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THE LEGAL STATUS OF YOUTH IN BRITISH COLUMBIA: IMPLICATIONS OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

by

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B.C.L., LL.B., McGill University, 1986

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The Legal Status of Youth in British Columbia:

Implications of the Canadian Charter of Rights and

Freedoms

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ABSTRACT

This thesis examines the potential impact of the *Canadian Charter of Rights and Freedoms* on the legal status of youth in British Columbia. Although the legal framework for achieving justice for children in British Columbia is dominated by a protectionist ideology (i.e., the "needs" of children, as opposed to liberties, is the predominant focus of concern), the Charter mandates the adoption of a liberationist conception of justice. Therefore, its potential impact on the legal status of youth is a matter of some significance.

Recognition of children as right-bearing individuals is supported by social and political theory. All persons are worthy of protection against governmental actions that may be discretionary, abusive, or not reasonable and demonstrably justifiable. And, although justifications for the subjugation of younger or infant children might be self-evident in some circumstances, the similar subjugation of older or adolescent children is controversial.

The extent to which the competing protectionist and liberationist conceptions of justice are reflected in law is determined, in this thesis, through examination of three principal components of the social control network facing youth; i.e., criminal justice, child protection and health care. In the realm of criminal justice a recent shift in policy has brought young persons within a liberationist conception of justice;

however, in the realms of child protection and health care, policy remains dominated by a protectionist philosophy.

The manner in which courts address "equality rights" challenges to laws that differentiate children from adults, is a crucial testing ground for measuring the potential impact of the Charter on the advancement of a liberationist conception of justice. Furthermore, it is within the context of such challenges that the underlying values and assumptions of impugned laws can be distinguished and scrutinized.

Although the adoption of a liberationist conception of justice for the treatment of youth is not the panacea for resolving all social ills suffered by youth in our society, it has the potential to increase the responsiveness and accountability of governmental or judicial interventions.

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The author is extremely grateful for the significant contributions made to this thesis by Mr. Neil Boyd, Dr. Robert M. Gordon and Dr. John Lowman. Special thanks to Christine Burdeniuk for her editing prowess, to Mrs. Aileen Sams for her assistance in directing me through the bureaucratic labyrinth of the graduate program, and to Dr. Margaret Jackson for her part in making the last two years a positive experience.

DEDICATION

To Mom and Dad for their love and support throughout my academic endeavors

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CHAPTER I

INTRODUCTION

> "Dennis," I said, as he was polishing the glass, "I am writing an article on the 'Rights of Children.' What do you think about it?" Dennis carried his forefinger to his head in search of an idea, for he is not accustomed to having his intelligence so violently assaulted, and after a moment's puzzled thought he said, "What do I think about it, mum? Why, I think we'd ought to give 'em to 'em. But Lor', mum, if we don't, then they *take* 'em, so what's the odds?" And as he left the room I thought he looked pained that I should spin words and squander ink on such a topic. (Wiggin, 1892:3)

A person's legal status and corresponding rights and freedoms are dependent upon various distinctions drawn in law. One critical distinction, that has significant repercussions for the rights and freedoms of young persons,[1] differentiates "minors" from adults. In British Columbia the age of majority has been set at 19 years;[2] therefore, "in the absence of a definition or of an indication of a contrary intention",[3] all persons under the age of 19 are deemed to be "minors". The status of "minority" raises concern because it is used as the basis for limiting the rights and freedoms of young persons.

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[1] "Young persons" will be used interchangeably with "youths" and "children"; however, a distinction will be drawn between "infant" and "adolescent" children.

[2] *Age of Majority Act*, R.S.B.C. 1979, c.5, subs.1(1).

[3] Ibid., subs.1(2).

Examples of limitations on the rights and freedoms of young persons are numerous in British Columbian legislation. They include: section 36 of the *Liquor Control and Licensing Act*,[4] wherein persons under the age of majority are prohibited from buying or consuming alcohol; section 113 of the *School Act*,[5] wherein persons under the age of 15 must attend school; section 2(1)(a) of the *Election Act*,[6] wherein persons under the age of 19 are not entitled to be registered as voters and therefore not entitled to vote in any provincial election; Part 2.1 of the *Infants Act*,[7] wherein persons under the age of 19 are presumed to lack the capacity to enter into binding contractual relationships; section 9(1) of the *Family and Child Services Act*[8] (hereinafter the FCSA), wherein persons under the age of majority can be deemed to be "in need of protection" and apprehended by a representative of the state; and, section 19(1) of the *Mental Health Act*[9] (hereinafter the MHA), wherein persons under the age of 16 can be "voluntarily admitted" to designated mental health facilities by parents or guardians. Differential treatment of youth appears as well in various federal statutes,[10] the most significant of these being the *Young*

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[4] *Liquor Control and Licensing Act*, R.S.B.C. 1979, c.237.

[5] *School Act*, R.S.B.C. 1979, c.375.

[6] *Election Act*, R.S.B.C. 1979, c.103.

[7] *Infants Act*, R.S.B.C. 1979, c.196 [Am. S.B.C. 1985, c.10].

[8] *Family and Child Services Act*, S.B.C. 1980, c.11.

[9] *Mental Health Act*, R.S.B.C. 1979, c.256.

[10] For example see the *Tobacco Restraint Act*, R.S.C. 1970, c.T-9, subs.4(1) and the *Canada Elections Act*, R.S.C. 1970, c.14, ss.14

Offenders Act[11] (hereinafter the YOA) - legislation that establishes a system for the management of "young persons" who are accused of committing offences against federal statutes (especially, the *Criminal Code*).[12]

The advent of the *Canadian Charter of Rights and Freedoms*[13] (hereinafter the Charter) presents an opportunity to re-evaluate the legitimacy of a "minority" status and to question the legality of limitations on the rights and freedoms of young persons.[14] This opportunity now exists because young persons, as "persons" under the Charter,[15] are benefactors of its guarantees. Furthermore, the Charter, as part of the Constitution, is deemed, by section 52 of the *Constitution Act, 1982*,[16] to be the supreme law of Canada and any law that is

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[10](cont'd) & 20 (1st Supp.).

[11]*Young Offenders Act*, S.C. 1980-81-82-83, c.110.

[12]*Criminal Code*, R.S.C. 1970, c.C-34.

[13]*Canadian Charter of Rights and Freedoms*, Constitution Act, 1982, Part 1.

[14]The Charter is limited in its application. Section 32 states:
"32. (1) This Charter applies
(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
(b) to the legislatures and government of each province in respect of all matters within the authority of the legislature of each province."
See the leading case on the interpretation of this provision *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery*, [1986] 2 S.C.R. 576 (hereinafter *Dolphin Delivery*).

[15]See for instance *R. v. S.B.*, (1983) 40 B.C.L.R. 273, 142 D.L.R.(3d) 69, rev. 43 B.C.L.R. 247, 146 D.L.R.(3d) 69, (B.C.C.A.).

[16]*Constitution Act, 1982*, Part VII, s.52.

inconsistent with its provisions can be held to be, to the extent of any inconsistency, of no force or effect. Therefore, with an entrenched Charter, Canada now has a watered-down version of parliamentary sovereignty (Hogg, 1985), wherein all laws - including, of course, laws that differentiate and perhaps "discriminate" on the basis of age - are subject to a supreme law and can be rendered inoperative by the courts.

The Charter provides individuals with protection against state attempts to limit rights and freedoms; that is, it concerns the advancement of negative right claims. According to Bender,

> A "freedom" suggests strongly that the entitlement is, in fact, merely one to be free from governmental prohibitions and restrictions (in the absence of a sufficiently strong governmental justification). Even the word "right" (used, for example, in the mobility rights provisions of the *Charter*) seems susceptible to a similar construction - that is, that right to leave Canada is the right to be free from interference with such activity, not a right to affirmative governmental assistance for one who wishes to leave. (1983:823-4)

Thus, while children's positive right claims, such as rights to subsistence, education, medical care, etc.,[17] make up a substantial part of the childrens' rights literature (for example see Wilkerson, 1973 and Foster, 1974), this thesis is concerned principally with negative right claims.

A Charter challenge requires a court to embark upon a two-step process. First, it must be determined - with the burden

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[17]Positive rights advocates want the special needs and interests of children to be recognized as rights that are enforceable against parents, guardians or, in some cases, the state by virtue of its *parens patriae* jurisdiction.

of proof upon the complainant to establish a *prima facie* case - whether or not a right or freedom has been or is being infringed upon. And, unlike the *Canadian Bill of Rights*[18] (hereinafter the Bill), not only the purposes of legislation may be subject to judicial scrutiny but also its effects.[19] Secondly, if the complainant is successful in satisfying this onus, attention is turned to section 1 where it must be determined whether or not this prejudicial purpose or effect is reasonable and demonstrably justified in a free and democratic society.[20] To

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[18]*Canadian Bill of Rights*, R.S.C. 1970, App.III. The Bill did not prove to be effective in protecting and developing human rights and civil liberties. According to Le Dain, J. in *Regina v. Therens* (1985), 18 C.C.C. (3d) 481 (S.C.C.), "on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament. The significance of the new constitutional mandate for judicial review provided by the Charter was emphasized by this court in recent decisions..." (p.501). In other words, "the Charter, as a constitutional document, is fundamentally different from the statutory *Canadian Bill of Rights*, which was interpreted as simply recognizing and declaring rights" (per Dickson C.J.C. in *Regina v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C.(3d) 321, at p.337 C.C.C.).

[19]See the leading case of *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481 at p.513, 18 C.C.C. (3d) 385 at p.414, 18 D.L.R. (4th) 321 at p.350.

[20]Charter, *supra*, s.1. This section states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." According to the Supreme Court of Canada in *Regina v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C.(3d) 321, s.1 has two functions: "first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and secondly, it states explicitly the exclusive justificatory criteria...against which limitations on those rights and freedoms must be measured. Accordingly, any s.1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms - rights and freedoms which

establish this, the Supreme Court of Canada has provided two principal criteria:

> First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s.1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Secondly, once a sufficiently significant objective is recognized, then the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test"... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question... Thirdly, there must be a proportionality between the *effect* of the measures which are reponsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".[21]

The burden of proof in the section 1 inquiry lies with the party seeking to establish the reasonableness of the limitation. The standard of proof is by a preponderance of probability; however, it is more onerous than the the civil standard, as a very high degree of probability is considered by the Supreme Court of

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[20](cont'd) are part of the supreme law of Canada" (per Dickson C.J.C., at p.345 C.C.C.).

[21]Per Dickson C.J.C. in *Oakes*, *supra*, at p.348 C.C.C. (emphasis in original).

Canada to be "commensurate with the occasion".[22]

The two steps, the Supreme Court of Canada instructs us, must be kept analytically distinct. This is critical because the onus of proof shifts when one moves from the first step to the second. Moreover, by focusing only upon the first step of the process one could, in the case of a young person challenging a restrictive or interventionist law, "avoid the essential exercise of having to balance the interests of the state in advancing the objective of the legislation against the interests of the child in preserving his fundamental rights and freedoms" (Wilson, 1985:300).[23] In other words, if the shift is not made to section 1 (the second step), a consideration of competing rights and interests could be severely restricted, thereby

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[22]Ibid., at p.347 C.C.C. (per Dickson, C.J.C. quoting Lord Denning).

[23]Wilson argues that the Charter may even pave the way to the development of a principle that permits interventions of a quality nature only. For instance, in discussing the potential of the equality rights guarantee (i.e., section 15 of the Charter) in relation to education, he argues that since all young persons are required by law to attend school (in British Columbia subsection 113(1) of the *School Act*, R.S.B.C. 1979, c.375, requires that: "Subject to the exemptions under subsection (2), every child over the age of 7 and under the age of 15 years shall attend public school during the regular school hours every school day...") then, "[t]he comparative analysis that is necessarily part of any section 15 challenge forces the court to address directly the fundamental inequity that certain persons are denied opportunities available to others under the law". He therefore suggests that this analysis could result in the state having to take positive action to redress this inequity. Thus, in this particular example, it could be argued that "the state must provide an education to the person suited to his or her learning needs; there is no justification for a democratic state to force a person to sit in a desk and stare at a blackboard for 10 years other than if it provides the opportunity to learn..." (1985:321).

reducing the potential impact of the Charter in protecting rights and freedoms.

Although state policy over the last hundred years, in relation to achieving justice for youth, has been dominated by a protectionist or *parens patriae* ideology, it is argued that the principles of the Charter mandate the adoption of a liberationist ideology. In chapter II, the contours of the competing protectionist and liberationist approaches to achieving justice for young persons will be sketched. Also, arguments in favour of a liberationist conception of justice, from social, political and philosophical perspectives, will be presented.

Legal recognition of young persons as right-bearing individuals is supported by social and philosophical theory; however, it remains a controversial issue. The extension to young persons of independent rights and freedoms offends strongly held paternalistic conceptions of childhood and upsets the status quo balance between the rights of children, the rights of parents and the interests of the state. Nonetheless, it will be argued that the justifications for differential treatment of adults and children - principally being the physical and intellectual limitations of children - are not reasonable and demonstrably justifiable in all cases. In regards to older or adolescent children, especially, these justifications are subject to question. An argument is, therefore, advanced that unsubstantiated differences between

children and adults have led to, and can lead in the future to, unjustifiable differences in legal treatment.

In chapters III through V, these arguments will be developed in relation to three principal components of the social control network facing young persons in British Columbia; namely, criminal justice, child protection and health care. In these three areas of law, young persons are treated quite differently than adult persons; that is, these areas of law reflect the differentiated status of "childhood" or "minority".

In chapter III, the evolution of Canadian youth justice policy (in relation to criminal law) from the protectionist approach of the *Juvenile Delinquents Act*[24] (hereinafter the JDA) to the liberationist approach of the YOA will be traced. The overt and underlying philosophies of these Acts as they relate to the two principal competing conceptions of justice will be examined. In contrast to the JDA, the YOA regards young persons as right-bearing individuals with the capacity for rational decision-making. This presumption of capacity, it is suggested, is consistent with the liberationist principles of the Charter.

In chapter IV, the impact of the Charter on the constitutionality of the FCSA will be assessed. It will be argued that the dominance of protectionist principles in the Act raises serious constitutional concerns. In measuring the potential impact of the Charter on provisions of the FCSA two cases concerning the rights of mentally handicapped persons, in

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[24] *Juvenile Delinquents Act*, R.S.C. 1970, c.J-3.

relation to applications for permission to perform sterilization operations, will be analysed. The approach of the courts in these cases - where the balancing of the state's protectionist powers against the rights of persons with diminished legal status - will be indicative of whether the Charter might mandate a watering down of the protectionist bias of the FCSA. Subsequently, more specific aspects of the Act - such as the lack of provision for the independent representation of children in proceedings - will be evaluated to determine whether they can withstand Charter scrutiny.

In chapter V, the rights of children in relation to the making of health care decision will be examined. It will be argued that the protectionist ideology underlying the law in this area is in conflict with the Charter. There is a presumption that all children lack the capacity to make health care decisions which - because of the common law adoption of a normative approach to this issue (i.e., growth, maturity and intellectual capacity are used as the criteria for determining ability to make decisions independently) - is rebuttable with respect to most health care decisions. However, in relation to decisions concerning admission to and treatment in mental health facilities the common law position is overridden by statute. Pursuant to the MHA all persons below the age of 16 are deemed to lack the capacity to participate in or to make these decisions for themselves. It will be argued that this protectionist approach is, in several respects, inconsistent with the liberationist principles of the Charter.

Once the legal status of youth in British Columbia has been outlined, the potential impact of the Charter's equality rights guarantee (section 15) on the advancement of liberationist principles of justice for young persons will be examined. Judicial interpretation of this provision is a crucial testing ground for determining whether the Charter will actually bring young persons within the mainstream liberationist philosophy of justice.

Lastly, in chapter VII the findings of this thesis will be summarized and their implications assessed.

In short, this thesis is concerned with the potential impact of the Charter on the present legal status of youth in British Columbia. The position adopted throughout this thesis is that differential treatment of "minors" can no longer be taken for granted as being justifiable. The principles of a liberationist conception of justice support the claim that all persons have the right to be protected against discretionary and potentially abusive state actions. The important larger issue, therefore, is whether, as the result of the Charter, young persons will be brought within a liberationist conception of justice.

CHAPTER II

COMPETING CONCEPTIONS OF JUSTICE FOR YOUTH: AN ARGUMENT IN FAVOR OF LIBERATION

Rights advocated on behalf of young persons cover a wide spectrum reflecting two principal perspectives: protectionist and liberationist. In general terms, the former focuses upon "needs" of children and translates into policies that aim to save them from wayward or impoverished lives; whereas the latter focuses upon "rights and freedoms", including full due process protections, and translates into policies that aim to secure children against discretionary and abusive practices by the state. In this chapter, both perspectives will be outlined in relation to their competing approaches to achieving justice for children. It will be argued that a liberationist conception of justice finds support in social and philosophical theory.

The "child saving" movement of the Progressive Era (mid-19th century) was built upon protectionist principles. Canadian reformers of the day, including Kelso, Scott, Egerton and Ryerson (see West, 1984; Corrado, 1983; and Leon, 1977), advocated the adoption of protectionist measures such as compulsory schooling, child labour laws and a separate juvenile court system.[1] The image of childhood that guided these reformers was one of dependence and incapacity. In effect, according to Minow, "the reformers helped to invent adolescence

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[1]Elaboration of the protectionist ideology in relation to juvenile justice will be provided in chapter III.

- a new stage after infancy but before adulthood - and thereby prolonged childhood" (1986:9).[2]

Philosophically speaking, Melton (1983) believes that justice demands that fundamental liberties and protections be recognized for all participants in society including, of course, young persons. Historically, however, as Worsfold (1974) argues, the manner in which children have been treated has stemmed from paternalistic conceptions of childhood that have not recognized children as independent actors.

Paternalistic conceptions of childhood are found in the writings of Hobbes (1839), Locke (1952) and Mill (1963) - who offer three different but closely aligned views. Hobbes accords children no natural rights or rights by way of the social contract because of their natural incapacities. Rights for Hobbes are correlatives of power, therefore, fathers, who have the power of life and death over their children, can demand obedience. The logic of this argument, in the words of Hobbes, is that "[t]here would be no reason why any man should desire to have children or to take care to nourish them if afterwards to have no other benefit from them than from other men" (1839:45, as found in Worsfold, 1974:144).

Locke, on the other hand, attributes natural rights to children, including the development of autonomy. However,

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[2]Although Minow made this comment in relation to the American "child savers", it is applicable in the Candian context. See also Platt (1977) for an excellent account of the "child saving" movement in the United States.

children are not granted negative right claims of their own - parents and children are considered to have an identity of interests which are protected by the parents. As Worsfold notes, both Hobbes and Locke advocate "the continued dependency of children on their parents. Each prevents children from making claims of their own and thereby hinders society from seeing them as worthy of respect as individuals" (1974:145).

John Stuart Mill espouses the view that personal liberty is the ultimate interest of individuals and must be protected; however, this doctrine is not extended to children. Their abilities to think rationally, he argues, are undeveloped and they are therefore unable to make choices in their own or society's best interests, the *sine qua non* for the entitlement to rights.

In short, Worsfold contends that these philosophers help propagate a negative attitude toward children. He states:

> As we progress from Hobbes's thought through Locke's to Mill's, the strict paternalism of Hobbes is replaced by an emphasis on benevolence in the treatment of children. Despite this, all three philosophers regard children as persons to be molded according to adult preconceptions. None of these philosophers would have considered seriously the perspective of children themselves in determining their own best interests. None accorded children rights of their own. (1974:146)

The extent of a child's capacity for independent participation in the social contract will depend on a combination of development and maturity. Thus, while it is generally accepted by all paternalistic theories that restrictions on the autonomy of those who have yet to reach the

age of reason, like young children or infants, is justifiable, restrictions on the autonomy of older children or adolescents are more contentious. In regard to the justifications of physical and intellectual limitations for denying liberty rights to children, Rodham states:

> There is obviously some sense to this rationale except that the dividing point at twenty-one or eighteen is artificial and simplistic; it obscures the dramatic differences among children of different ages and the striking similarities between older children and adults. The capacities and the needs of a child of six months differ substantially from those of a child of six or sixteen years. (1973:489)

Therefore, as capacity or competence develops, participation in the making of important decisions should not be impeded by protectionist policies; in fact, it becomes unjust to do so.

Liberationist reformers of more recent times have attacked the status of "childhood" because it has been used to emphasize differences between children and adults and thereby, as Minow (1986:10) points out, to stigmatize and exclude young people from adult worlds and responsibilities. Advancements in child-liberation have been made in the United States with the recognition by the U.S. Supreme Court that children are entitled to be recognized as right-bearing individuals and are protected, as adults are, from governmental action that attempts to restrict the scope of their constitutionally guaranteed freedoms.[3]

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[3]See *In Re Gault*, 387 U.S. 1 (1967), which recognized a minor's right to procedural protections within delinquency proceedings. Also, see *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), which recognized a minor's right to terminate her pregnancy without having to gain parental approval.

However, advocacy on behalf of greater autonomy rights for young persons is contentious because it affects parental rights and state interests.' The family has traditionally been the principal institution of socialization and control of children. As Bala and Redfearn note:

> In general, parents have a presumptive right allowing them to exercise a broad degree of control over their children, making decisions regarding such matters as place of residence, health care, discipline, education, religious training and even marriage. (1983:293)

Nonetheless, parental rights are limited by state interests in the socialization and development of its young citizens. The state, within the boundaries of its *parens patriae* jurisdiction, attempts to protect children from harm through child protection legislation (e.g. the *Family and Child Services Act*)[4] and promote their welfare through measures such as compulsory schooling.[5] For example, in the recent Supreme Court of Canada decision in *Jones v. The Queen*,[6] Madame Justice Wilson (dissenting, but not on this point) held that "liberty", as found in section 7 of the Charter,[7] includes the right of parents to raise and educate their children. However, she stressed that this right is not unlimited. In her opinion, the appellant's claim to the right to bring up and educate his

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[4]*Family and Child Services Act*, S.B.C. 1980, c.11.

[5]*School Act*, R.S.B.C. 1979, c.375.

[6]*Jones v. The Queen*, [1986] 2 S.C.R. 284 (S.C.C.).

[7]Section 7 states:
"7. 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."

children as "he sees fit" was too extravagant.[8] In Wilson's opinion, parental rights are presumed to be paramount; however, these rights are not absolute - they are tempered by competing state interests.

Furthermore, Mr. Justice La Forest addressed the appellant's freedom of religion submission and noted that it is not only parents who have an interest in the education of their children; the state also has a vested interest. He stated:

> No proof is required to show the importance of education in our society or its significance to government. The legitimate, indeed compelling, interest of the state in the education of the young is known and understood by all informed citizens.[9]

This position finds support in the famous American case of *Brown v. Board of Education of Topeka*.[10] In this case, the United States Supreme Court held that segregated education violated the Constitutional rights of black school children. In the following oft-quoted passage the Court stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if

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[8] Ibid.

[9] Ibid., at p.299.

[10] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

he is denied the opportunity of an education.[11]

In relation to its "compelling" interests, the state has adopted an increasingly interventionist role in the development and socialization of its future voters and workers. However, as Melton suggests:

> ...the state itself has distinct, complex, and somewhat contradictory interests in supporting family life, individual liberty, and the socialization and education of minors to be productive adults. (1983:6)

In other words, perhaps the "best interests" or needs of children are not the sole or most relevant factors in the adoption of protectionist policies by the state.

Boli-Bennett and Meyer (1978) examine state involvement in the differentiation of childhood in an attempt to understand the "rule-like" aspect of it. They argue that institutional rules differentiating childhood are not principally a reflection of "interpersonal and local organizational change" (such as a child-saving movement) and it "is more than a collection of schools, specialized professions, children's books and records, and separate courts" (1978:798). In their view, "childhood" is more a reflection of ideological principles that amount to a special social status for children.

Boli-Bennett and Meyer also suggest that due to the expanding role of the state in a highly competitive world market system, the state assumes responsibility "to prepare its citizens for their roles in aiding national development,

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[11]Ibid., at p.493.

achieving progress, and obtaining success in the world system" (1978-810). In other words, increased state involvement in the socialization and control of child citizens parallels the expansion of state authority throughout society.

Rodhām adopts a similar tenor in suggesting that the issue of children's rights is more political and ideological than is often portrayed. She states:

> The pretense that children's issues are somehow above or beyond politics endures and is reinforced by the belief that families are private, non-political units whose interests subsume those of children. (1973:493)

Furthermore, in commenting upon the principal justification for differentiation, namely, the dependency relationship in which children find themselves, she states:

> Obviously this dependency can be explained to a significant degree by the physical, intellectual, and psychological incapacities of (some) children which render them weaker than (some) older persons. But the phenomenon must also be seen as part of the organization and ideology of the political system itself. (1973:493)

In a survey of philosophical justifications for the extension of adult rights to older or adolescent children, Worsfold (1974) finds the justifications offered in support of ascribing rights to children, whether on religious, moral or biological grounds, to be inadequate. Justificatory theories which attempt to find a common denominator between children and adults, in his view, suffer from problems of definition and proof. For Worsfold, "any entitlement to rights cannot be resolved without reference to some broader framework, a comprehensive theory of justice to which all parties can agree"

(1974:149). And, the foundation of a theory of justice must be the right of all individuals to "fair treatment" irrespective of age or capacity.

Worsfold (1974) believes that John Rawls' (1972) theory of justice satisfies this condition because it incorporates a principle of fair treatment. In an attempt to philosophically justify increased freedom for children to participate in decisions affecting their lives, Worsfold (1974) argues, pursuing Rawls' theory of justice, that the inability to participate fully due to actual or supposed incapacities should not lead to reduced protection against parental or state domination. In this vein, Worsfold states:

> Those selecting the principles of justice in the original position would probably consent to some form of paternalism. But they would be very reluctant to adopt any paternalism which did not protect them against abuses of authority by members of the older generation. (1974:154)

Houlgate (1980) offers a competing philosophical theory for the granting of more liberty rights to young persons. This theory is based upon the principle of utility (i.e., the maximization of happiness) and the principle of just distribution of rights. Rights are to be distributed so that everyone has an equal chance of achieving the best life he or she is capable of (1980:102).

Houlgate (1980) is critical of Worsfold's use of Rawls' theory of justice. He argues that Rawls' form of paternalism simply defends the status quo; it is just another in a long line

of justificatory devices for denying negative claim rights to children and is deficient to the extent that, like all paternalistic theories, it is based upon the assumption that childrens' choices are usually irrational (1980:88). Houlgate argues that paternalistic actions to restrict the liberty of individuals who lack the capacity for rational choice are justifiable; however:

> ...we cannot conclude from this that it is justifiable paternalistically to restrict the liberty of all children, for...we have no empirical evidence that all (or even most) children lack the capacity for rational choice. It follows that unless it can be shown that there is some other relevant respect in which those children who *possess* the capacity for rational choice differ from competent adults, it is unjust (and therefore unjustifiable) to deny to them liberty rights that the law commonly grants to competent adults. (1980:103, emphasis in original)

For Houlgate:

> The moral right to have one's autonomy respected is violated whenever a person *who is capable of making a rational choice* is not allowed to decide for himself what to do. (Ibid., emphasis in original)

Adler, representing a modified protectionist view of children's rights, is critical of Houlgate's focus upon "capacity" as the criterion for entitlement to rights. She states:

> Many children do indeed have the capacities of many adults. The key difference would appear to lie not in any capacity, but rather in the different *perspectives* of children and adults, perspectives of what is important, what is worthwhile, of time. (1985:40, emphasis in original)

Furthermore, she argues:

> A theory of juvenile rights must ultimately accomodate the concept of *development* and some kind of description

> of *maturity* as that towards which development is directed. It is surely these concepts which embrace the difference between adults and children that constitute the ground for ascribing varying rights to them. (Ibid., emphasis in original)

Although in agreement that children should have rights of their own, Adler (1985) suggests that "development" and "maturity" represent more suitable criteria than "capacity" for justifying differential treatment of children.

The concept of "capacity" is probably a more appropriate criterion for attempting to delineate the similarities and differences between children and adults because of its familiarity in legal discourse. Nonetheless, debate in regards to the justifications for differential treatment will be relevant in determinations, pursuant to the Charter, of whether limitations on the rights and freedoms of children are reasonable and demonstrably justifiable. The Charter, in fact, might require courts to deal with the issue of capacity in a direct and thorough manner for the first time. According to Leon,

> Although the issue of the child's general capacity to make various decisions provokes an extensive debate as to whether promotion of "children's rights" (particularly when in conflict with "parental rights") demands a full or partial reversal of the *legal* presumption of incapacity, in terms of the child's *actual* capacities, the discussions remain hypothetical and grounded in preferred value orientations. (1978:377)

Thus, there is a void that needs to be filled in order to deal with the rights of children in a more informed way.

Further support for the view that children should be recognized as independent actors with independent interests is

found in a dissenting opinion in the American case of *Wisconsin v. Yoder*.[12] In this case, the United States Supreme Court was faced with a challenge by "Old Order" Amish parents to Wisconsin's compulsory education statute. They argued that this legislation violated their right of religious freedom. The majority of the Court upheld their claim and exempted the children from compulsory school attendance beyond the eighth grade. Of interest is the now famous dissent of Justice Douglas. He recognized that the interests of the child and parents are potentially in conflict here. In this respect he stated:

> It is the future of the student, not the future of the parents, that is imperilled in today's decision....It is the student's judgment, not his parent's, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.[13]

Although this opinion disturbs traditionally recognized notions of parental prerogative, it is untenable to deny to children who have reached an age of advanced moral and intellectual judgement (usually associated with adolescence according to Tremper and Kelly, 1987; see also Leon, 1978) the right to make, or at the very least to participate, in the making of decisions affecting their lives.

Similarly, Worsfold (1974) suggests that the interests of the child may not always be identical to those of the parents,

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[12] *Wisconsin v. Yoder*, 406 U.S. 205.

[13] Ibid., at p.246.

guardians or state and, even more importantly perhaps, there should be a presumption of capacity in circumstances where others attempt to act in a child's "best interests". Only when this presumption is properly rebutted does it become fair or just to forge ahead without the active participation of the child. Thus independent rights are required and any law or action curtailing such rights is *prima facie* inconsistent with this position. Thus, Worsfold concludes that:

> The point has major implications for children's rights, shifting the burden of proof to those who would deny children the exercise of their own rights. Although there are no doubt many areas where children are justifiably denied the exercise of freedoms, the correctness of this denial is no longer taken for granted. On the the contrary, it must be shown to be just...(1974:156)

The issue of capacity or, more specifically, presumptions in relation to capacity, is central to the recognition of independent rights for young persons and, as noted above, needs to be addressed in a direct and thorough manner.

In summation of this chapter, liberationist justifications for the recognition of more extensive rights and freedoms for young persons have been presented. A liberationist system of justice for youth - which mandates the recognition of due process protections - is advocated for the same reasons that it is advocated on behalf adults; namely, to protect young persons against governmental actions that may be discretionary, abusive or not reasonable and demonstrably justifiable. As right-bearing individuals, it becomes unjust to prevent children from independently participating in decisions which affect their

rights and freedoms. Furthermore, it is no longer solely a question of "justice" in the philosophical sense of the word, it has become a question of legality. The Charter mandates the adoption of a liberationist conception of justice for all persons subject to the will of the state.

In the next three chapters, the extent to which the competing protectionist and liberationist conceptions of justice are reflected in the three principal components of the state's social control network affecting young persons (i.e., criminal justice, child protection, and health care) will be examined. The philosophical biases of each component will be evaluated and subjected to Charter scrutiny.

CHAPTER III

FROM THE JUVENILE DELINQUENTS ACT TO THE YOUNG OFFENDERS ACT: A NEW PARADIGM FOR YOUTH JUSTICE

A significant age-distinction affecting one's legal status is made with respect to the treatment of persons accused of federal offences pursuant to the *Criminal Code*[1] or other federal statutes. There is a separate criminal justice system to try cases involving "young persons"; that is, persons twelve years of age or more and less than eighteen years of age.[2] In this chapter, the recent shift from a protectionist to a liberationist model of justice that occured when the JDA was replaced by the YOA in 1984 will be examined. It will be argued that this shift in policy creates a paradigm for determining young persons' negative right claims that is consistent with the liberationist principles of the Charter. The YOA only permits limitations on rights and freedoms that are in accordance with the principles of fundamental justice; that is, liberty can be limited or denied only when substantial due process protections have been met.[3] Therefore, the YOA establishes a framework for achieving a reasonable and justifiable balance between a young person's negative and positive right claims (i.e., civil liberties and needs).

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[1]*Criminal Code*, R.S.C. 1970, c.C-34.

[2]*Young Offenders Act*, S.C. 1980-81-82-83, c.110, s.2.

[3]Charter, *supra*, s.7. The leading case on the scope of "principles of fundamental justice" is *Reference Re s.94(2) of Motor Vehicle Act (B.C.)* (1986), 24 D.L.R.(4th) 536 (S.C.C.).

Prior to 1908, no separate court for juveniles existed in Canada; however, courts did recognize a diminished responsibility status[4] and, as early as 1857, statutory provisions for the speedy trial of juveniles and for special institutions to imprison young offenders were enacted.[5] During this same era, child protection legislation and various welfare oriented measures, including schooling, were promoted at the provincial level. The goal of the child-savers was to help those potentially delinquent children avoid a wayward path. It did not matter whether a child was suffering from abandonment or mistreatment or had actually committed a criminal offence - remedial intervention was required. And, if necessary, intervention into family life was to be undertaken; it was believed that the "evil must be reached at its source; the noxious weed must be nipped in the bud; [and] the child must be separated from parents who would only train it up to vice" (Leon, 1977:77).[6] In a summary of this period, Leon states:

> Thus, at the close of the nineteenth century, a comprehensive base of legislation had been secured as authorization for child-saving ventures. In part due to inadequate financing, the two major institutions now associated with juvenile justice - a separate court and organized probation - were still in the formative stage.

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[4]For example, at common law a special defence of "infancy" evolved. See Gardner (1987:129).

[5]See *An Act for Establishing Prisons for Young Offenders, for the Better Government of Public Asylums, Hospitals and Prisons, and for the Better Construction of Common Gaols*, S.C. 1857, c.28, and *An Act for the More Speedy Trial and Punishment of Young Offenders*, S.C. 1857, c.29.

[6]Original source of quote is "Philanthropy," *Care of our destitute and Criminal Population: A Series of Letters Published in the Montreal Gazette* (Montreal: Sallner and Ross, 1857) at 10.

> *In the context of the trial process, the linking of neglect and delinquency to prevent future criminality had begun to minimize concern with adjudication in favour of an emphasis on disposition.* Response to the delinquent behaviour did not, for the child-savers, require a determination of 'fault'. (1977:91, emphasis added) [7]

Pursuant to the *Juvenile Delinquents Act* of 1908,[8] a separate court for juveniles was established. "Juveniles" were no longer to be processed along with and as, adults. In essence, this reform was conceived of as an humanitarian effort to decriminalize offences committed by juveniles. Juveniles found guilty of "delinquency" were no longer to be punished as ordinary "criminals"; but rather, subjected to benevolent state intervention.

The original definition of "delinquency" in the JDA included offences found in various federal and provincial statutes and municipal by-laws, as well as behaviour that made one liable "to be committed to any industrial school or juvenile reformatory under any federal or provincial statute".[9] According to Hagan and Leon (1977:593), this Act "did not add any behaviours to those already specified under existing statutes and by-laws"; it simply "consolidated various previously illegal behaviors into a new category called 'delinquency'". Even a 1921 statutory amendement that added "sexual immorality or any similar form of vice" and "incorrigible" or "unmanageable" behaviour to the

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[7]See Grant (1984) who also examines the origins of the JDA.

[8]*Juvenile Delinquents Act*, 1908, 7-8 Edw. VII, c.40 (Can.).

[9]Ibid., s.2.

definition of "juvenile delinquency",[10] cannot be said to have added previously unsanctioned behaviours. As Leon notes: "such behaviour had been previously dealt with under provincial child protection laws, again underscoring the links between delinquency and neglect" (1977:94, fn.154). Thus, pursuant to the JDA, Parliament claimed jurisdiction over what are arguably provincial matters of a purely local and private nature (Osborne, 1979).[11]

The constitutionality of this federal initiative was further put into doubt by its welfare or *parens patriae* emphasis. On this point, Leon states:

> Resting with the Crown in right of province, *parens patriae* could not be used as the 'legal basis' for federal delinquency legislation, although the intention of the draftsmen was to incorporate the rationale of *parens patriae* into the 'spirit' of the juvenile court, which was to be "that of a wise and kind, though firm and stern father... [asking] not, "What has the child done? but, 'how can this child be saved". (1977:73,fn8)

The constitutionality of the JDA was eventually challenged in the case of *A.G. British Columbia v. Smith*,[12] and the Supreme Court of Canada held that the all-encompassing offence of "delinquency" in the JDA was a valid exercise of Parliament's criminal law power. Mr. Justice Fauteux speaking for the Court stated:

> They [the operative provisions of the Act] are directed to juveniles who violate the law or indulge in sexual

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[10] *An Act to amend the Juvenile Delinquent Act*, 1921, 11-12 Geo. V., c.37, s.1 (Can.).

[11] *Constitution Act, 1867*, s.92(16).

[12] *A.G. British Columbia*. [1967] S.C.R. 702, 2 C.R.N.S. 277, [1967] 1 C.C.C. 244.

> immorality or any other similar form of vice or who, by reason of any other act, are liable to be committed to an industrial school or a juvenile reformatory. They are meant, - in the words of Parliament itself, - *to check their evil tendencies and to strengthen their better instincts*. They are primarily prospective in nature. And in essence, they are intended to prevent these juveniles to become [sic] prospective criminals and to assist them to be law-abiding citizens. Such objectives are clearly within the judicially defined field of criminal law. For the effective pursuit of these objectives, Parliament...deemed it necessary to create the offence of *delinquency*...[13]

This omnibus offence of "juvenile delinquency" - although validly enacted - raised serious civil liberty concerns because it provided no due process protections for juveniles prosecuted under the Act. In fact, it permitted harsh dispositions - including indeterminate sentences - for contraventions of what amounted to "status offences"; that is, conduct that if committed by adults would not be subject to criminal prosecution (Landau, 1981). Thus, juveniles, as distinguished from adults, were made subject to criminal types of penalties such as incarceration, even in the absence of a conviction for any criminal offence (found either in the *Criminal Code* or other federal statutes).

Influenced by a conception of childhood that, in accordance with the positive school of criminology, believed behaviour to be determined by personal or social and environmental factors (Shoemaker, 1984), the JDA adopted a welfare model of justice. Since a youth's ability to exercise free will, the *sine qua non* of punishment, was doubted, treatment and rehabilitation were

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[13]Ibid., at p.710 S.C.R. (emphasis in original)

suggested in lieu of punishment. It was thought to be in the juvenile's best interest to acquire discipline and self-control and it was the state's duty to ensure this opportunity was available; wayward children needed to be saved (see Leon, 1977; Hagan and Leon, 1977; West, 1984; Grant, 1984; and, for an American perspective see Platt, 1969, rev. 1977).

Evidence of the welfare orientation of the JDA is found in its preamble:

> WHEREAS it is inexpedient that youthful offenders should be classed or dealt with as ordinary criminals, the welfare of the community demanding that they should on the contrary be guarded against association with crime and criminals, and should be subjected to such wise care, treatment and control as will tend to check their evil tendencies and to strengthen their better instincts...

In accordance with this orientation, the Act called for informal court proceedings, an inquisitorial judicial role, "treatment" oriented dispositions and a multi-functional probation officer role. In fact, as Leon argues:

> the major aim of the...delinquency legislation was to extend probation. Probation was designed to protect children through the prevention of 'crime' by keeping them out of institutions and providing them with supervision in their home environment.(1977:81)[14]

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[14]See as well Hagan and Leon (1977) who present a critique of Platt's neo-Marxian class conflict perspective employed to explain the emergence of delinquency legislation in the United States. Hagan and Leon trace the social history of delinquency legislation in Canada and find that Kelso and Scott (the two principal advocates of the 1908 juvenile justice reform) collaborated "to engineer a legislative movement whose organizational goal became the prevention of delinquency through juvenile probation work". And, the result of this effort was that "the handling of *unofficial* occurences by probation officers dramatically increased, while the level of *official activity* showed some signs of decline" (1977:595, emphasis in original).

Therefore, in the name of protection, wide ranging powers were given to probation officers. This permitted considerable penetration into the "delinquent's" family life and, arguably, facilitated greater social control than was possible through mere imprisonment (Cohen, 1985). In this vein, Hagan and Leon argue that, "the overall effect was not to intensify a formal and explicit system of coercion, but rather to reinforce and increasingly intervene in informal systems of social control, particularly the family" (1977:597).

The *parens patriae* philosophy of the JDA permitted the blurring of welfare and crime control aspects of intervention and facilitated a policy of disrespect for the civil liberties of young persons. No due process protections were provided and, furthermore, subsection 17(2) of the JDA stated:

> No adjudication or other act of the juvenile court with respect to a child shall be quashed or set aside because of any informality or irregularity where it appears that the disposition of the case was in the best interests of the child.

As Gardner notes in relation to a similar philosophical bias in American law:

> Under the guise of parens patriae, juvenile court functionaries were to promote the welfare of the offender thus rendering unnecessary, indeed counterproductive, the procedural protections of the criminal justice system.(1987:130-1)

In summation, the perceived "best interests" of the juvenile, often the basis of intervention in welfare oriented statutes, became the predominant rationale for prosecution under the JDA; in fact, it became more important than the safeguards

associated with traditional notions of adversarial justice. In summation, the words of Leon are appropriate:

> Further, with the evolution of special juvenile court procedures, there was a failure to distinguish between stages of adjudication, with the 'trial' itself considered part of the treatment. Hence, minimal attention was paid to ensuring recognition of legal rights for children at either stage of the process. There was, in this regard, a notable absence of organized support for such recognition, and children remained vulnerable to the protective intrusion of others.(1977:104-5)

In 1984, the YOA replaced the JDA and a radical shift in policy is discernable from the Declaration of Principle.[15] With an emphasis upon "due process" rights and protection of society, the civil libertarian and law and order lobbies were successful in advancing their agendas. Protectionist considerations, although included in the Declaration of Principle,[16] have been overshadowed by the dominance of the "justice" model. This model provides for recognition of young persons' rights and freedoms[17] and stresses, not unlike the adult system, protection of society as a principal goal (Havemann,1986; Leschied and Gendreau, 1986).

Significant momentum for this swing in policy was provided by criticisms of the juvenile justice system under the JDA. The Act came under attack for its inablity to fulfil its promises of humanitarian treatment and effective rehabilitation (Havemann, 1986; Grant, 1984; and Osborne, 1979). Since dispositions were

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[15]YOA, *supra*, s.3.

[16]Ibid., subss.3(a) & (c).

[17]Ibid., subss.3(e),(f) & (g).

often more akin to "punishment" than "treatment", civil libertarians argued that the lack of due process protections was unconscionable. Their position was supported by two important American Supreme Court decisions. In *Kent v. The United States*,[18] the Court ruled that a juvenile court's order that waived its jurisdiction over the accused and sent him to adult court was invalid because the basic requirements of due process and fairness had not been satisfied. In reasons for judgement Mr. Justice Fortas stated:

> There is much evidence that some juvenile courts...lack the personnel, facilities and techniques to perform adequately as representatives of the State in a parens patriae capacity, at least with respect to children charged with law violation. *There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded adults nor the solicitous care and regenerative treatment postulated for children.*[19]

And, in *In Re Gault*,[20] Mr. Justice Fortas went further in his attack on the *parens patriae* philosophy of the juvenile justice system.

> The constitutional and theoretical basis for this peculiar system is - to say the least - debatable. And in practice...the results have not been entirely satisfactory. Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.[21]

The Court added that due process protections would enhance the possibility of truth emerging from the trial and would not

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[18] *Kent v. The United States* (1966), 383 U.S. 541.

[19] Ibid., at p.555-6, emphasis added.

[20] *In Re Gault* (1967), 387 U.S. 1.

[21] Ibid., at pp.17-8.

detract from the benefits the system might have to offer; that is, the recognition of rights for juveniles was not seen as being inconsistent with an humanitarian system of justice.

As well, some of the responsibility for the YOA's shift in policy lies with the emergence of the societal reaction or labelling school of criminology (Osborne, 1979), often associated with the decriminalization, decarceration and diversion movements of the 1960s (Cohen, 1985). In accordance with labelling theory, "status offences" are not incorporated into the new Act - offences include only those created by federal statutes.[22] As well, the concept of "delinquency", which ironically was employed to avoid stigmatising juvenile offenders but had tended to do exactly that (Osborne, 1979), is not included in the YOA. Thus, an attempt is made under the YOA to limit, wherever possible, the formal processing of youths through the criminal justice system. For example, section 3(1)(d), which provides that in some cases taking no measure at all may be considered as an alternative, is included in the principles of the YOA.[23]

Advocacy on behalf of a justice model made for a peculiar coalition of the left wing (civil libertarian) and right wing (law enforcement) lobbies (Havemann, 1986). Both groups were critical of the *parens patriae* philosophy of the JDA. Civil libertarians pointed to social science research indicating that

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[22]YOA, *supra*, s.2.

[23]This notion of "radical non-intervention" was advocated by Schur (1973).

adolescents have, as adults do, the moral reasoning skills and mental capacity for rational decision making (for summaries of this research see Leon, 1978, Tremper and Kelly, 1987, and Gardner, 1987), and argued that, therefore, young persons deserved the same due process protection as afforded adults. This argument was seized upon by law enforcement officials as it lent "credibility to to the notion that adolescent youngsters should also be held accountable for their acts of delinquency" (Gardner, 1987:139). Evidence of their success is section 3(1)(f) which provides that young persons are granted the right to the "least possible interference with freedom that is consistent with the protection of society". Society, according to section 3(1)(b), must be protected from illegal behavior, and in relation to this, section 3(1)(c) states: "young persons who commit offences require supervision, discipline and control". Thus, although civil libertarians and law enforcement officials would disagree in relation to the nature and severity of dispositions meted out to offenders, the revived emphasis on free-will and responsibility has made for what Havemann calls an "unholy alliance of Left-liberal and Right protaganists of the justice model" (1986:235).

A clear example of Parliament's recognition of youths as persons with capacity for rational decision making is found in section 22 of the YOA. Section 22 curtails Parliament's use of *parens patriae* inspired measures with respect to mental health matters. An "offender" can only be detained for treatment, according to section 22, with the combined consent of the young

person, her/his parents or guardians and the treatment facility. While the consent of a parent can be dispensed with pursuant to section 22(2), the consent of the youth is essential. Thus, it seems clear that the intention of Parliament is to limit the influence of the welfare model of justice and to not presume that young persons lack the capacity to make decisions in their best interests. This is especially a cogent approach in the face of evidence that indicates that mental health intervention has no valid claim to effectiveness (McConville and Bala, 1985; Melton, 1987).

In a comment on the implications of section 22, Leschied and Hyatt (1986), representing a welfare or "right to treatment" perspective, argue that Parliament has been over-zealous in its concern for the rights and freedoms of youths in regard to coercive treatment. They suggest that whether or not a young person has the ability to make an informed decision with respect to a need for treatment should be subject to question and not simply conceded in the youth's favor. In sum, they believe that young persons' rights to treatment are being undermined and overshadowed by provisions like section 22. In rebuttal, I would suggest that in calling for a review of this consent to treatment section, Leschied and Hyatt (1986) have given scant attention to two influential factors that led to its adoption - the desire to bring any new legislation within the letter and spirit of the Charter and recognition that welfare and mental health oriented dimensions of youth behaviour are matters of a local and private concern within the legislative domain of the

respective provinces.[24] Thus, if a young person is perceived to be in need of "treatment" or "protection", application for corrective measures can be made pursuant to provincial health and welfare oriented legislation.

The approach of section 22 of the YOA is both reasonable and consistent in regard to the issue of possible mental health treatment. Since one of the guiding principles of the YOA is the presumption that young persons, like adult persons, exercise free-will, and on this basis are made to accept responsibility for their actions, they should not be deprived of the opportunity to exercise their free-will in relation to how they are processed, or the mode in which their "right" to freedom is to be limited, especially if reasonable alternative dispositions are available. Since the presumption of sanity is a hallmark of our criminal law, if an accused is not found unfit to stand trial[25] or not guilty by reason of insanity,[26] it is only a matter of fairness and coherence that, in the absence of an accused's consent, this presumption not be undermined with respect to dispositions. Furthermore, since there is little evidence with respect to the benefits of mental health treatment (McConville and Bala, 1985), and there is general agreement that for such treatment to have positive effects the patient's cooperation is needed (Tremper and Kelly, 1987),[27] it does not

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[24]*Constitution Act, 1867*, s.92.

[25]*Criminal Code, supra*, s.543.

[26]Ibid., s.16.

[27]They argue that restricting autonomy can impede healthy

seem cogent to pursue a policy of coercive treatment.

Although, as noted above, the YOA emphasizes civil liberty and crime-control concerns, the *parens patriae* imperative, which justifies intervention on a welfare or "child-saving" basis, is not abandoned. For instance, section 3(1)(c) recognizes a special status for youth. It states: "because of their state of dependency and level of development and maturity, they also have special needs and require guidance and assistance". Also, section 3(1)(a) recognizes that young persons, "should not in all instances be held accountable in the same manner or suffer the same consequences for their behaviour as adults". Along these lines, Mr. Justice Morden in *Regina v. R.L.*[28] stated that although there are similarities with the adult system,

> the formal statement of the principle [the least possible interference with freedom that is consistent with the protection of society] in the Act and all of the others that emphasize the special needs of young persons such as being removed from parental supervision only when appropriate, together with the detailed provisions relating to dispositions, give a force and emphasis that has to be recognized - and makes the youth court system significantly different from the adult system.[29]

Thus, although there is a return to the classical concepts of free will, responsibility and punishment in the Act, the

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[27](cont'd) psychological development. "To shape their inchoate identities, perceive themselves as being in control of their lives and nurturance their sense of self-worth, adolescents need to act independently" (1987:111). Furthermore, they suggest that seminal research in this area has shown that perceived free choice enhances the effectiveness of treatment. Conversely, lack of choice reduces commitment and may even produce reluctance to "therapeutic efforts" (1987:117).

[28]*Regina v. R.L.* (1986), 26 C.C.C.(3d) 417 (Ont. C.A.).

[29]Ibid., at p.431. See also Bala and Lilles (1984:19).

discretion to consider a youth's state of dependency and maturity is preserved. In regards to the balance between rights and needs, it can be argued that the YOA represents a new and important paradigm for youth rights because due process protections - associated with adult court - are given precedence over the perceived "best interests" of young persons accused of federal offences.

However, it should be noted that some critics of the YOA argue that what they see emerging is an unduly punitive system of justice. For example, Leschied and Gendreau summarize the shift from welfare to justice in the following terms:

> Disaffected liberals agreeing with Martinson argued that, if 'nothing worked', we should at least avoid doing harm and that any punishment meted out to offender [sic] should be a 'just-desert'. We should be concerned with justice not mercy. Rehabilitation efforts were seen, in retrospect, as being degrading to offenders. Therefore, we should do less, not more.(1986:316)

Furthermore, they view this turn of events as an abandonment of concern for the needs of children. They suggest that:

> It would appear that justice model proponents have fallen prey to ultra conservatives who believe the overriding goal of the criminal justice system is social protection and safety, *to the exclusion of the concerns of the offender*. (1986:317, emphasis added)

Havemann (1986), using a neo-Marxist perspective, also offers a scathing critique of the system of justice adopted by the YOA. He believes that the criticisms of the JDA that were advanced by the civil libertarian lobby group, were co-opted by the Right to facilitate the destructuring of the Keynesian welfare state.

> To the unpopular Federal Liberal Government in the 1980s as it attempted to steer its way through the deepening economic crisis, the passage of the *Young Offenders Act* based on a justice model offered an electoral opportunity. The *Young Offenders Act* enabled it to appear to disassociate itself from the treatment lobby and its costly expansionism and to associate both with the due process concerns of the civil libertarian lobby and with law and order. (1986:230)

For Havemann, the inclusion of substantive and procedural rights in the YOA "is unlikely to constitute a progressive change in the law" (1986:225). The recognition of rights, according to Havemann, is more ceremonious than substantial and simply perpetuates the myth of justice being done. In this vein, he states:

> The justice model exploits such a narrow definition of the youth crime problem by emphasizing individual accountability of youth as calculating criminals and therefore in need of deterrence)..and by claiming to guarantee equality before the law through the provision of individual due process. The justice model essentially creates a mirage of justice in formalistic procedural terms as a substitute for redistrubitive social justice in the form of work, education, income security, and social and political rights. (1986:232)[30]

It is evident that a difficulty with the principles declared in section 3 of the YOA, which according to subsection 3(2) are to be influential in decisions with respect to young persons coming within its domain, is that none of the principal models (namely, due process, crime-control or welfare) is given explicit prominence. As Reid and Reitsma-Street note, this compromise of principles places a great deal of discretion in the hands of the actors responsible for the implementation of

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[30]See Teram and Erickson (1988) who make this same argument in relation to children's rights in institutional placement decisions in Quebec and Ontario.

the Act. Thus, they argue it is likely that, "other factors, such as bureaucracies' access to funds and the ideologies of those responsible for enforcing the new Act, will influence the implementation of the provisions" (1984:12).

Furthermore, critics argue that this discretion permits the development of an excessively punitive system. For example, Leschied and Gendreau suggest that the provinces have "only grudgingly moved in the direction of minimal compliance or failed to seize many of the opportunities created by the YOA for innovative responses to the problems of young offenders" (1986:321). They also complain that some youth court judges are "failing to live up to the spirit of the legislation by stressing punishment at the expense of rehabilitation" (1986:321). However, it is just as likely that some judges are placing a greater emphasis on the welfare aspects of the Act. For example, it is not inconceivable that some judges, in order to ensure that a youth receives the attention and intervention that he or she is perceived to need, are overlooking technical deficiencies in the process or, even, reasonable doubts as to an accused's guilt. This latter scenario is, of course, problematic because the apparent intention of Parliament is to make clear that the Crown should have the same onus of proof as in adult cases (i.e., proof beyond a reasonable doubt), where any reasonable doubt as to guilt must be resolved in an accused's favor and it is always in an accused's favor to be found not guilty of the charges laid and to be free from state control. Although we will have to wait until more extensive data is

collected before the success or failure of the YOA - in terms of achieving justice for young persons - can be measured, it is clear that the Act allows for "rehabilitative" alternatives to punishment. Therefore, any lack of creative responses to criminal behaviour is more likely the result of failures by the provinces to encourage, financially or otherwise, and implement such responses, rather than shortcomings in the Act itself.

Although the YOA represents increased recognition of the rights and freedoms of young persons, there remains concern that certain provisions are inconsistent with Charter protections. For example, in *Regina v. D.F.G.*,[31] the court of first instance, the Youth Court, held that s.24(13) of the YOA - which disallows dispositions where there are insufficient facilities to carry out such dispositions - violated a young person's right to equal protection and equal benefit of the law because no such requirement was in effect with respect to dispositions in ordinary or adult court.[32] The Court of Appeal rejected this opinion and held that the Youth Court judge, in arriving at her conclusion, erred in focusing upon one subsection alone of the Act. And on the whole, the YOA - which creates a separate and

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[31] *Regina v. D.F.G.*, unreported June 16, 1986. B.C.C.A. No.V000261 Victoria Registry. (See discussion in Chapter III.)

[32] In substance, Her Honour Judge Auxier was advocating a duty on the province to provide sufficient facilities for various kinds of dispositions. According to Mr. Justice Esson, in a concurring opinion in the Court of Appeal: "The real basis of the decision appealed from, I think, is a disagreement with the policy of Parliament in leaving it to the governments to decide whether facilities would be provided for intermittent sentences for young offenders" (at p.7).

distinct criminal justice system - is not discriminatory.[33]

Another suspect provision is section 52 of the YOA, which disentitles a young person, tried pursuant to the YOA, to a trial by jury.[34] In *Regina v. R.L.*,[35] the Ontario Court of Appeal addressed the constitutionality of section 52 and in overturning the trial court decision, held that the distinction drawn by the impugned provision was not adverse or prejudicial. It was found to be advantageous because under the scheme set out by the Act a young person accused of the crimes allegedly committed by R.L. was subject to a maximum two year sentence, whereas an adult accused of the same crimes would have faced a maximum of fourteen years. The trial judge arrived at a different result because denying a person the right to a trial by jury upon charges of indictable offences, when this right is available to other persons, is plainly adverse or prejudicial; it limits the accused's protections. As the trial court judge stated:

> To deprive a young person, due to his age or merely because the drafters and legislators of this legislation have chosen to limit the method and duration of punishment, or as a "trade-off" or "fair price to pay", *to deprive the young person of all the same protections afforded adults in this society is improper, and now, due to the implementation of s. 15 of the Charter,*

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[33]Ibid., p.4.

[34]Section 52 of the YOA makes the summary conviction procedure of the *Criminal Code, supra,* applicable to all offences tried in youth court and since a trial by jury is available to only those accuseds processed by way of indictment, persons tried in Youth Court are denied this option.

[35]*Regina v. R.L.* (1986), 26 C.C.C.(3d) 417 (Ont. C.A.).

illegal.[36]

Furthermore, in support of recognition of all due process protections for young persons, Gardner argues that denials of various protections cannot logically be premised upon *parens patriae* grounds.

> Juvenile proceedings are "criminal" in nature when punishment is the sanction imposed. Therefore, the full trappings of the criminal process, including trial by jury in hearings open to the public, are constitutionally mandated. Legislatures seeking to avoid such departures from the secrecy and informality of traditional juvenile proceedings can do so only by assuring that punitive sanctions are not visited upon offending youngsters. (1987:147)[37]

In closing, it should be noted that the YOA does not represent the elimination of all status offences within federal or, for that matter, provincial enactments. There are still provisions of federal Acts that penalize young persons for actions not punishable if committed by adults. For example, the *Tobacco Restraint Act*[38] creates an offence for anyone under the age of 16 to smoke or chew tobacco publicly or to purchase or possess it.[39] As well, status offences continue to exist in provincial enactments. An example can be found in section 36 of the *Liquor Control and Licensing Act*,[40] which makes it an offence for all minors (i.e., persons "under the age of majority

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[36]*Regina v. R.L., supra*, quoted at p.424 (emphasis added).

[37]Although this comment was made drawing upon the American experience, it is relevant due to the similarities that exist between the two systems of youth justice.

[38]*Tobacco Restraint Act*, R.S.C. 1970 c.T-9.

[39]Ibid., subs. 4(1).

[40]*Liquor Control and Licensing Act*, R.S.B.C. 1979, c.237.

established by the *Age of Majority Act*"),[41] to purchase or consume liquor in a licensed establishment, to enter or be found in a liquor store, or to have, without lawful reason or excuse, possession of liquor.[42] A question arises as to whether or not these status offences are consistent with the guarantee of equality found in section 15 of the Charter. Discussion of a possible answer is undertaken in chapter VI.

In summary, it has been argued in this chapter that the YOA represents a paradigm for evaluating young persons' negative right claims that is consistent with the liberationist principles of the Charter. The YOA operates on a presumption that "young persons" have the capacity, as adults do, to make reasoned decisions. And, as a corollary, young persons who are found guilty of criminal offences - in a process where procedural and substantive protections are recognized - should be held responsible for their actions. The guarantee of due process protections in the YOA provides stark contrast to the concerns of the JDA. The JDA, which consolidated federal, provincial and municipal offences into the category of "delinquency", emphasized a welfare model of intervention and provided negligible due process protection for juveniles. This system of justice was severely criticized for its arbitrary and abusive tendencies. Although recognition by the YOA that young persons are right-bearing individuals, and deserving of all the protections afforded to adults accused of criminal offences, is

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[41]Ibid. s.1.

[42]Ibid., s.36.

not the panacea for resolving all social problems facing youth, it represents an attempt to bring young persons within liberationist justice theory; that is, where a justifiable balance between the rights and freedoms of young persons can be achieved. Therefore, the inclusion of young persons within this system of justice represents an important evolution in their legal status in society.

It appears that with the abandonment of "status offences" in the YOA, the social control net facing youth has come full circle; the provinces have regained their lost jurisdiction over health and welfare dimensions of miscreant behaviour. How the province of British Columbia will respond to this increased power remains to be seen; however, the possibility of increased use of their *parens patriae* jurisdiction exists within the social control network already in place. In the next two chapters, two important components of this network, namely, child protection and health care, will be examined and the implications of the Charter for the processing and treating of children caught by these components will be evaluated.

CHAPTER IV

CHILD PROTECTION: PARENS PATRIAE AND THE CHARTER

If a "child" (i.e., "a person under 19 years old")[1] is thought to be, upon nothing more than an honest belief,[2] "in need of protection",[3] an apprehension can be made pursuant to subsection 9(1) of the *Family and Child Service Act*.[4] The paramount principles upon which the Act is to be administered and interpreted by the courts are "the safety and well being of a child";[5] in other words, the "best interests" of a child are the guiding concerns.[6] The court's jurisdiction to interfere with a parent's or guardian's custody of a child stems from its inherent *parens patriae* power as expressly preserved by section 21 of the FCSA.[7] In this chapter, it will be argued that the

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[1]*Family and Child Services Act*, S.B.C. 1980, s.1. (hereinafter the FCSA).

[2]*Gareau et al. v. Superintendent of Family and Child Services For British Columbia et al.* [Indexed as: *Gareau v. B.C. (Supt. of Fam. & Child Services)*] (1986), 5 B.C.L.R. 352 (B.C.S.C.).

[3]FCSA, *supra*, subs. 9(1).

[4]Ibid.

[5]FCSA, *supra*, s.2.

[6]See the *Law and Equity Act*, R.S.B.C. 1979, c.224, s.47, which states: "In proceedings involving the adoption, guardianship, custody, access to or maintenance of a child or proceedings under the *Family and Child Service Act*, the court shall consider the best interests of the child."

[7]Section 21 states:
"Nothing in this Act limits the inherent jurisdiction of the Crown, through the Supreme Court, over infants, as parens patriae, and the Supreme Court may rescind a permanent order where it is satisfied that to do so is conducive to a child's best interest and welfare".

absence of explicit recognition that youths have fundamental rights and freedoms that must be protected in the application of the "best interests" principle is, *prima facie*, inconsistent with the liberationist conception of justice that is mandated by the Charter. The rights and freedoms of persons who are being subjected to the state's will, must be considered when decisions having an impact upon their lives are being made. Following the analytic approach to the Charter as developed by the Supreme Court of Canada, the balancing of competing concerns (for instance, "best interests" and "rights") should occur within section 1 of the Charter, with the onus of establishing the reasonableness of a limitation or denial of a right or freedom upon the party seeking to uphold it. Thus, with this process in mind, it will be argued that the lack of due process protections in the FCSA is not reasonable and demonstrably justifiable; there is no evidence suggesting that the benefits to children from this Act would be impaired as a consequence of the recognition of basic constitutional rights and freedoms.

With the advent of the Charter, all governmental action is subject to Charter scrutiny.[8] As well, when the judiciary applies and develops the principles of common law they must do so "in a manner consistent with the fundamental values enshrined in the Constitution."[9] Therefore, the balance between a child's "best interests" and "rights" represents a key issue in any

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[8]See section 32 of the Charter.

[9]Per McIntyre J. in *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery*, [1986] 2 S.C.R. 576, (S.C.C.), at p.198.

potential Charter challenge to the FCSA and/or to a court's exercise of its *parens patriae* jurisdiction. An indication of how the Charter might have an impact upon the protectionist ideology of the FCSA, is evident from two recent cases concerning the jurisdiction of Canadian courts to authorize the sterilization of mentally handicapped persons.

In *Re K*[10] an application by parents for approval to have a hysterectomy performed on their "severely mentally handicapped" ten year old, was dismissed by the trial court but granted on appeal. The argument advanced in favour of the hysterectomy was that it would eliminate a potential phobic aversion to the sight of blood and thereby protect K against unnecessary pain and suffering or, in other words, it would have the effect of "sparing the child, who does not get a lot of joy out of life, a little extra anguish".[11] Justice Wood, speaking for the Supreme Court, found the proposed sterilization to be for non-therapeutic reasons and therefore placed the onus upon the parents to establish by clear and convincing evidence that this irreversible operation was in their child's best interest and of greater merit than a significant violation of the child's right to security of the person.

Justice Wood did not accept the view that the child would be the real beneficiary of the proposed hysterectomy. Although recognizing the possibility of a phobic reaction, he found that

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[10]*Re K.: K. v. Pub. Trustee* (1985), 60 B.C.L.R. 209 (B.C.S.C.), 63 B.C.L.R. 145 (B.C.C.A.).

[11]Ibid., per Wood, J. quoting a doctor's testimony, at p.237.

the parents, rather than the child, were the likely beneficiaries of the operation as it would alleviate having to manage the problem of menstrual hygiene. Therefore, Justice Wood held that the applicants had not met the requisite onus and stated: "Does the fact that K will probably never enjoy what Heilbron J. refers to as 'the right of a woman to reproduce' make that right any the less important to her? In my view it does not".[12]

The Court of Appeal overturned the Supreme Court's dismissal of the application and thereby authorized the sterilization. The Court of Appeal was convinced by the evidence that the proposed sterilization was for therapeutic reasons and, therefore, held that their *parens patriae* power should not, in these special circumstances, be exercised in limiting existing parental rights over the incompetent child. Since the most compelling expert evidence indicated that the child was not capable of comprehending the loss of her uterus or the menstrual function, they opined that there was no potential loss of legal rights at issue and, therefore, the protection of the court was unnecessary.[13]

The Court of Appeal's decision to allow the sterilization, perhaps unfortunately for K, is apparently unsound in law. In a judgment coming on the heels of *Re K*, the Supreme Court of

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[12]Ibid., p.220.

[13]Ibid., per Anderson J.A. at p.169.

Canada in *Re Eve*[14] severely restricted the ability of courts to authorize sterilizations pursuant to the *parens patriae* jurisdiction. In this case, the proposed sterilization was applied for by a mother who wanted her 24 year old daughter, described as mildly to moderately retarded, to have a reliable birth control plan. Because of this unquestionably non-therapeutic purpose, *Re Eve* is, *prima facie*, distinguishable from *Re K*. However, this case is relevant because it discusses the relationship between best interests and rights and because it explicitly questions the reasoning of the B.C.C.A. in *Re K*.

Considering "[t]he grave intrusion on a person's rights and the certain physical damage that ensues",[15] Mr. Justice La Forest, speaking for the unanimous Court, held that a sterilization "should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction".[16] However, since courts can use their *parens patriae* jurisdiction to authorize therapeutic sterilizations, although not having to decide on the issue for the purpose of rendering a decision in this case, the Court, nevertheless, considered the question of where to draw the line between therapeutic and non-therapeutic sterilizations. Once again Mr. Justice La Forest emphasized human rights. He stated: "Marginal justifications must not be weighed against what is in every case a grave intrusion on the

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[14] *Re Eve* (1986), 31 D.L.R. (4th) 1 (S.C.C.).

[15] *Re Eve*, *supra*, at p.32.

[16] Ibid.

physical and mental integrity of the person."[17] Furthermore, to quote in full:

> The importance of maintaining the physical integrity of a human being ranks high in our scale of values, particularly as it affects the privilege of giving life. I cannot agree that a court can deprive a woman of that privilege for purely social or other non-therapeutic purposes without her consent. The fact that others may suffer inconvenience or hardship from failure to do so cannot be taken into account. The Crown's *parens patriae* jurisdiction exists for the benefit of those who cannot help themselves, not to relieve those who may have the burden of caring for them.
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> I should perhaps add...that sterilization may, on occasion, be necessary as an adjunct to treatment of a serious malady, but I would underline that this, of course, does not allow for subterfuge or for treatment of some marginal medical problem... *The recent British Columbia case of Re K and Public Trustee, supra, is at best dangerously close to the limits of the permissible.*[18]

On the evidence as weighted by the trial justice in *Re K*, the Court of Appeal did not come close to that limit but exceeded it.

The trial justice in *Re K* after hearing all the evidence came to the conclusion that the proposed sterilization was for non-therapeutic purposes. The Court of Appeal, in overturning this finding realized, as evidenced by their dubious reasoning, that they were treading in rough waters. The Court of Appeal discredited Justice Wood's assessment of the testimony by holding that he "had made a significant error in his approach to this case - namely, that he tended to focus on the rights of mentally handicapped people generally rather than on the best

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[17]Ibid., at p.34.

[18]Ibid. (emphasis added).

interests of 'K', although he appreciated that his sole concern should be the best interests of 'K'".[19] First, it should be noted that if Justice Wood was wrong in how he proceeded, then Mr. Justice La Forest is equally as wrong in how he proceeded in *Re Eve*. Secondly, on the authority of a recent Supreme Court of Canada decision,[20] powers of the Crown derived from the common law are subject to the Charter. Therefore, any state action based on the *parens patriae* power which infringes upon rights and freedoms, even though in the perceived "best interests" of that person, is presumably subject to Charter scrutiny. In making decisions premised upon powers derived from the common law, courts must take into consideration the legal rights of those who are affected by their decisions. Thus, in applying the "best interests" principle of the FCSA, the rights of a child, who is subject to apprehension and ensuing intervention, must be considered.

In addition to the general lack of concern for the fundamental rights and freedoms of children subject to "apprehension" and removal from the custody of their parents or guardians, the FCSA raises some very specific civil liberty concerns. First, although the Act provides a definition of when a child is "in need of protection",[21] it is couched in terms of

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[19] *Re K, supra* p.157, 63 B.C.L.R.

[20] *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery, supra.*

[21] FCSA, *supra*, s.1: "'in need of protection' means, in relation to a child, that he is
(a) abused or neglected so that his safety or well being is endangered,

the vague and subjective "safety and well being" or "best interests" test. This test is arguably inconsistent with the provisions of the Charter. Limits on rights and freedoms must be, according to the Ontario Court of Appeal in *Regina v. Zundel*,[22] "ascertainable and understandable and articulated with some precision. They cannot be vague, undefined and simply discretionary, at the whim of an official..."[23] However, no definition of what is in the child's "best interests" is provided in the FCSA. It is "a standard that leaves virtual unbridled discretion in the hands of a trial judge" (Melton, 1987:83. See also Skolnick, 1979; Mnookin, 1973; and Goldstein et al., 1973, 1979). To bring the Act into line with the Charter, a set of definitions or criteria should be provided.[24]

Secondly, the FCSA arguably infringes upon the rights to equality guaranteed by section 15 of the Charter, as it "discriminates" - on the basis of age - against persons deemed to be "children". The choice of the age of 19 as the relevant criteria distinguishing children from adults is arguably not reasonable and demonstrably justifiable in the circumstances,

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[21](cont'd) (b) abandoned,
(c) deprived of necessary care through death, absence or disability of his parent,
(d) deprived of necessary medical attention, or
(e) absent from his home in circumstances that endanger his safety or well being".

[22]*Regina v. Zundel* (1987), 35 D.L.R.(4th) 338.

[23]Ibid., at p.367. See also *Luscher v. Dep. M.N.R. (Customs and Excise)*, [1985] 1 C.T.C. 246, 57 N.R. 386, [1985] 1 F.C. 85, 17 D.L.R.(4th) 503 (Fed. C.A.).

[24]An excellent model can be found in the *Family Services Act*, S.N.B. 1983, c.F-2.2, c.16.

especially in relation to older and adolescent children. The age of 19 appears to be unrelated to any ascertainable difference between older children and adults.[25]

Thirdly, since there is a lack of recognition of a child's right to participate and to be independently represented in the proceedings, the FCSA is inconsistent with "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" as guaranteed by section 7 of the Charter. This shortcoming is partly due to the view that proceedings under the FCSA, although considered judicial, are not considered adversarial. For example, in *D.R.H. and A.H. v. Superintendent of Family and Child Services and Public Trustee*,[26] Mr. Justice Hinkson, delivering a unanimous opinion of the B.C.C.A., stated:

> The Act is intended to deal with children in need of protection. While the inquiry provided for by the Act is to be conducted upon the basis that it is a judicial proceeding, unlike some judicial proceedings it is not an adversary [sic] proceeding and there is no lis before the court. It is an inquiry to determine whether a child is in need of protection and, as the statute directs, the safety and well-being of the child are the paramount considerations.[27]

This interpretation of the Act is of great importance as its effect, not unlike the "not punishment but treatment" rhetoric

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[25]See chapter VI for an indepth analysis of the equality rights provision.

[26]*D.R.H. and A.H. v. Superintendent of Family and Child Services and Public Trustee* (1984), 58 B.C.L.R. 103, 41 R.F.L.(2d) 337 (B.C.C.A.)

[27]Ibid., at p.105.

of judicial interpretations of the JDA,[28] is to permit a reconsideration of norms that usually apply in judicial proceedings. For example, since the nature of the inquiry in *D.R.H.* was deemed not to be adversarial, the Court was able to admit into evidence testimony that would have, under normal circumstances, been found to be inadmissible under the hearsay rule.[29] With respect to the arguments of this thesis, this kind of judicial reasoning is relevant as it could be used, as it was under the JDA, as a justification for limiting or denying children their fundamental rights and freedoms.

With respect to the right to "liberty", Madame Justice Wilson, in the recently decided *Morgentaler* case stated:

> Thus, an 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, as was noted in *Singh*, 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 personal importance.[30]

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[28]For example, in *R. v. Burnshine* (1974), 15 C.C.C. (2d) 505 (S.C.C.), the accused challenged a provision of the *Prisons and Reformatories Act*, R.S.C. 1970, c.P-21, s.150 (repealed by S.C. 1976-77, c.53, s.46(9)), which imposed longer sentences on juveniles than on adults. The provision, challenged on the basis of an infringement of the right to "equality before the law and the protection of the law" as guaranteed pursuant to section (1)(a) of the *Canadian Bill of Rights*, R.S.C. 1960, c.44, was held not to be discriminatory as the objective of the JDA was not punishment but treatment.

[29]*D.R.H. and A.H., supra*, at p.107 B.C.L.R.

[30]*R. v. Morgentaler et al.*, (1988) 44 D.L.R.(4th) 385, at pp.486-7; 37 C.C.C.(3d) 449; [1988] 1 S.C.R. 30 (S.C.C.). See also *Reference Re s.94(2) of Motor Vehicle Act* (1986), 24 D.L.R. (4th) 536 (S.C.C.) and *Jones v. The Queen*, [1986] 2 S.C.R. 284

More on point to the issue under discussion, Bala and Redfearn argue:

> A child who has the capacity to participate in a protection proceeding but who is denied the right to notice and participation may well be able to challenge the proceedings as violating his "liberty" rights under s.7 of the Charter. Although parents may be viewed as "natural guardians", protecting the rights of their children from the state, in many situations, the parents may lack this inclination or ability; their views or interests may be antithetical to those of their child. The child with capacity should be able to participate in the proceeding in his *own* right. (1983:296-7; see also Leon, 1978)

Legal precedents for this position have been set in Manitoba and Ontario, where courts have recognized a child's right to participate in protection proceedings.

In *Re R.A.M.; Children's Aid Society of Winnipeg v. A.M. and L.C.*,[31] the Manitoba Court of Appeal discussed the applicability of section 7 of the Charter to a child's independent rights under protection proceedings. The original application to have R.A.M. made a permanent ward of the Children's Aid Society of Winnipeg was uncontested with R. not being present or represented at the hearing. The court found R. to be in need of protection and the application was therefore granted. However, R. wanted to live with his aunt and applied to the court for an order granting him standing as a party to the proceedings and allowing counsel to represent his interests. In arriving at a decision in this application, the court discussed the applicability of section 7 of the Charter to the issue of

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[30](cont'd) (S.C.C.).

[31]*Re R.A.M.; Children's Aid Society of Winnipeg v. A.M. and L.C.*, [1984] 2 W.W.R. 742 (Man. C.A.).

independent legal counsel.[32]

After making the preliminary decision that children are protected under the Charter, citing a British Columbia case as an example,[33] Mr. Justice Matas, while not recognizing the right to legal representation in every case, stated:

> 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. 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 mentioned above, the suggested disposition in the juvenile proceedings is a committal to the society. That is very close to the appointment of the society as R.'s permanent guardian.[34]

Similarly, in *Re T and Catholic Children's Aid Society of Metropolitan Toronto*,[35] the Provincial Court Judge, citing with

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[32]Unlike the FCSA, Manitoba's child protection legislation, the *Child Welfare Act*, 1974 (Man.), c.30 (also C.C.S.M. c.C80), expressly guides the court to consider "the views and preferences of the child where such views and preferences are appropriate and can reasonably be ascertained..." (subs.1(a.2)(vi) [en. 1979, c.22, s.1]), and provides the judge discretion, if of the opinion that the child should be represented by counsel, to order that "legal counsel be provided to represent the interests of the child", (subs.25(7) [am. 1979, c.22, s.26]. See also subs.25(7.1) [en. 1979, c.22, s.27]). Even though the judge therefore had discretion to grant the application on the basis of these provisions, he apparently felt compelled to discuss the Charter issue.

[33]*R. v. S.B.*, (1983) 40 B.C.L.R. 273, 142 D.L.R.(3d) 339, rev. 43 B.C.L.R. 247, 146 D.L.R.(3d) 69, (B.C.C.A.).

[34]*Re R.A.M.; Children's Aid, etc., supra*, at p.751, emphasis added.

[35]*Re T and Catholic Children's Aid Society of Metropolitan Toronto* (1984), 46 O.R. (2d) 347, [(Prov. Ct. (Fam. Div.)]

approval both *Re R.A.M.; Children's Aid, etc.* and Bala and Redfearn (1983), held:

> The *Canadian Charter of Rights and Freedoms* helps to reinforce the view that a child may have separate interests worthy of special protection in proceedings such as these. The argument is obviously more easily made when dealing with a child with legal capacity. However, there is a growing recognition that, in certain situations, children may have separate security or liberty interests requiring the protection of the Charter...[36]

Although the FCSA directs the court to consider "the child's feelings towards and emotional ties with his parents,"[37] in deciding whether to make a permanent order, it makes no express mention of a child's right and potential need for independent representation. However, section 2 of the *Family Relations Act*,[38] provides that:

> The Attorney General may appoint a person who is a member in good standing of the Law Society of British Columbia to be a family advocate...[who may] attend a proceeding under the Act or respecting the...(e)*Family and Child Service Act* and intervene at any stage in the proceeding to act as counsel for the interests and welfare of the child.[39]

In *Gareau et al. v. Superintendant of Family and Child Services for British Columbia et al.*,[40] the Supreme Court Justice held that the advocate's duty is to act in what he believes to be in the interests and welfare of the child. However, the course he

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[36]Ibid., at p.352.

[37]FCSA, *supra*, subs.14(3)(a).

[38]*Family Relations Act*, R.S.B.C. 1979, c.121.

[39]Ibid., subss.2(1), (2), (2)(e).

[40]*Gareau et al. v. Superintendant of Family and Child Services et al.* (1986), 2 B.C.L.R. (2d) 268, (B.C.S.C.).

pursues is an independent one, not subject to interference from the Attorney General or the children he represents. According to Justice Southin, these children are not his clients.

> He is appointed to act as counsel for their interests and welfare but nothing in the act warrants the conclusion that he is to take instructions from them even if they are of an age of sufficient maturity to give instruction.[41]

If Justice Southin is correct in her analysis, there is no statutory authority providing children affected by orders pursuant to the FCSA with a right to "independent representation" in the traditional meaning of these words. Thus it can cogently be argued that custody orders under the FCSA deprive those subject to such orders of the right to liberty and security of the person, *prima facie* without accordance to the principles of fundamental justice (which clearly include the *audi alteram partem* rule and, as a corollary, the right to independent counsel who will represent the preferences of his or her client).[42] Furthermore, on a related point, it can be argued that since an apprehension pursuant to the FCSA amounts to a "detention" for the purposes of the Charter,[43] pursuant to

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[41] Ibid., at p.271.

[42] The leading case on the meaning of "principles of fundamental justice", as found in the Charter, is *Reference Re s.94(2) of Motor Vehicle Act, supra*. See also Garrant (1982) at pp.278-85.

[43] See *R. v Therens* (1985), 18 C.C.C. 486, at p.503 where Le Dain J., dissenting with respect to disposition but speaking for the unanimous court on this matter, states: "In addition to the case of deprivation of liberty by physical constraint, there is, in my opionion, a detention within s. 10 of the Charter when a police officer or *other agent of the state assumes control over the movement of a person by a demand or direction which may have significant legal consequence and which prevents or impedes access to counsel*" (emphasis added).

section 10(b) of the Charter, any person so detained has the right to retain and instruct counsel without delay and to be informed of that right. Therefore, there are two grounds, at least, upon which to argue that the FCSA, with respect to the issue of legal representation, is inconsistent with provisions of the Charter.

In this chapter, it has been argued that the protectionist conception of justice found in the FCSA - which is based on the *parens patriae* doctrine - is inconsistent with the guarantees of the Charter. Children are subject to limits on their rights to liberty and security of the person under this Act but they enjoy none of the due process protections associated with the liberationist conception of justice that is mandated by the Charter. As can be gleaned from the analysis of the sterilization cases, courts must not employ their inherent *parens patriae* jurisdiction without paying careful attention to the rights of persons whose interests are at stake; even young persons or persons of diminished intellectual capacity have rights and freedoms that must be protected. Proceedings pursuant to the FCSA are considered non-adversarial; therefore, the need for due process protections is doubted. However, it is clear from other examples of benevolently motivated state policies (such as the juvenile justice policy of the JDA), the lack of, at least, basic due process protections is often inconsistent with the demands of fundamental justice. Furthermore, without evidence that the benefits of this Act would be impaired as a result of the recognition of basic constitutional protections,

it is not reasonable and demonstrably justifiable to deny to children - especially older or adolescent children - rights to participate and to have independent legal representation in proceedings under the FCSA.

CHAPTER V

HEALTH CARE DECISION-MAKING: CAPACITY TO CONSENT

In British Columbia, persons with "minority status" are presumed to lack the capacity to make health care decisions in their best interests; their parents or guardians have the presumptive right to make these decisions for them. Since a minor cannot give a valid consent, a doctor risks being held civilly responsible for assault if medical procedures are performed without the informed consent of the patient's parents or guardians.[1] In other words, health care treatment provided to minors without the prior approval of parents or guardians, who can consent on their behalf, *prima facie* constitutes an assault. The presumption of incapacity, however, is rebuttable with respect to some health care decision-making. In this chapter, the extent to which a minor's right to make health care decisions is recognized in statute and at common law will be examined.

The starting point for an examination of a minor's legal capacity to consent to medical or dental treatment, is section 16 of the *Infants Act*.[2] Medical or dental procedures performed in relation to the consent of a minor who has attained the age of 16 free the treator from potential civil liability for assault provided that either of the following requirements,

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[1]The leading case on the law of informed consent is *Reibl v. Hughes* (1980), 89 D.L.R.(3d) 112, [1980] 2 S.C.R. 880 (S.C.C.).

[2]*Infants Act*, R.S.B.C. 1979, c.196.

found in subsection 16(4), is met:

> (a) a reasonable effort has first been made by the medical practitioner or the dentist to obtain the consent of the parent or guardian of the infant; or
> (b) a written opinion from one other medical practitioner or dentist is obtained confirming that the surgical, medical, mental or dental treatment and the procedure to be undertaken is in the best interest of the continued health and well being of the infant.

It seems that the purpose of section 16 is to provide an exception to the presumption of incapacity for minors; persons having reached the age of 16 can consent to medical or dental treatment and treators can advance a defence of consent to any charges of trespass or assault. However, since the common law provides a more generous defence of consent, as will be discussed below, and is permitted apparently via subsection 16(5) to be engaged,[3] doctors and dentists will not require the aid of section 16. Section 16 would be of use only if the common law had a more stringent test of capacity, for instance, if the age of 21 was chosen as the prerequisite for valid consent; however, this is not the case.

The common law position on the issue of a minor's capacity to consent to health care intervention is traced and elaborated upon by the House of Lords in the 1985 case of *Gillick v. West Norfolk and Wisbech Area Health Authority and another*.[4] In *Gillick*, the court was asked to rule on the validity of a policy by the Depatment of Health and Social Security (DHSS) which, in

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[3]Subs. 16(5) provides that:
"This section [s. 16] does not make ineffective a consent which would have been effective if the section had not been enacted".

[4]*Gillick v. West Norfolk and Wisbech Area Health Authority and another* (1985), [1985] 3 All E.R. 402 (HL).

essence, permitted doctors to prescribe contraceptive treatment for "girls" under the age of 16 without the knowledge and consent of their parents. The majority of their Lordships held that the parental right to determine whether or not their child will undergo medical treatment terminates when the child,

> achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed. [And], [it] will be a question of fact whether a child seeking advice has sufficient understanding of what is involved to give a consent valid in law.[5]

In arriving at this conclusion, Lord Scarman stated:

> Parental rights clearly do exist, and they do not wholly disappear until the age of majority. Parental rights relate to both the person and the property of the child: custody, care and control of the person and guardianship of the property of the child. But the common law has never treated such rights as sovereign or beyond review and control. *Nor has our law ever treated the child as other than a person with capacities and rights recognised by law. The principle of the law, as I shall endeavour to show, is that parental rights are derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.* The principle has been subjected to certain age limits set by statute for certain purposes; and in some cases the courts have declared an age of discretion at which a child acquires before the age of majority the right to make his (or her) own decision. *But these limitations in no way undermine the principle of the law, and should not be allowed to obscure it.*[6]

Furthermore, Lord Scarman stated:

> The law relating to parent and child is concerned with the problems of the growth and maturity of the human personality. If the law should impose on the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change.[7]

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[5]Ibid., at p.423, per Lord Scarman.

[6]Ibid., at p.420 (emphasis added).

[7]Ibid., at p.421.

To reiterate, the underlying principle of law is that as a child matures he or she gains more control over important decisions and parental rights must yield accordingly.

This principle was recently adopted by the Alberta Court of Appeal in *C. et al. v. Wren*.[8] In this case the sole question before the court was whether a 16-year-old expectant mother had the capacity to give an informed consent to an abortion. The "minor's" parents petitioned the court for an injunction against the doctor who had agreed to perform the procedure, arguing that their child could not provide an effective consent. The Court of Appeal affirmed the trial court decision to reject the parent's application. The principle of law held to be applicable is that parental prerogative terminates when a child achieves sufficient intelligence and understanding to make informed decisions. Therefore, the Court of Appeal concluded that due to the patient's age and level of understanding a valid consent had been made.[9]

As noted above, common law principles are applicable only when the legislature is silent or when express statutory

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[8]*C. et al. v. Wren* (1986), 35 D.L.R.(4th) 419 (Alta. C.A.). For an earlier pronouncement of this principle see *Johnston v. Wellesley Hospital* (1970), 17 D.L.R.(3d) 139 (Ont. H.C.). And for analysis see Ferguson (1988), Emson (1987), Thomson (1981) and Wolfish (1981).

[9]This decision will, without doubt, gain more attention as women now have, as a result of the Supreme Court of Canada's decision in *R. v. Morgentaler et al.*, (1988) 44 D.L.R.(4th) 385, [1988] 1 S.C.R. 30, 37 C.C.C.(3d) 449, the constitutional right to abortion on demand. It will not be long before a 14 or 15-year-old attempts, to her parents' dismay, to take advantage of her liberty rights as a woman.

provision, as in subsection 16(5) of the *Infants Act*, permits it. With respect to admission to and treatment in mental health facilities, the legislature, in section 19(5) of the *Mental Health Act*,[10] has deemed 16 to be the age of capacity. Children below this age are subject to the substitute consent of parents or guardians who are permitted to make these important health care decisions for them.[11] Thus, common law principles with respect to the attainment of capacity can have no application here as the legislature has spoken. The only means avaliable to alter the law, short of legislative amendment, is by way of challenge based upon the Charter.

Pursuant to section 19(1)(b) of the MHA, a person under the age of 16 years may be admitted to a designated mental health facility on the request of a parent or guardian and on the recommendation of a physician who is of the opinion that the person is "mentally disordered" (i.e., "mentally retarded or mentally ill").[12] This is considered a "voluntary admission" even though the consent of the person to be admitted is not required. As a consequence of this so called "voluntary admission", the informal admission procedure found in section

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[10]*Mental Health Act*, R.S.B.C. 1979, c.256, [Am. 1987, c.42, s.65].

[11]Ibid., subs. 19(1)(b).

[12]The MHA defines a "mentally ill person" as "a person suffering from a disorder of the mind
(a) that seriously impairs his ability to react appropriately to his environment or to associate with others; and
(b) that requires medical treatment or makes care, supervision and control of the person necessary for his protection or welfare or for the protection of others".

19, that simply requires a request from a parent or guardian and one medical opinion that a person is "mentally disordered", is applicable. And, none of the procedural safeguards associated with "involuntary admissions", including the right to a panel review hearing[13] and the right to judicial review in the Supreme Court,[14] are available. Furthermore, youths, as "incompetents", have no control over treatment and have no right to apply for a discharge; only those persons entitled to apply for his or her admission can do so.[15] As well, in this scheme, there is neither provision for a youth's independent representation nor for his or her views to be heard.

Youths are particularly vulnerable to involuntary admission under the MHA not only because their constitutional rights and freedoms go unrecognized, but also because of an expanding and ill-defined concept of "mental illness".[16] The declared mandate of the Maples Adolescent Treatment Centre, a designated provincial mental health facility in British Columbia, reveals the breadth of this concept in present times. The facility is mandated "to provide treatment for adolescents...who are

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[13]MHA, s.21.

[14]Ibid., s.27.

[15]Ibid., s.19(3)(b).

[16]In relation to defining mental illness, Panneton argues, "[m]ental illness continues to be a matter of opinion, subjective in nature and resting at least partially on a function of values as represented by the diagnostician... Moreover, because there is little absolute knowledge about the child development process, a minor's behavior and personality traits are particularly susceptible to misdiagnosis" (1978:58-9).

psychiatrically ill (persons diagnosed as having major psychiatric disorder, affective disorder or incapacitating neurotic disorder) and for adolescents who have a serious conduct disorder" (Maples, 1987:1). The inclusion of conduct disorder provides great latitude in the determination of who is in need of treatment. If *DSM-III-R* is used for diagnostic purposes then behaviour including lying, truancy, cheating in games or schoolwork, running away from home, regular use of tobacco, liquor or illicit drugs and early sexual behavior, are considered indicative of "mental disorder" (A.P.A., 1987:53).

Lerman suggests that perhaps the division between sociological type disorders and medical/psychiatric disorders is becoming increasingly blurred; "the psychiatric hospital is becoming more sociological than medical in its approach" (1982:136). Similarly, Warren argues that misbehaviour is increasingly interpreted as indicative of a pathological condition; "[a]dmissions of adolescents to psychiatric hospitals is increasingly a response to their behaviour problems rather than to severe pathology" (1981:728). It seems that mental health facilities have the potential to become a more prominent locus of control in response to behaviour that was formerly classified as "delinquent" or "immoral" and traditionally controlled through criminal or delinquency legislation. The important point here is that as part of the control apparatus affecting youths it is imperative that the mental health system provide a fair opportunity to question the necessity or desirability of this kind of potentially harmful intervention.

What is being advocated here is not an abandonment of positive right claims (such as the right to appropriate care and treatment), but rather, recognition of other competing rights, such as the rights to liberty and security of the person. Such an initiative can encourage the development of a principle of effective mental health treatment or no mental health treatment (see Gordon and Verdun-Jones, 1987).

Prima facie, the state of affairs created by section 19 of the MHA - premised upon antiquated notions of both the extent of parental rights and the capacity of young persons to consent to treatment - raises several grounds upon which to argue that this section is inconsistent with the Charter, and to the extent of these inconsistencies, should be of no force or effect.[17]

First, it can be argued that since section 19(1)(b) singles out only those under the age of 16 for differential treatment, it is a denial or limitation of "equal protection and equal benefit of the law without discrimination...based on...age" which is guaranteed by section 15 of the Charter.[18] The party seeking to uphold this law should be obliged, pursuant to a section 1 analysis, to justify - unless it is self evident as in the case of a four year old - the use of age as the sole

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[17] *Constitution Act, 1982*, Part VII, s.52.

[18] See Chapter VI. Also, it should be noted that an argument can be made that this is a *prima facie* case of the total negation of a right, as opposed to a limitation, and, as a consequence, ends the matter without having to conduct a section 1 analysis. See *R. v. Big M Drug Mart Ltd., supra*, at p.415 C.C.C. and *A.-G. Quebec v. Quebec Ass'n of Protestant School Boards et al.* (1984), 10 D.L.R. (4th) 321, [1984] 2 S.C.R. 66, 54 N.R. 196.

relevant criteria for the determination of capacity.

Secondly, it can be argued that a person admitted to a mental health facility pursuant to section 19(1)(b) of the MHA suffers a violation of their "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", as guaranteed by section 7 of the Charter. A youth's right to liberty is infringed when he or she is admitted to a mental health facility without his or her express consent. And, importantly, a youth's right to security of the person is infringed when compelled, as an incompetent, to accept treatment that is not desired and potentially injurious. Moreover, these infringements are not in accordance with the principles of fundamental justice, as the precedents indicate that these principles embrace, at least, the notion of procedural fairness.[19] And, it is certain that procedural fairness includes provision for independent representation,[20] an opportunity to be heard and access to judicial review. Therefore, since anyone admitted pursuant to section 19(1)(b) of the MHA is deprived of

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[19]See *R. v. Morgantaler et al.* (1988), 44 D.L.R.(4th) 385, 37 C.C.C.(3d) 449, [1988] 1 S.C.R. 30 (S.C.C.) and *Reference Re s. 94(2) of Motor Vehicle Act (B.C.)* (1986), 24 D.L.R.(4th) 536 (S.C.C.).

[20]See Panneton (1977:81) who argues that independent representation is required as the parent's and child's interests are not always compatible. He states: "As a general rule of law, the child should be afforded impartial representation whenever there is a potential conflict of interest with his family in any proceeding which could result in the minor's confinement. Without such an absolute principle of law, minors will continue to be victimized both by well-meaning and ill-intentioned parents."

liberty and subject to an infringement of security of the person, and the procedure set out for this process is not in accordance with the principles of fundamental justice, this provision is in violation of the guarantee found in section 7. And, with the possibility of a wrongful admission of a healthy child, it would be difficult for the government to satisfy a court, pursuant to its onus under section 1 of the Charter, that the means chosen to override a youth's rights and freedoms are reasonable and demonstrably justified in this instance. In summation, section 7 seems to provide a strong Charter challenge to section 19(1)(b) of the MHA.

Thirdly, section 9 of the Charter - which guarantees the right not to be arbitrarily detained or imprisoned - can be employed in challenging the impugned section. The leading case concerning section 9 of the Charter, in relation to the rights of mental health patients, is *Thwaites v. Health Sciences Centre Psychiatric Facility*.[21] In this case, the appellant who was admitted to a psychiatric facility as a compulsory patient pursuant to provisions of Manitoba's *Mental Health Act*,[22] challenged the constitutionality of the compulsory committal provisions of the Act. Judge Scollin, sitting in motions court, denied the application.[23] In the course of his decision, Judge

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[21] *Thwaites v. Health Sciences Psychiatric Facility* (1988), 48 D.L.R.(4th) 338 (Man. C.A.).

[22] *Mental Health Act*, R.S.M. 1970, c. M110, ss. 2(o)(q)(r). 9 (am. 1980, c. 62, s. 19), 15 (am. *idem*, ss. 21,22), 26(1).

[23] Re *Re Thwaites and Health Sciences Centre et al* (1986), 33 D.L.R. 549, (Man. Q.B.).

Scollin - obviously perturbed by the flood of Charter arguments pouring into the courts - made some surprising comments with respect to the application of the Charter generally and the application of the Charter to mental health legislation specifically. In discussion of whether a detention based upon the provisions of the mental health legislation in question would amount to one that was "arbitrary" and inconsistent with section 9 of the Charter, Judge Scollin held that, "[g]iven that the standard as formulated and the requirement of both medical and judicial judgment, the committal process in the present type of case is not unreasonable, despotic, capricious or the like and does not fall within any of the other shades of meaning of the word 'arbitrary'".[24] In coming to this conclusion as to the meaning of "arbitrary", the judge looked at some case law,[25] as well as academic commentary;[26] however, as the following words indicate, he appears to be most influenced by his view of our social and legal history:

> Our legal system has been shaped by the social philosophy of the common law and bears no imprint of the totalitarian heel of continental or eastern Europe. We live in a constitutional temperate zone and need not fear extremes of alien political climes. Appreciation of that background can affect our view of the meaning of the words employed to convey the law. *Oppression did not stalk the land until midnight on April 16, 1982 and we should be on guard against a Charter-inspired paranoia that sees any restraint as the Bastille or the Lubyanka and hears the parliamentarian speak with the voice of*

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[24] Ibid., at p.559.

[25] For example, *Re Mitchell and The Queen* (1983), 150 D.L.R. (3d) 449, 6 C.C.C. (3d) 193, 42 O.R. (2d) 481.

[26] See Chevrette (1982).

the tyrant.[27]

Furthermore, returning to the matter at hand, he stated:

> This is not to deny the obvious need for improvement, but if the legislation merits no praise it deserves no pejoratives... Incomplete knowledge and imperfect solutions may deny this legislation a place in the civil liberties hall of fame, but it is saved from the brand of the arbitrary by the existence of a broad but ascertainable test and its ultimate dependence, in common with much other legislation, on professional ability and integrity.[28]

The Court of Appeal rejected Judge Scollin's restrictive interpretation of "arbitrary". His analysis was held to inhibit a purposive interpretation of section 9 of the Charter. The Court of Appeal found the criteria governing compulsory admissions rather vague and subjective. Although detention is authorized by statute,

> the legislation does not narrowly define those persons with respect to whom it may be properly invoked, and does not prescribe specifically the conditions under which a person may be detained. The compulsory admission provisions of the Act fail the test and are clearly arbitrary.[29]

Furthermore, pursuant to the required section 1 analysis, Mr. Justice Philip, considered the reasonableness of the limitation:

> Although I am satisfied that the objective of the compulsory admission provisions of the Act is one of sufficient importance to warrant overriding the right "not to be arbitrarily detained", I am equally satisfied that the provisions clearly fail all components of the proportionality test. Firstly, I have concluded that the provisions have not been carefully chosen to achieve their objective; that they are arbitrary and unfair for

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[27] *Re Thwaites, supra*, at pp.557-8, (emphasis added).

[28] Ibid., at p.558. The court had little to say with respect to the application of section 7 except that it provided no remedy here.

[29] *Thwaites, supra*, at p.349 (per Philip J.A.).

> the reasons set out above. Secondly, I do not think it can be said that, in the absence of a "dangerousness" or like standard, the provisions impair as little as possible on the right of a person "not to be arbitrarily detained". Finally, when compared with other legislation...the provisions strike the wrong balance between the liberty of the individual and the interests of the community. In the absence of objective standards, the possibility of compulsory examination and detention hangs over the heads of all persons suffering from a mental disorder, regardless of the nature of the disorder, and the availability and suitability of alternative and less restrictive forms of treatment.[30]

In applying the reasoning of this important precedent to B.C.'s MHA, a cogent argument can be advanced that its provisions, especially section 19(1)(b), are arbitrary and not reasonable and demonstrably justifiable in relation to the objectives sought.

Lastly, a potential remedy for injustices caused by the MHA is found in section 10 of the Charter which guarantees upon arrest or detention the right to counsel as well as the right to have the validity of the detention determined by way of *habeas corpus*. The first part, found in section 10(b), needs little elaboration as it is obviously being denied; there is no provision made in the Act for a person under 16 years of age to be represented. With respect to the latter part found in section 10(c), the decision of the Prince Edward Island Supreme Court in *Re Procedures and the Mental Health Act*[31] is helpful. This case concerned a *habeas corpus* application by an involuntarily committed patient. Judge McQuaid, speaking for the court, held

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[30]Ibid., at p.351.

[31]*Re Procedures and the Mental Health Act* (1984), 5 D.L.R.(4th) 577 (P.E.I. S.C.).

that since the Act in question provided "for an indepth review of the *grounds of committal* at the option of the person committed and, again, at his option, immediately upon his committal", then "it is extremely doubtful that *habeas corpus* was a remedy which was available".[32] Although making this finding he went on to consider the content of this remedy for two reasons. First, he may have been wrong with respect to the holding that at common law the remedy of *habeas corpus* was unavailable in this instance and, secondly, in any case the remedy is made available pursuant to the Charter and therefore, on this basis alone, must be examined.

Upon a review of the relevant case law the court held that only in the case of a patent irregularity on the face of the record can a judge direct an inquiry questioning the legality of the detention. In other words,

> First, he must examine the record; that is, the committal document together with any essential supporting documents. Then he must examine the statutory requirements respecting such a committal. If the record complies with the statutory requirements, that is an end to the matter.[33]

In the case to be decided the court found no patent irregularity on the face of the record, therefore there was no discharge ordered. Granting the interpretataion of the law to be correct, the question arises as to the effect it would have on the case of a *habeas corpus* application by a person admitted to a mental health facility pursuant to section 19(1)(b) of the MHA. Can a

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[32]Ibid., at p.585.

[33]Ibid., at p.586.

strong argument be made that to admit a person without his or her consent, using a voluntary admission procedure, is a patent irregularity? Or will a court asked to rule on this matter simply look at the record and look at the statute and conclude that the proper procedure had been followed? Although both possibilities apparently are supportable on this precedent, the former is more consistent with a purposive interpretation of section 10 of the Charter and should, therefore, be adopted.

In interpreting the Charter, Canadian courts are increasingly looking to American authorities for guidance. In the United States a shift towards judicial recognition of independent civil liberties for youths, as evidenced in several leading cases concerning issues such as due process rights in delinquency proceedings[34] and privacy rights in relation to abortion and contraception decisions,[35] was curtailed in a case concerning a so-called "voluntary" admission of a child into a mental health facility. In *Parham v. J.R.*,[36] the United States Supreme Court held that judicial review of "voluntary" admissions of minors to mental health facilities are not constitutionally required; formal due process, which would include independent legal representation, was ruled to be unnecessary. According to Chief Justice Berger such formalities

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[34]See *Re Gault* (1967), 387 U.S. 1.

[35]See *Planned Parenthood of Central Missouri v. Danforth* (1967), 428 U.S. 52 and *Carey v. Population Servs. Int'l* (1976), 431 U.S. 678.

[36]*Parham v. J.R.* (1979), 442 U.S. 584.

would amount to an inefficient use of time and energy.[37] The court broke with the pattern of previous decisions and refused to recognize a potential conflict of interest between a parent and a child in an application by that parent to have his/her child admitted to a psychiatric institution.

Melton (1984) found this decision surprising for, after the landmark case of *Lessard v. Schmidt*,[38] wherein constitutional protections for respondents in civil commitment proceedings were specified, several states "legalized" such proceedings. In anticipation of the *Parham* decision, some of these states even adopted procedures for judicial review of the "voluntary" admission of minors into mental health facilities. And some of these procedures provided greater due process protection than *Parham* ultimately required (Melton, 1984:152). The *Lessard* decision, Melton suggests, reflected "widespread recognition by courts and legislatures that involuntary mental hospitalization is often not a benign exercise of state power" (Melton, 1984:152). Moreover, a few years earlier the Supreme Court and Chief Justice Berger, in a case involving an adult, expressed concern over a potential misdiagnosis and the ensuing harm that unnecessary hospitalization might cause.[39] Melton therefore finds the the Supreme Court to be acting inconsistently in now placing such great confidence in the diagnostic abilities of

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[37]Ibid., at p.605.

[38]*Lessard v. Schmidt* (1972), 349 F. Supp. 1078 (E.D. Wis.).

[39]See *O'Connor v. Donaldson* (1975), 422 U.S. 563.

psychiatrists:

> In the face of such precedent, to rely on medical or psychological decision makers without judicial review for civil commitment of minors would require a denial of the risks of unnecessary and erroneous curtailment of liberty, unless diagnosis could be shown to be substantially more reliable and valid for minors than for adults, or the stigma, and deprivation of liberty could be shown to substantially less harmful. (Melton, 1984:152)

The reasoning of the Court, as Melton cogently argues, is severely flawed. He finds from a review of the relevant literature on the family, mental hospitals and adversary procedures, that the court's assumptions which formed the foundation of the ruling are largely spurious. The Court paid little attention to relevant social science research and, instead, relied too heavily on the Chief Justice's intuition. It is hoped that our courts, when having to balance the interests of the state in promoting the health and welfare of young persons against the possibility of wrongful and potentially harmful admissions into mental health facilities, will consider the relevant scientific evidence.

In summary, it appears that for most health care decisions, young persons' rights and freedoms are recognized and protected, to some extent, by the common law. The common law, with its recognition that some minors mature prior to the "age of majority", provides doctors and dentists with some latitude to decide whether a young person is competent to provide an informed consent to medical or dental procedures. The common law, however, is inapplicable in relation to requests for

admission to and treatment in mental health facilities. Persons under the age of 16 can be admitted to mental health facilities on the request of their parents or guardians. An irrefutable presumption exists that persons under the age of 16 lack the requisite capacity to make the request themselves and to consent to treatment once in the facility. As outlined above, the provisions of the MHA raise several civil liberty concerns and in several respects are in violation of rights and freedoms guaranteed by the Charter.

In the next chapter, there will be a change of emphasis from a component of the social control network to a specific provision of the Charter. The potential impact of the equality rights guarantee of the Charter on the legal status of youth in British Columbia will be telling for whether young persons are going to be brought within a liberationist conception of justice; therefore, it is made the focus of the next chapter.

CHAPTER VI

EQUALITY RIGHTS: JUDICIAL INTERPRETATIONS THUS FAR

In this chapter, judicial responses to the use of the equality rights guarantee found in section 15 of the Charter will be examined. Section 15 states:

> 15(1)Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, *without discrimination based on* race, national or ethnic origin, colour, religion, sex, *age*, or mental or physical disability.[1]

In general, equality rights claims will seek to emphasize similarities between adolescents and adults; therefore, how courts will respond to claims that laws which differentiate on the basis of a minority status are "discriminatory" will be indicative of whether a liberationist conception of justice for young persons might be advanced by the Charter.

It is important for a complainant to be able to establish "discrimination" under section 15 of the Charter, because only when this is achieved does the analysis move into section 1, where the party seeking to uphold the law has the burden of proving its reasonableness.[2] This section 1 analysis is essential as it requires a court to balance the interests of the state in pursuing its objectives, against the interests of persons whose rights and freedoms are being limited. In this

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[1]Emphasis added. Several commentaries on this section can be found. See Tarnopolsky (1982), Wilson (1985), Smith (1986), Brudner (1986), and Harris (1987).

[2]See comments in the Introduction.

respect, the Charter has the potential of making law makers judicially accountable for legislative interventions into the lives of young persons because the Charter can be interpreted in a manner that requires "both a baring of the assumptions which underlie such legislation and an assessment of the values which support it" (Wilson, 1985:297). Therefore, if the values and assumptions are exposed and do not represent a sound justification, empirically or otherwise, the impugned governmental intervention must be found to be inconsistent with the Charter and to the extent of the inconsistency, of no force or effect.[3]

In relation to the use of section 15 of the Charter in challenging allegedly discriminatory laws, the first step of the inquiry has become somewhat difficult to surmount. Therefore several questions in relation to establishing a violation of section 15 (1) will be addressed. First, what kind of interpretation is given to the words of section 15 and how does this differ from the interpretation of the equality provision found in the *Canadian Bill of Rights*? Secondly, do different standards of review apply to different types of discrimination? Thirdly, and most crucially, what meaning is ascribed to the words "without discrimination"? And lastly, what are the implications of the answers to the above questions for the advancement of liberty rights for young persons.

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[3]*Constitution Act, 1982,* Part VII, s.52.

With respect to the issue of interpretation, the Ontario Court of Appeal in *McKinney v. The University of Guelph*,[4] held that the language chosen for section 15 was calculated to avoid difficulties found in the Bill and should be given a broad and liberal interpretation.[5] An example of how the equality provision of the Bill was interpreted is found in *Mackay v. The Queen*.[6] In this case, the Supreme Court of Canada held the provisions of the *National Defence Act*[7] that mandated trial in military court for military personnel accused of federal offences, not to be in violation of the guarantee of equality found in the Bill. The majority of the Court, maintaining a restrictive interpretation of the Bill, reasoned that the impugned provision did not violate the right to equality as it was enacted pursuant to a valid federal objective. This restrictive reasoning is clearly not applicable under the Charter which is the supreme law of Canada.[8]

In relation to the issue of whether different standards or scrutiny apply to different bases of discrimination, both the British Columbia Court of Appeal and the Ontario Court of Appeal have answered in the negative.[9] On this matter, the Ontario

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[4]*McKinney v. University of Guelph*, (1987) 46 D.L.R.(4th) 193.

[5]For elaboration of this view see Tarnopolsky (1982).

[6]*Mackay v. The Queen* (1980), 54 C.C.C. (2d) 129, 114 D.L.R. (3d) 393, [1980] 2 S.C.R. 370, (S.C.C).

[7]*National Defence Act*, R.S.C. 1970, c.N-4.

[8]*Constitution Act, 1982, supra*, s.52.

[9]See *Harrison v. University of British Columbia*, (1988) 21 B.C.L.R. 145 (B.C.C.A.), (1986) 30 D.L.R.(4th) 206 (B.C.S.C.)

Court of Appeal in *McKinney* stated: "With respect, we can find nothing in the text of s. 15(1) that warrants a difference in the degree of protection accorded to any of the rights guaranteed under that section".[10]

In relation to the third and most crucial issue to be addressed, namely, the meaning ascribed to the words "without discrimination", the Supreme Court of Canada, when called upon to address this issue, will have three options. The first, suggested by Professor Hogg (1985), has yet to find acceptance in the relevant judicial precedents. In his opinion, the words "without discrimination" should be read in a "neutral sense". This implies that any distinction or classification advanced in law should be considered discriminatory and, as a result, the investigation should be forthwith moved into section 1. As most laws tend to make distinctions or classifications, this view would greatly reduce the complainant's burden of having to establish a *prima facie* case; therefore, courts have tended to reject it.

The second and third options facing the Supreme Court of Canada emanate from, respectively, the British Columbia Court of Appeal (hereinafter B.C.C.A.) and the Ontario Court of Appeal (hereinafter the Ont. C.A.). It will be argued that the Ont.

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[9](cont'd) and *McKinney, supra*.

[10]*McKinney, supra*, p.234. This issue arose because the trial judge in *McKinney*, influenced by American jurisprudence, suggested that age is a less repugnant category of discrimination and, therefore, deserving a minimal standard of scrutiny. It seems that this interpretation has been put to rest in the *Harrison* and *McKinney* decisions.

C.A. offers a more sensible approach than the B.C.C.A. as it permits the balancing of competing interests to take place within section 1, whereas the B.C.C.A. limits debate to the confines of section 15.

The second option facing the Supreme Court of Canada was developed by the B.C.C.A. in the leading cases of *Andrews v. Law Society of British Columbia*,[11] *Regina v. Le Gallant*,[12] and *Harrison v. University of British Columbia*.[13] The Court has defined "without discrimination" as distinctions that are unreasonable or unduly prejudical. The effect of this is to make the complainant's task of satisfying his or her onus of proof extremely difficult and to thereby restrict the section's potential in advancing equality rights. To clarify the position adopted by the B.C.C.A. and the repercussions for the advancement of equality rights, a closer look at the precedents is in order.

In *Andrews*, the complainant (appellant), a citizen of the United Kingdom, challenged a provision of the *Barristers and Solicitors Act*[14] which prohibited non-Canadians from the

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[11] *Andrews v. Law Society of British Columbia* (1986), 2 B.C.L.R.(2d) 305, 27 D.L.R.(4th) 600, 23 C.R.R. 277, [1986] 4 W.W.R. 242 (B.C.C.A.) [leave to appeal to S.C.C. granted 7 B.C.L.R.(2d) xlin, 23 C.R.R. 273n, 74 N.R. 233n].

[12] *Regina v. Le Gallant* (1986), 6 B.C.L.R.(2d) 105, 33 D.L.R.(4th) 444, 29 C.C.C.(3d) 46, [1986] 6 W.W.R. 372 (B.C.C.A.).

[13] *Harrison v. University of British Columbia, supra.*

[14] *Barristers and Solicitors Act*, R.S.B.C. 1979, c.26, s.42 [Am. 1983, c.10, sched.2].

practice of law in British Columbia. He argued that the provision was discriminatory under section 15 of the Charter and not "demonstrably justified in a free and democratic society";[15] therefore, unconstitutional and of no force or effect. The trial court dismissed the application,[16] holding that the complainant had not established that the distinction drawn by the Act was discriminatory. However, an appeal to the B.C.C.A was successful. Of particular interest, Madame Justice McLachlin, delivering the opinion of the court, took the opportunity to expound a test for section 15 Charter challenges. In brief, the court held that the test for "discrimination" occurs within section 15 alone. The role of section 1 is limited. If there is a finding of "discrimination" then it is unlikely to be saved by section 1.[17] It is to be used in times of "overriding" circumstances such as war.[18] According to Madame Justice McLachlin, "the test to be applied in determining whether the provision is discriminatory is whether it is unfair or unreasonable, having regard to the purposes it serves and effect it has on those who are treated unequally".[19] Thus the

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[15]Charter, s.1.

[16] *Andrews v. Law Society of British Columbia*, (1986) 66 B.C.L.R. 363, [1986] 1 W.W.R. 252, 2 D.L.R.(4th) 9 (B.C.S.C.)

[17]See *Re MacVicar And Superintendent of Family & Child Services*, (1986) 34 D.L.R.(4th) 488 (B.C.S.C.), at p.503 where Her Honour Judge Huddart stated: "...I have great difficulty in envisaging how I could find that legislation drew an unreasonable distinction under s. 15(1), then find it a reasonable limit on the right to be treated equally."

[18]*Andrews, supra*, p.316.

[19]Ibid., p.317.

entire two step process, described earlier, occurs within section 15, with the onus upon the complainant to satisfy the court that the impugned distinction is unreasonable or unfair in the circumstances.[20]

In *Le Gallant*, the accused (respondent) was charged with sexual assault pursuant to section 246.1(1) of the *Criminal Code*.[21] Since the alleged victim was under the age of fourteen (he was thirteen at the time) and the accused was more than three years older (he was thirty-seven at the time), under subsection 246.1(2) no defence of consent was available.[22] The accused challenged this provision on the grounds that it discriminated on the basis of age. The trial judge agreed with

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[20]In *Andrews* the complainant (appellant) satisfied his onus as the court found that he was similarly situated with others admitted to the Law Society and that the distinction drawn on the basis of citizenship was unreasonable and therefore "discriminatory". Furthermore, the court concluded that this limitation was not saved by section 1. Therefore, the impugned provision was held to be inconsistent with the Charter and to the extent of the inconsistency to be of no force and effect.

[21] *Criminal Code*, R.S.C. 1970, c.C-34, subs. 246.1(1) (enacted 1980-81-82-83, c.125, s.19). See the related case of *R. v. Ferguson* (1987), 16 B.C.L.R.(2d) 273 (B.C.C.A.), where the appellant accused challenged the constitutionality of s.146(1) of the *Criminal Code* (since repealed, S.C. 1987, c.24, s.2, and substituted by the offence of sexual exploitation). This section made it an absolute offence for a "male person to have sexual intercourse with a female person who (a) is not his wife, and (b) is under the age of fourteen years". While the court held that this provision significantly violated the accused's s.7 Charter rights, since no defence of honest mistake of fact was permitted, the majority opined that this limitation was reasonable and demonstrably justified, due to the significant harm that could follow from this kind of behaviour and the need to deter it.

[22]Subs. 246.1(2), enacted S.C 1980-80-82-83, c.125, s.19, has since been repealed, S.C. 1987, c.24, s.10.

this submission and struck it down; however, this decision was overturned on appeal. In holding that the impugned provision did not discriminate on the basis of age, the Court of Appeal reiterated the section 15 test first enunciated in *Andrews*:

> The question to be answered in determining whether or not a law is discriminatory is whether the law is reasonable or fair, having regard to its purpose and effect. Involved in this approach there is the consideration that a law may be discriminatory if it treats some persons unduly prejudicially.[23]

Even though section 246.1(2) has since been repealed[24] the *Le Gallant* decision is important in relation to the development of equal rights for young persons because it focuses upon differences between adolescents and adults. Unfortunately, however, it does so within the confines of section 15. The provision in question was held not to be unreasonable or unfair "because the distinction drawn by s.246.1(2) corresponds to a real and important difference between adolescents and adults";[25] namely, with respect to sexual experience, "[a]dults and adolescents are not similarly situated..."[26] The court arrived at this conclusion without considering the alleged victim's actual sexual experience and without the aid of social or bio-medical research that could have helped us to understand, in terms of sexuality, when adolescence ends and when adulthood begins. While it is self-evident, in terms of sexual experience,

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[23] *R. v. Le Gallant*, *supra*, p.300, per Hinkson, J.A.

[24] S.C. 1987, c.24, s.10.

[25] Ibid., p.300.

[26] Ibid.

that young or infant children are differently situated than adults, it is not so for older or adolescent children.

Because of the large age difference between the accused and the alleged victim, the *Le Gallant* case did not force the courts to address the issue of the constitutional validity of drawing distinctions that can be perceived, not unreasonably, as arbitrary. For example, what if the accused was still over three years older than the complainant but, instead of twenty-four years older, only three and a half years older and, the youth court, pursuant to section 16 of the *Young Offenders Act*[27] transferred the young person to ordinary criminal court? Could a court come to the same conclusion as the court in *Le Gallant*? Could a court, without any evidence with respect to the individuals involved, hold that this hypothetical 16 year old accused, and someone six months younger than him or her (who would have had a defence of consent pursuant to subsection 246.1(2) of the *Criminal Code*),[28] were not similarly situated? In other words, is the justification that it is generally accepted to be this way reasonable and justified, in terms of section 1, even in the absence of evidence of individual circumstances? Unless there is persuasive justification for drawing what are arguably arbitrary distinctions - which in some instances may amount to the practical reality of having to draw a line somewhere - distinctions, such as found in subsection 246.1 (2), should fail section 1 analysis. Nonetheless, from the

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[27] *Young Offenders Act*, *supra*, s.16.

[28] *Criminal Code*, *supra*.

precedents reviewed thus far, it is apparent that "well accepted distinctions" are considered by the judiciary in British Columbia to be significant indicators of whether statutes that draw distinctions on the basis of age are discriminatory.

In *Silano v. R. in Right of British Columbia*,[29] a regulation under the *Guaranteed Available Income For Need Act*,[30] (hereinafter GAIN), which distinguished between persons less than twenty-six years of age and persons twenty-six years of age and older with respect to the amount of assistance, was challenged on the basis of age discrimination. Pursuant to the test enunciated by the B.C.C.A. in the *Andrews* and *Le Gallant* cases, the Supreme Court held this distinction to be unduly prejudicial. While this decision indicates that "age discrimination" represents a viable ground to challenge laws that differentiate on the basis of age, it is not very helpful in the development of equality rights for young persons. In reasons for judgement, Justice Spencer reiterated the "well accepted distinctions" rhetoric discussed above:

> The distinction, in its effect, is unreasonable and unfair and unduly discriminatory to those under 26, many of whom are in precisely the same position as those over 26. *That age has no connection with any other recognized age limit already accepted by society as a watershed in the lives of its citizens.*[31]

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[29] *Silano v. R. in Right of British Columbia*, [indexed as: *Silano v. B.C. (Govt.)*], (1987) 16 B.C.L.R.(2d) (B.C.S.C.).

[30] *Guaranteed Available Income For Need Act*, R.S.B.C. 1979, c.158.

[31] Ibid., p.120 (emphasis added). In passing, the GAIN Act was amended (B.C. Reg. 305/87, O.I.C. 1703, 26th August, 1987) and the provincial legislature, in all its wisdom, decided to avoid the extra financial burden and eliminated the benefit that was

Along similar lines, the trial judge added that age 19 seemed to be a more appropriate age to draw the distinction because persons under the age of 19 are more likely to have access to parental support in times of need. However, in the absence of a full blown section 1 analysis, how cogent is the argument that age is a relevant factor in the determination of need? And, in the absence of evidence of individual circumstances, how convincing is the argument that drawing the line at age 19 is not discriminatory? Is not the purpose of a constitutional protection of equality to limit the abilities of legislative bodies to create arbitrary distinctions? Whether age is a justifiable criterion upon which to draw distinction in any specific area, is a question that should be pursued and fully debated under section 1. However, to reiterate, if the age distinctions drawn are well accepted in society, then irrespective of appropriateness, it seems that courts in B.C. are unlikely and unwilling to deem them discriminatory.

An excellent example of this is found in an interesting unreported judgement of the B.C.C.A. - interesting given the trial judge's pre-*Andrews* and *Le Gallant* reasoning. In *Regina v. D.F.G.*,[32] the court of first instance, the Youth Court, held that s.24(13) of the YOA - which disallows dispositions where there are insufficient facilities to carry them out - violated young persons' rights to equal protection and equal benefit of

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[31](cont'd) previously enjoyed only by those persons 26 years or older.

[32]*Regina v. D.F.G.*, unreported June 16, 1986. B.C.C.A. No.V000261 Victoria Registry.

the law, as no such requirement was in effect with respect to dispositions in ordinary or adult court. The Court of Appeal did not accept the reasoning of the youth court judge. In their opinion, a court cannot focus upon a single section or subsection alone because the YOA creates a separate and distinct criminal justice system.[33] And, in response to whether the entire Act is discriminatory, Mr. Justice Seaton stated:

> Of course young persons are treated differently. They must be. I do not think that to be barred by s.15 of the Charter. If it was contrary to s.15 then it would be saved by s.15(2) or section 1. *I do not propose to worry further about the constitutional validity of treating young people differently from adults. It seems to me to be perfectly clear.* [34]

However, justifications for treating young persons differently from adults is not always as self-evident as Mr. Justice Seaton claims; it is often not self-evident in relation to older or adolescent children and therefore such differential treatment should be subjected to a more thorough inquiry that is required under section 1 of the Charter.

Lastly, in *Harrison v. University of British Columbia*,[35] the constitutional validity of the University of British Columbia's (hereinafter UBC) mandatory retirement policy was at issue. Even though the Charter was held not to apply to UBC, as non-governmental actions lie outside its scope,[36] the trial judge, nonentheless, in an *obiter dictum*, considered the

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[33] Ibid., p.4.

[34] Ibid., (emphasis added).

[35] *Harrison v. University of British Columbia, supra.*

[36] B.C.S.C. decision, *supra*, at p.215.

application of section 15. The court held that the scheme does not discriminate as it does not impose "unreasonable" or "unfair" burdens on persons adversely affected by the age-based distinction. The choice of sixty-five years for mandatory retirement, according to Justice Taylor, has become well accepted as an age when one's legal status is subject to change. Evidence of this lies in "old-age" benefits like pensions and various "senior citizen" price-reductions on goods and services. The complainant was held to have failed in satisfying the onus of proof in this case. Not a surprising result since, according to Justice Taylor:

> The Court cannot...be greatly influenced by the suggestion that mandatory retirement enjoys little public favour, or is criticized among economists or social scientists... Those may be relevant matters for legislators and administrators, but they seem to have little bearing on the issues I must decide.[37]

This result is apparently the product of the test laid out by the B.C.C.A.. With the onus upon the complainant to establish unreasonableness there appears to be an unwillingness to give "equality" a purposive interpretation. The B.C.C.A., however, has overturned this decision.

On appeal, the Court of Appeal agreed with the trial court that U.B.C.'s mandatory retirement policy is not subject to Charter scrutiny as it is a private matter not falling within the Charter's reach.[38] However, the court turned to the *Human*

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[37]Ibid., p.211.

[38]See s.32 of the Charter and the leading case of *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery*, [1986] 2 S.C.R. 576.

Rights Act,[39] which is directly applicable to discriminatory actions by private persons. This Act protects against employment discrimination on the basis of age; however, it is only applicable to those persons between the ages of 45 and 65. Thus the issue arose as to whether this age limitation was in conformity with section 15 of the Charter. On this question the court held: "In the absence of evidence or a *self-evident* justification supporting the distinction between older workers under 65 years of age and those over 65 years of age, the distinction must be viewed as arbitrary".[40]

In an *obiter dictum*, the court suggested the age of majority as an example of where the purpose of drawing a distinction is more self-evident. The court stated:

> Examples of age-based distinctions in other statutes are more readily apparent. The Young Offenders Act, the Age of Majority Act, the Motor Vehicle Act (minimum age for obtaining a driver's license), Liquor Control Act (minimum age for consumption of alcohol) and the Infants Act (role of the Public Trustee, consent to medical treatment, infant's contracts) are some examples.[41]

Apparently then, these distinctions are not viewed as being arbitrary.

On the evidence made available to the court, it was held that the appellants had discharged their burden of establishing that the distinction drawn by the *Human Rights Act* was unfair and unreasonable in the circumstances. After paying lip-service

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[39] *Human Rights Act*, S.B.C. 1984, c.22, ss.1 and 8.

[40] *Harrison, supra*, B.C.C.A., at p.157 (emphasis added).

[41] Ibid., at p.156.

to section 1, the court concluded that the definition of age in the Act is inconsistent with the Charter and to the extent of this inconsistency is of no force and effect. The effect of this is to maintain the Act with one change, the elimination of the definition of age. Thus, it now apparently applies to everyone including, of course, those over the age of 65.[42] And, as a result, the mandatory retirement policy of U.B.C. was found to be in violation of the new *Human Rights Act*. While the result of this case is somewhat surprising, the Charter analysis is not. The debate in relation to competing interests was limited to section 15, where the complainant has an onerous burden of proof and where the scope of the evidence required to justify impugned legislation can be easily curtailed.

While Professor Hogg's definition of discrimination represents one extreme of the spectrum and the B.C.C.A.'s the other, the Ontario Court of Appeal has opted for a middle of the road approach. In the leading case of *McKinney v. University of Guelph*,[43] which also addressed the validity of a university's mandatory retirement policy, the court defined discrimination as "treatment which viewed objectively, is tangibly adverse, unfavourable or prejudicial..."[44] The court concluded,

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[42]The remedy applied here by the court is questionable. In essence it has introduced a new anti-discriminatory law, one that substantially differs from the intention of the provincial legislature. The proper course would have probably been to strike down the entire Act, in doing so however it would have legalized mandatory retirement.

[43]*McKinney v. University of Guelph, supra.*

[44]Ibid., at p.226.

respectfully disagreeing with the B.C.C.A., that a test of reasonableness is not required in section 15, it belongs in section 1. The majority opined:

> Reasonableness, then, is a matter to be determined within the context of s. 1, where the rights of the person challenging the legislation can be balanced against the interests of other people and the societal values which the legislation may be claimed to assert or uphold. *With respect, we are of the view that to require proof of unreasonableness for a finding of discrimination under s. 15(1) distorts the operation of the Charter. The burden of proof which properly falls on the upholder of the distinction under s. 1 is shifted to the challenger. If in a given case the requirement is not met, real discrimination could be defined out of existence and the open discussion of competing rights and values, which s.1 requires, would be forestalled.*[45]

The approach to section 15 of the Charter adopted by the Ont. C.A. is more sensible than the approach adopted by the B.C.C.A. - it is consistent with a constitutional guarantee of "equality before and under the law and equal protection and benefit of the law". While it does not go as far as Professor Hogg's approach it is, nonetheless, in accord with a purposive interpretation of this section; namely, to constrain governmental action inconsistent with the right to equality. It accomplishes this by paying heed to the two step methodology enunciated by the Supreme Court of Canada.

In summation, this chapter has sketched how courts have, thus far, interpreted the equality rights guarantee found in section 15 of the Charter. In British Columbia, the Court of Appeal, as evident by its restrictive definition of "discrimination" and its *obiter dictums* in the *D.F.G.*, *Silano*

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[45]Ibid., at p.232 (emphasis added).

and *Harrison* cases, has left little room for the advancement of equality rights for young persons. Since the "equality rights" debate in British Columbia is limited to section 15, only moving to section 1 in limited circumstances, the balancing of competing interests, as mandated by the Supreme Court of Canada, is curtailed. Limiting debate, as well, is the "well accepted distinctions" rhetoric which makes a complainant's task in proving the unreasonableness of legislation quite onerous. Therefore, the justifications for protectionist or welfare oriented governmental intrusions into the lives of young persons have not been subjected to serious scrutiny. Whether the equality rights provision of the Charter will eventually enforce a liberationist approach to achieving justice for children -- an approach that would emphasize the similarities between adolescents and adults - depends on the Supreme Court of Canada, who will have the last word on the interpretation of this provision.

CHAPTER VII

SUMMARY AND CONCLUSION

This thesis has assessed the potential impact of the *Canadian Charter of Rights and Freedoms* on the legal status of youth in British Columbia. The Charter, as the supreme law of Canada, provides an opportunity to re-evaluate the legal treatment of "minors" or "children" because laws that are inconsistent with its provisions can be declared, to the extent of any inconsistency, of no force or effect. In fact, the Charter establishes a new constitutional framework for determining the validity and reasonableness of governmental actions.

In chapter II, the protectionist and liberationist conceptions of youth justice were introduced and liberationist justifications for the recognition of more extensive rights and freedoms for "minors" were advanced. Also, it was noted that any consideration of the recognition of greater rights and freedoms for young persons is controversial because of its repercussions for the rights of parents and the powers of the state. In particular, it was suggested that such recognition puts into question the presumptive right of parents to make decisions on behalf of their children and limits the state's ability to use its *parens patriae* jurisdiction in pursuit of its objectives.

In protectionist legislation the principal justification for treating children differently than adults is the presumed

incapacity of children; children are not recognized as independent actors. However, although the reasonableness of restrictions on the autonomy of young or infant children is obvious or self-evident, this is not so in regard to older or adolescent children. It was argued, in philosophical and social terms, that it is unjust to presume that all children have limited intellectual capacity and, therefore, it was suggested that any party seeking to limit the rights of children on the basis of incapacity should be made to bear the burden of justification.

The constitutional framework created by the Charter to examine these issues is consistent with the philosphical approach advocated by Worsfold's (1974) and Houlgate's (1981) theories of justice. All persons, pursuant to the Charter, are protected from governmental limitations on their rights and freedoms. And, although rights are not absolute, limitations can be challenged and subjected to Charter scrutiny. In this process, courts have the task of balancing the interests of the state in advancing its objectives against the interests of persons whose rights and freedoms are thereby being infringed. Furthermore, evidence introduced in support of justifications for these limitations is generally required and "should be cogent and persuasive and make clear to the court the consequence of imposing or not imposing the limit".[1] It is in this manner that an attempt can be made to treat all persons fairly.

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[1] *R. v. Ferguson, supra* chapter VI, at p.298.

The extent to which the protectionist and liberationist conceptions of justice have been adopted in law were examined in chapters III through V. The main components of the social control network facing young persons (youth justice, child protection and health care) provided the foci of study. In short, the guiding ideologies of these various components of the control net were exposed and scrutinized in relation to Charter provisions.

The analysis revealed inconsistencies in the recognition of young persons as right-bearing individuals. With respect to the separate criminal justice system for youth, it was argued that the *parens patriae* philosphy of the JDA permitted the blurring of welfare and crime control justifications for state intrusions into the lives of juveniles, and facilitated the belief that due process protections were unnecessary in what were regarded as non-adversarial proceedings. This Act came under attack from divergent positions. Civil libertarians argued that the lack of due process protections led to discretionary and abusive results and, therefore, the Act had failed to fulfil its promise of an humanitarian system of justice. And, crime control advocates argued that the ideal of rehabilitation was ineffective in adequately protecting society.

The YOA, to a large extent, reflects these criticisms and concerns; the civil libertarian and law and order lobbies were successful in advancing their respective agendas. Young persons falling within the jurisdiction of the YOA are presumed to have

the requisite mental capacity to exercise free will and can be held responsible for actions amounting to criminal offences. And, as a corollary to this conception of adolescence, most of the due process protections associated with the adult criminal justice system are provided.[2] As in the adult system, it is believed that justice can be best achieved in an adversarial context where each side has the opportunity to present its strongest case. This represents an important evolution in the legal status of young persons; they have been brought within the established liberationist conception of justice. And within this conception, a reasonable and demonstrably justified balance between the rights of individuals and the interests of the state can be achieved.

In contrast to the framework of the YOA, pursuant to the FCSA all persons below the age of majority are subject to benevolent apprehensions by the state and are presumed to be incapable of participating in the outcome of these interventions. This statute clearly rests upon protectionists principles which may be affected by the emergence of the liberationist principles of the Charter.

The lack of due process protections in the FCSA is objectionable because it is not only parental rights that are at stake in proceedings under this Act - a child's liberty and security of the person are at issue. A review of two sterilization cases indicated that courts - in the exercise of

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[2]As noted in chapter III some exceptions, such as the right to trial by jury, exist.

their *parens patriae* jurisdiction - must take into consideration the legal rights of persons involved. Thus, in applying the "best interests" principle of the FCSA, courts must do so within the framework of a liberationist conception of justice.

Furthermore, analysis of specific aspects of the Act revealed several inconsistencies with the Charter. The most problematic of these inconsistencies is the lack of recognition for a child's right to participate and to be independently represented in proceedings under the Act. Two apparent justifications for this shortcoming can be found: the presumption that children lack the requisite capacity to instruct counsel and the perception that there is no need for children to be independently represented in proceedings, such as these, which are considered to be non-adversarial and where all parties are expected to act in the "best interests" of the child. The cogency of these justifications, however, are suspect. This limitation on the rights and freedoms of children is arguably not reasonable and demonstrably justifiable in the circumstances. The means chosen to achieve the Act's objectives - which are obviously "of sufficient importance to warrant overriding a constitutionally protected right or freedom"[3] - do not impair children's rights "as little as possible".[4] Therefore, it fails the proportionality test under section 1 of the Charter.

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[3] *Oakes*, *supra*, at p.348.

[4] Ibid.

Similarly, in relation to the treatment of youth within the health care system protectionist principles currently dominate. Minors are presumed to lack the capacity to make informed health care decisions, parents or guardians are given the right to make these decisions for them. This presumed homology of interests between parents and children reflects the view that all children under the age of majority live in a state of incapacity and dependence. This is problematic; while the justifications for this approach are obvious when children are in their infancy, it is not so as children enter into adolescence.

Although the common law allows for the refutation of the presumption of incapacity where a child has achieved "sufficient understanding and intelligence" to make his or her own health care decisions, the British Columbian legislature has overruled this position in relation to admission to and treatment in mental health facilities. Pursuant to section 19(1)(b) of the MHA, "children" under the age of 16 are deemed to lack the capacity to make these decisions for themselves. Parents or guardians are permitted to "voluntarily" admit their children, with the recommendation of one physician, into a mental health facility and to consent, on behalf of their "incapable" children, to the prescribed treatment. The most serious Charter infringement caused by this provision is the violation of the rights to liberty and security of the person and "the right not to be deprived thereof except in accordance with the principles of fundamental justice".[5] Moreover, this is anathema to the

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[5]Charter, *supra*, s.7.

emerging liberationist conception of justice.

Since the differentiated status of "childhood" or "minority" largely determines the rights and obligations of children, regardless of actual ages or individual circumstances, an argument can be advanced that this status is "discriminatory" and therefore in violation of section 15 of the Charter. In Chapter VI, with the two-step analysis that the Supreme Court of Canada has developed in mind,[6] the manner in which courts have thus far addressed equality rights challenges to laws that draw distinctions between children and adults, on the basis of this status, was examined.

As argued, the B.C.C.A. has adopted an approach to section 15 of the Charter that inhibits discussion of the competing interests of the state in advancing its objectives and the interests of young persons who are being treated differently from adults. The B.C.C.A. has defined "without discrimination" in a very restrictive manner, making the complainant prove that an impugned law draws an "unreasonable" or "unduly prejudicial" distinction. In this manner section 1 analysis is circumvented and apparently only relevant in times of insurrection. Moving the inquiry into section 1 is essential as it is here that underlying assumptions can be distinguished and carefully examined. If the shift is not made, "the open discussion of competing rights and values, which s. 1 requires, would be

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[6]See Chapter I.

forestalled".[7] Therefore, it was suggested that Professor Hogg's approach (i.e., any distinction or classification in law should be considered "discriminatory") or the approach adopted by the Ont. C.A. (i.e, only distinctions that are "tangibly adverse, unfavourable or prejudicial" should be considered discriminatory), both of which permit the discussion of competing interests to occur within section 1, were more congruous with the dictates of the Supreme Court of Canada.

In conclusion, it is submitted that the Charter provides a constitutional basis to challenge the validity of laws that limit the rights and freedoms of young persons and thereby mandates a re-evaluation of the legal status of youth in British Columbia. Any time the justifications of incapacity and dependence are forwarded in defence of protectionist policies that, in effect, limit to young persons rights and freedoms that are enjoyed by adults, the state, pursuant to section 1 of the Charter, should be obliged to provide cogent evidence in support of this differential treatment. Furthermore, the liberationist principles of the Charter demand that due process protections, reflecting the principles of fundamental justice, be recognized any time a young person's life, liberty or security of the person is potentially affected by governmental or judicial decision-making. The constitutional validity of subjugating young persons to the rights and powers of others can no longer be taken for granted.

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[7] *McKinney, supra*, Chapter VI, at p.232 (per the Majority).

The purpose of advocacy in favour of bringing young persons within a liberationist conception of justice is not to discourage advocacy in favour of increased recognition of young persons' positive right claims, but rather, to encourage greater responsiveness and accountability from law makers. To this end the Charter is a powerful instrument. It can be employed to expose the values and assumptions which underlie governmental actions and to force the adoption of a reasonable and justifiable balance between the objectives of the state and the rights and freedoms of young persons. In this manner we can come closer to realizing justice for youth.

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