# The Constitutionality of Canada's Youth Courts nnder the *Young Offenders Act*

John P. McEvoy*

The author examines the constitutionality of Canada's Youth Courts as presently constituted under the *Young Offenders Act*. He argues that the fact that these courts are presided over by provincially appointed judges contravenes section 96 of the *Constitution Act, 1867*. An historical inquiry leads to the determination that powers of jurisdiction which in 1867 were exclusively those of a superior, district or county court have been conferred on the Youth Courts by the *Young Offenders Act*. Through an application of the test set out in *Reference Re The Residential Tenancies Act, 1979*, it is asserted that this jurisdiction cannot be exercised by a non-section 96 court.

L'auteur étudie la constitutionalité des tribunaux pour adolescents, tels que présentement constitués dans les provinces canadiennes par la *Loi sur les jeunes contrevenants*. Selon l'auteur, l'article 96 de la *Loi constitutionnelle, 1867* est violé puisque ces tribunaux sont présidés par des juges nommés par les provinces. Une analyse historique révèle que des pouvoirs qui étaient en 1867 propres à une cour supérieure, de district ou de comté ont été dévolus aux tribunaux pour adolescents par la *Loi sur les jeunes contrevenants*. À la suite d'une application du test mis de l'avant dans l'arrêt *Renvoi relatif à la Loi de 1979 sur la location résidentielle*, l'auteur soutient que ces pouvoirs ne peuvent être exercés par des tribunaux dont les juges ne sont pas nommés suivant la procédure de l'article 96.

*Of the Faculty of Law, University of New Brunswick.

A new era in the administration of juvenile justice in Canada was launched with the coming into force of the *Young Offenders Act*.[1] Besides tinkering with procedures, the Act significantly altered juvenile justice by implementing a diversion system which allows deserving young persons in conflict with the law to avoid the necessity of appearing before a court for disposition. The purpose of this note is neither to discuss the merits of diversion nor the other philosophical changes represented by the Act, but to present a problem arising from the tinkering: the proposition advanced is that the *Young Offenders Act*, as implemented, violates section 96 of the *Constitution Act, 1867*,[2] which requires the Governor General to appoint the judges of the superior, district and county courts.

The *Young Offenders Act* repealed and replaced the *Juvenile Delinquents Act*, which, although amended over time, remained in substance as originally enacted in 1908.[3] Both Acts followed a similar philosophy by establishing systems of juvenile justice separate and apart from that to which adult offenders are subject. The adjudicative tribunal with jurisdiction under the two Acts, a "juvenile court" under the former and a "youth court" under the current scheme, are similarly defined. That tribunal is either a new court established by the Legislature for the purpose, or an existing court designated or authorized by the Legislature, the Governor in Council or the Lieutenant Governor in Council to exercise jurisdiction under the Act.[4] The present "youth courts", as with the former "juvenile courts", in each province of Canada are presided over by judges appointed by the respective Lieutenant Governors in Council.[5]

One important distinction between the two schemes is the range of offences covered. Under the *Juvenile Delinquents Act*, the omnibus offence

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[1]S.C. 1980-81-82-83, c. 110. The *Act* came into force on 2 April 1984, SI/84-56.

[2]Enacted as *British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[3]*Juvenile Delinquents Act*, S.C. 1908, c. 40; R.S.C. 1927, c. 108, as rep. *The Juvenile Delinquents Act, 1929*, S.C. 1929, c. 46; R.S.C. 1952, c. 160; *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3.

[4]*Juvenile Delinquents Act*, R.S.C. 1970, c. J-3, s. 2(1); *Young Offenders Act, supra*, note 1, s. 2(1).

[5]Newfoundland: Provincial Court, per Nfld Reg. 72/84; Nova Scotia: Family Court, per N.S. Reg. 65/84 Schedule A, s. 2; Prince Edward Island: Provincial Court, per EC 282/84; New Brunswick: Provincial Court, per O.C. 85-882; Quebec: Youth Court, per *Courts of Justice Act*, R.S.Q. c. T-16, ss 110-14; Ontario: Unified Family Court (a superior court) Provincial Court (Criminal Division) and Provincial Court (Family Division), per *Courts of Justice Act, 1984*, S.O. 1984, c. 11, ss 47(b), 67(2) and 75(b); Manitoba: Provincial Court (Family Division), per *The Provincial Court Act*, S.M. 1982-83-84, c. 52, s. 19(1)(b) and per O.C. 283/84; Saskatchewan: Provincial Court, per O.C. 378/84; Alberta: Provincial Court, per *The Provincial Court Act*, R.S.A. 1980, c. P-20, as am. *Young Offenders Act*, S.A. 1984, c. Y-1, s. 38; British Columbia: Provincial Court, per *Provincial Court Act*, R.S.B.C. 1979, c. 341, s. 2(4), as am. *Young Offenders (B.C.) Act*, S.B.C. 1984, c. 30, s. 59 and per O.C. 617/84.

of "delinquency" was substituted for the myriad of possible violations of federal and provincial statutes and municipal by-laws.[6] It also extended the reach of the statute to include sexual immorality or "any similar form of vice". The *Young Offenders Act*, however, is limited to violations of federal statutes or regulations and retains the character or identity of each offence as the specific offence, characterized as being either an indictable or summary conviction offence. Thus a violation of the theft provisions of the *Criminal Code* retains its identity as theft and is the offence with which the young person is charged rather than, as under the former Act, being subsumed within the general offence of "delinquency". At minimum, it is this retention of the character or identity of each federal offence which, it is suggested, is fatal to the *Young Offenders Act* as implemented with provincially appointed judges acting as youth court judges.

Over the eight decades of its existence, the *Juvenile Delinquents Act* faced only two substantial challenges on constitutional grounds. The first concerned the validity of subsection 20(2) of the Act which allowed a court to impose liability upon a municipality for the financial support of a child in care. This challenge was maintained over a twenty year period from its initial rejection in 1962 by Schatz J. in *Re Dunne*[7] to its ultimate acceptance in 1982 by the Supreme Court of Canada in *Regional Municipality of Peel* v. *MacKenzie.*[8] The statutory imposition of this financial burden upon a municipality was finally determined not to be supportable as, or necessarily incidental to, the criminal law and procedure justification of the Act and was found to encroach upon provincial jurisdiction in relation to municipal institutions under subsection 92(8) of the *Constitution Act, 1867.* Accordingly, the severance doctrine was applied to annul any reference to municipalities in the section, the imposition of such a financial burden being *ultra vires* the jurisdiction of Parliament.

The second challenge questioned the constitutional validity of the substitution of the procedures of the *Juvenile Delinquents Act* for those under provincial legislation where a violation of provincial law was alleged against a juvenile. The case arose out of an alleged speeding infraction under the provincial *Motor Vehicle Act* of British Columbia. Rather than being proceeded against under the *Juvenile Delinquents Act*, the accused, a juvenile, was tried by the magistrate as if he were an adult and upon conviction was

[6]*Juvenile Delinquents Act, supra*, note 4, ss 2(1) and 3(1).

[7](1962), [1962] O.R. 595, 33 D.L.R. (2d) 190 (H.C.).

[8](1982), [1982] 2 S.C.R. 9, 42 N.R. 572, Martland J. Three years earlier in *A.G. Ontario* v. *Regional Municipality of Peel* (1979), [1979] 2 S.C.R. 1134, [1981] 2 W.W.R. 540, the Court approved a construction of the Act such that a committal order to a private enterprise home was not authorized by s. 20(1). This was sufficient to dispose of the case without addressing the constitutional issue.

fined $400. Under subsection 92(15) of the *Constitution Act, 1867* the provincial legislatures enjoy exclusive jurisdiction in relation to "the imposition of punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province ...". The issue, therefore, was whether such provincial enforcement procedures and penalties in respect of violations of provincial law could be ousted by the Parliament of Canada in the exercise of its jurisdiction under subsection 91(27) of the *Constitution Act, 1867* over "the Criminal Law ... including Procedure in Criminal Matters". More specifically, was the creation of an all-encompassing offence of "delinquency" in the *Juvenile Delinquents Act* a valid exercise of the criminal law power? Fauteux J., for the Supreme Court of Canada in *A.G. British Columbia* v. *Smith*,[9] held that it was. Two well-accepted general propositions in respect of federal power under subsection 91(27) of the *Constitution Act, 1867* were found to be controlling: subsection 91(27) confers upon Parliament jurisdiction in relation to criminal law in its widest sense,[10] and it includes the power to create new crimes.[11] Given the breadth of these propositions, his Lordship did no more than merely accept that the Act was a proper exercise of the criminal law power:

> The primary legal effect of the *Juvenile Delinquents Act* ... is the effective substitution, in the case of juveniles, of the provisions of the Act to [sic] the enforcement provisions of the *Criminal Code* or of any other Dominion statute, or of a provincial statute ... . [T]his substitution of the provisions of the Act to [sic] the enforcement provisions of other laws, federally or provincially enacted, is a means adopted by Parliament, in the proper exercise of its plenary power in criminal matters, for the attainment of an end, a purpose or object which, in its true nature and character, identifies this Act as being genuine legislation in relation to criminal law.[12]

His Lordship went on to say:

> [I]n essence, [the operative provisions of the Act] are intended to prevent these juveniles to become [sic] prospective criminals and to assist them to be law-abiding citizens. Such objectives are clearly within the judicially defined field of criminal law. For the effective pursuit of these objectives, Parliament ... deemed it necessary to create the offence of *delinquency* ... .[13]

In light of this characterization of the legislation for constitutional purposes, the argument that the Act was merely a colourable use of the criminal law power was rejected.

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[9](1967), [1967] S.C.R. 702, 2 C.R.N.S. 277, [1969] 1 C.C.C. 244, aff'g (1965), 53 D.L.R. (2d) 713 (B.C.C.A.), Davey and Norris JJ.A. dissenting [hereinafter *Smith* cited to S.C.R.].

[10]*A.G. Ontario* v. *Hamilton Street Railway Co.* (1903), [1903] A.C. 524, 24 O.A.R. 170.

[11]*Proprietary Articles Trade Association* v. *A.G. Canada* (1931), [1931] A.C. 310, 55 C.C.C. 241.

[12]*Smith*, *supra*, note 9 at 708.

[13]*Ibid.* at 710.

It bears repetition that the *Young Offenders Act* does not continue the judicially approved offence of "delinquency"; rather, each offence under the *Criminal Code* and other federal statutes and regulations retains its character as such offence, including its nature as being either an indictable or summary conviction offence. The result then is that a youth court under the new scheme exercises jurisdiction in relation to all federal offences. It is, in other words, a unified court of criminal jurisdiction in respect of young persons. Where, as in each province, the youth court judge is not appointed by the Governor General, the issue arises as to whether section 96 of the *Constitution Act, 1867* is violated.

Section 96 is an institutional provision of the Constitution. As such, it overrides the distribution of powers provisions in Part VI of the *Constitution Act, 1867*, sections 91 to 95. This was already recognized by the Supreme Court of Canada in the 1879 decision, *Valin* v. *Langlois*.[14] In upholding the validity of conferring jurisdiction upon provincial superior courts in relation to controverted federal elections, Ritchie C.J. stated:

> [B]efore these specific powers of legislation were conferred on Parliament and on the Local Legislatures, all matters connected with the constitution of Parliament and the Provincial Constitutions had been duly provided for, separate and distinct from the distribution of legislative powers, and, of course, overriding the powers so distributed; for, until Parliament and the Local Legislatures were duly constituted, no legislative powers, if conferred, could be exercised.[15]

In 1929, a comment to the same effect was made by Duff J. in *Reference Re Waters and Water-Powers*:

> In considering the effect of the phrase "notwithstanding anything in this Act" [in section 91 of the *Constitution Act, 1867*] one must not overlook the fact that it is only the "exclusive authority" of the Dominion under the enumerated heads of s. 91 which is accorded the primacy intended to be declared by those words.[16]

These restrictive judicial views of federal power were largely ignored in favour of an expanded approach to federal legislative jurisdiction until the reasons for decision of the majority of the Supreme Court in the 1982 case of *Reference Re Exported Natural Gas Tax*.[17] In the context of the referred facts, federal taxation jurisdiction under subsection 91(3), "[t]he raising of Money by any Mode or System of Taxation", was squarely set against the institutional provision in Part VII of the *Constitution Act, 1867*, section 125, "[n]o Lands or Property belonging to Canada or any Province shall be liable to Taxation". This opposition of constitutional provisions

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[14](1879), 3 S.C.R. 1, 5 Q.L.R. 1 [hereinafter cited to S.C.R.].

[15]*Ibid.* at 11.

[16](1929), [1929] S.C.R. 200 at 217, [1929] 2 D.L.R. 481.

[17](1982), [1982] 1 S.C.R. 1004, 37 A.R. 541 [hereinafter cited to S.C.R.].

resulted from the finding that the export tax was a revenue tax *simpliciter*, without additional constitutional anchoring in the federal trade and commerce power, and in the assumed fact of provincial ownership of the natural gas resource until transfer to the foreign purchaser outside of the territory of Canada. The majority opinion of Martland, Ritchie, Dickson, Beetz, Estey and Chouinard JJ. resolved the conflict between the institutional provision and the distribution of powers provision in favour of the former, stating:

> The immunity conferred by s. 125 must override the express powers of taxation contained in ss. 91(3) and 92(2). The legislative powers conferred by Part VI (ss. 91 to 95) must be regarded as qualified by provisions elsewhere in the Act.[18]

The institutional provision under present consideration, section 96, has been a popular basis of constitutional challenge; it has however been less than popular with the judiciary. The late Chief Justice Laskin, long of the view that section 96 did not bind Parliament, evidenced an apparent frustration with the provision, stating on one occasion:

> It is not for this court, by deploring the presence in the Canadian Constitution of such an anomalous provision as s. 96, to reduce it to an absurdity through an interpretation which takes it literally as an appointing power without functional implications.[19]

And on another occasion he is reported as having said: "I for one would like to see s. 96 repealed."[20] However, a federal discussion paper on a proposed amendment to section 96 has not, to date, developed into serious action.[21]

The threshold test for a violation of section 96 was synthesized by Dickson J. (as he then was) in *Reference Re The Residential Tenancies Act, 1979*[22] as a three-step inquiry. The first step involves consideration of the historical powers or jurisdiction exercised by superior, district or county courts in 1867 to determine whether the power or jurisdiction of the provincial tribunal in issue broadly conforms to such powers or jurisdiction. If

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[18]*Ibid.* at 1067.

[19]*Reference re Section 6 of the Family Relations Act, S.B.C. 1978, c. 20* (1982), [1982] 1 S.C.R. 62 at 72, 40 N.R. 206 [hereinafter *Re B.C. Family Relations Act* cited to S.C.R.].

[20]E.R.A. Edwards, "Section 96 of The *Constitution Act, 1867*—The Call for Reform" (1984) 42 Advocate 191 at 191, quoting Laskin C.J.C. from argument in *Reference Re The Residential Tenancies Act, 1979, infra*, note 22.

[21]See Canada, Department of Justice, *The Constitution of Canada: A Suggested Amendment Relating to Provincial Administrative Tribunals* by the Honourable Mark MacGuigan ([Ottawa]: Dept. of Justice, August, 1983).

[22](1981), [1981] 1 S.C.R. 714, 37 N.R. 158 [hereinafter *Residential Tenancies* cited to S.R.C.].

it does not, then the inquiry is over and the power or jurisdiction may be exercised by the non-section 96 tribunal. If, however, the answer is in the affirmative the second step in the inquiry is necessary. The power or jurisdiction is examined in its institutional setting to determine if it remains a "judicial function". If the answer is in the negative, the inquiry is over but if in the affirmative, the third step must be addressed. In this final step, the tribunal itself is examined to determine whether the power or jurisdiction in issue can be said to be the central function of the tribunal or whether it is merely subsidiary or ancillary to its administrative functions. If the judicial power is the sole or central function, then its exercise by a tribunal not appointed by the Governor General violates section 96, as the tribunal is determined to be acting as a section 96 court.[23]

An historical inquiry leads clearly to the determination that powers of jurisdiction which in 1867 were exclusively those of a superior, district or county court have been conferred on the youth courts established under the *Young Offenders Act*. In 1867, offences were generally categorized as being either felonies or misdemeanors with a restricted jurisdiction being allowed to magistrates, normally over the misdemeanor category of offences. A core of exclusive superior court criminal jurisdiction was recognized over the most serious crimes. In 1842, the Parliament of the United Kingdom passed *An Act to Define the Jurisdiction of Justices in General and Quarter Sessions of the Peace*[24] which prohibited the justices from trying "any Person or Persons for any Treason, Murder, or Capital Felony, or for any Felony which ... is punishable by Transportation beyond the Seas for Life". There followed eighteen groupings of offences which were excluded from the jurisdiction of justices. Similar restrictive legislation was adopted in New Brunswick,[25] Nova Scotia[26] and Canada[27] prior to the 1867 union. After union, the new federal Parliament enacted in 1869 the first *Criminal Procedure Act*[28] which made the following provision in section 12:

> No Court of General or Quarter Sessions or Recorder's Court, nor any Court but a Superior Court having criminal jurisdiction shall have power to try any treason, or any felony punishable with death, or any libel.

Though the number of offences within the exclusive jurisdiction of a superior court has been reduced over time, section 427 of the present *Criminal*

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[23]*Ibid.* at 734-36.

[24](U.K.), 5 & 6 Vict., c. 38.

[25]*An Act to Consolidate and Improve the Laws Relative to the Administration of Criminal Justice*, S.N.B. 1849, c. 30, s. 24; R.S.N.B. 1854, c. 158, s. 3.

[26]*An Act to Improve the Administration of the Law and to Reduce the Number of Courts of Justice Within This Province and to Diminish the Expense of the Judiciary Therein*, S.N.S. 1841, c. 3.

[27]*An Act to Abolish the Right of Courts of Quarter Sessions and Recorders to Try Treasons and Capital Felonies*, S.C. 1861, c. 14, s. 1.

[28]S.C. 1869, c. 29.

*Code* continues to reserve treason, alarming her Majesty, intimidating Parliament or a legislature, inciting to mutiny, sedition, piracy, piratical acts, murder, and associated offences such as attempts and conspiracies, as well as bribery by a judicial officer, for the exclusive jurisdiction of superior courts of criminal jurisdiction.

A youth court under the *Young Offenders Act* enjoys jurisdiction over all federal offences including those reserved by the present *Criminal Code* for the superior courts of criminal jurisdiction. The question then becomes whether or not in 1867, or prior thereto, there existed a separate justice regime for young persons. The answer to this is "yes", though the scheme was not as broad as Duff C.J. apparently believed, as is indicated by his statement in *Reference Re Adoption Act of Ontario*:

> Jurisdiction under the old law of the Province of Canada in respect of offences by juvenile delinquents was exercisable by two justices of the peace, by a recorder, or by a stipendary magistrate.[29]

The legislation referred to by Duff C.J. was *An Act respecting the trial and punishment of juvenile offenders* adopted by pre-Confederation Canada in 1857.[30] It provided that any accused not exceeding the age of sixteen years who was charged with an offence being "simple larceny or punishable" as such was, in lieu of prescribed penalty, to be punished upon conviction with imprisonment, "with or without hard labor, for any term not exceeding three months" or a fine, not exceeding twenty dollars.[31] This Act had no counterpart in New Brunswick. In Nova Scotia, a minimum of five justices sitting in a court of general sessions of the peace could try a juvenile offender under the age of fourteen years for any offence except capital felonies.[32]

To determine the scope of offences included within the ambit of the Canadian juvenile justice scheme, one must turn to another consolidated statute, *An Act respecting Offences against Person and Property*.[33] That Act provided that the penalty upon conviction for simple larceny or a felony punishable as such was imprisonment "in the Penitentiary for any term not less than two years, or ... in any other prison or place of confinement for any term less than two years".[34] Though not defined in the Act, simple larceny was understood as being "the felonious taking, and carrying away,

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[29](1938), [1938] S.C.R. 398 at 422, [1938] 3 D.L.R. 497. See also comments of Laskin C.J.C. in *Re B.C. Family Relations Act*, *supra*, note 19 at 75-76.

[30]S.C. 1857, c. 29; C.S.C. 1859, c. 106.

[31]*Ibid.*, s. 1. See also *An Act for the more speedy Trial and Punishment of Juvenile Offenders* (U.K.), 10 & 11 Vict., c. 82.

[32]*Of Petty Offences, Trespasses, and Assaults*, R.S.N.S. 1864, c. 147, s. 1.

[33]C.S.C. 1859, c. 92. (Other statutes have not been thoroughly canvassed in search of other possible felonies punishable as if simple larceny.)

[34]*Ibid.*, s. 20.

of the personal goods of another",[35] for which, it should be added, no penalty had been specified. Felonies punishable as simple larceny, as provided by the Act, were the theft of fixtures or parts of buildings,[36] and of growing plants from gardens.[37] These then were the offences for which an accused aged sixteen years or younger was to receive a lesser sentence upon conviction. In 1869, this same restricted regime of juvenile justice was enacted by the new federal Parliament for post-Confederation Canada.[38] It is important to note that the scheme did not extend to include all criminal or other offences but was confined to a specific field of petty offences.

This historical inquiry leads to the conclusion that a youth court, as presently constituted in each province of Canada, as a court exercising plenary criminal jurisdiction and presided over by a judge appointed by the Lieutenant-Governor in Council meets the first step in the *Residential Tenancies* test.

Further, it cannot be doubted that the exercise of such powers or jurisdictions by a youth court remains judicial; therefore, the second step in the test is adverse to validity of the youth court. Similarly, it cannot be doubted that, when exercised, the judicial jurisdiction is the sole or core jurisdiction of the youth court and is not altered in its institutional setting by administrative functions. The exercise of historically exclusive superior court criminal jurisdiction by the youth court, as presently constituted, is accordingly unconstitutional.

The matter may be adversely determined in a second authoritative manner. There is a controlling decision of the Supreme Court of Canada on point which, it is suggested, is not distinguishable. In 1981, the Lieutenant Governor in Council of New Brunswick referred to the Court of Appeal the question of the constitutional validity of a proposed unified criminal court to be composed of provincially appointed judges exercising jurisdiction over all criminal offences. This scheme, if implemented, would have been the result of federal-provincial co-operation, with Parliament feeding the jurisdiction under its criminal law and procedure power and the province appointing the judges. Before the Supreme Court of Canada, as *McEvoy* v. *A.G. New Brunswick*,[39] the scheme ran aground on the shoals of section 96.

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[35]J.S. James, ed., *Stroud's Judicial Dictionary*, 4th ed., vol. 5 (London: Sweet and Maxwell, 1974) at 2556, quoting W. Blackstone, *Commentaries on the Laws of England*, vol. 4 (Oxford: Clarendon Press, 1769) at 230.

[36]*Supra*, note 33, ss 34-35.

[37]*Ibid.*, s. 39.

[38]*An Act respecting the trial and punishment of Juvenile Offenders*, S.C. 1869, c. 33; *An Act respecting Larceny and other similar Offences*, S.C. 1869, c. 21.

[39](1983), [1983] 1 S.C.R. 704, 48 N.R. 228, rev'g (1981), 36 N.B.R. (2d) 609 (C.A.)[hereinafter cited to S.C.R.]. The author acted as intervening counsel in this Reference.

In a *per curiam* opinion, the Court applied the *Residential Tenancies* test by noting with respect to the historical inquiry that "jurisdiction to try indictable offences was part of the Superior Court's jurisdiction in 1867"[40] and that the considerations involved in the other two steps of the test were not applicable as the proposed court remained a court exercising judicial powers. The Supreme Court then expressly recognized the overriding nature of section 96 as an institutional provision of the Constitution:

> Parliament can no more give away federal constitutional powers than a province can usurp them. Section 96 provides that "The Governor General *shall appoint* the Judges of the Superior, District and County Courts in *each* Province". The proposal here is that Parliament transfer the present Superior Courts' jurisdiction to try indictable offences to a provincial court. The effect of this proposal would be to deprive the Governor General of his power under s. 96 to appoint the judges who try indictable offences in New Brunswick. That is contrary to s. 96. Section 96 bars Parliament from altering the constitutional scheme envisaged by the judicature sections of the *Constitution Act, 1867* just as it does the provinces from doing so.[41]

The proposed unified criminal court was therefore determined to be unconstitutional. There is perhaps a suggestion by the Court that a distinction is constitutionally justifiable between the complete conferral of superior court criminal jurisdiction upon an inferior court and a gradual expansion over time of inferior court jurisdiction into the realm of superior court criminal jurisdiction:

> What is being contemplated here is not one or a few transfers of criminal law power, such as has already been accomplished under the *Criminal Code*, but a complete obliteration of Superior Court criminal law jurisdiction.[42]

Such a suggestion must be considered, with all due respect, to have been made *per incuriam*. Having determined that Parliament is bound by section 96, it cannot have been intended that the criminal law power under subsection 91(27) is to be specially treated to allow erosion of the historical superior court exclusive criminal jurisdiction in 1867. Rather, it must be remembered that the questions referred by the Lieutenant Governor in Council concerned the exercise of complete criminal jurisdiction by a unified court with a provincially appointed judge. The Court responded to that question and did not have before it the issue of the expansion of inferior court criminal jurisdiction. It is in this light that the above comment should be construed and the expansion of inferior court criminal jurisdiction cannot be assumed to be constitutionally valid.

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[40] *Ibid.* at 717.
[41] *Ibid.* at 720.
[42] *Ibid.* at 719.

Both the youth court referred to in the *Young Offenders Act*, as constituted in each province, and the unified criminal court held invalid in *McEvoy* share a common defect in regards to constitutional validity — the complete criminal law jurisdiction exercisable by the provincially appointed judge violates section 96. That being so, it necessarily follows that the youth court, as constituted, is unconstitutional.[43] The merits of a separate scheme for youth justice are entirely irrelevant to a determination of validity where section 96 is involved. Unlike the *Canadian Charter of Rights and Freedoms*,[44] there is no controlling principles of "reasonable limits ... demonstrably justified in a free and democratic society" to overcome the constraints of the *Constitution Act, 1867*.

If the analysis presented here is correct, one may well ask why did Parliament pass the *Young Offenders Act* in such form. The answer appears to be quite simply that the Act was approved and received Royal Assent on 7 July 1982, but the decision of the Supreme Court in *McEvoy* came eleven months later, on 7 June 1983.

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[43]On the same analysis, the former juvenile courts under the *Juvenile Delinquents Act* were always unconstitutional, though never challenged on a section 96 basis.

[44]Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.