

FAMILY TIES: INDIVIDUAL AND FAMILY RIGHTS UNDER CANADA'S *CHARTER OF RIGHTS AND FREEDOMS*

Gerald Chipeur*

Traditional *Charter* Protection

Since its inception, the *Canadian Charter of Rights and Freedom's* [*Charter*] has primarily been employed to advance individual rights.¹ The protection and preservation of individual rights is the grand purpose for which the *Charter* was created by the Federal Parliament, in conjunction with the Provinces.²

These individual rights have been characterized by jurists in our common law tradition as "inalienable"³ and "God given."⁴ The drafters of the *Charter* described them in a number of ways. Most significantly, Parliament has characterized them as "fundamental," and employed such words as "democratic," "legal," and "equality" to delimit the scope of these important individual rights.

The *Charter* provides explicit rights for many groups in Canadian society. For example, section 15 affords equality rights to classes in Canadian society who have historically suffered disadvantage as a result of discrimination.⁵ Section 15 expressly grants a remedy to members of groups who suffer discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

* Gerald Chipeur practices constitutional law with Chipeur Advocates (www.chipeur.com) in Calgary, Alberta. His work often takes him before the Supreme Court of Canada to advance the interests of the family, civil rights and religious liberty.

¹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982 c.11. (I refer specifically to sections 2-15 *i.e.*: fundamental freedoms, democratic rights, mobility rights, legal rights and equality rights.)

² Quebec objected, but adopted a *Charter of Human Rights and Freedoms*, S.Q. 1975 c.6, virtually identical in effect.

³ George Mason, *Virginia Declaration of Rights 1776*, and Thomas Jefferson, *The Declaration of Independence 1776*.

⁴ *Ibid.*

⁵ *Law Society of B.C. v. Andrews*, [1989] 1 S.C.R. 143; and *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

In addition, the *Charter* provides “group rights” to both Anglophone and Francophone minority communities,⁶ and the Aboriginal Peoples of Canada.⁷

Section 7 is a unique section of the *Charter*. It includes all of the foregoing concepts within its life, liberty, and security of the person. Section 7 has been applied primarily to the individual, particularly when individual rights conflict with state rights in the context of the state’s criminal law power.⁸ However, section 7 is increasingly looked to by various groups in Canadian society for protection when their fundamental group interests conflict with those of the state.

Charter Protection for the Family

Does and should the *Charter* recognize the family as a group worthy of protection? These two questions will be explored below.

The family has been a foundational institution in society for millennia.⁹ The intimate social compact created by a mother and father provides the essential environment in which a child is prepared to flourish and contribute to society. This fundamental importance of the family is recognized in the *Universal Declaration of Human Rights*.¹⁰ Article 16(3) of the *Declaration* provides that:

The family is the natural and fundamental group unit of society and is entitled to

⁶ *Supra* note 1. (See section 16, Official Languages of Canada, and section 23, Minority Language Educational Rights.)

⁷ *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11, s. 35. (Referring to rights of the Aboriginal Peoples of Canada).

⁸ See *R.B. v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315. Lamer C.J. states at para. 3, “With the exception of certain remarks by Wilson J., this Court has never really, up to this point, examined the concept of liberty in s. 7 except in close connection with the context of the criminal or penal law, by which the state takes action, through the courts or other agencies, to create or punish offences or, more generally, to exercise coercive power over certain human activities.”

⁹ See *DeBurgh v. Deburgh*, 39 Cal. 2d 858., cited in Sylvia Law, “A Theory of Family Rights”(1987) 39 U. Fla. L. Rev. 583 at 631 quoting Traynor J., “The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life....Since the family is the core of our Society, the law seeks to foster and preserve marriage.”

¹⁰ *Universal Declaration of Human Rights*, 10 December 1948, GA Res. 217(III), UN GAOR, 3d SESS., Supp No.13 UN Doc A/810 (1948) 71, online: Office of the High Commissioner for Human Rights <<http://www.unhchr.ch/udhr/lang/eng.htm>>.

protection by society and the State.¹¹

The family's significant role is highlighted throughout the *Declaration*, including Article 26(3):

Parents have a prior right to choose the kind of education that shall be given to their children.¹²

The *International Covenant on Civil and Political Rights*¹³ also protects the family. Article 23(1) declares that:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.¹⁴

Article 18(4) provides as follows:

The States' Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.¹⁵

Significantly, the *Convention on the Rights of the Child*¹⁶ proclaims in its preamble:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can

¹¹ *Ibid.* at ¶ 3.

¹² *Ibid.* at ¶ 5.

¹³ *International Covenant on Civil and Political Rights*, 23 March 1976, G.A. Res 2200A(XXI), 21 U.N. GAOR, Supp No 16 at 52, U.N. Doc. A/6316(1996),999 U.N.T.S. 171, online: University of Minnesota Human Rights Library <<http://www1.umn.edu/humanrts/instree/b3ccpr.htm>>.

¹⁴ *Ibid.* at ¶ 8.

¹⁵ *Ibid.* at ¶ 7.

¹⁶ *Convention on the Rights of the Child*, 2 September 1990, G.A. Res 44/25, annex, 44 U.N. GAOR, supp no 49 at 167, U.N. Doc A/44/49 (1989), online: University of Minnesota Human Rights Library <<http://www1.umn.edu/humanrts/instree/K2ccr.htm>>.

fully assume its responsibilities within the community.¹⁷

The family's role in society is also recognized in the preamble to the *Canadian Bill of Rights*:¹⁸

The Parliament of Canada affirming that the Canadian Nation is founded upon principles that acknowledge the Supremacy of God, the dignity and worth of the Human person and the position of the family in a society of free men and free institutions.¹⁹

The Family and Group Rights Under the *Charter*

The family is not granted explicit recognition or status as a group or a class within the *Charter*. Robert Kaplan, the Solicitor General of Canada at the time the *Charter* was drafted, explained to the Parliamentary Joint Committee on the Constitution why a preamble referencing the family (such as that in the *Bill of Rights*) was not included in the *Charter*. Kaplan indicated the omission of such a preamble in the *Charter* was due to a controversy regarding multiculturalism and certain other aspects of Canadian society.²⁰

Despite the fact the family is not enumerated explicitly in the *Charter*, the rights of the family and parents are inherent and derive naturally from our common law tradition.²¹ The *Charter* acknowledges these family group rights in section 26. Since

¹⁷ *Ibid.* at ¶ 1.

¹⁸ *Bill of Rights*, S.C., 1960, c.44 [*Bill of Rights*].

¹⁹ For a discussion of the legal effect of the preamble see Nicholas Bala and D. Redfern, "Family Law and the "Liberty Interest": Section 7 of the *Canadian Charter of Rights*" (1983) 15 *Ottawa L. Rev.* 274 at 278-279.

²⁰ *Ibid.* at 278. Mr. Kaplan stated that the preamble in the *Bill of Rights* "are a fine statement of principles which certainly are behind the spirit of the rights and freedoms that are enunciated . . . in the *Charter*." Mr. Kaplan's comments were made to a Special Joint Committee of the Canadian Senate. See The Joint Special Committee of the Senate and House of Commons, "The Constitution of Canada" in Minutes and Evidence of the Senate and House of Commons, No. 41 (20 January 1981) at 7.

²¹ See *Martin v. Duffell*, [1950] S.C.R. 737(QL). A decision of Rand J., in which he quotes at ¶ 7: "In the settled formula, the welfare of the infant is the controlling consideration: that is, the welfare as the court declares it"; but in determining welfare we must keep in mind what Bowen L.J., in the case of *In re Agar-Ellis* (1883) 24 Ch. D. 317, as quoted by Scrutton, L.J. in *In re J.M. Carroll* [1931] 1 K.B. 317 at

its enactment, the courts have in various instances spoken about the family and the rights of parents, particularly in connection with section 7.

The Family and Section 7 of the *Charter*

In *R.B. v. Children's Aid Society of Metropolitan Toronto*,²² the Supreme Court of Canada was asked to determine whether a parent's right to refuse a blood transfusion for their child was protected by section 7 of the *Charter*. In addition, the Court had to decide whether the government could interfere with the parent's decision in violation of the parent's religious beliefs.

Justice La Forest, writing for himself and four others, held that the government's intervention was a *prima facie* violation of the parent's liberty interest under section 7. This interest, according to Justice La Forest, includes the right to nurture a child, to care for her development, and to make decisions for her concerning fundamental matters such as health care.²³ The Supreme Court, however, found the government's limitation on the parental liberty interest to be justified under section 1 and in accordance with fundamental justice.

In his analysis of the section 7 "liberty" interest, Justice La Forest discounted the notion of "integrity of the family" recognized under the American Constitution:²⁴

334, says: "it must be the benefit to the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can." [emphasis added]

²² *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1999] 3 S.C.R. 46, [*R.B. v. Children's Aid*].

²³ See Jennifer Wilson, *Wilson on Children and the Law*, looseleaf (Toronto: Butterworths, 1994) at 118.

²⁴ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The Supreme Court declared unconstitutional a statute that required that children attend public schools. McReynolds J. stated, at 534-35:

Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. *The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.* [emphasis added]

The appellants claim that parents have the right to choose medical treatment for their infant, relying for this contention on s. 7 of the *Charter*, and more precisely on the liberty interest. They assert that the right enures in the family as an entity, basing this argument on statements made by American courts in the definition of liberty under their Constitution. While, as I will indicate, American experience may be useful in defining the scope of the liberty interest protected under our Constitution, I agree that s. 7 of the *Charter* does not afford protection to the integrity of the family unit as such. The *Canadian Charter*, and s. 7 in particular, protects individuals. It is the individual's right to liberty under the *Charter* with which we are here concerned. The concept of the integrity of the family unit is itself premised, at least in part, on that of parental liberty.²⁵

Justice La Forest did, however, determine that parental decision making nevertheless received protection under the *Charter*:

While acknowledging that parents bear responsibilities towards their children, it seems to me that they must enjoy correlative rights to exercise them. The contrary view would not recognize the fundamental importance of choice and personal autonomy in our society. As already stated, the common law has always, in the absence of demonstrated neglect or unsuitability, presumed that parents should make all significant choices affecting their children, and has afforded them a general liberty to do as they choose. This liberty interest is not a parental right tantamount to a right of property in children. (Fortunately, we have distanced ourselves from the ancient juridical conception of children as chattels of their parents.) The state is now actively involved in a number of areas traditionally conceived of as properly belonging to the private sphere. Nonetheless, 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 such intervention must be justified. In other words, 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

²⁵ *Supra* note 22 at ¶ 72.

underlying the *Charter*.²⁶

This liberty interest includes the right to be wrong. Justice La Forest determined that parents were entitled to make decisions that were contrary to their child's wishes:

If one considers the multitude of decisions parents make daily, it is clear that in practice, state interference in order to balance the rights of parents and children will arise only in exceptional cases. In fact, we must accept that parents can, at times, make decisions contrary to their children's wishes – and rights – as long as they do not exceed the threshold dictated by public policy, in its broad conception. For instance, it would be difficult to deny that a parent can dictate to his or her child the place where he or she will live, or which school he or she will attend. However, the state can properly intervene in situations where parental conduct falls below the socially acceptable threshold. But in doing so, the state is limiting the constitutional rights of parents rather than vindicating the constitutional rights of children.²⁷

More recently, in *New Brunswick (Minister of Health and Community Service) v. G.(J.)(J.G)*,²⁸ the Supreme Court of Canada held that a parent's section 7 *Charter* rights are triggered when the state seeks to remove the child from the parents' care. In that case Chief Justice Lamer ruled:

Section 7 guarantees every parent the right to a fair hearing when the state seeks to obtain custody of their children. In certain circumstances, which obtain in this case, the parent's right to a fair hearing requires the government to provide the parent with state-funded counsel.²⁹

Justice Lamer also held that the parent's "security" interest under section 7 was engaged when the attempt to deprive the parent of custody had an impact on the parent's psychological integrity:

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

²⁶ *Ibid.* at ¶ 85.

²⁷ *Ibid.* at ¶ 86.

²⁸ *New Brunswick (Minister of Health and Community Services) v. G.(J.)(J.G.)*, [1999] 3 S.C.R. 46 [New Brunswick].

²⁹ *Ibid.* at ¶ 55.

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, as LaForest J. held in *B. (R.)*, supra, at para. 83, "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.³⁰

When reviewing whether the section 7 violation could be saved by section 1, the Court highlighted the classic common law position, as articulated in *Hepton v. Matt*, describing parental rights *vis a vis* the state:

... *prima facie* the natural parents are entitled to custody unless by reason of some act, condition or circumstance affecting them it is evident that the welfare of the child requires that that fundamental natural relation be severed ...

The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties.

This, in substance, is the rule of law established for centuries and in the light of which the common law Courts and the Court of Chancery, following their differing rules, dealt with custody.³¹

The Supreme Court also found that a child's section 7 interest is engaged by state action that interferes with family relationships:

The interests at stake in the custody 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

³⁰ *Ibid.* at ¶ 61.

³¹ *Ibid.* at ¶ 69.

child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.³²

The Supreme Court reaffirmed the place of parental rights in apprehension cases in *Winnipeg Child and Family Services v. K.L.W.*,³³ where the majority of the Court found that section 7 had been violated. Justice L'Heureux-Dubé expressed the view that the section 7 analysis must proceed in a contextual manner. Familial rights and responsibilities must be balanced with the child's right to life and health. The state's responsibility to protect children must also be accounted for. In reaffirming the parental role in that case, Justice L'Heureux-Dubé explained why the relationship between children and parents is so important:

The mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary disruptions of this bond by the state have the potential to cause significant trauma to both the parent and the child. Parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit. Indeed, no one would dispute the fact that the task of raising a child can be difficult, especially when parents experience the types of personal, social and economic problems faced by the appellant in this case. A proper description of the general context of this case cannot ignore the frequent occurrence of child protection proceedings involving already disadvantaged members of society such as single-parent families, aboriginal families and disabled parents.³⁴

Conclusion

The Supreme Court of Canada has effectively used section 7 of the *Charter* to erect a wall of protection around the family. Parents and children have an indivisible right to each other's love and support and to exercise the roles they have mutually fulfilled since time immemorial. The government may not violate the integrity of the family without a compelling reason that meets the high test set by section 1 of the *Charter*.

As courts continue to apply section 1 to cases involving government interference

³² *Ibid.* at ¶ 76.

³³ *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519 [*Winnipeg Child*].

³⁴ *Ibid.* at ¶ 72.

with family relationships, they will be greatly assisted by reference to the words of Lord Justice Bowen in *Re: Agar-Ellias*,³⁵ the preamble to the *Canadian Bill of Rights*,³⁶ and the International treaties signed by Canada.³⁷

There can be no doubt that Lord Justice Bowen was correct. It is impossible for a judge to know the best interests of a child given the limited contact the court has had with the family. It is only with the humble recognition that a court cannot do good; but rather, only prevent evil, that the courts should allow government to proceed to intervene and disrupt a family.

Section 1 of the *Charter* sanctions government actions that are reasonable in a free and democratic society. An understanding of this power is critical to an analysis of the impact of a violation of parents' section 7 rights regarding their children. To the extent that there is unnecessary interference with the family, the very foundation of freedom in our society is shaken. The *Canadian Bill of Rights* recognizes that individual freedoms and free institutions will not survive if the position of the family in society is extinguished through government intervention.

Far too little attention has been paid to Canada's international obligations to protect the family. Each of the *Universal Declarations of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *Convention on the Rights of the Child*, recognize the family as the "fundamental group unit of society." With respect to the proper hierarchy of roles within society, the courts should reinforce to bureaucrats that the family rightly comes first and the state second. International law dictates that the family is entitled to protection from both society and the state. Therefore, any intrusion by the state should be viewed with suspicion. It is the role of the courts to protect the family from bureaucracies too often convinced of their own wisdom and good will.³⁸ During discussions regarding which changes in public policy are best for children, it is important for both the government³⁹ and the courts to keep focused on Justice LaForest's bottom line:

³⁵ *Re: Agar-Ellis* (1883), 24 Ch.D.317.

³⁶ *Supra* note 18.

³⁷ *Supra* notes 10-16.

³⁸ *Supra* note 33 at ¶ 72.

³⁹ The Justice Minister's statement about rights of children in the "Child Centered Family Justice Strategy" in December 2002 will lead to children being mere creatures of the state, while seeking to undermine parental rights. See Minister of Justice Announces the Child-Centred Family Justice Strategy online: <http://canadajustice.gc.ca/en/news/nr/2002/doc_30772.html>.

The state can properly intervene in situations where parental conduct falls below the socially acceptable threshold. But in doing so, the state is limiting the constitutional rights of parents rather than vindicating the constitutional rights of children.⁴⁰

⁴⁰ *Supra* note 27 at ¶ 86.