FAMILY LAW AND THE "LIBERTY INTEREST": SECTION 7 OF THE CANADIAN CHARTER OF RIGHTS

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I. INTRODUCTION

The Canadian Charter of Rights and Freedoms[1] has been in force for only a relatively short period of time, yet it is already apparent that this constitutional document will have a profound impact on our legal system. The popular press, legal commentators and the courts have devoted a great deal of attention to the effect of the Charter on police practice and criminal law, but it is also clear that it will have significant influence in other areas. The purpose of this paper is to consider how the Charter of Rights may affect some aspects of family law.

There is no express reference in the Charter to the protection of the family, and this has been the subject of considerable adverse comment.[2]

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[1] Constitution Act, 1982, Part 1, *enacted by* Canada Act, 1982, U.K. 1982, c. 11.

[2] *See, e.g.*, Barry, *Law, Policy and Statutory Interpretation under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms*, 60 CAN. B. REV. 237, at 261-62 (1982), where the author states:

> The importance of the family to the Canadian way of life was identified in the preamble to the Canadian Bill of Rights. This is one recognition, albeit indirect, that *affection* or the need for human relationships, the need to love and be loved, has the status of a fundamental value. But no reference to this value appears in the Charter.

See also MINUTES OF PROCEEDINGS AND EVIDENCE OF SPECIAL JOINT COMMITTEE OF THE SENATE AND THE HOUSE OF COMMONS ON THE CONSTITUTION OF CANADA, Issue No. 29, at 7-8; Issue No. 40, at 32-33; Issue No. 41, at 7-11; and Issue No. 43, at 56-61 (32nd Parl., 1st sess., 1980-81-82) [hereafter cited as SPECIAL JOINT COMMITTEE]. The Charter of Rights may be contrasted to other human rights documents which specifically refer to the need to protect the family. For example, the Universal Declaration of Human Rights provides:

> Art. 12. No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence . . . . Everyone has the right to the protection of the law against such interference. . . .

Similarly, the International Covenant on Civil and Political Rights Provides:

> Art. 23.1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

And the United Nations' Declaration of the Rights of the Child states:

> Principle 6. [The child] shall, wherever possible, grow up in the care and under the responsibility of his parents . . . a child of tender years shall not, save in exceptional circumstances, be separated from his mother.

Section 7 does, however, provide that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". In this paper it will be argued that the constitutionally protected concept of "liberty" includes more than a mere freedom from physical restraint; "liberty" includes a freedom to enjoy family life, subject to deprivation only "in accordance with the principles of fundamental justice". Thus, the right to enjoy familial relations should receive constitutional protection under section 7 of the Charter. Passing reference to other sections of the Charter which may be invoked in cases involving the family will also be made.

The view that section 7 of the Charter has such a broad scope is in part based on the interpretation given to the provisions of the Fifth and Fourteenth Amendments of the American Constitution. The Fifth Amendment provides that the federal Congress shall not deprive any person of "life, liberty or property, without due process of law". The Fourteenth Amendment imposes a similar obligation on the states. These provisions have been interpreted so as to afford substantial protections to various aspects of family life. Though jurisprudence interpreting the American Constitution will not furnish us with binding precedents, it may offer invaluable insights into how the Canadian Charter of Rights should be interpreted.[3]

Despite the assistance American decisions may provide, ultimately the "language of the Charter will be approached as that of a Canadian constitutional instrument, and it must receive its interpretation in the light of Canadian experience and Canadian conditions".[4] In interpreting the Charter, courts will have to struggle with giving fair expression to underlying community values and expectations.[5] As stated by MacKinnon A.J.C.O.:

In Minister of Home Affairs v. Fisher, [1979] 3 All E.R. 21, [1979] 2 W.L.R. 889, the Privy Council held that the Constitution of Bermuda should be interpreted bearing this Principle in mind.

[3] Canadian courts have traditionally shown considerable reluctance in following, or even citing, American jurisprudence. In decisions regarding the Charter of Rights, however, Canadian judges have been looking very closely at American procedures and practices; *see, e.g.*, R. v. Southam (not yet reported, Ont. C.A., 14 Feb. 1983); and R. v. Oakes, 40 O.R. (2d) 660, 32 C.R. (3d) 193 (C.A. 1983).

[4] D. MCDONALD, LEGAL RIGHTS IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: A MANUAL OF ISSUES AND SOURCES 1 (1982).

[5] Barry, *supra* note 2, at 241 states, "[T]he court's primary aim in statutory interpretation must be: *the ascertainment of the shared community expectations generated by the social policy prescribed as law by Parliament.*" Barry goes on to argue that when there is doubt about legislative objectives, there should be a "presumption in favour of those . . . correspond[ing] most closely with traditionally accepted community goals and values". As already indicated, Barry believes that an appreciation of family life is a fundamental Canadian value.

Similarly, in the SPECIAL JOINT COMMITTEE, *supra* note 2, Issue No. 41, at 7, The Honourable Robert Kaplan, Solicitor General of Canada, acknowledged that "the rights and freedoms that are put forward [in the Charter] are animated hopefully by a commonly held set of values among the Canadian people".

> The *Charter* as part of a constitutional document should be given a large and liberal construction. The spirit of this new 'living tree' planted in friendly Canadian soil should not be stultified by narrow technical, literal interpretations without regard to its background and purpose; capability for growth must be recognized.[6]

It is the authors' view that in construing the Charter, courts may make reference to the Parliamentary proceedings at the time that the Charter was enacted and should make use of Canadian jurisprudence pre-dating its enactment.[7] These sources clearly recognize the primacy of the family unit and express a concern for the protection of the family from improper state interference, thus supporting the interpretation of "liberty" as a broad concept, including a freedom to enjoy family life.

The ultimate definition of familial rights which are to be constitutionally protected will in many cases necessitate balancing the competing interests of a child, his parents and the state. This will be discussed after considering some general issues in regard to the interpretation of section 7 of the Charter.

II. THE INTERPRETATION OF "LIBERTY"

In the United States, the courts have held that the concept of "liberty", protected by the requirements of due process in the Fifth and Fourteenth Amendments, extends far beyond mere freedom from imprisonment or other physical restraint. In *Meyer v. Nebraska*, Mr. Justice McReynolds of the United States Supreme Court stated that the term "liberty"[8] without doubt "denotes not merely freedom from bodily

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In the United States, there has been considerable academic and judicial commentary concerning the extent to which courts ought to rely on fundamental community values in interpreting constitutional documents. For a survey of the conflicting views, *see Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156 (1980), especially *Part II: Sources of Constitutional Protection for Family Rights*, 1161-97. It is argued in that article that the courts in the United States have appropriately relied on deeply rooted, traditionally held American values in interpreting their Constitution. For a somewhat different view, *see* Fairley, *Enforcing the Charter: Some Thoughts on an Appropriate and Just Standard for Judicial Review*, 4 SUP. CT. L. REV. 217 (1982).

[6] R. v. Southam, *supra* note 3.

[7] The courts are making use of existing Canadian jurisprudence to interpret the Charter. *See, e.g.*, R. v. Gallant, 38 O.R. (2d) 788 (Prov. Ct. 1982) where Lewis J. states at 797: "It must be remembered that ss. 7 and 11(*d*) of the Charter have been with us as root principles of our common law for many years. . . ." *See also* R. v. Stasiuk, 38 O.R. (2d) 618 (Prov. Ct. 1982).

[8] The term "liberty" is also used in the Canadian Bill of Rights, R.S.C. 1970, App. III, where para. 1(*a*) recognizes the "right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law". The concept of "liberty" in para. 1(*a*) was not extensively discussed in any Canadian jurisprudence. *Re* Bruce, [1979] 2 F.C. 697, 48 C.C.C. (2d) 313 (Trial D.), seemed to suggest that the concept of "liberty" did not include a penitentiary inmate's right to marry, though arguably the Court was saying only that a person confined to prison must be deprived of certain rights and liberties, including the right to marry. *See also* Whitfield v. Can. Marconi, 68 D.L.R. (2d) 251 (Que. C.A. 1968).

restraint but also the right to the individual . . . to marry, establish a home and bring up children . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men".[9] The Supreme Court affirmed this approach in 1973 in *Roe v. Wade*, with Mr. Justice Stewart, in a concurring opinion, offering a broad summary of the meaning of "liberty":

> "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed". . . .The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the "liberty" protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights. . . .
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> . . .This "liberty" is not a series of isolated points pricked out in terms of . . . the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. . . . In the words of Mr. Justice Frankfurter, "Great concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.". . .
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> Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.[10]

Recently, the Utah Supreme Court surveyed a number of leading American decisions[11] concerning the scope of rights entitling parents to raise their children free from undue state interference. It offered the following rationale for the protection of parental rights:

> [T]he parental liberty right at issue . . . is fundamental to the existence of the institution of the family, which is "deeply seated in this Nation's history and tradition" . . . and in the "history and culture of Western civilization". . . .
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> This recognition of the due process and retained rights of parents promotes values essential to the preservation of human freedom and dignity and to the perpetuation of our democratic society. The family is a principal conservator and transmitter of cherished values and traditions. . . . Any invasion of the sanctity of the family, even with the loftiest motives, unavoidably threatens those traditions and values.

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[9] 262 U.S. 390, at 399 (1923).

[10] 410 U.S. 113, at 168-69 (1973).

[11] Some of the leading American decisions include: Meyer v. Nebraska, *supra* note 9; Roe v. Wade, *supra* note 10; Moore v. City of East Cleveland, 431 U.S. 494 (1977); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1943); and Wisconsin v. Yoder, 406 U.S. 205 (1972). For a detailed survey, *see Developments in the Law: The Constitution and the Family*, *supra* note 5.

> For example, family autonomy helps to assure the diversity characteristic of a free society. There is no surer way to preserve pluralism than to allow parents maximum latitude in rearing their own children. Much of the rich variety in American culture has been transmitted from generation to generation by determined parents who were acting against the best interest of their children, as defined by official dogma. Conversely, there is no surer way to threaten pluralism than to terminate the rights of parents who contradict officially approved values imposed by reformers empowered to determine what is in the "best interest" of someone else's child.[12]

Clearly, American jurisprudence supports the view that "liberty", as referred to in section 7 of the Charter of Rights, is a broad concept and includes the right to enjoy family relations free from unreasonable state interference.

The Canadian Charter of Rights and Freedoms does not expressly protect familial rights, but this is not due to a failure by the federal Parliament to appreciate the fundamental importance of the family to Canadian society. The Preamble to the Canadian Bill of Rights[13] contains an affirmation that "the Canadian Nation is founded upon principles that acknowledge . . . the dignity and worth of the human person and the position of the family in a society of free men and free institutions". In responding to a question in the Parliamentary Joint Committee on the Constitution, the Solicitor General of Canada, Robert Kaplan, acknowledged that the affirmations contained in the Preamble "are a fine statement of principles which certainly are behind the spirit of the rights and freedoms that are enunciated . . . in the Charter".[14] Mr. Kaplan explained further that the omission in the Charter of a similar introduction resulted from controversy concerning multiculturism and certain other aspects of the Canadian identity, but that nonetheless "the rights and freedoms that are put forward [in the Charter] are animated hopefully by a commonly held set of values among the Canadian people".[15]

Canadian courts have generally held that Parliamentary debates are not admissible to show Parliamentary intent,[16] though in a recent case the Supreme Court of Canada departed from this practice.[17] It has been argued that it is particularly important in cases involving the interpretation of constitutional documents for courts to refer to Parliamentary debates.[18] To the extent that the courts are prepared to refer to Parliamentary proceedings in construing section 7 of the Charter, these proceedings are not inconsistent with the view that

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[12] *In re* J.P. 648 P.2d 1364, at 1375-76 (Utah 1982).

[13] R.S.C. 1970, App. III.

[14] SPECIAL JOINT COMMITTEE, *supra* note 2, Issue No. 41, at 7.

[15] *Id.* at 8.

[16] *See, e.g.*, A.G. Can. v. Reader's Digest Ass'n (Canada), [1961] S.C.R. 775, 30 D.L.R. (2d) 296.

[17] R. v. Vasil, [1981] 1 S.C.R. 469, 121 D.L.R. (3d) 41; subject of comment on this point by Parker, Comment, 60 CAN. B. REV. 502 (1982).

[18] Barry, *supra* note 2, at 258.

Parliament has acknowledged the importance of the family to Canadian society and sought to protect this fundamental institution through the Charter.[19]

Certainly Canadian courts have consistently recognized the importance of the family and the need to protect parents from improper interference. In *Martin v. Duffell*, the Supreme Court of Canada held that it was well-settled in law that the mother of an illegitimate child had a right to custody of the child and that apart from statute the right could only be lost if the mother abandoned the child or if she "so misconduct[ed] herself that in the opinion of the Court her character is such as to make it improper that the child should remain with her".[20]Cartwright J. went on to say:

> In the present state of the law as I understand it giving full effect to the existing legislation, the mother of an illegitimate child, who has not abandoned it, who is of good character and is able and willing to support it in satisfactory surroundings, is not to be deprived of her child merely because on a nice balancing of material and social advantages the Court is of [the] opinion that others, who wish to do so, could provide more advantageously for its upbringing and future.[21]

In *Re Mugford*, Schroeder J.A., affirming a decision to terminate permanent state wardship of a child, stated:

> One cannot over-estimate the importance to a child of living, moving, and having its being in an environment shared by its own blood kin where it will enjoy the warmth and affection of the mother who gave it birth. These are but a part of the intangible values which flow from a custom deeply rooted in our way of life against which superior material advantages which a child may enjoy in the home of strangers in blood cannot accurately be measured on the most delicately balanced scales. The law is on the side of the natural parents unless for grave reasons, endangering the welfare of the child, the Court sees fit not to give effect to the parents' wishes.[22]

In *Children's Aid Soc'y of Winnipeg v. M.*, Freedman C.J. upheld a decision dismissing a wardship application, stating that "the right of a natural parent to the care and control of a child is basic. It is a right not easily displaced. Nothing less than cogent evidence of danger to the child's life or health is required before the court will deprive a parent of such care and control".[23]

Similarly, in *Re Chrysler*, Judge Karswick refused to make a wardship order and returned a young child to the custody of her parents

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[19] *See also* SPECIAL JOINT COMMITTEE, *supra* note 2, Issue No. 43, at 56-61, where a government member specifically stated that s. 8 of the Charter is intended to guarantee the family and home from unreasonable interference; *see* discussion accompanying note 116 *infra*.

[20] [1950] S.C.R. 737, at 744, [1950] 4 D.L.R. 1, at 7; *see also* Hepton v. Maat, [1957] S.C.R. 606, 10 D.L.R. (2d) 1; Wiltshire v. Wiltshire, 20 R.F.L. 50 (Ont. H.C. 1975); and More v. Primeau, 2 R.F.L. (2d) 254 (Ont. C.A. 1978).

[21] *Id.* at 746, [1950] 4 D.L.R. at 9.

[22] [1970] 1 O.R. 601, at 609, 9 D.L.R. (3d) 113, at 121 (C.A.), *aff'd, sub nom.* Prospective Adoptive Parents v. Mugford, [1970] S.C.R. 261, 9 D.L.R. (3d) at 122n.

[23] 15 R.F.L. (2d) 185, at 188 (Man. C.A. 1980).

under agency supervision. He emphasized that even though there might be some risk involved in sending a child back to a purportedly neglectful parent, that risk "must still give way to the greater risk of the irreparable harm that can be inflicted upon a child and the danger to society of the serious undermining of the parents and the family if a C.A.S. [Children's Aid Society] is permitted to act in an arbitrary way. . .".[24]

Canadian judges have been prepared to protect parents from interference by the state or others, in particular interpreting legislation in such a way as to maximize the rights of natural parents threatened with loss of custody of their children. The authors would argue that this special judicial concern, as part of our common law tradition of protecting the individual, should be reflected in the interpretation of the concept of "liberty" in section 7 of the Charter of Rights.[25]

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[24] 5 R.F.L. (2d) 50, at 59 (Ont. Fam. Ct. 1978); for other examples of the same judicial approach, *see Re* Goneya, 79 A.P.R. 92, 28 Nfld. & P.E.I.R. 92 (P.E.I.S.C. 1979), and *Re* W., 32 R.F.L. (2d) 153, especially at 187-88 (Man. C.A. 1982). For a somewhat different view, however, *see* Children's Aid Soc'y of Ottawa-Carleton v. D.J.L., 15 R.F.L. (2d) 102 (Ont. Fam. Ct. 1980).

[25] The authors were not able to find any published Canadian commentary giving extensive consideration to the meaning of "liberty" in s. 7 of the Charter. The commentators discussing the issue even briefly were divided in their views. D. MCDONALD, *supra* note 4, at 27 notes that American constitutional jurisprudence on the Fifth and Fourteenth Amendments has given the concept of "liberty" in that country "surprising breadth — it is not merely the antonym of physical restraint — but it is not without limits". In a footnote the author quotes passages from Meyer v. Nebraska, *supra* note 9, and Roe v. Wade, *supra* note 10. M. MANNING, RIGHTS, FREEDOMS AND THE COURTS: A PRACTICAL ANALYSIS OF THE CONSTITUTION ACT, 1982, 242-44 (1983) supports a broad interpretation.

A much narrower view is taken by Garant, *Fundamental Freedoms and Natural Justice*, in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY 257 (W. Tarnopolsky & G. Beaudoin eds. 1982). The author states at 263:

> In positive law, the concept of "liberty" appears in criminal and civil law. . . . It is a multi-faceted concept that applies to States, governments, collectivities, territories, physical places, juridical and natural acts, goods, legal entities, and physical persons. "Liberty of the physical person," in contrast, is concerned above all with criminal law, civil law and administrative law.
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> The liberty of the person envisaged by s. 7 must be distinguished from those liberties enumerated in s. 2, which is also concerned with the person, but from its moral, spiritual or psychological aspect.
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> Certainly in a general sense one can conceive that the term "liberty" has a value with regard to all the rights and freedoms recognized by the Charter. However, the structure of the Charter requires us to give the concept a residual and restrictive sense in considering s. 7. Contrary to the Canadian Bill of Rights, which recognizes the right to liberty, in s. 1, in a broad and introductory way, s. 7 is concerned with the right to liberty following other dispositions which grant rights of a moral order, like the fundamental freedoms (s. 2), democratic rights (ss. 3 to 5), and mobility rights (s. 6). The "liberty" envisaged by s. 7 is found in a section consecrated to "legal rights" and precedes ss. 8 to 14, which deal with various aspects of the rights of the physical person.
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> The right to liberty of the physical person signifies the absence of constraints or external interference of a nature such as are enumerated in ss. 8 to 14.

The Parliamentary debates and much of the jurisprudence, both American and Canadian, refer to the need to protect the "family unit". It is, however, possible to distinguish at least two different, yet interrelated interests. One is familial integrity — an interest in upholding the family as an autonomous, independent unit in society. The other is parental authority — a *parental* right to enjoy family life and control various aspects of a child's life, free from unnecessary outside interference. Though conceptually distinct, and not always necessarily harmonious,[26] the courts and legislatures have tended to give recognition and protection only to a right of parental authority, though they sometimes justify this on the basis of promoting familial integrity.[27]

The common law has viewed the parent as the child's natural guardian and has given him a broad range of rights in this regard. At

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And Garant writes further, at 270:

> We believe that the term "liberty" utilized in s. 7 must be understood in a restrictive sense. Section 7 is concerned with physical liberty of the person, the right to dispose of one's own body, of one's person; in this context the right to liberty cannot signify "the right to a free exercise of human activity", contractual freedom, freedom of choice of mode of life, professional freedom, etc.

It would seem that Garant interprets the word "liberty" as being virtually synonymous with "security of the person".

[26] *See* Keiter, *Privacy, Children, and Their Parents: Reflections on and Beyond the Supreme Court's Approach*, 66 MINN. L. REV. 459 (1982). The author identifies three distinct interests. He states at 492-93:

> When the interests of parent and child collide, however, it is not clear that the constitutional principles underlying these decisions necessarily support legislative reinforcement of parental child rearing prerogatives. Three distinct, yet interrelated constitutional principles emerge . . . to limit the state's authority . . . to regulate family matters — parental authority in child rearing, family privacy and family institutional integrity. These principles are neither synonymous nor necessarily harmonious with each other. This becomes particularly evident when each principle is individually evaluated as the basis for a state legislative decision requiring parental involvement in situations implicating children's constitutional . . . interests. The concept of parental authority certainly serves as a legitimate state interest underlying a legislative decision to reinforce the parental role. The concept of family privacy, however, suggests that state intrusion into the family in any guise, even to support the parental role, is undesirable. The principle of family institutional integrity, which recognizes the fundamental importance of the family unit to all members, also mitigates against any form of state legislative interference that might jeopardize the family as a unit. Therefore, when the state . . . chooses to reinforce parental authority in real or potential parent-child conflict situations, it may be overlooking or disregarding other important interests, each with venerable constitutional status in its own right.

[27] *See*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW 986-87 (1978):

> [A]lthough the [United States Supreme Court] has spoken of decisions such as these as recognizing a "private realm of family life which the state cannot enter" without compelling justification. . . .
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> . . . such "exercises of familial rights and responsibilities" . . . prove to be *individual* powers to resist governmental determination of who shall be born, with whom one shall live, and what values shall be transmitted.

common law, a parent has the right to custody and control of, to direct the education and religious training of, to discipline, and to make health care decisions regarding, his child. In various Canadian jurisdictions, some of these rights have been modified and codified by statute.[28]

The protection of parental rights is based, at least in part, on a belief that parents will act to promote their child's interests. To protect these rights, therefore, is to promote a child's welfare. Further, as parents in our society have primary responsibility for the care of children whom they have brought into the world, they ought to be given a significant set of rights in regard to those children. It is also recognized that even well-intentioned state involvement in a child's life may not be beneficial. The resources of the state to care for and control children are inevitably limited, and so it is felt presumptively best to leave a child in his natural environment, particularly since any change is bound to have a disruptive effect upon the child. Most fundamentally, perhaps, parental rights are viewed as "natural rights". It is accepted as a basic tenet of our culture that parents have a "right" to control and care for their children; this right is inextricably bound to our view of a society based on the primacy of the individual.

It is the authors' view that section 7 of the Charter protects "parental rights" as one of its "liberty interests". Later it will be argued that children as well have constitutional rights which they can assert on their own. Of course, none of these are absolute. The various constitutional rights which parents and children may have and questions which arise when these rights have to be declared against each other, and against societal interests, will also be discussed.

III. "In Accordance with the Principles of Fundamental Justice"

Assuming acceptance of the argument that "liberty" includes some notion of familial rights, the second issue to be considered is the meaning of the words "in accordance with the principles of fundamental justice".

Section 7 of the Charter allows the state to infringe upon rights of liberty, including any notion of familial rights, as long as the infringement occurs "in accordance with the principles of fundamental justice". This phrase was not widely used by Canadian courts but does appear in paragraph 2(*e*) of the Canadian Bill of Rights which provides that "no law of Canada shall be construed or applied so as to . . . deprive a person of the right to a fair hearing in accordance with the

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[28] For a discussion of the scope of parental rights at common law and under legislation, *see* Dickens, *The Modern Function and Limits of Parental Rights*, 97 L.Q.R. 462 (1981); White, *A Comparison of Some Parental and Guardian Rights*, 3 Can. J. Fam. L. 219 (1980); and Eekelaar, *What are Parental Rights?*, 89 L.Q.R. 210 (1973).

principles of fundamental justice for the determination of his rights and obligations".[29]

In *Duke v. The Queen*, the Supreme Court of Canada considered the proper interpretation of this section. Fauteux C.J.C., writing for the majority of the Court, stated:

> Under s.2(e) of the *Bill of Rights* no law of Canada shall be construed or applied so as to deprive him of "a fair hearing in accordance with the principles of fundamental justice." Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.[30]

In *R. c. Elms*,[31] a recent Quebec decision, an interpretation of section 7 of the Charter was offered which seems to follow closely the approach of *Duke*. Lanctôt J. stated:

> Les principes de justice fondamentale sont en particulier la règle de l' 'audi alteram partem', c'est-à-dire qu'une personne ne peut pas être jugé pour quoi que ce soit sans avoir eu l'occasion de se faire entendre. Cela en est un des principes de justice fondamentale.
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> La justice ne doit pas être biaisée, en ce sens que le juge qui décide ne doit pas avoir été acheté, ne doit pas avoir de relation avec la personne accusée. On appelle cela le 'biais'. Il y a d'autres principes de justice fondamentale également qui ne me viennent pas à l'esprit immédiatement. Mais le principal, c'est l' 'audi alteram partem'.
>
> L' 'audi alteram partem' suppose qu'une personne a eu toutes les chances possibles de répondre à une accusation qui est portée. . . .

Some courts have treated the term "principles of fundamental justice" as roughly equivalent to "natural justice". Indeed, in *Re Jamieson and The Queen*, Durand J. simply stated, "It is also established that the words 'fundamental justice-justice fondamentale' are synonymous with 'natural justice-justice naturelle'."[32]

At the Parliamentary Joint Committee on the Constitution, Dr. B. Strayer, Assistant Deputy Minister, Public Law, of the federal Department of Justice, commented that the "term 'fundamental justice' appears to us to be essentially the same thing as natural justice".[33]

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[29] R.S.C. 1970, App. III.

[30] [1972] S.C.R. 917, at 923, 28 D.L.R. (3d) 129, at 134. It should be noted that the words "in accordance with the principles of fundamental justice" in sub. 2(3) of the Bill of Rights define "fair hearing", and this may tend to restrict the interpretation given them by decisions like *Duke*. It may be argued that the words have a much broader meaning in s. 7 of the Charter. *See* discussion accompanying note 88 *infra*; and remarks of Laskin C.J. (dissenting) in Morgentaler v. The Queen, [1976] 1 S.C.R. 616, at 633, 53 D.L.R. (3d) 161, at 174.

[31] (Not yet reported, Que. C.S.P., 29 Sep. 1982).

[32] 70 C.C.C. (2d) 430, at 438 (Que. C.S. 1982).

[33] SPECIAL JOINT COMMITTEE, *supra* note 2, Issue No. 46, at 38.

Similar views have been expressed by a number of scholarly commentators.[34]

The term "natural justice" has been the subject of very extensive judicial interpretation and academic commentary, particularly in the administrative law field. If "fundamental justice" is considered to be synonymous, the courts should be greatly facilitated in the task of defining the specific procedural protections afforded by section 7 of the Charter.

The concept of natural justice is composed of two main principles. First, an adjudicator must be disinterested and unbiased; and second, the parties must be given adequate notice and an opportunity to be heard (*audi alteram partem*). From these two principles flow a number of specific procedural rights which would generally include:[35]

- the right to have the decision made by a person who is free of bias or who does not give rise to a reasonable apprehension of bias, and who has heard all the evidence and argument;
- the right of each party whose rights may be affected to notice thereof with sufficient information concerning the allegations against him to enable him to make adequate reply;
- the right to a genuine hearing at which each party affected is made aware of the allegations against him and is permitted to answer;
- the right of each party to cross-examine witnesses giving evidence against his interest;
- the right to be represented by counsel;
- the right to make a reasonable request for an adjournment so as to permit a party affected properly to prepare and present his case.

It must be kept in mind that "the rules of natural justice are not rigid norms of unchanging content, and their ambit may vary according to the context".[36] Thus the procedural safeguards necessary to ensure that the requirements of the "principles of fundamental justice" are satisfied will depend on the nature of the right being adjudicated and on the circumstances of the case.

Parliamentary proceedings, the bulk of academic commentary and much of the recent caselaw indicate that the "principles of fundamental justice" are procedural in nature, consisting essentially of the rules of natural justice. The concept, however, may be considerably broader and may have a substantive element as well. The Fifth and Fourteenth

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[34] P. HOGG, CANADA ACT 1982 ANNOTATED 27 (1982); W. TARNOPOLSKY, THE CANADIAN BILL OF RIGHTS 264 (2d ed. 1975); Garant, *supra* note 25, at 278; and Gold, *The Legal Rights Provisions — A New Vision or Déjà Vu?*, 4 SUP. CT. L. REV. 107, at 110-11 (1983).

[35] DE SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 156 (4th ed. J. Evans 1980); D. MCDONALD, *supra* note 4, at 23; 1 ROYAL COMMISSION OF INQUIRY INTO CIVIL RIGHTS, Report No. 1, 137 (McRuer Commissioner 1968); and Garant, *supra* note 25, at 278-90.

[36] DE SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, *id.* at 163.

Amendments of the American Constitution guarantee that no person shall be deprived of "life, liberty or property, without *due process of law* [emphasis added]". In the United States, the concept of "due process" has developed two branches, one "procedural" and the other "substantive".

"Procedural due process" ensures that an individual is to be deprived of the rights of "life, liberty or property" only if certain procedural safeguards are satisfied.[37] The concept of procedural due process is the requirement of natural justice. Clearly, however, the American courts have taken a relatively broad view of such procedural rights, for example, by constitutionally requiring that the state provide counsel to an indigent person who faces a loss of liberty.[38] Requirements of procedural due process thus provide a basis for judicial scrutiny of the adequacy of legal procedures.

The doctrine of "substantive due process" provides that certain freedoms are to be afforded special constitutional protection. A "zone of privacy" is recognized in which state action is severely constrained. An American author summarizes the doctrine as recognizing the following:

> [A]t least to some extent, individual decisions concerning marriage, procreation, contraception, family relationships, child rearing, and education implicated fundamental privacy rights. . . . [O]nce state legislative action infringed on a fundamental right, the infringement would withstand constitutional scrutiny only if the state could demonstrate that a compelling interest supported the legislative scheme and that the means chosen for the accomplishment of those objectives were the narrowest possible.[39]

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[37] In Morrissey v. Brewer, 408 U.S. 471, at 481 (1972), His Honour Chief Justice Burger explained the approach of the Court in determining whether constitutional provisions requiring procedural due process are satisfied:

> Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grevious loss". . . . The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment. . . . Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court . . . that due process is flexible and calls for such procedural protections as the particular situation demands . . . "what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action". . . . To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

[38] *See* Gideon v. Wainwright, 372 U.S. 335 (1963); and *Re* Gault, 387 U.S. 1 (1967) (where due process rights, including the right to have counsel paid by the state, were granted to a juvenile).

[39] Keiter, *supra* note 26, at 465. A detailed consideration of the American constitutional doctrine of substantive due process is far beyond the scope of this paper. For a discussion of this topic, *see, e.g.*, M. MANNING, *supra* note 25, at 155-64; L. TRIBE, *supra* note 27, especially chs. 7 and 15; and *Developments in the Law: The Constitution and the Family*, *supra* note 5, at 1166-87.

Thus the due process clause affords more than mere procedural protection. In *Griswold v. Connecticut*,[40] for example, it was held that there was a constitutionally protected right of marital privacy, and that a state statute forbidding use of contraceptives was an unconstitutional interference with this right. Similarly, in *Roe v. Wade*,[41] a Texas statute prohibiting all non-therapeutic abortions was held to be an unconstitutional state interference in a matter in which the stage ought not to be involved. It was accepted that the state may still have a valid interest in regulating abortions in some circumstances, for example, when necessary to ensure that an abortion does not threaten a woman's health or in certain situations involving pregnant minors. However, a complete ban on non-therapeutic abortions or a requirement that every pregnant minor have parental consent for an abortion was declared to violate the principle of substantive due process.[42]

Paragraph 1(*a*) of the Canadian Bill of Rights[43] explicitly recognizes "the right of the individual to life, liberty, security of the person . . . and the right not to be deprived thereof except by due process of law"; Laskin J. (as he was then) in *Curr v. The Queen*[44] seemed to suggest that despite the use of the term "due process", the concept of substantive due process was not to be introduced into the Canadian legal system. By deliberately avoiding the use of the term "due process" in the Charter of Rights, it seems clear that at least some of the framers of this constitutional document intended to exclude any notion of substantive due process from the expression "in accordance with the principles of fundamental justice". At the Parliamentary Joint Committee on the Constitution, Dr. B. Strayer expressed the following view:

> [I]t was our belief that the words "fundamental justice" would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to the policy of the law in question. . . .
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> [In the United States] the term due process has been given the broader concept of meaning both the procedure and substance. Natural justice or fundamental justice in our view does not go beyond the procedural requirements of fairness.[45]

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[40] 381 U.S. 479 (1965). *See also* Carey v. Population Servs. Int'l, 431 U.S. 678 (1977), where a state law prohibiting distribution of contraceptives to minors under the age of sixteen was struck down as a violation of the concept of substantive due process.

[41] *Supra* note 10.

[42] *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); and Bellotti v. Baird II, 443 U.S. 622 (1979).

[43] R.S.C. 1970, App. III.

[44] [1972] S.C.R. 889, 26 D.L.R. (3d) 603. *See* M. MANNING, *supra* note 25, at 255-56 for a commentary which argues that *Duke* and *Curr* should not be used as a basis for a strictly procedural interpretation of "the principles of fundamental justice".

[45] SPECIAL JOINT COMMITTEE, *supra* note 2, Issue No. 46, at 32; *see also* comments of Dr. Strayer, The Honourable Jean Chrétien, then Minister of Justice, and Mr. Fred Jordon, Senior Counsel, Public Law, Federal Department of Justice, *id.* at 32-43.

A number of recently decided Canadian cases have accepted the argument that section 7 of the Charter is procedural only. As Matheson J. stated in *Clark v. Clark*, its effect "is procedural and not substantive in that it may be used to impugn the form of an infringement of the guaranteed rights but not the substance thereof".[46]

Some courts, however, are clearly prepared to take a broader view of section 7. In *Re Sec. 94(2) of the Motor Vehicle Act*, the British Columbia Court of Appeal struck down provincial legislation which created a strict liability offence having a minimum sentence of seven days imprisonment for any person driving while prohibited from doing so or while his licence was suspended, regardless of whether or not he knew of the prohibition or suspension. The Court noted the potential unfairness of a strict liability offence and concluded:

> The Constitution Act . . . has added a new dimension to the role of the courts; the courts have been given constitutional jurisdiction to look at not only the vires of the legislation and whether the procedural safeguards required by natural justice are present but to go further and consider the content of the legislation.
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> . . . .
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> . . .[T]he meaning to be given to the phrase "principles of fundamental justice" is that it is not restricted to matters of procedure but extends to substantive law and . . . the courts are therefore called upon, in construing the provisions of s. 7 of the Charter, to have regard to the content of legislation.[47]

At least one academic commentator, Professor John Whyte, has also suggested that section 7 should not be restricted to a notion of procedural due process. Though he acknowledges that the "dominant academic and bureaucratic opinion" has been that section 7 embodies procedural standards only, he comments:

> In a purely speculative vein there is reason to doubt that this restricted meaning to s. 7 will, in the long run, prevail. In the first place, the changing of the language from "due process" to "principles of fundamental justice" is seemingly a change from a procedural norm to a norm which requires the judges to inquire into the justice of the law.[48]

Whyte goes on to suggest that case law such as *Duke v. The Queen* interpreting paragraph 7(*e*) of the Canadian Bill of Rights is not

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[46] 40 O.R. (2d) 383, at 385 (Cty. Ct. 1982). *See also Re* Jamieson, 70 C.C.C. (2d) 430 (Que. C.S. 1982).

[47] 2 C.R.D. 775.05-01 (1983); *see also* R v. Hayden, 9 W.C.B. 385 (Man. Prov. Ct. 1983).

[48] *Developments in Constitutional Law: The 1981-82 Term*, to be published in 5 SUP. CT. L. REV. (1983). In *Prostitution: Municipal Regulations and the Domain of Criminal Law Meet Again*, 32 C.R. (3d) 107 (1983), Whyte adds, at 114, that "the natural meaning to give the word 'justice' is not a set of procedural standards, but rather a political virtue applicable to the allocation of benefits and punishments". *See also* remarks of Edwin Webking, Chairman of the Canadian Federation of Civil Liberties and Human Rights Associations, SPECIAL JOINT COMMITTEE, *supra* note 2, Issue no. 21, at 21 where he stated, "[W]e feel that the principles of fundamental justice are more encompassing than simple due process."; M. MANNING, *supra* note 25, at 255-63.

applicable to the Charter, since in the Bill of Rights the expression "fundamental justice" specifically relates to a "fair hearing for the determination of one's rights and obligations".[49]

By way of conclusion, it is clear that the words "in accordance with the principles of fundamental justice" will at least be interpreted to mean that principles of procedural due process or natural justice must be upheld. It may well be that section 7 has a broader meaning. In *Re Potma and The Queen*, Robins J.A. remarked:

> This is not to suggest that "the principles of fundamental justice" now recognized by the *Charter of Rights and Freedoms* are immutable. "Fundamental justice", like "natural justice", or "fair play", is a compendious expression intended to guarantee the basic right of citizens in a free society to a *fair procedure*. The principles or standards of *fairness* essential to the attainment of fundamental justice are in no sense static, and will continue as they have in the past to evolve and develop in response to society's changing perception of what is *arbitrary, unfair or unjust*.[50]

This suggests that while section 7 has a "procedural core", it may also have a "substantive tinge". While it is improbable that Canadian courts will quickly undertake the broad substantive reviews of legislation which have been the hallmark of American constitutional jurisprudence, they may cautiously move beyond the procedural core of section 7. In much of the following discussion, only that procedural core will be considered. Where appropriate, however, situations will be discussed in which the courts may move beyond this and invoke section 7 to strike down legislation viewed as "arbitrary, unfair or unjust".[51]

IV. Parental Rights

Section 7 of the Charter of Rights stipulates that no person shall be deprived of "liberty . . . except in accordance with the principles of fundamental justice". Above it was argued that this constitutional provision should protect the parental right to enjoy family life as an aspect of the "liberty interest", and a description of the meaning of "the principles of fundamental justice" was sketched. In this section, some suggestions will be offered about who may invoke these rights and some discussion made concerning possible violations of parental rights under the Charter. In the following section, the nature of the constitutional rights a child may have will be outlined and consideration given to how

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[49] The same line of argument was employed in R. v. Carriere, 2 C.R.D. 850.60-10 (Ont. Prov. Ct. 1983) where s. 7 of the Charter was invoked to exclude evidence under a writ of assistance issued under the Food and Drugs Act, R.S.C. 1970, c. F-27.

[50] 41 O.R. (2d) 43, at 52 (C.A. 1983) (emphases added).

[51] Finkelstein, *The Relevance of Pre-Charter Case Law for Post-Charter Adjudication*, 4 Sup. Ct. L. Rev. 267, at 280 (1983) seems to suggest that s. 7 has a substantive nature as well. The author asserts, without discussion, that a law providing for compulsory sterilization of all mentally retarded persons could be struck down as a violation of the "liberty interest" of those persons.

parental rights are to be weighed against the rights of a child and the interests of the state.

A. *Unwed Fathers*

In some judicial decisions, such as *Chidren's Aid Soc'y of Metro Toronto v. Lyttle*,[52] the courts have shown a concern with ensuring that fathers of a child born out of wedlock have a right to notice and to participate in legal proceedings at which the fate of their children is to be decided. Canadian legislatures, however, have sometimes shown much less concern for the parental rights of unwed fathers. For example, Manitoba's Child Welfare Act defines a child in need of protection to include "a child born of parents not married to each other whose *mother* refuses or is unable to maintain him";[53] no mention is made of the ability of the father of a child born out of wedlock to care for the child. Similarly, in several provinces, a child born out of wedlock can be adopted without the father having to consent or even being notified of the proposed adoption, but a mother's consent is always required[54] (unless the child is a ward of the state or a court order is made dispensing with a mother's consent).

It seems inevitable that legislation which discriminates against unwed fathers will be challenged as a violation of the Equality Rights provisions of section 15 of the Charter after that section comes into effect in April 1985.[55] In the meantime, however, a strong challenge can

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[52] [1973] S.C.R. 568, 34 D.L.R. (3d) 127.

[53] S.M. 1974, c. C-80, para 16(*f*) (emphasis added). This legislative provision prompted Huband J.A. to remark in Children's Aid Soc'y of Winnipeg v. Sinclair, 5 Man. R. (2d) 170, at 175 (1980):

> The natural mother has a *prima facie* right of custody against all others, including the putative father, and that right can be interfered with only where there are serious and important reasons affecting the welfare of the child to warrant such interference. A putative father has no comparable rights, either as against the mother, or against the Children's Aid Society which claims guardianship with the mother's apparent approbation.
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> . . . A putative father has few rights, if any, relative to custody of a child.

[54] *See, e.g.*, the Adoption Act, R.S.B.C. 1979, c. 4, s. 8; and The Family Services Act, R.S.S. 1978, c. F-27, ss. 2, 52. *See* the brief comment of McLeod, *Annotation to Re J.R.M.*, 28 R.F.L. (2d) 131, at 132 (1982) which supports the view that an unwed father may have rights under s. 7 of the Charter in regard to the adoption of his child. In *Re* L.T.K., 31 R.F.L. (2d) 424 (Man. Cty. Ct. 1982), an unwed father tried to argue that the failure to give him notice of an adoption application concerning his child was "cruel and unusual treatment" and hence in violation of s. 12 of the Charter. The judge did not deal with the argument on its merits since the application was commenced prior to the Charter coming into force and the judge decided that the Charter was not "retroactive". If the father's case was based on s. 7, could he have argued that his rights were "procedural" and hence, could be applied after the Charter came into effect? In *Re* D.(M.), [1982] W.D.F.L. 726 (Ont. Fam. Ct. 1983), a similar issue arose, again without discussion of the applicability of s. 7 of the Charter.

[55] The Constitution Act, 1982, sub. 32(2) provides that s. 15 will come into force April 1985.

be made to such legislation on the ground that it violates rights protected under section 7 of the Charter.

In *Stanley v. Illinois*,[56] the United States Supreme Court declared unconstitutional state legislation making a child born out of wedlock a ward of the state upon the death of his mother. The Court recognized that the state has a right, indeed a duty, to protect minor children, and that many children born out of wedlock might be in need of protection upon the death of their mothers. But the Court emphasized that an unwed father has a substantial "liberty interest" in raising his child,[57] and held that the state could not deprive him of this interest on the basis of a mere presumption that unwed fathers are unfit parents.[58] Due process, said the Court, demanded that Stanley have a hearing to determine *his* fitness as a parent.[59] In other American cases it has been held that procedural due process requires that a father of a child born out of wedlock have reasonable notice of a proposed adoption and be given an opportunity to be heard before his parental rights are terminated.[60]

In Canada, it would seem that a constitutional challenge can be made under section 7 of the Charter to adoption and child protection legislation which denies an unwed father the right to reasonable notice or to a hearing before a decision is made concerning his child. Clearly the "principles of fundamental justice" require notice and an opportunity to participate in a hearing. The key to making a successful constitutional challenge depends upon demonstrating that an unwed father has a substantial "liberty interest" in such a proceeding. If it is accepted that "liberty" generally includes a right to enjoy familial relationships, it may be difficult to deny an unwed father procedural protection for this right, particularly a father who has established a meaningful relationship with the child in question.

It is not adequate to presume simply that all unwed fathers should be denied "liberty" rights without notice or a hearing. Of course, when a case involving the welfare of a child is decided on its substantive merits, it may be that the parental rights of an unwed father will be curtailed or terminated. Often unwed fathers have little contact with their offspring, but this does not mean that all such men should be denied the right to participation in legal decisions concerning their children. As was noted in *Stanley v. Illinois*:

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[56] 405 U.S. 645 (1972).

[57] *Id.* at 652.

[58] *Id.* at 657-58.

[59] *Id.*

[60] Lutheran Social Servs. of New Jersey v. Doe, 411 A.2d 1183 (N.J. Super. Ct. 1979). *See also* Quilloin v. Walcott, 434 U.S. 246 (1978).

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child.[61]

The argument opposing discrimination against unwed fathers, as contrasted to unwed mothers, in terms of rights to notice and participation in a proceeding, is strengthened by section 28 of the Charter which provides that the "rights and freedoms" referred to in the Charter, including the "liberty rights" of section 7, are "guaranteed equally to male and female persons".

Of course, the rights in the Charter are not absolute, but rather, as set out in section 1, are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It would not therefore seem necessary to extend to all unwed fathers a full panoply of procedural rights. By way of example, the Child Welfare Act of Ontario, for the purposes of protection and adoption proceedings, defines "parent" to include a biological father who has established or acknowledged his paternity.[62] It would seem to be a "reasonable" limitation to protect the procedural rights of unwed fathers who can be identified with reasonable effort *but* not to deny automatically all unwed fathers these rights.

In summary, it is the authors' view that an aspect of the "liberty" of an unwed father is his right to enjoy a relationship with his child. This does *not* mean that he cannot be deprived of custody of his child, or have the relationship to his child severed through child protection proceedings and adoption. But it does mean that, subject to such "reasonable limits" as may be "demonstrably justified in a free and democratic society", he can forfeit this aspect of his liberty only "in accordance with the principles of fundamental justice".

B. *Foster Parents*

In Canada, until relatively recently, those who voluntarily agreed to care for the children of others, whether at the request of the biological parents or of the state after the children were made state wards, had few, if any, legal rights in regard to the children. The legal custodian, whether a biological parent or a state agency, could simply remove the child without notice and without any sort of a hearing. In the past few years, some courts and legislatures[63] have come to grant limited legal

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[61] *Supra* note 56, at 656-57. For a very interesting discussion of this case and the constitutional difficulties surrounding the use of conclusive presumptions, *see* Tribe, *Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles*, 39 LAW AND CONTEMP. PROBLEMS (no. 3) 8 (1975).

[62] R.S.O. 1980, c. 66, paras. 19(1)(*e*) and 69(1)(*c*).

[63] *See, e.g.*, *Re* Moores, [1973] 3 O.R. 921, 38 D.L.R. (3d) 641 (C.A.) (where persons having *de facto* care of a four-year-old child almost since birth were awarded custody over the biological mother); the Family Law Reform Act, R.S.O. 1980, c. 152,

recognition to those who have cared for children and who, in many cases, have become the only "psychological parents" some children have.

In the United States there have been a number of reported decisions in which foster parents have claimed to be entitled to procedural due process under the Fourteenth Amendment before their relationship to a child in their care is severed. Clearly, in many instances foster parents will have no right to constitutional protections, as the relationship to the child is not strong enough and there is no reasonable expectation of the formation of any stable relationship.[64] In *Rivera v. Marcus*, however, the Court was prepared to extend a range of due process protections to a foster mother who was a blood relative of the child before allowing the child's removal by the welfare department which had legal custody. The Court stated:

> [T]here would appear to be instances in which a liberty interest should be recognized where long term family relationships evolve out of foster home placements. It seems clear that, as with a biological parent and child, strong, loving emotional and psychological ties can develop among members of a long term foster family. Any arbitrary state interference with those ties surely can result in harsh and lasting consequences to the foster child and to the foster family members. In these special circumstances, it would seem that a pre-removal hearing which comports with constitutional standards may be required.[65]

In some circumstances, foster parents in Canada might argue that they too have a right not to be deprived by state action of the care of a child with whom they have established a stable relationship "except in accordance with the principles of fundamental justice". The recognition of such procedural rights would be in accordance with the tentative legislative and judicial steps which have been taken in this country, and with the growing body of evidence supporting a child's need for stable relationships with his "psychological parents".[66]

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para. 1(*e*) ("*parent* . . . includes a person who has demonstrated a settled intention to treat a child as a child of his or her family, but does not include a person in whose home a child was placed as a foster child for consideration by a person having lawful custody"); and the Child Welfare Act, R.S.O. 1980, c. 66, subs. 28(6), (8) (a foster parent having care of a child on behalf of a child protection authority for six continuous months has the right to notice of a protection hearing, to make representations and to be represented by counsel).

[64] *See, e.g.*, Kyees v. County Dep't of Pub. Welfare, 600 F.2d 693 (7th Cir. 1979).

[65] 8 F.L.R. 2270, at 2271 (D.C. Conn. 1982); *see also* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977); and Sherrard v. Owens, 484 F. Supp. 728 (W.D. Mich. 1980), *aff'd* 644 F.2d 542 (6th Cir. 1981).

[66] *See, e.g.*, J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973). *See also* W. v. Children's Aid Soc'y of Sarnia-Lambton, [1982] W.D.F.L. 1373 (Ont. Fam. Ct.) for a case where foster parents and a child in care sought to challenge the actions of the Children's Aid Society; and D.B. v. Director of Child Welfare for Newfoundland, 30 R.F.L. (2d) 438 (S.C.C. 1982) where the Court invoked its *parens patriae* jurisdiction to protect the rights of prospective adoptive parents who had a child arbitrarily removed from them after almost six months in their care.

V. CHILDREN, PARENTS AND THE STATE

A. *The Status of Childhood*

Children have limited intellectual, physical, social, psychological and economic resources. They are born in a state of total dependence, requiring constant care. As they mature, they gradually acquire the capacity to care for themselves. At some point they are deemed to be fully capable of caring for themselves, and become adults. At birth a child is not capable of exercising any rights on his own behalf; his parents, some other person or agency, or the state must do this. In certain matters, a child may acquire legal rights and responsibilities before becoming an adult. Upon becoming an adult, the former "child" acquires a full range of legal and citizenship rights, to be exercised in his own right.

A child has a particular legal "status". In recognition of the child's limited development there are certain legal obligations, privileges and incapacities ascribed to this status by operation of law. The common law and legislation provide that children are legally incapable of making various decisions which affect their lives though, for some matters, children who are older may have certain rights which are denied to younger children. In general, parents have a presumptive right allowing them to exercise a broad degree of control over their children, making decisions regarding such matters as place of residence, health care, discipline, education, religious training and even marriage.[67] As outlined above, at least in regard to some of these matters, parents can argue that they have a constitutionally protected "liberty interest", and exercise certain rights in regard to their children, subject to state intervention only "in accordance with the principles of fundamental justice".

The state also recognizes the status of childhood by exercising direct control over children, for example through school attendance laws and delinquency legislation. Furthermore, at some point the state is prepared to intervene and protect children *from* their parents, either through the medium of criminal law (*e.g.* prosecutions in cases of child abuse) or by invoking child protection legislation, and, if necessary, by removing a child from parental care. The state also recognizes the status of childhood by specifically denying children certain rights guaranteed to others. For example, section 3 of the Charter of Rights guarantees "every citizen of Canada . . . the right to vote in an election of members of the House of Commons or of a legislative assembly". It can no doubt be demonstrably justified in a free and democratic society that this is a right which should be denied citizens under a certain age, though there might be some argument as to what age constitutes a "reasonable limit".

The concern here is to consider what "liberty interests" a child may assert against the state and his parents, and the difficult issues which

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[67] *See* Dickens, White and Eekelaar, *supra* note 28, which deal with the extent of parental rights.

arise when the state interferes with parental "liberty interests" in order to protect a child from his parents.

B. *Child v. State*

There are a number of situations in which the state becomes directly involved in controlling the behaviour of young persons, and interfering with their "liberty or security of the person".

Perhaps the most obvious example is through delinquency legislation. At present, the Juvenile Delinquents Act provides that a child who violates the Criminal Code, any federal, provincial or municipal law, or who is guilty of "sexual immorality or any similar form of vice" commits the offence of delinquency, and faces a maximum possible sanction of removal from his home until the age of twenty-one.[68] Under this Act, it is the *child* who is the accused. It seems clear that as he faces a potential threat to his liberty and a restraint on his freedom, he is entitled to the protections given by the legal rights provisions of the Charter, including section 7. The Charter has already been successfully invoked in a number of juvenile cases[69] by the accused *child*, through his counsel, to ensure adequate protection of his rights. This is consistent with the approach in the United States, where courts have held that juveniles are entitled to a broad range of due process constitutional rights though, in view of the nature of the juvenile proceedings, they are denied certain rights guaranteed to adults, such as the right to a trial by jury.[70]

In a juvenile delinquency proceeding, the child and not the parent is a party to the proceedings. It is generally assumed that the child has the capacity to retain and instruct counsel and participate in the proceedings.[71] Since the child faces sanction and a loss of "liberty" if a

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[68] R.S.C. 1970, c. J-3, subs. 2(1), 3(1) and s. 20. The Young Offenders Act, S.C. 1980-81-82, c. 110, tentatively scheduled to come into effect 1 Oct. 1983, will replace the Juvenile Delinquents Act, altering the age jurisdiction and reducing the offence jurisdiction to violations of federal law.

[69] *See, e.g.*, R. v. V.T.W., 30 C.R. (3d) 193 (N.S. Fam. Ct. 1982) (s. 15 of the Juvenile Delinquents Act governing bail violates s. 7 and para. 11(*e*) of the Constitution Act, 1982). In R. v. D.M., 30 C.R. (3d) 210 (Ont. Fam. Ct. 1982), it was suggested by way of *obiter* that sub. 20(4) of the Juvenile Delinquents Act violates s. 7 of the Charter; *see also* R. v. W.(S.), [1982] W.D.F.L. 713 (Ont. H.C.); R. v. S.(K.), [1983] W.D.F.L. 017 (Ont. Fam. Ct. 1982) (a juvenile's statement excluded because of a denial of right to counsel, violating para. 10(*b*) of the Constitution Act, 1982); and R. v. N.C.A., [1983] W.D.F.L. 444 (Y.T. Terr. Ct.) (a defective information could not be rectified, a violation of s. 7 of the Charter).

[70] *See Re* Gault, *supra* note 38, and *In re* Winship, 397 U.S. 358 (1970) for cases granting rights to juveniles. In McKeiver v. Pennsylvania, 403 U.S. 528 (1971), a juvenile charged with a delinquency was held not to be constitutionally entitled to a jury trial; in Canada, R. v. B.(S.), [1983] W.D.F.L. 445 (B.C.C.A.) came to the same conclusion.

[71] *See* Maczko, *Some Problems with Acting for Children*, 2 CAN. J. FAM. L. 267, at 272-74 for a discussion of this issue.

conviction is registered, it is entirely justifiable that the child be granted constitutional protections in such proceedings.[72]

There are other proceedings in which a child faces a loss of "liberty" but for which Canadian courts and legislatures have thus far failed to grant rights of participation and constitutional protections. In a child protection proceeding, it can be argued that a child faces a loss of "liberty" since committal to the care of a state agency until adulthood may result. Such committal will involve the removal of a child from his natural family which may in itself be viewed as a deprivation of "liberty" under section 7 of the Charter. The child may be placed in a group home or other facility in which his movements and activities are controlled, and in some provinces may actually be put in a correctional institution in which juvenile offenders are situated.[73] In many jurisdictions, the

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[72] In *Re* Gault, *supra* note 38, the United States Supreme Court held that a boy charged with a delinquency has a range of constitutional rights. Mr. Justice Fortras remarked, at 27:

> It is of no constitutional consequence — and of limited practical meaning —that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes a "building with whitewashed walls, regimented routine and institutional hours. . .". Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

Canadian courts have shown some reluctance to adopt the approach of *Gault*. In R. v. Burnshine, [1975] 1 S.C.R. 693, 44 D.L.R. (3d) 584 (1974), the Supreme Court of Canada refused to accept an argument that provincial legislation which allowed for indeterminate sentences to be imposed on young offenders exceeding those which could be imposed on others violated the "equality before the law" provisions of s. 1 of the Canadian Bill of Rights. Martland J. stated at 407, "[T]he legislative purpose . . . was not to impose harsher punishment upon . . . a particular age group. . . . The purpose of the indeterminate sentence was to *seek to reform and benefit* persons within that younger age group [emphasis added]." Recently in R. v. B.(S.), *supra* note 70, the British Columbia Court of Appeal held that a juvenile could not rely on para. 11(*f*) of the Charter to obtain a jury trial for a charge under the Juvenile Delinquents Act as that Act does not contemplate punishment or the imposition of penalties, but rather requires "treatment":

> It is our view that while there may be a legislative intent to "help" or "treat" a child, the question of a restraint on "liberty" should be assessed from the point of view of the individual affected, not the basis of professed legislative intent. Further, it should be noted that the *Juvenile Delinquents Act* is enacted under the federal "criminal law" power, and should thus be treated as an essentially criminal legislation when assessing the impact of the Constitution Act on its provisions. See *Attorney General of British Columbia v. Smith* [1967] S.C.R. 702, C.R.N.S. 277, [1969] 1 C.C.C. 244, 61 W.W.R. 236, 65 D.L.R. (2d) 82 for a discussion of the constitutional nature of the *Juvenile Delinquents Act*.

[73] *E.g.*, The Family Services Act, R.S.S. 1978, c. F-7, para. 2(*n*) defines a "place of safety" to include a "correctional institution for boys or girls" but does not include a jail, prison, police station, lock-up or guardroom unless used temporarily and in an

grounds for finding a child in need of protection may effectively overlap with those which form the basis of a delinquency charge.[74] All of this suggests that a child's "liberty" is at stake in a protection proceeding.[75]

The principal parties to a protection hearing are the parents and the state. In many cases a child will lack the capacity or interest to participate meaningfully in a protection proceeding. In some provinces, children in certain limited circumstances are legislatively given rights of notice and participation in these hearings.[76] In other Canadian jurisdictions however, there are no such rights. A child who has the capacity to participate in a protection proceeding but who is denied the right to notice and participation may well be able to challenge the proceedings as violating his "liberty" rights under section 7 of the Charter.[77] Although parents may be viewed as "natural guardians",

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emergency. In Ontario, the Child Welfare Act, R.S.O. 1980, c. 66, para. 19(1)(*f*), s. 27 and sub. 28(13) provide that a child dealt with in a protection proceeding may not be detained in a training school, but such a child may be placed in an observation and detention home with children being dealt with under the Juvenile Delinquents Act.

[74] *E.g.*, the Child Welfare Act, R.S.O. 1980, c. 66, para. 19(1)(*b*) defines "a child in need of protection" to include a child with respect to whom "the person, in whose charge the child is, is unable to control the child"; evidence of criminal conduct is often used in an application based on this ground. The definition also includes a child "who without sufficient cause is habitually absent from . . . school"; a child brought before the court under this head might alternatively be charged as a "truant" under the Education Act, R.S.O. 1980, c. 129, and dealt with as a delinquent.

For a more general discussion of the relationship and overlap between protection and delinquency proceedings, *see* Landau, *Status Offences: Inequality Before the Law*, 39 U. TORONTO FAC. L. REV. 149, especially at 160-67, and N. BALA, H. LILLES & G. THOMSON, CANADIAN CHILDREN'S LAW: CASES, NOTES AND MATERIALS 471-78 (1982).

[75] The courts will doubtless face the argument that a protection proceeding is intended to "help" and "protect" the child, and hence should not be viewed as a restraint on a child's "liberty". For many of the reasons outlined in note 72 *supra*, the courts should determine whether there is a loss of "liberty" from the perspective of the individual claiming constitutional rights, not by considering the professed intent of the legislature in enacting the legislation.

[76] *E.g.*, in Ontario, a court may direct that counsel be provided for a child under the Child Welfare Act, R.S.O. 1980, c. 66, s. 20. Sub-section 27(7) provides for notice to a child presumptively if the child is over ten, and otherwise at the discretion of the court. Section 33 provides that a court may allow a child to be present at the hearing, and ss. 32, 35, 37 and 38 allow a child over the age of twelve to initiate a review of previous court orders.

[77] In W. v. Children's Aid Soc'y of Sarnia-Lambton, *supra* note 66, foster parents and a nine-year-old Crown ward, acting through counsel, sought to have the child found in need of protection as against the protection authorities. Under Ontario's Child Welfare Act, R.S.O. 1980, c. 66, sub. 38(1), only a child of *twelve* or more can apply for a review of a Crown wardship order. Counsel for the child argued:

> [T]o deny the child an opportunity for a review of her case under section 38 because of an apparently arbitrary age requirement would mean she herself would have no legal recourse in this court under the [Child Welfare] Act, which is contrary to the Canadian Charter of Rights and Freedoms to live with the security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice, and also to

protecting the rights of their children from the state, in many situations the parents may lack this inclination or ability; their views or interests may be antithetical to those of their child. The child with capacity should be able to participate in the proceedings in his *own* right.[78]

Other circumstances may exist where a child has the intellectual capacity and legal right to challenge directly state actions as violating his constitutional rights. For example, may a child who, at a public school, is subjected to corporal punishment or suspension by a teacher or a principal, an agent of the state, argue that his "liberty" or "security of the person" has been violated without regard to the "principles of fundamental justice"? Does it matter whether the student is seven or seventeen? Does it matter whether his parents approve or disapprove of this type of punishment?[79]

C. *Child v. Parent*

As discussed above, a parent is given a broad range of powers at common law and by legislation so as to enable him to make decisions regarding the life of his child and effectively to discipline and control him. The authors have argued that these parental rights are an aspect of "liberty" as used in section 7 of the Charter of Rights. The issue explored here is whether there are circumstances in which a child will be able to assert that his "liberty" is being infringed by his parents' decisions or conduct, thereby giving rise to constitutional protections.

Clearly the "liberty" interests of a child as against his parents are subject to extensive limitations. It would seem easy to justify demonstrably as reasonable a law which allows parents to determine where their nine-year-old child will reside. It is part of the concept of parental "liberty" that parents are entitled to make these decisions, at least as long as the child is not being harmed. In *Tischendorf v.*

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her rights under s. 8 wherein everyone has a right to be secure against unreasonable seizure. . . .

The court did not rule on this issue.

[78] *See* Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976) (in a child neglect proceeding a child was constitutionally entitled to have state appointed counsel), and *In re* D., 547 P.2d 175 (Or. 1976), *cert. denied* 429 U.S. 907 (1976) (court need not appoint counsel for a child in *all* termination proceedings).

[79] In Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd without opinion*, 423 U.S. 907 (1975) it was held that a student was constitutionally entitled to certain minimal procedural protections before receiving corporal punishment. In Ingraham v. Wright, 430 U.S. 651 (1977), the Supreme Court affirmed that school children do have a "liberty interest" requiring constitutional protection before corporal punishment, though it appeared to set quite a low standard for due process, saying, at 683, its requirements were "satisfied by . . . preservation of common law constraints and remedies". In Goss v. Lopez, 419 U.S. 565 (1975), the Court held, at 581, that a high school student facing a ten day suspension was threatened with a violation of a "liberty interest" and entitled to "notice of the charges . . . and an opportunity to present his side of the story".

Tischendorf,[80] the Minnesota Supreme Court ruled that once a court has decided, in an access dispute, that it is in the child's best interest to visit his father in Germany, the nine-year-old boy has no constitutional right to stay in the United States. The Court commented that "[w]hile children do possess constitutional rights, some of those rights may not become operative unless it can be demonstrated that the child can exercise them intelligently".[81] An alternative approach is to argue that whatever else "liberty", as used in section 7 of the Charter, may mean, it does *not* encompass a nine-year-old's right to determine where he will reside or what he will do with his life.

There are clearly many situations in which children lack the intellectual or emotional maturity to make decisions about their lives. However, there may be circumstances in which a child may seek to make a decision about his own life, and where to deny him this right is to infringe upon his "liberty" or upon other constitutionally guaranteed rights.

There has been a considerable amount of constitutionally based litigation in the United States concerning the rights of children to participate in health care decisions affecting their lives. Should parents decide such questions as whether their child will have an abortion,[82] or have access to contraceptives[83] or be committed "voluntarily" (*i.e.* by the parents) to mental health facilities?[84] What should be the rights of a child to participate in such decisions? Clearly the resolution of these issues will require a careful balancing of the rights of parent, child and state and will depend on the nature of the proposed treatment and the maturity of the child. It would not seem adequate, however, to deny a child all right to participate in a decision about such matters solely on the basis of age.

In regard to the issue of abortion, for example, it may be argued that the right to make a decision about such a matter is an aspect of "liberty". Though the state may have a right to regulate the procedure, the limitations must be "reasonable", and denial of access to an abortion should only be in accordance with the principles of fundamental justice. Presently in Canada, the effect of hospital practice and legislation is to require the consent of a parent or guardian before a girl under a certain age can have an abortion. Cannot a mature fifteen-year-old argue that such a decision is one that *she*, and not her parents, should make? Should her parents be able to force her to have an abortion if she does

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[80] 321 N.W. 2d 405 (1982).

[81] *Id.* at 410. In *Re* K.K., 31 R.F.L. (2d) 334, at 336 (Sask. U. Fam. Ct. 1982), it was held that a thirteen-year-old girl could not invoke the mobility rights guaranteed by sub. 6(2) of the Charter, as these rights were subject to "the reasonable limit of the legal guardian's right, prescribed by law, to determine where that child shall live".

[82] Carey v. Population Servs. Int'l, *supra* note 40.

[83] Planned Parenthood v. Danforth, Bellotti v. Baird, and Bellotti v. Baird II, *supra* note 42.

[84] Parham v. J.R., 442 U.S. 584 (1979); P.F. v. Walsh, 648 P.2d 1067 (Colo. 1982).

not want one?[85] It may be that an aspect of her liberty is being infringed if she is denied a right to make such an important decision, thus entitling her to some sort of hearing before being so deprived.[86] At least it should be possible for a mature girl to make this argument. Indeed, one may argue that since an adult woman is entitled to make a decision concerning abortion,[87] a mature girl cannot be denied the same right without offending the "principles of fundamental justice". Any requirements beyond those which apply to adults or are used for ascertaining a child's capacity to make this kind of decision might be viewed as a violation of section 7 of the Charter. Although this argument may apparently give the "principles of fundamental justice" a "substantive tinge", perhaps it merely reflects the impossibility of a tribunal or judge making decisions about the liberty of another person in a way which is not "arbitrary, unfair or unjust".[88]

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[85] *See* B. DICKENS, MEDICO-LEGAL ASPECTS OF FAMILY LAW 50-55 (1979) for a discussion of Canadian practice and law regarding abortions for minors. For an example of legislation requiring parental consent, *see* regulations made pursuant to the Public Hospitals Act, R.R.O. 1980, Reg. 865, ss. 50-51.

[86] *See In re* Mary P., 444 N.Y.S. 2d 545 (Fam. Ct. 1981) which upheld the constitutional right of a fifteen-year-old girl to refuse to have an abortion, despite parental wishes to the contrary.

[87] Her decision would, of course, be subject to the approval of a therapeutic abortion committee, as required by s. 251 of the Criminal Code. In many places in Canada, the obtaining of such consent is virtually a formality for an adult woman seeking to obtain an abortion though in other localities it may be quite difficult; *see* DICKENS, *supra* note 85, at 56-57.

The arguments made here can form the basis of a challenge to s. 251 of the Criminal Code as a violation of s. 7 of the Charter in that it denies adult women an aspect of their "liberty": the right to decide whether to have an abortion, without the approval of a third party, a therapeutic abortion committee. The success of this argument depends upon the interpretation of "liberty" and "security of the person", and will presumably require the courts to accept that the "principles of fundamental justice" guarantee substantive due process. Such challenges have been launched in the Ontario courts; *see Charter Used in Abortion Fight*, The Globe and Mail (Toronto), 29 Apr. 1983; Strauss and Slotnick, *Abortion Law is Challenged by Morgentaler*, The Globe and Mail (Toronto), 21 Jun. 1983. *See* Roe v. Wade, *supra* note 10, for an American approach to this issue. The argument made here is that a competent minor should have the same access to abortion as an adult. This of course says nothing about the essential constitutional legality of abortion. In a case currently before the courts, Borowski v. Minister of Justice of Canada, it is being argued that a fetus is guaranteed the "right to life" and hence s. 251 of the Criminal Code violates s. 7 of the Charter; *see* Steed, *Canada's abortion law on trial*, The Globe and Mail (Toronto), 9 Jun. 1983. Commentary on this topic is clearly beyond the scope of the present article.

[88] *See* discussion accompanying note 30 *supra*, concerning the meaning of "in accordance with the principles of fundamental justice".

Some of the issues which arise when adults or state agencies become involved in restricting a minor's access to abortion were a matter of public concern in a recent case involving a pregnant fifteen-year-old ward of the Cornwall Children's Aid Society: *see* Landsberg, *Raped, Pregnant: Agony of a Child's Fight for Abortion*, The Toronto Star, 19 Jan. 1983, at A-1.

For a further discussion of this issue, *see* Bellotti v. Baird II, *supra* note 42, and Batey, *The Rights of Adolescents*, 23 WM. & MARY L. REV. 363 (1982).

Parents generally make decisions about what schools and churches their children will attend. In Canada[89] and the United States[90] courts have upheld, as an aspect of religious freedom, the parental right to send a child to a religious rather than a public school. These cases have arisen in the context of quasi-criminal charges brought by the state against the parents for violating school attendance laws. Arguably, a mature child should have the right, as against his parents, to decide issues such as what church to attend and whether to enroll in a religious school.[91] Is a mature child not entitled to "freedom of conscience and religion" as guaranteed by section 2 of the Charter of Rights?

D. *State v. Parent*

The state has the right to protect children from harm and promote their welfare. This will inevitably involve some infringement or curtailment of parental rights, though doubtless much state action in this regard may be justified under section 1 of the Charter as "reasonable limits . . . demonstrably justified in a free and democratic society".

The state may enact laws which uniformly curtail rights of all parents. For example, certain laws require all parents to send their children to a school; a parent cannot decide that his ten-year-old child should join the labour force instead. Other laws may have a specific focus such as child protection legislation allowing the state to intervene to protect children when "the level of care . . . falls below that which no child in this country should be subjected to".[92]

It has been suggested that such intervention is justified as necessary to protect the child's constitutionally guaranteed "right to life and security of the person". In *Re Tamatha L. W. and Children's Aid Soc'y of York*,[93] parents challenged the admissibility of evidence in a protection hearing as having been obtained illegally and hence in violation of their right under section 8 of the Charter to be free from "unreasonable search". In holding that the evidence was admissible, Nevins J. considered it inappropriate to make comparisons with criminal cases where illegally obtained evidence was excluded:

> The case we have . . . is totally different in that the statute [Ontario's Child Welfare Act] under which this search was ostensibly conducted deals not only with the authority of representatives of the state, namely the Children's Aid Society, but more importantly deals with the *rights* of a class of persons who

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[89] R. v. Wiebe, [1978] 3 W.W.R. 36 (Alta. Prov. Ct.) (education law violates religious freedom guarantees of the Alberta Bill of Rights, S.A. 1972, c. 1).

[90] *See, e.g.*, Wisconsin v. Yoder, *supra* note 11; in a dissenting judgment, Mr. Justice Douglas raised the question of the child's rights to make this sort of decision.

[91] *See* Comment, *Adjudicating What Yoder Left Unresolved: Religious Rights for Minor Children after Danforth and Carey*, 126 U. PA. L. REV. 1135 (1978); *see also Developments in the Law: The Constitution and the Family*, *supra* note 5, at 1377-83.

[92] *Re* Brown, 9 O.R. (2d) 185, at 189, 21 R.F.L. 315, at 319 (Cty. Ct. 1976).

[93] [1983] W.D.F.L. 009 (not yet reported, Ont. Fam. Ct.).

> are not able to protect themselves, namely children. As against the child's *right* of course is the right of the adult parties, usually the parents, to be afforded the protections guaranteed by the Charter of Rights.
>
> In this context, I feel that one must not only consider the question of whether or not the search was technically authorized by statute but one must also consider the nature and purpose of the entire statute under which the case is proceeding and the particular facts and circumstances of the case. In addition, one must consider whether there would be a possible violation of another person's *rights*, namely, the *right of a child to have life and security of the person.*
>
> . . .[B]efore the court decides whether a search, albeit "illegal" was "unreasonable," the court must bear in mind the broad purposes of the statute and also *the rights of the child or children* which may in a given set of circumstances be in conflict with those of the parents.[94]

This approach justifies a violation of parental constitutional rights, to be free from "unreasonable search", by balancing them against the child's constitutional right to life and security of the person.

The authors would argue that while the state may be justified in limiting parental rights, it is wrong to conceive of this as a situation where the court or state is somehow protecting *constitutional* rights of the child. Rather this should be viewed as a situation in which the state limits the constitutional rights of parents, and sometimes those of a child, to promote the welfare of the child. As argued above, there may be situations in which a *child* may himself assert constitutional rights against the state or a parent. If the approach of Nevins J. is followed, laws such as those compelling school attendance may be difficult to justify since the state infringes upon parental rights in order to promote the welfare of children without protecting their *rights.* Conceptual difficulties may also arise if the child, himself becoming involved in protection proceedings, argues that despite allegations of abuse or neglect, he wishes to exercise *his* "liberty rights" and return to his family. Following the same reasoning, one could further argue that in a criminal context, constitutional rights of the accused must in some way be abridged to protect the constitutional rights of actual or potential victims whose "life . . . and security of the person" have been infringed. However, it seems inappropriate to allow an agency of the state to invoke the Charter of Rights to limit the rights of a citizen. The Charter is intended to protect individuals from the state, not to justify state interference.[95]

While the outcome in *Tamatha L.W.* may be correct, it is better to view this as a situation in which the limitations on parental rights are demonstrably justified as "reasonable limits . . . in a free and democratic society". This appropriately places the onus upon those who seek to

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[94] *Id.* at 16-17 of unreported judgment (emphasis added).

[95] M. MANNING, *supra* note 25, at 241 suggests that the Charter may apply to restrict only the actions of government, rather than private actions. If this is accepted, then the approach of Nevins J. must be rejected.

restrain parental rights to justify their actions.[96] It is better to consider that individuals, including children, have constitutional rights, which the state may limit, if justified, rather than to conceive of the state as exercising constitutional rights on behalf of children against their parents.[97]

The state clearly has an interest in promoting the welfare of children, and may in the process infringe upon the constitutional rights of parents and children. The basis for this state intervention was recently articulated by Mr. Justice Rehnquist of the United States Supreme Court:

> A stable, loving homelife is essential to a child's physical, emotional and spiritual well-being. . . .
>
> In addition to the child's interest in a normal homelife, "the State has an urgent interest in the welfare of the child". . . . Few could doubt that the most valuable resource of a self-governing society is its population of children who will one day become adults and themselves assume the responsibility of self-governance. "A democratic society rests, for its continuance, upon the healthy well-rounded growth of young people into full maturity as citizens, with all that implies". . . . Thus, "the whole community" has an interest "that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed citizens."[98]

As Chief Justice Burger stated in *Wisconsin v. Yoder*, "[T]he power of the parent, even when linked to a [constitutionally protected] free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."[99] In a Canadian context, the issue to be resolved is whether limitations on the constitutional rights of the parents and children are "reasonable" and whether deprivations of "liberty" occur in accordance with the "principles of fundamental justice".

In sum, it is the authors' view that the state has a strong social interest in promoting the welfare of children, and if necessary protecting them from their parents or themselves, an interest which may be regarded as an important "social" right entitling a child to grow up in a safe, healthy and nurturing environment. It is wrong, however, to conceive of the state as protecting any constitutional rights of a child. The limiting of parental constitutional rights for the sake of promoting a child's social

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[96] It has consistently been held that s. 1 of the Charter places an onus upon the party seeking to justify a limitation upon a guaranteed freedom. *See, e.g.*, R. v. Southam, *supra* note 3; and Quebec Ass'n of Protestant School Bds. v. A.G. Que. (No. 2), 140 D.L.R. (3d) 33 (Que. C.S. 1982).

[97] This does not mean that individuals other than parents are precluded from acting as guardians of the interests of children and raising the Charter on their behalf. This is the role which Borowski seeks to take on behalf of the unborn fetus in his challenge to Canada's abortion law, *supra* note 87.

[98] Dissenting in Santosky v. Kramer, 102 S. Ct. 1388, at 1412-13 (1982).

[99] *Supra* note 11, at 233-34.

rights involves a difficult weighing process in order to determine what constitutes a "reasonable limit" upon the parental rights.[100]

For illustrative purposes, we will briefly consider some situations in which the state's intervention in the family to promote the welfare of a child may raise issues under the Charter of Rights.

1. *Vagueness of Legislation*

In *Alsager v. District Court of Polk County, Iowa*, a statute allowing termination of parental rights where parents refused to give their child "necessary parental care and protection" or engaged in conduct "detrimental to the physical or mental health or morals of the child" was considered so vague as to violate the due process requirements of the Constitution. Hanson C.J. stated:

> The initial danger present in a vague statute is the absence of fair warning. Citizens should be able to guide their conduct by the literal meaning of phrases expressed on the face of statutes. . . .
>
> The second danger present in a vague statute is the impermissible delegation of discretion from the state legislature to the state law enforcement body. . . .
>
> The Alsagers were not given fair warning of what was and was not prohibited by the Iowa law. The petition which instituted the termination proceeding against them merely alleged the conclusory language of the state: "refused to give their children necessary parental care and protection" and "conduct detrimental to the physical or mental health or morals of their children." A reading of the petition and the termination statute would not have given the Alsagers notice of what they were doing wrong. They were not given a factual basis from which to predict how they should modify their past conduct, their "parenting," to avoid termination.[101]

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[100] *See Re* D., 30 R.F.L. (2d) 277 (Alta. Prov. Ct. 1982) where a court, in a protection case, refused to give effect to the argument of Jehovah's Witness parents that giving a blood transfusion to their child violated their right to freedom of religion under para. 2(*a*) of the Charter. Catonio J. did not specifically mention s. 1 of the Charter, but concluded, at 281, "As between the state's right to safeguard the health and welfare of children and the rights of parents to freely practice their religion, the former must prevail."

For a discussion of the nature of the onus under s. 1 of the Charter, *see* R. v. Southam, *supra* note 3, where MacKinnon A.C.J.O. stated that s. 1 imposes a "significant burden on the proponent of the limit . . . to demonstrate their justification to the satisfaction of the court". *See also* Quebec Ass'n of Protestant School Bds. v. A.G. Que., *supra* note 96, Conklin, *Interpreting and Applying the Limitations Clause: An Analysis of Section 1*, 4 SUP. CT. L. REV. 75, and Marx, *Entrenchment, Limitations and Non-Obstante* in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY, *supra* note 25, at 68.

[101] 406 F. Supp. 10, at 18-20 (S.D. Iowa 1975), *aff'd on other grounds* 545 F.2d 1137 (8th Cir. 1976). *See also In re* Crooks, 262 N.W. 2d 786 (Iowa 1978); Davis v. Smith, 583 S.W. 2d 37 (Ark. 1979); Custody of a Minor, 389 N.E. 2d 68 (Mass. 1979); and Roe v. Conn, *supra* note 78.

Cannot a similar argument be made with respect to legislation such as Ontario's Child Welfare Act,[102] which allows a child to be made a temporary or permanent ward of the state if the child is "living in an unfit or improper place"?[103] What about statutes like Saskatchewan's Family Services Act empowering a court to dispense with a parent's consent to adoption, thereby irrevocably severing the parent's connection to his child, if this is in the "best interests"[104] of the child? In these situations, might not a parent be faced with deprivation of a cherished aspect of his "liberty", his relationship to his child, without adequate notice and hence be denied treatment according with the principles of fundamental justice?

The concern expressed in American decisions like *Alsager* may prompt those seeking judicial severance of the parent-child link to set out more fully the nature of their case in pleadings or other pre-hearing notices to avert the possibility of constitutionally-based requests for further particulars and adjournments. Though it may be impossible to draft legislation specifying exactly what kind of parental conduct will lead to protection proceedings, nonetheless failure to give parents adequate notice of the case they are expected to meet may be difficult to justify.

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[102] R.S.O. 1980, c. 66, para. 19(1)(*b*)(iv). It is interesting to note that the Government of Ontario seems to have similar concerns. ONTARIO MINISTRY OF COMMUNITY AND SOCIAL SERVICES, THE CHILDREN'S ACT: A CONSULTATION PAPER (1982) comments at 78-79 on the present definition of a "child in need of protection": "[M]any of the grounds are defined in extremely broad and vague language. . . . [T]his . . . fails to give parents and children fair warning of when intervention may occur and fails to give adequate guidance to agencies and courts in their attempts to protect children. . . ." In *Re* Ontario Film and Video Appreciation Soc'y, 19 A.C.W.S. (2d) 62 (Ont. Div'l Ct. 1983), the decision of the Board of Censors was quashed. The legislative provisions granting authority to the Board were held to be too vague to satisfy the requirements of the Charter:

> [A]lthough there has certainly been a legislative grant of power to the Board to censor and prohibit certain films, the reasonable limits placed upon that freedom of expression [a right recognized in para. 2(*b*) of the Charter] . . . have not been legislatively authorized. The Charter [in s. 1] requires reasonable limits that are prescribed by law; it is not enough to authorize a Board to censor or prohibit the exhibition of any film of which it disapproves. That kind of authority is not legal for it depends on the discretion of an administrative tribunal. . . . *It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable.* Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered law [emphasis added].

[103] *See* judgment of Rand J. in Saumur v. City of Quebec, [1953] 2 S.C.R. 299, at 333, [1953] 4 D.L.R. 641, at 673-74 for a discussion of the significance of a broad delegation of discretion to an administrative official.

[104] R.S.S. 1978, c. F-7, s. 53.

2. *Right to Challenge Evidence*

In cases involving the welfare of children there is often a tendency to relax the rules of evidence. This seems quite proper, at least from a constitutional point of view. However, should this go so far as to violate "the fundamental principles of justice", for example by denying an affected party the right to cross-examine or to challenge evidence, there may be a violation of section 7 of the Charter of Rights. In custody and child protection cases, for instance, it is the practice of some judges to interview a child alone in chambers. Whether this practice violates the constitutional rights of parents is open to question.

In *Re Maricopa County Juvenile Action*, a judge in a dependency proceeding based on alleged sexual abuse of a ten-year-old girl interviewed the child alone in his chambers. A challenge to this procedure, based on a violation of the parents' right to procedural due process, was upheld by the Arizona Supreme Court:

> Considering the nature of the interests involved in this case, it is essential under the adversary system that parents be given the opportunity to challenge the testimony of their children when such testimony is essential to establishing the parental misconduct alleged in the petition. Without the opportunity to test the reliability of a child's statements, the adversary process is subverted and made meaningless. . . .
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> . . .[T]here may be instances in which the court may wish to limit the conditions under which children are examined by providing that the examination be in groups or by providing that only counsel for the parties be present. Testimony which is traumatic in nature would merit an examination in chambers, and the presence of counsel alone would be justified where a party's presence is potentially inhibiting.[105]

3. *Onus and Standard of Proof in Protection Proceedings*

A recent decision of the United States Supreme Court closely examines the issue of due process and parental rights. In *Santosky v. Kramer*[106] the Court considered the constitutionality of a New York law which allowed for the termination of parental rights "on a fair preponderance of the evidence". The Court stated that the right to the care, custody and upbringing of one's children was an extremely important one and that the threatened intervention by the state would permanently deprive the parents of this right. The Supreme Court held that the private interest of the parents was "a commanding one"[107] weighing heavily against the ordinary civil "preponderance standard" set out by state law; such a significant determination of rights required a higher standard of proof.

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[105] 638 P.2d 692, at 695 (1981); *see also In re* Stanley F., 152 Cal. Rptr. 5 (Ct. App. 1978). For a similar approach, *see Re* Roy C. (unreported ruling, Ont. Fam. Ct. 8 Jan. 1980) (Karswick J.) reproduced in CANADIAN CHILDREN'S LAW: CASES, NOTES AND MATERIALS, *supra* note 74, at 178.

[106] *Supra* note 98, at 1388 (1982).

[107] *Id.* at 1396.

The Court was also concerned that the termination proceeding had many of the *indicia* of a criminal trial and was oriented toward the state's position;[108] the state, with all its manpower and financial resources, is pitted directly against the parents. This imbalance coupled with a "preponderance of the evidence" standard of proof creates an appreciable risk of erroneously terminating parental rights. Lastly the Court held that the state's interests in promoting the welfare of the child and in reducing the costs of the proceedings were not inconsistent with a higher standard of proof than a "preponderance of the evidence". The Supreme Court concluded that a "clear and convincing evidence" standard of proof would strike a fair balance between the parents' rights and the state's legitimate concerns; any lower standard of proof would be unconstitutional.

The "clear and convincing evidence" standard requires that the state prove parental misconduct to a degree higher than on the mere balance of probabilities, the usual civil standard, but not beyond a reasonable doubt,[109] the ordinary criminal test.

It is notable that the Court in *Santosky* did not consider a termination case as one in which the interests of parents and children were antithetical. The Court rejected the theory which assumes that "termination of the natural parents' rights invariably will benefit the child".[110] The contest is between the parents and the state whose case is based on what its agencies believe will best promote the welfare of the child:

> The factfinding . . . is not intended to balance the child's interest in a normal family home against the parents' interest in raising the child. . . . Rather, the . . . hearing pits the state directly against the parents. . . .
>
> At the factfinding, the State cannot presume that a child and his parents are adversaries . . . . [U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favour use of error-reducing procedures.[111]

The *Santosky* decision marks a judicial recognition of the importance of parental rights, indicating that when a final balance is struck, these rights may take priority over competing interests. Though the Court was perhaps influenced by the notion of "substantive due process", its emphasis was on providing parents with adequate procedural safeguards before allowing the state to end the parent-child relationship.

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[108] *Id.* at 1397-98.

[109] For a fuller discussion of the significance of this standard, *see* Sigmond, *Involuntary Termination of Parental Rights: The Need for Clear and Convincing Evidence*, 29 AM. U. L. REV. 771; and Daskow, *Standard of Proof in Parental Termination Proceedings*, 6 J. JUV. L. 27 (1982).

[110] *Supra* note 98, at 1400.

[111] *Id.* at 1397-98. This approach offers further support for the argument made *supra* notes 93-100, that the analysis offered by Nevins J. in *Re* Tamatha L.W., *supra* note 93, is unsound.

In Canada, questions of standard and onus of proof in protection proceedings have not been the subject of specific legislative direction, and the courts have been somewhat inconsistent in their approach. For example, in *Re S.*, Judge Main seemed to suggest that, at least in abuse cases, the ultimate onus of persuasion might lie with the parents:

> If the court is satisfied that on the balance of probabilities there has been "abuse", then it should be quick to act to protect the child. If the balance does not tip either way, then the resulting doubt should be determined in favour of the safety of the child [and, if the circumstances warrant, the child should be permanently removed from his family].[112]

On the other hand, judges have in some cases recognized that the onus must rest on the state protection agency, and have even suggested that the standard of proof may be higher than the ordinary civil one, particularly if a child faces permanent removal from his family. For example, in *D. v. Children's Aid Soc'y of Kent*, Clements J. stated:

> The power given to the children's aid society under the Act is to impose an agency of the government on behalf of society into the home when necessary. The contest, it must be remembered, is between the society and the natural parents in most instances.
>
> . . . .
>
> There is a civil onus on the children's aid society on the application of this nature but not the usual onus as stated in *Re Chrysler* . . .:
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> > "The authorities are clear that although the onus is of a civil nature where the contest over custody is between the mother and a children's aid society the onus is still very demanding and it must be clearly demonstrated that the child's best interests are served by removing her from the natural parent and placing her into the custody of the state in the agency of the children's aid society."
>
> . . . .
>
> The standard of proof, therefore, is not that of the balance of probabilities per se; nor is there a test akin to the onus in criminal matters. No magic formula need be devised other than the heavy onus on the director of the children's aid society to satisfy the court the allegations necessary to intervene are met and clearly met without reference or deference to the second issue after a finding is made, i.e., the finding that the child is in need of protection, as to the appropriate placement under s. 30 of the Act. As has been said by the court in *Re Brown* . . . :
>
> > "Society's inference in the natural family is only justified when the level of care of the child falls below that which no child in this country should be subjected to."[113]

Ultimately, Canadian legislatures or courts will have to resolve the question of the onus and standard of proof in a protection proceeding. In addressing this issue, it will be necessary to keep in mind that parents

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[112] 10 R.F.L. (2d) 341, at 349 (Ont. Fam. Ct. 1979); for a similar approach *see* Superintendent of Family and Child Serv. v. M.(B.), 28 R.F.L. (2d) 278 (B.C.S.C. 1982). *See also In Re* Linda C., 451 N.Y.S. (2d) 268 (App. Div. 1982) which held that despite *Santosky*, it was appropriate to have a lower standard of proof in a child protection case based on sexual or physical abuse.

[113] 18 R.F.L. (2d) 223, at 226-27 (Ont. Cty. Ct. 1980); *see also* Children's Aid Soc'y of Winnipeg v. M., *supra* note 23, at 189.

may have constitutionally recognized rights. If it is accepted that the concept of "liberty" in section 7 of the Charter includes a parental right to enjoy a relationship with their children, *Santosky v. Kramer* would suggest that a state agency must satisfy a heavy onus before removing a child from his family.[114] Arguably many Canadian judges, following the approach of *D. v. Children's Aid Soc'y of Kent*, have already recognized the importance of the parent-child relationship and afforded the family this protection.[115]

4. *Apprehension of a Child*

Child welfare authorities in Canada are given very broad police-like powers to enter premises, with or without a warrant, to apprehend a child believed to be in need of protection, and take the child into care until he is brought before a judge for an interim care hearing.[116] In some provinces, it may be quite a while before the matter is brought to court;

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[114] It should be noted that in New York, as in many other American jurisdictions, a child may be found to be neglected, and removed from his home, without a full termination of parental rights. *Santosky* only deals with the issue of the nature of onus on the state at a termination hearing. It may be that when only a temporary removal of a child from his family is sought, the onus upon the state is not as high; *see In re* Linda C., *supra* note 112. This would correspond with the view of some Canadian judges about the nature of the onus in a child protection case. *E.g.*, in Children's Aid Soc'y of Kingston v. Neilson, (unreported, Ont. Fam. Ct. 15 Jun. 1972), Thomson J. stated:

> [T]he court should always keep in mind the nature of the order which is being sought by the applicant [state agency]. It is true that only one set of grounds can be found in the Act to justify all three of the orders possible under the Act [supervision in the home, temporary removal and permanent separation of parent and child], but it would seem to me that the Court should require much clearer and cogent evidence to be presented to it when a permanent separation of the children is being sought rather than a temporary separation.

[115] In *Re* S.V.'s Infant, 43 W.W.R. 374, at 379-80 (B.C. Cty. Ct. 1963), Harvey J. stated:

> In my opinion, the provisions of the *Protection of Children Act* relating to the apprehension of children fall more closely within the realm of criminal than of civil proceedings. The process employed and the procedure adopted are those appropriate to criminal procedure, save only for the absence of a plea. In discussing similar legislation in Alberta, Buchanan, C.J.D.C. in *Supt. of Child Welfare v. Edmonton (City)* (1957), 22 W.W.R. 593, points out (at p. 597) how the legislation "trespasses to an almost shocking degree upon the *liberty* of the *individual, both parent and child.*"
>
> . . . .
>
> In the present case I think the "criminal" standard should be applied and that I should not find S.V.'s child to be "in need of protection" unless I am satisfied on the evidence beyond reasonable doubt that S.V. is incapable of exercising proper parental control.
>
> If I am wrong in applying the "criminal" standard, I think I clearly would be right in requiring that "the case must be very strong indeed" and one which needs proof by a *high preponderance of probability* [emphasis added].

[116] For an example of a case in which such powers were abused, *see Ex parte* D., [1971] 1 O.R. 311, 15 D.L.R. (3d) 265 (H.C. 1970).

for example, in Saskatchewan, The Family Services Act[117] allows the protection authorities up to thirty days from the apprehension before having to bring the child before the court.

In addition to the guarantees of section 7, the Charter of Rights provides:

> 8. Everyone has the right to be secure against unreasonable search or seizure.
> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
> 10. Everyone has the right on arrest or detention
> (*a*) to be informed promptly of the reasons therefor;
> (*b*) to retain and instruct counsel without delay and to be informed of that right; and
> (*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

In the Parliamentary Committee on the Constitution, a government member, Jean Lapierre, specifically stated that section 8 of the Charter was intended to offer to "privacy, family, home and correspondence . . . a fairly wide array of protections".[118]

It may be argued that a child detained under protection legislation has a right under section 10 of the Charter to retain counsel and seek release. A parent or a child might bring immediate application to a court to have the child returned to his family on the basis of lack of sufficient evidence, making the seizure "unreasonable" under section 8 of the Charter. If parents and child are not adequately informed of the reasons for an apprehension and given a reasonable opportunity to challenge the matter before the courts, this may violate sections 7-10. Might not the detention of a child for thirty days without a hearing constitute "unreasonable seizure" or "arbitrary detention"?[119]

VI. CONCLUSION

The intention of this paper was not to make an exhaustive examination of all the implications which the Canadian Charter of Rights and Freedoms may have on family law. Rather, certain issues have been raised and tentative suggestions offered as to how the Charter might be employed to assist in the resolution of these problems. Analogies drawn to American jurisprudence have shown that the rights of individuals to enjoy family life may be considered fundamental and subject to constitutional protection.

Hopefully, this discussion will stimulate others to consider whether Charter rights are being violated in various situations and cause further inquiry into the applicability of the Charter to family law. The Charter may be relevant to many other issues not raised here, including a child's right to standing in custody proceedings, the rights of indigent parents

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[117] R.S.S. 1978, c. F-7, s. 21.

[118] SPECIAL JOINT COMMITTEE, *supra* note 2, Issue No. 43, at 58.

[119] *See* Roe v. Conn, *supra* note 78.

and children to appointed counsel and the rights parents may have against one another in custody disputes. A constitutional document like the Charter has much potential to be a guarantor of the rights of all Canadians and should not be restricted to the most obvious areas of application such as criminal law. The rights and freedoms of parents and children as family members are at least as important as those of persons accused of criminal offences. It can only be hoped that the courts will accept that the protection of these rights is a valuable and legitimate application of the Charter.