

canadian council on children and youth
le conseil canadien de l'enfance et de la jeunesse

president / président : karl a. marshall

executive director / directeur général : andrew cohen

THE CHILD AS CITIZEN

A submission to the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada

BY: The Canadian Council on Children and Youth

Professor David A. Cruickshank, Faculty of Law, University of Alberta, Calgary, Alberta; vice-president, Canadian Council on Children and Youth.

Dr. Joseph C. Ryant, Professor, School of Social Work, University of Manitoba, Winnipeg, Manitoba; member of the Board of Directors, Canadian Council on Children and Youth.

Andrew Cohen, Executive Director, Canadian Council on Children and Youth.

December 8, 1980

A0453977_1-000959

AGC-4080

INTRODUCTION

The Canadian Council on Children and Youth is a national non-profit organization dedicated to improving the situation of Canadian children. For over 20 years, the Council has acted as an informal umbrella organization, bringing together individuals and groups who share an interest in children and developing a variety of coalitions to advocate together for changes in the conditions affecting children. In 1978, the Council's report, "Admittance Restricted", examined in depth the citizenship status of Canada's 7 million children.

Also, in 1978 the Council organized a coalition of over 200 national associations to work together for the International Year of the Child. That group planned and organized the Canadian Commission which was eventually put in place for the Year. The legacy of the Commission is less what was accomplished during 1979 - despite the excellence of those achievements - than it is the thousands of people across the country who became sensitized to the special situation of the 7 million Canadians under 18 years of age and dedicated to the improvement of their status. At the conclusion of its mandate, the Canadian Commission for the International Year of the Child asked the Council to accept that legacy to ensure that those who care about children continue to work together on their behalf, and to ensure that they are heard. So we appear before this Committee partly on behalf of our own organization, but also on behalf of the many thousands of Canadians who feel that children are at an unfair disadvantage in our society. What we want, simply stated, is full citizenship status for Canadian children.

PRINCIPLES

Our definition of citizenship status for children rests on four distinct principles:

The Rights of Children

We believe that human rights are indivisible. They are not to be parcelled out to different segments of a society at different times and under different circumstances. The concept of universal human rights hinges entirely on the indivisibility of those rights. Every being defined as human is entitled to the rights, otherwise either the being is not human or the rights are not universal.

The rights of children are not usually expressed and/or exercised directly by children but indirectly through intermediaries such as families, school systems, family courts and child welfare agencies. Although it is through these intermediaries that the child's rights are often defined and exercised, the rights are no less indivisible or unalienable.

Support for the Family

Accepting the premise that the family is the most appropriate place for a child, while applauding the evolution of the institution itself, requires the re-examination of the traditional family support structures in the community which must now be redesigned to meet new conditions.

For the past 20 years, the view of the nuclear family as the basic institution of our society has been open to serious question. The very definition of what constitutes an acceptable family role has undergone some fundamental changes. There are a growing number of families in which both parents work; others in which neither parent is employed; and many which are single-parent families.

In the Council's view, the evolution of family role and function is a positive thing, not a step towards the disintegration of the institution. The long overdue arrival of some acceptance of women's roles outside the home has generally been a positive and liberating force in our society. However, the resultant hasty arrangements which have been made for child care are sometimes less progressive in their effects.

The answer does not lie in refusing to accede to women's demands for equal treatment in the workplace. Rather it requires an understanding that a new attitude towards working women has implications for all members of society, including children.

The growing and unmet need for quality daycare is not a reason to deny women the choices they deserve. It is a demonstration of the kind of family support service the community must develop to go along with its appropriate new attitudes. In fact, regardless of the situation of parents, quality daycare is, in and of itself, a provider of educational, social, and cultural experiences of undeniable value for children.

Important as it is, daycare is just a single pillar in the kind of support structure society must build to strengthen its family units.

Canadian families are not what they were 100 years ago. We cannot predict how they will be 100 years from now. We do know that we cannot turn back the clock by merely asserting traditional values in pious tones. Viable family life has always had the support of the society around it. That need is no less present today, but the form of society's support must catch up with the enormous changes in work, mobility, housing, and lifestyle.

Equality of Opportunity

No matter how radically or progressively one may pursue and encourage a re-definition and strengthening of the family role, one aspect of it remains unalterable: children are dependent on the care of others during the most significant part of their lives. Neither utopian reverie nor ideological exhortation can change this fact. Neither should its acceptance amount to the abdication of child care responsibility to the parents alone.

Most important in this regard is the question of equality of opportunity. Because of the dependent status of children, it is difficult to separate the opportunities of children from those of their parents and it is important that every effort be made to ensure that the right to equal life chances be provided for dependent people. Supporting the family assumes that its socializing role is a desirable and positive influence. But equality of opportunity for children must not be completely and solely dependent on family circumstances, on family income and status.

Individuality of Interest

One question which bears special examination in a discussion of the place of children in the family is that of identifying circumstances in which their best interests may not be served by the interests of their parents. Here again, merely stating that each individual has the right to personal interests is not enough to guarantee these rights to the child. For a variety of obvious reasons, it is often impossible for children to identify, articulate or defend their interests. To recognize the primacy of the child's interest is to accept:

- that a child does have an individual interest within his or her own living situation, whether he or she is capable of identifying it or not;
- that as a result of the existence of this interest, the child has an inalienable right to its recognition and its representation in circumstances where it is being ignored, threatened or denied.

The family and educational situations of children should be used as mechanisms to ensure their growth as individuals, progressively better able to make their own decisions and to take responsibility for their own lives. Until the child achieves independent adulthood, society has a responsibility to identify and safeguard the child's interest.

THE CURRENT SITUATION

Canada's most significant constitutional document, the BNA Act, makes no reference to children. We view the Resolution which Parliament has placed before this Committee as the best opportunity in over 100 years to ensure that children have full citizenship rights in our country, to create the context for improvement in their situation, and to banish forever the repugnant notion of children as chattels of their parents or of society. The rest of our brief will discuss the ways in which our principles can be applied to the proposed "Canadian Charter of Rights and Freedoms". This includes a discussion of entrenchment, our position on the rights of children, and the legal rights proposed in the Charter.

THE ENTRENCHMENT QUESTION AND THE RIGHTS OF CHILDREN

GENERAL

The Council takes no strong position in favour of, or against, entrenchment. However, in connection with children and youth, the courts have not served us very well. Entrenchment would give greater authority to the courts under section 25 of the proposed Charter. But will youth fare better under the proposed Charter than under the Canadian Bill of Rights?

EQUALITY BEFORE THE LAW - THE BURNSHINE PROBLEM

In R.v.Burnshine (1974), 44 D.L.R. (3d) 584, the Supreme Court of Canada examined "equality before the law" in connection with a young offender. Although the boy faced a maximum of six months' imprisonment or a $500 fine under the Criminal Code (Can.), he was sentenced to three months definite

and two years less a day indeterminate. The sentence, passed under the Prisons and Reformatories Act (Can.), was upheld even though an apparent inequality existed in law on the grounds of:

(1) age (the longer sentences applied to persons under 22); and

(2) geography (the facilities for indeterminate sentencing were available only in British Columbia and Ontario)

"No inequality" said the Supreme Court. Since the indeterminate sentence was designed to "reform and benefit persons within the younger age group", it was not the Court's function to call it "unequal" and render it inoperative. The "benefit" of two years' imprisonment was put ahead of the maximum six months an adult would receive.

Any child care worker, probation officer, or young person in the corrections system will admit that the large institutions used for indeterminate sentencing are, in fact, schools for learning crime, not preventing it.

These "training schools" are juvenile prisons and the odds of "reformation" are slim. But the court, using paternalistic assumptions, was able to turn down an apparently strong case of inequality. This case is to young persons what Lavell is to native women - a demonstration that we can place little hope in judicial interpretation of "equality before the law".

With entrenchment of the Charter, a decision like R.v. Burnshine could be even more disappointing because it would require a constitutional amendment to undo.

WILL PARLIAMENT AND THE LEGISLATURES PROTECT RIGHTS?

On the other hand, the provincial Legislatures and Parliament have not performed well in protecting the needs and rights of children. The problems of abused and neglected children, outlined in Admittance Restricted, are often related to out-of-date, inadequate provincial legislation. Some provinces have forged ahead - Quebec's Youth Protection Act (1977) sets forth rights of children in care. Ontario's Child Welfare Act (1978) amendments guarantee a voice for the child and frequent reviews of the child's progress in care.

But other provinces, like British Columbia in its Family and Child Service Act (1980), consolidate governmental power over children in care with little attention to the child's needs. The British Columbia government virtually ignored the comprehensive recommendations of the B.C. Royal Commission on Family and Children's Law and the views expressed in hundreds of submissions since the Commission reported in 1975. Are these the legislators we can count on to update and advance children's needs and rights?

Parliament's record is hardly praiseworthy. The Juvenile Delinquents Act (Can.), hardly changed since 1908, has been slated for replacement since 1965. Fifteen years after the promises, we are still waiting - and still seeing unacceptable, paternalistic practices carried out under the existing Act.

In 1978, the Council made submissions to the Commons Standing Committee on Justice and Legal Affairs when it examined Bill C-204 (A "Canadian Bill of Rights for Children", introduced by Mr. James McGrath). Although we did not support a distinct Bill of Rights for children, we advocated a series of changes in federal law under the heading "Omnibus Legislation for Children's Rights". To our knowledge, none of our recommendations, nor those of the Standing Committee, have been acted upon. Should voluntary organizations and citizens continue to lobby in the expectation that Parliament will respond quickly to needed changes in the law?

Some legislators claim that the Legislatures and Parliament will best protect human rights and fundamental freedoms. Without entrenchment, let those same legislators demonstrate how speedily and competently their Legislatures have protected the rights of children in education, health care, child welfare, and other fields.

POSITION ON CHILDREN'S RIGHTS

It is apparent that entrenchment or non-entrenchment could still cause problems for children and youth. As we have pointed out in Admittance Restricted, some fundamental changes in attitude are required. Consistent with our philosophy that children are "persons", we believe that any entrenched Charter should simply apply the rights of all persons to children and youth.

Except for some clarification of the "Legal Rights" and "Equality Before the Law", no special Bill of Rights for children is necessary. Nevertheless, the recognition of children as persons is a significant step away from existing legal assumptions. It recognizes that children are not the chattels of their parents or the state. They have individual interests to acknowledge.

Assuming that an entrenched Charter assigns to the courts the protection of basic rights for children, the Legislatures and Parliament will not be able to relax. Nor can they expect Human Rights Commissions to cover the cases. In 1979, the International Year of the Child, the Canadian Human Rights Commission reported that not a single complaint was filed by or on behalf of children. This illustrates a perceived lack of connection between general anti-discrimination law and the rights of children. Children's rights will have to be specified in the legislative areas they most frequently arise - child welfare, education, juvenile delinquency, and health care. Initiatives like the Quebec Youth Protection Act (rights of children in care) will have to be pursued.

LEGAL RIGHTS

GENERAL

Legal rights under the Charter must clearly apply to persons under the age of majority. With some exceptions related to detention and police questioning, the rights in Sections 7 through 15 ought to apply to "everyone" in the fullest sense of the word.

RIGHT NOT TO BE DETAINED - SECTION 9

The right not to be detained has such a vast exception that it is hardly a right. Nevertheless, we submit that one of the "procedures established by law" should be separate detention for adults and young persons. Separate detention is the current law (in the Juvenile Delinquents Act) but it is often breached in practice. However, any separate detention for young persons should fall under the same legal regime as that of adults. Longer remands should not be authorized. Bail should be available. Review and release from detention should be available on the same grounds.

RIGHTS UPON ARREST - SECTION 10

Two new clauses should be added to the existing Section 10. An accused should be entitled to be informed of his right to remain silent. Furthermore, a young person should be entitled to have an independent adult present during police questioning. These additions would go a long way toward protecting young persons accused of crime. Most convictions in juvenile court are now based on the confessions of the accused. The combination of a confession and the absence of counsel leads to many questionable guilty pleas. These rights will become even more important if new young offenders legislation adopts a more punitive philosophy.

RIGHT TO COUNSEL - SECTION 10

The right, as stated, is meaningless to most young persons unless a Legal Aid Duty Counsel is available in Juvenile Court. Duty Counsel is not provided in many rural areas and the legal advice comes too late if at all. Therefore, we recommend that indigent persons, including accused young persons, have the right to have counsel provided at the time of plea and trial. In time, this right should be extended to arrest procedures.

RIGHT TO AN INTERPRETER - SECTION 14

Section 14 should be broadened to include the right to an interpreter where age or a disability is a barrier to understanding the language and the process of the courts. This would cover, for example, the 13-year-old who finds it impossible to follow legal proceedings. At the same time, someone with a hearing handicap would be protected.

RIGHT TO EQUALITY BEFORE THE LAW - SECTION 15

The existing Section 15 could roll back even the meagre advances of "equality before the law" cases under the Canadian Bill of Rights. The cases have decided that one of the stated forms of discrimination is not a prerequisite to finding an inequality. Geography (Burnshine case) and the method of prosecution (Smythe case) have been two forms of discrimination found to be potential additions to the list. But the present wording of section 15 (1), which combines the equality right and the non-discrimination list, seems to restrict findings of inequality to race, national or ethnic origin, colour, religion, age, or sex.

RIGHT TO EQUALITY BEFORE THE LAW - SECTION 15 (cont'd)

The problem is straightforward. So is the solution. The Section should be amended to read:

"...without discrimination on a prohibited ground".

An added subsection should read:

"Prohibited grounds of discrimination include race, national or ethnic origin, colour, religion, age, sex, having the care and control of children, or a disability."

This is the draftman's technique for not limiting the discrimination list. The courts will have specific guidance on some forms of discrimination, but they will be free to add other forms in the future without a constitutional amendment.

ADDITIONAL FORMS OF DISCRIMINATION - SECTION 15

We have also suggested two additions to the anti-discrimination list - parenting status and disability. Many children are disabled from birth or develop a physical, mental or emotional handicap. These children suffer the greatest discrimination in the education system. They have no legal right to an education in most provinces - it is a privilege dependent upon the good will of their local school board. Equality before the law must mean that they can have the same opportunities and the same investment in the future that is accorded the non-disabled child.

The addition of "having the care and control of children" follows recent proposed amendments to the Ontario Human Rights Code. In the Charter, it would mean that laws could not discriminate because a person has children. This form of discrimination, practiced in "adult-only" housing and restaurants, is usually discrimination in fact, not in law. However, statutes and regulations should also have to meet this standard. This addition would also recognize that parents meet discrimination simply because of their status as parents.

"DISADVANTAGED PERSONS OR GROUPS" - SECTION 15 (2)

Subsection 15 (2) requires a person or group to be labelled "disadvantaged" before receiving unequal, but beneficial, treatment. This has an obviously distasteful connotation in connection with age discrimination. Will our senior citizens have to be labelled "disadvantaged" to receive old age pensions? Will all Canadian children and their families be termed "disadvantaged" in order to get family allowances? We suggest that "disadvantaged" be dropped in favour of "persons or groups having a special need related to a prohibited ground of discrimination".

"AMELIORATION OF CONDITIONS" - SECTION 15 (2)

A second problem arises with the wording "...that has as its object the amelioration of conditions...". The Burnshine case difficulties again come to the fore. If a court decides that the object of longer sentences for young offenders is "the amelioration of conditions", the court can authorize unequal treatment. They cannot go beyond the stated object of the "law, program or activity" to find the real substance of the so-called benefit. The courts should have the power and the initiative to question whether a law in fact produces a benefit that justifies unequal treatment.

This would allow courts to question, for example, the residential treatment programs conducted in provincial child welfare and delinquency facilities. If "behaviour modification" requires an unequal form of detention and sentencing, does it really work? Or would the child be better off facing the penalties that all other young offenders encounter? It should be clear in Section 15 (2) that the courts can go beyond the object of a "law, program or activity," get to the facts, and decide whether "amelioration of conditions" is really taking place.

CONCLUSION

In Admittance Restricted, the Task Force on the Child as Citizen asks, "Who is to protect the child from its adult protectors?" This question can have its answer in the new Canadian Constitution. The CCCY does not believe that a Charter of Rights and Freedoms can in any way be considered complete if it does not include a set of guarantees that children be defined as persons so as to enjoy the same protection of constitutional status as all other persons. We view this as a necessary but still not sufficient protection of these most vulnerable of Canadians, children.

The vulnerability of children needs to be underlined. Children have their needs met through the actions of others. How well or badly these "others" discharge their responsibilities to the children in their care is widely variable. Normally, only the most flagrant derelictions of responsibility by parents, teachers, or other caregivers evokes an official response. In most of these cases, decisions about what is best for the children is tempered by a keen awareness of the "natural rights of parents" and the care that must be taken not to infringe upon these rights. Parental rights are not to be taken lightly, and we would be the last to suggest that they be dismissed as unimportant. However, as we have noted in our discussion of entrenchment, children's rights have yet to enjoy similar legitimacy either in the eyes of our courts or our Legislatures. What we seek is to redress an imbalance, a disproportionate neglect of the view that, as persons, children ought to enjoy the same protection of their rights as all others, as well as that extra measure of protection that comes with being dependent upon others and having diminished responsibility.

How else can we avoid the sad spectacle of native children not receiving the same protection of a provincial child welfare act as other children because the federal and provincial governments cannot agree about who shall bear the cost of service and in what proportions? How else can we

AGC-4080

indicate to a child-caring authority which has removed a child from the custody of his or her parents for neglect, that it is no less neglectful to keep moving the child from one foster home to another to another and another? If those who are responsible for the child are to be held accountable for their acts, by what standard shall such accountability be measured, and with what authority shall it be exacted? Where else should we begin to define such standards and such authority than in the Charter of Rights and Freedoms of the Constitution of Canada? The needs and rights of 7 million Canadians demand inclusion in any proposed Charter of Rights and Freedoms for Canada.

- 30 -

A0453977_10-000968

AGC-4080