The Juvenile Delinquents Act, 1929*

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Especially since the revision of the Criminal Code, should not some consideration be given to revising the Juvenile Delinquents Act? This Act was first passed in 1908 and, after several amendments, was completely revised and consolidated in 1929.[1] Since then, with the exception of some minor amendments, the Act has remained unchanged. I will deal with it under the following headings: (1) General Scope of the Act; (2) Definition of "Child"; (3) The Hearing before the Juvenile Court Judge; (4) Punishment and Penalties; (5) The Offence of Contributing to Juvenile Delinquency; (6) Appeals.

1. *General Scope of the Act*

The Act is intended to give to the juvenile court exclusive jurisdiction in cases of delinquency, including cases where, after the committing of the delinquency, the child has passed the age limit of a juvenile as defined by the Act. The Act creates a new offence not previously known to the law, the offence of delinquency, which comprises all criminal offences and all offences against provincial laws. It is a complete code in itself and sets out the prodecure to be followed in dealing with the charge of delinquency before a juvenile court judge, including the procedure on appeal. It goes even further than this, in that it creates an additional offence applicable mainly to adults, the offence of contributing to juvenile delinquency.

2. *Definition of "Child"*

A "child" is defined in section 2 of the Act as meaning any boy or girl apparently or actually under the age of 16 years, with the

*An address to the Section on the Administration of Criminal Justice, delivered by Mr. E. Pepler, Q.C., Deputy-Attorney General of British Columbia, on September 4th, 1952, during the Thirty-fourth Annual Meeting of the Canadian Bar Association.

[1] Stats. Can. (1929), c. 46: amended by Stats. Can. (1932), c. 17; (1935), c. 41; (1936), c. 40; (1947), c. 37; (1949, 1st sess.), c. 6; and (1951), c. 30.

proviso, that, in any province as to which the Governor-in-Council by proclamation has directed or may hereafter direct, "child" means any boy or girl apparently or actually under the age of 18 years, and this proclamation may apply either to boys only, or to girls only, or to boys and girls. In only three provinces in Canada has the age been raised to 18, Quebec, Manitoba and British Columbia. In all the others the age is 16 years, with the exception of Newfoundland where it is 17 under a statute of Newfoundland called the Welfare of Children Act, 1944.[2] In Alberta, the age was raised to 18 some years ago but recently, at the request of the province, the Dominion cancelled the proclamation and reverted to the 16-year age limit, except for girls.

The question arises whether it is advisable to have different ages in different provinces or whether, because this is a Dominion statute, the same law should not apply throughout Canada. There is also the question whether it is advisable to treat a youth 18-years old as a juvenile delinquent. In these days many youths between 16 and 18 years of age know as much about crime as a man of mature years; prison officials say that, in many cases, the youthful offender is their worst prisoner, who can teach the old offender a great deal he does not know about the ways of crime.

Under the Act as it now stands, where the age limit has been raised to 18 years, a youth may commit a crime on the eve of his eighteenth birthday and not be caught until some months later. He is then required to be tried in juvenile court, which in certain circumstances seems an anomalous procedure. If he is convicted, he may, for instance, be committed to an industrial school, which is hardly the place for a youth of that age.

Many cases have arisen over the jurisdiction of the juvenile court judge to try cases where a mistake in age is made. In *Ex parte Cardarelli*,[3] the accused was convicted by the police magistrate of the city of Vancouver and sentenced to a term of imprisonment. After conviction it was discovered that, at the time of the commission of the offence, the accused was under eighteen. On an application for certiorari, the objection was taken that the police magistrate had no jusridiction to try the offence, as police magistrate, since the case should have been dealt with in the juvenile court. The application for certiorari was allowed. The supreme court judge before whom the application came applied section 1120 of the Criminal Code and directed that the accused be taken before the police magistrate, as judge of the juvenile court, and

[2] Stats. Newfoundland (1944), c. 57.
[3] (1929), 52 C.C.C. 267.

that such proceedings then be taken before him as might be deemed proper. In his judgment the learned judge said that the situation was a peculiar one since, as was pointed out during the argument, the juvenile, or "child" to use the term in the Act, might commit an offence when he was 17 years of age, which would not be discovered perhaps until he reached 25, and then he would have to be dealt with in the juvenile court. This appeared to him to be an anomalous thing, but he felt constrained to give effect to the objection taken by the applicant, that the police magistrate had no jurisdiction as magistrate to try and convict the accused.

The cases go even further and show that, even when the accused gives his age as over 18, but in reality is under 18, the magistrate has no jurisdiction to deal with him. This was decided by Coady J. in the Supreme Court at Vancouver — *Ex parte William Carr* — as recently as May 10th, 1952.[4] Here certiorari proceedings had been taken in respect of a conviction for retaining stolen goods. The accused, before the charge was read in the police court, replied to a question of the magistrate about his age and said that he was 18 years of age, whereas in fact he was only 16. The conviction was quashed on the ground that proceedings should have been taken under the Juvenile Delinquents Act.

"Child" is defined as any boy or girl *apparently* or *actually* under the age of sixteen years, or such other age as may be directed in any province under subsection 2 of section 2. The word "apparently" would seem to apply only where the accused appears to be under the prescribed age, and not where he appears to be over it. Thus, where an accused, when he committed the offence, was actually over 18 but appeared to be under, it would seem that the juvenile court judge has jurisdiction to hear the case, provided he makes a finding that the accused is apparently under the prescribed age.[5] The reverse, however, is not true: that is, where at the time of commission of the offence the accused appeared to be over 18 years of age but was actually under it, the magistrate has no original jurisdiction.

There seems to be some doubt whether the juvenile court judge can infer from the appearance of the accused that he is under the prescribed age without evidence to that effect. In *Rex* v. *Crossley*[6] Coady J. said: "I express no opinion as to whether the learned judge had the right to determine without evidence, on his own view, that the accused was apparently under the age of 18 years,

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[4] Unreported.
[5] *Rex* v. *Denton* (1950), 10 C.R. 218.
[6] (1950), 98 C.C.C. 160.

since in fact no such finding was made by him". This passage would seem to indicate that where no proof of age is given and the accused is "apparently" under the prescribed age, the juvenile court judge must make a finding to that effect. If this conclusion is correct, any judgment of a juvenile court judge can be upset in a higher court on proof that he did not make a finding that the accused was "apparently" under the prescribed age, even though the accused may have been obviously a boy of tender years, say 12 or 13 years of age, an absurd conclusion, to say the least.

3. *The Hearing before the Juvenile Court Judge*

The Act provides that, except as provided in it, prosecution and trial must be summary and governed by the provisions of the Criminal Code on summary convictions, in so far as such provisions are applicable, subject to certain exceptions there set out. It also provides that the Act must be liberally construed to carry out its purpose, namely, that the care, custody and discipline of a juvenile delinquent will approximate as nearly as may be what is expected of its parents, and that, so far as practicable, every juvenile delinquent will be treated, not as a criminal, but as a misdirected and misguided child, needing aid, encouragement, help and assistance. Trials are required to take place without publicity and separately from the trials of other accused persons. They may also be held "in camera" and publicity is prohibited. These are radical departures from the principles of the criminal law.

The Act also provides that notice of the hearing of any charge of delinquency must be served on the parent or parents, or guardian, of the child, who has the right to be present at the hearing. Failure to notify the parent has been held fatal to a committal in *Re Wasson*.[7] This right of being present at the hearing is restricted to the court officials and the parents or guardian. The question arises whether the provision should not be enlarged to enable the juvenile court judge in his discretion to allow other persons to attend the hearing who are interested in the welfare of the child, such as his teacher or school principal, close friends and welfare officials.

Juvenile courts have power to deal with murder and other capital offences as delinquencies, and have in fact done so. Usually it would seem proper, however, to transfer the case from the juvenile court to the ordinary criminal courts under section 9 of the Act. As was said by Dysart J. of the Manitoba Court of Appeal

[7] [1940] 1 D.L.R. 776.

in *Re (L.Y. No. 1)*[8] "The Juvenile Court has no machinery nor settled procedure for trying so serious a charge as murder. The system in that Court is designed for lighter offences."

Section 9 of the Act is very important in the application of justice to juveniles. It is out of its place in the Act and should be inserted in or immediately following sections 20 to 26, dealing with the powers of the juvenile court judge on the hearing. Section 9 allows the juvenile court judge before whom a juvenile over 14 years of age is brought on a charge involving an indictable offence to transfer the case from the juvenile court to the ordinary criminal courts for disposal, if the juvenile court judge in his discretion thinks that the good of the child and the interest of the community demand it.

In the first place, it is noted that the section applies only to an indictable offence and not to a summary conviction offence. The offence of taking a car without the owner's consent is a summary conviction offence under subsection 3 of section 285 of the Code. Most of the offences of this nature are committed by juveniles and it would sometimes be desirable to proceed against them in the ordinary criminal courts under section 9 of the Juvenile Delinquents Act. This procedure, under the present wording of the section, is impossible, with the result that the more serious offence, that of stealing a car under section 377 of the Code, has to be laid. Stealing a car is an indictable offence for which the minimum penalty on conviction is one year's imprisonment. In many cases the offence does not warrant so heavy a punishment, but the authorities are bound to lay the more serious charge in order to have the offender dealt with in the ordinary criminal court. It is submitted that summary conviction offences under the Code should be included in section 9 and that the juvenile court judge should be able to transfer any case under the Code, whether indictable or not.

Many cases have arisen involving alleged irregularities on the part of the juvenile court judge in proceeding under section 9. The section requires the judge to order the child to be proceeded against by indictment, from which it is assumed that the judge must make an order to this effect in preparing the record. Since the section further states that the order to proceed by indictment must not be made unless the judge, in his discretion, is of opinion that the good of the child and the interest of the community require, it follows that his opinion should be stated in the order. If this is not done, the proceedings may be challenged and the con-

[8] (1944), 82 C.C.C. 105, at p. 106.

viction quashed, as was done in the case of *Rex* v. *Newton*.[9] A form of order under this section, which has been upheld on appeal, is found in *Rex* v. *D.P.P.*[10]

To the juvenile court judge who is a layman, and to police and law enforcement officers generally, this section presents another serious difficulty. The charge in the juvenile court is committing a delinquency and, since delinquency is not a crime under the Criminal Code or at common law, the case cannot be proceeded with in the ordinary criminal courts on the charge as originally laid. The laying of a new charge covering the substantive offence committed by the juvenile is necessary. This is a somewhat complicated procedure. I think it is safe to say that juvenile court judges in general are not familiar with what section 9 of the Juvenile Delinquents Act involves and that, in most cases where the juvenile is brought before a juvenile court judge, especially in the rural districts, the judge takes the easiest way out and deals with the case in the juvenile court, imposing one of the restricted penalties found in section 20 of the Act, whereas the case should have been dealt with in the ordinary criminal courts.

An interesting commentary on the working of the Juvenile Delinquents Act is found in *Rex* v. *H. & H.*,[11] a decision of Mr. Justice Manson of the Supreme Court of British Columbia. This was an appeal from a conviction and sentence by a juvenile court judge. The learned judge on appeal stated in lengthy reasons for judgment that "The Act is not a lawyer's Act, not a model of perfection in the matter of draftsmanship, not one to which it is easy to apply the ordinary rules of construction. Nevertheless, we must take the Act as we find it and despite some anomalies, give effect as best we can to its provisions." In this case the accused — two boys — were charged with killing a cat, presumably contrary to the provisions of section 537(1) of the Code, which makes it an offence punishable on summary conviction to kill certain animals. The charge was laid under the Code and not the Juvenile Delinquents Act. The accused pleaded guilty and the juvenile court judge convicted them for the offence and suspended sentence. On appeal it was held that there is only one offence for which a juvenile delinquent can be charged, the offence of delinquency, and the charge in the case was therefore bad. It was also decided that in this particular case, where the accused were boys of tender years, they should not have been asked to plead, the judge stating in part as follows:

[9] (1949), 94 C.C.C. 180.
[10] (1948), 6 C.R. 326.
[11] (1946), 88 C.C.C. 8.

> It does not follow that a child should always be asked to plead when charged with a delinquency. Regard must be had to the age of the child and to his mentality and to the nature of the delinquency charged. Obviously, the Court may very properly ask a normal 16 year old second-year high school boy charged with the delinquency of having stolen a bicycle (or other act of definitely illegal character) to plead, but just as obviously the Court ought not to ask a boy of 8 or 9 to plead, no matter what delinquency is charged. The proper procedure in the case of a boy of 8 or 9, no matter what delinquency is charged, is to follow as closely as circumstances will permit, the language of Section 721 [of the Code].

This section, which is found in part XV of the Code dealing with summary convictions, provides that, if the defendant is personally present at the hearing, the substance of the information and complaint must be stated to him and he must be asked if he has any cause to show why he should not be convicted or why an order should not be made against him, as the case may be. The judge also stated that the juvenile court judge ought to have entered an adjudication, not a conviction, that the boys were juvenile delinquents under section 3(2) of the Juvenile Delinquents Act.

In this case the power to suspend sentence was also questioned, the judge stating: "the powers of the Court in the case of a child adjudged to be a juvenile delinquent are set forth in Section 20 of the Act. Suspension of sentence is not one of them. A juvenile Court has no inherent power to suspend sentence. . . ." In making this statement he did not refer to clause (a) of section 20, giving the juvenile court judge power to "suspend final disposition". Is this power limited to the adjudication only, or does it include sentence as well, sentence being the final act in the disposition of the case?

As regards the form of charge, and following the rule laid down in *Rex* v. *H. & H.*, juveniles in British Columbia are charged with committing a delinquency, to wit, theft or some other offence, as the case may be. From a reading of cases in some other provinces, I gather that there the juvenile is charged with the substantive offence only, for example, murder, as was done in *Rex* v. *D.P.P.* (*supra*), and I feel that it would be better if the practice were uniform in all provinces.

4. *Punishment and Penalties*

Punishment of a child in the juvenile court is governed by section 20, which sets out the penalties that may be imposed or the other disposition that may be made. A fine may be imposed on the child not exceeding $25.00, to be paid in periodical amounts or otherwise. Since the statute was enacted many years ago and, be-

cause of the depreciation of the dollar and the fact that many juveniles under the age of 18 years are earning good wages today, should not this maximum be raised to $50.00 or, perhaps, $100? There is no mention of costs in the subsection, so presumably the juvenile court judge has no authority to impose costs, although the costs incidental to the case may sometimes be considerable. There would seem to be no case holding that a juvenile court judge has power to impose costs on a juvenile delinquent, although it has been held by the Manitoba Court of Appeal in *Rex* v. *S.*[12] that he can award costs on a conviction against an adult for contributing to juvenile delinquency under section 33 of the Act — this under section 5, which applies the provisions of the summary conviction sections of the Code to prosecutions and trials under the Act, in so far as they are applicable.

An important section, and one that is often overlooked by juvenile court judges, is section 22, which provides that the court may in certain cases order the fine, damages or costs to be paid by the parent or guardian of the child, instead of by the child itself, provided that no fine may be imposed on a parent or guardian without giving him an opportunity of being heard. In these days, when the commission of offences by juveniles is so often the direct result of parental neglect, or neglect in the home, the importance of this section becomes especially apparent. It also solves to some extent the problem of making the parent responsible for property damage occasioned by the child.

Under section 20 the court may commit the child to an industrial school approved by the Lieutenant-Governor in Council. There is no mention of the length of sentence where there is a commitment and it is apparently a matter for the determination of the authorities in charge of the industrial school. In British Columbia the practice is to keep the delinquent in the school for six months, and thereafter for such period as the principal thinks fit, depending upon the conduct of the inmate and his progress towards reformation. Would it not be advisable to provide for a determinate sentence, or a combined determinate and indeterminate sentence, not exceeding in all, say, two years less one day, so that the juvenile, on being sent to the industrial school, knows exactly when he may expect to be released? Uncertainty in this respect undoubtedly causes restlessness and discontent from the start of the period of incarceration, which could be avoided by fixing a maximum period of detention at the time of the sentence.

The provisions for release are found in subsection (3) of section

[12] (1946), 87 C.C.C. 154.

20, which allows the court, at any time before the juvenile has reached the age of 21 years, to cause him to be brought before the court for the purpose of releasing him from detention, on a favourable report from the Superintendent of Neglected Children. It sometimes happens that, in the interval between the committal of the child to the industrial school and the time for his release, the juvenile court judge who sentenced him has died or ceased to hold office, and the judge who takes his place has no knowledge of the case and declines to act. This creates a problem that can only be met by methods of expediency but, as the matter involves a release from detention only, it is not a very serious one. I think, however, that this is a matter that should be dealt with by a suitable amendment providing that any juvenile court judge may release a child from detention under the section.

It has been suggested that juvenile court judges be empowered to order a spanking in certain cases. There is now no power in the Act to order a spanking as a punishment, either by itself or in addition to some other penalty, although there is clause (g) of section 20, which empowers the court to impose upon the delinquent such further or other conditions as may be deemed advisable. This clause, however, would appear to relate only to such conditions as, for instance, attending school, obtaining suitable employment, and changing companions. A great deal may be said both for and against spanking as a form of punishment for juveniles. On the one hand, it is said that spanking would be a decided advantage, provided it is administered under proper supervision and is limited to juveniles of the male sex under, say, 16 years of age. It would probably be a lesson he would never forget and in many respects might be a better form of punishment than sending him to an institution for an indefinite period of time, where he would come in contact with older and vicious types of prisoners. Probably, if the juvenile were given his choice of punishment, a spanking or sentence to an industrial school for an indefinite period, ranging from six months to two years, he would choose the spanking. On the other hand, one could expect considerable protest from certain individuals and organizations throughout the country, who are opposed on principle to any form of corporal punishment, on the ground that it is degrading not only to the recipient of the punishment but to the person who inflicts it, and contrary to the spirit of the Act.

5. *The Offence of Contributing to Juvenile Delinquency*

Section 33 of the Act, which constitutes the offence of contributing

to juvenile delinquency, is a section frequently invoked by law enforcement officers. It was intended, it would appear, to apply only to adults. The section, however, is not confined to adults because it speaks of "Any person whether the parent or guardian of the child or not who, knowingly or wilfully. . . ". Thus a juvenile under the prescribed age may be charged and convicted of contributing to juvenile delinquency. If the accused is a juvenile, he has of course to be dealt with in juvenile court; if an adult, he can be dealt with in juvenile court or by a magistrate.

The question arises whether the crime of contributing should be limited to adults or remain as it is. The offence may in some cases duplicate the provisions of the Criminal Code; for example, an adult may be charged with contributing and the facts show that he had sexual intercourse with a girl under 16, or perhaps under 14, years of age. The offence would then constitute the crime of having carnal knowledge of a girl under 16, or under 14, under section 301 of the Criminal Code. These are serious indictable offences, punishable with life imprisonment and a whipping in the one case, and imprisonment for five years in the other, whereas a charge of contributing is a summary conviction offence, punishable only with a fine not exceeding $500 or imprisonment not exceeding two years, or both. The result is that we have two types of offence dealing with the same facts, one of which may be disposed of in a summary way before a magistrate or juvenile court judge, and the other constituting an indictable offence of a serious nature.

I also refer to section 35, which provides that prosecutions against adults for offences against any provision of the Criminal Code in respect of a child may be brought in the juvenile court without the necessity of a preliminary hearing before a justice and may be summarily disposed of, where the offence is tried summarily, or otherwise dealt with as in the case of a preliminary hearing before a justice. The meaning of this section is not quite clear, but in any event it does not mean that the trial of an adult by a juvenile court judge may be conducted informally or in a manner other than that in which an ordinary criminal trial is conducted. In fact the reverse has been held to be the case.[13] Here Wood J. in the Supreme Court of British Columbia said on an application for leave to appeal from a conviction on a charge of contributing under section 33 that "it seems to me that it is in the public interest and in the interests of the due administration of justice that the trial should be conducted in the same way as any

[13] *Rex* v. *Nicholson* (1950), 10 C.R. 137.

other criminal charge is conducted in any court, whether it is an Assize Court, a County Court Judge's Criminal Court or the Magistrate's Court". It has also been held that on a charge of contributing the rule on corroboration of an accomplice's evidence applies.[14]

6. *Appeals*

To avoid pitfalls the section dealing with appeals requires careful consideration by an appellant. It provides that an application for leave to appeal shall not be granted unless the judge or court considers that, in the particular circumstances of the case, it is essential in the public interest or for the due administration of justice to do so. When leave is granted, the provisions of the Criminal Code on appeals to the Court of Appeal in the case of a conviction on indictment are made applicable, save that the appeal is to a supreme court judge instead of the court of appeal, with a further right of appeal to the court of appeal by special leave of that court. The application for leave to appeal must be presented within ten days of the making of the conviction or order complained of, or within such further time not exceeding twenty days as the judge may see fit to fix, either before or after the expiration of the ten days. This means that the application for leave to appeal must come before the judge within the limited period, and not merely the filing of notice for leave to appeal, and it has been so held.[15] It has also been held that the judge to whom the application for leave to appeal has been made is *persona designata* and seized of the case to the exclusion of any other judge.[16] In cases where the application has been adjourned and comes on later before another judge, this may cause considerable hardship. There is also nothing in the section to prevent an application for leave to appeal being made ex parte, or requiring service of the notice of an application for leave to appeal to be served on the Attorney-General or counsel for the Crown. I think the section should be amended to provide for notice to the Attorney-General in all cases of an application for leave to appeal under it and also to provide that any judge may, at any time, hear the application for leave to appeal or the appeal itself, notwithstanding that it may have previously come before another judge.

It has also been held that the right of appeal given by section

[14] *Rex* v. *Perensky and Smith* (1950), 10 C.R. 62, *per* Boyd McBride J. (Alberta Supreme Court).

[15] *Reg.* v. *Martin*, [1952] 5 W.W.R. 185, *per* Manson J. (Supreme Court of British Columbia).

[16] *Rex* v. *S.* (1946), 87 C.C.C. 154.

37 of the Juvenile Delinquents Act is exclusive in the case of an appeal not only from the decision of a juvenile court judge but also from the decision of a magistrate on summary conviction of an offence under the Juvenile Delinquents Act. In *Rex* v. *Curtiss*[17] a district court judge in Alberta held that an appeal from the decision of a magistrate on a charge of contributing under section 33 of the Act did not lie to the district court under the summary convictions sections of the Code, but only under the special procedure for appeal of the Juvenile Delinquents Act. This case was recently followed by the British Columbia Court of Appeal in *Reg.* v. *Kelham.*[18] Here there was a conviction by a juvenile court judge on a charge of contributing. The accused appealed by way of stated case under the summary convictions sections of the Code to a judge of the Supreme Court. When the matter came before the Chief Justice counsel for the Crown took the objection that he had no jurisdiction to entertain it because the right of appeal given by section 37 of the Juvenile Delinquents Act was exclusive and the right of appeal given by the summary conviction sections of the Code did not apply. This objection was overruled and the conviction was quashed. On a further appeal by the Crown, the Court of Appeal overruled the decision of the Chief Justice of the court below and held that the right of appeal given by section 37 was exclusive. In giving judgment the Chief Justice of British Columbia said: "It is my view that Parliament by the enactment of this section [section 37] has by plain implication deprived a person aggrieved by the decision of a Juvenile Court or Magistrate in a prosecution under the said Act of invoking any other method of appeal than that contemplated by the section".

Although restrictions on the right of appeal in the case of juvenile delinquents are understandable, it is difficult to see the necessity of restricting it in the case of an adult convicted of contributing, where the decision is by a magistrate on summary conviction. This matter, however, is not very important because the main thing is that, as now provided, there be a right of appeal to a higher court and ultimately to the Court of Appeal. It does, however, illustrate one of the many anomalies we find in construing this important and rather difficult Act.

[17] [1948] 2 W.W.R. 863.
[18] [1952] 6 W.W.R. (N.S.) 244.