suspend sentence for a definite or indefinite period, or if the child be found guilty of the offence charged, or be wilfully wayward and unmanageable, the court may cause him or her to be sent to an industrial school or to the provincial reformatory for boys or to the refuge for girls. . . .
    \end{itemize}
  \item \textsuperscript{108} \textit{Id.}, s. 29.
  \item \textsuperscript{109} \textit{Id.}, s. 30. A further provision in the Act authorized municipalities to pass by-laws stipulating a curfew time, after which children were prohibited from being in the streets without proper guardianship (s. 31).
  \item \textsuperscript{110} 1893, 56 Vict., Bill M (Can.).
  \item \textsuperscript{111} \textit{Can.}: \textit{Sen. Deb.}, Mar. 7, 1893, at 298.
  \item \textsuperscript{112} \textit{Can.}: \textit{H. of C. Deb.}, May 15, 1894, at 4941.
  \item \textsuperscript{113} 1894, 57-58 Vict., c. 58 (Can.). Subsequently, part of this Act was incorporated into the \textit{Criminal Code} 1906, 6-7 Edw. VII, c. 146, ss. 644-45 (Can.), and part into the \textit{Prisons and Reformatories Act}, 1906, 6-7 Edw. VII, c. 148, ss. 67-70 (Can.).
  \item \textsuperscript{114} Bain, \textit{supra}, note 68 at 82.
  \item \textsuperscript{115} 1894, 57-58 Vict., c. 58 s. 1. (Can.).
\end{itemize}
for separate pre- and post-trial custody. Further, in Ontario, children under fourteen years of age, following conviction, could be committed to the charge of a home for destitute and neglected children, an approved children’s aid society or a certified industrial school, in lieu of imprisonment. The executive officers of the said children’s aid societies were also given investigative powers in cases involving accused boys under twelve years of age and girls under thirteen years. Upon submission of the officer’s report, the judge could, rather than committing the child for trial or sentencing the child, authorize his or her binding out or placement in an approved foster home, impose a fine, suspend sentence, or “if the child has been found guilty of the offence charged or is shown to be wilfully wayward and unmanageable,” commit the child to a certified industrial school, reformatory, or refuge.

In the Senate, Senator Allen explained that certain sections of the Act were restricted to Ontario because it was the only province with “the machinery . . . for carrying out these clauses.” A possible limitation to the principle of trials without publicity was suggested by Senator Kaulbach, in that, if the offence “were a very heinous one . . . a private trial would not be suitable for youthful offenders . . .” In the House of Commons, Sir John Thompson indicated that “a great many magistrates from motives of humanity” were already conducting separate trials of juvenile offenders. Mr. Mulock, who later became Chief Justice of Ontario, suggested that although trials without publicity raise “a danger of justice being interfered with . . . perhaps under regard for humanity, [and] tenderness of heart,” such measures may not be objectionable for young people. While not in disagreement, Thompson countered that the interests of both the children and the state would be served by the children’s aid societies which had been “very strongly recommended on account of their good work among children;” and in advocating this reform, “the Ontario Government has joined their intercession with those of philanthropists.” The children’s aid societies would not only investigate the home to determine whether the child should remain there, but would “carry out more effectively the system of suspended sentences with regard to children.”

Although the latter allusion to probation may have been somewhat premature, the children’s aid societies were actively involved with children accused of crimes. Thompson’s reference to the prior initiation of separate

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116 Id., s. 2.
117 Id., s. 3.
118 Id., s. 4.
120 Id., May 2, 1894, at 305.
121 Can.: H. of C. Deb., June 24, 1894, at 4940.
122 Id.
123 Id.
124 Id. at 4941.
125 This was indicated by the case of Maggie, from the Toronto Society’s daily log: “April 20th, 1892 — Taken out of hands of a policeman and brought to Shelter by Miss Hamilton. Had been arrested for supposed attempted larceny. Was found in a terribly filthy condition. . . .” Children’s Aid Society of Metropolitan Toronto, Summary of Activities, 1875-1975 (Toronto: n. pub., 1975) at 6.
trials was confirmed by Col. G. T. Denison, a magistrate in the Toronto Police Court, who later wrote:

In 1892 we instituted the Children's Court. It was not really a separate court, but we set apart a small room in the lower part of the City Hall, with a table and a few chairs, and I was accustomed to go down to that room to try all charges against children, in order to keep them out of the public court. . . . If I felt that punishment was necessary, I would send the child to the Children's Aid Society, or the Roman Catholic School for Children, for a few days, and give the culprits a scolding, and warn them to behave themselves in the future.\textsuperscript{129}

In spite of the distinction drawn between a separate ‘court’ and a separate ‘trial,’ these developments, and Kelso’s role in them, became the basis for claims that the juvenile court had a Toronto origin, and was therefore a “Canadian enterprise” that had been appropriated by “American social workers.”\textsuperscript{127}

In light of the relationship between Canadian and American developments, Kelso was later somewhat disappointed that more recognition was not given to the pioneering work of the Ontario reformers. In a letter to W. L. Scott, he emphasized that “our Ontario work should not be overlooked as I advocated the Children’s Court here twenty years ago, gave addresses in Chicago and elsewhere in favour of it and got the law passed here in 1893. . . . Of course, the Denver and Chicago courts have far outstripped us but at the same time we gave them the inspiration that led to their present success.”\textsuperscript{125}

The address to which Kelso specifically referred was given to the Waif-Saving Congress on October 11, 1893.\textsuperscript{129} Kelso noted that “Judge Hurd consulted


\textsuperscript{128}P.A.C., W. L. Scott Papers, vol. 6, J. J. Kelso to W. L. Scott, Dec. 27, 1906.

with me as to the drafting of the Juvenile Court following my address"¹²⁰ and an article on his presentation appeared in the *Chicago Tribune* on the following day.

Thus, at the close of the nineteenth century, a comprehensive base of legislation had been secured as authorization for child-saving ventures. In part due to inadequate financing, the two major institutions now associated with juvenile justice — a separate court and organized probation — were still in the formative stage. In the context of the trial process, the linking of neglect and delinquency to prevent future criminality had begun to minimize concern with adjudication in favour of an emphasis on disposition.¹³¹ Response to the delinquent behaviour of children did not, for the child-savers, require a determination of "fault." "[Children] are what their surroundings have made them," wrote Kelso, "but they are still in the formative period, still capable of being put on the right path."¹³² The ideal location for reformation was not in an institution but in a family home, be it natural or foster. However, this philosophy was not uniformly accepted by all persons involved in crime prevention. In the context of an expanding bureaucracy, conflicts arose over which groups of professionals and volunteers would play the decisive role in dealing with delinquents. The final configuration of the system designed to respond to children’s situations and transgressions was the product of conflicts among those who had personal and professional interests in the ultimate design of that system.

D. EARLY TWENTIETH CENTURY JUVENILE JUSTICE: LEGISLATION, PROBATION AND THE COURT

In 1903, legislative recognition of probation was extended by *An Act to amend the Children’s Protection Act of Ontario*.¹³³ The Act provided for the appointment of volunteer "children’s committees," whose agents were to assist the Superintendent of Neglected and Dependent Children and the children’s aid societies in child placement, visitation, and fund raising.¹³⁴ These "children’s agents," along with consenting officers of children’s aid societies, could also serve as probation officers in whose care a judge could place, without registering a conviction, a child under sixteen years of age accused of a provincial offence. The probation officers, charged with the duty to take a "personal interest in the child... so as to secure its reformation," might be required to report periodically to the judge "concerning the progress and welfare of the child."¹³⁵ The trend against institutionalization was further

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¹²⁰ This comment was penned by Kelso at the bottom of an article by Timothy D. Hurly on *The History of the Illinois Juvenile Court Law* which was found among J. J. Kelso’s Papers at the Public Archives of Canada.

¹³¹ In a 1909 address, W. L. Scott noted the on-going nature of this development in that "it is every day becoming more and more generally recognized that delinquent children are all neglected in one way or another and if neglected children are not delinquent it is accidental that they are not so" (*supra*, note 39 at 38).

¹³² *Supra*, note 84 at 69.

¹³³ 1903, 3 Edw. VII, c. 30 (Can.).

¹³⁴ *Id.*, s. 5.

¹³⁵ *Id.*, s. 8a.
emphasized by a provision that such children be granted bail as often as possible, or be put in the temporary care of an association or individual, rather than be committed to gaol or the police station pending trial.\textsuperscript{180}

The idea of a probation system, manned by both volunteers and professionals, to "help the children before they become criminally disposed"\textsuperscript{137} was increasingly discussed. In an address to the Sixth Canadian Conference of Charities and Corrections, Kelso gave this top priority: "Prevention work should begin when the children are small. . . . We want to bring about what is called the Probation System, following these children up from their first offence and never letting them get any further."\textsuperscript{138} The probation officer would "frequently visit the home and insist on school attendance and proper moral instruction . . . [and], having a constant supervision of the child, would prevent his getting into trouble again."\textsuperscript{139} Consistent with the related goals of protection and prevention, the methods used by probation officers would be based on "kindly advice and practical aid."\textsuperscript{140} Furthermore, these methods would be in direct conflict with those of the police, who, in the course of seeking convictions, were prone to use "force" and "punishment" in the "restoration" process.\textsuperscript{141} Thus, it was "too easy," according to Kelso, simply to suspend sentence or to commit a child to an industrial school; and while some progress with probation had been made, "the machinery thus far provided is totally inadequate to meet the need that exists."\textsuperscript{142}

Kelso was not alone in his advocacy of a children’s court and probation. W. L. Scott, Local Master at Ottawa for the Supreme Court of Ontario and president of the Ottawa Children’s Aid Society, attended the 1906 National Conference of Charities and Corrections in Philadelphia and found that the juvenile court and probation system were "looked upon as the highest and most important development of child-saving work yet reached."\textsuperscript{143} On his return, Scott and John Keane, his co-delegate who was full-time secretary of the Ottawa Society, arranged the appointment of Mme Bruchesi, a French Catholic, and Miss Cassady, an English Protestant, as probation officers "to co-operate with our regular agent in the endeavour to reform in their own homes children coming before the Police Magistrate for infractions of the criminal law."\textsuperscript{144} Scott later suggested that the choice of women as professional probation officers was based not only on the notion, popular among feminists of the time, that "women, intended by nature for motherhood, are

\textsuperscript{136} Id., s. 8b.

\textsuperscript{137} J. Kelso, Delinquent Children: Some Improved Methods Whereby They May Be Prevented from Following a Criminal Career (1907), 6 Can. L. Rev. 106 at 107.

\textsuperscript{138} Supra, note 98 at 21.

\textsuperscript{139} Id.

\textsuperscript{140} Supra, note 137 at 107.

\textsuperscript{141} Id.

\textsuperscript{142} Supra, note 84 at 13.

\textsuperscript{143} Id. at 69.

\textsuperscript{144} P.A.C., W. L. Scott Papers, vol. 6, W. L. Scott to W. J. Hanna, July 8, 1907.
better fitted for the work than men,” but also because “a better class of women than men can frequently be got for the money available.”

The issue of finances was one of the three main concerns voiced by Kelso and Scott during this period. Additional funds were needed to elevate “philanthropic work to the status of a profession and to encourage University graduates to become specialists in social and moral reform work.” In proposing that local counties and the Ontario government share the cost of salaries for probation officers, Kelso felt that the lack of paid agents was “the greatest drawback in the work today.” A second concern was that, although the Ottawa police co-operated with the local children’s aid society to allow for probation, the probation officers were hindered in their work by a lack of “legislative recognition.” And third, the existing children’s courts were not “conducted by specially selected persons, and held in different premises from the ordinary legal courts.” This shortcoming, in particular the absence of special judges, was not consistent with the notion that the court “should undoubtedly be an educational rather than a police tribunal.” The ‘trial’ itself was viewed as an important aspect of the treatment process, thus diminishing the significance of the distinction between adjudication and disposition. The remedy for these deficiencies was sought in new federal legislation.

Early recognition of the proposed legislation came in the Speech from the Throne on November 23, 1906 with the mention of “a Bill to make better provision for dealing with juvenile delinquents.” This announcement was inserted by Senator R. Scott, father of W. L. Scott, who was then serving as Secretary of State. In doing so, the elder Scott failed to consult with the Minister of Justice, Mr. Aylesworth. Taking offence, Aylesworth refused to support the proposed legislation and it was over a year before he consented, under much pressure, to introduce the Bill to the House of Commons. However, as a means of generating discussion, Senator Scott was permitted to introduce the Bill to the Senate in April of 1907, on the condition that it not go beyond Second Reading.

Correspondence between W. L. Scott and J. J. Kelso towards the end of 1906 reflected the considerations that ultimately formed the basis of various provisions in the legislation. Kelso, for example, asked whether “it is possible to have the offences of all children under sixteen classed as delinquencies so

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146 Scott, supra, note 8 at 896. See also Morrison, supra, note 5; Morrison, supra, note 57; V. Strong-Boag, “Introduction” in N. McClung, In Times Like These (Toronto: University of Toronto Press, 1972) at viii; N. McClung, The Stream Runs Fast: My Own Story (Toronto: Thomas Allen, 1945) at 27. Of further relevance in this regard is, supra, note 66.

147 Proceedings of the Eighth Canadian Conference of Charities and Corrections (Toronto: n. pub., 1905) at 8.


149 Kelso, supra, note 136 at 164.

150 Id.

151 Can.: H. of C. Deb., Nov. 23, 1906, at 5.

that they may be dealt with as neglected children under our Ontario law rather than under the Criminal Code." Under the 1908 Juvenile Delinquents Act, the offence of "delinquency" included, for children under sixteen years, violations of any federal or provincial statute or municipal by-law, or behaviour that created liability under any other Act for commitment to an industrial school or juvenile reformatory. Scott later emphasized, however, that "[t]he intention of Parliament was not to create a new class of offence, but to afford a means of dealing with offences, or evils, already in existence."

W. L. Scott, who admitted his unfamiliarity with criminal procedure, was assisted by Senator Beique and Recorder Weir of Montreal, as well as Kelso, in drafting the Act. In view of subsequent reactions to the proposals, three main groups can be discerned. The ultimately successful group, which advocated protection and prevention through probation and a special court, formed a powerful lobby that rallied considerable support among the public and politicians. Information and copies of the Bill were distributed, petitions were circulated, letters were sent, and speakers, such as Judge Lindsay of Denver and Mrs. Schoff of the Philadelphia Mother's Union, addressed various gatherings. Assistance was forthcoming from across Canada. A circular that received wide distribution featured supportive statements from twelve judges, ten senators, three clergymen, two police officers, and ten others. Indicative of

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153 P.A.C., W. L. Scott Papers, vol. 6, J. J. Kelso to W. L. Scott, Nov. 21, 1906. Kelso was apparently not well versed in the constitutional implications of the proposals for legislation.

154 1908, 7-8 Edw. VII, c. 40, s. 2 (Can.). By An Act to amend the Juvenile Delinquents Act, 1921, 11-12 Geo. V., c. 37, s. 1 (Can.), the definition of "juvenile delinquent" was altered to include any child "who is guilty of sexual immorality or any similar form of vice." In spite of strong support for the amendment from those involved in child-saving, Mr. Meighen and Sir Henry Drayton questioned the advisability of making each individual judge "the arbiter of what constitutes a vice on the part of a juvenile delinquent." (Can.: H. of C. Deb., June 23, 1924, at 3508). However, at a later stage of the debate, Mr. Meighen reconsidered his objections, indicating that he "certainly would not like to be instrumental in disarming the organizations that have to do with these matters" (at 3512). Presumably, such behavior had been previously dealt with under provincial child protection laws, again underscoring the links between delinquency and neglect.

155 Scott, The Juvenile Court in Law and the Juvenile Court in Action, supra, note 3 at 7.


157 Id., W. L. Scott to the Editor of The Gazette, July 18, 1907.

158 Among those individuals and organizations that took action to indicate their support were: Katherine Weller of the Montreal Women's Club; the National Council of Women; various chapters of the Women's Christian Temperance Union; F. C. Wade, President of the Juvenile Protection Association of British Columbia; C. J. South, Superintendent of the Children's Protection Act of British Columbia; F. J. Billiard, Superintendent of the Winnipeg Children's Aid Society; and Premier Rutherford of Alberta. Petitions were received from several locations, including Medicine Hat and Claresholm in Alberta, and Canso, Guysboro, and Yarmouth in Nova Scotia. One Montreal petition had over 5,000 signatures, with many "prominent" people represented. Id., vols. 6-10.
the extensive support generated for the proposals was the statement by Robert Borden, then Leader of the Opposition in the House of Commons, that while it was unusual for the opposition party to give advance assurances of support for legislation, "I am entirely in favour of the principle [of delinquency legis-
lation]."5

Opposition to the proposals, however, came from two groups: those concerned with possible abuses of the proposed system and the resulting effects on the rights of children and their parents, and those who advocated a more 'punitive' approach to delinquency. The former group's response was largely ineffectual. Its members were more cautionary than critical, since they generally accepted the competence of those who advocated probation and a special court to act in the best interests of the child and society. For example, Mr. Justice Anglin questioned the stringency of the proposed measures and the wisdom of removing safeguards against the arbitrary exercise of "very wide and largely discretionary" powers by judges and probation officers.6 He further suggested that evidence from juvenile proceedings be recorded for purposes of appeal, and that the probation officers' protection from civil liability be limited to actions done in the *bona fide* exercise of their powers under the Act. While Scott expressed agreement with the need for such limitations, he emphasized that, "Neither the Courts nor the probation officers will be anxious to take in hand cases where the child does not seem to be going wrong. Still it is desirable to have the definition wide enough to enable the Court to take hold of any case where the intervention of the Court seems desirable."7

More significant opposition to the proposed legislation came from the second group, of which many members were actively working with children as police officers and magistrates, and in association with some children's aid societies.8 Their differences were more than philosophical: they considered their own continued involvement with child-saving in jeopardy. In the words of R. E. Kingsford, a Police Magistrate in Toronto, "it would be a great pity if the notion got abroad that the police were so harsh in their dealings with juveniles that it was necessary to take from them that portion of work."9 The proposed juvenile court would replace the existing children's court. Probation might affect the use of other dispositions — such as dismissal, fine,

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5 Id., vol. 6, R. Borden to W. L. Scott, Feb. 20, 1907.
6 Id., Mr. Justice Anglin to W. L. Scott, Feb. 7, 1907.
7 Id., W. L. Scott to Mr. Justice Anglin, Feb. 8, 1907.
8 Others who were opposed included at least one factories inspector, Thomas Keilty, who argued that probation officers need not be given the power to enter factories in that the "required machinery has already been provided for the purpose indicated" (Id., Thomas Keilty to W. L. Scott, Mar. 30, 1907; see also Mar. 7, 1907; Mar. 25, 1907).
committal to a children's aid society, or committal to an industrial school\textsuperscript{164}—
and hence the personnel connected with them.

The police officials associated with the Toronto children's court, including Inspectors Stark and Archibald and Police Magistrates Denison and Kingsford, were most vehement in their attacks. They argued that not only were the existing methods both sufficient and less expensive, but also that the "harsh" attitude of the police had a deterrent effect by making an impression on children without resulting in the police being viewed as enemies.\textsuperscript{165} The debate was often bitter. In a report circulated to gain support for the police position, Archibald characterized the new proposals as "child saving propaganda" and the advocates of these measures as "superficial and sentimental faddists" who, in the interests of their own "selfish ends":

... work upon the sympathies of philanthropic men and women for the purpose of introducing a jelly-fish and abortive system of law enforcement, whereby the judge or magistrate is expected to come down to the level of the incorrigible street arab and assume an attitude absolutely repulsive to British Subjects. The idea seems to be that by profuse use of slang phraseology he should place himself in a position 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. I would go further to affirm from extensive and practical experience that this kissing and coddling, if indiscriminately applied, even to the best class of children, would have a disastrous effect, both physically, mentally, morally and spiritually.\textsuperscript{166}

In response to this criticism, Scott labelled Archibald a "person of very limited intelligence,"\textsuperscript{167} while Kelso called him "self-opinionated" and "opposed to those who failed to treat him with deference."\textsuperscript{168} Opposition from the Toronto Police Department indicated to Scott that "the members feel the proposals are intended to supplant them and are a reflection on their past work."\textsuperscript{169} Moreover, Archibald's particularly negative attitude was said to be based on the fact that he "had prepared all the legislation on the subject

\textsuperscript{164} The actual impact that probation had on industrial school commitment is not clear, although it was the intention of Scott and Kelso, "to save children going to those institutions ... [even if] we can never hope to do without them entirely" (\textit{Id.}, J. J. Kelso to W. L. Scott, May 12, 1907). In the 1908  \textit{Senate Debates} on the \textit{Juvenile Delinquents Act}, Senator Beique noted that "It is not my understanding of the Bill that it will interfere with the industrial schools. Of course, there may be a smaller number sent to industrial schools, because other means will be tried before having recourse to that ..." (\textit{Can.: Sen. Deb.}, July 3, 1908, at 1038). In his correspondence, Scott emphasized that very few children had been sent to industrial school from Ottawa since probation had been initiated (P.A.C., W. L. Scott Papers, vol. 6, W. L. Scott to Mr. Justice Anglin, Feb. 8, 1907; W. L. Scott to the Editor of \textit{The News}, April 11, 1907; W. L. Scott to Judge Winchester, June 11, 1907; W. L. Scott to W. J. Hanna, July 8, 1907; W. L. Scott to E. H. Bronson, Oct. 15, 1907; W. L. Scott to F. J. Billiarde, Jan. 10, 1908).

\textsuperscript{166} Id., R. G. Kingsford to J. J. Kelso, Dec. 20, 1906.

\textsuperscript{167} P.A.C., W. L. Scott Papers, vol. 6, W. L. Scott to J. J. Kelso, Mar. 19, 1907.

\textsuperscript{168} Id., J. J. Kelso to W. L. Scott, May 14, 1907.

\textsuperscript{169} Id., W. L. Scott to Mrs. Weller, May 2, 1907; J. J. Kelso to W. L. Scott, May 5, 1907.
during the last forty years and . . . is apparently deeply offended that anyone else should have usurped this prerogative." For Scott, Kelso, and their supporters, probation was "the only effective method of dealing with young offenders," and the "trial [should take place] before a judge specially selected for his fitness for the work." The police, they claimed, too often showed a "great lack of patience" with children, giving more weight to "the spirit of revenge . . . than consideration of a boy's future.

The children's aid societies in Toronto also opposed the proposals, although the Toronto Children's Aid Society eventually gave the new measures qualified approval. Kelso suggested that the "police officials have both our Societies hoodwinked." The St. Vincent de Paul Society was most vocal in opposition, particularly as to probation which would have "a troop of Probation Officers, women and men, shadowing . . . [delinquent children] through the Province." Scott believed their opposition to be misconceived: "What are the agents of the Children's Aid Societies," he asked, "but Probation Officers under another name?" Commenting on the situation in Ottawa of dependent and neglected children, Scott noted that with the work of Probation Officers, "we have been enabled to place back an unusually larger number of children with their own parents during good behaviour." Extending probation work to delinquent children had allowed not only for supervision of those with suspended sentences, but also for "dealing with an increasing number of what may be called preventative cases . . . in which we are called in before the child actually gets into the hands of the police." A further result of probation of equal importance was: "to keep children in their homes who would otherwise go to the Industrial School.

The degree of success achieved by those who campaigned for special delinquency legislation was reflected in the overwhelming acceptance of the proposals in the House of Commons and the Senate. With few significant exceptions, the response of the less enthusiastic supporters of the legislation was characterized more by apathy than by opposition. In introducing the Juvenile Delinquents Bill to the Senate in 1907 "in order to elicit an opinion on the subject," Senator Scott praised the work accomplished in Ottawa and elsewhere, quoting from the Preamble to emphasize that children should be "guarded against association with crime and criminals, and should be sub-

170 Id., W. L. Scott to J. S. Willison, April 16, 1907.
171 Scott, supra, note 8 at 894.
172 Supra, note 98 at 5.
173 P.A.C., W. L. Scott Papers, vol. 6, J. J. Kelso to W. L. Scott, April 9, 1907.
174 Id., W. L. Scott to the Editor of The News, April 11, 1907.
175 Id.
177 Id., W. L. Scott to W. J. Hanna, July 8, 1907.
179 An Act respecting Juvenile Delinquents, 1907, 6-7 Edw. VII, Bill FFF (Can.).
180 Can.: Sen. Deb., April 19, 1907, at 804.
jected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts."181 While some questions were raised as to the constitutional validity of the Bill, and Senator Ellis referred to "considerable difference of opinion as to who shall take care of children, and how they should be taken care of,"182 the discussion focused on the causes of crime and its nature and extent in Canada. Senator Cloran best summed up the deliberations and the mood of the Senate by stating: "While other matters are contentious and are debated with some degree of feeling and sometimes hostility, there seemed to be but one opinion in the House as to the importance of this Bill and the humane and benevolent purpose which it is proposed to serve."188

When the Bill184 was re-introduced to the Senate by Senator Beique in May, 1908, Senator Coffey referred to "the difference of view as to the means and methods whereby the best results may be achieved" in reforming children, and explicitly dismissed the position of Inspector Archibald as being characterized by an outmoded "spirit of rigidity and severity."185 Even Senator Kerr, who came to Inspector Archibald's defence by characterizing him as a man to be commended for his work, indicated that he was glad the Bill was about to become law.188 Senator Wilson, however, questioned the broad powers given to probation officers. He was not convinced that it was in the child's best interests to be effectively deprived, along with his or her parents, of certain rights:

We are all desirous of making every child as it grows up a useful member of society, but we may differ as to the means of accomplishing that. Here we pass an Act to permit a child being taken away from its parents and put in other charge, and who is as solicitous for the welfare of the child as the parent? We put young children in the hands of an officer and that officer has absolute power and control over them. He may do anything under the Act and he is protected. I say that it is an unreasonable proposition to make, and I am fearful that instead of lessening the criminal juvenile class it will increase them.187

These cautions appear to have gone unheeded, given Senator Scott's reply that he had "never heard of an instance where the whole community did not sustain the probation officer in the action he took."188 A second challenge to

181 Id.
182 Can.: Sen. Deb., April 24, 1907, at 891.
183 Id. at 896. In commenting on these debates, Scott suggested that the "majority of Senators knew little of the subject, but all were united in their support of the bill" (P.A.C., W. L. Scott Papers, vol. 6, W. L. Scott to Mrs. Weller, July 8, 1907).
184 An Act respecting Juvenile Delinquents, 1908, 7-8 Edw. VII, Bill QQ (Can.).
185 Can.: Sen. Deb., May 21, 1908, at 975-77.
186 Id. at 981.
187 Id., June 4, 1908, at 1044.
188 Id.
the Bill, proposed by Senator De Boucherville on constitutional grounds, was defeated.\(^{189}\)

In the House of Commons, Aylesworth, the Minister of Justice, introduced the Bill\(^{190}\) by indicating that in Ontario “children's aid societies have felt the necessity of legislation of this character.”\(^{191}\) The general attitude assumed towards this Bill may be gleaned from the critical statement of Mr. Lancaster, an Ontario lawyer, who expressed concern that:

... it is to be laughed through as a joke. Here is an Act respecting juvenile delinquents, a brand new law, brought in during the dying hours of the session by the Minister of Justice, containing thirty-five sections, and after midnight we are asked to pass but not consider it. It affects the liberty, the character and the treatment of every little child in this country.\(^{192}\)

Mr. Lancaster strongly defended the 'rights' of children. He focused on the failure to provide for the 'protection' and defence of children by counsel, thus placing them "entirely at the mercy of a person called a probation officer," without an opportunity "to say he is not guilty if he is not guilty."\(^{193}\) Moreover, to justify depriving the child of the "inherent right to trial by jury,"\(^{194}\) it was not, according to Mr. Lancaster, sufficient to provide lighter sentences and avoidance of publicity: provision could be made for a less severe penalty without denying the child, or his parents, assisted by counsel, the right to elect for a jury. In other words, the adjudication aspect of the trial should be kept separate from that of disposition. This position received no further support, however, and the Bill was passed.\(^{195}\)

\(^{189}\) Id., June 16, 1908, at 1152-56.

\(^{190}\) An Act respecting Juvenile Delinquents, 1908, 7-8 Edw. VII, Bill 190 (Can.).

\(^{191}\) Can.: H. of C. Deb., July 18, 1908, at 12400.

\(^{192}\) Id. at 12400-01.

\(^{193}\) Id. at 12402.

\(^{194}\) Id. at 12403-05.

\(^{195}\) The following exchange between Mr. Leighton McCarthy, also an Ontario lawyer and later Canadian ambassador to the United States, and Mr. Lancaster, perhaps best summarized the opposing perceptions of the issues and foreshadowed present concerns with 'childrens rights':

Mr. L. M.: If the child is allowed the inherent right of trial by jury, which he undoubtedly has under the British constitution, it is put in the hands of the child to do away with the entire benefit of the Act. We are passing extraordinary legislation for the protection of the child, and to amend that as my hon. friend suggests would be to do away with the benefit of the Act.

Mr. L.: You are providing that the parents shall be notified. On being notified, if the case is a serious one, the parent will employ counsel, and the child will have the advice of both the parents and the counsel, and the decision can be safely left to them. But you are leaving the decision entirely in the hands of someone [sic] who has no direct interest in the child's welfare.

Mr. L. M.: It is the converse of the case which the hon. gentleman puts. We are passing an enactment for the benefit of the juvenile delinquent.

Mr. L.: How do you know it is? (Id.)
With the enactment of the *Juvenile Delinquents Act* in 1908, the essential pattern for juvenile justice in Canada was established. The juvenile court was given exclusive jurisdiction in cases of delinquency, subject to a discretion to transfer certain cases to the ordinary courts.\(^1\) Trials were to be conducted summarily, separately, and without publicity, with notification of the hearing going to a parent, guardian, or near relative of the child and to the probation officer.\(^2\) The proceedings might be “in the discretion of the judge, as informal as the circumstances permit, consistently with a due regard for a proper administration of justice.”\(^3\) In addition to provisions for separate pre-trial detention and post-trial incarceration,\(^4\) several possible dispositions were set out, including commitment to a probation officer and supervision by a probation officer in the child’s natural or foster home. The Act further provided for the formation of a voluntary juvenile court committee to consult with and advise probation officers, or to appoint a probation officer if one was not appointed under provincial authority and if remuneration was available for this.\(^5\) Probation officers were assigned the powers of a constable and their duties were to conduct such investigation as required by the court, to furnish the court with such assistance or information as required, to take charge of any child, before or after trial, as might be directed by the court, and to be present and represent the interests of the child in the court.\(^6\)

Other sections dealt with the liability of adults who contributed to delinquency, the effect of the Act on other federal and provincial statutes,\(^7\)

\(^{190}\) 1908, 7-8 Edw. VII, c. 40, ss. 4 and 7 (Can.).

\(^{197}\) Id., ss. 5, 10, 8, and 9.

\(^{198}\) Id., s. 14.

\(^{199}\) Id., ss. 11, 12, 21, and 16. Pre-trial incarceration was only to be used if necessary to ensure the child's attendance in court. Other dispositions available under the Act included: adjournment; a fine of up to ten dollars; commitment of the child to a children’s aid society or to the charge of the provincial Superintendent of Neglected and Dependent Children; or commitment of the child to an industrial school. A 1921 amendment, *An Act to amend the Juvenile Delinquents Act*, 1921, 11-12 Geo. V., c. 37, s. 2 (Can.), gave the court the power to postpone or adjourn the hearing for any period it might deem advisable, or do so *sine die*. In 1924, the maximum fine was raised to twenty-five dollars, and a further provision to allow for the imposition of “such further or other conditions as may be deemed advisable” was added by *An Act to amend the Juvenile Delinquents Act*, 1924, 14-15 Geo. V, c. 23, s. 2 (Can.). In response to a question in the House of Commons from Sir Henry Drayton as to the possibility of other penalties or punishments being inflicted on the child as a result of this amendment, Mr. Lapointe claimed that: “[t]hey are not trying to punish the child; they want to protect them, to help them” (Can.: H. of C. Deb., June 23, 1924, at 3510-11). Finally, it might be noted that under s. 17, a child committed to a children’s aid society, to the superintendent, or to an industrial school, if ordered by the provincial secretary, could be dealt with under provincial laws.

\(^{200}\) Id., ss. 23, 24, and 25.

\(^{203}\) Id., ss. 26 and 27.

\(^{200}\) Id., ss. 29 and 32. Section 29 was amended in 1921 and 1924 due to difficulties encountered in its application.
and when the Act was to be put into force. The underlying philosophy of the Act was expressed as follows:

This 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.

The drive to implement organized probation and special juvenile courts continued beyond the enactment of the 1908 Act. Concerted efforts were made to secure the necessary provincial legislation creating the recently authorized juvenile courts and to obtain sufficient funds from various levels of government to employ probation officers. In addressing the Tenth Canadian Conference of Charities and Corrections in 1909, Scott claimed that only the hiring of probation officers was problematic, a situation which he attributed to difficulties in funding and to the slow pace of the Ontario government in implementing the Act.

The establishment of juvenile courts in Ontario was haphazard. An Act respecting Juvenile Courts, passed in 1910, provided that every County or District Court Judge's Criminal Court and every Police Magistrate would constitute a juvenile court. Agents of children's aid societies were to be probation officers. Scott and Kelso considered this Act inadequate and through their efforts a new Act respecting Juvenile Courts was passed in 1916 which stipulated that there be a juvenile court in every city, town, and county in

203 Under id., s. 34, the Act could be put into force by federal proclamation in a province, or a portion thereof, after the provincial legislature had passed an Act to provide for juvenile courts and detention homes, or for the designation of existing courts as juvenile courts. Scott suggested that this provision was necessary because the matter of juvenile courts was within the constitutional authority of the provinces and because of the fact that:

[When the] Act was originally passed, probation, which has been described as the keystone of the arch of the modern juvenile court, was practically unknown in Canada. . . . Had the Act been put in force at once throughout the country it would therefore necessarily have remained for a long time a dead letter, at all events, over the greater portion of the country. In consequence, it would have been in danger of not being taken seriously, or of being condemned as a failure, without having been given a fair trial (Scott, The Juvenile Court in Law, supra, note 3 at 31).

Alternatively, the Act could be put into force in any city, town, or other portion of a province by proclamation, notwithstanding that the provincial legislature had not passed an appropriate Act, if the proper facilities existed. By an order of the Governor-General in Council published in the Canada Gazette, September 26, 1908, the necessary requirements included: a proper detention home; an industrial school; a superior or county court justice or judge willing to act as a juvenile court judge; remuneration for an adequate staff of probation officers, as provided by municipal grant, public subscription or otherwise; and some society or committee ready and willing to act as the juvenile court committee.

204 Id., s. 31.
205 Supra, note 39 at 44.
206 1910, 10 Edw. VII, c. 96, ss. 1 and 3 (Ont.).
which *The Juvenile Delinquents Act, 1908* had been or would be proclaimed.\footnote{207} Further provisions dealt with the appointment of judges of the juvenile court, who in turn could appoint professional and voluntary probation officers, subject to municipal or county funding.\footnote{208} Agents of local children’s aid societies were made *ex officio* probation officers.\footnote{209} Probation officers were charged with the performance of duties assigned by the judge and were given the powers of a peace officer and a truant officer.\footnote{210} The Act further authorized the appointment of juvenile court committees.\footnote{211} Kelso, in formulating a juvenile court procedure, would have taken “a firm stand on the exclusion of lawyers from the court.”\footnote{212} Scott agreed that the appearance of lawyers should be limited, perhaps to exceptional cases, but felt that a blanket exclusion might “arouse considerable opposition with the public and in that way raise difficulties for the Court.”\footnote{213}

In November, 1911, Reverend J. Edward Starr was appointed Juvenile Court Commissioner in Toronto. Archibald, who was then a Chief Inspector in the Toronto Police Department, had continued his active but unsuccessful opposition to the concept, maintaining that separate trial by police magistrates was sufficient.\footnote{214} In his First Annual Report, Commissioner Starr outlined the procedure that was being followed:

If the advice or warning of the Probation Officer is not sufficient the offender is brought to the office of either the Commissioner or the Chief Probation Officer. If all these methods fail, or if it is felt wise after investigation, the Occurrence Report is transferred to the Clerk, and, is made a Court case.\footnote{215}

Both voluntary probation officers, or “Big Brothers,” and professionals were used in Toronto during the ensuing years. There was no consistent trend or pattern over the next forty years in the number of juveniles being sent to the various institutions. Further, it is not clear what proportion of juveniles were placed on probation for any given category of offence. There was, however, a significant increase in the size of the staff associated with juvenile court. The number of judges, including deputy judges, increased from one in 1912 to four in 1950. The number of probation officers and other professionals increased from five in 1912 to nineteen in 1950. Other support personnel increased from one in 1912 to ten in 1950. The period of most rapid expansion for all three categories was prior to 1930.\footnote{216}
Subsequent to the 1908 Act, a number of minor amendments to the provisions were adopted, largely at the request of those involved in the administration of the Act. Scott played a central role in this regard, engaging in extensive correspondence with juvenile court judges across the country. In 1928, at the request of the Canadian Council on Child Welfare, which was represented by Charlotte Whitton, and the Canadian Conference of Child Protection Officers, a conference was called by the Minister of Justice, Mr. Lapointe, to discuss a complete revision of the Act. Representatives from every province except Prince Edward Island, superintendents of industrial schools, juvenile court judges, probation officers, and prominent social workers were among the delegates. The recommended revisions, according to a subsequent press release, were "largely of a technical nature, looking to improved administration and operation by the removal of handicaps that have developed in the years of profitable work under the Act." A revised and consolidated *Juvenile Delinquents Act* was passed in 1929.

In the House of Commons, although a few members noted the lack of legal protections for the child, no substantial opposition was generated to the 1929 Act. For example, Mr. Guthrie, an Ontario lawyer and former Solicitor-General of Canada who went on to a term as Minister of Justice, questioned the broad range of offences, including municipal by-laws of a "more or less trifling nature," encompassed in the definition of "juvenile delinquency." Dr. McGibbon, a Member of Parliament, questioned the inclusion of a new subsection which provided:

> 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.

He claimed that: "Many such sections ... when placed in the hands of the law officers of the country to administer ... are found not to be harmless, but rather detrimental ... to the growth and development of character." In both cases, the Minister of Justice was governed in his uncritical response by

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217 In addition to the amendments noted above, the Act was also amended by *An Act to amend the Juvenile Delinquents Act, 1908*, 1912, 2 Geo. V, c. 30 (Can.), and *An Act to amend the Juvenile Delinquents Act, 1908*, 1914, 4-5 Geo. V, c. 39 (Can.).

218 P.A.C., W. L. Scott Papers, vols. 7-10. Among those with whom he corresponded were Ethel MacLachlan of Saskatchewan, Helen Gregory MacGill of British Columbia, Emily Murphy of Alberta, Hawley Mott of Ontario, Frank Hamilton of Manitoba, and E. Blois of Nova Scotia.

219 *Id.*, vol. 10, Press Release, October 26, 1928.

220 *An Act Respecting Juvenile Delinquents*, 1929, 19-20 Geo. V, c. 46 (Can.).

221 It might be noted that, in the course of the debates in the House, Mr. Lapointe indicated that the *Juvenile Delinquents Act* had been proclaimed in twenty-three locations in Ontario, and twelve other locations in the rest of Canada by 1929. This latter figure included each of the four Western provinces as a single location (*Can.: H. of C. Deb.*, May 16, 1929, at 2568).

222 *Id.* at 2569-70.

223 1929, 19-20 Geo. V, c. 46, s. 3(2) (Can.).

224 Supra, note 221 at 2571.
the 'benevolent' purposes behind the Act, and further by the fact that the recommendations were made "by the child welfare organizations after very long and serious consideration."225

Among the various recommended changes was a subsection that prevented an adjudication or other action of a juvenile court from being quashed or set aside because of an informality or irregularity, if the disposition appeared to be in the best interests of the child.226 In the Senate, Senator Willoughby characterized this provision as "most embarrassing to anybody practising law, and . . . hardly fair."227 He received little response from other Senators, when he went on to emphasize that "the interest of the child . . . is always a controversial question, and a matter of opinion."228 Among the revisions, however, was a provision for appeals with leave from a decision of a juvenile court.229 This section stands in contrast to the apparent lack of regard in the 1929 Act for the 'legal rights' of children.

E. CONCLUSION

The origins of delinquency legislation in Canada may be traced to the perceived need to protect children and prevent crime through a system of probation and special court procedures and personnel. The primary emphasis of this system was on treatment, with only minimal attention paid to accountability. In the course of efforts to secure implementation of preferred methods for treatment, conflicts emerged between two competing groups, those favouring existing police methods, and those advocating the expansion of probation and the creation of special courts. Only minor and largely ineffectual concern was expressed for the 'legal rights' of children. The resulting procedural changes and innovations may best be viewed as evolutionary rather than revolutionary.230 In part due to financial constraints on the growth of professionalism, organizational development was gradual, in spite of the singular success of the 'reformers' in securing the desired legislation.

The philosophy of these reformers favoured external support in a family context through probation, over disruption of the family by institutional commitment. It is not clear to what extent supervision by probation officers, as a frequently used disposition, resulted in a de-emphasis of industrial schools and also in additional control being exercised over children who otherwise would have been discharged. According to the reformers' accounts, both of these effects were intended. It is apparent, however, that the reformers were partial to probation. Further, with the evolution of special juvenile court procedures, there was a failure to distinguish between stages of adjudication and disposi-

225 Id.
226 1929, 19-20 Geo. V, c. 46, s. 17(2) (Can.).
228 Id.
229 1929, 19-20 Geo. V, c. 46, s. 37 (Can.).
230 See Lemert, supra, note 8.
tion, with the 'trial' itself considered part of the treatment. Hence, minimal attention was paid to ensuring recognition of legal rights for children at either stage of the process. There was, in this regard, a notable absence of organized support for such recognition, and children remained vulnerable to the protective intrusions of others.

A basic implication of the historical development of delinquency legislation for the prospects of reform is that the dependent status of children has rendered them open to a variety of measures imposed by parties with personal and professional interests. Such measures may have been viewed by their proponents as necessary for the protection of children and society. Nevertheless, the 'child-saving' process in Canada has been guided primarily by individuals and organizations seeking to legitimize and finance their own preferred plans for protecting and controlling children.

Only minor technical amendments to the Juvenile Delinquents Act, 1929 have been enacted in subsequent years. Perhaps because the 'goals' of the juvenile court are complex, varied, and to an extent unstated, no comprehensive evaluation of the court's operation throughout Canada has been undertaken. While many of the innovations in disposition popularized by the juvenile justice system, such as probation, have been adopted by the 'adult' criminal justice system, the same does not hold true for juvenile court procedures. The possibility of accepting differential 'treatment' of children in terms of the dispositions available to the court, without acceding to the necessity of altering the procedural process whereby the child's culpability is determined, is generally ignored in the present system.

Since the organization of juvenile justice in Canada at the turn of the century, popular views of children's behaviour have been reconstituted. Literature by social scientists has expanded people's understanding of children's behaviour. In the context of juvenile justice, critics argue that injustices result from the failure to accord children substantive legal rights and procedural safeguards. Further, the value of 'rehabilitative intervention' as a response to misbehaviour is questioned. Although accepting the value of such rehabilitation, some argue that it need not necessitate as extensive a derogation of rights as has been the practice in some juvenile courts.


232 A comprehensive review of juvenile delinquency in Canada was sponsored by the federal government between 1962 and 1965, Report of the Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada (Ottawa: Queen's Printer, 1965). In recommending a comprehensive program of research, the Committee noted that "little is known in this country concerning the effectiveness of the many and varied techniques that are employed to meet the delinquency problem" (at 273).


The 1970 legislative response to such criticism, which attempted to reform Canadian juvenile justice extensively, engendered substantial opposition and was eventually abandoned. A critical stance is again reflected, albeit in a modified form, in the preamble to the draft *Young Persons in Conflict with the Law Act*. Whether such proposals for reform in Canada will significantly alter the nature of juvenile justice, which has essentially retained its reliance on the criteria used by the turn-of-the-century reformers, remains to be seen.

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