JUVENILE JUSTICE IN CANADA:

THE END OF THE EXPERIMENT

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Master of Laws

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by

Lawrence Charles Wilson

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INTRODUCTION

On July 31, 1975 a new era in juvenile justice was heralded with the release of Young Persons in Conflict with the Law,[1] a report of the Solicitor General's Committee on proposals for new legislation to replace the Juvenile Delinquents Act.[2] For over sixty years, judges, lawyers and social workers have wrestled with a great experiment, the union of criminal justice and social welfare philosophy. This experiment, its origins and effects, is the subject of this presentation.

Initial discussion will focus on the incorporation of the concept of parens patriae, whereby the State assumes the role of a protective parent, into our system of criminal justice. This merger has failed to meet the expectations of those who first advanced it. In fact, our present system offers children nothing more than unfilfilled promises:

> We have been deceiving ourselves in claiming that our legislation and our judicial decisions are moral. It is true that they are usually based on good intentions and that they are in accordance with values. This, in the light of our modern, scientific approach is insufficient. Moral action is not simply action in accordance with values; it must mean action in accordance with the probability of achieving values. In that sense, action based on good intentions alone is

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1. Young Persons in Conflict with the Law, a Report of the Solicitor General's Committee on Proposals for new legislation to replace the Juvenile Delinquents Act, (Communication Division, Ministry of the Solicitor General, 1975).

2. Juvenile Delinquents Act, R.S.C. 1970, c. J-3.

> not only irrational, it is also immoral. Our present juvenile justice is full of good intentions; but it commands little respect from those who are subjected to it and who, despite their youth and limited education, are able to gain insight into its moral and legal weakness.[3]

The original proponents of specialized juvenile courts envisaged a system which would protect the best interests of society and the child. Apologists for present institutions contend that this goal would have been achieved if society had chosen to allocate sufficient resources and personnel to ensure adequate treatment. There is considerable evidence to the contrary; evidence which suggests that intensive treatment will not produce lower recidivism rates among youthful offenders. The most unsettling aspect of recent research is the suggestion that association with the juvenile court, and the resultant stigmatization, actually produces, rather than prevents, anti-social behaviour.

Thus, the opening chapters of this work will attempt to establish that Canadian children have been caught up in an ill-conceived experiment destined to fall far short of its laudable objectives. The remainder of the presentation will analyze the extent of this failure.

Canadian courts have had several opportunities to examine our juvenile justice system. For example, the Supreme Court of Canada considered the constitutional validity of the Juvenile Delinquents Act[4] and determined that it fell within the scope of the federal criminal law power. This decision is highly questionable. It will be suggested that where active intervention is required in the life of a child and his

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3. Grygier, T., "Crime and Society" in McGrath, W.T., Crime and Its Treatment in Canada, (Toronto, 1965), p. 35.

4. Juvenile Delinquents Act, R.S.C. 1970, c. J-3.

family, welfare legislation, which is essentially a matter for the provinces, is the most appropriate basis for action.

Similarly, the statute and its interpretation by the courts violates the spirit of the Canadian Bill of Rights[5] and particularly its "equality before the law" provision. In this context, the trial of juveniles and other areas such as the role of the police and the right to counsel will be discussed at length.

This presentation concludes with an examination of the future of juvenile justice in Canada and suggests that the solution to delinquency will not be found in isolated legal structures and institutions. The evolution of juvenile justice in Canada is only one aspect of the need to re-evaluate the nature and purpose of the family, the school, the church, the government and other traditional social institutions.

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5. Canadian Bill of Rights, R.S.C. 1970, Appendix III.

CHAPTER ONE

THE PHILOSOPHY OF JUVENILE JUSTICE

For centuries the law has acknowledged the need to protect children. Very early recognition was given to the plight of the child who had lost his natural guardians. Originally, this protection was granted through the Crown's prerogative power to act as parens patriae for those in need of help. Parens patriae was a power which was delegated to the courts of equity through the office of the Chancellor and has remained in some branches of the law relating to children until the present day.[1] When first recognized, it was essentially a parental jurisdiction; the State simply assumed the duties and obligations of the natural parents.

The courts of equity were not concerned with matters which were criminal or even quasi-criminal in nature; protection was granted exclusively to neglected, destitute or dependent children. The Chancellor lacked any means of investigating the social situation of the child such as a probation officer, or any other social worker, would have today.[2] Further, his officials and he experienced considerable difficulty attempting to define precisely the difference between young criminals and neglected children. In the narrow sense, they were concerned only with children beyond

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1. Parker, G. "Some Historical Observations on the Juvenile Court" (1967), 9 Crim. L.Q. 467, 469. According to Halsbury's Laws of England, Third Edition, Volume 7, p. 225, the concept of parens patriae dates back to the 16th century. The Sovereign enjoyed the prerogative right of taking care of the persons and estates of infants, idiots and persons of unsound mind, and of superintending charities.

2. Ibid, p. 478.

the control of their parents. Delinquent children, if limited to those who have committed acts which would be crimes in the adult sense, would not be included in this category. However, it evolved that by such delinquency they had proved themselves to be beyond the control of their parents and should now be looked after by the State.[3]

Serious anti-social or criminal acts of children were dealt with severely by the early English courts; during the 17th and 18th centuries the fundamental aim in criminal jurisprudence was not reformation but punishment - punishment as retribution for the wrong, punishment as a warning and deterrent to others.[4] There are numerous reported decisions about young children who were hanged for minor offences or foolish pranks.[5]

As the common law developed not only was there a complete exemption from criminal responsibility for any child under the age of seven but, in addition, there was a rebuttable presumption that a child between the ages of seven and fourteen was incapable of committing a crime.[6]

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3. Wang, K., "The Continuing Turbulence Surrounding the Parens Patriae Concept in Juvenile Courts" (1972), 18 McGill L.J. 219, 221.

4. Ibid, p. 220.

5. "The History of the Pleas of the Crown", Sir Mathew Hale, 1736, p. 25 footnote (u), contains the following: 'At Abigdon Assizes, Feb. 23, 1629, before Whitlock justice, one John Dean an infant between eight and nine years was indicted, arraigned, and found guilty of burning two barns in the town of Windsor; and it appearing upon examination that he had malice, revenge, craft and cunning, he had judgment to be hanged, and was hanged accordingly.' Schmeiser, D.S., Cases and Comments on Criminal Law, (Toronto, 1966), p. 596.

6. Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada, (Ottawa, 1965), p. 53.
These rules are now found in sections 12 and 13 of the Criminal Code, R.S.C. 1970, c. C-34 which read as follows:

> 12. No person shall be convicted of an offence in respect of an act or omission on his part while he was under the age of seven years.
> 13. No person shall be convicted of an offence in respect of an act or omission on his part while he was seven years of age or more, but under the age of fourteen years, unless he was competent to know the nature and consequences of his conduct and to appreciate that it was wrong.

Acceptance of this principle was not universal and late 19th century reformers were incensed by the application of the harsh rules of criminal law and procedure to children who were sometimes below the lawful age of criminal responsibility.[7]

This newly awakened concern for children extended beyond young people who were considered criminal or incorrigible. The reformers sought to protect and redeem the victims of vicious environments, unfortunate heredity and cruel treatment at the hands of parents and employers. The juvenile court movement was but part of a social movement to clear slum tenements, to enact and enforce humane factory laws, to ameliorate prison conditions and save future generations from misery, pauperism and crime.[8]

Consequently, through the notion of parens patriae, the concept of juvenile courts designed to protect socially and economically disadvantaged young people was developed at the turn of the century. Spurred on by the cries of the reformers, legislators introduced laws which would treat young people guilty of criminal acts by civil process. This union of criminal law and social welfare philosophy and the dichotomy which developed when some functions of both jurisdictions were placed in the hands of the juvenile court has exercised the minds of social worker, lawyer, and judicial officer to the present day.[9]

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7. Parker, supra, footnote 1, p. 476. For an excellent discussion of the work of the first advocates of a juvenile justice system see Parker, supra, footnote 1; Wang, supra, footnote 3 and the references contained therein. It is important to note that the initial impetus for the movement was concern for the treatment of the child after, rather than before, conviction. The actual mechanics of the juvenile's trial and disposition were given little consideration.

8. Id.

9. Ibid, p. 470.

Since the inception of the juvenile court concept there has been a basic conflict between those who seek to protect and provide guidance for the child in need and the civil libertarians who emphasize concern for the preservation of a child's legal rights.[10] Attempts to reconcile the two positions have been described as an exercise in futility.[11]

The juvenile court may be seen either as a duplicate of an adult court, with some changes in venue and procedure to protect the child, or it may be regarded as an altogether different institution. The former approach proceeds on the assumption that the adult trial process contains valuable safeguards for the accused person which are no less necessary for children than they are for adults. Indeed, they may be far more necessary. The alternative approach presumes there is a fundamental difference between the treatment of crimes committed by adults and the anti-social acts of children. The protagonists of this doctrine regard any court which is a mere modification of the adult court as inappropriate for the disposition of cases involving juveniles.[12.]

Canadian courts have never adequately examined the history of the parens patriae philosophy and the evolution of juvenile justice. It is

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10. Fox described the conflict as between "....those who contend that, in dealing with juvenile delinquency, the state should assume and maintain coercive power over the misbehaving child, primarily by reference to his or her apparent need for care, protection or treatment, and those, on the other hand, who would limit the state's criminal jurisdiction over children to cases in which the commission of a substantial criminal offence can be demonstrated." Fox, R.G., "The Young Offenders Bill: Destigmatizing Juvenile Delinquency?" (1972), 14 Crim. L.Q. 172, 214.

11. "But the introduction of detailed rules of criminal procedure and protection will inevitably lead the juvenile courts away from their informal rehabilitative function and towards an adversary process that cannot maintain the same concern for the general welfare of the child." Grosman, B.A., "Young Offenders Before the Courts" (1971), 13 Can. B.J. (N.S.) 2:6-7, 6.

12. Parker, supra, footnote 1, p. 469.

conceivable that such an examination would have prevented many of the subsequent problems which they encountered. Judges in other jurisdictions have considered the origins of juvenile delinquency legislation. Fortas J. stated in the United States Supreme Court decision of In Re Gault:

> These results were to be achieved, without coming to conceptual and constitutional grief, by insisting that the proceedings were not adversary, but that the state was proceeding as parens patriae. The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historical credentials are of dubious relevance. The phrase was taken from chancery practice, where, however, it was used to describe the power of the state to act in loco parentis for the purpose of protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence.[13]

Fortas J. concluded that the incorporation of parens patriae into the criminal law has produced a system of tyranny:

> The right of the state, as parens patriae, to deny the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right "not to liberty but to custody." He can be made to attorn to his parents, to go to school, etc. If his parents default in effectively performing their custodial functions - that is, if the child is "delinquent" - the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the "custody" to which the child is entitled. On this basis, proceedings involving juveniles were described as "civil" not "criminal" and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.
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> Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context. The constitutional and theoretical basis for this peculiar system is - to say the least - debatable...the results have not been entirely satisfactory. Juvenile Court

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13. In Re Gault, 387 U.S. 1, 16 (1966) per Fortas J.

> history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts"...[14]

Different jurisdictions have experimented with a variety of methods designed to cope with children who commit breaches of the law; all are premised on the belief that the State must intervene.[15] Approaches to juvenile justice range from the processing of all such complaints under child welfare legislation whereby delinquent children are viewed and treated as children in need of protection to the other extreme whereby all children who break the law are formally brought before the juvenile court on a delinquency complaint.[16]

Since the introduction of a formal juvenile justice system in Canada, we have, for the most part, opted for a non-legalistic approach.[17] However, constitutional limitations precluded creation of a national scheme based on welfare legislation.[18] The original Juvenile Delinquents

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14. In Re Gault, 387 U.S. 1, p. 17-18 (1966) per Fortas J.

15. For a thorough examination of the historical development of juvenile delinquency legislation in Canada, Europe, the United States and Australia see Parker, supra, footnote 1; Wang, supra, footnote 3; Debates of the Senate, Session 1906-7, Third Session, Tenth Parliament, p. 804-807, 820-830, 876-880, 887-902; Debates of the Senate, Session 1907-8, Volume II, Fourth Session, Tenth Parliament, p. 971-983, 1150-1165.

16. Canadian Association of Social Workers, Brief on Bill C-192, The Young Offenders Act, (Ottawa, 1971), p. 1.

17. There was movement towards a more rigid, legalistic system in the proposed Young Offenders Act, Bill C-192, Third Session, Twenty-Eighth Parliament, which was introduced by Solicitor General George McIllraith on November 16, 1970. The legislation was subsequently withdrawn by the government.

18. Infra, Chapter 3.

Act[19] had to be framed within the confines of the federal criminal law power,[20] thereby intensifying the clash between philosophy and implementation.

Our initial venture into juvenile justice was introduced in the House of Commons on June 19, 1908, by the Honourable A. B. Aylesworth, Minister of Justice.[21] He stated that it was the government's intention to obviate the necessity for children, when accused of crime, being tried before the ordinary tribunals. The legislation would prevent the possibility of children, who might be reclaimed if treated otherwise than as criminals, being sent to the ordinary prisons of the country with the older, hardened offenders.[22]

Although these objectives were greeted with enthusiasm, Mr. Lancaster, the Member for Simcoe, was appalled at the lack of attention given the potential impact of the legislation. He was somewhat concerned that this new law, containing thirty-five sections, was introduced during the dying hours of the session and that Parliament was asked to pass, but not consider it.[23]

Despite the protests of Mr. Lancaster, the entire debate and third reading in the House of Commons took just a little over ten minutes.

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19. Juvenile Delinquents Act, S.C. 1908, c. 40. The Act was introduced in the Senate on April 4, 1907. See Debates of the Senate, Session 1906-7, Third Session, Tenth Parliament, p. 556.

20. Infra, Chapter 3.

21. Debates of the House of Commons, Session 1907-8, Volume VI, Fourth Session, Tenth Parliament, p. 10916.

22. Debates of the House of Commons, Session 1907-8, Volume VIII, Fourth Session, Tenth Parliament, p. 12399-12400.

23. Ibid, p. 12400-12401.

A few minor changes in the legislation were enacted in 1929,[24] but these had little or no impact on the basic philosophy of juvenile justice in Canada. The amendments enacted at that time related largely to procedure and were of such a nature as to make the Act work more smoothly.[25]

The Juvenile Delinquents Act[26] is one of the few pieces of Canadian legislation which explicitly states the principles which should underlie its administration. The tone of the statute is clearly non-punitive; a juvenile is not convicted or sentenced but is "adjudged" and "dealt with" and at all times he is to be treated "not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance."[27] For his protection, all juvenile proceedings are

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24. Juvenile Delinquents Act, S.C. 1929, c. 46.

25. The Act was introduced on May 29, 1929 by the Honourable Ernest Lapointe, Minister of Justice. See Debates of the House of Commons, Session 1929, Volume II, Third Session, Sixteenth Parliament, p. 2016.

26. Juvenile Delinquents Act, R.S.C.1970, c. J-3.

27. Sections 3(2) and 38 of the Juvenile Delinquents Act, R.S.C.1970, c. J-3 read as follows:

> 3 (2) Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.
>
> 38. This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

held in camera[28] and every effort is made to separate children from adult offenders.[29]

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28. Section 12 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 12.(1) The trials of children shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose.
>
> (2) Such trial may be held in the private office of the judge or in some other private room in the court house or municipal building, or in the detention home, or if no such room or place is available, then in the ordinary court room, but when held in the ordinary court room an interval of half an hour shall be allowed to elapse between the close of the trial or examination of any adult and the beginning of the trial of a child.
>
> (3) No report of a delinquency committed, or said to have been committed, by a child, or of the trial or other disposition of a charge against a child, or of a charge against an adult brought in the juvenile court under section 33 or under section 35, in which the name of the child or of the child's parent or guardian or of any school or institution that the child is alleged to have been attending or of which the child is alleged to have been an inmate is disclosed, or in which the identity of the child is otherwise indicated, shall without the special leave of the court, be published in any newspaper or other publication.
>
> (4) Subsection (3) applies to all newspapers and other publications published anywhere in Canada, whether or not this Act is otherwise in force in the place of publication.

Section 441 of the Criminal Code, R.S.C.1970, c. C-34 reads as follows:

> 441. Where an accused is or appears to be under the age of sixteen years, his trial shall take place without publicity, whether he is charged alone or jointly with another person.

29. Sections 13(1) and 26(1) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 read as follows:

> 13.(1) No child, pending a hearing under this Act, shall be held in confinement in any county or other gaol or other place in which adults are or may be imprisoned, but shall be detained at a detention home or shelter used exclusively for children or under other charge approved of by the judge, or, in his absence, by the sheriff, or, in the absence of both the judge and the sheriff, by the mayor or other chief magistrate of the city, town or county or place.
>
> 26.(1) No juvenile delinquent shall, under any circumstances, upon or after conviction, be sentenced to or incarcerated in any penitentiary, or county or other gaol, or police station, or any other place in which adults are or may be imprisoned.

Our juvenile justice system has always been characterized as an exercise in prevention. It has been described as an attempt,within the framework of the criminal law, to identify the potential criminal at an early age and to provide, through the intervention of the juvenile court, the means of preventing anti-social behaviour from developing into serious and persistent criminality.[30]

Nevertheless, in Canada and in other jurisdictions,the sword of benevolent justice is double-edged. The juvenile court must exercise its prerogatives with a due regard for the proper administration of justice which would indicate,at least superficially, that all the rules followed by a court hearing a criminal or quasi-criminal case should be present, (i.e. oaths, rules of evidence, pleas, onus of proof, etc.). On the other hand, the Act entitles the court to relax rigid procedural requirements as it sees fit although it must not go beyond that mystical line separating due regard from disregard.[31] In addition, section 17(2) states that no adjudication of the court will be quashed because of

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30. Department of Justice Committee on Juvenile Delinquency, supra, footnote 6, p. 63.

31. Chapman, P.B., "The Lawyer in Juvenile Court: A Gulliver Among Lilliputans" (1971), 10 Western Ont. L.Rev. 88,89.
Sections 5(1) and 17(1) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 read as follows:

> 5.(1) Except as hereinafter provided, prosecutions and trials under this Act shall be summary and shall, mutatis mutandis, be governed by the provisions of the Criminal Code relating to summary convictions in so far as such provisions are applicable, whether or not the act constituting the offence charged would be in the case of an adult triable summarily.
> 17.(1) Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be as informal as the circumstances will permit, consistent with a due regard for the proper administration of justice.

informality or irregularity.[32] The potential for abuse is obvious; the theory that in juvenile cases the court acts as parens patriae has led juvenile courts to relax or altogether omit many formal safeguards found in adult criminal courts.[33] Such practices have been justified by the assertion that the juvenile court acts for the benefit of all those concerned.[34]

Thus, Canada's juvenile justice system is a curious mixture of criminal law and social welfare philosophy. The failure to examine critically the ramifications of this union have left a legacy of unfulfilled promise. While there are many constitutional differences between Canada and the United States, the words of Fortas J. in the case of Kent v. United States are, in the writer's view, equally applicable to Canada:

> While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolderable the immunity of the process from the reach of constitutional guarantees applicable to adults...There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.[35]

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32. Section 17(2) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 17.(2) No adjudication or other action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child.

33. Wang, supra, footnote 3, p. 224.

34. Section 20(5) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 20.(5) The action taken shall, in every case, be that which the court is of opinion the child's own good and the best interests of the community require.

35. Kent v. United States, 383 U.S. 541, 555-556 (1966) per Fortas J.

CHAPTER TWO

THE FAILURE OF PARENS PATRIAE

In its analysis of Canada's criminal justice system, the Ouimet Report of 1969 stated:

> The Committee regards the protection of society not merely as the basic purpose but as the only justifiable purpose of the criminal process in contemporary Canada.
> The inclusion of the offender as a member of society entitled to full protection is important. This principle prevents the application of correctional measures against convicted persons too harshly or for too long.[1]

Implicit in this statement is the question whether the best interests of society and the child are served by our system of juvenile justice. It is submitted that, in reality, existing structures and institutions do more to produce, rather than control or prevent, juvenile delinquency in Canada.

While society continues to expend enormous amounts of capital and personnel for the system, there is little to suggest that the rehabilitative goals of juvenile justice are being achieved.

From a purely statistical point of view, the practical effect on the child associated with Canada's juvenile justice system may be expressed as negligible. The difference in rates of prevention or rehabilitation among groups of children receiving no treatment, those receiving casual counselling and those receiving intensive care is not significant. Data

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1. Ouimet, R., Chairman, Report of the Canadian Committee on Corrections, (Ottawa, 1969), p. 11.

relating to recidivism in juvenile delinquency and the proportion of delinquents continuing into a life of adult crime show a remarkably similar distribution and percentage of juvenile offenders. It may be reasonably presumed that those children who obtain the greatest amount of service and therapy from the system are the recidivists, and considering the fact that well over 50% of all adult offenders were juvenile offenders, the inevitable inference is a strong positive relationship between the degree of association with the juvenile court processes and the propensity for a life of adult crime.[2]

Juvenile court philosophy, with its predominate emphasis on treatment, presupposes that the court will have at its disposal a variety of rehabilitative resources and professionals. It can be stated with confidence that no province has available a sufficient quantity or quality of needed services. The problem appears to be either an inadequate number of skilled personnel or a lack of financial resources in the service

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2. Johnston, G., "The Function of Counsel in Juvenile Court" (1969), 7 Osgoode Hall, L.J. 199, 201.
In a footnote the author adds: "It is no doubt ludicrous to suggest such involvement causes adult crime, but it is equally unwise to presume such treatment will cure the child or will, in fact, be in the best interests of the child."
He cites data in Teuber and Powers,"Evaluating Therapy in a Delinquency Program in Psychiatric Treatment", 31 Proc. Assn. Res. Nera. and Ment. Dis. 138; W. Lundin and C. Thomas, Statistics on Delinquents and Delinquency (Springfield, Ill.).

Studies such as Consultative Study on Youth Services For Crime Prevention, (A Project of the Consultation Centre, Department of the Solicitor General, 1973) indicate that lack of funds and resources have thwarted the development of effective prevention programmes; the focus and funding remain crisis-oriented. The crucial issue in the development of any pre-delinquency programme is at what stage and to what extent the professional should intervene in the life of a child and his family: "Interventive action should interfere with rights and responsibilities of parents only to the extent necessary to protect or help the child. Parental responsibility is not developed or acquired by responsibility being removed." Canadian Association of Social Workers, Brief on Bill C-192, The Young Offenders Act, (Ottawa, 1971), p. 2.

agencies because of the policies of various levels of government.[3]

While the bulk of the attack on juvenile courts is levelled at the judges, they are, in effect, being asked to do an impossible job. The Senior Judge of the Winnipeg Family Court has expressed the frustration felt by himself and other judges:

> If the worthy purpose of the social rescue of children is not always realized, the failure is due, in no small measure, to the lack of machinery to handle the problem efficiently. The court is charged with the responsibility of acting in the best interests of the children but it does not always have at its command the resources to make dispositions which could best further these interests.[4]

The McRuer Report states that many commentators have begun to wonder whether the juvenile does not relinquish too many of his rights in exchange for an unfulfilled promise of treatment rather than punishment.[5] The demand for facilities has not yet been met. The Canadian Corrections Association has suggested that any change in legislation should be preceded by agreements between the governments concerned which would completely

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3. Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada, (Ottawa, 1965), p. 31. At page 165 the Report notes: "Very few courts have readily available the necessary psychologists and psychiatrists.....The problem here is not solely one of financing. Canada just does not have enough psychologists and psychiatrists."

On the following page the Report states that children are often held for excessive periods of time after the hearing to undergo psychiatric tests: "Our information is that three weeks is ordinarily sufficient for a thorough assessment. If more time is required an application should be made to the court for authority to detain the child for an additional period, not exceeding two weeks. To hold children for longer periods would seem likely to add to the problems already faced by the child."

4. Stubbs, R. St. G., "The Young Offender" (1972), 5 Man. L.J. 19, 24.

5. McRuer, Hon. James Chalmers, Commissioner, Royal Commission Inquiry Into Civil Rights, Volume 2, (Toronto, 1968), p. 576.

revamp present delivery systems and ameliorate this deficiency.[6]

Under the provisions of the Canada Assistance Plan[7] the federal government will aid any municipality which initiates programmes of prevention on a cost sharing basis with the provinces; however, the statute does not cover allocation of assistance to correctional services. Accordingly, while there are few actual prevention programmes, some provinces have rearranged their correctional programmes by placing children under the umbrella of welfare legislation. Children receive no benefit when a province changes the name of "training school" to "child care resource". Yet the provinces claim a massive expansion of service facilities. In essence, they are merely changing terms and re-organizing agency structures to save money.[8]

This struggle for funding, however, is largely irrelevant. It is submitted that additional money and staff will not necessarily alleviate existing conditions. Canada's juvenile justice system rests upon the premise, first, that a degree of precision in predicting the future behaviour of juveniles is possible and, secondly, that rehabilitation of those identified as being at risk is an attainable goal. In fact, no practical predictive devices have yet been developed, and screening and treatment decisions at all stages are largely ad hoc intuitive reactions.[9]

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6. Canadian Corrections Association, "Report of the Committee established to consider child welfare and related implications arising from the Department of Justice Report on Juvenile Delinquency" (1968), 10 Can. J. Corr. 480, 481-482.

7. Canada Assistance Plan, R.S.C. 1970, c. C-1.

8. Litsky, H., "The Take-Over From the Juvenile Court" (1969), 45 Can. Wel. 6:8, 8.

9. Fox, R.G., "The Young Offenders Bill: Destigmatizing Juvenile Delinquency?" (1972), 14 Criminal L. Q. 172, 195.

A massive expansion of existing institutions such as industrial schools would be a mistake. The Canadian Bar Association, in a rather restrained statement, cautioned that training schools, in their present form, have not had a salutary effect upon the young persons committed to them.[10] Most other commentators have not been quite so careful in their choice of words.[11]

Industrial schools in Canada are home to many different kinds of children; they work with delinquent children, neglected children and those in need of protection. This is not only ineffective,[12] it is potentially dangerous. It is not difficult to imagine the negative influence of a hardened delinquent on a child who is neither criminal nor anti-social but simply has no other place to go.

Incarceration does not serve the parens patriae philosophy; it is punishment, not treatment, and is viewed as such by the child. In general, the court also looks upon committal as punishment. The child is warned that if he continues acting in his present fashion, he will be jailed. Of course, if the court is forced to commit a child who is not really delinquent, but badly neglected, its attitude is quite different. The training school is not represented as the ultimate sanction, but as a warm and friendly place with a swimming pool, a gymnasium, and good food.

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10. Canadian Bar Association, Brief on Bill C-192, (Ottawa, 1971), p. 4.

11. For example, see the sixteen part series on our juvenile justice system and Ontario's training schools by Michael Valpy, Globe and Mail, February 10-April 23, 1973.

12. In his study of American research in this area, Warren noted that, while the material is inconclusive,"...by lumping together all kinds of offenders, the beneficial effects of the treatment program on some individuals, together with the detrimental effects of the same treatment program on other individuals, masked and cancelled out each other." Warren, M.Q., "The Case for Differential Treatment of Juveniles" (1970), 12 Can. J. Corr. 451, 452.

A certain amount of hypocrisy seems almost unavoidable when the same disposition has to be made in vastly different circumstances.[13]

It seems that there is justification for the often-voiced complaint of training school staffs that their schools are little more than catch-basins for all sorts and conditions of children whose only common denominator is that other agencies in society have failed to meet their needs.[14] In many cases children who should be sent to hospitals with in-patient facilities for treatment of the mentally ill or to some other specialized residential treatment centres are sent instead to training schools. The reason for this practice is that hospitals and other treatment institutions control intake. The treatment programmes of most hospitals are not designed to meet the special needs of psychotic or severely disturbed children; in most cases they cannot be accommodated in the same facilities as adults, without serious disruption of the total treatment programme.[15]

Thus, better training schools, in isolation from the rest of the system, are bound to prove ineffective. Fortunately, only a small percentage of those children appearing in juvenile court, for whatever reason, are sent to one of these institutions.

It is much more common for the child to be placed on probation. This decision is made, for all practical purposes, by the individual probation officer involved in the case, and will be based on such factors as his present work load and personal attitude in regard to working with

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13. Sinclair, Donald, "Training Schools in Canada", in McGrath, W.T., Crime and Its Treatment in Canada, (Toronto, 1967), p. 246

14. Id.

15. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 184.

the juvenile. While the probation officer supposedly works under the direction of the judge, in fact, the judge operates under the direction of the probation staff. The probation staff, on an informal basis, screen the cases, and then refer only those cases which they deem appropriate to the court.[16]

It is generally agreed that probation services in Canada are completely inadequate for the assigned task. The services provided in many courts consist largely of surveillance of token supervision. This is due to the fact that many probation officers carry very large, undifferentiated caseloads. Many probation officers must also spend a disproportionate amount of their time on pre-sentence investigations, often almost to the exclusion of other duties.

There are several other factors which limit the potential effectiveness of probation. First, all juveniles receive the same intensity of supervision and counselling despite differential needs. Usually this service is uniformly minimal. Second, in terms of available time, the dependence on establishment of a relationship between the officer and the juvenile is often unrealistic. Third, the one-to-one counselling or casework relationship is neither necessary nor appropriate for all juveniles. Fourth, special treatment strategies to supplement the individual counselling have not been developed. Fifth, the limited and static perception of the role of the probation officer has not been re-examined in light of research conducted by behavioural scientists on the relationship between delinquent behaviour and the community. Finally, practice in probation tends to be defined by the personal abilities of the probation officer.[17]

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16. Regier, K.P., "Proposed Revisions to Juvenile Delinquents Act" (1970), Pitblado Lect. 94, 98.

17. Gandy, J.M., "Rehabilitation and Treatment Programme in the Juvenile Court" (1971), 13 Can. J. Corr. 9, 10-11.

Many commentators argue that, given sufficient money and staff, probation will be the saviour of our juvenile justice system. However, the very concept of probation is suspect. Supporters of probation argue that it is humane, economical and effective in terms of reducing crime rates. Undoubtedly, probation is more humane than most sentencing alternatives, and more economical than incarceration. But, its effectiveness as a better method of treatment has never been demonstrated empirically. It has simply been assumed that it would prove to be more effective.[18]

Probation has been variously described as a device to escape punishment, leniency, a policing device, and treatment.[19] While probation may be a status symbol for many juveniles, in general, the child will see the imposed terms as punishment; this is a poor starting point for any rehabilitative programme. Any treatment, however well conceived, starts with a handicap if the patient regards it as punishment. When treatment is an unpleasant consequence of a crime, it is seen as punishment for the crime; if it does not fit the crime and does not follow any clearly defined rules of law, it will be seen as unjust.[20]

Research studies such as the San Francisco Project[21] indicate that intensive probationary supervision will do little to overcome this initial burden. The project compared intensive treatment for adult

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18. Outerbridge, W.R., "Re-thinking the Role of Treatment in Probation" (1970), 18 Chitty's L.J. 189, 191.

19. Madeley, St. John, "Probation", in McGrath, W.T., supra, footnote 13, p. 220-222.

20. Grygier, Tadeusz, "Crime and Society", in McGrath, W.T., ibid, p. 36.

21. Joseph Lohman, Albert Wahl and Robert M. Carter, The San Francisco Project: A Study of Federal Probation and Parole, (Berkley, 1968), cited in Outerbridge, supra, footnote 18, p. 192.

probationers with a minimum amount of treatment and no treatment at all; there was no difference in the recidivism rates of the different groups. Dr. Carter, the supervisor for the study, pointed out the enormous significance of this finding: "What are the implications for corrections if, indeed, individuals who are required to submit only to a monthly report and to receive assistance only when they ask for it, or when a crisis exists apparently do as well under supervision as those who receive intensive...supervision?"[22]

Although similar studies have not been conducted with juvenile offenders, similar results would probably be obtained. If this assumption is correct, it would seem that we have misplaced our emphasis and that money will not act as an immediate remedy. Apparently such factors as training of the probation officer, the size of his caseload, and the degree of intensity with which he works with his probationers will have no effect upon the outcome of supervision as measured by reconviction rates.[23]

Canada's system of juvenile justice offers little protection for society; there is nothing to indicate that existing treatment programmes have any effect on rising crime rates. The great majority of "successes" are children who probably required no assistance in the first place. Judge Thompson argues that it helps us very little to know that a resource has a forty per cent success rate when the critic is arguing that if all the children in question were left alone the success rate would rise to fifty

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22. Robert M. Carter, "The San Francisco Project: Progress and Potential", an Address to the Ninety-Sixth Congress of Corrections, Baltimore, Maryland, August 29-31, 1966, quoted in Outerbridge, ibid, p. 193.

23. Ibid, p. 196. The author offers comments on other studies which reach the same conclusions.

per cent.[24] He states:

> The vision of reality which continually attracts new disciples is the following: that apart from a relatively small number of cases, it is probably better for all concerned if the young offender were not detected, processed, treated or institutionalized. Too many children deteriorate while in care. Furthermore, the problem could remain even if we had unlimited resources at our disposal for child care resources.[25]

Judge Litsky suggests that a juvenile court judge would have to be naive as well as optomistic to think his dour presence will have a therapeutic effect on the juvenile.[26] Obviously, a child acquires a healthy attitude by healthy relationships. In a courtroom, there is the inherent danger of the opposite occurring. Very few children, particularly first offenders, are prepared for the traumatic appearance in court.

Thus the present system, because of the "labelling" or "stigma" dilemma, is causing irreparable damage to Canadian children. Once assigned to a particular position and given a particular label, the individual tends to conform to the expectations associated with the label. In turn, other people respond to him on that basis, thereby reinforcing the assignment. In other words, to call a young person a "juvenile delinquent" is to generate pressures that push the offender further in the direction

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24. Thompson, G., "The Child in Conflict With Society" (1973), 11 Rep. Family Law 257, 262.

25. Ibid, p. 258.

26. Litsky, H., "The Cult of the Juvenile Court, 'Justice with Mercy'" (1972), 20 Chitty's L.J. 152, 153-154.

of anti-social behaviour.[27]

It seems that one of the unforeseen consequences of the juvenile court process is the fostering of criminal conduct. In short, the delinquency label is often applied with negative consequences for the child's further acceptance in the community, thereby contributing to the self-fulfilling prophecy of a criminal career.[28] In many instances intervention may be positively harmful or even useless. The child has become a victim of the process rather than saved from it.[29]

There are three distinct stages in this labelling process.[30] The first stage is pre-judgment stigma, i.e., that which is applied to and affects the young person prior to an actual court finding of delinquency. The next stage is judgment stigma. This is the label applied by the court and its officers and related agencies as a direct result of a finding of delinquency. The final stage is post-judgment stigma. This stigma, applied to the young person by society following a finding of delinquency, affects the young person to such a degree that he is likely to alter his conception of himself and his conduct.

Many children have been branded as delinquent by school teachers

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27. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 36.
At page 46 the Report states, "We do know that children who have been found to be delinquent do have difficulty, as a result of an official finding of delinquency, in adjusting in school and obtaining employment."

28. Macdonald, J.A., "A Critique of Bill C-192, The Young Offenders Act" (1972), 13 Can. J. Corr. 166, 168.

29. Parker, G., "The Century of the Child" (1967), 45 Can. B. Rev. 741, 762.

30. Walker, P., "The Law and the Young; Some Necessary Extra-legal Considerations" (1971), 29 U.T. Faculty L.R. 54, 60-61.

or social agencies long before they actually appear in court; this may partially explain why they are in court. Here lies the real danger of our present system. When a young person already has a delinquent self-concept because of earlier influences, a court appearance and finding may serve only to reinforce that self image. For the young person whose self-image is yet incomplete or vague, the court process may serve to solidify a negative self-concept which the child will adopt.[31] It is little wonder that many organizations advocate avoidance of formal action except in the most extreme circumstances.[32] Social scientists do not yet fully understand the impact of a court appearance on a child; if stigmatization produces the results described above, the juvenile justice system may be creating a grave injustice, both for the child and society at large.

The goals of the early reformers have not materialized. Its founders had envisaged a system which would save children, not condemn the more unfortunate ones to a life of misery in the name of charity.[33] In fact, provincial authorities have been forced to go to considerable lengths to avoid the so-called beneficial effects of federal legislation. For example, in 1968 the province of British Columbia ordered that juveniles should not be charged with violations of provincial statutes or municipal by-laws; the use of warnings to children and their parents and voluntary probation were encouraged. Changes were initiated which prevented

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31. Ibid, p. 63.
For a further comment see Hagan, J.L., "The Labelling Perspective, The Delinquent and The Police: A Review of Literature" (1972), 14 Can. J. Corr. 150.

32. For example, see Canadian Association of Social Workers, supra, footnote 2, p. 14.

33. Parker, supra, footnote 29, p. 761.

a judge from sentencing a child to an industrial school; judges were limited to making the juvenile a ward of the Superintendent of Child Welfare or a children's aid society.[34]

We have witnessed harsh and candid criticism of juvenile courts from the men charged with the responsibility for seeing that they function effectively and fairly. Some of this country's most respected juvenile court judges, including Fox, Litsky, Little, Steinberg, Stubbs and Thompson, have expressed dissatisfaction and frustration with their role in the system.[35] This, perhaps more than anything else, is illustrative of the shortcomings of our present approach to juvenile justice.

Juvenile justice in Canada protects neither society nor the children involved in the process. Resentment and disrespect for our judicial system are common denominators among those children and parents who have been involved. Considering the present situation, it would be unrealistic to expect anything else:

> The hypocrisy of our law and our system of administering justice to our children can hardly go further. We use terms so vague that any child whose behaviour we dislike can easily be branded a juvenile delinquent, but we are careful not to use the word "crime" even with respect to most serious antisocial acts. We use a language full of moral indignation and utter condemnation, and then pretend that we never convict children, we merely

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34. Petersen, L.J., "Experiments in the Administration of Justice" (1970), 12 Can. J. Corr. 445.
This indicates direct interference with the discretion of the judge as authorized by the federal enactment.

35. Judge Litsky's comments are typical: "Any Court, by tradition, must reflect and act as the conscience of the community in dealing with children who come before it. Here is the irony; the basic philosophy of the Juvenile Court is to bring the child under its protection and jurisdiction, for the child's best interests, but instead we may be subjecting him to traditional inequities rather than granting him individualized justice." Litsky, supra, footnote 26, p. 152.

> "adjudicate". We take decisions that separate children from their parents and submit them to a variety of measures that, because of their unpleasant character and clear connection with the offence committed, can only be viewed by the children as punishment for their crimes. Then we call their punishment "welfare", and add - not without justification, but often without evidence - that we act in the interest of the children.[36]

Canada's juvenile justice system was ill-conceived and destined to fall far short of its laudable objectives. Total abolition of federal legislation is one possibility for the future. However, it is unlikely that the federal government, the provinces or the public would support such radical change. While there may be some shifting of responsibilities, Canada will continue to deal with anti-social behaviour by children through the use of the criminal law.

Canadian courts have had several opportunities to minimize the harmful effects of the present system but have failed to act accordingly. The remainder of this work will examine the extent of that failure and suggest alternatives to reduce the potential for injustice.

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36. Grygier, supra, footnote 20, p. 35.

CHAPTER THREE

THE CONSTITUTIONAL DILEMMA

The architects of Canada's Juvenile Delinquents Act[1] adopted the parens patriae philosophy as their basic underlying assumption. However, Canada's federal structure, as embodied in the British North America Act,[2] posed a number of problems. Since the regulation of the civil status of persons is within the exclusive jurisdiction of the provincial legislatures, it is beyond the competence of Parliament to enact legislation creating, as did the American juvenile court statutes, a non-criminal status of delinquency. Also, because the field of criminal law is within the exclusive jurisdiction of Parliament, neither could the provincial legislatures enact legislation on the American pattern.[3]

In the best tradition of Canadian politics a compromise solution was devised and "delinquency" was treated as conduct and made an offence;[4] thus the Act, arguably, could be supported as a valid exercise of the criminal

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1. Juvenile Delinquents Act, S.C. 1908, c. 40.

2. British North America Act, 1867, 30 & 31 Victoria, c. 3.

3. Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada, (Ottawa, 1965), p. 64.

4. Section 3 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 3(1) The commission by a child of any of the acts enumerated in the definition "juvenile delinquent" in subsection 2(1), constitutes an offence to be known as a delinquency, and shall be dealt with as hereinafter provided.
> (2) Where a child is adjudged to have committed a delinquency he shall be dealt with, not as an offender, but as one in a condition of delinquency and therefore requiring help and guidance and proper supervision.

law power under section 91(27) of the British North America Act.[5] This was crucial because under constitutional doctrine there could be no basis other than the federal criminal law power for support of a comprehensive federal scheme of legislation in respect of juveniles.[6]

It is the very general and vague definition of "juvenile delinquent"[7] which created the major constitutional question, i.e., whether federal authority extends to the supervision of juveniles on the broader basis of violation of provincial or even of municipal legislation, or of immoral conduct which may not itself be against the law.[8] This has been the central issue in the judicial disputes contesting the validity

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5. Section 91(27) of the British North America Act, 1867, 30 & 31 Victoria, c. 3 reads as follows:

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, -
> (27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

6. Abel, A.S., Laskin's Canadian Constitutional Law, 4th Edition, (Toronto, 1973), p. 843.

7. Section 2(1)(h) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 2.(1) In this Act
> (h) "Juvenile Delinquent" means any child who violates any provision of the Criminal Code or of any federal or provincial statute, or of any by-law or ordinance of any municipality, or who is guilty of sexual immorality or any similar form of vice, or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute.

8. Abel, supra, footnote 6, p. 842.

of the Act.

Although the statute has remained substantially unchanged since 1908, the first decision on this question did not come before the courts until 1962, when, in the case of Re Dunne,[9] the Ontario High Court of Justice held that section 20(2) of the Act[10] was intra vires the Dominion. Shatz J. held that the Act was not, in its pith and substance, in relation to municipal institutions or property and civil rights even if it did affect them. In his opinion, the subsection in question was valid as being ancillary or necessarily incidental to the provisions of a federal statute validly enacted pursuant to the federal criminal law power. He also rejected the suggestion that the Act encroached on the jurisdiction of the province in respect to its procedures for the care of neglected children.[11]

This decision was followed by the case of Re K.'s Certiorari Application[12] in which MacLean J. of the British Columbia Supreme Court

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9. Re Dunne, [1962] O.R. 595 (H.C.J.).

10. Section 20(2) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 20.(2) In every such case it is within the power of the court to make an order upon the parent or parents of the child, or upon the municipality to which the child belongs, to contribute to the child's support such sum as the court may determine, and where such order is made upon the municipality, the municipality may from time to time recover from the parent or parents any sum or sums paid by it pursuant to such order.

11. Re Dunne, [1962] O.R. 595, 589-599 (H.C.J.) per Schatz J. The Ontario courts are prepared, however, to limit the scope of section 20(2): "The Juvenile Delinquents Act is legislation of the Dominion passed in pursuance of its power to pass legislation relating to criminal law. I would be reluctant to construe the word 'support' in s. 20(2) so as to permit the imposition by the Government of Canada under the guise of criminal law an obligation higher than that imposed upon a parent by the Children's Maintenance Act, R.S.O. 1960, c. 55, an Act passed by the Province of Ontario." Re Landry, [1965] 2 O.R. 614, 617 (C.A.) per Aylesworth J.A.

12. Re K.'s Certiorari Application (1964), 43 C.R. 257 (B.C.S.C.)

sustained the Act as a valid exercise of federal jurisdiction and quashed a magistrate's conviction of a juvenile for a provincial motor vehicle offence. The Court held that the offence was a delinquent act over which the juvenile court had exclusive authority. MacLean J. stated, obiter, that the Act was well within the legislative powers of the Dominion as criminal law and matters necessarily ancillary thereto.[13]

The constitutional question came squarely before the Supreme Court of Canada in the case of Attorney-General of British Columbia v. Smith;[14] where a unanimous Court of seven affirmed the majority decision of the British Columbia Court of Appeal[15] which had upheld the validity of the Act. The case arose out of a conviction in Magistrate's court for the violation of a provincial motor vehicle statute. Smith, who was sixteen, applied for a writ of certiorari to quash the conviction on the ground that the magistrate had exceeded his jurisdiction in failing to deal with the matter in accordance with the federal legislation. The Attorney-General of British Columbia responded by calling into question the constitutionality of the Juvenile Delinquents Act.

Section 4 of the Act[16] gives the juvenile court exclusive jurisdiction in cases of delinquency. In a limited category of situations,

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13. Re K.'s Certiorari Application (1964), 43 C.R. 257, 259 (B.C.S.C.) per MacLean J.

14. Attorney-General of British Columbia v. Smith (1967), 65 D.L.R. (2d) 82 (S.C.C.)

15. Attorney-General of British Columbia v. Smith (1966), 53 D.L.R. (2d) 713 (B.C.C.A.). The five man court split 3-2 in the result.

16. Section 4 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 4. Except as provided in section 9, the juvenile court has exclusive jurisdiction in cases of delinquency including cases where, after the committing of the delinquency, the child has passed the age limit mentioned in the definition "child" in subsection 2(1).

section 39[17] provides the option to deal with a juvenile under the terms of provincial legislation. The Supreme Court in the Smith case interpreted this option to be available only in respect of juveniles whose questioned actions came within the terms of provincial legislation intended for the protection or benefit of children, a description which clearly did not fit the British Columbia motor vehicle legislation.[18]

In a bare majority decision, the British Columbia Court of Appeal found that section 3(1) of the Juvenile Delinquents Act[19] was of the essence of criminal law and not an invasion of a provincial field of jurisdiction. Bull J.A. stated that Parliament had adopted a complete and comprehensive criminal code for children which covered not only all existing crimes, but all breaches of statutory authority of every kind as well as immoral behaviour not necessarily forbidden to adults. He rejected the suggestion that the statute had been framed as criminal law merely as a guise or pretence to invade the provincial field generally, or, in this particular case, the regulation of motor vehicle traffic on the highways. Far from being colourable, Bull J.A. decided that the statute was of the very essence of criminal law. In his opinion, provincial legislation directs itself to the control or

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17. Section 39 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 39. Nothing in this Act shall be construed as having the effect of repealing or overriding any provision of any provincial statute intended for the protection or benefit of children; and when a juvenile delinquent, who has been guilty of an act that is under the provisions of the Criminal Code an indictable offence, comes within the provisions of a provincial statute, he may be dealt with either under such statute or under this Act as may be deemed to be in the best interests of the child.

18. McNairn, C.H., "Juvenile Delinquents Act Characterized as Criminal Law Legislation" (1968), 46 Can. B. Rev. 473, 474.

19. Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 3, supra, footnote 4.

alleviation of social conditions, the proper education and training of children, and the care and protection of people in distress including neglected children; whereas the object of the Act was found to be the prevention of crime through the apprehension, punishment, proper care and guidance of children who were offenders against the laws of the community.[20]

The majority also concluded that to the extent that there was an invasion of provincial jurisdiction, namely section 92(15) of the British North America Act,[21] such invasion was a valid exercise of federal power. Bull J.A. stated that on its true construction the pith and substance of the statute was the prevention of crime by a special extension of the criminal law, necessary in the national interest, to enfold, by a new method

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20. Attorney-General of British Columbia v. Smith (1966), 53 D.L.R. (2d) 713, 739-740 (B.C.C.A.) per Bull J.A.

21. Section 92(15) of the British North America Act, 1867, 30 & 31 Victoria, c. 3 reads as follows:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, -
> (15) The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

It is interesting to note that none of the judges in the British Columbia Court of Appeal or the Supreme Court of Canada referred to the classic test of valid criminal law set out by Rand J. in the Margarine reference, Reference re Validity of s. 5(a) of Dairy Industry Act, [1949] S.C.R. 1, 49-50 where that learned Judge stated: "A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened...Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by the law..."

of sanction and punishment, a defined class of offenders; in substance, it was not the invasion of the provincial field of procedural enforcement of its regulatory laws. Thus, while the Act unquestionably invaded to a considerable degree a field exclusively granted to the province, namely the enforcement of its motor vehicle legislation and punishment for its violation, the invasion was held to be consequential, ancillary and necessarily incidental to effective legislation by Parliament.[22]

In these particular circumstances, the provincial and federal statutes were held to be in conflict with one another, thus rendering the provincial enactment inoperative. Bull J.A. stated that with respect to an offence under the provisions of the provincial statute, the forbidden act, when committed by certain persons, became the crime of "delinquency" under the federal legislation. In his opinion, the enforcement of penalties provided under, and the use of, the provincial procedures would completely frustrate and make nugatory the provisions of the Act. Thus, while the provisions of neither statute were held to be ultra vires, those of the Juvenile Delinquents Act prevailed. In summary, to the extent that the provincial legislation provided for the conviction and enforcement of penalties for its breach by a child, such legislation was rendered inoperative and was superceded by the provisions of the Act.[23]

The Supreme Court of Canada dismissed the appeal, and as Parker suggests, the decision of the Supreme Court is, unfortunately, a typical

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22. Attorney-General of British Columbia v. Smith (1966), 53 D.L.R. (2d) 713, 740-741 (B.C.C.A.) per Bull J.A.

23. Attorney-General of British Columbia v. Smith (1966), 53 D.L.R. (2d) 713, 742 (B.C.C.A.) per Bull J.A.

judgment - Fauteux J. wrote a rather colourless decision adopting the majority view of the court below, adding little to our understanding of the juvenile court; the remainder of the court remained silent.[24] The Court was obviously concerned with the practical implications of a successful appeal.[25]

Fauteux J. upheld the validity of the Act and, in so doing, focused particularly on the end, purpose and object which the statute, in his opinion, was designed to serve. He found evidence of an essentially criminal law objective in the main operative provisions of the Act, in the original preamble and the general interpretation section.[26] He stated that the true nature and character of legislation cannot always be conclusively determined by the mere consideration of its primary legal effect. In his opinion, this substitution of the provisions of the Act for the enforcement provisions of other laws was 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, identified this Act as being genuine legislation in relation to criminal law.[27]

Fauteux J. concluded therefore that the Act dealt with juvenile delinquency "...in its relation to crime and crime prevention, a human, social and living problem of public interest, in the constituent elements, alleviation and solution of which jurisdictional distinctions of

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24. Parker, G., "The Appellate Court View of the Juvenile Court" (1969), 7 Osgoode Hall L.J. 155, 171.

25. A successful appeal would have meant the end of an elaborate bureaucratic structure and legislation which had stood for nearly sixty years. Thus, the decision can be seen as a thinly veiled attempt to prevent a vacuum in the regime of law relating to juveniles in Canada.

26. McNairn, supra, footnote 18, p. 475.

27. Attorney-General of British Columbia v. Smith (1967), 65 D.L.R. (2d) 82, 86 (S.C.C.) per Fauteux J.

constitutional order are obviously and genuinely deemed by Parliament to be of no moment."[28] Colin McNairn, one of the counsel who represented the Attorney-General of Ontario before the Supreme Court in the Smith case, is extremely critical of this statement:

> It suggests that Parliament was entitled to ignore the distribution under the British North America Act of classes of legislative competence between itself and the provincial legislatures because of the character of the problem dealt with. But this would be destructive of the most basic of principles in our system of government - that legislative supremacy is subordinated to the limitations of an over-riding constitutional document which embodies a federative division of legislative powers. It is suggested, therefore, that the statement must be taken to mean, albeit with a good deal of interpolation, that the problem of juvenile delinquency as dealt with in the federal Act, because of its important and far-reaching implications may properly be given a constitutional value such that it may be characterized as a whole as criminal law though, if various particular elements of the problem were evaluated, these might be considered as falling within provincial heads of jurisdiction. However, even this interpretation cannot be taken very far in the light of long-standing authorities, particularly involving the federal trade and commerce power, which indicate that the practical necessities or inherent logic of a comprehensive base of regulation cannot be taken to enlarge an otherwise limited scope of federal competence.[29]

McNairn further suggests that the Supreme Court should have considered the subject matter of the Act as distinct from its objects or purpose. He argues that the latter are not controlling in constitutional assessment and suggests that this is readily apparent from a number of cases which, while holding legislative provisions ultra vires, at the same

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28. Ibid, p. 88 per Fauteux J.

29. McNairn, supra, footnote 18, p. 476.

time admit that the same object, in whole or in part, could be achieved without constitutional impediment through legislation differently framed.[30]

Critics of the Smith case insist that to be constitutionally acceptable as validly enacted criminal law, federal legislation ought, at the very least, to manifest an avowal, either explicit or implicit, of an exercise of the criminal law power. Yet the language of the Act, particularly sections 3(2) and 38, suggests exactly the opposite.[31] If these provisions were related to general child welfare legislation detached from delinquency as such, there would be little doubt of the invalidity of the legislation as a federal measure: "Is then the constitutional position advanced by tying it to a definition of delinquency which embraces violation of provincial and municipal law and, indeed, extends to conduct which is not elsewhere defined as an offence?"[32]

It seems extremely difficult to justify the legislation; any such justification reflects a radical departure from accepted notions of federal jurisdiction over criminal law. One objection is based on the possibility of less than uniform application of the Act across the country. While some minor subsections are in force throughout

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30. Id.

31. Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 3, supra, footnote 4.
Section 38 reads as follows:

> 38. This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

32. Abel, supra, footnote 6, p. 843.

Canada,[33] the decision to introduce the entire Act is left in the hands of provincial authorities. The Act may be put in force throughout the entirety of a province only where the province has enacted legislation establishing a system of juvenile courts and detention homes. This has been done in most provinces although the quality and quantity of facilities varies dramatically. Alternatively, provision exists for bringing the Act into force in an individual town, or other portion of a province. This has been done in the Yukon Territory and the Northwest Territories. The Act is now in force in all of the major metropolitan areas of Canada.[34]

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33. Section 41 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 41. Subsections 12(4) and 17(3) and (5), and section 34 shall be in force in all parts of Canada, whether this Act is otherwise in force or not.

34. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 35.

Sections 42 and 43 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 read as follows:

> 42. Subject to section 41, this Act may be put in force in any province, or in any portion of a province, by proclamation, after the passing of an Act by the legislature of any province providing for the establishment of juvenile courts, or designating any existing courts as juvenile courts, and of detention homes for children.
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> 43.(1) Subject to section 41, this Act may be put in force in any city, town, or other portion of a province, by proclamation, notwithstanding that the provincial legislature has not passed an Act such as referred to in section 42, if the Governor in Council is satisfied that proper facilities for the due carrying out of the provisions of this Act have been provided in such city, town, or other portion of a province, by the municipal council thereof or otherwise.
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> (2) The Governor in Council may designate a superior court or county court judge or a justice, having jurisdiction in the city, town or other portion of a province, and the judge or justice so designated or appointed has and shall exercise in such city, town or other portion of a province, all the powers by this Act conferred on the juvenile court.

The Act has never been in force in Newfoundland. A provincial statute, which provided for the establishment of juvenile courts, was in operation when Newfoundland became part of Canada and under the terms of union, this Act remains in force.[35] It seems reasonable that if the Act is truly beneficial, it should be available for the benefit of all Canadian children, and not merely those who live in the wealthier areas of our country.[36]

The maximum age at which juveniles fall within the ambit of the legislation also varies significantly from province to province. The Act permits the individual provinces to establish the maximum age limit for young persons in the juvenile court at ages sixteen to eighteen. It is sixteen in Saskatchewan, Ontario, New Brunswick, Nova Scotia and Prince Edward Island. It is seventeen in British Columbia, eighteen in Manitoba and Quebec; and in Alberta eighteen for girls and sixteen for boys. In Newfoundland, under provincial legislation it is seventeen.[37] Thus,

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35. McGrath, W.T., "Some Suggested Amendments to Canada's Juvenile Delinquency Act" (1962), 4 Criminal L.Q. 259, 260. See article 18(1) of the schedule to the British North America Act, 1949, 12-13 Geo. VI, c. 22 (U.K.)

36. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 35.

37. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 54.

Sections 2(1)(a) and 2(2) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 read as follows:

> 2.(1) In this Act
> (a) "child means any boy or girl apparently or actually under the age of sixteen years, or such other age as may be directed in the province pursuant to subsection (2);
> (2) The Governor in Council may from time to time by proclamation
> (a) direct that in any province the expression "child" means any boy or girl apparently or actually under the age of eighteen years and any such proclamation may apply either to boys only or to girls only or to both boys and girls, and
> (b) revoke any direction made with respect to any province by a proclamation under this section, and thereupon the expression "child" in this Act in that province means any boy or girl apparently or actually under the age of sixteen years.

identical conduct in different provinces might result in a young person being treated either as a juvenile delinquent or as a misdirected or neglected child.

There may be unfortunate consequences arising in situations where a young person has committed offences in more than one province with different age limits:

> Because of the present variation in the juvenile age it may happen that a young person will serve a sentence in one province and then be returned to face charges in another province. In other words, the effect may be to deny him a privilege that could have been made available were he an adult. A simple example will illustrate the problem. A boy, seventeen years of age, steals a car in British Columbia and drives to Saskatchewan. He breaks and enters premises in British Columbia, Alberta and Saskatchewan. In Alberta, where he is apprehended, the juvenile court lacks jurisdiction because of his age. He is tried in the ordinary courts which can take into account his offences in Saskatchewan but apparently not those in British Columbia. After serving the sentence imposed by the Alberta court our offender is theoretically subject to the jurisdiction of the juvenile court in British Columbia. Similarly, if he had been first apprehended in British Columbia, it seems that the juvenile court there could not take into account the offences committed outside that province so as to preclude the ordinary courts in these provinces from trying him. This result is clearly undesirable.[38]

Finally, uniformity of application is not possible because of

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38. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 61-62.

Section 434 (3) of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 434.(3) Where an accused is charged with an offence that is alleged to have been committed in Canada outside the province in which he is, he may, if the offence is not an offence mentioned in section 427, and the Attorney General of the province where the offence is alleged to have been committed consents, appear before a court or person that would have had jurisdiction to try that offence if it had been committed in the province where the accused is, and where he signifies his consent to plead guilty and pleads guilty to that offence the court or person shall convict the accused and impose the punishment warranted by law, but where he does not signify his consent to plead guilty and plead guilty, he shall if he was in custody prior to his appearance be returned to custody and shall be dealt with according to law.

the myriad differences in provincial statutes and municipal by-laws; hence, conduct encompassed by the federal legislation will vary depending upon a youth's place of residence. The Act fails to specify or define, with any precision, prohibited behaviour.[39] It is not difficult to imagine phrases such as "...any similar form of vice" being variously interpreted in different parts of the country.

Probably more significant, however, are variations of an administrative nature at the community level. Middle class children are much less likely than children from lower socio-economic groups to become "delinquents". Their behavioural problems are dealt with either in the home or by social agencies, apart altogether from formal legal proceedings.[40]

In addition, several provinces prefer to deal with a child suspected of having committed a delinquency as neglected under child-welfare legislation, rather than as a delinquent under the Juvenile Delinquents Act.[41]

The implications arising from the lack of uniformity in the application of the statute are significant. In some provinces, a child coming from a certain home environment, will be charged and adjudged a delinquent in proceedings before the juvenile court. In another province, the same child would be dealt with under provincial social welfare

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39. Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 2(1)(h), supra, footnote 7. Under United States constitutional doctrine due process of law "...requres definiteness, or certainty; a vague or uncertain statute does not meet the requirements of due process. Hence, if an act of the legislature is so incomplete, vague, indefinite, or uncertain that men of common intelligence must necessarily guess at its meaning and as to its application, it denies due process of law." Corpus Juris Secundum, Volume 16A, p. 584.

40. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 5.

41. McGrath, W.T., "The Juvenile and Family Courts" in McGrath, W.T., Crime and Its Treatment in Canada, (Toronto, 1965), p. 215.

legislation. The "delinquent" child is likely to be scorned by the public as a young malefactor; the "neglected" child will be the object of public sympathy and understanding. Yet, in both cases the act that brings the child to the attention of the authorities is the same.[42]

The problem is exacerbated by the uneven distribution of after-care facilities available to those adjudged to be juvenile delinquents. Whereas adult offenders in Canada, at least in the case of persons sentenced to penitentiary, have been provided equality or uniformity of services; Canadian children have not. The quantity and quality of accommodation and training received by the adult inmate is substantially the same in all provinces; an adult sent to a federal prison in one part of Canada receives the same treatment as a similar adult sent to another penitentiary in a different part of the country. The treatment and services accorded to young offenders are provided and determined entirely by provincial authorities. The comparative prosperity and social conscience of the province in which they live usually determine the quality of the treatment they receive.[43]

Even today, many areas in Canada, particularly rural, do not have sufficient resources to meet the needs of the juvenile justice system. Again, it is important to remember that this discrimination is not limited

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42. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 43.

43. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 26.

simply to the different economic positions of the provinces; significant variations in the availability of facilities will be observed from municipality to municipality in the same province. The experience in Ontario, our richest province, provides a good example:

> The caliber of justice depends on the locality in which one lives. This is inevitable wherever individual municipalities are financially responsible for the administration of justice within their borders. Some counties are more affluent than others, and some view their responsibilities differently.
>
> Some county councils may provide adequate staff and facilities, while in other counties the functions of the courts may be severely curtailed by marginal budgets.[44]

The preceeding discussion is intended to show that, unlike our system of criminal law and corrections for adult offenders, Canada's juvenile justice system varies dramatically from one locale to another. Yet, in the Smith decision, Fauteux J. commented, "Desirable as uniformity may be in criminal law, it is not, per se, a dependable test of constitutionality as, indeed, is shown in the case of the Lord's Day Act, R.S.C. 1927, c. 123, cf. ss. 3, 7 and 15, the Canada Temperance Act, R.S.C. 1927, c. 196, cf. Part I, both judicially held intra vires, notwithstanding lack of uniformity."[45] Despite the Supreme Court's holding that uniformity is not a constitutional requirement, fairness demands that, in the absence

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44. McRuer, Hon. James Chalmers, Commissioner, Royal Commission Inquiry into Civil Rights, Volume II, (Toronto, 1965), p. 564.

45. Attorney-General of British Columbia v. Smith (1967), 65 D.L.R. (2d) 82, 89 (S.C.C.) per Fauteux J.

of overwhelming considerations to the contrary, the application of criminal law powers should be uniform throughout Canada.[46]

It is submitted that the purpose in allocating the power to enact criminal law to the exclusive jurisdiction of Parliament was to ensure that a person could act in the knowledge that if his conduct is legal in one part of Canada, it is legal everywhere in Canada. Similarly, if his conduct is illegal, the maximum power of the courts to punish him should be uniform throughout the country.[47] Nonetheless, the federal criminal law power has been used to treat children differently from adults.

There are other aspects to this problem which suggest that the Juvenile Delinquents Act should not have been held to be validly enacted federal criminal law. For instance, mens rea and the presence of moral turpitude are generally accepted as necessary elements of most crime, yet they are not characteristic of many provincial and by-law violations which fall within the scope of the Act.[48] Thus, while this criterion of criminal law is not suggested as definitive, it may be argued that if the criterion is not satisfied by a particular statute it is of persuasive value, in combination with other features, in establishing the character of the statute

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46. Fox, R.G., "The Young Offenders Bill: Destigmatizing Juvenile Delinquency?" (1972), 14 Criminal L.Q. 172, 188.
At p. 199 the author adds: "No rules of court yet exist governing procedure either at trial or disposition and lack of uniformity and uncertainty has been noted in the practices followed in different courts in laying informations, arraigning defendants and taking pleas."

47. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 26.

48. McNairn, supra, footnote 18, p1 478.
The author notes that these elements are absent in regulatory offences which may be the subject of valid criminal law legislation.

as other than criminal law.[49]

The major hurdle to constitutional reconciliation is the definition of "juvenile delinquent".[50] The legal definition is far wider than is generally appreciated:

> Not only is a juvenile delinquent one who violates federal or provincial statutory provisions, by-laws or ordinances of municipalities or who engages in sexual immorality or similar form of vice, he is also one who is liable by reason or any other act to be committed to an industrial school or juvenile reformatory under the provisions of a provincial statute. Ontario's Training School Act, R.S.O. 1970, c. 467, s. 8 permits a judge to order a child under the age of sixteen years to be sent to a training school if: (a) the parent or guardian of the child is unable to control the child or to provide for his social, emotional, or educational needs; (b) the care of the child by any other agency of child welfare would be insufficient or impractical; and (c) the child needs the training and treatment available at a training school.[51]

Thus, the concept of "delinquency" under the Act has been used to classify diverse forms of behaviour as of equal seriousness. The term "juvenile delinquent" and the procedures and penalties resulting from such classification can potentially be applied to three distinct types of young people.[52] First, the definition includes the neglected child who, because of parental death or inability lacks adequate care. It also includes the dependant child who lacks adequate care because of mistreatment or physical, mental or financial problems. Finally, the

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49. Id.

50. Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 2(1)(h), supra, footnote 7.

51. Fox, supra, footnote 46, p. 175.

52. Walker, P., "The Law and the Young: Some Necessary Extra-legal Considerations" (1971), 29 U.T. Faculty L.R. 54, 56.

definition includes those children who violate laws. Even in this last category there are degrees of seriousness. Under our present legislation, a young person who, if an adult, would be guilty of murder, and a boy who fails to purchase a bicycle licence, would both be delinquent.

The Act has been criticized on the ground that it contravenes the principle of legality - nullem crimen sine lege, nulla poena sine lege - that citizens should have fair warning of what conduct is regarded as criminal.[53] Since, for all practical purposes, any child in Canada could come within the terms of the statute, his fate will hinge largely upon the attitudes of the authorities and the availability of facilities in his community.

Technically, there are more juvenile delinquents when there are more agencies, and more workers to handle them. The more professionalized a particular occupation becomes, the more likely it is that the definition and concept of the people with whom they deal will broaden. One writer asks us to consider how wide the definition of "emotionally disturbed" would be if we witnessed a sudden influx of five hundred German psychoanalysts.[54]

Most commentators also take issue with the fact that we attach sanctions to conduct which would not be criminal if committed by an adult. For example, an habitually truant child may be taken to juvenile court; however, if he is over the statutory age limit, he will be neither stigmatized nor punished. Often this age limit produces some unfortunate results. In a recent case in Montreal, a juvenile who admitted a speeding charge was sentenced to ten days detention as a delinquent. For the same

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53. Fox, supra, footnote 46, p. 176.

54. Walker, supra, footnote 52, p. 59.

act of speeding, an adult could only be fined, not imprisoned.[55]

Similarly, the Criminal Code[56] differentiates between offences of greater and lesser seriousness by providing for differences in the maximum penalties that a court may impose. In the case of adult offenders, we recognize that the extent of the sanctions that can be imposed upon an individual should be proportioned in some manner to the nature and gravity of his anti-social conduct; juveniles are not protected by such principles. Any committal to a training school, regardless of the nature of the offence or the wishes of the judge, is for an indefinite period of time, that is, a period that may extend until the young person reaches the age at which release is required by law. Therefore, it is possible in some provinces for an offender to remain in training school from the age of seven to the age of twenty-one.[57]

It has been argued that the Act could be viewed as an exercise of federal power to legislate for prevention of crime, a power which Parliament enjoys along with that of legislating for cure.[58] However, this position is untenable inasmuch as a significant proportion of the conduct caught by the challenged part of the federal Act is but remotely connected with criminal conduct. An isolated jay-walking offence by a juvenile, for example, is not likely to be symptomatic of anti-social behaviour that could lead to a life of crime. In short the net is case more broadly than necessary.[59]

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55. Fish, M.J.,"Bill C-192: Another View" (1971), 2 Can. B.J. (N.S.) 31, 32.

56. Criminal Code, R.S.C. 1970, c. C-34.

57. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 87.

58. Abel, supra, footnote 6, p. 844.

59. McNairn, supra, footnote 18, p. 478.

The competing provincial and federal heads of power demand more attention than that given them by the Supreme Court. Critics of the Act submit that it is clearly legislation which, in pith and substance, is in relation to the welfare and protection of children.[60] Davey J.A., in his dissenting opinion in the British Columbia Court of Appeal in the Smith case, agreed. He stated that while the purpose of preventing juveniles from becoming criminals was discernable in the Act, this did not settle the matter. In his opinion, in dealing with breaches of provincial law, that purpose was so remote from the subject-matter that in pith and substance the Act, to that extent, could not be said to be for the prevention of crime; that part of it could only be explained as being in pith and substance for the welfare and protection of children.[61] Giving a child help, guidance

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60. "At the other end of the constitutional spectrum from prevention of crime is welfare, which as a subject of legislation is committed to the provinces by the combined operation of heads 13, 14 and 16 of section 92 of the British North America Act." Ibid, p. 479.

Sections 92(13), (14) and (16) of the British North America Act, 1867, 30 & 31 Victoria, c. 3 read as follows:

> 92. In each Province the Legislature may exclusively make laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, -
> (13) Property and Civil Rights in the Province.
> (14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
> (16) Generally all Matters of a merely local or private Nature in the Province.

61. Attorney-General of British Columbia v. Smith (1966), 53 D.L.R. (2d) 713, 718 (B.C.C.A.) per Davey J.A. (dissenting).

At p. 724 Norris J.A. (dissenting) adds: "In my opinion if s. 3 is considered with the remainder of the statute and particularly with ss. 38 and 39, it is apparent that in relation to the issues on the appeal the statute is concerned not with the creation or definition of new offences or the prevention of crime, but with the welfare of juveniles, a matter within the provisions of s. 92(13) of the B.N.A. Act and with their actions under an admittedly valid Provincial statute."

and proper supervision may prevent him from becoming a criminal at a later date. However, there are many children who may be delinquent under the extremely broad definition of a juvenile delinquent, and who, in their own interests may need help and guidance. Yet, they are in no danger of becoming criminals without it.

The response of the Supreme Court leaves much to be desired. Fauteux J. suggested that the interest of the child was not the sole question to be considered by the juvenile court judge; he must also consider the community's best interest and the proper administration of justice. In his opinion, this qualified the nature of the protection which the Act was meant to give to juveniles alleged or found to be delinquents and supported the proposition that the Act was not legislation in relation to protection and welfare of children.[62] Surely, this assessment must be questioned on the ground that the casual relationship of certain of the proscribed types of conduct to legitimate criminal law objectives is very tenuous, and the relationship to matters concerning welfare more apparent.[63]

The Act can also be attacked as an unwarranted invasion of the exclusive power given the provinces under section 92(15) of the British North America Act.[64] Davey J.A., in his dissent in the British Columbia Court of Appeal, noted that to the extent that the offence of delinquency

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62. Attorney-General of British Columbia v. Smith (1967), 65 D.L.R. (2d) 82, 89-90 (S.C.C.) per Fauteux J.

63. McNairn, supra, footnote 18, p. 479.

64. British North America Act, 1867, 30 & 31 Victoria, c. 3, s. 92(15) supra, footnote 21.

consists of a breach of a provincial statute or municipal by-law, it is not a new offence created by Parliament independently of provincial law. The Juvenile Delinquents Act provides the manner in which the breach shall be charged, the court by which the offender shall be tried, and the manner in which he shall be prosecuted and punished. Yet, the essence of the charge remains the breach of the provincial act or municipal by-law. Davey J.A. held this to be a wrongful intrusion by Parliament into the exclusive authority of the provincial legislature to make laws for the enforcement of its own legislation.[65] Thus, although section 92(15) does not provide an independent source of validity for particular provincial legislation, it is submitted that it should have an independent operation so as to exclude from the scope of section 91(27) imposition by Parliament of punishment by fine, penalty, or imprisonment as a consequence of the violation of provincially prescribed norms of conduct.[66]

The Supreme Court rejected this submission[67] and held the provincial enactment inoperative by invoking the paramountcy doctrine.[68] Since this decision, Canadian courts have been hesitant to allow any provincial

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65. Attorney-General of British Columbia v. Smith (1966), 53 D.L.R. (2d) 713, 716 (B.C.C.A.) per Davey J.A. (dissenting).

66. McNairn, supra, footnote 18, p. 479.

67. Attorney-General of British Columbia v. Smith (1967), 65 D.L.R. (2d) 82, 86 (S.C.C.) per Fauteux J.

68. Attorney-General of British Columbia v. Smith (1967), 65 D.L.R. (2d) 82, 92 (S.C.C.) per Fauteux J.
"There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail..." Attorney-General for Canada v. Attorney-General for British Columbia, [1930] 1A.C.111, 118 (P.C.) per Lord Tomlin.

legislation to interfere with the operation of the Act.[69]

In his analysis of the Smith decision, Colin McNairn offers an argument which was not explored before the Supreme Court. He maintains that incorporating offences by juveniles under provincial or municipal laws, in force from time to time, as delinquencies is an unconstitutional delegation of legislative authority. McNairn notes that the particular variety of delegation which the Act involves may be more aptly described as referential incorporation, a legislative device that is normally unobjectionable from a constitutional standpoint.[70] In this instance, he perceives a serious objection:

> However, in the present case the incorporation does not appear to be confined to provincial or municipal provisions in force at a specific date preceding or at the date of the most recent enactment of the Juvenile Delinquents Act. Rather the referential incorporation is of an ambulatory variety, a fact which of itself would not give rise to any constitutional objection. But in the particular instance of the Juvenile Delinquents Act the situation is complicated by the fact that referential incorporation has the effect of bringing into play at the same time the doctrine of paramountcy (that is of the federal provisions). Accordingly, depending on what view one takes of the operation of the doctrine of provincial legislation, the provincial and municipal provisions are simply temporarily overborne or provincial competence in relation to the matters dealt with in the federal legislation is suspended.
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> If one adopts the latter proposition then in the present case any amendments or additions to

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69. See Re P., [1973] 2 O.R. 818, 820 (H.C.J.) per Zuber J.

70. McNairn, supra, footnote 18, p. 480.

> provincial and municipal provisions, after initial incorporation, so far as they purport to apply to juveniles will be without a base in any persisting provincial legislative competence. The Juvenile Delinquents Act must be taken to have occupied that field.[71]

The argument may be summarized as follows:

> Amendments or new provisions at the provincial level, to the extent that the federal Act purports to incorporate them, would therefore appear to have no independent legal validity. And it is suggested that this is a condition to the validity of an ambulatory referential incorporation.....The referential incorporation in the Juvenile Delinquents Act is, on the above view, unconstitutional to the extent that it is ambulatory. It involves an attempt to incorporate provincial legislative changes in matters in respect of which the Provinces have lost their competence by the very enactment of the incorporating legislation. As mentioned earlier, this position depends on a particular view of the effect of the operation of the doctrine of paramountcy, a view which has not been by any means universally accepted.[72]

It is submitted that there are some very compelling reasons to support the provincial position; however, any new directions in the administration of juvenile justice will have to be initiated by the federal Parliament. Parliament could facilitate the creation of a non-criminal, non-stigmatic status of delinquency by declaring certain conduct criminal only if committed by persons over a defined age, thus allowing the provinces

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71. McNairn, supra, footnote 18, p. 480-481.
Section 39 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 supra, footnote 17 would provide an exception in the case of provincial legislation enacted for the protection or benefit of children.

72. Ibid, p. 481-482.
At p. 481 the author offers an analogy in the law relating to wills: "A testator cannot by his will incorporate the terms of a future document which is unattested, and therefore not of independent legal validity. But a subsequent instrument of a testamentary character, and hence possessing independent legal validity, may be read with an earlier testamentary instrument so that the two instruments are given force as the will of the testator so far as they are not inconsistent."

to legislate from a non-criminal aspect in relation to persons under that age.[73]

However, many people fear a provincial take-over of juvenile justice. It has been suggested that the federal government would be abdicating its constitutional responsibilities if it permitted delinquency to be defined and dealt with by the individual provinces under child welfare legislation. Commentators argue that this would result in the loss of the value of a national approach and that multifarious legislation and programmes would produce social chaos in the juvenile field.[74]

This position is somewhat tenuous; there is no national approach to the problems of juvenile delinquency. Realistically, we must accept the lack of uniformity. An increase in the minimum age of criminal responsibility would have severe, and perhaps beneficial effects, on existing structures. The provinces would then be compelled to decide whether they would take no action whatsoever with respect to the behaviour of these children, or whether they would develop techniques for the negotiated civil disposition of the child-care or related legislation.[75] The different responses of the provinces would provide fertile ground for comparative research.

It is unlikely that the resulting social chaos would be more widespread than that found under existing legislation. In any event, while the violation of provincial and municipal enactments may eventually be removed from the definition of "delinquent act", the federal authorities show

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73. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 25.

74. Id.

75. Fox, supra, footnote 46, p. 818

no intention of wholly relinquising their role in the juvenile justice system.[76] In the meantime, the power struggle between Ottawa and the provinces will continue to disguise the real issues and prevent the development of exciting innovations found in other jurisdictions.

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76. Fox, supra, footnote 46, p. 818.

CHAPTER FOUR

JUVENILE JUSTICE AND "EQUALITY BEFORE THE LAW"

Since its introduction in 1960, the Canadian Bill of Rights,[1] and more particularly, section 1(b) thereof has provided the focal point for one of Canada's most interesting and controversial legal debates. Most of this discussion was generated by the examination of the "equality before the law" clause by the Supreme Court of Canada in Regina v. Drybones.[2] The Court held, for the first and only time, that a provision in a federal statute was inoperative when construed as being in conflict with the Bill of Rights.

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1. Section 1 of the Canadian Bill of Rights, R.S.C. 1970, Appendix III reads as follows:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
> (b) the right of the individual to equality before the law and the protection of the law;
> (c) freedom of religion;
> (d) freedom of speech;
> (e) freedom of assembly and association; and
> (f) freedom of the press.

2. Regina v. Drybones (1970), 9 D.L.R. (3d) 374 (S.C.C.)
For an analysis of Drybones and subsequent decisions such as Attorney-General of Canada v. Lavell (1973), 38 D.L.R. (3d) 481 (S.C.C.), see Sinclair, J.G., "R. v. Drybones: The Supreme Court of Canada and the Canadian Bill of Rights" (1970), 8 Osgoode Hall L.J.599; Tarnopolsky, W.S., "The Canadian Bill of Rights from Diefenbaker to Drybones" (1971), 17 McGill L.J. 437; Cavalluzzo, P., "Judicial Review and the Bill of Rights: Drybones and Its Aftermath" (1971), Osgoode Hall L.J. 511; Sanders, D.E., "The Bill of Rights and Indian Status" (1972), 7 U.B.C. L. Rev. 81; Sanders, D.E., "The Indian Act and the Bill of Rights" (1974), 6 Ottawa L.R. 397; Hogg, P.W., "The Canadian Bill of Rights - Equality Before the Law - Attorney General of Canada v. Lavell" (1974), 52 Can. Bar R. 263; Drieger, E.A., "The Canadian Bill of Rights and the Lavell Case; a Possible Solution" (1974), 6 Ottawa L.R. 620; Tarnopolsky, W.S., The Canadian Bill of Rights, (Toronto, 1975).

The rapid retreat from this decision and the ensuing controversy serve as an excellent example of legal gymnastics.

While an exhaustive analysis of this evolution is beyond the scope of this study, the problems encountered by the courts in their approach to juvenile justice reflect the many issues involved. The first case in this area was, surprisingly, not heard until 1972, twelve years after the Bill of Rights became law. The British Columbia Supreme Court determined that although the Juvenile Delinquents Act[3] does not, as does the Criminal Code,[4]

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3. Section 37(3) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 37.(3) Application for leave to appeal under this section shall be made within ten days of the making of the conviction or order complained of, or within such further time, not exceeding an additional twenty days, as a supreme court judge may see fit to fix, either before or after the expiration of the said ten days.

4. Section 750 of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 750(1) Where an appeal is taken under section 748, the appellant shall
> (a) prepare a notice of appeal in writing setting forth
> (i) the summary conviction court that made the conviction or order appealed from or imposed the sentence appealed against, and
> (ii) with reasonable certainty, the conviction or order appealed from or the sentence appealed against;
> (b) cause the notice of appeal,
> (i) where the appellant is the prosecutor, to be served on the defendant or on such other person or in such manner as a judge of the appeal court directs, or
> (ii) where the appellant is the defendant, to be filed with the clerk of the appeal court, within thirty days after the conviction or order was made or the sentence was imposed, whichever is the latter; and 1972 c. 13, 2.66
> (c) where the appellant is the prosecutor, file in the office of the clerk of the appeal court
> (i) the notice of appeal referred to in paragraph (a), and
> (ii) proof of service of the notice of appeal in accordance with subparagraph (b)(i),
> not later than seven days after the last day for service of the notice of appeal.
> (2) An appeal court may, before or after the expiration of the periods fixed by paragraphs (1)(b) and (c), extend the time within which service and filing may be effected.

See also section 603 of the Criminal Code, R.S.C. 1970, c. C-34.

provide for an extension of time to apply for leave to appeal conviction beyond thirty days, this omission does not constitute a violation of "equality before the law". McIntyre J. did not feel there was unwarranted discrimination in the fact that had the applicant been an adult, charged with the same offence, he would have had the right to apply for an extension of time to launch his appeal. He agreed with counsel that paragraph (b) of section 1 was not limited in its effect to inequalities in the law which resulted only from the enumerated subjects in section 1. However, he reasoned that all laws could not be applied to the whole population without some differentiation. McIntyre J. argued that no one could dispute the proposition that the blind should be prohibited from driving automobiles or that the young should be required to attend school up to a certain age.[5] It is difficult to draw an analogy between his examples and the facts of this case. Surely, limiting the right of appeal of a juvenile confers no benefit or protection.

In the following year a magistrate in the Northwest Territories held that failure by the Governor in Council to raise the age limit from sixteen to eighteen pursuant to section 2(2)(a) of the Act[6] did not constitute a violation of the principles set out in the Bill of Rights. The Court found no discrimination although the applicant, aged sixteen

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5. R. v. O. (1972), 6 C.C.C. (2d) 385, 387-388 (B.C.S.C.) per McIntyre J.

6. Section 2(2)(a) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 2.(2) The Governor in Council may from time to time by proclamation
> (a) direct that in any province the expression "child" in this Act means any boy or girl apparently or actually under the age of eighteen years and any such proclamation may apply either to boys only or to girls only or to both boys and girls.

and one-half, was treated as an adult in the Northwest Territories; in several of the provinces, because of the different age limits, he would have been considered a child. Magistrate De Weerdt suggested that "equality before the law" cannot be understood to mean complete legal parity with those in the provinces for persons in the Territories, even in matters that are properly the subject of federal law. He pointed out that there is no Lieutenant-Governor in either of the Territories, nor do they have representation in the Senate. He also noted that Parliament has recognized the special conditions of the Northwest Territories by providing for a jury of six instead of the usual twelve in criminal matters.[7] These differences, however, do not appear to offer any rational reason for denying a child in the Territories the same rights and privileges granted to children in the provinces.

Since the accused was charged with non-capital murder, Magistrate De Weerdt expressed some serious misgivings about the consequences of his decision. In the final result, he held that he had jurisdiction to proceed in the normal manner under the Code.[8] Thus, the accused, rather than receiving treatment as a juvenile delinquent, was subject to a sentence of life imprisonment as a criminal convict.

The Ontario courts have taken much the same approach in their

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7. R. v. Dubrule (1973), 13 C.C.C. (2d) 358, 361 (N.W.T. Mag. Ct.) per De Weerdt, Magistrate. Under the provisions of An Act to amend the British North America Acts, 1867 to 1975, S.C. 1974-1975, c. 53, the Yukon Territory and the Northwest Territories are entitled to be represented in the Senate by one member each. At the time of writing, a Senator has been appointed to represent the Yukon Territory; none has been appointed to represent the Northwest Territories.

8. Ibid, p. 361-362 per De Weerdt, Magistrate.

interpretation of the true meaning of section 1(b). In M. v. The Queen[9] the appellant contended that section 9(1) of the Juvenile Delinquents Act,[10] which permits the transfer, in special circumstances, of juveniles over fourteen years of age to adult courts, offended the "equality before the law" provision of the Bill of Rights. He argued that the section created a distinctive class of children who were treated differently from the entire class of children, that is, discrimination existed not as between juveniles and adults but within the class of children as a whole. Holden J. felt this was quite justified. In his opinion, if Parliament could validly distinguish between adults and children for the purpose of criminal legislation, there was no reason why it could not further subdivide the classification of children when the reason for such subdivision was the benefit and the protection of the children. He also suggested that section 9(1) was designed to protect the best interests of the community and the child.[11] It is difficult to accept the proposition that exposure to Canada's criminal justice system will ever confer any benefit upon a child.

This continual process of subdividing classes has effectively destroyed the potential and intended impact of s. 1(b). This is clearly evident from the leading decision on juvenile justice and "equality before

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9. M. v. The Queen (1973), 23 C.R.N.S. 313 (Ont. S.C.).

10. Section 9(1) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 9(1) Where the act complained of is, under the provisions of the Criminal Code or otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of the Criminal Code in that behalf; but such course shall in no case be followed unless the court is of the opinion that the good of the child and the interest of the community demand it.

11. M. v. The Queen (1973), 23 C.R.N.S. 313, 318 (Ont. S.C.) per Houlden J.

the law" - R. v. Burnshine.[12] At issue was section 150 of the Prisons and Reformatories Act[13] which authorizes the use, in certain circumstances, of indeterminate sentencing in the case of British Columbia citizens apparently or actually under the age of twenty-two.

Burnshine, who was then seventeen years of age, was charged with a summary conviction offence for which the maximum punishment prescribed by the Criminal Code is six months imprisonment.[14] However, he was convicted and sentenced to a term of three months definite and two years less one day

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12. R. v. Burnshine (1974), 25 C.R.N.S. 270 (S.C.C.).

13. Section 150 of the Prisons and Reformatories Act, R.S.C. 1970, c. P-21 reads as follows:

> 150. Every court in the Province of British Columbia, before which any person apparently under the age of twenty-two years is convicted of an offence against the laws of Canada, punishable by imprisonment in the common gaol for a term of three months, or for any longer term, may sentence such person to imprisonment for a term of not less than three months and for any indeterminate period thereafter of not more than two years less one day
> (a) in the case of a male person apparently under the age of eighteen years, in Haney Correctional Institution,
> (b) in the case of any other male person to whom this section applies, in Oakalla Prison Farm or in New Haven, or
> (c) in the case of a female person to whom this section applies, in a place designated by the Lieutenant Governor for such female persons
> instead of the common gaol of the county or judicial district where the offence was committed or was tried, and such person shall thereupon be imprisoned accordingly until he is lawfully discharged or paroled pursuant to section 151 or transferred according to law, and shall be subject to all the rules and regulations of the institution as may be approved from time to time by the Lieutenant Governor in that behalf.

14. Burnshine was charged with causing a disturbance under section 171 of the Criminal Code, R.S.C. 1970, c. C-34. Section 722(1) reads as follows:

> 722.(1) Except where otherwise expressly provided by law, every one who is convicted of an offence punishable on summary conviction is liable to a fine of not more than five hundred dollars or to imprisonment for six months or to both.

indeterminate. Counsel for Burnshine submitted that the sentence was void because Burnshine was denied "equality before the law"; he received a greater term of imprisonment by virtue of his age, sex and commission of the offence in British Columbia than he would have received had he been older, female, or if he had committed the offence in another province.

The British Columbia Court of Appeal, in a majority judgment, allowed the appeal and set aside the sentence.[15] Branca J.A. adopted the reasoning of Laskin J. in the Curr[16] case and held that the prohibitions listed in the non-discrimination clause in the opening paragraph of section 1 of the Bill of Rights were not exhaustive of the matters which violated the provisions of the statute. In Branca's opinion, the specific freedoms which were not to be abrogated, abridged or infringed were those declared in section 1, paragraphs (a) to (f) inclusive, and all rights referred to in paragraphs (a) to (g) of section 2. He also noted that there was nothing in the legislation which expressly declared that it was to operate notwithstanding the Bill of Rights.[17]

On the basis of the judgment of Ritchie J. in Drybones, the

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15. R. v. Burnshine (1974), 13 C.C.C. (2d) 137 (B.C.C.A.).

16. "In considering the reach of s.1(a) and s.1(b), and, indeed, of s. 1 as a whole, I would observe, first, that the section is given its controlling force over federal law by its referential incorporation into s. 2; and, secondly, that I do not read it as making the existence of any of the forms of prohibited discrimination a sine qua non of its operation. Rather, the prohibited discrimination is an additional lever to which federal legislation must respond. Putting the matter another way, federal legislation which does not offend s. 1 in respect of any of the prohibited kinds of discrimination may nonetheless be offensive to s. 1 if it is violative of what is specified in any of the paras. (a) to (f) of s. 1." Curr v. The Queen (1972), 26 D.L.R. (3d) 603, 611 (S.C.C.) per Laskin J.

17. R. v. Burnshine (1974), 13 C.C.C. (2d) 137, 146-147 (B.C.C.A.) per Branca J.A.

majority in the British Columbia Court of Appeal found that Burnshine, on account of his age and place of residence, was an individual being treated more harshly by the law than others in his class.[18] Branca J.A. stated that where there are differences and distinctions in the law as it applies to an individual or a class, those differences and distinctions do not necessarily render an individual or a class unequal before the law, if the differences and distinctions apply to all persons in that class throughout the country.[19]

Branca J.A. also felt it was irrelevant if, as contended by Crown counsel, section 150 of the Prisons and Reformatories Act[20] created equality within the particular province. In his opinion, the crucial point was the fact that individuals under the apparent age of twenty-two years in British Columbia were treated far more harshly than other males or females of that apparent age who committed the same offence in all other parts of Canada, except Ontario. The discrimination arose because of the

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18. "I think that the word 'law' as used in s. 1(b) of the Bill of Rights is to be construed as meaning 'the law of Canada' as defined in s. 5(2) (i.e. Acts of the Parliament of Canada and any orders, rules or regulations thereunder) and without attempting any exhaustive definition of 'equality before the law' I think that section 1(b) means at least that no individual or group of individuals is to be treated more harshly than another under the law, and I am therefore of opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made subject to any penalty." R. v. Drybones (1970), 9 D.L.R. (3d) 473, 484 (S.C.C.) per Ritchie J.

19. R. v. Burnshine (1974), 13 C.C.C. (2d) 137, 158 (B.C.C.A.) per Branca J.A.

20. Prisons and Reformatories Act, R.S.C. 1970, c. P-21, s. 150, supra, footnote 13.

incidence of age and locality.[21]

Nemetz J.A., although finding it unnecessary to provide a definition of "equality before the law", added an important dimension to the majority judgment. He considered the second phrase in section 1(b), namely, "and the protection of the law". He argued that since the phrase did not stand in a separate paragraph but was attached to the right of the individual to "equality before the law", it must have some reference to "equality before the law". Nemetz J.A. concluded that what was being guaranteed in section 1(b) was not only "equality before the law" but additionally "equality in the protection of the law".[22] Equal protection of the law was not afforded to young British Columbians where a statute provided for a longer prison term for the same offence to be imposed in that province than in any other province in Canada, save Ontario.

MacLean J.A. adopted the reasoning of Jackett C.J. in Re Prata and Minister of Manpower and Immigration[23] as the basis for his dissenting

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21. R. v. Burnshine (1974), 13 C.C.C. (2d) 137, 158-159 (B.C.C.A.) per Branca J.A.
It is interesting to note that despite the tremendous variations in facilities and administrative patterns across the country, Branca J.A. in obiter dicta, at p. 159 states: "In the case of each child, male or female, who comes under the provisions of the Juvenile Delinquents Act, there is complete equality of all procedures and rights to children dealt with by the Act and it is not possible for one child to be treated more harshly than another because a crime is committed in one locality rather than another in Canada."

22. R. v. Burnshine (1974), 13 C.C.C. (2d) 137, 164 (B.C.C.A.) per Nemetz J.A.

23. "It is a novel thought to me that it is inconsistent with the concept of 'equality before the law' for Parliament to make a law that, for sound reasons of legislative policy, applies to one class of persons and not to another class. As it seems to me, it is of the essence of sound legislation that laws be so tailored as to be applicable to such classes or persons and in such circumstances as are best calculated to achieve the social, economic or other national objectives that have been adopted by Parliament." Re Prata and Minister of Manpower and Immigration (1972), 31 D.L.R. (3d) 465, 473 (F.C.) per Jackett C.J.

judgment. Since British Columbia and Ontario had pioneered the use of indeterminate sentencing and could afford the necessary institutions and staff, he felt that this system of corrections was both justified and beneficial. He stated that many prison authorities were of the view that the best results in reforming young offenders could be achieved by adding the indeterminate sentence to the usual definite sentence. In his opinion, the system should be regarded as one for the reformation and benefit of young offenders. MacLean J.A. concluded that there was no discrimination; the section merely provided a different method of treatment.[24] Such a position might be more acceptable if his conclusions had been confirmed by research and if all Canadian children had the benefits of extended periods of incarceration.

The Supreme Court of Canada reversed this decision, by a majority of six to three, setting aside that portion of the Court of Appeal judgment declaring section 150 to be inoperative. Martland J. stated:

> The judgments of the majority of the Court of Appeal in the present case rely substantially upon the decision of this Court in the Drybones case... Branca J.A. also relied upon the judgments of the Federal Court of Appeal in A.G. Can. v. Lavell and of Osler J. in Isaac v. Bedard, supra, both of which were subsequently reversed in this Court.
>
> The Drybones case is the only one to date in which this Court has held a section of a federal statute to be inoperative because it infringed the Bill of Rights. The circumstances of the case were unusual...[25]

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24. R. v. Burnshine (1974), 13 C.C.C. (2d) 137, 141-142 (B.C.C.A.) per MacLean J.A.

25. R. v. Burnshine (1974), 25 C.R.N.S. 270, 279 (S.C.C.) per Martland J. (Fauteux, C.J.C., Abbott, Judson, Ritchie, Pigeon JJ. concurring); Laskin J. dissenting (Spence and Dickson JJ. concurring).

Tarnopolsky suggests that what Martland J. did, in effect, was to apply the "reasonable classification" test, or the test of whether the impugned provision is rationally related to a legitimate legislative purpose.[26] In so doing, Martland J. approved the position of Ritchie J. in Attorney-General of Canada v. Lavell[27] and concluded that the legislative purpose of section 150 was not to impose harsher punishment upon offenders in British Columbia in a particular age group than upon others. He agreed with MacLean J.A. that the purpose of the indeterminate sentence was to seek to reform and benefit persons within that younger age group. It was made applicable in British Columbia because that province was equipped with the necessary institutions and staff for that purpose.[28] The majority in the Supreme Court held that in order for the respondent to succeed it would be necessary for him to satisfy the Court that, in enacting s. 150, Parliament was not seeking to achieve a valid federal objective.[29]

Laskin J., who wrote the dissenting opinion, expressed his

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26. Tarnopolsky, W.S., "The Canadian Bill of Rights and the Supreme Court Decisions in Lavell and Burnshine: A Retreat from Drybones to Dicey?" (1975), 7 Ottawa L.R. 1, 13.

27. "The fundamental distinction between the present case and that of Drybones, however, appears to me to be that the impugned section in the latter case could not be enforced without denying equality of treatment in the administration and enforcement of the law before the ordinary courts of the land to any racial group..." Attorney-General of Canada v. Lavell (1973), 38 D.L.R. (3d) 481, 499 (S.C.C.) per Ritchie J.

28. R. v. Burnshine (1974), 25 C.R.N.S. 270, 280 (S.C.C.) per Martland J.

29. Ibid, p. 281 per Martland J.
Martland J. relied on Laskin's reference to section 1(a) of the Bill of Rights: "...compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutional competent to do so, and exercising its powers in accordance with the tenets of responsible government, which underlie the discharge of legislative authority under the British North America Act." Curr v. The Queen (1972), 26 D.L.R. (3d) 603, 613 (S.C.C.) per Laskin J.

preference for a construction which would avoid a collision between the impugned section and the Bill of Rights:

> It is important to appreciate that the Canadian Bill of Rights does not invariably command a declaration of inoperability of any federal legislation affected by its terms. That may be the result, under the principle enunciated in the Drybones case, supra, if a construction and application compatible with the Canadian Bill of Rights cannot reasonably be found. The primary injunction of the Bill, however, is to determine whether a challenged measure is open to a compatible construction that would enable it to remain an effective enactment. If the process of construction in the light of the Bill yields this result, it is unnecessary and, indeed, it would be an abuse of judicial power to sterilize the federal measure.[30]

He did not doubt Parliament's right to give its enactments special application in terms of locality of operation or otherwise.[31] However, in reference to the lower court decision, he agreed that the majority of the Court rightly concluded that insofar as s. 150 provided for the imposition of a greater punishment of the accused in British Columbia than elsewhere in Canada (save Ontario) for the same offence, it denied to him as an individual "equality before the law".[32] His solution to the problem, which construes and applies section 150 in harmony with the Criminal Code and the Bill of Rights is clearly preferable to the majority position:

> In my opinion, a construction of s. 150 in the light of the Canadian Bill of Rights that would enable a court in British Columbia to impose the maximum term of imprisonment fixed for the offence under the Criminal Code and in addition an indeterminate term of up to two years less one day appears on its face

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30. R. v. Burnshine (1974), 25 C.R.N.S. 270,286 (S.C.C.) per Laskin J.

31. Id.

32. Ibid, p. 287 per Laskin J.

> to be alien to the very purpose which is said to animate it. It seems to me to be very much more consonant with the suggested purpose, considered in the light of the Canadian Bill of Rights, that the combined fixed and indeterminate sentences be limited in their totality by the maximum term of imprisonment prescribed by the Criminal Code or other federal enactment creating an offence and prescribing its punishment. In this way, there is an umbrella of equality of permitted length of punishment and within that limit a scope for relaxing its stringency to accommodate a rehabilitative and correctional purpose. On this view which commends itself to me, the age factor under s. 150 does not amount to a punitive element in that provision but rather redounds to the advantage of an accused who is within the age group.[33]

Unfortunately, the most recent Canadian case in this area has demonstrated acceptance of the somewhat inflexible approach of the majority in Burnshine. Re Campbell and The Queen[34] was concerned with an application under section 689 of the Criminal Code.[35] Campbell, who was seventeen years

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33. R. v. Burnshine (1974), 25 C.R.N.S. 270, 228-389 (S.C.C.) per Laskin J.

34. Re Campbell and The Queen (1974), 16 C.C.C. (2d) 573 (B.C.S.C.)

35. Section 689 of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 689(1) Where an accused has been convicted of
> (a) an offence under section 144, 146, 155, 156 or 157; or
> (b) an attempt to commit an offence under a provision mentioned in paragraph (a),
> the court shall, upon application, hear evidence as to whether the accused is a dangerous sexual offender.
> (2) On the hearing of an application under subsection (1) the court shall hear any relevant evidence, and shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the Attorney General.
> (3) Where the court finds that the accused is a dangerous sexual offender it shall, notwithstanding anything in this Act or any other Act of Parliament of Canada, impose upon the accused a sentence of preventive detention in lieu of any other sentence that might be imposed for the offence of which he was convicted or that was imposed for such offence, or in addition to any sentence that was imposed for such offence if the sentence has expired.

of age, was tried in adult court in British Columbia. Counsel submitted that the accused had been denied "equality before the law" because in other provinces the minimum age at which his client could be tried in adult court was eighteen. The British Columbia Supreme Court rejected this suggestion. Hinkson J. held that there was nothing in section 689 that caused it to apply unequally to different individuals. Rather, he suggested that it applied equally to everyone who was convicted of one of the offences specified in section 689(1).[36] The fact remains, however, that Campbell was treated differently from other Canadians of the same age living in a different province.

The real test in all these decisions although unarticulated, is, as Tarnopolsky states, whether or not the distinctions created by the legislation are reasonably justifiable:

> In summation, section 1(b) of the Bill of Rights indeed requires a comparison between the person before the court and others in his class. But that in itself is not enough, because it does not help in determining with which class the person is to be compared! That should be at least partly determined by the second step in the process, i.e., assessing whether an inequality in fact constitutes inequality before the law. The purpose of Parliament in enacting the law providing for the distinction must be considered. The onus of showing inequality must be on the one who alleges it. The judges must, in cases of any doubt, resolve the issue in favour of upholding the law. However, the Bill of Rights indicates that Parliament directed the courts to make the assessment. This assessment should be made on the basis of a standard like: "Is the distinction in the law or process reasonably justifiable in a liberal-democratic state which is committed to a policy of equality of opportunity, tempered with the aim of striving for equality in fact".[37]

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36. Re Campbell and The Queen (1974), 16 C.C.C. (2d) 573, 576 (B.C.S.C.) per Hinkson J.

37. Tarnopolsky, supra, footnote 26, p. 33.

Section 1(b) of the Bill of Rights has become an impotent force in the struggle for children's rights. However, the courts have yet to examine sections 1(a) or 2 in the context of juvenile justice.[38] Their interpretation by the courts, barring any new legislation, provides perhaps the last opportunity to correct some of the inequities of the present system.

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38. Sections 1(a) and 2 of the Canadian Bill of Rights, R.S.C. 1970, Appendix III read as follows:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringment of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
> (a) authorize or effect the arbitrary detention, imprisonment or exile of any person;
> (b) impose or authorize the imposition of cruel or unusual treatment or punishment;
> (c) deprive a person who has been arrested or detained
> (i) of the right to be informed promptly of the reason for his arrest or detention,
> (ii) of the right to retain and instruct counsel without delay, or
> (iii) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is now lawful.
> (d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;
> (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
> (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independant and impartial tribunal, or of the right to reasonable bail without just cause; or
> (g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

CHAPTER FIVE

POLICE DISCRETION AND CONFESSIONS BY JUVENILES

Traditionally, the anti-social behaviour of children was dealt with by the family; today, the police forces in Canada are generally considered the front line of defence in the battle against juvenile delinquency. While the discretion of the individual officer in each case can play a positive role in the administration of justice, there are certain inherent dangers in the interaction between the police and juveniles. How the police view their role relative to the processing of young persons is a relevant factor in determining delinquency statistics since, in practice, the police are acting as an informal screening body, hand-picking those children who will be sent on to court and those who will be dealt with outside the system.[1]

The imprecise definition of "juvenile delinquent" has given the police a discretionary power of considerable proportions; for all practical purposes, a "juvenile delinquent" is anyone the police wish it to be, within the age limitations expressed by the Juvenile Delinquents Act.[2] Thus, while the police will ordinarily act for the protection of the children concerned, it is doubtful whether this consideration justifies such an extension, albeit indirect, of what has been traditionally regarded as the proper scope of police powers, namely, the apprehension of persons alleged to have violated

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1. Walker, P., "The Law and the Young; Some Necessary Extra-legal Considerations" (1971), 29 U.T. Faculty L.R. 54, 59.

2. Juvenile Delinquents Act, R.S.C. 1970, c. J-3.

specifically defined norms of conduct.[3]

Although it is impossible to establish definitive guidelines for the exercise of police discretion in the handling of juveniles, the present extent of their individual decision making power is awesome. Police discretion in juvenile law enforcement has three aspects.[4] First, there is the question whether a child should be charged or, alternatively, dealt with on an informal basis. Second, if it is decided to deal with the case informally, the question then is whether the child should be referred to an agency other than the court or should be dealt with on the spot by police action alone. Finally, if it is decided to charge the child, the police must determine whether or not to place him in detention pending a hearing.

There are a tremendous number of factors which influence the police officer's final decision. Some studies in the United States indicate that it is the demeanor of the juvenile that determines the major criteria used by the police to make their decisions.[5] Influential factors in the decision making process include group affiliation, age, race, grooming and dress. Several other studies rule out socio-economic bias as a determining factor and suggest that, due to severe shortages of institutional facilities in most jurisdictions, authorities reserve the use of court referrals for only the most extreme cases. The authors claim that the police are much more influenced by citizen complaints; in other words, the police do not aggressively seek out delinquent behaviour, but rather they more often

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3. Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada, (Ottawa, 1965), p. 66.

4. Ibid, p. 110.

5. Hagan, J.L., "The Labelling Perspective, The Delinquent and the Police; a Review of Literature" (1972), 14 Can. J. Corr. 150, 154.

respond to complaints about juvenile behaviour.[6] Thus, it seems that the satisfaction of outraged adults is often the major priority of youth squads and the police in general. Although conclusive studies are not available, the situation is probably the same in Canada.

There are marked differences in the treatment accorded to adults and that accorded to juveniles by the police. Two factors operate to give juvenile dispositional decisions more visibility and a character quite unlike that of decisions when adults are involved. First, police discretion in the handling of juveniles has been sanctioned by police and court practices. Secondly, the range of actions available to the police in their handling of juveniles who violate, or are alleged to have violated the law, is greater than that for handling adults suspected of, or who have committed, comparable offences.[7]

In a major study of the Toronto Police Department in 1965, Gandy found that officers were considered to have available to them five courses of action for the disposition of juvenile rule violators:

1. Unofficial action
   a. Outright release following an interview (no official record)
2. Official action
   a. Release of juvenile and submission [to the police department] of a Juvenile Contact Card
   b. Referral to social agency
   c. Release to parents with a reprimand
   d. Referral to Juvenile Court followed by juvenile being either released to parents or placed in detention home awaiting hearing.[8]

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6. Hagan, J.L., "The Labelling Perspective, The Delinquent and the Police; A Review of Literature" (1972), 14 Can. J. Corr. 150, 152.

7. Gandy, J.M., "The Exercise of Discretion by the Police as a Decision Making Process in the Disposition of Juvenile Offenders" (1970), 8 Osgoode Hall L.J. 329, 329.

8. Ibid, p. 331. While the other dispositions are self-explanatory, the use of the Juvenile Contact Card, or field interrogation card, requires some elaboration. The card is a form used by the police department for recording police contacts with juveniles. Its primary purpose is to provide information that will assist in the investigation of offences such as thefts and burglaries.

When considering whether or not to grant an outright release to a child, the police officer casts himself in the role of a judge; the decision is related to his perception of an offence as one that might be committed by any child of tender years without malice or danger to the community. It is regarded as a behaviour problem that should be handled by the family rather than as a crime.[9]

According to the Toronto study, major factors affecting the final decision included the extent of property damage or seriousness of the offence; whether or not the juvenile was a persistent rule violator; the character of the juvenile; the attitude of the complainant; and the willingness of the parents to make restitution in cases of property damage or petty theft. There is cause for concern that many juveniles, under pressure from their parents, have admitted offences of which they were innocent in order to avoid a court appearance. Once again, this would depend to a large extent on the attitude and approach of the individual police officer.

Referrals to social agencies are completely within the discretion of the police, thereby offering an additional possibility of coercion. This disposition is one which the family must express a willingness to accept. Further, the family must take some responsibility for action to implement the suggestions of the police. However, even in cases where the police do not use their authority to get the family to accept the referral, the family often gets the impression that if it does not accept the referral, the juvenile will be sent to court.[10]

The police generally tend to doubt the effectiveness of agency

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9. Gandy, J.M., "The Exercise of Discretion by the Police as a Decision Making Process in the Disposition of Juvenile Offenders" (1970), 8 Osgoode Hall L.J. 329, 332.

10. Ibid, p. 336

efforts to treat and rehabilitate juveniles; the limited use of this disposition by police officers is indicative of the nature of the relationship between the police and social agencies and as one writer suggests, it is also indicative of the isolation of the police.[11]

Referral to the juvenile court is the most formal action available to the police in the disposition of alleged violators of the provisions of the Act. Except for isolated instances, there are no firm guidelines to assist the police in deciding when to follow this course of action. In most cases a juvenile is in a position where his handling by the police is as much a function of which officer apprehends him as it is of the offence he is alleged to have committed. The police meanwhile are open to the criticism of lack of consistency and objectivity in law enforcement.[12] Thus, while rigidity is neither possible nor desirable, development of national, or at least local, guidelines will be beneficial to both police and juveniles.

One of the most important aspects of the police role in juvenile justice is the taking and encouraging of statements and confessions. Throughout the years, judges have shown much concern for those accused who, by reason of a special weakness, were in particular need of protection. However, it was not until 1958 that Canadian Courts began to develop a line of jurisprudence that deals with statements made by juvenile suspects.[13] The initial decision was R. v. Jacques;[14] a young boy's

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11. Gandy, J.M., "The Exercise of Discretion by the Police as a Decision Making Process in the Disposition of Juvenile Offenders" (1970), 8 Osgoode Hall L.J. 329, 338.

12. Ibid, p. 343.

13. Kaufman, F., The Admissibility of Confessions, 2nd Edition, (Toronto, 1974), p. 171.

14. R. v. Jacques (1958), 29 C.R. 249 (Que. Social Welfare Ct.).

statements, which amounted to a confession, were tendered in evidence. On the voir dire the Court, in ruling the statements inadmissible, was careful to express certain principles of law:

> The principles on a voir dire relating to the admissibility of a statement made by an accused comprise three main elements:
> 1. The statement, in order to be admissible, must have been made voluntarily: Regina v. Allen (1954), 18 C.R. 313...Boudreau v. The King, [1949] S.C.R. 262...
> 2. In order to constitute a voluntary statement the statement should have been made without fear of prejudice or hope of advantage: Ibrahim v. The King, [1914] A.C. 599; Regina v. Thompson, [1893] 2 Q.B. 12...
> 3. The burden of proving that the statement was not made as a result of promises or threats rests on the Crown: Sankey v. The King, [1927] S.C.R. 436...Boudreau v. The King, supra; Rex v. Boagh (Bogh) Singh (1913), 24 W.L.R. 941...
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> From this it follows that the Court must consider all the circumstances which precede and surround a statement which the Crown wishes to produce in evidence: Thiffault v. The King, [1933] S.C.R. 209...; Rex v. Cummings (1912), 19 C.C.C. 358...[15]

The Court found that the conditions of the boy's detention at the police station, including imposed silence, insufficient meals and isolation, were of such a nature as to prevent his statements being voluntary. Schreiber J., obiter, set down several guidelines for the interrogation of children:

> The Court, which has formerly, as well as in the present case, had occasion to study this question of statements made by children, is of the opinion that in similar circumstances, in order to ensure their future admissibility, the cases show that the authorities should:
> 1. Require that a relative, preferably of the same sex as the child to be questioned, should accompany the child to the place of interrogation.

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15. R. v. Jacques (1958), 29 C.R. 249, 260-261 (Que. Social Welfare Ct.) per Schreiber, Welfare Court Judge.

> 2. Give the child, at the place or room of the interrogation, in the presence of the relative who accompanies him, the choice of deciding whether he wishes his relative to stay in the same room during the questioning or not;
> 3. Carry out the questioning as soon as the child and his relatives arrive at headquarters;
> 4. Ask the child, as soon as the caution is given, whether he understands it and if not, give him an explanation.
> 5. Detain the child, if there is a possibility of proceeding according to 3, above, in a place designated by the competent authorities as a place for the detention of children.[16]

A leading case on confessions by juveniles is the 1961 decision of the Ontario Supreme Court, R. v. Yensen.[17] The accused, aged fourteen, was charged with murder; he first appeared in juvenile court and was subsequently transferred to adult court. The Crown tendered a statement obtained by the police from Yensen and a voir dire was held to determine its admissibility.

Before being taken to the police station for questioning, the accused asked the police if he could see his mother; the request was refused. Evidence presented at the trial also established that Yensen was retarded and had the intellect of an eight year old. McRuer, C.J.H.C. stated, obiter, that where an accused who is a juvenile is invited to make a statement, it should be made clear to him, if he is over fourteen, that the juvenile court judge may send him to trial by a higher court, and that he may be charged there with an offence as an adult. He suggested that in these circumstances, the offence should be explained to the child. In his opinion, in taking statements that may be incriminating, children are not

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16. R. v. Jacques (1958), 29 C.R. 249, 268 (Que. Social Welfare Ct.) per Schreiber, Welfare Court Judge.

17. R. v. Yensen (1961), 36 C.R. 339 (Ont. S.C.)

to be dealt with as mature adults; they are not to be presumed to have the intelligence, or to know the law as adults know it.[18]

The Ontario Supreme Court did not accept the guidelines set down by Schreiber J. in the Jacques case as firm rules of law. However, McRuer, C.J.H.C. suggested that if a child is to be questioned and invited to make a statement of such a character that may be used against him at his trial, especially a trial in the higher court, a relative should be present. He added that if the child asks for a parent to be present, the parent should have the opportunity of being present.[19] These comments do little to clarify the position of the courts on this matter. There is no suggestion in this judgment that the courts would actually rule a statement inadmissable simply because a child's parents were not present during questioning. Their attendance is a matter entirely for the discretion of the police.

In the final result, Yensen's statement was ruled inadmissable on the grounds that it was not voluntary. McRuer, C.J.H.C. held that it was not sufficient to ask the child if he understood the caution. In his opinion, the police must demonstrate that the child actually understood the caution as a result of careful explanation.[20] In this case, the course of events leading up to the statement raised in the boy's mind the feeling that he was obliged to answer the questions the officers put to him; the manner in which the caution was given was not sufficient to remove this feeling from his mind.

Both of these decisions, and particularly the Yensen case, drew

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18. R. v. Yensen (1961),36 C.R. 339, 344 (Ont. S.C.) per McRuer, C.J.H.C.

19. Ibid, p. 347 per McRuer, C.J.H.C.

20. Ibid, p. 347-348 per McRuer, C.J.H.C.

immediate and harsh criticism. It was suggested that the courts had applied a subjective test of voluntariness by interpreting what motivated the accused to give the statement. One writer stated that these decisions were not in line with the English decisions on the same point because, in England, the question of capacity is relevant only to the question of weight and not to that of admissibility.[21] In effect, the decisions created one standard for a statement made on a charge of juvenile delinquency triable in the juvenile court and another standard where the child was sent on to a higher court to be charged there as an adult.[22]

The cases were also criticized for their comments on the presence of parents or guardians; it was argued that the presence of a parent might tend to discourage a child from telling the truth to the police. It was also suggested that where parents are hostile or actively discourage the child from telling the truth it would not be for the good of the child or in the interest of the community that they be present.[23] In the vast majority of cases, however, the role of the parent would be simply to advise their child and ensure fair play. In any event, these critics seem to have missed the point in issue. While the presence of some parents may deter a child from telling the truth, that fact in itself does not justify the admission of a statement made in the absence of a parent.[24] The question of the effect of the presence of parents is largely irrelevant since the voir

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21. Fox, W.H., "Confessions by Juveniles" (1963), 5 Criminal L.Q. 459, 460.

22. Ibid, p. 462-463.

23. Ibid, p. 469.

24. Shulman, P.W., "Confessions by Juveniles" (1964-65), 1 Man. L.S.J. 291, 295.

dire is concerned only with the voluntariness of the statement.

There have been only a handful of other cases in this area in recent years. The first of these was Re R.D.,[25] a decision of the British Columbia Supreme Court. The accused, a thirteen year old boy, was convicted of a delinquent act, car theft, on the basis of a statement he made to the police. His statement was taken in the presence of both parents, with their consent and before any charge was laid; however, they were led to believe that the basis of the charge would be driving without a licence and not auto theft. The Court dismissed the boy's appeal and found the statement to be voluntary. Hutcheson J. held that if the appellant or his father came to the conclusion that if the appellant gave a statement he would not be charged with theft, it was purely a subjective decision on their part. The statement was voluntarily given in that it was not obtained by any direct threats, promises or inducements.[26] Hutcheson J. went on to suggest that even if the statement had been improperly admitted no substantial miscarriage of justice had occurred since the appellant gave evidence in his own defence and reiterated under oath all the material facts in the statement.

The next case in this series is R. v. Wolbaum,[27] a decision of the Saskatchewan Court of Appeal which concerned an appeal from a conviction for non-capital murder. Wolbaum, aged sixteen, made a statement to United States immigration authorities when questioned at the border about his illegal entry

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25. Re R.D. (1961), 35 C.R. 98 (B.C.S.C.)

26. Ibid, p. 100-101 per Hutcheson J.

27. R. v. Wolbaum (1964), 40 W.W.R. 405 (Sask. C.A.)

into that country; the appeal turned on the admissibility of this statement in which Wolbaum admitted the murder. The immigration officers were obviously persons in authority; however, no warning was given and Wolbaum was questioned in the absence of his parents or a guardian. The Court dismissed the appeal, and without referring to Yensen found the statement to be voluntary. Culliton, C.J.S. found there was no evidence to suggest that the statement resulted from any fear of prejudice or hope of advantage exercised or held out by persons in authority. In his opinion, even if the statement was induced by fear, such fear came from within Wolbaum himself and not from anyone in authority and, consequently, would not destroy the voluntariness of the statement. Culliton, C.J.S. stated that the absence of warning will not of itself determine the admissibility of a statement; it is one of the factors to be considered, the importance of which will depend upon the circumstances in each case.[28] It is submitted that the age of the accused in this case was an extremely important consideration and should have been given more attention. This factor, and the fact that no relative was present during the time in which the statement was made gave the Court sufficient grounds for holding the statement to be inadmissable. Instead, the Court found this to be a unique situation since the appellant was being questioned, not about the charge he eventually faced, but about his illegal entry into a foreign country. In view of the consequences of the boy's statement, this distinction seems somewhat specious. Wolbaum was obviously not aware of the consequences of his statement, and had not been made aware of the consequences by persons in authority or his parents.

The issue of juvenile confessions was considered by the British

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28. R. v. Wolbaum (1964), 50 W.W.R. 405, 413 (Sask. C.A.) per Culliton, C.J.S.

Columbia Court of Appeal in 1970 in the case of R. v. Wilson.[29] A police officer testified that the accused, a sixteen year old boy, appeared to be quite immature and under a considerable amount of stress during a two hour interrogation which produced an inculpatory statement. The youth's appeal was allowed and a new trial was ordered on the ground that the trial judge had erred in denying defence counsel the opportunity to argue the question of voluntariness upon the voir dire. While the Court's other observations must be considered obiter dicta, they are nevertheless valuable in this examination. Branca J.A. pointed out that the mere fact that the Crown by and through its witnesses, establishes that no promises, inducements and threats had been made, does not prove that a statement was freely and voluntarily made. All of the surrounding circumstances from the time of the arrest to the time that the statement is made must be considered; each case is peculiar and must depend upon the evidence adduced and the circumstances involved in that case. In his opinion, where incriminating statements are made by juveniles the police should be extremely fair and ensure that the child appreciates the full import and effect of speaking after his arrest.[30] In most cases, this would imply that a warning be given and that a child's parents be present when the statement is made.

Two recent decisions on the admissibility of statements made to a police officer by a juvenile, demonstrate the overriding concern for the protection of the child's rights. In R. v. R. (No.1),[31] Thompson J. of the Ontario Provincial Court was concerned with the following factors:

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29. R. v. Wilson (1970), 11 C.R.N.S. 11 (B.C.C.A.)

30. Ibid, p. 17-21 per Branca, J.A.

31. R. v. R. (No.1) (1972), 9 C.C.C. (2d) 274 (Ont. Prov. Ct.)

the absence of any warning or caution; the absence of the parents; and the juvenile's state of mind at the time of questioning. He considered both the Yensen and Jacques cases and dismissed Fox's comments on those decisions. In his opinion, evidence as to the boy's state of mind was worthy of consideration in deciding the issue of voluntariness.[32]

In Re A.,[33] Litsky J., one of Canada's best known juvenile court judges, took a similar approach. A young boy gave a statement to the Calgary police; although he was given full opportunity to contact his parents, he refused to do so. In holding the statement to be inadmissible, he adopted the words of the Department of Justice Report[34] and stated that, having regard to the peculiar vulnerability of juveniles in the matter of police questioning, juveniles should be questioned by the police only in the presence of a relative or other suitable advisor, possibly a lawyer. Further, Litsky J. suggested that statements taken without this protection should not be admissible in evidence.

The Courts have been hesitant to set down exact rules of procedure for police in the questioning of juveniles; extensive encroachment on their

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32. R. v. R. (No.1) (1972), 9 C.C.C. (2d) 274, 275-277 (Ont. Prov. Ct.) per Thomson, Prov. Ct. J.

33. Re A., [1975] 2 W.W.R. 247 (Alta. Juv. Ct.).

34. Department of Justice Committee on Juvenile Delinquency, supra, footnote 3, p. 112-113.

It is important to note that Judge Litsky considered the statement inadmissible, despite his finding of voluntariness. He also offered the following comment on the boy's apparent waiver of the right to have a parent present: "I believe that a child cannot waive his rights during interrogation however well-intentioned the police or persons in authority conducting the interrogation may be. The principle as I interpret it seems to be that a child cannot waive something which is per se inviolate and which the law enforcement authorities should fully comprehend." Re A, [1975] 2 W.W.R. 247, 250-251 (Alta. Juv. Ct.) per Litsky, Juvenile Ct. J.

discretionary powers is often cited as an obstacle in the path of justice for the total community. Similarly, the exclusion of inculpatory statements at the trial is a matter which is left entirely to the discretion of the judge, to be decided upon the diverse and particular circumstances of each case. Unfortunately, while considerable attention has been focused on the problem and some new directions are indicated, there is too often insufficient protection available to those who, because of their special weaknesses, perhaps require it most.

In conclusion, it is submitted that firm national, or at least local, guidelines should be established for the exercise of discretion by the police in the disposition of alleged juvenile offenders. Further, in the area of confessions by juveniles, special rules of evidence should be established. These rules would ensure the presence of a parent or other advisor while the child was questioned by authorities;[35] they would also ensure that a child fully understood the consequences of his statement.

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35. Supra, p. 79.

CHAPTER SIX

ENTERING THE SYSTEM

Police officers may, in certain instances, refer a child to a children's aid society or provincial social welfare agency. The child's fate will then be determined by officials in the agency or a probation officer. Most probation officers are provincial employees; while this study will not examine provincial welfare programmes, it is important to examine the role of the probation officer in the juvenile justice process.

The probation staff can, of course, decide that charges should be laid and formal action initiated. However, the use of "voluntary probation" has become popular in Canadian cities, particularly those with significant personnel resources. The child is asked to submit to a probationary term without any formal disposition of his case; the dangers of this practice are obvious. Having acted as an investigating officer, a prosecutor, and a judge, the probation officer now proceeds to sentence, imposing probationary conditions and appointing himself as supervisor to ensure compliance. If he has not succeeded in having the parents join him somewhere along the line as co-investigators, co-prosecutors, or co-judges, he must at least by verbal agreement, arrived at in discussion with the parents, have them concur in the imposition of the sanction.[1] All too often, parents will readily agree to "voluntary probation" for the principle reasons that it avoids loss of time at work and the embarrassment involved in a court appearance.

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1. Alberta Royal Commission on Juvenile Delinquency, (Edmonton, 1967), p. 36.

The Juvenile Delinquents Act specifically states that a probation officer, however appointed, is to act under the authority of the court.[2] An Alberta study on juvenile delinquency described the use of "voluntary probation" as being in obvious contempt of the very court of law upon which the probation officers depend for their existence and only under which they can lawfully exercise their real duties.[3] In fact, most provinces, as contemplated by section 39 of the Act, have authorized such practices.[4] However, it is submitted that in so doing the provinces have frustrated the goals of the federal statute. These informal measures, conducted prior to any court disposition, tend to engender the belief, in the eyes of the child, that the juvenile court is primarily punitive. In general, the social worker concerned advises his charge specifically to the effect that unless he

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2. Sections 31 and 32 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 read as follows:

> 31. It is the duty of a probation officer
> (a) to make such investigation as may be required by the court;
> (b) to be present in court in order to represent the interests of the child when the case is heard;
> (c) to furnish to the court such information and assistance as may be required; and
> (d) to take such charge of any child, before or after trial, as may be directed by the court.
> 32. Every probation officer, however appointed, is under the control and subject to the directions of the judge of the court with which such probation officer is connected, for all purposes of this Act.

3. Alberta Royal Commission on Juvenile Delinquency, supra, footnote 1, p. 36.

4. For example, sections 16(1) and 16(4) of the Provincial Court Act, S.B.C. 1969, c. 28 read as follows:

> 16(1) In addition to his powers and duties under the Probation Act, a probation officer shall endeavour to solve family problems without the intervention of a judge.
> (4) Where, on the recommendation of the probation officer, a child is not prosecuted, the probation officer may, with the consent of the child and the parent or parents of the child, enter into an arrangement in writing with the child and his parents for the supervision of the child for a period not exceeding one year.

See Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 39, supra, chapter 3, footnote 17.

co-operates, he will be taken to court.[5]

One is hard pressed to imagine an adult offender being processed in such fashion, with almost complete disregard for any semblance of "due process". If probation is viewed as a sentence, as it is by the child in most cases, it is surely unjust that such sanctions are imposed under the pretence of helping the child when there has been no determination of improper conduct. Such discretionary power is not only dangerous, it is clearly unwarranted. "Voluntary probation" is best seen as a device designed to allow circumvention of our fundamental principles of law and as a method whereby individual probation officers are allowed to lower the level of their responsibilities. This development is an unfortunate consequence of the massive caseloads faced by most probation officers; our failure to provide adequate resources automatically necessitates efforts to reduce the work load to manageable proportions.

If the authorities decide to initiate court proceedings, the action is commenced by laying an information; this procedure has been criticized on the ground that it smacks of criminality and departs from the fundamental philosophy of juvenile justice. It has been suggested that, following the procedure in England, a summons should go to the parents or the guardian requiring them to attend at court and bring the child with them.[6] Undoubtedly, this would result in the same type of problem encountered by our present procedure, namely, the lack of uniformity. Today, the form and contents of an information employed in juvenile court proceedings remain at the discretion of local authorities.[7]

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5. Alberta Royal Commission on Juvenile Delinquency, supra, footnote 1, p. 36.

6. Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada, (Ottawa, 1965), p. 75.

7. Ibid, p. 147.

The information charging the juvenile must disclose or set out the particulars of the offence.[8] Unfortunately, there are problems concerning the time limits applicable to the laying of informations and commencement of prosecutions under the Act.[9] Du Val J. stated in the Manitoba Kings Bench that there are no time limitations for proceedings against a child. In his opinion, the limitation in the Code had no application to juveniles. He offered no reasons for this decision other than to state that this was his conclusion after a careful reading of the Act.[10]

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8. Section 723(1) of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 723(1) Proceedings under this Part shall be commenced by laying an information in Form 2.
> Form 2 is found in Part XXV of the Code.

9. Sections 5(1)(b) and 5(2) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 read as follows:

> 5.(1) Except as hereinafter provided, prosecutions and trials under this Act shall be summary and shall, mutatis mutandis, be governed by the provisions of the Criminal Code relating to summary convictions in so far as such provisions are applicable, whether or not the act constituting the offence charged would be in the case of an adult triable summarily, except that
> (b) the provisions prescribing a time limit for making a complaint or laying an information in respect of offences punishable on summary conviction where no time is specially limited for making any complaint or laying any information in the Act or law relating to the particular case, do not apply to any such proceeding other than a proceeding against an adult, except when an adult is dealt with under section 4 of the Act.
> (2) The provisions of the Criminal Code prescribing a time limit for the commencement of prosecutions for offences against the Criminal Code apply, mutatis mutandis, to all proceedings in the juvenile court.

Section 721(2) of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 721(2) No proceedings shall be instituted more than six months after the time when the subject-matter of the proceedings arose.

10. In re Dureault and Dureault (1952), 14 C.R. 279, 282 (Man.K.B.) per Du Val J.

In a recent decision, the Ontario Provincial Court took a second look at this issue and suggested that if a section of the Criminal Code has been breached, the time limit for commencing prosecutions should be in accordance with the provisions of the Code. The court also held that section 5(1)(b) is applicable to prosecutions based on violations of provincial or municipal statutes and by-laws. Here, the time limit would be that specifically set by the particular enactment. Steinberg J. held that section 721(2) of the Code was not eliminated from consideration by section 5(1)(b) of the Act. It was reinstated into the procedures of the Act since many decisions held that a prosecution was commenced when an information was laid.[11] Thus, since section 723 of the Code indicates that proceedings shall be commenced by the laying of an information, and the authorities indicate that a prosecution is commenced by the laying of an information, the words of section 5(2) of the Act, "commencement of prosecution", mean the same thing as laying of an information.

The dilemma is how to construe two subsections which appear to be in conflict. Steinberg J. offers a solution:

> One way of resolving the contradiction would be to conclude that under the Juvenile Delinquents Act there are no time-limits for laying an information in respect to offences that would otherwise be punishable on summary conviction of the Criminal Code and that the time-limit would only apply to the commencement of prosecution in regard to offences that would otherwise be indictable under the Criminal Code. This, however, would lead to an absurd result, for if a child committed murder there would be a limitation on the prosecution but if he simply committed some minor summary offence there would be no such limit.

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11. R. v. M. and D. (1973), 12 C.C.C.(2d) 441, 443-444 (Ont.Prov.Ct.) per Steinberg, Prov. Ct. J.

> It is my view that it must have been the intent under s. 5(1)(b) to make that section applicable to prosecutions in regard to offences not otherwise under the Criminal Code, and that in regard to those prosecutions under the Juvenile Delinquents Act there is no limitation except that which would be specifically set out in that particular Act.
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> I am thinking of the prosecution of juveniles for violations of the Highway Traffic Act, R.S.O. 1970, c. 202, the Schools Administration Act, R.S.O. 1970, c. 424, and things of that nature, which matters are not in the Criminal Code but may be dealt with under the Juvenile Delinquents Act.[12]

There would seem to be no rational justification for denying children the same protections accorded to adults when exactly the same offence is involved. The statements of Steinberg J. indicate recognition of this principle.

Under the provisions of the Criminal Code, an arrested person must appear before a justice within twenty-four hours.[13] However, no similar provision is contained in the Act. Nor does it appear that the Act can be readily interpreted as incorporating this requirement of the

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12. R. v. M. and D. (1973), 12 C.C.C. (2d) 441, 444 (Ont. Prov. Ct.) per Steinberg, Prov. Ct. J.

13. Section 454(1) of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 454.(1) A peace officer who arrests a person with or without warrant or to whom a person is delivered under subsection 449(3) shall cause the person to be detained in custody and, in accordance with the following provisions, to be taken before a justice to be dealt with according to law, namely:
> (a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and
> (b) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible.

Criminal Code in so far as the arrest of juveniles is concerned. It is submitted that there should be an obligation to bring young persons promptly before the court.[14]

In some instances, after the information has been sworn, it will be necessary to hold the child in detention prior to his hearing. This practice includes young people who are considered dangerous to themselves or others, run-aways, and children being held pending action in another jurisdiction. While provisions for bail are included in the Act,[15] the decision to release the child remains a matter entirely for the discretion of the presiding judge. The Act sets down clear guidelines for the detention of juveniles prior to their court appearance;[16] but the lack

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14. Department of Justice Committee on Juvenile Delinquency, supra, footnote 6, p. 118.

15. Section 15 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 15. Pending the hearing of a charge of delinquency the court may accept bail for the appearance of the child charged at the trial as in the case of other accused persons.

16. Sections 13 and 14 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 read as follows:

> 13.(1) No child, pending a hearing under this Act, shall be held in confinement in any county or other gaol or other place in which adults are or may be imprisoned, but shall be detained at a detention home or shelter used exclusively for children or under other charge approved of by the judge or, in his absence, by the sheriff, or, in the absence of both the judge and the sheriff, by the mayor or other chief magistrate of the city, town or county or place.
>
> (2) Any officer or person violating subsection (1) is liable on summary conviction before a juvenile court or a magistrate to a fine not exceeding one hundred dollars, or to imprisonment not exceeding thirty days, or to both.
>
> (3) This section does not apply to a child as to whom an order has been made pursuant to section 9.
>
> (4) This section does not apply to a child apparently over the age of fourteen years who, in the opinion of the judge, or, in his absence, of the sheriff, or, in the absence of both the judge and the sheriff, of the mayor or other chief magistrate of the city, town, county or place, cannot safely be confined

of proper facilities in many areas of the country renders these provisions less than useful.

In any event, the detention of juveniles has taken on several aspects which were obviously never intended. All too often, detention has been used for the convenience of the police or an agency conducting a social investigation for the court, rather than for the good of the child. In some areas, detention is used as a punitive device by the police and occassionally by juvenile court judges; juveniles are placed in detention and then released without a charge being brought.[17] Detention should only be used to ensure that the child will appear in court to answer the allegations against him; it must not be used, and there is no legal authority for such use, as a sanction prior to an adjudication of delinquency.

It should be noted that while children in detention are usually separated from adults, there is little or no effort to separate different types of children, some of whom will obviously have a very detrimental

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in any place other than a gaol or lock-up.
14.(1) Where a warrant has issued for the arrest of a child, or where a child has been arrested without a warrant, in a county or district in which there is no detention home used exclusively for children, no incarceration of the child shall be made or had unless in the opinion of the judge of the court, or, in his absence, of the sheriff, or, in the absence of both the judge and the sheriff, of the mayor or other chief magistrate of the city, town, county or place, such course is necessary in order to ensure the attendance of such child in court.
(2) In order to avoid, if possible, such incarceration, the verbal or written promise of the person served with notice of the proceedings as aforesaid, or of any other proper person, to be responsible for the presence of such child when required, may be accepted; and in case the child fails to appear, at such time or times as the court requires, the person or persons assuming responsibility as aforesaid, shall be deemed guilty of contempt of court, unless in the opinion of the court there is reasonable cause for such failure to appear.

17. Department of Justice Committee on Juvenile Delinquency, supra, footnote 6, p. 116-117.

effect on those who are held simply because there is no other place for them.

It is apparent that before a child ever appears in juvenile court, he has inevitably been subjected to the personal whims and preferences of various individuals who are, for the most part, left to their own devices. Once the child makes his appearance, he will surely have a very clear idea of exactly what has been happening to him and he is unlikely to expect the juvenile court to treat him any differently. Such observations are usually confirmed as the child is subjected to unbridled discretion purportedly exercised in the name of justice and his own best interests.

CHAPTER SEVEN

JUDGES AND LAWYERS IN THE JUVENILE COURT

The focal point and backbone of Canada's juvenile justice system is the juvenile court judge. While most provinces have produced one or two judges of exceptional ability, a great number of judges are simply not qualified to handle their assigned tasks. Unlike many other jurisdictions, in Canada, no professional conditions of qualification are by law required of persons appointed as juvenile court judges. Persons selected in the past have had experience in the business world as well as in fields such as social work, law, divinity, psychology and police work.[1]

Although higher courts have, as a general rule, refrained from comment on the qualifications of juvenile court judges, Wilson J. of the British Columbia Supreme Court felt compelled to express his frustration. He was concerned with an appeal from a decision of a juvenile court judge untrained in law. Wilson J. pointed out that an ordinary citizen, and even professional criminals, have available to them costly and elaborate courts with a trained judge and competent Crown counsel. Yet, for a trial which could shape the future of a fifteen year old boy, the services of an untrained judge were considered adequate.[2] Surely, the duties and

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1. Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada, (Ottawa, 1965), p. 131.

2. R. v. Tillitson (1947), 89 C.C.C. 389, 390-394 (B.C.S.C.) per Wilson J. A recent study indicates that the situation has not improved: "Since no special qualifications or terms of office are required there is wide variation in the educational standards, training and background of the judges of the juvenile and family courts in Ontario." McRuer, Hon. James Chalmers, Commissioner, Royal Commission Inquiry into Civil Rights, Volume II, (Toronto, 1968), p. 558.

responsibilities of the juvenile court are as vital and far-reaching as those of any court in Canada.

In many parts of Canada, a county court judge or local magistrate performs juvenile court duties on a part-time basis. This situation is entirely unsatisfactory since they would find it difficult, or impossible, to adjust their approach to the specialized philosophy of the juvenile court in the afternoon when, on the morning of the same day, they were involved in the trial of an adult. A magistrate functioning within the framework of an adversary system under strict and formal rules requiring proof beyond a reasonable doubt and where punishment must be a consideration, is engaged in an inquiry of an entirely different sort from one in which he seeks solutions where these attributes are not predominate features.[3] This is an extremely important consideration because where the two functions are performed by the same person, there is a tendency to neglect juvenile cases, which are often more time consuming.[4]

The solutions to these problems are extremely complex. A good layman is likely to become a much better juvenile and family court judge than a poor lawyer who has obtained the appointment as a political favour. On the other hand, it is an unjustified encroachment on the civil rights of an individual to have his legal rights determined by a judge who is not adequately trained in the law.[5]

It has been suggested that Canada adopt the European system of

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3. McRuer, supra, footnote 2, p. 561.

4. Department of Justice Committee on Juvenile Delinquency, supra, footnote 1, p. 131.

5. McRuer, supra, footnote 2, p. 562.

appointing juvenile court judges.[6] In Europe, judges are trained as career judges; they are not appointed from the bar as in Canada. It is submitted that actual previous practice of law is a great asset to a juvenile court judge. However, in addition to this experience, all juvenile court judges should have an extensive knowledge of the social sciences. Special training programmes should be developed. In addition, periodic consultation sessions involving judges, provincial authorities, lawyers, police, and behavioural scientists would allow valuable information flow and provide access to new trends and developments in the law and social sciences.

At present, may of our juvenile court judges are put in the rather uncomfortable position of being forced to wear several hats at once. They are forced, in some instances, to act as defence lawyer, Crown attorney and judge. It is not unusual to see a judge cross-examining police officers, defendants and witnesses as well as deciding on the admissibility of evidence, often after it has been given.[7] This situation occurs because the great majority of children who appear in juvenile court are not represented by counsel. It is not clear whether this is because parents are unaware of the right of the child to have counsel, or cannot afford to retain counsel, or feel they do not want or need counsel.[8] In some instances, the child is represented by a probation officer; this is clearly unsatisfactory. A probation officer lacks many of the fundamental skills a lawyer possesses and can employ in judicial proceedings. The probation officer represents a punishing authority; the child may be hesitant to confide in him. Further,

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6. McRuer, supra, footnote 2, p. 562.

7. Little, W.T., "A Guarantee of the Legal Rights of Children Through Legal Aid" (1970), 4 Gazette 217, 233.

8. Department of Justice Committee on Juvenile Delinquency, supra, footnote 1, p. 143.

the close relationship between the probation officer and the juvenile court judge may cause the probation officer to accept the methodology of the court as being in the best interests of the child, either out of apprehension of incurring the judicial displeasure of a person with whom he must work, or else by his habitual acquiescence in common practices of the court of which he is an officer.[9]

Quite often the probation officer may not know the accused or even have conversed with him prior to the hearing. Yet, in most cases, the judge is forced to rely exclusively on the probation staff for any information about the child; he often simply rubber stamps the findings and recommendations of the probation officer. If the probation staff has conducted research into the juvenile's background, there are even more serious considerations to be taken into account. This information may be used as evidence, or even submitted to the judge out of court. The rationale for such action is that it is in the best interests of the child. It has been suggested that the investigation conducted by the probation officer, under these circumstances, may be an invasion of the child's civil rights.[10] Surely, this procedure is inconsistent with the proper administration of justice; background information which is not properly before the judge until after a finding of delinquency is made is sometimes received prior to or during the adjudication stage of the proceedings.

The Juvenile Delinquents Act states that is the duty of the

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9. Chapman, P. B., "The Lawyer in Juvenile Court: A Gulliver Among Lilliputans" (1971), 10 Western Ont. L. Rev. 88, 91.

10. Ibid, p. 92.

probation officer to represent the interests of the child in court.[11] It seems most unusual, therefore, that the accepted practice in most juvenile courts is for a police officer or a probation officer to act as Crown counsel. One person should not be expected to perform inconsistent functions; in reality, the probation officer's primary responsibility is to the court, not to the child.[12]

Canadian courts have had occasion to comment on this unusual situation and suggest that the presence of properly trained Crown counsel is clearly preferable to the use of police or probation officer.[13] The Act is an unusual and difficult statute. Altogether too many points arise in a prosecution under the Act to ensure that justice will be done by a judge, often untrained in the law, particularly if unassisted by counsel. Thus, a child's fate is often left in the hands of an untrained judge, inappropriate Crown counsel and the whims of a probation officer.

In the writer's opinion, defence counsel has a vital role to play in the juvenile court. However, many authorities express grave misgivings at the prospect of defence counsel taking an active part in the proceedings. They fear entrenchment of rigid adversary processes and the appearance of special prosecutors. One writer suggests that a juvenile court prosecutor, responding to challenging counsel for the defence, may so modify the nature of the court as to undermine the rehabilitative goals of the present informal inquisitorial

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11. Section 31(b) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 31. It is the duty of a probation officer
> (b) to be present in court in order to represent the interests of the child when the case is heard.

12. Department of Justice Committee on Juvenile Delinquency, supra, footnote 1, p. 142.

13. R. v. H. (Hankins) (1955), 20 C.R. 407, 409 (B.C.S.C) per Manson J.

system.[14]

It has also been argued that active participation by defence counsel may deny the child access to much needed help. This position suggests that it would not be for the good of any child to have a delinquency charge against him dismissed because of his being represented by an astute attorney; the child might be given a wrong impression and further delinquency might result.[15] These comments assume that the juvenile court actually helps children and is able to offer adequate treatment facilities if required; such an assumption is, at best, tenuous.

If a child's parents have not retained a lawyer, the normal practice is for the judge to advise them of this right when they appear in court; technically, under our law, a child, not being sui juris cannot even retain counsel.[16] However, the parents are also usually informed that if they wish to have counsel it will be necessary to adjourn the hearing. Rather than risk the added inconveience or the loss of another day's work, the parents sometimes declare to the court that the assistance of counsel is not required.[17]

When defence counsel appears, his efforts on the child's behalf generally meet with frustration. It is understandable that where a tribunal and its ancillary services are supposedly acting only in the best interests of those who are brought before it, the defence lawyer is necessarily cast

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14. Dootjes, I., Erickson, P. and Fox, R.G., "Defence Counsel in Juvenile Court: A Variety of Roles" (1972), 14 Can. J. Corr. 132, 133.

15. Garrett, Hugh D., "Criminal Responsibility of Infants" (1966), 5 Western L. Rev. 97-99.

16. Steinberg, D.M., "The Young Offender and the Courts" (1972), 6 Rep. Fam. Law 86, 90.

17. Department of Justice Committee on Juvenile Delinquency, supra, footnote 1, p. 143.

in the role of an obstructionist. Some judges expect the attorney to assume a role in the juvenile court different from that which he might play in adult courts. The use of technical legal objections, in the case of a child apparently needing care, is frowned upon; counsel is expected to act as the servant of the court in the process of ascertaining the child's needs. This may entail actively encouraging his client to confess. Defence counsel is confronted by the paradox that, at the adjudicatory stage, in an informal inquisitorial court, an aggressive adversary attitude may well harm his client's interests.[18] Despite the good intentions of all those involved, it appears that the child often becomes the victim of competing philosophies rather than the beneficiary of a system designed to promote his best interests and those of the community.

Juvenile legislation was introduced in Canada as an attempt to afford children safeguards in addition to those already possessed and not to diminish them. Thus, since the right to counsel is founded on the incompetence or inability of the man on the street to defend himself in court, it follows that there is an even greater right to counsel when applied to juveniles because of their greater incompetence and ignorance.[19]

Canada's system of criminal justice assumes an ability on each side, that of the defence as well as the Crown, to present its case as fully as possible.[20] If we hope to retain the respect of juveniles caught up in the system, lawyers must become involved. Since there is a judicial process

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18. Fox, R.G., "The Young Offenders Bill: Destigmatizing Juvenile Delinquency?" (1972), 14 Criminal L.Q. 172, 203.

19. Wang, K., "The Continuing Turbulence Surrounding the Parens Patriae Concept in Juvenile Courts" (1972), 18 McGill L.J. 219, 418.

20. Department of Justice Committee on Juvenile Delinquency, supra, footnote 1, p. 142.

occurring, and as a consequence thereof, a disposition being made, lawyers should be present to represent the child and the State.[21] This representation will ensure that the child receives a proper judicial consideration, and a disposition that is truly in his own best interests and those of society. The lawyer's role as a protector of childrens' rights and welfare in our juvenile courts is a most important step forward in the judicial process of our court system, and should assure those who come to our courts that justice is not only done but appears to be done effectively and efficiently.[22]

There is no rational justification for treating children as second-class citizens. A juvenile is as entitled as an adult to the protection of the law, and the presence of counsel is an essential safeguard in a court which traditionally sits in camera and whose processes are far from being governed by judicial principles.[23] It is necessary to ensure that the theory of the protection of the child will not be used to eliminate his basic civil rights.[24] Surely, a finding of delinquency, with all the

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21. Chapman, supra, footnote 9, p. 90.
Some courts have suggested that the Crown is not a necessary party to the proceedings: "Counsel for the applicant took formal objection to the informant opposing the application and cited cases in which it was held that counsel for an informant has no status in criminal proceedings. The Crown is not, necessarily, a party to a proceeding in a Juvenile Court. In my view it is more fitting for the informant to appear, by counsel, before this Court and endeavour to uphold the validity of the information than for the Judge of the Juvenile Court to do so." Ex parte Grey (1959), 123 C.C.C. 70, 71 (N.B.C.A.) per Ritchie J.A.

22. Little, supra, footnote 7, p. 228.

23. Fox, supra, footnote 18, p. 204.

24. Canadian Corrections Association, "Report of the Committee established to consider child welfare and related implications arising from the Department of Justice Report on Juvenile Delinquency" (1968), 10 Can. J. Corr. 480, 482.

powers of disposition incidental thereto, is as significant, from the point of view of both the child and society, as is, for example, the trial and disposition of a speeding case against an adult.[25]

The urgent need for legal counsel in juvenile court is best illustrated by the fact that approximately ninety-five to ninety-nine per cent of the children charged plead guilty.[26] Children have often admitted the commission of delinquent acts which, when studied in retrospect by legally trained persons, indicates they should have pleaded not guilty, and would have done so if they had obtained even a modicum of counsel from a lawyer.[27]

Canadian courts have spoken in favour of the presence of defence counsel; however, there is some doubt that lawyers may appear as of right in the juvenile court.[28] Adamson, C.J.M. of the Manitoba Court of Appeal stated, "Mr. Crawford, as counsel for this child, was in court as of right and not on sufferance".[29] Unfortunately, this comment was made in a dissenting opinion and the majority did not deal with the issue of the child's right to counsel. The case went to the Supreme Court of Canada on appeal,[30] but this issue was not considered.

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25. Department of Justice Committee on Juvenile Delinquency, supra, footnote 1, p. 142.

26. Chapman, supra, footnote 9, p.90.

27. Little, supra, footnote 7, p. 222.

28. Bowman, D.E., "Transfer Applications"(1970), Pitblado Lect.78,82.

29. R. v. X. (1958), 28 C.R. 100, 111 (Man. C.A.) per Adamson, C.J.M. He based the right to counsel for juveniles on section 737(1) of the Criminal Code, R.S.C. 1970, c. C-34 which reads as follows:

> 737(1) The prosecutor is entitled personally to conduct his case, and the defendant is entitled to make his full answer and defence.

30. Smith v. R., [1959] S.C.R. 638.

Decisions such as R. v. T.[31] and R. v. H. (Hankins)[32] have simply expressed a preference for qualified Crown and defence counsel without setting down any specific rules. There is no suggestion that counsel must appear; in fact, quite the opposite is true. In the case of Re P.,[33] Zuber J. of the Ontario High Court noted that the child's parents had spoken to duty counsel and had elected to proceed without a lawyer. In his opinion, while there was a right to counsel, there was no provision in our law that a conviction or any adjudication in the absence of counsel was by that fact void.

It is submitted that, in the case of juveniles, such provision should be made. At present, the lofty phrase, "right to counsel", is meaningless in the context of Canada's juvenile justice system. The child is, in most cases, at the mercy of his parent's discretion; in the first place, they may either hire a lawyer or apply for legal aid. The decision will be based on their assessment of the cost involved or whether they feel the child really requires such services. Secondly, they could decide to waive the child's "right to counsel". It is not yet decided whether the child can have any influence on this decision. The general consensus is that the child should be the one to waive the "right to counsel". Some writers go further and state that a child can not effectively waive any rights, and therefore must have counsel assigned.[34] The latter position should be adopted since it is the child, and not the parents, who will bear the court's disposition and the resultant stigma.

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31. R. v. T. (1947), 89 C.C.C. 389 (B.C.S.C.)

32. R. v. H. (Hankins) (1955), 20 C.R. 407 (B.C.S.C.)

33. Re P., [1973] 2 O.R. 818, 819 (H.C.J.) per Zuber J.

34. Chapman, supra, footnote 9, p. 98.

Canada's hesitancy in introducing a system to provide counsel for children is directly opposed to the trend in most other countries with highly developed juvenile justice systems. Legal aid schemes, which are generally not even adequate in relation to adult offenders, do not ordinarily extend to proceedings in juvenile court in many provinces. On the other hand, in a number of European countries, free legal aid is available in juvenile court; in France, Italy and the Netherlands a juvenile must be represented by counsel.[35]

Because of the special position of children and the confusion surrounding waiver of counsel, Canada should move towards a system of mandatory representation. There will be difficulties with any such system, either private or public. There are obvious economic restrictions for many families and public defender schemes have also encountered setbacks. One of the unfortunate features of both the law guardians and public defender systems in the United States is that in both cases the attorneys are largely permanent members of the court. This situation engenders a relationship between police, judge, and prosecutor that is not always in the best interests of justice. The public defender system of California, by rotating its deputies approximately every six months, has attempted to mitigate this possibility.[36]

While some form of representation could be developed, the biggest problem facing its implementation will be the role of counsel once he enters the courtroom. It is submitted that any lawyer appearing as defence counsel before a juvenile court is bound to present every defence that the law of the land permits to the end that no person may be deprived of his liberty but by

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35. Department of Justice Committee on Juvenile Delinquency, supra, footnote 1, p. 144.

36. Little, supra, footnote 7, p. 222.

due process of law. The rationale for this position is succinctly stated by Chapman:

> It is submitted that when counsel enters the juvenile court, he should use every legal technique that is available, in defending the juvenile client. While such a position may be in direct opposition to the basic philosophy of the juvenile courts, it is submitted that that is not the concern of the lawyer. He is bound by the ethics of his profession...The argument that the "best interests of the child" demand any less representation or defense than would be expected in any "adult" court is without substance. If the legislature had wished to make "helping" the child (which "best interests" really means) a ground for gaining jurisdiction, they would have so directed. Instead, they set up the requirement that judicial authority was authorized only when there had been a proper judicial determination of the acts set out as offences under the legislation. This determination was made subject to, and dependant on, the proper regard for the due administration of justice. What is due administration of justice in any other court cannot be less so in the juvenile court, without legislative authorization. Therefore, if this "legalistic" philosophy of counsel is untenable, it is up to the legislature to alter it, and until such time as this is done, counsel should present each and every defense available, no matter if it is "technical" or not.[37]

Competent counsel's contribution will not only serve the cause of justice but may also help create a meaningful experience for the child and his parents; this experience is a vital component of any long-term success in the prevention of crime by young people. The lawyer can help interpret the court and its procedure to both the parents and the child. He can facilitate the fact-finding function of the court. Further, counsel may help instill in the child a feeling that he has both the rights and obligations of an adult. In some situations, counsel may be able to direct the child to another, more appropriate agency, and with the Crown's consent, have the charge withdrawn

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37. Chapman, supra, footnote 9, p. 103.

or dismissed. He may also be able to formulate some alternative plan for the child that is a solution to the problem at hand, but does not require a court appearance.[38]

It has been suggested that lawyers should withdraw after a determination of delinquency has been reached.[39] In an adult court, it is rare indeed to find a lawyer who leaves when his client is found guilty. Instead, counsel puts forward facts in mitigation or explanation of the defendant's conduct.[40] It is submitted that the need for such participation by defence counsel is equally important in the juvenile court. Information not previously before the court could be presented by counsel, thereby assisting the judge to determine an effective and just disposition.

While it is important to note that the protection of legal rights does not flow automatically from the lawyer's presence,[41] most of the fears of those opposed to the presence of qualified counsel have proven groundless. Erickson has shown, for example, in a recent study in Toronto, that the presence of lawyers has not created a "mini-adult court."[42]

Experience in other jurisdictions indicates profound results when lawyers are involved in the juvenile justice process. In New York State, increased appearances by lawyers reduced the incidence of temporary detention

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38. Chapman, supra, footnote 9, p.104-105.

39. "To be truly effective, the lawyer might assume his usually accepted role of advocate at the intake and adjudicatory stages, but not at the dispositional stage when he should assist the court in deciding what is best for rehabilitation of the juvenile". Wang, supra, footnote 19, p.426.

40. Chapman, supra, footnote 9, p.106.

41. Erickson, P., "The Defense Lawyer's Role in Juvenile Court" (1974), 24 U. of T. L.J., Volume 2, 126, 144.

42. Ibid, p. 146.

of children pending the court proceedings. The number of cases which were dismissed for failure of proof rose dramatically.[43] It is not unfair to suggest, therefore, that prior to this development, many children were not receiving the protections accorded to adults. Similarly, Fox reports that court decisions in the United States on the right to counsel and procedure in the juvenile court caused a reduction in the volume of cases brought before the court or handled by its probation staff.[44] Similar developments in Canada would be beneficial. A child's legal rights would be protected in the same manner as the rights of an adult. In addition, the number of children appearing before the juvenile court would be reduced. The decreased work-load would mean that the juvenile court and its ancillary services could concentrate their efforts on those children urgently in need of assistance.

Two conclusions can be drawn from this discussion. First, we must begin immediately to expand and improve existing programmes to develop qualified personnel to act as juvenile court judges. Secondly, competent Crown and defense counsel are required to assist the courts in all phases of the juvenile justice system. Until these needs are met, it is unrealistic to describe the juvenile court as an institution acting in the best interests of the child and the community.

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43. Chapman, supra, footnote 9, p.107.

44. Fox, supra, footnote 18, p.206.

CHAPTER EIGHT

JURISDICTION OF THE JUVENILE COURT

Except in those cases in which a child is transferred to adult court, the juvenile court has exclusive jurisdiction in cases of delinquency.[1] A magistrate who proceeds to deal with a child offender otherwise than as provided by the Juvenile Delinquents Act[2] assumes a jurisdiction vested exclusively in the juvenile court, and the proceedings will be quashed.[3]

Section 39 of the Juvenile Delinquents Act[4] may confer an option

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1. Sections 4 and 8(1) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 read as follows:

> 4. Except as provided in section 9, the juvenile court has exclusive jurisdiction in cases of delinquency including cases where, after the committing of the delinquency, the child has passed the age limit mentioned in the definition"child" in subsection 2(1).
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> 8.(1) When any child is arrested, with or without a warrant, such child shall, instead of being taken before a justice, be taken before the juvenile court; and, if a child is taken before a justice, upon a summons or under a warrant or for any other reason, it is the duty of the justice to transfer the case to the juvenile court, and of the officer having the child in charge to take the child before that court, and in any such case the juvenile court shall hear and dispose of the case in the same manner as if the child had been brought before it upon information originally laid therein.

2. Juvenile Delinquents Act, R.S.C. 1970, c. J-3.

3. See R. v. Roos, [1932] 3 W.W.R. 372 (B.C.S.C.); Re K's Certiorari Application (1964), 43 C.R. 257 (B.C.S.C.) Attorney-General of British Columbia v. Smith (1967), 65 D.L.R. (2d) 82 (S.C.C.).

4. Section 39 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 39. Nothing in this Act shall be construed as having the effect of repealing or overriding any provision of any provincial statute intended for the protection or benefit of children; and when a juvenile delinquent, who has not been guilty of an act that is under the provisions of the Criminal Code an indictable offence,

on a prosecutor or magistrate to proceed either under the Act or provincial legislation intended for the protection or benefit of children. This decision is discretionary and is based on the authorities' conception of the child's best interests. In the case of Re K.'s Certiorari Application,[5] McLean J. of the British Columbia Supreme Court stated that section 39 referred only to those provincial statutes which provided a mode of trial for child offenders. He also suggested that the section was only applicable to those situations in which there was an alleged violation of a provincial statute specifically designed for the protection or benefit of children.

Nevertheless, section 39 presents a conundrum with which McLean J. did not concern himself.[6] The section provides that a "juvenile delinquent... may be dealt with either under such statute" or under the Act. However, there must be a finding of delinquency under the Act before the child may be dealt with under the appropriate provincial legislation. If the purpose of section 39 is to allow the child to be dealt with under provincial legislation rather than under the Act, then that purpose is defeated. This problem has not been the subject of judicial comment; the issue has been ignored. In practice, many children are dealt with under the provisions of provincial legislation even though there has been no finding of delinquency.

The Act states that a "child" is a person who is under the age

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> comes within the provisions of a provincial statute, he may be dealt with either under such statute or under this Act as may be deemed to be in the best interests of the child.

5. Re K.'s Certiorari Application (1964), 43 C.R. 257, 258 (B.C.S.C.) per McLean J.

6. Steele, R., Nelson, C., "The Vagrancy Dilemma, An Empirical Study" (1969), 7 Osgoode Hall L.J. 177, 192.

of sixteen years.[7] This arbitrary line has occasionally brought the juvenile court into disrepute; the cases of R. v. Turner[8] and R. v. Haig[9] are illustrative. At the time of the alleged offence, Haig was a few weeks less than sixteen years of age; Turner was barely over the age limit. Both were charged with the rape of a young nurse in Windsor. Turner, who under the present law was an adult, was tried in the ordinary courts. Haig, a juvenile, appeared initially in juvenile court. The juvenile court judge denied a motion by the Crown to transfer the case to adult court. Haig entered a guilty plea to the rape charge; on a finding of delinquency he was committed to a training school. The training school refused to admit him because at the time of the order of committal by the juvenile court judge he was over the maximum age, sixteen, for admission to an institution of that type. The decision refusing to waive Haig to adult court was affirmed by the High Court on appeal. On further appeal by the Crown to the Ontario Court of Appeal, the decision was reversed. Haig's application for leave to appeal to the Supreme Court of Canada was dismissed by that Court.[10] Public outrage, and charges of discrimination, were further compounded by the fact that Turner, the older boy was black.

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7. Section 2(1)(a) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 2(1) In the Act
> (a) "child " means any boy or girl apparently or actually under the age of sixteen years or such other age as may be directed in any province pursuant to subsection (2).

8. R. v. Turner (1970), 1 C.C.C. (2d) 293 (Ont. C.A.)

9. R. v. Haig (1970), 1 C.C.C. (2d) 299 (Ont. C.A.)

10. Green, B., "The Disposition of Juvenile Offenders" (1971), 13 Criminal L.Q. 348, 348-349.

Section 2(2) of the Act[11] makes provision for the raising of the age limit by the Governor in Council. The interpretation of this section has drawn considerable judicial comment in the province of British Columbia. In 1970, the Governor in Council directed, by proclamation, that in British Columbia the word "child" meant any boy or girl apparently or actually under the age of seventeen years; by the same order he revoked a proclamation of 1950 directing that the age limit was eighteen.

In the case of R. v. McEwan,[12] this action was challenged. A seventeen year old boy was charged in Provincial Court with theft and possession of an automobile; he argued that he must be afforded the protection of the Juvenile Delinquents Act since it was not open to the Governor in Council to define a "child" as one under the age of seventeen years. This position found support in the British Columbia Court of Appeal. Robertson J.A. stated that someone reading the words in paragraph (a) of subsection (1), "or such other age as may be directed in any province pursuant to subsection (2)", might well think that there was a choice of two or more ages given by subsection (2). However, in his opinion, careful reading of subsection (2) indicated that the only other age that may be directed is the

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11. Section 2(2) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 2.(2) The Governor in Council may from time to time by proclamation
> (a) direct that in any province the expression "child" in this Act means any boy or girl apparently or actually under the age of eighteen years and any such proclamation may apply either to boys only or to girls only or to both boys and girls, and
> (b) revoke any direction made with respect to any province by a proclamation under this section, and thereupon the expression "child" in this Act in that province means any boy or girl apparently or actually under the age of sixteen years.

12. R. v. McEwan (1971), 15 C.R.N.S. 283 (B.C.C.A.)

age of eighteen years.[13]

The decision was reversed by the Supreme Court of Canada. Judson J. stated that the section did not limit the power of the Governor in Council in the manner suggested by the British Columbia Court of Appeal. In his opinion, the lesser power to define "child" as one under seventeen years of age was to be implied in the larger power to define "child" to mean one under eighteen years of age.[14] In his dissenting judgment, Spence J. stated that it was the intention of Parliament that there should be two ages alone which could apply to the determination of who is and who is not a juvenile, and that those two ages are under sixteen years and under eighteen years.[15] While the majority decision opens the door for even more variation in the application of the statute across the country, it is submitted that neither position is acceptable. Under present legislation, acts committed by children of the same age are regarded as criminal in one province and as delinquent acts in another province; subsequent treatment of the child varies considerably. In the writer's opinion, one maximum age limit should be established throughout Canada.

Section 4 of the Act[16] makes it clear that the juvenile court has jurisdiction when the offence is committed by an accused under the specified age limit; this would include children who are under the age limit at the time of the offence but over the age limit when they come to trial. It would

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13. R. v. McEwan (1971), 15 C.R.N.S. 283, 287 (B.C.C.A.) per Robertson J.A.

14. R. v. McEwan (1972), 18 C.R.N.S. 138, 140 (S.C.C.) per Judson J. (Martland, Ritchie and Pigeon J.J. concurring). See also R.v.Agin (1972), 6 C.C.C. (2d) 60 (S.C.C.).

15. Ibid, p. 141 per Spence J. (Hall and Laskin J.J. concurring).

16. Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 4, supra, footnote 1.

also include situations in which the offence was not discovered for a considerable period of time after the youth passed the age limit.[17] The Act confers exclusive jurisdiction over any person who commits an offence on his or her sixteenth birthday.[18]

Additionally, the juvenile court may try a married person so long as he is under the maximum age requirement of a particular province. Lachapelle J., in the case of R. v. Leveille,[19] held that the statute makes the age of the accused the only determining factor of jurisdiction. In his opinion, the term "boy or girl" in the text of the statute is not incompatible with the state of marriage; a boy or girl is either married or unmarried.

Finally, it is interesting to note that under section 33(1),[20] the juvenile court has jurisdiction over a person under sixteen years of

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17. Ex p. Cardarelli, [1929] 2 W.W.R. 223 (B.C.S.C).

18. R. v. Harvan (1956), 116 C.C.C. 311 (Ont. Mag. Ct.).
Magistrate Jasperson adopted the wording of Section 3(1) of the Criminal Code, R.S.C. 1970, c. C-34 which reads as follows:

> 3.(1) For the purposes of this Act a person shall be deemed to have been of a given age when the anniversary of his birthday, the number of which corresponds to that age, is fully completed, and until then to have been under that age.

19. R. v. Leveille (1959), 30 C.R. 391, 391-392 (Que. Mun. Ct.) per Lachapelle J.
See also Procureur General v. Cour du Bien Etre Social et. al. (1971), 14 C.R.N.S. 384 (Que. C.A.).

20. Section 33(1) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 33.(1) Any person, whether the parent or guardian of the child or not, who, knowingly or wilfully,
> (a) aids, causes, abets or connives at the commission by a child of a delinquency, or
> (b) does any act producing, promoting, or contributing to a child's being or becoming a juvenile delinquent or likely to make any child a juvenile delinquent,
> is liable on summary conviction before a juvenile court or a magistrate to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years, or to both.

age charged with "contributing to delinquency".[21]

It is imperative that a juvenile court judge determine the age of the child; without such determination he lacks jurisdiction. Coady J., in the case of R. v. Crossley,[22] stated that failure to prove the age of the accused was much more than an irregularity; it denied jurisidiction to the juvenile court. Appeal courts have regarded the matter of proof of age to establish jurisdiction of the juvenile court as one requiring either legal proof upon oath, or by a finding upon appearance of the child, that such child is apparently under the specific age.[23]

Failure to establish the age of the child normally results in a direction for a new trial; however, there have been exceptions. In the case of R. v. H. (Hankins),[24] Manson J. referred to a number of cases in which a new trial was not granted. He held that the decision must rest upon the particular circumstances of each case.

An admission or statement under oath as to age by the accused will not give jurisdiction to the juvenile court. Wootton J., in the case of R. v. Hicks,[25] stated that such evidence was not valid proof of the fact of the age of the juvenile. Further, in this particular case, the judge of the juvenile court did not make a finding of apparent age as authorized by the Act. Wootton J. held that the juvenile court acted without jurisdiction and ordered a new trial.

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21. R. v. P.C.M. (1971), 3 C.C.C. (2d) 266 (B.C.S.C.).

22. R. v. Crossley (1950), 10 C.R. 348, 348 (B.C.S.C.) per Coady J.

23. R. v. Harford (1965), 43 C.R. 415, 417 (B.C.S.C.) per Wootton J.

24. R. v. H.(Hankins) (1955), 20 C.R. 407, 409 (B.C.S.C.) per Manson J.

25. R. v. Hicks, [1969] 4 C.C.C. 203, 204 (B.C.S.C.) per Wootton J. See also Re Kelly (1929), 51 C.C.C. 113 (N.B.S.C.); E. v. R. (1965), 53 W.W.R. 114 (Albt. S.C.); R. v. McLean, [1970] 2 C.C.C. 112 (N.S.S.C.).

In many instances, a young person appearing in juvenile court has lied about his age, claiming to be much older than he actually is. He has been subsequently tried and convicted by a magistrate; the child's lawyer has then made application for certiorari to quash the conviction on the ground that the magistrate was without jurisdiction since the boy should have been tried in juvenile court. The first reported case to consider this question was heard in 1952. Coady J., in the case of Ex Parte Carr,[26] suggested that in these circumstances the juvenile court judge should have adjourned the proceedings to permit inquiries to be made instead of accepting the statement of the boy. He quashed the conviction; however, this did not prevent the Crown from taking proceedings against the accused under the Act. Coady J. commented that the accused ought not to secure any advantage resulting from the mis-statement made by him which induced the magistrate to proceed as he did.

The juvenile court judge may find that a person is "apparently" under the age limit and thereby assume jurisdiction to hear his case. However, there is no authority for the proposition that a person "actually" under the age limit can be dealt with by a magistrate merely because the person appeared to the magistrate to be "apparently" over the age limit.[27] Thus, there is no room for dual jurisdiction in view of the use of the word "exclusive" in section 4 of the statute.[28]

The proper construction of the phrase "apparently or actually"

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26. Ex Parte Carr (1952), 103 C.C.C. 283, 284 (B.C.S.C.) per Coady J.

27. R. v. Pilkington (1969), 5 C.R.N.S. 275, 276 (B.C.C.A.) per McLean J.A.

28. Ibid, p. 277 per Bull J.A.

requires that it be read disjunctively for were it not, it would be impossible for any court to exercise jurisdiction unless the actual age was proved and it coincided with the apparent age.[29] Acceptance of this approach has significant ramifications. Jurisdiction does not always depend on actual age. In a case where the evidence shows only that the boy is "apparently" under the age limit, the jurisdiction of the juvenile court is established. If, after the court has adjudicated, it is learned that the boy was not "actually" under the age limit, that discovery will not establish that the court did not have jurisdiction.[30]

In summary, any person under the specified age limit will appear in juvenile court unless there is a formal transfer order to an adult court. Someone "apparently" over the age limit but "actually" under it, will also appear in juvenile court; it is possible, however, for someone "actually" over the age limit to be tried in juvenile court if it is determined that he or she is "apparently" under that limit. It is submitted that actual age should be established before the court properly assumes jurisdiction. While considerable inconvenience may result, this suggestion avoids the potential for abuse found in the wording of the section. Rather than forcing an investigation, a juvenile court judge may use the phrase

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29. R. v. Pilkington (1969), 5 C.R.N.S. 275, 281 (B.C.C.A.) per Robertson J.A.

Contra: "In the definition of 'child', the essential words are 'apparently or actually' under the age specified. This expression must necessarily mean 'apparently and actually' for otherwise an offence could be committed with a person over 21 years who was 'apparently' under 18. This is obviously not the intention of the statute." R. v. Rees, [1956] S.C.R. 640, 647-648 (S.C.C.) per Rand J. This statement was obiter dicta and does not mean that in cases of prosecutions against children the Act only applies when they are children in fact and appearance; this decision concerned a charge of "contributing to delinquency" under section 33(1)(b) and therefore has reference to an entirely different situation.

30. Ibid, p. 282 per Robertson J.A.

"or apparently" to assume jurisdiction over young people who would otherwise appear in adult court.

Of course, any child who lies about his age and is convicted in adult court is in very serious trouble; the court is not bound to allow the introduction of new evidence of age in every case and the conviction may stand. This is precisely what happened in the case of R. v. Marcille[31] where applications for leave to appeal against conviction and for leave to introduce new evidence were dismissed. Robertson J.A. of the British Columbia Court of Appeal considered three factors: (1) when the offence was committed, the appellant was less than six months short of eighteen years of age; (2) had the appellant been brought before a juvenile court, he probably would have been transferred to adult court; (3) the appellant had deliberately deceived the court concerning his age and misled it into exercising ordinary criminal jurisdiction over him.[32] This situation could not occur if the courts were bound to determine the actual age of the child.

The courts have also established that unless the parent of a child charged with committing a delinquent act is served with written notice of the charge, as required by section 10 of the Act,[33] the juvenile court acts

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31. R. v. Marcille (1970), 11 C.R.N.S. 288 (B.C.C.A.)

32. Ibid, p. 293 per Robertson J.A. In an annotation to this case at (1970), 11 C.R.N.S. 294, Cecil O. D. Branson argues that this decision is incorrect since a judge cannot give himself jurisdiction by wrongly finding as facts, the existence of conditions essential to his jurisdiction. The adult court had no legal authority to assume jurisdiction on the basis of the boy's misrepresentation concerning his age; any person under the specified age limit must appear in juvenile court unless there is a formal transfer order to an adult court.

33. Section 10 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3, reads as follows:

> 10.(1) Due notice of the hearing of any charge of delinquency shall be served on the parent or parents or the guardian of the child, or if there is neither parent nor guardian, or if the residence of the parent or parents or guardian is unknown, then on some near relative, if any, living in the city, town or country, whose whereabouts is known, and any person so served has the right to be present at the hearing.
>
> (2) The judge may give directions as to the persons to be served

without jurisdiction. In the case of Re Wasson,[34] Doull J. of the Nova Scotia Supreme Court stated that the word "served" in the section contemplated a notice in writing. In his opinion, without a written notice, it was not safe for the court to proceed in the absence of the parents. Doull J. held that the want of notice was not a mere irregularity or informality; it was a requirement, the neglect of which might lead to grave abuses. He stated that there may be cases where some other notice would be sufficient; he suggested that if the parent appeared in response to an oral notice, the more formal notice would be held to be waived. Locke J. of the Supreme Court of Canada stated, in the case of Smith v. The Queen,[35] that section 10 required written notice.

There is no automatic waiver of notice where a parent has sent another person to the child's trial. In the case of Re Wasson,[36] the prosecution argued that the mother waived the notice by sending another adult to attend at the juvenile court in her stead. Doull J. rejected this position. In his opinion, the juvenile court must be satisfied that the mother had knowledge of the essential ingredients of the notice; this knowledge was not established. The fact that another adult attended the hearing was found to be irrelevant.

Canadian courts have demonstrated determination to protect the parent's right to be present at the hearing; some judges go further and

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under this section, and such directions are conclusive as to the sufficiency of any notice given in accordance therewith.

34. Re Wasson, [1940] 1 D.L.R. 776, 777-779 (N.S.S.C.) per Doull J. See also R. v. McLean, [1970] 2 C.C.C. 112 (N.S.S.C.).

35. Smith v. The Queen, [1959] S.C.R. 638, 648 per Locke J.

36. Re Wasson, [1940] 1 D.L.R. 776, 778 (N.S.S.C.) per Doull J.

argue that the presence of an adult is necessary to enable the case of the child to be presented.[37] However, the question of notice has raised several problems which have not yet been discussed by the courts. For example, they have not defined "due notice". It is submitted that there should be an obligation to notify the parent when the child is taken into detention or when waiver to the adult court is contemplated. In fact, the parents should be notified of every step in the proceedings that may affect the child's liberty.[38] A judge should also be authorized under the Act to permit substituted service of notice where necessary, or to order in certain specified situations that notice be served on some other suitable adult relative or advisor who would be entitled to appear at the hearing on the child's behalf.

Similarly, there are a number of problems related to the scope of the territorial jurisdiction of the juvenile court. The Act sets down certain rules which govern the situation when a child, against whom a warrant has issued out of juvenile court, can no longer be found within that jurisdiction; the warrant will simply be endorsed in the jurisdiction in which the child is found and executed therein.[39]

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37. Re Wasson, [1940] 1 D.L.R. 776, 778 (N.S.S.C.) per Doull J.

38. Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada, (Ottawa, 1965), p. 145-146.

39. Sections 17(3), 17(4) and 17(5) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 read as follows:

> 17.(3) Except as provided in subsection (5), if a person, whether a child or an adult, against whom any warrant has issued out of a juvenile court cannot be found within the jurisdiction of the juvenile court out of which the warrant was so issued, but is or is suspected to be in any other part of Canada, any judge or deputy judge of a juvenile court within whose jurisdiction such person is or is suspected to be, or if there is no juvenile court having jurisdiction in such place, then any justice within whose jurisdiction such person is or is suspected to be, upon proof being made on oath or affirmation of the handwriting of the

Although Canadian courts have not yet dealt specifically with this issue, there are obiter dicta which suggest that under no circumstances will a judge of the juvenile court have jurisdiction outside the territory to which he is appointed. In a dissenting opinion, Adamson, C.J.M. referred to sections 720(1)(g) and 733 of the Criminal Code[40] and stated that these provisions made it clear that the juvenile court was an inferior court and that a juvenile judge had jurisdiction only within the territory or district to which he was appointed.[41]

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juvenile court judge or other officer who issued the warrant, shall make an endorsement on the warrant, signed with his name, authorizing the execution thereof within his jurisdiction.
(4) Such endorsement is sufficient authority to the person bringing such warrant, and to all other persons to whom the warrant was originally directed, and also to all probation officers, constables and other peace officers of the juvenile court or of the territorial division where the warrant has been so endorsed, to execute the warrant therein and to carry the person against whom the warrant issued when apprehended, before the juvenile court out of which the warrant issued.
(5) Where a child who has been before a juvenile court and is still under the surveillance of such court has been caused by the court to be placed in a foster home outside of the jurisdiction of such court or has been committed by the court to the care or custody of a probation officer or other suitable person or to an industrial school, outside of the jurisdiction of such court, the court may take any action with respect to such child that it could take were the child within the jurisdiction of such court, and for any such purpose any warrant or other process issued with respect to such child may be executed or served in any place in Canada outside of the jurisdiction of such court without the necessity of complying with subsection (3).

40. Sections 720(1)(g) and 733 of the Criminal Code, R.S.C. 1970, c. C-34 read as follows:

720.(1) In this Part
(g) "summary conviction court" means a person who has jurisdiction in the territorial division where the subject-matter of the proceedings is alleged to have arisen.
733. Every summary conviction court has jurisdiction to try, determine and adjudge proceedings to which this Part applies in the territorial division over which the person who constitutes that court has jurisdiction.

41. R. v. X. (1958), 29 C.R. 100, 102 (Man.C.A.) per Adamson, C.J.M.

In the Supreme Court of Canada, Kerwin C.J., in obiter dicta, preferred to base his approach to the problem on what is now section 428 of the Code.[42] Under that provision, the juvenile court would have jurisdiction although the offence charged had been committed outside the territorial limits of the jurisdiction.[43] It is submitted that this position is preferable. Otherwise, as a practical matter, it would be impossible to bring many children before the court. Once charged, they would simply leave the province in which the alleged offence was committed. If this practice became frequent, authorities might be tempted to increase the use of pre-trial detention.

A related matter has recently been considered by the British Columbia Court of Appeal in the case of R. v. Johnsen.[44] Johnsen, a "child" in British Columbia, had committed offences in Alberta and Saskatchewan where, because of the differences in age limits, he was an "adult". The Court had to decide whether he should appear in juvenile court or the ordinary criminal court, as he would had he been apprehended in either of the other two provinces. In a bare majority decision, it was held that Johnsen should appear in juvenile court. Bull J.A. based his decision on

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42. Section 428 of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 428. Subject to this Act, every superior court of criminal jurisdiction and every court of criminal jurisdiction that has power to try an indictable offence is competent to try an accused for that offence
> (a) if the accused is found, is arrested or is in custody within the territorial jurisdiction of the court; or
> (b) if the accused has been committed for trial to, or has been ordered to be tried by
> (i) that court, or
> (ii) any other court, the jurisdiction of which has by lawful authority been transferred to that court.

43. Smith v. The Queen, [1959] S.C.R. 638, 643 per Kerwin C.J.

44. R. v. Johnsen, [1972] 1 W.W.R. 203 (B.C.C.A.)

section 434(3) of the Criminal Code.[45] This decision clearly illustrates the need for a uniform age limit. This simple amendment, in combination with the changes suggested above, would eliminate much of the inconsistency and discrimination inherent in existing legislation.

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45. R. v. Johnsen, [1972] 1 W.W.R. 203, 205 (B.C.C.A.) per Bull J.A. Section 434(3) of the Criminal Code, R.S.C. 1970, c. C-34, reads as follows:

> 434.(3) Where an accused is charged with an offence that is alleged to have been committed in Canada outside the province in which he is, he may, if the offence is not an offence mentioned in section 427, and the Attorney General of the province where the offence is alleged to have been committed consents, appear before a court or person that would have had jurisdiction to try that offence, if it had been committed in the province where the accused is, and where he signifies his consent to plead guilty and pleads guilty to that offence the court of person shall convict the accused and impose the punishment warranted by law, but where he does not signify his consent to plead guilty and plead guilty, he shall if he was in custody prior to his appearance be returned to custody and shall be dealt with according to law.

CHAPTER NINE

THE TRIAL OF JUVENILES

There are several unique features of a juvenile court trial which distinguish it from ordinary criminal proceedings. All trials are conducted *in camera* and the media are expressly forbidden to report the names of the accused.[1] Naturally, this has generated suggestions that the

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1. Sections 12 and 24 of the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3 read as follows:

> 12.(1) The trials of children shall take place without publicity and separately and apart from the trials of other accused persons, and at suitable times to be designated and appointed for that purpose.
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> (2) Such trials may be held in the private office of the judge or in some private room in the court house or municipal building, or in the detention home, or if no such room or place is available, then in the ordinary court room, but when held in the ordinary court room an interval of half an hour shall be allowed to elapse between the close of the trial or examination of any adult and the beginning of the trial of a child.
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> (3) No report of a delinquency committed, or said to have been committed, by a child, or the trial or other disposition of a charge against a child, or of a charge against an adult brought in the juvenile court under section 33 or under section 35, in which the name of the child or of the child's parent or guardian or of any school or institution that the child is alleged to have been attending or of which the child is alleged to have been an inmate is disclosed, or in which the identity of the child is otherwise indicated, shall without the special leave of the court, be published in any newspaper or other publication.
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> (4) Subsection (3) applies to all newspapers and other publications published anywhere in Canada, whether or not this Act is otherwise in force in the place of publication.
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> 24.(1) No child, other than an infant in arms, shall be permitted to be present in court during the trial of any person charged with an offence or during any proceedings preliminary thereto, and if so present the child shall be ordered to be removed unless he is the person charged with the alleged offence, or unless the child's presence is required, as a witness or otherwise, for the purposes of justice.
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> (2) This section does not apply to messengers, clerks and other persons required to attend at any court for the purposes connected with their employment.

press should be allowed to act as a check on arbitrary action by the court.[2] One of the traditional functions of the press has been to alert the public to improper or undesirable practices. It is submitted, therefore, that reporters should be permitted to attend juvenile hearings as of right. They should be permitted to report the evidence adduced at the trial; however, the prohibition against identifying any child before the court, or any child alleged to have committed an offence, should be retained.

Police associations and other organizations have advocated public trials for juveniles; in their opinion this would act as a deterrent to others. This position is not borne out by experience. Judge Litsky states that experimental open hearings in Montana had no deterrent effect on juvenile crime.[3]

Adamson, C.J.M. is one of the few members of the Canadian judiciary to comment on this issue. In the case of R. v. X.,[4] he stated that it is well-settled law that trials, both civil and criminal, shall be held in open court. In his opinion, the crucial issue was to what extent the provisions of the Act abolished or varied this well-established practice of our criminal jurisprudence.

Section 441 of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 441. Where an accused is or appears to be under the age of sixteen years, his trial shall take place without publicity, whether he is charged alone or jointly with another person.

2. Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada, (Ottawa, 1965), p. 141.

3. Litsky, H., "The Cult of the Juvenile Court, 'Justice With Mercy'" (1972), 20 Chitty's L.J. 152, 154.

4. R. v. X. (1958), 28 C.R. 100 (Man. C.A.) per Adamson, C.J.M. (dissenting)

He concluded:

> It is significant that the term "in camera", which is a well known and understood legal phrase, is not used. Section 12, after providing that "trials of children shall take place without publicity", then enacts that such trials shall be held "separately and apart from the trials of other accused persons." Section 12(3) then says precisely what shall not be made public, namely, the name of the child or the parent or guardian or the school. This indicates that the public or the press shall not be excluded. Section 24 enacts that no child shall be present. The implication is that adults may be present. It is to be noticed that no power is given by the Juvenile Delinquents Act to exclude the general public or to hold trials in camera. The only authority that a juvenile court judge has to hold trials in camera is the general one, seldom used, provided by the Criminal Code to exclude the public or certain classes or age groups in the interests of public morality. Sections 427 and 428 of the Criminal Code makes a distinction between "without publicity" and the exclusion of "all or any members of the public". The salutary practice of public trials should not be departed from to any greater extent than the statute specifically requires.[5]

Thus, it is submitted that, under the provisions of the Act, there is no legal basis for in camera trials in juvenile court. However, as a matter of practice, juvenile court judges, purporting to act under the authority of the statute, refuse to open their courts for public viewing. The relevant sections of the statute should be replaced by provisions which allow public trials. In exceptional circumstances, that is, cases involving issues such as the interest of public morals, the maintenance of order or

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5. R. v. X. (1958), 28 C.R. 100, 114 (Man.C.A.) per Adamson, C.J.M. (dissenting).

Section 442 of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 442. The trial of an accused that is a corporation or who is or appears to be sixteen years of age or more shall be held in open court, but where the court judge, justice or magistrate, as the case may be, is of opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the court room, he may so order.

the proper administration of justice, the judge should be authorized to exclude all or any members of the public from the court.

There has been very little experimentation in Canada with the concept of jury trials for juveniles. In British Columbia, in 1969, in one of the few such experiments, a jury of juveniles was used to assist the family court judge in sentencing but not in adjudication. They sat through the case and then submitted their recommendation.[6] While this process may have some educational value for the jury panels, as an approach to justice, it must been seen as a completely futile exercise. Traditionally, the jury has assisted the Court on the matter of adjudication. However, it is somewhat unrealistic to expect children to perform a meaningful role as jurors, either in the adjudication or dispositional stages.

In the writer's opinion, jury trials would disrupt the administration of the present system. On the other hand, although there is no evidence to suggest that a jury will provide a superior fact-finding process, a jury may help to establish procedural safeguards.[7] For example, in some instances, the introduction of jury trials in juvenile court would bring about the necessary separation of the adjudication and dispositional stages. This is crucial since background information, which is not properly before the judge until after a finding of delinquency is made, is sometimes reviewed at the adjudication stage for making the determination.[8] Jury trials might help remedy this unsatisfactory situation. However, on balance, the introduction of jury trials in juvenile court would cause more problems than it would solve.

If a young person needs protection, action should be initiated

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6. Peterson, L.R., "Experiments in the Administration of Justice" (1970), 12 Can. J. Corr. 445, 449.

7. Wang, K., "The Continuing Turbulence Surrounding the Parens Patriae Concept in Juvenile Courts" (1972), 18 McGill J.L. 219, 438.

8. Department of Justice Committee on Juvenile Delinquency, supra, footnote 2, p. 53.

under child protection legislation, not under criminal legislation.[9] Unfortunately, there are those who insist that, if a child needs help, he should get it regardless of whether or not formal proof of delinquency is available. Such an attitude should not guide the juvenile court. When a child appears in juvenile court there must be concern for the standard of proof and "presumption of innocence" rule of our criminal justice system.[10] There is the danger that the inquiry will focus, at the adjudication stage, upon the kind of person that the alleged offender is, rather than upon the specific act that is said to have been done.[11]

Some courts arrange for a psychiatric examination of a child charged with an act of delinquency, or direct that a probation officer conduct an investigation into the child's background, prior to a determination that the child is, in fact, delinquent. This material is then used during the adjudication stage of the proceedings. The Department of Justice Report states that such practices have no basis in law and are a clear

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9. McGrath, W.T., "Some Suggested Amendments to Canada's Juvenile Delinquency Act" (1962), 4 Criminal L.Q. 259, 264.

10. The issue has been recognized by the Canadian Bar Association: "Although the Bill does not specifically say so, we take for granted that the statute includes the presumption of innocence of the young offender and maintains the standard of proof required as being beyond a reason of doubt". Canadian Bar Association, Brief on Bill C-192, (Ottawa, 1971), p. 2.

11. Department of Justice Committee on Juvenile Delinquency, supra, footnote 2, p. 39.

violation of a child's fundamental civil rights.[12] Until the child is found to have committed the act complained of, the juvenile court authorities have no right to infringe the child's right to privacy.

The judge's authority to adjourn a matter sine die has also been abused:

> We have been told that it is not uncommon for juvenile court judges to indicate that they are prepared to adjourn a matter sine die, without proceeding to an actual finding of "delinquency", provided that the child and his parents agree to follow a specified course of action, which may include making restitution or accepting the supervision of a probation officer. But again, there is no authority for action of this kind - and, indeed, the dangers of ad hoc improvisations are apparent. There is, of course, a basic objection to permitting any substantial interference in the life of a child in the absence of a formal adjudication that the child is an offender.[13]

A child, appearing in juvenile court, will find himself in, to most persons of tender age, an intimidating and perhaps hostile environment. While most adults are fearful of a court appearance, few actually receive

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12. Ibid, p. 151. Section 5 of the Act provides that trials under the Act shall be governed by the provisions of the Criminal Code relating to summary convictions. Section 738(5) of the Criminal Code, R.S.C. 1970, c. C-34 provides that a summary conviction court may, at any time before making an order against a defendant, remand the defendant for observation when, based on medical evidence, there is reason to believe the defendant is mentally ill. In the recent case of Wiedeman v. The Queen (Manitoba C.A., unreported, March 19, 1976), provincial legislation, namely section 15 of The Correction Act, R.S.M. 1970, c. C 230, was held ultra vires the provincial legislature, as being in relation to Federal Parliament jurisdiction over criminal procedure. The provincial legislation authorized psychiatric examination of a juvenile, before the juvenile hearing, without requiring medical evidence of mental illness.

13. Department of Justice Committee on Juvenile Delinquency, supra, footnote 2, p. 169.
Section 16 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3, reads as follows:

> 16. The court may postpone or adjourn the hearing of a charge of delinquency for such period or periods as the court may deem advisable, or may postpone or adjourn the hearing sine die.

the kind of treatment which has become commonplace in some juvenile courts. In the case of R. v. B.,[14] the accused juvenile was verbally assaulted by the juvenile court judge. In the opinion of Brown J. of the British Columbia Supreme Court, the language used by the juvenile court judge went beyond ordinary severity and, in being subjected to such exprobation, the juvenile underwent an improper punishment.

Experienced judges agree that every effort must be made to speak in terms which the child can comprehend. Judge Thompson recommends that the judge should constantly ask himself if he has heard from the child and if the child understood.[15] Procedure should be altered to allow meaningful participation by the child during the course of the trial and to ensure protection of his right to understand and be heard. The inevitable community condemnation inherent in an adjudication of delinquency makes it unfair to allow a child to be found delinquent in a proceeding in which he is unable to participate effectively.[16] Since he is unable to participate actively in the proceedings, a child in juvenile court should, perhaps, be considered in a position similar to that of the adult who is found unfit to stand trial.[17]

This inability to communicate creates a critical situation when a child is asked to enter a plea at his hearing. It is incumbent upon the court to ensure that an accused has a full understanding of the offence.

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14. R. v. B. (1956), 25 C.R. 95, 100 (B.C.S.C.) per Brown J.

15. Thompson, G., "The Child in Conflict with Society" (1973), 11 Rep. Family Law 257, 263.

16. Department of Justice Committee on Juvenile Delinquency, supra, footnote 2, p. 50.

17. Ibid, p. 41.

with which he is charged before being asked to plead. There is reason to believe that not all juvenile court judges have been sufficiently conscious of this obligation.[18]

There has been intense debate as to whether or not a judge of the juvenile court may actually accept a plea from a child.[19] The problem was first discussed in 1946. The British Columbia Supreme Court held that a juvenile court should only proceed by way of a plea in appropriate circumstances. Manson, J., in the case of R. v. H. and H.,[20] stated that regard must be had to the age of the child, his mental state and to the nature of the delinquency charged. In his opinion, the court must always be cautious to satisfy itself that the accused understands the offence with which he is charged.

A guilty plea is a technical legal concept. It involves not simply

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18. Ibid, p. 148.

19. Section 736(1) of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 736.(1) Where the defendant appears, the substance of the information shall be stated to him, and he shall be asked,
> (a) whether he pleads guilty or not guilty to the information, where the proceedings are in respect of an offence that is punishable on summary conviction, or
> (b) whether he has cause to show why an order should not be made against him, in proceedings where a justice is authorized by law to make an order.

This section is made applicable to the juvenile proceedings by virtue of section 5(1) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 which reads as follows:

> 5.(1) Except as hereinafter provided, prosecutions and trials under this Act shall be summary and shall, mutatis mutandis, be governed by the provisions of the Criminal Code relating to summary convictions in so far as such provisions are applicable, whether or not the act constituting the offence charged would be in the case of an adult triable summarily.

20. R. v. H. and H. (1947), 88 C.C.C. 8, 17 (B.C.S.C.) per Manson J. Approved in R. v. Wood (1951), 101 C.C.C. 126 (B.C.S.C.).

an admission that a particular act has been committed, but an admission of every essential element of the offence. Usually, the court will ask the child, "Did you do this?" An affirmative response to such a question, while being an admission of specific conduct, may not necessarily represent an admission of all the elements of the offence involved. Further, the form of question tends to constitute an invitation to the child to make a statement concerning the occurrence itself. Thus, the child is sometimes being asked, in effect, to incriminate himself.[21]

This informality is justified as being "in the best interests of the child"; sections 17 and 38 of the Act[22] are cited as proof of legislative intent. In the case of R. v. X.,[23] a juvenile court judge stated the substance of the complaint and information to the accused and asked him, "What did you do?" The juvenile admitted that the charge was true. Coyne J.A. stated that what took place informally in the juvenile court was a proper juvenile court equivalent of procedure in the adult court. In

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21. Department of Justice Committee on Juvenile Delinquency, supra, footnote 2, p. 148.

22. Sections 17(1), 17(2) and 38 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 read as follows:

> 17.(1) Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be as informal as the circumstances will permit, consistent with a due regard for a proper administration of justice.
> (2) No adjudication or other action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child.
> 38. This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated, not as criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

23. R. v. X. (1958), 38 C.R. 100, 120-121 (Man. C.A.) per Coyne J.A.

his opinion, it was the plain intention of the Act to differentiate materially between the conduct of children's courts and that of ordinary courts.

Adamson, C.J.M., in a dissenting opinion, held there was no proper plea and that section 17 did not deprive any accused of any of the safeguards which are fundamental to our criminal jurisprudence.[24] Similar sentiments had been expressed in the British Columbia Supreme Court where Brown J., in reference to the problem of accepting a plea from a juvenile, stated that Canadian law has always been to the effect that informal procedure may never be used in such a way as to prejudice the rights of an accused person.[25]

On appeal to the Supreme Court of Canada, the decision of the Manitoba Court of Appeal was reversed. Locke J. held, and the writer agrees, that there must be compliance with the provisions of the Code. He stated that the judge must explain the nature and gravity of the charge before the juvenile is allowed to plead. Following this explanation, the accused must be asked whether he pleads guilty or not guilty.[26] Locke J. rejected unwarranted informality in the juvenile court. In his opinion, the contention that sections 17 and 38 of the Act relieved the judges from complying with the provisions of the Code could not be supported.[27] It is submitted that a lawyer must be present to ensure compliance with the required formalities and to assist his client in reaching a decision as to the proper plea to be entered. A lawyer could also help explain the charge to the child.

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24. Ibid, p. 115 per Adamson, C.J.M. (dissenting).

25. R. v. B. (1956), 25 C.R. 95, 95 (B.C.S.C.) per Brown J.

26. Smith v. The Queen, [1959] S.C.R. 638 per Locke J.

27. Ibid, p. 650 per Locke J.

Informality in the juvenile court and the rules of evidence have come into direct conflict.[28] The general consensus among commentators indicates that rules governing admissability of evidence in juvenile court are unsettled.[29] One of the major areas of contention is the use of hearsay evidence during the adjudication stage of the trial. Section 17(1), in permitting informality both at trial and disposition, creates the risk that the judge may receive, as evidence relevant to the determination of delinquency, social reports whose content should, strictly speaking, be considered only in relation to disposition.[30]

Section 19(1) of the Act[31] allows the juvenile court to dispense

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28. For an analysis of the problems involved in preparing a child for trial see Turner, K., "Children in Court" (1962), 1 Man. L.S.J. 23.

29. Waterman, N., "Disclosure of Social and Psychological Reports at Disposition" (1969), 7 Osgoode Hall L.J. 213, 220.

30. Fox, R.G., "The Young Offenders Bill: Destigmatizing Juvenile Delinquency?" (1972), 14 Criminal L.Q. 179, 201.
Where it appeared in a case that the evidence was entirely circumstantial, the court held that the juvenile was not given the benefit of the rule in Hodge's Case and his conviction was quashed. R. v. Moore, [1975] W.W.D. 55 (B.C.S.C.).

31. Section 19(1) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:
19.(1) When in a proceeding before a juvenile court a child of tender years who is called as a witness does not, in the opinion of the judge, understand the nature of an oath, the evidence of such child may be received, though not given under oath, if in the opinion of the judge the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

with the taking of a child's oath. However, the Canada Evidence Act,[32] the Criminal Code[33] and the Juvenile Delinquents Act[34] clearly state that no case shall be decided upon the unsworn testimony of a child and that corroboration by some other material evidence is necessary.

The British Columbia Supreme Court allowed an appeal from a decision in which a juvenile court judge, untrained in law, permitted two children to be sworn without any preliminary inquiry as to their understanding of the meaning of oath. Wilson J., in the case of R. v. T.,[35] stated that this was an issue, not of barren technicalities, but of fundamental rights. The accused had not been allowed to call witnesses, cross-examine or give evidence in his own defence. In addition, he was sworn and compelled to testify without his consent. It is small wonder that the Court referred

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32. Section 16 of the Canada Evidence Act, R.S.C. 1970, c. E-10 reads as follows:

> 16.(1) In any legal proceeding where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
> (2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

33. Section 586 of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 586. No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.

34. Section 19(2) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 19.(2) No person shall be convicted upon the evidence of a child of tender years not under oath unless such evidence is corroborated in some material respect.

35. R. v. T. (1947), 89 C.C.C. 389, 391 (B.C.S.C.) per Wilson J.

to the transcript of the trial as "...a fair record of the pathetic parody of justice which resulted in the condemnation of this lad."[36]

Section 737 of the Criminal Code[37] gives the right to make full answer and defence and the right to examine and cross-examine witnesses. The refusal of certain judges to adhere to these rules has generated comment on the limits of discretion in the juvenile court.

In the case of R. v. X.,[38] Adamson, C.J.M. stated that where a child was denied the right to make full answer and defence, the juvenile court judge was deprived of his jurisdiction. In his opinion, section 737 was merely a restatement of the underlying principles in the administration of criminal law that an accused is entitled to a fair trial. The right of an accused to be heard and call witnesses is fundamental and exists apart from statutory provisions; the wide discretion given with respect to many details connected with the trial must always be exercised with this underlying requirement in mind. Thus, it is submitted that if this discretion is so exercised that the accused is deprived of this right, it is illegally exercised so as to deprive the magistrate of jurisdiction.

Juvenile court judges have attempted to serve the principle of parens patriae as stated in the Act. However, it is submitted that, to some extent, informality in the proceedings denies the "best interests of the

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36. Ibid, p. 393 per Wilson J.

37. Section 737 of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 737.(1) The prosecutor is entitled personally to conduct his case, and the defendant is entitled to make his full answer and defence.
> (2) The prosecutor or defendant, as the case may be, may examine and cross-examine witnesses personally or by counsel or agent.
> (3) Every witness at a trial in proceedings to which this part applies shall be examined under oath.

38. R. v. X. (1958), 28 C.R. 100, 111 (Man. C.A.) per Adamson C.J.M. (dissenting).

child". In reality, informality provides a method whereby the administration of justice is geared to meet the needs of other participants, namely judges, police and probation officers. The necessary separation of the adjudicatory and dispositional stages of the trial has become blurred; long established rules of law are often ignored.

There are very few cases which discuss children's legal rights in the juvenile court. Many decisions, which would have been overturned on appeal, were never taken to a higher court. This situation is due to the fact that most children are not represented by counsel.

The juvenile court is a court of law. While every effort must be made to use language which a child can understand, a strict adherence to procedural formality is essential. A child will not respect a system which denies him basic legal rights - rights which are taken for granted by adults.

The Juvenile Delinquents Act was designed to provide a different mode of trial for juveniles. It was intended to provide safeguards in addition to the basic legal rights granted to adults. Unfortunately, the courts have interpreted some sections of the Act in such a manner as to deprive a child of the protections enunciated in the Criminal Code.

The preceeding discussion is intended to establish that this departure from basic principles of criminal justice is, to a large extent, not authorized by the Act. Further, it is submitted that this approach to juvenile justice does not serve the "best interests of the child and the community". Rather, there is the danger that justice will not be done, and will not be seen to be done.

CHAPTER TEN

SENTENCING OF JUVENILE DELINQUENTS

Section 20(1) of the Juvenile Delinquents Act [1] states that in the case of a child adjudged to be delinquent, the juvenile court may, in its discretion, take action which it deems proper in the circumstances of the case. Unlike provisions governing the disposition of adults, there are no specific sanctions for breaches of the law by children. For example, an adult found guilty of an offence punishable on summary

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1. Section 20(1) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 20.(1) In the case of a child adjudged to be a juvenile delinquent the court may, in its discretion, take either one or more of the several courses of action hereinafter in this section set out, as it may in its judgment deem proper in the circumstances of the case:
> (a) suspend final disposition;
> (b) adjourn the hearing or disposition of the case from time to time for any definite or indefinite period;
> (c) impose a fine not exceeding twenty-five dollars, which may be paid in periodic amounts or otherwise;
> (d) commit the child to the care or custody of a probation officer or of any other suitable person;
> (e) allow the child to remain in its home, subject to the visitation of a probation officer, such child to report to the court or to the probation officer as often as may be required;
> (f) cause the child to be placed in a suitable family home as a foster home, subject to the friendly supervision of a probation officer and the further order of the court;
> (g) impose upon the delinquent such further or other conditions as may be deemed advisable;
> (h) commit the child to the charge of any children's aid society, duly organized under an Act of the legislature of the province and approved by the lieutenant governor in council, or, in any municipality in which there is no children's aid society, to the charge of the superintendent, if there is one; or
> (i) commit the child to an industrial school duly approved by the lieutenant governor in council.

conviction is liable to a maximum fine of five hundred dollars and to imprisonment for a maximum of six months.[2] The juvenile court judge has a much greater range of options; his decision is to be based entirely on his conception of "the child's own good and the best interests of the community".[3]

Canadian courts have, on occasion, attempted to establish guidelines for the sentencing of juvenile offenders. The British Columbia Supreme Court, in the case of R. v. Ginnetti,[4] stated that a juvenile court must not only examine what would be most beneficial for the child but must also consider the best interests of the community at large. Wood J. rejected the submission that under no circumstances should a first offender be committed to an industrial school. In his opinion, there may be circumstances in which a committal will be in the best interests of the child.

The New Brunswick Court of Appeal, in the case of R. v. S.,[5]

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2. Section 722(1) of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 722.(1) Except where otherwise expressly provided by law, every one who is convicted of an offence punishable on summary conviction is liable to a fine of not more than five hundred dollars or to imprisonment for six months or to both.

3. Section 20(5) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 20.(5) The action taken shall, in every case, be that which the court is of opinion the child's own good and the best interests of the community require.

4. R. v. Ginnetti (1955), 113 C.C.C. 223, 225 (B.C.S.C.) per Wood J.

5. R. v. S. (1948), 6 C.R. 292, 299-301 (N.B.C.A.) per Hughes J.
Section 25 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 25. It is not lawful to commit a juvenile delinquent apparently under the age of twelve years to any industrial school, unless and until an attempt has been made to reform such child in his own home or in a foster home or in the charge of a children's

took a different approach. Hughes J. was concerned with the fate of a twelve year old boy; in the Ginnetti case, the accused was sixteen years of age. He stated that committal to a training school should only be used as a last resort. In his opinion, it would be of no benefit either to the public or to the boy to send him to a training school.

These two cases offer an interesting insight into the discretionary power of the juvenile court judge. In the S. case, the youth, charged with committing a delinquent act in that he indecently assaulted a nine year old girl, was sent home. Ginnetti, on the other hand, was charged with auto theft. He was sent to an industrial school. Wood J. apparently felt that committal was in Ginnetti's best interests and that he did not deserve a second chance. Although age is a factor in these decisions, the distinction between the two cases reflects the different attitudes of the judges involved. It is submitted that some measure of control over the discretion of the juvenile court judge is required. Training schools, which have not demonstrated rehabilitative value, must only be used when all other programmes have been exhausted. The disposition in the Ginnetti case offends the purpose of the statute, namely that a delinquent receive the discipline which should be given by his parents. A conscientious parent would not deny a child a second chance and the opportunity to demonstrate responsible behaviour.

Some courts have suggested that judges of the juvenile court can use their sentencing power to set an example for other potential offenders. In the case of R. v. S.,[6] Hughes J. stated that this was not the

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aid society, or of a superintendant, and unless the court finds that the best interests of the child and the welfare of the community require such committment.

6. R. v. S. (1948), 6 C.R. 292, 301 (N.B.C.A.) per Hughes J.

principle which Parliament laid down to be used in connection with delinquency in children. It would not be in the best interests of the child to be used as an example for others.

Unfortunately, such statements have had little impact; decisions are often based on local attitudes, or more accurately, the judge's interpretation of those attitudes. This problem is illustrated by a 1967 decision of the Manitoba Queen's Bench. In the case of Re Strahl,[7] a juvenile pleaded guilty to a charge of committing a delinquent act in that he caused a disturbance by swearing and using insulting and obscene language. Acting under the authority of section 20(1)(g) of the Act,[8] the juvenile court judge suspended his driver's licence for a period of four months. Tritschler, C.J.Q.B. stated that a wise parent might well consider the withholding of driving privileges a suitable discipline for an erring child. In his opinion, the juvenile court judge acted as a wise parent and imposed upon the delinquent a condition that was within the spirit and letter of the Act. The decision is correct. However, it is submitted that the legislation must be amended. A juvenile court judge should not have the authority to punish a child as he sees fit and in a manner that is not available to the

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7. Re Strahl (1967), 2 C.R.N.S. 178, 179-180 (Man. Q.B.) per Triitschler, C.J.Q.B.

8. Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 20(1)(g), supra, footnote 1.

Section 663 of the Criminal Code, R.S.C. 1970, c. C-34 sets down the terms of probation applicable to adults; there are no guidelines in the Act except the general power under section 20(1)(g).

There is also a danger of abuse in the use of restitution orders: "...failure to include a provision defining expressly the powers of the court in regard to restitution orders leads to the danger that orders exceeding reasonable limits will be made on the basis of the courts' power to 'impose... such further or other conditions as may be deemed advisable.'" Department of Justice Committee on Juvenile Delinquency Juvenile Delinquency in Canada, (Ottawa, 1965), p. 172.

courts in the sentencing of adult offenders. While a juvenile court judge should act as a wise parent, constraint must be placed on the limits of his discretion. Those limits are found in the provisions of the Criminal Code dealing with the disposition of adult offenders.

There has been considerable comment on another aspect of the juvenile court's discretionary power, namely whether or not the information upon which the judge will base his decision as to sentence should be made available to the accused or his lawyer. This is another grey area of juvenile justice; it is also unclear whether the accused, if he has the right to see the reports, has a further right to cross-examine its author or his informants. In the trial of adults, complete disclosure is not required; the accused and his lawyer have a right of access only in relation to detrimental documents. The manner and amount of disclosure remains in the discretion of the trial judge, although, if upon review it appears he was influenced by undisclosed detrimental factors in a pre-sentence report, his sentence is likely to be quashed.[9]

As a general rule, most adult courts which grant a right of access to documents also provide a right to cross-examine. However, the one does not automatically follow from the other:

> Historically, at Common Law, a convicted defendant did not have the right to confront and cross-examine adverse witnesses, at the disposition hearing. Therefore it would seem doubtful that the defendant has a right to confront and cross-examine the report writer and a fortiori it would seem that he has no such right with regard to the investigator's informants, absent any statutory or case law provisions.[10]

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9. Waterman, N., "Disclosure of Social and Psychological Reports at Disposition" (1969), 7 Osgoode Hall L.J. 213, 223.

10. Ibid, p. 226.

Juvenile courts in Canada have rarely shown the disposition report to the child, his parents or his lawyer. This practice severely limits the potential effectiveness of the court's decision.[11] If the background information, including the child's history, attitude and family relationships, is not made available to the child, then the court, in disposing of the case, may be acting on false or incomplete reports. There is the danger that the court will then make a disposition that is felt to be unjust by the child, his parents, or by the public. Under the present system, the chid's fate may be subject to inefficient or inadequate investigation, an incompetent investigator, deceitful sources, and judges unschooled in the proper use of such reports.[12]

On the other hand, probation officers, social service agencies, psychologists and psychiatrists insist that confidentiality is essential if they are to be able to obtain information from school teachers, neighbours and other sources. It has also been suggested than an automatic right to acquire a report and cross-examine its author would result in a great increase in the workload of overtaxed investigators.

This position is unacceptable. The investigators claim that if the report could be challenged in court it would be too limited in scope; data necessary for treatment would have to be excluded because of insufficient time to verify it.[13] It is submitted that if the material is so speculative or unsupported that it cannot be defended to the satisfaction of the judge, then it should not be acted upon, especially if it means arbitrarily dealing

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11. Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada, (Ottawa, 1965), p. 165.

12. Waterman, supra, footnote 9, p. 217.

13. Ibid, p. 226.

with the offender.

It is important to remember that some of the information, such as derogatory comments about the youth's character, may be psychologically harmful if disclosed to the accused. Rather than leaving any final decision pertaining to such material with the judge, all reports received by the court should be disclosed to the child's lawyer. If will then be counsel's responsibility to decide how much of the information disclosed therein should be revealed to the child or his parents.[14]

Under present procedure, a disposition based on erroneous information could deprive a young person of his liberty. If we are prepared to treat children differently from adults, and retain the spirit of the legislation, the approach should be a positive one:

> It seems that the investigator's integrity and this relationship of trust and confidence, in many cases would be better promoted by a forthright honest disclosure to the offender of the investigator's function and position in writing the report, of how the material was to be used, and then by allowing him to see it to assure him that it had not been misused. Such disclosure - confrontation could be a useful part of the treatment process if done by the professional behavioural scientist in a setting where implications could be explained and interpreted.....When the subject realizes that the purpose of the investigation is to promote his own welfare he will be more willing to co-operate.[15]

Canadian courts have offered little guidance, although Osler J. of the Ontario High Court of Justice has commented that any documentary evidence

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14. Department of Justice Committee on Juvenile Delinquency, supra, footnote 11, p. 165.

15. Waterman, supra, footnote 9, p. 229.

bearing upon the possible disposition which the judge might make of the matter should be made fully available to the juvenile and his representative.[16] He also suggested that they should have every opportunity to counter such evidence and, if they wish to do so, to examine those responsible for its preparation. Unfortunately, we have no other major statements from the judiciary.[17] The dispositional hearing is perhaps even more important than the actual adjudication of guilty; thus, the most basic and urgent need in this area is the formulation of guidelines and rules in relation to the use of reports.

The authority of the juvenile court to impose sanctions does not end with the original disposition of the child. Provision is made in the Act[18] to bring the child back before the court at any time before he

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16. Re M., [1971] 2 O.R. 19, 21 (H.C.J.) per Osler J. This statement was made in an appeal from an order committing the juvenile to a training school under provincial legislation.

17. In R. v. S. (1948), 6 C.R. 292 (N.B.C.A.) it was held that statements made to the magistrate at the time the information was laid, and not in the presence of the accused, could not be used against the youth by the magistrate in passing sentence.

18. Sections 20(3) and 20(4) of the Juvenile Delinquents Act , R.S.C. 1970, c. J-3 read as follows:

> 20.(3) Where a child has been adjudged to be a juvenile delinquent and whether or not such child has been dealt with in any of the ways provided for in subsection (1), the court may at any time, before such juvenile delinquent has reached the age of twenty-one years and unless the court has otherwise ordered, cause by notice, summons, or warrant, the delinquent to be brought before the court, and the court may then take any action provided for in subsection (1), or may make any order with respect to such child under section 9, or may discharge the child on parole or release the child from detention, but in a province in which there is a superintendent, no child shall be released by the judge from an industrial school without a report from such superintendent recommending such release, and where an order is made by a court releasing a juvenile delinquent from an industrial school or transferring such delinquent from an industrial school to a foster home or from one foster home to another under this subsection, it is not necessary for such delinquent to be before the court at the

has reached the age of twenty-one years. This is extraordinary since the maximum age for original jurisdiction in most provinces is sixteen or eighteen years of age.

This provision is often invoked when a child has been placed on probation and has subsequently breached one of the conditions of supervision. In the case of R. v. S.W.,[19] the Crown contended that such a breach constituted a violation of the provisions of the Criminal Code.[20] In that case, Murphy, Prov. J. stated that breach of a probation order made pursuant to the provisions of the Act did not constitute an offence. Therefore, there was no violation of any provision of the Code. In his opinion, the only procedure that could be followed in such a case was to bring the juvenile back before the juvenile court under the provisions of section 20(3).

Unless an order has been made under section 21 of the Act,[21] a

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time that such order is made.
(4) When a child is returned to the court, as provided in subsection (3), the court may deal with the case on the report of the probation officer or other person in whose care such child has been placed, or of the secretary of a children's aid society, or of the superintendent, or of the superintendent of the industrial school to which the child has been committed, without the necessity of hearing any further or other evidence.

19. R. v. S.W., [1973] 6 W.W.R. 76, 83-84 (B.C. Prov. Ct.) per Murphy, Prov. J.

20. Section 666(1) of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:
666.(1) An accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction.

21. Section 21 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:
21.(1) Whenever an order has been made under section 20 committing a child to a children's aid society, or to a superintendent, or to an industrial school, if so ordered by the provincial secretary, the child may thereafter be dealt with under the laws of the province in the same manner in all

child may be returned to juvenile court and have his sentence varied even though he has committed no new offence. When a child, previously found delinquent, reappears before a juvenile court on any subsequent charge, the judge may act in two possible ways. He may consider the new charge of delinquency as raising a fresh offence. The determination of this charge requires the formalities of arraignment, plea, adjudication and the application of evidentiary standards which exclude hearsay. Alternatively, he may treat the case as falling under section 20(3) so that only a dispositional issue arises. This involves revision of the original sentence in the light of changed circumstances; the consideration of hearsay evidence may not be inappropriate.[22]

A juvenile may actually serve two sentences for the same offence. A juvenile court judge may direct that a young person be transferred to the ordinary criminal courts for prosecution in respect of the very matter for which he has been found delinquent and subjected to treatment or corrective

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> respects as if an order had been lawfully made in respect of a proceeding instituted under authority of a statute of the province; and from and after the date of the issuing of such order except for new offences, the child shall not be further dealt with by the court under this Act.
> (2) The order of the provincial secretary may be made in advance and to apply to all cases of committment mentioned in this section.

For a comment on this section see R. v. S.W., [1973] 6 W.W.R. 76(B.C. Prov. Ct.).

22. Fox, R.G., "The Young Offenders Bill: Destigmatizing Juvenile Delinquency?" (1972), 14 Criminal L.Q. 172, 201.

At page 201, the author notes: "It is a general prevailing rule in the trial of both criminal and civil matters that hearsay evidence is inadmissable. It is prohibited because it is likely to be unreliable and because it cannot be the subject of cross-examination. However, the application of exclusionary rules of evidence is usually less stringent at the sentencing or dispositional stage of a hearing than at the prior or adjudicatory or fact-finding stage."

measures by the juvenile court.[23] It is submitted that this provision is objectionable on the ground that no person should be placed in jeopardy more than once for the same offence.

A child adjudged to be delinquent has virtually no idea of the sentence which he can expect to be imposed by the juvenile court judge; he is also subject to the whims of this individual until the age of twenty-one. This discretionary power cannot rationally be justified as an attempt to make the punishment fit the crime; it seems more likely to bring disrepute to the juvenile court and our judicial system. Canada's juvenile justice system allows judges to treat children, convicted of the same crime and victims of the same circumstances, in radically different manners. Until children are accorded the protections of the adult criminal justice system, it is sheer hypocrisy to maintain that we always act in their best interests and the interests of society.

This discussion is not intended to suggest that children be charged with specific crimes and made subject to the penalties provided by the Criminal Code. Rather, it is submitted that where a child has committed an act which would be an offence if committed by an adult, he should not be subject to punishment that is unavailable to the courts in the disposition of adult offenders.

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23. Department of Justice Committee on Juvenile Delinquency, supra, footnote 11, p. 83-84.

CHAPTER ELEVEN

APPEALS FROM DECISIONS OF THE JUVENILE COURT

Section 37 of the Juvenile Delinquents Act[1] suggests an intention to keep appeals to a minimum.[2] It is the only method whereby an appeal may be taken from the juvenile court; the provisions of the Criminal Code are not applicable.[3] In the case of R. v. Kelham, Sloan,

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1. Section 37 of the Juvenile Delinquents Act, R.S.C. 1970, c.J-3 reads as follows:

> 37.(1) A supreme court judge may, in his discretion, on special grounds, grant special leave to appeal from any decision of the juvenile court or a magistrate; in any case where such leave is granted the procedure upon appeal should be such as is provided in the case of a conviction on indictment, and the provisions of the Criminal Code relating to appeals from conviction on indictment mutatis mutandis apply to such appeal, save that the appeal shall be to a supreme court judge instead of to the court of appeal, with a further right of appeal to the court of appeal by special leave of that court.
> (2) No leave to appeal shall be granted under this section unless the judge or court granting such leave considers that in the particular circumstances of the case it is essential in the public interest or for the due administration of justice that such leave be granted.
> (3) Application for leave to appeal under this section shall be made within ten days of the making of the conviction or order complained of, or within such further time, not exceeding an additional twenty days, as a supreme court judge may see fit to fix, either before or after the expiration of the said ten days.

The phrase "or magistrate" in the section refers to a magistrate acting in his capacity as a judge of the juvenile court. See R. v. Samboluk (1942), 77 C.C.C. 243 (Sask. K.B.); R. v. Henderson (1944), 82 C.C.C. 357 (B.C.S.C.); Contra: R. v. Curtiss (1948), 92 C.C.C. 321 (Albt. Dis. Ct.).

2. Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada, (Ottawa, 1965), p. 155.

3. Section 5(1)(a) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 5.(1)(a) Except as hereinafter provided, prosecutions and trials under this Act shall be summary and shall, mutatis mutandis, be

C.J.B.C. stated that section 37 cannot be regarded as providing for an alternative or additional right of appeal, but as substituting a sole and exclusive method of appeal from conviction under the Act.[4]

When an order has been issued under the authority of a provincial enactment, it is unclear whether or not the appeal provisions of the federal statute are applicable. However, the Ontario High Court of Justice has held that when a child, adjudged to be delinquent in juvenile court, is ordered to be sent to a training school under the Training School Act,[5] Section 37 does not apply because the provincial statute has its own appeal provisions.[6] In Manitoba, a juvenile charged with non-capital murder was ordered hospitalized pursuant to provisions of The Corrections Act;[7] the legislation contained no appeal provision. Matas J. held that The Corrections Act and the Juvenile Delinquents Act must be read together; the appeal provisions of s. 37 were available to the juvenile in respect of the order made against him.[8] Unfortunately, we can only speculate as to the result of this case if there had been appeal provisions in the provincial statute.

Aside from this problem, the appeal procedure remains extremely complex. For example, in a case from British Columbia counsel filed a

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governed by the provisions of the Criminal Code relating to summary convictions in so far as such provisions are applicable, whether or not the act constituting the offence charged would be in the case of an adult triable summarily, except that
(a) the provisions relating to appeal do not apply to any proceeding in a juvenile court.

4. R. v. Kelham (1952),15 C.R. 195, 197 (B.C.C.A.)per Sloan, C.J.B.C.

5. Training Schools Act, R.S.O. 1970, c. 467.

6. Re C., [1970] 2 O.R. 626 (H.C.J.).

7. The Corrections Act, R.S.M. 1970, c. C-230.

8. R. v. Shewman (1972), 17 C.R.N.S. 362, 364 (Man. Q.B.) per Matas J.

notice of application for leave to appeal within ten days after conviction; however, the actual application to the judge of the Supreme Court was made on a date later than ten days after conviction. The application was dismissed. Manson J. stated that Parliament deliberately intended that the application for special leave should be heard within the time prescribed in section 37(3). In his opinion, what the appellant did was to file a notice of intention to apply for special leave to appeal; he did not write to the court applying for leave nor did he file an application for leave. Manson J. held that since there was no provision in the statute for filing a notice of intention to apply for leave, he had no jurisdiction to hear the application.[9]

The Manitoba Queen's Bench initiated the retreat from this decision in the case of R. v. P.[10] Tritschler, C.J.Q.B. stated that section 37(3) could not be interpreted to mean that a notice of appeal must be served returnable within ten days and that the matter must be heard and disposed of in the presence of both parties within that period. He held that the statute required only that the application be signed, filed and placed before the Court within the time period.

The Court also held that the presence of the opposite party is not required at the making of the application, nor on an application to extend the time within which the application for leave may be made. Tritschler, C.J.Q.B. felt that appearance by the respondent would often be impossible. He posed two questions:

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9. R. v. Martin (1952), 14 C.R. 128, 132-133 (B.C.S.C.)per Manson J. See also R. v. Hipke, [1968] 1 C.C.C. 11 (Sask.Q.B.).

10. R. v. P.(1964), 41 C.R. 254, 261(Man.Q.B.) per Tritschler, C.J.Q.B.

> Suppose, because of the illness of the accused, it was impossible to serve him or for him to understand the nature of the notice served or to attend before the expiration of 10 days, is the Crown's right to apply lost? If there is not a distinction to be drawn between the making of the application and the hearing of the application, then if an accused served with a notice returnable within the 10 days is, for any good cause, unable to be present, must the application go on, i.e., the hearing take place in his absence?[11]

Thus, the right of an accused to be present at all stages of the proceedings does not include a right to be present when the application for leave is filed or when the proceedings leading toward appeal are launched. The making of the application does not affect any right of the accused; it is at the hearing of the application that his rights are affected. At the hearing, the accused must be present or represented if he wishes to be, and the judge to whom the application is made must defer the hearing until, on reasonable notice, the accused is afforded the opportunity to be present.

Nineteen years after the Martin decision, the British Columbia Supreme Court reversed itself in holding that an application for leave to appeal is to take effect when the notice of motion is filed. In the case of R. v. Mason,[12] McIntyre J. found no point of distinction between the Martin case and the case at bar. He adopted the reasoning of Tritschler, C.J.Q.B.

Unfortunately, the issue was further clouded a month after this decision by the Nova Scotia Supreme Court in the case of R. v. Corkum.[13] The Court held that the filing of a notice of application for leave to

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11. R. v. P. (1964), 41 C.R. 254, 260-261 (Man.Q.B.) per Tritschler, C.J.Q.B.

12. R. v. Mason (1971), 14 C.R.N.S. 126, 129-130 (B.C.S.C.) per McIntyre J.

13. R. v. Corkum (1971), 2 C.C.C. (2d) 497, 501 (N.S.S.C.) per Cowan, C.J.T.D.

appeal within the thirty day period, but after ten days from the date of conviction, was not sufficient to found the jurisdiction of the appellate court when no extension of time had been applied for or granted. It is submitted that, on the authority of the Mason case, the Court was clearly authorized to allow the extension of time to apply and accept the notice of application.

Section 750(2) of the Criminal Code[14] grants an appeal court the power to extend time for service and filing beyond thirty days in the case of an adult convicted of a summary conviction offence. There is no such power to extend time beyond this period for appeals from the juvenile court. The British Columbia Supreme Court has held that this does not amount to a difference in law relating to juveniles which offends the principle of equality before the law.[15]

The appeal provisions of the Act have caused frustration for Canadian judges; the comments of Smith J. provide a good example:

> On the merits, I have no doubt whatsoever that both appeals should succeed, for me the grounds given by the Judge below for his extemporaneous decision constitute, so far as these boys are concerned, the most serious miscarriage of justice I have ever seen while at the bar and on the bench of this Province.
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> Unfortunately, however, the appeals were not launched within 30 days of the orders attacked here, which were made in May of this year. Legal Aid was not invoked until early this month, when the time for appeal had already expired.

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14. Section 750(2) of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 750.(2) An appeal court may, before or after the expiration of the periods fixed by paragraphs (1)(b) and (c), extend the time within which service and filing may be effected.

15. R. v. O. (1972), 6 C.C.C. (2d) 385, 388 (B.C.S.C.) per McIntyre J.

> Cases such as R. v. Kelham (1952), 103 C.C.C. 205 ...preclude me from going outside s. 37 of the Act in an effort to remedy this situation. My hands, therefore, are tied; and for this reason alone the applications were dismissed.
>
> I am appalled to think that the result of my ruling is to condemn one young man to serve the balance of a 12 month sentence, and to leave his brother for disposition by the same adult Court, with both thereafter bearing a criminal record for the first offence either has ever committed. I can only hope that these views will be brought to the attention of the Attorney-General and the provincial probation authorities, so that such limited amends as lie within these authorities' control may be made without the judicial intervention which I would dearly love, but am powerless to effect. What these amends may be, and whether there may be other legal remedies available to the applicants, I cannot say; but if those who have the power which I have not here to correct this situation fail to act, there will, in my opinion, be a lasting stain on the administration of justice in this Province, which no volume of fulsome correspondence will erase.[16]

The Act confers on a Supreme Court Judge the authority to grant leave to appeal against both sentence and conviction.[17] In the case of R. v. Lee et al.,[18] Wootton J. stated that the words "any decision" in the section were crucial. In his opinion, these two words embraced conviction, sentence and any other item that might be included in a decision of the

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16. R. v. W. and W., [1970] 5 C.C.C. 298, 299-300 (B.C.S.C.) per Smith J.

17. Section 603(1)(b) of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 603.(1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
> (b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.

18. R. v. Lee et al. (1964), 43 C.R. 142, 145 (B.C.S.C.) per Wootton J.

See also R. v. Vankoughnett, [1970] 1 C.C.C. 92 (Ont. C.A.).

Contra: "...I have very serious doubts whether s. 37 confers jurisdiction to give leave to appeal against sentence". In re H.C.S. (1949), 9 C.R. 89, 91 (Man.K.B.) per Williams, C.J.K.B.

juvenile court. He suggested, and the writer agrees, that there would be a manifest injustice if no appeal could be taken against sentence.

The Court, in hearing an application for leave to appeal, is given a wide discretion in deciding which factors to consider; the judge must, in accordance with section 37, determine that it is essential in the public interest or for the due administration of justice that such leave be granted.[19] Only one Canadian case, Re A.C.S.,[20] has given careful consideration to the meaning of this phrase. Mackay J. stated that leave should not be granted unless there appears a case of extraordinary circumstances. He noted that the cases in which leave to appeal had been granted resulted from a failure properly to administer the law. In his opinion, public interest did not mean something in which the public was interested; public interest meant something in which the public had some vital interest which affected them in either a pecuniary or personal sense.

It remains undecided whether a child's parents may launch an appeal on his behalf. The courts' position seems to vary depending upon the age of the child. For example, Mackay J. referred to sections 603(1) and 607(1) of the Criminal Code[21] in holding that the appeal must be made by the

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19. Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 37(2), supra, footnote 1.

20. Re A.C.S. (1969), 7 C.R.N.S. 42, 53-54 (Que. Sup. Ct.) per Mackay J. See also R. v. Schwanbeck, R. v. De La Gorgendierre (1931), 56 C.C.C. 94 (Sask. K.B.); R. v. Bawa Singh (No.1) (1949), 93 C.C.C. 193, (B.C.S.C.); R. v. Blue, [1965] 2 C.C.C. 1975 (B.C.S.C.); R. v. Morin, [1968] 2 C.C.C. 175 (N.W.T. Ter. Ct.).

21. Criminal Code, R.S.C. 1970, c. C-34, s. 603(1), supra, footnote 17. Section 607(1) reads as follows:

> 607.(1) An appellant who proposes to appeal to the court of Appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal, in such manner and within such period as may be directed by rules of court.

person convicted. In the case of R. v. B.,[22] he stated that the language of these sections is unambiguous; the appellant and the person convicted are clearly one and the same and only he can apply for leave to appeal or appeal his conviction. In this case, the person convicted was seventeen years of age and a student at McGill University. In the case of a very young child, it is submitted that these provisions of the Code should apply. However, it is essential in all cases and regardless of the child's age, that he be represented by counsel. A juvenile of seven, eight or nine years can not be expected to have the capacity or competence to initiate proceedings in court.

Some decisions suggest that when a judge grants leave to appeal, he must personally hear that appeal.[23] However, the practice varies from province to province; the Ontario Supreme Court has taken exactly the opposite position in the case of R. v. Simpson.[24] Lieff J. stated that the absence of the words "the Judge of the Supreme Court who grants special leave" in section 37 was a clear indication that Parliament did not intend to bind the hands of the justice by providing that both functions were to be exercised by the same judge. He pointed out that it was not the practice in Ontario to consider the judge who granted leave as being seized of the matter.

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22. R. v. B., [1970] 1 C.C.C. 254, 256 (Que. Sup. Ct.) per Mackay J.

23. R. v. S. (1946), 87 C.C.C. 154, 157 (Man. C.A.) per MacPherson, C.J.M. See also R. v. Bloomstrand (1952), 15 C.R. 249 (Sask. C.A.); Re A.C.S. (1969), 7 C.R.N.S. 42 (Que. Sup. Ct.).

24. R. v. Simpson (1966), 46 C.R. 327, 331-332 (Ont. S.C.) per Lieff J. In Nova Scotia, it seems that the judge will proceed where both parties are agreed: "Leave to appeal having been granted, it was agreed by counsel for the appellant and counsel for the Crown, who was present at the hearing, that I should proceed to deal with the merits of the appeal without adjourning the matter further". R. v. McLean, [1970] 2 C.C.C. 112, 118 (N.S.S.C.) per Cowan, C.J.T.D.

If the judge of the provincial Supreme Court refuses leave to appeal there is no jurisdiction in the Court of Appeal to consider an application for leave to appeal the finding of the Supreme Court. However, if the Supreme Court grants leave to appeal and then dismisses the appeal on its merits, the Court of Appeal may entertain an application for leave to appeal. In the case of R. v. Moroz, Freedman J.A. examined the structure of the section:

> It will be observed that it first declares that a Supreme Court judge may grant special leave to appeal. This portion of the section is then followed by a semi-colon. The entire balance of the section makes up the rest of the sentence. It is introduced by the words "in the case where such leave is granted". The provision at the end of the section dealing with an appeal to the Court of Appeal is part of the same sentence. If it is governed by the words "in any case where such leave is granted", then manifestly the refusal by the Queen's Bench judge of leave to appeal automatically shuts off any right of appeal to the Court of Appeal. The form in which the language is expressed would indicate that this indeed is the effect of the section.
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> If, after the first reference to the Court of Appeal, the sentence had come to a full stop, and had then been followed by a new sentence beginning "There shall be a further right of appeal, etc.", it could well be said that the right of appeal to this Court stood on its own feet, in no way qualified or governed by what went before. But that is not the way in which the sentence is written. The provision for appeal to this Court is distinctly included in that portion of the sentence which begins with the words "in any case where such leave is granted". Accordingly the right of appeal to this Court cannot be looked upon as independently and unqualifiedly conferred. It can only arise where leave to appeal has previously been granted by a Supreme Court Judge.[25]

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25. R. v. Moroz (1964), 42 C.R. 112, 113-114 (Man.C.A.) per Freedman J.A. See also Re H.C.S. (1949), 9 C.R. 89 (Man. K.B.); R. v. Bawa Singh (No.2)(1949), 93 C.C.C. 196 (B.C.S.C.); R. v. Locas, [1945] Que.K.B. 676 (C.A.). Contra: R. v. Bloomstrand (1952), 15 C.R. 249 (Sask.C.A.); R. v. Reed, [1970] 5 C.C.C. 309 (B.C.C.A.). These cases also held that the time limitations in Section 37(3) do not apply to an application for leave to appeal from an order of the Supreme Court judge.

Freedman J.A. expressed his regret at the result and stated, "One does not like to see the path to an appellate court blocked off".[26]

The preceeding discussion has attempted to illustrate the confusion and injustice created by the appeal provisions of the Juvenile Delinquents Act. It is submitted that appeals from decisions of the juvenile court should be governed by Part XVIII of the Criminal Code. It is also submitted that Part XXIII of the Code, which deals with extraordinary remedies, should be made applicable to proceedings in the juvenile court through express provision in any new legislation. Present procedure does not provide additional protection for juveniles; in fact, it severely limits the right of appeal. Due process demands that children be given, at the very least, the same right to appeal as their adult counterparts.

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26. R. v. Moroz (1964), 42 C.R. 112, 115 (Man. C.A.) per Freedman J.A.

CHAPTER TWELVE

WAIVER OF JURISDICTION

One of the most controversial aspects of Canada's juvenile justice system is the use of section 9 of the Act.[1] This provision allows for the transfer, in certain circumstances, of children from juvenile court to adult court. The scope of the discretionary power of the juvenile court judge under this section has been sharply criticized[2]. The most basic problem presented by the waiver process concerns the criteria that govern the exercise of discretion. The judge must make a "finding" in terms of two subjective criteria: that "the good of the child" and "the interest of the community" demand waiver. The difficulty is that these tests are not explicit enough to indicate the kinds of situations that the designated "finding" is intended to include. Without the direction that reasonably firm legislative guides provide, waiver of jurisdiction has become an expression, not of any consistent policy, but of the predilections of

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1. Section 9 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 9.(1) Where the act complained of is, under the provisions of the Criminal Code or otherwise, an indictable offence, and the accused child is apparently or actually over the age of fourteen years, the court may, in its discretion, order the child to be proceeded against by indictment in the ordinary courts in accordance with the provisions of the Criminal Code in that behalf; but such course shall in no case be followed unless the court is of the opinion that the good of the child and the interest of the community demand it.
> (2) The court may, in its discretion, at any time before any proceeding has been initiated against the child in the ordinary criminal courts, rescind an order so made.

2. Department of Justice Committee on Juvenile Delinquency, Juvenile Delinquency in Canada, (Ottawa, 1965), p. 78-79 .

individual juvenile court judges or of local pressure upon them.

It remains undecided who should initiate the proceedings for transfer to adult court. In many cases it is the juvenile court judge himself; this has never been found to be improper. In the case of R. v. R.,[3] Rae J. pointed out that if such a course is followed, and the Crown is not represented, there is a danger of the judge slipping into the role of the advocate and possibly sitting in judgment in what, however well motivated, he has made his own case.

Although the courts have held that the true function of a juvenile court judge in considering an application for transfer is essentially administrative in nature, nonetheless, the judge must act judicially in the sense of proceeding fairly and openly.[4] This position has substantial implications for the hearing of the application. For instance, in the case of R. v. Arbuckle[5], the Court held that hearsay evidence should not be excluded from consideration.

The Court suggested that it would be difficult to assign a reason for excluding hearsay since it was settled practice that unsworn testimony should be allowed. This was the decision of the Supreme Court of Canada[6] in which Hall J. adopted the words of Miller, C.J.M. in the case of R. v. Pagee (No. 2):

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3. R. v. R. (1970), 8 C.R.N.S. 257, 268 (B.C.S.C.) per Rae J. See also R. v. David (1972), 20 C.R.N.S. 184 (B.C.S.C.).

4. R. v. Arbuckle (1967), 1 C.R.N.S. 318, 324 (B.C.C.A.) per McFarlane J.A.

5. Ibid, p. 322-323 per McFarlane J.A.

6. S. v. The Queen (1967), 50 C.R. 350 (S.C.C.).

> In my opinion, if Crown counsel outlines to the Juvenile Court Judge reasons which indicate that it is for the good of the child and in the interest of the community that the transfer be made then the Juvenile Court judge, after considering any representation on behalf of the juvenile, can, in his discretion, act upon such information and material as is before him. I do not say that sworn evidence could not be given if desired, either by the Crown or the defence or by both, in support of, or in opposition to, the transfer, but what I want to make clear is that there is no rule of law, nor any authority, to compel the magistrate when making an order under s. 9(1) of the Juvenile Delinquents Act, supra,[7] to base his opinion solely on sworn testimony.

The evidence introduced at the application hearing must be considered safe and capable of supporting the decision of the juvenile court. In the case of R. v. Hirvonen,[8] Aikins J., of the British Columbia Supreme Court, held that evidence of a probation officer was sufficiently unsatisfactory that it did not furnish proper evidentiary support for a transfer order; the quality of the evidence was such as to render it unsafe to proceed thereon to the conclusion reached by the juvenile court judge. In his opinion, it was not proper that the consideration that a juvenile court judge may proceed on hearsay evidence on an application under section 9 should, as a matter of routine, be allowed to serve as a justification for denying a juvenile court judge the assistance of more cogent evidence when it is readily available.

In a decision from British Columbia, a juvenile court judge ordered a transfer to adult court although he had no material before him

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7. R. v. Pagee (No.2) (1963), 40 C.R. 257, 259 (Man. C.A.) per Miller, C.J.M.

See also R. v. Trodd (No.2) (1966), 47 C.R. 369 (B.C.S.C.); R. v. Joseph (1968), 65 W.W.R. 446 (B.C.S.C.).

8. R. v. Hirvonen, [1963] 3 C.C.C. 140, 147-148 (B.C.S.C.) per Aikins J.

other than the evidence of the child's age and the information and complaint. The order was quashed. In the case of R. v. R.,[9] Rae J. stated that although the jurisdiction of the juvenile court was administrative, it did not warrant the judge of the court acting on information and knowledge in this manner. In his opinion, this practice did not pass the test of necessity, only the test of convenience or expediency. In this case, the general tenor of the proceedings and of the judge's report indicated that it was considered that the onus was on the child to show why the order should not be made rather than the reverse, and with no one present to present the reverse.

The courts have stated that an accused must be given the opportunity to offer evidence and submit argument at the transfer hearing. In the case of R. v. David,[10] Anderson J. found that the child was not given the right to take any part in the proceedings. In his opinion, there was no hearing in the eyes of the law and the transfer order was a nullity. In the David case, the British Columbia Supreme Court quashed, by certiorari, the order transferring the juvenile to adult court;[11] the British Columbia Supreme

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9. R. v. R. (1970), 8 C.R.N.S. 257, 264-266 (B.C.S.C.) per Rae J. See also R. v. Martin (Middleton) (1969), 9 C.R.N.S. 147 (Man. Q.B.); R. v. Proctor, [1970] 2 C.C.C. 311 (B.C.S.C.); R. v. F. (1974), 20 C.C.C. (2d) 11 (B.C.S.C.); Green, B., "The Disposition of Juvenile Offenders" (1971), 13 Criminal L.Q. 348.

10. R. v. David (1972), 20 C.R.N.S. 184, 187 (B.C.S.C.) per Anderson J. See also Re M. (1961), 37 C.R. 262 (Sask. Q.B.).

11. "If David had taken any steps to appeal his conviction, it might well be said that his conduct was such that he might be disentitled to relief by way of certiorari proceedings". Ibid, p. 187-188 per Anderson J. Section 710 of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 710. No conviction or order shall be removed by certiorari
> (a) where an appeal was taken, whether or not the appeal has been carried to a conclusion, or
> (b) where the defendant appeared and pleaded, and the merits were tried, and an appeal might have been taken, bu the defendant did not appeal.

Court has also done this on two other occasions.[12]

In order to prepare for the hearing, it is mandatory that the accused be given proper notice; preparation of defence also requires access to probation reports and other such materials. In the case of R. v. R.,[13] Rae J. stated that it was implicit in the expression audi alteram partem, that one must first hear and know what the case of the first party is; one cannot make an answer or submission in the absence of this material. It is submitted that all material, prejudicial or otherwise, should be disclosed to counsel if it forms part of the evidence on which a decision is based. The non-prejudicial portion may assist counsel for the alleged delinquent in cross-examination of the probation officer or others, or in making submissions on the advisability of the order sought.

The essence of the controversy surrounding section 9 is the discretion exercised by the juvenile court judge at the various stages in the process. Wilson J. of the Manitoba Queen's Bench has stated that "discretion" is "...a word of the widest significance, and provided always that it has been exercised in a judicial manner, implies the reaching of his own personal conclusion by the judge whose duty it is to come to a decision".[14] This "personal conclusion" must be ascertainable; a judge of

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12. "...he therefore submitted that, because an appeal was available, this application should be dismissed. I am of the view that, if the appeal had been available to the applicant without restriction, then this point would have been well taken and the application should have been dismissed. However, it is only by 'special leave' of a Judge of this Court that an appeal from the decision of a Juvenile Court Judge may be heard". R. v. Lawrence, Ex Parte Painter, [1968] 3 C.C.C. 77 (B.C.S.C.) per Wootton J. This case also held that a juvenile has a right to have counsel present on the hearing of the merits of the application to transfer.
See also R. v. Cook (1958), 29 C.R. 87 (B.C.S.C.)

13. R. v. R. (1970), 8 C.R.N.S. 257, 265 (B.C.S.C.) per Rae J.

14. R. v. Sawchuk (1967), 1 C.R.N.S. 139, 140 (Man. Q.B.) per Wilson J.

the juvenile court is not simply entitled to state that a child should be proceeded against by indictment. In the case of R. v. Newton,[15] the Court held that it must be apparent that the judge did himself consider the question and formed his belief independently on the relevant facts of the situation. The order will be effective unless the belief or opinion was without proper foundation or was erroneously formed.[16]

The juvenile court judge may also rest assured that appeal courts are loathe to tamper with the exercise of his discretion. In this regard, Canadian courts have consistently cited the words of Viscount Simon L.C.:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.[17]

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15. R. v. Newton (1949), 7 C.R. 422, 424-425 (Albt.S.C.) per Clinton J. Ford J.

16. "Therefore the appellant had the onus of satisfying me that the Juvenile Court Judge exercised his discretion in a manner contrary to law". In re L.Y., [1944] 2 W.W.R.36, 37 (Man. K.B.) per Dysart J.

17. Charles Osenton and Co. v. Johnston, [1942] A.C. 130, 138(H.L.) per Viscount Simon L.C.

See Re S.M.T.(1959), 31 C.R. 76 (Ont.S.C.); Re Cline, [1964] 2 C.C.C. 38 (B.C.S.C.); R. v. S.(1965), 54 W.W.R. 635 (B.C.S.C.); R. v. Trodd (No.2)(1966), 47 C.R. 369 (B.C.S.C.); R. v. Joseph (1968), 65 W.W.R. 446 (B.C.S.C.); R. v. Martin (Middleton)(1969), 9 C.R.N.S. 147 (Man. Q.B.); R. v. Proctor, [1970] 2 C.C.C. 311 (B.C.S.C.); R. v. Chamberlain (1974), 15 C.C.C. (2d) 379 (Ont. C.A.).

The courts have attempted to define the relevant issues to be examined by a judge when deciding whether or not a transfer is in the best interests of the child and the community; both factors must be demonstrated.[18] The court should examine the age of the child, his character, education, family background, state of maturity, record of past delinquencies, conduct since the commission of the offence, the nature of the offence, the availability and effectiveness of existing facilities and the community's interest in the accused.[19] The court should not consider the deterrent effect of the transfer.[20]

In 1944, in the case of In re L.Y.,[21] Dysart J. of the Manitoba

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18. "A judicial discretion under s. 9 of the Act cannot be exercised by arithmetical balancing of the good of the child on the one hand and the interest of the community on the other. It is well established that both factors must be present to justify a transfer". R. v. Martin (Middleton) (1969), 9 C.R.N.S. 147, 152 (Man. Q.B.) per Matas J.

19. In re L.Y., [1944] 2 W.W.R. 36 (Man. K.B.); R. v. Pagee (1962), 39 C.R. 329 (Man. Q.B.); R. v. Simpson, [1964] 2 C.C.C. 316 (Ont. Juv.Ct.); Re Liefso (1965), 46 C.R. 103 (Ont. S.C.); R. v. Trodd (No.1)(1966), 47 C.R. 365 (B.C.S.C.); R. v. Trodd (No.2) (1966), 47 C.R. 369 (B.C.S.C.); R. v. Arbuckle (1967), 1 C.R.N.S. 318 (B.C.C.A.); R. v. Proctor, [1970] 2 C.C.C. 311 (B.C.S.C.); R. v. Haig, [1971] 1 C.C.C. 299 (Ont. C.A.); M. v. The Queen (1973), 23 C.R.N.S. 313 (Ont. S.C.); R. v. Chamberlain (1974), 15 C.C.C. (2d) 372 (Ont. C.A.).

20. R. v. Martin (Middleton)(1969), 9 C.R.N.S. 147 (Man. Q.B.).

21. In re L.Y., [1944] 2 W.W.R. 36, 38 (Man. K.B.) per Dysart J. Similar sentiments were expressed in two earlier decisions:
"It seems to be a limited procedure, where children of the age mentioned had in the opinion of the court committed or are alleged to have committed an offence of such a nature that the Juvenile Court should not deal with it". Ex. p. Cardarelli (1929), 52 C.C.C. 267, 270 (B.C.S.C.) per Macdonald J.
"For a serious offence, like this, with the guilt or innocence of the child a very strenuously disputed point, it is surely in the interest of justice that the child should have the benefit of a trial presided over by one who has been trained in law and the facts considered by a jury of 12 men who would bring their united wisdom and experience to serve them in their work". R. v. H., [1931] 2 W.W.R. 917, 925 (Sask.K.B.) per Knowles J.

King's Bench, held that serious charges such as murder should be transferred to adult court. In his reasons for judgment he stated that the juvenile court was only experimental and had neither the machinery nor settled procedure for trying so serious a charge as murder. He also favoured the advantages of a jury trial and a court open to the scrutiny of the public. The Manitoba Court of Appeal, without written reasons, dismissed the appeal. This approach has been followed in several cases and received national attention during the murder trial of Steven Truscotte. In that case, Re S.M.T.,[22] Schatz J. stated that, notwithstanding the publicity and strain of a trial, it would be for the good of the child to have his position in respect of such a serious charge as murder established by a jury. In his opinion, this would remove any possible criticism of having such a serious matter determined by a single judge in in camera proceedings. He also stated that it was in the interests of the community that the public be assured that, in a matter of this kind, where public sentiment may have been aroused, the trial and disposition of the matter shall be in the ordinary course and free from any criticism.

The decisions in Manitoba have been severely criticized in other jurisdictions; the Alberta Supreme Court explicitly rejected them. In R. v. Newton,[23] the Court stated that this approach showed a policy to be adopted rather than an opinion to be formed; this was not what the section

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22. Re. S.M.T. (1959), 31 C.R. 76, 78 (Ont. S.C.) per Schatz J. See also R. v. D.P.P. (1948), 6 C.R. 326 (Man. K.B.); R. v. Paquin and De Tonnancourt (1955), 21 C.R. 162 (Man. C.A.).
The British Columbia Supreme Court has stated that transfers should be effected in the case of a serious charge because there is a wider appeal available from a decision of an adult court. R. v. Cline, [1964] 2 C.C.C. 38 (B.C.S.C.).

23. R. v. Newton (1949), 7 C.R. 422, 425 (Albt.S.C.) per Clinton J. Ford J.

contemplated. A juvenile court judge in British Columbia offered some rather derogatory comments about the quality of juvenile court judges in Manitoba and argued that it would never be for the good of the child to transfer him to adult court. In the case of R. v. P.M.W.,[24] Pool, Juv. Ct. J. stated that juvenile court judges in Manitoba apparently considered themselves incapable of giving as fair a trial in their courts as the boy would receive on indictment. He noted that committal for trial upon a charge should not in any case take place unless there is evidence upon which a jury could convict. In his view, if the court is of the opinion that a jury could convict, there would seem little justification for, in effect, gambling with the life of a child.

After the Truscott case, the Ontario courts began to change their approach. In the case of R. v. Simpson,[25] Wallace, Juvenile and Family Ct. J. of the Ontario Juvenile Court stated that many cases appeared to lay down rules which removed the judge's discretion when the offence was murder. In his opinion, such a view constituted an amendment to the section and was not sound.

This decision also rejected suggestions that the juvenile court was experimental and argued that the interest of the accused would be amply protected in such a setting. This position has found support in the Ontario Supreme Court. In the case of Re Liefso,[26] Jessup J. stated that the presumption must be that an accused will receive a fair trial before a juvenile court. In his opinion, there can be no presumption that the child

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24. R. v. P.M.W. (1955), 16 W.W.R. 650, 652-653 (B.C.Juv. Ct.) per Pool, Juv. Ct. J.

25. R. v. Simpson, [1964] 2 C.C.C. 316, 321-323 (Ont.Juv. Ct.) per Wallace, Juvenile and Family Ct. J.

26 Re Liefso (1965), 46 C.R. 103, 105-106 (Ont. S.C.) per Jessup J.

will have a better or fairer trial before a superior court judge and jury.

Twenty years after their initial examination of this area, the Manitoba courts did an abrupt about-face. In the case of R. v. Moroz,[27] Bastin J., of the Manitoba Queen's Bench, rejected the suggestion that all serious crimes committed by juveniles shall be dealt with by the ordinary courts. In a subsequent decision, R. v. Sawchuck,[28] Wilson J. stated that there can be no settled policy as to which case ought to, and which should not, be transferred to the ordinary courts. In his opinion, it was no longer necessary to refer to the juvenile court as an experimental court, or to question the fairness to all concerned, delinquent and community alike, of its procedure. These cases involved very young boys charged with offences other than murder. It will be interesting to observe the reaction of the Manitoba courts when they are faced with a fact situation identical to the earlier decisions.

There is no settled policy in terms of a national approach. Some courts have shown little hesitation in transferring a child to adult court. However, Parker, writing in 1970, noted that one of the busiest juvenile courts in Canada, the Court of Metropolitan Toronto, had not waived a juvenile case in the preceeding twenty years.[29] In general, the courts seem willing to order a transfer only in exceptional circumstances; unfortunately, a recent decision of the Ontario Court of Appeal will surely start the controversy anew. In the case

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27. R. v. Moroz, [1964] 2 C.C.C. 135, 137 (Man. Q.B.) per Bastin J.

28. R. v. Sawchuk (1967), 1 C.R.N.S. 139, 141-142 (Man. Q.B.)

29. Parker, G., "Juvenile Delinquency, Transfer of Juvenile Cases to Adult Courts; Factors to be Considered Under the Juvenile Delinquents Act" (1970), 48 Can. B. Rev. 336, 337.
The author notes that only in a very small percentage of juvenile cases are transfer orders actually sought by the Crown.

of R. v. Chamberlain,[30] a fifteen year old boy was alleged to have committed a delinquent act, namely the attempted murder of a police constable. The accused was an honours student with a solid family background; although psychiatric evidence indicated some personality disorder, the boy had good educational prospects and, in the opinion of experts, reformation would not be a lengthy process. However, the Court, which was wary of interfering with the discretionary power of the judge, allowed the appeal by the Crown and restored the transfer order of the juvenile court.

Schroeder J.A. noted that if the accused was convicted after trial upon indictment preferred in the ordinary court, he would have an appeal as of right and without the necessity of first making out a case for special leave to appeal as required by the provisions of the Act. He also suggested that it was highly desirable that the boy be tried at a public hearing jointly with his co-accused, his sixteen year old brother. Since the trial of the older boy had received considerable publicity, this was undoubtedly a major factor in the final decision of the Court.

There may be many instances in which the procedure of the juvenile court is inappropriate. However, if the court unnecessarily transfers cases to the adult court, it is not protecting children; it may well be bowing to the retributive instincts of the public and may also be sacrificing a child to a brutalizing adult penal system.[31] The argument is succinctly stated by the

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30. R. v. Chamberlain (1974), 15 C.C.C. (2d) 379, 386 (Ont. C.A.) per Schroeder J.A.
For further comments on this series of cases see Garrett, H.D., "Criminal Responsibility of Infants" (1966), 5 Western L. Rev. 97; Macdonald, J.A., "Juvenile Court Jurisdiction" (1965), 7 Criminal L.Q. 426; Tadman, M., "A Critical Analysis of Bill C-192: The Young Offenders Act" (1971), 4 Man. L.J. 371; Parker, G., "The Appellate Court View of the Juvenile Court" (1969), 7 Osgoode Hall L.J. 155.

31. Parker, supra, footnote 30, p. 166.

Department of Justice Report:

> The problem with any test for waiver that focuses on the character of the offence, without more, is that it is especially difficult to reconcile this test with the stated objectives of the juvenile court concept. For the idea of "individualized justice", which lies at the heart of the juvenile court approach, carries with it, as possibly its most essential element, the implication that a child should be dealt with according to his needs, rather than be subjected to punitive measures proportionate to the nature of the offence.[32]

Some provincial authorities have sought to temper the impact of section 9. In British Columbia, in the late 1960's, the Attorney-General's Department instructed Crown counsel not to make application for transfer except in very exceptional circumstances.[33] Cases involving serious offences such as murder and manslaughter were to be heard in juvenile court. This seems to suggest that juvenile court judges will often transfer a case only when the issue is actively and energetically pursued by the Crown, perhaps as a response to public pressure. In the case of R. v. Simpson,[34] Wallace, Juvenile and Family Ct. J. took special note of the fact, that in the opinion of the Crown, there was no demand for transfer arising from the interest of the community.

Since the independence of the judiciary is theoretically unfettered, it would be an interference with the judicial function for provincial officials to recommend guidelines for the exercise of the judge's discretion in transfer hearings. The Department of Justice Report has noted one possible solution which might alleviate the fears of provincial authorities. The Kansas law

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32. Department of Justice Committee on Juvenile Delinquency, supra, footnote 2, p. 79.

33. Peterson, L.R., "Experiments in the Administration of Justice" (1970), 12 Can. J. Corr. 445, 448.

34. R. v. Simpson, [1964] 2 C.C.C. 316, 324 (Ont. Juv. Ct.) per Wallace, Juvenile and Family Ct. J.

provides that a case be referred to the ordinary courts for trial and, upon proof of the allegations against the accused, the case is then remanded to the juvenile court for disposition.[35] This innovation could be used in the matter of joint trials. Waiver is sometimes sought because there are a number of offenders, of whom several are adult, and the Crown wishes to proceed against all in one trial. While this, of itself, is not a sufficient justification for waiver, it may not be inappropriate to transfer such a case to the ordinary courts if the disposition provisions of the juvenile court could continue to apply.

After the hearing in juvenile court, a formal order transferring the case must be filed before the magistrate acquires jurisdiction. In the case of R. v. Cook,[36] MacFarlane J. stated that this order is as necessary to jurisdiction in the case of a juvenile as an election is in the case of an adult.

Decisions from all provinces indicate that there is nothing to prevent the same individual sitting as both juvenile court judge and magistrate after the case is transferred, often on the same day.[37] It is submitted that this practice brings disrepute to the judicial system and must be ended. In the eyes of the public, there can only be one explanation for such action on the part of the juvenile court judge. If the accused is convicted, the judge will be able to impose much more severe sanctions on the child than are authorized by the Act. Surely, this indicates a complete disregard for

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35. Department of Justice Committee on Juvenile Delinquency, supra, footnote 2, p. 80-82.

36. R. v. Cook (1958), 29 C.R. 87, 89 (B.C.S.C) per MacFarlane J. See also R. v. Newton (1949), 7 C.R. 422 (Alta. S.C.); R. v. David (1972), 20 C.R.N.S. 184 (B.C.S.C.); R. v. Allan (1973), 12 C.C.C. (2d) 38 (N.B.S.C.); Re Woodhouse and The Queen (1974), 16 C.C.C. (2d) 501 (Man. Q.B.).

37. See R. v. Paquin and De Tonnancourt (1955), 21 C.R. 162 (Man. C.A.); R. v. McKellar (1967), 9 Criminal L.Q. 503 (Ont. C.A.); Re M. (1961), 37 C.R. 262 (Sask. Q.B.); Re Straza (1967), 60 W.W.R. 110 (B.C.S.C.); R. v. R. (1970), 8 C.R.N.S. 257 (B.C.S.C.).

the spirit and intent of the legislation.

Once the information is sworn in adult court, the juvenile court judge is powerless to make an order returning the child to his jurisdiction; the laying of a charge in adult court initiates proceedings within the meaning of section 9(2).[38] However, defence counsel's failure to accept the juvenile court judge's offer to rescind the transfer order will not bar an appeal.[39]

The original information used in the juvenile court proceedings cannot be introduced in the adult court; a new information must be issued. In the case of R. v. McKellar,[40] Aylesworth J.A., of the Ontario Court of Appeal, stated that when the information used in the juvenile court is read to the accused in the ordinary court, the judge is without jurisdiction. The child, so far as any legal basis for proceeding is concerned, stands charged with committing a delinquency, a charge unknown under the provisions of the Code. Further, following transfer to adult court, the Crown will not be allowed to introduce evidence of the plea in the juvenile court or any of the evidence given therein.[41]

Included offences have caused considerable difficulty for the juvenile court in transfer hearings. One judge in British Columbia has

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38. Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 9(2), supra, footnote 1.
See R. v. Paquin and De Tonnancourt (1955), 21 C.R. 162 (Man.C.A.).

39. R. v. R. (1970), 8 C.R.N.S. 257 (B.C.S.C.).

40. R. v. McKellar (1967), 9 Criminal L.Q. 503, 504 (Ont.C.A.) per Aylesworth J.A.
See also R. v. Newton (1949), 7 C.R. 422 (Albt. S.C.).

41. R. v. Haig, [1971] 1 C.C.C. 299 (Ont. C.A.).

demonstrated a unique approach; in the case of R. v. P.M.W.,[42] Pool, Prov. Ct. J. held that transfer to the ordinary courts should be a transfer on a specific charge and not merely a transfer of the person of the accused without relation to a specific charge. In this particular case, although the act of the accused, if proved, would have justified a conviction for murder in an adult court, the Court ordered that the child be proceeded against on the lesser included offence of manslaughter. This innovation has been rejected by commentators who argue that the question is simply one of transfer or no transfer. One writer argues that since there is only one charge in juvenile court, a charge of delinquency cannot be an included offence in another charge of delinquency.[43] However, where particulars are available, it is submitted that a judge of the juvenile court may order that the child be proceeded against, in the ordinary court, on the lesser and included charge.

In the case of R. v. Goodfriend,[44] the transfer order was based on a charge of possession of marijuana for the purpose of trafficking. This was withdrawn in the adult court and a simple possession charge was substituted; a plea of guilty was entered. The British Columbia Court of Appeal quashed the conviction. McFarlane J. A. noted that provisions of the Code authorized amendment of an indictment. However, in this case the power to amend was not invoked; the first information charging possession for the purpose of trafficking was withdrawn and another information substituted. McFarlane J.A. rejected the submission of the Crown that this substitution ought to be regarded as a mere amendment. The juvenile court judge might

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42. R. v. P.M.W. (1955), 16 W.W.R. 650 (B.C. Juv. Ct.).

43. Bowman, D.E., "Transfer Applications" (1970), Pitblado Lect. 78, 82.

44. R. v. Goodfriend, [1969] 1 C.C.C. 184 (B.C.C.A.).

not have acted as he did under section 9 if the delinquency alleged before him had been mere possession and not possession for the purpose of trafficking. The different maximum penalty was certainly a factor requiring his consideration when deciding whether or not the good of the child and the interest of the community demanded proceedings by indictment in the ordinary court. Although possession is an included offence in the offence of possession for the purpose of trafficking, McFarlane J.A. held that withdrawal, as opposed to amendment, deprived the magistrate of jurisdiction to proceed on the new information.[45]

The British Columbia courts had to deal with this issue again in the case of R. v. B.[46] A juvenile was charged with committing a delinquent act in that he attempted to commit an act of gross indecency with another male person. The juvenile court judge transferred the case; however, in adult court he was indicted for counselling another person to commit an act of gross indecency. Before a plea was entered, a motion to quash was brought for want of jurisdiction on the ground that the charge in the indictment differed from that in respect of which the transfer order had been made. Crown counsel argued that the indictment was a substitution and fell within the ambit of section 496(2) of the Criminal Code.[47] The conviction was

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45. R. v. Goodfriend, [1969] 1 C.C.C. 184, 186-187 (B.C.C.A.) per McFarlane J.A.

46. R. v. B. (1969), 6 C.R.N.S. 382 (B.C.Co.Ct.).

47. Section 496(2) of the Criminal Code, R.S.C. 1970, c. C-34 reads as follows:

> 496.(2) An indictment that is preferred under subsection (1) may contain any number of counts, and there may be joined in the same indictment
> (a) counts relating to offences in respect of which the accused elected to be tried by a judge without a jury and for which the accused was committed for trial, whether or not the offences were included in one information, and
> (b) counts relating to offences disclosed by the evidence taken

quashed.[48]

On appeal, the British Columbia Supreme Court considered the Goodfriend case and overruled the lower court decision. MacDonald J. distinguished the Goodfriend case on the ground that, in that case, the magistrate never obtained jurisdiction because the initiating step in the proceedings, the swearing of the second information, was ineffective. In this case, the initiating step was not challenged and the magistrate conducted a preliminary inquiry with full jurisdiction to do so. MacDonald J. held, therefore, that valid proceedings had been initiated against the accused in the ordinary courts and that he was beyond recall to the juvenile court.[49]

In the Court of Appeal, the majority upheld this decision. It is interesting to note that McFarlane J. delivered the opinion of the Court in the Goodfriend case. In the case of R. v. B.[50] he stated that there was no sufficient reason for extending the effect of that decision beyond the precise matter there decided.

Branca J.A. offered a strong dissenting opinion. He stated that, if the submission of the Crown was correct, it meant that once a juvenile was raised to the ordinary criminal court for trial in reference to a specific act then, by virtue of section 9, the juvenile would no longer be

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on the preliminary inquiry, in addition to or in substitution for any offence for which the accused was committed for trial.

48. R. v. B. (1969), 6 C.R.N.S. 382, 387 (B.C.Co.Ct.) per Ladner Co. Ct. J.

49. R. v. B. (1970), 8 C.R.N.S. 58, 62-63(B.C.S.C.) per MacDonald J.

50. R. v. B. (1970), 15 C.R.N.S. 89, 90(B.C.C.A.) per McFarlane J.A. (Tysoe J.A. concurring).

entitled to the protective mantle of the Act.[51] This is correct since, once he is raised to the ordinary criminal courts, he may be proceeded against in reference to any act which may be disclosed in the evidence taken at the preliminary inquiry whether the act so disclosed is an act included in the original charge or not, or whether such act is in addition to or in substitution for the original offence upon which the juvenile was raised to the ordinary court, and upon which he was committed for trial. Branca J.A. suggested that such far reaching results were not contemplated by the terms of section 9. In his opinion, when a judge of the juvenile court invoked the provisions of section 9, he did so in regard to a specific act which constituted the delinquency and that act only. He concluded that the provisions of the indictable procedure which applied were only those relating to the specific act originally charged and no other.

This issue has been considered in a recent Manitoba decision, Re Woodhouse and The Queen.[52] The accused was transferred to adult court on a charge of capital murder. At the time of the offence culpable murder was a capital offence. However, when the indictment was signed, legislation had changed the law and, except in circumstances which did not occur here, murder was not a capital offence. The indictment charged simply that the accused did commit murder.

The applicant, relying on the Goodfriend decision, argued that the order whereby a delinquent is transferred to the ordinary courts is ineffective as to any charge other than that upon which he was raised to

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51. R. v. B. (1970), 15 C.R.N.S. 89, 94 (B.C.C.A.) per Branca J.A. (dissenting).
For comments on this case see Bowman, supra, footnote 43; Parker, supra, footnote 30.

52. Re Woodhouse and The Queen (1974), 16 C.C.C. 501 (Man.Q.B.).

adult court. Wilson J., of the Manitoba Queen's Bench, disagreed. In his opinion, the expression "in that behalf" in section 9 was not intended to confine the transfer of jurisdiction to the strict form and language of the charge initially before the juvenile court.[53] Thus, the Goodfriend decision will be applied in a very strict and limited sense; the Crown will not be allowed to withdraw any information in the adult court and substitute another charge. However, they are free to indict on another charge, within the limits described below, when the case first comes before an ordinary criminal court. It is submitted that this is correct and that when children are transferred to adult court, they should receive the same treatment as an adult. However, the vast majority of cases, including those involving murder, should be heard in juvenile court. Transfer to adult court should be considered only in the most extreme circumstances.

There is further potential for abuse when the effects of sections 9(1)[54] and 20(3)[55] of the Act are combined. For example, where a child has been

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53. Re Woodhouse and The Queen (1974), 16 C.C.C. 501, 504-505 (Man. Q.B.) per Wilson J.

54. Juvenile Delinquents Act, R.S.C. 1970, c. J-3, s. 9(1), supra, footnote 1.

55. Section 20(3) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 20.(3) Where a child has been adjudged to be a juvenile delinquent and whether or not such child has been dealt with in any of the ways provided for in subsection (1), the court may at any time, before such juvenile delinquent has reached the age of twenty-one years and unless the court has otherwise ordered, cause by notice, summons, or warrant, the delinquent to be brought before the court, and the court may then take any action provided for in subsection (1), or may make an order with respect to such child under section 9, or may discharge the child on parole or release the child from detention, but in a province in which there is a superintendent, no child shall be released by the judge from an industrial school without a report from such superintendent recommending such release, and where an order is made by a court releasing a juvenile delinquent from an industrial school or transferring such delinquent from an industrial school to a foster

adjudged delinquent and sentenced, even when no further offence has been committed, he may be returned to juvenile court, transferred to adult court and charged with the original offence. In the case of R. v. Chamberlain,[56] Schroeder J.A., of the Ontario Court of Appeal, considered this problem. He commented that, in the interests of finality, it may be better that a juvenile be transferred to adult court. Even if the case was dealt with under the provisions of the Act, the action provided for by section 9(1) would remain suspended over the juvenile's head until he attained the age of twenty-one years.

It seems unlikely that those responsible for drafting the legislation foresaw the inherent danger in these provisions. A judge could sentence a boy to a substantial term in an industrial school and later, on the termination of that incarceration, send him to trial in a criminal court. He could again be punished for what under another name, would be the same misconduct.[57]

The possibility exists that as facilities become more and more overburdened, probation officers and other officials could use this provision to lighten case loads. They would simply make arrangements to have the juvenile court transfer the child out of the juvenile justice system or to another institution or programme; a course of action facilitated by the

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home or from one foster home to another under this subsection it is not necessary for such delinquent to be before the court at the time that such order is made.

56. R. v. Chamberlain (1974), 15 C.C.C. (2d) 378, 385-386 (Ont. C.A.) per Schroeder J.A.

57. R. v. Lalich (1963), 40 C.R. 133, 137 (B.C.C.A.) per Wilson J.A. See the comment in Fox, W.H., "Sentencing the Juvenile Offender" (1966), 5 Western L.R. 109.

wording of section 20(4) of the Act.[58]

If a juvenile does commit a subsequent offence, the juvenile court has the power to bring him back for a new trial. However, these provisions are dangerous because they could be used to bring him back before the juvenile court, have him transferred, and then charged in adult court with either the original offence or the second offence. The plea of autrefois convict is not available to him.[59]

In the case of R. v. Gray,[60] a juvenile was alleged to have committed a delinquent act; an application to transfer the boy was refused. He entered a plea of guilty in juvenile court and was placed on probation. When he breached the terms of probation, he was brought before the juvenile court and at the request of the Crown was transferred to adult court. The British Columbia Court of Appeal held that the phrase "unless the Court has otherwise ordered" did not prevent the juvenile court from again ruling on an application to send the boy to be tried in the ordinary criminal courts. Thus, the juvenile court judge is able to transfer a child in situations where the second offence is not indictable.

In circumstances where a child has been transferred to adult

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58. Section 20(4) of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 reads as follows:

> 20.(4) When a child is returned to the court, as provided in subsection (3), the court may deal with the case on the report of the probation officer or other person in whose care such child has been placed, or of the secretary of a children's aid society, or of the superintendent, or of the superintendent of the industrial school to which the child has been committed, without the necessity of hearing any further or other evidence.

59. R. v. Olafson, [1969] 4 C.C.C. 318 (B.C.C.A.).

60. R. v. Gray, [1971] 3 W.W.R. 478, 480 (B.C.S.C.) per Wilson, C.J.S.C.

court, convicted and placed on probation, serious questions arise if he is subsequently charged with a breach of the probationary order. One juvenile court judge declined to hear such a charge on the ground of lack of jurisdiction. The British Columbia Supreme Court, in the case of R. v. McGowan,[61] agreed and held that once the transfer order was made, the juvenile court was without jurisdiction on any proceeding stemming from the original charge on which the juvenile was ordered to be tried in the adult court.

The Court was faced with a very practical problem; if the juvenile court had exclusive jurisdiction to try the applicant for failure to comply with the probation order, the Crown could not bring the applicant before the ordinary court which convicted him of theft, made the probation order and suspended sentence.[62] The breach of probation was a summary conviction offence;[63] an application for transfer would not be in order.

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61. "I summarize counsel for the applicant's argument as follows. The applicant is a child. He is alleged to have violated a provision of the Criminal Code (s. 640 A(1)). By reason of the provisions of ss.3(1) and 2(1)(h) of the Juvenile Delinquents Act, the commission by any child of a violation of any provision of the Criminal Code constitutes the offence to be known as a delinquency. By section 4 of the Juvenile Delinquents Act, the Juvenile Court is given exclusive jurisdiction in cases of delinquency. Therefore it is said that the ordinary courts have no jurisdiction to deal with the present information". R. v. McGowan, [1970] 12 C.R.N.S. 235, 237-238 (B.C.S.C.) per Aikins J.

62. Ibid, p. 239 per Aikins J.

63. Section 666(1) of the Criminal Code, R.S.C. 1970, c.C-34 reads as follows:

> 666.(1) An accused who is bound by a probation order and who wilfully fails or refuses to comply with that order is guilty of an offence punishable on summary conviction.

Section 664(4)(d) and (e) of the Criminal Code, R.S.C. 1970, c.C-34 read as follows:

> 664(4) Where an accused who is bound by a probation order is convicted of an offence, including an offence under section 666 ...in addition to any punishment that may be imposed for that offence the court that made the probation order may, upon

It appears that the child is unlikely to see his best interests protected whatever decision is made regarding transfer to adult court. If he is transferred he will be subject to the harsh realities of Canada's criminal justice system. If he is adjudged a delinquent in juvenile court, he will be liable to be recalled at any time before his twenty-first birthday and re-sentenced or transferred to adult court. It is submitted, therefore, that transfer to adult court should be considered only as a last resort. Further it is submitted that juveniles should not be subject to recall and transfer to adult court.

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application by the prosecutor, require the accused to appear before it and, after hearing the prosecutor and the accused,
(d) Where the probation order was made under paragraph 663 (1)(a) revoke the order and impose any sentence that could have been imposed if the passing of sentence had not been suspended, or
(e) make such changes in or additions to the conditions prescribed in the order as the court deems desirable or extend the period for which the order is to remain in force for such period, not exceeding one year, as the court deems desirable.

CONCLUSION

Canada's initial experiment in juvenile justice seems about to end with virtually all questions left unanswered. While few people claim more than a partial victory in the battle against crime by young people, we remain uncertain as to the extent of our failure. Unwillingness to allocate adequate research resources may lead to a new regime of juvenile justice with very limited understanding of the evolution of our present system. This creates the danger that new methods of dealing with juvenile delinquency will not move towards a solution but rather will act as nothing more than a reaction to dissatisfaction with existing structures.

The United States has returned to a system favouring adversary criminal proceedings. The American position argues that all the individual protections granted an accused adult pursuant to the Constitution should likewise be given to a child in juvenile court proceedings.

In Europe, delinquency continues to be treated as one aspect of child welfare.[1] The Scandinavian countries have replaced the juvenile court with welfare panels. This is also the trend in England where judicial proceedings for those under fourteen years of age have been largely abolished; whenever possible, proceedings are civil not criminal in nature. One writer has suggested that, by the 1980's, the juvenile court in England will remain only as a court of last resort. The juvenile court's principle concern will be to protect the liberty of the child against the power of the social

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1. For a comparative study on several jurisdictions, with special reference to Sweden and California, see Nyquist, Ola, Juvenile Justice, (London, 1960).

agency in those few cases in which co-operation is unattainable between the parents, the local municipal authority, and the social welfare agency.[2]

Recent innovations in Scotland have generated a great deal of interest. Legislation forbids all prosecutions of children under sixteen years of age except on the instructions of Scotland's Lord Advocate. The court has been replaced by a system of children's panels. The panels, each consisting of three members, function as a welfare body rather than a criminal court and are staffed by persons trained in law and social work. The panels are empowered to order appropriate measures of supervision or residential care. There is provision for legal adjudication of facts in issue at the instance either of the child or his parents. Essentially, these changes remove the vast majority of juvenile offenders from the adversary, quasi-criminal juvenile court system, while at the same time ensuring adequate social controls.[3] Concurrently, unification of social services at the local level has provided a greater range of resources to all children referred for assistance or supervision.

The European countries have opted for a policy of encompassing

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2. Fox, R.G., "The Young Offenders Bill: Destigmatizing Juvenile Delinquency?" (1972), 14 Criminal L.Q. 172, 173.

At page 180 the author notes: "Since Canadian allocation of legislative power is different from the unitary system which obtains, say, in Britain or Sweden where both criminal law and welfare powers are vested in the legislative body, or under federal systems such as the U.S.A. and Australia in which the separate states possess legislative competency in both areas, the usefullness of these jurisdictions in providing legislative models for the Canadian Parliament to emulate is severely limited. Indeed the chief difficult faced by those originally drafting the Juvenile Delinquents Act was to keep it within the legislative jurisdiction of the Dominion Parliament".

3. MacDonald, J.A., "A Critique of Bill C-192, The Young Offenders Act" (1971), 13 Can. J. Corr. 166, 177-178.

See also Spencer, J., "Social Workers, the Social Services and the Juvenile Court: The Relevance For Canada of Recent Scottish Proposals" (1967), 9 Can. J. Corr. 1.

juvenile offenders within a revamped and integrated system of social welfare controls and services. Despite the many constitutional hurdles involved consultation and agreement between Ottawa and the provinces could produce a national programme on much the same basis. Unfortunately, if past performance is an accurate indication, the spirit of co-operation required for such a venture may well be subverted by political power-plays.

Many writers have expressed hesitation in allowing panels to make such decisions. The panel system is seen as administrative and bureaucratic with little regard for due process of the law. There is concern that what is in the best interests of the child, as determined by the tribunals, may mean nothing more than unimpeachable decisions.[4] It is somewhat ironic that these criticisms are equally applicable to our present system of juvenile justice.

The evolutionary process in Canada has been slow and painful. It was not until November 16, 1970 that new federal legislation, The Young Offenders Act,[5] was introduced in the House of Commons by Solicitor General George McIlraith.[6] It was hailed as a bold new direction by the government; unlike the Juvenile Delinquents Act,[7] the proposed legislation dealt only with the violation by juveniles of sections of the Criminal Code[8] and other federal enactments. Procedure in the juvenile court was to approximate

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4. Litsky, H., "The Cult of the Juvenile Court, 'Justice With Mercy'" (1972), 20 Chitty's L.J. 152, 155.

5. The Young Offenders Act, Bill C-192, Third Session, Twenty-Eighth Parliament, 1970.

6. The Honourable Jean-Pierre Goyer became Solicitor General before the bill received second reading.

7. Juvenile Delinquents Act, R.S.C. 1970, c. J-3.

8. Criminal Code, R.S.C. 1970, c. C-34.

much more closely that of adult courts.

Very few pieces of legislation in recent years have provoked the controversy and debate which followed the introduction of this bill.[9] Eldon Woolliams,Conservative Member of Parliament, stated that the bill was "...the most punitive, enslaving, vicious and tyrannical piece of legislation that has ever come out of the legislative grist mill".[10] John Gilbert, New Democratic Party Member of Parliament, argued that condemnation of the proposed enactment was nation-wide:

> Every time I read Bill C-192 I wonder who is responsible for this criminal law monstrosity, this caveman's approach to young people, this bill of rights for social wrongs, this simplistic Spiro Agnew approach to young people's problems. .....Here are some of the criticisms set forth by responsible bodies. It is called, "A Half-Pint Criminal Code for Children", "Inhuman and Intolerable", "A frightening piece of legislation", "The Title is Misleading, Inappropriate and a Step Backward", "Its legalistic terminology - offender, offences, inmates, finger printing, pardon, criminal records - make it a junior Criminal Code", "The approach is punitive", and "Classifying a ten year old an offender is ludicrous".[11]

The general consensus among critics, both inside and outside the House of Commons, labelled the bill as a fine seventeenth century approach to some very pressing twentieth century problems.[12]

Under this somewhat unexpected barrage of criticism, the bill was subsequently withdrawn and returned to the Solicitor General's Department

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9. The pros and cons of the bill are well stated in Grosman, B.A., "Young Offenders Before the Courts" (1971), 2 Can. B.J. (N.S.)2: 6-7; Fish, M.J., "Bill C-192: Another View" (1971), 2 Can. B.J. (N.S.) 31.

10. Debates of the House of Commons, Third Session, Twenty-eighth Parliament, Volume III, January 13, 1971, p. 2374.

11. Ibid, p. 2381.

12. Ibid, p. 2425 per David MacDonald (M.P.-Egmont).

for review. On July 31, 1975, the Deputy Solicitor General, Roger Tasse, Q.C., submitted a report and new draft legislation to Solicitor General Warren Allmand.[13] While the proposed legislation is replete with parental expressions of concern, basic philosophy will entail adherence to adult criminal procedure. We are now witnessing the end of the experiment, the last gasp of parens patriae in Canada's juvenile justice system.

The draft bill will undoubtedly undergo considerable examination and change before it becomes law. Thus, while it is perhaps inappropriate to attempt an analysis of its potential impact, it is important to outline the general retreat from individualized justice and the return to procedural safeguards.

The new legislation will extend solely to offences against federal statutes and regulations.[14] All offences under provincial statutes, territorial ordinances, and municipal by-laws, would be excluded. Other forms of misconduct, such as the "status offences", would also be excluded. The net effect of this proposal is to eliminate the offence of delinquency.

The minimum age of criminal responsibility under the new legislation and in the Code will be set at fourteen years of age; youth courts will have exclusive jurisdiction to deal with young persons who have committed an offence while between the ages of fourteen and eighteen years.[15] Children below the age of fourteen will be dealt with under the provisions of provincial child welfare legislation. The legislation will apply

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13. Young Persons in Conflict with the Law, A Report of the Solicitor General's Committee on Proposals for new legislation to replace the Juvenile Delinquents Act (Communication Division, Ministry of the Solicitor General, 1975).

14. Ibid, p. 7.

15. Ibid, p. 8-9.

uniformly across Canada to all persons who have reached their fourteenth birthday and are under eighteen years of age.

Provision has been made for the establishment of a formal mechanism to provide pre-court screening in an attempt to facilitate the diversion of young persons from the court process. Specific guidelines are provided in the legislation and any agreement entered into between the screening agency and the young person would be voluntary and contain reasonable conditions.[16] This mechanism would provide the opportunity to screen cases on a uniform basis to determine if a more appropriate alternative to formal court proceedings was available. The screening mechanism created could vary in composition and form depending on the decision of each province.

Unlike its predecessor, the draft bill encourages active participation of the young person at most stages of the proceedings.[17] The young person would be directly involved in the process surrounding the formulation of an agreement with the screening agency. He would also have the right to be represented by legal counsel and would be entitled to receive a copy of the predisposition report and question its contents.

The bill also recognizes many of the abuses of the past and moves toward a more formal adjudication structure.[18] The proposed legislation recognizes that the State should not intervene in the life of a young person on the basis of an offence until it is proved, beyond a

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16. Young Persons in Conflict with the Law, supra, footnote 13, p. 10.

17. Id.

18. Ibid, p. 11.

reasonable doubt and within proper legal safeguards, that the youngster has, in fact, committed the offence. The bill acknowledges the need for safeguards against inappropriate or improper judicial and administrative actions or decisions by personnel, such as probation officers, within the juvenile justice process.

Mandatory assessments in the disposition process will be undertaken to define the needs of the young person and to identify the most appropriate services. It will no longer be possible for a child to be transferred to provincial jurisdication; the child will remain under the jurisdiction of the court until the expiration or termination of the disposition.[19] Under present legislation, when an order is made which has the effect of committing a young person to the care of a child welfare authority or to an industrial school, the young person may, at the discretion of the provincial secretary, be dealt with thereafter under provisions of provincial law until such time as he is discharged from the care of the authority in question.

Finally, the proposed legislation makes provision for a continuing review of dispositions.[20] This provision would ensure that an in-depth judicial review be made to determine the progress of a young person and to ascertain that the restraint imposed on the young person is no greater or more severe or lengthy than the circumstances require. Such a review would take place annually as a matter of course until the disposition has terminated. Further,a judicial review would be available to the young person, his parent or the provincial director, or at the instance of a

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19. Young Persons in Conflict with the Law, supra, footnote 13, p.10.

20. Ibid, p. 12.

judge, if circumstances indicated that such a review was desirable. In addition to a review by the court, an administrative agency would be established to consider the case of every young person within its jurisdiction who is on probation or who has been committed to care in a residential or institutional setting. This review agency would be charged with reviewing the implementation of the disposition, particularly the quality of services and care provided. It would report to the responsible provincial authority or to the court if appropriate measures were not being taken with respect to these matters.

While there are a number of other substantial proposals in the bill, including recommendations on transfer to adult court, dispositions, youth court records and appeals, the preceeding discussion indicates the main thrust of the proposed legislation:

> ...to restrict the scope of the legislation, provide for a formal process to divert young persons from the juvenile justice process through the establishment of a screening agency, place emphasis on responding as precisely as possible to the individual needs of young persons by providing for mandatory assessments in those cases where probation, open or secure custody is being contemplated, promote more active participation of the young persons and their parents in the process, stipulate specific substantive and procedural safeguards and outline the accountability of those persons involved in the administration of the process through judicial and administrative reviews.[21]

In essence, this is an enlightened report but one which, hopefully, will receive considerable attention and public scrutiny. Considering the present social and political climate in Canada, the proposed

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21. Young Persons in Conflict with the Law, supra, footnote 13, p.12-13.

The Commission's report has drawn heavily upon the work of the Law Reform Commission.

See Law Reform Commission of Canada, The Principles of Sentencing and Dispositions, Working Paper 3, (Ottawa, 1974); Law Reform Commission of Canada; Diversion, Working Paper 7, (Ottawa, 1975).

legislation is an important step forward and deserves the support of those charged with the task of implementation.

The draft bill will undergo considerable change before it becomes law. For example, it will be suggested that the minimum age of criminal responsibility under the new legislation and in the Criminal Code be set at sixteen years of age. This recommendation should be given serious consideration. The proposed youth court should have exclusive jurisdiction to deal with young persons between the ages of sixteen and eighteen who have committed an offence against federal statutes and regulations. The legislation should forbid prosecutions of children between the ages of sixteen and eighteen years of age except on the instructions of the Attorney-General of Canada. An appearance in court, particularly a court open to the media and the public, may cause irreparable damage to a person of tender years. It is submitted, therefore, that referral of a child to a youth court should only take place in extreme circumstances.

When a child appears in the youth court, he should be accorded all the protections of the adult criminal justice system. For the most part, the proposed legislation recognizes this principle. Unfortunately, the bill allows for up to three years custodial detention. A child should not be subject to a greater sentence than an adult for commission of the same offence. Further, considering the present state of custodial facilities, this provision is totally unwarranted.

The rights and responsibilities of both the parents of the child and the public are largely ignored in the report. For example, a youth may request, if he is at least sixteen years of age, that a copy of the proceedings before a screening agency not be given to his parents. Further, a child sixteen years of age and over may waive notice to his parents of his

arrest, temporary detention or appearance in youth court. In addition, the public does not have any right to know the disposition of an offence unless the child, sixteen years of age and over, grants permission for its release. It is submitted that recognition must be given the role of the parent as a valuable resource in the treatment process; they have a right to know. Similarly, the public, particularly the victim, has a right to know the disposition of the case.

Under the provisions of the draft bill, the decision of the screening agency would not be reviewable by a court. This approach is totally unacceptable. Although the relationship between the agency and the young person will be voluntary, this is not adequate justification for excluding appeals from its decisions. Additional protections, apart from those provided by the adult criminal justice system, are necessary if the new legislation is to serve the child's best interests.

These additional protections should include provision for mandatory representation by counsel at all stages in the proceedings. Further, as stated earlier in this presentation, special rules of evidence governing the admissibility of confessions should be introduced.

The proposals have several implications for the provincial governments; the key to the success of the total programme will be their reaction to this challenge. When the juvenile justice system was first introduced, there were very few provincial enactments designed to deal with the problems of young people; this is no longer the case. However, the report identified the following areas as requiring the development of new resources and extensions of existing resources: age changes, pre-court screening and referral, service resources, assessment resources, judges, training of personnel throughout the system, pre-dispositional reviews,

residential and non-residential post-dispositional care and services.[22] The development of preventive social systems is crucial if the incidence of crime by young people is to be reduced. Combined with prescribed standards, funding under the Canada Assistance Plan[23] for the effective integration of social services could make possible analysis and assessment of different approaches in the provinces.

Obviously, legislation and programmes aimed at one area of a child's total needs will prove futile. Crime by young people must be dealt with through solutions to slum living, child abuse, broken homes and an inadequate educationsl system. However, there is little to suggest that any level of government intends to begin re-weaving Canada's social fabric.

Neither the public nor government is likely, in the immediate future, to support wholesale adoption of European-style juvenile justice. One experiment has ended. We are now embarking on a new course in hope of developing a system capable of dispensing justice and ensuring protection of a child's best interests. In so doing, we will protect the best interests of Canadian society.

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22. Young Persons in Conflict with the Law, supra, footnote 13, p. 13.

23. Canada Assistance Plan, R.S.C. 1970, c. C-1.

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