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THE ONTARIO CHILD AND FAMILY SERVICES ACT:

Maintaining the Balance Between Competing Rights

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PART I - BACKGROUND

1. Overview

In Victorian society, parents who could not provide for their children were considered neglectful and could quickly lose all rights to their children. Homes for "neglected" children were run mainly by charities or from contributions from private citizens and were not government funded.

After the First World War, attitudes began to change with the rise of professionals in social work and psychology. This trend increased after the Second World War with the provincial governments becoming directly involved with providing childrens' services. These services were run by full-time trained professionals who specialized in specific areas.¹

Up until 1985, child welfare legislation gave these professionals wide discretion in removing children from their homes and was highly interventionist. Protection of children was the primary goal and was carried out by these professionals on the basis of wide and vague definitions of children in need of protection with little, if any, concern for the rights of parents.

¹ Ministry of Community and Social Services, Consultation Paper: Children's Services Past, Present and Future, December 1980, pp 5-6.

This thesis will look at the provisions of the Child and Family Services Act² which became law on November 1, 1985 and how they attempt to strike a balance between the right of children to be protected and the right of parents to family autonomy. It will be submitted that this Act, insofar as is possible, does provide such balance.

In the text where no specific reference is given for a particular point of view, opinion or assertion of fact, it will invariably be based on the author's experience from being involved in child welfare cases over the last fifteen years.

2. Introduction

Some will argue that the creative genius is born from a background of hardship, struggle and deprivation. That to be a great writer, painter or poet, one must have suffered. But this kind of suffering is generally understood to mean such things as a home on the "wrong side of the tracks", dressing in "hand-me-down" clothing, not having enough to eat but enough to sustain existence, and dealing with a cold and distant father but being reared by a warm and caring mother. It does not mean physical, sexual or emotional

² S.O. 1984. c. 55.

abuse. It does not mean, for example, making a retarded six year old female stand on one foot in the basement with a rope around her neck because she has soiled her clothing.

That great man, Winston Churchill, although born to privilege and wealth, was raised in a home where he was virtually ignored by a demanding father and generally spurned by a beautiful but distant mother. He found affection and warmth in the rough but very caring hands of an ordinary English woman, his nanny, who stood by him through all of his formative years. His chief antagonist, Adolf Hitler, was raised in a house with an abusive father and a worn out, bitter mother whom he adored. Churchill, as we all know, was a great military and civilian leader with a sense of compassion while Hitler, on the other hand, probably a genius, albeit an evil one, had no sense of compassion. This is not to suggest that the world war and the holocaust that followed was caused by poor parenting or child abuse. What cannot be denied, however, is that the upbringing of each played a significant and important role in shaping their world view. A fairly recent task force report put it this way:

Children who are inadequately cared for grow up to be unfeeling adults, and lack characteristics of concentration and persistence so essential for their ability to function in society, succeed at school, hold a job and rear families on their own.³

³ Report of the Task Force on Child Care, Status of Women, Canada, March 1986, p. 211.

The Victorian England of Churchill's youth would never have contemplated state intervention in Lord Randolph Churchill's home nor, if Hitler had been an English subject, in his home. Lord Randolph's home would be absolutely immune because of class and privilege while Alois Hitler's home would have been immune because his physical beatings of the young Adolf and his siblings were within socially acceptable limits. This was the patria potestas concept, or the right of the father to exercise control over his family, including the right to discipline his children.⁴

Society at that time was more concerned with street urchins who either had no home or place to go or, if they had a place to go, were never there. These were the kinds of children that got involved in petty criminal activity and went to jail as adults.⁵

At the beginning of their book, In the Children's Aid, Andrew Jones and Leonard Rutman have a number of illustrations, one in particular which stands out. The caption

⁴ See also section 43 of the Criminal Code which provides: "Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances". Contained in Martin's Criminal Code 1990, Canada Law Book: Toronto, 1989.

⁵ Andrew Jones and Leonard Rutman, In the Children's Aid: J.J. Kelso and Child Welfare in Ontario, University of Toronto Press: 1981, p. 27.

below the illustration reads "A neglected boy just as he was received by Kelso in 1898".⁶ J.J. Kelso was the father of the Ontario Child Welfare System.

The boy in the picture is approximately ten years of age with long, black unkept hair. His eyes are sorrowful and reflect a world weary attitude. Obviously posing for the camera, his lips form a false half-smile. He is wearing a winter jacket that has adorned a number of backs but which is at least three sizes too big for him. The sleeves of the jacket are rolled up at the end and are frayed. He is clutching a small bag in his left hand which evidently holds all of his earthly possessions. His trousers are old and are stuffed into the top of a pair of boots that improperly fit and were probably worn by someone's grandfather. The boots are oversized and are turned up at the toes much like the clowns in a circus. His overall expression is one of fear and apprehension. This boy was obviously homeless or, if not homeless, came from a situation where his parents could not look after him. He was a pitiful sight and a candidate then, as he would be now, for state intervention.

Although Kelso and others were saddened and concerned about the plight of children such as the boy in the picture, they were more concerned with eradicating crime from the streets of Toronto. If they could take a boy such as this and put him in a good

⁶ Id., at p. 3.

middle-class home, where Christian values were taught, he would not become a juvenile delinquent or turn to crime in adulthood. The general social goal was the eradication of crime from the streets. This is no longer the philosophy for state intervention. It is now recognized that protection of children is a worthy social goal in itself.

3. "The State Agency"

The "business" of protecting children has grown from its humble early beginnings in Kelso's time. Now there are fifty-four Children's Aid Societies in Ontario who serve its more than 2.2 million children. Three of these serve native children and families exclusively. They are Weechi-it-te-wan in Fort Francis, Payukotayno in Moosenee and Tikinagan located in Sioux Lookout. The total budget for the fifty-one non-native agencies in 1988 was 282.6 million with a projected budget in 1989 of 300.4 million. As of June 1989, there were 4,039 staff members employed by the Children's Aid Societies in Ontario with another 4,000 volunteers supporting and assisting the Societies in providing these services.

These Children's Aid Societies see their functions as follows:

- a) investigate allegations that children who are under the age of sixteen or are in the Society's care or under its supervision may be in need of protection and to provide such protection;
- b) provide guidance, counselling and other services to families for protecting children or for the prevention of circumstances requiring the protection of children;
- c) provide care for, and supervise those children assigned to its care under the relevant legislation;
- d) place children for adoption;
- e) perform any other duties given to it by the relevant legislation.⁷

4. The Need for the "State Agency"

We enter this world naked and helpless. How we fare from that moment on is very much dependent on genetics, our environment, how fortune smiles on us and our parents. Not necessarily in that order.

⁷ Fact Sheets #'s 1, 2, 3 extracted from Information - 89, the annual survey conducted by the Ontario Association of Children's Aid Societies.

As infants, we can only lay on our back exposed to the world and hope that the parent that is changing or feeding us is to some reasonable extent in control of their own life - our very survival may depend on it. That is not to say that in order to live a normal and fruitful existence, our parents must live up to those mass media standards set by American television in the 1950's. In fact, most children, as long as they are provided with the basic necessities and some semblance of human affection and normality, will mature into, at the very least, functioning adults.

Canadian children, like their counterparts throughout the world, are without power. They do not have unions or associations to protect their common interests. They have no economic power through which they can influence legislators or anyone else. They are disenfranchised and, up to a certain age, are subject to the control of their parents or guardian, for good or evil depending on the parent. It is left to adults, acting through the legislators of each province, to protect the rights of their young in relation to abusive parents or other guardians.

On the 11th of August, 1976, Kim Ann Popen was admitted to the hospital in Sarnia, Ontario where she later died. At her death, Kim Ann was nineteen months of age.

In March of 1975 when she was two months old, she had been admitted to the same hospital with a bruise on her left arm and a complete fracture of the left humerus of the long bone on the right side. In August of 1975, she was again examined and was found to have both her left and right elbows swollen and bruised, a fracture of the left elbow and an old fracture of the two ribs on the left side of the chest. The state intervened; she was removed from her home but was later returned in May of 1976.

On the day that she died, an internal examination at the hospital showed that she had two separate contusions to her forehead near her hairline which had occurred four to five days before her death; abrasions on her left ear caused within a few days of death and probably caused by pinching; contusion and scratch marks on her right ear; three separate contusions on her left cheek which had been caused by a solid object; a noticeable mark on the lower lip and an abrasion on the entire surface of the lip which was probably caused by a blow to the face and which occurred within a few days before her death; an irregular contusion on the palm of her hand; injuries to her genital area which were probably caused by pinching a few days before death; a bruise on her left inner thigh which was probably caused by pinching; rectal and vaginal injuries which were probably caused by the introduction of a foreign object; other injuries including contusions on the left side of the chest; bruises at the left elbow; bruises on the right elbow and left buttock and lower back. All these had occurred within a few days of her death.

On internal examination, Kim Ann had suffered haemorrhages on the front, top and back of the scalp. Death was caused by a subdural haemorrhage in two areas of the brain and one general subachrivial haemorrhage. There was also a haemorrhage in the spleen area of the left kidney and haemorrhages occurred around the vagina.⁸

The perpetrator of this abuse was not some deranged stranger but her mother aided and abetted by her father's silence. One could not imagine a worse case of abuse. Had the State agency properly performed its functions in this case, Kim Ann might be alive today.

5. The Statistical Basis for Protection of Children

Around the same time as Kim Ann's death, the number of reported cases of child abuse rose from three hundred and twenty in 1966 to one thousand and fifty-four in 1977.⁹ The number of reported cases of abuse has risen consistently. In Manitoba, for example,

⁸ R. v Popen (1981) 60 C.C.C. (2d) 232.

⁹ M. Benjamin, "Child Abuse and the Interdisciplinary Perspective: Panacea or Problem", Family Law: An Interdisciplinary Perspective. Carswell: Toronto, 1981, p. 128.

there was a 220% increase in reported cases of abuse from the years 1974 through to 1984 and it was felt in that province that this was still only half of the probable cases.¹⁰

In 1988 alone, the Children's Aid Societies across Ontario received more than 15,000 allegations of child abuse; 51% being of physical abuse; 46% being of sexual abuse; and 3% relating to emotional abuse.¹¹

In a report prepared by the Federal Government in February of 1981, they had studied fifty-four deaths of children in Canada during a one year period. They found a very frightening and unsettling pattern with regard to those deaths. Many of the children were in care of young, single mothers who possessed low I.Q.s. They were on welfare, had alcohol problems and were abused themselves as children. Most of the children who died were under two years of age. Fifty-seven percent of the deaths had been classed as homicides and another nineteen percent of those deaths they were not sure about. Many

¹⁰ Review Committee on Indian and Metis Adoptions and Placements, Final Report, No Quiet Place. Manitoba Community Services. 1985, p. 56 (hereinafter referred to as the Kimmelman Report).

¹¹ Supra, note 7, Fact Sheet #6.

of the children had been neglected before.¹² These were obvious similarities to Kim Ann Popen's situation.

Another study of ninety-eight deaths from child abuse found more than half occurred before the child reached twelve months and another twenty-five percent before they reached two years while only five percent were over five years of age. Sixty-four percent of abuse was committed by parents, twenty-five percent by common law partners and nine percent by babysitters. As a result of these statistics, the Task Force on Child Care advocated early detection and intervention.¹³

The Badgley Commission found that at some time during their lives, about one in two females and one in three males had been victims of unwanted sexual acts. Approximately four in five of these incidents first occurred when they were children or youths.¹⁴ It further found that in all serious sexual offences against children, 30.7% were perpetrated by family members, guardians, or others in a position of trust.¹⁵

¹² Health and Welfare Canada, Child Protection in Canada, Ottawa, February 1981, p. 101.

¹³ Report of the Task Force on Child Care, *supra*, note 3, pp. 90-91.

¹⁴ Health and Welfare Canada, Sexual Offences Against Children, Vol. I. 1984, p. 175.

¹⁵ *Id.*, at p. 532.

Cases such as Popen are at the extreme end of the spectrum and represent an obvious situation where state intervention is warranted to protect those who cannot protect themselves. What about more subtle forms of poor parenting that may result in, for example, emotional abuse?

6. The "Borderline" Parent

A mother may, for example, have a personality disorder with some histrionic behaviour pattern resulting in flirtatious and manipulative conduct in certain situations. Her personality may result in traits of immaturity, a tendency to form superficial relationships and, at times, she might appear to have behaved in an irresponsible manner towards her children. This personality disorder may result in her having a tendency to form relationships with men very quickly and easily and often these men may prove to be aggressive, alcoholic and dependent on her. It may prevent her from entering into a stable relationship or settling down with one person. Her behaviour could have resulted from being sexually abused as a child.¹⁶ If the prognosis is poor in that this disorder

¹⁶ Ruth and Henry Kempe, Child Abuse, Harvard University Press: 1979, p. 38.

may not change in the foreseeable future, should her child be taken from her because of the lack of stability in her life? This is the case at the other end of the spectrum.¹⁷

7. The Concept of "Family Autonomy"

Churchill would have been outraged at the thought of some young social worker poking around in his family's affairs to determine whether abuse had occurred. After all, the family is the cornerstone of society. It is the bond that most securely holds people together and gives them a sense of balance, and security. This is no less true today than it was in Churchill's time. The family, however, seems to be much more heavily under seige today than it was in the early part of the twentieth century.

It is not surprising that the importance of the family unit has been stressed in almost all known cultures and in many religious beliefs and traditions underlining those cultures. One only has to look to the Roman Catholic tradition in which the supreme being, the clergy and the laity, form a close knit family ruled by a divine patriarch. The legislatures at both the Federal and Provincial levels unashamedly borrowed and promoted this concept in various statutes.

¹⁷ Re: Thomas L., Ont. Prov. Ct. (Fam. Div.) Foran, Prov. Ct. J., 23 March 1981, unreported but cited in Michael Hartrick and Yan Lazor, The Child Welfare Act Annotated, Carswell: Toronto, 1983, pp 3, 107, 137 and 149.

The preamble to the Canadian Bill of Rights reads as follows:

The Parliament of Canada affirming that the Canadian nation is founded upon principles that acknowledge the supremacy of God, dignity and worth of the human person and the position of family in a society of free men and free institutions...¹⁸

This, at once, is a recognition of religion, a bow in the direction of human rights and the acknowledgment and underlining of the importance of family to Canadian society.

Not to be outdone, the Province of Ontario in enacting the Family Law Act, produced the following sentiments in the preamble to the Act:

Whereas it is desirable to encourage and strengthen the role of the family...¹⁹

The irony here is that although the expression of the sentiments were probably sincere, it is most difficult to see how a Bill that deals with the division of partnership assets and support rights and obligations on a marriage breakdown can be said to strengthen the family unit. Perhaps it was meant in a negative fashion, i.e. the cost involved in dividing those assets forcing the couple to remain together.

¹⁸ Canadian Bill of Rights, 1960 (Canadian), c. 44, R.S.C., R.F.C. 1970, Appendix 3 as amended by 1970-72-73, c. 38, s. 29 preamble.

¹⁹ S.O. 1986, ch. 4 as amended by 1986, c. 35.

Bala and Redfearn have argued that family autonomy and parental rights are protected by section 7 of the Canadian Charter of Rights and Freedoms. This section provides as follows:

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.

They have argued that this section would include the freedom to enjoy family life subject only to deprivation in accordance with the principles of fundamental justice.²⁰ If this argument is valid and it is submitted that it is, any provincial legislation dealing with such rights must comply with the Charter. This statement has received judicial approval at the Provincial Court (Family Division) level in Re: T. and Catholic Children's Aid Society of Metropolitan Toronto.²¹

Family autonomy, is quickly becoming a platitude but without any legal definition. We may kowtow to it in nicely turned phrases, put it in preambles to various statutes and even argue that it is Charter protected but, ultimately, it only has as much value as society

²⁰ Nicholas C. Bala and J. Douglas Redfearn, "Family Law and the Liberty Interest: Section 7 of the Canadian Charter of Rights and Freedoms", 15 *Ottawa Law Review*, (1983) 2, pp. 274 to 310 at p. 275.

²¹ (1984), 46 O.R. (2d) 347, at pp. 357-358.

places on it. This is particularly so when dealing with child welfare legislation. By its definition, child welfare legislation must reflect society's value and the importance it places on family autonomy. What price are we prepared to pay to keep a family together? What risks are we prepared to run with the lives and well-being of our young? Do we give people like Annals and Jennifer Popen a second and third chance?

Family autonomy is a concept readily understood by the vast majority of people but often deliberately misinterpreted by a small minority. Children are not possessions or chattels to be dealt with according to one's whim or fancy. Regrettably, there are some individuals who feel they have every right to treat their children as they would a piece of furniture or any other belongings. For some of these people, it is simply a matter of education and enlightenment while for others, no amount of enlightenment will lead them to change their behaviour towards a child in their midst.²²

This latter group of people would simply never be capable of meeting the basic needs of their children. Such people would include individuals with a long and consistent history of abuse towards their children and others; those who suffer from a severe form

²² See the Task Force on Child Care, *supra*, note 13, at p. 210 which stated that the cycle of abuse will often repeat itself, but some abusing parents can be helped to develop parenting skills and to exhibit more appropriate forms of behaviour towards their children.

of mental illness or retardation or alcoholism; those who with help might be able to parent but have consistently refused such help in the past or, in spite of such help, have continued to maltreat their children or to live their lives in the same manner that brought them before the court in the first place.²³ Therein lies the rub.

Child welfare legislation must recognize that people can and do change. The problem, of course, is to identify those who are capable of changing and those who are not. There are some that despair that people don't change but they are in the minority. There are some studies, for example, that have suggested that treatment of abusive parents is not overly successful and that between twenty to fifty percent of all abusive families are untreatable.²⁴ This, indeed, is a very depressing statistic particularly if one advocates on behalf of parents and for the preservation of the family unit.

A far more optimistic view was expressed by the Kempes in their book, Child Abuse. These child abuse experts indicate that there are about ten percent of abusive parents who cannot be treated and that these fall into four separate categories: those who suffer from delusional psychosis - "God made me do it"; aggressive sociopaths - those

²³ W.J. Sammon, Advocacy in Child Welfare Cases: A Practitioner's Guide, Carswell: Toronto, 1985, p. 79.

²⁴ Benjamin, "Child Abuse and the Interdisciplinary Perspective", supra, note 9, p. 128.

who often react with blind and impulsive rage; those who are simply cruel and who torture their children - Jennifer Popen; and finally, those who are seriously mentally ill and behave like fanatics. It has been their experience that the remaining ninety percent can be treated with about a ten percent failure rate so that, accordingly, eighty percent of abusive parents can be helped.²⁵

Although all forms of abuse are reprehensible and the reported cases are on the rise, it should not automatically mean the end of the family provided the child can be adequately protected within the family. As one author has stated: "The rights of parents to the full custody of their children is traditional and deeply ingrained in our society. The family, as the basic unit in society, enjoys the right to function with minimum interference, especially from the state."²⁶ It is recognized in our society that the family unit is of fundamental importance and worth saving. The argument relates to the cost of that saving.²⁷

²⁵ Ruth and Henry Kempe, Child Abuse, pp. 68-70.

²⁶ Canadian Council on Children and Youth, Legislation Related to the Needs of Children, Carswell: Toronto. 1979, pp. 60-61.

²⁷ For a good discussion of assessing parents for parenting capacity, see Paul D. Steinbauer's "Assessing for Parenting Capacity" in Family Law in the Provincial Courts (Family Division), C.B.A.O. 1982.

8. The Clients of the Child Welfare System

In a 1979 paper, the National Council of Welfare found that it was the poor who were the clients of the child welfare system. There were two reasons given for this: a) low income parents encounter problems that reduce their capacity to provide adequate care for their children; and b) the poor are dependent on the single overburdened source of help, being the child welfare system.²⁸ This Council suggested that the welfare system may be biased against the poor simply because of their poverty. For example, poor nutrition may be defined as a failure to thrive, the lack of funds to provide adequate accommodation may be defined as a failure to provide adequate housing.²⁹ On the other hand, as indicated earlier, many of the more serious forms of abuse occurred in poor families headed by single mothers.

This does not mean that abuse and neglect of children are isolated to one economic group in our society. It can and does occur in all classes of society. There can be no doubt, however, that the vast majority of children who are apprehended from their parents and brought before the Family Courts of the various provinces as children

²⁸ Kimmelman Report, pp. 144-145.

²⁹ Id., at p. 198.

apparently in need of protection, are being raised in poverty. The National Welfare Council found, for example, that 1,131,000 children under sixteen years of age resided in families that are poor. One out of every five Canadian children. In families headed by women, fifty percent of children lived in poverty.³⁰

It takes little imagination to visualize the despair, bitterness and stress of the single mother raising children on her own in subsidized housing and an inadequate cheque from the social welfare authorities. It is little wonder that children are at risk in these situations.

The Badgely Commission found the following:

In terms of their family circumstances, a sizeable proportion of sexually abused children served by child protection workers came from reconstituted families; a high proportion of their "father figures" was unemployed; half of the families were on the caseloads of agencies prior to the incidents being reported and one in five had previously been removed by agencies from his or her home. In eight in 10 cases (81.5 percent) in all provinces (except Quebec), the child's natural mother was the 'mother figure' in the home where the offence had occurred. However, it was only half as likely that the natural father was the father figure (45.2 percent). Adoptive or stepfathers (17.5 percent) or male common-law partners (13.8 percent) filled the paternal role in three in 10 cases. These findings tend to confirm the widely held belief in the child welfare field that reconstituted families served by the workers are likely to experience types of problems which are less commonly present in families of partners having first-time marriages or relationships.

³⁰ *Id.*, at pp. 262-263.

A third of the children's mothers (31.3 percent) were employed and about half the 'father-figures' (52.7 percent) had regular jobs. Two in five (42.7 percent) mothers of sexually abused children received some form of government financial assistance and, of these, three in four (76.8 percent) were on municipal or provincial welfare.³¹

The draftsman designing child welfare legislation must be sensitive to these social and economic factors. The temptation is always there to apply middle class values and standards to those who are not of the middle class, especially when the vast majority of those involved in child welfare cases are poor and it could be perceived that most poor people will abuse or neglect their children simply because they are poor. This is not the case.

9. Changing Trends

This dichotomy between protecting our young and maintaining family autonomy while recognizing the clientele (and their needs) of the child welfare system has been the subject of debate and discussion in a number of cases over the years. One of the decisions most quoted is that of Mr. Justice Rand in Hepton v Maat.

It is, I think, of utmost importance that questions involving the custody of infants be approached with a clear view of the governing considerations. That view cannot be less than this: prima facie the natural parents are

³¹ Report of the Committee on Sexual Offences Against Children and Youth, Vol. I, Health and Welfare Canada: August 1984, p. 585.

entitled to custody unless by reason of some act, condition or circumstance affecting them, it is evident that the welfare of the child requires that that fundamental natural relation be severed. As *parens patriae*, the sovereign is the constitutional guardian of children, but that power arises in a community in which the family is the social unit. No one would, for a moment, suggest that the power ever extended to the disruption of that unity by seizing any of its children at the whim or for any public or private purpose of the sovereign or for any other purpose than that of the welfare of one unable, because of infancy, to care for himself. The controlling fact in the type of case that we have here is that the welfare of the child can never be determined as an isolated fact, that is, as if the child were free from natural parental bonds entailing moral responsibility - as if, for example, he were a homeless orphan wandering at large.

The view of the child's welfare conceives it to be, first, within the warmth and security of the home provided by his parents; when through a failure, with or without parental fault, to furnish that protection, that welfare has been threatened, the community represented by the sovereign is, on the broadest social and national grounds, justified in displacing and assuming their duties.³²

The phrasing and cadence employed by the Justice in this extract is most illuminating. It has an imperial quality and tone as though the Justice envisaged the Sovereign looking down on his average Canadian family, happy in conversation around a warm hearth in winter. However, if that family does not measure up to the mark expected, then the Sovereign will intervene. But how does one define the mark to which they are to live up to and how does one determine whether they have measured up? Although expressing the most appropriate sentiments, these phrases are from a different

³² [1957] S.C.R. 606.

era and mindset. It reflects both the *parens patriae* and the *patria potestas* concepts that had been prevalent in our legal decisions up to that time.

In contrast to this extract, one should refer to the more recent remarks of Judge Thomson in the *The Children's Aid Society of Kingston v Reeves* where he said:

As we enter the age of cloning and genetic engineering, it is ironic and yet also comforting to know that we have become increasingly uncertain about the skills and characteristics necessary to perform the role of parent in an adequate fashion. Throughout the child protection and delinquency fields, there is constant questioning of the values and moral principles which underline the decision to remove children from their parents. Being poor, or unwed, or espousing other than middle class values no longer induces the somewhat automatic response it may have in the past. Perhaps the most important recent developments in the child care field has been the growing commitment to prevention work, to family rehabilitation rather than removal from the home. It is recognized that children should be permanently removed from the home only when the factors which have produced an environment of risk to the physical or mental health of the child cannot be ameliorated by help given to that child and to those who care for him or her.³³

To those who fought in the trenches on behalf of embattled parents, these were enlightened sentiments indeed. They were also a harbinger of things to come. Let us judge the poor by their own set of values and standards and not by those of the professionals who provide services or draft the legislation. Here was some understanding

³³ (1976), 23 R.F.L. 391, at p. 393.

for that poor harassed mother. Let us concentrate on prevention and keeping the family together.

10. The Effect of State Intervention

Ontario legislation introduced at the time of Kelso up to that of the Child Welfare Act³⁴ was interventionist in its intent and content. The child welfare system had largely been taken over by child care professionals who answered to no one and who were given extremely intrusive power which they exercised on vague and ambiguous grounds, and on the basis of what they felt were in the "best interests" of children. These professionals had a direct and vested interest in maintaining this status quo. The *parens patriae* concept suited their purposes because it promoted the theory that they knew what was in the child's best interest and justified wide discretionary powers.³⁵ During the hearings which considered proposed changes to the Child Welfare Act, it became increasingly apparent to government policy makers that these professionals did not know what was in the child's best interests.³⁶

³⁴ S.O. 1978, c. 85.

³⁵ Richard Barnhorst, The Development of Child and Family Policy in the Legislative Process, Stanford University, 1986, (unpublished doctoral dissertation) at p. 146.

³⁶ Id., at p. 134.

When discussing child welfare legislation, lawyers who advocate on behalf of parents often tend to concentrate solely on the effect that apprehension has on the family and the parents and to forget about the effect it has on the child. The separation of a child from a parent to which that child has psychologically bonded has been described by one psychiatrist as the most traumatic event a child could suffer outside of being killed.³⁷ The Kimmelman report put it this way:

The trauma caused to children who are simultaneously severed from contact with parents, siblings, relatives, friends and community must be painful beyond endurance.³⁸

The neglected boy in the picture mentioned in the opening chapter may have had that very melancholy and sad expression as a result of the separation from a loved one or family as opposed to neglect or parental indifference.

One must also keep in mind and ask what awaits these children on the other side of the interventionist door. Long term foster care and adoption is no panacea. Once in

³⁷ Talk given by Dr. Palframan, Psychiatrist at Children's Hospital of Eastern Ontario, to Social Workers of the Ottawa Board of Education with regard to the Child and Family Services Act, February 1985, at R.A. Centre, Ottawa, Ont. at which the author was present; see also the article by P.D. Steinbauer mentioned in note 27.

³⁸ Kimmelman Report, *supra*, note 10, p. 33.

care, a child may wallow in a long term foster care placement or move from one home to another or be placed in a group home and, at the very best, be placed for adoption. However, all adoptions do not work. The Kimmelman Report in Manitoba, for example, noted there were many unsuccessful adoptions and that this side of the child welfare system had essentially failed. Group homes, they have found, were used as a dumping ground for teenage wards and for children who are not able to adjust to a family setting. They were also used to ease the administrative and supervisory responsibilities of staff. Children were placed in these homes mainly because they existed, not as a result of any benefit that might accrue to the child.³⁹

In a report entitled The Abuse of Children in Foster Care, Ross Dawson found that "the rate of abuse in foster care is substantially higher than that of children in their own homes".⁴⁰ The incidence of child maltreatment in foster care was widespread and significant. Two out of three abused children in foster care were over thirteen years old and two-thirds of those were females who had experienced sexual abuse. One-half of all reports of physical abuse involved teens. There was one fatality.⁴¹ It was also found that

³⁹ Id., at pp. 47 and 251.

⁴⁰ Ross Dawson, Abuse of Children in Foster Care, Ontario Association of Children's Aid Societies, (undated) p. 4.

⁴¹ Id., at pp. 4-5.

children who were solely dependent on the placement agency and who had no connection with their natural families were at a higher risk of abuse than children in temporary care.⁴² Even though some of these children had special needs, they were not necessarily placed in specialized foster care.⁴³

After children were placed into foster care, there was a tendency for the placement to break down and for the child to lose contact with his or her family entirely. One of the reasons for the breakdown of the placement related to extremely negative feelings of the child as a result of being separated from their family. In a study done by the University of Toronto between August 1980 and January 1983, it was found that workers who were experienced and had training in the "separation experience" were more successful than their counterparts who did not have such training in reuniting children with their families.⁴⁴ Pity those families who did not have such a worker.

The Kimmelman Report, which in many ways was an indictment of the child welfare system in Manitoba, stated that:

⁴² Id., at p. 6.

⁴³ Id., at p. 7.

⁴⁴ Ministry of Community and Social Services, Improving Services for Children: Research Summaries, at pp. 55 and 164-165.

The major emphasis of the child care system must be in providing the services necessary to permit children to live safely and securely in their own homes.⁴⁵

This sentiment was not new. An Ontario Government consultation paper in 1980 stated:

The philosophy endorses the family as the best social structure available for meeting needs of children and strives to maximize its use wherever possible... Therefore, there will be an increasing preference for retaining the child in the home rather than seeking alternate care. Removal of a child will occur only in severe cases when a major family breakdown has occurred and where the child is at risk at the hands of others or is a threat to others or himself.⁴⁶

This paper was the first salvo in the attempt to liberalize the provisions of the Child Welfare Act.

⁴⁵ Kimmelman Report, supra, note 10, p. 261.

⁴⁶ Ministry of Community and Social Services, Consultation Paper: Children's Services Past, Present and Future, December 1980, p. 35.

11. A Need for Change?

Was the Child Welfare Act so rooted in its conservatism that it needed to be reformed? Compared to the other provinces, the answer is probably no.⁴⁷ However, in relation to the reality that many families found themselves in when confronted by state intervention, it was in need of liberalization.

During the Kimmelman hearings, it was found there was an abysmal lack of sensitivity to children and their families by the Children's Aid Society. Families would approach the agency for help and would find that what was described as in the child's best interest actually resulted in families being torn apart.⁴⁸ This was not far from the reality in Ontario during the 1970's.

The Child Welfare Act was a very patriarchal piece of legislation and interventionist. The kind and quality of treatment afforded to a family often depended on the social worker and how he or she interpreted the legislation. As under the present

⁴⁷ See Richard F. Barnhorst, "Child Protection Legislation: Recent Canadian Reform", Children's Rights in the Practice of Family Law, Barbara Landau (ed.). Carswell: Toronto. 1986, pp. 255-298.

⁴⁸ Kimmelman Report, *supra*, note 10, p. 274.

Act, it was the worker, in consultation with his or her supervisor, who would decide whether or not to apprehend a particular child. Any doubt as to whether apprehension should occur would be resolved in favour of safety and apprehension would follow. The Kimmelman Report observed "that social workers tend to make idealistic judgments about family functioning and may view situations as neglect, where no actual harm is likely to occur".⁴⁹ This report also argued that middle class values were being applied to the poor in child welfare matters.

There are also many other factors at play in the social worker's analysis of a particular family situation. These would include the worker's own prejudices and biases; their past history with a particular family; their natural concern for the child involved; and their fact gathering method which is often based on hearsay from neighbours or other third parties. The social worker, as a result of concern for the child, often becomes the child's advocate rather than a family resource person or counsellor.⁵⁰ The legislation, accordingly, must take into account these natural human tendencies and frailties by putting brakes and curbs on the power of such individual workers when they are making the decision to intervene or not.

⁴⁹ *Id.*, at p. 45.

⁵⁰ Sammon, Advocacy in Child Welfare Cases, Carswell: 1985, p. 80.

The Child and Family Services Act⁵¹ is still a very intrusive piece of legislation. The state, in the guise of a social worker or police officer, can enter one's home without warrant, apprehend a child and place that child in a place of safety and have the child medically examined. This can occur without the parent's consent and indeed without the child's consent.

Those responsible for guiding the Child and Family Services Act through the legislature had seen the effects that unfettered discretion had on families and had lost faith in the professionals to make decisions that were in fact in the child's best interests. They saw the provisions of the Child and Family Services Act as enshrining legal rights for both children and their parents; increasing rights for both children and their parents; increasing agency accountability; reducing the discretion of professionals; and requiring due process.⁵² The object was to protect parental rights to family autonomy while ensuring the right of children to be protected.⁵³

⁵¹ S.O. 1984, c. 55.

⁵² Barnhorst, The Development of Child and Family Policy in the Legislative Process, *supra*, note 35, p. 20.

⁵³ See Richard Barnhorst, "Child Protection Legislation: Recent Canadian Reform", Children's Rights in the Practice of Family Law, B. Landau (ed). Carswell, 1986; James D. Karswick, "Perspectives on the New Child and Family Services Act", (1986) 48 R.F.L. (2d) 19; D.W. Phillips, "The Child and Family Services Act", (1985) 45 R.F.L. (2d) 301.

The professionals were opposed to these proposed changes. They saw the Child Welfare Act as a good piece of legislation that only needed minor tuning. Out of the 400 submissions made to the Committee studying the legislation, 360 came from professional service providers, most of whom opposed the legislation.⁵⁴ They saw the draft bill as anti-professional and one that would inhibit their protection efforts. To them, the family autonomy concept was simply an ideal that had no place in the work-a-day world and was an inappropriate cornerstone on which to construct the proposed legislation. It should in no event take precedence over the child's welfare.⁵⁵

This paper will be concerned with the Child and Family Services Act insofar as its provisions attempt to balance the rights of children to be protected with the rights of the parents to family autonomy. It will look at these provisions both in their technical sense and practical effect. The social goal of the legislation is to protect those who cannot protect themselves while doing so, as far as possible, within the context of the family. If this goal is achieved, the number of children in institutional care should be reduced. In this way, children who might otherwise be lost to society will grow into functioning citizens. Does the Child and Family Services Act balance these competing rights and promote this

⁵⁴ Barnhorst, The Development of Child and Family Policy, *supra*, note 35, p. 148.

⁵⁵ *Id.*, at pp. 48-49.

social goal or is it merely a glossy and superficial attempt at reform which pays lip service to family autonomy while actually promoting intervention?

12. Child Welfare Proceedings in Profile

To understand what follows, it is necessary to give a brief profile of a typical child welfare application. It can be broken down into the following parts:

- a) Institution of proceedings by apprehension with or without warrant or by application to the court to determine whether the child is in need of protection;
- b) Within five days of apprehension, the court must hold a care and custody hearing. This will determine where the child will stay pending the trial;
- c) After the interim care and custody has been held, a pre-trial is normally ordered to narrow the issues, obtain admissions and arrive at possible consent orders;
- d) At the end of the pre-trial, a trial date will be set. The issue at trial will be whether the child is in need of protection. If the child is found to be in need of protection, then the court will make a disposition. Once the child is found in need of protection, the court has the power to order an assessment of the parents for dispositional purposes;

- e) If the parents or any other party is not satisfied with the finding, an appeal can be taken to the District Court. Only evidence arising after the trial is admissable on the appeal;
- f) If the child is returned under supervision or is made a Society ward, there must be a status review hearing before the expiration of the order. This hearing will determine whether the original order is terminated, extended, or expanded to include an application for Crown wardship.

13. The Cornerstone - "Children in Need of Protection"

(i) Importance of the Definition

The crucial first step is to determine what children will be covered by the legislation. In other words, what children are in need of protection. It must be remembered that the Child and Family Services Act only applies to children who are found to be in need of protection. The wider and more vague the definition, the more children the Act will catch in its net and the more families affected.

Take, for example, the following definitions of children in need of protection that were contained in the 1970 Child Welfare Act.⁵⁶

⁵⁶ The Child Welfare Act, R.S.O. 1970, c. 64, as amended by S.O. 1971, c. 98 and S.O. 1972, c. 109.

s. 20(1)(b) "child in need of protection" means,

...

- (iii) a child where the person in whose charge he is cannot, by reason of disease or infirmity or misfortune or incompetence or imprisonment or any combination thereof, care properly for him,
- (iv) a child who is living in an unfit or improper place,
- (v) a child found associating with an unfit or improper person.

...

An enthusiastic interventionist social worker would need little more than these definitions to spur them into action. These definitions would give the worker writ to intervene in almost any conceivable fact situation. They conjure images of poor houses, shoeless, dirty street children and shadowy adults. There is little doubt that these definitions would relate, in the vast majority of cases, to the poor in our society.

In 1973, the Chief Judge of the Provincial Court (Family Division), H.T.G. Andrews stated:

It is quite obvious that under these definitions (s. 20(1)(b)), a child could be considered to be "in need of protection" without any neglect on the part of a parent or person in charge of him". It is therefore submitted that in

respect of the matters falling under the above subsections, a parent cannot raise the defence that there was no neglect on his part in raising the child.⁵⁷

This statement seems almost a contradiction in terms but represents the dilemma parents faced in these kinds of hearings.

In cases that dealt with these definitions, the Children's Aid Societies normally threw a hodge podge of evidence at the parents hoping that some of it would stick. This approach was more successful than not largely because of the room to manoeuvre that the definitions gave to counsel for the Children's Aid Society and to the court. The woman with the personality disorder that was discussed earlier had little chance of hanging onto her child under these definitions.⁵⁸

It must also be mentioned that, traditionally, child welfare matters have not attracted much attention from the legal profession. These cases were not glamorous or high profile. There was also an economic disincentive to the Bar. Because many of these clients were poor, they were on Legal Aid. Until very recently, the Legal Aid tariff discouraged more senior members of the Bar from taking these kinds of cases. In the

⁵⁷ H.T.G. Andrews, Family Law in the Family Courts, Carswell: Toronto. 1973, p. 72.

⁵⁸ Re: Thomas L. *supra*, note 17.

result, many of these cases fell to lawyers who were newly called members with little court experience. Very few of them were prepared to develop an expertise in the area even after doing a few cases. Many lawyers often found the provisions and procedures under the Child Welfare Act vague and confusing. Many parents, consequently, were under-represented when their cases came before the courts, often resulting in very negative findings.

This trend began to subside during the late seventies and early eighties. Lawyers were often "hungry" for work and were prepared to take these cases on and put a great deal of time and effort into them. Trials became lengthier, more complex and much more interesting. Children's Aid Societies began to establish their own legal departments across the province which quickly developed an expertise in this area. The Official Guardian's Office became formally involved through statutory direction and now have lawyers on their personal rights panel who deal, in some cases, almost exclusively in this area. Now, more and more lawyers, if not specializing in this area, have developed out of interest their own special knowledge with the provisions and procedures under the relevant legislation.

Parallel to this development was a new awareness that the existing child welfare legislation was not meeting society's need to keep families together and that, in fact, it was

having the opposite effect and was leaving many children to be needlessly bounced around in the system. It became increasingly apparent that services were going to those children whose needs had become apparent rather than going to the family for support and prevention of problems.⁵⁹

Around 1980, it had begun to dawn on policy makers that removing children from the home might be doing more harm than good. It was just not a matter of family autonomy or parental rights to custody but, also, what was in the child's best interests.⁶⁰ It also became apparent to those who made policy decisions in this area that because of an historical legacy, the system was biased towards removing children from the home. It had been taking the line of least resistance and once residential places were set for children, it was easier to use them than to pour resources into the family.⁶¹ This same complaint was reiterated in Manitoba four years later.⁶²

⁵⁹ Consultation Paper: Children's Services Past, Present and Future, *supra*, note 46, p. 19.

⁶⁰ *Id.*, at p. 10.

⁶¹ *Id.*, at p. 14.

⁶² Kimmelman Report, *supra*, note 10, p. 258.

Judge Thomson's philosophy in the Reeves' case was gaining ground and being accepted as the correct one and was a welcome change to those who represented parents before the courts. Although the decision in Reeves came almost five years before the Consultation Paper⁶³, it gave tacit recognition to the following important factors:

- a) Parents should not be judged according to middle class standards but those of their own socioeconomic group;
- b) Intervention in the family should only be undertaken as a last resort and after other less restrictive measures have been tried, such as community assistance;
- c) The best interests of a child lie in being raised in the family; only if this is not possible with the state's assistance should the child be removed;
- d) The parent's right to custody cannot simply be ignored, even in light of the child's right to protection and, in any event, the rights are not mutually exclusive and in many cases would be the same.

The 1980 Consultation Paper: Children's Services Past, Present and Future put it this way:

⁶³ Supra, note 59 at p. 59.

Put more simply, the family is hardly perfect, frequently faulted and sometimes outright deficient but in the vast majority of cases, it still remains the best placement available for the child. Therefore, there will be an increase in preference for retaining the child in the home rather than seeking alternate care. Removal of a child will occur only in severe cases when a major family breakdown had occurred and where the child is at risk at the hands of others or is a threat to others or himself.⁶⁴

These were bold but plain sentiments that came down squarely in favour of family autonomy. But what about protecting children? Could the interventionist thrust of earlier legislation be so easily set aside?

(ii) A Snapshot of the Legislative Process

In April 1977, the Ontario government established The Children's Services Division which was to serve children with special needs. Prior to that, services had been provided through many government departments including Health, Community and Social Services, Attorney-General and Corrections. This new division was, among other things, to be responsible for child protection. It was to be located within the Ministry of Community and Social Services with a mandate to implement new policies through legislation. These policies would be subjected to public consultation.

⁶⁴ Supra, note 59, at p. 35.

The Division's first publication, The Children's Act: A Consultation Paper, was supposed to form the basis for the provision of children's services in Ontario. Those intimately involved with this proposed legislation saw it as a "legalistic and non-interventionist" approach to child protection matters. The paper was designed to raise issues and to be controversial. It succeeded in this. It was released on the 20th of October, 1982, and thereafter followed eight months of public hearings. Service providers were, on the whole, against these proposals while lawyers and clients involved in child welfare proceedings supported them.

Arising from this process emerged The Child and Family Services Act: Draft Legislation. A standing committee of the provincial legislature held hearings on this draft bill over a lengthy period of time. It heard from many witnesses during this time. Ultimately, the committee supported the draft legislation which adopted this "legalistic" approach in child welfare matters.

On the 7th of March, 1984 the report of the Standing Committee on Social Development was released and on May 18th, 1984 Bill 77: The Child and Family Services Act was introduced into the legislature and was proclaimed in November 1985.⁶⁵

⁶⁵ Richard Barnhorst, Doctoral Dissertation, *supra*, note 35, pp 15-20, 20-30, 53-90.

(iii) The Evolving "Definitions"

In The Children's Act - A Consultation Paper⁶⁶, it was suggested by the authors that the definitions of a "child in need of protection" contained in the 1978 Child Welfare Act be replaced by more definite grounds which would focus on serious present or potential risks to children.

These definitions in the 1978 Act were as follows:

s. 19(1)(b) "child in need of protection" means:

- (i) a child who is brought with the consent of the person in whose charge the child is, before a court to be dealt with under this Part,
- (ii) a child who is deserted by the person in whose charge the child is,
- (iii) a child where the person, in whose charge the child is, cannot for any reason care properly for the child, or where that person has died and there is no suitable person to care for the child,
- (iv) a child who is living in an unfit or improper place,
- (v) a child found associating with an unfit or improper person,
- (vi) a child found begging or receiving charity in a public place,
- (vii) a child where the person in whose charge the child is is unable to control the child,
- (viii) a child who without sufficient cause is habitually absent from home or school,
- (ix) a child where the person in whose charge the child is neglects or refuses to provide or obtain proper medical, surgical or other

⁶⁶ Ministry of Community and Social Services, The Children's Act - A Consultation Paper, October 1982.

- recognized remedial care or treatment necessary for the child's health or well-being, or refuses to permit such care or treatment to be supplied to the child when it is recommended by a legally qualified medical practitioner, or otherwise fails to protect the child adequately,
- (ix) a child whose emotional or mental development is endangered because of emotional rejection or deprivation of affection by the person in whose charge the child is,
 - (x) a child whose life, health or morals may be endangered by the conduct of the person in whose charge the child is.

The suggestion that these definitions needed change was clearly based on the recommendations contained in the 1980 Consultation Paper which had suggested a two-step approach in determining whether a child was in need of protection.

First, one of the following conditions must be present:

- a) A child has suffered or there is a substantial risk that the child will suffer serious physical harm;
- b) The child has been sexually abused and the parents knowing of the possibility of such abuse, failed to protect the child;
- c) The child is in need of immediate medical treatment and the parents are unwilling to provide or consent to such treatment;
- d) The child is suffering from serious emotional disturbance and the parents are unwilling to provide or consent to such treatment;

- e) The child has been abandoned.

Second, before the Court would intervene in the family in these situations, it would have to be satisfied that intervention was necessary to protect the child in the future. In other words, intervention should not take place in an isolated incident where it was unlikely to be repeated or other measures could effectively deal with the problem.⁶⁷

The adjectives used are important. They speak of substantial risk that the child will suffer serious physical harm. They further talk of sexual abuse, immediate medical treatment and serious emotional disturbance. Finally, there would be the necessity that the condition likely continue. All of these phrases convey a sense of urgency and import, an immediate and present danger. This proposal was intended to be controversial. It was such a radical departure from existing definitions that controversy would inevitably follow. That is a gambit often employed by skilled negotiators.

As expected, the Children's Aid Societies throughout Ontario severely criticized these amendments as nothing more than shackles that would tie their hands in abuse

⁶⁷ Ministry of Community and Social Services, The Children's Act - A Consultation Paper, October 1982, pp. 80-81.

cases.⁶⁸ The horrible death of Kim Ann Popen was still fresh in the minds of most Society directors. Given these criticisms, the radical nature of the amendments proposed, and the increase in reported cases of physical abuse, it is not surprising that they did not survive the draft legislation.

In a later report, the Ministry indicated that these amendments were simply an attempt to balance the protection of children with allowing families to function and rear their children in a number of ways. It further acknowledged that the draftsmen of the previous report did not have Judge Allen's report into the death of Kim Ann Popen.⁶⁹

The draft legislation proposed that intervention would occur if the child had suffered or there was a risk he or she would suffer physical harm which was inflicted by

⁶⁸ See for example, The Citizen, Ottawa, Saturday, 7th of May, 1983. In his doctoral dissertation, at p. 84, Richard Barnhorst relates an interesting incident which occurred during the Legislature's Standing Committee hearings on the legislation: "The credibility of child welfare professionals was probably also weakened by a demonstration orchestrated by the Metropolitan Toronto C.A.S. During its formal presentation to the Committee, a C.A.S. social worker and a ten year old child were brought into the committee room wrapped in red tape. Signs attached to them read: 'Bill 77'. Press photographers, having been notified in advance by the C.A.S., took pictures which later appeared in Toronto newspapers. The general message was that the legal requirements in Bill 77 would result in children and professionals being tied up in unnecessary 'red tape'."

⁶⁹ Ontario Ministry of Community and Social Services, The Child and Family Services Act: Draft Legislation and Background Paper, November 1983, p. 41.

the person having custody of the child. This removed from the definition the requirement that the person deliberately inflict the harm, or that the harm be serious, or that there be a substantial risk of harm.⁷⁰ It also broadened the ground relating to sexual abuse and emotional harm. Such abuse would now include a child who had been or was at risk of being sexually molested by the person having charge of the child or by another person where the person having charge of the child knew or should have known that the possibility of abuse existed, and did nothing to prevent or protect the child from such abuse.⁷¹

The Children's Aid Society could also intervene where the child was suffering from emotional harm which was demonstrated by certain conditions and where there was a risk that the child would suffer emotional harm where the person having charge of the child was unwilling to provide or consent to the necessary services in relation to the emotional disturbance. This section would then delete the necessity of showing serious emotional harm and would add the concept of risk, i.e. intervention when there is a risk of such harm. The draft legislation also included a general section dealing with neglect or emotional deprivation and would allow the Children's Aid Society to intervene based on the child suffering from any mental, emotional or developmental condition which, if not

⁷⁰ *Id.*, at p. 42.

⁷¹ *Id.*, at p. 42.

remedied, could seriously impair the child's development, where the guardian of the child was unable or unwilling to provide for or consent to such treatment.⁷²

As is evident, these proposals were the middle ground between the old style intervention and the earlier proposals of intervention only in the most serious of cases. This is most clearly demonstrated in the definitions relating to emotional disturbance. Under October 1982 proposals, the Children's Aid Society would have to show the child was actually suffering from emotional disturbance before intervening, and now all they would have to do is show that there was a risk that the child may suffer from emotional harm.

The importance of these definitions and the debate surrounding them cannot be overstated. They unlock the door to intervention. Child welfare legislation will not apply to children unless the worker can reasonably place the child in one or more of the defined categories of "children in need of protection". Under the old legislation, the door to intervention was left completely open by wide and ambiguous definitions. The proposed definitions would provide a more restricted entry.

⁷² Id., at p. 42.

(iv) The New Definitions

In its final form, the Child and Family Services Act was the essence of compromise.

It defined "children in need of protection" as follows:

Those children who are:

- a) physically abused or at substantial risk of being abused;
- b) sexually abused or exploited or at substantial risk of being so;
- c) emotionally harmed or who are at substantial risk of being harmed, or who are emotionally disturbed and their parents fail to treat that disturbance;
- d) those children who need proper medical care and do not receive it;
- e) those children whose parents cannot look after them and voluntarily bring the child before the Court with the child's consent;
- f) those children under twelve who come into conflict with the law.⁷³

Gone were those definitions that relate to the "fitness" of the caregiver and the home the child was being raised in. No longer should wardship cases be fought solely as a result of a worker's value judgment in this regard. The Child and Family Services Act was telling the Children's Aid Societies and their workers to concentrate on the crucial

⁷³ Child and Family Services Act, s. 37(2).

issue - actual or potential harm to children. When the Act was proclaimed on the 1st of November, 1985 it did promote family autonomy through these definitions. These definitions are clear, easy to understand and more limiting than those contained in the Child Welfare Act. There is no question that they would have protected Kim Ann Popen, if properly applied, but probably would not have resulted in the wardship order of the histrionic mother's child. It is precisely for this reason that many Children's Aid Societies were not happy with these new definitions. They were afraid that they would not catch those people who lived on the fringe and for that reason were not able to care for their children in an adequate or proper fashion - the cases of so-called "chronic" neglect.

This position is completely understandable. Institutionalized values die slowly and hard. Children's Aid Societies had had their own way for such a long period that these definitions could not but be seen as a threat to their mandate. Even a few years after the fact, Societies were still complaining about the lack of intervention. For example, a recent report prepared by the Children's Aid Society of Ottawa-Carleton stated as follows:

The growing popularity in Government for social service policies centered on the deinstitutionalization is beginning to make it difficult for the Society to retain the share of resources already connected with the child welfare services. In an attempt to reduce the number of children coming into care, there will be pressure on the Society and other community social services to promote greater primary and secondary preventative services. There is growing evidence, however, that there may be an unintentional consequence of this secondary preventative programming. The youngsters who eventually

do come into care display more serious behavioural problems than might have been the case with earlier removal from the parental home.⁷⁴

With the government becoming less interventionist in child welfare matters and emphasizing prevention through family support, theoretically more resources would be made available for that purpose with less being available for institutional care. The passage quoted above is one caught in nostalgia - a longing for the past. It also takes issue, albeit in guarded terms, with the non-interventionist philosophy contained in the provisions of the Child and Family Services Act while complaining about retrenchment of its budget.

One also must remember when dealing with this kind of legislation, that its aims and aspirations cannot be proclaimed one day and met the next. It takes many months and perhaps years for ideas and attitudes which have been shaped by experience and applied over a long period of time to change. There are some judges who will never shake the interventionist mindset and will grudgingly apply the liberalized provisions of the Child and Family Services Act.

⁷⁴ Looking to the 90's: The Corporate Plan of the Children's Aid Society of Ottawa-Carleton, May 1988, p. 10.

Fortunately, however, the Provincial Court (Family Division) is a creature of statute. Judges must apply the law as it is found in the statute. This court has no inherent *parens patriae* jurisdiction, as the Superior Courts do.⁷⁵ It would take a rogue Judge to simply ignore the plain and ordinary terms of the Act. For the most part, it would appear that the Child and Family Services Act has been accepted by the judiciary and applied in a manner consistent with Government policy of less intervention in the family.

(v) The Balance Provided

The argument thus far must not be taken to mean that the definitions relating to children in need of protection are one-sided. They are not. Arguments might be made by some that the definitions are still too wide and give the Society too much latitude to intervene. For example, there are no limiting adjectives before the words "physical harm" or the demonstrable words used in relation to emotional harm.⁷⁶ The door, although not left wide open, is open far enough to allow a social worker to squeeze through the opening.

⁷⁵ Children's Aid Society of Metropolitan Toronto v Caroline G. [1982] W.D.F.L. 890 and Child and Family Services Act, s. 3(1)(1).

⁷⁶ Child and Family Services Act, s. 37(2)(f).

No guidance on the kind of physical harm envisaged or the number of incidents which must occur, or their severity, before intervention is warranted is given by these definitions. Will a parent who is totally frustrated by his child's blind intransigence and who strikes him or her with his open hand be subject to intervention? Will a rural mother who takes her children "skinny dipping" in a nearby pond be subject to intervention? Will a father who uses a ruler to discipline his children on a daily and consistent basis be subject to intervention?⁷⁷ These definitions encompass as many situations as there are people and, although they might not form the basis of a finding of "in need of protection", they allow a determined worker to establish a base camp for further operations by establishing a basis for the allegation that the child is "in need of protection".

(vi) The Charter and the New Definitions

The reader should not be surprised that the changes wrought by the introduction of the Child and Family Services Act resulted largely from the efforts of Judge George Thomson acting in conjunction with Richard Barnhorst who, at the time, was a lawyer

⁷⁷ CAS of Ottawa-Carleton v W(S) and W(M) [1988] W.D.F.L. 458, (Sheffield, J.) where this kind of parental discipline did lead to a finding the children were in need of protection.

with the Ministry of Community and Social Services.⁷⁸ Based on their past experience, (Thomson as a judge of the Provincial Court (Family Division) and Barnhorst as a lawyer representing parents in these kinds of proceedings), they were critical of the existing Child Welfare Act and, in particular, felt that professional service providers and judges had too much discretion and that there was not enough substantive legal rights and procedural safeguards contained in that Act.⁷⁹ Barnhorst who was the Project Director and Thomson who was then the Associate Deputy Minister of the Social Services Ministry committed the Ontario Government to a "legalistic, non-interventionist" approach to child welfare matters.⁸⁰ These types of proceedings, in other words, should be decided on an adversarial basis with the protection that the rules of that process provide and not at the discretion of the professional service provider.

Even without these two key players and the very important impetus they obviously provided, child welfare legislation had to change with the advent of the Canadian Charter

⁷⁸ Barnhorst, "Child Protection Legislation: Recent Canadian Reform", supra, note 47, p. 285.

⁷⁹ Id., at p. 285.

⁸⁰ Id., at p. 286.

of Rights and Freedoms.⁸¹ Although, admittedly, the definitions of children "in need of protection" cannot be too rigid, they should be clear enough that a parent or other guardian knows with reasonable certainty the standard of conduct required and whether it has been breached. How does an alleged improper or unfit person answer that charge? Or the charge that the dwelling they are providing a child with is an unfit or improper place to live? A strong argument could be made that in both these situations, parents would be deprived of their section 7 Charter right to a parent-child relationship on the basis of an arbitrary, vague and value-laden standard and that such a standard would not be saved by section 1 of the Charter.

In striking down provisions contained in statutes on account of vagueness, Canadian courts have based their decisions more on section 1 of the Charter than section 7 while the American courts have treated it more as a violation of the right to due process.⁸²

As Bala and Cruickshank point out, the Provincial Family Court in Nova Scotia in Re M.B. and Re B.M., dismissed applications to bring two boys into care on the basis

⁸¹ Constitution Act, 1982 as enacted by the Canada Act 1982 (UK) c. 11, proclaimed in force April 7, 1982 and amended by the Constitution Amendment Proclamation, 1982 S.I./84-102, effective June 21st, 1984.

⁸² Nicholas Bala and David Cruickshank, "Children and the Charter of Rights". Children's Rights in the Practice of Family Law, B. Landau (ed). Carswell, 1986, pp. 68-70.

their section 7 Charter rights were violated in that notices served upon them did not adequately detail the charges they had to meet.⁸³

The new Child and Family Services Act definitions are much more likely to withstand a Charter challenge than those of the Child Welfare Act. They are clearer and more precise and are an attempt to reasonably limit a social worker's discretion to intervene. As already conceded, no precise definitions would ever be possible. They also require the social worker to draft the Children's Aid application on the basis of specific allegations that relate to the definitions. The parent will no longer have to face general allegations of "chronic neglect" or being an unfit or improper person. They will know with some specification what conduct is impugned.

These definitions have been dealt with in some detail because they are a microcosm of the entire Act in the way they attempt to balance the right of children to be protected while, at the same time, protecting parental rights to family autonomy.

⁸³ Id., at p. 70; (1984) 65 N.S.R. (2d) 181; N.S. Family Court, Roscoe, Prov. J., 19 March, 1985 (unreported).

PART II - BALANCING THE SCALES

A. Parental Rights

1. The Principles

The Child Welfare Act⁸⁴ contained no statement of government policy or purpose and, accordingly, no guidance for those who were to apply its provisions. This, in effect, was detrimental to parental rights as it did not set any parameters on the discretion of the professional service providers. This starkness in expressed government policy is in sharp contrast with the stated purposes of the Child and Family Services Act.

Not only are these purposes set out in section 1 of the Act, but the margin note makes it clear they are to be a declaration of principles.⁸⁵ Understandably, the paramount objective of the Act is to promote the best interests, protection and well-being of children.⁸⁶ But not far behind and ranked second in importance is that, although parents may need help, that help should be given to support family autonomy and integrity and,

⁸⁴ The Child Welfare Act, S.O. 1978, c. 85.

⁸⁵ Child and Family Services Act, s. 1.

⁸⁶ Id., s. 1(a).

where possible, should be provided on the basis of mutual consent.⁸⁷ Service providers are directed to follow the least disruptive course and to always keep in mind the child's need for continuity of care in a stable family environment. They are further directed to remember that there are differences among children in the rate of physical and mental development and that, where possible, their cultural, religious and regional differences should be respected. There are also special provisions that relate to our native and Indian people.⁸⁸ These include: (i) a recognition that our Indian and native people should be allowed to provide their own child and family services where possible and that such services should recognize their culture, heritage and traditions and their concept of the extended family,⁸⁹; (ii) party status to a representative of the child's band or native community in a protection application⁹⁰; (iii) a recognition that one of the "best interests" criteria is the uniqueness of the Indian and native culture, heritage and traditions and of preserving the child's cultural identity; (iv) and a direction that before Crown or society wardship is ordered the court, unless there is substantial reason not to, shall place the

⁸⁷ Id., s. 1(h).

⁸⁸ Id., s. 1(b)(c)(d)(e)(f).

⁸⁹ Child and Family Services Act, s. 1(b)

⁹⁰ Id. s. 39(1)(4).

child with his or her extended family, a member of the child's band or native community or another Indian or native family⁹¹.

Although this statement of principle set out in section 1 is not a substantive provision, all of the other sections of the Child and Family Services Act should be read having these principles in mind. Counsel for parents should be asserting these principles, but the reality seems to be that they are hardly ever mentioned by counsel or the court.

For example, the Child and Family Services Act states as one of its paramount objectives "to promote the best interests" of the child. "Best interests" is actually defined in the Act, but as with the statement of principles, this definition is often overlooked by counsel and the court.⁹² A study of reported cases has revealed that most courts were making dispositional orders without much consideration of the "best interests" factors set out in the Act.⁹³

⁹¹ Id., s. 53(5).

⁹² Id., s. 37(3).

⁹³ Barnhorst. "Child Protection Legislation: Recent Canadian Reform", supra, note 47, p. 271.

A dispositional order in relation to a child can only be made after a finding that a child is in need of protection and must be made in light of the child's best interests. The relevant factors listed mirror in many respects the declaration of principles. Once a finding of in need of protection is made, parent's counsel should look to these factors of best interests and tailor them to their case. On a careful and objective reading, one will find the "best interests" factors favour family over institutional care. Some of these factors include the child's cultural background, religious faith, continuity in care and the child's views and wishes if they can be reasonably ascertained.⁹⁴

The crucial ones are:

- 1) The importance of the child's development of a positive relationship with a parent and a secure place as a member of a family;
- 2) The child's relationship by blood or through an adoption order.⁹⁵

Even when a finding is made that a child is in need of protection, counsel should turn to these "best interests" criteria and make the argument that the child should be returned to the parents with or without supervision or on other appropriate conditions.

⁹⁴ Child and Family Services Act, s. 37(3)3, 4, 7, and 9.

⁹⁵ Id., s. 37(3) 5 and 6.

This position should then be reinforced by referring these "best interests" factors to the appropriate sub-sections of the declaration of principles. In this way, counsel can turn these declaratory provisions into an effective mechanism for protecting parenting rights.

2. Prior Authorization

The old adage that a man's home is his castle has been reflected over the years by the severe criminal penalties meted out to those who destroy, attack or invade private property.⁹⁶ Perhaps more important is the psychic damage that is done by invasion of private property. Victimized householders have often been heard to describe their feelings in the same way that women have described rape - a violation of their sense of sanctity and security. The feeling is no less powerful when the intruder happens to be the state. This important right to be secure in one's home is simply an additional and supportive one to family autonomy with the two being closely entwined.

One of the most important issues in child welfare proceedings is: what power will the state be given to initiate protection proceedings and to enter private dwelling places to apprehend children allegedly in need of protection.

⁹⁶ See for example the present provisions contained in Martin's Criminal Code 1990, Canada Law Book: Toronto, 1989, ss. 38-42 and 430-434.

Under the Child Welfare Act the state acting through the Director of the Children's Aid Society or a police officer who had reasonable and probable grounds to believe that the child was in need of protection could, without warrant, enter a home, by force if necessary, search for and apprehend a child and remove the child to a place of safety. There the child would be detained until the matter was brought before a Provincial Court Judge. Although there was another section of the Act allowing entry, search and seizure under a warrant, most of the cases that came before the court resulted from a warrantless apprehension or no prior authorization.⁹⁷

Section 8 of the Canadian Charter of Rights and Freedoms provides:

Everyone has a right to be secure against unreasonable search and seizure.

Judge Thomson in T.T. v The Catholic Children's Aid Society of Metropolitan Toronto accepted that this section of the Charter applied to seizure of persons, as well as property and could be applied in child welfare cases.⁹⁸

⁹⁷ The Child Welfare Act, 1978, ss. 21(1)(3).

⁹⁸ (1984), 46 O.R. (2d) 347.

More recently, Mr. Justice Campbell of the Supreme Court of Prince Edward Island held that section 15(1) of the Family and Child Services Act⁹⁹ of that province was of no force and effect as it contravened this section of the Charter and was not saved by section 1 of the Charter¹⁰⁰. Section 15(1) of the Child and Family Services Act read as follows:

The Director or a peace officer may apprehend without warrant and take to a place of safety any child who is believed to be a child in need of protection.

Mr. Justice Campbell found that this subsection authorized the Director or a peace officer to enter a home and search for a child therein and to apprehend a child on mere belief that the child was in need of protection. The Director or other person was not required to have reasonable and probable grounds to believe that the child was in need of protection.

The court stated that three conditions at least must be met to satisfy the test of reasonableness contained in section 8 of the Charter where the Director or a person acting on his or her behalf proceeds to apprehend a child without prior approval:

⁹⁹ R.S.P.E.I., 1974, Cap F-2.01, as amended in 1984.

¹⁰⁰ HM & MM v The Director of Child Welfare for the Province of Prince Edward Island, (1989), 22 R.F.L.(3d) 399.

The Director or person searching or seizing must have reasonable or probable grounds to believe:

- a) that the child is in need of protection pursuant to the Act and;
- b) it is not feasible to obtain prior authorization (warrant) in the circumstances;
- c) that the child intended to be apprehended will be found in the premises to be searched.

Justice Campbell could not read these safeguards into the Act as that would usurp the legislature's function. The impugned section was, therefore, inconsistent with section 8 of the Charter and did not meet the proportionality test as set out in R. v Oakes¹⁰¹ as:

- a) The section provided no safeguard against arbitrary search and seizure;
- b) The means provided did not impair rights and freedoms as little as possible;

¹⁰¹ [1986] 1 S.C.R. 103. There are three elements to the proportionality test: (a) The measures adopted must be carefully designed to achieve the objective in question and must not be arbitrary, unfair or based on irrational considerations. They must rationally connect to the objective. (b) The means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question. (c) There must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance.

- c) A requirement of a minimal standard of reasonable and probable grounds would not in any way frustrate the legitimate ends to be served by the Director;
- d) The effect of the measures which limit the Charter right to be secure against unreasonable search and seizure is too deleterious to be justified as a reasonable limit under section 1 of the Charter.

In the result, Mr. Justice Campbell exercised the Court's *parens patriae* jurisdiction to keep the apprehended children in care and, further, offered the opinion that apprehension by the Director without prior authorization but on reasonable and probable grounds, would constitute a reasonable search and seizure within the meaning of section 8 of the Charter. Respected academics and experts in this area would agree with this decision and see it as a sensible one. They would agree that any child welfare legislation authorizing intervention should be subject to the requirement of prior authorization in non-emergency situations.¹⁰² The rationale for this is based as much on the child's right not to be subject to unreasonable search and seizure as it is the family's right to autonomy and the security of their home. But, as mentioned earlier, both concepts are closely linked and in some cases indistinguishable.

¹⁰²

See Bala and Cruickshank, "Children and the Charter of Rights", *supra*, note 82, pp. 76-79; and Professor Rollie Thompson's comments on this decision in the Lawyers' Weekly, 15th December 1989. pp. 1 and 9.

Section 21(1) of the Child and Family Services Act of Manitoba was challenged as being contrary to s. 7 (legal rights) and s. 15 (equality rights) of the Charter of Rights and Freedoms as it allowed the director or peace officer, who on reasonable and probable grounds believed that a child was in need of protection, to apprehend the child without a warrant and to take the child to a place of safety where the child may be detained for examination and temporary care. The court decided, on the basis of possible risk to a child's health or safety, that requiring the director to seek and obtain a warrant from the court before apprehending a child would be unreasonable. Even if this provision did violate ss. 7 and 15 of the Charter, it would be saved by s. 1 as a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.¹⁰³ It is submitted the better view is that expressed by Justice Campbell in H.M. Prior authorization should be required in a non-emergency situation.

Ontario's Child and Family Services Act anticipated these problems and has made significant departures from the provisions contained in the previous Child Welfare Act. Under the Child and Family Services Act, a worker can obtain a warrant for apprehension only after they have provided a Justice of the Peace with a sworn affidavit stating that

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Winnipeg South Child and Family Services Agency v M.P. and M.P. (1989), 20 R.F.L. (3d) 99.

there are reasonable and probable grounds to believe that a child is in need of protection and there are reasonable and probable grounds to believe that a less restrictive course of action is not available or will not protect the child adequately. A worker can only apprehend without warrant when the worker believes on reasonable and probable grounds that a child is in need of protection and there would be substantial risk to the child's health and safety during the time necessary to bring the matter on for a judicial hearing.¹⁰⁴

These were intended as, and are, an early recognition in the substantive provisions of the Act that apprehension of a child from its home should only be done as a last resort and where there is no other less restrictive course of action open. In other words, if a Justice of the Peace is satisfied on the material presented that the child would be adequately protected by an application carried out in the usual manner, then no warrant should issue for apprehension.¹⁰⁵ It also shows the policy makers' "greater concern for ensuring that the discretion of decision makers is structured in the direction of the least intrusive option".¹⁰⁶

¹⁰⁴ Child and Family Services Act, s. 40(2)(6).

¹⁰⁵ Id., s. 40(1)(3).

¹⁰⁶ Barnhorst, "Child Protection Legislation: Recent Canadian Reform", supra, note 47, p. 265.

To some extent, the statutory provisions fall down in their practical application. Counsel for parents do not usually see or challenge the information on which the warrant to apprehend was obtained. If no warrant was issued, the only information available to counsel for the parents will be the affidavit material filed with the Children's Aid Society's application for wardship. It would be in the rarest of cases where a worker could not provide sufficient factual information couched in the appropriate language in order to justify their actions.

These provisions provide, however, a threat of being censured by the court or parent's counsel and this acts as a brake on the worker's discretion. It is the thought of exposure of the shallowness and hollowness of their reasons for apprehending that must be kept in mind by the worker. In other words, it is an attempt to make the Children's Aid Society accountable for their actions which is an important step in protecting parenting rights.

Under the Child Welfare Act, workers were protected from liability in search and seizure situations so long as they were acting in good faith and with reasonable care in the circumstances.¹⁰⁷ Under the Child and Family Services Act, they are protected unless the

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The Child Welfare Act, 1970, s. 23(5).

act was done maliciously or without reasonable grounds.¹⁰⁸ The old provision gave workers more comfort as the dispensation covered wider ground and there were fewer procedural requirements involved in seizure situations. The Children's Aid Societies viewed the new provisions as giving their workers less protection and were concerned that this change may lessen the vigour with which workers approach their task and result in the weakening of their will to take action when it might otherwise be necessary.¹⁰⁹

These provisions have had a positive influence in protecting families from unnecessary intrusion. They have reduced the number of instances where children are apprehended without warrant and without, at least, a modicum of caution on the part of the worker. They have also provided additional impetus for the workers to be more specific in their application as to the type of parental behaviour that is being attacked.

¹⁰⁸ Child and Family Services Act, s. 40(16).

¹⁰⁹ This view has resulted from the author's various discussions with counsel for the Children's Aid Society and from views expressed at various seminars attended by the author by Children's Aid Society Directors and others dealing with the Child and Family Services Act.

3. Medical Examination and Treatment

Another fundamental right common to both child and parent affected by apprehension is the right to consent to medical examination and treatment. At common law, age was not conclusive of an infant's capacity to consent to medical treatment. Where he or she could understand the nature and consequences of a particular treatment, he or she could give a fully informed consent and parental consent was unnecessary.¹¹⁰ This is known as the mature minor doctrine.¹¹¹ If the child does not have the capacity to consent because of age or the child is under the age of sixteen, the parent's consent to medical treatment is required.¹¹² It would appear, however, that in Ontario, because of tort liability concerns, it was and is a common practice by health care professionals to obtain parental consent for medical treatment of minors.¹¹³

¹¹⁰ Johnston v Wellsley Hospital [1971] 2 O.R. 103, at p. 108 (OHC).

¹¹¹ Barbara Landau, "The Rights of Minors to Consent to Treatment and Residential Care", Children's Rights in the Practice of Family Law, p. 93-149 at p. 116.

¹¹² Public Hospitals Act, R.S.O., 1980 c. 410, and Hospital Management Regulation, R.R.O. 1980, Reg. 865, ss. 50 and 51.

¹¹³ Supra, note 111, at p. 113.

How far should child welfare legislation impinge on these rights and should apprehension automatically terminate this parental right to provide consent to medical examination or treatment? It must be kept in mind that, at this stage, the child has been apprehended merely on the basis of allegations and no actual finding that the child is in need of protection has been made or can be made until after a trial. In Alberta, for example, the Director on apprehension may authorize the provision of any essential medical, surgical, dental or other remedial treatment without the parent's consent after it has been recommended by two doctors or dentists as the case may be.¹¹⁴ More importantly, the Director, if he considers it necessary, can confine the child to a secure treatment facility to protect the child's survival, security or development.¹¹⁵

This is highly interventionist and, of course, takes away fundamental parental rights without any kind of a hearing.

The Child and Family Services Act makes a distinction between examination and treatment. On apprehension, a worker can authorize a child's medical examination (not treatment) where the parent's consent would otherwise be required.¹¹⁶ The Children's Aid

¹¹⁴ Child Welfare Act, S.A. 1984, c. C-81, s. 20(1)(a).

¹¹⁵ Id., s. 20(1)(b).

¹¹⁶ Child and Family Services Act, S.O. 1984, c. 55, s. 40(8).

Society can also apply to have the child admitted to a secure treatment facility. The application is to the administrator of that facility and the grounds for the admission are restrictive. The admission is also subject to court review.¹¹⁷ There is no authority in the Act to allow the Children's Aid Society to consent to medical treatment of the child until the child has been found to be in need of protection or has been ordered to remain in the care of the society pending trial.¹¹⁸ Even if the child is made a society ward (as opposed to a Crown ward), the court still has the discretion to allow the parents to consent to medical treatment.¹¹⁹

When the Ontario legislation is compared to that of Alberta, it does go a long way to protect parents as far as medical treatment is concerned on apprehension and is far better than the total lack of protection under the old Child Welfare Act.¹²⁰ The

¹¹⁷ Id., s. 118 and 110.

¹¹⁸ Id., s. 58 and 59 and 47(4).

¹¹⁹ Id., s. 58(1). Once a child is made a Crown ward, the parent-child relationship is severed and the child becomes a permanent ward of the state and can be placed for adoption. A society ward, on the other hand, is only entrusted to state custody on a temporary basis and may be returned to the parents either on consent or by a further court order.

¹²⁰ There was no specific provision in the Child Welfare Act dealing with medical treatment or examinations on apprehension and it was the author's experience that they were routinely conducted by the Children's Aid Society, particularly in abuse cases and treatment was provided as thought necessary.

provisions, however, are not without problems. For example, even though there may be no allegation that the parents have physically or sexually abused their child, there is nothing to prevent the agency from having the child medically examined and using evidence thus obtained against the parents at a subsequent court hearing.

The word "medical" is defined by the Oxford Dictionary as:

of medicine; requiring, supplying, medical not surgical treatment.

Is this medical examination limited to a physical one as opposed to a psychological or psychiatric examination? Given the definitions of a child in need of protection, the emphasis on emotional as well as sexual or physical abuse and the plain meaning of the word, there is no reason why the word "medical" would not include at least a psychiatric examination of the child. Part of that psychiatric examination could then include a psychological assessment. If this argument is accepted, this leaves the agency with a powerful tool that can be used against the parents. It allows them to essentially search for evidence by having a child examined and using any negative findings to buttress their application. This section may have to be revised so that examinations are only used when the Children's Aid Society's application is based on specific allegations of physical or sexual abuse.

4. Timing and Care and Custody Hearing

Time is a valuable ally to intervention and the Children's Aid Society's application for wardship while being a quiet but often overlooked enemy to parental rights. The lapse of a long time period between apprehension and the first court appearance allows, in Richard Barnhorst's words, "more extensive interference with parental rights and responsibilities without any check on the agency's authority".¹²¹ More importantly, the passage of time will often reinforce the tendency of Judges to preserve the status quo in custody cases, even though these cases involve the state versus the parents.

Time is also a very important factor and works against the parents between the date of the care and custody, or show cause hearing, and the actual trial, especially where infants or young children are involved. This is so for a number of reasons, among which are:

- a) At the ultimate hearing and after the child is found to be in need of protection, the court will consider what dispositional order should be made pursuant to the provisions of the Act.¹²² An extremely important

¹²¹ Barnhorst, "Child Protection Legislation", supra, note 47, p. 267.

¹²² Child and Family Services Act, s. 53(1).

consideration is the bond between the parent and child and whether it should be severed. If the infant or young child has been in care for a long period of time, the bond may already have been severed and, accordingly, its consideration may no longer be an important factor.

- b) As a corollary to this, the infant or young child may have established a very close and affectionate relationship with the foster parents and their family and this may become a crucial factor in the judicial disposition.¹²³
- c) The Children's Aid Society, once the child is ordered to remain in their care even on an interim basis, becomes the child's guardian and as such may have psychological, psychiatric or other tests carried out on the child prior to the hearing.¹²⁴ The experts used to conduct these tests or assessments will be

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See s. 37(3) of the Child and Family Services Act which requires the Court to consider the following circumstances when determining best interests: "The importance of continuity in the child's care and the possible effect on the child of disruption of that continuity". (s. 37(3)7); and "The merits of a plan for the child's care proposed by a Society, including a proposal that the child be placed for adoption or adopted, compared with the merits of the child remaining with or returning to the parent". (s. 37(3)8). Both of these provisions have been used to promote the interest of foster parents over that of parents. See also s. 39(3) Child and Family Services Act which gives foster parents quasi-legal status to be present and make submissions at the hearing through their own counsel.

¹²⁴

See s. 47(2)(4) and s. 58 of the Child and Family Services Act and Children's Aid Society of Metropolitan Toronto v Janet A., Ont. Prov. Ct., June 10, 1983, James, Prov. Ct. Judge (unreported), summarized at O.L.W.D. 13-19-026, September 9, 1983.

of the Children's Aid Society's choosing and will often be someone that the agency has consulted several times in the past. In most cases, the results from these assessments will be used by the agency at the hearing to support the order they are advocating.¹²⁵

- d) The child, once placed in care, may react violently as a result of the separation from his or her biological parents and may suffer from symptoms such as anger, anxiety or depression. These symptoms will be aggravated if the child is moved from one foster home to another pending the hearing. This will often be the child that is assessed by the agency's experts who may relate these symptoms of emotional disturbance to past poor parenting rather than a single or multiple separation experience.
- e) If the parents at the care and custody hearing are given access to the child, their visits may take place under unusual or stressful conditions. They may occur, for example, in the foster home or under supervision at the Children's Aid Society's office. There may be others present while the visits are taking place such as the social worker or foster parents. These visits may be erratic

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This should not be confused with the provision contained in s. 50(6) of the Child and Family Services Act where the Court can order an assessment of the parents and children involved and this assessment will form part of the record and be received in evidence without further notice. The court ordered assessment is normally done by the Family Court Clinic and is objective while that obtained by the Children's Aid Society will normally support the position it is advocating.

and vary in length and quality. Visits could occur after the child or parent has been sick or suffered from some other physical or emotional trauma or incident. At the hearing, the social worker and foster parents may be called by the Children's Aid Society to give evidence as to the interaction between the parent and child on these visits. Their observations may have been made in these artificial and limited situations and the views that they express may be quite negative.

- f) It may be very difficult for the parents, for whatever reason, to maintain regular and consistent access with the children while in care. This lack of consistency can be used against the parents at the ultimate hearing.
- g) Often the act of intervention and apprehension will add enormous stress to an already difficult situation in the family, sometimes resulting in the breakdown of the family unit altogether. Time will also allow the family to "shoot itself in the foot" by often lurching from one crisis to another between the date of apprehension and the hearing. At the dispositional hearing, these incidents are developed into a series of vignettes evidencing parental neglect and fault.

There is an attempt to deal with these timing problems in the Child and Family Services Act. As under the Child Welfare Act, the child once apprehended must be

brought before the court within five days for a child protection hearing.¹²⁶ None of the parties will be prepared to proceed with a formal hearing to determine whether the child is in need of protection on this date and the issue will become interim custody of the child during the period of adjournment.¹²⁷ For many of the reasons just mentioned, this is the most crucial interim hearing in child welfare cases and perhaps the most important hearing of the whole process. Far too many counsel approach this hearing as though it were simply another adjournment. It is not - it will bear directly on the final outcome and whether the parents retain custody.

The parents are still reeling from the shock of apprehension within that five day period between the date of apprehension and the first court appearance. In many cases, they have to apply for and receive Legal Aid and search for counsel. Often counsel is retained a day or so before the first return date. Because any adjournment of this interim hearing will result, in most cases, in the child remaining in care, it is extremely important for counsel not to adjourn for a long period of time and only long enough to meet with the worker, review the Children's Aid Society's file, speak with important witnesses and prepare affidavit material to be used in the care and custody hearing. Although the Act provides for a hearing within five days, it is not unusual for this preliminary hearing to be

¹²⁶ Child and Family Services Act, s. 42(1).

¹²⁷ Id., s. 47(2).

adjourned for at least a two to three week period during which time the apprehended child will remain in care. This is a serious infringement on both parental rights and the child's right but it is the price that one has to pay to keep the legal and adversarial model for determining child welfare cases.

There is a specific provision dealing with undue delay. If a determination of the protection issue has not been made within three months after the commencement of the proceeding, the court must fix a date for the hearing of the application and the date may be the earliest date that is compatible with the just disposition of it.¹²⁸ This provision is more symbolic than real. Although designed to protect parents and families with regard to the timing problems, it does not work in practice. Given the crowded dockets of the Provincial Court (Family Division) and the complex nature of these cases, there are not enough blocks of time available to ensure that these cases are dealt with in a fast and efficient manner. Often, there will be many months pass between the time of the interim care and custody order and the final determination and, as indicated, time is an ally of the Children's Aid Society and a parent's enemy. Perhaps counsel will have to be more vocal in their use of this tool by bringing it to the Judge's attention during the proceedings and, if necessary, to the government's attention if the purpose of this provision is defeated by the inertia of the system itself.

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Id., s. 48.

5. The Test on the Care and Custody Hearing

As discussed, because this interim care and custody hearing may be determinative of parental rights, the criteria set out in the Child and Family Services Act and the tests used on the interim hearing are absolutely crucial to such rights. Under the Child Welfare Act, all the agency would have to do was to show cause why the child should remain or be placed in the care of the Children's Aid Society.¹²⁹ It had been held that it was proper to make a preliminary finding that the child was in need of protection at this hearing and on that basis order the child to remain in care.¹³⁰ On the other hand, the court in Children's Aid Society of Metropolitan Toronto v Janet A. held that in determining whether the child should remain in care at the show cause hearing, the court should consider the likelihood of a finding that the child was in need of protection and the primary dispositional aspects of best interests of the child pursuant to section 1(1)(b).¹³¹ It is submitted that this latter test was the more appropriate in the circumstances and was

¹²⁹ Child Welfare Act, 1978, s. 28 (13).

¹³⁰ Re Smith and Herault, Ont. Fam. Ct. Pembroke, Document No. 362181, Foran, Prov. J. (unreported) summarized [1982] W.D.F.L. 961.

¹³¹ Ontario Prov. Ct. June 10, 1983, James J. (unreported) summarized at O.L.W.D. 13-19-026 (Sept. 9, 1983).

routinely applied by judges,¹³² as it did not prejudge the case by making a preliminary "in need of protection" finding. It must be kept in mind that this interim hearing was usually determined on the basis of affidavit evidence and before the parents could put in their full case.

It is immediately apparent that this section (28(13)) and the way it was interpreted gave the judge wide and, some would argue, unfettered discretion in placement of the child during the period of adjournment.

It was also unclear under the Child Welfare Act whether the court had the power to impose a supervisory order on the parents if the child was returned to them. There was no specific provision in the Act allowing this. Some judges would return the child under supervisory conditions while others felt they did not have the power to impose conditions. This apparent lack of authority would sometimes lead judges to err on the side of caution and keep the child in care out of concern for the child's safety.¹³³ A supervisory order simply allowed the agency access to the parents' home to ensure the child's safety.

¹³² See The Lawyers Weekly, Vol. 6, No. 14, (1 Aug. 1986) p. 1.

¹³³ Ministry of Community and Social Services, The Children's Act, A Consultation Paper, October 1981, p. 86.

The Child and Family Services Act provides the court with specific guidelines in the exercise of its discretion at this crucial juncture of the wardship proceedings. The court shall not make an order placing the child in the custody of the Children's Aid Society or another person unless it is satisfied that there are reasonable and probable grounds to believe that there is substantial risk to the child's health or safety and the child cannot be protected adequately by an order returning the child to its parents with or without supervision.¹³⁴ There is now a specific provision allowing the court to impose reasonable terms of supervision.¹³⁵ The court also has the discretion to place the child with another family member or neighbour or other suitable person during the period of the adjournment.¹³⁶ In the Catholic Children's Aid Society of Metropolitan Toronto v Patricia L.¹³⁷ Judge Felstiner had this to say about these new provisions:

On the other hand, the burden upon all Children's Aid Societies, as I see it, is almost massive now in that the risk must be substantial. The government, in that section (section 47(3)), has said, in effect, that it is willing to subject infant children, helpless children, to risks which are significant but not substantial. That is the policy of the Province of Ontario and I am bound by that policy. I am not given the option, nor is any other

¹³⁴ Child and Family Services Act, s. 47(3).

¹³⁵ Id., s. 47(2)(a)(b).

¹³⁶ Id., s. 47(c).

¹³⁷ Ont. Prov. Ct. (Fam. Div.) 16 April, 1986, Felstiner, J. (unreported) Docket # 1815/86, North York.

Judge, of looking at the best interests of the children... We can look only at a substantial risk to the child's health or safety.

The Judge was so upset by these provisions that he wrote to the Chief Judge requesting that the matter be drawn to the attention of the Deputy Minister of Community and Social Services.¹³⁸ This interpretation by Judge Felstiner was upheld on appeal to the District Court.¹³⁹ Apparently, negotiations to amend the legislation were held between the Catholic Children's Aid Society of Metropolitan Toronto and the Ministry of Community and Social Services but they did not amount to anything.¹⁴⁰ These provisions are obviously anathema to Children's Aid Societies and some of the judges that interpret them, and for obvious reasons. They were designed to and, in fact, strengthen parental rights to interim custody. They also give the parents an option where the Children's Aid Society can prove substantial risk by allowing the child to be placed with a relative or close neighbour pending the trial.

¹³⁸ Supra, note 132 at p. 1.

¹³⁹ Catholic Children's Aid Society v Patricia L., D.C.O. Hawkins, J. 25th June, 1986, unreported; but other cases have suggested that substantial risk refers to real and apparent risk demonstrated by the evidence presented as opposed to a risk which can be described as without substance or speculative or fanciful - for a good discussion of this aspect, see the article by Judge R.J. Abbey entitled "Child and Family Services Act, s. 37(2), A Child in Need of Protection" in Representing Parents in Child Protection Proceedings, 9th May, 1989, Law Society of Upper Canada.

¹⁴⁰ Supra, note 132, at p. 13.

6. The Bifurcated Hearing

Under the Child Welfare Act, evidence as to disposition was often admitted at the hearing prior to a determination that the child was found to be in need of protection. For example, when giving evidence as to the reasons surrounding the Children's Aid Society's application, the worker would often be asked by the applicant's counsel what their plans for the child were. Then would follow a detailed description as to the adoptability of the child under consideration, the fact that there was a readily available placement for the child and that the placement consisted of a middle-class or upper middle-class home where the child would receive all of the advantages. The parents home, on the other hand, might be adequate but barely so and this evidence would be severely prejudicial to their attempts to retain custody. This type of evidence is not relevant to the issues surrounding "in need of protection".

The Child and Family Services Act has addressed this by requiring the hearing to be a two stage process. The first stage is to determine whether the child is in need of protection with the second to determine the disposition that should be made.¹⁴¹ The Act does not require two separate hearings but creates a wall between issues relating to a finding of in need of protection and disposition by the exclusion of evidence relating only

¹⁴¹

The Child and Family Services Act, s. 46(2).

to disposition from the "in need of protection" hearing. The issue of whether two separate hearings should be used was debated but rejected by the policymakers as being too rigid and only adding unnecessarily to the length of the proceedings.¹⁴² This very important provision, however, can only work and be of use to parents if their counsel rely on it.

It has been the experience of counsel for the Children's Aid Societies that most parent's counsel will not object to evidence relating to disposition at the "in need of protection" hearing. They have also indicated that even if an objection is made, Judges will often allow the evidence in on the basis that it relates to some aspect of the issues surrounding "in need of protection". This may be acceptable, for example, where part of the Children's Aid Society's plan is to obtain psychiatric counselling or assessment for the child as a result of alleged abuse. However, evidence as to the placement of the child is not relevant to a finding of "in need of protection". In order to make this an effective weapon in protecting parents, counsel should be vigilant with regard to the kind of evidence tendered and forceful in their objections to irrelevant evidence.

¹⁴²

Supra, note 133 at p. 87.

7. Requirements on Disposition

Once a child is found to be "in need of protection" within the definitions contained in the Act, and the court is further satisfied that intervention through an order is necessary to protect the child in the future, it can make one of the following orders that is in the child's best interests:

- a) return the child to the parents under supervision;
- b) make the child a society ward;
- c) make the child a Crown ward;
- d) make the child a society ward for a period of time and then order that the child be returned to the parents.¹⁴³

There are a number of built-in protections to parental rights surrounding the court's exercise of this dispositional power. Under the Child Welfare Act, the court was required to consider the Children's Aid Society's plan when making a disposition.¹⁴⁴ However, it

¹⁴³ Child and Family Services Act, s. 53.

¹⁴⁴ The Child Welfare Act, s. 36(c).

did not set out the type of information which should be contained in the plan. The Act now requires the court to consider the agency's written plan which must include:

- a) a description of the services to remedy the situation that brought the child before the court;
- b) a statement of the criteria by which the society will determine when its wardship or supervision is no longer required;
- c) an estimate of the time required to achieve the purposes of intervention;
- d) if a move from the parent is suggested, why the child cannot be adequately protected in the home of the parents and any past efforts the Society has tried in order to have the child remain there;
- e) its plans of access with regard to the child;
- f) if Crown wardship is proposed, the description of the arrangements made or being made for the child's long term stable placement;
- g) what efforts were made to help the family prior to intervention.¹⁴⁵ This section clearly ties into that which requires the Judge in his decision to set out all of the plans proposed by the various parties to the proceedings.¹⁴⁶

¹⁴⁵ Child and Family Services Act, s. 52.

¹⁴⁶ Id., s. 49.

These provisions were designed to ensure "that the generally non-interventionist philosophy of the Act is implemented. In keeping with the Act's preference for leaving children with their parents, the court is required, in cases of removal, to establish on the record why it is departing from the preferred approach".¹⁴⁷

More importantly, the court will not make an order removing a child from its home unless it is satisfied that less restrictive alternatives have been attempted and failed or have been refused, or would be inadequate to protect the child.¹⁴⁸ Also, if the court considers it necessary to remove a child from a parent, the court will consider whether the child can be placed with a relative, neighbour or other member of the child's community. An order for Crown wardship should not be made unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable

¹⁴⁷ Barnhorst, "Child Protection Legislation", *supra*, note 47, p. 277. But it is also important for another reason. The parents attempt to regain custody of their children at a subsequent status review hearing will often depend on how they followed or cooperated with the society in implementing the agency's plan that was accepted by the Court. Accordingly, it is extremely important that they be given a copy of the plan and understand what is expected of them. Also, the parents can apply for review of the order at any time if a major element of the plan of the child's care that the court applied in its decision is not carried out. In other words, they do not have to wait the otherwise mandatory six month period. (See Child and Family Services Act, s. 60(7)(8)).

¹⁴⁸ Child and Family Services Act, s. 53(3).

time, not exceeding twenty-four months.¹⁴⁹ Accordingly, the agency to obtain custody of the child, thereby severing the parent - child relationship, must adduce clear evidence to show:

- a) there is no less restrictive alternative available;
- b) there is no relative or neighbour willing to take the child or it is not possible to place the child with them - this will usually be done through negative inference in the parents' failure to adduce such evidence;
- c) and where Crown wardship is sought, that there is no hope that the parents will change for the better within the next two year period.

These are evidentiary hurdles placed in the path of the agency that were designed to keep a child in the home. The policymakers considered a suggestion that there should be a presumption in the legislation that society wardship would have to be implemented before Crown wardship could be considered but this was not carried over into the provisions of the Child and Family Services Act. It was felt that such a presumption would only lead to indecision and delay thereby leaving the child in limbo for a longer period of time.¹⁵⁰ But it is fair to say that, in practice, most judges in all but the most

¹⁴⁹ Id., s. 53(4)(6).

¹⁵⁰ Supra, note 133 at p. 91.

obvious cases will attempt society wardship before ordering a complete severance of the child-parent relationship through a Crown wardship order.

Any disposition that is made, as previously discussed, must be made in light of the child's best interests. This includes such things as the child's physical, mental and emotional needs and development. It also includes the child's background, religious faith, relationship with parent and family members, any other important relationships, continuity that his or her home environment would provide, the benefits of the plan proposed by the Society against those of any other interested party, the views and wishes of the child if they can be ascertained, the risk that the child may suffer harm if removed or returned to the parents, the degree of risk, if any, that justified the finding that the child was in need of protection and any other relevant circumstance.¹⁵¹ These factors are frequently not mentioned at all by counsel for the parents and are often ignored by the court in making its decision. There are no specific guidelines as to what factors are most important. Accordingly, it is up to the lawyer for the parents to marshal their evidence behind these factors and build a case for keeping the child in the home. It was felt by the policymakers that, even though the best interests criteria may not always be referred to,

they did introduce some substance and clarity to the phrase "best interests" though they might not be over'y effective in practice.¹⁵²

New criteria (i.e. not previously contained in the Child Welfare Act) relating to best interests include the child's cultural background, relationship by blood (which would include siblings) and religious faith. But perhaps one of the most important changes deals with the degree of risk, if any, that justifies the finding that the child is in need of protection.¹⁵³ This is a clear direction to the court not to impose society wardship where there is an isolated incidence of physical abuse that is unlikely to reoccur. The father who uncharacteristically strikes his child out of frustration should not be subject to any order under the Act when there is no apparent risk of repetition.

8. Placement of Child After Disposition

In keeping with the declaration of principles in section 1 of the Child and Family Services Act, once the child is made a society or Crown ward, there are guidelines in the Act relating to the child's placement which, again, underline the least restrictive

¹⁵² The Children's Act - A Consultation Paper, *supra*, note 66, p. 89; and Barnhorst, "Child Protection Legislation", *supra*, note 47, p. 271.

¹⁵³ Compare Child and Family Services Act, s. 37(3) to Child Welfare Act, s. 1(b) and, in particular, s. 37(3)12.

alternative. Consistent with these provisions is one which restricts the placement of children outside of Ontario. As in Manitoba¹⁵⁴, such placements have been of particular concern to native people. Apparently, some child welfare agencies in the United States have released data which indicate that virtually all of the native children they have placed for adoption come from Canada.¹⁵⁵ Such a placement can only be done under Ontario law if the Director is satisfied that extraordinary circumstances justify it.¹⁵⁶

9. Access

Although, under the Child Welfare Act, the court would order access to the child in a "proper" case¹⁵⁷, under the Child and Family Services Act there is a presumption in favour of access in temporary wardship cases. Even in Crown wardship cases, the court can order access to continue if: (i) the child's placement will not be adversely affected; (ii) the child is twelve or over and wishes to maintain contact; and (iii) long-term foster care as opposed to adoption is taking place or some other special circumstance exists.¹⁵⁸

¹⁵⁴ Kimmelman Report, *supra*, note 10, i.

¹⁵⁵ The Children's Act - A Consultation Paper, *supra*, note 66, p. 94.

¹⁵⁶ Child and Family Services Act, s. 57.

¹⁵⁷ The Child Welfare Act, 1978, s. 35(4).

¹⁵⁸ Supra, note 156, s. 55(1)(2).

This, although, is the exception and not the rule. These provisions are again an attempt to maintain family contact so that in the long run, the child can be reintegrated into the home.

B. Children's Rights

I. Child Representation

In Re Holmes¹⁵⁹, it was held that under provincial legislation, there was no authority in the Provincial Court (Family Division) to appoint the Official Guardian on behalf of children or to appoint any person to represent children in child welfare matters. Some judges simply ignored this gap in the legislation and appointed the Official Guardian in any event. The report of the Ontario Committee on the Representation of Children did not recommend that the child be represented in all cases, nor did it recommend that the child be a party to the proceedings in Family court because if they were, it would require representation in all cases.¹⁶⁰ By this refusal, the Committee recognized the Children's Aid Society's mandate to protect children and the rights and responsibility of the parents to make decisions on behalf of the children.¹⁶¹ The report suggested that the

¹⁵⁹ (1976), 13 O.R. (2d) 4 (Div. Ct.)

¹⁶⁰ Report of the Committee on Representation of Children in the Provincial Court (Family Division), Ont. Gov. June 1977, p. 30.

¹⁶¹ Id., at 31.

Judge should be given discretion to appoint representation for the child after hearing submissions from all of the parties and that this would provide a minimum protection for the child.¹⁶² It further suggested that such discretion be provided by way of an amendment to the Provincial Court's Act as opposed to any amendment to the Child Welfare Act.¹⁶³

There are, of course, many compelling reasons why children should be represented in child welfare proceedings. The child will often be in no emotional shape to choose between his parents and the state, let alone be able to consider all the information available in order to make such a terrible and foreboding decision. Some children will be old and mature enough to evaluate their position, to make rational decisions and to instruct counsel. Others, because of infancy, immaturity or any other reason, may not be in such a position and will need independent representation.¹⁶⁴

¹⁶² Id., at 33.

¹⁶³ Id., at 34.

¹⁶⁴ For a good discussion of this issue, see Jeffrey S. Leon, Legal Representation of Children in Selected Court Proceedings: The Capacity of Children to Retain Legal Counsel, Toronto, 1978.

The Child Welfare Act in 1978 filled the gap in existing legislation by giving the court discretion to appoint representation for the child in any proceeding under the Act and at any stage.¹⁶⁵

Under the Act, the court can and usually does order independent representation for the child.¹⁶⁶ A child who is an applicant (on a status review application) or has legal representation at a protection hearing or receives notice of a hearing is entitled to participate in the hearing and to appeal as though he or she were a party.¹⁶⁷ A child twelve or older is entitled to notice and be present at a hearing unless the child would not understand the nature of the hearing or the hearing would cause the child emotional harm. On the other hand, a child under twelve is not entitled to notice or to be present unless the court is satisfied that the child is capable of understanding the nature of the proceeding and will not suffer emotional harm as a result.¹⁶⁸ Also, a child twelve or over can initiate a status review hearing after six months have elapsed from the original order

¹⁶⁵ The Child Welfare Act, 1978, s. 20.

¹⁶⁶ Child and Family Services Act, s. 38(1)-(4).

¹⁶⁷ Id., s. 39(6).

¹⁶⁸ Id., s. 39(4)(5).

or from the previous application¹⁶⁹, while a child at any stage can apply for access to any person at any time.¹⁷⁰

2. Role of Child's Lawyer

The role of child's lawyer in child welfare cases is unclear. Should they advocate only what they perceive to be in the child's best interests, or must they advocate a position based solely on the child's instructions? It is submitted that the lawyer must carry out the child-client's instructions when he or she is capable of giving those instructions. If not so capable, it would then be open to the child's counsel to advocate a position based on a best interests approach much like a guardian ad litem or amicus curiae.

In one case, the court held that where the child expressed definite views, those views rather than the lawyer's should determine what is conveyed to the court. This, in turn, involves indicating to the court the child's concerns, wishes and opinions. It further involves presenting to the court accurate and complete evidence which is consistent with the child's position. On the other hand, counsel must ensure that the child when expressing those wishes and preferences, has done so freely and without duress from any

¹⁶⁹ Id., s. 60(4).

¹⁷⁰ Id., s. 54(2).

party or person. If the child is ambivalent about his or her position or unable to give instructions, then the role of the lawyer is to protect the child's best interests. The absence of clear instructions and the protection of the client's interest can then involve the lawyer's perception of what would protect the child's interests. The lawyer, in this case, should make sure that all the evidence is before the court so that it can make an order based on the child's best interests. If the lawyer does not feel the client's instructions are in his or her best interests, there is nothing to prevent the lawyer canvassing the facts and issues in dispute and advising the client thereon.¹⁷¹ For example, if a twelve year old girl is being physically abused but wishes to go home, counsel has an obligation to discuss what options are available to her to alleviate the abuse and strongly advise her to accept one of these options. But if she refuses to do so, then counsel must advocate her instructions.

In a conflicting decision, the court held that if the lawyer representing a child feels the views and instructions of the client child are not in accordance with the child's best interests, he or she can place those views before the court and also give counsel's own views as to what is in the child's best interests.¹⁷² It would appear that the approach

¹⁷¹ Re W (1979), 13 R.F.L. (2d) 381.

¹⁷² Re C (1980), 14 R.F.L. (2d) 21.

taken in Re W¹⁷³ is preferable in that, traditionally, lawyers are retained in order to carry out client's instructions. If the client cannot give those instructions, then it is open to the lawyer to put forward the position of the client that is in the client's best interests. In the case where the client can give instructions, it is open to the court to decide on all of the evidence what is in the best interests of the child and the submissions of counsel in that regard on behalf of the child would simply be redundant. No clear guidelines have been given by the Official Guardian's Office in this regard and it would appear to be up to the individual panel member what role he or she will follow in any particular case. Panel members are those lawyers across the province who have applied to the Ministry of the Attorney-General to represent children in custody, access and protection cases and who have been accepted by the Ministry for that purpose. Their names are then placed on a panel and as cases arise, children are referred to these lawyers.

In Re M¹⁷⁴, His Honour Judge Naismith of the Provincial Court (Family Division) on an interim motion brought by the lawyer for the child to discover the respondent mother, an alleged chronic schizophrenic, stated as follows:

Moreover, I have noted a tendency of a number of panel lawyers representing young children to make a statement at the opening of trial that they are not taking any position and they will be listening to the evidence and making a "recommendation" to the Judge at completion of trial. I have

¹⁷³ Supra, note 171, at p. 129.

¹⁷⁴ (1982), 29 C.P.C. 44.

been uncomfortable with this pattern for a number of reasons. I think the traditional role of counsel would be to come to trial prepared to take a stand on the issues before the court, rather than to sit back as an adviser with a view to giving the Judge an opinion at the conclusion of evidence at trial. An opinion from a lawyer on the ultimate issue is somewhat redundant. It would be much more useful if a lawyer were to perform the usual role of preparing evidence for trial and confronting the evidence of others. Mr. Hartrick argues on this motion that it will be difficult for him to take this traditional position of a lawyer if he does not have a pre-trial opportunity to examine the mother. I would like to encourage and support his approach because I think it is an appropriate one although rarely used to date.¹⁷⁵

He then made the order requiring the mother to undergo a pre-trial discovery under oath. One can agree with this logic if the child is able to give the solicitor acting on his behalf clear instructions. In such situations, the lawyer should be prepared to advance his client's views at trial. This would include interviewing and preparing witnesses, obtaining all relevant documentary evidence, giving the appropriate notices under the Evidence Act, S.O. 1989, c. 68, subpoenaing the witnesses, leading evidence in chief, cross-examining witnesses of the other parties, making the appropriate objections at trial, and making submissions in accordance with either the client's instructions or, if not capable of instructing, in accordance with their best interests. However, where the child

¹⁷⁵Id., at p. 46.

cannot instruct counsel, then the proposition that no position will be taken by the child's counsel until all the evidence is in, it is submitted, is a valid and appropriate one.¹⁷⁶

In giving an opinion on section 20 of the Child Welfare Act, the Law Society suggested that it should be interpreted to preserve the traditional solicitor and client relationship and that the lawyer must follow the instructions or directions of his or her client (if capable of so instructing) and that solicitor and client privilege is maintained. "It was felt that if the child could accept the consequences of his decisions and acts, understood the nature of the proceedings, and could express his wishes as to its resolution, then he had the necessary capacity to instruct." If he or she did not have the capacity, the lawyer should advise the court and proceed on the lawyer's interpretation of what was in the child's best interests.¹⁷⁷ As a result of the ambiguity in the judicial interpretation of section 20, the Ministry had considered setting out specific guidelines for the role of child's counsel in the Child and Family Services Act but this, unfortunately, has not been followed through.¹⁷⁸

¹⁷⁶ DB and PB v Director of Child Welfare for Newfoundland [1982] 2 S.C.R. 716; the comments on the preceding few pages are taken from the author's book Advocacy in Child Welfare Cases, Carswell, 1985, pp. 38-39.

¹⁷⁷ The Children's Act - A Consultation Paper, *supra*, note 66, p. 96.

¹⁷⁸ Id., at p. 96.

As will be immediately evident, the role assumed by child's counsel will often be crucial to parental rights. For example, in a case where the child is ten years of age, has capacity, and instructs his counsel that he wants to go home - must counsel not only express this wish to the court, but also advocate that position? There are panel lawyers who feel that they are entitled to advise the court not only what the child wants but also what the lawyer believes is in the child's best interests. Accordingly, a situation can arise when the lawyer will be advocating a position opposed to the expressed instructions of his child client. Often in this situation, the Children's Aid Society is seeking some type of wardship order and, accordingly, the child's counsel will simply be part of that chorus. Instead of facing only one counsel that desires the order, the parents will end up facing two, even though the parents and child do not want the result advocated by the panel lawyer. In canvassing this issue in the Law Society Gazette, James Eayrs, an LL.M. candidate, suggested that the final step should be a legislative act or judicial ruling obliging the Official Guardian to advocate the views and preferences of a child in all protection cases, leaving to the state agency seeking custody the onus of proving contrary "best interests".¹⁷⁹

Professor Martin Guggenheim put it this way:

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James W. Eayrs, "Some Problems of Professional Ethics in Legal Representation of Minors", The Law Society Gazette, March, 1986, p. 108.

While there may be sound reasons for providing mature children with counsel in proceedings affecting their interest, the appointment of counsel for a child too young to direct his counsel creates major difficulties and undermines legitimate parental interests in privacy and autonomous decision making without producing significant benefits.¹⁸⁰

Indeed, the issue must be this - are children entitled to the same right to be represented as adults? Although not given party status, they are the battleground over which the issues are fought and should have a say in the outcome. Party status in these cases is reserved to the society, the child's parent or if the child is a native or Indian person, to a representative of the band or native community. A party is directly involved in the litigation and has the right to prosecute the case or to make full answer and defence. It is most appropriate that if the child has the capacity to instruct, then counsel should follow those instructions. If they do not have capacity, then counsel can promote the child's best interests. In the former case, society's concern in protecting the young will be advocated by the Children's Aid Society's lawyer while the child's views and wishes will only be one factor among many that the court will consider in making its disposition. This approach offers the best one for the protection of parental rights and family autonomy while at the same time recognizing the child's right to be independently represented and

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M. Guggenheim, "The Right to be Represented but not Heard: Reflections on Legal Representation for Children", 59, *New York University Law Review*, 76, at p. 78 (April 1984); see the Discussion of Representing Children by Susan Himel, "An Overview of the Role of Child's Counsel", Representing Children, Law Society of Upper Canada, 1987, B11.

have his or her views and preferences not only brought to the court's attention but actually advocated. This approach further recognizes the child as an independent individual (when they have capacity) and not merely a chattel or appendage of their parents or the state or even a semi-ward of the child's own counsel.¹⁸¹ This protection could have easily been afforded by providing guidelines to the child's counsel in the Act. By leaving this area devoid of such guidance, the legislators have, perhaps unintentionally, negatively affected parental rights while curbing the child's rights to independent counsel.

3. Status of Child

It does seem quite strange that a child is not a party to the proceedings. Being a party would elevate the child's status to that of the agency or parents and would give an equality of representation that is not available in their present quasi-party status where they are entitled to some of, but not all of, the benefits of party status. Party status would certainly clarify the role of the lawyer in that counsel would have to follow the

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For a good discussion outlining the various positions taken by academics on the child's right to be treated as an independent actor, see Michael S. Wald "Children's Rights: A Framework for Analysis" and Barbara Landau, "The Rights of Minors to Consent to Treatment and Residential Care", both found in Children's Rights in the Practice of Family Law, Carswell: 1986 at p. 3 and 93 respectively.

instructions of the child if capable of giving them and it would also ease the path of admissibility of crucial evidence, such as statements made by the child outside of court.

In a federal government discussion paper prepared in 1980, the author advocated giving children party status in child abuse cases.¹⁸² She felt the existing adversarial system left it to the parties to present and marshal their evidence which supported their particular position with the Judge playing only a passive role. As the child is not a party, his or her views were not presented or, if presented, were not done with the authority or persuasiveness of parties, and in particular, parents. She suggested that the child be a party as of right.¹⁸³

There are many problems, of course, with this position. It would seriously diminish parental rights at an early stage. As Barbara Landau has stated:

Parents were seen as the natural advocates for children and any suggestion that the child should participate in the decision making process was generally dismissed as unnecessary or likely to undermine parental authority.¹⁸⁴

¹⁸² Corinne Robertshaw, Outline of Key Legislative Issues Relating to Child Abuse, Discussion Paper. Health and Welfare Canada, 1980, p. 9.

¹⁸³ Id., at p. 19.

¹⁸⁴ Barbara Landau, "The Rights of Minors to Consent to Treatment and to Residential Care", Children's Rights in the Practice of Family Law, Carswell, 1986, p.93.

Not only would the position advocated by Corinne Robertshaw allow children to participate in the decision making process, it would give them equal participation to parents and the Children's Aid Society. It could also conceivably lead to an extremely adversarial system with the parents and child "slugging it out" in court. This would not be in anyone's long term interest, even in abuse cases. Also, if a child is made a party, how does one limit the right of the child to receive potentially harmful information in light of the Charter of Rights and Freedoms? A Judge's discretion in relation to how a child will give evidence, whether the child will be present, or even whether there would be a publication ban which the child did not want, would either be severely restricted or done away with entirely. The child would also be open to examination before trial by way of discovery or cross-examination on affidavit material filed.

One can picture the child sitting across a table from a parent in an examination room conducting examinations for discovery of each other. Perhaps the child will instruct their counsel to bring an application to have the parent's psychiatrically examined and assessed or to undergo therapy before they will consent to returning to them. In the words of Professor Wald, this may amount to "abandoning children to their rights".¹⁸⁵

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Michael S. Wald, "Children's Rights: A Framework for Analysis", Children's Rights in the Practice of Family Law, p. 27.

Certainly, the report on the Committee on the Representation of Children in 1977 saw this as a problem and, therefore, would not recommend party status to the child.

To give the child full party status could lead to many unforeseen and complex legal and factual situations which would not be in anyone's long term interests. By giving the child quasi-party status and the right to independent representation, the government has recognized the right of children to have a voice in these proceedings. But, given the nature of infancy, childhood and adolescence and the sensitive nature of these hearings, full party status is not appropriate in most cases. There is, of course, always the exception to the rule, but when legislation is dealing with thousands of children, it must err on the side of determining the fairest and most appropriate solution for the vast majority. Any problem with lack of proper representation of the child's interests can be solved by clarifying the role of the child's lawyer.

4. Sanctions

a) Infliction of Abuse

No person having charge of a child shall inflict abuse on the child, or by failing to care and provide for or supervise and protect a child adequately, allow the child to suffer abuse or permit the child to suffer from a mental, emotional or developmental condition

that if not remedied could seriously impair the child's development.¹⁸⁶ Abuse means a state or condition of being physically harmed, sexually molested, or sexually exploited.¹⁸⁷

In an interesting decision, R. v Kates¹⁸⁸, a day nursery owner and operator was charged with failing to report suspected child abuse in relation to one of its employees who had allegedly abused a child in its care. The Judge held that the charges laid by the Crown showed a misunderstanding of the terms of the Child and Family Services Act. He found that the Act did not contemplate a hearing against the person having temporary control of the child only and that the duty to report related to the persons having care and custody of the child, usually the parents, or others who exercise parental rights. The worker who allegedly abused the child only had temporary care and custody of the child during the day and was not a person in charge of the child.

The Judge went on to state that he was not aware of "ever making an order that the child was in need of protection against anyone other than the parents or person

¹⁸⁶ Child and Family Services Act, s. 75(2); this offence is a strict liability offence, where the accused may exculpate himself by proving that he took reasonable care to avoid criminal conduct. See R. v Barry Francis Irish, November 1, 1989, Kirkland, J., Ont. Prov. Ct. (Family Div.) unreported

¹⁸⁷ Id., s. 75(1).

¹⁸⁸ R. v Kates, Ont. Prov. Ct. (Family Div.) September 8, 1986 per Fisher, J. (unreported).

exercising those rights." He found that to suffer abuse means to be in need of protection and that the whole scheme of the Act was to declare children in need of protection "from the person having charge of the child".¹⁸⁹ He concluded that a reading of the Act led one to the inevitable conclusion that the person in charge of the child is the parent or person who exercises parental rights.¹⁹⁰ The owner of the day nursery was acquitted as the Judge concluded that there was no duty on the owner to report an employee who only had temporary control of the child for abuse of that child. On a further appeal to District Court, this reasoning was rejected and a conviction was entered on one count of failing to report.¹⁹¹

In light of this decision, a professional or other person who has knowledge of suspected abuse by a third party (other than a parent or guardian) in relation to the child, still has an obligation to report it so that the provisions and sanctions dealing with the infliction of abuse can be imposed against the alleged abusers.

¹⁸⁹ Id., at p. 6.

¹⁹⁰ Id., at pp. 6 - 7.

¹⁹¹ The author does not have a copy of the decision as it was not readily available but was advised this by the lawyer representing the accused. It was a decision of the Honourable Judge Lorraine Gottleib in District Court.

b) Abandonment of Child

No person having charge of a child less than sixteen years of age shall leave the child without making provision for his or her supervision and care that is reasonable in the circumstances. If such a person is charged with contravening this provision and the child is less than ten, the onus of establishing that the person made provision for such care rests with the person.¹⁹² This, of course, is a reverse onus section.

If abuse is alleged to have occurred or the child has been abandoned or deserted, the court can hold a hearing in respect of the child and proceed as though the child had been brought before the court to determine whether the child was in need of protection.¹⁹³ A person who leaves a child unattended without making reasonable provision for the child's care is guilty of an offence and, on conviction, is liable to a fine of not more than \$1,000.00 or to imprisonment for a term of not more than one year or both.¹⁹⁴ A person who commits child abuse is guilty of an offence and, on conviction, is liable to a fine of not more than \$2,000.00 or to imprisonment of a term of not more than

¹⁹² Child and Family Services Act, s. 75(3)(4).

¹⁹³ Id., s. 75(7).

¹⁹⁴ Id., s. 81(1)(f).

two years or both.¹⁹⁵ In addition to the foregoing, the Criminal Code¹⁹⁶ provides sanctions that deal with abandoning children, corrupting their morals, failing to provide them with necessities (including medical help), incest and sexual exploitation. All of these offences are indictable and subject the accused to varying degrees of incarceration. The sanctions provided in the Code and the Child and Family Services Act are designed to act as a deterrent and thereby protect children not only from the world at large, but also from parents and other guardians.

c. Injunctions

Once the court finds a child in need of protection, it can make an order that is in the child's best interests, restraining or prohibiting a person's access or contact with the child and the order may include such directions as the court considers appropriate for implementing the order and protecting the child.¹⁹⁷

¹⁹⁵ Id., s. 81(2).

¹⁹⁶ Martin's Criminal Code 1990, Canada Law Book: Toronto, 1989, sections 218, 172, 215, 153 and 155.

¹⁹⁷ Id., s. 76(1).

As is apparent, this section could be used by the court to affect a judicial separation between spouses by ordering the husband, for example, to stay away from the couple's child and only returning the child to the mother if the father is not present in the home.¹⁹⁸ Under the old Child Welfare Act, the court had no such injunctive power. Although at first glance, this may seem contrary to parental rights, in practice, it probably is conducive to such rights. Under the Child Welfare Act, a Judge faced with physical and sexual abuse, would have no choice but to keep a child in care if the alternative was to send the child home with the alleged abuser. Now that they have this power to enjoin that alleged abuser from entering the home, the court will be more likely to return a child home on conditions.¹⁹⁹ This injunctive power is routinely used by the court even on an interim care and custody hearing where no finding has been made.

The Society sees this injunctive remedy as an important one for several reasons:

- a) It helps to alleviate the guilt of the victim by removing the alleged offender and not the victim;

¹⁹⁸ This proposal was recommended by Corinne Robertsshaw in the Discussion Paper, supra, note 182, at p. 53.

¹⁹⁹ See for example, Re Lisa B., Ont. Prov. Ct. (Fam. Div.) 15 August, 1988, Foran, J. (unreported).

- b) It helps to establish whether the person who is left to look after the child (usually the mother) is committed to the child;
- c) It will determine how well the family will respond to the child's needs;
- d) If the alleged offender admits the abuse, the society can then work with the family.

5. Review Teams

Where a child has been placed in care either as a society ward or even on a temporary basis, and may have been abused, the child shall not be returned to the parent suspected of the abuse until the society has referred the child to a review team and has obtained and considered its recommendations or the court has terminated the order placing the child in care.²⁰⁰ This consideration with regard to returning the child would apply to a situation where the Society was contemplating voluntarily placing the child with the parents pending a hearing and not a situation where the court has ordered the child returned. It is not a condition precedent to a court ordered return that the review team's assessment be considered. In Ottawa, this review team is called "The Child Protection Review Committee" and consists of the Director of the Protection Section, the supervisor of that section, the social worker involved in the case and that worker's immediate

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Child and Family Services Act, s. 69(7).

supervisor. In many cases, the lawyer involved in handling the case will be present or, if none is assigned, a lawyer from the legal department will be asked to attend. The society sees these committees as important both from a child protection perspective and their own protection from civil liability. It creates a standard of care in these types of situations, and as long as the workers live up to that standard of care by holding such a review, they would be protected in any subsequent civil suit.

The review team may be an important protection for those children who may have been subject to abuse. However, if no finding has been made that the child is in need of protection, the review team will probably not have the benefit of assessment of the parents as such an assessment cannot be ordered until after this finding is made. This is the assessment that the court can order once a child is found in need of protection and is usually done for dispositional purposes. In Ottawa, it is normally conducted by the Family Court Clinic. It would be difficult for the review team to make an intelligent decision as to whether abuse has occurred if the alleged offender has not been assessed for such purpose.

6. Actions for Abuse

When a child has suffered abuse within the definitions encompassed under sections 37(2)(a)(c)(e)(f) or (h) and the Official Guardian is of the opinion that such child has a cause of action as a result, the Official Guardian may, if he or she believes it in the child's best interests, institute and conduct proceedings on the child's behalf for the recovery of damages or other compensation. If the child is in the society's care, it will be the society who decides on such action.²⁰¹ Again, the benefits of this section may be more apparent than real. Most of the alleged abusers who come before the courts, are poor and would not have the resources to meet any judgment against them for damages recovered on behalf of such a child. Perhaps the real question will become whether the child will have a cause of action for such damages against a professional or other person who knew of the abuse and did not report it. Given the obligation on professionals and others to report under the Child and Family Services Act, there would appear to be no reason why a child who is subject to abuse could not sue such a professional if the abuse that they suffered was reasonably foreseeable and could have been prevented by timely reporting.²⁰² In Madalena v Kunn et al²⁰³, a former foster child sued her foster father (Kunn), the Crown, the Superintendent of Family and Child Services, and the Ministry of Human

²⁰¹ Id., s. 77(1)(2)(3).

²⁰² See the article by Jennifer A. Blishen, "Reporting Child Abuse - Legal Obligations of Professionals in Ontario", November 8, 1986, (unpublished).

²⁰³ (1988) 35 D.L.R. (4th) 222.

Resources for damages arising out of a series of sexual encounters she had with Kunn over a two and one-half year period. The action was framed in negligence against all of the defendants except Kunn whom she sued for assault. It was held that the Superintendent was not negligent in placing the child with Kunn as he had no prior knowledge of Kunn's illicit activities and even if the social service work provided by the Superintendent in monitoring her placement was found to be of such poor quality as to constitute carelessness, the child's action would still not succeed because it had not been proved that the sexual intercourse would not have occurred had there, in fact, been proper services provided. In other words, any negligence on the part of the Superintendent did not cause the damage. It had been established that she had consented to the acts of intercourse with Kunn. The result may have been different if the Superintendent had known, or should have known, that Kunn and his foster child were having sexual relations.

In Landeros v Flood²⁰⁴, the Supreme Court of California held that both a physician and a hospital could be held liable for injuries sustained by a child if they negligently failed to diagnose a battered child syndrome which resulted in the child being returned to the parents who inflicted further injuries.

7. Reporting Requirements

The reporting requirement is, perhaps, the most important protection for children contained in the Act. Obviously, it is necessary for abused and neglected children to be identified. As under the old Act, the Child and Family Services Act places a duty on various professionals to report suspected abuse. Where a person believes on reasonable grounds that a child is or may be in need of protection, they shall forthwith report that belief and the information on which it is based to the Children's Aid Society. This is the general duty to report and applies to everyone. If professionals, in the course of their duties, have reasonable grounds to suspect that a child is or may be suffering from abuse, they are obliged to report the suspicion and the information on which it is based to the Children's Aid Society.²⁰⁵

This latter obligation covers a range of individuals and includes health care professionals (physicians, nurses, dentists, pharmacists, psychologists, psychiatrists, etc.), teachers, school principals, social workers, family counsellors, priests, rabbis, clergyman, operators or employers of day nurseries and youth and recreation workers, peace officers, coroners, solicitors, service providers or employees of service providers.²⁰⁶ This list is not

²⁰⁵ Child and Family Services Act, s. 68(2)(3).

²⁰⁶ Id., s. 68(4).

exhaustive. This duty applies even though the information reported may be confidential or privileged. No action for damages can be instituted against such a person who acts in accordance with this section unless he or she acts maliciously or without reasonable grounds for the belief and suspicion.²⁰⁷ Nothing in this section abrogates the privilege that exists between a solicitor and his or her client. However, if a solicitor in the course of his or her duties discovers that a child has been abused by a person other than a client, he or she is under an obligation to report.

A professional who fails to report abuse is guilty of an offence and, on conviction, is liable to a fine of not more than \$1,000.00.²⁰⁸ There is no such sanction provided for people who fail to report that are not professionals. In R. v Stachula²⁰⁹, a family doctor was charged with failing to report suspected child abuse pursuant to section 49(2) of the Child Welfare Act. He had been the family's doctor for a ten year period and had been advised in August 1983 that the family's daughter had been impregnated by her brother. It was determined that the child had been pregnant and an abortion carried out. The doctor did not advise the Society until the 1st of December, 1983 that this had occurred. The doctor was subsequently acquitted. It was held by the court that the Crown had an

²⁰⁷ Id., s. 68(7).

²⁰⁸ Id., s. 81(1)(b).

²⁰⁹ (1984), 40 R.F.L. (2d) 184.

obligation to lead evidence to prove all of the elements of the charge. There was no evidence to prove that the brother in this case ever had charge of the fourteen year old girl. Further, the standard of care of the professional faced with reasonable grounds to suspect child molestation varied in accordance with the professional capacity of the person or class of person involved in the particular case. In this case, the Crown had led evidence through a pediatrician, who was qualified as an expert in child abuse cases, but had never conducted a family practice. The court stated that:

The standard of care applicable to pediatricians skilled in child abuse should not be the standard of care applicable to family practitioners or to others, such as public health nurses, school teachers, family service workers or child care workers, to name but a few. The relevant standard must vary in accordance with the professional capacity of the person or persons involved in the particular case. In fulfilling its onus under section 49(2), the Crown must lead evidence of the standard of care expected of the class of persons represented by the defendant before the court, and it has failed to do so.²¹⁰

In the case of R. v Cook²¹¹, the defendant doctor was also charged with failing to report suspected abuse pursuant to section 49(2) of the Child Welfare Act. The court held that the offence must be proved beyond a reasonable doubt. The Crown has an obligation to prove the essential ingredients of the offence. However, the Crown does not

²¹⁰ Id., at p. 188.

²¹¹ (1983), 37 R.F.L. (2d) 93.

have to prove that the defendant had any culpable intent or mens rea. The court stated that:

This is an offence involving both subjective and objective elements. There is room for an assessment of the reasonableness of the grounds for suspecting a condition of abuse, but ultimately the test is an objective one. I have applied the standard rules of statutory interpretation. We have an offence which represents an imposition upon professionals of an objective societal standard of reporting suspected abuse to the state.²¹²

The test was whether the Crown had satisfied the court beyond a reasonable doubt that the defendant had reasonable grounds to suspect that the child had suffered abuse and failed to report it. The existence or absence of actual abuse was not relevant to the test. In the instant case, the doctor did not have sufficient information to establish reasonable grounds to suspect that abuse had occurred. Accordingly, the court could not find beyond a reasonable doubt that she had an obligation to report the abuse pursuant to the Child Welfare Act.

The Crown appealed this decision and was successful at the District Court level. On a further appeal to the Court of Appeal for Ontario, the acquittal was reinstated.²¹³ The court held that the reporting requirements contained in the Child Welfare Act created

²¹² Id., at p. 96.

²¹³ R. v Cook, 46 R.F.L. (2d) 174 (Ontario Court of Appeal, per Zuber, J.A.).

a strict liability offence where proof of culpable intent was not needed, but the doctor could not be convicted in this case because the charge, as it was framed, limited the suspected abuse to ongoing abuse and not to past abuse.²¹⁴

In his commentary to this case, Professor McLeod points out the real issue is whether a professional, who believes that the abuse can be dealt with through counselling, must still report it pursuant to the Child Welfare Act, now the Child and Family Services Act. There can be no doubt that the words used in the Act do not give the professional the luxury of exercising an option. He has an obligation to report the abuse. He has an obligation not only to report abuse which is occurring or is ongoing but also any abuse that has occurred in the past. Professor McLeod stated as follows:

If the reporting requirement is as broad as Cook suggested, some discretion must be exercised by the relevant law enforcement agencies and institutions to ensure that unnecessary harm does not come to the family. In the end, however, it is the doctor with the dilemma. It appears he must breach confidentiality and report abuse even where, in his judgment, this is damaging to the family.²¹⁵

It is true that this statutory requirement is draconian in its nature, but it is submitted in its defence that it is the only way abused children can be identified. In the

²¹⁴ Id., at p. 179.

²¹⁵ Id., at 175.

end, it is better to put the spotlight on the abused child and the abuser than to keep it hidden with the possibility that the cycle of abuse will continue with all of its attendant damage.

Although solicitor and client privilege is maintained, this reporting requirement still creates serious problems for the practitioner. There may be no legal duty on a lawyer to report abuse but he or she is still under a moral duty to get the abusive parent help. If one sends that parent to a therapist, must the therapist report the abuse to the agency and, accordingly, the police? Jeffrey Wilson has stated that the therapist might be so required.²¹⁶ It is submitted that the proper view is that if such a referral is made during the litigation process for the purpose of furthering the parent's plan in that process and is intended to be confidential, the therapy provided should be covered by solicitor and client privilege.²¹⁷ In R. v Dempsey where the accused had been referred for psychiatric counselling for the purposes of a child welfare hearing and where the psychiatrist had been subpoenaed by the Crown, it was held by the court that solicitor-client privilege

²¹⁶ See Jeffrey Wilson, "The Ripple Effect of the Sexual Abuse Allegation and Representation of the Protecting Parent", Canadian Family Law Quarterly. Carswell: Toronto, p. 166.

²¹⁷ R. v Dempsey, Prov. Ct. (Criminal Div.), 21 January, 1987 (unreported), Beaulne, J. For a good discussion of the issue surrounding doctor (psychiatrist)-patient privilege in child welfare matters, see R. v R.S., 19 C.C.C. (3d) 115 (Ont. C.A.), where no privilege was allowed because of the important issues in a child sexual abuse case.

covered the psychiatrist's evidence if the accused was referred for the purpose of litigation and it was anticipated that any information the psychiatrist received would be held in confidence.

But, ultimately, there can be little doubt that in some cases the duty of professionals to report will cause serious damage to the family. However, given that the child's very existence may be at stake, and given the relatively small number of cases where reporting will cause serious permanent damage that would not have been caused in any event, the requirement to report is imperative.

8. Abuse Register

In order to alert agencies of incidents of abuse, provide necessary information with regard to these incidents, and maintain reliable statistics on abuse, the various provinces have established child "abuse registers". Their primary objective is to protect individual children. But what of the hapless parent who finds that his or her name has been registered?

In S.S. and L.S. v Director of Child and Family Services et al²¹⁸, the Provincial Court (Family Division) in Manitoba found that the compilation of lists of alleged abusers and their victims offended section 7 of the Charter. A person's right to security as contemplated by that section is violated when the legislation allows the government to compile and maintain these lists in secret as it has significant negative implications for those registered, including loss of reputation, dignity and, in some cases, even employment opportunity. It was not saved by section 1 of the Charter because there was no provision for a hearing, no clear notice provisions, and no provisions allowing a person to move for removal. The legislation was devoid of procedural fairness. It did not meet the proportionality test in R. v Oakes²¹⁹ as it did not impair the rights as little as possible. It provided absolutely no protection to those who found themselves on the register. It could have been drafted so as to meet its laudable objective without so completely interfering with the "targeted" individuals. The court found that the Act and the Regulations made thereunder were of no force and effect to the extent that they violated such rights.

In contrast, the Child and Family Services Act does provide procedural safeguards in relation to the "targeted" individuals. A person must obtain notice that their name has

²¹⁸ (1987), 8 R.F.L. (3d) 430.

²¹⁹ [1986] 1 S.C.R. 103.

been registered. They have the right to inspect the information and to request the removal of their name from the register. The Director (a government employee responsible for maintaining the register) can grant the request or hold a hearing to determine whether to grant or refuse the request. The Statutory Powers Procedure Act, R.S.O. 1980, c. 484, applies to these hearings. The Director can remove the name if it is there in error or should not be there. The decision can be appealed to the Divisional Court. The hearing is held in private and the record of the hearing is not admissible in any other hearing except those under sections 81(1)(d) (confidentiality of records) and 81(1)(e) (amendment of society's records). Disclosure of information from the record is controlled and must be done in accordance with the Act.²²⁰

²²⁰Child and Family Services Act, s. 72(1)-(12).

PART III - THE FUTURE OF CHILD WELFARE LEGISLATION

Where does child welfare legislation go from here? Since the introduction of the Child and Family Services Act in November of 1985, there have been no government or other studies evaluating the effectiveness of its provisions. The Ministry of Community and Social Services will be undertaking such a review in 1990 with its findings not expected until mid-1991.²²¹ One thing is clear - there has been a 15.5% decrease in the number of children in care between 1982 and 1989.²²²

If one reads between the lines, it would appear that the professional service providers will be taking the position that the Act is not working, at least in some areas. For example, the corporate plan of the Ottawa-Carleton Children's Aid Society spoke about children being more damaged when they came into care, impliedly as a result of the non-interventionist approach taken in the Act.²²³ There is a similar sentiment in Dawson's report on the Abuse of Children in Foster Care where he stated:

²²¹ The author was told this by Barbara Kane, a policy analyst with the Ministry of Community and Social Services by letter dated the 19th of December, 1989.

²²² Supra, note 7, Fact Sheet #5.

²²³ Looking to the 90's: The Corporate Plan of the Children's Aid Society of Ottawa-Carleton, p. 10.

The admission to foster placement of a population of children with more serious emotional/behavioural symptoms may result in an increased incidence of abuse occurring in foster care.²²⁴

It is a relatively simple matter to move from this statement to the theory that non-intervention in the early stages not only does not work, but it leads to more damaged children who are then prey to further abuse either in foster care or elsewhere. If this becomes their central theme, the service providers will no doubt be calling the government to go back to the "old days" where they were given virtually unlimited discretion in exercising the decision whether to intervene.

It must be remembered that the Child and Family Services Act was passed into law against all of the odds. The Badgely Commission had reported in August of 1984 outlining the serious nature of sexual abuse against children in Canada and supporting their findings by numerous examples. Judge Allen's report on the Kim Ann Popen case was released prior to the passage of the Act. Health professionals were beginning to take the position that the rights of children must take precedence over those of parents.²²⁵

²²⁴ Dawson, Abuse of Children in Foster Care, *supra*, note 40, p. 3.

²²⁵ See, for example, the article by Reinhart Lampp, "Child Welfare and the Law: A Medical and Psychiatric Viewpoint". Child and Law. Vol. I, Bates, Frank (ed), New York 1976, pp. 225-227.

A Federal Government discussion paper was advocating positions that would go much further in promoting intervention in the family than the then-current Child Welfare Act. This report, for example, recommended such things as:

- a) Open public hearings in child welfare cases with the right to publish parents' names in abuse cases.
- b) The child should be a party in abuse cases as a right.
- c) Judges should take a more active role in making fundamental inquiries and in examining witnesses.
- d) Medical professionals should be given a greater input in defining the term to be used relating to abuse in provincial legislation.
- e) In abuse cases, parents should be assessed once the allegation is made and prior to a finding that the child is in need of protection in order to help determine whether abuse had actually occurred.
- f) The allegedly abused child should be observed and assessed by independent professionals skilled in such cases. The interview should be recorded and used and accepted as evidence by the court. This evidence would go to the truth of the matter stated or observed with the court giving it whatever weight it was deemed appropriate.

- g) The child's evidence should be made available to the courts in a meaningful way by using the skills of these professionals and such evidence would be crucial in determining the issue as to fact, i.e. whether abuse had occurred.²²⁶

These proposals, if accepted, would have made child welfare legislation more intrusive rather than less and would have taken the province of Ontario on a path totally opposed to that followed in the Child and Family Services Act.

The battle over the passage of the Child and Family Services Act pitted a hard core group of reformers in the Ministry of Community and Social Services led by Thomson and Barnhorst against the vested interest of the professional service providers and health care professionals. These reformers were essentially out to control the vast discretion previously exercised by these professionals in the delivery of children's services.

It was felt by these people that the professionals had failed in the provision of services. This position was strengthened by the almost total lack of evidence of their success presented in the committee hearings relating to the draft legislation.

²²⁶

Robertshaw, Outline of Key Legislative Issues Relating to Child Abuse, *supra*, note 182, pp. 8, 19, 29, 60, 69 and 70.

The paternalistic and benevolent attitude of the professionals had become suspect.

As Barnhorst stated:

The deinstitutionalization movement (the reformers) has emphasized the failure of institutions to fulfil their responsibilities - rehabilitation, effective treatment, adequate custodial care.²²⁷

The policymakers felt that the problem lay with the institutional system itself, in that it really did not deliver what it had promised and, in many cases, actually harmed children through "regimentation, bureaucratization, and loss of individualization".²²⁸

To the reformers, the professionals' motives were "assumed to be social control and self-interest rather than benevolence. Their decisions, especially if they lead to institutional commitment, are assumed to have more potential for harm than help. The result is a call for reduction of discretion through precise legal rules."²²⁹

The professionals were also often caught, especially in protection cases, in the dual role of providing services and acting as policemen. Finally, "the tradition of leaving wide

²²⁷ Barnhorst, The Development of Child and Family Policy in the Legislative Process, supra, note 47, p. 153.

²²⁸ Id., at p. 153.

²²⁹ Id., at p. 154.

discretion in the hands of psychiatrists and social workers had led to a system that was out of control of government. It was an open ended system with a continuing increase in costs due, to a large extent, to individual professional decisions at a time when money was becoming scarce.²³⁰

The Child and Family Services Act then became to government administrators a way of controlling professionals, while to the reformers it was a way of increasing the legal rights of parents and children.²³¹

The legislation survived because it was sponsored and pushed by a dedicated group of reformers; the professional service providers had essentially failed in their mandate; and the government administrators were committed to gaining control of the provisions of these services while at the same time limiting their burgeoning budget. Whether the Act will survive intact into the future will depend very much on how it is perceived in protecting children while maintaining the balance between the rights of children to be protected and the rights of parents to family autonomy.

²³⁰ Id., at p. 163.

²³¹ Id., at p. 164.

It is submitted that when one weighs in the balance those provisions contained in the Child and Family Services Act that have been specifically designed to promote family autonomy against those that relate to the protection of children, the scales are as evenly balanced as they can be.

Children are protected by the extensive and all-inclusive nature of the reporting requirements; the wide definitions of child "in need of protection"; the provisions relating to apprehension with or without warrant; the "semi-party" status they are afforded; their right to legal counsel and representation in the process; the right to apply for access to any person at any time; the right to have their counsel put forward a plan whereby they reside with a relative or a neighbour pending the hearing if they cannot go home; the internal abuse review process; the injunctive sanctions that the court can impose on a perpetrator of abuse; the right to be represented by the Official Guardian or the Children's Aid Society with regard to any action concerning abuse; the criminal and financial sanctions provided in the Act with regard to breach of its provisions, including the reporting requirements and many others.

Parents are protected by the declaration of principles; the definition of best interests; the least restrictive philosophy that is repeated in many sections of the Act and is a theme of the Act; the more restrictive definitions of children in need of protection

when compared to the previous Child Welfare Act and other pieces of legislation across the country; the restrictions on the apprehension of children from their homes without warrant; the substantial onus that is on the Children's Aid Society to keep a child in care on an interim basis; the requirements that the proceedings be heard in a timely fashion; the requirements that a written plan be submitted to the court by the Children's Aid Society; the requirements that a Judge must consider all of the plans and render a written decision in relation to the comparable benefits of the plans in relation to the child; the codification of common law restrictions on making children Crown wards; the expanded rights to access of children in care; the right to consent to medical treatment in some cases; the bifurcated hearing where evidence in relation to disposition is not heard until the dispositional stage and many others.

It is most difficult to see how any retreat from these legislative initiatives and the balance that they provide would be possible. No legislation is perfect or insulated from change. Obviously, there will be some changes to the provisions in the Child and Family Services Act. It is submitted, however, that most of the changes should be of a housekeeping nature except perhaps those that relate to the representation of children. Even under existing legislation, the role of the child's advocate is not explicit or spelled out in the provisions of the Act. There is case law going both ways with no clear guidance to the Official Guardian's personal rights panel on what role they should take.

Even with these problems, it would appear that the province of Ontario is ahead of many other jurisdictions where the child advocate is not paid and may perform their services on a pro bono basis.²³²

The 1980 report by Health and Welfare Canada recommended that an Office of Child Protection Advocate be established. This office would be government financed but totally independent of child welfare authorities. It would deal only in abuse cases and only be concerned with what is in the child's interest. It would be staffed by lawyers who have good knowledge of children's law and who would be very familiar with the medical and social sciences that are relevant to abuse.

These lawyers would be supported by an interdisciplinary team, consisting of a skilled investigator, pediatrician, child psychologist, psychiatrist, public health nurse and social worker from the child welfare authorities. On any report of abuse, the child welfare authorities would have to notify the advocate who would be solely responsible in consultation with their team, for the decision to intervene or not and the disposition to be sought.

²³²

See for example the American Bar Association, Advocating for Children in the Courts, National Institute, 1979, p. 420.

On receipt of a report of abuse, the advocate would be obliged to properly and thoroughly investigate the allegation using trained staff. This team would take photographs where necessary, conduct medical examinations of any and all kinds, including psychiatric and psychological and have an interview with the child recorded for court purposes. After such investigation, the advocate would decide whether abuse had occurred and the type of application that would be brought. The advocate would then be responsible for representing the child throughout the court process. In representing the child, this lawyer would be expected to be aggressive and solely represent the child's welfare. By taking on the policeman's role, the Children's Aid Society would be free to provide the family with the therapeutic services they might require.²³³

In some ways, these recommendations foreshadowed and were similar to those of the Kimmelman Report in 1984. That Report recommended the establishment of a Child Protector's Office which would report solely to the Manitoba Legislature. This recommendation was based on the assumption that a child advocate needs special skills and knowledge in such areas as the law, psychology and social work. It suggested that the law schools establish a combined degree in social work and child advocacy. The Child Protector's Office would have the power to examine all of the files of children in care to

²³³

Robertshaw, Outline of Key Legislative Issues Relating to Child Abuse, *supra*, note 182, pp. 71-73.

ensure that they are being properly treated and dealt with and, if need be, bring any such child back before the court to be dealt with. It would also have the mandate to ensure that the child welfare system is functioning properly and could investigate any internal complaints regardless of the source and take whatever action is warranted by the circumstances. This Office would further be responsible for all areas relating to child abuse, including the maintenance of a child abuse registry, development of multi-disciplinary teams throughout the province and case monitoring. It would develop inter-disciplinary abuse committees and treatment centres in every region of the province and develop protocols for such committees. Finally, it would be empowered to do any act, conduct any study or investigation, recommend to any individuals, organization or government department or agency on any topic which affects the safety and security of children in the province.²³⁴

The Robertshaw proposals essentially deal with individual representation for children while the Kimmelman recommendations propose a central agency with the mandate to protect the rights of children with regard to the administration and provision of services and the court process.

²³⁴

Kimmelman Report, *supra*, note 10, pp. 42, 44, 47, 51-55, 59, 66-69.

Given the direction followed by the policymakers as evidenced by the provisions of the Child and Family Services Act, it would appear unlikely that professional service providers and health care professionals in the province of Ontario will be given such a decisive role in child welfare matters. The Office of the Official Guardian continues to provide representation for children through panel lawyers outside of Toronto while in Toronto, children are represented by lawyers employed on a full time basis by the Official Guardian's Office. Although these lawyers are not trained in psychology or social work, they usually have extensive litigation experience and a special interest in child welfare matters.

The Office of the Official Guardian also provides periodic training sessions, gives panel lawyers access to their research and expertise, and periodic newsletters updating them on the law in child welfare cases.

In Ontario, the debate will continue on the issues surrounding the role of the lawyer in representing the child. This perhaps will be the area where legislative changes may take place. The status of the child in these types of proceedings may be more closely defined and expanded with the role of the lawyer being specifically provided for in the legislation.

If these issues are not addressed by legislation, they may be addressed in another way. The Charter of Rights and Freedoms may open a whole non-legislative area in child protection applications. It is difficult to see how the legislation can be challenged on a substantive basis given the important societal goal involved - the protection of children. But questions relating to party status, the role of child's counsel, the provisions that make distinctions based on age, the provisions that relate to Indian and native people but not other types of cultures, could possibly be challenged on the basis of sections 7 and 15 of the Charter.

Section 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.

Section 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.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In the United States, the courts are moving towards a policy of granting children more rights and holding that same are constitutionally protected.²³⁵ In Re T.L.W.²³⁶, parents' counsel argued that certain evidence should be excluded pursuant to subsection 24(2) of the Charter because the parents' charter rights had been violated. In that case, the child protection worker had entered the home looking for the child but, while so doing, conducted a search in relation to evidence that could be used at a subsequent proceeding. Under the Child Welfare Act, the worker had the right to enter and search for the child but not to seek evidence. The search for evidence was, therefore, outside her legislative authority. The court looked at the purpose of the legislation in light of the competing interests of the child to be protected and the parents to custody and held that the search was not unreasonable and, even if it were, the evidence would still be admitted as its admission would not bring the administration of justice into disrepute. This same kind of reasoning was applied in two cases involving Jehovah's witness where the parents argued, on the basis of religious freedom, that their children should not undergo involuntary blood transfusions. The court, in both cases, held that as between the state's

²³⁵ See for example, In re Gault, 387 U.S. 1 (1967) and In re Winship, 397 U.S. 358 (1970) and Bala and Cruickshank "Children and the Charter of Rights" in Children's Rights in the Practice of Family Law, pp. 58-59.

²³⁶ (1982), 5 C.R.R. 241.

right to safeguard the health and welfare of children and the rights of parents to freely practice their religion, the former must prevail.²³⁷

There has been some question whether the Charter applied to children. In the British Columbia case of R v Brooks²³⁸, the Provincial Court held that a twelve year old male was not a person within the meaning of section 11 of the Charter (proceedings in criminal and penal matters). On appeal, both to the Supreme Court and Court of Appeal of British Columbia, it was assumed the Charter did apply to children.²³⁹

The better view is expressed in Re R.A.M. where it was held that the child's liberty and security is affected by a wardship order. The child had the right to be present at the hearing and to be represented by counsel, and this was particularly so in light of the child's age, level of understanding and ability to instruct counsel.²⁴⁰ This reasoning was

²³⁷ Re D, 30 R.F.L. (2d) 277, at p. 281 and Re S.M.B. v Children's Aid Society of Metropolitan Toronto, 36 R.F.L. (2d) 80.

²³⁸ Regina v Brooks, Provincial Court (Family Division) British Columbia, per C.J. Lewis, unreported, 20 August, 1982, p. 3.

²³⁹ R. v S.B. (1983) 3 C.C.C. (3d) 39 (B.C.C.A) and 1 C.C.C. (3d) 73, 1 W.W.R. 511 (B.C. S.C.).

²⁴⁰ 37 R.F.L. (2d) 113.

followed by Judge Thomson in Re T. and the Catholic Children's Aid Society of Metropolitan Toronto where he stated:

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 ... however, there is a growing recognition that in certain situations, children may have separate security or liberty interests requiring the protection of the Charter.²⁴¹

If the reasoning is correct, and it is submitted that it is, then the question that counsel must ask with regard to any particular fact situation, is whether the state is justified through the particular provision in question in limiting the constitutional rights of the child or parent pursuant to section 1 of the Charter.²⁴² If the answer is in the negative, then a successful Charter challenge may be launched. As Bala points out, child welfare legislation curbs the constitutional rights of parents to family autonomy and the constitutional rights of children in order to promote the child's welfare.²⁴³ There is no

²⁴¹ (1984), 46 O.R. (2d) 347 at 352.

²⁴² See Nicholas Bala, "The Charter of Rights and Child Protection". Representing Parents in Protection Cases, L.S.U.C. May 1989, p. R-42. Section 1 of the Charter provides "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 on a free and democratic society."

²⁴³ Id., p. R-43.

doubt, however, that as time passes the Charter will increasingly become the "weapon of choice" where constitutional rights of children or their parents have been infringed.

PART IV - SUMMARY

The Robertshaw proposals would, no doubt, provide maximum protection for children but would fundamentally destroy parenting rights in child welfare cases. The idea of establishing a central office of "Child Protector" as espoused by both Kimmelman and Robertshaw would probably give professionals more power than less which, in turn, would lead to active promotion of the rights of children over those of parents. Bala is correct when he asserts that child welfare legislation must by necessity curb both the rights of children and parents in order to promote the child's welfare. There can be no question that the Child and Family Services Act does curb these rights but it is, nevertheless, a valiant attempt at balancing parental rights against the child's right to protection so that the child's right to protection does not totally defeat parenting rights. In this way, the philosophy which "evidences the family as the best social structure available for meeting the needs of children"²⁴⁴ is confirmed and promoted. The Charter will become a useful tool for both parents and children in ensuring the balance is maintained. From a practical perspective, the Child and Family Services Act has been a welcome change to those who appear before the Courts on behalf of parents while, at the same time, adequately protecting those children in need of protection.

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Consultation Paper: Children's Services Past, Present and Future, supra,
note 46, p. 35.

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