The Charter of Rights & Child Welfare Law

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Abstract: Child welfare proceedings are a dramatic instance of state intervention in the lives of Canadians, and are regulated by the *Charter*. Lawyers and judges who deal with cases in the child welfare field must understand the implications of the *Charter of Rights* for this area of practice.

While initially reluctant to recognize the constitutional significance of familial relationships, in the last few years, the courts have accepted that familial relationships are of fundamental societal importance and worthy of constitutional recognition and protection. The 1999 Supreme Court of Canada decisions in *M. v. H.* and *New Brunswick v. G.(J.)* marked a dramatic change in judicial approach. In *G.(J.)* the Supreme Court held that child protection proceedings pose a fundamental threat to the "security of the person" of parents and their children, and hence must be conducted in accordance with "the principles of fundamental justice." This decision dealt with the right of indigent parents to a lawyer paid by the state, but it has implications for a range of issues in child protection and adoption proceedings. More recent Supreme Court decisions in *Trociuk* (2003) and *Canadian Foundation for Children* (2004) demonstrate a continued concern with parental rights, while *Gosselin* (2002) signals a reluctance of the Court to use the *Charter* to require the state to incur significant financial costs to address social inequities.

This paper reviews the Supreme Court of Canada decisions, and considers the implications of this jurisprudence for other issues that arise in child welfare proceedings. In some cases the superior courts invoke their *parens patriae* power and "*Charter* values" rather than the *Charter* itself, as this may give a court more remedial and procedural flexibility. The issues raised are complex, and I offer a conceptual framework to analyze the constitutional issues that can arise in child welfare proceedings.

In most cases, the *Charter* is invoked in child welfare cases to ensure a fair process, one that is fair to parents and children, but also one that will ensure that the court has a hearing that allows for an proper exploration of the child's best interests. In some cases, Canadian courts have invoked the *Charter* to affect the substantive outcome, but decisions in the Supreme Court and in the trial courts also reflect a concern that the *Charter* should not be invoked to require that the state to incur expenses to promote the welfare of the disadvantaged. In *Canadian Foundation of Children* the Supreme Court held that the "best interests of the child" is *not* one of the principles of fundamental justice. This judicial pronouncement may limit judicial invocation of the *Charter* to address substantive issues in the child welfare field, but it is argued in this paper that the decision does not totally preclude judicial use of the *Charter* to achieve substantive outcomes that promote the best interests of children.

THE CHARTER OF RIGHTS & CHILD WELFARE LAW

Nicholas Bala

I. INTRODUCTION

After the *Charter of Rights* came into force in 1982, academic commentators predicted that the Canadian courts would follow American jurisprudence, where there was been a long history of using the Constitution to recognize and protect a broad range familial rights.[1] And soon after the *Charter* came into effect, governments were pressured by litigation,[2] or the threat of litigation, to revise a few family law statutes that obviously discriminated on the basis of gender, in particular against fathers of children

born out of wedlock, and to end some of the most blatant types of legal discrimination against children born out of wedlock.[3] A few of the early trial judgements under the *Charter* recognized that a child protection agency exercises a broad set of state powers which can profoundly affect the lives of children and parents, and hence should be subject to *Charter* regulation.[4] However, until quite recently decisions from the higher courts dismissed arguments that spousal, parental or other familial relationships were entitled to constitutional recognition,[5] making the *Charter of Rights* essentially an academic curiosity for family law judges and practitioners.

The 1999 Supreme Court of Canada decisions in *M.* v. *H.* and *New Brunswick* v. *G.(J.)* marked a dramatic change in judicial approach. The Supreme Court has accepted that familial relationships are of fundamental importance and worthy of constitutional recognition and protection.

In *New Brunswick* v. *G.(J.)*[6] the Supreme Court held that child protection proceedings pose a fundamental threat to the "security of the person" of parents and their children, and hence must be conducted in accordance with "the principles of fundamental justice." This decision dealt with the right of indigent parents to a lawyer paid by the state, but it has potential implications for a range of issues in child protection and adoption proceedings. The 2000 decision of the Supreme Court in *W.(K.L.)* [7] recognized that there is a need for "delicate balance" between the rights of parents and the need to protect children from potential abuse, and upheld the validity of warrantless apprehension of children, even in "non-emergency" situations.

Two more, recent Supreme Court decisions, although not directly in the child welfare field, again affirm the importance of parental rights. In 2003 in *Trociuk v British Columbia* the Court held that it is a violation of the *Charter* rights of the father of a child born out of wedlock to leave it totally to the mother to decide whether his name appears on the birth certificate.[8] In *Canadian Foundation for Children*, decided in January 2004, the Supreme Court upheld the constitutional validity of s. 43 of the *Criminal Code*, ruling that it would not use the *Charter* to infringe on parental rights to use "reasonable force" for the purposes of correction of their children.[9] The 2002 Supreme Court decision in *Gosselin v Quebec(Attorney General)*[10] may also be significant for child welfare cases; that decision rejected a *Charter*-based claim by young adults to have the same social assistance rates as older adults; in rejecting this claim the Court may have been signaling a reluctance to use the *Charter* to require the state to incur significant financial costs to address social inequities.

This paper reviews the Supreme Court of Canada decisions on the *Charter* in the child welfare area and in related fields, and considers their implications for various issues in the child welfare context. The issues raised in many of these cases are conceptually complex, and I offer a conceptual framework to analyze the constitutional issues that can arise in child welfare proceedings. In discussing the potential application of this Supreme Court jurisprudence to specific child welfare issues, the discussion in this paper is in places more suggestive of the types of arguments that might be made rather than offering an exhaustive analysis. For a number of issues, I have drawn on the more fully developed American jurisprudence, though this paper does not purport to exhaustively compare developments in the two countries.

One important introductory point needs to be made: a Canadian court is only likely to use the *Charter* in a child welfare case if there is a sympathetic factual context. The sympathetic factual context may involve the specific child or parent who is before the court, or may arise from a desire to prevent institutional abuse by a very powerful state agency that is dealing with individuals who often have very limited resources and are often socially marginalized. In some areas of law, most notably in the criminal law field, judges are prepared to protect constitutional rights in very unsympathetic fact situations, sometimes allowing an individual who may be guilty of murder to be acquitted if there has been a serious *Charter* violation.[11] In the child welfare area, however, Canadian judges are only willing to invoke the *Charter* if they think that this is likely to promote the welfare of a particular child or of children in similar cases. Conversely, judges are not willing to use the *Charter* if they believe that doing so may harm a child or would harm the position of children in general.

In most child welfare cases, the *Charter* is invoked to ensure a fair process, one that is fair to parents and children, but also one that will ensure that the court has a hearing that allows for an proper exploration of the child's best interests. In some cases, however, courts have invoked the *Charter* to affect substantive outcomes, taking the position that in the child welfare context, legislation which precludes the consideration of an order that would be in accordance with the "best interests of the child principle" is a violation of the child's "security of the person" that fails to "accord with the principles of fundamental justice." This substantive use of the *Charter* in child welfare cases may have to be reconsidered, at least to some extent, in light of the recent Supreme Court decision in *Canadian Foundation for Children*, in which a majority of the Court stated that the "best interests of the child" is not a "foundational requirement for the dispensation of justice" and accordingly not a "principle of fundamental justice."[12] It is, however, argued in this paper that this decision does not totally preclude the use of the *Charter* to produce substantive outcomes in child welfare cases that meet the best interests of children.

Another introductory point is that in some child welfare cases superior judges may cite the *Charter*, but then decide a case based on "*Charter* values", rather than the *Charter* itself. The inherent *parens patriae* jurisdiction allows superior courts to make decisions to promote the best interests of a child.[13] There is undoubtedly some overlap in the *parens patriae* and *Charter* based powers of a superior court. If a superior court judge invokes "*Charter* values" but then actually uses its *parens patriae* power, this has the advantage for counsel and the court of not requiring that notice to be served on the government of the raising of a "constitutional question," and also tends to make a decision seem relatively narrow and hence will be less likely to be appealed. Thus the exercise of the *parens patiae* power is unlikely to delay the final resolution of the case. The exercise of the *parens patriae* power, however, can only be done by federally appointed superior court judges, and only in situations in which legislation is "silent." A *Charter* based right can override an explicit legislative provision.[14] While only a superior court judge can use the *parens patriae* power to address "legislative gaps," provincially appointed judges, who cannot directly invoke this power, have sometimes also used "*Charter* values" to help interpret legislation and the common law, again without the need to formally give a *Charter* remedy, which requires compliance with potentially cumbersome provisions requiring notice and involvement of the Attorney General in a case.

One final introductory comment. Ontario already has a child welfare system that is *relatively* receptive to parents, children and foster parents having legal and procedural rights. The child welfare statute, the *Family Court Rules*, legal aid policies and the Office of the Children's Lawyer go a significant way towards protection of rights. So there is less need and scope in Ontario for invocation of the *Charter* to protect rights. It is not surprising that the leading cases in Canada on the application of the *Charter* in the child welfare field are from outside Ontario. This does not mean that the *Charter* has no significance for lawyers and judges dealing with child welfare cases in Ontario, but its impact has and is likely to remain relatively limited compared to other provinces.

II. THE CHALLENGE OF CHARTER CHALLENGES

It is now clear that family law judges and practitioners need to know about the *Charter of Rights* and its implications, especially for the child welfare field.

It is submitted that there is an obligation on a court, in appropriate cases to raise *Charter* issues, even if the parties have not done so.[15] This judicial obligation is greatest if a party is unrepresented, but even if there is representation, the court has an obligation to ensure that constitutional rights of an individual, especially in regard to the vitally important personal interests at stake in a child welfare case, are not violated as a result of court action.

While family law lawyers and judges need to able to apply the *Charter*, this is a very challenging area for practitioners, both practically and conceptually. Practically, the judges and lawyers involved in

child welfare cases often lack familiarity with the *Charter,* and hence may have some difficulty in dealing with the issues that arise. Further, the *Charter* issues that arise are conceptually complex. Lawyers, judges and academics struggle with them. Because of the conceptual complexity in this area, some of the doctrinal analysis in this area, including some of the Supreme Court of Canada jurisprudence, is confusing, inconsistent and difficult to apply.[16]

The conceptual difficulty arises, at least in part, because the main focus of the *Charter,* in particular of sections 7 to 14, is the protection of the rights of the individual against unwarranted state interference. In the child welfare field, however, it is in some senses a collectivity, the family, that faces state intervention. In some cases, the courts must wrestle with trying to recognize and balance constitutional rights of both children and their parents, or the rights of one parent against the other, or of one sibling against another.

Another conceptual difficulty is trying to decide how to recognize and protect the constitutional rights of children who lack the capacity to personally exercise those rights. The challenges of understanding and analysing the legal status of childhood and deciding how to apply s. 15 of the *Charter* to children is found in the *Canadian Foundation for Children,* which wound its way through the courts with different judges who agreed in the result in the Ontario Superior Court, the Ontario Court of Appeal and the Supreme Court of Canada taking quite different approaches, and three very different dissents in the Supreme Court.

In the child welfare context, a fundamental question arises, a question that defies a single simple answer, but that is central to many of the cases: Who speaks for the child and protect the child's rights? The parents? The foster parents who may have lived with the child since birth and to whom the child has become psychologically attached? The state agency with the mandate to protect the interests of children? A lawyer for the child? The judge?

Before turning to a review of some of the specific issues that the courts are facing in this area, it is useful to review the leading Supreme Court of Canada cases and offer a conceptual framework for the analysis of the child welfare cases that raise *Charter* issues.

III. SUPREME COURT CHARTER & CHILD WELFARE JURISPRUDENCE

A. Pre-1999 : The Court Divided in *R.B. v. C.A.S. of Metropolitan Toronto*

The 1995 decision in *R.B.* v. *Children's Aid Society of Metropolitan Toronto*[17] revealed a Supreme Court that was deeply split over whether, in principle, parents (or children) should enjoy *any* constitutional rights in litigation with a child protection agency.

R.B. arose out of a case where Jehovah's Witness parents were refusing, on religious grounds, a blood transfusion for their new-born child who was suffering infantile glaucoma. Doctors believed that surgery, which would require a blood transfusion, was necessary to save the child's life. A court order was sought by the child protection agency to have the child made a temporary ward of the agency. The trial judge made the order, and the agency consented to the operation and transfusion. Although the operation was performed and the child returned to parental custody, the parents appealed the original decision on the ground that it had violated their constitutional rights. After a lengthy appeal process, the Supreme Court of Canada agreed to hear the case, even though on its specific facts the case was moot. The Supreme Court upheld the original order and the constitutional validity of the child protection legislation in question. However, the Supreme Court divided sharply over the broader question of whether there were any circumstances in which the *Charter* might apply to a child protection case.

Justice La Forest, writing for four of the nine justices, accepted that parents have a constitutionally protected right to enjoy their relationship with their children, though recognizing their rights must be balanced against a state interest in promoting the welfare of children.[18] While he was prepared to uphold the constitutional validity of the legislation in question, he accepted that the concepts of "liberty and security of the person" include a parental right to enjoy a relationship with a child.

Accordingly, state action to restrict parental autonomy must accord with the "principles of fundamental justice." Justice La Forest wrote:[19]

> our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a *protected sphere of parental decision-making* which is rooted in the presumption that parents should make important decisions affecting their children *both because parents are more likely to appreciate the best interests of their children* and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But ... *parental decision-making must receive the protection of the Charter* in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the Charter.

While La Forest J., with three other judges concurring, took a broad view of parental rights, four other judges of the Supreme Court appeared to dismiss the idea that parents could have any *constitutional* rights in the context of child protection proceedings. Chief Justice Lamer wrote that:

> the liberty interest protected by s 7 ... includes neither the right to of parents to choose (or refuse) medical treatment for their children, nor more generally the right to bring up or educate their children without undue interference by the state ... the autonomy or integrity of the of the family unit ... does not fall within the ambit of s.7.[20]

Justices Iacobucci and Major also expressed a concern that "the family is often a very dangerous place for children,"[21] and felt that any concern about parental "liberty" must be balanced against the *child's* constitutionally protected rights to "security of the person." The difficulty with this analysis is that the child often lacks the capacity to articulate any views, and this type of argument suggests that a state agency can purport to use the *child's* constitutional rights to limit parental rights.

The ninth judge, Sopinka J., did not express an opinion on whether s. 7 of the *Charter*, with its protection of "liberty and security of the person," includes parental rights, but he did conclude that the parents in this particular case were entitled to some constitutional protection for their religious freedom, an interest protected by section 2 of the *Charter*. The four judges who took the broader view of s. 7, as including parental rights, agreed that parental religious freedom was infringed in a child protection proceeding if religious beliefs are the basis for resistance to state interference with the child.

B. Recognition of *Charter* Rights: *New Brunswick (Minister of Health)* v. *G. (J.)*

In its 1999 decision in *New Brunswick (Minister of Health)* v. *G.(J.)*, the Supreme Court of Canada sent a strong message that parents have a vital interest in their relationship with their children, an interest that is entitled to protection under s. 7 of the *Charter* as an aspect of "security of the person."[22] The Court concluded that, pursuant to the s. 7 of the *Charter*, a single mother on social assistance whose children had been apprehended by a child welfare agency had the constitutional right to be represented by counsel paid by the government to ensure that the temporary wardship proceedings were "in accordance with the principles of fundamental justice."

Writing for the majority of the Court,[23] Lamer C.J.C. focused on the argument that a child protection proceeding represents a threat to the "security of the person" of both parent and child, thereby purporting to distinguish his own decision in *R.B.* v. *C.A.S. of Metropolitan Toronto*, in which he dismissed the notion that s. 7, and in particular the "liberty interest" could be engaged in a child protection proceedings. While the cases are clearly factually distinguishable, the rhetoric and approach

of Lamer C.J.C. in the two cases is very different, and it is submitted that there is no practical or conceptual difference between the judicial protection afforded "liberty" or "security of the person" interests. It is now clear that when faced with a concrete situation in which parents or children are being subjected to treatment in a child protection proceeding that does not accord with the "principles of fundamental justice," the courts will respond.

In *G. (J.)* the Court invoked the constitutional rights of a parent, but was clearly influenced by a concern for the welfare of children.[24] Chief Justice Lamer wrote:[25]

> Thus, the interests of fundamental justice in child protection proceedings are both substantive and procedural. The state may only relieve a parent of custody when it is necessary to protect the *best interests* of the child, provided that there is a fair procedure for making this determination....
> The interests at stake in the custody [child protection] hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, *the child's is as well. Since the best interests of the child are presumed to lie with the parent,* the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.....
> In light of these factors, I find that the appellant needed to be represented by counsel for there to have been a fair determination of the children's best interests. Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an *unacceptable risk of error in determining the children's best interests* and thereby threatening to violate both the appellant's and her children's s. 7 right to security of the person.

While the Court recognized that in this case it was not dealing with a permanent termination of the parent-child relationship but only a review of temporary wardship, it nevertheless concluded that the parent's constitutional rights were engaged. A judge considering a request for counsel must assess the circumstances and complexity of the case. In this particular case, Lamer C.J.C. commented: [26]

> A six-month separation of a parent from three young children is a significant period of time. It is even more significant when considered in light of the fact that the appellant had already been separated from her children for over a year and that generally speaking, the longer the separation of parent from child, the less likely it is that the parent will ever regain custody ...
> At issue in this appeal is whether the custody hearing would have been sufficiently complex ... that the assistance of a lawyer would have been necessary to ensure the appellant her right to a fair hearing. I believe that it would have been. Although perhaps more administrative in nature than criminal proceedings, child custody [wardship] proceedings are effectively adversarial proceedings which occur in a court of law. The parties are responsible for planning and presenting their cases. While the rules of evidence are somewhat relaxed, difficult evidentiary issues are frequently raised. The parent must adduce evidence, cross-examine witnesses, make objections and present legal defences in the context of what is to many a foreign environment, and under significant emotional strain. In this case, all other parties were represented by counsel ...
> In *proceedings as serious and complex as these, an unrepresented parent will ordinarily need to possess superior intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case ... Without the benefit of counsel, the appellant would not have been able to participate effectively* at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's rights.

The decision in *G(J.)* is clearly significant, though some of the analysis is confusing, with the Court

failing to clearly distinguish between the constitutional rights that parents have and the rights of their children. The lack of a clear analysis allowed the entire Court to agree about the outcome of the case, though later cases revealed that there are actually sharp divisions on the Court about how to apply the *Charter* to child welfare cases.

C. The Court Again Divided: *Winnipeg C.& F.S. v W.(K.L)*

In its 2000 decision in *Winnipeg Child & Family Services v. W.(K.L.)*, the Supreme Court considered a case in which a mother was challenging the constitutional validity of Manitoba child welfare legislation, which permits the apprehension without a warrant of a child believed to be in need of protection in non-emergency situations.[27] By a 5 to 2 margin, the Court upheld the legislation. Writing for the majority, L'Heureux-Dubé J. concluded that a parent's right to "security of the person" is infringed by the legislation, but held that the statute accords with the principles of fundamental justice because procedural fairness is satisfied by requiring a post-apprehension judicial review. When balancing the various interests at stake in the child protection context, the majority of the Court placed pre-eminent importance on society's interest in protecting children from the possibility of abuse or neglect, emphasizing the difficulty and risk of distinguishing between emergency and non-emergency apprehension situations in child protection cases.

The constitutional analysis of L'Heureux-Dubé J. was very much influenced by a concern about protecting children from *the possibility* of parental abuse or neglect, even in non-urgent situations: "the state's protective purpose in apprehending a child is clearly distinguishable from the state's punitive purpose in the criminal context, namely that of seeing that justice is done with respect to a criminal act."[28] However, she also recognized the need for procedural fairness in the child welfare context. She emphasized that removal of children from their parents' care poses a threat to the welfare of children as well as to the rights of parents. Accordingly she held that the apprehension of a child from parental care can only be justified if there is a "situation of harm or a risk of serious harm to the child," and that the *Charter* requires prompt resolution of cases involving a threat to the parent-child relationship. She wrote:[29]

> The child's need for continuity in relationships provides the most compelling basis for requiring a prompt post-apprehension hearing....
> While a two-week delay between the removal of a child and, at a minimum, an interim child protection hearing, would seem to lie at the outside limit of what is constitutionally acceptable, it does not seem advisable in this case to state a precise constitutional standard for delays in the child protection context. There may be several means by which constitutionally-sufficient safeguards could be implemented.

Justice Arbour (McLachlin C.J.C concurring) dissented, focussing on the emotionally disruptive effect for both child and parents of apprehension, and arguing that in situations where there is no *urgency* (as assessed by a child protection worker), it would be better for children to have a check on state action and require a warrant before apprehension. While disagreeing with the majority in the result, she also articulated the view that the *Charter* should be interpreted in a manner that promotes the welfare of children:[30]

> I would suggest, therefore, that to satisfy the substantive content of the principles of fundamental justice in the child protection context, the apprehension of a child by a state agency requires an evaluation of the best interests of the child, in addition to the apprehending party having reasonable and probable grounds for believing the child is in need of protection.
> .....The central concerns in the case before us are the parent's [*Charter* protected] interest in

> raising his or her child free from unwarranted state intrusion *and the child's right to have his or her best interests protected.* However, when they appear to conflict, these interests must be balanced against each other and against the interest of society in the child protection context. In my view, not only should the Court recognize the child's interest in being protected from harm, but we must also recognize the interest of a child in being nurtured and brought up by his or her parent.

D. Recent Decisions on Parental Rights & Reluctance to Make Resource Decisions: *Gosselin, Trociuk & Canadian Foundation for Children*

While the Supreme Court has not recently directly dealt with any child welfare cases, in the past couple of years it has rendered three judgements that deal with children and youth that are relevant to child welfare cases. One decision, *Gosselin*, signals a reluctance to use the *Charter* to incur require the state to incur costs to address costs to address social inequities, while *Trociuk* and *Canadian Foundation for Children* reaffirm the importance of parental rights.

A major issue in many *Charter* cases in different areas is how far a court can go in imposing resources costs on the state government. Related to this is the question in child welfare cases, of how far a judge should go in making specific directions about the care of a child. Child welfare legislation generally does not allow a court to order an agency to place a child in a specific home or facility, or to require specific resources to be spent on the child. Although judges can make recommendations about specific placements, and may have expectations about placements in making orders, they generally cannot directly order child welfare agencies to undertake specific actions or provide specific services.[31]

In 1999 in *Eldridge v British Columbia*[32] the Supreme Court used s. 15 of the *Charter* to order the British Columbia government to provide specific services for an identifiable group of disadvantaged Canadians, the hearing impaired. More recently, however, in its 2002 decision in *Gosselin v Quebec (Attorney General)*[33] a majority of the Court was unwilling to invoke either s. 7 or s. 15 of the *Charter* to strike down social assistance regulations that provided for significantly lower rates of assistance to those under the age of 30, as a way of encouraging them to undergo training or education. The majority of the Court held that the primary purpose of s. 7 is to provide “adjudicative” or process-oriented rights, rather than conferring substantive rights, rejecting a *Charter*-based claim by young adults to have the same social assistance rates as those 30 and older. Chief Justice McLachlin rejected the argument that “security of the person” encompassed the right to certain minimum level of social assistance, and further questioned whether s. 7 could be invoked to impose a positive duty on the state to provide resources, as opposed to constraining the way in which the state *deprives* individuals of their liberty or security of the person:[34]

> the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those "that occur as a result of an individual's interaction with the justice system and its administration"...This view limits the potential scope of "life, liberty and security of person" by asking whom or what s. 7 protects against. Under this narrow interpretation, s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice...Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right *not to be deprived* of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to *deprive* people of these. Such a deprivation does not exist in the case at bar.

While not accepting that s. 7 was implicated in this case, McLachlin C.J. left a narrow opening for argument in future cases about a "positive state obligation" to provide resources or services to address societal inequities:[35]

> it is both unnecessary and undesirable to attempt to state an exhaustive definition of the administration of justice at this stage, delimiting all circumstances in which the administration of justice might conceivably be implicated. The meaning of the administration of justice, and more broadly the meaning of s. 7, should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration.... One day s. 7 may be interpreted to include positive obligations.

The decision in *Gosselin* signals a reluctance to use the *Charter* to require the state to incur financial costs to provide services outside of the justice system to address social inequities or even to ensure a minimum level of sustenance. Although the Supreme Court in *Gosselin* left some room for making arguments in future cases to invoke s. 7 to require the state to provide services to protect children or promote their welfare, the judgement reflects an understandable judicial reluctance to in effect become involved in making resource decisions for the state.[36]

In its June 2003 decision in *Trociuk v British Columbia* the Supreme Court held that it is a violation of the s. 15 *Charter* rights of the father of a child born out of wedlock to leave it totally to the mother to decide whether his name appears on the birth certificate, and to give him no opportunity to register his paternity. This case arose out of a challenge to British Columbia birth registration legislation brought by the biological father of triplets, who had lived with their mother at the time of birth, and subsequently separated from her. A paternity test proved that he was the biological father, and he had court ordered access as well as the obligation to pay child support. The legislation in British Columbia (unlike Ontario) made no provision for a man in this situation to be registered on the birth certificate as the child's father. In striking down the statute, Deschamps J. wrote for the unanimous Court:[37]

> Parents have a significant interest in meaningfully participating in the lives of their children. "The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world." Including one's particulars on a birth registration is an important means of participating in the life of a child. ....Contribution to the process of determining a child's surname is another significant mode of participation in the life of a child. For many in our society, the act of naming a child holds great significance.
>
> In the present case, the reasonable claimant in the father's position, apprised of all relevant circumstances, would observe that the impugned provisions impose a disadvantage on him that they do not impose on a mother. It would be reasonable for him to perceive that the legislature is sending a message that a father's relationship with his children is less worthy of respect than that between a mother and her children. Given the centrality of such relationships to an individual's identity, a reasonable claimant would perceive the message to be a negative judgment of his worth as a human being).

As discussed further below, the *Trociuk* decision may have some implications for Ontario cases involving notice or status of fathers of children born out of wedlock, though it is significant to note that unlike in British Columbia when this case arose, the Ontario *Children's Law Reform Act* s. 12 allows a man who believes that he is the father of a child to file an affirmation of paternity with the Registrar of Vital Statistics, which then entitles him to notice of any child protection or adoption proceedings.[38]

In *Canadian Foundation for Children*, decided in January 2004, the Supreme Court upheld the constitutional validity of s. 43 of the *Criminal Code*, ruling the *Charter* rights of children are not infringed by Parliament giving parent the right to use "reasonable force" for the purposes of correction of their children.[39] While the majority of the Court upheld the validity of s. 43 of the *Criminal Code*, it provided a relatively narrow interpretation of this provision, for example ruling that any use of implements is "unreasonable," as is any use of force that results in any injury to a child. Further, corporal punishment is not to be used on children under the age or 2 or over 12 years, and teachers may not use corporal punishment at all, though they may use reasonable force to restrain a child.

Writing for the majority of the Court, McLachlin C.J. accepted that s. 43 infringes on the child's "security of the person," but held that this was done in a way that accords with the "principles of fundamental justice" and hence s. 7 of the *Charter* is not violated. The Court held that Crown is able to represent the interests of the child and hence the child's security of the person is adequately protected. Of potential significance for child welfare proceedings, the Court concluded that the "best interests of the child is *not* a "principle of fundamental justice," an issue that is further discussed below.

While accepting that children are clearly a "highly vulnerable group" and hence entitled to the protection of 15 of the *Charter*, the majority of the Court also held that s. 43 of the *Criminal Code* corresponds to "actual needs and circumstances of children," and hence does not "discriminate" against children.[40] In coming to this conclusion, the Court emphasized the importance of respecting the role and rights of parents to make decisions about how to raise their children.[41] This aspect of the decision is also further discussed below.

Although *Trociuk* and *Canadian Foundation for Children* are not child welfare cases, they both signal a continued respect in the Supreme Court for the constitutional rights of parents. As will be discussed further below, it is also significant that in *Canadian Foundation* the Court rejected the argument the "best interests of the child" is one of the principles of fundamental justice. It is perhaps ironic that while *Canadian Foundation for Children* is generally "pro-parent," the conclusion that the "best interests of the child" is not one of the principles of fundamental justice, if followed, may in some cases help child welfare agencies to resist the *Charter* claims of parents (and children) in child welfare cases.

IV. A CONCEPTUAL FRAMEWORK: CHILDREN, PARENTS & THE STATE

It is now accepted that the "liberty and security of the person" of both children and parents are threatened in child welfare proceedings, and that there is the potential for both to seek constitutional protections under s.7 of the *Charter*. There may, however, be situations in which their rights conflict and must in some way be balanced against each other. However, in most child protection situations, it is submitted that the *constitutional rights* of children and parents are not in conflict with one another, and can be *independently asserted against the state*.

While some of the jurisprudence in this area, both American and Canadian, refers a little vaguely to the right of "the family" to constitutional protection, it is analytically necessary to distinguish a number of distinct, yet related rights and interests, of parents, children and the state.

A. The State vs The Parent

It was clearly been accepted by the Supreme Court of Canada in *New Brunswick* v. *G.(J.)* that a fundamental aspect of parents' "security of the person" is their relationship with their children. As Lamer C.J. wrote:[42]

I have little doubt that state removal of a child from parental custody pursuant to the state's

> *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. The *parental interest in raising and caring for a child is.... "an individual interest of fundamental importance in our society"*. Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct....relieving a parent of custody of his or her child restricts a parent's security of the person.

The protection of parental rights is based, in part, on a belief that parents should be presumed to be acting to promote their child's interests, and hence a protection of these rights will promote a child's welfare. Further, as parents in our society have primary responsibility for the care of the children that they brought into the world, this necessitates giving parents a very significant set of rights in regard to their 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 with his or her family, particularly since any change is bound to have a disruptive effect upon a child. Perhaps most fundamentally, parental rights are viewed as "natural rights." It is accepted as a basic tenet of our culture and way of life that parents have a "right" to control and care for their children; this right is inextricably bound to the view of a society based on the primacy of the individual, and the protection of "liberty and security of the person."

The state has a *clear interest in protecting children* from harm and promote their welfare.[43] The protection of children will inevitably involve some infringement or curtailment of parental rights, though if the state action is done "in accordance with the principles of fundamental justice," there is no violation of s. 7 of the *Charter*. It is also possible for a violation by the state of parental rights to be justified under s.1 of the *Charter* as a "reasonable limit...demonstrably justified in a free an democratic society."

The state may enact laws which uniformly curtail the rights of all parents. For example, compulsory school attendance laws may require all parents to send their children to a school, so parents cannot decide that their 10-year-old child should join the labour force rather than attend school (though they may have a right to choose the type of school or education). Other laws may have a narrower focus. In particular child protection legislation allows the state to intervene to protect children when "the level of [parental] care...falls below that which no child in this country should be subject to."[44]

Some judicial analysis suggests that the state's interest in protecting the physical or psychological integrity of children may give rise to an argument that the state is protecting the *constitutional rights* of the child. It is submitted that this approach is misconceived, though it has received some support in the courts, including in the Supreme Court of Canada, where in *R.B.,* in a concurring opinion Iacobucci and Major JJ. wrote:

> It is important to bear in mind that the impugned provisions of the Child Welfare Act are geared to the promotion of the health, safety and personal integrity of the child. To this end, although this appeal raises issues related to the right of parents to rear their children without undue influence by the state, *it also touches on the s. 7 right of the child to life and security of the person.* It is this perspective that we find absent from the reasons of La Forest J. As such, we are concerned by the fact that our colleague's decision creates a situation in which *the child's right to life or security of the person is reduced to a limitation on the parents' constitutionally protected* ability to deny that child the necessities of life owing to parental liberty and freedom of religion....
>
> We find that the right to liberty embedded in s. 7 does not include a parents' right to deny a child medical treatment that has been adjudged necessary by a medical professional. Although

> the scope of "liberty" as understood by s. 7 is expansive, it is certainly not all-encompassing. This Court has unequivocally held that "liberty" is not synonymous with unconstrained freedom....
> We note that La Forest J. holds that "liberty" encompasses the right of parents to have input into the education of their child. In fact, "liberty" may very well permit parents to choose among equally effective types of medical treatment for their children, but we do not find it necessary to determine this question in the instant case. We say this because, assuming without deciding that "liberty" has such a reach, it certainly does not extend to protect the appellants in the case at bar. *There is simply no room within s. 7 for parents to override the child's right to life and security of the person.*[45]

This approach purports to justify a violation of *parental constitutional rights*, by balancing them against the claim that the state (or the court) is protecting the child's *constitutional right to "life and security of the person"* from the threat posed by parental abuse or neglect.

While the state may be justified in limiting parental rights, it is wrong to conceive of a child protection case as a situation where the *court or state child protection agency* is somehow protecting the *constitutional rights* of the child. Rather, this should be viewed as a situation in which the state limits the constitutional rights of parents, and also those of a child, in order to promote the welfare of the child; such a limitation must be consistent with the s. 7 requirements of "fundamental justice"or must be justified under s.1 of the *Charter*. If the approach of Iacobucci and Major JJ. were followed, conceptual difficulties arise if a child with capacity is a party in protection proceedings and expresses a wish to remain with the family or out of agency care, despite allegations of abuse or neglect. In this situation it is the child who is directly asserting constitutional rights to liberty and security of the person; surely a state agency cannot assert the purported constitutional rights on behalf of children, against the children themselves or against their parents.

If their approach were adopted, one by analogy could 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. As noted by McLachlin C.J. of the Supreme Court in *Canadian Foundation for Children*, thus far the jurisprudence has not recognized procedural rights for the victims of an alleged offence.[46]

More fundamentally, it seems inappropriate to allow a state agency to invoke the provisions of the *Charter of Rights* to limit the rights of a citizen. The rights in the *Charter* are intended to protect individuals from the state, not to justify interference by the state or its agencies.

The state clearly has an *interest* in promoting the welfare of children, and in the process may infringe upon the constitutional rights of both parents and children. The basis for state intervention to promote the welfare of a child was articulated by Justice Rehnquist of the United States Supreme Court:

> A stable, loving home life is essential to a child's physical, emotional and spiritual well-being.... *In addition to the child's interest in a normal home life, 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 well-developed citizens.[47]

In a Canadian context, the issue which must be resolved is whether deprivations of "liberty" and "security of the person" occur in accordance with the "principles of fundamental justice," and if not whether the limitations on the constitutional rights of parents and children are "demonstrably justified in a free and democratic society". Clearly an important factor in determining whether s.1 of the *Charter*

may be invoked is a consideration of the child's welfare, though this must be balanced against other important interests.

The Supreme Court would appear to have recently recognized the distinction between constitutional rights and the interests of a child involved in a protection application. In *Winnipeg C.F.S. v W. (K.L.),* Justice L' Heureux-Dubé wrote:

> the *interests* at stake in cases of apprehension are of the highest order, given the impact that state action involving the separation of parents and children may have on all of their lives, and particularly on their psychological and emotional well-being. From the child's perspective, state action in the form of apprehension seeks to ensure the protection, and indeed the very survival, of another *interest* of fundamental importance: the child's life and health. Given that children are highly vulnerable members of our society, and *given society's interest* in protecting them from harm, fair process in the child protection context must reflect the fact that children's lives and health may need to be given priority where the protection of these *interests* diverges from the protection of parents' *rights* to freedom from state intervention.

The state's interest in protecting children from abuse was also recognized by the Supreme Court in *Canadian Foundation for Children,* to justify taking a relatively narrow interpretation of the grant to parents of the right to use "reasonable force" for the purposes of correction of their children in s. 43 of the *Criminal Code.*

In summary, the state has a strong *social interest* in promoting the welfare of children, if necessary protecting them from their parents or themselves. This is a vitally important social interest, but it is confusing and wrong to conceive of a child protection proceeding as a situation where the state is acting to protect the *constitutional rights* of a child. The limitation of parental constitutional rights for the sake of promoting a child's "social interests" involves the sometimes difficult determination of what the "principles of fundamental justice" require or a determination under s.1 of the Charter of what constitutes a "reasonable limit" upon the rights of parents and sometimes upon the constitutional rights of children as well.[48] Under s. 1 of the *Charter*, however, the onus is clearly on the state to justify the restriction on constitutional rights.

B. The State vs The Child

Children have limited intellectual, physical, social, psychological and economic resources. They are born in a state of total dependence, requiring constant care. As children mature, they gradually acquire the capacity to make decisions for themselves and to care for themselves. At some point they are deemed fully capable of caring for themselves and legally become adults. At birth, children are not capable of exercising any rights on their own, though for certain purposes they may be regarded as having inherent rights which a parent or guardian may exercise on their behalf. As children mature, they gain the social and legal capacity to begin to exercise rights on their own. As a child matures towards adulthood, a greater full range of legal rights and responsibilities are assumed.

The major focus of judicial concern about the constitutional rights of children has been on the protection of their *procedural rights*. There has, however, generally been a reluctance to allow the *Charter* to be invoked in the child welfare context *by children,* to give them the substantive right to make decisions that a court considers will be harmful to them. For example, most decisions dealing with the medical treatment of adolescents have tended to order treatment regarded as medically necessary, even if the adolescent is expressing religiously based views rejecting the treatment.[49]

A child has a particular legal "status." In recognition of the child's limited development, there are certain legal obligations, privileges and capacities ascribed to this status by operation of law. The common law and legislation provide that children are legally incapable of making some important decisions which affect their lives, though children who are older may have certain rights denied younger

children. In general, parents have a presumptive right to exercise a broad degree of control over their children, making decisions regarding such matters place of residence, health care, discipline, education, religious training and even marriage. As outlined above, at least in regard to some of these matters, parents have a constitutionally protected "security interest," and may exercise 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 young offenders legislation. Further, the state is prepared to intervene and protect children *from* their parents, either through criminal law (for example prosecutions resulting from situations of child abuse), or by invoking child protection legislation and, if necessary, removing a child from parental care. As well, the state recognizes the status of childhood by specifically denying children certain rights guaranteed to others, as the “realities” of the their condition mean that their “distinctive” treatment is not “discriminatory.” At least for children below a certain age or level of maturity, the right to vote would, for example, fall into this category.

There are, however, a number of situations in which the state becomes directly involved in controlling the behaviour of children and limiting their "liberty or security of the person". Some of these are situations in *which children may assert their own constitutional rights against the state.* In young offender prosecutions, it is the “child” (using the term in its generic sense) who is a party to the proceedings; the parents are not parties. It is the child who faces sanction and a loss of "liberty" if a sentence is imposed, and so it is entirely justifiable that the youth is granted constitutional protections in such proceedings.

There are other proceedings in which a child also faces a loss of "liberty and security of the person" but for which Canadian courts and legislatures have thus far failed to afford full rights of participation and constitutional protections. As recognized by Lamer C.J. in *G.(J.) v New Brunswick* a child protection proceedings threaten a child’s constitutional rights:

> Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent’s right to security of the person at stake, *the child’s is as well*. Since the child’s best interests are presumed to lie with the parent, the child’s psychological integrity and well being may be seriously affected by interference with the parent-child relationship.[50]

A child protection proceeding may result in committal to the care of a state agency until adulthood. Such committal will involve removal from a child's natural family, which may in itself be viewed as a deprivation of "liberty and security of the person;" as well, familial relationships are threatened. The child may be placed in a group home or other facility in which his or her movements and activities are controlled, and in some provinces may actually be placed in a correctional institution in which juvenile offenders are confined.

While the parties to a protection proceeding are usually the parents and the state's child welfare agency, in some Canadian provinces older children may be afforded the right to participate in the proceedings. For example, in Ontario, the *Child and Family Services Act* provides that in certain circumstances children are given rights to notice and of participation in a protection hearing.[51] In a number of other Canadian jurisdictions, however, such rights are not statutorily recognized. There is a strong argument that a child who has the capacity and desire to participate in a protection proceeding, but who under legislation is denied the right to notice and participation, might be able to claim a right of participation, claiming that the proceedings threaten the child’s “liberty and security of the person” under s.7 of the *Charter*. Though in some situations parents may be viewed as "natural guardians," protecting the rights of their children from the state, in many proceedings the parents may lack the inclination or ability to protect their child's rights; parental views or interests may be antithetical to those of their child. Children with capacity should be able to participate in the proceedings in their *own* right.[52] Arguments in this regard under s.7 of the *Charter* may be reinforced by reference to s.15 of the *Charter*.

The argument put forward here about the effect of a protection proceeding on a child's rights under s.7 of the *Charter* was recognized in 1983 by Matas J.A. of the Manitoba Court of Appeal in *Re R.A.M.; Children's Aid Society of Winnipeg v. A.M.*[53] In that case, a 13-year-old boy was made a permanent ward of the children's aid society. The boy did not appear and was not represented at the wardship hearing; though he recognized that it would not be appropriate for him to return home to live with his parents, he expressed a desire to live with an aunt. The boy apparently was not told of his right to make his wishes known to the court or to be represented by counsel. The boy had retained counsel for a delinquency proceeding and when that lawyer learned of the wardship order, after it had been made, an appeal of that order was launched by the boy. In a preliminary motion in regard to the appeal an application was made for an order appointing counsel for the child and adding the child as a party to the protection proceeding. In making the order that the boy should be represented, Matas J.A. quoted s.7 of the *Charter* and stated:

> The premise of Ms. Burka's [counsel for the boy] argument is that the principles of fundamental justice are at least equivalent to the principles of natural justice; *audi alteram partem* applies and all children, regardless of age, are entitled to be present at a hearing and to be represented by counsel.
>
> It is not necessary to hold that counsel should be appointed in all cases of applications for permanent guardianship....
>
> Nor do I think it is necessary to decide the extent of the applicability of the section with respect to age, nor to enter upon a full discussion of the inherent biological and human constraints applicable to children, or to consider the reasonableness of s.7 as it applies to children generally (s.1 of the Charter). *Taking into account the age of the applicant and his apparent level of understanding, it is my judgment that he comes within the ambit of s.7. I have concluded that his liberty and security would be affected by a permanent order.*
>
> An important factor leading to this conclusion is the relationship of these proceedings to those under the Juvenile Delinquents Act. It is taken for granted that R. [the boy] has the capacity to instruct counsel in the juvenile proceedings. I see no reason for thinking he cannot do so here. Coincidentally, there is an overlap in the two matters. As I have mentioned above, the suggested disposition in the juvenile proceedings is a committal to the society.[54]

The decision of Matas J.A. was reversed by a full panel of the Manitoba Court of Appeal on procedural grounds, as the boy had not brought his application by a next friend; the brief decision of the full panel does not deal with the applicability of the Charter to this situation.

In a 2001 Saskatchewan decision, *Re R.M.S.* involving litigation between the child welfare authorities, the biological mother, the foster parents and the children's aboriginal tribal council, Smith J. expressed a concern that the child's interests might not be fully presented to the court. While citing the *Charter*, the judge invoked the court's *parens patriae* power to appoint counsel for the children, even though they apparently lacked the capacity to instruct counsel, remarking:

> independent counsel [can] be appointed as a legal representative for the child, to advocate for the rights and interests of the child and ensure that the court [has] before it all the relevant evidence and arguments in relation to the best interests of the child and to [any] Charter issue raised.[55]

In cases where a child lacks capacity to instruct counsel, there is always a concern about how counsel will formulate a position, and whether counsel for the child will simply adopt the position of one of the other parties. Accordingly courts should be cautious about appointing counsel in such cases; however, in cases in which there are real concerns about whether their interests will be fully protected, it may be constitutionally necessary to do so.[56]

Clearly older adolescents who are apprehended under legislation like Alberta's *Protection of*

Children Involved in Prostitution Act face a threat to their "liberty and security of the person" and are entitled to be treated in accordance with the principles of fundamental justice. A concern about the child's welfare may justify giving an adolescent apprehended under this type of legislation fewer rights than an adolescent arrested under youth justice legislation, for example by delaying a post-apprehension hearing. However, concerns about the welfare of a child cannot justify denying the youth detained under child welfare legislation of the right to a fair hearing to determine the validity of the detention.[57]

A fundamental argument of this paper is that parents and children each have independent interests in their relationship. There are, however, a number of Canadian cases which recognize constitutional rights in a familial context, but seem to confuse the rights of parents and children. An example of this confusion is the 1988 Newfoundland decision in *Re C.P.L.* A Jehovah's Witness child was apprehended shortly after birth, without notice to the parents. The parents were not notified until 21 days after the apprehension (as opposed to the statutorily required 10 days), and no hearing was held until 46 days after the apprehension (though the statute required a hearing within 21 days.). The child was eventually discharged from medical care, though suffering from an inoperable condition, and died in his parents' care. Riche J. of the Newfoundland Unified Family Court nevertheless allowed the parents' challenge to the constitutional validity of the statute. The Court declared unconstitutional the provisions of the Newfoundland *Child Welfare Act* which dealt with interim custody and medical care prior to a court hearing, though founding its decision on a violation of the *child's* constitutional rights, not the *parents'* rights.

> As between the parents and the children, the parents have few rights and many obligations. The children have many rights and at infancy no obligations. The right that an infant child has, which is important to this case, is a right to be cared for by its parents. This is a right which I find is a right enshrined in the Charter under Section 7....In this challenge it is not parental rights or family autonomy or even state rights, with which I am concerned, I am only concerned with the right to life, liberty and security of the child....
> When Baby C.P.L. was born, he immediately had the right to the protection of his parents. That includes the right to have them make all decisions for him with respect to his health and well-being. It was his right and his parents' obligation. Baby C.P.L. had that right to parental care, including the making of decisions on his behalf with respect to well-being. This includes decisions as to what medical or surgical treatment he should be given. The right that Baby C.P.L. had to have these decisions made by his parents is his right....The law recognizes the child of the parent to take or defend an action on behalf of the child.[58]

While Riche J. emphasized the *child's* rights, he recognized that these were to be exercised by the parents.

> The child was apprehended. Apprehension is similar to arrest. It is the taking control of the physical person....The rights contained in s.10 the Charter are some of the principles of fundamental justice. Baby C.P.L. was not advised of his detention or the reasons therefor. Baby C.P.L. was only two days old when he was apprehended and detained. Because of his age and understanding, it was impossible to attempt to inform the baby of his detention and the reasons therefor. I believe that Baby C.P.L. had the right to be informed *through his parents* of this apprehension and...the reasons therefor.[59]

The outcome of *C.P.L.* is justifiable. The judge was using the *Charter* to narrow the effect of a

very broadly worded legislative provision which allowed a state agency a wide power to intervene in the family[60] (and the legislation has since been replaced with a statute that more narrowly defines the state power.[61]) Further, the child welfare authorities did not ever comply with the lengthy time periods provided in the legislation. The judge used the *Charter* as a remedy for injustice, requiring child protection authorities to conduct themselves in accordance with the principles of fundamental justice. He characterized the authorities' conduct as "high-handed", or at the very least totally insensitive and contrary to the spirit of the legislation.

While it is submitted that the outcome of *Re C.P.L.* is correct, the analysis offered seems confusing.[62] The judge apparently wished to avoid having a conflict between rights of parents and children, and did so by purporting to ignore the rights of parents. However, in a practical sense the parents' rights were recognized, since the judge ruled that they alone had the power to exercise the constitutional rights which he had assigned to the child. Surely it would be practically and analytically sounder to characterize *C.P.L.* as a situation in which the parents' constitutional rights were violated by the agency and the court fashioned a remedy, with the intention of both protecting the parents' rights and of promoting the interests of the child to a speedy hearing.

C. Child vs Parent

Parents are given a broad range of powers at common law and under legislation to make decisions affecting their children and to control their lives. Further, it has been accepted that under the *Charter*, some parental rights are aspects of a parent's "security of the person," and hence entitled to constitutional protection. It has also been accepted by the courts that children have a constitutional right to "liberty and security of the person," which in some situations they may assert in their own capacity.

A central theme of this paper is that generally in a child protection proceeding the *constitutional rights* of parents and children are not in conflict.[63] Both parents and children have the right to have the state intervention occur only "in accordance with the principles of fundamental justice." It is only once the court has determined that the state has proven that there is sufficient evidence of parental abuse, neglect or incapacity that their constitutional rights may start to diverge in a child welfare proceeding, or if it is a case in which the child has capacity to participate in the proceedings and is expressing views different from the parents.

There may, however, be situations in which the constitutional rights of children and parents must be balanced against each, and children may be able to claim that their rights take precedence to the rights of their parents. These situations, however, will arise relatively rarely in the context of child welfare litigation.

In many situations involving younger children, parental rights to raise their children are easily justifiable as reasonable limits on the rights of their children. 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 children may seek to make a decision about their own lives, and in which denial of this right to the child is an infringement upon the child's "liberty and security of the person". In one American case, a teenaged boy was ultimately permitted to claim political asylum, despite his parents' desire to have him return with them to the then Communist Soviet Union. The court observed that at age 12 he would have been "under the lower end of an age range in which a minor may be mature enough to assert individual rights that equal or override those of his parents", but that these rights "grow more compelling with age",[64] and by the time he was an older adolescent, he was permitted to assert his own constitutional 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. Courts have considered whether parents should decide such questions as whether their child will have an abortion,[65] or access to contraceptives[66] or be committed "voluntarily" (that is, by the parents) to mental

health facilities.[67] Clearly the resolution of these issues requires 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 does not seem adequate, however, to deny a child all right to participate in a decision about such matters solely on the basis of age, nor conversely is it appropriate to dismiss all parental claims to rights to participate in this type of decision.

In *Canadian Foundation for Children v. Canada* , the Supreme Court of Canada upheld the constitutional validity of s. 43 of the *Criminal Code*, which allows parents to use reasonable force on children "for the purpose of correction." The Court noted that s. 7 of the *Charter* can only be invoked when there is *state action* that curtails the liberty or security of the person of a child, so that a child could not, for example, invoke the *Charter* to bring a court application to compel parents to do something. However, the Court accepted that to the extent that parents are relying on a state enforced legal regime to exercise powers over their children, the legal regime must be consistent with the *Charter*. The Supreme *Court* recognized that parents should be given a significant degree of autonomy to raise their children as they see fit.

While accepting that children are clearly a "highly vulnerable group" and hence entitled to the protection of s. 15 of the *Charter*, the majority of the Court also held that s. 43 of the *Criminal Code* corresponds to "actual needs and circumstances of children," and hence does not "discriminate" against children.[68] In coming to this conclusion, the Court emphasized the importance of respecting the role and rights of parents to make decisions about how to raise their children.[69]

> Children need to be protected from abusive treatment. They are vulnerable members of Canadian society ....the government responds to the critical need of all children for a safe environment. Yet this is not the only need of children. Children also depend on parents .... guidance and discipline, to protect them from harm and to promote their healthy development within society. A stable and secure family .... is essential to this growth process.
> Section 43 is Parliament's attempt to accommodate both of these needs. It provides parents and teachers with the ability to carry out the reasonable education of the child without the threat of sanction by the criminal law. The criminal law will decisively condemn and punish force that harms children, is part of a pattern of abuse, or is simply the angry or frustrated imposition of violence against children; in this way, by decriminalizing only minimal force of transient or trivial impact, s. 43 is sensitive to children's need for a safe environment. But s. 43 also ensures the criminal law will not be used where the force is part of a genuine effort to educate the child, poses no reasonable risk of harm that is more than transitory and trifling, and is reasonable under the circumstances. Introducing the criminal law into children's families and educational environments in such circumstances would harm children more than help them. So Parliament has decided not to do so, preferring the approach of educating parents against physical discipline. This decision, far from ignoring the reality of children's lives, is grounded in their lived experience. The criminal law is the most powerful tool at Parliament's disposal. Yet it is a blunt instrument whose power can also be destructive of family and educational relationships.....
> The reality is that without s. 43, Canada's broad assault law would criminalize force falling far short of what we think of as corporal punishment, like placing an unwilling child in a chair for a five-minute "time-out". The decision not to criminalize such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families — a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process.

Parents generally make decisions about what schools and churches their children will attend. In Canada and the United States[70] courts have upheld the parental right to send a child to a religious school rather than a public school as an aspect of religious freedom. These cases arose in the context of quasi-criminal charged brought *by the state against the parents* for violating school attendance laws. It can be

argued that mature adolescent children should have the right, as against their parents and the state, to decide such issues as what church to attend and whether to attend a religious school, or whether to engage in religious practices at a public school.[71] A mature child should be entitled to "freedom of conscience and religion" as guaranteed by s.2 of the *Charter of Rights*.

The constitutional aspects of the parent-child relationship must also be considered in light of s.15 of the Charter, which prohibits any person from being denied "equal protection and equal benefit of the law without discrimination ...and in particular without discrimination on the basis of...age". It is clearly discriminatory if a 15-year-old is denied the opportunity to make decisions about health care or about which school to attend. A significant question is whether provisions such as s.1 of the Charter can be invoked to justify such restraints on the rights and freedoms of young persons. The older the child, the more difficult it is to justify differential treatment from adults, and granting parents control over them. It is significant to note that in *Canadian Foundation for Children* the Court allowed corporal punishment only for children under the age of twelve. Although not directly basing this part of the decision on the *Charter*, the Court clearly treated adolescents differently from children for the purposes of this constitutional challenge.

D. Best Interests of the Child and the Principles of Fundamental Justice

As discussed above, there are some passages in some of the Supreme Court of Canada judgements on the *Charter* and child welfare which suggest that it is one of the “principles of fundamental justice” that decisions about children must be made according to the “best interests” of the child. For example in
G. (J.) Lamer C.J. wrote:

> Thus, the interests of fundamental justice in child protection proceedings are both substantive and procedural. The state may only relieve a parent of custody when it is necessary to protect the *best interests* of the child, provided that there is a fair procedure for making this determination....[72]

In *W. (K.L.),* Arbour J.(in dissent) observed:

> I would suggest, therefore, that *to satisfy the substantive content of the principles of fundamental justice in the child protection context, the apprehension of a child by a state agency requires an evaluation of the best interests of the child...*[73]

Notwithstanding these statements, it is clear that the *Charter* does not require that in every situation the courts or state act to promote the best interests of children. In rejecting the claim that s. 43 of the *Criminal Code* violates the *Charter,* Goudge J.A. in the Ontario Court of Appeal in *Canadian Foundation for Children v Canada* observed:

> the appellant argues that s. 43, in decriminalizing limited physical punishment of children intended for correction, contravenes "the best interests of the child", which it argues is a principle of fundamental justice.
> I cannot agree that in the context of this [criminal] case "best interests of the child" stands as such a principle. The Supreme Court of Canada has repeatedly made clear that the meaning of fundamental justice must depend in a given case on both the nature of the s. 7 right asserted and the character of the alleged violation.....
> In that light, it must be remembered that this is not a case arising in the context of family law where, *if the removal by the state of a child from a parent's custody infringes the parent's right to security of the person, fundamental justice may require an evaluation of the best interests of the*

child. Indeed, *even in the family law context of child protection, the fundamental principle has been articulated not in terms of "best interests of the child" but in the rather more guarded language* quoted by L'Heureux-Dubé J. in *Winnipeg Child and Family Services v. W. (K.L.)*:

> The protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, as it also meets the requirements of fair procedure.

In my view, the application of "best interests of the child" as a principle of fundamental justice in this criminal law context presents significant difficulty....

Hence I think that the concept of "best interests of the child", while undoubtedly one of the underlying principles upon which our society is based, *is insufficiently precise in the criminal law context presented here to serve as a principle of fundamental justice in this case*.[74]

It is interesting to note that Goudge J.A. limited his discussion to the issue that was before the court - the criminal law context, suggesting that there might be cases in the family law or child welfare context in which a requirement that a decision is to be made that accords with the child best interests would be required by the principles of fundamental justice. In the Supreme Court of Canada in *Canadian Foundation for Children,* Chief Justice McLachlin gave considerable attention to this question, and concluded:[75]

> While "the best interests of the child" is a recognized legal principle, this legal principle is not a principle of fundamental justice....[in order to be a principle of fundamental justice].... there must be sufficient consensus that the alleged principle is "vital or fundamental to our societal notion of justice"...The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens.
>
> .... the "best interests of the child" fails to meet the second criterion for a principle of fundamental justice: consensus that the principle is vital or fundamental to our societal notion of justice. The "best interests of the child" is widely supported in legislation and social policy, and is an important factor for consideration in many contexts. *It is not, however, a foundational requirement for the dispensation of justice. .... the legal principle of the "best interests of the child" may be subordinated to other concerns in appropriate contexts*. For example, a person convicted of a crime may be sentenced to prison even where it may not be in his or her child's best interests. *Society does not always deem it essential that the "best interests of the child" trump all other concerns in the administration of justice. The "best interests of the child", while an important legal principle and a factor for consideration in many contexts, is not vital or fundamental to our societal notion of justice, and hence is not a principle of fundamental justice.*
>
> To conclude, "the best interests of the child" is a legal principle that carries great power in many contexts. However, it is not a principle of fundamental justice.

The statements of the McLachlin C.J. about the best interests of the child not being a principle of fundamental justice sound quite definite. They must, however, be understood as having been made in the context of a case in which a challenge was being made to a *criminal law*, and the invocation of the best interests of the child might have result in extending the scope of the criminal law *against parents.* As the discussion of the *Charter* jurisprudence in this area makes clear, when the context changes, the Supreme Court does not view itself as bound by general statements in previous cases, and even individual judges do not view themselves as bound to follow their own seemingly broad pronouncements in previous cases.[76]

It is clear that the *Charter* does not require that parents establish that their decisions and care are always intended to promote the best interests of their children. To the contrary, the *Charter* recognizes a

substantial area of parental autonomy. For example, a mother who smokes in the house does not risk loss of custody of her children to child welfare authorities (in the absence of special health concerns), even though this type of parental conduct is clearly not in the best interests of her child. It is only if there is a clear and substantial risk of harm that the state can justify removal of a child from parental care.

Especially after *Gosselin* and *Canadian Foundation for Children*, it seems unlikely that a court will order a state agency to incur the expense to undertake a course of action that will do *the most*, in the court's view, to promote the interests of a child. However, as discussed further below, in situations in which a legislative provision or agency policy appears to *preclude* a court from making a decision that will promote the child's best interests, the courts may be persuaded to invoke the *Charter* to promote a child's best interests. In some of these situations, the courts may be prepared to find that the "principles of fundamental justice" require that the court should be able to consider alternatives that promote a child's best interests, provided that these alternatives do not impose unreasonable burdens on the state agency. As the Supreme Court recognized in *Gosselin* , s. 7 of the *Charter* is a flexible provision that must be interpreted in the context of the specific issues before a court. The *Charter* may require judicial action if legislation precludes consideration of a reasonable alternative that would promote the interests of a child, but it does not require every decision must do the most that is conceivably possible to promote the interests of the child before the court.

V. PROCEDURAL ISSUES IN A CHARTER CHALLENGE

A. Notice of a Charter Challenge

Every jurisdiction in Canada requires that the relevant Attorney General or Minister of Justice must receive notice of any case raising a "constitutional question," in order to allow the statute in question to be defended by the government or the relief sought to be resisted.[77] The courts have held that this provision is mandatory, even in cases in which the court itself raises the *Charter* issue, as might for example occur if the trial judge raises the possibility of making a constitutionally based order for representation of an indigent parent in a child protection case.[78] If the judge raises the *Charter* issue, in particular in regard to a possible order for representation, then the court may direct that notice is to be given to the Attorney General, indicating that if the Attorney General does not appear to justify why an order should not be made, an order will be forthcoming.

While the Attorney General must be notified before a *Charter* remedy can be given under s.24 of the *Charter*, a judge may consider "*Charter* values" to help interpret legislation or the common law, and a superior court may invoke its *parens patriae* jurisdiction to promote "*Charter* values" even in the absence of such notice.[79]

B. Charter Remedies

There are a number of remedies available under the *Charter*, though under s. 24 only a court must have "competent jurisdiction" to give particular remedies. There are limits to the jurisdiction of a provincially appointed judge in a child welfare case to grant certain types of relief; in particular an award of damages can generally can only be made by a federally appointed superior court judge.

The constitutional remedies are:[80]

- *Declaration of Invalidity – With or Without Suspension*: a court can declare a piece of legislation invalid for violating the *Charter*, usually suspending the effect of the order to allow the legislature sufficient time to enact appropriate remedial legislation. Because this type of remedy may deprive the court of jurisdiction to make an order about any child who is before the court, this will rarely be an appropriate remedy in a child welfare case, unless the future of any child who is involved in the case can be provided for without the legislative provision in question.

- *"Reading In," "Reading Down" and Severance*: in cases in which judges in child welfare cases have concerns about legislative violations of the *Charter*, they understandably want to provide immediate relief for the child before the court, which they sometimes can do by in effect judicially amending the legislation through the related devices of "reading in," "reading down" or severance, that is applying or interpreting the legislation in a way that is consistent with the *Charter*. Since there is no delay in giving providing appropriate relief, this may be an appropriate remedy in a child welfare case.

- *Procedural Order for Relief for a Specific Case* such as requiring an adjournment, or ordering disclosure of information in possession of a child welfare agency, or that a parent or child have legal representation. This seems to be the most commonly awarded relief where there is a *Charter* violation in a child welfare case and has the advantage of remedying the specific *Charter* violation without causing significant systemic disruption. In criminal cases, there may be a stay of proceedings if there has been a significant *Charter* violation, but this will rarely if ever be appropriate in a chid welfare case. For example, where there has been an unreasonable delay in getting a criminal case to trial, an "*Ashkov* stay" may be appropriate, but this will not be appropriate in a child welfare case as it would potentially endanger a child; an order for an expedited trial, extended access or costs might be appropriate remedies.

- *Exclusion of Evidence* obtained in violation of a *Charter* right. Although this type of remedy is quite frequently given when there has been a violation of *Charter* rights in criminal proceedings, there is an understandable reluctance to grant this type of relief in any case in which a court is considering the future of a child. The court will be most reluctant to exclude consideration of any highly probative evidence in a child welfare proceeding in the absence of an egregious violation of rights, though the *Charter* may be invoked to exclude evidence of questionable probative value.[81]

- *Damages:* Awards of damages have been rare for *Charter* violations, and are beyond the jurisdiction of provincially appointed judges. In some cases an award of legal costs may be an appropriate remedy and can be awarded by a provincially appointed judge, and there may be cases in which damages are appropriate to compensate for expenses incurred or because there is no other remedy available to compensate a parent or child.[82] In general, however, a monetary award will not be appropriate in a case involving the well-being of a child.[83]

C. The Need for Hearing & Factual Findings

A *Charter* based claims for relief in one case will often have potential implications for other cases. Judges in child welfare cases have indicated that they will not make these rulings without appropriate notice to the Attorney General and will then require evidence to allow them to make appropriate factual findings to support an aplpication.[84] While in appropriate cases this evidence can be submitted by affidavit, a *Charter* application cannot be based merely on submissions of counsel.

Further, if a *Charter* claim is made in the context of a child protection application and the main application is dismissed on the merits, a judge may be *functus* and will in any event be reluctant to deal with any *Charter* issue that may have been raised.[85]

VI. THE CHARTER & CHILD WELFARE: APPLYING THE PRINCIPLES

The following discussion illustrates some of the situations in which the *Charter* may be important for child welfare proceedings, though it is not intended to be an exhaustive discussion of all of the situations in which the *Charter* may apply to this type of case.

A. Legal Representation for Parents in Child Protection Cases

While *G. (J.)* held that an indigent parent[86] does not have an absolute right to state-paid counsel in a child protection proceeding, the complexity and importance of most contested wardship applications, and the limited education and sophistication of most parents involved in these cases, suggest that there will be few cases in which there is the possibility of even temporary removal of a child from parental care in which a trial judge is likely to find that there is no right to representation.

In practice, since *G. (J.),* Legal Aid offices in Canada have generally been ensuring that some minimum level of legal representation is available for trials in child protection cases involving indigent parents where a child may be removed or kept from parental custody.

A British Columbia case makes clear that judges also have a role in ensuring that representation for indigent parents is adequate, and the mere fact that Legal Aid is willing to offer some minimal level of assistance may not be sufficient to assure that *Charter* rights have been protected. There is, however, an onus on a parent (or counsel) seeking a *Charter*-based court order for representation to show that the representation that Legal Aid plan will provide is inadequate. In *Walton v Simpson* a mother of three children was trying to regain custody of her three children, who had been apprehended after a fourth child was killed by the woman's common law husband. The case was high profile and complex, with a five week trial planned. A very experienced family law counsel was prepared to represent the mother at legal aid rate of $72 per hour (less than half his regular rate), but felt that he could not adequately prepare within the approximately 125 hours for preparation time that legal aid was prepared to guarantee. Accordingly, counsel representing the mother sought an order that he be appointed by the court without any restriction on preparation time, at the tariff rate. Justice Meiklem accepted that he had jurisdiction under s. 7 of the *Charter* to make the order sought, but felt that counsel had not established through "any independent or expert opinions" that the legal aid cap would not allow adequate preparation, and further counsel had not established that the Legal Services Society would not exercise its discretion to increase the maximum if reasonably required. After discussing the Supreme Court decision in *G. (J.),* the judge wrote:[87]

> The applicant has the burden of establishing a Charter breach on a balance of probabilities. That would be achieved in this case by establishing that the cap on preparation will probably impede the effectiveness of counsel to the extent that the hearing will be rendered unfair due to the lack of adequate representation.
>
> I do not accept the argument advanced by the Attorney General that, as a matter of principle, if there is legal aid coverage, and therefore counsel available, that is the end of the inquiry. *There is obviously some minimum threshold level of funding required to make the provision of counsel meaningful and effective to ensure the fairness of the hearing*. For example, if there was no funding for preparation in a case which required extensive preparation, providing counsel at the hearing alone would be perfunctory and probably would not ensure fairness.....

> The only evidence before me on the question of the impact of the funding formula for preparation on the fairness of the hearing is the opinion of ...[counsel for the mother] as expressed to the Legal Services Society. That is entitled to some weight because of his seniority and his familiarity with the case, but it is nevertheless a subjective opinion put forward in negotiation, and is a tenuous basis on which to find a Charter breach established.

The court dismissed the mother's application, and a Legal Aid staff lawyer took over her representation. The decision in *Walton v Simpson* establishes that the courts have a role in ensuring that representation for an indigent parent is adequate, but also illustrates a reluctance by judges to not lightly overturn a decision by Legal Aid or government officials about how representation is to be provided.

If the provincial legal aid plan is unable to provide adequate representation for an indigent parent in a child welfare case, the court has the basis for making a *Charter* based order for representation. In a 2002 Ontario child welfare case, a mother was unable to obtain a lawyer with her legal aid certificate because of the refusal of local counsel to accept the Legal Aid tariff rate of $88 per hour. Justice Cosgrove of the Ontario Superior Court invoked the *Charter* in a "*Fisher* application"[88] and ordered that counsel was to be a rate of $125 per hour, a rate at which counsel was willing to provide representation.[89]

It is submitted that in any case in which a judge considers that an unrepresented litigant in a child protection case may have a constitutional right to counsel, the judge has an obligation to raise this issue as an aspect of the judicial duty to ensure that there is a fair trial. If Legal Aid refuses to provide adequate representation, the judge has the jurisdiction to order that the litigant retain counsel who is to be paid by the provincial (or territorial) government.[90] Before a judge makes a *Charter* order that the government pay for counsel, the Attorney General should have notice that issue is raised and have an opportunity to oppose the order.[91] In all of the reported cases to date, counsel have appeared *pro bono* to argue the initial motions for a *Charter* based order for representation, though costs should normally be awarded if the application is successful.

In an appropriate case an independent *amicus curiae* counsel might be appointed by the judge (and paid by the Attorney General) to investigate and argue the issue of whether counsel should be appointed, though ordinarily this should not be necessary.[92] The matter of representation for an unrepresented indigent parent should be dealt with in a relatively expeditious fashion so as not to prejudice the child and ordinarily can be resolved without the appointment of an *amicus curiae* to argue the parent's case.

The analysis in *New Brunswick (Minister of Health)* v. *G.(J.)* may be relevant for a range of issues beyond representation of parents that may arise in child protection proceedings, and may, for example, also be applied in adoption cases.[93]

In a Saskatchewan child welfare appeal, it was recognized that *G.(J.)* may also apply at the appeal stage, though in cases where Legal Aid has refused to fund an appeal because counsel for the parents at trial, "consistent with his professional obligation" advised Legal Aid that the appeal does not meet "merit criteria," the appeal court may decide not to appoint counsel for an indigent parent.[94] The appeal court in *R.A.F. v Saskatchewan (Department of Justice)* held that there must be "some chance of success- some basic merit to the appeal" before counsel will be appointed. This is similar to the approach that courts have taken to summary judgement issues in child protection cases (discussed below). While a parent's claim in a child protection case is to be adjudicated "in accordance with the principles of fundamental justice," there is some "internal balancing" that must go on when determining what these principles are and how to apply them in specific cases.[95] It is legitimate for courts, when considering what these principles are, to recognize that the state does not have unlimited resources to provide counsel for an appeal without even arguable grounds. Further, automatically providing counsel for an appeal may encourage frivolous appeals that delay the permanent placement of children and hence would be contrary to the interests of justice.

B. Disclosure in Child Welfare Cases

The Supreme Court decisions in *G. (J.)* and *W. (K.L.)* require that child protection proceedings are to be conducted "in accordance with the principles of fundamental justice." Counsel for a parent (or child) in a child welfare case may find it useful to place arguments about a range of procedural and evidentiary issues on a constitutional basis, though given the notice requirements[96] and complexity of arguments, it is usually preferable to first exhaust any claims under statute, rules of court or common law.

Although several provinces, including Ontario, have rules of court that govern disclosure in child protection cases, in some Canadian jurisdictions the disclosure for child protection cases are vague or quite narrow. Counsel for a parent may, for example, use the *Charter* to argue for a wide right to disclosure before trial of evidence obtained by the agency during its investigation. Disclosure of information both helps to ensure a fair trial, by allowing for the opportunity to prepare adequately, and helps to ensure that the court will hear a full testing of the evidence presented by the agency, which will help the court to make the best decision for the child.

In *S.D.K. v Alberta,* Bielby J. held that s. 7 of the *Charter* required that the rules of civil procedure court should be interpreted consistent with the "principles of fundamental justice" to ensure fair disclosure in a child welfare proceeding.[97] The child welfare agency had only offered counsel for a parent in a child protection case limited disclosure of its file. The Court held that parent's counsel had a constitutional right to disclosure, though given the nature of a child protection proceeding, the constitutionally mandated criminal disclosure process had to be modified.[98] The agency was obliged to provide full disclosure "of all relevant information in the possession of the Department," subject to non-disclosure of the identity of informers and of information that "may potentially harm a child's physical, mental or emotional health to a degree that such harm outweighs the entitlement of his or her parents to disclosure." The Court held that material which it did not intend to disclosure had to be identified so that, if necessary, a court could rule on whether disclosure was appropriate. Further, the agency was obliged to obtain and disclose material relevant to the case which was in the possession of other agencies or professionals which the child welfare agency could get access to. In this case, the child welfare agency was required to obtain and disclose police reports related to the case and the notes in the possession of a psychologist that the agency had retained to do an assessment.

B. Notice of a Protection Proceedings

A key principle of fundamental justice is that a person with constitutionally important rights should be notified of the hearing at which those rights may be affected so that person can have the opportunity to participate. Notification serves both to protect rights and to help ensure that the court is more likely to have participation by those who can provide evidence about the best interests of the child.

In *Re N.P.* the father was living with the mother in Ottawa at the time that the child was conceived; he left the mother before the child was born, though he saw the child after it was born.[99] The mother decided to have the child placed for adoption through the Children's Aid Society. The agency began a permanent wardship application. The father was a "parent" within the definition of Ontario's *Child and Family Services Act*, and the agency obtained an order under the *Family Law Rules* allowing for notice of the hearing to the father to be served by placing of advertisements in the local Ottawa newspaper. To support the motion to obtain the order dispensing with personal service, an agency worker swore an affidavit that the father was last known to be living in Ottawa, and that his whereabouts were "unknown."

A permanent wardship order was made without the father being aware of the proceedings; all

parental access rights terminated under that order and the child was placed for adoption.

The father then discovered through the maternal grandmother that the child had been placed for adoption, and immediately brought a motion to set aside the wardship order and applying for custody. Since the child had been placed for adoption, though not yet adopted, the legislation precluded a review of the wardship order.

The father had had no actual notice of the proceedings, and was able to establish that before the wardship order was made, the maternal grandmother had told the agency worker who had sworn the affidavit to obtain newspaper service that the father lived with his parents in a small town, which she identified, about two hours drive outside of Ottawa. As it turned out, the phone number of the parents was listed in the phone book.

Justice V. J. MacKinnon castigated the agency worker for her "deficient" and "misleading" affidavit, emphasizing the high duty of "full and frank disclosure" to the court when a party is seeking *ex parte* relief. The judge observed that s. 7 of *Charter* emphasizes "the importance of procedural fairness in child protection proceedings" and that the child's "best interests" are promoted by giving a "fair opportunity for parents to participate." In the end the judge relied on the court's *parens patriae* power to set aside the permanent wardship order and made an order for an expedited trial. It is clear that if a similar case arose in a Provincial or Territorial Court, which lacks the *parens patriae* jurisdiction, that the same remedy could be achieved by using the *Charter* to "read in" a remedial power into the legislative scheme.

There can be difficult questions about what efforts the *Charter* requires for an agency involved in an adoption to undertake to identify and locate the parent of a child. This issue typically arises in regard to the father of a child born out of wedlock, especially if the mother is unwilling to cooperate with the agency in identifying and locating him[100]. This is an issue which has been the subject of litigation in the United States,[101] with a reported few cases in Canada as well.

The *Trociuk* decision in the Supreme Court of Canada makes clear that a man who is aware that he is the father of a child and wants to attempt to establish a relationship with the child cannot have a permanent termination of his relationship through wardship or adoption without the right to notice and a hearing. Legislation in some provinces, such as Alberta, may be vulnerable to challenge based on *Trociuk* for failing to allow for fathers of children born out of wedlock to take steps to declare their interest and be notified of any court hearings.[102]

The *Trociuk* case arose from British Columbia and involved legislation which had a relatively narrow definition of who has the rights of a "father." It is significant to note that in Ontario the *Children's Law Reform Act* s. 12 allows a man who believes that he is the father of a child to file an affirmation of paternity with the Registrar of Vital Statistics, which then entitles him to notice of any child protection or adoption proceedings.[103] In one recent Ontario adoption case the court, of its own motion, raised the question of whether a man who knows that he is the biological father of a child but has not lived with the mother or the child, and has taken no steps to register his status or assume support obligations, should be entitled to the rights of a "parent" and required to consent to the adoption. Initially Wolder J. felt that *Trociuk* required the consent of such a man, but in *C.(D.) v A.(W.)*, the judge distinguished *Trociuk* since in Ontario a man in this position has a "simple and effective method to become defined as a 'parent,'" namely by registration.[104] The judge nevertheless concluded that the man should be given notice of the application for a the ruling that he was not a "parent." The decision in *C.(D.) v A.(W.)* Is problematic.

The Supreme Court in *Trociuk* clearly focused on the "arbitrary" denial of rights to a man who knows that he is a father and wants to exercise rights. The Court also accepted that there are cases in which there may be "good reasons" for a mother to assert that a man should have no rights, such as if the pregnancy was a result of rape or incest.[105] Further, the biological reality is that if a woman gives birth to a child and the father has not registered, it is not possible to force her to identify him.[106] It is submitted that given this reality, the Ontario legislature is justified in limiting rights to men who have

either actually lived the mother or child, or taken steps to formally identify themselves by registration (acquiring rights, but also assuming obligations of child support.) While this might result in some men losing rights that they might want to exercise without even being aware that they are fathers, the alternative is a scheme that would require the co-operation (or coercion) of women into identifying men whom they do not want to identify (or may not be able to identify.) Such a scheme would ultimately be unworkable, and could indefinitely delay adoptions and hence would be contrary to the interests of children. If men want to have parental rights (and in the case of children born to single mothers the reality is that the vast majority of men want to avoid any obligations), they have to take the responsibility to know whether the women with whom they have had intercourse have had a child, and then take some steps to formally recognize the relationship with the child.

D. Investigations & Evidence - Statements to Child Protection Workers

It is common in criminal cases involving evidence obtained by the police in violation of *Charter* rights for s. 24 to be invoked by a court to exclude evidence if, as a result of its admission, the "administration of justice would be brought into disrepute." While in theory a court in a child welfare case could also invoke the *Charter* to exclude evidence, the courts are much more reluctant to exclude relevant, probative evidence if doing so could potentially compromise the ability of the court to make the best decision about the child.

Section 10 of the *Charter* requires that a police officer who has detained or arrested a person must advise the person of the right to retain counsel and provide that an opportunity to consult with counsel before questioning the person. A violation of this *Charter* right is very likely to render a statement made to the officer inadmissible in criminal proceedings. Further s. 11 (c) of the *Charter* provides that any "person *charged with an offence* has the right ...not to be compelled to be a witness in a proceeding against that person in respect of the offence."

An argument can be made that a child protection agency worker who is investigating a case of suspected abuse or neglect has an obligation to advise a parent that any incriminating statements may be used against the parent, either in a child protection proceeding or in a criminal prosecution. There might also be an argument that the worker has a constitutional obligation to advise the parent of the right to seek legal counsel before a statement is made.

The American courts have rejected any such arguments. In the absence of legislation (which a few American states have), there is no obligation in the USA on child protection workers or court appointed therapists to warn parents about the potential use of any of there statements in child protection proceedings.[107] This approach tends to ensure that a court dealing with the future of a child will have available as much information as possible about the child, even if it is an incriminating admission from a parent.

Indeed, in the United States, it has been held that the incriminating statement made to a child protection investigator by a parent while in pre-trial custody on criminal charges arising out of the abuse allegations is admissible in a criminal prosecution without any "*Miranda* caution" (a warning of the right to remain silent and to have counsel), as the worker is not "an agent of the police."[108]

In one of the few Canadian cases to deal with this issue, *Family and Children's Services of St. Thomas v W.F.*,[109] Schnall J. held that a parent is obliged to answer the questions of a child protection worker in the course of an investigation of suspected abuse, and that there is no obligation to warn the parent of the potential use of any information of to advise of the right to consult with counsel. The judge noted that an adverse inference will be drawn from the failure to answer questions, and observed that a parent is a compellable witness in a child protection proceeding. She recognized that a child welfare proceeding, while engaging the "liberty and security of the person," is a *civil proceeding* and accordingly s. 11(c) of the *Charter* has no application and a parent is a competent and compellable witness in a child welfare proceeding.[110] While s. 13 of the *Charter,* which creates a constitutional right

against self-incrimination may be invoked to limit use in a later criminal prosecution against the parent of testimony given by a parent in a child welfare proceeding, it does not affect the obligation to testify at a child welfare proceeding for any person summonsed as a witness.

While courts in child welfare proceedings will understandably be very reluctant to invoke the *Charter* to exclude reliable evidence, there have been cases in which the courts have invoked "*Charter* values" to help interpret legislation and common law rules in such a way as to exclude evidence of limited reliability that would be highly prejudicial and difficult for parents to rebut. For example in *Catholic C.A.S. of Toronto v J.L.*,[111] the court considered the issue of the admissibility of various documents and agency records. While Jones J. was prepared to admit the agency records to the extent that they provided a summary of agency involvement with the family over six years, she gave no weight to them to the extent that they included opinions about parental risk or other expert issues and comments from third parties, and also gave no weight to statements in the records attributed to the parents except to the extent that the parents adopted those statements in cross-examination. Justice Jones held that s. 7 of the *Charter* required the court to take a narrow interpretation of s. 50 of Ontario's *Child and Family Services Act,* a seemingly very broad statutory provision allowing a court to "consider... any oral or written statement or report" concerning a person's past conduct towards any child. She wrote:

> The principles of fundamental justice are clearly inconsistent with the admission of potentially unreliable, untestable evidence, when such important issues are being determined. The admission of such evidence puts the fairness of the trial process and the result in question. At a minimum, Charter principles require that hearsay evidence admitted under section 50 meet the threshold test of reliability. As well, in many cases, trail fairness will require that the party seeking to elicit hearsay evidence for the truth of the facts asserted must also meet the test of reasonable necessity.

In this case, Jones J. was not directly applying the *Charter* or giving a *Charter* remedy (and apparently no notice was given to Attorney General that a *Charter* question had been raised), but rather she was using "*Charter-values*" to help interpret legislation.

E. Apprehension of the Child

In *Winnipeg Child & Family Services v. W.(K.L.)* the Supreme Court of Canada upheld the constitutional validity of Manitoba child welfare legislation permitting warrantless apprehensions in non-emergency situations.[112] The Court emphasized the importance of society's interest in protecting children from possible abuse and neglect, and the difficulty and risk of distinguishing between emergency and non-emergency situations in child protection cases. Justice L'Heureux-Dubé was clearly concerned with protecting children from the possibility of abuse. However, she also recognized the need for procedural fairness. She emphasized that removal of children from their parents' care poses a threat to the welfare of children as well as the to parents' security of the person, and accordingly s. 7 of the *Charter* requires that the apprehension of a child from parental care can only be justified if there is a "situation of harm or a risk of serious harm to the child." She wrote:[113]

> Apprehension should be used only as a measure of last resort where no less disruptive means are available. For the reasons set out above, I find that the appropriate minimum s. 7 threshold for apprehension without prior judicial authorization is not the "emergency" threshold. Rather the constitutional standard may be expressed as follows: where a statute provides that apprehension may occur without prior judicial authorization in situations of *serious harm or risk of serious harm* to the child, the statute will not necessarily offend the principles of fundamental justice.

The decision in *W. (K.L.)* thus appears to indicate that, regardless of the specific words of the statute authorizing the apprehension of a child, it should be possible to should be able to seek a post-apprehension judicial hearing within a reasonably short time to challenge the apprehension on the grounds that it is not a situation of "serious harm or risk of serious harm."

It is, however, also apparent that *W. (K.L.)* emphasizes that the state has a significant degree of authority to apprehend children without a prior court order if there is a "risk of serious harm." In *Alberta v K.B.*, a decision rendered a few weeks after the *W. (K.L.)*, Rooke J. cited and relied heavily upon the Supreme Court judgement to uphold the constitutional validity of Alberta's *Protection of Children Involved in Prostitution Act*, legislation which allows apprehension and detention in a "safe house" of children up to the age of eighteen if they are reasonably believed to be "seriously and imminently endangered because [of] ...engaging in ...prostitution," with a judicial review of the detention only required within 72 hours. Although the court accepted that a child's "liberty" is affected, the legislation was held to be consistent with the principles of fundamental justice and the *Charter*. The court emphasized that "the purpose of the legislation is to assist children who are [believed to be] ... sexually abused because they are engaging in prostitution, [and that the] state has a legitimate interest in assisting these adolescent children." [114] Accordingly, it is constitutionally justifiable to give these children fewer legal protections than a child of the same age arrested for a prostitution related (or other) offence under the *Young Offenders Act.*

In *Family and Children's Services of St. Thomas v W.F.*,[115] Schnall J. suggested *in obiter dicta* that even if there was a violation of the constitutional rights of parents in the process of apprehending a child or some other agency error affecting the legal validity of the apprehension of a child, this did not affect the validity of a child protection proceeding that was commenced by the apprehension: "The parents' rights under the Charter should not be allowed to supercede the children's rights [to protection]," she concluded, though in an appropriate case there might be some other remedy, such as monetary compensation.

F. Ensuring A Fair Hearing - Summary Judgement

An important aspect of the "principles of fundamental justice" is that hearings are to be conducted fairly,[116] which will ordinarily mean that parents are to have an opportunity to present their evidence and to challenge the evidence of the agency.

There are, however, some cases in which the case of the child welfare agency is so overwhelming that holding a full oral hearing would be a futile exercise. A full hearing will not only be a waste of resources but will delay the permanent placement of the children, and hence be contrary to their interests. There is caselaw,[117] and in some provinces like Ontario *Family Law Rules*, that allow for a motion for summary judgement in a child welfare case. The judicial power to grant summary judgement in a child protection case, especially one involving permanent wardship, must be exercised in a fashion that respects the parent's rights under s. 7 of the *Charter*. As held by Fedak J. in *C.A.S of Hamilton v M.W. et al.*, a motion for summary judgement gives the parents a "hearing" and hence accords with the principles of fundamental justice, because a "hearing" is a "fluid" concept that depends on the relevant circumstances of a case.[118] If the documentary and affidavit evidence that the agency presents in support of the motion, and the reply material filed by the parents, reveals that there is "no genuine issue for trial," the court may terminate parental rights without requiring the agency to call witnesses to testify.

In *B. (F.) v G. (S.)* [119] Himel J. of the Ontario Superior Court also accepted that in principle summary judgement is consistent with the *Charter*, but she ruled that in dealing with a motion for summary judgement by an agency, the court must act in accordance with the "principles of fundamental justice." The case concerned a child who 2 years old and had been in agency care since birth. The mother had given birth at the age of 14 years, and was a troubled teen with a history of youth offending and involvement in abusive relationships. The mother had decided that she did not want

representation from her first counsel, who had been appointed by the Office of the Children's Lawyer. She then retained a lawyer in private practice (doubtless through legal aid); she missed five of the six scheduled meetings with her counsel.

At the first day of the of five scheduled hearing dates, the trial judge, Zuker J., allowed counsel for the father, who was in prison, to withdraw from the case. The judge *suo motu* indicated that he was prepared to consider proceeding summarily on the next hearing date, scheduled for 10 days later. On that second hearing date, the mother's lawyer advised the court that he had no instructions from his client and that the mother did not wish him to act any longer. The trial judge allowed her counsel to withdraw. The mother then requested an adjournment to obtain new counsel. The judge refused the request and informed the mother that he had read the material filed, and that he intended to proceed summarily remarking: "Quite frankly... having read all the material, I know what has to be done. It's a sad situation." Extensive documentary evidence was then filed by the agency, and the mother and both grandmothers gave oral evidence. The trial judge then made a summary order for permanent wardship without access for the purpose of adoption.

The mother then obtained counsel for an appeal, at which Himel J. ordered a new hearing, recognizing the possibility of another motion for summary judgement at the start of that hearing. Justice Himel ruled that there was a violation of s. 7 of the *Charter* and a lack of "due process" in the original motion for summary judgement. The cumulative effect of the lack of clear written notice that a motion would be brought for summary judgement, the absence of counsel for the mother and the denial of her request for an adjournment and the judicial comments before the motion was dealt with, was such that the motion for summary judgment was "so unilateral that it cannot stand." Justice Himel observed that the agency evidence was "overwhelming," but concluded that if the "rights of the [mother] under s. 7 of the *Charter* had been protected at the hearing, it is conceivable" the outcome at the motion for summary judgement would have been different and the mother could have raised a genuine issue for trial. In ordering a new hearing, on an expedited basis, Himel J. expressed concerns about the effect of delay on the welfare of the child, but noted that the agency had the option of seeking expedited hearings.

While a trial judge can initiate a motion for summary judgement, this procedure may result in the permanent severance of the relationship between parents and their biological parents without a full hearing, and accordingly the summary process must be conducted with care to ensure that there is respect for due process.

G. Delay in Child Protection Cases

While majority and dissent in *Winnipeg Child & Family Services v. W.(K.L.)* disagreed about how to weigh potential risks and benefits to a child of apprehension by the child welfare authorities, in principle, both took similar approaches to determining whether the rules governing intervention are constitutionally justifiable. The entire Supreme Court recognized that state intervention must "accord with the principles of fundamental justice," and that any constraint on the rights of parents and children to enjoy a relationship with each other will be assessed against a standard of whether it serves to promote the interests of children.

Significantly, despite dismissing the *Charter* challenge to warrantless non-emergency apprehensions, the majority judgment of L'Heureux-Dubé J. raised concerns about the six month delay in this case from apprehension to trial. As is not uncommon in child protection cases, the delay in this case was on consent of the mother, who used the time to try to deal with personal problems and improve her parenting capacity. However, L'Heureux-Dubé J. remarked that if the delay had not been with the mother's consent, for a newborn child such as in this case, a six month delay "would have constituted an unacceptable violation" of the mother's *Charter* rights.[120] She was clearly concerned about the problem of systemic delay in child protection cases, suggesting that in an appropriate case, a court could determine that the failure to hold a hearing within the required time would result in a loss of jurisdiction, might require the return of the child to the parent.

In most cases, the appropriate remedy for delay will be an expedited hearing, perhaps with an order for costs in favour of the parents. It is submitted that the remedy of returning the child to parental care, perhaps under agency supervision, will only be appropriate if the court is satisfied that there is not a "serious risk of harm" from this course of action.[121]

The comments of L'Heureux-Dubé J. in *W. (K.L.)* could also be used to argue that if a parent regains custody at trial, there is a strong claim for the expecting the child to be returned to parental care (probably under agency supervision) pending any appeal by the child protection agency.[122]

While the Supreme Court accepted that the apprehension of a child without a warrant is a restraint on parental rights that can be justified by the need to protect children from the possible risk of abuse, there is no advantage to a child from delays in the court system that frustrate the right of parents and the interest of children to obtain a timely hearing about the child's future. Indeed, children often suffer as their cases "drift" through the court system.

It must, of course, be recognized that not infrequently the delay in child welfare proceedings is caused by parents, and the interests of their children may require the denial of their requests for adjournments.[123] The *Charter*, however, imposes obligations on state agencies and the court system to respect constitutional rights, and parents do not have fully equivalent obligations. Further parents do not have the same resources and responsibilities as state agencies and the judicial system for the resolution of cases, so that courts may be somewhat more tolerant of parental requests for adjournments, especially from a constitutional perspective.

H. Statutory Rigidity & Best Interests

There have been decisions in which s. 7 of the *Charter* has been invoked to give courts some flexibility to "override" a legislative scheme, if this is necessary to promote the best interests of the child.

In a decision of the Yukon Territorial Court, *Re R.A.J.*,[124] Judge Lilles held that a *child's* constitutional rights under s. 7 of the *Charter of Rights* were infringed by the statutory regime in that Territory, which requires that for a child under two years of age a "permanent decision" must be made after the child has been in agency care for 12 months. The case involved a young child who had been apprehended and was in state care for more than a year but who was not considered suitable by the agency for adoption; the parents continued to visit and hoped to regain custody at some future time and were accordingly opposed to a permanent wardship order. Judge Lilles stated:

> While there is general acceptance of the principle that children should not be kept in temporary custody indefinitely, there is no consensus on what the maximum time should be. The 12 month limit [for children apprehended under 2 years of age] prescribed in the Yukon is ... justified ... by the aforementioned general principle. The general principle, however, does not account for the shortness of the period, the rigidity of the section or the absence of a safety valve to permit extensions of time where the interests of the child so dictate. The 12 month period does not accommodate the resolution of the issues in this case and prevents the development of a plan which would reflect R.'s interests as paramount. In this case, the 12 month rigid time period is arbitrary ...
>
> To remedy the *Charter* violation, the section may be struck down. In this instance, this may not be the most 'appropriate and just' remedy. The provision seeks to ensure that children who are placed in temporary care and custody are not indefinitely in such care. As such, the provision does attempt to strike a balance between the rights of the child and the parent with respect to the state. In many instances, the time frames prescribed may be perfectly workable and fair. In some cases, including the case at bar, the child's s. 7 *Charter* rights are infringed ... In the absence of any flexibility, it is not surprising that in some individual cases, such a short time

period will be totally inadequate.

Accordingly Lilles Terr. J. "read into" the legislation the authority to make a further temporary wardship order to allow a decision to be made that would promote the best interests of this particular child.

The decision of Lilles Terr. J. in *Re R.A.J.* was rendered in 1992, well made before *G.(J.)* and *W.(K.L.)* were decided. A 2002 Yukon decision, *Re R.A.*, rendered by Stuart C.J. Terr. Ct., recognizes the significance of the Supreme Court of Canada judgement in *G.(J.)* for giving judges constitutionally based authority to vary "inflexible"child welfare laws that fail to allow for decisions that accord with the best interests of a child. *Re R.A.* dealt with a three year old special needs aboriginal girl who had been in care since the age of ten months, residing in one foster home for that time. The mother herself had Fetal Alcohol Effects and could not adequately care for the child, but she continued to be involved in the child's life; the child was "thrilled" to see her mother during regular visits. The court concluded that the best interests of this child required permanent wardship with the continuing involvement of her mother in his life and regular access to her. However, the Yukon's *Children's Act* s. 126 provides that if an order for permanent guardianship is made, the child is only to enjoy to contact with a natural parent at the discretion of the child welfare agency. Chief Judge Stuart concluded:

> Section 7 [of the *Charter*] protections must not only ensure there is a fair procedure governing any state intervention, but must as well ensure the state can only remove a child when it is in the best interests of the child to do so (*G. (J.)* at par. 70). On the facts of this case, s.126, in preventing an outcome that serves the child's best interests, violates the s. 7 rights of both the parent and the child.[125]

The judge also concluded that this provision violated s. 15 of the *Charter,* for failing to recognize the needs of handicapped parents and children. The judicial remedy that was implemented by "reading into" the legislation the power to make an "open permanent care order" to meet the "best interests" of this particular child, allowing the mother to "co-parent" with the Department. The court made a fairly detailed order, with provision for judicial review, though recognizing that it was for the child welfare agency, the foster mother and the natural mother to make decisions about the care of the child. The court recognized that the *Charter* can be invoked where legislative inflexibility prevents the making of a decision that accords with the "best interests" of a child. This does not, however, mean the courts can ignore resource constraints, with Stuart C.J. Terr. Ct. noting that the agency "cannot be expected to underwrite all expenses" that would promote the welfare of the child, but only "reasonable expenses."

The approach of *Re R.A.J.* and *Re R.A.* is premised on the notion that it is a violation of the "principles of fundamental justice" for legislation to preclude a court from considering a type of order that would meet the best interests of an individual child whose case is before the court. Parents and children are entitled to an individualized judicial assessment that takes account of the best interests of the specific child. The type of argument may be important in Ontario, where the *Child and Family Services Act* has been amended to provide that for children six years of age and under the maximum total period in care will be 12 months.[126] More generally these decisions illustrate that judges can be persuaded to use the *Charter* as a flexible tool to attempt in situations where legislative rules appear rigid and unresponsive to the best interests of individual children.

The validity of these decisions has to be assessed in light of the 2004 judgement of the Supreme Court of Canada in *Canadian Foundation for Children* that the best interests of the child is *not* a "principle of fundamental justice." As noted above, some of the discussion in that judgement sounds quite categorical (and inconsistent with prior discussion such as in *G(J.).* Those statements must, however, be understood as having been made in the context of a case in which a challenge was being made to a *criminal law,* and the invocation of the best interests of the child might have result in extending the scope of the criminal law *against parents.* While it is clear that the *Charter* does not require that the state expend resources to what is *the very best* that can be done for a child, it is

submitted that there is still room to argue that child welfare legislation that precludes a court from even considering an alternative for the that is not more expensive for the state to implement is a violation of the child's security of the person that does not accord with the principles of fundamental justice.

I. Rights of Children in Child Protection Cases to Notice & Counsel

While the Supreme Court judgement in *New Brunswick (Minister of Health)* v. *G. (J.)* focused on the constitutional rights of *parents* to enjoy a relationship with children free from undue interference by the state, the Court also recognized that *children* have their own constitutional right to "liberty and security of the person" which may be affected by the child protection process.[127] As a child's rights and interests are not the same as those of a parent, some American decisions have recognized that when a child is "old enough to understand the nature of the guardianship proceeding and its effect on him, to have formed considered views about it, and to express those views," then "due process" requires that the child "be given the opportunity to be heard in a meaningful way."[128]

While some provinces, like Ontario, have statutory schemes that provide for individualized assessments to determine the appropriateness of notification and counsel for children in child protection cases, most provinces do not. As a child's right to "liberty and security of the person" is affected by a protection proceeding, a *child with capacity* to understand the nature of the proceeding should have notice of the proceeding, and in cases where the child has a position different from the parents or agency, there is arguably a constitutional right to independent counsel to advance that view.[129]

Further in some Canadian cases judges have appointed appoint counsel to represent the rights or interests of children who lack the capacity to instruct counsel. This seems especially likely to occur in cases in which the child welfare agency for policy or legislative reasons is unwilling to explore all of the alternatives that might promote the best interests of the children. For a superior court judge, invoking the *parens patriae* power may be an easier procedural route to achieve this remedy, since there is no need for notice to the Attorney General of a constitutional question being raised.[130]

J. Sibling Access For Children in State Care

Some Canadian courts have accepted a limited statutory right for children who are permanent wards of the state to seek a "best interests" determination about the right to enjoy a relationship with their siblings, even after their relationship to their parents has been terminated .[131] In situations where there is no statutory right to sibling access, a constitutional argument can be made by on behalf of a child in state care that the child's "security of the person" (i.e. psychological well-being) requires consideration of whether there it would be in the child's best interests to have contact with siblings. In cases where children have established psychologically meaningful relationships with siblings, the best interests and constitutional arguments in favour of contact might be pursued even after adoption of one or both siblings.

Some American decisions have accepted constitutionally based claims by children in state care for visitation rights to their siblings. As noted in one case: "children's relationships with their siblings are the sort of 'intimate human relationships' that are afforded 'a substantial measure of sanctuary from unjustified interference by the state' ... relationships with ... siblings are even more important [when] ... relationships with ... biological parents are tenuous or non-existent."[132]

K. Rights of Foster-Parents & Other 'Psychological Parents'

The Supreme Court decision in *New Brunswick (Minister of Health)* v. *G. (J.)* recognizes that the

"security of the person" of children and their biological parents is affected by child protection proceedings and accordingly the parent-child relationship can only be altered or severed by a state agency acting "in accordance with the principles of fundamental justice." There may be relationships between children and other long-term adult caregivers which are also entitled to a degree of constitutional recognition and protection. In particular, there may be situations in which children, "long term foster-parents" may seek to invoke s. 7 of the *Charter* to intervene in proceedings to protect their relationship from arbitrary state intervention. There may also be cases in which a relative or other person has had a "parent-like" role that merits constitutional protection.

At one time those who agreed to care for the children of others, whether at the request of the biological parents or for state after children were made wards, had very few, if any, legal rights in regard to the children. No matter how long the child lived with caregivers and how close the psychological bond with the child, the legal custodian, whether a biological parent or a state agency, could remove the child without notice and without any sort of a hearing. Gradually, however, courts and legislatures have begun to recognize the significance of care provided by "psychological parents" with a long term relationship with a child.

In many situations foster-parents will have no right to constitutional protections as their relationship to the child is not strong enough and there is no reasonable expectation of any stable relationship forming.[133] In some cases, however, a foster-parent or other adult caregiver may have a long-term relationship with the child, and in effect become the child's only "real parent."

In the United States there have been a number of decisions in which long-term foster-parents have successfully claimed that they were entitled to procedural due process under the Fourteenth Amendment before their relationship to a child in their care is severed. In *Rivera* v. *Marcus*, for example, 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 removal by the welfare department which had legal custody. The court stated:

> ...there would appear to be instances in which a liberty interest should be recognized where long term family relationships evolved 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.[134]

Some courts in the United States have been prepared to protect long-term foster-parents in situations where a child welfare agency plans to move the child to another foster home or to an adoptive placement. On the other hand, at least in situations where a foster- parent obtains care of the child through the intervention of an agency, the interests of the foster-parents "must be substantially attenuated where the proposed removal from the foster-family is to return the child to his natural parents."[135] It is submitted that the existence of a relationship between the foster-parent and the child should not be permitted to weaken the claim of natural parents in their relationship with the state child welfare agency, though foster parents may acquire *constitutional rights as against the state agency*.[136]

In some cases, American courts have indicated that granting foster-parents constitutional rights of participation in proceedings about the child is intended to promote the interests of the child, since the foster-parents may important information about the child and a unique understanding of the child's interests.[137]

An interesting 1988 Alberta decision used the *Charter* to give long-term foster-parents "due process" before a child could be removed from their care by the child welfare agency that had placed the child with them. In *N.P.P.* v. *Regional Children's Guardian*, the child welfare agency planned to move a five-year-old native child from the non-native foster home where she resided for over three years into

the care of relatives on her mother's reserve. Justice D.C. McDonald of the Alberta Court of Queen's Bench quashed the original decision, in part relying on the fact that it violated s.7 of the *Charter*, and ordered that a hearing should be held "in accordance with the principles of fundamental justice" to determine whether the foster-parents could become the child's private guardians.[138]

> Section 7 is engaged by the facts of this case because the child's liberty is in issue. A decision as to where the child is to spend his days -- in the home of the foster parents or in someone else's home -- raises an issue as to his liberty, even in the narrowest of the definitions of "liberty" as the word is used in s.7. More specifically, whether the child is to be under the guardianship of the foster parents, with whom he has lived for three years, raises an issue as to the child's liberty. I think that it would be stretching things to say that an issue of the liberty of the foster parents is raised in this situation. It is the liberty of the child that is in issue. But, it has been said, by counsel for the Regional Children's Guardian, only the Children's Guardian has a right to speak for the child ... I agree that in regard to ordinary litigious matters only the Regional Children's Guardian may speak for the interests of the child. I do not agree that only the Regional Children's Guardian may do so when what is in issue is the constitutional right of the child to liberty and not to be deprived of that liberty except in accordance with the principles of fundamental justice. Where the Children's Guardian has set her feet firmly against allowing the child to be under the guardianship of persons who seek to be the guardians of the child, someone must be allowed to exercise the right to access to this court in an application for judicial review or in some other proceeding that is based on a constitutional ground. ... The court should ... recognize that they [the fosterparents] have standing to bring this application on behalf of the child in as far as it is based upon an allegation that the refusal or consent to the private guardianship order sought by the foster parents was an infringement of the child's right under s.7 of the *Charter*.

It is clear that McDonald J. was attempting to promote the child's best interests by requiring a hearing about the merits of the proposed move. While the child's security of the person (and liberty) were threatened by the proposed move, it is submitted that it would have been preferable to directly recognize that it was the rights of the foster-parents which were being upheld by the decision. There was no real explanation of why the foster-parents could protect *the child's* constitutional rights. If the intent were truly the protect the *rights of the child*, surely it would be preferable to appoint independent counsel. In reality in this case it was the foster-parents' rights which were recognized, since they were the ones actually granted standing at the hearing, though the recognition of these rights served to promote best interests of the child by ensuring that there is an opportunity for a fair hearing with as much information as possible about the child before the child was removed from a long term placement by state agents.

In some provinces, such as Ontario, legislation gives foster-parents fairly extensive rights, particularly if they have had care of a child for at least two years. In such jurisdictions the *Charter* may have little or no practical impact on the rights of foster-parents, as foster parents who have had the children for shorter periods may not have established a sufficiently close connection to the child to be entitled to constitutional protection.[139] However in Canadian jurisdictions that do not give statutory recognition to the rights of long term foster parents or other long term caregivers who have assumed a "parent-like" role, the *Charter* may be a source for protection of relationships with the child and for gaining the right to participate in the proceedings affecting the child.[140]

L. Rights of Parents in Adoption Cases

While the focus of the Supreme Court in *G.(J.)* was on the rights of parents and children in the context of a child protection hearing, similar interests may arise in an adoption proceeding. Even if an adoption does not involve a state child protection agency, the adoption will generally result in the state

sanctioned permanent severance of a relationship between a biological parent and the child, and accordingly may give rise to *Charter* based claims for treatment in "accordance with the principles of fundamental justice."[141]

Courts in both Canada and the United States have been very reluctant to recognize constitutional rights in the context of "private"custody or access disputes between separated parents, but in the United States the courts have held constitutionally protected due process rights may arise in an adoption proceeding in which one biological parent seeks to have a step-parent adopt the child and thereby sever the child's link to the other biological parent. As recognized by the United States Supreme Court in its 1996 decision in *M.L.B.* v. *M.L.J.*, the parental interest involved in an adoption is a "commanding one ... [because] unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child." The adoption destroys "family bonds" and is similar in effect to a termination of parental rights as part of a child protection proceeding.[142]

In a 1999 Florida decision a court in a contested step-parent adoption held that the indigent biological father faced the termination of parental rights as a result of "state action ... vested in the judicial branch of ... government" and hence is constitutionally entitled to counsel.[143]

Although the issue has yet to be directly addressed in Canada, similar arguments can be made that adoption directly affects the "security of the person" of both parent and child and must be conducted in accordance with the principle of fundamental justice, which would include the right of an indigent parent opposing an adoption to seek to have access to counsel paid by the state.

M. Aboriginal Children: s. 35 of the Charter

The *Canadian Charter of Rights and Freedoms*, s. 35 explicitly states that the "Aboriginal peoples of Canada includes the ... Métis" and "recognized and affirmed" their "existing Aboriginal rights." An argument is now being in an Ontario case by the Squamish First Nation that this *Charter* provision should be interpreted in such a way as to restrict the placement of Aboriginal children in non-Aboriginal foster homes.[144] While child welfare legislation in most Canadian jurisdictions, including Ontario, requires agencies and courts dealing with child welfare cases to take into account a child's Aboriginal culture and heritage in making decisions placement and adoption about a child's "best interests," to this point judges have been unwilling to give this factor any further constitutional significance.[145] The court have focused on the needs and interests of the individual children before the court, rather than any collective rights of First Nations.

N. Freedom of the Press Issues

It has been accepted by the courts that the restriction on the publication of identifying information about a child and parents involved in a child welfare proceeding, such as those found in Ontario's *Child and Family Services* s. 45, is constitutionally justified restraint on freedom of the press, even if the parents and children involved consent to their identities being revealed. The importance of the protection of the privacy and emotional health of children who may have been abused, neglected or abandoned by their parents from the intrusive effects of identifying publicity are matters of "superordinate importance."[146]

However, freedom of the press and giving the public access to information about how state power is being exercised by child welfare agencies are also matters of great constitutional significance.[147] Accordingly in the absence of clear evidence that the child involved will be likely suffer emotional harm if there is *non-identifying* publicity, courts should be most reluctant to issue a ban on the reporting of non-identifying information in a child protection proceeding.[148]

VII. CONCLUSION: THE CONSTITUTIONALIZATION OF CHILD WELFARE LAW

Canada is going through a process of constitutonalizing of family law, a few decades after a similar process started in the United States.[149] Interestingly, in some respects, especially in terms of recognizing rights for same-sex partners, the Canadian courts have, in the past couple of years, already gone further than the American courts in using the constitution to promote familial rights. In the child welfare field, however, American courts have had more experience in grappling with and recognizing the rights of parents and children.

Lawyers, judges, academics and policy makers in the child welfare field in Canada have to consider the *Charter* implications of the issues and cases that they are dealing with. The greatest impact has been on procedural issues, on ensuring that the child welfare process is fair and that courts have enough information to make the best decision for a child. In some cases, the courts have also been prepared to invoke the *Charter* to achieve substantive ends, to modify the effects of rigid legislation that precludes the making of decisions that accord with the best interests of a child before the courts. While *Charter* rights are important, it is apparent that in the child welfare context, the courts will not allow the *Charter* to be invoked to harm children, even if the children are mature adolescents who want to assert the "right" to make a decision that may be harmful.

It would seem that in comparison to the American courts, Canadian courts have been less willing to recognize and protect the constitutional rights of parents because of a concern that the recognition of these rights may threaten the physical safety of children. This reflects the fact that Canadian court place less of an emphasis on *parental rights*, and have a more benign view of the effects of state intervention on children. It might be argued that the American courts are not only concerned about the protection of parental rights, but that they also have greater concerns about the long term emotional (and sometimes physical) risks to children from state intervention and placement in state care.

* Email contact: ncb@post.queensu.ca. This paper is a revised version of a paper presented at Child Protection Law Seminar of the National Judicial Institute, Ottawa, Sept. 26, 2002. Some portions are also a substantially revised version of Bala, "The *Charter of Rights* and Family Law in Canada: A New Era"(2001), 18(3) Can. Fam.L.Q.373.

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1. See e.g. Bala & Redfearn, "Family Law and the Liberty Interest: Section 7 of the Charter of Rights" (1983), 15 Ottawa L. Rev. 274; and D.A. Rollie Thompson, "Why Hasn't the Charter Mattered in Child Protection" (1989), 8 Can. J. Fam. L. 133.

2. See e.g. *MacVicar* v. *British Columbia Superintendent of Family and Child Services* (1986), 34 D.L.R. (4^{th}) 488 (B.C.S.C.).

3. See e.g. *S.(B.)* v. *W. (G.J.)* (1988) 18 R.F.L. (3d) 138 (Sask U.F.C.).

4. See e.g. *Re L.D.K.* (1985), 48 R.F.L. (2d) 164 (Ont. Prov Ct. Fam. Div) per Main Prov. J.; *Re R.A.M.* (1983), 37 R.F.L. (2d) 113 (Man. C.A.).

5. See e.g. Lamer C.J.C. in *B (R.)* v. *C.A.S. of Metro Toronto* (1994), 9 R.F.L. (4^{th}) 157 (S.C.C.), dismissing the argument that "liberty" is affected when children are apprehended by a child protection

agency; *Attorney General* v. *Nevins* (1988), 13 R.F.L. (3d) 113 (Ont. Div. Ct.) dismissing the notion that a "casual fornicator" could have any rights in regard to his child; *Catholic C.A.S.* v. *T.S.*(1989), 20 R.F.L. (3d) 337 (Ont. C.A.) dismissing claims to parental rights in child protection proceedings; and *Layland* v. *Ontario* (1993), 14 O.R. (4th) 658 (Div. Ct.) dismissing a claim by same-sex partners for the right to marry.

6.[1999] S.C.J. 47.

7.*Winnipeg Child & Family Services v. K.L.W.*, 2000 SCC 48

8.*Trociuk v British Columbia (Attorney General)*, [2003] S.C.J. 32

9.*Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] S.C.J. 6 [hereafter *Canadian Foundation for Children*].

10.[2002] S.C.J. 85 [hereafter *Gosselin*]

11.See e.g. *R.* v. *Feeney* (1997), 7 C.R. (5th) 101 (S.C.C.).

12.*Canadian Foundation for Children*, [2004] S.C.J. 6, at para 10.

13.The *parens patriae* power refers to the residual inherent power that superior court judges (i.e. federally appointed judges) in Canada have to protect the interests of children or those who are mentally disabled, based on the jurisdiction once exercised by the Courts of Equity: see *Beson v Newfoundland (Director of Child Welfare)*, [1982] 2 S.C.R. 176

14.In theory the legislature could invoke the "notwithstanding clause" to override any judicial decision that limited the effect of legislation, but it seems most unlikely that a legislature would do this, especially in the child welfare context.

15.If a judge raises a *Charter* issues and is considering giving a *Charter* remedy under s. 24, as in situations in which a party raises the *Charter*, the court must ensure that the Attorney General has notice that the issue has been raised, in order for the question to be fully canvassed; see *Paluska v Cava*, [2002] O.J. 1767 (C.A.); and *C.(D.) V A.(W.)*, [2003] O.J. 5119 (Ct. Justice), and Ontario *Courts of Justice Act* s. 109.

16.See Janet Dolgin,"The Constitution as Family Arbiter: A Moral in the Mess" (2002), 102 Columbia L. Rev. 337 who writes about the "confused and hesitant" analysis of the United States Supreme Court in dealing with constitutional issues in the family law area.

17. [1995] 1 S.C.R. 315, 9 R.F.L. (4th) 157.

18. In his decision, LaForest J. quoted from some of the leading American jurisprudence on parental rights, though he subtly modified the traditional approach adopted in that country, placing some emphasis on *the interests of children* as well as on the rights of parents. In the United States the emphasis in traditional constitutional jurisprudence has tended to be more exclusively on the *rights of parents*, though even in that country some of the more recent constitutional cases also consider the interests of children. Some of the cases he quoted included e.g. *Pierce v Society of Sisters*, 268 U.S. 510 (U.S.S.C. 1925); *and Board of Regents v Roth*, 408 U.S. 564 (U.S.S.C., 1972). He also quoted from Bala & Redfearn, "Family Law and the 'Liberty Interest': Section 7 of the Canadian Charter of Rights" (1983), 15 *Ottawa L. Rev*. 274 .

19. At para. 85. Emphasis added.

20.At para. 1.

21. Para 219.

22.[1999] 3 S.C.R. 46, 50 R.F.L.(4th) 63; see accompanying Annotation by D.A.R Thompson at R.F.L. 74-78 which discusses the context and implications of the Supreme Court judgement.

23.The case was decided by a seven-member panel. Bastarache J. was recused since he sat on this case when a judge of the New Brunswick Court of Appeal, though it is clear from his (dissenting) judgement there (131 D.L.R. (4th) 273) that he supported the Supreme Court decision.

Justice L'Heureux- Dubé gave an opinion concurring with Lamer C.J.C., though arguing that "liberty" as well as "security of the person" were involved (an academic distinction only) and that s. 15 issues were also raised in this situation, since the parents affected by child protection proceedings are disproportionately low income, single mothers, and aboriginal or members of various other minority groups.

24.Conversely, courts are unlikely to recognize parental rights if doing so is likely to be harmful to a child. *In re Brandon W.* , 747 A. 2d 526, 2000 Conn. App. Lexis 23 (Conn. App. 2000) the appeal court upheld a trial decision to refuse to allow the mother to call her young children as witnesses in a child abuse proceeding based on allegations of sexual abuse. Parental rights of confrontation should not be interpreted in such a way as to potentially harm the young children by directly involving them in the adversarial process

25.At para 70 & 76. Emphasis added.

26. At para 77 - 81.

27.(1998), 41 R.F.L.(4th) 291 (Man. C.A.).

28.2000 SCC 48, at para. 98.

29.Para 124 - 125.

30.Para. 9, 11 & 12. Emphasis added . For an American case taking a similar approach to the dissent, see *Calabretta* v. *Floyd*, 189 F. 3d 808 (9th Cir. 1999).

31.See *Re J.J.* , [2003] N.S.J. 57 (N.S.C.A.) (Under appeal to S.C.C.) (This is an adult protection case but the same approach applies to child protection cases.)

32.[1997] 3 S.C.R. 624

33.[2002] S.C.J. 85 [hereafter *Gosselin*]

34.[2002] S.C.J. 84, at para 77-81. Emphasis in original.

35.[2002] S.C.J. 84, at para 79-82.

36. See, however, *Auton v British Columbia*, [2002] B.C.J. 2258 (B.C.C.A.) where the British Columbia Court of Appeal invoked s. 15 to order the government to provide health care and education services for autistic children, concluding that the children were victims of discrimination based on disability; case is

under appeal to the Supreme Court. See also *Doucet-Boudreau v. Nova Scotia (Minister of Education)* 2003 SCC 62 where the Supreme Court appeared to endorsed a more activist role for the courts in supervising *Charter* remedies. This, however, was a language rights case, where the courts have taken am more interventionist role.

37.*Trociuk v British Columbia (Attorney General)*, [2003] S.C.J. 32, at paras 15-21.

38. See Ontario C.F.S.A. s. 37(1) and 137(1)(f). *Trociuk* may have some implications for the provisions of the *Vital Statistics Act*, R.S.O. 1990, c . V 4 that deal with the naming of children born out of wedlock, and perhaps some revisiting of *Kreklewetz v. Scopel*, [2003] O.J. 2364 , leave to appeal to SCC dismissed [2002] S.C.C.A. No. 378.

39.*Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, [2004] S.C.J. 6 [hereafter *Canadian Foundation for Children*].

40.[2004] S.C.J. 6, at para 56.

41.[2004] S.C.J. 6, at para 58-62.

42.[1999] S.C.J. 47, at para. 61 & 68. Emphasis added.

43. At least in a moral and political sense , the state actually has a duty to protect children and promote their welfare, arising for example, under the *United Nations Convention on the Rights of the Child*, Art. 19

44. *Re Brown* (1975), 9 O.R. (2d) 185, at 189 (Co. Ct.).

45.[1995] 1 S.C.R. 315, at para. 211-214. See also *Re T.L.W.* [1983] W.D.F.L. 009 (Ont. Prov. Ct.); *Shingoose v. Minister of Social Services of Saskatchewan*(1983), 49 D.L.R. (3d) 400 (Sask. Q.B.), leave to appeal abandoned (1984), 4 D.L.R. (4th) 765 (Sask. C.A.); and *Family and Children's Services of St. Thomas v W.F.*, [2003] O.J.717, at para 360, per Schnall J.(Ont Ct. J.): "The children also have a right to have their s. 7 rights to security of the person protected. If the State cannot intervene to protect children from thier parents, no on else can."

See also. *Alberta (Director of Child Welfare) v W.J* , [2001] A.J. 1349 (Prov. Ct.) where Kvill Prov. Ct. J. rejected the father's request for an adjournment on the day of trial to have time to seek counsel for a permanent wardship trial. Counsel for the parents withdrew just before trial because of the repeated failure of the parents to attend meetings or provide instructions. The trial proceeded with the father representing himself; the children were made permanent wards. The judge considered whether the refusal to grant an adjournment violated the constitutional rights of the father by forcing to represent himself. The judge concluded that the parents "chose to ignore" the "opportunity" to have counsel, and remarked (at para 24):

> At some point, and to my mind it is early on in child welfare proceedings, this court must also recognize the s. 7 Charter rights of children. They too have the right to security of the person....Little children need an early decision regarding their future.

46.[2004] S.C.J. 6, at para. 6.

47. Dissenting in *Santovsky v. Kramer*, 102 S. Ct. 1388 (1982). Emphasis added

48. Some commentary and documents like the *United Nations Convention on the Rights of the Child* Art. 19 refer to the "child's *right"* to be free from parental abuse. While this has a nice rhetorical sound, it is very confusing to use the concept of the "child's right to be free from abuse" in the context of any

constitutional analysis.
In *Deshaney v. Winnebago Department of Social Services*, 57 L.W. 4218 (1989), the United States Supreme Court dismissed a constitutionally based claim by a child against a social service department for a failure to take reasonable steps to protect the child from abuse by his father (though noting that an ordinary tort action could be pursued). Rehnquist C.J. wrote (at 4219):

> "...nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security....Its purpose was to protect the people from the State, not to ensure that the state protected them from each other."

49. See e.g. *C.U.. v McGonigle* (2000) AR. 106 (Alta Q.B.); and *A.H.v Alberta* , [2002] A.J. 518 (Q.B.), aff'd , [2002] A.J. 568 (C.A.), leave to appeal dismissed [2002] S.C.C.A. 196. But contra, *.Re L.D.K.* (1985), 48 R.F.L. (2d) 164 (Ont. Prov Ct. Fam. Div) per Main Prov. J.

50.[1999] 3 S.C.R. 46 at para 76

51. See, *Child and Family Services Act*, ss.38, 39 -- children 12 and over presumptively given rights of notice and participation; under 12 with discretion of the court. See also s.60(4) of the Ontario *Child and Family Services Act* which gives children 12 and over certain rights of participation.

52. The issue of a child's capacity to raise a constitutional challenge in his or her own right should be determined on an individualized basis, having regard to the nature of the issue and the child's intellectual and social development..

53. (1983), 37 R.F.L. (2d) 113, reversed on other grounds 39 R.F.L. (2d) 239 (Man. C.A.).

54. 37 R.F.L. (2d) at 121-22. See also *Roe v. Conn*, 417 F. Supp. 769 (Ala. Dist. Ct., 1976)(in a child neglect proceeding a child was constitutionally entitled to have state appointed counsel); and 24 *In re D*, 547 P. 2d 175 (Or. C.A., 1976), cert. denied 429 U.S. 907 (1976)(court need not appoint counsel for child in *all* termination proceedings).

55.[2001] S.J. 724 (Sask Q.B.), at para. 18.

56. In *Re R.M.S.,* Smith J. acknowledged that the "circumstances [were] unusual" since the agency seemed, as a matter of policy, to be siding with the aboriginal council rather than considering the best interests of the individual children.

57.*Alberta v. K.B.* ,[2000] A.J. 1570 (Alta Q.B.), per Rooke J.

58. (1988), 70 Nfld. & P.E.I.R. 287, at 303-304 (Nfld. U.F.C.).

59. Id, at 305. Emphasis added.

60. In response to this decision, the Newfoundland *Child Welfare Act* was amended to require that parents be given notice of the apprehension within 5 days, and that there is a hearing within 15 days. S. Nfld. 1989, c.12, s.6.

61.See *Child, Youth and Family Services Act*, S.N.L. 1998, c. C-12.1, s. 29 & 30; application to be filed within one day of apprehension, presentation hearing within 10 days, and protective intervention hearing within 30 days.

62. Prof. D.A.R. Thompson, "Meditations of a True Believer: Why Hasn't the Charter Mattered in Child Protection" (1988), 8 Can. J.F. Law 133, at 134, described *Re C.P.L.* as a "horribly muddled decision".

Later in this paper *N.P.P. v. Regional Children's Guardian* (1988), 14 R.F.L. (3d) 55 (Alta. Q.B.) is discussed. This case purported to recognized a child's rights under s.7 of the *Charter*, but gave foster parents the standing to enforce them. That case also illustrates the difficulties in assigning a child's to an adult for enforcement.

63. See also discussion in *Santovsky v. Kramer*, 102 S.Ct. 1388 (1982).

64. *Polovchak v. Meese*, 11 F.L.R., 1687 at 1636-37 (C.A. 7th Circ., 1985); see also *In re Polovchak*, 454 N.E. 2d 258 (Ill. S.C., 1983). The boy in fact originally sought asylum when he was 13, but the ultimate judicial resolution of the case did not come until he as 17, which appeared to influence the court's assessment of his capacity.

65. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979); and *Akron v. Akron Centre for Reproductive Health*, 103 S. Ct. 1983).

66. *Carey v. Population Services Int.*, 431 U.S. 678 (1977).

67. *Parham v. J.R.*, 42 U.S. 584 (1979). See also *Bartley v. Kremens*, 402 F. Sup. 1039, vacated and remanded for consideration 431 U.S. 119 (1977).

68.[2004] S.C.J. 6, at para 56.

69.[2004] S.C.J. 6, at para 58-62.

70. *R. v. Jones* (1987), 28 C.C.C. (3d) 513 (S.C.C.). In the United States, see e.g. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); in a dissenting judgment, Justice Douglas raised the question of the child's rights to make this sort of decision. See, Comment, "Adjudicating What *Yoder* Left Unresolved: Religious Rights for Minor Children after *Danforth* and *Carey*" (1978), 126 U. Penn. L. Rev. 1135; also "The Constitution and the Family" (1980), 93 Harv. L. Rev. 1156 at 1377-83.

71. In an incident in Manitoba, a 17-year-old student at a public high school refused to stand for the Lord's Prayer. School officials were only prepared to excuse him from this religious exercise if his parents requested it, and the parents did not do so. The threat of litigation, invoking ss.2(a), 7 and 15 of the *Charter*, apparently forced the school officials to relent. The case received substantial attention in the Canadian media, and focused attention on the rights of adolescents: see, e.g., "Students raises uproar over refusal to stand for prayer", *Kingston Whig Standard*, 11th January 1986.

As noted earlier, in *Canadian Civil Liberties Assn. v. Ontario Minister of Education* (1990), 71 O.R. (2d) 341 (C.A.) the Ontario Court of Appeal recognized that freedom of religion protected students from being required to have "religious instruction" in public schools, but left unresolved whether it was a parental right or the right of the children.

72.At para 70 Emphasis added.

73.Para. 9, 11 & 12. Emphasis added

74.(2002), 57 O.R. (3d) 511 (Ont C.A.), at para. 36-40. Emphasis added.

75.[2004] S.C.J. 4, at para 6 -13.

76.An obvious example of this is the change in the position of Lamer C.J. from *R.B.* to *G.(J.)*. The

factual contexts were very different and the situations are clearly distinguishable, but his general statements in the two cases do not seem consistent with one another. When the context changes, he was prepared to use s. 7 of the *Charter* to protect fundamental rights.

77.See e.g British Columbia, *Constitutional Questions Act*, R.S.B.C. 1996, c. 68, s.8; and Ontario *Courts of Justice Act*, R.S.O. 1990, chap. C.43, s. 109.

78. See e.g *Paluska v Cava*, [2002] O.J. 1767 (C.A.); and *C.(D.) V A.(W.)*, [2003] O.J. 5119 (Ct. Justice), . In provinces like Alberta where the Minister of Justice provides representation to the child welfare agency, notice to that counsel should suffice, but in jurisdictions like Ontario where a separate child welfare agency is involved, there must be notice to the Attorney General or the Minister of Justice.

79. See *Re J.J.*, [2001] N.S.J. 101 (N.S.S.C., Fam Div.), per Legere J. See also *C.A.S Ottawa-Carletn v Y.L.*, unreported June 17, 2002 (Ont. Sup. Ct.), per Ratushny J., *Charter* s. 7 cited in decision to grant father adjournment in child protection case.

80. For a fuller discussion of the many procedural issues that arise in a constitutional analysis, see D.A. R Thompson, "No Longer 'Anything But the Charter': The New ABC's of the Charter" (National Judicial Institute, 2002). There is an extensive literature on *Charter* remedies, see e.g Kent Roach, *Constitutional Remedies in Canada* (Canada Law Book, looseleaf) & P. Hogg, *Constitutional Law* (Carswell, looseleaf).

81.See e.g *C.A.S of Toronto v D.M.* , [2001] O.J. 4425 (Ct. J.); and *Catholic C.A.S. of Toronto v J.L.*, [2003] O.J. 1722 (Ct.J.), per Jones J.

82.See *Auton v British Columbia*, [2002] B.C.J. 2258 (B.C.C.A.) where the British Columbia Court of Appeal invoked s. 15 to order the government to provide health care and education services for autistic children, concluding that the children were victims of discrimination based on disability. In addition to directing that the government provide treatment in the future, the Court ordered the government to pay $20,000 to each of the six parents involved to compensate for expenses that they had incurred. `

83.*Frame v Smith*(1987), 9 R.F.L. (3d0 225 (S.C.C.).

84.*Kemora-Patricia Child & Family Services v A.M.*, [2003] O.J. 3911 (Ct. J.), per Little J.

85.*C.P. v Alberta (Director of Child Welfare)*, [2003] A.J. 706 (Prov. Ct.), per Helmer Prov. Ct. J.

86.Clearly a court must be satisfied that a parent is really "indigent" before a *Charter*-based order for representation is made in a child protection case. Parents with a "reasonable income [approx $45,000-$55,000 gross joint incomes] who, with a reworking of their priorities, should be able to retain counsel"are *not* "indigent" and are not entitled to a court order for representation: *F. & C.S. of Guelph and Wellington Cty. v. K.F.*, [2001] O.J. 4548 (Ont. Ct. J.), per Caspers J.

87.2000 BCSC 758, at para 13 -18. Emphasis added. See also *B.D. v British. Columbia (Director of Child, Family and Community Services)*, [2002] B.C.J. 253 (C.A.) where the court held that s. 7 of the *Charter* includes the right to "effective" legal representation, citing the *Charter* as the basis for ordering a new trial in a child welfare casein which trial counsel for the mother clearly disregarded her instructions and failed to provide effective representation.

88. These are sometimes referred to as "*Fisher* applications" as this type of order was made in a Saskatchewan case: *R v Fisher:* see "LAO sends in staff lawyers to cover cases: *Fisher* applications fail but illustrate major problems in system," *Law Times*, August 26, 2002, p.1.

89. Decision of Cosgrove J., August 28, 2002, as reported in "Judge gives 437 over legal aid rate: Brockville lawyer appointed to defend child welfare case at $125 per hour." *Law Times*, Sept. 9, 2002, p. 1

90. See *R.C. v Quebec (Attorney General); R v Beauchamp*, [2002] SCJ 53, where the Supreme Court considered, but did not rule on the appeal of the order of a trial judge in a criminal case that state-paid counsel for the accused were to receive more than the legal aid tariff.

See also *In Re Nicholson*, 2002 U.S Dist Lexis 4820 (E.D.N.Y. 2002) in which a United States District Court held that state attorney fees for parents involved in certain types of child welfare proceedings were inadequate and violated the constitutional requirements of due process, and ordered that parent's counsel receive $90 per hour, more than double the state fee of $40 per hour.

91.Serving the Legal Aid Plan with notice is NOT sufficient notice to the Attorney General or Minister of Justice.

92.See e.g *R.A.F. v Saskatchewan (Department of Justice)*, [2003] S.J. 783(Q.B.), per Zarzecny J.

93.To this point, Canadian courts have restricted the application of *G (J.)* to cases that have a "public" dimension (ie child protection agency involvement) and not been willing to invoke the *Charter* to provide representation "private" litigation in cases in which one parent is involved in a custody or access dispute with another parent; see e.g.*S.A.K. v A.C.*, [2001] A.J. 999(Alta C.A.); *Defehr v Defehr*, [2002] B.C.J. 418 (B.C.C.A.); and *Mills v Hardy* (2000), 13 R.F.L. (5th)150 (N.S.C.A.); but see V. Schmolka et al, *Making the Case: The Right to Publicly-Funded Legal Representation in Canada* (Ottawa: Canadian Bar Association, 2002)

94.See e.g *R.A.F. v Saskatchewan (Department of Justice)*, [2003] S.J. 783(Q.B.), per Zarzecny J.

95.See *Cunningham* v. *Canada*, [1993] 2 S.C.R. 143.

96.Where the order sought is clearly interlocutory and only affects the specific case, it may be that notice to the agency that an order will be sought may suffice.

97.[2002] A.J. 70 (Alta Q.B.); see also *J.W v. M.E.S.* , [2000] B.C.J. 371 (B.C.S.C.)

98.See e.g. *R.* v. *Stinchcombe*, [1995] 1 S.C.R. 754.

99.[2001] OJ 441

100.See e.g *Re L.J.J.*,[2003] A.J. 1611 & 1612 (Q.B.)

101. See e.g *Lehr v Robertson*, 463 U.S. 248 (1983), at 261 :"the mere existence of a biological link does not merit...constitutional protection." See also *Adoption of Kelsey S.*, 823 P. 2d 1216 (Cal. 1992)

102.See e.g *J.F.P. v V.P.* , [2003] A.J. 1588 (Alta Q.B.)

103. See Ontario C.F.S.A. s. 37(1) and 137(1)(f). *Trociuk* may have some implications for the provisions of the *Vital Statistics Act*, R.S.O. 1990, c . V 4 that deal with the naming of children born out of wedlock, and perhaps some revisiting of *Kreklewetz v. Scopel*, [2003] O.J. 2364(C.A.) , leave to appeal to SCC dismissed [2002] S.C.C.A. No. 378.

104.[2003] O.J. 5119 (Ont. Ct J.); see also *Re Adoption of Natalie Y.*, [2003] O.J. 2636 (Ont. Ct.J.)

105.[2003] S.C.J. 34, at para 25.

106.See e.g *J.F.P. v V.P.* , [2003] A.J. 1588 (Alta Q.B.)

107.See e.g W.W. Patton, "The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings" (1990) 24 Ga. L. Rev. 473

108.*People of the State of New York v Greene*, 730 N.Y.S. 2d 697(Cty Ct.)

109.[2003]O.J. 717 (Ct Just.)

110.See *Nova Scotia (Minister of Community Services) v M.(D.J.)*, [2002] N.S.J. 119, 25 R.F.L. (5th) 354 (N.S.S.C.) (alleged abuser compellable witness in hearing to determine whether that person's name will be placed on Child Abuse Register)

111.[2003] O.J. 1722

112.(1998), 41 R.F.L.(4th) 291 (Man. C.A.).

113.Para 117. Emphasis added.

114.[2002] A.J. 1570 (Q.B.) Per Rooke J, revg. [2002] A.J. 876.

115.[2003]O.J. 717 (Ct Just.), at para 226. See also *S.(T.) V Alberta (Director of Child Welfare)* (2002), 26 R.F.L. (5th) 415 (Alta CA.); and *T. v Alberta (Dircetor of Child Welfare)*(2000), 9 R.F.L. (5th) 417 (Alta C.A.)

116.The *Charter* does not, however require that every procedural error by a trial court or agency will give rise to a *Charter* remedy; the court must assess the effect to the error on the rights of the parents and the interests of the child; see e.g *T.S. v Alberta(Director of Child Welfare)*, [2002] A.J. 286 (Alta.C.A.) (Failure of Director of Child Welfare to file a plan of care as required by statute does not give rise to remedy). Further, the existence of *Charter* protected interests in child welfare proceedings does not mean that parents can ignore procedural rules; see e.g *J.U. v Alberta (Regional Director of Child Welfare*), [2001] A.J. 673 (Alta CA) (no *Charter* violation to dismiss appeal in child welfare case when parent appealing decision failed to comply with rules governing appeal process.)

117.*Catholic C.A.S. of Metro Toronto v O.(L.M.)* (1996), 139 D.L.R. (4th) 534 (Ont. Gen Div.), decided before the 1999 introduction of Rule 16 of the Ontario Family Law Rules explicitly allowed for motions for summary judgement. In *C.A.S of Hamilton v M.W. et*. also upheld the constitutional validity of Rule 16

118.(2003), 63 O.R. (3d) 512 (Ont. Sup. Ct.)

119.(2001), 16 R.F.L. (5th) 237 (Ont. Sup. Ct.). For a different approach in a somewhat different factual context, see *Alberta (Director of Child Welfare) v W.J.* , [2001] A.J. 1349 (Prov. Ct.) per Kvill Prov. Ct. J. The court rejected the father's request for an adjournment on the day of a permanent wardship trial to have time to seek counsel. Counsel for the parents withdrew just before trial because of the repeated failure of the parents to attend meetings or provide instructions. The trial proceeded with the father representing himself; the children were made permanent wards.

120.Para. 136.

121. See *obiter* comments in *J.W v M.E.S.* [2000] B.C.J. 371 (S.C.) about the possibility of interim return of a child to parental care if there is not clear evidence of risk to child.

122. In *Catholic C.A.S of Metro Toronto v M.(C.)* (1994), 2 R.F.L. (4th) 313 (S.C.C.) the mother regained custody of her child at a trial, but by the time the lengthy appeals process was completed in the Supreme Court of Canada, the child had spent several more years in the care of her foster family and had bonded to them. In reversing the trial decision and deciding that the child should not be returned to the mother, L'Heureux-Dubé J. emphasized that by the time of the Supreme Court hearing the case, there would be significant emotional damage to the child by removal from such along term placement. In that earlier case she commented on the desirability of "speedy resolution" of child protection cases, but made no suggestion that the failure to do so might violate the *Charter*. The suggestion in *W.(K.L.)* that there might be a constitutional remedy for a mother at an earlier stage is a welcome response to the problem of delay.

123. See *Alberta (Director of Child Welfare) v W.J* , [2001] A.J. 1349 (Prov. Ct.) where Kvill Prov. Ct. J. rejected the claim of father for *Charter* based right to an adjournment in a child protection case. But see *C.A.S Ottawa-Carletn v Y.L.*, unreported June 17, 2002 (Ont. Sup. Ct.), per Ratushny J., *Charter* s. 7 cited in decision to grant father adjournment in child protection case.

124.[1992] Y.J. 126 (Terr. Ct.).

125.[2002] Y.J. 48, at para 174.

126.See *C.A.S Ottawa-Carleton v Y.L.*, unreported June 17, 2002 (Ont. Sup. Ct.), per Ratushny J., *Charter* s. 7 cited in decision to grant father adjournment in child protection case despite expiry of two year maximum for temporary wardship.

127.There is also scope for children and adolescents to raise "liberty" interest based challenges to legislation that may arise in their confinement for "treatment" purposes. See *Alberta v K.B.* , [2000} A.J. 1570 (Alta Q.B.)

128.*In re Adoption No. 6Z97003 for Montgomery County*, 731 A. 2d 467 (Md. Ct. Spec. App. 1999).

129. This argument was accepted in *Re R.A.M.; Children's Aid Society of Winnipeg v. A.M.* (1983), 37 R.F.L. (2d) 113, reversed on other grounds 39 R.F.L. (2d) 239 (Man. C.A.).

130.See e.g *Re T.L.F.* [2001] S.J. 353 (Sask.Q.B.), per Ryan-Froslie J; *Re R.M.S.*, [2001] S.J. 724 (Sask.Q.B.) per Smith J.;and *P.W.S. v British Columbia (Director of Child and Family Services*), [2000] B.C.J. 2656(B.C.S.C.)

131.See *P.(M.A.R.)* v. *V. (A.)* (1998), 40 R.F.L. (4th) 411 (Ont. Gen. Div.). This decision recognizes that the child protection legislation appears to focus exclusively on the "best interests" of the child in state care, while appearing to recognize that the interests of other children should also be considered. A constitutional approach requires consideration of the "security of the person" (i.e psychological well-being) of each of the siblings.

See also *Children's Aid Society for Oxford* v. *Terry M. et al*, (unreported) October 21, 1999, per Schnall J., Ont Ct. Just., which accepted a statutory argument to allow post-adoption sibling access where one child was a Crown ward.

132.*Aristotle P.* v. *Johnson* 721 F. Supp. 1002, at 1006-07 (USDC N.D. Ill 1989).

133. See e.g. *Kyees* v. *Tippecanoe County Dept. of Pub. Welfare*, 600 F. 2d 693 (C.A. 7th Circ., 1979).

134.8 F.L.R. 2270 at 2271, affirmed 9 F.L.R. 2178 (C.A. 2nd Circ., 1982). See also *Brown* v. *County of*

San Joaquin, 601F. Supp. 653 (USDC, E. Dist Cal. 1985).

135.*Smith* v. *Organization of Foster Families for Equality and Reform*, 97 S.Ct. 2095 at 2111 (1977), per Brennan J.

136.*In re Michael Ray T.*, 525 S.E. (2d) 315, 1999 W. Va. Lexis 167 (W.Va. 1999) a court rejected the claim of a *former* foster parent to participate in a protection hearing arising after the child was returned to the care of the natural parents. The court observed that a prime purpose of recognizing rights of foster parents in cases where a child is being removed from their care is to ensure that the court has "all pertinent information regarding the child" and that their involvement in a case involving the natural parents could make the proceedings might result in delay and hence be contrary to the interests of the child.

137.*In Re Michael Ray T.*, supra.

138.(1988), 14 R.F.L. (3d) 55, at 78-80 (Alta. Q.B.). Emphasis added. For a preliminary ruling in recent Canadian case that appears to raise similar issues, see *Re R.M.S.* , [2001] S.J. 724 (Q.B.), per Smith J. For a similar American case, which recognized the foster-parents as having rights, see *McLaughlin* v. *Pernsley*, 693 F. Supp. 318 (E.D. Pa. 1988).

139.See e.g. *R.L. v C.A.S of Niagara*, [2002] O.J. 4793(C.A.) and *C.A.S of Niagara v K.K.*, [2003] O.J. 837(Ct. J.) on the unsuccessful attempt of foster parents to invoke statutory and *parens patriae* jurisdiction to prevent removal of children from their care and placement with biological relatives.

140.In *C.K. v British Columbia (Minister of Children and Family Development)*, [2003] B.C.J. 1165 (B.C.S.C.) Maczko J. rejected a *Charter* based claim by foster parents to prevent removal of children from their, though in this case the Director of child welfare was taking the children to live in the same home as three of his siblings.

141. See *D. (S.J.) v S.(J.)* (2001), 15 R.F.L. (5^{th}) 322 (Sask.C.A.) where the court held that an indigent parent seeking to appeal an adoption decision should not be required to post security for costs. Although the *Charter* was not cited, the Court observed that the interest involved is of unique significance, since the parent will "forever lose any right to the infant child."

It is also clear that adoption legislation that violates s. 15 of the *Charter*, for example by discriminating against same-sex partners, in the adoption process is vulnerable to challenge; see e.g *Re K* (1995), 15 R.F.L. (4^{th}) 129 (Ont. Prov. Ct.); and *Re Nova Scotia (Birth Registration No. 1999-02-004200)* , [2001] N.S.J. 261 (N.S.S.C. (Fam. Div.)

142.117 S.Ct. 555 (1996). The Court held that it was a violation of the Constitution to require an indigent mother to pay a transcript fee before appealing an adoption order granted to the child's father and his new wife.

143. *O.A.H.* v. *R.L.A.*, 712 S. (2d) 4 (1999 Fla. 2nd Dist).

144. The case is being heard by Czutrin J. in the Ontario Superior Court, and involves the foster parents and the Hamilton C.A.S. See e.g "Chief's letter called 'inappropriate': B.C. Band v. Foster Parents," *National Post*, Sept. 11, 2003; and "'She was pretty clear that she didn't want to go': Foster girls meet B.C. woman fighting to take them home," *National Post*, Sept. 25, 2003.

145.See e.g *Alberta (Director of Child Welfare) v G.N.*, [2002] A.J. 1609 (Q.B.)

146. *R. v Davies* (1991), 87 D.L.R. (4th) 527 (Ont. Prov. Ct.) and ; *A.H. v P.C.*, [2002] B.C.J. 589 (B.C. Prov. Ct.)

147. See e.g. *Dagenais v C.B.C,* [1994] 3 S.C.R. 835

148.Granger J., unreported judgement June 28, 2002 (Ont. Sup. Ct.) (see "Judge's bans swept aside," *National Post*, June 29, 2002) dismissed as "speculation" the concerns of Schnall J. about "emotional harm" that led to the order (May 27, 2002, Ont Ct. J.) prohibiting the publication of virtually any evidence from a highly publicized child protection hearing arising from the apprehension of children on the grounds that their religiously devote parents used excessive discipline.

149.See D.A.R. Thompson, "Revenge of the Charter: 'Public' and 'Private' in Family Law" (1996, National Family Law Program, Ottawa).