1965

*Oct. 29
*Nov. 1

1966
Feb. 9

DAME EMILIE MARY KREDL ..... APPELLANT;

AND

THE ATTORNEY GENERAL OF THE PROVINCE OF QUEBEC and THE SOCIAL WELFARE COURT FOR THE DISTRICT OF MONTREAL } RESPONDENTS;

AND

STANISLAV KELLER ..... (MIS-EN-CAUSE).

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC

Jurisdiction—Prohibition—Custody of children—Matter before Superior Court—Whether Social Welfare Court superseded—Youth Protection Act, R.S.Q. 1941, c. 38, s. 15 [now R.S.Q. 1964, c. 220]—Code of Civil Procedure, art. 1210.

*PRESENT: Fauteux, Abbott, Martland, Judson and Hall JJ.

In 1957, the appellant obtained a separation from her husband, the mis-en-cause, and custody of their two children. The parties were later divorced. Subsequently, the husband filed two petitions before the Superior Court to obtain the custody of the children. The first one was dismissed, and the second one was adjourned *sine die* and was still pending at the time of the present proceedings. In November 1962, the husband signed a petition before a judge of the Social Welfare Court, seeking the holding of an inquiry in respect of one of the children, pursuant to s. 15 of the *Youth Protection Act*, R.S.Q. 1941, c. 38 [now R.S.Q. 1964, c. 220]. The first allegation contained in the petition was a repetition of the wording of the first sentence of s. 15(1) of the Act. The second allegation recited that the boy was being kept away from his father, that he was being prejudiced against his father, and that all of this "may lead to serious character disturbances". The Court ordered a notice to be served on the appellant advising her that an inquiry would be held before a judge of the Social Welfare Court. The appellant then obtained from the Superior Court the issuance of a writ of prohibition which was later declared peremptory. The Social Welfare Court and the Attorney General, the latter pursuant to the right conferred upon him by art. 1210 of the *Code of Civil Procedure*, appealed to the Court of Appeal where the writ of prohibition was quashed. The appellant was granted leave to appeal to this Court.

Held (Martland and Hall JJ. dissenting): The appeal should be dismissed.

Per Fauteux, Abbott and Judson JJ.: The proposition that a child, of whom the custody has been determined by the Superior Court, is under the protection of that Court and does not need to be protected by the Social Welfare Court, is untenable.

The unalterable consequences of *res judicata* do not attach to a judgment of the Superior Court awarding the custody of children. The jurisdiction of the Social Welfare Court to entrust the custody of the children to somebody else than the person to whom it had been entrusted by the Superior Court is to be ascertained by a reference to the terms of the *Youth Protection Act*—the validity of which was not challenged here—and not by reference to the doctrine of *res judicata*.

The argument that the jurisdiction of the Courts has been completely exhausted when the husband elected to proceed by way of a petition which is still pending before the Superior Court, is also untenable. The maxim *Electa una via non datur recursus ad alteram* has no application in the province of Quebec. Even if it were part of the law of the province, it could not operate to prevent an inquiry under the *Youth Protection Act* which is not a judicial process of the nature and character of the judicial proceedings contemplated by the maxim.

Nothing has been shown and there is nothing in the *Youth Protection Act* supporting the proposition that the jurisdiction of a judge of the Social Welfare Court to embark upon an inquiry is subject to the limitations suggested by the appellant. An inferior Court may not be prevented from exercising the jurisdiction, conferred upon it by a valid statute, through fear that its judgment may contradict that of another Court.

The judge of the Social Welfare Court was given information of the nature indicated in the *Youth Protection Act*. The word "information" is not to be given the technical meaning ascribed to it in penal or criminal proceedings.

1966

KREDL v. ATTORNEY GENERAL OF QUEBEC et al.

Per Martland and Hall JJ., *dissenting*: The judge of the Social Welfare Court can only order an inquiry if he has information, which he deems serious, to the effect that the child is particularly exposed to moral or physical dangers by reason of environment or other special circumstances and for such reasons needs to be protected. In this case the judge did not have before him information to the effect that the child in question was in the conditions described in the first sentence of s. 15(1) of the *Youth Protection Act*, and therefore he had no legal authority to bring the child before him for an inquiry.

Juridiction—Prohibition—Garde des enfants—Question devant la Cour Supérieure—La Cour de Bien-Être Social est-elle supplantée—Loi de la Protection de la Jeunesse, S.R.Q. 1941, c. 38, art. 15 [maintenant S.R.Q. 1964, c. 220]—Code de Procédure Civile, art. 1210.

En 1957, l'appelante et son mari, le mis-en-cause, obtinrent une séparation de corps, et la garde de leurs deux enfants fut confiée à l'appelante. Un divorce a été subséquemment accordé. Par la suite, le mari a produit deux requêtes devant la Cour supérieure pour obtenir la garde des enfants. La première a été rejetée, et la seconde a été ajournée *sine die* et était encore en suspens lors des procédures en instance. En novembre 1962, en se basant sur l'art. 15 de la *Loi de la protection de la jeunesse*, S.R.Q. 1941, c. 38 [maintenant S.R.Q. 1964, c. 220], le mari a signé une requête devant un juge de la Cour de bien-être social demandant la tenue d'une enquête relativement à l'un des enfants. La première allégation dans la requête était une répétition des mots de la première phrase de l'art. 15(1) de la Loi. Dans la seconde allégation il était récité que l'enfant était tenu éloigné de son père, qu'on le prédisposait contre son père, et que tout ceci «pouvait le conduire à des troubles caractériels sérieux». La Cour a ordonné qu'un avis soit signifié à l'appelante l'avisant qu'une enquête serait tenue devant un juge de la Cour de bien-être social. L'appelante a alors obtenu de la Cour supérieure l'émission d'un bref de prohibition qui par la suite a été déclaré péremptoire. La Cour de bien-être social et le Procureur général, ce dernier en vertu du droit qui lui est conféré par l'art. 1210 du *Code de Procédure Civile*, en appelèrent devant la Cour d'Appel qui a rejeté le bref de prohibition. L'appelante a obtenu permission d'en appeler devant cette Cour.

Arrêt: L'appel doit être rejeté, les Juges Martland et Hall étant dissidents.

Les Juges Fauteux, Abbott et Judson: La proposition qu'un enfant, dont la garde a été déterminée par la Cour supérieure, est sous la protection de cette Cour et n'a pas besoin d'être protégé par la Cour de bien-être social, est insoutenable.

Les conséquences immuables de la *res judicata* ne peuvent être imputées à un jugement de la Cour supérieure confiant la garde des enfants. La juridiction de la Cour de bien-être social de confier la garde des enfants à une autre personne que celle à qui la Cour supérieure les avait confiés doit être établie en se référant aux termes de la *Loi de la protection de la jeunesse*—dont la validité n'est pas mise en question ici—et non pas en se référant à la doctrine de *res judicata*.

La proposition que la juridiction des Cours a été complètement épuisée lorsque le mari a choisi de procéder par voie de la requête qui est encore en suspens devant la Cour supérieure, est elle aussi insoutena-

ble. La maxime *Electa una via non datur recursus ad alteram* n'a pas d'application dans la province de Québec. Même si elle faisait partie de la loi de la province, elle ne pourrait pas avoir l'effet d'empêcher une enquête sous le régime de la *Loi de la protection de la jeunesse,* car une telle enquête n'est pas une procédure judiciaire de la nature et du caractère des procédures judiciaires contemplées par la maxime.

Rien n'a été démontré et il n'y a rien dans la *Loi de la protection de la jeunesse* pour supporter la proposition que la juridiction d'un juge de la Cour de bien-être social d'entreprendre une enquête est sujette aux limitations suggérées par l'appelante. Une Cour inférieure ne peut pas être empêchée d'exercer la juridiction, qui lui est conférée par un statut valide, par crainte que son jugement pourrait contredire celui d'une autre Cour.

Le Juge de la Cour de bien-être social a reçu une information de la nature prescrite par la *Loi de la protection de la jeunesse.* On ne doit pas donner au mot «information» le sens technique attribué à ce mot dans les procédures pénales ou criminelles.

Les Juges Martland et Hall dissidents: Le Juge de la Cour de bien-être social ne peut ordonner une enquête que s'il a une information, qu'il estime sérieuse, à l'effet que l'enfant est particulièrement exposé à des dangers moraux ou physiques en raison de son milieu ou de d'autres circonstances spéciales et qu'il a besoin pour ces raisons d'être protégé. Dans le cas présent, le Juge n'avait pas devant lui une information à l'effet que l'enfant en question était dans les conditions décrites dans la première phrase de l'art. 15(1) de la *Loi de la protection de la jeunesse,* et en conséquence il n'avait pas l'autorité légale d'émettre un ordre d'amener l'enfant devant lui pour les fins d'une enquête.

APPEL d'un jugement de la Cour du banc de la reine, province de Québec[1], rejetant un bref de prohibition. Appel rejeté, les Juges Martland et Hall étant dissidents.

APPEAL from a judgment of the Court of Queen's Bench, Appeal Side, province of Quebec[1], quashing a writ of prohibition. Appeal dismissed, Martland and Hall JJ. dissenting.

C. A. Geoffrion, Q.C., for the appellant.

Laurent E. Bélanger, Q.C. for the respondents.

The judgment of Fauteux, Abbott and Judson JJ. was delivered by

FAUTEUX J.:—The facts of this case are simple and not in dispute. Since 1957 the appellant and the mis-en-cause, now divorced, have been litigating over the custody of their two minor children, Stephen and George. In November

[1] [1965] Que. Q.B. 689.

1966

KREDL
v.
ATTORNEY GENERAL OF QUEBEC
et al.

Fauteux J.

1962, Keller signed a petition, supported by affidavit, before Judge J. W. Long, of the Social Welfare Court, in Montreal, in which he alleged

> I have reason to believe and I do believe that the child GEORGE KELLER under the age of eighteen years, is particularly exposed to moral and physical dangers by reasons of his environment or other special circumstances, and for such reasons needs to be protected. The boy is being kept away from the father, the boy is being prejudiced against the father, all of which may lead to serious character disturbances.

and prayed that one of the Judges of the Court apply the provisions of s. 15 of the *Youth Protection Act*, as amended by 8-9 Eliz. II, c. 42, now being R.S.Q. 1964, c. 220, and conduct an inquiry as to the particular circumstances in which the child was situated. The relevant parts of the section read as follows:

> 15. (1) When a child is particularly exposed to moral or physical dangers, by reason of its environment or other special circumstances, and for such reasons needs to be protected, any person in authority may bring him or have him brought before a judge. A judge may also, upon information which he deems serious, to the effect that a child is in the above described conditions, order that he be brought before him.
>
> Without limiting the generality of the provisions of the preceding paragraph, children whose parents, tutors or guardians are deemed unworthy, orphans with neither father nor mother and cared for by nobody, abandoned illegitimate or adulterine children, those particularly exposed to delinquency by their environment, unmanageable children generally showing pre-delinquency traits, as well as those exhibiting serious character disturbances, may be considered as being in the conditions contemplated by the preceding paragraph.
>
> * * *
> * * *
>
> The judge shall make an inquiry, in judicial form, into the particular circumstances in which the child is situated.
>
> Notice in writing of such inquiry and of the time and place when and where it will be held must be served on the father and mother or one of them, or the tutor or on those having custody of the child; the latter shall have the right to be heard and to submit any proof which the judge deems relevant.

The Court then ordered a notice to be served on the appellant and her son George, advising them of the inquiry, of the time and place of its holding and of the right to be heard and submit any pertinent evidence. Upon reception of this notice appellant applied to and obtained from the Superior Court the issuance of a writ of prohibition directed against the Social Welfare Court, its Judges and particularly Judge J. W. Long, and the mis-en-cause, ordering them to refrain from and discontinue all proceedings in the

matter until final judgment. In support of her petition for prohibition, appellant alleged that in November 1957, the Superior Court for the District of Montreal granted her a separation from bed and board from the mis-en-cause and awarded her the custody of their two minor children, Stephen and George; that in April 1959, she obtained a Parliamentary divorce from Keller; that in March 1961, the Superior Court dismissed a petition by which the latter sought to obtain the custody of the children; and that in January 1962, the Superior Court was again seized of a similar petition by Keller and that this petition, which was never proceeded with but adjourned *sine die* after several postponements, was still pending before the Superior Court. Appellant submitted that in view of the above facts the Social Welfare Court had no jurisdiction whatever to reopen the case, confirm or reverse the Superior Court which had already decided the issue and which had again been and was still being seized of the matter by reason of the last mentioned petition of Keller. Appellant also contended that the Social Welfare Court and Judge J. W. Long had already exceeded their jurisdiction by accepting Keller's petition for an inquiry under the *Youth Protection Act* and by ordering a notice of hearing to be addressed to her.

The mis-en-cause did not appear and while both Judge J. W. Long and the Social Welfare Court filed an appearance only the latter contested appellant's petition. The case having been heard, the writ of prohibition was declared peremptory by a judgment of the Superior Court resting substantially on the factual and legal grounds raised in appellant's petition for prohibition.

The Social Welfare Court and the Attorney General of the Province, the latter pursuant to the right conferred upon him by art. 1210 of the *Code of Civil Procedure*, appealed from this judgment. By a unanimous decision, the Court of Queen's Bench (Appeal Side)[1] composed of Tremblay C.J., Pratte, Casey, Rinfret and Owen JJ., allowed the appeal and quashed the writ of prohibition.

The appellant now appeals, with leave, from this judgment of the Court of Appeal.

The validity of the *Youth Protection Act* and particularly of s. 15 has not been challenged and is not here in

[1] [1965] Que. Q.B. 689.

1966

KREDL
v.
ATTORNEY GENERAL OF QUEBEC
et al.

Fauteux J.

issue. Appellant's contention is simply that in the circumstances of this case the Judge of the Social Welfare Court should not have embarked upon the inquiry contemplated by s. 15 and that this is a question of jurisdiction. This contention is more fully stated at p. 11 of appellant's factum and textually expressed as follows:

> In the second place, it should be borne in mind that by the Writ of Prohibition herein, the jurisdiction of the Social Welfare Court and its judges is under attack only to a limited extent, Appellant's position being simply that neither the Social Welfare Court nor any of its judges has jurisdiction to deal with the case of a child whose custody is already the subject of proceedings before the Superior Court, particularly where, as in the present case, the application to the Social Welfare Court or its judge, it is made by a party to the litigation before the Superior Court, a judgment has already been rendered by such Court awarding custody to one of the parents and a Petition is pending before the Superior Court to revise this judgment. Beyond these limits the jurisdiction of the Social Welfare Court is not under attack nor is the constitutional validity of Section 15 and following of the *Youth Protection Act* questioned in any way whatsoever.

In support of these views appellant submitted, as a first proposition, that at least one of the conditions precedent to the exercise of the jurisdiction of the Social Welfare Court does not exist in the present case. A child, it is said, of whom the custody has been determined by the Superior Court, is under the protection of that Court and does not need to be protected by the Social Welfare Court. On appellant's interpretation the words "and for such reasons needs to be protected" could only have been inserted in the first paragraph of s. 15 to prevent a Judge of the Social Welfare Court from proceeding in the case of a child of whom the custody has been determined by the Superior Court. I cannot agree with this interpretation. If valid, it should equally obtain in the case of children to whom the Superior Court has appointed a tutor or guardian. Yet, the second paragraph of s. 15 provides that "children whose parents, tutors or guardians are deemed to be unworthy, . . . may be considered as being in the conditions contemplated by the preceding paragraph".

Appellant then argued that neither the Social Welfare Court nor any of its Judges have jurisdiction to interfere with a judgment of the Superior Court which carries with it the force of *res judicata*. A judgment of the Superior Court which awards the custody of a child may be changed or modified every time the interest of the child requires it. The unalterable consequences of *res judicata* do not attach

to a judgment of this nature. Trudel: Traité de droit civil du Québec, vol. 2, p. 49. The inquiry in the Social Welfare Court may very well show, in certain cases, that the person, to whom the Superior Court has previously entrusted the custody of a child, has now become unworthy of it and that it should be committed to somebody else. The jurisdiction of the Social Welfare Court to do so must be ascertained by reference to the terms of the *Youth Protection Act*—the validity of which is not challenged—and not by reference to the doctrine of *res judicata* which, in addition and in the present hypothesis, can hardly have more virtue in the Social Welfare Court than it has in the Superior Court.

Appellant also suggested that even assuming that both the Superior Court and the Social Welfare Court and its Judges could have jurisdiction over the case of the child here involved, such jurisdiction has been completely exhausted when mis-en-cause Keller elected to proceed by way of a petition which, continued *sine die,* is still pending before the Superior Court. In appellant's view this is a clear case for the application of the maxim *Electa una via non datur recursus ad alteram.* This maxim, which no general text of law justifies, has been borrowed from the Roman law which never formulated it in precise terms. Revue de législation et jurisprudence (1866), tome 28, p. 412. Its principle is stated in Revue critique de législation (1933), v. 53, p. 85:

> Le principe *Electa una via* 'est fondé sur l'humanité et aussi sur la justice qui ne permettent pas qu'on traîne un accusé d'une juridiction dans une autre et qu'on décline à son préjudice celle qu'on a volontairement saisie parce qu'on ne la croit peut-être pas favorable aux demandes qu'on a formées par devant elle'.

The rule is formulated in these terms in Dalloz (1955), Encyclopédie juridique, Procédure, tome 1, p. 55, n° 181:

> D'après elle, si la victime d'une infraction peut, à son choix, agir en réparation devant la juridiction civile ou devant la juridiction répressive, son option a un caractère irrévocable.

In France, the maxim has no application in civil matters and only in criminal matters does jurisprudence take it into account. Glasson et Tissier, Précis de procédure civile (1925), tome 1, p. 427, n° 174. Whatever be the situation in other jurisdictions, the maxim appears to have no application whatever in the Province of Quebec. In this respect, reference may be had to the provisions of s. 10 of the

1966

KREDL v. ATTORNEY GENERAL OF QUEBEC et al.

Fauteux J.

Criminal Code of Canada; Roy, Droit de plaider (1902), p. 7, n° 9, Ferland, Traité sommaire et Formulaire de procédure civile (1962), pp. 4-5. Even if it could be held to be part of the law in the Province, it cannot, in my opinion, operate to prevent an inquiry under the *Youth Protection Act*, which is not a judicial process of the nature and character of the judicial proceedings contemplated by the maxim.

In short, nothing has been shown and I can find nothing in the *Youth Protection Act* supporting the proposition that the jurisdiction of a Judge of the Social Welfare Court to embark upon an inquiry—be that in the case of a child brought before him by a person in authority within the meaning of s. 1(*e*) or as a result of an order of the Judge—is subject to the limitations suggested by appellant, which, in essence, appear to be inspired by the fear that a custody order, conflicting or in any way different from that which was made by the Superior Court, might issue at the conclusion of the inquiry. I am in respectful agreement with Mr. Justice Casey, who delivered the judgment for the Court of Appeal, that an inferior Court may not be prevented from exercising the jurisdiction, conferred on it by a valid statute, through fear that its judgment may contradict that of another Court.

The only remaining point is one of which no mention is made in the reasons for judgment of the Court of Appeal or in appellant's factum where the limited extent of the attack on jurisdiction is, as shown from the quotation above, well defined. This point seems to have been mentioned for the first time at the hearing in this Court. It is said that Judge Long did not have before him information that the child involved was in the conditions described in s. 15 and, that being so, he had no legal authority to order the child before him. With deference, I am unable to agree with the premise of this proposition. The procedure set out in s. 15 is of a civil nature. I do not think that the word "information", in the context in which it appears, has the technical meaning ascribed to the same word, in penal or criminal proceedings, and that rules, related to the sufficiency of an information or indictment, are here relevant. The question is whether Judge Long was given information of the nature indicated in the Act. I think he was. The petition contains two allegations, sworn to before him, one of which repeats

the words of the Statute. The record does not permit an assumption that Judge Long did not ask and did not obtain details pertaining to this particular case. The holding of an inquiry, under the *Youth Protection Act,* is, of course, a serious matter. It may very well be that the decision to embark upon an inquiry was unwise. We are concerned here with jurisdiction and not with the manner in which it was exercised. I see nothing in this Statute, specially enacted for the protection of children, which suggests that the Legislature intended that the wide authority, conferred on a Judge of the Social Welfare Court to order a child to be brought before him, should be narrowed by procedural considerations.

I would dismiss the appeal with costs.

The judgment of Martland and Hall JJ. was delivered by

MARTLAND J. (*dissenting*):—By a judgment of the Superior Court of the Province of Quebec dated November 27, 1957, the appellant obtained a separation from her husband, Stanislav Keller (hereinafter referred to as Keller) and custody of the two children of their marriage, Stephen and George.

On April 28, 1959, by an act of the Parliament of Canada, she obtained a divorce from Keller.

On March 1, 1961, a judgment of the Superior Court dismissed a petition by Keller for revision of the earlier judgment of that Court.

A further petition was submitted by Keller to the Superior Court on January 23, 1962, seeking custody of the two children. After several adjournments this petition was adjourned *sine die* on March 14, 1962.

On November 12, 1962, Keller signed a petition before the respondent, Honourable John W. Long, a judge of the Social Welfare Court, seeking the holding of an inquiry pursuant to s. 15 of the *Youth Protection Act,* R.S.Q. 1941, c. 38, as amended (now c. 220, R.S.Q. 1964), in respect of the child George Keller. As a result, a notice, dated the same day, was issued and served upon the appellant, advising her that an inquiry as to the particular circumstances in which George Keller is found would be held on November 21, 1962, before a judge of the Social Welfare Court.

1966

KREDL v. ATTORNEY GENERAL OF QUEBEC et al.

Martland J.

Upon receipt of this notice, the appellant obtained the issuance of a writ of prohibition on April 4, 1962, by a judgment of the Superior Court. Appearances were filed by the respondents, Judge Long and the Social Welfare Court, but only the latter filed a contestation. The respondent Keller did not appear. By a judgment of the Superior Court on January 22, 1964, the writ of prohibition, previously authorized, was declared peremptory.

An appeal was taken by the Attorney General of Quebec pursuant to the provisions of art. 1210 of the *Code of Civil Procedure*. This appeal was allowed by unanimous decision of the Court of Queen's Bench (Appeal side).[1] From that judgment the appellant, by leave of this Court, has appealed.

The question in issue before this Court is as to whether the Social Welfare Court exceeded its jurisdiction when it directed an inquiry in relation to George Keller. That issue involves a consideration of the provisions of the *Youth Protection Act*, which is now c. 220, R.S.Q. 1964. The references to sections in these reasons are to the sections of that Act, which are the same as the ones applicable at the relevant times, although the former numbering was slightly different.

The Act, as its name indicates, was enacted to provide for the protection of children particularly exposed to moral or physical dangers by reason of environment or other special circumstances. It is divided into eight divisions.

Division I contains the interpretation section, s. 1, the relevant portions of which are as follows:

> *(c)* "judge": a district judge, except in a territory under the jurisdiction of a Social Welfare Court, where it means a judge of such court;
>
> * * *
>
> *(e)* "person in authority": the father, mother, tutor and subrogate tutor of a child, rector (curé), any school commissioner of the locality where the child is, any person designated ex-officio by the judge in a particular case, and any officer of any social organizations looking after the welfare and protection of children and who shall be officially recognized as such by the Minister;
>
> *(f)* "child": a boy or a girl apparently or effectively aged less than eighteen years;

[1] [1965] Que. Q.B. 689.

Division II deals with the establishment of youth protection schools.

Division III deals with the duties of the directors of such schools.

Division IV is entitled "Admission and Sojourn of Children in Schools" and it contains s. 15, which is the provision of the greatest importance in this case. The relevant parts of that section provide as follows:

15. (1) When a child is particularly exposed to moral or physical dangers, by reason of its environment or other special circumstances, and for such reasons needs to be protected, any person in authority may bring him or have him brought before a judge. A judge may also, upon information which he deems serious to the effect that a child is in the above described conditions, order that he be brought before him.

Without limiting the generality of the provisions of the preceding paragraph, children whose parents, tutors, or guardians are deemed unworthy, orphans with neither father nor mother and cared for by nobody, abandoned, illegitimate or adulterine children, those particularly exposed to delinquency by their environment, unmanageable children generally showing pre-delinquency traits, as well as those exhibiting serious character disturbances, may be considered as being in the conditions contemplated by the preceding paragraph.

Throughout the pendency of the case the judge, in case of urgency, may take for the benefit of the child such provisional protective measures as he may deem useful by confiding the child to any person, home, society, reception centre or institution capable of receiving him temporarily.

The judge may also whenever he deems it expedient, issue an order to bring or have brought before him any child whose case is pending before the Court.

The judge shall make an inquiry, in judicial form, into the particular circumstances in which the child is situated.

Notice in writing of such inquiry and of the time and place when and where it will be held must be served on the father and mother or one of them, on the tutor or on those having custody of the child; the latter shall have the right to be heard and to submit any proof which the judge deems relevant.

(2) The judge may then, according to circumstances and after consultation, if need be, with a social agency, leave the child at liberty under supervision, confide him to any person or society, recommend to the Minister that he be entrusted to a school, to a public charitable institution or to a social agency, or take any other decision in the interest of the child.

Division V deals with the cost of custody of children. Division VI defines various offences under the Act. Section 39(2) has some relevance to this case:

39. (2) Whosoever, wilfully and without valid excuse, exposes a child to a serious moral or physical danger or, being responsible for such child, neglects to protect him from such danger in a manner and in circumstances

1966

KREDL
v.
ATTORNEY GENERAL OF QUEBEC
et al.

Martland J.

not covered by the Criminal Code, is liable, on summary conviction, to a fine not exceeding three hundred dollars or to imprisonment not exceeding one year, or to both penalties together, in addition to the costs.

Division VII covers the final discharge of children and Division VIII contains miscellaneous provisions.

Under the terms of this Act a judge has important duties to perform in relation to children particularly exposed to moral or physical dangers because of environment or other special circumstances, with power to place them in the care of persons, societies, schools, charitable organizations or social agencies. He is given broad powers to control the destinies of such children, including the power to remove them from the custody of their own parents. Such a power is not to be exercised lightly, and in entrusting it to a judge the Legislature has spelled out in s. 15 the circumstances which must exist before he can do so.

Under the first paragraph of s. 15(1) a child may be brought before a judge in one of two ways. A "person in authority" may bring a child before him or have him brought, when such child is "particularly exposed to moral or physical dangers, by reason of its environment or other special circumstances, and for such reasons needs to be protected".

It should be noted that the child must be "*particularly*" exposed to such dangers and needs to be protected.

The second paragraph of s. 15(1) contains specific instances of what may be considered as the conditions contemplated by the first paragraph. These include "exhibiting serious character disturbances".

The second way in which a child may be brought before a judge is by his own order, which he may make "upon information *which he deems serious*", to the effect that a child is in the conditions described earlier in the first paragraph of s. 15(1), and which have been described above.

This provides a method whereby a person not having custody or control of a child may seek the intervention of a judge to have such child brought before him, and it was this method which was invoked by Keller in the present case.

The power of the judge to make such an order is set out in this subsection. He can do so only if he has information, which he deems serious, to the effect that the child is particularly exposed to moral or physical dangers by reason of environment or other special circumstances and for such reasons needs to be protected.

I turn now to consider the information which was before the judge in the present case. It consisted of a written petition by Keller, sworn to before the judge, which read as follows:

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
NO. 1481/62

SOCIAL WELFARE
COURT

Youth Protection Schools Act
(As modified by 14-15 Geo. VI,
chapter 56).

Petition re child GEORGE KELLER child of Mr. and Mrs. Stanislav Keller (Emily M. Kredl)

I am one of the persons in authority mentioned in section 1 (paragraph e) of the Youth Protection Schools Act, to wit Mr. Stanislav Keller, father of the said child, 4461 Linton Ave., apt. 5.

I have reasons to believe and I do believe that the child GEORGE KELLER under the age of eighteen years, is particularly exposed to moral and physical dangers by reasons of his environment or other special circumstances, and for such reasons needs to be protected. The boy is being kept away from the father, the boy is being prejudiced against the father, all of which may lead to serious character disturbances.

Wherefore I pray that one of the judges of the Court of Social Welfare apply the provisions of section 15 of the Youth Protection Schools Act (14 George VI Chapter II as modified by 14-15 Geo. VI, Chapter 56) and conduct an inquiry as to the particular circumstances in which this child is found.

(Signed) STANISLAV KELLER

Sworn to before me at Montreal
this 9th day of November 1962.
(Signed) J. W. Long,
Judge of the Social Welfare Court
District of Montreal.

1966

KREDL v. ATTORNEY GENERAL OF QUEBEC et al.

Martland J.

The essential part of this petition is contained in the second paragraph. Keller there expresses a belief that George Keller is particularly exposed to moral and physical dangers by reason of his environment or other special circumstances and for such reasons needs to be protected. This is merely a repetition of the wording of the first sentence of s. 15(1). This, in my opinion, is not sufficient unless the facts on which that belief is founded are stated. Under s. 15, before ordering an inquiry, the judge must have before him *information*, which he deems serious. I understand this to mean an allegation of circumstances which create a particular exposure to moral or physical danger.

Keller then goes on to state what are the reasons for his belief:

> The boy is being kept away from the father, the boy is being prejudiced against the father, all of which *may* lead to serious character disturbances. (The italics are mine.)

As to the allegation that George Keller was being kept away from his father, it is clear that this separation was the consequence of the custody order granted by the Superior Court. Keller did allege, in his petition to the Superior Court of January 23, 1962, that he had been denied the right to see his children, given to him by the Superior Court, but he did not proceed with that petition, which was adjourned *sine die*.

The contention that the child was being prejudiced against the father and that this might lead to serious character disturbances is not, in my opinion, an allegation that the child was particularly exposed to moral or physical danger. The second paragraph of s. 15(1) refers to the actual exhibition of serious character disturbances.

In my opinion the judge did not have before him information to the effect that George Keller was in the conditions described in the first sentence of s. 15(1), and, that being so, he had no legal authority to bring the child before him for an inquiry.

In reaching this conclusion, I do not feel that I am adopting a technical approach to the provisions of the *Youth Protection Act*, which would impair its proper operation. The Act is an important means for the protection of neglected children and, for that reason, clothes the judge

with wide powers. On the other hand, it certainly was not designed to serve as a weapon in the hands of a disgruntled parent who has been unsuccessful in custody proceedings in the Superior Court.

If it is open to any person to compel the appearance of a child before a judge for an inquiry merely by swearing to a belief that it is particularly exposed to moral or social danger the consequences may be serious indeed. Individual beliefs as to what constitutes moral danger to a child may vary widely. Consequently the Act requires that, before summoning a child before him for an inquiry, the judge must have information to the effect that the conditions defined in s. 15(1) do, in fact, exist. In my opinion the Act does not contemplate that, without that much information before him, a judge can compel a parent, in lawful custody of a child, to produce that child before him.

The holding of an inquiry, under s. 15, is a matter of serious consequence to a child and to the parent in lawful custody of that child. The child faces the possibility of being removed from the custody of its parent and being placed in the care of another person, school, institution or agency. The parent is faced with the possibility of a charge under s. 39(2) of the Act, the provisions of which have been previously quoted.

In my opinion, the appeal should be allowed, and the judgment of the Superior Court restored, with costs throughout.

Appeal dismissed with costs, MARTLAND *and* HALL JJ. *dissenting.*

Attorneys for the appellant: Biega, Beauregard & Kooiman, Montreal.

Attorney for the respondents: L. E. Bélanger, Montreal.