CIVIL RIGHTS IN JUVENILE COURTS*

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Civil rights in juvenile courts is an area of the law that has attracted wide discussion and comment in the United States. Canada's laws, however, while following the same general pattern as those in the United States have not been the subject of close scrutiny. The purpose of the article is to scrutinize Canada's laws and place them in the context of modern views as the role and function of juvenile courts.

I. INTRODUCTION

> I am not concerned with barren technicalities, but with fundamental rights—rights which we provide for the sorriest scoundrel tried in our criminal courts, and should accord with double-handed generosity to an immature lad.[1]
>
> . . . neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.[2]

Since the case of *In re Gault*[3] there has been a great deal of comment in the United States concerning the constitutional rights of children before juvenile courts. The cry "children are people too" has also been heard in Canada[4] and Parliament has seriously considered replacing the Juvenile Delinquents Act[5] with the Young Offenders Bill.

In view of this interest in the criminal liabilities and civil liberties of children in juvenile courts, this writer proposes to inquire into: (i) what modifications the Juvenile Delinquents Act[6] has made in respect of the criminal liability and civil liberties of children; (ii) what fundamental rights and procedural safeguards have been held to exist in juvenile proceedings; and (iii) what possible application the Canadian Bill of Rights[7] might have affirming or extending those fundamental rights.

II. THE JUVENILE DELINQUENTS ACT: WHAT IT DOES

Prior to the enactment of the first Juvenile Delinquents Act in 1908,[8] children were subject to generally the same sanctions as adults,[9] with the exception that children between 7 and 14 could not be convicted unless they were competent to know the nature and consequences of their conduct and they could appreciate that it was wrong.[10]

In reforming the law, the J.D.A. adopted the following basic scheme:

1. One Offence—Juvenile Delinquency

Section 2(1) provides:

> 'juvenile delinquent' means any child who violates any provision of the Criminal Code or any federal or provincial statute, or any by-law or ordinance of any municipality, or who is guilty of sexual immorality, or any similar form of vice, or

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* This paper refers to the case law as decided up to March 15, 1973.

** B.A., L.L.B. (Alta.).

[1] *R. v. T.* [1947] 2 W.W.R. 232 (B.C.S.C.) per Wilson J.

[2] *Re Gault* (1967) 387 U.S. 1 per Fortas J.

[3] *Id.*

[4] *See* D.M. Steinberg, Ont. Prov. Ct. J. (Family Division), *The Young Offender and the Courts*, 6 R.F.L. 86: "Children are people. They deserve at least the same right of protection before the law as adults, and probably more so".

[5] R.S.C. 1970, c. J-3.

[6] Hereinafter called J.D.A.

[7] R.S.C. 1970, Appendix III.

[8] 7-8 Edward VII, c. 40.

[9] *See* The Criminal Code, R.S.C. 1970, c. C-34, s. 12.

[10] *Id.* at s. 13.

> who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under any federal or provincial statute; . . . .

Section 3(1) provides that the commission of any of these acts constitutes an offence known as a delinquency. Except as provided in s. 9, the juvenile court has exclusive jurisdiction in all cases of delinquency,[11] and it is the duty of any other court to transfer all such cases to the juvenile court.[12]

The creation of this new "criminal offense"[13] is not an end in itself but only a means to an end:[14]

> The primary legal effect of the Juvenile Delinquents Act . . . is the effective substitution, in the case of juveniles, of the provisions of the Act [for] the enforcement provisions of the Criminal Code, or of any other Dominion Statute, or of a provincial statute . . . .

It therefore enables Parliament:[15]

> ". . . to adopt, for the prosecution of this offense, an enforcement process specially adapted to the age and impressibility of juveniles . . . fundamentally different, in pattern and purpose, from the one governing the case of adults".

2. Adjudication of Guilt or Innocence

Except as specifically or generally provided in the J.D.A., prosecutions and trials are to be summary and are to be governed *mutatis mutandis* by the provisions in the Criminal Code relating to summary convictions in so far as such provisions are applicable.[16]

Specific provisions are made for a waiver of jurisdiction to the adult courts,[17] the jurisdiction of a juvenile court judge,[18] notice to the parent or guardian of the child,[19] pre-trial detention and adjournments,[20] publicity and the admission of the public to the trial,[21] and the admission of evidence of children of tender years.[22]

Section 5 is cut down in general terms by s. 17(1) and s. 17(2) which provide, respectively, that proceedings under the Act with respect to children, including the trial, "may be as informal as circumstances permit, consistent with a due regard for a proper administration of justice", and no adjudication with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears the disposition of the case was in the best interests of the child.[23] Section 3(2), which provides that a delinquent is not to be dealt with as an offender, but as one in a condition of delinquency, and s. 38, which provides that the Act is to be liberally construed, do not in their terms apply to the adjudication process, but only the treatment of a child once adjudged to be a delinquent.

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[11] *Supra*, n. 5 at s. 4.

[12] *Id.* at s. 8.

[13] Per Bull J.A., *A.-G. of B.C.* v. *S. and A.-G. of Canada* (1963) 53 W.W.R. 129 (B.C.C.A.):

> Section 3 clearly creates the new criminal offense of 'delinquency'. . . , what Parliament appears to have said is that . . . every child who breaks or offends against any of the laws in force in Canada shall be deemed to have committed a single new all embracing crime called 'delinquency'. . . .

Aff'd [1967] S.C.R. 703.

[14] Per Fauteux J. *A.-G. of B.C.* v. *Smith* [1967] S.C.R. 703 at 708.

[15] *Id.* at 710.

[16] *Supra*, n. 5 at s. 5.

[17] *Id.* at s. 9.

[18] *Id.* at ss. 6, 36.

[19] *Id.* at s. 10.

[20] *Id.* at ss. 13-16.

[21] *Id.* at ss. 10, 12, 24.

[22] *Id.* at s. 19.

[23] Note that these sections only apply to proceedings against children under the Act, not adults.

The number of procedural safeguards available to a juvenile will, to a large extent, depend on how far s. 5 is cut down by s. 17. This will be discussed at a later point in the article.

3. The Disposition of the Case

The major reform or "primary legal effect" wrought by the J.D.A. is in the power and goals in the disposition of a juvenile delinquent's case. Because the only offense under the Act is "delinquency" and because the juvenile court judge has a very large discretion under s. 20(1) in the disposition of the case, conceivably a child who is charged with jaywalking could receive the same "treatment" as the child charged with bank robbery. However, the discretion of the juvenile court is limited in general and specific ways.

Generally, s. 20(5) provides that the action taken under s. 20(1) "*shall* . . . be that which the court is of the opinion the child's own good *and* the best interests of the community require" [emphasis added]; s. 38 provides that:[24]

> . . . the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents and that as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance . . . ,

and s. 3(2) provides that a delinquent is to be dealt with not as an offender but as one in a condition of delinquency.

Further, the Act provides that in the disposition of a case the religion of the child is to be respected,[25] that *prima facie,* children under 12 are not to be committed to an industrial school,[26] and that no delinquent shall under any circumstances be sentenced to or incarcerated in any penitentiary or gaol or other place where adults are or may be imprisoned.[27]

Provision is also made for a juvenile court committee and probation officers[28] to enable the court to better carry out its duties.

Although the J.D.A.[29] may operate to incidentally enhance the welfare of children it is not child welfare legislation but criminal law:[30]

> In the former [Child Welfare Legislation], the objects are directed to the control or alleviation of social conditions, the proper education and training of children, and the care and protection of people in distress, including neglected children. In the latter the object is clearly to govern the apprehension, punishment, proper care and guidance of children who are offenders against the laws of the land, of whatever type and by whoever enacted to the end of the overall prevention of crime.

The J.D.A. may give the court a very large discretion in the disposition of a case once the accused is found guilty, but the proceeding is criminal in its essence, and the procedural rights and civil liberties of a child in front of a juvenile court are *prima facie* the same as the rights of any adult in front of a criminal court.

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[24] *See R.* v. *B.* [1956] 19 W.W.R. (N.S.) 651 (B.C.S.C.). Statements by the judge to the accused were held to go beyond what was contemplated by s. 38 and constituted "improper punishment".

[25] *Supra,* n. 5 at s. 23.

[26] *Id.* at s. 25.

[27] *Id.* at s. 26.

[28] *Id.* at ss. 27, 28.

[29] *Id.* at ss. 29, 30, 31, 32.

[30] Per Bull J.A., *A.-G. of B.C.* v. *S. and A.-G. of Canada, supra,* n. 13 at 156. Aff'd *A.-G. of B.C.* v. *Smith, supra,* n. 14 at 712.

III. THE RECOGNIZED RIGHTS OF A JUVENILE BEFORE A JUVENILE COURT

1. Rules of Prosecution and Trial Procedure

(a) Generally

As stated above[31] the general rule is that prosecutions and trials in juvenile courts are to be governed *mutatis mutandis* by the provisions relating to summary convictions in the Criminal Code.[32] The question is the extent to which s. 5 is cut down by s. 17(1) and s. 17(2)—and it is open to debate: s.s. (1) and (2) of s. 5 provide:

> (1) Except as hereinafter provided, prosecutions and trials under this Act shall be summary and shall, *mutatis mutandis*, be governed by the provisions of the Criminal Code relating to summary convictions in so far as such provisions are applicable . . . .
> (2) The provisions of the Criminal Code prescribing a time limit for the commencement of prosecutions for offenses against the Criminal Code apply, *mutantis mutandis*, to all proceedings in the juvenile court.

Subsections (1) and (2) of s. 17 provide:

> (1) Proceedings under this Act with respect to a child, including the trial and disposition of the case, may be as informal as the circumstances will permit, consistent with a due regard for a proper administration of justice.
> (2) No adjudication or other action of a juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child.

In *R.* v. *Gerald X*[33] Coyne J. A. stated:[34]

> . . . aside from (a) and (b) [of section 5], some of those provisions of the Criminal Code are inapplicable in juvenile courts. The section gives no specific determinant of how far any of those provisions are applicable.

A good illustration of the divergence of opinion on this point is provided by the Manitoba Court of Appeal in this case. At issue was the application of s. 708(1)[35] of the Criminal Code: Does it apply? If so how strictly must it be complied with? Section 708(1) provides "where the defendant appears, the substance of the information shall be stated to him and he shall be asked . . . whether he pleads guilty or not guilty to the information". When the juvenile appeared in court the judge had asked "there's an information here sonny that . . . [you did] unlawfully and indecently assualt H.B.. What about that? Is that correct or not? What did you do?" G., who was fourteen years old, answered, "We took her pants down and let her go." The juvenile court judge, at a subsequent hearing at which counsel was present, stated that this was a plea of guilty and refused to allow the accused to withdraw it. The Manitoba Queen's Bench[36] and the majority of the Court of Appeal held that s. 708(1) applied, but that it was complied with. This was an arraignment and plea—informal compliance with what is formally required in an adult court. Adamson C.J.M. (dissenting) said this was not an arraignment as required by statute but an attempt to interrogate the child in a manner calculated to incriminate him. Coyne J.A. (Montague J.A. concurring) based his argument of informal compliance on s. 17 and what he took to be the intent of the Act:[37]

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[31] *Infra*, *II. 2.*

[32] *Supra*, n. 5 at s. 5.

[33] (1958) 25 W.W.R. 97 (Man. C.A.).

[34] *Id.* at 116.

[35] Now section 736(1).

[36] (1958) 24 W.W.R. 310.

[37] *Surpa*, n. 33 at 114.

> At the basis of the new system was the consideration that the moral atmosphere and associations of ordinary legal tribunals which deal with offences of adults is injurious to the child as is also the publicity of the proceedings: and the children who appear before such tribunals are irked by the technical character and formality of the adult proceedings, obviously too protracted in many cases and often by technical disputes: and that the early familiarity they gain with those legal processes tends to breed disrespect for courts and law.

However, Coyne J.A. did recognize that some procedural safeguards were necessary:[38]

> Observance of basic principles of justice is, of course, an implicit requirement as in every British and Canadian Court, embracing plain and simple statement of charge, statement made of its substance to the defendant in court, opportunity afforded to him to admit or deny the charge and the further opportunity of making full defense where the charge is denied.

Adamson C.J.M. replied, arguing:[39]

> It [the Juvenile Court] is an important court and should not only observe the principles of criminal law but should be conducted with decorum. The Juvenile Delinquents Act is intended to protect children. Sec. 17 of the Act . . . does not deprive an accused of any of the safeguards which are fundamental to our criminal jurisprudence: (1) It does not take away the right to full answer and defense; (2) Accused children should not be questioned without being warned or in the absence of parent or counsel; (3) An alleged statement or confession should not be used without it being established that it was voluntary; (4) An accused child cannot be required to give evidence against himself; (5) Witnesses who understand the meaning of an oath must be sworn; (6) The Act does not do away with open and fair trials.

In the Supreme Court of Canada[40] the accused's appeal was allowed and all three judges who dealt with the s. 708(1) argument agreed with Adamson C.J.M. that the conversation between the juvenile court judge and the accused did not amount to a valid arraignment. Locke and Martland JJ.[41] not only stated that this was not an "informal compliance" (because the substance of the information was not sufficiently explained, and he was not asked to plead but to make a statement of what occurred), but also stated that s. 708(1) was "plain" and "imperative" and failure to comply with it deprives the juvenile court of jurisdiction. In other words informal compliance is not sufficient, it must be strict, as in an adult court. Further, they agreed with Adamson C.J.M. as to the effect of s. 17:[42]

> The contention that s. 17 of the Juvenile Delinquents Act . . . and s. 38 . . . in some way relieves the judges of that court from complying with s. 708(1) of the Code, cannot be supported. I can see no difficulty in complying with ss. 17 and 38 . . . while following the requirements of that section.

Cartwright J., although he thought this verbal exchange was not sufficient compliance with s. 708(1) (because it was not a question as to plea but an invitation to make a statement), also thought that informal compliance was possible. If the juvenile court judge had not added, "What did you do?" the statement would have been an arraignment.

Although the question is far from settled, it is submitted that the better view is expressed by Adamson C.J.M. and by Locke and

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[38] *Id.* at 115.

[39] *Id.* at 113.

[40] *Gerald Smith* v. *R.* [1959] S.C.R. 639.

[41] *Id.* at 649.

[42] *Id.* at 650.

Martland JJ.. The view of Coyne J.A. in respect of the intent of the Act is not supportable on the interpretation of the Act. As noted previously the great change in the treatment of juveniles was made in the disposition of the case after judgment, not in the trial procedure. *Prima facie,* therefore, the formalities and safeguards remain and are not cut down by the vague and general provisions of s. 17.

It should be noted that s. 17 permits informality only in so far as it is consistent with "a due regard for the proper administration of justice." In *Re Miller*[43] Disbery J. stated that:[44]

> It is essential for due administration of justice that an accused be tried according to law, and that he should have a fair trial and not be deprived of any of his rights.

In *R.* v. *Nicholson*[45] Wood J. said,[46] "it is in the interest of the administration of justice that no person should be convicted except by due process of law."

The cases cited below generally illustrate that formal prosecution and trial procedure is required.

(b) Pre-Trial Detention and Bail

Section 15 of the J.D.A. provides:

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

In *R.* v. *Libby Louise Walker*[47] Kerans Dis. Ct. J. acceded to counsel's argument that the section, by using the word "may", gives the juvenile court no additional discretion, but merely the same discretion and jurisdiction as any provincial court judge under the new Bail Reform Act.[48] A juvenile who was detained in custody was ordered to be admitted to bail as the prosecutor had not shown cause why she should not be released.

If a child has been arrested, with or without a warrant, the child is not to be incarcerated prior to trial unless such a course is necessary to ensure the attendance of such child in court,[49] and, to avoid incarceration, the person responsible for the child (or the person served with notice under s. 10) may promise to be responsible for the presence of the child.[50] A child is not to be confined in a place where adults are or may be imprisoned except where that child is over the age of fourteen and cannot safely be confined in any other place.[51]

(c) Adjournments

Under the Criminal Code a summary conviction court may, at its discretion, adjourn proceedings but no longer than 8 days without the consent of both parties.[52] This does not apply to juvenile court

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[43] (1962) 37 W.W.R. 571. Here leave to appeal under s. 37 of the J.D.A. conditioned on "due administration of justice" was at question.

[44] *Id.* at 573.

[45] [1950] 2 W.W.R. 309 (B.C.S.C.).

[46] *Id.* at 311.

[47] Unreported, June 28, 1972 (Alberta District Court).

[48] *See supra,* n. 9 at s. 457(1).

[49] *Supra,* n. 5 at s. 14(1).

[50] *Id.* at s. 14(2).

[51] *Id.* at s. 13(1).

[52] *Supra,* n. 9 at s. 738(1).

proceedings, however, for s. 16 of the J.D.A. gives a juvenile court the power to adjourn proceedings indefinitely. But where a juvenile court has adjourned and with the consent of the parties set a date for a hearing, it cannot hold the hearing at an earlier date if one party does not consent.[53]

(d) Transfer of Jurisdiction to the Ordinary Courts

The action of the juvenile court in waiving its jurisdiction and ordering a child to be proceeded against in ordinary courts is the most litigated area under the Act. Section 9 provides that a juvenile court may, in its discretion, so order if: (i) the act complained of is an indictable offense; (ii) the accused child is apparently or actually over the age of fourteen years; and (iii) the court is of the opinion that the good of the child and interest of the community demand it.

Even if a hearing under the section is classified as an administrative or ministerial function and not a judicial function, it has been held that the *audi alterum partem* rule must be complied with. The accused child is entitled to be heard and is entitled to put forward evidence.[54] The court must enquire into all the evidence to determine whether such an order is for the good of the child and in the best interests of the community.[55] In *Re Miller*[56] it was stated that no child shall be tried by indictment unless it is for the good of the child and in the interests of the community:[57]

> It is therefore incumbent upon a juvenile court judge to inquire into these matters in order to exercise his discretion judicially, and such seems to me to require that the accused should be afforded full opportunity to offer evidence if he so desires and to submit argument with respect thereto.

However a juvenile court judge making an order under this section is not compelled to rely on sworn statements.[58] The unsworn statements of a probation officer are admissible.

(e) Plea

Judicial attitudes on the necessity of putting the juvenile to a plea, and the acceptance of a plea of guilty as grounds for conviction, have changed over the years. In *R.* v. *Wigman*[59] a girl of sixteen was convicted of juvenile delinquency on her plea of guilty. A writ of *habeas corpus* was granted on the ground that a juvenile court could not convict on a plea of guilty because the J.D.A. makes no provision for a plea, obviously intending that a child could not be convicted by his or her own admission. This position was modified in *R.* v. *H. and H.*[60] where it was held that this was not proper for a younger child, but an older child, who understands the nature of the proceedings can be convicted on a plea of guilty. The Supreme Court of Canada in *Smith* v.

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[53] *R.* v. *Painter* (1968) 62 W.W.R. 418 (B.C.S.C.). The court so held even though the juvenile and both parents were present at the hearing. The juvenile's lawyer, however, was not able to attend, and the lawyer's partner's motion that the proceeding be heard on the date originally set was denied.

[54] *R.* v. *R.* (1969) 70 W.W.R. 293. *See also R.* v. *Pagee (No. 1)* (1963) 41 W.W.R. 189 (Man. Q.B.); *R.* v. *Arbuckle* (1967) 59 W.W.R. 605.

[55] *See* Bowman, D.E., *Transfer Applications*, (1970) Issac Pitblado Lectures, at 78, and the cases cited therein.

[56] *Supra*, n. 43.

[57] *Id.* at 573.

[58] *Shingoose* v. *R.* [1967] S.C.R. 298.

[59] (1918) 25 B.C.R. 35 (B.C.S.C.).

[60] [1947] 1 W.W.R. 49 (B.C.S.C.).

R.[61] leaves the present position somewhat uncertain. It is clear that some type of arraignment and plea is necessary in every case.[62] The nature of the arraignment and plea required is not clear. Locke and Martland JJ. suggest that it shall be as formal as in every adult court, but that its meaning must be explained as well. Cartwright J. suggests that the arraignment and plea need only be put informally. One inference from the judgment is that, because an arraignment and plea is a mandatory requirement in some form, a child can therefore be convicted upon a plea alone.[63] However, this point is still open.

(f) Public Trial

It is often assumed that the J.D.A. deprives a child of an open and public trial—that all juvenile proceedings are to be held *in camera.* However the Act only provides:

i) Trials shall take place *without publicity* and separately and apart from the trials of other accused persons [s. 12(1)]. "Without publicity" does not mean "in private".
ii) Trials may be held in the private office of the judge or in some other private room in the court house [s. 12(2)]. This, it may be argued, only designates the place of the trial, and does not grant the specific authority to deny a person the right to an open trial.
iii) No report of a delinquence, etc., shall be published in a newspaper or other publication without leave of the court [s. 12(3)].
iv) No child, with some exceptions, shall be permitted to be present in court during a trial unless his presence is required [s. 24].

Therefore, the J.D.A. has no specific provision requiring trials of juveniles to be held *in camera,* and it is probable that so fundamental and historical a right as the right to a fair and open trial cannot be cut down by inference. However, s. 6 of the J.D.A. provides that a juvenile court judge has all the powers of a magistrate[64] and s. 442 of the Criminal Code provides:

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

Assuming this section applies to juvenile proceedings[65] it would give the juvenile court judge the discretion to hold proceedings *in camera* in certain circumstances where the child is over the age of sixteen and a juvenile.

In *R.* v. *Gerald X* Adamson C.J.M., after discussing the provisions of the J.D.A., concluded:[66]

> It is to be noticed that no power is given by the Juvenile Delinquents Act to exclude the general public or to hold trials *in camera.* The only authority that a juvenile court judge has to hold trials *in camera* is the general one, seldom used, provided in the Criminal Code to exclude the public or certain classes or age groups in the in-

[61] *Supra,* n. 40.

[62] The case might be distinguished on the ground that it involved an older boy (14 years) who understood the nature of the proceedings and charge, but this is doubtful in view of the imperative language used by the court.

[63] This is not as harsh at is seems if counsel or the parents must be present at the time.

[64] *Supra,* n. 5 at s. 5 may also be used.

[65] It will not apply if it is found inconsistent with the provisions of the J.D.A.: *supra,* n. 5 at s. 40.

[66] *Supra,* n. 33 at 112. There was a question as to whether the accused's counsel had a right to be present. The point was not discussed by the rest of the court or the Supreme Court of Canada.

> terests of public morality. . . . The salutory practice of public trials should not be departed from to any greater extent than the statute specifically requires.

In *R.* v. *H. and H.* Manson J. reached a contrary conclusion.[67] He held the phrase "without publicity" meant juvenile trials are to be held *in camera:* "Subsection (1) of section 12 constitutes a statutory exception to the general rule that trials shall be held in public. . . ."[68] Some assistance was found by looking at s. 28(2), which provides that members of the juvenile court committee "may be present at any session of the juvenile court." Further, Manson J. stated that:[69]

> A fair inference therefrom is that the court is to be held *in camera* except for members of the Juvenile Court Committee, and, of course, such persons as are entitled to be present at a trial *in camera.*

Manson J. came to this conclusion even though he was aware that:[70]

> . . . the rule that trials shall be held in public is so thoroughly ingrained in our practice . . . that departure from it is not to be countenanced unless . . . as a result of clear and unmistakable statutory enactment.

It is submitted that Manson J. is not correct. "Without publicity" does not clearly mean "in private". Certainly any inference that may be drawn from its use, or from other contradictory expressions in the Act, is not enough to cut down a rule that even the learned judge recognizes as fundamental.

However the matter does not end here. It will be noted that s. 442 only codifies the common law in so far as children who are "or appear to be sixteen years of age or more." The common law is set out, *obiter,* by the House of Lords in *Scott* v. *Scott*[71] where it was stated that:[72]

> The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of justice are first, in suits affecting wards; secondly, in lunacy proceedings; and, thirdly, in those cases where secrecy . . . is of the essence of the cause. The first two of these cases . . . depend on the familiar principle that the jurisdiction over wards and lunatics is exercised by the judges as representing His Majesty as *parens patriae.* The affairs are truly private affairs; the transactions are transactions truly *intra familiam:* and it has long been recognized that an appeal for the protection of the court in the case of such persons does not involve the consequence of placing in the light of publicity their truly domestic affairs.

The question then, is whether the jurisdiction exercised by juvenile courts is a jurisdiction *parens patriae*—parental and administrative (in which the primary object is to guard the interest of the ward, and not to secure justice—which may be an incidental question) or a criminal jurisdiction. It is submitted that the Supreme Court of Canada has answered this question[73] by finding the J.D.A. to be an enactment in relation to criminal law and not an enactment in relation to welfare and protection of children. The Act provides[74] that the best interests of the community as well as the child's own good are to be considered.

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[67] *Supra,* n. 60 at 54-56. Where the accused children allegedly killed a cat contrary to the Criminal Code and the prosecutor, an inspector for the B.C. S.P.C.A., requested to make a report of the proceedings to the society.

[68] *Id.* at 56.

[69] *Id.* at 55.

[70] *Id.*

[71] [1913] A.C. 417.

[72] *Id.* per Lord Shaw at 482-483. Viscount Haldane L. C. made comments to the same effect at 437.

[73] *A.-G. of B.C.* v. *Smith, supra,* n. 14 at 712.

[74] *Supra,* n. 5 at s. 20(5).

The basis of a juvenile court's jurisdiction as *parens patriae* was discussed by the United States Supreme Court in *In re Gault*.[75]

> The Latin phrase [*parens patriae*] proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance. The phrase was taken from Chancery practice, where, however, it was used to describe the power of the State to act *in loco parentis* for protecting the property interests and the person of the child. But there is no trace of the doctrine in the history of criminal jurisprudence. At common law, children under seven were considered incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders. In these old days, the state was not deemed to have authority to accord them fewer procedural rights than adults.

It was held that whatever jurisdiction the state may exercise as *parens patriae,* (a jurisdiction which may allow the state to assert that a child, unlike and adult, has a right "not to liberty but to custody"), this jurisdiction is not unlimited, and where a juvenile court hearing is in question, that hearing "must measure up to the essentials of due process and fair treatment".

It is submitted that the correct conclusion, therefore, is that a juvenile under the age of sixteen years has the same right to a fair and open trial as an accused at common law. The trial must be open except in very exceptional circumstances.[76]

The effect of the Canadian Bill of Rights upon the right to an open trial will be discussed at a later point in this paper.[77]

(g) When Evidence may be Called

The Criminal Code states that where the defendant pleads not guilty, the court shall proceed with trial[78] and shall first take the evidence of the prosecution, and then of the defense.[79] In *R.* v. *B.*[80] the appeal court disapproved of the juvenile court judge's practice of taking evidence from the accused's mother and the probation officer before the juvenile was arraigned. If the questions had related to age or identity they would not have been objectionable; however, they related to the substance of the charge and whether the accused had been "in trouble" before.

(h) The Right to Make Full Answer and Defense

The Criminal Code provides that an accused has the right to make full answer and defense to the prosecution's case.[81] Adamson C.J.M., in *R.* v. *Gerald X*[82] stated that the section applied and guaranteed the child the right to answer to the probation officer. In *R.* v. *T.*[83] a conviction was quashed on the grounds, *inter alia,* that the accused had not been offered a right of cross examination, or asked whether he wanted to call witnesses or give evidence.

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[75] *Supra*, n. 2 at 16 per Fortas J.
[76] 9 Hals. (3d) 345-346.
[77] *Infra*, IV.
[78] *Supra*, n. 9 at s. 736(3).
[79] *Id.* at s. 468.
[80] *Supra*, n. 24.
[81] *Supra*, n. 9 at s. 737(1).
[82] *Supra*, n. 33.
[83] *Supra*, n. 1.

(i) The Right to Speak to Sentence

The accused juvenile apparently has a right to speak to sentence after judgment is given. In *R.* v. *B.*[84] the refusal of the juvenile court to hear any further statements after an alleged plea of guilty was taken —the accused had only made one prior statement and that was: "That's right, sir" when the court had asked him if he had committed the act— was cited on appeal as one of the grounds on which the conviction could be challenged.

(j) Other Sections of the Criminal Code and Provincial Legislation

The degree to which other sections of the Criminal Code must be complied with in juvenile court proceedings is open to speculation.

Two provincial statutes apply specifically to juvenile delinquents. The Juvenile Court Act[85] sets up a system of juvenile courts in Alberta. Part 4 of the Child Welfare Act[86] provides for probation officers, detention centres, and co-ordination[87] between the J.D.A. and provincial child welfare legislation. Section 72 grants certain procedural rights: the right to be brought before a judge as soon as practicable; notice to parents upon detention; a four day limit on pre-trial detention without judicial order. The maximum time of initial commitment to custody without judicial review is limited to twelve months.[88] As the J.D.A. is "in essence" criminal law,[89] there may be some question as to the constitutionality of these sections. Section 39 of the J.D.A. provides: "[n]othing in this Act shall be construed as having the effect of repealing or overriding any provision of any provincial statute intended for the protection of children". However, if the provisions of Part 4 are so indistinguishable from the provisions under the J.D.A. as to be in "pith and substance" criminal law, s. 39 would be of no aid. Perhaps a better argument can be made for their validity when the act committed by the juvenile was a violation of a provincial statute.

In practice, the administration of the J.D.A. is co-ordinated with the administration of Part 2 of the Child Welfare Act[90]—"neglected and dependent children". Part 2 appears to give the court a true *parens patriae* jurisdiction. A child who has committed a wrong is often apprehended instead of being arrested—indeed s. 39 of the J.D.A. provides that even if a child alleged to have committed an indictable offense is found not guilty in a juvenile court, he may still come under the operation of the provincial statute. The result—committal of the child to the custody of the Director of Child Welfare—is potentially the same, regardless of which statute is used.

2. New Procedural Rights Created by the Juvenile Delinquents Act

Section 10 of the J.D.A. provides that due notice of the hearing of any charge of delinquency is to be served on the parent(s) or guardian(s) of the child and that any such person has the *right* to be present at the hearing. In *Smith* v. *R.*[91] the Supreme Court of Canada held

[84] *Supra*, n. 24 at 654-655.
[85] R.S.A. 1970, c. 195.
[86] R.S.A. 1970, c. 45.
[87] *Id.* at ss. 74, 76, 77, 78, 79, 80.
[88] *Id.* at s. 78(1).
[89] *A.-G. of B.C.* v. *Smith*, *supra*, n. 14.
[90] *Supra*, n. 86.
[91] *Supra*, n. 40.

that this notice must include notice of the wrong the child is alleged to have committed; it must be served in a written and not a verbal form; and lack of notice deprives a juvenile court of jurisdiction.

3. The Application of Rules of Evidence[92]

(a) Confessions

The rule that statements to persons in authority, to be admissible, must be made voluntarily, in the sense that they are made without fear of prejudice or hope of advantage, applies to persons charged with being juvenile delinquents as well as to adults. In *R.* v. *Jacques*[93] a fourteen year old boy was accused of criminal negligence in the shooting of another juvenile and was charged under the J.D.A. He was taken by police 135 miles from his home and detained for 48 hours in a cell normally used for adults detained on suspicion of murder.[94] Personal belongings, belt and shoelaces were taken from him on arrival; a guard was placed on continual watch outside his cell door; and he was in full view of the guard at all times, including when he used the toilet facilities. During detention he was in a dazed condition, somewhat ill, inadequately fed, and without the visitation of a brother in the vicinity who could have been contacted. When he was finally led to a room to be questioned by police he was nervous and crying. No effort, however, was made to reassure him, and the first words spoken to him were the customary caution. In these circumstances Schreiber Welfare Ct. J., found the statement was not voluntary. He stated that the rights of an individual concerning the taking of a statement[95]

> . . . should be observed even more carefully in the case of a child by reason of the fact that a child is a child and that as such, he has not the resistance, maturity or understanding of an adult to cope with a situation of this nature.

In order to ensure the admissibility of a statement the authorities should:[96]

1. Require that a relative, preferably of the same sex as the child to be questioned, should accompany the child to the place of interrogation;
2. Give the child, at the place or room of the interrogation, in the presence of the relative who accompanies him, the choice of deciding whether he wishes his relative to stay in the same room during the questioning or not;
3. Carry out the questioning as soon as the child and his relative arrive at headquarters;
4. Ask the child, as soon as the caution is given, whether he understands it and if not give him an explanation;
5. Detain the child . . . in a place designated by the competent authorities as a place for the detention of children.

(b) Oath

It appears that every person giving evidence in a juvenile trial must do so under oath or on solemn affirmation. The J.D.A.[97] repeats the provision in s. 16 of the Canada Evidence Act.[98] A child of tender years, under fourteen, may give evidence under oath if he understands the "nature" of the oath. The court must be satisfied that the child un-

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[92] On this subject generally *see* Schulman, P.W. *Rules of Evidence Relating to Children*, (1970) *Pitblado Lectures* at 86.

[93] (1959) 29 C.R. 249 (Que.).

[94] This is *prima facie* a violation of J.D.A., s. 13.

[95] *Supra*, n. 93 at 267.

[96] *See supra*, n. 5 at s. 13; *Child Welfare Act, supra*, n. 86 at s. 71.

[97] *Supra*, n. 5 at s. 19.

[98] R.S.C. 1970, c. E-10.

derstands he is to tell the truth, and has assumed a moral obligation to do so.[99] It is not likely that the law demands the child understand the religious consequences[100] of not telling the truth. If the child does not understand the nature of the oath, s. 19 (J.D.A.) provides that the evidence may be received if the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth—however, such evidence must be corroborated in some material respect if a person is to be convicted on it.[101] In *R.* v. *T.*[102] a conviction of juvenile delinquency was quashed on the ground, *inter alia,* that the accused was convicted on the evidence of children of a tender age which was unsworn and uncorroborated.[103] However, where a juvenile court is conducting a hearing to determine whether a child should be transferred to adult court, it is not compelled to rely on sworn testimony.[104]

(c) Leading Questions, Irrelevant and Prejudicial Testimony, Other Rules

In *R.* v. *Nicholson*[105] the decision of a juvenile court was quashed on the ground, *inter alia,* that the prosecutor cross-examined his witness without having her declared a hostile witness. In *R.* v. *B.*[106] where the juvenile court, in trying a case, inquired whether the accused had ever been in trouble before, and in *R.* v. *Gerald X.*[107] where the juvenile court appeared to determine the guilt of the accused on the basis of the prior convictions of his co-defendants, the convictions were said to be bad on that ground.

From the preceding discussion, it appears that juvenile courts are generally bound by the substantive rules of evidence. The hearsay rule and other rules not discussed in the cases probably also apply. Although s. 17 (J.D.A.) could be used to modify or exclude these rules, it has not been so used.

4. Natural Justice and Other Procedural Requirements

A juvenile trial is clearly a judicial proceeding and as such it must comply with the "rules of natural justice" in so far as they have not been impaired or modified by statute. Although these rules have seldom been used as an independent basis for quashing a juvenile conviction[108] it is submitted that they could be. It is not certain what rules a court will recognize and invoke, apart from the *audi alteram partem* rule. However, it is submitted that the following and more could be argued to apply (as well as the "right" to notice and a hearing): "right" to examine reports and other evidence, "right" to cross-examine witnesses, "right" to counsel, "right" to an open court, "right" to be heard by the person who decides, "right" to be tried according to the rules of

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[99] *R.* v. *Bannerman* (1966) 48 C.R. 110 (Man. C.A.).

[100] It was said to be necessary in *R.* v. *Androbus* [1947] 1 W.W.R. 157 (B.C.C.A.).

[101] Corroboration is discussed in the article by Schulman, *supra,* n. 92.

[102] *Supra,* n. 1.

[103] A conviction of contributing to juvenile delinquency was quashed in *R.* v. *Nicholson, supra,* n. 45 on the same ground.

[104] *Shingoose* v. *R., supra,* n. 58.

[105] *Supra,* n. 45.

[106] *Supra,* n. 24.

[107] *Supra,* n. 33 per Adamson C.J.M.

[108] *See R.* v. *Gerald X, supra,* n. 33 per Adamson C.J.M.; *Re Miller, supra,* n. 43; *Re Mailman* [1927] 2 D.L.R. 526 (N.S.C.A.); *Lysenko* v. *Cooper* [1938] 1 W.W.R. 366 (Man.); *R.* v. *H.* [1931] 2 W.W.R. 917.

evidence, and the "right" to be tried by a tribunal free of interest and bias.[109]

In *R.* v. *T.*[110] the conviction of a juvenile was quashed on the ground, *inter alia,* that he was not offered the right of cross-examination.

In *R.* v. *Painter*[111] a new hearing was granted on the ground, *inter alia,* that the juveniles' solicitor was unable to attend because the court had set a different date for the hearing than the one originally agreed on. In *R.* v. *Gerald X.,*[112] Adamson C.J.M. (the other members of the court expressed no opinion on this point) stated:[113]

> Where an accused is not represented by counsel and the magistrate does not tell him what his rights are, he has not been admitted to make his full answer and defense . . . . In the case of an undefended child it is imperative that he be given that opportunity to have a parent, guardian or counsel present and if he is not given that opportunity the magistrate has no jurisdiction.

On appeal to the Supreme Court of Canada, Locke and Martland J.J. accepted the proposition, but stated that it would not deprive a court of jurisdiction.

In *R.* v. *T.*[114] and *R.* v. *Gerald X.*[115] it was held that an accused in juvenile court proceedings could not be compelled to incriminate himself. In *R.* v. *T.* the child was sworn and told to give evidence without his consent. In *Gerald X.,* instead of being put to his plea, a child was asked, "What did you do?" This was held to be an interrogation calculated to have the child incriminate himself (per Adamson C.J.M.) and an invitation to make a statement "without at least being warned that he was not obliged to say anything" (per Locke and Martland J.J.).

5. The Disposition of the Case

As stated previously, the significant changes were made in the method of disposition of the case after judgment. No matter what wrong was committed, the court has almost the same discretion in dealing with every child found to be a juvenile delinquent. The different courses of action a juvenile court may take are set out in s. 20(1).[116] By s. 20(3), the court may of its own motion cause a child, found at one time to be a delinquent and still under the age of twenty-one, to be brought before the court. The court may then take any of the courses of action set out in s. 20(1), and may even transfer a child to an adult court.[117]

It will be noted that although the juvenile court judge is given a large discretion, this discretion is never absolute and must always be exercised judicially[118]—for the proper purpose for which it was granted, on relevant grounds, and in good faith. In disposing of a case the court

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[109] *See* Laux, *The Administrative Process, Cases Notes and Other Materials* (1969; Supplement, 1971).

[110] *Supra,* n. 1.

[111] *Supra,* n. 53.

[112] *Supra,* n. 33.

[113] *Id.* at 111.

[114] *Supra,* n. 1.

[115] *Supra,* n. 33.

[116] *See Child Welfare Act, supra,* n. 86 at ss. 77-80.

[117] The court may do so even if a previous application for transfer was rejected: *R.* v. *Grey* [1971] 3 W.W.R. 479. *See also R.* v. *Lalich* (1973) 41 W.W.R. 562 (B.C.C.A.).

[118] *See Sharp* v. *Wakefield* [1891] A.C. 173.

may speak to young persons firmly, even harshly—however it cannot abuse this discretion. In *R.* v. *B.*[119] the court made the following closing remarks to a juvenile who had been quiet and respectful throughout the hearing:[120]

> THE COURT: You haven't got any brains have you? The law wasn't made to control you was it? Only made for me wasn't it? Maybe you made it up to grade twelve—but you haven't got any brains. Do you always chase about the country like that—you don't possess brains enough to appreciate the pleasure and privilege the government gives you, do you? You lack brains—you're ignorant—in spite of your education you're just ignorant . . . . You don't need a sign up—you're dumb—you're ignorant—you've got no brains—use your brains—if you buy a lot do you want the whole neighborhood walking across it—that's what you did—and a lot more like you—you haven't got the capacity to have any respect for other peoples' property—and in grade twelve—what good did it do you?

This was held to amount to "improper punishment".

IV. APPLYING THE BILL OF RIGHTS TO JUVENILE COURT PROCEEDINGS

This writer has been unable to find any cases in which the Canadian Bill of Rights[121] has been applied to the Juvenile Delinquents Act, or to proceedings thereunder. But there is no lack of case law in the United States.

In the landmark case of *In re Gault*[122] it was held that juvenile proceedings must comply with the "essentials of due process". The facts were these: G. had been taken into custody as the result of a complaint that he had made lewd telephone calls. G. was ordered committed to the state industrial school until he should reach the age of majority. The maximum penalty for an adult charged with the same offense would have been a fine of $50. The Supreme Court of the United States granted *habeas corpus* on the ground that the due process requirement of the 14th Amendment had not been complied with in that the child and parents were not given proper notice of the hearing, they had not been advised of their right to counsel, and the right to cross-examine and be confronted with the accusor had been denied. Fortas J. set out the rationale for denying due process:[123]

> The right of the state, as *parens patriae,* to deny the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right 'not to liberty but to custody'. . . . If his parents default in effectively performing their custodial functions—that is, if the child is 'delinquent'—the state may intervene. In doing so it does not deprive the child of any rights, because he has none. It merely provides the 'custody' to which the child is entitled. On this basis, proceedings involving juveniles were described as 'civil' and not 'criminal' and therefore not subject to the requirements which restrict the state when it seeks to deprive a person of his liberty.

Fortas J. stated that the theoretical and constitutional basis for this theory were, to say the least, debatable.[124] In practice, unbridled discretion, instead of leading to an enlightened process, often leads to ar-

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[119] *Supra,* n. 24. The juvenile was accused of driving while his license had been suspended, and of using obscene language.

[120] *Id.* at 656.

[121] *Supra,* n. 7.

[122] *Supra,* n. 2.

[123] *Id.* at 14.

[124] *Id.* at 16.

bitrariness. Due process is of more impressive and therapeutic value. Essentially, however, it came to this:[125]

> The fact of the matter is that however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time .... Instead of a mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and 'delinquents' confined with him for anything from waywardness to rape and homicide. In view of this it would be extraordinary if our Constitution did not require the procedural regularity and the care implied in the phrase 'due process'.

However, it was not held that all the requirements of an adult trial had to be complied with, or all the benefits of a juvenile court lost:[126]

> ... [T]he observation of due process standards, intelligently and not ruthlessly administered, will not compel the states to abandon or displace any of the substantive benefits of the juvenile process.

It was further said that:[127]

> We do not mean to indicate that the hearing must conform with all the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.

It is submitted that these arguments would also apply when the due process sections[128] of the Canadian Bill of Rights are sought to be applied to juvenile proceedings.

There have already been statements in Canadian Courts that juvenile court proceedings must be conducted according to due process of law and consonant with fairness and fundamental procedural safeguards.

In *R.* v. *Nicholson*[129] the juvenile court judge tried a charge of contributing to juvenile delinquency in a very informal manner (witnesses unsworn, leading questions) with the attitude that "In Juvenile Court things are not so formal as in police court .... I am allowed a great deal more latitude."[130] Wood J. allowed the appeal, ordered a new trial, and gave this response to the juvenile court judge's statement:[131]

> I *could* concede that this is true where you are dealing with juveniles. The purpose of a Juvenile Court so far as juveniles are concerned is not punishment, it is reformation, but when you are dealing with an adult under sec. 33 it is a question of punishment and in such cases 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 other criminal charge is conducted in any court .... *Further in my opinion it is in the interests of the administration of justice that no person should be convicted except by due process of law.* We do not convict people because they are guilty but because they are so found—that is, found guilty by due process of law [emphasis added].

Wood J. thought "due process of law" required a formal hearing. Although he is deciding the rights of adults in juvenile courts, and although he concedes that juveniles *may* not have the right to a formal criminal trial, he concludes that *all persons,* including juveniles, should be tried by due process of law.

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[125] *Id.* at 27-28.

[126] *Id.* at 21.

[127] *Id.* at 30, quoting *Kent* v. *U.S.* (1966) 383 U.S. 541 at 562.

[128] *Supra*, n. 7 at ss. 1(a), 2.

[129] *Supra*, n. 45.

[130] *Id.* at 310.

[131] *Id.* at 311.

In *R.* v. *T.*[132] a juvenile court judge who was not learned in the law convicted a child accused of indecent assault after a trial in which many standard rules of criminal procedure were ignored. Wilson J. quashed the conviction stating:[133]

> I am not concerned with barren technicalities, but with fundamental rights—rights which we provide for the sorriest scoundrel tried in our criminal courts, and should accord with double handed generosity to an immature lad.

He recognized that legally trained judges and counsel are necessary if the accused is to be tried by due process of law:[134]

> An ordinary adult citizen accused of an offense of this nature would have available to him the costly and elaborate machinery of an assize court with a trained judge and a competent crown counsel to see that the law is observed. The same machinery, the same safeguards are provided for professional criminals who rob and kill our people. But for a trial of a 15 year old lad, the services of an untrained justice are considered adequate.

A "due process" requirement, therefore, has already been imposed upon our juvenile courts. The standards of justice recognized by the *Gault* case are presently in or within the reach of Canadian Courts. It remains to be recognized that this essential fairness is embodied and guaranteed in the Canadian Bill of Rights.

The Canadian Bill of Rights may be used to invalidate a proceeding or to render inoperative federal statutory provisions which conflict with it. It is doubtful that any provisions of the J.D.A. could be rendered inoperative. Three possibilities are: (a) the scheme whereby the same penalty may be imposed for all wrongs; (b) possible indefinite periods of incarceration;[135] and (c) the "resentencing" of a former juvenile under s. 20(3) who has already been "punished". It might be argued that a juvenile's right to liberty is being deprived otherwise than by due process of law[136] or that this amounted to cruel and unusual treatment or punishment.[137] The juvenile could also argue that he has been denied "equality before the law"[138] in that he is being "penalized" more than an adult who committed the same offense. He would have to establish that the treatment meted out to convicted delinquents really amounts to punishment and not solely protection. Discrimination on the basis of age could be struck down if s. 1(b) is wider than and includes the non-discrimination clause in the opening paragraph of section 1.

The Canadian Bill of Rights could be of its greatest utility in ensuring that juveniles have the right to an open trial. Section 2(f) provides that no law of Canada is to be construed or applied so as to "deprive a person charged with a criminal offense of the right to . . . a fair and public hearing . . .".

It is first necessary to establish that the juvenile is "a person charged with a criminal offense." It has been held in *A.-G. of B.C.* v.

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[132] *Supra*, n. 1. The nature of the offense was not made clear. The accused was not offered the right to cross-examine, to call witnesses or give evidence. He was convicted on the unsworn and uncorroborated evidence of children. Further, he was sworn and told to give evidence without his consent.

[133] *Id.* at 234. *See also Re Miller*, *supra*, n. 24; *R.* v. *Gerald X* per Adamson C.J.M. *supra*, n. 33.

[134] *Id.* at 238.

[135] But see: *Child Welfare Act*, *supra*, n. 86 at s. 78.

[136] *Supra*, n. 121 at s. 1(a).

[137] *Id.* at s. 2(b).

[138] *Id.* at s. 1(b).

Smith[139] that the J.D.A. is clearly *intra vires* the Dominion as "genuine legislation in relation to criminal law". The Act is not merely a procedural statute which provides for the enforcement of (quasi-criminal) provincial legislation as well as federal legislation. It is an Act which makes this contravention of such legislation in itself a criminal offense. The presence of the criminal offense is essential to the Act's constitutionality, in that "Sec. 3 clearly creates the new criminal offense of delinquency" . . .[140] and further:[141]. . . to protect these juveniles Parliament found it necessary to create the offense of *delinquency,* an offense embracing, *inter alia,* all punishable breaches of the public law, whether defined by Parliament or the Legislatures, and to adopt, for the prosecution of this offense, an enforcement process specially adapted to the age and impressibility of juveniles and fundamentally different, in pattern and purpose, from the one governing in the case of adults. "Delinquency", therefore, is a criminal offense. The Act only provides that once a juvenile has been found guilty of the offense, he is not be dealt with as an offender.[142]

Does s. 2(f) give an unqualified right to an open trial? Prior to 1960 it was held that all criminal trials must be held in public except where otherwise provided.[143] The Criminal Code gave the court the power to exclude the public. The question now is whether a person who insists on a public trial could get one. Tarnopolsky replies:[114]

> It was clearly the intention of the draftsman of the Bill of Rights that he should, and that the presiding judge would not have the discretion . . . . While it is eminently reasonable that in a case . . . where young children are involved, the trial should be held in closed court, the terms of the Bill of Rights are clear. If the result is absurd, amendment is necessary.

Tarnopolsky states that the decision of the Saskatchewan Queen's Bench in *Benning* v. *A.-G. for Sask.*[145] is wrong.

V. CONCLUSION

It is submitted that the authorities cited in this article indicate that Canadian jurisprudence has recognized that children appearing in Juvenile Court ought to enjoy the same civil rights as an individual appearing in an adult court. I shall refrain from drawing any conclusions with respect to whether the civil rights of children are, as a matter of fact, respected in Juvenile Courts; however, one must take notice, as even the cases which have been reported indicate, that the administration of justice in our Juvenile Courts is justifiably subject to some criticism.

The onus is on the legal profession and our Juvenile Courts to ensure that the civil rights of juveniles are respected in accordance with the true spirit of Canadian law.

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[139] *Supra*, n. 13, 14.

[140] *Supra*, n. 13 at 156 per Bull J.A.

[141] *Supra*, n. 14 at 710.

[142] *Supra*, n. 5 at s. 3(2). *Ex Parte Grey* (1958) 123 C.C.C. 70 may be support for the contrary proposition. There it was stated: "Proceedings in Juvenile Court are not criminal proceedings. The Crown is not a necessary party to a proceeding in a Juvenile Court."

[143] *Snell* v. *Hayward* [1947] 1 W.W.R. 790 (Alta. A.D.).

[114] Tarnopolsky, *The Canadian Bill of Rights* 190 (1966).

[145] [1963] 2 C.C.C. 197.