JUVENILE COURT IN RETROSPECT: SEVEN DECADES OF HISTORY IN ALBERTA (1913 - 1984)

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This article commemorates the seventy-year history of Juvenile Courts in Alberta and traces the origins of juvenile courts both in general and specifically in Alberta. Bowker considers the effect of enlightened legislation, specialized court systems, and correction and rehabilitation services, all of which are crucial to the success of the system. The movement for reform and its culmination in the Young Offenders Act are examined.

I. INTRODUCTION

The year 1984 marked the end of an era — the demise of Juvenile Courts in Canada, the implementation of new legislation and the establishment of Youth Courts with changed procedures and philosophy.

The earlier system, whatever its strengths and deficiencies, had operated for over 70 years — at times innovative and at times regressive — as the sole judicial authority for dealing with children who had transgressed the law.

Lest the good features of that system be lost to history, or the lessons of its shortcomings be forgotten by future policy makers, it is of value now to reflect on the juvenile corrections system in Canada as it prevailed throughout these significant years.

This commentary will review the origin and history of Juvenile Court, its development in Canada and its operation in Alberta.

It will demonstrate that a juvenile justice system depends for its effectiveness on three components:

a. enlightened legislation (both federal and provincial)
b. a specialized court system
c. corrective and rehabilitative resources available to the court including a variety of institutional facilities.

II. THE ORIGIN AND HISTORY OF JUVENILE COURT

The first Juvenile Court in the world was established in the City of Chicago in 1899. It came into being largely as a result of efforts by a group of women who prevailed upon the State legislature to establish a separate court for children distinct from the adult criminal court. With the enactment of legislation entitled "An Act to Regulate the Treatment and Control of Dependent, Neglected or Delinquent Children",[1] the first Juvenile Court opened on July 1, 1899 in Cook County, Illinois.

The idea of a separate Children's Court quickly spread to other American states, beginning with Colorado; and shortly thereafter to England, Ireland and Canada, followed later by countries in Europe and Asia. The spread of the Juvenile Court system is regarded as one of the most remarkable developments in the field of jurisprudence during the

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1. 1899 Illinois Laws 131.

early decades of the 20th century. Historically, the roots of Juvenile Court go back to the equity jurisdiction of the English Courts of Chancery, and some traces of it can be found in Roman law.[2]

Dean Roscoe Pound of Harvard University Law School once said that the establishment of Juvenile Court was "one of the most significant advances in the administration of justice since Magna Carta".

The reason for its establishment was widespread dissatisfaction with existing methods for dealing with delinquent children within the adult criminal court system. Up to this time, children were tried in the same courts as adults, subject to the same sentences as adult offenders and imprisoned in the same prisons as adult criminals.

At common law, once a child had reached the age of seven years (being the common-law age of criminal responsibility) he was treated in the same way as an adult. There was a record, for example, of a 13-year-old boy being hanged for murder in New Jersey in 1828, and in 1830 a 14-year-old boy was reported to have been executed in Upper Canada for theft. Insofar as prisons were concerned, it is reported that in Canada's oldest penitentiary at Kingston (dating back to 1835), convicts, women and children were all caged together. Records in 1846 show that 16 children were imprisoned there along with 11 murderers and 10 rapists.

There was obvious need for a specialized court where an erring child would be protected and rehabilitated, rather than exposed to harsh sentences and imprisonment under the criminal law.

In 1908 when the "Children's Bill" was introduced into the British House of Commons to establish a Juvenile Court, its objectives were idealized in this passage which appears in the Hansard debate:[3]

> It is our duty . . . to lift if possible, and rescue the child, to shut the prison door and open the door of hope.

An American author, Julian Mack, writing in the Harvard Law Review in 1909[4] stated that the objective of a Juvenile Court in dealing with a child "treading the path that leads to criminality" is "to take him in charge not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."

As to the qualities of a Juvenile Court judge, Mack, would include not only a knowledge of the law, but a love of children, an interest in philanthropy, infinite patience and faith in humanity. He visualized the "fatherly judge seated at his desk with the child at his side and on occasion putting his arm around his shoulder and drawing the lad to him". He points out however that it would not be the intent of Juvenile Court to detract from parental responsibility:

> The object of Juvenile Court and of the intervention of the state is in no case to lessen or weaken the sense of responsibility either of the child or of the parent; on the contrary, the aim is to develop and enforce it.

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2. It should be noted that a form of Children's Court was operating in South Australia in 1895. However, it was considered experimental only — according to the reply of the Australian government to a United Nations questionnaire in 1955, confirming that it was not until 1904 that the first Juvenile Court in Australia was established by legislation.
3. 186 Hansard 1262.
4. "The Juvenile Court" (1909) 23 *Harv. L.R.* 104.

Thus the concept of Juvenile Court was born of lofty ideals and perhaps unattainable expectations. However, as stated by Judge Lindsay, an influential American Juvenile Court Judge, Juvenile Court was not intended as a cure-all: it does not (in his words) pretend to do all the work necessary to correct children or prevent crime. It was nonetheless recognized from the outset that Juvenile Court offered a far superior method than that of the criminal justice system in providing a form of individualized justice, which is more appropriate to children — with less emphasis on the nature of the offence than on the special needs of the particular child.

A. TWO APPROACHES: JUDICIAL AND WELFARE

As Juvenile Courts became established in various countries, two separate approaches emerged as alternative methods of handling juvenile offenders:

- — first was the judicial approach; that is a court with a single judge, this being the system which has prevailed in North America (United States and Canada) as well as in Japan and several European countries;
- — second was the Scandanavian or welfare approach adopted by Sweden, Denmark, Norway and Finland, involving the use of child welfare Boards comprising lay persons instead of judges; such boards being empowered to determine sentence after either a guilty plea or conviction by a court; there being no detention centres, only welfare institutions.

It is interesting to note that these two systems (the judicial and the welfare) developed side by side, yet independent of each other, commencing around 1905. No apparent explanation exists as to why the Scandanavian countries adopted the welfare approach, other than their natural propensity towards administration boards. An excellent comparison of the two systems appears in an article in 1960 entitled "Juvenile Justice" by Ola Niquist.[5]

Developments in Britain were somewhat in between the two approaches described above, namely, juvenile courts presided over not by a judge but by a panel of three lay-persons (one always being a woman) with a legally-trained secretary, the writer having observed this system in operation in London in 1968.

The "Tribunal de Juveniles" in Mexico City is a similar mixture of the judicial and social welfare systems. By contrast, Juvenile Courts in the United States, such as New York and Los Angeles, are well structured on the judicial model, while those in Japan and Korea are similar, though less formalized. The writer had occasion to visit all of these Juvenile Courts during the late 1960s and early 1970s, along with Juvenile Courts in most Canadian cities.

Whatever the structure, the objective seemed the same: to provide a less formal court structure for juvenile offenders, less rigidity in procedure; a wider sentencing discretion vested in judges; a philosophy and supportive services aimed at rehabilitation.

5. Volume XII Cambridge Studies on Criminology.

III. DEVELOPMENT OF JUVENILE COURTS IN CANADA

Turning to a more detailed analysis of Canadian developments, it is significant that Canada followed so promptly the initiative begun in Chicago in 1899 by a passage through Parliament of the Juvenile Delinquents Act in 1908.[6] This Act was consolidated in the 1927 Revised Statutes of Canada,[7] re-enacted in 1929[8] and appeared in this form in the various federal consolidations thereafter.

Under Section 44, the coming into force of the Act in any province required a federal Proclamation and its publication in the Canada Gazette. The Juvenile Delinquents Act was brought into force in Alberta by Proclamation of the Governor-General-in-Council in 1913.[9]

In an Alberta case in 1955, the crown appealed where a juvenile had been acquitted on the ground that the prosecution had not proved the proclamation bringing into force the 1929 Act. The Court of Appeal dismissed this argument, holding that the earlier Proclamation of the 1908 Act applied to the 1929 Act under the corrective provisions of Section 45: *R. v Breland.*[10] A similar finding was made in *Re Penno.*[11] That judicial notice may be taken of such a proclamation was held earlier by the Nova Scotia Court of Appeal in *R. v St. Peters.*[12]

Subject to minor amendments in 1929[13] the original Juvenile Delinquents Act remained in effect until 1984 when it was replaced by the Young Offenders Act, enacted in 1982,[14] and proclaimed as of April 1, 1984. The new Act was the result of some fifteen years of study, research, consultation and review directed by the Office of the Solicitor General of Canada. From 1967 on, the writer along with many others throughout Canada participated in this review process on an informal but continuing basis through the submission of briefs and commentaries pertaining to the various draft Bills circulated for comment during this period, culminating in passage of the Young Offenders Act in 1982.[15]

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6. S.C. 1908, c. 40.
7. R.S.C. 1927, c. 108.
8. S.C. 1929, c. 46.
9. The Canada Gazette, Part I, Vol. 47 (1913-14) O.C. No. 3745.
10. (1955) 15 W.W.R. 93 (Alta. C.A.).
11. (1963) 42 W.W.R. 611 (B.C.S.C.).
12. (1927) 47 C.C.C. 204 (N.S. en banco).
13. S.C. 1929, c. 46.
14. S.C. 1982, c. 110.
15. Some of the Bills drafted and circulated during this period but which did not receive passage by Parliament were:

    Childrens and Young Persons Act
    Young Offenders Act (No. 1)
    Young People in Conflict with the Law Act.

IV. ANALYSIS OF JUVENILE DELINQUENTS ACT[16]

A. GENERAL PROVISIONS OF ACT

This Act created a new offence of "delinquency"[17] defined as violation of any provisions of the Criminal Code, any federal or provincial statute, municipal by-law or ordinance and "sexual immorality or any similar form of vice". The Act provided for the establishment of Juvenile Courts at the provincial level, prescribed the powers, jurisdiction and philosophy of such courts, leaving to the provinces the responsibility for appointing judges, providing court facilities, supportive services and correctional institutions. Before the Act came into force in any province, the federal government had to be satisfied that detention homes or industrial schools[18] were established for the confinement of juveniles separate from adult offenders. Court hearings were to be held in private,[19] the names of accused juveniles were not to be published.[20] In practice, prior to disposition, the court would rely on local or provincial agencies to furnish a report on the juvenile's situation and background, and later, if ordered by the court, to provide probation services or residential and correctional facilities.

B. PHILOSOPHY

Rehabilitation of the juvenile, rather than punishment, was the predominant goal of the entire system. This philosophy was set out in the following sections of the Act:

> Sec. 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.
>
> Sec. 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 interest of the community require.
>
> Sec. 38 — . . . that as far as practicable every juvenile delinquent be treated not as a criminal but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance.

That the Juvenile Delinquents Act was *intra vires* the Parliament of Canada as being in essence criminal law, and that Juvenile Court had exclusive jurisdiction over juvenile offenders was established by the Supreme Court of Canada in *A.G. B.C. v Smith.*[21] This case defined informality of procedures as "abstention from formalities in any proceedings under the Act including the trial and disposition of the case as circumstances permit, consistently with the due administration of justice".

16. R.S.C. 1970, C. J-3.
17. Ss. 2(1) and 3.
18. Defined in s. 2(1).
19. s. 12.
20. s. 12(3)(4).
21. [1967] S.C.R. 702.

C. PROTECTION OF JUVENILES FROM PUBLICITY

As for the provision that trials shall take place "without publicity",[22] the Supreme Court of Canada in 1981 in *C.B. v The Queen.*[23] after several conflicting decisions at the provincial level, adopted a narrow interpretation of this term as being equivalent to "in camera", excluding the media and the public from attending either the trial or disposition of a case, and virtually closing the door to all persons except those directly concerned with the case. However, following enactment of the Constitution Act of 1982 and the Charter of Rights and Freedoms, the issue arose again, this time before the Ontario Court of Appeal in *Re Southam Inc. v The Queen (No. 1).*[24] wherein it was held that freedom of access to courts is an integral and implicit part of the guarantee of freedom of opinion and expression, and that the blanket exclusion of the public under sec. 12(1) of the Juvenile Delinquents Act is not a reasonable limit justifiable in a free and democratic society.

A few months earlier, the Alberta Court of Queen's Bench (Dea J.) in *Re Edmonton Journal and Attorney General for Alberta.*[25] had held that a newspaper reporter who had been refused access to a Juvenile Court hearing could challenge section 12(1) ("private trials") as being inconsistent with sec. 11(d) of the Charter which guarantees a "public hearing" to persons charged with an offence. The judgment rejected the argument (confirmed in the Ontario case above) that the guarantee of freedom of expression includes freedom of access to information (in that case attendance in court). While refusing to support an absolute bar to public access to Juvenile Court, the judgment would sanction a discretionary denial in individual cases.

The Young Offenders Act (Section 39) adopts a different approach, namely, that hearings are open to the public with the court retaining the power under certain circumstances to exclude persons from the proceedings except for certain specified individuals. Since this is not an absolute exclusion of the public, it is more likely to withstand a constitutional challenge.

The prohibition against publication of the name of a juvenile, his parents or school in section 12(3) of the Juvenile Delinquents Act is preserved in the Young Offenders Act (section 38) though in narrower terms, applying only to the name of the accused, though extending to the name of any underage witness. When this prohibition was challenged under the Charter before the Ontario Supreme Court, Holland J. on November 5, 1984, upheld the publication bar as a "reasonable limit" on the Charter of Rights (unreported).

At the time of this writing (January, 1985) these issues are by no means settled and are likely to receive differing interpretations before eventual clarification by the Supreme Court.

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22. s. 12(1).
23. [1981] 2 S.C.R. 480.
24. [1983] 3 C.C.C. (3d) 515.
25. [1983]4 C.C.C. (3d) 59.

D. SERVICE OF NOTICE ON PARENTS

The requirement of service of notice upon parents of a Juvenile Court hearing (section 10) has been strictly interpreted. The Supreme Court in *Smith* v. *The Queen* [26] held that the giving of due notice to parents of the hearing of any charge is a condition precedent to Juvenile Court having jurisdiction.

Following that decision, courts vacillated in their interpretation of the notice requirement from rigidity to moderation. In 1976 in an appeal to the Saskatchewan Court of Queen's Bench (Estey J.) it was held that in the absence of notice, the mere attendance of a mother in court cannot be accepted as constituting compliance with Section 10: *R.* v. *Cote.*[27]

In 1980 in the Manitoba Provincial Court it was held (Kimelman J.) that it is incumbent on the defence to raise the issue of notice at the outset of a hearing and that the Judge is not obliged on his own motion to inquire as to the sufficiency of notice: *R v Wowk.*[28]

When an appeal from a waiver order involving the same juvenile came before the Manitoba Court of Queen's Bench (*R. v D.L.W.*),[29] the same issue of insufficient notice was again raised. It was disposed of on the ground that the juvenile now being aged 16 was no longer a "child" for whom notice was required.

In 1983 the B.C. Court of Appeal held that lack of written notice was corrected by the appearance of the mother in court: *R. v G.B.*[30]

Thus by the time the Juvenile Delinquents Act was about to be replaced, some relaxation may have been developing in the rigidity of the law respecting notice to parents.

The Young Offenders Act attaches equal importance to the necessity for notice though with somewhat different emphasis. For example sec. 9 requires that a parent be notified not only concerning a court appearance, but also concerning the initial arrest and place of detention. However, if the whereabouts of a parent are unknown, notice can be given to an adult relative, or failing that, to any interested adult, or otherwise, on direction of a judge. Unlike the Juvenile Delinquents Act, the new Act has provision for ordering the attendance of the parent if not present and where such attendance is deemed necessary (sec. 10).

Even in the absence of such provision in the Juvenile Delinquents Act, my experience as Judge of the Juvenile Court was that there was always a parent in attendance (except of course where the juvenile was a government ward). Parents generally were anxious to be included in the court proceedings, and pleased to express an opinion when invited to do so. Though it was mostly mothers who attended in court, there were numerous instances when fathers, often at some inconvenience to themselves, attended as well. Parents on the whole were genuinely concerned with what was best for the children, even though this might require corrective measures by the court.

26. [1959] S.C.R. 638.
27. (1976) 31 C.C.C. (2d) 414.
28. (1981) 61 C.C.C. (2d) 394.
29. (1981) 64 C.C.C. (2d) 40.
30. (1983) 31 R.F.L. (2d) 307.

E. PROOF OF AGE

As to proof of age, this too was regarded as basic to the jurisdiction of the Juvenile Court. "Child" was defined in the Act as a boy or girl "apparently or actually" under the age of 16 years with the proviso in Sec. 2(2) that by federal proclamation (at the request of a province) such age limit could be fixed at 18 years for either boys or girls.

Alberta's history under the Juvenile Delinquents Act is that up to 1935 the maximum age for both boys and girls was 16. In 1935 this was changed by Order-in-Council to 18 for both sexes. In October 1951 it was lowered to 16 for boys but remained at 18 for girls. This age differential was not questioned until 1976 when it was challenged under the Canadian Bill of Rights 1960 as being discriminatory in that it denied to boys aged 16 and 17 the benefits provided to girls of similar age within the Juvenile Court system. These benefits included protection from publicity, from a criminal record or a jail sentence. In a case before the Alberta District Court in 1976, *R. v Willington & MacKay*,[31] Stevenson J. held that the differentiation in age on the basis of sex was a violation of "equality before the law and protection of the law". In that case a boy of 16 was charged in criminal court with contributing to the delinquency of a girl aged 16 (he being an adult and she a juvenile, though both being 16). On appeal[32] this was reversed by the Appellate Division of the Supreme Court which held that the Proclamation of 1951 providing different maximum ages for boys and girls did not violate the Canadian Bill of Rights.

Subsequently the maximum age was made uniform at 16 for both boys and girls by federal Proclamation dated September 27, 1978, and published in the Canada Gazette[33] revoking the Proclamation of 1951. The latter which had established the age differential had remained in effect for 27 years.

Age 16 remained the maximum age in Alberta until April 1, 1985, when under the Young Offenders Act the maximum age throughout Canada was established at 18. This age is in keeping with international trends.

On termination of the Juvenile Delinquents Act in 1984, most Canadian provinces had a juvenile age of 16 (Alberta having been the only province which at any time had an age differential). Three provinces (Manitoba, Newfoundland and Quebec) had age 18, British Columbia, 17; and all other provinces (like Alberta) had 16.

Case law under the Juvenile Delinquents Act was very rigid as to proof of age, such proof being held to go to the root of the jurisdiction of Juvenile Court.[34]

The statement of a child as to his age or even an admission by his counsel were held to be unacceptable as being in the nature of hearsay,

31. (1976) 70 D.L.R. (3d) 214.
32. (1977) 78 D.L.R. (3d) 344.
33. Vol. 112, p. 6628.
34. *R.* v. *Crossley* [1950] 2 W.W.R. 768 (B.C.S.C.).

the reasoning being that though a person is present at his own birth, he cannot recall the event or the date.[35]

Even the evidence of a father was held to be insufficient proof of a child's age in *R. v Harford.*[36]

It is strange however, that in another case, the evidence of an adoptive mother who had read the child's birth certificate was accepted as proof of age (though admittedly hearsay): *R. v A.M.P.*[37]

While the Act permitted a finding of "apparent age" such a finding could not be made in a vacuum. It was still necessary to adduce evidence and the judge must state that he (or she) is making a finding of apparent age.[38]

It would be difficult to imagine a case involving more complicated proof of apparent age than one which arose in Ontario in 1977. Here evidence was given by a father that on a given date he took his pregnant wife to the hospital, that he saw her later the same day, that she was no longer pregnant but had given birth to a child, which child was identified by him in the hospital nursery, this being the child whom he took home and raised and who had resided with them continually since then. Thus the juvenile in court was identified as the child born on that date, hence the court was entitled to make a reasonable inference as to the child's age (namely under 16 years).[39]

On the other hand in an earlier case, *Re Penno,*[40] the judge appears to have accepted the evidence of a father under oath as to the juvenile's date of birth.

The rigidity of the law respecting proof of age led Kaufman J.A. of the Quebec Court of Appeal in *R. v. Lechapelle* [41] to state that "The logic of this reasoning is impeccable. The result however is grotesque".

Strict legality required that the only person who could attest to the "actual" age of a child was the mother who gave birth to him. During trials, it was my practice to require the mother be sworn to state the child's date of birth under oath. In one case, this necessitated a mother who was serving a prison sentence in a B.C. jail to be issued a subpoena to attend in the Edmonton Juvenile Court to give evidence as to the birthdate of her son charged with delinquency.

The Young Offenders Act provides a more expansive definition [sec. 2(1)] which should remove the difficulties surrounding proof of age under the former Act. A "young person" is defined as a person who is, "or in the absence of evidence to the contrary appears to be" 12 years of age or more, but under 18 years.

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35. *R.* v. *Denton* [1950] 2 W.W.R. 315 (B.C.S.C.), *R.* v. *Linnerth* (1975) 119 C.C.C. 395 (Ont.), *E.* v. *Reginam* (1965) 53 W.W.R. 114 Alta. S.C.), *R.* v. *MacLean* (1970) 2 C.C.C. 112 (N.S.S.C.).
36. (1965) 48 W.W.R. 445 (B.C.S.C.).
37. [1977] 2 *Fam. L. Rev.* 58 (Ont. Prov. Ct.).
38. *Re Kelly* (1928) 51 C.C.C. 113 (N.B.C.A.), *R.* v. *L.* (1981) 59 C.C.C. (2d) 160 at 163 (Ont. Prov. Ct.).
39. *R.* v. *D.* (1977) 27 R.F.L. 298.
40. Supra n. 11 at 612.
41. (1978) 38 C.C.C. (2d) 369, at 372.

F. THE TREND TOWARDS LEGALISM

To illustrate the extent to which legalistic arguments were being advanced in Juvenile Court (and as a possible portent of the future) a case arose in the Manitoba Court of Queen's Bench in 1981 (*R. v K.L.B.*)[42] wherein it was argued that a preliminary finding of "compentence" is required in the trial of a juvenile. The basis for the argument was Section 13 of the Criminal Code that no person between the age of 7 and 14 years shall be "convicted" unless he is "competent to know the nature and consequences of his conduct and to appreciate it was wrong". It was held in this case on appeal that sec. 13 does not anticipate a proceeding to determine fitness to stand trial such as is required on an insanity defence; rather it is a procedural matter that the judge must before conviction be satisfied on the basis of all of the evidence that the juvenile was competent to understand the proceedings.

On the subject of the growing emphasis on legal rights in Juvenile Court, Judge Larson of the Juvenile Court in Salt Lake City made this comment at a symposium in Denver in 1972:

> There is strong focus today on legal rights, and it is badly needed. But we should not be misled. The protection of individual rights, while of utmost importance, cannot *per se* solve complicated behavioural problems. To believe that protection of legal rights is the only concern can become a fraud on the child and on the public, and may not afford the child an opportunity (perhaps his only opportunity) to improve, and so develop to the limit of his potential.

G. APPEALS

Under the Juvenile Delinquents Act, appeals were very restricted. Section 37 provided that "a supreme court judge may in his discretion on special grounds grant special leave to appeal from any decision of the juvenile court . . .". The criteria for granting leave to appeal was stated in ss. (2) as follows: "No leave to appeal shall be granted . . . unless the judge . . . considers that in the particular circumstances of the case it is essential to the public interest and for the due administration of justice that such leave be granted". Application to appeal had to be made within 10 days following the conviction, or by special leave, within an additional 20 days. In addition, any appeal from the Supreme Court to the Court of Appeal had to be by special leave of that Court.[43]

In contrast under the Young Offenders Act a general right of appeal lies under s. 27.

H. DISCLOSURE OF JUVENILE COURT RECORD IN ADULT COURT

When a person with a Juvenile Court record was subsequently charged as an adult with a criminal offence, the issue arose as to whether the sentencing judge in adult court could have access to the delinquency record of the accused as a juvenile.

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42. 58 C.C.C. (2d) 287.

43. *R.* v. *Locas* [1945] Que. K.B. 679, *R.* v. *Wiedeman* (1976) 35 C.R. (N.S.) 351 (Man. C.A.), *R.* v. *P.* (1973) 15 C.C.C. (2d) 46 (Sask. C.A.).

Alberta's Juvenile Court Act (s. 14), later s. 28 of the Provincial Court Act, stipulated no disclosure of a Juvenile Court record except with the consent of the Attorney General.

In 1976, (in the absence of constitutional argument) the Alberta Appellate Division applied this prohibition in *R. v Beacon and Modney.*[44] However, in delivering the judgment of the court, Sinclair J.A. expressed the dictum that it would be advisable for a judge in sentencing to consider all of an accused's background including any previous convictions in Juvenile Court. In a later case before the same Appellate Court, *R.* v. *Domstad* [45] the constitutional issue was fully argued. It was held that the requirement of consent of the Attorney General to disclosure was *ultra vires* the province as an interference with criminal procedure which is a matter of exclusive federal legislative competence.

Consistent with that decision, though in a different context, was the case of *Morris v The Queen* [46] where the question arose as to whether an adjudication of delinquency is a "previous offence" concerning which a witness may be cross-examined under the Canada Evidence Act when the "good character" of the witness was in issue. The delinquency was held to constitute an "offence" and therefore a conviction concerning which the witness could be subjected to cross-examination.

These cases demonstrate a gradual trend in the closing years of operation of the Juvenile Delinquents Act of bringing juvenile delinquency closer to the criminal justice system in respect to disclosure of Juvenile Court records.

The Young Offenders Act, s. 40, makes Youth Court records available for inspection by numerous persons throughout the Court proceedings, and also afterwards in the event that the youth as an adult is charged with a criminal offence, is in prison or is being considered for parole. Equally significant is the provision in s. 45 for the destruction of all Youth Court records following acquittal, or in the event of conviction, after the expiration of a specified period of time.

V. THE GAULT DECISION IN THE UNITED STATES 1967

The trend towards legalism in the Juvenile Court system had its roots in an American decision in 1967.[47]

Here a boy of 15 was charged with making lewd phone calls in his home town of Globe, Arizona; in court he was questioned by the judge, the complainant did not appear, no one was sworn and no transcript was made; the only notice to the parents was a note written on a slip of paper by the probation officer with the date and time of the court hearing but no particulars as to the charge. The parents nonetheless did attend. There was uncertainty as to what the boy did or did not admit; he was not told that he did not have to testify or make a statement or that an incriminating statement might result in him being declared a delinquent.

44. 31 C.C.C. (2d) 56.
45. (1982) 27 C.R. (3d) 126.
46. [1979] 1 S.C.R. 405.
47. *In re Gault* 87 Sup. Ct. 1428; 387 U.S.I.

He was committed to a state industrial school until age 21 (whereas the penalty for an adult on a similar conviction would be a maximum fine of $50 or 2 months' imprisonment). No appeal was permitted under Arizona law in a Juvenile Court case; hence proceedings were taken by way of habeas corpus to the Supreme Court of Arizona, where the application was dismissed, resulting in an appeal to the Supreme Court of the United States. Mr. Justice Fortas delivering the main judgement of the Court held that a juvenile has the right to notice of charges, to counsel, to cross-examination of witnesses and to the privilege against self-incrimination. It was stated that a juvenile "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon the regularity of proceedings and to ascertain whether he has a defence and to prepare and submit it. The child requires the guiding hand of counsel at every step in the proceedings against him."[48]

It should be noted that this decision is confined to prescribing procedural safeguards at the adjudication stage of the proceedings. It does not relate to the disposition stage.

Two other decisions of the United States Superme Court at approximately the same time granted juveniles other procedural protections previously denied them.[49]

At the time of these decisions, concerns were being expressed by some jurists and scholars that the effect would be to bring the adversary process of the criminal system into Juvenile Court, thus hampering the ability of the court to provide the kinds of special measures needed to rehabilitate a child. Chief Justice Burger dissenting in the *Winship* case above said:

> I dissent from further strait-jacketing of an already overly-restricted system. What the Juvenile system needs is not more but less of the trappings of legal procedure and judicial formalism: the juvenile system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court . . . My hope is that today's decision will not spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional court; each step we take turns the clock back to the pre-Juvenile Court era. I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing.
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> . . . We have glorified and idealized the adversary system with its clash of advocates. But the system as a whole is inefficient and wasteful. Dean Roscoe Pound of Harvard, one of our great legal scholars, as long ago as 1906, viewed the excesses of the adversary system as one of the genuine impediments to the rational administration of justice.

Likewise in the Gault case there was a strong dissent expressed by Mr. Justice Stewart in which he says in part:[50]

> Juvenile proceedings are not criminal trials. They are not civil trials. They are simply not adversary proceedings. Whether treating with a delinquent child, a neglected child,

48. *Id.* at 1448.

49. *Kent v U.S.* (1966) 383 U.S. 541, this was a waiver hearing, in which it was held that a formal hearing is necessary, that defence counsel shall have access to social reports, and that the court must provide written reasons if waiver is ordered; *In re Winship* (1970) 397 U.S. 358, holding that the degree of proof required for an adjudication of delinquency must be proof beyond reasonable doubt; *McKeiver v Pennsylvania* (1971) 403 U.S. 528, holding that a juvenile has no constitutional right to a jury trial.

50. *Supra* n. 53 at 1470. He then quotes the case of a 12-year-old boy who in 1847 was found guilty of murder, sentenced to death by hanging and the sentence was executed — adding "It was all very constitutional".

> a defective child or a dependent child, a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act.
>
> In the last 70 years many dedicated men and women have devoted their professional lives to the enlightened task of bringing us out of the dark world of Charles Dickens in meeting our responsibilities to the child in our society. The result has been the creation in this century of a system of Juvenile and Family Courts in each of the 50 states. There can be no denying that in many areas the performance of these agencies has fallen disappointingly short of the hopes and dreams of the courageous pioneers who first conceived them. For a variety of reasons the reality has sometimes not even approached the ideal, and much remains to be accomplished in the administration of public juvenile and family agencies — in personnel, in planning, in financing, perhaps in the formulation of wholly new approaches.
>
> I possess neither the specialized experience nor the expert knowledge to predict with any certainty where may lie the brightest hope for progress in dealing with the serious problems of juvenile delinquency. But I am certain that the answer does not lie in the court's opinion in this case which serves to convert a juvenile proceeding into a criminal prosecution . . . .

Mr. Justice Black, though concurring with the majority judgment in the Gault case appears to do so reluctantly when he states at page 1461:

> This holding strikes a well-nigh fatal blow to much that is unique about the juvenile courts in the nation. For this reason there is much to be said for the position of my Brother Stewart.

It is not surprising that at the time of the Gault case, criticisms were being directed at the operation of Juvenile Courts in the United States, if for no other reason than the inferior qualifications of many Juvenile Court judges, concerning which, particulars are set out in footnote 14 in the Gault judgment. Quoting the Directory and Manual of the National Council of Juvenile Court Judges for 1964, it states that of the 2987 juvenile court judges listed, only 213 are full-time in that capacity. According to figures in the National Crime Commission Report, half the total number of such judges had no undergraduate degree; one-fifth had no college education at all; three-quarters of them devoted less than one-quarter of their time to juvenile matters; one-quarter had no law school training at all; one-third had no probation or social work staff available; 80 to 90 per cent had no available psychologist or psychiatrist.[51]

However the case did have a significant effect on the development of legal safeguards for juveniles everywhere. One might say that, when over time the full impact of the decision was felt, Juvenile Courts were never the same again, and the trend towards legalism which was already becoming apparent, was rapidly accelerated. Never before had such attention been directed at the role and importance of Juvenile Courts.

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51. The writer's personal fascination with the Gault case led to a visit during a 1978 motor trip to the town where that case arose, namely Globe, Arizona which is located in a mountainous area east of Phoenix. At the local courthouse, the writer had an informal chat with Judge Robert E. McGhee who had been the presiding Judge in the Gault case in Juvenile Court; and with another judge of that Court, namely Judge Barry La Rose. While no reference was made to the Gault case, Judge McGhee impressed the writer as a kindly, competent and experienced judge, warm, compassionate and knowledgeable. The view of the Clerk of the Court, Arnold M. Ambos, with whom the writer later spoke was that many of the issues raised during the Gault appeal were mitigated by the local situation in a small community where contact between court officials and the family of the juvenile was at all times close and informal, so that the juvenile was not in ignorance as to his rights.

In respect to Canada, the qualifications of Juvenile Court judges, as well as procedural safeguards, were generally superior to those prevailing in many such Courts in the United States, one reason being that judges in Canada are appointed, not elected. Certainly the criticisms levelled against Juvenile Courts in the Gault case would not pertain to all Juvenile Courts in the United States, and certainly not to such well-established Courts as the writer observed in New York and Los Angeles. Likewise there would have been Juvenile Courts in less-populated areas in Canada where procedures may well have been lax and judges untrained. So far as the Edmonton Juvenile Court was concerned (and with which the writer was associated throughout all of this period) the safeguards prescribed in the Gault case were regular practice with the one exception that legal counsel was not provided automatically in all cases, though available through legal aid on request. This however was later rectified by provision for "duty counsel" in all Juvenile Court cases.

VI. ROLE OF LAWYERS IN JUVENILE COURT

Beginning in 1977 a system of "duty counsel" was established in the Juvenile Court of Edmonton wherein a local lawyer would be present each day on a rotating basis for any juvenile who might wish this service. While utilized with great frequency in the initial years, requests for the assistance of duty counsel declined in the later years. There ws no particular reason for this, other than what appeared to be growing public confidence in Juvenile Court and its sentencing philosophy of offering help for juveniles found to be delinquent. Where the juvenile faced a serious charge, the practice of most judges was always to insist that the juvenile received legal advice before entering a plea, whether such advice was requested or not; and in the event of a trial, legal counsel was always provided for the defence.

Though some lawyers adopted an adversarial attitude on a first appearance, insisting that the charge be proven rather than admitted (even when the juvenile and his family wished to do so), most lawyers gradually came to see that if a denial were entered when there was no legitimate basis for doing so, the effect would not be protection from punishment but rather depriving the juvenile of what might be much-needed rehabilitative services. A major challenge to counsel appearing in Juvenile Court was reconciling their traditional adversarial role with the concept of a juvenile's best interest.[52]

This is not to suggest that an admission is appropriate in all cases; rather that lawyers should weigh carefully the consequences for a juvenile of all ill-founded denial. In adult court, a denial is designed to save an accused from punishment and a criminal record; in Juvenile Court it can delay or prevent remedial help. Realistically the objective of the Juvenile Court process was to deal with delinquents in such a way that when they became adults, they would be less likely to appear later in adult court on criminal charges. In the achievement of this objective, lawyers have

52. See article entitled "Legalistic and Traditional Role Expectations for Defence Counsel in Juvenile Court" by Patricia Erickson, *Canadian Journal of Corrections*, January 1975 at 78.

played and will continue to fulfill an essential role in the dispensing of justice to youthful offenders.

VII. VARIOUS STUDIES ON JUVENILE COURTS IN THE 1960's

Even apart from the Gault case which raised legalistic and procedural concerns, criticisms were being voiced in various countries during the 1960s reflecting disillusionment in the effectiveness of the Juvenile Court system in the handling of children involved in criminal misconduct. Studies were being undertaken as each country in turn examined its existing system with a view to recommending improvement.

A. ENGLAND

In England (where Juvenile Courts had first been established in 1908) a new Act entitled "Children and Young Persons Act" had been passed in 1933, providing for Juvenile Courts presided over by three lay justices drawn from panels. In 1960 the *Ingelby Committee on Children and Young Persons* was set up to examine the Court systems existing at that time — for which it submitted its report in 1963. Evidence given before this Committee was overwhelmingly in favor of retaining the judicial process and against transfer of the juvenile court function to any form of welfare agency (as in Sweden).

B. SCOTLAND

In Scotland on the other hand, the Kilbrandon Committee in 1964 recommended abolition of Juvenile Courts and their replacement by "juvenile panels" being independent bodies of lay persons, with the juvenile appearing in court only in the event of a dispute as to the facts. The Committee expressed concern that Juvenile Courts were preoccupied with legal procedures to the detriment of the child's welfare and protection.

C. UNITED STATES

In the United States a national study entitled "The President's Commission on Crime" (1963) referred to the administration of juvenile justice in many states as a "nightmare", lacking in procedural safeguards, with negligible treatment resources and insufficient concern for protection of the public.

Along similar lines in California the "Governor's Special Study Commission on Juvenile Justice" recommended stricter adherence to legal formalities.[53]

53. Reference is made later in this article (page 29) to the American Juvenile Justice Standards, 1971.

D. CANADA

It is not surprising that Canada too began investigating its juvenile justice system with the establishment in 1961 of a "Committee on Juvenile Delinquency". This came about largely as the result of the following statement contained in a federal report in 1960 of the Correctional Planning Committee of the Department of Justice:

> The best way to prevent crime is to eradicate those influences that produce criminals. There should therefore be an organized integrated approach in Canada to the problem of juvenile delinquency in order to discover at an early stage those children who are in danger of becoming delinquent and to correct their maladjustments at that time. Unless this is done there is no real hope of stopping the flow of an ever-increasing number of young adult offenders through the criminal courts and into Canadian prisons.

Accordingly five persons representing four divisions of the Department of Justice were appointed in 1961 (at this relatively early date) to analyze Canada's juvenile justice system, resulting in the publication in 1965 of an exhaustive 300-page report entitled "*Juvenile Delinquency in Canada*". It recommended retention of the single-judge concept and rejected the British trend towards the use of panels or Scandanavian welfare boards. Juvenile Courts were seen as a compromise between criminal courts and welfare agencies. Their weakness was stated to lie in failure of the provinces to provide adequate supportive services and correctional institutions. This report was the beginning of some 15 years of study on the revision of Canada's juvenile justice system, culminating (as already observed) in the Young Offenders Act of 1982.

E. REPORT ON JUVENILE DELINQUENCY IN CANADA[54]

As an initial observation, the Report states at page seven that when the Committee was appointed in 1961, Canadians knew there was a problem concerning juvenile delinquency, but "what was not known was the nature and extent of the problem". In 1961 the population of Canada was 18.2 million. During the period of 1957 to 1961 when the population increased 9.5 per cent, the number of juveniles brought before Juvenile Courts increased 17 per cent — almost double the rate of increase in the general population. Statistics at that time showed that the largest proportion of delinquent acts in Canada consisted of property offences — something that continued to be true into the 1980s.

This is an outstanding Report in its detail, with much of its comment as true now (1984) as when it was written almost 20 years ago. For example, in a lengthy section on theories of the cause of juvenile delinquency, this comment appears:[55]

> Whatever may be the private citizen's view concerning the causes of delinquency it is clear that there is no agreement among the professions, and in many cases not even among the same class of profession.

Quoting the view of some sociologists, these statements appear (any of which would have merit today):[56]

> Our society . . . places an extremely high premium upon values such as competitiveness and material success extolling such values through the school system, the communica-

54. Department of Justice, *Report on Juvenile Delinquency in Canada*, 1965.

55. *Id.* at 12.

56. *Id.* at 14 and 17.

> tion media and otherwise. Unable for a number of reasons to compete effectively with children from the middle or upper class levels of society, the 'lower case' youth, it is suggested, is driven to obtain these culturally prescribed goals by illegitimate means, or alternatively to recoup his loss of self-esteem by developing in combination with other status-deprived youth a set of values (e.g. 'hanging around' instead of industriousness; agressiveness instead of self-control) that constitute in effect an open rejection of conventional values.
>
> The factor most frequently mentioned to us throughout the country is the importance of the role of the family in preventing delinquent behavior.
>
> We tend to be more and more a nation of transients, and the continual movement of families from place to place can be especially difficult for growing children who must face a series of adjustments and readjustments.

Reference is made at page seventeen to ". . . a disportionate emphasis on symbols of status which are highly visible . . . such as automobiles".

Speaking of the mass communication media and the absence of scientific proof as to its influence in promoting crime and violence, this statement appears:[57]

> If television is effective for advertising and teaching purposes in relation to young persons, it must seem indeed to be a paradox that the horror, crime and violence content should not have any significant effect upon the mind of the child at all.

On the effect of the working mother, there is this comment:[58]

> Some observers think that a prominent cause of delinquency in the young stems from the emancipation of women. The issue of the working mother is one that has been much debated over the years. Studies of the negative effects of working mothers on their children are, it seems far from conclusive. Many persons would argue that a more significant influence on the child occurs by reason of changes in parental functions and in family relationships.

Concluding the discussion of the causes of delinquency, these comments appear:[59]

> It is evident then that there is no simple or readily ascertainable explanation for the cause of juvenile delinquency . . . [that it must be regarded] as 'multi causal' . . . .
>
> . . . thus it seems to be generally recognized that sociological, psychological, hereditary and other factors all play their part in producing anti-social behavior, but the importance or the weight that is to be attached to each in the overall assessment of juvenile delinquency is not as yet sufficiently understood.

In respect to rehabilitation services, there is this comment:[60]

> The treatment and services accorded children adjudged delinquent under the federal statute are provided entirely by provincial authorities. The degree of prosperity and social conscience of the province in which they live usually determines the adequacy of the treatment they receive;

and later:[61]

> . . . there is a wide variety in the availability of services and facilities across the country. It can be stated with confidence however that no province has available a sufficient quantity or quality of needed services.

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57. *Id.* at 18.
58. *Id.* An astute observation which the next two decades would confirm.
59. *Id.* at 19. This no doubt has reference to the offence contained in the Juvenile Delinquents Act Sec. 2(1), "sexual immorality or similar forms of vice" which does not appear in The Young Offenders Act. Nor have studies during the subsequent two decades thrown any significant light on this subject.
60. *Id.* at 26.
61. *Id.* at 31.

Referring to the powers of Juvenile Court under s. 20 of the Act, the Report states:[62]

> . . . the powers of the court are very wide . . . Such powers obviously require great resources if they are to be implemented effectively.

On use of the term "juvenile delinquent" the Report makes this observation:[63]

> A recommendation that was urged repeatedly on the Committee is that the term 'juvenile delinquent' should be abandoned for purposes of legal characterization . . . [there is] an overlay of emotion that the term 'juvenile delinquent' seems clearly to have acquired in contemporary usage . . .
>
> Any new designation . . . can become as infamous as 'delinquent', a term that was itself after all, designed to protect against the stigma of 'criminal' . . . nevertheless we find the argument in favor of abandoning the existing terminology compelling . . .
>
> We think that the term 'juvenile delinquent' should be abandoned as a form of legal designation . . . Specifically we proposed that the term 'child offender' or 'young offender' be adopted . . . We recommend also that the name of the new statute be changed to the more neutral title of 'Children's and Young Persons Act' . . . Undoubtedly the element of stigma will continue to accompany an appearance in Juvenile Court regardless of any change in descriptive language that is made.
>
> [Both these terms were attempted in the Bills presented to Parliament before adoption of the term "Young Offender" in the new Act].

The report, at pages 41 and 490, contained a recommendation that the minimum age for criminal responsibility be raised (it being age seven under the Criminal Code).

The main recommendation (already referred to) was rejection of the Scandanavian approach which involved child welfare tribunals at page forty-five. The Report states:[64]

> . . . we accept the Juvenile Court process in its essential feature as the preferred approach to the problem of the juvenile offender.

As to the involvement of parents, the report states:[65]

> That it is desirable to have a child's parents as fully involved as possible in proceedings affecting the child is a proposition to which few, if any, would take exception.

On the subject of a maximum age limit, the Report states that . . . the age limit of juvenile court jurisdiction should be made uniform across Canada.[66]

As to a uniform minimum age the report states:[67]

> . . . we think it is preferable that there be a uniform minimum age . . . it is our view that this age should be set at 10 or at the most 12.

On the question of the nature of juvenile offences, the Report states:[68]

> . . . we recommend that children be charged only with specific offences, as is the case in proceedings against adults, and that any provisions in the law that are inconsistent with this principle be repealed.

62. *Id.* Lack of "resources" in the form of probation services and institutional facilities continued to plague Juvenile Courts throughout their history.

63. *Id.* at 36.

64. *Id.* at 51.

65. *Id.* at 48.

66. *Id.* at 52. It is well known that this recommendation initially met with strong provincial opposition, but was made mandatory at age 18 in the Young Offenders Act (giving the provinces until April 1985 to comply). This report had suggested age 17 at p. 59.

67. *Id.* at 53. The Young Offenders Act sets it at 12.

68. *Id.* at 67. [The Young Offenders Act (Sec. 16) does provide guidelines for a judge in determining if waiver is "in the interest of society having regard to the need of the young person"].

On the subject of waiver the Report recommends that waiver be preserved for cases where the young offender "proves unresponsive to the rehabilitative efforts of the Juvenile Court". Commenting on the waiver section, the report states:[69]

> . . . it would seem desirable that the Act be amended to give more adequate guidance than the present wording of section 9 provides.

The Report expresses criticism of s. 20(3) of the Juvenile Delinquents Act giving power over a juvenile to age 21, and recommends its repeal as being objectionable on the ground of double jeopardy.[70] That provision, however, remained in effect and was not seriously challenged until objection was raised under the Charter of Fundamental Rights and Freedoms in a series of provincial court decisions in 1982.

As to the philosophy of the Juvenile Delinquents Act, the Report states:[71]

> We agree with the philosophy expressed in sec. 38 of the Act. The difficulty has been not in the basic philosophy of the Act but in the failure of society to give to the Juvenile Court adequate resources with which to fulfill the aims of that philosophy.

The Report likewise endorses the provision of s. 17 stating that "proceedings be as informal as the circumstances permit, consistent with a due regard for the administration of justice".[72] As to publicity, while stating that the identity of the child should be protected, the Committee favored attendance by a maximum of three representatives of the news media, with freedom to report evidence adduced at the hearing; as well as the attendance of such other persons as have an interest in the work of the court;[73] members of the public to be excluded however, except those having a direct interest in the proceedings. As to appeal procedure, the Committee considered it unduly restrictive;[74] and they viewed the term "industrial school" as no longer appropriate.[75]

By way of concluding comment, the Report states as follows:[76]

> The broad conclusions to which our inquiries have led us can be stated quite simply. Juvenile delinquency is, and should be recognized as a social problem of major importance. As yet there is little agreement concerning its causes, and perhaps still less about the kinds of measures that are most appropriate to its solution . . . Above all, there is need for an expansion of vision of a kind that can only be achieved by giving higher visibility to juvenile delinquency as a distinct focal point for social concern, and by bringing a wide variety of experience into program planning in this field. . .

This Canadian Report deserves a significant place in international literature on juvenile delinquency.

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69. *Id.* at 78.
70. *Id.* at 83, 89.
71. *Id.* at 106.
72. *Id.* at 139.
73. *Id.* at 141.
74. *Id.* at 154.
75. *Id.* at 179.
76. *Id.* at 281.

VIII. THE MOVEMENT TOWARDS CHANGE AND REFORM CULMINATING IN THE YOUNG OFFENDERS ACT 1982

The foregoing history of Juvenile Court and of the studies relating to it reflect disillusionment in the light of its original aspirations. Deficiencies are most marked of course where hopes are highest. Perhaps as one writer said "our reach exceeded our grasp". Juvenile Courts were expected to curb delinquency and reform delinquents; whereas in reality they were primarily a response to a social problem, namely the treatment of children accused of criminal misconduct. Whatever its shortcomings, the motivation for establishing it was laudable and desirable, including greater emphasis on rehabilitation, hearings conducted in a sympathetic atmosphere, broad discretion in the Judge to choose an appropriate disposition befitting the individual child. The writer's experience revealed numerous instances where juveniles and their families were assisted in the redirection of their lives as a result of programs laid down by a Juvenile Court.

Nonetheless as delinquency increased in volume and seriousness, and where treatment programs were not always successful, critics of the system became increasingly vocal. Suffice to say, during the 1960's and early 1970's, extensive literature was published (almost entirely American in origin) highly critical and condemnatory of the Juvenile Court system. Too often unfortunately it was assumed by many Canadian academics and professionals that such criticisms pertained equally to the Canadian system, whereas in truth the latter lacked the flagrant abuses frequently observed in some American Juvenile Courts.

This is not to say there had not been deficiencies in the Canadian system, or that discrepancies did not exist between standards prevailing in Juvenile Courts in isolated areas as compared with those in urban centres. To a considerable extent such deficiences related to insufficient supportive services (probation, psychiatric and institutional facilities) to enable courts to fulfill the rehabilitation mandate envisioned in legislation.

It is not surprising therefore, that in the later years of the 1970's, Juvenile Courts in many countries would feel the impact of the growing trend towards formality, legalism, due process and the adversarial methods of the criminal justice system.

The latter was particularly true in the United States, where in 1971 a Joint Commission on Juvenile Justice Standards was set up, cosponsored by the American Bar Association and the Institute of Judicial Administration, the report of which (published in 1977), contained 23 volumes of standards and recommendations. The gist of the conclusions was that punishment should play a greater role in juvenile justice with a shift towards the criminal law model; that sanctions should be based on the seriousness of the offence not on the court's view of the juvenile's needs, and that the rehabilitative ideal be down-graded. The Report contained a strange proviso, namely that juveniles should have the right to refuse all services offered in a custodial institution; yet such refusal would not affect the length of confinement. Commenting on this point, Judge Lindsay Arthur of the Juvenile Division of the District Court in

Minneapolis stated that in many cases, compulsion is necessary if meaningful treatment is to be utilized; that allowing a juvenile to veto treatment was unrealistic since few have the maturity to make such a decision. The Juvenile Justice Standards have elicited a great deal of critical comment in aligning juvenile corrections to the criminal justice system.[77]

During the same period as these studies, in the United States, Canada was struggling with changes within its own system, drafting Bills for Parliament, discarding them, drafting new ones and circulating them for comment, so that when the final Bill was approved and enacted as the Young Offenders Act, it reflected in section 3 the current changed philosophy under its heading "Declaration of Principle". The Act places stress on accountability, responsibility and protection of the public, while at the same time acknowledging the need of young offenders for supervision, discipline, control, guidance and assistance. It is an Act well designed for the closing decades of the 20th century.

IX. DEVELOPMENTS IN ALBERTA

Because the history of Juvenile Courts in Alberta is linked with child welfare legislation, it is useful at this point to examine provincial legislative developments pertaining to both delinquency and child neglect.

A. EARLY PROVINCIAL LEGISLATION

Following passage of the first Juvenile Delinquents Act by the federal government in 1908, Alberta passed the following legislation:

> *1909 The Children's Protection Act* providing for the appointment of a "Superintendent of Neglected Children", and of commissioners;[78]
>
> *1913 The Juvenile Court Act* providing that Commissioners appointed under the Children's Protection Act would be judges of the Juvenile Court. Ex-officio judges would be police magistrates, District and Supreme Court judges.[79]

The first of these Acts was replaced in 1925 by the Child Welfare Act[80] and the "Superintendent of Neglected Children" became the "Superintendent of Child Welfare". With the passage by Parliament in 1929 of the Juvenile Delinquents Act, the provinces were empowered to appoint Juvenile Court judges to hold office during pleasure. Accordingly in 1932, the provincial Juvenile Courts Act of 1913 was amended[81] empowering the Lieutenant Governor in Council to appoint a judge or judges of the Juvenile Courts to hold office during pleasure.

The Alberta Gazette dated January 11, 1932 lists 28 justices of the peace as "judges appointed for the trial of juvenile offenders". The issue of April 6, 1932 lists 61 magistrates in this category, including Police

77. For an excellent discussion of the American Report on Juvenile Justice Standards, see an article by the Director of the Project, David Gilman in: (1977) 57 *Boston University Law Review* 617.

78. S.A. 1909, c. 12.

79. Children's Protection Act, S.A. 1913 (2 sess.) c. 14.

80. Juvenile Court Act S.A. 1925 c. 4.

81. S.A. 1932, c. 24.

Magistrates Emily Murphy of Edmonton and Alice Jamieson of Calgary.[82]

In 1944 through 1945, three significant changes were made to provincial legislation:

1. The Juvenile Court Act dating back to 1913 was repealed.
2. The Child Welfare Act was amended by incorporating in Part II thereof, provisions relating to Juvenile Court;
3. A new Act, called the Juvenile Offenders Act was passed in 1945 providing for committal of juvenile delinquents to the Superintendent of Child Welfare.

These provincial Acts remained in effect until 1952. In other words from 1944 to 1952, juvenile delinquency was dealt with under two Acts: The Child Welfare Act and the Juvenile Offenders Act.

For all the years prior to January 1, 1952, the federal Juvenile Delinquents Act was administered in Alberta by the Department of Public Welfare. In 1952 this administration was transferred to the Attorney General Department and the following changes in provincial legislation were enacted:

(a) The Juvenile Offenders Act (passed in 1945) was repealed;

(b) The Juvenile Court Act (passed in 1913 and repealed in 1944) was re-enacted.[83] This Act for the first time established a Juvenile Court for the province.

Until this time, magistrates from the criminal courts acted as Juvenile Court judges. Following passage of this Act, however, special Juvenile Courts were established: Edmonton in 1952, Calgary 1953; Lethbridge and Medicine Hat 1960; Red Deer 1962; and with others to follow.

Under the Juvenile Court Act (1952) as a maximum sentence a juvenile could be committed to the "Superintendent of Juvenile Offenders" who was an official in the Attorney General's Department. This official could decide on appropriate placements for juveniles so committed: either a foster home designated specifically for delinquents, or a closed institution.

B. JUVENILE CORRECTIONAL INSTITUTIONS

Following transfer of administration to the Attorney General Department, two correctional institutions were established for juveniles:

(1) The Bowden Institute for Boys (up to age 16); built in 1955; located near Bowden, Alberta, being physically attached to, though supervised separately from the adjacent adult jail for young offenders. The main program was schooling (since all inmates were under 16 and hence of compulsory school age). It had a capacity for 60, and operated under maximum security.

82. Hope Sanders in her biography "Emily Murphy Crusader" states that Mrs. Murphy wrote her letter of resignation in October 1931 (she died on October 27, 1933). She had been appointed a Police Magistrate in June 1916, being the first woman so appointed in the British Empire, and Alice Jamieson was appointed a few months later (December 1916) to a similar position in Calgary. Both had dealt with juvenile court cases throughout their magistracy by virtue of the 1913 Juvenile Court Act.

83. S.A. 1952, c. 42; R.S.A. 1955, c. 166.

(2) Alberta Institute for Girls (up to age 18); built in 1958; located near Edmonton and serving the whole province; capacity 120 girls. In addition to schooling, some courses were offered in typing and beauty culture; there was a gymnasium, and later a swimming pool and chapel were added. It operated under maximum security.

In essence these were juvenile prisons. They were administered by the same government official who administered jails, namely the Superintendent of Correctional Institutions. Yet neither institution was designated by provincial order-in-council as an "industrial school" within the meaning of the federal Juvenile Delinquents Act until 1967, and then only after the issue was raised by a provincially-appointed Royal Commission.

C. CHILD WELFARE INSTITUTIONS

In the child welfare field, the mid-1960s saw a move away from the orphanage type of institution which for several decades had provided the principal form of placement for neglected children. A consensus was developing amongst professionals in North America and Western Europe that normal children should be placed in foster homes rather than in institutions and that institutional placement should be reserved for emotionally-disturbed children only.

Alberta moved with laudable speed into this new enlightened philosophy of child care, and in 1966 a number of "residential treatment centres" were opened, some owned and operated by the government, others administered privately, but all receiving a per diem grant from the provincial government to cover operating costs. While originally these institutions were designed for child welfare wards, changes which were coming in the 1970s would require them to admit delinquent children as well. All were new and modern, mostly of the cottage-type design, well equipped, and with professionals on staff, the philosophy being orientated to the needs of neglected, rather than delinquent children, and operating in an open setting. The following is a description of four such centres:

— Westfield Diagnostic and Treatment Centre, Edmonton. Residential accommodation for young children with severe emotional and behaviour problems or learning disabilities; government owned and operated. The Centre opened in 1966.
— William Roper Hull Home, Calgary. Treatment centre for emotionally disturbed children; capacity 48; privately endowed; funded by provincial government.
— Mapleridge Residential Treatment Centre for Girls, Edmonton. Privately owned residential institution for girls; administered by Sisters of Charity; funded by government. This was the successor to the Good Shepherd Home, established in 1912, which in 1952 became Our Lady of Charity School for Girls.
— Marydale owned by Catholic Charities, funded by the government for emotionally disturbed young children which opened in 1966.

When established, these institutions had a different purpose and function from the two correctional institutions described above. The latter were locked, secure and correctional in philosophy, administered by the At-

torney General Department, and used specifically for juvenile delinquents committed to the Superintendent by the Court. The child welfare institutions, on the other hand, were unlocked, operating under the Department of Welfare and housing neglected children who had been made wards of the court under the Child Welfare Act.

X. PROVINCIAL STUDIES ON JUVENILE DELINQUENCY

A. ROYAL COMMISSION ON JUVENILE DELINQUENCY, 1967

In the early 1960s, concerned citizens and organizations were presenting Briefs to the government for improving services to juvenile delinquents. Amongst these was a brief from the Catholic Welfare Council (1961); another from the Youth Services Division of the Edmonton Welfare Council of which the writer was a member and participated in preparation of its brief entitled "Report of the Committee on Juvenile Corrections" (1965).

On September 27, 1966 (three months after the writer was appointed a Judge of the Juvenile Court) the provincial government by O/C 1792/66, pursuant to the Public Inquiries Act, set up a royal commission to conduct an inquiry into juvenile delinquency in Alberta with broad terms of reference. Its members were Magistrate Frank Quigley, Q.C. of Calgary as chairman; Dr. Jean Nelson, medical doctor (pediatrics) of Edmonton, later to become Deputy Minister of Health; and Fred Kennedy, a newspaper columnist of Calgary.

The Commission was required to report within five months, that is, by February 15, 1967. Due to the restricted time frame, it did not hold public hearings, but invited written submissions of which it received 127 from 42 agencies and 85 from private citizens, including one from the writer. Its report entitled "Report of the Alberta Royal Commission on Juvenile Delinquency" was filed on February 15, 1967, containing the findings and recommendations of the Commission, together with a Supplementary Report from Dr. Jean Nelson containing her further studies and observations.

The main Report rejects in very strong terms proposals advocating that "responsibility for juveniles adjudged delinquent and all juvenile correctional institutions be transferred to the Department of Public Welfare".[84] It reiterates in these words the prime purpose of the law as being protection of the public:[85]

> . . . in all areas where laws exist to govern human conduct, the prime purpose of the law is for the benefit and protection of society generally. . . . If the individual, adult or child, can be cured, curbed, rehabilitated or benefitted by the operation of the law, so much the better, but this aspect of law is a secondary consideration and always must remain so.

It deplores the "near complete abandonment of the philosophy of responsibility where young offenders are concerned".[86] As to the conflict between welfare and judicial philosophies, the Report states:[87]

84. Royal Commission on Juvenile Delinquency, (1967) 23.

85. *Id.* at 27.

86. *Id.* at 28.

87. *Id.* at 22.

> . . . there has developed on the part of many, a sincere but dangerous and expanding philosophy advocating an invasion of the judicial process by the welfare ethic. It can only result in a weakening of the fundamental positive protective purpose of the legal process;

and also:[88]

> . . . the duty and right to determine, identify and declare by judgment that a particular person has breached the criminal law is reserved in this country solely and exclusively to the courts of law.

These words were to have prophetic meaning in the years which were to follow.

The Report expressed concern as to the legality of procedures used for confining juveniles in the two institutions described above (Bowden Institute for Boys and Alberta Institute for Girls). It states that one of the powers vested in a Juvenile Court judge under federal legislation (s. 20 of the Juvenile Delinquents Act) is to "commit the child to an industrial school approved by the Lieutenant-Governor-in-Council". However, neither Bowden nor A.I.G. had ever been declared "industrial schools". Hence:[89]

> Judges of the Juvenile Court of Alberta have never been able to commit a delinquent to an industrial school simply because no such schools have ever been established in Alberta. . . . Both of these institutions are in fact gaols and administered as gaols by the Superintendent of Correctional Institutions for the Province.

On visiting these Institutions, the Commissioners were satisfied that they did in fact operate as gaols.[90]

The Report referred to s. 26 of the Juvenile Delinquents Act which stated as follows:

> 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.

By way of comment, the Report states that this section:[91]

> clearly and emphatically prohibits anyone from sentencing or incarcerating juvenile delinquents in any gaol. Yet for many years now, male and female juveniles delinquents have been incarcerated at Bowden and The Alberta Institute for Girls in what appear to be a clear breach of Section 26 of the Act.

Perhaps so strict an interpretation of s. 26 is not justified where (as here) juveniles were not incarcerated in the same institutions as adults. The Report does, however, refer to a warning from a solicitor in the Attorney General's Department as far back as 1951 concerning this possible infraction. The Report states: "At the very least the warning has been ignored. There is much evidence the law has been ignored also."[92]

The Report continues:[93]

> Even had Bowden or Alberta Institution for Girls been lawfully declared 'industrial schools' within the meaning of the Juvenile Delinquents Act, the power to commit a juvenile to such an institution rests solely with the Juvenile Court judge, not with the Superintendent of Juvenile Offenders.

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88. *Id.* at 21.
89. *Id.* at 38.
90. *Id.* at 41.
91. *Id.* at 39.
92. *Id.*
93. *Id.*

The Report states that it was not Juvenile Court judges who were committing delinquents to these two institutions since their powers were restricted by provincial legislation. However, when judges did exercise their maximum power by committing such delinquents to the Superintendent of Juvenile Offenders, it was this official who (quite wrongly in the Commission's opinion) placed them in institutions where they in turn came under the care and custody of the Superintendent of Correctional Institutions.

Provincial legislation permitting this procedure was contained in the Juvenile Court Act, s. 33(1) and (2) which stated that where a child has been adjudged delinquent and has been committed by the Court to the care and custody of the Superintendent (of the Juvenile Offenders Branch), the Superintendent "shall exercise during the period of commitment all the rights of the legal guardian of the child" and that "he may at any time direct the release of the juvenile delinquent from his care and custody either absolutely or on such conditions as the Superintendent may think fit."

The Royal Commission Report makes the following statement by way of summary:[94]

> In summary your Commissioners are of the opinion that the Superintendent of Juvenile Offenders who could not (even if Bowden and the Alberta Institute for Girls were industrial schools) commit juvenile to such institutions, is in fact committing juveniles to these gaols, a power no one has under any circumstances. The Superintendent of Correctional Institutions is in turn accepting these juveniles into his care and custody without any warrant of committal or on the basis of any other apparent lawful authority. If such authority does exist, none of these officials is aware of it, nor has the Attorney General's Department advised your Commission of its existence.

These were strong words indeed from the government's own Commission, yet as will be indicated later no steps were taken for legislative change for another three years.

Dr. Jean Nelson in her Supplementary Report expressed her concern about the "enormous power vested in the Superintendent of Juvenile Offenders Branch by section 33". Commenting on that section, she states:

> The section removes decisions concerning sanctions and deprivation of liberty from the hands of the court and places it in the hands of an individual without any provision for consultation with the court.

Both reports attest to the inadequacies of the two juvenile institutions in respect to rehabilitation programs, education and staffing. Dr. Nelson states: "No treatment programs worthy of the name were set up in either institution."[95] In describing the Bowden Institute for Boys, the Commission Report states that when completed in 1955 as an annex of the Bowden adult institution, it had dormitory accommodation for 60 boys (four dormitories with 15 beds each) yet for some reason, dining capacity for only 40. When visited by the Commission in late 1966, the Report states:[96]

> . . . the population was approximately 80; 22 beds in one dormitory, originally designed for 15, and the room was so small there was no space for chairs. Because there are no open spaces available for study rooms outside the main class rooms, the inmates have to do their homework sitting on their beds with a complete lack of adequate lighting for

94. *Id.* at 41.

95. *Id.* at 41.

96. *Id.* at 42.

> study purposes. The presence of 22 boys at close quarters in one room, some of whom have no desire to study in any event, defeated any useful purpose attached to homework duties. . . .
>
> [the only illumination was 8 light bulbs in each dormitory set in a 10 foot high ceiling — Nelson, at 81].
>
> There are no kitchen facilities in the juvenile section. The food is brought in by cart from the adult section to the dining room which was built to accommodate only 40. The food appeared wholesome, well prepared and the portions adequate. The school class rooms are not large but are adequately equipped.

Dr. Nelson makes this comment in her Supplementary Report concerning the Bowden Institute:[97]

> Although only 10 years old, this 2-winged, 2-storey building is run down, barren, cramped and in fact can only be described as decrepit.

The main Report states:[98]

> Your Commissioners are in complete agreement that the Juvenile Section of Bowden Institute is completely inadequate and to be condemned from a physical point of view;

adding that:[99]

> The Commission finds it difficult to condone or explain the delay in taking action in the case of Bowden. The need has been obvious for a long time.

The fact is that it continued to operate as it then was for another three years.

As to the Alberta Institution for Girls, its physical facilities are described as "in the upper levels of modernity and adequacy."[100] It was built in 1958 with a substantial addition in 1965 which brought the capacity to 120, though daily occupancy during 1964-66 was under 70. It is described as large, modern, spotlessly clean, ample dormitory accommodation, 24 single rooms, 12 large enough to accommodate 2 girls, rooms decorated in pastel colors, equipped with vanities, ample closet space, a good gymnasium, good classrooms, kitchen and dining facilities, a modern beauty parlor for vocational training, craft room, sewing room, homemaking area, lounges, sun deck and pool, chapel, well-equipped dental and medical facilities, sick bay area, outside playing fields and picnic areas, a cell block in the basement containing 11 cells, the entire premises enclosed by a "high wire fence with barbed-wire apron, which is lit at night by arclights." The staff consisted of a Superintendent, 2 deputies, and 43 "correctional officers", 7 teachers, 5 instructors for crafts, 2 nurses, a clerk and a cook. There was no social worker on staff and no member of staff with any social work qualifications; short consultations were available with a visiting psychiatrist (who also served the jails in the Edmonton area); no organized psychotherapy or counselling, lack of any qualified staff for effective rehabilitation treatment. In her comments, Dr. Nelson stated that "there is an atmosphere of custodial regimentation in the institution" and "no attempt to encourage warm human relations between staff and the girls."[101] The paddle was used for corporal punishment, as was the strap at Bowden, but in early 1966 corporal punishment was forbidden.

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97. *Id.* at 87.
98. *Id.* at 43.
99. *Id.* at 48.
100. *Id.* at 81.
101. *Id.* at 78.

Dr. Nelson described the cells at the Alberta Institute as barred, barren and prison-like, designed and used for complete isolation as punishment for infringement of rules, adding that "the isolation described above is so archaic and punitive that it cannot be condoned and must inevitably increase hostility towards authority."[102] Her assessment of this institution is summed up as "a very costly gaol which gives a facade of therapy."[103]

The writer would agree with these assessments of both institutions following visits on several occasions. They demonstrate how imperative good staffing is in juvenile institutions, including qualified professionals, without which the best physical facilities cannot be made adequate, and poor facilities are rendered even worse.

It should be pointed out that though schooling was of necessity the main program, schools in neither institution were licensed and hence not subject to inspection by the Department of Education.[104] A critical report by the Inspector of Schools in 1965 pointed to the lack of qualified teachers, poor salary scales and conditions of work, stating that "teaching methods and equipment are archaic . . . the emphasis is more on security and incarceration than on treatment, training or education."[105]

The unanimous recommendation of the Commission was that Bowden be replaced by two new centres (cottage type), one near Edmonton and the other near Calgary, designated for custodial and rehabilitation treatment, and operated so as to embody the most modern treatment facilities at a top professional level, both designated as "industrial schools" within the meaning of the Juvenile Delinquents Act, with the court making direct committal to them.

Three years would pass before steps were taken which would even attempt to address the problems raised in these Reports. However, one change did occur almost immediately, the critical urgency of which had been made abundantly apparent, namely the designation of the two juvenile institutions as "industrial schools." Within two weeks of the filing of the Commission Reports (i.e. on February 28, 1967) the Attorney General filed a request with the Executive Council resulting in the passage of an Order-in-Council on March 6, 1967[106] approving the Bowden Institution and the Alberta Institution for Girls as industrial schools. Comments could be heard among the judiciary at the time, as to whether the incarceration of juveniles for the previous 12 years (at least) had been illegal. Fortunately in those less litigious times, no formal challenge was made.

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102. *Id.* at 79.

103. *Id.* at 80.

104. *Id.* at 50.

105. The writer was a Judge of the Juvenile Court for one-and-a-half years prior to the filing of the Commission Reports, and as such can affirm the comment made by Dr. Nelson on p. 42 of her Report as to the situation confronting judges during this period. Because Committal to the Superintendent of the Juvenile Offenders Branch meant almost automatic placement of the juvenile by him in Bowden or the Alberta Institute, the tendency of judges was to do everything possible to avoid making orders of commitment (which they were empowered to do) knowing the lack of treatment services in either institution.

106. O.C. 363/67.

B. McGRATH REPORT — ALBERTA PENOLOGY STUDY, NOVEMBER 1968

Surprisingly soon after completion of the Royal Commission Report in February 1967, the provincial government Executive Council in May, 1968[107] commissioned a study of Alberta's correctional system (juvenile and adult) headed by William T. McGrath, Executive Secretary of the Canadian Corrections Association of Ottawa and a noted authority in this field. This study had its origin in the "White Paper on Human Resources Development" issued by Ernest C. Manning, Premier of Alberta, in March 1967. Its theses endorsed the doctrine that persons involved in crime constitute a waste of human resources for whom specialized services are needed.

This study (to be completed within six months) was confined to corrections and did not include the roles of police or courts. It dealt with two main topics "Services for Juveniles" and "Services for Adults". In enunciating the principles and purpose of corrections, its statement on correctional institutions was remarkably similar to those in the Royal Commission Report.[108]

> The staff are the most important factor in any correctional system. New buildings and programs will accomplish little unless they are competently staffed . . . carefully selected and well-trained career staff are the first priority in corrections.

It stressed the team approach involving many disciplines in any effective program of rehabilitation. It recommended the cottage type of institutions for juveniles to accommodate both boys and girls, one each to be built in the Edmonton and Calgary areas[109] — again very similar to the Royal Commission recommendations. There was one significant difference, however, in that the Royal Commission had strongly decried any invasion of the welfare ethic into the judicial process and rejected any suggestion that the administration of juvenile corrections be transferred to the Welfare Department. The McGrath Report however, appeared to favour the latter though (it would seem) for economic reasons.[110]

> Considerable financial savings would be possible in future if these institutions were grouped with the general child welfare services because they may become eligible for inclusion under the Canada Assistance Plan.

The Report did however express a cautionary note in connection with the blending of corrections with child welfare in that delinquents might not get primary attention from staff, and further:[111]

> Another danger is that the training school [this term is used in the Report to refer to juvenile correctional institutions] might be used for children who need security but who have not been declared delinquent by the courts. *No matter which Department is responsible for training schools, no child should be admitted to them unless committed by the courts.* [Emphasis added]

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107. O.C. 973/68.

108. McGrath Report, 15.

109. *Id.* at 54.

110. *Id.* at 38. It is stated on p. 39 that this would amount to half the operating costs, which for the previous year were in excess of $600,000.00 plus depreciation on buildings.

111. *Id.* at 39.

The program at such institutions should include medical, academic, vocational, recreational, social, spiritual, individual therapy and counselling.[112] As to time necessary for completion of a program of this nature, the Report states:[113]

> This requires several months, and perhaps years, and the school should be prepared to keep him for whatever period is needed. There should be sufficient space so that a juvenile is never released to free his bed for another juvenile coming in. He should be released only when the staff feel he is ready.

This statement foretells the overcrowding situation which was later to overtake juvenile institutions in the Province.

The Report commented (as had the Royal Commission) on the need for direct committal by the court to an industrial school:[114]

> It is unusual for the court not to commit the juvenile direct to the [industrial] school. It is suggested that the best procedure would be for direct court committal in all cases, that only juveniles so commited by the court be admitted to a training school . . . it is also suggested that juveniles be committed to training schools for an indefinite period.

Thus, within the space of one and a half years the Provincial Government had received two Reports, both of which it had itself commissioned and both pointing to glaring deficiencies, if not illegalities, in the system of juvenile justice in Alberta.

XI. LEGISLATIVE AND INSTITUTIONAL CHANGES IN THE 1970's

Whether because of the veiled suggestions in the McGrath Report, or because similar child welfare trends were developing in other western provinces in the handling of juvenile delinquency, Alberta in 1970 launched upon sweeping changes in legislation and in the designation of institutions which changes were to profoundly affect juvenile corrections in this Province for most of the next decade.

William McGrath while alluding to possible financial savings to the Province through federal cost-sharing if correctional institutions became classified as child welfare institutions, took care to point out possible risks attendant upon adoption of the child welfare approach to juvenile delinquency. Moreover, the Royal Commission had expressed its disapproval in the strongest terms of any suggestion that the administration of juvenile delinquency be transferred to the Welfare Department.

Nonetheless in April 1970, following the pattern set by certain other provinces in Canada, Alberta closed its industrial schools and replaced them by "open" child welfare institutions administered by the Social Development Department (later called Alberta Social Services). This meant removal of juvenile delinquency from the Attorney General's Department under which it had been since 1952. Legislation concerning juvenile delinquency was now contained in an amendment to the Child

112. The Report describes each in detail at pages 40 through 50.

113. *Id.* at 52.

114. *Id.* at 66.

Welfare Act under a new heading entitled "Part 4 Juvenile Delinquency".[115] Under this amendment (section 78 thereof) any order henceforth of a Juvenile Court judge made pursuant to Section 20 of the Juvenile Delinquents Act whereby a delinquent was committed to an "industrial school" would be deemed to be an order committing the child to the custody of the Director of Child Welfare as a temporary ward of the Crown. It provided further (section 77) that any committal order then in effect would similarly become an order of temporary wardship. With respect to children under 12, it contained this special provision (section 75):

> No child apparently or actually under the age of 12 shall be charged with being a juvenile delinquent without the consent of a Judge.

Contemporaneous with the changed legislation, the Bowden Institute for Boys was phased out, having remained in use for three years after the highly critical assessment of it by the Royal Commission. Alberta Institute for Girls was closed as a "correctional institution" and converted into a child welfare type of institution to accommodate both boys and girls (the former up to 16 years and the latter up to 18) and to be called the Youth Development Centre with capacity for 60. As part of the conversion, guard fences were removed, doors were unlocked, basement cells closed out. As an "open" child welfare institution (rather than "custodial") it qualified for federal aid. It became the only institution of "last resort" for juvenile delinquents, boys and girls, in the Province.

There can be no question but that the changes in legislation and in the classification of juvenile institutions were motivated basically by economic considerations, since neither the Royal Commission nor the McGrath Report envisioned the abandonment of closed correctional institutions for juvenile offenders, regardless of which government Department administered the system.

Other child welfare institutions which had long been used for temporary wards under the Child Welfare Act, such as Westfield and Mapleridge in Edmonton, and William Roper Hull Home and the Children's Centre in Calgary, would now be required to accommodate not only neglected children but juvenile delinquents as well, some of whom under the new legislation would also become temporary wards under the Child Welfare Act.

It thus follows that pursuant to legislative changes in 1970, the maximum sentence which a Juvenile Court could impose on a delinquent was "committal to the Director of Child Welfare." This meant that placement would be determined at the discretion of this official, who could return the child home, place him in a foster home, or at most, in one of the open child welfare institutions.

Juvenile Court as a result was rendered relatively ineffective so far as dealing with chronic offenders. It was easy to run away from the open institutions (and many of them did) often committing further offences

115. S.A. 1970, c. 17.

while absent; and when they were returned to Court, all that a Judge could do was to do what already had been done in relation to previous offences — namely, committal to the Director of Child Welfare.

These were difficult years for Juvenile Court — its powers and resources emasculated to the point that it no longer provided a deterrent to repeaters. However, the pattern adopted during those years was representative of what was taking place generally in the juvenile corrections field — namely, a swing away from the punitive approach of previous decades, which admittedly had not been effective in deterring juvenile crime, and adopting the child welfare approach — which likewise was to prove ineffective. The period from 1970 to 1977 was characterized by the commission of more serious types of offences by juveniles and at a younger and younger age. Because of legislative restrictions on the sentencing powers of judges, coupled with lack of closed institutions, serious limitations were imposed on the effectiveness of the juvenile correctional system throughout this period. The result was that Juvenile Court was frequently criticized for failure to provide protection for the public, and at the same time was subject to ridicule from those juveniles who knew that their propensity to continued delinquencies would not be curbed by the limited sanctions available to Juvenile court.

This was a period too of increased applications by the Crown for waiver to adult court, frequently on the basis that the limited remedies and resources available to Juvenile Court had already been exhausted for the juvenile in question. The statutory criteria for waiver, however, (sec. 9 Juvenile Delinquents Act) required that the judge be "of the opinion that the good of the child and the interest of the community demand it." One could only question whether so extraordinary a procedure as waiver should be invoked in cases where a more effective juvenile system might have enabled a juvenile to be handled there rather than be exposed to the severity of the criminal justice system.

As already stated, there were frequent escapes (runaways) from the unlocked institutions in which delinquents were placed. In 1975 the Youth Development Centre, with a capacity at that time of 95 had 240 escapees, 48 of whom were charged with additional offences while on unauthorized absence. In 1976 during the period January to June, there were 125 escapees, 14 of whom were charged with new offences. This was approximately 20 per month, indicating how serious this matter had become, disruptive for other inmates and demoralizing for staff.[116]

An added complication was this: when escapees were located by the police, they could not be placed in detention (unless of course they had committed a new offence) — the reason being that they could not be charged with "escaping lawful custody" since they were not deemed to

116. The figures quoted were obtained from the staff at the Youth Development Centre at the time, and were presented to the then Minister of Social Services, The Honourable Helen Hunley during a conference arranged with her by Judges of the Juvenile Court in September 1976, and which the writer attended. Its purpose was to bring to the attention of the Department the critical situation resulting from the 1970 legislation and institutional policies respecting juvenile offenders.

be "in custody" when in a child welfare institution. All that the police could do was return the absconding juvenile to the premises from which he had escaped and from which he might conceivably escape again.[117]

Frequently however during these escape episodes, new offences were committed, for which the juvenile was returned to Court. Because he was a temporary ward already (the maximum sentence) the Court could merely confirm his existing sentence — a process frequently referred to as "the revolving door." In an attempt to curb increasing runaways which produced these anomalies, an unofficial policy developed in the mid-1970s whereby certain areas in child welfare institutions were designated by administrators as "locked and secure" in which the more difficult juveniles would be confined. There were also well-documented instances that the old cells in the basement of the Youth Development Centre were utilized for this purpose. Questions were raised in judicial circles as to the legality of such confinement of juveniles in locked areas by administrative decision at a time when even Juvenile Court judges had no such power.

However necessary (even desirable) such confinement might have been it was certainly not contemplated by legislators in the original planning in 1970 when "industrial schools" were closed and replaced by open child welfare institutions. The developments which occurred represented a clear departure from the philosophy professed by the legislative changes made in 1970.

XII. COMPULSORY CARE LEGISLATION 1977

A. POWER OF CONFINEMENT

With a view presumably to correcting some of these deficiencies, the Alberta Legislature on May 18, 1977 passed an amendment to the Child Welfare Act by adding Part 6, entitled "Compulsory Care".[118] This was later to become Part 5 of the said Act in the 1980 Revised Statutes of Alberta.[119]

Under this provison, where a juvenile delinquent had been committed to the Director of Child Welfare as a temporary ward of the Crown, a judge could make an additional order that the juvenile be "confined in an institution" for up to 90 days (s. 78). In making such an order the judge had to be satisfied that the juvenile "is in a condition presenting a danger to himself or others or is otherwise out of control" and that "it is in the best interest of such child that he be confined in an institution."

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117. Child Welfare Act, S.A. 1970, c. 17.

118. S.A. 1977, c. 11.

119. R.S.A. 1980, c. C-8. Section numbers referred to under this heading are those in the 1980 Revised Statutes.

The Director of Child Welfare was similarly empowered (section 79) to issue a "Certificate of Compulsory Care" on similar grounds concerning any child, who was then a temporary ward. In addition, the Director was empowered (s. 80) to grant a "renewal certificate" of a compulsory care order or a compulsory care certificate or a previous renewal certificate where the Director had "reasonable cause to believe" that the child "is suffering from an emotional or behavioural disturbance and is in a condition presenting a danger to himself or others or is otherwise out of control" and where he "is of the opinion that it is in the best interests of the child to be confined in an institution." Any certificates issued by the Director had to be submitted within 48 hours for review by a judge who could order a hearing if not satisfied that the requirements of the Act had been met (s. 88).

If the effect of any renewal certificate was to authorize confinement for a period of more than six consecutive months, then the Director was required to make application for a hearing before a Judge (s. 81). Upon such hearing, the Judge could confirm or cancel the certificate or terminate the compulsory care order with or without conditions where "of the opinion that it is no longer in the best interests of the child to be confined in an institution."[120]

The need for confinement is evident from the large number of Orders and Certificates for Compulsory Care issued during the six-month period (October 1, 1977 to March 31, 1978) being shortly after the amendment came into effect:

255 Compulsory Care Orders issued by Juvenile Courts in Alberta

31 Certificates of Compulsory Care } issued by the
13 Renewal Certificates } Director of Child Welfare

This legislation was astutely conceived as a response to a recognized urgency for the power of confinement concerning the chronic type of juvenile delinquent. It did not, however, fully address the legality of confinement by administrative order (that is by Certificate of the Director, albeit subject to judicial review). Applying as it did to any temporary ward, it did not differentiate between delinquent and neglected children. It was possible (and indeed frequently occurred) that children who were temporary wards under the "protection" provisions of the Child Welfare Act as "neglected" under Part 2 could be confined under this legislation even though never having been adjudged "delinquent" under the Juvenile Delinquents Act.

This situation would prevail for the next seven years until the coming into force of the Young Offenders Act in 1984.

120. Other sections dealing with such hearings were 89, 90, 91, 92.

B. JUVENILE AGE FIXED AT 16 (1978)

After 27 years (dating back to 1951) during which time Alberta was the only province in Canada with an age differential between boys (16) and girls (18), concerning which questions were being raised as to possible sexual inequality, the Government of Alberta requested the federal government, pursuant to s. 2(2) of the Juvenile Delinquents Act, that the existing directive be revoked and a uniform age established. Accordingly, by federal Proclamation dated September 27, 1978, the maximum Juvenile Court age for both boys and girls in Alberta was fixed at 16 years.[121] This was to remain in effect until the mandatory age of 18 was fixed throughout Canada by the Young Offenders Act effective as from April 1, 1985.

C. INSTITUTIONAL CHANGES RELATING TO 1977 COMPULSORY CARE LEGISLATION

To carry out the 1977 legislation allowing for confinement of temporary wards under compulsory care, certain units in institutions such as Westfield and the Youth Development Centre were designated as "closed." Within these units, maximum security was provided, along with a more intensive program of rehabilitation and education. Throughout the Province "Youth Assessment Centres" were constructed (including Grande Prairie, Lac La Biche, Peace River, Fort McMurray, Lethbridge, Red Deer, etc.) several of which the writer visited over the next few years. All of these Centres were closed institutions and were basically intended for the confinement of juveniles during remand periods or for assessment. There were numerous instances, however, when detention centres in Edmonotn and Calgary were used to hold delinquents even after their cases had been disposed of in Juvenile Court and while waiting an opening in a residential institution. Instances are recorded in the Report of the Kirby Board of Review (discussed later) wherein some juveniles were known to be held for up to 4 months in the Calgary Detention Centre awaiting institutional placement following a court order of committal.[122]

Not only was this a misuse of a detention facility intended for short-term remands, but juveniles so detained were deprived of the benefit of corrective treatment, since such Centres did not purport to have rehabilitative programs or recreational facilities for longer-term care. If, for example, a juvenile were committed by a Court to 60 days of compulsory care, much of that period could have expired before he or she gained admission to a treatment institution. Institutions such as the Youth Development Centre and Westfield continually had waiting lists

121. The Canada Gazette, Part I, Vol. 112 (1978) at 6628.

122. Report of Kirby Board of Review, No. 3, 56-7.

for admission to their closed units in respect to juveniles already committed by the Courts. By 1980 these waiting lists had become chronic. To cope with the situation it was not uncommon to have instances where a juvenile delinquent committed to compulsory care by an Edmonton Juvenile Court would have to be flown to a Youth Assessment Centre at Fort McMurray or Lac La Biche because institutions in Edmonton were filled to capacity and had waiting lists. This use of rural facilities for Edmonton delinquents caused displeasure in these outlying areas when their much-needed local Youth Assessment Centres were being utilized for delinquents from elsewhere. This points up the gap which persisted throughout all of this period between the number of Compulsory Care Orders which Juvenile Courts found it necessary to make and the number of institutional beds available to accommodate delinquents so committed.

Another questionable feature of compulsory care procedure (as already stated) was that it applied equally to Child Welfare temporary wards. When neglected and delinquent children are merged as here under the same administration and within the same institutions, both being classes as "temporary wards," the legal position and separate identities of the two groups become obscured.

One of the reasons given for failure to expand institutional facilities (even as far back as 1979) was the expectation of a new federal Act which might alter institutional requirements. Suffice to say, long before the Young Offenders Act was implemented in April 1984 the institutional shortage had reached the point of seriously undermining the effectiveness of the juvenile justice system in Alberta.

Praise must be accorded however to staff in these institutions working under frustrating pressures, as well as to probation officers who served the Edmonton Juvenile Court (drawn from the City of Edmonton Social Services Department) but most of all to Social Workers from Alberta Social Services who had the difficult, and at times impossible tasks of finding placement in institutions which were already overcrowded for the many delinquents ordered by Juvenile Courts into compulsory care.

For the seven years during which compulsory care legislation was in effect in Alberta (1977 to 1984), while the intent of such legislation was meant to be corrective of deficiencies previously existing, and was welcomed for that reason, still the basic problems persisted, namely inadequate resources in terms of institutional facilities to cope with the growing and changing delinquent population, the serious characteristics of which were evident from the early 1970s.

XIII. REPORT OF KIRBY BOARD OF REVIEW "JUVENILE JUSTICE IN ALBERTA" (1977)

Reference must be made here to an analysis of the Juvenile Court system in Alberta done by a government-appointed Board whose report was released five months after compulsory care legislation had come into effect, and in which many of the subsequent problems were anticipated.

Pursuant to the Public Inquiries Act, the provincial government in June 1973 appointed "The Alberta Board of Review on Provincial Courts" to review the operation of Provincial Courts in Alberta. Its Chairman was The Honourable Mr. Justice W.J.C. Kirby of the Trial Division of the Supreme Court of Alberta, and its members were Dr. Max Wyman, former President of the University of Alberta and J.E. Bower, Editor of the Red Deer Advocate. Its Report No. 3 entitled "The Juvenile Justice System in Alberta" was released on October 31, 1977. While it was in the course of being written, the Provincial Legislature had on May 18, 1977, passed the Child Welfare Amendment Act with the provisions for compulsory care (set out above).

Commenting on the new sections 78, 79 and 80 (compulsory care order, compulsory care certificate and renewal certificate), the Report states:[123]

> While the Board welcomes the restoration of power to Juvenile Court judges to impose a period of confinement for juvenile delinquents, the Board does not consider 90 days adequate in dealing with juveniles who are chronic offenders or who have committed indictable offences of a serious nature. The Board does not, however, believe that this problem can be solved by waiving serious cases to the adult court.

and:[124]

> A further effect of sections 79 and 80 [compulsory care certificates and renewal certificates] is to allow the liberty of a juvenile to be taken away by an administrative act. In our opinion, it is fundamental to our system of justice that no person will be deprived of his or her freedom for an extended period of time except by order of an autonomous Court.
>
> Further with respect to the provisions of Section 80 [renewal] it is wrong in principle for anyone to have the power to extend a period of detention.

In a supplementary Report by Dr. Max Wyman entitled "Comments on Juvenile Delinquency", he makes this statement:[125]

> Finally there are the juveniles, some hundreds in number, whose repetitive misbehaviour should be stopped by confinement of one sort or another. Since this is a serious sanction to impose, involving a curtailment of freedom and separation of juvenile and family, we would allow no authority other than a court to impose this sanction or to specify the length of time such sanction must be endured.

As to the adequacy of the period of confinement, the Board's Report contained this recommendation:[126]

> Juvenile Court judges should have the power to confine a juvenile for a period of time not exceeding three years.

The Report contained the following comment at page 43 on the age difference between boys and girls in Alberta which was still in effect at the time of publication of its recommendations:

> The distinction prevailing in Alberta between the maximum ages for boys and girls for the purpose of jurisdiction of the Juvenile Delinquents Act should be discontinued.
>
> For the purpose of the Juvenile Delinquents Act, a child should become an adult at the age of 16 years.

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123. The Juvenile Justice System in Alberta, Report No. 3, 21.

124. *Id.* at 22.

125. *Id.* at 106.

126. *Id.* at 22, [It is interesting to note that the federal Young Offenders Act enacted 5 years later provides for committal to "open or secure custody" for a period not to exceed 3 years].

The Board of Review also recommended the repeal of s. 75 of the Child Welfare Act (enacted in 1977)[127] under which no child under 12 could be charged with a delinquency without the consent of a judge.[128] Despite this recommendation for its repeal, this section was not repealed prior to 1984 though several Juvenile Court judges had ceased to apply it due to the apparent conflict with federal legislation on criminal law. Section 12 of the Criminal Code sets the age of criminal responsibility at 7 years. The Juvenile Delinquents Act sets no minimum age; the Young Offenders Act is the first federal legislation establishing that age at 12 years.

Another recommendation of the Board of Review was that a special study be undertaken on the problem of runaway children, since no legal authority existed for charging a juvenile for running away from home or from a child welfare placement.[129]

As to institutions, the Board recommended that the Province provide at least four closed detention units, each to accommodate not more than 25 delinquents, that security be provided by an outside fence and by adequate surveillance, and that non-delinquent children not be placed in closed units.[130] This recommendation was strikingly similar to one made ten years earlier in both the Royal Commission and McGrath Reports. Yet the same situation would continue to prevail under provincial legislation for another seven years until implementation of the new federal Act in 1984.

The Board summarized its findings in these comments:[131]

> Although the Alberta juvenile justice system works reasonably well, it does have some flaws and some deficiencies. The critical comments we make concern the system. They are not directed at the people who work in that system.
>
> At all levels, the juvenile justice system has competent and dedicated people discharging the responsibilities of the roles they are called upon to play. . . .
>
> Although our recommendations should improve the juvenile justice system of Alberta, the Board does not pretend to have found the answers to the many problems which plague juvenile justice systems in all parts of the world.

This latter comment probably summarizes in broadest terms the situation prevailing here and elsewhere concerning juvenile corrections. All countries are searching for more effective methods for the prevention of delinquency and the reform of youthful offenders.

XIV. SUMMARY

This outline in historical perspective of juvenile delinquency in Alberta demonstrates the search which has gone on in this Province over a period of 71 years, from 1913 to 1984, during which time many methods were

127. R.S.A. 1980.
128. *Id.* at 44.
129. *Id.* at 83.
130. *Id.* at 74.
131. *Id.* at 1.

tried, abandoned and tried again. Such methods included punitive procedures, then child welfare approaches; institutions which fluctuated from those considered by a Royal Commission to be juvenile prisons to those which were open and unlocked; then a partial return to the philosophy of confinement through the device of compulsory care. The entire era is marked by vascillation, indecision and inconsistency.

Ambivalence is reflected in the changing administrative policies concerning juvenile delinquency. Initially for almost 40 years (1913 to 1952) juvenile delinquency was administered by the welfare branch of government; for the next 18 years (1952 to 1970) by the Attorney General Department; and for the following 14 years (1970 to implementation of the Young Offenders Act in 1984) a return to the welfare system (Social Services Department of government).

Ambivalence was apparent too in the types of institutions used for juvenile delinquents. These were officially estblished in 1955, and for the next 15 years were administered by the same government official who administered provincial jails. Nor were they designated as "industrial schools" as required by the Juvenile Delinquents Act until 1967.

As to the power of Juvenile Court judges, this was limited for 18 years (1952 to 1970) to committing a juvenile delinquent to the Superintendent of Juvenile Offenders, who in turn was empowered to place him or her in a locked institution as an administrative decision. This practice was sharply condemned by two independent reports separately commissioned by the provincial government, both of which recommended direct committal by the Court to approved "industrial schools".

In 1970 despite a strong recommendation to the contrary by a Royal Commission appointed by the government, administration of juvenile delinquency was transferred back to the welfare branch of government, institutions became open, and the power of Juvenile Court limited to committal to the Director of Child Welfare who in turn would decide on placement.

In 1977 because of recurring runaways from unlocked institutions, there was a partial return to confinement through compulsory care legislation. However, while permitting judges directly to order confinement (for the first time in 25 years, that is since 1952) the same power to authorize confinement was given to the Director of Child Welfare through the issuance of certificates.

For the third time in ten years (1977), a government-commissioned Report (this time of the Kirby Board of Review) sharply condemned this practice. Nonetheless the practice continued until 1984 when the federal Young Offenders Act was implemented.

Throughout all the period following 1970, neglected children who had not been adjudged delinquent but who were classed as temporary wards were subject to the same procedures. Delinquent and neglected children occupied the same institutions.

At no time in the history of juvenile delinquency in Alberta prior to 1984 has the power to confine juvenile delinquents rested exclusively where only legally it can, namely in the Court.

In the handling of juvenile delinquency, the thread which persists through three decades of Alberta's history (prior to 1984) reveals three fundamental weaknesses:

1. juvenile institutions insufficient in number and lacking in quality
2. questionable legality of confinement of juveniles by administrative decision
3. encroachment of the judicial function by legislation vesting decision-making powers in administrative officials.

It might appear from the foregoing that the writer's years as a Judge of the Juvenile Court in Alberta (1966 to 1983) would have been fraught with dissatisfaction and frustration.

The situation however must be viewed in its overall perspective. The deficiencies within the system which have been described relate primarily to that small category of juvenile offenders whose conduct had reached the point of requiring the maximum sanction which a court could impose. It was in this type of situation that the system was ineffective. However, of the hundreds of juveniles who appeared in Juvenile Court in the course of a year, only a small percentage were in this category. Many would appear once, and were not likely ever to appear again on a future charge. For them an appropriate disposition would likely be "admonishment" in the expectation that the court appearance itself would prove a beneficial experience. In addition, Juvenile Court was empowered to impose fines (limited to $25 under the Juvenile Delinquents Act but raised to $1,000 under the Young Offenders Act). By far the most frequently used and the most effective disposition was probation which was viewed and intended as a helping service. It was not uncommon as a term of probation to order that the juvenile make restitution for damage done or perform voluntary community service.

While the sentencing provisions in the Young Offenders Act have become more formalized, it is interesting to note that similar sentencing powers were available to Juvenile Court through the flexible and discretionary powers contained in the Juvenile Delinquents Act. It was only after repeated court appearances on new charges or continued breaches of probation that more stringent measures became necessary, and where the system frequently proved inadequate. This should not, detract however, from the recognized accomplishments by Juvenile Court over three-quarters of a century of Alberta's history.

XV. YOUNG OFFENDERS ACT

In 1984 came the first major change in federal legislation since 1908 — namely the Young Offenders Act — adopting a more legalistic approach, more akin to the criminal justice system, with greater emphasis on legal rights, more punitive sentences, a philosophy not simply of protection and rehabilitation, but primarily of accountability and responsibility.

Of necessity it will require several years before the effectiveness of the new Act can be appraised. What can be said at this time however is that its enactment represents a logical and positive response to the social, economic and legal factors which are paramount in these times. One can only express the hope that the new system will not be plagued as so often others have been in the past with inadequate supportive resources, in particular, treatment services and institutional facilities.