The Journal of Law and Education

Volume 22 | Issue 3 Article 8

Summer 1993

Foreign Developments - Canadian Constitutional Guarantee of "Liberty" as It Effects

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Recommended Citation

Anwar N. Khan, Canadian Constitutional Guarantee of Liberty as It Affects Education and Children, 22 J.L. & EDUC. 335 (Summer 1993).

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Canadian Constitutional Guarantee of "Liberty" as It Affects Education and Children*

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Preliminary

The word "liberty" is now used in the Canadian Constitution. The same word has been used in other constitutional documents,[1] particularly in the Constitution of the United States. Canadian jurisprudence is gradually developing in this area, and United States precedents are commonly cited in arguments in and by Canadian courts. This article examines the Canadian courts' interpretation of "liberty" as it applies to education and children.

The Fifth Amendment to the United States Constitution stipulates[2] that no person is to be deprived of liberty without due process of law.[3] The Supreme Court of the United States has stated repeatedly that the meaning of "liberty" extends far beyond physical restraint. For Example, Chief Justice Warren stated:

> Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue.[4]

This is in line with Justice McReynolds' broad definition of "liberty" as used in the Fifth Amendment, who said that liberty

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* Included with permission of EDUCATION AND THE LAW, published by Longman UK Ltd. This paper was first published in (1993) 5 (2) EDUC. & L. 95-106.

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1. Part 3, article 9 of the International Covenant also states, "Everyone has the right to liberty and security of person." The European Convention on Human Rights provides, in section 1, article 2(1), "Everyone's right to life shall be protected."

2. The Fourteenth Amendment to the U.S. Constitution provides, "No State shall . . . deprive any person of life, liberty or property without due process of law."

3. According to Justice Cardozo, in Palko v. Connecticut, 302 U.S. 319 (1939), the scheme provided by the Fifth Amendment to the United States Constitution is a scheme of ordered liberty.

4. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

> denotes not merely freedom from bodily restraint, but also the right to the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[5]

According to Justice Douglas, Fifth Amendment "liberty" has three components:

> First is the autonomous control over the development and expression of one's intellect, interests, tastes and personality.
>
> . . .
>
> Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.
>
> . . .
>
> Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, or loaf.[6]

Introduction

Section 7 of the Canadian Charter of Rights and Freedoms[7] provides that:[8]

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5. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). This was quoted in the Supreme Court of Canada in R. v. Jones, 2 S.C.R. 284 (1986), to give broad, generous interpretation of Section 7 of the Canadian Charter. However, before the Supreme Court's final decision, not all judges of the lower court had been in favor of following or applying *Meyer*. For example, the Alberta Court of Appeal, in R. v. Neale, 46 Alta. L.R.2d 225 (1986) — reversing the Alberta Queen Bench's judgment, 39 Alta. L.R.2d 24 (1985), in which Justice McDonald had followed *Meyer* — was against, and rejected, the opinion that when the Charter was drafted the American case of *Meyer* and *Bolling* were well known. The Court was not persuaded by the arguments that the meaning of "liberty" in section 7 should be construed widely so that it encompasses more than, and goes beyond, the traditional meaning of liberty — i.e., liberty from physical restraint. The Court rejected "the position represented by cases such as *Meyer* as indicative of the purpose or meaning of the phrase liberty as used in section 7 of the Canadian Charter." However, this position became untenable after R. v. Jones.

In R. v. Jones, the Supreme Court of Canada also followed Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), in which the Supreme Court of the United States affirmed that liberty was "a broad and majestic term" and that "in a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed."

6. Roe v. Wade, 410 U.S. 113, 211-13 (1973).

7. Contained in the Canadian Constitution Act 1982. For background information, see Anwar (Andy) N. Khan, *Mandatory Retirement Age for University Professors,* 19 J.L. & EDUC. 135 (1990); Anwar (Andy) N. Khan, *Canadian Academics and Mandatory Retirement Age,* 21 J.L. & EDUC. 241 (1992).

8. *See* C.P. Manfredi, *Fundamental Justice in the Supreme Court of Canada: Decisions Under Section 7 of the Charter of Rights and Freedoms,* 38 AM. J. COMP. L. 653 (1990).

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[9]

The Canadian courts are struggling with this section, both with the individual rights (right to life, right to liberty, right to security of the person), and compendiously with these rights in association with "the principles of fundamental justice."[10] Some judges are unhappy with this section. For example, Justice Scollin, in the Manitoba Court of Appeal, complained:

> The sweeping terms of section 7 read more like the marching-banner of a political philosopher than a serious identification of realistic legal right. This makes it difficult to attempt any useful analysis or general defintion of the right to life, liberty and security of the person.[11]

On the other hand, the breadth of the section has been used to say that a broad and liberal approach to its interpretation is more necessary for it than for other sections;[12] and, according to one judge,

> [l]iberty is so grand a concept, it may not be possible to capture its meaning in words. At its broadest, liberty means power to do as one wishes without restraint. In a society governed by the rule of law, it is recognized that the liberty of individuals is subject to limitations. I do not think it either possible or wise to attempt an exhaustive list of limitations which we accept as consistent with the idea of liberty under law.[13]

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9. The Canadian Bill of Rights 1962 contained the phrase "due process of law" in section 1(a) and the phrase "the principles of fundamental justice" in section 2(3).

10. An example of where the pendulum has swung both ways is the question whether section 7 protects economic or proprietary rights. Even the invocation of the Fourteenth Amendment to the U.S. Bill of Rights has not solved the problem because the American provision speaks specifically of a protection of property right, which is conspicuous by its absence in section 7. For the most recent case, which decided that the Alberta Workers' Compensation Act, which distinguishes an injured worker's right to sue for damages, does not violate section 7 of the Charter because the common law right to sue for damages is proprietary in nature and purely economic, and thus not protected by section 7, see Budge v. Calgary (City) 6 C.R.R.2d 365 (1992). *See also,* Reference Workers' Compensation Act 1983 (Newfoundland), 1 S.C.R. 922 (1989).

11. Thwaites v. Health Sciences Centre Psychiatric Facility, 45 Man. R.2d 187, 194-95 (1987).

12. See, for example, Justice Finch, in R. v. Robson, 56 B.C.L.R. 194 (1984), *affd.,* 28 B.C.L.R.2d 8 (1984), where he said that undoubtedly the breadth of section 7 was intended by its authors. He observed that within a short time after the introduction of the Canadian Charter, section 7 "already has been considered in such diverse contexts as deportation, abortion, missile testing, privacy, narcotics, breath samples, wiretaps, parole, extradition, sentencing, writs of assistance and others. The use of its general language was clearly intended to permit the application of s. 7 to a wide variety of situtations."

13. Finch, J., in R. v. Robson, *supra,* note 12. This was followed in Cowling v. Brown, Kocher & Bd. of Sch. Trusteees of Sch. Dist. No. 68 (Nanaimo), 48 C.R.R. 205 (1990).

In *R. v. Morgentaler, Smoling & Scott,*[14] Chief Justice Dickson was of the opinion that, early in the history of section 7, it was inappropriate to attempt an all-encompassing explication of it.[15] According to him, the Supreme Court of Canada should be presented with a wide range of claims and factual situations before articulating the full range of the rights provided in this section.[16] Nevertheless, also according to the Supreme Court of Canada, the interpretation of section 7 should be "a generous rather than a legalistic one."[17] Furthermore, in interpreting section 7, meaning should be given to each of the elements — life, liberty, and security of the

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14. 1 S.C.R. 30 (1988). *See* S.L. Martin, *Morgantaler v. The Queen in the Supreme Court,* 2 CAN. J. WOMEN & L. 422 (1988). Within a short time of deciding *Morgatentaler,* in Borowski v. Attorney-General for Canada, 1 S.C.R. 342 (1989), the Supreme Court held that an unborn foetus is not a person within the meaning of the law and is not within the scope of the term "everyone" in section 7. Because this term is undefined in the Charter, historical treatment at common law of a foetus in determining whether the section includes it is worth looking at. The Court said that an interpretation of the Charter which gave independent rights to a foetus would be a major departure from traditon and so novel that it would require clear and unambiguous wording if it was intended to enshrine such rights in the Charter. Furthermore, an examination of the Charter itself indicates that an unborn foetus was not intended to come within the protection afforded by section 7. *See* D.L. Beschle, *Judicial Review and Abortion in Canada; Lessons for the United States in the Wake of Webster v. Reproductive Health Services,* 16 U. COL. L. REV. 537 (1990); J.E. Bichenbach, *The Principle of Fundamental Justice — Prospects for Canadian Constitutionalism,* 38 U. FLA. L. REV. 269 (1987); G. Marshall, *Liberty, Abortion and Constitutional Review in Canada,* ____ PUB. L. 199 (1988); M.L. McConnel, *'Even by Commonsense Moriality': Morgentaler, Borowski and the Constitution of Canada,* 68 CAN. B. REV. 765 (1989); K.M. McCourt & D.J. Love, *Abortion and Section 7 of the Charter: Proposing a Constitutionally Valid Foetal Protection Law,* 18 MAN. L.J. 365 (1989).

15. Chief Justice Dickson, in R. v. Big M Drug Mart, 1 S.C.R. 295 (1985), emphasized "the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system." He stressed that these rights are the *sine qua non* of the political tradition underlying the Canadian Charter. Then again, Chief Justice Dickson, in R. v. Oakes, 1 S.C.R. 103 (1986), commented that the very purpose of the Canadian Chater's having been originally entrenched in the Constitution was the protection of underlying values and principles of a free and democratic society.

16. This was the case in which the Supreme Court of Canada declared section 251 of the Criminal Code of Canada, which made it an offence to procure a female person's or one's own miscarriage, inconsistent with section 7 of the Canadian Charter. Their reason for so ruling was that the Criminal Code provision offended the "security of the person" of women who wanted an abortion. Justice Wilson, after examining American case law, concluded:

> [T]he respect for individual decision-making in matters of fundamental personal importance reflected in the American jurisprudence also informs the Canadian Charter. . . . Given that the right to liberty guaranteed by s. 7 of the Charter gives a woman the right to decided for herself whether or not to terminate her pregnancy, does s. 251 of the Criminal Code violate this right? Clearly it does. The purpose of the section is to take the decision away from the woman and give it to a committee [which] bases its decision on criteria entirely unrelated to the pregnant woman's priorities and aspirations.

Justice Wilson added that, in interpreting section 7, a broad approach should be adopted, which necessitates a broader exploration of both of the rights (the right to liberty and the right to security of the person) contained in the section. Justice Beetz opined that the full ambit of section 7 rights will only be revealed over time.

17. R. v. Big M. Drug Mart Ltd., 1 S.C.R. 295 (1985).

person — which make up the rights contained therein, and those three concepts are capable of a broad range of meaning.[18]

Above all, according to Justice Wilson,[19] the right to liberty has to be construed in the spirit of the Canadian Charter, which is

> predicated on a particular conception of the place of the individual in society. An individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both. The Charter reflects this reality by leaving a wide range of activities and decisions open to legitimate government control while at the same time placing limits on the proper scope of that control.[20]

In support of her stand that the Canadian Charter and the right to individual liberty guaranteed in the Charter are inextricably tied to the concept of human dignity, Justice Wilson followed the definition given by Professor Neil MacCormick.[21] According to Professor MacCormick, liberty is:

> a condition of human self-respect and of that contentment which resides in the ability to pursue one's own conception of a full and rewarding life . . . To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a human being, and essential to the possibility of that contentment. Such self-respect and contentment are in my judgment fundamental goods for human beings, the worth of life itself being on condition of having or striving for them. If a person were deliberately denied the opportunity of self-respect and that contentment, he would suffer deprivation of his essential humanity.

After quoting Professor MacCormick, Justice Wilson continued:

> [A]n aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty . . . is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental importance. . . .

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18. Singh v. Canada (Min. of Empl. & Imm.), 1 S.C.R. 177 (1985). *See also* Re B.C. Motor Vehicles Act, 2 S.C.R. 486 (1985).

19. R. v. Morgentaler, *supra* note 14.

20. In Singh v. Minister of Employment and Immigration, 1 S.C.R. 177 (1985), Justice Wilson said that "it is incumbent upon the Court to give meaning to each of the elements, life, liberty and security of the person, which make up the 'right' contained in s. 7. Each of these . . . is a distinct though related concept to be construed as such by the courts." This was confirmed by Justice Lamer in Reference re S. 94(2) of Motor Vehicle Act, 2 S.C.R. 486 (1985).

21. N. MacCormick, Legal Rights and Social Democracy: Essays in Legal and Political Philosophy, ((1982) Oxford: Clarendon Press).

> To be able to decide what to do and how to do it, to carry out one's own decisions and accept their consequences, seems to me essential to one's self-respect as a human being, and essential to the possibility of that contentment.[22]

Does Truancy Law Infringe Parental Freedom?

Similar to the law in the United States and other western countries, Canadian law makes all Canadian parents responsible for the education of their children who are within the compulsory school-leaving age. The law requires that parents should either ensure that a child within the prescribed ages attends public school or prove to the satisfaction of the appropriate authorities that the child is under efficient instruction at home or is being educated at a recognized or approved private school. In *R. v. Jones,* a parent whose children were considered truants but who maintained that he educated them at home, and had the constitutional right to do so, was prosecuted under the Schools Act of Alberta. The Schools Act provides that all children must attend public school and that a parent is responsible for the public school attendance of his or her children. Children who are receiving efficient instruction at home as certified by an official with the public school authorities, are excepted from this requirement. The accused, who was pastor of a fundamentalist church, had refused to apply for certification, contending that he had the right to bring up his children as he saw fit and thus to refuse to send his children to public school or apply for any exemption or approval. When he was prosecuted, his lawyer's attempt to produce evidence that the child was receiving efficient instruction outside school was not allowed because the statutory scheme dealing with certification had not been complied with. The lawyer then persuaded the trial judge[23] (1) that the provincial truance legislation offended section 7 of the Charter in that the former contained a provision preventing the accused from presenting evidence to rebut the charge against him and (2) that the threatened penal sanctions, including imprisonment, deprived the defendant of his liberty to bring up his children as he deemed appropriate according to his conscience.

However, the Alberta Court of Appeal reversed the trial judge's decision, Justice Lieberman holding that the father of the truant child could have applied for a certificate, as required by the legislation.[24] Had the certificate been granted, his freedom to educate his children would be pro-

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22. Saskatchewan Chief Justice Bayada, in Beare v. R., 40 D.L.R.4th 600 (1987), *rev'd on other grounds,* 2 S.C.R. 387 (1988), quoted the words of Gandhi: "I cannot conceive a greater loss to a man than the loss of his self-respect." LOUIS FISHER, THE LIFE OF MAHATMA GANDHI. ((1983) HARPER COLLINS).

23. *Supra* note 5.

24. 10 D.L.R. 4th 765 (1984).

tected. The Supreme Court of Canada, by a majority of six to one, dismissed the father's appeal,[25] holding that a "liberty" interest was not implicated by the truancy legislation. Justice La Forest, for the majority, said:

> The provision under which the appellant is charged is one dealing with truancy generally. It does not *per se* violate the claimed liberty. It does so only if those charged with its administration use it as a device for unduly infringing on such liberty. If this occurred, the Charter defence would come into play.

Therefore, there was no violation of the "liberty" provision of the Charter, even assuming that that liberty includes the right of parents to educate their children as they see fit, since the accused had not been deprived of that liberty in a manner that offended section 7. Nevertheless, if the school authorities exercise their power in an unfair or arbitrary manner, then the Charter's reference to "liberty" may be invoked. A balance must be struck between the statutory requirement of compulsory schooling, and the liberty of the individual parent to educate his or her children as he or she sees fit. According to the Supreme Court of Canada, balancing this issue involves balancing fairness and efficiency, which should be done with a certain amount of pragmatism. In this respect, the provinces

> must be given room to make choices regarding the type of administrative structure that will suit their needs unless the use of such structure is in itself so manifestly unfair, having regard to the decision it is called upon to make, as to violate the principles of *fundamental* justice.

Justice Wilson, in her dissenting decision, said that the liberty interest protected in section 7 is the parent's right to educate his or her children in accordance with his or her conscientious belief. However, even she would not go so far as to say that this right extends to the point where one sees fit to extend it, because the liberty provided in section 7 is not untrammelled liberty: no one lives in splendid isolation. She explained:

> We live in communities with other people. Collectivity necessarily circumscribes individuality and the more complex and sophisticated the collective structures become, the greater the threat to individual liberty in the sense protected by s. 7.
>
> Section 7 does not spell out for us when individual liberty must yield to the collective authority of the state. It does, however, provide that no one can be deprived of it "except in accordance with the principles of fundamental justice."

Subject to the above reservation, Justice Wilson was of the opinion that the framers of the Canadian Constitution,

> in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to

25. 2 S.C.R. 284 (1986).

> the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric — to be, in today's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way." This, he believed, we should be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it."[26]

School Board Trustees' Conflict of Interest

Section 7 was invoked as a defense in a British Columbia case[27] in an attempt to nullify a provision of the School Act that a person who has, directly or indirectly, by himself or through another person, any contract or interest in a contract with or for the board of the school is disqualified from holding office as a member of the board of that district. The respondents in this case were elected trustees of a school board. Their spouses were employed in the same district as a teacher and a vice-principal and had, as a consequence, contracts of employment with the board of which their spouses were trustees. The respondents' election was invalidated, and both of them were disqualified. The court said that, as had been decided in *R. v. Robson,*[28] "at its broadest, liberty means power to do as one wishes without restraint. In a society governed by the rule of law, it is recognized that the liberty of individuals is subject to limitation."[29] Therefore, according to the court,

> It is not inconsistent with Canadian society's concept of liberty that persons do not act in a manner involving a conflict of interest. By marriage, the respondents did have an interest in a contract, as prohibited under the relevant legislation, since they have a personal interest which raises a question of conflict with the duty undertaken in office, and involves a concern in respect of an advantgage or detriment which arises from a contract. The conflict arises with respect to salaries and benefits paid by the board, and the Act does not make any provision for exemptions from votes or discussions for trustees in the respondents' position. A reasonable person in this situation would think that the respondents do or will favour one side unfairly.[30]

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26. JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., 1978).

27. Cowling v. Brown, Kocher & Bd. of Sch. Trustees of Sch. Dist. No. 68 (Nanaimo), 49 C.R.R. 205 (1988).

28. *Supra* note 12.

29. Per Finch, J.

30. In a line of cases, courts have decided that where a statute excludes or disqualifies an employee, e.g., a schoolteacher, from being eligible to be elected to the employer's board, a municipality board or school board, the equality provisions of the Charter, under section 15, are not infringed. For a recent example, see Socco v. Attorney-General for Ontario, 77 D.L.R.4th 764 (1991), where a schoolteacher was considered ineligible to be elected as a trustee in a municipal election because of a limitation under the Education Act.

Children's Liberty

In many court cases involving children, the applicability of section 7 has been raised, particularly when a party argues that a legislative provision should be declared unconstitutional. In *Halifax v. R. W.*,[31] a family court judge said that the application of section 7 has to take into account the unity of a family, that "the family as a unit of individuals has a right to life, liberty and security of the person." This means that "we must not break up the family unit unless we have no other alternative." However, Justice Riche of the Newfoundland Supreme Court, in *Reference re Child Welfare Act (Newfoundland),*[32] rejected the contention that a right to family autonomy exists. He said that although parents and children have individual rights, he was not aware of any family collective rights. He elaborated:

> The parents have individual rights which they hold as members of society. With respect to their children, they have obligations or responsiblities. The parents have a right to custody of their children while they are children and for as long as they discharge their obligations to those children. . . .

Section 7 of the Canadian Charter often comes into play where the rights of children are concerned, for example, the right of an infant child to be cared for by its parents, which cannot be taken away except in accordance with principles of fundamental justice.

In *Children's Aid Society of Winnipeg v. A.M.*,[33] a thirteen-year-old boy, by a court order, was made a permanent ward of the Children's Aid Society, despite the fact that he was not represented by a lawyer in the court proceedings. On appeal to the Court of Appeal, although the Court did not rule that a lawyer must be appointed to represent the child in every such case of wardship or guardiansip, it did decide that, taking into account the age and understanding of the appellant child, his liberty and security were affected by a permanent order of wardship. Thus his case came within the ambit of section 7.[34] In *Re V.B.*,[35] a Territorial Court judge in the Yukon Territory declared section 123(6)(*b*) of the Territorial Children's Act unconstitutional. Under this provision, a child could be placed under departmental care if the administering department of

31. 80 N.S.R.2d 341 (1987).

32. 48 C.R.R. 281 (1990).

33. 2 W.W.R. 742 (1984), *rev'd,* 4 W.W.R. 478 (1984).

34. See Shingoose v. Minister of Soc. Servs., 149 D.L.R.3d 400 (1983), where the Saskatchewan Court of Queen's Bench decided that the provision in the provincial Family Services Act, which allowed seizure of children, was a reasonable measure and to be protected although it offended the freedom of association provision of the Canadian charter.

35. B.C. W.L.D. 3106 (1985).

government were successful in obtaining an order to apprehend the child, irrespective of the evidence as to whether there was a need for care of the child by that department, pending a protection hearing to determine the issue of whether a temporary care order should be issued. The judge considered that the overreaching effect of the section could not be justified as manifesting the State's preoccupation with the well-being of children, since the inflexibility of s. 123(6)(*b*) may require a degree of departmental control which may be contrary to the child's well-being.

Nevertheless, while the right to liberty includes the parental right to be free from state intervention, parents' rights are not the only rights protected by section 7.[36] They must be balanced with those of the child and those of society.[37] Neither society nor children's health and welfare would be adequately safeguarded by ignoring children's interests. A good example of this was provided by *New Brunswick (Minister of Health & Community Services) v. B. (R.),*[38] in which it was decided that the right to liberty conferred by section 7 limits the discretion of parents, physicians, and courts to deny medical treatment to children who are congenitally mentally handicapped on the basis that those children cannot be expected to enjoy any quality of life or that further medical treatment would only prolong their suffering. The New Brunswick Court of Queen's Bench decided that there is a right to life however low parents or medical practitioners may think its quality.

In other cases, Canadian courts have held that section 7 does not encompass (1) the liberty of parents to choose how their children receive religious education in public schools,[39] (2) the liberty of birth parents upon their being by statutorily denied access when their child is placed for adoption,[40] (3) the liberty of parents where the relevant statute provides that a child needing protection must be taken into custody,[41] (4) a situation where a statute provides for the payment of maintenance for child

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36. Many provincial statutes provide that a child in need of protection may be taken into State care. A "child in need of protection" is defined as, e.g., a child in the care or custody of a person (even if that person is a natural parent) who is unfit, unable or unwilling to exercise proper care over the child, where a child's life, health or emotional welfare is in danger. If proper procedural safeguards are provided, it is unlikely that such provisions will be declared in contravention of section 7 of the charter. For example, see, Nova Scotia (Minister of Community Services) v. S.(M.K.), 86 N.S.R.2d 209 (County Ct.), aff'd., 88 N.S.R.2d 418 (Ct. App. 1988).

37. Where a statute authorizes a judge to commit to a place of safety a child in care who appears to be repeatedly unmanageable and who requires committal for his own protection as well as that of others, the child's or parent's liberty is not infringed. *See,* Re E. & Minister of Soc. Servs., 36 D.L.R.4th 683 (Nova Scotia Ct. App. 1987).

38. 70 D.L.R.4th 568 (1990).

39. Black v. Metropolitan Separate Sch. Bd., 52 D.L.R.4th 736 (1989).

40. Catholic Children's Aid Soc. of Metro. Toronto v. S.(T.), 60 D.L.R.4th 397 (1989).

41. Children's Aid Society of Halifax v. H.(G.), 85 N.S.R.2d 286 (1989).

support even though the child's paternity is in dispute,[42] (5) the statutory exclusion of a biological parent from adoption consent where the parent has demonstrated no interest in or concern for the child[43] or (6) the issuance, without a prior hearing, of a statutory order requiring a parent to produce his or her child to the family court.[44]

In certain circumstances where state intervention is necessary, the welfare of the child — not the choice of the parent — may be of paramount consideration in a statutory scheme. Courts have upheld such provisions and decided that state intervention in such cases is protected. For example, the Alberta courts have upheld the Alberta provincial legislation[45] which provides machinery for taking away and looking after a child in need of protection. However, certain safeguards are provided in the legislation.[46] The director of Child Welfare has to apply to a judge or justice of the peace for an order authorizing the director to take the child. The child can be taken without an order of a judge or justice of the peace where he or she has been abandoned, has become lost or left without a guardian, has left the guardian's custody without the guardian's consent or is so situated that his or her life or health is seriously and imminently in danger. The guardian of the child has to be notified forthwith that the child has been removed from his or her custody. The director must apply to a court for a supervision order within two days after removal of the child. If the guardian of a removed child refuses to permit the child to receive essential medical surgical treatment as recommended by a physician, the director must apply to the court for an order authorizing the treatment. The court, if satisfied that such treatment is in the best interest of the child, may, notwithstanding the refusal of the guardian, authorize it. The courts in Alberta have said that these provisions of the Child Welfare Act 1984 do not offend section 7 of the Charter because the child's life takes precedence over the competing right of the parents and because adeuqate safeguards are provided to either obtain parental consent or cooperation or give the parents adequate information.[47] However,

42. P.(L.) v. E.(G.) 108 A.R. 125 (1990).

43. S.(C.E.) v. Children's Aid Soc'y of Metro. Toronto, 49 D.L.R.4th 468 (1988).

44. Re T. & Catholic Children's Aid Soc'y of Metro. Toronto, 46 O.R.2d 347 (1984).

45. Child Welfare Act.

46. Similar provisions exist in other provinces. In Reference re Child Welfare Act (Newfoundland), 48 C.R.R. 281 (1990), a comparative examination is made of these provisions.

47. R.E.D.M. v. Alberta (Director of Child Welfare), 47 Alta. LR.2d 380 (Ct. Queen's Bench 1987), *aff'd,* 88 A.R. 346. The Alberta Court of Queen's Bench held, in Re McTavish & Director, Child Welfare, 32 D.L.R.4th 394 (1986), that the Alberta Child Welfare Act, which confers on the court jurisdiction to authorize medical treatment of a child despite the absence or refusal of the guardian's consent for the treatment where the court is satisfied that the treatment is in the best interest of the child, does not infringe on the liberty of the guardian. Because it is the child's life that is

the Newfoundland legislation,[48] which did not provide for sufficient protection or parental involvement before the removal of a child, was considerd by the Newfoundland Supreme Court to be in violation of section 7 of the Charter.[49]

The best summary of the applicability of the liberty provision of section 7 in relation to parents and children is provided in *Re V.B.*:[50]

> State power or actions manifesting the following characteristics violate the principles of fundamental justice:
>
> i) any interference with parents and children that exceeds the proven need to protect the well-being of the child is unconstitutional;
>
> ii) any inflexible statutory provision precluding the court from tempering state interference to the minimal degree warrented by the circumstances in each case, violates the constitutional rights of children and parents;
>
> iii) any legislative scheme creating a discretionary power to limit constitutional rights must allow for the discretionary decision to be exercised in accord with the principles of natural justice.

Conclusions

The Fifth Amendment to the U.S. Constitution protects liberty, providing that no person shall be deprived of liberty without due process of law. The Supreme Court of the United States has interpreted this provision widely, applying it to a variety of situations. It is clear to us today that liberty is not confined to mere physical liberty. The Canadian courts, after their initial false start, have accepted the American jurisprudence respect-

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at stake in such proceedings, and not the guardian's, the legislation protects rather than infringes the child's right to life. Even if one of the liberty interests protected by section 7 of the Charter is the parental right to be free from state intervention, the law requires, in some cases, balancing of competing rights; and the child's right to life must take precedence where the child's chances for survival would otherwise be seriously endangered.

See also Re K.(R.), 79 A.R. 140 (1989), where it was held by the Alberta Family Division that a child's right to life cannot always be subsumed to the parents' liberty to make decisions concerning the child. If parents refuse to give consent for a blood transfusion which is considered essential by the doctors treating him, infringement on section 7 does not take place if, in such serious circumstances, a blood transfuson is performed despite the denial of consent by the parents.

48. Child Welfare Act 1972.

49. Reference re Child Welfare Act (Newfoundland), 48 C.R.R. 281 (1990). The Court followed and applied the Supreme Court of the United States' following dictum in Parham v. J.R., 442 U.S. 584, 602:

> [O]ur constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

50. *Supra* note 35.

ing this. However, because the language used in the American Fifth Amendment differs from that of section 7 of the Canadian Charter of Rights and Freedoms, the American legal devleopments can be of help only to a limited extent. The Supreme Court of Canada has accepted for its own guidance some of the United States Supreme Court's leading cases on the subject of liberty: for example, *Meyer v. Nebraska,*[51] *Bolling v. Sharpe,*[52] *Roe v. Wade,*[53] *Board of Regents v. Roth.*[54] The most important section 7 educational case to reach the Supreme Court of Canada was *R. v. Jones,*[55] in which each justice, whether in a majority or minority opinion, and while not setting forth a comprehensive definition of "liberty" as applicable either generally or to education, was, in contrast to numerous pronouncements of the lower courts and in keeping with American legal developments, willing to apply the term in a wider sense than the merely physical one. The Canadian Supreme Court has followed a path of developing section 7 gradually and incrementally, on a case-to-case basis. How far the "liberty" provision of section 7 will change or affect the law and practice of education remains in the balance; it is too early to discern any definite pattern. However, *R. v. Jones* provides sufficient criteria to conclude that the Supreme Court of Canada is not prepared to easily declare educational statutes null and void. However, legislative bodies and education authorities have been sent a signal that, despite statutory or other authority under which bureaucrats or educationists act, any arbitrary or unfair action or decision is likely to be seen as infringing on the liberty provision of section 7. This is obvious if one reads carefully these passages from Justice La Forest's opinion in *R. v. Jones:*

> If in exercising their functions the school authorities sought to impose arbitrary standards, i.e. standards extraneous to the educational policy under the (Schools or Education) act, or if they in other aspects acted in a manner that was fundamentally unfair, such as failing to examine the facts or to fairly considert the appellant's representations, the courts could intervene. . . .
>
> [I]f it can be established that the school authorities' action is exercises in an unfair or arbitrary manner, then the courts can intervene. It may also be that at some stage certain requirements, whether imposed directly by the School Act or by regulations or by officials of the Department of Education or of local school boards, may have to give way to the liberty of the individual to educate his children as he pleases to the extent that such liberty is protected by the Charter.

Although some Canadian judges still subscribe to the principle that considerable deference must be paid to the values expressed by federal or pro-

51. *Supra* note 5.
52. *Supra* note 4.
53. *Supra* note 6.
54. *Supra* note 5.
55. *Supra* note 25.

vincial legislative bodies and that courts are not appropriate bodies in which to articulate complex and controversial programs of public policy,[56] the widespread use of the Charter in litigation and the flood of court cases dealing with Charter issues indicate that the courts in Canada — probably even more than in the United States, due to the novelty of the Charter — are being pressed to ensure that all laws — and education laws are no exception — conform to the democratic values expressed in the Charter, whether or not they think that some parts of the Charter appear to be "more like the marching-banner of a political philosopher"!

56. For example, Justice Pratte, in R. v. Operation Dismantle, Inc., (Fed. Ct. App.), 3 D.L.R.4th 193, *aff'd* on other grounds, 1 S.C.R. 441 (1985), stated that, despite the enactment of the Canadian Charter, the Constitution remains similar in principle to that of the United Kingdom, under which laws are made by elected representatives to whom the Executive is responsible. In his opinion, section 7 must therefore not be interpreted in a manner that would permit the courts to substitute their opinions for those of Parliament and the Executive on purely political grounds.