

# The Process of Juvenile Detention: The Training School Act, the Child Welfare Act

J. Walker

A. Glasner

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>  
Article

## Citation Information

Walker, J. and Glasner, A.. "The Process of Juvenile Detention: The Training School Act, the Child Welfare Act." *Osgoode Hall Law Journal* 3.2 (1965) : 343-361.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol3/iss2/50>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

# THE PROCESS OF JUVENILE DETENTION: THE TRAINING SCHOOL ACT, THE CHILD WELFARE ACT

J. WALKER and A. GLASNER\*

A basic problem confronting the legislator who would authorize juvenile detention is to create a procedure which strikes a balance between the competing objectives of protecting juveniles from adverse publicity and insuring a proper adjudication of their rights. Two widely different processes for detaining juveniles are in use in Ontario. Under Part II of the Child Welfare Act,<sup>1</sup> a juvenile whose detention is sought is brought before a judge of the Family and Juvenile Court. The proceedings followed are similar to those of the Supreme Court of Ontario, with the addition of suitable safeguards to prevent undue publicity. Under section 10 of the Training School Act,<sup>2</sup> the decision to commit a juvenile to a Training School is made by the Training School Advisory Board, utilizing procedures, largely self-developed, which constitute an exercise of administration discretion. This paper will examine the workings of both of these Acts in order to determine which, if either, is suitable for the purpose it sets out to serve.

## Section 10 of the Training School Act

### 1. *History*

Under the present version of the Act, children may be placed in a Training School by two methods:

(i) Juvenile Court commitment under section 7.

(ii) By order of the Minister of Reform Institutions under section 10 of the Act which reads:

The Minister may at any time order a boy or girl

(a) who has been made a ward of the Children's Aid Society under the Child Welfare Act or any other boy or girl one of whose parents or guardians consents thereto, unless there is no parent or guardian, and who in the opinion of the Minister is in need of the training and discipline offered by a Training School shall be admitted to a Training School.<sup>3</sup>

---

\* Mr. Walker and Mr. Glasner are third year students at Osgoode Hall Law School. Both are graduates of the University of Toronto.

<sup>1</sup> R.S.O. 1960, c. 53.

<sup>2</sup> R.S.O. 1960, c. 404.

<sup>3</sup> *Ibid*, s. 10.

The purpose of a Training School, as outlined in the Act, is "to provide the boys or girls therein with a mental, moral, physical and vocational education, training and employment".<sup>4</sup>

Like many of our other institutions, the Training School can be traced to English origin. It was discovered at an early stage in the history of the reformatory movement in England that nothing was being done for the many neglected and destitute children who were not yet convicted of any offence. There was an urgent need to do something for the numerous urchins who gathered in the lanes and alleys of the large cities and who, if not cared for, would sooner or later join the ranks of criminal offenders.

The first step was taken in the closing years of the eighteenth century with the establishment in London of "Ragged Schools". At first these schools operated only on Sunday, but later were open every evening and finally day schools were established. Poor children were induced to attend by the provision of a substantial meal to those who complied with the rules.

In 1840 Sheriff Watson established in Aberdeen what he called an "Industrial Feeding School" which was open to all destitute boys. The boys gathered at eight o'clock every morning and returned to their homes at eight in the evening. The school was opened by prayer and religious education, followed by a lesson in Geography and History. The remaining part of the day involved manual work, three substantial meals and recreation. This school proved to be remarkably successful and was soon emulated in many of the chief cities of Scotland and England. Its great advantage was that while giving the boys needed training and discipline it preserved the family bond and made the boys feel that they were not getting a hand-out but that each earned his keep.

The Industrial Feeding school was superceded by the Industrial School. In England until 1854 schools of this type were supported by voluntary contributions. In 1866 the Industrial School Act<sup>5</sup> provided for the establishment, maintenance, management and inspection of such schools. The Act initiated the use of compulsion, setting out the classes of children who could be detained in the Industrial Schools.

In March 1874 Ontario passed its own Industrial Schools Act,<sup>6</sup> adopting almost verbatim the classes of children who could be detained in Industrial Schools and many of the other important provisions of the English Act. Section 1 defined an Industrial School as a school in which industrial training is provided, and in which children are lodged, clothed and fed as well as taught.<sup>7</sup>

Industrial Schools were regarded in Ontario as part of the regular school system. The act of 1874 provided that Industrial

---

<sup>4</sup> *Ibid.*, s. 2.

<sup>5</sup> Spettique, *Historical Review of Legislation on Child Welfare*, p. 31.

<sup>6</sup> 1874, 37 Vict. c. 29.

<sup>7</sup> *Ibid.*, s. 1.

Schools be established by "the public school board of trustees for any city or the separate school trustees therein".<sup>8</sup> Section 4 of the Industrial Schools Act was the basis for section 7 of the Training School Act.

There was one provision in the 1874 Act allowing a parent to bring a child before a court for commitment when the "parent, step-parent or guardian represents to the judge or magistrate that he is unable to control the child and that he desires the child to be sent to an Industrial School under this act".<sup>9</sup>

This was the first provision in an Ontario statute which allowed a parent to take the initiative in bringing his child before a judge to be placed in an institution. This provision of the Industrial Schools Act was widely used and was criticized by a Royal Commission in 1891:

In nearly all cases the Superintendent says, the boys are committed to this school (Industrial School at Mimico erected in 1888) at the request of their parents or some friends. It is manifest that such an institution must offer strong temptations to unprincipled worthless parents to rid themselves of the care and expenses of bringing up their children at home.<sup>10</sup>

After much public criticism, this provision was deleted in the Industrial Schools Act of 1910.<sup>11</sup> However, a dangerous precedent had been established, and the practice of allowing parents the initiative in introducing proceedings whereby their child could be placed in an institution was soon to reappear in more drastic form in the Training School Act.

In 1931 the Ontario Training School Act was passed.<sup>12</sup> One section of this Act permitted a judge or magistrate, with the approval of the Minister, to make an order of admission to a Training School for a boy or girl who might otherwise be committed to a place of imprisonment.<sup>13</sup> Nowhere, however, does a provision like section 10 of the present Act appear.

In 1939 the Ontario Training School Act was amended and the provision which is section 10 of the present Act made its first appearance.

## 2. *Procedure for Admission*

Although the Training School Act itself outlines admission procedures in skeletal form, it does not go into specific detail. It merely provides, in s. 26(b), that the Minister can make regulations, subject to the approval of the Lieutenant Governor in Council.

<sup>8</sup> *Ibid.*, s. 2.

<sup>9</sup> *Ibid.*, s. 5(4).

<sup>10</sup> Ontario Report of The Commissioners Appointed to Enquire into the Prison & Reformatory System of Ontario: Queen's Printer 1891.

<sup>11</sup> Statutes of Ontario, 10 Edw. c. 105, s. 10.

<sup>12</sup> Statutes of Ontario, 21 George V c. 60.

<sup>13</sup> *Ibid.*, s. 20.

- (viii) "Respecting any matter necessary or advisable to carry out effectively the intent and purpose of the act."

No regulations have been made under this section relating to the procedure for admission. All of the forms utilized by the Department of Reform Institutions appear to be inventions of the Advisory Board.

Section 5 of the Training School Act provides for the establishment of a five man Advisory Board appointed by the Lieutenant Governor, the function of which is to:

act in an advisory capacity to the Minister and when requested by him so to do . . . consult with him as to the administration of the Act and the Training Schools.

Aside from these general enunciations no further guide lines can be found to the specific role of the Board.

In actual practice a number of forms are forwarded to the Advisory Board by the person seeking the detention of a juvenile in a Training School. On the basis of these documents, the Board decides whether or not the child will be admitted. The Minister merely approves the decision of the Board in most cases. The documents required by the Advisory Board are three in number: the Application for Admission, the Social History and the Agreement.

(a) *The Application for Admission*

An application for admission is made out by the parent, guardian or Children's Aid Society in triplicate and sent to the Advisory Board. Nearly all applications are made by a Children's Aid Society. One reason for this practice is that the Advisory Board is very skeptical of applications made by an individual parent without the scrutiny of the Children's Aid Society. In fact, parents are advised to see a Children's Aid Society before they apply.

The application is two sides of legal size paper in length. Side two contains both a mental and a medical report, one quarter of this space being devoted to the mental report and three quarters to the medical report. On examining numerous applications we noticed that often the mental report was made two or more years before the date the application was submitted to the Advisory Board. It is questioned how valid a two-year-old report is when dealing with a child between the ages of seven and fifteen.

The rest of page two is devoted to the medical report including height, weight, hearing, vision, medical history, immunization record and the physical examination of all the systems.

On side one of the form the age, name and address of the child are required. Next the applicant must state whether the child has ever been before the Juvenile Court. We noticed on a number of application forms some interesting entries in this apparently routine request for information. For instance, in some cases a child had

been charged in Juvenile Court with unmanageability or vagrancy on a certain date. The charge was suspended and within two or three days the application for admittance was accepted by the Advisory Board, indicating the child was in need of discipline and training for the very same reasons, the appearance before the court being noted under the section calling for prior hearings. In one case the Judge on June 3rd remanded a case until June 10th and on June 7th an application was submitted to and accepted by the Advisory Board with the June 3 appearance entered under the aforementioned section.

The most important information requested on the application form is contained in the less than two inch space entitled "reasons for making this application". It is interesting to note that the form provides seven times more space for the medical report than it does for the reason for application.

In one application involving the admission of a nine-year-old boy the full statement of the problem was that the child was guilty of:

running away from home, petty thieving, protective lying, truancy from school.

In a great number of the applications which we examined the same wording appeared:

S, is an aggressive impulsive (boy or) girl who uses her physical strength at hitting out at others especially those younger than her, also B, has knowledge in sex beyond her years, or he has no regard for authority and is belligerent and defiant.

One application form, after mentioning the usual "bully clause", went on to say:

S, is thought to be pilfering although recently she had not been caught. A few applications gave as a reason "the undesirable associations the child has made".

One social history which accompanied an application form contained the following:

two people at the Salvation Army are worried over her demands for freedom and frightened she will become involved with the wrong boy or get into dangerous situations.<sup>14</sup>

Another contained the statement "there are strong indications of sexual acting out".

From these examples it appears that some applications are being made on the grounds of surmise, suspicion or fear of future possibilities. This is one of the strongest reasons for proceeding by application, since, if the child were brought before a Juvenile Court Judge, all of these allegations would have to be proved. A judge would not allow into evidence the fact that a child was "thought to be pilfering",

---

<sup>14</sup> In the above case, the report of the Social Worker revealed two interesting observations:

(a) one of the Salvation Army workers who expressed fear about the future welfare of the child had an unnatural distrust of men, feeling that they were always attempting to take advantage of the weaker sex.

(b) the girl in question had never been out on a date with a boy.

or might "get into dangerous situations", yet this obviously impressed the Advisory Board since these children were admitted.

(b) *Social History*

The second document required by the Advisory Board is a Social History containing details of the child's family background. The length of this Social History varies from one to seven or eight pages. In a number of cases examined, the Social History consisted solely of a description of the child's relatives and his present position, but in some others an extensive review of the life of the child was presented, including a survey of his personality, present behaviour problems, achievement in school, attitude towards authority, and conduct in the community.

(c) *Agreement*

Along with these two forms, the party applying must fill out an Agreement signed sealed and delivered in the presence of a witness stating that the infant will be allowed to remain in the Training School until attaining *majority* or until wardship is terminated by the Superintendent of the Training School and the Minister. The agreement further provides that the applicant will at no time interfere with the training or management of the infant or with his moral, intellectual or religious education or instruction.

The application form, accompanied by the Social History and the Agreement is then forwarded to the Training School Advisory Board, which meets every Thursday to consider admissions. Prior to each meeting, the file of each case to be considered is carefully studied by the chairman and secretary of the Board, who then present a summary of the relevant circumstances of each case to the remaining members. It should be emphasized that at no time does any member of the Board actually see the child or hear oral evidence from any of the interested parties. Their sole basis for a decision is the information contained in the Social History and the Application Form.

This practice prompted the following exchange in the Ontario Provincial House,

MR. SALSBERG: "I suggest, Mr. Chairman it is physically impossible for the Advisory Board to have any knowledge as to what the individual case is like, what it requires and to what place they are sending a child. . . . I would be inclined to think that the Department itself should assume responsibility and designate a capable person or persons to really have the responsibility, rather than to hand it over to this type of Board which meets periodically and serves as a rubber stamp."

HON. MR. FOOTE: (Minister of Reform Institutions) "As regards the Advisory Board, it has stood for a long time in a legal relationship to the child. The child is a joint ward of the Advisory Board and the government. There are people on that Board who give their time, without any remuneration at all in the way of salary or expenses, and I am told that over the years these people have acquired very good skills in dealing with the children through the records."<sup>15</sup>

<sup>15</sup> Legislature of Ontario, Debates, April 2, 1954, p. 1169.

Once the Advisory Board has decided that the child is a suitable case for admission, the Chairman of the Board fills out a form called Authority For Admission. The top half of this form contains the name and age of the child and the words "The Training School Advisory Board having duly considered an application submitted by . . . recommend to the Minister of Reform Institutions that the said application be approved. The bottom half of the form contains the Minister's order to admit the child. This having been completed, notification is sent to the Children's Aid Society or the parent and the child is conveyed to the Training School by a representative of the body making the application.

### (3) *Constitutionality*

Under the B.N.A. Act the provincial legislature is given exclusive jurisdiction to make laws pertaining to civil rights, and to the care and confinement of persons in "asylums" and "reformatory prisons".<sup>16</sup>

These powers were interpreted in the *Re: Adoption*<sup>17</sup> case so as to place on provincial authorities:

the responsibility of the state for the care of people in distress and for the proper education and training of youth in the province.<sup>18</sup>

In the words of Louis Pigeon:

as matters now stand a person deprived of liberty under provincial legislation enacted under these heads cannot challenge the legality of his detention otherwise than by showing that it is not authorized by such legislation.<sup>19</sup>

The above would seem to substantiate that the Training School Act is constitutionally valid.

### (4) *Inherent Defects of The Act*

We are of the opinion that the Act, and more particularly section 10 as it stands at present, contains so many defects of draftsmanship that its proper working is greatly impaired.

#### (a) *Failure to Define "boy or girl"*

The Juvenile Delinquency Act in dealing with children who can be institutionalized in Training Schools, provides safeguards to insure that children of tender years won't be sent to "child saving institutions". By section 25 of that Act it is not lawful to commit a juvenile delinquent apparently under the age of twelve years to any industrial school unless and until an attempt has been made to reform such child in its own home, or in a foster home, or in charge of a Children's Aid Society, or Superintendent, and unless the court finds that the best interests of the child and the welfare

<sup>16</sup> B.N.A. Act 30-31, Vict. 1867, c. 3, s. 92(13); s. 92(6); s. 96(7).

<sup>17</sup> [1938] 3 D.L.R. 497.

<sup>18</sup> *Id.*, at 515.

<sup>19</sup> *The Bill of Rights & B.N.A. Act* 37 Can. Bar Rev. 1.



of the community require such committal.<sup>20</sup> Provincial legislation in other Canadian jurisdictions for the most part has provided similar safeguards.

The Ontario Training School Act provides no minimum age requirement for admission by application. In fact, the annual reports of the Department of Reform Institutions illustrate numerous cases of children as young as seven being sent to training school. This practice prompted an interesting discourse in the Ontario Legislature between J. B. Salsberg, member from St. Andrew, and the Honourable Mr. Foote, Minister of Reform Institutions.

MR. SALSBERG: "I was shocked when I learned that children as young as seven years of age are committed to these training schools . . . I think it is somewhat alarming to find that children of such tender age should be taken away from home environment and institutionalized in training schools which in my opinion are unfit and unprepared to treat children of that age. . . . We do not solve anything by taking a 'kid' of seven or eight and sending him away to a training school. Such children are not a type to be given training for a trade. . . . I feel that this is so antiquated an approach that it is time we changed it. Children of that age should go to specialized institutions, trained personnel should take care of them and whenever possible they should be put in foster homes instead of being sent to training schools at that age."

HONOURABLE MR. FOOTE, V.C.: "I do not think that the Honourable Member should be surprised to find that there are children in children's training schools. That is what they are for. . . .

MR. SALSBERG: "The point I want to make, and I repeat, I am ending now with this, is the department should adopt a policy that below a certain age children be not institutionalized but rather they be placed in foster homes where more help be given them to overcome their difficulties and assume a normal way of life."<sup>21</sup>

By section 26 of the Training School Act the Minister of Reform Institutions is given power to make regulations to implement the policy of the department. Up to this time no regulation has been made concerning the minimum age at which children can be admitted to Training Schools.

The problem of age is important not only in regard to the minimum age at which children can be admitted, but also with reference to a maximum age. Under the sections in the Training School Act providing for *committal* by a judge of the Juvenile Court it is expressly provided that no child over sixteen can be committed to a Training School. However, under section 10 no such safeguard is established with respect to *admitted* children and it is our contention that this section of the Act is being utilized in an improper and indirect manner in order to avoid the limitations placed upon the Juvenile Court judge. The following statistics will substantiate our allegations.

---

<sup>20</sup> Juvenile Delinquents Act, R.S.C. 1952, c. 160, s. 25.

<sup>21</sup> Legislature of Ontario, Debates, April 2, 1954, p. 1168.

Years	Number of Admissions	Children over 16 Admitted <sup>22</sup>
1955 .....	32	0
1956 .....	43	4
1957 .....	41	14
1958 .....	47	10
1959 .....	47	9
1960 .....	57	17
1961 .....	92	29
1962 .....	51	26
1963 .....	55	35

As these figures show, during the past three years the practice of admitting children over 16 has greatly increased.

It is our contention that no child should be placed in an institution without a proper hearing. There is certainly no excuse for not holding a hearing when a child has reached an age at which he is considered by the law to be sufficiently mature to be amenable to the same procedures as an adult. On reaching the age of sixteen a child steps out of the purview of the Juvenile Delinquency Act, the Child Welfare Act and indeed out of the jurisdiction of the Juvenile Court.<sup>23</sup> Institutionalization of a sixteen year old can, with this one exception be accomplished only through the regular adult criminal process, whereby the "accused" is convicted of a crime. Would any one suggest that a seventeen year old be convicted in Magistrate Court and sent to an institution on the basis of an *ex parte* application filed by an individual who has a direct interest in the outcome of the trial? If the Legislature intended that children over sixteen should be sent to Training School then most certainly it would have given jurisdiction to the judges of the Juvenile Court, and not vested such an arbitrary power in the Minister of Reform Institutions. The power of the Minister as exercised in this area would appear to be contrary to the tenor of all statutes dealing with juveniles in Ontario.

(b) *Implications Arising from the Phrase "one of whose parents or guardians consents"*.

Since, under the language of the statute, the consent of only one parent is needed for admission, a situation can be envisaged in which one parent makes an application to the Minister without the knowledge of, or over the objection of the other parent. Under the Act a parent is defined as:

a person under a legal duty to provide for a child.

If one parent has been relieved by the court of his obligation to provide for the maintenance of his child, he cannot consent. But what of the situation where the husband has deserted the wife and is still under a legal obligation to support the wife and child? It is conceivable that he could make an application for the admission of his

<sup>22</sup> Annual Reports of The Department of Reform Institutions.

<sup>23</sup> With the exception of s. 17(18) and s. 17(19) whereby the child is a ward of the Children's Aid Society until age 18, and the circumstances whereby wardship can be extended to age 21.

children in order to avoid his financial responsibilities. It is also conceivable that a child could be admitted when the family unit is intact. The father, being of the opinion that the child is in need of training and discipline, may make an application to the Minister. Since there is no opportunity for a hearing, the Minister would reach his opinion solely on the basis of the father's application, notwithstanding the possibility that had he heard the mother's objections, his decisions would have been otherwise. As was pointed out earlier, the application is not a sworn affidavit, and thus no consequences are attached to untruths placed in the application by the consenting parent. The Minister is empowered under the section to make an order admitting the child in such circumstances since all the necessary elements are present: consent of one parent, and the Minister's opinion that the child is in need of training and discipline. No similar practice could exist under the Child Welfare Act. In *Re Maher*<sup>24</sup> a father committed his child to the Children's Aid Society while the mother was in prison. The child was made a ward of the Children's Aid Society under the section dealing with neglected children. On the mother's release she applied for the production of the child by a writ of habeas corpus. In the subsequent action Middleton J. stated: "the act does not give to the father the right to hand over a child to the society to the prejudice of the mother".<sup>25</sup> It is submitted that the same type of reasoning would not apply to the Training School Act because of the wording of section 10.

(c) *Ambiguity of the term "in need of training and discipline"*

The phrase "in need of training and discipline" is so broad and ambiguous that it can offer no guidance to the Board in ascertaining the limits of its jurisdiction. It yields no clue of the legislature's intent and opens the door to abuse. Other legislation dealing with juvenile detention is much more definite with regard to the grounds for committal. For example under section 7 of the Training School Act a judge can commit a child if the child:

- (d) is a habitual truant and whose parent or teacher represents that he is unable to control the child
- (g) proves unmanageable.

Similarly The Juvenile Delinquency Act defines a delinquent child as

any child who violates any provision of the Criminal Code or any other Dominion or Provincial statute or any by-law or ordinance of any municipality or who is guilty of sexual immorality or any other similar form of vice or who is liable by reason of any other act to be committed to an industrial school or juvenile reformatory under the provision of any Dominion or Provincial statute.<sup>26</sup>

Surely the above sections are wide enough to include every permutation and combination of children who should be liable to committal as "in need of training and discipline". This contention is

<sup>24</sup> (1913), 28 O.L.R. 419.

<sup>25</sup> *Id.*, at 425.

<sup>26</sup> Juvenile Delinquents Act, R.S.C. 1952, s. 160, s. 2(h).

substantiated by the Report of the Department of Reform Institutions. In categorizing the causes of committal and admission the Department has classified admissions not under the category of "in need of training and discipline" but under categories entitled unmanageability, truancy, vagrancy, and immorality.

STATISTICS FOR 1963<sup>27</sup>

Total number of children institutionalized in Training Schools.

Committed .....	1,056	<i>Causes</i>	
Admitted .....	55	Arson .....	6
		Assault .....	24
	1,011	Breach L.C.A. ....	13
		Breach Prop. ....	32
		Break and Enter .....	181
		Forgery .....	2
		Immorality .....	23
		Trespass .....	2
		Murder .....	2
		Theft .....	302
		Truancy .....	54
		Unlawful weapon .....	1
		Unmanageable .....	412
		Vagrancy .....	41
		Wilful of Malicious Damage ...	16
			<hr/>
			1,011

It would appear from the above that the term "in need of training and discipline" is a conclusion and not a proper classification. Before ascertaining that a child is in need "of training and discipline" he must necessarily be adjudged by the Minister through the Board to be immoral, unmanageable, vagrant or a truant.

If every person being detained by application to the Minister could easily have passed through the machinery of the Juvenile Court, as the records indicate, then the question could reasonably be asked as to the real purpose of section 10? From discussions with the Children's Aid Society and the members of the Advisory Board three purposes of the section can be ascertained:

- (i) To prevent the child from undergoing the traumatic experience of a court appearance and the consequences of being labeled a juvenile delinquent.<sup>28</sup>
- (ii) To avoid embarrassment to the parent of having to appear in court.
- (iii) To allow the detention and training of potential juvenile delinquents.

<sup>27</sup> Annual Report of Minister of Reform Institutions 1963. A perusal of the Reports for 1960, 1961, and 1962 will reveal the same facts.

<sup>28</sup> Under the definition of a juvenile delinquent in the Juvenile Delinquents Act a child committed to a Training School is deemed a juvenile delinquent though no such label is attached to a child admitted by an application to the Minister. This is so even though when the child reaches the Training School no distinction is made between those admitted and those committed. This practice leads the Children's Aid Society consciously to avoid the Court procedure so as not to subject the child concerned to a criminal record, the repercussions of which might be felt in future years.

As to (i) and (ii), most certainly the benefit of having an impartial adjudicator determine the issue on the basis of admissible evidence adduced before him, would far out-weigh any emotional experience that the child or parent would undergo. Furthermore, someone having in essence laid a charge against the child it is imperative that they should substantiate that charge, and not be allowed to "convict" the child simply by completing a standard form.

In regard to (iii) certainly such a purpose is contrary to the fundamental tenets of Canadian jurisprudence. The law deals with accomplished facts not with prospective possibilities. A present detention should not be based on conjecture as to the possibility of future conduct, especially when the information as to future conduct is obtained from a prejudiced source.

It is submitted that if the above be the true purposes of the section then the section has no valid reason for existence.

(d) *Extent of Power in The Minister and Consequences thereof*

The only limitation upon the powers of the Minister appears to be that he reached the "opinion" that the child is in need of training and discipline. The Oxford dictionary defines opinion as "judgment or belief based on grounds short of proof, a provisional conviction". This is a much less rigorous criterion than that imposed upon a court of law.

Even more startling is the fact that no reasons need be given as to the basis for this opinion, nor do the factors taken into consideration by the Minister have to be outlined. Other concerned persons would have no opportunity to assess the factors upon which the Minister relied to arrive at his opinion. This process completely removes from any prospective appellant the possibility of arguing that the Minister reached his opinion on the basis of irrelevant and totally incorrect facts. This makes the provision allowing an appeal to the Court of Appeal practically ineffective. This very problem was discussed by the Select Committee on Ministers' Powers in England in 1932. The committee unequivocally demanded that Ministers acting in a judicial or quasi-judicial capacity never deprive a person of his right of appeal by neglecting to communicate the grounds of the decision.

It may well be argued that there is a principle of natural justice, namely, that a party is entitled to know the reason for the decision, be it judicial or quasi judicial. Our opinion is that there are some cases when the refusal to give grounds for a decision may be plainly unfair; and this may be so, even when the decision is final and no further proceedings are open to the disappointed party by way of appeal or otherwise. But it cannot be disputed that when further proceedings are open to a disappointed party, it is contrary to natural justice that the silence of the Minister or the Ministerial Tribunal should deprive him of his opportunity. And we think it beyond all doubt that there is from the angle of broad political expediency a real advantage in communicating the grounds of the decision to the parties concerned and, if of general interest, to the public.<sup>29</sup>

<sup>29</sup> Report of the Committee on Minister's Powers, CMD. 4060 (1932).

The Committee then went on to recommend that:

- (c) Any party affected by a decision should be informed of the reasons on which the decision is based; indeed it is generally desirable that the fullest amount of information compatible with the public interest should be given. Further:
- (d) Such a decision should be in the form of a reasoned document available to the parties affected. This document should state the conclusions as to the facts and as to any points of law which have emerged.<sup>30</sup>

This criticism appears to be equally applicable to the Minister's decisions under section 10 of the Training School Act.

---

### Child Welfare Act, Part II

The Child Welfare Act,<sup>31</sup> was an attempt on the part of Ontario to consolidate into one statute all the legislation with respect to neglected children. As such it represents the culmination of over a century of legislation, commencing with the Apprentices and Minors Act of 1851<sup>32</sup> and including The Child Protection Act of 1908.<sup>33</sup>

Co-extensive with this legislative concern, there sprang into existence lay bodies upon whose co-operation the successful enforcement of the legislation depended. Government policy at an early stage seems to have approved of these organizations dealing with the children rather than insisting on exclusive control by an agency established by the state.

The powers given to Children's Aid Societies under this Act are very extensive, providing as they do for the removal of children from the care and custody of their parents. It is the purpose of this aspect of the paper to ascertain whether the powers given are conscientiously observed, and whether the rights of the individual are sufficiently safeguarded.

#### *Procedure Under The Act*

##### *(a) Complaint, Investigation, and Apprehension*

Before any steps can be taken by the Society to have a child placed under its care, it is important that the Society be somehow informed as to the condition of the child. Information arises in many forms; complaints of neighbours, requests by the parents, referrals

---

<sup>30</sup> *Ibid.*, p. 76.

<sup>31</sup> R.S.O. 1960, c. 53.

<sup>32</sup> R.S.O. 1877, c. 135.

<sup>33</sup> An Act for the Prevention of Cruelty to, and Better Protection of Children, Statutes of Ont. 56 Vict. 1893, c. 45.

by other agencies, referrals by schools, complaints by relatives, and in some cases, requests by the children themselves.<sup>34</sup>

During the year 1963, 11,909 requests and complaints were made.<sup>35</sup> Once a complaint is received it is investigated by the staff to ascertain its validity. If the society determines that a child appears neglected, and if the physical and mental health of the child are in imminent danger, a procedure is established whereby the child can be apprehended without warrant and taken to a place of safety.<sup>36</sup> If the child's health is found not to be in imminent danger then the Society will leave the child with its parents and serve the parents with an order to produce if it deems court action necessary. The power to apprehend is limited to constables, the Director, or a person authorized by the Director.<sup>37</sup> If the Society is unable to peacefully obtain possession of the child, under section 13 of the Act a justice of the peace may, if information is laid before him to the effect that there is reasonable cause to suspect that the child is neglected, issue a warrant authorizing the person named therein to search for the child and take and detain him in a place of safety.<sup>38</sup> A place of safety is defined in the Act as a receiving home or an institution for the care and protection of children.

(b) *Procedure Once Apprehended*

Once the child has been brought into the care of the Society, the case is referred to a social worker who undertakes a thorough examination of the circumstances surrounding the child's admittance. Certain safeguards are provided by the Act to ensure that this investigation does not drag on endlessly. By section 15, an apprehended child must be brought before a judge within ten days or returned to its parents. Under the old Child Protection Act, the child had to be brought before a judge within seven days of his apprehension.<sup>39</sup> The

<sup>34</sup> The Children's Aid Society of Metropolitan Toronto does not keep overall statistics as to the source of referrals. However, a study of 384 children at the Toronto agency, undertaken by the Child Welfare League of America revealed the following break-down as to the original sources of referral:

<i>Source</i>	<i>Number of Children</i>
Social Agencies .....	194
Mother only .....	84
Court or Police .....	21
Father only .....	18
Both parents .....	17
Relatives .....	8
Health Agencies .....	7
Schools .....	3
Child Guidance Clinics .....	3
Governmental Agencies .....	2
Other (Ministers, friends, etc.) .....	13
Not reported .....	14
Total .....	384

<sup>35</sup> This figure was obtained from the Children's Aid Society of Metropolitan Toronto.

<sup>36</sup> R.S.O. 1960, c. 53, s. 12.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Supra*, footnote 36, s. 13.

<sup>39</sup> R.S.O. 1950, c. 53, s. 8.

extension seems to have been solely for the purpose of allowing the society more time to investigate the circumstances. In 1957, a new provision was added to the Act, whereby the ten day requirement was relinquished when a child was placed in the care of a Society with the consent of the parent.<sup>40</sup> However, it is the policy of the Society to bring even these children within the provisions of section 15 if at all possible. It may be pointed out at this juncture, that there is no safeguard provided in the Act to ensure that the procedure enunciated therein will be strictly followed. Theoretically, there is nothing to prevent the society from apprehending a child, circumventing the judge completely and sending the child out on adoption. As was pointed out to us by the Director, there are a number of indirect safeguards against this type of practice. Aside from the integrity of the individual society, there also exists the threat of civil litigation and also the ultimate weapon of public outcry if such a practice were ever discovered. Further, the simple fact that so many people are involved in the handling of any individual ward helps to insure the protection of the child.

With the investigation completed, the social worker makes a recommendation as to the future disposition of the child. If it is decided that it is in the better interests of the child to have him placed in the custody of the Society, then an appointment is made to have the matter tried before a judge of the Juvenile and Family Court. In the appointment form, the society must not only indentify the child, but also state the grounds upon which it is going to attempt to have the child declared a neglected child.

Once the date has been set for the hearing, the Society must serve personally upon the parents of the child, or the person having custody, and the municipality liable to pay the rate, a Notice of Hearing within a reasonable time before the date set down.

### (c) *Court Hearing*

In the City of Metropolitan Toronto, the case is heard before a judge or deputy judge of the Family and Juvenile Court.<sup>41</sup> The procedure, and the nature of the proceedings to be utilized are extensively covered in the Act. The court is to be held in camera and the judge may hear any person on behalf of the child.<sup>42</sup> Witnesses are sworn and all evidence given is transcribed.<sup>43</sup>

The first function of the judge is to ascertain that the child was apprehended in accordance with the provisions of the Act. The Ontario Court of Appeal has ruled that the Legislature, by using the word "apprehended",

---

<sup>40</sup> *Supra*, footnote 36, s. 16.

<sup>41</sup> *Supra*, footnote 36, s. 11(1)(d), 11(2).

<sup>42</sup> *Supra*, footnote 36, s. 17(2), s. 17(3).

<sup>43</sup> *Supra*, footnote 36, s. 17(6).



contemplated a physical possession and custody of the child, and the taking of him to a place of safety and detaining him there until he can be brought before a judge.<sup>44</sup>

In order to prove proper apprehension the Society follows two practices. Firstly, the child is physically brought into court and presented to the judge. Secondly, in the event that the child is too young for a court appearance, the social worker in charge of the case will swear an affidavit that the child was apprehended in accordance with the provisions of the Child Welfare Act.

Some jurisdictions have done away with the necessity of having the child appear in court at all. For instance, in Hamilton, the only evidence that the child was legally apprehended consists of a sworn affidavit. However, the Family and Juvenile Court in Toronto is insistent that the child be brought before it if at all possible.

Once it is established to the satisfaction of the judge that the Act has been complied with, the Society proceeds to introduce its evidence to establish that the child falls within the definition of "neglected" as contained in section 11(e) of the Child Welfare Act. The Society must establish that the child was neglected at the time that the action was commenced. In the case of *Re Campbell*<sup>45</sup> it was stated that:

In the investigation of the facts of the case a judge is required to ascertain whether a child is a neglected child at that time because unless the status exists at the time of the investigation a judge has no power to make an order.<sup>46</sup>

At all stages of the proceedings it is obvious that the welfare of the child is foremost in the mind of all participants. In one case at which we were present the presiding judge refused to carry on with the proceedings until the father of the child was present, even though the father at a previous hearing stated that he no longer cared what happened to his child, and made it known that he would have nothing further to do with him. In another case the judge refused to proceed until he could personally question a psychiatrist who had submitted a report to the court. Further, the judge will, if at all possible, question the child to ascertain whether the child has any strong desires in regard to its future disposition. In this court, it is our opinion that although the external characteristics of the adversary system are present, the essential elements common to a civil or criminal trial are absent. The prime interest of the court is directed to the future welfare of the child and all the parties present at the hearing cooperate to an extent unknown to the criminal court in order to ascertain all the facts which would enable them to make a just decision. It is suggested, that one of the factors leading to this approach may

<sup>44</sup> *Re Blackmore*, 12 C.C.C. 19, 20; see also *Re Robertson*, [1956] O.W.N. 544.

<sup>45</sup> [1944] 3 D.L.R. 34.

<sup>46</sup> *Id.*, at 36.

well be the lack of formalized legal training of the participants.<sup>47</sup> The social worker in charge of the case presents to the court the recommendations of the Society. The Society will in all circumstances attempt to have the child rejoin its family, and only in the most obvious cases will it ask for permanent wardship. After all the evidence has been introduced and all the witnesses heard the judge will make his order according to the provisions of the Act. If he finds that the child is neglected, he may order the child made a ward of the Children's Aid Society.

(d) *Right of Appeal*

There are two methods of appeal allowed from a judge's order under the Act. By section 30 an appeal lies to the Court of Appeal with the leave of a Supreme Court Judge. However, the powers of the Appeal Court in hearing an appeal are restricted. In *Re Kenna*<sup>48</sup> it was said:

The Act recognizes the power of the High Court Division to act, notwithstanding the order of the Commissioner, provided that the power is exercised not by way of review.<sup>49</sup>

The second method of appeal is by way of an application to a judge of the Supreme Court for the production of the child.<sup>50</sup>

In *Re Longaker*<sup>51</sup> it was said:

the modern view holds that irrespective of the form in which the matter is brought before the court, whether by writ of *habeas corpus* or upon the petition for custody, the duty of the court is to consider what, having regard to all circumstances, is most beneficial for the welfare and advantage of the infant.<sup>52</sup>

However, as the decisions reveal, the courts are loathe to upset the decision of the Family Court Judge unless the clearest evidence of error exists. The Act clearly places the onus upon the applicant:

to show or prove in some satisfactory way that the removal of the custody of the foster-parent will inure to the benefit of the child.<sup>53</sup>

Middleton J. stated, that the use of the phrase "having regard to the welfare of the child":

indicates that the intention of the Statute is that the judge in determining whether the parent is a fit person to have the child restored is to contrast the situation of the child in the care of the foster parents with that which it would occupy if the order should be made to restore it to its natural parent. The situation is somewhat different from that in which the court might be called upon to take a child away from a parent who is alleged to be unfit.<sup>54</sup>

<sup>47</sup> In the Family and Juvenile Court two of the judges have been called to the Ontario Bar, one attended law school, and the remaining two judges do not have formalized legal training. None of the Court workers have any legal training.

<sup>48</sup> (1913), 5 O.W.N. 392.

<sup>49</sup> *Id.*, at 394.

<sup>50</sup> *Supra*, footnote 36, s. 29.

<sup>51</sup> (1909), 14 O.W.R. 321.

<sup>52</sup> *Id.*, at 322.

<sup>53</sup> *Re Driscoll*, [1920] O.W.N. 144.

<sup>54</sup> *Re Chienelewski*, (1928), 61 O.L.R. 651, 653.

Resort to the Court of Appeal is open to all interested parties and is the procedure most utilized by the municipalities where they are attempting to avoid liability for the maintenance of the child. However, where a parent wishes to dispute the finding of the court he generally proceeds via a writ of *habeas corpus*. The action outlined in section 20 of the Act is available only to a parent or guardian of the child. Aside from these provisions of the Act no right of appeal lies. In *Fortowski v. Roman Catholic Children's Aid Society*<sup>55</sup> an attempt was made to have a Surrogate Court judge make an order for custody as provided by section 1(1) of the Infants Act. In dismissing the case it was said:

the sole remedy of a parent is to bring an application for custody before a Supreme Court judge pursuant to S. 30 of the Act.<sup>56</sup>

### *Conclusions and Recommendations*

#### (1) *Child Welfare Act*

It would appear that the Legislature, by providing for co-ordination between the Children's Aid Society and the Family and Juvenile Court, has ensured that the rights of the individual child will be protected insofar as possible. No step can be taken by the Society in regard to the status of a child until a court has evidence adduced before it to the effect that the welfare of the child would best be served by complying with the request of the Society. This use of the judicial process insures that the child and the parents will receive a fair and impartial adjudication of their rights. Holding hearings in camera gives sufficient protection from publicity to all parties.

#### (2) *Training School Act*

It is our contention that the continued existence of section 10 in the Training School Act constitutes a blot on Ontario Law. It infringes the basic concept of natural justice that no person should be deprived of his liberty without a fair and impartial hearing. As a result of the above we recommend the immediate repeal of section 10.

However, should the legislature decide that section 10 should be retained then we offer the following recommendations to clarify the section:

(a) Child should be defined as a boy or girl over the age of twelve and under the age of sixteen. If the Legislature feels that children over sixteen should be admitted then it should also increase the jurisdiction of the Judge under section 7 to deal with children over sixteen years of age. It is our opinion that the jurisdiction of the Minister should not be utilized as a method of avoiding the restrictions placed upon the Judge by section 7. The same principle should be applied in regard to minimum age.

---

<sup>55</sup> (1960) 23 D.L.R. (2d) 569.

<sup>56</sup> *Id.*, at 571.

(b) The requirement of Parental Consent should be clarified. Perhaps it is too radical to suggest that the consent of both parents be required before a child can be admitted, but surely both parents should be made aware that the application is being submitted. We therefore recommend that when one parent applies to the Advisory Board, the Board be prohibited from acting until conclusive proof is introduced that the other parent has been contacted or that a *bona fide* effort has been made to reach him.

(c) The application form itself should be in the nature of a sworn affidavit. This would have the effect of preventing wild generalizations and semi-truths about the child in question.

(d) The term "in need of training and discipline" should be deleted and replaced by specific categories of behaviour. The phrase, as was pointed out earlier, is capable of such a wide interpretation that almost any young child could fall within its purview. The addition of specific categories would direct the minds of the members of the Advisory Board to the essential elements which must be established. Further, it would allow a type of precedent to be formulated.

(e) The Minister should be satisfied beyond a reasonable doubt and should be compelled to outline his reasons for decision in writing. This would make an appeal from the Minister's order at least a possibility.

(f) No distinction should be made in the records between a child committed and one admitted to Training School. The label of juvenile delinquent should be attached neither to committed nor to admitted children. Both classifications should be dealt with on the same basis. It is suggested that one procedure should not be selected over the other solely on the basis of the record that is to accompany the juvenile, especially when the end result of the two procedures is the same. This would have the effect of removing one of the main uses of the section by the Children's Aid Society.