

I would allow the appeal, set aside the conviction and order a new trial on the indictment.

Appeal allowed; new trial ordered.

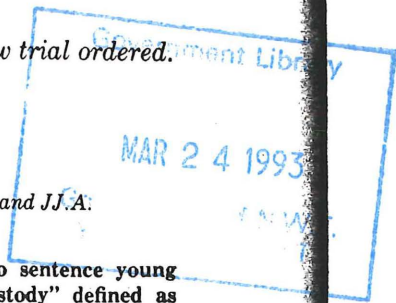
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RE F AND THE QUEEN et al.

*Manitoba Court of Appeal, Matas, O'Sullivan and Huband J.J.A.
October 31, 1984.*



Young offenders — Disposition — Judge given power to sentence young offender to open custody or secure custody — “Open custody” defined as facility designated by Lieutenant-Governor in Council or his delegate as place of open custody — Lieutenant-Governor in Council designating certain cottage in Manitoba Youth Centre as place of open custody — Youth centre also used for pre-trial detention of young persons and entrance to centre controlled by electronically controlled double-locking doors — Manitoba Youth Centre itself not designated as place of secure custody — Designation of cottage within centre as place of open custody valid — Young Offenders Act, 1980-81-82-83 (Can.), c. 110, ss. 20, 24.

Statutes referred to

Young Offenders Act, 1980-81-82-83 (Can.), c. 110, ss. 20(1)(k), 24, 35

APPEAL by the Crown from a judgment of Kroft J., 14 C.C.C. (3d) 161, [1984] 6 W.W.R. 37, 30 Man. R. (2d) 120 *sub nom.* C.F. v. *Canada and Manitoba et al.*, granting an application by the young offender for declaration.

L. H. Lee, for the Crown, appellant.

M. S. Minuk and M. B. Nepon, for accused, respondent.

The judgment of the court was delivered by

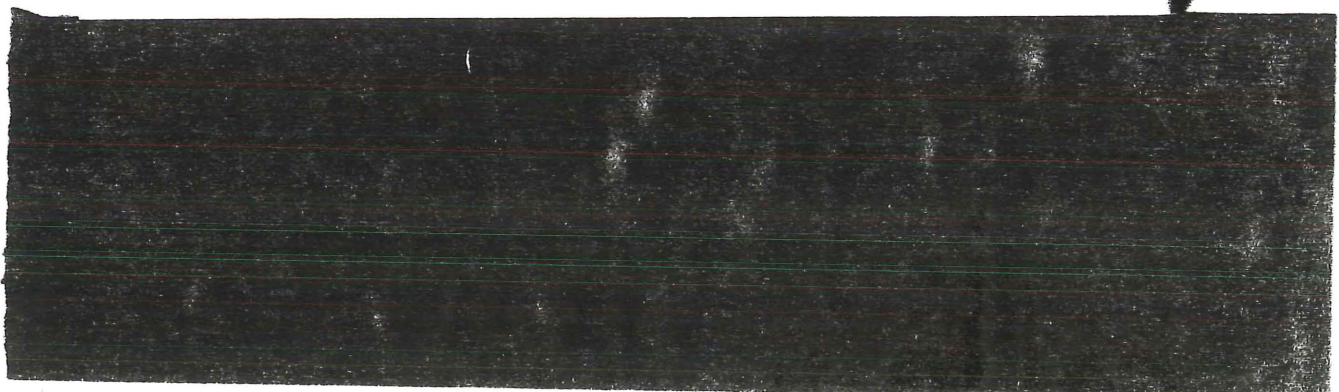
MATAS J.A.:—We are called upon in this appeal to consider the authority, under the *Young Offenders Act*, 1980-81-82-83 (Can.), c. 110 (the Act), of the Lieutenant-Governor in Council to designate a place or facility to which a young person may be committed to be held in open custody.

C.F. is 15 years of age. By definition, he is a “young person” for the purposes of the Act.

Under s. 20(1)(k) of the Act the young person could have been committed (subject to s. 24) to custody, to be served continuously or intermittently, for a specified period not exceeding two years from the date of committal.

Under s. 24(1) of the Act, the Lieutenant-Governor in Council may designate as a place of open custody for the purposes of the Act, a community residential centre, group home, child-care insti-

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tution or forest or wilderness camp, or any other like place or facility. As well, the Lieutenant-Governor in Council may designate a place or facility as being suitable for secure custody for the secure containment or restraint of young persons. Under s. 24(2) of the Act, the youth court is required to specify in the order of committal whether the custody is to be open custody or secure custody.

Section 35 of the Act grants jurisdiction to the provincial director or his delegate to authorize a young person committed to custody (no distinction is made between "open" or "secure") to be temporarily released for a period not exceeding 15 days for medical, compassionate or humanitarian reasons or for the purpose of rehabilitating the young person or reintegrating him into the community. Additional authority is given to the director to release the young person on such days and during such hours as the director specifies for certain specific purposes.

Sections 20(1)(k), 24(1)(a), (b) and (2) and 35(1) read as follows:

20(1) Where a youth court finds a young person guilty of an offence, it shall consider any pre-disposition report required by the court, any representations made by the parties to the proceedings or their counsel or agents and by the parents of the young person and any other relevant information before the court, and the court shall then make any one of the following dispositions, or any number thereof that are not inconsistent with each other:

- (k) subject to section 24, commit the young person to custody, to be served continuously or intermittently, for a specified period not exceeding
 - (i) two years from the date of committal, or
 - (ii) where the young person is found guilty of an offence for which the punishment provided by the *Criminal Code* or any other Act of Parliament is imprisonment for life, three years from the date of committal . . .

24(1) In this section,

"open custody" means custody in

- (a) a community residential centre, group home, child care institution, or forest or wilderness camp, or
 - (b) any other like place or facility
- designated by the Lieutenant Governor in Council of a province or his delegate as a place of open custody for the purposes of this Act, and includes a place or facility within a class of such places or facilities so designated;

"secure custody" means custody in a place or facility designated by the Lieutenant Governor in Council of a province for the secure containment or restraint of young persons, and includes a place or facility within a class of such places or facilities so designated.

(2) Where the youth court commits a young person to custody under paragraph 20(1)(k), it shall specify in the order of committal whether the custody is to be open custody or secure custody.

35(1) The provincial director of a province or his delegate may, subject to any terms or conditions that he considers desirable, authorize a young person committed to custody in the province pursuant to a disposition made under this Act

- (a) to be temporarily released for a period not exceeding fifteen days where, in his opinion, it is necessary or desirable that the young person be absent, with or without escort, for medical, compassionate or humanitarian reasons or for the purpose of rehabilitating the young person or re-integrating him into the community; or
- (b) to be released from custody on such days and during such hours as he specifies in order that the young person may
 - (i) attend school or any other educational or training institution,
 - (ii) obtain or continue employment or perform domestic or other duties required by the young person's family, or
 - (iii) participate in a program specified by him that, in his opinion, will enable the young person to better carry out his employment or improve his education or training.

On May 23, 1984, before Cramer Prov. Ct. J., C.F. pleaded guilty to five charges of delinquencies involving property. The learned trial judge declared the Wilderness Programme of the Sir Hugh John MacDonald Memorial Hostel to be a place or facility of open custody; he committed C.F. to one year open custody to be served continuously and in addition, ordered C.F. to perform 50 hours of community work. (It is common ground that the declaration made by Cramer Prov. Ct. J. was beyond the jurisdiction of a youth court judge.)

Following the disposition, C.F. was returned on the same day by administrative order to Peguis Cottage, a place within Manitoba Youth Centre at 170 Doncaster St., in Winnipeg. On the next day, May 24, 1984, C.F. was released on a 15-day temporary absence by order of the provincial director pursuant to s. 35 of the Act. The director has continued the 15-day leaves until completion of the appellate proceedings.

On June 13, 1984, C.F. filed an originating notice of motion in the Court of Queen's Bench seeking a declaration of his rights. The matter was heard by Kroft J. on June 21, 1984. At the hearing seven questions were presented to the court but only one question is brought forward for consideration on appeal.

By the time of the hearing before Kroft J. the Minister of Community Services had designated Peguis Cottage of the youth centre as a place of open custody for the purposes of the Act. Also before Kroft J. was an Order in Council dated March 21, 1984,

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which, *inter alia*, designated as places of secure custody for the purposes of the Act:

- (a) Manitoba Youth Centre;
- (b) Agassiz Centre for Youth;
- (c) Doncaster Youth Centre.

Doncaster Youth Centre is a facility within the Manitoba Youth Centre.

It was agreed between the parties that the Manitoba Youth Centre, in addition to the designation of one cottage as a place of "open custody", is also used for pre-court detention, a place or facility for secure custody, and a place of shelter for males and females under the age of 18 years. Entrance to and egress from the centre is controlled by double-locking doors, which are electronically controlled.

In considering the reach of s. 24 of the Act, Kroft J., in reasons for judgment delivered July 16, 1984, said [14 C.C.C. (3d) 161 at p. 167, [1984] 6 W.W.R. 37, 30 Man. R. (2d) 120 *sub nom. C.F. v. Canada and Manitoba et al.*]:

To resolve the question I must determine, from the agreed facts, whether the custody to which F was assigned should be described as "open" or "secure". If it does not meet the description of "open custody" as set forth in the Act then, in my opinion, no regulation or designation can give it a characteristic which it does not possess. The responsibility given to the Lieutenant-Governor in Council must be exercised within the parameters of the law.

Later in his reasons, Kroft J. said that his conclusion was consistent with O.C. 283/84.

In dealing with the factors governing the categorization of "custody", Kroft J. said [at p. 168]:

It seems evident that physical security is not the only consideration to be made when attempting to make distinctions. The number and nature of the supervisors and custodial staff will be a factor. So presumably will the rules pertaining to the conduct and movement of detainees. There will obviously be restraints which apply even to "open custody", just as there may be freedoms permitted in situations of "secure custody".

On July 26, 1984, the Lieutenant-Governor in Council, by O.C. 891/84, amended O.C. 283/84 by deleting the reference to the Manitoba Youth Centre, so that the facilities now designated as places of secure custody are:

- (a) Agassiz Centre for Youth;
- (b) Doncaster Youth Centre.

We agree with Kroft J. that the Lieutenant-Governor in Council is limited to designation of places of open custody to those kinds specified in s. 24(1)(a) and (b). However, on the material

presented to us, we are of the opinion that Peguis Cottage of Manitoba Youth Centre falls within the definition of a child-care institution and is therefore capable of being designated by the Lieutenant-Governor in Council as a place of open custody.

We allow the appeal.

No order as to costs.

Appeal allowed.

RE SOUTHAM INC. AND THE QUEEN

Ontario High Court of Justice, J. Holland J. November 5, 1984.

Constitutional law — Charter of Rights — Freedom of expression — Provision of Young Offenders Act (Can.) giving judge discretion to order that trials of children and young persons be held in camera — Order may be made excluding public where evidence or information presented to court which would be seriously injurious or seriously prejudicial to young person or child — Whether provision offends guarantee to freedom of expression — Whether constitutes reasonable limit prescribed by law — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Young Offenders Act, 1980-81-82-83 (Can.), c. 110, s. 39.

Constitutional law — Charter of Rights — Freedom of the press — Provision of Young Offenders Act (Can.) placing absolute prohibition on any publication which identifies child or young person involved in proceedings under Act — Whether provision offends guarantee to freedom of expression including freedom of the press — Whether absolute ban constitutes reasonable limitation — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Young Offenders Act, 1980-81-82-83 (Can.), c. 110, s. 38.

Section 38 of the *Young Offenders Act*, 1980-81-82-83 (Can.), c. 110, which provides that no person shall publish by any means any report of an offence committed by a young person or of a hearing concerning a young person who committed an offence in which the name of the young person, a child or young person aggrieved by the offence or child or a young person who appeared as a witness in connection with the offence or in which any information serving to identify such young person or child is disclosed, although an infringement of the guarantee to freedom of expression including freedom of the press under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, is nevertheless constitutional, being a reasonable limitation prescribed by law which is demonstrably justifiable in a free and democratic society within the meaning of s. 1 of the Charter. Similarly, s. 39 of the *Young Offenders Act*, which gives the court before whom proceedings are carried out under the Act a discretion to exclude the public where, in the opinion of the court, any evidence or information presented to the court or justice would be seriously injurious or seriously prejudicial to the young person being dealt with in the proceedings, a child or young person who is a witness in the proceedings or a child or young person who is aggrieved by or the victim of the offence charged in the proceedings, is also constitutional although it infringes the guarantee to freedom of expression under s. 2(b) of the Charter since it is as well a reasonable limitation within the meaning of s. 1.

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