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# A Positive Future for Section 7? Children and Charter Change

Alison M. Latimer\*

## I. INTRODUCTION

As Martha Nussbaum has observed, “[h]uman infants arrive in the world in a condition of needy helplessness more or less unparalleled in any other animal species.”<sup>1</sup> This neediness takes shape as three basic and fairly universal needs including “the basic bodily need for nourishment and care”,<sup>2</sup> the “need for comfort and reassurance”,<sup>3</sup> and the need for “cognitive stimulation”.<sup>4</sup> Children are often unable to secure access to these fundamental and universal needs in Canada because of gross disparities of wealth resulting in many children living in poverty.<sup>5</sup> This inability requires rectification because children who do not have secure access to these basic needs suffer adverse physical and mental impacts, are vulnerable to immediate harm, and their potential for growth and

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<sup>1</sup> Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (New York: Cambridge University Press, 2001) c. 4, at 181.

<sup>2</sup> *Id.*, at 183.

<sup>3</sup> *Id.*, at 185.

<sup>4</sup> *Id.*, at 189.

<sup>5</sup> For example, the 2011 National Household Survey conducted by Statistics Canada showed that “10% of Canadians had total income of more than \$80,400 in 2010 — almost triple the national median income of \$27,800. To be in the top 5%, Canadians needed to have a total income of \$102,300 and to be in the top 1% required \$191,100, nearly seven times the national median income.” This survey was unable to show trends in income inequality because of the shift in methodology from the mandatory long-form census to the voluntary household survey (online: <<http://www.statcan.gc.ca/daily-quotidien/130911/dq130911a-eng.htm>>). Statistics Canada’s separate release in June showed that three million Canadians, or 8.8 per cent of the population, had low incomes in 2011. And further that more than half a million, or 571,000 children aged 17 and under, lived in low income in 2011 and nearly a quarter of children who lived in single-mother families lived in poverty (online: <<http://www.theglobeandmail.com/news/politics/who-are-the-1-per-cent-a-snapshot-of-what-canadians-earn/article14269972/?page=2>>).

development is also compromised.<sup>6</sup> Rather than focus on more rigorous proof of each of these factual propositions, this paper explores a possible route to an effective remedy.

Political avenues of redress have so far been ineffective. People are now turning to courts to ensure these fundamental needs are not ignored. One of the challenges for advocates in the legal arena has been the courts' reticence to recognize positive socio-economic rights under the *Canadian Charter of Rights and Freedoms*.<sup>7</sup> This reticence stems from at least two concerns. The first is a liberal concern about state interference with autonomy. The second is an institutional concern about the courts' ability to address socio-economic wrongs. While these concerns appear to have undermined many claims from adults for positive socio-economic rights protection under the Charter, there are principled reasons on both grounds to distinguish the case for children. In particular, because of both the special vulnerability of children, their capacity for development, and the state's treatment of children in other contexts, recognition of positive rights for children, even where claims for such rights may have failed for adults in the past, is consistent with Canada's legal/political traditions, current laws and jurisprudence. Therefore, we should look to children as the place to push positive section 7 rights forward under the Charter.

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<sup>6</sup> See, e.g., Rhonda Kornberger, Janet E. Fast & Deanna L. Williamson, "Welfare or Work: Which is Better for Canadian Children?" (2001) 27 Can. Pub. Pol'y 407, noting at 407 that "studies have documented that children living in poor families are at greater risk of poor health and academic outcomes, accidental death and injury, dropping out of school, and developing emotional, psychosocial, and behavioural problems than other children" and at 409 that "these risks faced by poor children undermine their ability to grow and develop into healthy independent adults". There is an obvious link between poverty and the basic need for nourishment and similar adverse outcomes have been noted in respect of children experiencing food insecurity: see, e.g., Community Nutritionists Council of BC "Making the Connection — Food Security and Public Health" (June 2004), at 6-10. In *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, [2013] B.C.J. No. 2056, 2013 BCCA 405 (B.C.C.A.), leave to appeal granted [2013] S.C.C.A. No. 458 (S.C.C.), the B.C. Court of Appeal appeared to take judicial notice of the fact that depriving a child of proper care was detrimental to a child's development and participation in society as an adult when it held at para. 24: "Obviously anything that fosters the emotional and physical needs of infants and children of tender years tends to a healthier society. It is often observed that the roots of antisocial behaviour by adults can be traced to deficiencies of childhood care. Time afforded to parents for care for newborns and adopted children fosters a vital societal interest."

<sup>7</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

## II. THE CHALLENGING JURISPRUDENTIAL LANDSCAPE

Section 7 of the Charter provides one of the most likely avenues of correction of socio-economic wrongs to children and it provides that “[e]veryone 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.” To date, in approaching section 7, courts have typically drawn a distinction between negative rights (civil liberties requiring non-interference by the state) and positive rights (socio-economic rights requiring state action for their realization).<sup>8</sup> This distinction has been challenged by many as unconvincing given that it draws a false dichotomy between those interests that require state intervention (including possibly state expenditure) and those that do not.<sup>9</sup> Nevertheless, judicial interpretation of section 7 remains shackled to the requirement that the claimant demonstrate some deprivation arising from government action and has so far not been interpreted to protect positive socio-economic rights. The positive/negative rights distinction must therefore be attended to in any case that can be characterized as seeking a positive right under section 7.

Justice Arbour was the first Supreme Court of Canada justice to endorse an interpretation of section 7 that encompassed positive socio-economic

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<sup>8</sup> For discussion of the origins of s. 7 and its application to date, see Peter Hogg, “The Brilliant Career of Section 7 of the Charter” in J. Cameron & S. Lawrence, eds. (2012) 58 S.C.L.R. (2d) 195.

<sup>9</sup> *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at para. 53 (S.C.C.). See, e.g., Martha Jackman, “Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?” in Kent Roach & Robert Sharpe, eds., *Taking Remedies Seriously* (Montreal: Canadian Institute for the Administration of Justice, 2009), at 281-85 [hereinafter “Jackman 2009”]. Indeed, Professor Jackman has observed that this distinction has long been abandoned under international human rights law and increasingly rejected in other constitutional democracies and that “the continued reliance by Canadian courts and tribunals on the distinction between positive and negative rights as a basis for dismissing socio-economic rights claims represents a fundamental failure of constitutionalism and the rule of law”. For Jackman, “all human rights are interdependent and indivisible, and that governments have a corresponding duty to respect, protect and fulfil socio-economic rights on an equal footing with civil and political rights”. See also Martha Jackman, “What’s Wrong with Social and Economic Rights?” (2000) 11 N.J.C.L. 235, at 242-43 [hereinafter “Jackman 2000”]; Margot Young, “Section 7 and the Politics of Social Justice” (2005) 38 U.B.C. L. Rev. 539, at 549-50 [hereinafter “Young 2005”]; Louise Arbour, United Nations High Commissioner for Human Rights, “Freedom from Want — from Charity to Entitlement”, Lafontaine-Baldwin Lecture, Quebec City (2005) at 3, 15 [hereinafter “Freedom from Want”]. See also, in the s. 15 context, Hester Lessard, “‘Dollars Versus [Equality] Rights’: Money and the Limits on Distributive Justice” in J. Cameron & S. Lawrence, eds. (2012) 58 S.C.L.R. (2d) 299, at 301 [hereinafter “Lessard 2012”]; and in the American context, Tamer Ezer, “A Positive Right to Protection for Children” (2004) 7 Yale Hum. Rts. & Dev. L.J. 1, at 9-10, 47 [hereinafter “Ezer”].

rights in *Gosselin v. Quebec (Attorney General)*.<sup>10</sup> At issue was a claim for equality, liberty and security of the person arising from a differential welfare scheme that left those recipients under the age of 30 significantly below the poverty level. Discussion here is limited to the judgments of the Court in respect of section 7. Justice Bastarache alone, and in dissent, held that section 7 protects only negative rights.<sup>11</sup> In contrast, the majority held that “[o]ne day s. 7 may be interpreted to include positive obligations”,<sup>12</sup> but that there was insufficient evidence in that case to support the proposed interpretation of section 7.<sup>13</sup> Nevertheless, the majority left “open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances”.<sup>14</sup> Justice Arbour’s spirited dissent concluded that section 7 includes a positive dimension,<sup>15</sup> noting that the existing jurisprudence left open the possibility that section 7 encompasses economic rights<sup>16</sup> and extends beyond legal rights.<sup>17</sup> While she acknowledged that “virtually all past s. 7 cases” involved state interference with life, liberty or security of the person,<sup>18</sup> Arbour J. noted that the structure of the Charter, which includes many other provisions commanding positive obligations from the state,<sup>19</sup> the specific language of section 7,<sup>20</sup> a purposive analysis of section 7, which gives the right to life some meaning,<sup>21</sup> section 7’s position in the overall context of the Charter<sup>22</sup> and the jurisprudence<sup>23</sup> were all consistent with the view that section 7 includes a positive dimension.

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<sup>10</sup> [2002] S.C.J. No. 85, 2002 SCC 84 (S.C.C.) [hereinafter “*Gosselin*”]. This dissenting judgment was concurred in by L’Heureux-Dubé J., at paras. 99, 141-143. The possibility that s. 7 was amenable to such interpretation was recognized in *Reference re Motor Vehicle Act (British Columbia)* S. 94(2), [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486, at para. 21 (S.C.C.) and *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at para. 95 (S.C.C.).

<sup>11</sup> *Gosselin*, *supra*, note 10, at para. 209.

<sup>12</sup> *Id.*, at para. 82, *per* McLachlin C.J.C. and Gonthier, Iacobucci, Major and Binnie JJ.

<sup>13</sup> *Id.*, at para. 83.

<sup>14</sup> *Id.*, at para. 83.

<sup>15</sup> *Id.*, at para. 307.

<sup>16</sup> *Id.*, at paras. 311-313.

<sup>17</sup> *Id.*, at paras. 314-318.

<sup>18</sup> *Id.*, at para. 319.

<sup>19</sup> *Id.*, at para. 320.

<sup>20</sup> *Id.*, at paras. 321-322, 336-343.

<sup>21</sup> *Id.*, at paras. 344-348.

<sup>22</sup> *Id.*, at paras. 323, 349-358.

<sup>23</sup> *Id.*, at paras. 324-327.

The Supreme Court of Canada has not expressly addressed the issue of positive rights under section 7 of the Charter since *Gosselin*; however, a number of lower courts, most notably in Ontario and British Columbia, have recently considered the issue.

In Ontario, subject to the possibility of a successful appeal of *Tanudjaja v. Canada (Attorney General)*,<sup>24</sup> it appears that such claims will be foreclosed from even proceeding to trial. In *Tanudjaja* the Ontario Superior Court of Justice dismissed an application for recognition of a positive right to affordable, adequate and accessible housing for all Canadians on the basis that it disclosed no reasonable cause of action and raised issues that were not justiciable. With reference to a number of earlier cases, the Court concluded that it was settled in Ontario that section 7 protects only negative rights and does not confer a free-standing right to life, liberty or security of the person.<sup>25</sup>

The jurisprudence in British Columbia is less hostile. A claim for a positive section 7 right was dismissed in *Pratten v. British Columbia (Attorney General)*, a case concerning the rights of gamete donor offspring.<sup>26</sup> The right sought, while grounded in life, liberty and security of the person, was referred to as the right to know one's biological origins. Without foreclosing that such a claim might ever be successful, the trial judge "concluded that this case will not be the 'one day' when s. 7 is interpreted to impose on the state a positive duty to act and legislate where it has not done so".<sup>27</sup> The Court of Appeal dismissed the appeal in respect of section 7 and did so without foreclosing that section 7

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<sup>24</sup> [2013] O.J. No. 4078, 2013 ONSC 5410 (Ont. S.C.J.) [hereinafter "*Tanudjaja*"]; notice of appeal was filed on October 4, 2013.

<sup>25</sup> *Id.*, at paras. 32-59, citing *Doe v. Ontario*, [2007] O.J. No. 3889 (Ont. S.C.J.), affd [2009] O.J. No. 570, 2009 ONCA 132 (Ont. C.A.) (no positive right to witness protection program); *Good v. Toronto Police Services Board*, [2013] O.J. No. 2290 (Ont. S.C.J.), revd but not on this point [2014] O.J. No. 3643, 2014 ONSC 4583 (Ont. Div. Ct.) (no positive obligation on government to prevent Charter breaches); *Flora v. General Manager, Ontario Health Insurance Plan*, [2008] O.J. No. 2627 (Ont. C.A.) (no positive right to funding for life-saving out-of-country medical treatments); *Masse v. Ontario (Ministry of Community and Social Services)*, [1996] O.J. No. 363 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1526 (Ont. C.A.), leave to appeal refused [1996] S.C.C.A. No. 373 (S.C.C.) (no positive right to minimal social assistance); *Clark v. Peterborough Utilities Commission*, [1995] O.J. No. 1743 (Ont. Gen. Div.), appeal dismissed as moot [1998] O.J. No. 2915 (Ont. C.A.) (no positive right to be free from the requirement of a security deposit or no positive right to housing).

<sup>26</sup> *Pratten v. British Columbia (Attorney General)*, [2011] B.C.J. No. 931, 2011 BCSC 656 (B.C.S.C.) [hereinafter "*Pratten SC*"]. The author of this paper, along with Joseph J. Arvay, Q.C. and Sean Hern, acted as counsel for the plaintiff in *Pratten*.

<sup>27</sup> *Id.*, at para. 291.

could include a positive dimension. In fact the Court of Appeal assumed that section 7 was susceptible to an interpretation guaranteeing positive rights, but found that the test endorsed by Arbour J. in *Gosselin* for grounding such a claim was not met.<sup>28</sup>

More recently, in British Columbia in *Inglis*,<sup>29</sup> the B.C. Supreme Court considered the government's decision to cancel the Mother Baby Program — a program that allowed provincially incarcerated mothers and their babies to reside together at a correctional centre. The claimants argued that legislation that provided the authority to run the Mother Baby Program<sup>30</sup> was inconsistent with the Charter in that it did not require the program's continuation.<sup>31</sup> The trial judge dismissed this argument, noting that under the legislation, the choice of which programs to establish (or cancel) is a matter of discretion.<sup>32</sup> The legislation was therefore capable of being interpreted consistently with the Charter and the breach would only arise because of the exercise of discretion.<sup>33</sup> For the trial judge, the issue was better framed as whether the government action in *cancelling the Mother Baby Program* unjustifiably infringed the mothers' sections 7, 12 and 15 rights under the Charter.<sup>34</sup> Again, the focus here will be on the section 7 analysis. Rejecting that what the plaintiffs sought was, in effect,

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<sup>28</sup> *Pratten v. British Columbia (Attorney General)*, [2012] B.C.J. No. 2460, 2012 BCCA 480, at para. 62 (B.C.C.A.), leave to appeal refused, [2013] S.C.C.A. No. 36 (S.C.C.) [hereinafter "*Pratten CA*"]. The test for positive rights was first developed in *Dunmore v. Ontario (Attorney General)*, [2001] S.C.J. No. 87, 2001 SCC 94 (S.C.C.) [hereinafter "*Dunmore*"], a case dealing with s. 2(d) of the Charter. A claimant must show the following: (a) The claim must be grounded in a fundamental Charter right or freedom rather than in access to a particular statutory regime (at para. 24); (b) The proper evidentiary foundation must be provided, before creating a positive obligation under the Charter, by demonstrating that exclusion from the regime constitutes a substantial interference with the exercise and fulfilment of a protected right (at para. 25); (c) It must be determined whether the state can truly be held accountable for the inability to exercise the right or freedom in question (at para. 26).

<sup>29</sup> *Inglis v. British Columbia (Minister of Public Safety)*, [2013] B.C.J. No. 2708, 2013 BCSC 2309 (B.C.S.C.) [hereinafter "*Inglis*"].

<sup>30</sup> The *Correction Act Regulation*, B.C. Reg. 58/2005 provided in relevant part:  
38(1) The person in charge must establish programs for inmates, including religious and recreation programs.  
(2) As far as practicable, the person in charge must establish programs designed to assist inmates to  
(a) improve their education or training, and  
(b) reduce the risk they present to the community.

<sup>31</sup> *Inglis*, *supra*, note 29, at para. 350.

<sup>32</sup> *Id.*, at para. 351.

<sup>33</sup> *Id.*, at para. 354.

<sup>34</sup> *Id.*, at para. 358.

a positive right to access the Mother Baby Program under section 7, the trial judge reasoned that the cancellation of the Mother Baby Program resulted in the involuntary separation of mothers and newborns and was therefore a *deprivation*, in other words a negative right.<sup>35</sup> The trial judge found this cancellation to be made pursuant to an illegitimate objective and to be arbitrary, overbroad and grossly disproportionate and not saved by section 1.<sup>36</sup> Turning to the issue of remedy, the trial judge declared, among other things, that the decision to cancel the program was contrary to section 7 of the Charter and directed the government to administer the legislation in a manner consistent with her reasons.<sup>37</sup>

The reasoning and outcomes in *Inglis* and *Tanudjaja* are hard to reconcile and demonstrate the way in which the distinction between positive and negative rights eludes definition. In both cases, rights-enhancing programs were implemented and then restricted or cancelled.<sup>38</sup> In both cases, diminution of these programs had significant negative impacts on the life, liberty and security of the person of the individuals reliant on them, including loss of custody of children.<sup>39</sup> The Ontario Superior Court of Justice viewed the claim as a positive rights issue and held that section 7 did not protect positive rights and as such the governments of Canada and Ontario were free to amend, lessen or cut programs or benefits without breaching Charter rights. The B.C. Supreme Court applied a negative rights analysis and reached the opposite conclusion.<sup>40</sup>

The Ontario Superior Court of Justice's analysis of the issue as a claim for positive rights is consistent with the Supreme Court of Canada's approach in *Gosselin*. Yet the judgment in *Inglis* has not been appealed and remains the law in British Columbia. Thus there is conflicting jurisprudence within Canada on the issue of whether a claim for continuation of a program is a positive right and whether such a claim

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<sup>35</sup> *Id.*, at para. 394.

<sup>36</sup> *Id.*, at paras. 501, 655.

<sup>37</sup> *Id.*, at paras. 656, 658. While children featured in the factual matrixes of both *Pratten* and *Inglis*, in neither case was the B.C. Supreme Court faced with any arguments such as those developed below in respect of the unique position of children in relation to the state and why this position makes children's claims for positive rights more amenable to recognition.

<sup>38</sup> For a description of the erosion of programs see *Tanudjaja*, *supra*, note 24, at paras. 16-23.

<sup>39</sup> *Id.*, at paras. 24-26.

<sup>40</sup> See, e.g., *id.*, at paras. 33, 35, 37-40, 49.



is protected by section 7.<sup>41</sup> This conflicting jurisprudence leaves open the argument (at least outside of Ontario) that section 7 protects positive rights, contrary to the decision in *Tanudjaja* that such a claim was bound to fail. From an advocacy point of view, one might question whether the same result might have been reached in *Inglis* by grounding the claim in the positive rights of the children in question, rather than their mothers. Regardless, what decisions like *Inglis* demonstrate is a judicial appetite and ability to respond to socio-economic wrongs but a hesitance to explicitly recognize a positive right in fashioning this response. The source of this reluctance may be a liberal anxiety about interfering with autonomy, and also a worry about institutional competency. There are reasons to distinguish both concerns in respect of recognition of positive rights for children. Such recognition is responsive to children's vulnerable nature, capacity for development and special position in relation to the state, and is consistent with Canadian laws and jurisprudence. It is also consistent with the trend in foreign and international law, which has increasingly leaned toward recognition of positive rights.<sup>42</sup>

### III. THE SPECIAL STATUS OF CHILDREN IN LIBERAL RIGHTS DISCOURSE

In the U.S. context, Tamer Ezer, senior program officer in the Law and Health Initiative of the Open Society Public Health Program, has

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<sup>41</sup> Not all cases that result in the continuation of a government program properly form part of this conflicting jurisprudence. For example, although the outcome in *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, 2011 SCC 44 (S.C.C.) [hereinafter "*PHS*"] was the continued operation of a safe injection site, *PHS* does not properly fit within this conflicting jurisprudence. At issue in *PHS* was the state's blanket prohibition against the possession and trafficking of illegal drugs. While the remedy included an order that the federal Minister of Health grant Insite an exemption from the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (which enabled Insite to operate without contravening the Act), the federal government was not required to provide the services in question. These services were provided by a provincial health authority. Thus *PHS* is properly viewed as a negative rather than a positive rights case despite the continuation of the safe injection site as a result of the judgment.

<sup>42</sup> See, e.g., in Malcolm Langford, "The Justiciability of Social Rights: From Practice to Theory" [hereinafter "Langford 2008"] in Malcolm Langford, ed., *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) [hereinafter "*Social Rights Jurisprudence*"], at 4. See also Ezer, *supra*, note 9, at 9; Young 2005, *supra*, note 9, at 546; Jackman 2009, *supra*, note 9, at 281; "Freedom from Want", *supra*, note 9, at 13-14.

conceptualized children's rights as arising from their "very dependence and capacity for growth".<sup>43</sup> Recognition of children's dependence and capacity for growth has important ramifications for how public policy and the law within such a political system should approach the issue of children's rights. However, as Ezer has observed in the American context:

Children are an anomaly in the liberal legal order. Conceptualizations that work in other areas of human rights break down in the context of children. Children defy the conventional view of rights as implying fully rational, autonomous individuals who can exercise free choice and require freedom from governmental interference. Lacking fully developed rational capabilities, children are dependent "incompetents" by definition. Furthermore, unlike the term "individual", the term "child" does not stand alone from all others, but necessarily implies a relationship.<sup>44</sup>

These observations are equally applicable in Canada, where the "Charter has come of age in a neo-liberal era, one in which whatever political consensus there once was regarding distributive justice has splintered and dissolved".<sup>45</sup> The liberal rhetoric, placing responsibility on the private individual rather than the public state, has been instrumental in framing the negative rights analysis of section 7.<sup>46</sup> The prevailing approach to section 7, then, is particularly ill-adapted to children.

Instead, children's rights are better conceived as positive rights and the more closely the right claimed is connected to one of the three basic needs outlined above, the stronger the demand for positive constitutional protection of such needs in the interests of "justice". The theory of

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<sup>43</sup> Ezer, *supra*, note 9, at 3.

<sup>44</sup> *Id.*, at 1. Ezer notes at 2 that the "founders of liberal rights theory perceived children to be outside the scope of their philosophies". Ezer has therefore theorized that the U.S. Constitution should be interpreted to impose a positive right to state protection from corporal punishment for children. In *Canadian Foundation for Children, Youth and the Law v. Canada*, [2004] S.C.J. No. 6, 2004 SCC 4 (S.C.C.) the Supreme Court of Canada rejected an argument that a negative interpretation of s. 7 applied to protect children from corporal punishment. No positive right to such protection has been tested.

<sup>45</sup> Lessard 2012, *supra*, note 9, at 300. While Canadian rights culture has been significantly influenced by the United States, Canadian rights culture has "a distinctive commitment to social rights and to an emerging system of international human rights protections": Martha Jackman & Bruce Porter, "Socio-Economic Rights Under the Canadian Charter" [hereinafter "Jackman & Porter 2008"] in *Social Rights Jurisprudence*, *supra*, note 42, at 210-11.

<sup>46</sup> Lessard 2012, *id.*, at 300-301.

“justice” relied on here is not merely about remedying the “discrete symptoms”<sup>47</sup> of social inequality, but rather about ensuring that everyone is enabled to meet his or her full potential for development and thereby given an equal opportunity to be involved in society’s most important institutions, which ultimately control distribution of wealth, goods and opportunity.<sup>48</sup> For children, to fail to treat the symptom of injustice will perpetuate systems and structures of injustice because compromised child development will lead to greater chance of adult exclusion from participation in the economic, political and legal community.<sup>49</sup>

Children’s special character as uniquely dependent and capable of development and growth undermines the first objection raised to positive rights which is the objection grounded in the liberal anxiety about interference with autonomy. First, children do not fit easily within liberal rights discourse and this is a principled reason or a “special

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<sup>47</sup> Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997) [hereinafter “*Just Words*”], at 51 raises the concern that recognition of socio-economic rights has the potential to deal “only with discrete symptoms, leaving underlying social structures untouched”.

<sup>48</sup> This theory of justice is drawn from Rainer Forst, *Justification and Critique*, translated by Ciaran Cronin (Cambridge: Polity Press, 2014). Forst offers two ways of thinking about justice. The first is focused on goods and their recipients and in particular who should get what goods for what reasons “in order to compensate for arbitrary natural and social differences” (at 11). The second, and the one endorsed by the author, is focused on the structures within which the question of who should receive what for what reasons is decided. Forst posits (at 36) that “[f]undamental justice assures all citizens an effective status ‘as equals’, as citizens with opportunities to participate and wield influence. Fundamental justice is violated when primary justification power is not secured for all equally in the most important institutions.” This concept of justice is also consistent with the values underlying the Charter, which include social justice and enhanced participation in society: Jackman & Porter 2008, *supra*, note 45, at 220.

<sup>49</sup> The idea that positive rights will enhance citizenship by enhancing social participation has been developed elsewhere: see, e.g., Margot Young, “The Other Section 7” in E. Mendes & S. Beaulac, eds. (2013) 62 S.C.L.R. (2d) 3, at 46-47, citing Thomas Humphrey Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950). Jackman & Porter 2008, *id.*, at 229; *Just Words*, *supra*, note 47, at 135, citing Bruce Porter “Social and Economic Rights and Citizenship: Draft Paper Prepared for the Institute for Research and Public Policy, Victoria, BC” (1991); Young 2005, *supra*, note 9, at 541, 548. Ezer has observed that a society “which bases its rewards so heavily on achievement ... should give all young people a decent chance to compete and succeed”: Ezer, *supra*, note 9, at 40. The same observation is applicable in Canada. The lasting effects of failing to meet children’s basic needs also makes clear that we can add “consistency with unwritten constitutional principles” to Arbour J.’s rationales for interpreting s. 7 as including a positive dimension, at least with respect to children. In particular, if protection of children’s fundamental rights will safeguard their ability to participate in society’s most important institutions, this promotes the principle of democracy and specifically “evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation” of all, including those families suffering from social inequality: *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217, at para. 63 (S.C.C.).

circumstance<sup>50</sup> auguring in favour of recognizing positive rights for children under section 7 of the Charter even when such claims for adults may have failed in the past. Second, recognition of such rights gives rise to a much greater possibility that the values underlying liberal rights — namely autonomy and self-reliance — may eventually be achieved.<sup>51</sup> Finally, such a development is in the interest of justice because it ensures that children living in poverty today will have an equal opportunity in the future to participate in important institutions with the potential to ameliorate present systems of disadvantage.

Altering the traditional negative rights approach to section 7 in light of the recognition of children's basic dependence and capacity for growth is also consistent with the Canadian legal landscape, which treats children as requiring different considerations in light of these very considerations. This proposition, which is developed below, goes some distance to answering the second objection to positive rights and this is the objection grounded in institutional concerns about courts' capacity to remedy socio-economic wrongs.

#### IV. THE TREATMENT OF CHILDREN IN CANADIAN LAW

##### 1. Legislative

Canadian legislation conceptualizes children as dependent and vulnerable and deserving of protection of both their physical and mental well-being and also their potential for development. This conceptualization gives expression to the state's tacit recognition that children's special vulnerability demands a departure from the classic liberal approach to individual autonomy. Illustrative examples of this phenomenon are

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<sup>50</sup> *Gosselin, supra*, note 10, at para. 83.

<sup>51</sup> I do not suggest that individual choice can be understood as other than societally constructed and I make no normative claim about the role that individual choice plays in current adult rights jurisprudence. In such cases government lawyers typically argue that causation is negated by individual choice. Recently the Supreme Court of Canada has rejected this argument noting the lack of "choice" entailed in prostitution and injection drug use: see, e.g., *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72, at paras. 79-92 (S.C.C.); *PHS, supra*, note 41, at paras. 97-106. For discussion of the role that the notion of choice ought (and ought not) to play in the consideration of (adult) rights claims, see Margot Young, "Social Justice and the Charter: Comparison and Choice" (2012-2013) 50 Osgoode Hall L.J. 669, at 687-97; Margot Young, "Context, Choice, and Rights: *PHS Community Services Society v. Canada (Attorney General)*" (2011) 44 U.B.C. L. Rev. 221, at 248-52.

myriad. An exhaustive account is beyond the scope of this paper; however, the following examples establish the point.

In the civil context, family law prioritizes the “best interests of the child”.<sup>52</sup> While parents have a “protected sphere of parental decision making”, it is rooted “in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself”.<sup>53</sup> Protecting the best interests of the child ensures the child’s present mental and physical safety and, concomitantly, his or her potential for growth.

Despite the presumption in favour of parental decision-making, where parents or other authorized caregivers do not meet the requisite standards of care for a child, the state can intervene, including by instituting child protection proceedings for removal of children from their parents’ care.<sup>54</sup> Such intervention gives expression to the public’s responsibility towards children. As Professor Wilson explains:

Child protection laws represent the public’s responsibility towards children. This responsibility is discharged through an ongoing balancing of the community’s interest in the proper parenting and development of children, with that of the individual parent’s right to privacy and right to raise children as he or she sees fit.<sup>55</sup>

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<sup>52</sup> *Divorce Act*, R.S.C. 1985 c. 3 (2nd Supp.), ss. 16-17; *Family Law Act*, S.B.C. 2011, c. 25, s. 37; *Children’s Law Reform Act*, R.S.O. 1990, c. C.12, s. 24; see also *Convention on the Rights of the Child*, May 28, 1990, Can. T.S. 1992 No. 3, (ratified December 13, 1991) [hereinafter “*Convention on the Rights of the Child*”], which describes “the best interests of the child” as a primary consideration in all actions concerning children (art. 3) and then sets out a framework under which the child’s own input will inform the content of the “best interests” standard, with the weight accorded to these views increasing in relation to the child’s developing maturity. This framework thus gives expression to a child’s potential for growth and development (see, e.g., arts. 5, 12, 14 and *C. (A.) v. Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No. 30, 2009 SCC 30, at para. 93 (S.C.C.) [hereinafter “*C. (A.)*”]); see also *Convention on the Elimination of All Forms of Discrimination Against Women*, December 18, 1979, 1249 U.N.T.S. 13, (1980) 19 I.L.M. 33, ss. 5, 10, 16.

<sup>53</sup> *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24, [1995] 1 S.C.R. 315, at para. 85 (S.C.C.) [hereinafter “*B. (R.)*”].

<sup>54</sup> *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46; *Child and Family Services Act*, R.S.O. 1990, c. C.11.

<sup>55</sup> Jeffery Wilson, *Wilson on Children and the Law*, loose-leaf (Markham, ON: LexisNexis Canada, 1994) [hereinafter “*Wilson on Children*”], at 3-1. Notions like “proper parenting and development of children” are culturally informed. It is for this reason that looking back at the history of child welfare law in Canada has led others to observe that it has been motivated by damaging

Thus it is a concern not only for the physical protection of children but also for their *development* that informs child welfare laws.

Children's vulnerability and development is protected in other areas of civil law as well. Below a certain age, subject to limited exceptions, children are required to attend school;<sup>56</sup> there are restrictions on their freedom to be employed;<sup>57</sup> they are not permitted to drive;<sup>58</sup> there are restrictions on what films they can attend;<sup>59</sup> restrictions on their right to marry;<sup>60</sup> limitations periods do not begin to run against them until they reach the age of majority;<sup>61</sup> and the list goes on.

The *Criminal Code* imposes duties and creates offences that specifically protect children as potential victims of crime in recognition of their particular vulnerability.<sup>62</sup> When children are accused of criminal

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classist and colonial impulses: see, e.g., John J. Borrows & Leonard I. Rotman, *Aboriginal Legal Issues: Cases Materials & Commentary*, 3d ed. (Markham, ON: LexisNexis Canada, 2007), c. 10, at 830 [hereinafter "Borrows & Rotman"]; Hester Lessard, "The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring" (2002) 39 Osgoode Hall L.J. 717, at 727 [hereinafter "Lessard 2002"].

<sup>56</sup> *Wilson on Children*, id., Appendix 13; *School Act*, R.S.B.C. 1996, c. 412, s. 3; *Education Act*, R.S.O. 1990, c. E.2, s. 21.

<sup>57</sup> *Wilson on Children*, id., Appendix 18; *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 9; *Employment Standards Regulation*, B.C. Reg. 396/95, ss. 45.1, 45.5, 45.7, 45.15; *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 25; *Constructions Projects Regulation*, O. Reg. 213/91, ss. 16, 295; *Industrial Establishments Regulation*, R.R.O. 1990, Reg. 851, s. 4; *Mines and Mining Plant Regulation*, R.R.O. 1990, Reg. 854, s. 8; *Oil and Gas Offshore Regulation*, R.R.O. 1990, Reg. 855, s. 4; *Window Cleaning Regulation*, R.R.O. 1990, Reg. 859, s. 8; *Licences to Sell Liquor Regulation*, R.R.O. 1990, Reg. 719, s. 23; see also the International Labour Organization (ILO No. 182) *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, 2133 U.N.T.S. 161; *Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict*, June 5, 2000, Can. T.S. 2002, No. 5 (ratified July 7, 2000), ss. 1-5.

<sup>58</sup> *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, s. 30.04; *Highway Traffic Act*, R.S.O. 1990, c. H.8, ss. 37-38.

<sup>59</sup> *Motion Picture Act*, R.S.B.C. 1996, c. 314; *Motion Picture Act Regulations*, B.C. Reg. 260/86, ss. 3, 5; O. Reg. 452/05, s. 3.

<sup>60</sup> *Marriage Act*, R.S.B.C. 1996, c. 282, ss. 28-29; *Marriage Act*, R.S.O. 1990, c. M.3, ss. 5-6; see also *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 226 U.N.T.S. 3, s. 2.

<sup>61</sup> *Limitation Act*, S.B.C. 2012, c. 13, s. 18; *Limitation Act*, R.S.O. 1980, c. 198, s. 47.

<sup>62</sup> Illustrative examples in the *Criminal Code*, R.S.C. 1985, c. C-46 include the duty to provide necessities of life (s. 215) and the offences prohibiting: abandoning a child (s. 218); abducting a child (ss. 281-286); corrupting a child (s. 172); killing a child (ss. 223(2), 233, 237, 238); having sex with a child (ss. 151-153, 810.1, 811). The fact that a victim of a crime is a child is an aggravating factor in sentencing (s. 718.2(a)(ii.1)) as is profiting from child pornography (s. 163.1(4.3)). Protective measures are taken in respect of children who must testify at criminal trials (ss. 486.1-486.4). See also *International Covenant on Civil and Political Rights* New York,

wrongdoing, “special rules based on reduced maturity and moral capacity have governed young persons in conflict with the law from the beginning of legal history”.<sup>63</sup> These rules also protect young persons from publication of their identities and emphasize rehabilitation rather than punishment if they are convicted.<sup>64</sup> These special rules support the thesis that it is not only children’s dependence but also their capacity for growth that motivates the law.

Canada has also signed and ratified a number of international instruments that recognize the need to positively protect children rather than endorsing a *laissez-faire* attitude to their well-being and development.<sup>65</sup> While not binding unless and until incorporated into Canadian law,<sup>66</sup> these international instruments are important interpretative

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December 16, 1966, Can. T.S. 1976, No.47, ss. 6(5), 10; *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, May 25, 2000, 2171 U.N.T.S. 227, ss. 1, 3, 4, 5, 6, 10; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, November 15, 2000, Can. T.S. 2002, No. 25; *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, June 17, 1999, Can. T.S. 1963, No. 7, ss. 1, 2, 3, 8; *International Convention for the Suppression of Traffic in Women and Children*, September 30, 1921, as amended by the November 12, 1947 Protocol, 93 U.N.T.S. 43, ss. 1, 3, 4, 6, 7; *Rome Statute of the International Criminal Code*, 2187 U.N.T.S. 90, ss. 6, 7; and one of the only international commitments with respect to children to have actually been incorporated into Canadian law: *Hague Convention on the Civil Aspects of International Child Abduction*, October 25, 1980, Can. T.S. 1983, No. 35 — see *Children’s Law Reform Act*, R.S.O. 1990, c. C.12, Schedule.

<sup>63</sup> *R. v. B. (D.)*, [2008] S.C.J. No. 25, [2008] 2 S.C.R. 3 (S.C.C.); *R. v. C. (R.)*, [2005] S.C.J. No. 62, 2005 SCC 61, at para. 41 (S.C.C.) [hereinafter “C. (R.)”]; *Youth Criminal Justice Act*, S.C. 2002, c. 1; *Convention on the Rights of the Child*, *supra*, note 52.

<sup>64</sup> *C. (R.)*, *id.*, at para. 40.

<sup>65</sup> Most significantly here, the *Convention on the Rights of the Child*, *supra*, note 52, discussed in more detail below; *Convention on the Rights of Persons with Disabilities*, December 13, 2006, 2515 U.N.T.S. 3, Can. T.S. 2010 No. 8, ss. 3(h), 4(3), 7, 8, 16, 18, 23, 24, 25, 30; *International Covenant on Economic, Social and Cultural Rights*, December 16, 1966 (entered into force January 3, 1976), 993 U.N.T.S. 3, Can. T.S. 1976 No. 46, ss. 10, 12-14 [hereinafter “*International Covenant on Economic, Social and Cultural Rights*”]; *International Covenant on Civil and Political Rights*, December 16, 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, ss. 6(5), 10, 14, 17, 23, 24; *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, May 29, 1993, Can. T.S. 1997, No. 12; *Geneva Protocol No. 1 Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts 8 June 1977*, Can. T.S. 1991, No. 2, ss. 77-78; *Geneva Convention No. 4 Relative to the Protection of Civilian Persons in Time of War*, August 12, 1949, Can. T.S. 1965, No. 20, ss. 17, 24, 38, 50, 82, 89, 94, 132; *Convention on the Reduction of Statelessness*, August 30, 1961, Can. T.S. 1978, No. 32, ss. 1-9.

<sup>66</sup> [1999] S.C.J. No. 39, [1999] 2 S.C.R. 817, at paras. 69-71 (S.C.C.) [hereinafter “*Baker*”]. Only a small number of international instruments affecting children have been so incorporated, none of which are my focus here.

aids in respect of Canadian legislation including the Charter.<sup>67</sup> Perhaps most notably, the *Convention on the Rights of the Child* — which has been signed and ratified but not incorporated into Canadian law by Parliament or the legislatures — provides that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection”.<sup>68</sup> As the Supreme Court of Canada noted in *Baker v. Canada (Minister of Citizenship and Immigration)*:

The values and principles of the Convention recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future. In addition, the preamble, recalling the *Universal Declaration of Human Rights*, recognizes that “childhood is entitled to special care and assistance”. . . . The principles of the Convention and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was a reasonable exercise of the [Humanitarian and Compassionate Review] power.<sup>69</sup>

The *Convention* places a positive obligation on states parties to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention”. With regard to “economic, social and cultural rights” states parties are required to “undertake such measures to the maximum extent

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<sup>67</sup> *Slaight Communications Inc. v. Davidson*, [1989] S.C.J. No. 45, [1989] 1 S.C.R. 1038, at 1056 (S.C.C.); *Baker, id.*, at para. 70; *United States v. Burns*, [2001] S.C.J. No. 8, 2001 SCC 7, at para. 80 (S.C.C.); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 2002 SCC 1, at para. 46 (S.C.C.); *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27, at para. 69 (S.C.C.).

<sup>68</sup> *Convention on the Rights of the Child*, *supra*, note 52, Preamble. This recognition of the need to protect children in the preamble is then elaborated upon in the articles of the *Convention on the Rights of the Child* and includes a recognition of the need to positively protect a child’s development: see, e.g., arts. 3 (best interests), 2, 4 (duties of states implementing children’s rights), 6 (life, survival and development), 7-8 (identity, nationality, name, family), 9 (separation from parents), 10 (international family reunification), 11 (illicit transfer and non-return of children abroad), 12 (expression), 17 (ensuring access to information and media), 18-20 (parental and state duties in upbringing, development, and protection from abuse), 21 (adoption), 22 (immigration and refugee), 23 (disability), 24-25 (standard of health), 26 (social security and social insurance), 27 (standard of living and development), 28-29 (education), 30 (Indigenous rights), 31 (recreation and leisure), 32 (economic exploitation), 33 (drugs), 34 (sexual exploitation), 35-36 (abduction and trafficking), 37, 40 (penal systems and liberty), 38 (armed conflict), 39 (recovery and reintegration of victims).

<sup>69</sup> *Baker, supra*, note 66, at para. 71.



of their available resources and, where needed, within the framework of international co-operation”.<sup>70</sup> The *Convention* requires that states parties “ensure to the maximum extent possible the survival and development of the child”.<sup>71</sup> The Supreme Court of Canada has described the *Convention* as “the most universally accepted human rights instrument in history”.<sup>72</sup> Many of the *Convention*’s terms relate to the three basic needs identified above and include positive obligations on states parties to ensure their attainment. In reliance on the *Convention*, courts have interpreted domestic laws affecting children as requiring recognition of their unique nature and requiring special protection of children.<sup>73</sup>

## 2. Jurisprudential

The fact that legislation affords such scope for courts to take account of and impose remedies in light of children’s needs and capacity for growth supports that even the state acknowledges that courts are institutionally capable of doing so. While the remedies discussed so far are imposed by courts in the context of a specific statutory scheme enacted by the legislature, in other contexts courts act *without* any such framework. The state’s recognition of courts’ institutional capacity to impose such remedies is not surprising, then, given the long history of courts’ protection of children without statutory authority. This history dates back centuries and likely originates with the English King’s “royal prerogative to act as guardian of persons under legal disability such as infants or mental incompetents”.<sup>74</sup> Later the Crown exercised its jurisdiction through the Lord Chancellor, the Court of Chancery and eventually the superior courts of inherent jurisdiction of the provinces.<sup>75</sup> The courts’ jurisdiction to act as guardian for persons under a legal disability (including minors) is known as its *parens patriae* jurisdiction

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<sup>70</sup> *Convention on the Rights of the Child*, *supra*, note 52, art. 5. See to similar effect *International Covenant on Economic, Social and Cultural Rights*, *supra*, note 65, art. 2.

<sup>71</sup> *Convention on the Rights of the Child*, *supra*, note 52, art. 6(2).

<sup>72</sup> *R. v. Sharpe*, [2001] S.C.J. No. 3, 2001 SCC 2, at para. 177 (S.C.C.).

<sup>73</sup> *Wilson on Children*, *supra*, note 55, at 1-38 to 1-43.

<sup>74</sup> *G. (L.) v. F. (D.)*, [2000] O.J. No 3432, at para. 9 (Ont. S.C.J.), affd [2001] O.J. No. 888 (Ont. C.A.) [hereinafter “*G. (L.)*”]. Although the Supreme Court of Canada observed, in *E. (Mrs.) v. Eve*, [1986] S.C.J. No. 60, [1986] 2 S.C.R. 388, at para. 32 (S.C.C.) [hereinafter “*Eve*”], that the origins of this jurisdiction are “lost in the mists of antiquity”.

<sup>75</sup> *Eve, id.*, at paras. 33-36.

meaning literally “parent of the country”.<sup>76</sup> The scope of situations in which the courts can act pursuant to this jurisdiction extend “as far as is necessary for protection and education” and “have never been, and indeed cannot, be defined”.<sup>77</sup> Even where there is legislation in an area, “courts will continue to use the *parens patriae* jurisdiction to deal with un contemplated situations where it appears necessary to do so for the protection of those who fall within its ambit.”<sup>78</sup>

In addition to this inherent *parens patriae* jurisdiction, courts interpret statutes, the common law and the constitution in a manner protective of children. This protective stance is perhaps most stark in cases in which the child is pitted against the state in constitutional litigation. As Professor Wilson has observed:

The high level of scrutiny afforded to the Charter rights of children in the criminal context, in light of their recognized vulnerability, is similarly applied in the civil context where there is the potential for severe impact on the life, liberty or health of a child — however often with different results. Whereas in the former, the child receives greater protections through the Charter compared to her adult counterpart, in the latter the Charter rights of children may not be recognized or can be subsumed by the legal principle of the best interests of the child.<sup>79</sup>

These apparently divergent results can be rationalized when one considers the twin principles informing the legal conception of childhood — dependence and potential for development. Cases that focus on a *child’s* constitutional rights tend to prioritize immediate protection of the child’s life and health giving diminished weight to his or her liberty interests.<sup>80</sup>

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<sup>76</sup> *G. (L.)*, *supra*, note 74, at para. 9.

<sup>77</sup> *Eve*, *supra*, note 74, at paras. 42, 43.

<sup>78</sup> *Id.*, at para. 42. The Court has explained that the jurisdiction must be exercised in accordance with its underlying principle and must “at all times be exercised with great caution” (at para. 77).

<sup>79</sup> *Wilson on Children*, *supra*, note 55, at 1-70.

<sup>80</sup> See, e.g., *R. v. M. (M.R.)*, [1998] S.C.J. No. 83, [1998] 3 S.C.R. 393 (S.C.C.), where the Court explained the rationale for departing from the usual requirement, under s. 8 of the Charter, that prior authorization from a neutral arbiter be obtained before a search of a student by a school official was reasonably conducted. At para. 35, the Court held:

Teachers and principals are placed in a position of trust that carries with it onerous responsibilities. When children attend school or school functions, it is they who must care for the children’s safety and well-being. It is they who must carry out the fundamentally important task of teaching children so that they can function in our society and fulfil their potential. In order to teach, school officials must provide an atmosphere that encourages

Consider, for example, the constitutional validity of limiting a minor's authority to refuse life-saving medical treatment. At common law, such evaluations are governed by the mature minor doctrine, which recognizes a degree of decision-making autonomy reflective of a child's "evolving intelligence and understanding" and maturity, "with the degree to which maturity is scrutinized intensifying in accordance with the severity of the potential consequences of the treatment or its refusal".<sup>81</sup> The reason for this "sliding scale of scrutiny" and decision-making<sup>82</sup> is the tension between autonomy and child protection. In *C. (A.)*, Manitoba's statutory scheme was at issue and the majority interpreted the legislated best interest of the child standard to allow a minor the opportunity to demonstrate her maturity in a manner consistent with, among other things, "the evolutionary development of the common law 'mature minor' doctrine"<sup>83</sup> and "international standards" as expressed in the *Convention on the Rights of the Child*.<sup>84</sup> For the majority, such an approach satisfied the state's role in protecting children,<sup>85</sup> the child's interest in exercising her capacity for autonomous choice,<sup>86</sup> and society's interest in "nurturing children's potential for autonomy by according weight to their choices in a manner that is reflective of their evolving maturity".<sup>87</sup> According to the majority, such an interpretation ensured the legislation was Charter compliant.<sup>88</sup>

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learning. During the school day they must protect and teach our children. In no small way, teachers and principals are responsible for the future of the country.

See also at paras. 35-50.

<sup>81</sup> *C. (A.)*, *supra*, note 52, at para. 46. This doctrine does not entitle mature minors to make all decisions related to their medical care including the decision to refuse life-saving medical treatment. Instead, such "mature minors" remain subject to the court's *parens patriae* jurisdiction (*id.*, at paras. 47, 54). The wishes and objections of a minor weigh more heavily in the Court's assessment of his or her best interests in accordance with the minor's maturity (*id.*, at paras. 55, 56). However, to date, no court in the United Kingdom or Canada has allowed a child under 16 to refuse medical treatment that was likely to preserve the child's prospects of a healthy future (*id.*, at paras. 57, 59). Similarly courts in both Australia and the United States have recognized that a child's authority to make medical decisions can be overridden (*id.*, at paras. 65, 66, 68).

<sup>82</sup> *Id.*, at paras. 22, 115.

<sup>83</sup> *Id.*, at para. 23.

<sup>84</sup> *Id.*, at paras. 80, 93, 97-98.

<sup>85</sup> *Id.*, at para. 104.

<sup>86</sup> *Id.*, at para. 105.

<sup>87</sup> *Id.*, at para. 105.

<sup>88</sup> *Id.*, at para. 115.

As the majority of the Court observed in *C. (A.)*, principles of welfare and autonomy often collapse “when one appreciates the extent to which respecting a demonstrably mature adolescent’s capacity for autonomous judgment is ‘by definition in his or her best interests’”.<sup>89</sup> This collapsing of interests occurs because of the state’s interest in supporting a child’s development:

As L’Heureux-Dubé J. said in *Young v. Young*, [1993] 4 S.C.R. 3, “courts must be directed to create or support the conditions which are most conducive to the flourishing of the child” (p. 65 (emphasis added)). And in *King v. Low*, [1985] 1 S.C.R. 87, McIntyre J. observed: “It must be the aim of the Court ... to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult” (p. 101 (emphasis added)). When applied to adolescents, therefore, the “best interests” standard must be interpreted in a way that reflects and addresses an adolescent’s evolving capacities for autonomous decision-making. It is not only an option for the court to treat the child’s views as an increasingly determinative factor as his or her maturity increases, it is, by definition, in a child’s best interests to respect and promote his or her autonomy to the extent that his or her maturity dictates.<sup>90</sup>

Nevertheless this collapsing of interests will not always result in honouring a child’s decision at common law or under provincial statutes addressing the issue. So for example, in *C. (A.)*, if there had been no ability for minors to demonstrate their capacity under the statute, the majority and Binnie J. (dissenting) would likely have agreed that the scheme was unconstitutional.<sup>91</sup> But for the majority, even after acknowledging the importance of recognizing a child’s autonomy, protection of the child remained paramount. The child’s capacity remained one factor among others to consider in assessing the best interests of the child.<sup>92</sup> The majority noted that using this approach to date, no court in the United Kingdom or Canada has allowed a child under 16 to refuse medical treatment that was likely to preserve the

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<sup>89</sup> *Id.*, at para. 84.

<sup>90</sup> *Id.*, at para. 88 (emphasis added in *C. (A.)*).

<sup>91</sup> *Id.*, at para. 116, *per* Abella J.; at para. 224, *per* Binnie J.

<sup>92</sup> Justice Binnie, dissenting, would have given greater weight to a minor’s liberty interests and would have required that once a minor successfully demonstrated his or her capacity, this would determine *who* made the medical decisions in question (the minor): *id.*, at para. 194, *per* Binnie J.

child's prospects of a healthy future even if, as had occurred in the United Kingdom, the child was found to have capacity.<sup>93</sup> In its application, then, the majority's approach may have played out just as McLachlin C.J.C.'s dissenting judgment did — that is, with an irrebuttable presumption that persons under the age of 16 would not make life-threatening medical decisions. For McLachlin C.J.C., interpreting the legislation in this manner did not put it off-side of the Charter because the “protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, as it also meets the requirements of fair procedure”.<sup>94</sup> Thus we see that the majority of judges in *C. (A.)* (including McLachlin C.J.C.) recognized the priority that the jurisprudence has placed on a child's life and well-being over his or her autonomy.

Together this overview of the legal landscape as it relates to minors in Canada suggests that courts and legislatures are properly motivated by children's inherent vulnerability and dependence and also their capacity for growth and development. To the extent there is tension between these factors, such as when a child's life and health hangs in the balance, courts are likely to take positive measures to guard the child's immediate physical well-being, in part, in order to protect the child's capacity for development and his or her future adult autonomy. This second observation, then, demonstrates that Canadian courts are institutionally competent to protect children's positive rights.

## V. CONCLUSION

The unique nature of children and their relation to the state as well as Canadian laws and jurisprudence support recognition of positive rights to secure basic needs for children under section 7 of the Charter. While past claims for positive rights advanced by adults under section 7 have not met with success, this paper has proposed a modest and incremental advance for socio-economic rights advocacy. Such an approach ought to

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<sup>93</sup> *Id.*, at paras. 57, 59. Similarly, courts in both Australia and the United States have recognized that a child's authority to make medical decisions can be overridden (*id.*, at paras. 65, 66, 68).

<sup>94</sup> *Id.*, at para. 127, *per* McLachlin C.J.C., dissenting, citing a concurring majority judgment in *B. (R.)*, *supra*, note 53, at para. 88.

be adopted by the courts in the interests of justice — that is, to ensure that everyone has an equal opportunity to access society’s most important institutions. The Supreme Court of Canada has recently opined that “[e]nsuring access to justice is the greatest challenge to the rule of law in Canada today”.<sup>95</sup> When the Supreme Court of Canada uttered these words, the access to justice it had in mind was the civil justice system, in other words, access to the courts. But “justice” is not synonymous with “courts”, and the Court’s words ring true in respect of the broader concept of justice discussed in this paper. Positive rights for children, in recognition of both their vulnerability and capacity for growth, are important to ensure their future ability to access justice by participating in society’s most important institutions, which in turn will ensure the legitimacy of those institutions.

However, there are risks in focusing litigation on children to the exclusion of adults in need of the same socio-economic rights. Such a narrow focus could reinforce incorrect and stereotypical views about people living in poverty such as that poor people should not have children and if they do their children will become social problems.<sup>96</sup> It could reinforce the view that adult poverty is the product of individual moral failure or legitimate political decision-making.<sup>97</sup> It risks erasing “from public discourse the realities of parents, primarily women, living in poverty, and to ignore the injustices and systemic patterns of discrimination that cause poverty”.<sup>98</sup> Great care will be needed to ensure that public advocacy and evidence assembled in any case directed at positive rights for children is sensitive and responsive to these criticisms. Nevertheless, this need for sensitivity should not deter Charter challenges to insufficient state action in the face of deprivations of children’s basic needs. Courts have balked at more broadly based claims for positive rights, expressing concerns about the “uncertain” and possibly “enormous”

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<sup>95</sup> *Hryniak v. Mauldin*, [2014] S.C.J. No. 7, 2014 SCC 7, at para. 1 (S.C.C.).

<sup>96</sup> Bruce Porter, “Claiming Adjudicative Space: Social Rights, Equality and Citizenship” in Margot Young *et al.*, eds., *Poverty: Rights, Social Citizenship and Legal Activism* (Vancouver: UBC Press, 2007) 77, at 85 [hereinafter “Porter 2007”].

<sup>97</sup> *Id.*, at 80. In respect of risks inherent in recognizing social and economic rights more generally, see *Just Words*, *supra*, note 47.

<sup>98</sup> Porter 2007, *supra*, note 96, at 86.

impact that such recognition could entail.<sup>99</sup> Advocates must heed this caution and focus their claims more narrowly.

It could also be suggested that a focus on children invites the state to discipline parenting — a sphere that normally enjoys a high degree of privacy and autonomy.<sup>100</sup> The first response to this concern is simply that at the point where children’s health and development is jeopardized, the state already steps in to discipline parenting. More fundamentally though, relegating concerns about children’s access to their basic needs to the purely private sphere is simply inappropriate. It means that harms suffered by children are no longer considered harms of injustice and the response to these harms, though perhaps beneficent, is no longer the demand of justice. Yet ensuring that children have the opportunities to reach their full potential, regardless of their parents’ means, is necessary to ensure that systems of inequality are improved and public institutions remain legitimate.

Further, the extent to which this concern materializes hinges on the remedy imposed by the courts. Many have observed that recognition of positive rights would be difficult if not impossible to enforce because of remedial difficulties<sup>101</sup> or institutional competency issues,<sup>102</sup> or because of concerns about democracy and judicial legitimacy.<sup>103</sup> These concerns are simply not tenable in light of the courts’ current approach to children’s welfare discussed above and also in light of international experience, which includes successful judicial enforcement of socio-economic rights in many different legal systems.<sup>104</sup> In Canada, the recognition of a positive right lends itself to declaratory relief that the various levels of government have failed in their obligation under section 7 to provide children with their basic needs.<sup>105</sup> A declaration could draw on

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<sup>99</sup> *Pratten SC, supra*, note 26, at para. 290. In the s. 15 context Professor Lessard has mapped out the limits that scarcity places on justice in practice: Lessard 2012, *supra*, note 9.

<sup>100</sup> This concern resonates with the classist, colonial and racist history of child welfare, which has been explained elsewhere. See, e.g., Borrows & Rotman, *supra*, note 55, c. 10, at 830; Lessard 2002, *supra*, note 55, at 727.

<sup>101</sup> Jackman 2000, *supra*, note 9, at 238, 243; Young 2005, *supra*, note 9, at 551.

<sup>102</sup> Jackman 2000, *id.*, at 239-40; Young 2005, *id.*, at 552-56.

<sup>103</sup> Jackman 2000, *id.*, at 243-44; Young 2005, *id.*, at 548.

<sup>104</sup> Langford 2008, *supra*, note 42, at 3-45; “Freedom from Want”, *supra*, note 9, at 15.

<sup>105</sup> For a discussion of available remedies to enforce socio-economic rights, see Kent Roach, “The Challenges of Crafting Remedies for Violations of Socio-Economic Rights” in *Social Rights Jurisprudence*, *supra*, note 42, at 46-58. Professor Roach argues that more prospective and dialogic remedies such as declarations and delayed declarations of invalidity can play a role in remediating socio-economic rights violations and may be particularly apt in jurisdictions like Canada at least “to

article 2 of the *International Covenant on Economic, Social and Cultural Rights*<sup>106</sup> and its requirement that states must take reasonable steps based on a maximum of available resources.<sup>107</sup> Such a remedy is “an effective and flexible remedy for the settlement of real disputes”.<sup>108</sup> It provides deference at the remedial stage to ensure governments are left with a measure of discretion in adopting policy options to achieve Charter compliance. It would then fall to government to fashion an effective solution in light of the right recognized. If government failed to do so, subsequent litigation could be brought building on the initial declaration obtained. Or alternatively, the initial court could retain supervisory jurisdiction to ensure a meaningful remedy was achieved. Government will be held responsible to the extent that it “can truly be held accountable for the inability [of children] to exercise the right or freedom in question”.<sup>109</sup> Thus, the extent to which the state, in the exercise of its remedial jurisdiction, then disciplines what the family does with any means it provides to families to vindicate children’s rights will open it up to increasing spheres of accountability.

And this last point raises a final concern with recognizing positive rights for children alone, and that is the virtual impossibility of separating a child from the family upon which he or she is dependent. This impossibility need not be a weakness in cases for positive rights for children but rather can be their greatest strength. As Ezer has pointed out, “children’s and parents’ rights can be mutually reinforcing. It is both healthier and more realistic to view children’s and parents’ rights as fundamentally linked to each other.”<sup>110</sup> Recognition of positive rights for

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start the process of compliance” (at 46, 50, 52-53, 58). See, e.g., *Eldridge v. British Columbia*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at para. 96 (S.C.C.); *Gosselin*, *supra*, note 10, at paras. 296-297, *per* Bastarache J. in dissent. Professor Roach notes that injunctions and retention of supervisory jurisdiction by courts may be appropriate “where it is clear that governments are either unwilling or unable to respect” the rights at issue (at 47, 53-55). See, e.g., *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3 (S.C.C.).

<sup>106</sup> *International Covenant on Economic, Social and Cultural Rights*, *supra*, note 65.

<sup>107</sup> In *Social Rights Jurisprudence*, *supra*, note 42, at 211, the authors note that such an approach is already familiar to Canadian courts’ approach to human rights protections.

<sup>108</sup> *R. v. Gamble*, [1988] S.C.J. No. 87, [1988] 2 S.C.R. 595 (S.C.C.); *Canada (Prime Minister) v. Khadr*, [2010] S.C.J. No. 3, 2010 SCC 3, at para. 46 (S.C.C.).

<sup>109</sup> *Pratten CA*, *supra*, note 28, at para. 49, citing *Dunmore*, *supra*, note 28, at para. 26.

<sup>110</sup> Ezer, *supra*, note 9, at 42. An example of how closely linked these rights are can be seen in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.), where the Supreme Court of Canada recognized that a parent’s s. 7 right to security of the person is engaged by state removal of a child from parental custody. As such,



children today could lead to recognition of positive rights for parents tomorrow. Such incremental recognition and protection of Charter rights at some point down the road is not a floodgate to be protected against but rather the natural result of the slow and incremental approach to rights recognition endorsed by courts to date<sup>111</sup> and one entirely consistent with the values underlying the Charter.

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the Court required the government to provide the parent with state-funded counsel under s. 24(1) of the Charter.

<sup>111</sup> See, e.g., *Gosselin*, *supra*, note 10, at paras. 79, 82; *R. v. Hynes*, [2001] S.C.J. No. 80, 2001 SCC 82, at para. 114 (S.C.C.).



