

Canadian Jurisprudence and the *Convention on the Rights of the Child*, 2000-2003

The *Convention on the Rights of the Child* has been invoked or referred to in the following cases. For ease of reference, the cases have been divided by category of law: criminal, immigration and family/other. One case per category is discussed in detail.

Criminal Cases

Reference re: Bill C-7 respecting the youth criminal justice system, [2003] Q.J. No. 2850
Québec Court of Appeal

In this reference, the Government of Québec requested that the Québec Court of Appeal study a number of questions concerning the compliance of certain legislative provisions under the proposed federal *Youth Criminal Justice Act* (YCJA). With respect to the *Convention on the Rights of the Child*, the Québec Government requested that the Court opine as to whether certain provisions of the proposed legislation were incompatible with international law, especially the *Convention on the Rights of the Child* (CRC) and the *International Covenant on Civil and Political Rights* (ICCPR).

In determining whether the Bill was incompatible with the CRC and the ICCPR, the Court first questioned whether it should pronounce upon this issue. The Court recognized that, from strictly judicial and legal standpoints, a declaration of incompatibility would unlikely have any direct effect, given the power of Parliament to legislate, even against the terms of an international agreement that the executive of the federal Government has ratified. The Court also recognized that from an international standpoint, the Court's opinion would have no legal effect and that the consequences of such a decision would be purely political. Nonetheless, the Court decided to consider the matter, as the Convention serves as an instrument of interpreting what constitutes, in criminal matters, the fundamental rights of children under s. 7 of the Charter. Thus, any declaration of incompatibility may have an impact on the applicability of s. 1 of the Charter (reasonable limits to rights and freedoms prescribed by law as justified in a free and democratic society.)

With regard to whether the particular provisions of the YCJA were compatible with the CRC and the ICCPR, the Court performed a detailed review of the CRC — specifically the preamble and Articles 3, 37 and 40 as well as Article 10 of the ICCPR. Both parties (the Attorney General of Québec and the Attorney General of Canada), as well as the intervenor, recognized that the specific provisions of the CRC and the ICCPR must be interpreted in light of the instruments drawn up prior to their drafting and ratification. The Court also considered the interplay between these treaties and the Beijing Rules, the Riyadh Guidelines and the UN Rules for the Protection of Juveniles Deprived of their Liberty. Furthermore, it deliberated the role of the Vienna Convention on the Law of Treaties in interpreting the CRC and ICCPR.

The Court emphasized that it was not asked to express an opinion as to the philosophy and spirit underpinning the legislative provisions, as opposed to the philosophy and spirit of the international instruments. Its role was solely to determine whether the provisions of the YCJA contradict or are compatible with the corresponding provisions of these international treaties.

After a lengthy review of Canada's international obligations under these instruments, as well as the particular provisions of the YCJA, the Court concluded that this federal legislation is compatible with Canada's obligations under the CRC and the ICCPR.

Supreme Court of Canada case

R. v. Sharpe [2001] 1 S.C.R. 45

Other Canadian decisions

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 49 O.R. (3d) 662. Ontario Superior Court of Justice

Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 57 O.R. (3d) 511 Court of Appeal for Ontario

R. v. D.L.C., [2003] N.J. No. 94. Newfoundland and Labrador Provincial Court

R. v. E.T.F., [2002] O.J. No. 449 Ontario Superior Court of Justice

R. v. Fox, [2002] O.J. No. 3548. Ontario Court of Justice

R. v. Hamilton, [2003] O.J. No. 5327

R. v. Hewlett, [2002] A.J. No. 960. Alberta Court of Appeal

R. v. J.J.M., [2001] M.J. No. 425. Manitoba Court of Appeal

R. v. Jordan, [2002] A.J. No 1096 Alberta Provincial Court

R. v. North, [2002] A.J. No 696. Alberta Court of Appeal

R. v. Poulin, [2002] P.E.I.J. No. 88. Prince Edward Island Supreme Court - Trial Division

R. v. R.C., [2003] N.S.J. No. 243. Nova Scotia Supreme Court (Family Division)

United States of America v. Burns, [2001] 1 S.C.R. 283 Supreme Court of Canada

Immigration Cases

Hawthorne v. Canada (Minister of Citizenship and Immigration), [2002] F.C.J. No. 1687 Federal Court of Appeal

In 2000, the appellant had filed an application for permanent residency based upon humanitarian and compassionate ground (H&C application) as she had no legal immigration status in Canada. Her daughter, who had been sponsored by the appellant's former husband the year before, was a permanent resident and was living with the appellant. As the appellant was in breach of

Canada's immigration laws, she was initially ordered deported. However, she was able to obtain a stay of her removal pending the determination of her H&C application, on the ground that since she was her daughter's only source of financial support, her removal would cause irreparable harm to the daughter.

The narrow issue was whether the immigration officer's letter disclosed that the decision-maker had complied with the direction of the Supreme Court of Canada in the decision of Baker, (discussed in Canada's second report at page 74-75) by giving adequate consideration to the best interests of the child.

The Court held that it was common ground that an officer cannot demonstrate that she has been "alert, alive and sensitive" to the best interests of an affected child simply by stating in the reasons for the decision that she has taken into account the interests of the child in an H&C application. Rather, the interests of the child must be well identified and defined and examined with a great deal of attention. The interests of the child are an important factor and must be given substantial weight.

The Court recognized that the best interests of the child assumes an important place in an H&C decision because international law, a significant element of the interpretive context of domestic legislation, ranks the protection of the interest of children very highly. The Court cited both Article 3(1) and Article 12 of the *Convention on the Rights of the Child*, as well as the ICCPR and the *American Declaration on the Rights and Duties of Man*.

Other Canadian decisions

Ahani v. Canada (Attorney General), 58 O.R. (3d) 107 Court of Appeal for Ontario

Charlery (Designated Representative) v. Canada (Minister of Citizenship and Immigration), [2001] F.C.J. No. 1372 Federal Court of Canada – Trial division

Gao v. Canada (Minister of Citizenship and Immigration), [2000] O.J. No. 2784 Ontario Superior Court of Justice

Hawthorne v. Canada (Minister of Citizenship and Immigration), [2002] F.C.J. No. 1687 Federal Court of Appeal

Horvath v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. No. 1760 Federal Court of Canada – Trial Division

Irimie v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. No. 1906 Federal Court of Canada – Trial Division

Jesuthasan v. Canada (Minister of Citizenship and Immigration), [2002] F.C.J. No. 1150 Federal Court of Canada– Trial Division

Kwan v. Canada (Minister of Citizenship and Immigration) (T.D.) [2002] 2 F.C. 99 Federal Court of Canada– Trial Division

Legault v. Canada (Minister of Citizenship and Immigration), [2001] 3 F.C. 277 Federal Court of Canada – Trial Division

Li v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. No. 2037 Federal Court of Canada – Trial Division

N.B. v. S.V., [2002] Q.J. No. 6099 Québec Superior Court

Owusu v. Canada (Minister of Citizenship and Immigration), [2003] F.C.J. No. 139 Federal Court of Canada – Trial Division

Paterson v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. No. 139 Federal Court of Canada – Trial Division

Raudales v. Canada (Minister of Citizenship and Immigration), [2003] F.C.J. No. 532 Federal Court of Canada – Trial Division

Simoës v. Canada (Minister of Citizenship and Immigration), [2000] F.C.J. No. 936 Court of Canada – Trial Division

Xiao v. Canada (Minister of Citizenship and Immigration), [2001] F.C.J. No. 349 Court of Canada – Trial Division

Zheng v. Canada (Minister of Citizenship and Immigration), [2002] F.C.J. No. 850 Federal Court of Appeal

Zhu v. Canada (Minister of Citizenship and Immigration), [2001] F.C.J. No. 1251 Federal Court of Canada – Trial Division

Family/Other Cases

Supreme Court of Canada case

Winnipeg Child and Family Services v. K.L.W., [2000] 2 S.C.R. 519 Supreme Court of Canada

The case concerned the difficult balancing of the privacy interests of a parent to raise her children free from state interference with a child's right to life and health and the state's responsibility to protect children. The narrow issue was whether the apprehension of the appellant's child in a non-emergency situation without a warrant infringed her rights under s. 7 of the *Canadian Charter of Rights and Freedoms* in a manner that was not in accordance with the principles of fundamental justice. The appellant also claimed damages under s. 24(1) of the Charter.

The appellant was is the mother of five children. In 1993, she signed a Voluntary Placement Agreement to place her two oldest children into the care of the respondent agency. The children were later returned to the appellant but were subsequently apprehended by the agency on several occasions from 1994 to 1996 on the basis that the appellant was intoxicated, neglecting her

children or in contact with former abusive partners. In February 1996, the agency started proceedings seeking an order for the permanent guardianship of the two children. In July 1996, the appellant informed the agency that she was expecting a third child and approximately two weeks before the expected birth date, she agreed to enter a residential facility designed to assist pregnant women. Before the appellant could enter the residential facility, she gave birth to her third child in hospital. Pursuant to s. 21(1) of the *Manitoba Child and Family Services Act*, the agency apprehended the appellant's one-day-old child.

The Court recognized that the statutory provisions that permits the apprehension of a child from parental care infringes the parent's right to security of the person. Thus, such an infringement can only be carried out in accordance with the principles of fundamental justice. In determining what the principles of fundamental justice require with respect to the threshold for apprehension without prior judicial authorization, it is necessary to balance the following factors: (1) the seriousness of the interests at stake; (2) the difficulties associated with distinguishing emergency from non-emergency child protection situations; and (3) an assessment of the risks to children associated with adopting an "emergency" threshold, as opposed to the benefits of prior judicial authorization.

The interests at stake in cases of apprehension are of the highest order, given the impact that state action involving the separation of parents and children may have on all of their lives. From the child's perspective, state action in the form of apprehension seeks to ensure the protection, and indeed the very survival, of another interest of fundamental importance: the child's life and health. Given that children are highly vulnerable members of society, and given society's interest in protecting them from harm, fair process in the child protection context must reflect the fact that children's lives and health may need to be given priority where the protection of these interests diverges from the protection of parents' rights to freedom from state intervention. The court recognized a distinction between child welfare legislation to protect children and criminal procedures.

The state must be able to take preventive action to protect children and should not always be required to wait until a child has been seriously harmed before being able to intervene. While the infringement of a parent's right to security of the person caused by the interim removal of his or her child through apprehension in situations of harm or risk of serious harm to the child does not require prior judicial authorization, the seriousness of the interests at stake demands that the resulting disruption of the parent-child relationship be minimized as much as possible by a fair and prompt post-apprehension hearing. This is the minimum procedural protection mandated by the principles of fundamental justice in the child protection context.

The Court found that the provisions permitting the apprehension of the child without judicial authorization to be constitutional.

Other Canadian decisions

Alberta (Director of Child Welfare) v. S.J.E., [2003] A.J. No. 431 Alberta Provincial Court

Auton (Guardian ad litem of) v. British Columbia (Attorney General), [2002] B.C.J. No. 2258 British Columbia Court of Appeal

C.D.P.D.J. c. Gestion S.I.B. inc., (T.D.P.Q.), 500-53-000107-993, 2000-01-25, AZ-500068967, J.E. 2000-343

C.D.P.D.J. c. Montréal (Ville de), (T.D.P.Q.), 500-53-000181-022, 2003-03-14, AZ-50168718, J.E. 2000-787

C.D.P.D.J. c. Provigo Distribution inc., division Maxi, (T.D.P.Q.), 500-53-000148-005, 2002-09-23, AZ-50146357, D.T.E. 2002T-1041

C.D.P.D.J. c. Yazbeck, (T.D.P.Q.), 2001-08-03, 500-53-000145-001

C.U. v. McGonigle, [2003] A.J. No 238 Alberta Court of Appeal

Dixon v. Hinsley, [2001] O.J. 3707 Ontario Court of Justice

Droit de la famille — 3403, (C.A.), 500-08-000097-982, 2000-09-07, AZ-50078373, [2000] R.J.Q. 2252, [2000] R.D.F. 624 (rés.), J.E. 2000-1740

Droit de la famille - 3510, (C.Q.), [2000] R.J.Q. 559, [2000] R.D.F. 185 (rés.), AZ-50068957, J.E. 2000-248

D.W. c. A.G., (C.A.), 500-09-012878-021, 2003-05-29, AZ-50176853, J.E. 2003-114

G.L. c. C.F., (C.S.), [2002] R.D.F. 683, AZ-50137397, J.E. 2002-1523

Gosselin c. Québec (Procureur général), (C.A.), [2002] R.J.Q. 1298, AZ-50127980, J.E. 2002-950

J.A. (Dans la situation de), (C.Q.), 525-41-007976-00, 2002-10-21, AZ-50148537, J.E. 2002-1980

J.J.M. (Re.), [2003] S.J. No. 174 Saskatchewan Court of Queen's Bench (Family Law Division)

J.S. v. K.K., [2000] A.J. No. 226 Alberta Provincial Court (Family Division)

J.S.S. v P.R. S., [2001] S.J. No. 380 Saskatchewan Court of Queen's Bench

Kovacs v. Kovacs, 59 O.R. (3d) 671 Ontario Superior Court of Justice

Lalonde v. Ontario (Commission de restructuration des services de Santé), 56 O.R. (3d) 505 Court of Appeal for Ontario

L.E.G. v. A.G., [2002] B.C.J. No. 2319 British Columbia Supreme Court

Lennox and Addington Family and Children's Services v. T.S., [2000] O.J. No. 1420 Ontario Superior Court of Justice (Family Court)

Louie v. Lastman, [2001] O.J. No. 4941 Ontario Court of Appeal

Lowrey (Litigation guardian of) v. Ontario, [2003] O.J. No. 1197 Ontario Superior Court of Justice

M.G. c. G.B., [2003] Q.J. No. 3603 Québec Superior Court

Musgrove v. J.J.N., [2000] A.J. No. 1676 Alberta Provincial Court – Civil Division

N.L. (Dans la situation de), (C.Q.) 605-41-000272-021, 605-41-000273-029 et 605-41-000274-027, 2002-07-31, AZ-50141664, B.E. 2002BE-731

P. (A.) c. D. (L.), (C.A.), REJB 2000-21326

Protection de la jeunesse — 1198, (C.S.), [2000] R.D.F. 721, AZ-50080224, J.E. 2000-2180

P.W.S. v. British Columbia (Director of Child, Family and Community Services), [2000] B.C.J. No. 2656 British Columbia Supreme Court

R.J.N. v. L.J.M.N., [2003] A.J. No. 867 Alberta Court of Queen's Bench

T. v. Alberta (Director of Child Welfare), [2000] A.J. No. 736 Alberta Court of Appeal

Tonowski v. Tonowski, [2002] A.J. No. 1435 Alberta Court of Queen's Bench

Trinity Western University v. British Columbia College of Teachers, [2001] 1 S.C.R. 772 Supreme Court of Canada

Québec (Procureure générale) c. Entreprises W.F.H. ltée, (C.S.), [2000] R.J.Q. 1222, AZ-50071554, J.E. 2000-860 (70 p.); la Cour d'appel n'a pas fait référence à la Convention: *Entreprises W.F.H. ltée c. Québec (Procureure générale)*, (C.A.), 2001-10-24, 500-10-001846-003, SOQUIJ AZ-50103084, J.E. 2001-2034, [2001] R.J.Q. 2557; requête pour autorisation de pourvoi à la Cour suprême rejetée (C.S. Can., 2002-12-12), 28978

U. (C.) (Next friend of) v. Alberta (Director of Child Welfare), [2001] 3 W.W.R. 575 (Alta, Q.B.), appeal dismissed (2001), 223 D.L.R. (4th) 662 (Alta. C.A.)

V.L. v. D.L., [2001] A.J. No 1259 C.A.

VandenElsen v. Merkley, [2002] O.J. No. 4878 Provincial Court