

**Protecting Our Children: The Law Takes Note**

**Remarks of the Right Honourable Beverley McLachlin, P.C.  
Chief Justice of Canada**

**for Muriel McQueen Fergusson Foundation Gala Dinner**

**Moncton, New Brunswick  
October 23, 2007**

**Protecting Our Children: The Law Takes Note**  
**Remarks of the Right Honourable Beverley McLachlin, P.C.**  
**Chief Justice of Canada**

**for Muriel McQueen Fergusson Foundation Gala Dinner**

**Moncton, New Brunswick**  
**October 23, 2007**

Thank you for that kind and generous introduction Chief Justice Smith. I am honoured to be here tonight to speak to you in support of the Muriel McQueen Fergusson Foundation. The work of the Foundation in research and public education into the problem of family violence plays an important role in giving children a safe and nurturing environment in which to grow and develop.

Muriel McQueen Fergusson — avocate, conseillère municipale, sénatrice et activiste sociale — a consacré sa vie à l'amélioration du sort des femmes, des enfants, des pauvres et des personnes âgées. Elle serait sûrement ravie de savoir que la Fondation qui porte son nom s'intéresse cette année au problème de la violence faite aux enfants.

Children are precious. We love them, we value them. We are fond of saying that they are our future – the future of our families, our communities, our country. The drive for human continuity that we call civilization is dependent on children – children who will grow up to be strong, healthy, productive individuals who will carry the legacy of the past and the present into the future.

**CHECK AGAINST DELIVERY**

Yet, perversely, children are abused. Perhaps not your children or your grandchildren. But the reality cannot be denied: many children in our society, instead of being loved and nurtured and raised to be strong and caring individuals, are abused.

The statistics are sobering:

- One in six children in Canada live in poverty. That rate is much higher for some groups. 40 percent of children raised by single mothers live in poverty. Urban aboriginal children are more than twice as likely as non-aboriginal children to live in poverty.<sup>1</sup>
- Suicide is the second leading cause of death among teenagers and young adults. Suicide rates are six times higher among Aboriginal youth aged 10 to 19 than among non-aboriginal youth in the same age group.<sup>2</sup>
- Over sixty percent of sexual assaults reported to police are committed against children and youth. And reported crimes are only the tip of the iceberg. It has been estimated that 5-10 percent of boys and 13-25 percent of girls are victims of sexual abuse.<sup>3</sup>

---

<sup>1</sup> Ken Battle, “Child Poverty: The Evolution and Impact of Child Benefits” in *Children’s Rights in Canada*, R.B. Howe and K. Covell, eds. (2007) at 23; Marlyn Bennett, “Aboriginal Children’s Rights: Is Canada Keeping Its Promise” in *Children’s Rights in Canada* at 271-72.

<sup>2</sup> Cheryl van Daalen-Smith, “A Right to Health: Children’s Health and Health Care through a Child Rights Lens” in *Children’s Rights in Canada*, *supra* at 78.

<sup>3</sup> Anne McGillivray, “Child Sexual Abuse and Exploitation: What Progress Has Canada Made” in *Children’s Rights in Canada*, *supra* at 129-30; *R. v. L. (O.D.)*, [1993] 4 S.C.R. 419 at 440.

**CHECK AGAINST DELIVERY**

By far the majority of physical and sexual abuse of children takes place at the hands of family or those close to the family.<sup>4</sup> The family, which should be a place of refuge, is still a place of danger for many children.

Nor is violence involving children limited to the family. Children and young people often act out violence against one-another. A Queen's University study on children in grades six to ten found that 10-13 percent of boys reported being bullied once or twice a month or more. The same study found 4-11 percent of girls in grades six to ten reported being bullied once or twice a month or more. A study observing the behaviour of children in the primary grades found that incidents of bullying occur on the playground once every seven minutes.<sup>5</sup>

What is somewhat quaintly referred to as "bullying" covers the spectrum of behaviour from social exclusion and humiliation of a child by a bully or group of bullies, to physical violence, and in extreme cases even the killing of a child or young person by other young people.

Violence by youth against youth is harmful to both the victim, and the aggressor. Victims of bullying suffer from depression, anxiety, loss of self-esteem, and in some cases, increased aggressive behaviour.<sup>6</sup> In some cases, these symptoms continue into adulthood. Without

---

<sup>4</sup> Statistics Canada, *Family Violence in Canada: A Statistical Profile, 2007*, Catalogue no. 85-224-XIE at 21.

<sup>5</sup> National Crime Prevention Centre, *Bullying Prevention in Schools*, <<http://www.publicsafety.gc.ca/res/cp/bully-eng.aspx>>, 1.3.

<sup>6</sup> *Bullying Prevention in Schools, supra*, 1.1.

intervention, children who bully are likely to continue to engage in anti-social behaviours, including violence, as teenagers and adults.<sup>7</sup> Thus, bullying is a cause of future social problems for the victim, and bully, and for society as a whole. We cannot afford to let the problem of bullying go unchecked. Many school districts across the country have promising programs to catch and stop bullying. But there remains much to be done. Studies show that adults, even teachers, still fail to see most events of bullying. Canadian studies have shown that adults nearby a bullying incident intervene in between 4 percent and 25 percent of cases.<sup>8</sup> This is not because adults do not care. It is because they often do not recognize the problem. If we do not see the problem, how can we remedy it?

It is now accepted that governments have an obligation to work with families and communities to curb abuse and where that is not possible, to remove children from family situations where they are abused and place them in safe homes. Yet removal, while better than abuse, is often a second-best solution. The need for the removal of children signals deeper problems. We should thus be concerned that a disproportionately high percentage of aboriginal children find themselves in the care of child welfare authorities. For example, in Manitoba, aboriginals account for 25 percent of the population under the age of 19. But Aboriginal and Metis children account for 85 percent of children in care of child welfare authorities.<sup>9</sup> The causes of this problem are complex, rooted in poverty and other social problems in Aboriginal communities. Aboriginal communities are understandably concerned to try to preserve the ties of children in care with their cultural heritage.

---

<sup>7</sup> *Bullying Prevention in Schools, supra*, 1.1.

<sup>8</sup> *Bullying Prevention in Schools, supra*, 1.3.

<sup>9</sup> Margaret Wentz, *Globe and Mail*, October 13, 2007, p. A21; Marlyn Bennett, "Aboriginal Children's Rights: Is Canada Keeping Its Promise" in *Children's Rights in Canada, supra* at 268-69.

This said, recent cases of children who died at the hands of extended family who had been entrusted with their care by child protection authorities raise the issue of whether child protection authorities have the resources to carry out their mandates. We cannot turn our eyes from these tragedies. We must prevent them. Protecting cultural heritage for native children is an empty promise if it is done in a way that does not also protect the physical safety of the child.

The picture is sobering. The question is, “What can we do about it?” More particularly, what has the law done and what more can it do? A young law student writing in 1973, described the phrase “children’s rights” as: “A slogan in search of a definition.”<sup>10</sup> Much has changed since 1973. That young law student, whose name was Hillary Rodham, is now running for President of the United States. But have things changed for children? Are “children’s rights” more than just a slogan?

The first thing we must do, if we care about our children, if we want their rights to be more than a slogan, is to recognize that children are abused. We must, as I have suggested, look at the problem with honest eyes. We live in a wonderful country – the best country in the world, many of us like to think. Yet we must face the facts. Children continue to be abused in this wonderful country we call Canada. And each instance of abuse represents a tragedy – a tragedy in the life of the child, and a loss to the future of Canada.

---

<sup>10</sup> Hillary Rodham, “Children Under the Law”, 43 Harv. Edu. Rev. 487 (1973)

The second thing we must do, is to seek to understand of the causes of child abuse. What lies behind the paradox that a society that loves and prizes its children, abuses them? Guilt and the impulses to compensate it provokes, will not solve the problem. What is needed is a hard-headed look at why child abuse continues and what can be done to stop it.

History has a lot to tell us about the causes of child abuse. More specifically, legal history, since the tragedies that beset families and children have long been the domain of the courts. Two themes closely linked to child abuse and neglect emerge from the legal tomes of the past.

The first theme that historically is associated with child abuse is the view that children are the property of their parents. Historically, children were treated as property – specifically, the property of their father. They had no independent rights or interests. This view of children (and families) led to legal results that we would find unconscionable today. For example, in an infamous 1804 case, the mother of an eight-month old baby was denied custody and even access while the child was still breast-feeding, where the cruelty of the father had been the undisputed cause of the marriage breakdown.<sup>11</sup>

Il y a longtemps que cette conception de l'enfant n'a plus cours en droit. Le droit, et la société en général, en sont venus à reconnaître que les intérêts de l'enfant méritent d'être défendus et protégés à part entière. En 1991, le Canada a signé avec de nombreux autres pays la Convention des Nations Unies relative aux droits de l'enfant. Les progrès réalisés au Canada à cet égard sont dans

---

<sup>11</sup> *R. v. DeManneville* (1804), 5 East. 221, 102 E.R. 1054.

une large mesure postérieurs à cette date. Nous reconnaissons maintenant que, même si chaque enfant a encore besoin qu'on s'occupe de lui et qu'on veille sur lui, il est un individu doté de droits et, à l'instar des adultes, il a droit au respect, à la dignité et à l'autonomie.

While progress has been made, we should not be complacent. True, the law no longer regards children as property. Yet in our attitudes and in our practices, we all too often place the interests of the parents ahead of the interests of the child, which amounts to the same thing for practical purposes. We may cloak parental and community interests in the language of the “best interests of the child”. But beneath the rhetoric, we may really be looking at what adults want, not what is really best for the child. Custody fights between parents are too often still read like proprietary battles between a warring mom and dad. Placement of children at risk may be skewed by views as to which community is “entitled” to the child. The proponents may sincerely believe, and often with reason, that the child’s best interests coincide with their own preferences. Nevertheless, if we really care about our children we must submit adult motives in these disputes to rigorous examination. Is it really about the best interests of the child? Or is it about something else. We must resolve not to let contemporary versions of the old doctrine that children are property trump the best interests of the child.

The tendency to mistake private and community interests for the best interests of child plays out in a number of legal venues. I have already mentioned custody, where claims about who should care for the child are often thinly disguised proprietary claims. The law is working to ensure that these are unmasked, to focus more clearly on the child’s actual needs and interests.

**CHECK AGAINST DELIVERY**



Another area where the proprietary fallacy resurfaces is the medical care of children. The law recognizes that generally, a child's parents or guardians decide what medical care a child should receive. However, when a parent fails to provide proper medical care for the child, the state may intervene, even if to do so conflicts with the choices the parents might make. Thus the Supreme Court of Canada upheld an order making an infant a ward of the Children's Aid Society so that a blood transfusion essential to the child's survival could be given, over the religious objection of the parents.<sup>12</sup>

Yet another area where thinly disguised proprietary interests have been challenged is in the right to sue institutions such as churches, schools and athletic organizations whose employees or members may have inflicted sexual and other abuse on children in their control or custody. Viewing children as property means that their value is diminished. Wrongs to them are hence not seen as serious, as if children are seen as autonomous individuals, possessed of dignity and entitled to proper treatment. Recognizing the error of this, the law of tort has recently extended vicarious liability to these organizations, even though they may not have actually been aware of the abuse. It is enough that they created the conditions in which the perpetrator of the abuse could operate.<sup>13</sup> Moreover, the law has eased the rules of limitations, which prescribe the time in which a person can sue for abuse. It has recognized that often it is only when a person is an adult that they realize that what was done to them as a child constituted child abuse and how it is connected to their present suffering. The law

---

<sup>12</sup> *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.

<sup>13</sup> *Bazley v. Curry*, [1999] 2 S.C.R. 534 at 553-63.

has said that limitations do not begin to run until the victim understands the causal link between the abuse suffered as a child, and the damage the individual still suffers as an adult.<sup>14</sup>

Finally, the criminal law has been altered to recognize that prosecution for abuse is not just about, or even primarily about, the person accused of committing a crime on a child. It is also about the child, who, instead of being treated as mere property, is seen as fully human being possessed of human dignity and rights. The most important change is a new, aggressive approach to bringing to justice those who abuse children. In former times, crimes against children were all too often swept under the rug and forgotten. If offenders were prosecuted and convicted, sentences were often light. No longer is this so. Nationally, police forces work vigorously to pursue child abusers. Internationally, countries work together to apprehend and extradite offenders who are wont to slip from jurisdiction to jurisdiction. Trial procedures have also been changed, to reflect the interests of the child that is at the heart of the trial. Changes to the *Criminal Code* allow screens and video devices to lessen the trauma of testifying on the child.<sup>15</sup> The rules of hearsay evidence have been relaxed to permit hearsay statements of a child where they appear necessary and reliable.<sup>16</sup> Victim impact statements, expert evidence and pre-sentence reports all help to ensure that the focus is not only on the accused, but on the victim, to the end of ensuring appropriate sentences.<sup>17</sup>

---

<sup>14</sup> *M. (K.) v. M. (H.)*, [1993] 3 S.C.R. 6 at 24, 35.

<sup>15</sup> *Criminal Code of Canada*, ss. 486.2, 715.1; *R. v. Levogiannis*, [1993] 4 S.C.R. 475; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419.

<sup>16</sup> *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. F. (W.J.)*, [1999] 3 S.C.R. 569.

<sup>17</sup> *Criminal Code of Canada*, ss. 721, 722; *R. v. Marquard*, [1993] 4 S.C.R. 223; *R. v. Morin*, [1988] 2 S.C.R. 345.

A second causal theme of child abuse, historically viewed, is the tendency to apply stereotypical ideas to children or to particular kinds of children. Boys, in Victorian England, were subjected to sometimes brutal discipline – abuse by any other name – on the thesis that naughtiness had to be beaten out of them and that harsh treatment would make them strong. In Canada, in the late 19<sup>th</sup> and early 20<sup>th</sup> century, aboriginal children were forcibly removed from their homes and families – something that did not happen to “white” children – and sent to residential schools, where again they were subjected to special norms and discipline; for example, they were forbidden to speak their own language, were severely disciplined, and sometimes sexually abused.

Today, the law recognizes that children, or particular groups of children defined by gender, race or culture, cannot be lumped into one category and treated stereotypically. We recognize that the needs and abilities of children vary dramatically, depending on many factors, from age to health to personality to past treatment and on and on. Depending on these factors, what is right for one child may be wrong for another. And certain things are not right for any child, regardless of the category into which we might be inclined, instinctively to slot the child.

Nevertheless, the danger of stereotypical thinking in dealing with children remains a live one. Many sexual child abusers believe, we have learned, that children, or particular types of children, desire sexual relations with adults. Some fathers and step-fathers still believe that it is their duty to initiate their daughters in sex. In some families and communities, one individual “rules” over women and children; the result may be to perpetrate child abuse or to keep it under silent wraps.

**CHECK AGAINST DELIVERY**

These are extreme examples of stereotypical thinking that translates into child abuse. But less dramatically, it is still possible for authorities to fall into comfortable stereotypes in making decisions about children – from the stereotype that children are best off with their mother, to the view that children of a certain race should be treated in a special way or cared for in a particular place or community. It is not that the stereotype always is wrong. The danger is that it may sometimes be wrong, and that when decisions are made on this basis instead of on the basis of careful inquiry into what is in the interest of the particular child in question, the consequent decision may result in the child being harmed and abused.

Modern recognition of the need to consider the individual needs and situation of the child, like the need to get beyond the notion of property in the child, has resulted in new directions and orientations in the law.

The law of custody, for example, has moved from treating fathers as automatically entitled to custody on the “head of the house” - property theory, through a period when mothers almost always got custody on the theory that they were the natural maternal caregivers, to the modern position that custody depends on the best interests of child. The old stereotypes of paternal wisdom and maternal nurturing have been rejected in favour of a realistic fact-based assessment of the child’s actual needs and who is best situated to meet them.

The criminal law too has undergone a reform in which old stereotypes about crimes against children and their impact on children have been revised. In previous epoques, child abuse was often

**CHECK AGAINST DELIVERY**

accepted if not condoned as something that would inevitably occur. Common wisdom too often held that these “things would happen”, and that the child would “get over it.” We now know that child abuse can have terrible consequences and can leave scars that last a lifetime. We also know that while some children may “get over it” on their own, many will need years of counselling to reach the point where they can live fulfilled, productive lives. The innovations to the criminal law system that I touched on a moment ago reflect the new thinking that is focussed not on the stereotype but on the individual reality of the particular child. The changes to the law of tort that make it easier for victims to sue to recover their particular loss also attest to the new approach to child abuse, grounded not in stereotypical generalizations, but sensitive to the impact and needs of the individual victim.

Let me conclude. We live in a rich, civilized country that cherishes its children. In countless ways, we recognize that our children are our greatest asset, a treasure of inestimable wealth. Yet we also live in a country where some of the very children we so treasure are abused. They are abused mentally and spiritually by bullying and humiliation. They are abused physically by poverty and aggression. And they are abused sexually. On abuse d’eux mentalement et spirituellement par l’intimidation et l’humiliation. On abuse d’eux physiquement par la pauvreté et la violence. Enfin, on abuse d’eux sexuellement.

Society, using the law and other instruments, is coming to grips with the contradiction inherent in the twin realities that children are cherished and yet children are abused.

**CHECK AGAINST DELIVERY**

The first step is to honestly acknowledge the problem. In decades past, injuries to children were too often swept under the rug. We no longer do so. Yet it is still too easy to turn our gaze away from the suffering child, to shrug and say it is someone else's problem.

The second step is to seek understanding of the causes of child abuse and what may be done to prevent it from happening and, when it does happen, to aid its victims. History, abetted by psychology and criminology, can help us to better understand why abuse occurs. Medical and social science and the law can help us ease the burden it imposes on its victims, and by extension on society.

In 1973 Hillary Clinton referred to children's rights as "a slogan in search of a definition". Much has changed in the intervening decades. The law and social science have done much to define and entrench children's rights. One of the most fundamental rights of the child, we now accept, is to be free of abuse. Yet abuse, whether from poverty or heinous bodily crimes, still persists. Our goal must be to make the right to be free of abuse a reality. If we honestly face the problem of child abuse and unswervingly bring our best efforts to bear on its eradication and treatment, I believe we will succeed. Thank you.

**CHECK AGAINST DELIVERY**