The Disposition in Matters Concerning Young Offenders

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I. IMPORTANCE OF THE DISPOSITION

One of the most complex and difficult tasks faced by a youth court judge is to make a disposition concerning a young offender, whether for the purpose of adopting a corrective and responsibilizing measure with respect to an offence, reviewing such a measure, or deciding whether or not the young offender should be transferred to ordinary court.

This task is so difficult and complex that the legislator has adopted specific prescriptions relating to young offenders, thus setting aside all the penalties provided for in Canada's *Criminal Code*.

These prescriptions, which may be found in sections 3, 20 and following, and 28 and following of the *Young Offenders Act*,[1] are numerous, varied and at times difficult to reconcile. They require the judge to consider a number of factors before making a disposition adapted to a young offender. If the disposition is to comply with the declaration of principle provided for in section 3 of the Act, the judge must be aware of many aspects of the young offender's life and family situation. In addition, the judge must limit the disposition to the measures provided for in section 20 of the Act, and to the conditions connected with their application.

The public has little knowledge of all the considerations that a judge must weigh before making any type of disposition concerning a young offender. The judge's task is not just to carry out a mathematical or quantitative operation to determine the value of the equation *young person plus offence equals sentence*, but rather to evaluate the objective nature of the facts and the subject's particular circumstances in order to meet the objective of protecting society by rehabilitating the young offender.

As the Supreme Court of Canada stated on May 19, 1993 : [...] *there must be some flexibility in the dispositions imposed on young offenders.*[2] Thus, carefully prepared dispositions frequently make it possible to reform and rehabilitate a young offender — the ultimate objective of any disposition. Dispositions that carefully address the dual necessity of protecting society and reforming the young offender make it possible to reach this objective.

II. THE PRIMARY OBJECTIVE OF THE ACT — PROTECTION OF SOCIETY

In amendments made to the *Young Offenders Act* in the spring of 1995, the Canadian legislator emphasized the primary objective of the Act by incorporating the following statements in its declaration of principle :[3]

1. The protection of society is a primary objective of criminal law applicable to youth.

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1. *Young Offenders Act,* R.C.S. 1985, c. Y-1.
2. *R.* v. *M. (J.J.),* [1993] 2 S.C.R. 421 at 427.
3. *Supra* note 1, s. 3.

2. This protection is best served by rehabilitation, wherever possible, of young persons who commit offenses.

3. Rehabilitation is best achieved by addressing the needs and circumstances of a young person that are relevant to the young person's offending behaviour.

4. Crime prevention is essential to the long-term protection of society.

5. Young persons who commit offenses should bear responsibility for their contravention, but should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as should adults.

The primary objective of the Act, then, is the protection of society through prevention, rehabilitation and the development of a sense of responsibility.

The Government of Quebec set up a task force presided over by the Associate Chief Judge of the Youth Division of the Court of Quebec, the Honourable Michel Jasmin, to study the application of the *Young Offenders Act* in Quebec. The report, which was made public in May of 1995, is a highly judicious study of the principles that a judge must weigh when making a disposition. I would like to summarize this report with regard to certain aspects of my topic.

A. Prevention

The *Young Offenders Act* is part of the overall strategy that society uses to fight delinquency and its effects. Another part of this strategy is prevention, but prevention of juvenile delinquency cannot be achieved merely by amending the laws that pertain to young offenders or applying existing laws. More is required.

Prevention is so important that, despite the fact that paragraph 3(1)(b) of the *Young Offenders Act* speaks of prevention as an obligation for society, the legislator considered it necessary to amend paragraph 3(1)(a) in order to stipulate that prevention is essential to the long-term protection of society.

Most prevention efforts focus on the causes of what is to be prevented, and because delinquency is a phenomenon whose causes are multifarious and complex, its prevention may take various forms.

Certain situations are conducive to the commission of offenses. We need think only of such common examples as a car door left unlocked, or a house that is hidden from view and therefore inviting for burglars who wish to act without being seen. Prevention that focuses on situations is designed to change the circumstances that make these situations favourable to the commission of offenses.

Not all individuals are equally liable to commit offenses. Placed in the same situation, some people will follow their impulse, while others will not. Prevention that focuses on individuals seeks to influence them so as to reduce the likelihood of their

choosing to do something illegal. This type of prevention, depending on the target group, may be primary, secondary or tertiary.

Delinquency is associated with various social problems that are not exclusive to delinquents. These problems include poverty, unemployment, failure at school, violence and so on. Primary prevention seeks to reduce the magnitude of these problems, with the hope of reducing the social vulnerability of the individuals affected, thereby reducing the occurrence of delinquency. Primary prevention policies and programs use approaches such as anti-poverty initiatives and employment policies, the adaptation of certain educational programs, the social and economic integration of immigrants, community organization, volunteer prevention associations, training in parenting skills, and so on.

The Jasmin report points out that according to calculations by the United States Senate, every dollar invested in the Perry Preschool Prevention Program saved five dollars in security allocations and judicial costs, not to mention the monetary saving to potential victims and, insofar as it is quantifiable, the value of the quality of life thus preserved. Experiences such as this are a good illustration of the importance of prevention.

Programs of this type rely on social rather than penal measures. The application of penal laws, insofar as intended to deter the public from committing offenses, contains elements of primary prevention.

Various research projects have made it possible to determine certain links between children's behaviour or other characteristics and their involvement in significant delinquent activities as young persons. Although we cannot predict with certainty which children will become delinquent during adolescence, we can identify a certain number of children who appear more at risk than others. The aim of secondary prevention is to help these high-risk youngsters avoid succumbing to delinquency.

When a young person is identified as an offender after committing an offence, our intervention most often seeks to prevent a further offence. The measures taken to ensure that a young person commits no further offenses fall within the scope of tertiary prevention.

This, then, is the context in which we may situate the principal prevention aims underlying the application of the *Young Offenders Act.* The Act serves as the foundation for intervention with regard to young persons suspected or guilty of having committed offenses whose recurrence we wish to prevent. Police officers, lawyers, judges, social workers, parents and other members of the community must ensure that their intervention is rapid, coherent and effective if they are to fulfil the obligation that the Act gives to society to "take reasonable measures to prevent criminal conduct by young persons".[4]

The application of the *Young Offenders Act* focuses mainly on tertiary prevention.

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4. *Ibid.* s. 3(1)(b).

Following these observations, the Jasmin report presents a certain number of characteristics which, although they do not guarantee the success of prevention plans, do appear essential to their success :

— establishing and maintaining a relationship of confidence between social workers and the parents or other adults responsible for the young persons;

— ensuring the continuity of program;

— using intensive intervention;

— opting for flexibility;

— respecting the values of the people involved, in particular the parents, and relying on their experience and knowledge;

— taking advantage of periods of transition in the lives of the families and young persons.

— adopting a type of administration that supports youth workers;

— striving to achieve the pooling of resources, including the resources of government departments;

— using competent personnel;

— not attempting to obtain immediate results and recognizing that a prevention plan requires time;

— evaluating in order to learn;

— providing adequate funding.

The merits of prevention are not to be doubted. Primary and secondary prevention focused on individuals has given rise to a good number of social measures over the past few decades. Certain programs have proven their usefulness, although some projects fall short of the mark. On the one hand, only a minority of projects are evaluated, which means that we may draw conclusions from only a small group of experiments. On the other hand, the problem with many preventive measures is that they attempt to tackle delinquency with only fragmented aims, whereas the phenomenon is rooted in manifold, complex causes. Marc Leblanc, a researcher who examined a compilation of studies on known programs, concluded that juvenile delinquency is a phenomenon that is difficult to influence and prevent in a truly significant manner.[5] Experts have suggested that early

5. M. Leblanc, *La prévention de la délinquance chez les adolescents : une approche globale, intégrée et différentielle* (Montreal : Groupe de recherche sur l'inadaptation psychosociale chez l'enfant, Montreal University), (1991) at 1.

prevention programs are more likely to prevent the occasional delinquency of certain young persons that to affect the persistent delinquency of others.

In view of the complexity of juvenile delinquency, Leblanc proposes that the more isolated prevention programs be abandoned and that the most promising programs be combined into one overall, integrated strategy designed to allow for individual differences. This ties in with the concerns of a task force for young persons, which reminds us that spreading budgets too thinly dilutes the effectiveness of intervention and that, rather than succumb to the temptation of doing little for many, it is better to implement programs having all the resources required, even though they are geared towards a smaller number of children.

Regardless of the level of excellence that prevention programs may some day attain, the best they will be able to do will be to reduce delinquency. They will never replace tertiary prevention, within the scope of which the measures imposed under the *Young Offenders Act* are taken.

Our society must continue to provide services whose function is to address the problem of delinquency. The most difficult and disturbing types of adolescent behaviour will always command a considerable amount of energy and resources. The danger is ever present. The problems posed by more extreme cases monopolize the major part of our resources, leaving precious little for prevention programs (especially primary and secondary ones). Prevention is of the utmost importance. It is essential that governments and other organizations concerned about prevention allocate significant resources to prevention programs for young persons, and that these resources be protected from budget cuts made for the purpose of meeting other needs which, because of their short-term urgency, are often given priority.

B. Responsibilization of the Young Offender

The Jasmin report states that young people, depending on their age and degree of maturity, must face the consequences of the offences they have committed. By assuming their responsibilities, young people may in fact contribute to their gradual acceptance of their responsibilities.

The report points out that in the *Juvenile Delinquents' Act*,[6] which was in force until 1984, the young authors of crimes were regarded as victims of their environment, with no mention of responsibility for their offences. In the *Young Offenders Act*, however, the legislator, taking a more finely shaded stance, affirms that while young persons should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as should adults, they should nonetheless bear responsibility for their contravention.[7]

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6. *Juvenile Delinquents' Act*, R.C.S. 1970, c. J-3.

7. *Supra* note 2, paragraph 3 (1)(a).

Adolescence is a critical period in the development of a person's autonomy. Children are under the authority of their parents who, in return, take responsibility for the children's actions. As children's autonomy develops, they emerge from their parents' tutorship and gradually assume their responsibilities. They learn that they must comply on their own with social standards and that, if they violate them, they must bear the consequences.

This formative process is one in which responsibilities are both accepted and internalized. These two aspects of the process are interdependent, in the sense that being confronted with the obligation to assume one's responsibilities is essential to the development of one's sense of responsibility, which in turn increases the capacity to behave in a responsible manner.

The degree of responsibility that young persons may assume depends inevitably on their maturity, which is related to their age. For many, age alone constitutes an excuse to limit intervention with regard to young offenders aged 12 or 13 to an absolute minimum. However, recognition of a lesser degree of responsibility must not send these younger offenders the message that they are exempt from punishment. They, like other young offenders, must be subject to measures, although the measures chosen must be appropriate for their age.

Many studies have confirmed that early delinquent behaviour is a portent of future delinquency. An offender's very young age, rather than being used as an excuse, should be considered a risk factor where it coexists with other indicative factors, like inappropriate parental control or behaviourial problems at school. Where a young person's behaviourial problems are such that a measure scaled to the seriousness of the offence would be clearly insufficient to deal with the problem, or where the young person has not reached age 12, intervention under the *Youth Protection Act*[8] should be envisaged.

While adjusting our expectations for young people in relation to their degree of maturity, we must at the same time ensure that they are confronted with the consequences of the offenses that they have committed. It is then preferable for the measure to focus as closely as possible on a young person's resulting responsibilities.

Freedom to act independently does not mean freedom to act outside the social norms laid down in our laws. It is by recognizing his responsibility for his actions that a young person becomes aware of this reality. This constitutes a first step towards awareness of what is involved in the exercise of freedom — that fundamental value of our society.

The measures that we apply, whether judicial or alternative in nature, must be modeled after this reformative reality, which largely transcends the scope of justice alone and involves learning to assume the consequences of one's actions. By assuming his responsibilities, the young person thus contributes to the gradual development of a sense of responsibility.

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8. *Youth Protection Act,* R.S.Q., c. P-34.1.

III. THE DISPOSITION

Judges, in addition to keeping in mind the ultimate objective of the Act — the dual necessity of protecting society and rehabilitating young offenders while helping them assume their responsibilities — must weigh different factors before making their dispositions. They must evaluate the proportionality between the offence and the sentence, the deterrence factor, and the young person's overall situation.

The Jasmin report contains an in-depth study of these various factors. Permit me to summarize the very pertinent observations that it makes concerning proportionality and the study of the young person's overall situation. As for the deterrence factor, I refer you to the *obiter* of our higher courts.

A. Proportionality Between the Offence and the Sentence

The nature of the offence must make it possible to fix the limits within which reformative and rehabilitational measures are chosen and implemented. The judicial process is set in motion by the allegation that an offence has been committed. The offence is that starting point, and must remain the primary reason for the intervention.

Certain provisions of the *Young Offenders Act* explicitly mention the seriousness of the offence as the criterion that limits the court's disposition. In a more general way, the Supreme Court of Canada expressed its position on this matter in the following terms :

> *It is true that for both adults and minors the sentence must be proportional to the offence committed. But in the sentencing of adult offenders, the principle of proportionality will have a greater significance than it will in the disposition of young offenders. For the young, a proper disposition must take into account not only the seriousness of the crime but also all the other relevant factors.*[9]

Commenting on this decision, the Jasmin report points out that the choice of a measure should not be reduced to the automatic application of a "scale of penalties", with a particular offence necessarily commanding a particular penalty. Such a position would in fact be contrary to the position expressed by the Supreme Court. We must, however, adjust our degree of intervention in relation to the seriousness of the offence, so as not to obscure the link between the offence and the penalty. The penalty must appear just and equitable, and must appear so in the mind of the young person to whom it is applied. Just as we must avoid imposing too light a penalty for a serious offence, thus giving the young person, and other observers, the impression that we are not taking manifestly delinquent behaviour seriously enough, we must also avoid situations where a harsh measure is imposed on a young person following the commission of a minor offence, thus giving him

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9. *Supra* note 2 at 431-432.

or her the feeling of being treated unfairly, discrediting the disposition in their eyes and creating an obstacle to intervention.

For many people, the principle of proportionality is necessarily associated with punishment : we punish proportionately to the seriousness of the crime. This is no doubt the route along which proportionality was introduced into criminal law — a route that appears narrow, however, when the law is applied to young persons. Punishment alone is not an objective that meets our expectations of justice for minors. Our desire is for this justice to be reformative and to contribute to the adaptation of young persons to life in society, thus better protecting society. When we state that the degree of intervention, not the degree of punishment, must correspond to the seriousness of the offence, we mean that, within the context of the limits thus set, justice must seek as much as possible to protect society through reformative measures that foster the adaptation of young persons.

Ensuring that the seriousness of a crime is taken into account will inspire the public, both victims and onlookers, to have confidence in the judicial system. Consideration of seriousness also excludes the possibility of abuse such as the imposition of a harsh measure on a young person who is guilty of a minor offence but whose needs are very evident to the person imposing the measure. Finally, taking into account the seriousness of an offence is something of a guarantee that the measures imposed are just, equitable and reasonable, particularly for the young persons to whom they are applied and for their families. Research conducted over the last few decades has revealed that, when a measure is imposed on a young person,there is no certainty of that measure providing protection for society by effectively preventing future offenses. By basing the degree of intervention on the seriousness of an offence, the legitimacy of the intervention is given a more solid foundation than it would be given by the pursuit of an objective that we are not fully certain of attaining.

The seriousness of an offence thus makes it possible to establish a "corridor" within which the intervention must be situated. Within the limits thus set, the type and duration of the intervention must be individualized in order to address the needs of the young person and the victim; it must also protect society. The seriousness of an offence must not be determined in relation only to the "objective" seriousness that is translated into the maximum penalties provided for in the *Criminal Code*. Rather, it must be determined on the basis of all the particular circumstances of the matter in which young people were involved, including the extent of their participation, their responsibility and their attitude about the acts committed.

The seriousness of an offence must also be evaluated on the basis of the young person's prior record, if he or she has one. An offence may take on a more serious complexion when preceded by a series of earlier offenses than when it constitutes an isolated event in the young person's life.

Young people are brought before the authorities only when they commit an offence. Otherwise, they remain unknown. If they are acquitted, no measures may be imposed on them. This reality must not be forgotten when dispositions concerning a young person are made. The offence must therefore play a determining role among the factors on which dispositions are based.

B. The Deterrent Effect

Case law has largely recognized that in matters of adult sentencing, deterrence, both general and individual, is one factor to be considered when a disposition is made following the commission of an offence.

Although the *Young Offenders Act* does not speak specifically of deterrence, the higher courts have reminded us that a judge must consider deterrence before making a disposition concerning a young offender, even though young people should not be considered adults with respect to their degree of responsibility and the consequences of their actions.

In 1990, the Honourable Mr. Justice Fish of the Quebec Court of Appeal made the following statement on this subject :

> *I have come to the conclusion that general deterrence is a factor which cannot be excluded in absolute terms from the application of the* Young Offenders Act [...].
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> *Social science may in this instance appear to challenge assumptions based on instinct and common sense. The deterrent effect of specific sentences, or of a policy of severe sentences for particular crimes, may or may not be measurable. Nonetheless, we have not in this country rejected the notion that penal sanctions deter the commission of further offenses, and, until we do, there is no apparent reason entirely to remove individual and general deterrence from the ambit of factors which a youth court may consider in making disposition under the* Young Offenders Act.
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> *Clearly, however, the principles enunciated in s. 3 and the rules laid down in ss. 20 and 24, among others, make apparent Parliament's intention that general deterrence be given much less importance in dealing with young offenders than in the sentencing of adults.*[10]

In 1993, the Honourable Mr. Justice Cory of the Supreme Court of Canada reminded us of this principle in the following terms :

> *In* R. *v.* O., *Brooke J.A. writing for the Ontario Court of Appeal expressed the opinion that although the principle of general deterrence must be considered, it had diminished importance in determining the appropriate disposition in the case of a youthful offender. This, I believe, is the correct approach. This is apparent from a consideration of some of the provisions of the* Young Offenders Act. *Section 3 in emphasizing the need for the protection of society, s. 20 by its observation that dispositions should have regard to the best interest of the young person and the public, and s. 24 which provides for a disposition imposing custody if it is in the best interest of the young person*

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10. *R.* v. *L. (S).*, (1990), 75 C.R. (3d) 94 at 107-109 Que. C.A.).

and for the protection of the society, all indicate that general deterrence must be taken into account.[11]

C. The Young Person's Rights and Freedoms

When making a disposition, the judge must keep in mind the prescriptions of paragraph 3(1)(f), which lays down the principle that the rights and freedoms of young persons include a right to the least possible interference with freedom that is consistent with the protection of society, having regard to the needs of young persons and the interests of their families. Paragraph 3(1)(h) lays down the principle that young persons should be removed from parental supervision either partly or entirely only when measures that provide for continuing parental supervision are inappropriate.

Subsection 24(1) of the Act states that a young person must not be placed in custody unless the court considers a committal to custody to be necessary for the protection of society, having regard to the seriousness of the offence and the needs and circumstances of the young person.

Probably of the opinion that a judge was given too much discretion in evaluating these elements before making a disposition, the federal legislator decided to be even more specific in the amendments that were passed in the spring of 1995. The legislator incorporated into the Act a new subsection, 24(1.1), which states that the judge must take the following factors into account :

1. Committal to custody shall not be used as a substitute for appropriate child protection, health and other social services.

   Is the legislator not clearly recalling here the principle that the measure to be taken must never be excessive in relation to the offence? If the young person's needs and circumstances require a more social than penal type of intervention and the resources provided for in laws concerning youth protection exist, should we not, through these laws, favour helping measures before considering custodial measures as provided for in the *Youth Protection Act*?

2. A young person who commits an offence that does not involve serious personal injury should be held accountable to the victim and to society through non-custodial dispositions wherever appropriate.

   Are we to understand from this that committal to custody should be only an exceptional measure where there is no serious personal injury?

   Should crimes against property, the various types of trafficking, and crimes against persons where there is no serious injury not be dealt with first through measures that maintain the young person's freedom?

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11. *Supra* note 2 at 434.

3. Custody shall be imposed only when all available alternatives to custody that are reasonable in the circumstances have been considered.

   In this regard, the judge who imposes a custodial measure must, before imposing it, state the reasons why the alternative measures provided for in the Act would not have been adequate.[12]

Furthermore, under the new subsection 24.1(4), where a young person is committed to custody, whether open or secure, such custody should involve the least degree of containment and restraint, having regard to the seriousness of the offence and the circumstances in which that offence was committed, the needs and circumstances of the young person, the safety of other young persons in custody and the interests of society.

We will recall that according to paragraph 3(1)(c.1), the protection of society is best served by the rehabilitation, wherever possible, of young offenders.

The latest amendments to the *Young Offenders Act* strongly reaffirm the importance given by the legislator to the young person's right to benefit from freedom while learning to assume responsibilities.

D. The Young Person's Needs

The Jasmin report reminds us that a young person is a person who is in the process of developing and who thus has special needs that distinguish him or her from an adult. Formative needs are foremost among these special needs. Persons who work with young offenders must keep in mind their responsibilizing role in the course of their work.

The report adds that a young person's needs must be taken into account in choosing a disposition from among the options that correspond to the seriousness of the offence. These needs may justify reducing the harshness of a disposition that may be legitimate in view of the offence, but whose consequences would conflict with the young person's needs.

Just as the law distinguishes young persons from adults with regard to their degree of responsibility, it also recognizes that young persons have special needs. Because of their situation of dependency and their level of development and maturity, they have special needs and require guidance and assistance.[13] The Act also states that the needs of young persons and the interests of their families must be taken into account in the evaluation of the interference with freedom that is consistent with the protection of society.[14]

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12. *Supra* note 1, new subsection 24(4).

13. *Ibid.* s. 3(1)(c).

14. *Ibid.* s. 3(1)(f).

A young person's needs may be varied and may be present to different degrees. They are related to a number of attendant problems : difficulties at school, drug-related problems, retarded psychosocial development, lack of maturity, and so on. They may be caused by various factors, such as coming from an underprivileged socio-economic milieu, inadequate parental and scholastic supervision, a very troubled family situation or major conflicts between young people and their parents that may result in the parental refusal to allow the young person to live at home.

But if there is one need that encompasses many others and that must be emphasized within the context of the application of the *Young Offenders Act*, it is the need to develop. A young person differs from an adult in that he or she is in the process of developing. Developing involves various types of learning where the young person is expected to interiorize a certain number of social norms designed to orient his behaviour. An adult, however, is expected to have completed this learning process. This difference accounts largely for the particular nature of intervention with minors, which must be structured into the young person's learning of social norms, including the rules of criminal law.

The Jasmin report tells us that the various persons who work with young offenders contribute to this learning of social norms by young persons. These persons contribute to the development of young offenders, regardless of whether they define their roles as developmental. This is true of all these workers : police officers, lawyers, social workers, judges, each within their respective role. These persons are perceived by young persons as adults who reaffirm the importance of abiding by the law. Rather than simply imposing penalties or providing services, they must, through their work, complement the work of parents, teachers and other adults who play a developmental role, with a view to ensuring that young persons become law-abiding citizens.

This is a demanding role. Adults who work with young offenders must work in a manner that commands the respect of young persons and must appear credible if they are to achieve compliance with our social norms. These adults must always be aware of the importance of their developmental role in their work. This appears essential to us if we wish to take account of the needs of young persons as developing persons.

The Jasmin report refers to a statement by the Honourable Madam Justice L'Heureux-Dubé of the Supreme Court of Canada, to the effect that for some 100 years, Parliament's commitment has been to treat young offenders involved in criminal cases separately and to rehabilitate them through separate means.[15] Thus, the Act aims to prevent young offenders from becoming future criminals and to help them become law-abiding citizens. Although the Act was revised in 1992 and 1995, these fundamental values remain impregnated in all its provisions.

The central issue becomes how much weight, in arriving at a disposition, should be given to the young person's needs. The Honourable Mr. Justice Cory of the Supreme Court of Canada sets the following guidelines :

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15. *R.* v. *M. (S.H.)*, [1989] 2 S.C.R. 446 and Re *Young Offenders' Act* (P.E.I.), [1991] 1 S.C.R. 252.

> [The factors related to a young person's special needs] [...] *should neither be ignored nor made the predominant factor in sentencing. Nonetheless,* [they] *can properly be taken into account in fashioning the disposition.*[16]

According to the Jasmin report, the young person's needs would seem to have to be taken into account to affect dispositions in two ways. First, they may serve to determine the choice of a disposition from among the options to which the seriousness of the offence corresponds. Second, they may justify reducing the severity of a disposition that may be warranted by the offence, but whose consequences would conflict with the young person's needs.

Alternatives to the *Young Offenders Act* must therefore be considered where a young person is found to require more assistance that can be provided by the type of measure justified by the *Juvenile Delinquent Act. The Youth Protection Act* can be applied where the young person's security or development is compromised. That there is a compromise must be demonstrated, and being found guilty of an offence does not as such constitute proof. We should also remember that the Act respecting health services and social services also makes it possible to provide certain types of assistance where such assistance is willingly accepted by the persons involved.

The choice of a measure and, particularly, the manner of explaining it to the young person, must not leave any ambiguity as to his or her responsibility for the offence and the fact that he or she is being blamed for it. We must ensure that a measure centred on the young persons' needs and on providing them with assistance is not perceived by the young persons as our excusing their offence as being due to factors beyond their control. The young person could use such a perception as justification for future delinquent behaviour. Opening the door to such a perception is anti-reformative in that it may allow the young persons to shirk their responsibilities and encourage them to become a repeat offenders — exactly the opposite of what we are trying to achieve.

E. The Importance of Dealing with the Overall Situation

The Jasmin report expresses the wish that police forces, social workers and people working in the court system make every effort to group together the cases concerning the same young person, while adhering to the relevant legal principles. This would allow dispositions to address the young person's overall situation.

According to the report, in many instances a young person who has committed several offenses is dealt with separately for each offence, each case being examined individually instead of being evaluated and decided together with the other cases.

This approach would present fewer problems from a purely retributive perspective, i.e., in a system where the only aim is to inflict punishment for acts committed with no regard for protecting society. In such a system, whether punishments

16. *Supra* note 2, at 432.

were imposed simultaneously or at different times would be of little importance. The seriousness of each offence would serve to determine the punishment, and the punishment would be determined separately for each offence.

It is a different matter where, within the limits that we set on the basis of the seriousness of the offence, we seek to protect society through a reformative approach, through rehabilitation or through deterrence. In this approach, instead of examining a series of offenses only from the standpoint of the seriousness of each separate offence, their significance must be examined from the standpoint of the whole that they form, their frequency, and the young person's attitude. Also taken into account are other factors, such as how early the delinquent acts began, as well as factors that help us to predict the likelihood of repeat offenses and to choose the appropriate measure. In this context, there is a fair chance that the significance attributed to a particular offence, considered separately, will not be the same as that attributed when the offence is considered together with all the offenses of which the young person is found guilty. It is therefore necessary to make a single disposition focusing on the overall situation rather than a series of dispositions focusing on events examined individually.

It is true that, where several events are the subject of consecutive dispositions, the judge who makes the last disposition may take into account all the previous events. Judicial leeway is reduced considerably, however, both by the previous dispositions and by the fact that the judge can affect the situation only as regards the most recent offence. It is therefore much more difficult to make a disposition that is well adapted to the overall situation.

An adolescent's delinquent behaviour cannot be reduced to a succession of unrelated cases. It goes without saying that it is impossible to group together a large number of cases where a young person's delinquent activities span a lengthy period of time. However, there remains a significant number of situations in which it would be possible to group certain cases, thus possibly helping the judge make a better disposition.

In order to react appropriately to the commission of an offence, we need to understand the significance that the offence has for the young person. We must understand what caused him or her to commit it, and must gauge how the young person is liable to react to the various measures that could be imposed.

We cannot allow ourselves to make automatic, routine dispositions whereby we are content either to hand out fixed penalties according to a scale, or to use the gradual escalation approach where, from one offence to another, the measures imposed become harsher and harsher, the choice of measures being determined solely by a progressive increase in their severity.

The unconsidered application of escalating measures, in imitation of the adult system, violates the spirit of the *Young Offenders Act* by reducing young offenders, through a type of basic mathematical operation, to the sum of their offenses, without regard for the underlying causes.

While it is important to avoid discriminating against certain young persons by imposing harsher measures on them because of who they are rather than what they have done, we must nevertheless take into account the young person's overall situation so that we may arrive at a personalized disposition. The Act indicates this clearly where it lists the elements of information that youth workers are invited to provide to judges in pre-disposition reports : the analysis must centre as much on the various aspects of the young

person's personal, family and social situation as on the offender's reactions to previous offenses and measures.

An offence is an act perpetrated by a given individual in a set of circumstances specific to that individual. We cannot react appropriately to such an act without taking into account the young person's overall situation, so that we will understand the act itself and will choose the right measure.

F. Choosing the right measure at the right time

The right measure must be taken at the right time. When a disposition is made or a measure is applied, the challenge is the same for everyone — police officers, social workers or people working in the judicial system. The right measure at the right time must be geared to the offence, with respect to which the young person must assume responsibility in a way consistent with his or her abilities.

The right measure must be situated within the limits determined by the seriousness of the offence. Within that corridor, it must aim to protect society and to translate its reprobation of the offence into measures of a reformative and rehabilitational nature. It must also aim to address the victim's needs and uphold his or her rights.

The right measure must take into account the adolescent's overall situation, which it must seek to influence through personalized dispositions and measures based on the young person's needs. It must involve the parents, who are the people chiefly responsible for the adolescent's upbringing.

The right measure must call upon the consistency and sense of responsibility of all the people involved. It must be taken promptly, thus avoiding delays that make it less meaningful and reduce its impact. It must be applied in such a way as to respect everyone's rights, including, above all, the rights of the young person.

The right measure must be the result of a delicate balance between the concern for making dispositions and for applying measures that are fair, equitable, moderate and personalized, the concern for properly responding to the seriousness of the offence and to society's reprobation, and the concern for intervening at the appropriate time. Finding the right measure is demanding, and does not allow for easy solution.

With these words, the task force presided over by Assistant Chief Judge Michel Jasmin concluded that society confers delicate and difficult responsibilities on the persons who apply the *Young Offenders Act.* Assuming their responsibilities conscientiously and competently is no small challenge.

IV. EXAMINING THE DISPOSITION OR THE PAROLE GRANTED

Any disposition made with respect to a young offender is applied in its entirety unless examined further by the court. In this regard, the *Young Offenders Act* provides in sections 28 to 34 for the terms and conditions of the procedure for examining a disposition that may or may not contain a custodial measure.

Unlike adults, who may without the intervention of the court be paroled after serving either one-sixth or one-third of their sentence, young offenders must serve the entire custodial sentence imposed on them. Only the court, for good reason, may examine the situation and revise it if the young offender's interests so warrant and if the protection of society is ensured.

Within the framework of this examination procedure, the judge, before making a disposition that comprises a custodial measure, must weigh the consequences of the disposition as regards the protection of society, the needs of the young person and his or her family, the progress made by the young offender, changes in the circumstances that led to committal placement and the possibilities for rehabilitation. Only after the hearing, and after having considered all of these factors may the judge either maintain the custodial measure, relax it, or terminate it either by putting the young offender on probation or parole.

The general public is unaware of this particular aspect of sentences for young offenders. In evaluating these sentences, the public should consider the fact that there is no parole system for young offenders and that, in principle, they must serve their entire sentence unless there is an examination by the court. A three-year custodial measure imposed on a young offender is equivalent to a nine-year sentence for an adult, since the adult would be eligible for parole after one-third of a sentence.

Moreover, it is important to note that even measures that do not contain custodial measures must be carried out in full unless there is an examination by the court.

V. DETERMINATION OF THE COMPETENT JURISDICTION

One of the most important decisions for a youth court judge is no doubt to determine whether a young offender should be judged in the adult system or in the youth system.

The *Juvenile Delinquents Act* provided for a transfer measure. The *Young Offenders Act,* passed in 1984, retained this procedure of transferring a young person to ordinary court. The amendments made to the Act in 1992 and 1995 merely clarified the legislator's thinking and have adapted the conditions for the application of this transfer procedure to the needs of society.

Since the passage of the *Juvenile Delinquents Act* more than 60 years ago, judges have had to reflect on this existential question of determining what jurisdiction is competent to deal with the case of a young offender.

In 1984, the *Young Offenders Act* provided that the judge had to make the determination only if it was felt that, in the interest of society and in view of the young person's needs, a transfer was necessary.

In 1992, the amendments made to the Act merely specified the legislator's thinking concerning the interests of society and the young person's needs. In 1995, the legislator made only changes as to the form of the application for a transfer, stating that in regard to certain offenses, the burden of proving that the young person should be kept in the youth system now rests on the young person's shoulders rather than on those of the Crown, which previously was required in all circumstance to prove the advisability of transferring a young person to ordinary court.

The criteria for evaluating an application to transfer a young person to ordinary court, filed by the Crown, or an application to keep a young person in youth court, filed by the young person, remain the same. Parallel reading of the 1992 and 1995 versions of subsection 16(1.1) of the Act clearly show that the matters that the judge must consider before making a determination in transfer matters have not changed and that all the jurisprudence in these matters will still be applied.

1992	1995
In making [its] *determination* [...] *the youth court shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be reconciled by the youth remaining under the jurisdiction of the youth court, and if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall order that the young person be proceeded against in ordinary court* [...].	*In making* [its] *determination* [...] *the youth court* [...] *shall consider the interest of society, which includes the objectives of affording protection to the public and rehabilitation of the young person, and determine whether those objectives can be reconciled by the youth being under the jurisdiction of the youth court, and* [...[*if the court is of the opinion that those objectives cannot be so reconciled, protection of the public shall be paramount and the court shall* [...] *order that the young person be proceeded against in ordinary court* [...].

The same is true of the various factors[17] that the judge must take into account in determining whether to transfer a young person to ordinary court or to keep the youth in youth court. The legislator made no changes to these factors in the recent amendments to the Act.

17. *Supra* note 1, subsection 16(2).

The remarks by the Quebec Court of Appeal on February 28, 1994, in the matter of the transfer of a 14-year-old youth who was accused of committing the first degree murder of his mother, his father and his brother in 1992, are still relevant, even after the 1995 amendments :

> *The transfer procedure is designed to protect society, but also to ensure the future welfare of the young offender by facilitating as much as possible his rehabilitation — the fundamental objective of the system* [...].
>
> *It is truly a strange paradox that to ensure a good balance between protecting society and saving a 14 year old youth, we are obliged to try him not in the judicial system created especially for him, but in the system designed and created for adults. This certainly appears to be a strange paradox, but is the reality just the same!*
>
> *It is a strange paradox as well, that it is necessary to impose a harsher sentence in order to give the young person the best chance for rehabilitation through adequate psychiatric treatment. A strange paradox, but the reality just the same!*
>
> *In this case, the aim of transferring this young person to ordinary court is not to punish him by imposing a harsher sentence on him, but rather to help him, since the therapeutic possibilities thus offered are better.*[18]
>
> In 1992, the same court wrote as follows :
>
> *The legislator's wish is for the judge to be convinced, before transferring a young person to ordinary court, that the mechanisms and treatments available for him in the youth system will not "more" reasonably facilitate attainment of the objective of rehabilitating the young person. This is why the particular circumstances of each case must be examined.*[19]

In *J.E.L.*, the Supreme Court of Canada makes the following observation on this subject :

> *The question is whether the judge is satisfied, after weighing and balancing all the relevant considerations, that the case should be transferred to ordinary court.*[20]

The Supreme Court also states that the interests of society and rehabilitation are closely related criteria :

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18. *Labelle* v. *R.* (February 28, 1994), Montreal, 500-08-000017-923 (C.A.) [unofficial translation].

19. *R.* v. *Soucy* (1992), Montreal, 200-08-000012-905 (C.A.) [unofficial translation].

20. *R.* v. *L. (J.E.),* [1989] 2 S.C.R. 510 at 517.

> [...] *the "interest of society", is a broad concept. On the one hand, it incorporates the legitimate interest that those persons guilty of a criminal offence will be prosecuted and convicted. Reinforcement of fundamental societal values through the deterrence of criminal conduct and the punishment of criminals is a legitimate goal for the benefit of society. On the other hand, society's interest also commands the rehabilitation of criminals and their reintegration into society. This is especially relevant in the case of young criminals for whom the possibilities of rehabilitation are greater.*[21]

As we can see, the amendments made to the *Young Offenders Act* in 1995 have not changed the criteria and the factors that a judge must take into account in determining whether a young offender should be kept in youth court or transferred to ordinary court.

The changes made to the Act by the legislator involve only the mechanism for access to such an application.

In cases of first and second degree murder, attempted murder, manslaughter and aggravated sexual assault, a young person aged 16 or 17 must be tried in ordinary court. If he wishes to be kept in youth court, he must make an application to that effect and establish the advisability of his remaining in youth court.

In all other cases, a young person has the fundamental right to be tried in youth court, which means that if a transfer to ordinary court is desired an application must be filed to that effect.

When such an application is filed, the judge must apply the principles that have existed since the *Young Offenders Act* was passed in 1984 and that have since been commented on and rendered explicit by the courts.

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21. *Supra* note 15, at 449, 500.