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# Children's Intellectual Rights in Canada: A Comparative Constitutional Approach

James R. P. Ogloff

*University of Nebraska College of Law*, [jogloff@swin.edu.au](mailto:jogloff@swin.edu.au)

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# Children's Intellectual Rights in Canada: A Comparative Constitutional Approach

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## I. INTRODUCTION

Adult citizens of both Canada and the United States have come to value, and perhaps take for granted, their intellectual rights. Intellectual rights can be defined as "the right to use and develop one's intellect, including access to information and ideas, freedom to believe what one chooses, freedom to express one's beliefs, and freedom to act on those beliefs."<sup>1</sup> Intellectual rights include, but are not limited to, such things as freedom of expression, freedom of religion, and freedom of association. While most would agree that these rights apply to adults, many disagree about whether the rights extend to children as well.<sup>2</sup> However, at least one advocate of children's rights, Professor David Moshman, argues that society must demonstrate a principled commitment to children's intellectual rights. He has further discussed the applicability of the first amendment of the United States Constitution<sup>3</sup> to children.

Just as the first amendment provisions in the United States Constitution guarantee the intellectual rights of citizens of the United States, the Canadian Constitution<sup>4</sup> guarantees the intellectual rights of its citizens in section 2 of the Charter of Rights and Freedoms

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1. D. MOSHMAN, CHILDREN, EDUCATION, AND THE FIRST AMENDMENT: A PSYCHOLOGICAL ANALYSIS 3 (1989).
  2. *Id.*; D. MOSHMAN, CHILDREN'S INTELLECTUAL RIGHTS (1986).
  3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.
  4. Unlike the revolutionary roots of the United States, Canada has gained its independence from the United Kingdom in a gradual manner. Therefore, no single document serves as *the* constitution. In 1867, the Dominion of Canada was formed by an act of the Parliament of the United Kingdom, British North America Act, 30-31 Vict. ch. 3 (1867). Although Canada remained a British Colony, it enjoyed a great deal of independence. Canada gained considerable independence following passage of the British North America Act. Not until 1982, however, was the United Kingdom's parliamentary authority over Canada officially terminated with the passage of the Constitution Act, 1982, which was enacted as Schedule B to the Canada Act, 1982, which was passed by the United Kingdom Parliament, U.K. Stats. 1982, ch. 11. See P. HOGG, CONSTITUTIONAL LAW OF CANADA (2d ed. 1985) for a detailed discussion of the progression of constitutional law in Canada.

("Charter").<sup>5</sup> Unlike the United States, however, the Charter specifically prohibits discrimination against individuals based on age.<sup>6</sup> This Comment discusses traditional similarities and dissimilarities between children's intellectual rights in Canada and the United States. First, this Comment provides a brief overview of the constitutional guarantees and regulation of intellectual rights in the United States and Canada. Second, this Comment discusses specific legal interpretations of the first amendment and the influence that the legal interpretations have had on children's intellectual rights. Third, the applicability of the Charter on the intellectual rights of children in Canada will be analyzed. Finally, this Comment examines how the Canadian Charter, perhaps even more explicitly than the United States first amendment, provides a solid legal foundation for supporting children's intellectual rights.

## II. TRADITIONAL CONSTITUTIONAL DIFFERENCES BETWEEN THE UNITED STATES AND CANADA

### A. The United States Bill of Rights

Although the United States Constitution was ratified in 1787, the Bill of Rights was not ratified and amended to the United States Constitution until 1791. The Bill of Rights consists of the first ten amendments to the Constitution. Originally, the Bill of Rights only applied to actions by the federal government; however, the fourteenth amendment,<sup>7</sup> which was ratified in 1868, prohibited the states from abridging the rights of their citizens. The United States Supreme Court has found the rights guaranteed by the first amendment to be among those privileges protected by the fourteenth amendment.<sup>8</sup> As a result, the fourteenth amendment applies the Bill of Rights to the states. The fourteenth amendment is important for children's intellectual rights because their rights are directly affected by schools and education, which fall within the jurisdiction of individual states. Accordingly, the Bill of Rights applies to children who are educated in public schools, which are agencies of the state. Indeed, most litigation affecting children's intellectual rights in the United States was brought under the first amendment.

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5. "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion, and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association." CAN. CONST. § 2.

6. "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." CAN. CONST. § 15 (emphasis added).

7. U.S. CONST. amend. XIV, § 1.

8. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The noted case of *Marbury v. Madison*<sup>9</sup> established the doctrine of judicial review, which provides that statutes failing to comport with constitutional provisions are unconstitutional and therefore void. Thus, any state laws or administrative regulations that do not conform to the guaranteed protections of children's intellectual rights may be found unconstitutional by courts.

While the Constitution does not specifically state that children have constitutional rights, the Supreme Court has ruled that children are persons in the legal sense and, as such, they have constitutional rights.<sup>10</sup> In *Ginsberg v. New York*,<sup>11</sup> a case reviewing the constitutionality of a statute prohibiting the sale of obscene material to minors, the Supreme Court held that although the first amendment applies to children in principle, the government may distinguish children from adults to regulate what children read.

Overall, the Bill of Rights is entrenched in the United States Constitution. Further, with some limitations, the first amendment has been applied to children. Because of this, children and students in the United States, at least in principle, enjoy some constitutional rights.

## B. The Canadian Bill of Rights

Unlike the United States, Canada did not have a constitution, per se, until 1982.<sup>12</sup> Likewise, Canada did not have an entrenched bill of rights that applied to the provinces. Instead, the Canadian Parliament passed a federal statute in 1960 that was entitled the Canadian Bill of Rights.<sup>13</sup> Because the Canadian Bill of Rights was not constitutionally entrenched, however, it could be repealed or amended by a majority vote of Canadian Parliament, just like any other federal statute. A major limitation of the Canadian Bill of Rights was that it applied only to federal government action and did not apply to the provincial government action. Accordingly, because education falls within the exclusive jurisdiction of the provinces, the Canadian Bill of Rights had no direct effect on the public school's influence on children's intellectual rights. As a result, a paucity of litigation regarding the intellectual rights of Canadian children exists because there was virtually no

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9. 5 U.S. (1 Cranch) 137 (1803).

10. *E.g.*, *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (in striking down a school's attempt to prohibit students from wearing armbands in protest of the Vietnam War, the Court declared that students do not shed their constitutional rights when they enter schools); *In re Gault*, 387 U.S. 1 (1967) (holding that children in juvenile court proceedings must be afforded some constitutional protections that parallel adult rights). *But cf.* *Bethel School Dist. v. Fraser*, 106 S. Ct. 3159 (1986) (holding that a school may proscribe first amendment rights that are inconsistent with the school's basic educational mission).

11. 390 U.S. 629 (1968).

12. *See* P. HOGG, *supra* note 4.

13. *Appendices R.S.C.*, app. III (Can. 1970).

foundation for bringing such claims against schools and provincial governments.

### C. The Canadian Charter of Rights and Freedoms

As previously noted, the Canadian Charter of Rights and Freedoms was ratified in 1982. The Charter is a constitutionally entrenched document and can only be amended through the formula specified in the Canadian Constitution.<sup>14</sup> Unlike the Canadian Bill of Rights<sup>15</sup>, the Charter directly applies to the provinces.<sup>16</sup> Further, any statute conflicting with the Charter is constitutionally invalid according to section 52 of the Constitution.<sup>17</sup> Thus, section 52 explicitly authorizes judicial review power. Finally, the Constitution prohibits legal discrimination based on age, although this section did not come into effect until April 17, 1985.<sup>18</sup> Based on these provisions, the Charter now directly protects the fundamental rights of children from being abridged by any form of governmental action, federal or provincial. The constitutional guarantees include protecting children's intellectual rights from being abridged by those schools that are governmental agencies. Of course, the Constitution places some limits on the extent to which people may exercise their constitutional rights. These limits will be discussed later in this Comment with specific reference to children's intellectual rights.

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14. Essentially, the Canadian Constitution may only be amended when the proposed amendment is passed by the House of Commons, the Senate, and "resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces." CAN. CONST. § 38(1).
  15. The British North America Act of 1867 did not include a bill of rights. Instead, a Bill of Rights was adopted by the Canadian Parliament in 1960, Appendices R.S.C., app. III (Can. 1970). However, the Bill of Rights was merely an act of the Canadian Parliament and not an amendment to the British North America Act. Therefore, the Canadian Bill of Rights could be repealed at any time. Furthermore, it applied only to the federal laws. Thus, some question the effectiveness of the Canadian Bill of Rights. See P. HOGG, *supra* note 4, at 640-43.
  16. "This Charter applies . . . to the legislature and government of each province in respect of all matters within the authority of the legislature of each province." CAN. CONST. § 32(1)(b).
  17. "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." CAN. CONST. § 52(1).
  18. See CAN. CONST. § 15; *supra* note 6 and accompanying text. Further, the Constitution provides that "section 15 shall not have effect until three years after this section comes into force." CAN. CONST. § 32(2).

### III. THE FUNDAMENTAL FREEDOMS IN THE CHARTER AND THEIR GUARANTEE OF CHILDREN'S INTELLECTUAL RIGHTS

This section explores the applicability of the fundamental freedoms of the Charter<sup>19</sup> to the intellectual rights of children in Canada. This Comment briefly discusses each of the fundamental freedoms with reference to United States and Canadian law. The discussion is organized according to the fundamental freedoms delineated in the Charter.

#### A. Freedom of Conscience and Religion in Public Schools

##### 1. *Religion in Public Schools in the United States*

The first amendment contains two specific clauses bearing directly upon religion: (1) the establishment clause and (2) the free exercise clause.<sup>20</sup> The first amendment clearly prohibits Congress from establishing a religion, or preventing one from exercising one's religious beliefs. Since the 1940 case of *Cantwell v. Connecticut*,<sup>21</sup> the Supreme Court also has held that the fourteenth amendment extends the first amendment religion clauses to state and local governments. Courts have provided interpretative guidelines for the implementation of the religion clauses with respect to children. Some of these cases will be discussed to demonstrate the effect of the religion clauses of the first amendment on the intellectual rights of children.

In *Everson v. Board of Education*,<sup>22</sup> the Supreme Court held that "the clause against establishment of religion by law was intended to erect a wall of separation between church and state."<sup>23</sup> In *McCullum v. Board of Education*,<sup>24</sup> the Court struck down a state law permitting religion classes in public schools. Later, in *Zorach v. Clauson*,<sup>25</sup> the Court upheld a state statute allowing children release time from school to go to religious centers and attend religious instruction or devotional exercises during regular school hours. *Zorach* distinguished its facts from those in *McCullum* by stating that release time merely allows students an acceptable accommodation to their religious practices, unlike religious instruction in public schools, which unconstitutionally promotes religion.

In *Engel v. Vitale*,<sup>26</sup> the Court found that the recitation of prayers

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19. CAN. CONST. § 2. See the fundamental freedoms specified *supra* note 5.

20. U.S. CONST. amend. I.

21. 310 U.S. 296 (1940).

22. 330 U.S. 1 (1947).

23. *Id.* at 16 (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

24. 333 U.S. 203 (1948).

25. 343 U.S. 306 (1952).

26. 370 U.S. 421 (1962).

in public schools violated the first amendment religion provisions. Also, in *Abington School District v. Schempp*,<sup>27</sup> the Court held that devotional Bible reading in public schools was also unconstitutional. Similarly, the Court in *Stone v. Graham*<sup>28</sup> held that it was unconstitutional for a state to require schools to post the Ten Commandments in classrooms. In an apparent effort to maintain the potential for prayer in schools without clearly violating the first amendment provisions, some states passed laws requiring that public schools provide for a moment of silence for prayer or meditation. The Supreme Court struck down one such state law in *Wallace v. Jaffree*.<sup>29</sup> The decision relied heavily on the fact that the statute's legislative history clearly showed that the only purpose of the law was to return voluntary prayer to public schools.

In one particularly interesting case, *Wisconsin v. Yoder*,<sup>30</sup> the Court held that Amish children are not required to attend compulsory education beyond eighth grade. The decision specifically indicated, however, that the reasoning hinged on the fact that the Amish community provided for a great deal of social support—economic and emotional—for its members, unlike society in general.

The above cases indicate that the trend in United States constitutional law since 1940 has been to ensure that schools do not inculcate any religious beliefs in students. In this sense, courts clearly have attempted to separate church and state and, therefore, church and public schools. Such separation enables students to nurture their own choice of religion—or non-religion—without interference from governmental authority.

## 2. Religion in Public Schools in Canada

Unlike the United States, publicly supported sectarian, or denominational, schools are allowed in Canada and are protected by section 93 of the British North America Act<sup>31</sup> and by section 29 of the Constitution.<sup>32</sup> Also, the Charter provides for freedom of conscience and reli-

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27. 374 U.S. 203 (1963).

28. 449 U.S. 39 (1980).

29. 472 U.S. 38 (1985).

30. 406 U.S. 205 (1972).

31. (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union; (2) All of the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec.

The British North America Act, 30-31 Vict., ch. 3, § 93 (1867).

32. "Nothing in this Charter abrogates or derogates from any rights or privileges



gion in section 2(a).<sup>33</sup> The minority rights of school children are protected in various ways among the provinces that have denominational schools. Interestingly, most separate schools in Canada are Roman Catholic; in Quebec, however, most separate schools are Protestant.<sup>34</sup> Some argue that the division of students by religion leads to religious ignorance or, conversely, that parochial schools help preserve the unique religious and racial mix of the Canadian mosaic.<sup>35</sup>

As in the United States, the Canadian courts have interpreted the provisions of the Constitution. These cases illustrate changes in the law that have affected children's intellectual rights in Canadian schools. Unfortunately, the recency of the Charter means that the Supreme Court of Canada has not yet decided the Charter's limitations on the religious freedoms of school children. However, a brief review of some pre-Charter cases will help present the current state of the relationship between religion and education.

In *Schmidt v. Calgary Board of Education*,<sup>36</sup> the Alberta Court of Appeals held that religious discrimination was at the heart of a denominational school structure. The court ordered that a Roman Catholic parent, who wished to send his child to the local public school rather than a separate school, would either have to pay tuition to the board of education or to sign a document saying that he was no longer a Roman Catholic. Similarly, in the Saskatchewan case of *Bintner v. Regina Public School Board*,<sup>37</sup> the court upheld the public school board's refusal to admit a Roman Catholic girl. Clearly, the issue in these cases—requiring children to attend separate schools—could not have existed in the United States.<sup>38</sup>

Another example of the confusion arising over placement of students in denominational schools is a Quebec case, *Separate School Trustees v. Shannon*.<sup>39</sup> In *Shannon*, the Court held that the Protestant dissentient schools had to accept pupils who were the children of a Protestant father and a Roman Catholic mother, even though the children were baptized and raised as Roman Catholics. Cases also, predictably, have addressed the issue of where to place students who are neither Protestant nor Roman Catholic. In *Hirsch v. Protestant Board School Commissioners*,<sup>40</sup> Jewish children objected to classifica-

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guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools." CAN. CONST. § 29.

33. CAN. CONST. § 2(a). See *supra* note 5.

34. A. MACKAY, EDUCATION LAW IN CANADA 13 (1984).

35. Brent, *The Right to Religious Education and the Constitutional Status of Denominational Schools*, 40 SASK. L. REV. 239, 240 (1975-76).

36. [1976] 1 A.L.R. 286 (Alta. C.A.).

37. 55 D.L.R. (2d) 646 (Sask. C.A. 1965).

38. A. MACKAY, *supra* note 34, at 300-02.

39. [1930] 4 D.L.R. 190 (Can. S.C.).

40. [1928] 1 D.L.R. 1041 (Que. P.C.).

tion as Protestants for school purposes. The court held that the provincial legislature in Quebec could establish separate schools for non-Christians. In a case involving Jehovah's Witnesses, the court in *Peron v. School Trustees*<sup>41</sup> held that Jehovah Witnesses' children be admitted to a Protestant school. Finally, in *Chabot v. School Commissioners*,<sup>42</sup> the court held that non-Catholic children could attend the only school in the community, a Catholic one, without participating in Catholic instruction or devotion.

In another line of cases, the courts addressed the issue of whether parents can withdraw a child from school for religious reasons. To date, the answer has been unclear. *Perepolkin v. Superintendent of Child Welfare*<sup>43</sup> held that religious freedom did not include the right to remove a Doukhobor child from public school because, the court stated, non-attendance at the school was not a vital part of the Doukhobor religion.<sup>44</sup> Similarly, in *Regina v. Ulmer*,<sup>45</sup> a Lutheran father, who did not send his child to school because no separate minority school existed, was fined for not sending his child to a majority public school. In contrast, *Regina v. Wiebe*<sup>46</sup> held that a provincial compulsory school attendance provision unduly infringed on the religious beliefs of Mennonite children. The children were allowed to attend an uncertified Mennonite school.

In one post-Charter case, *Jones v. The Queen*,<sup>47</sup> a pastor was charged with violating provincial school attendance provisions by educating his own and twenty other children in a fundamentalist education program. The pastor refused to apply for certification of the education program, as required by an alternative education exemption, because he believed that seeking provincial approval was a sin. The trial court held that the attendance exemption provision was unconstitutional because it was contrary to the guarantees of liberty and fundamental justice as guaranteed in section 7 of the Charter.<sup>48</sup> Curiously, the court did not decide this case on the grounds of religious freedoms which are guaranteed in section 2 of the Charter.<sup>49</sup>

The Supreme Court of Canada considered the case on two grounds:

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41. [1956] 1 D.L.R. (2d) 414 (Que. Q.B. 1955).

42. [1958] 12 D.L.R. (2d) 796 (Que. Q.B. 1955).

43. [1958] 11 D.L.R. (2d) 417 (B.C.C.A. 1957).

44. The Doukhobor religion, somewhat similar to the Amish religion, is based on principles of communal living, pacifism, and non-patriotism to any government. *Id.* at 423.

45. [1923] 1 W.W.R. 1 (Alta. C.A.).

46. [1978] 3 W.W.R. 36 (Alta. Prov. Ct.).

47. 31 D.L.R. (4th) 569 (Can. S.C. 1986).

48. "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." CAN. CONST. § 7.

49. CAN. CONST. § 2, *see supra* note 5.

(1) the freedom of religion issue; and (2) the fundamental justice issue. The Court held that the provincial regulation requiring the pastor to apply for approval of his school by the department of education did not offend freedom of conscience and religion as guaranteed by section 2 of the Charter.<sup>50</sup> The Court in a plurality opinion specified that the legislation was flexible and required only that all children receive an adequate education.<sup>51</sup> The Court also held that any impact the statutory requirements had on the pastor's freedom of conscience and religion was formalistic, technical, and *de minimus*.<sup>52</sup>

In a concurring opinion, three justices asserted that the province's compelling interest in the education of students places reasonable limits on the freedom of the pastor's religious convictions.<sup>53</sup> The concurrence further noted that the infringement of the pastor's religious freedoms were demonstrably justified in a free and democratic society within the meaning of section 1 of the Charter.<sup>54</sup>

The Court next considered the pastor's claim that his right to liberty as guaranteed by section 7 of the Charter<sup>55</sup> was violated because he was not allowed to educate his children as he desired. The Court held that even if the term "liberty" in section 7 of the Charter included the right of parents to dictate their children's education, the province's compelling interest in ensuring a quality education to all children outweighed the parents' right to educate their children as they saw fit.<sup>56</sup>

In her dissent, Justice Wilson argued that the provincial regulations requiring the pastor to apply for approval of his school violated the pastor's liberty rights under section 7 of the Charter.<sup>57</sup> Justice Wilson further concluded that at the least section 7 required that one be allowed to adequately state one's case. Restricting proof of adequate educational instruction to a certificate from the department of education, Justice Wilson stated, was an unconstitutional infringement of the pastor's liberty rights.<sup>58</sup>

*Jones* demonstrates the difficulties that arise when different constitutional rights conflict. Because of the need for adequate education,

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50. *Jones v. The Queen*, 31 D.L.R. (4th) 569 (Can. S.C. 1986).

51. *Id.* at 574, 577, 579, 593.

52. *Id.* at 578, 594.

53. *Id.* at 593-95.

54. "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." CAN. CONST. § 1.

55. "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." CAN. CONST. § 7.

56. *Jones v. The Queen*, 31 D.L.R. (4th) 569 (Can. S.C. 1986).

57. *Id.* at 582-84.

58. *Id.* at 585.

the ultimate decision in *Jones* seems appropriate. However, the restriction on the pastor's religious and liberty interests could have been minimized through Justice Wilson's reasoning. Courts could find alternate means to determine the adequacy of the education provided by the pastor. Moreover, while a child's intellectual rights arguably include the right to obtain an education in a religious setting, courts first must ensure that the child's education meets minimal standards.

Clearly, the relationship between religion and education differs in Canada and in the United States. The main difference arises from the fact that, unlike the United States, Canadian law does not provide for a separation of church and education. This fundamental difference results in several different legal issues, especially involving school placement, as previously discussed. The effect of these differences on children's intellectual freedom will be discussed later in this Comment.

## B. Freedom of Thought, Belief, Opinion, and Expression

### 1. *Freedom of Speech and Expression in the United States*

The first amendment does not explicitly mention freedom of expression, but it provides a foundation for freedom of expression.<sup>59</sup> Freedom of expression extends from the freedom of speech explicitly expressed in the Constitution. In an early freedom of expression case, *West Virginia State Board of Education v. Barnette*,<sup>60</sup> the Court ruled in favor of the Jehovah's Witness plaintiffs who refused to participate in the flag salute and the pledge of allegiance in public schools because it was against their religious beliefs. In a plurality opinion, Justice Jackson stated that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>61</sup>

In *Keyishan v. Board of Regents*,<sup>62</sup> the Supreme Court further mentioned the necessity of the freedom of speech in schools and colleges. The Court noted that "[t]he classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues [rather] than through any kind or authoritative selection.'"<sup>63</sup>

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59. Stern, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.-C.L. L. REV. 485 (1979).

60. 319 U.S. 624 (1943).

61. *Id.* at 642.

62. 385 U.S. 589 (1967).

63. *Id.* at 603.

The pivotal freedom of expression case in the United States is *Tinker v. Des Moines Independent Community School District*.<sup>64</sup> In *Tinker*, students wore black armbands to school to symbolize their opposition to the United States' involvement in Vietnam. In the opinion, the Court recognized that children enjoy a constitutional right to freedom of expression that extends to public schools:

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under the Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.<sup>65</sup>

The Court further held that students may freely express their opinions, even on controversial subjects, so long as they do so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school,"<sup>66</sup> and without infringing on the rights of others.

In an opinion almost twenty years after *Tinker*, the Court in *Bethel School District v. Fraser*<sup>67</sup> ruled in favor of a school that suspended a high school student for making a brief speech supporting a candidate for the school's student government.<sup>68</sup> The Court held that the freedoms guaranteed under *Tinker* must be "balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behaviour [sic]."<sup>69</sup>

Another important issue pertaining to freedom of expression for children concerns the selection and removal of textbooks and library

64. 393 U.S. 503 (1969).

65. *Id.* at 511.

66. *Id.* at 513 (quoting *Burside v. Byars*, 363 F.2d 744, 749 (1966)).

67. 106 S. Ct. 3159 (1986).

68. The speech was as follows:

'I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.'

'Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.'

'Jeff is a man who will go to the very end—even the climax, for each and every one of you.'

'So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.'

*Bethel School Dist. v. Fraser*, 106 S. Ct. 3159, 3167 (1986).

69. *Id.* at 3164.

books in schools. In *Board of Education v. Pico*,<sup>70</sup> the Supreme Court addressed the issue of whether a school board may remove library books that it deems to be "objectionable." Unfortunately, the Court's direction is unclear. The case involved a class action suit brought against the school by students who claimed that the school infringed upon their first amendment rights by removing several books from the school library.<sup>71</sup> The Court remanded the case for trial, holding that students should have had the opportunity to show that the school board removed the books to suppress ideas. An important factor in the case was the procedure and motivation for removing books. In general, however, the majority recognized that students have a first amendment right that precludes school boards from suppressing ideas for the purpose of ideological indoctrination.

In a recent case, *Hazelwood School District v. Kuhlmeier*,<sup>72</sup> the Court held that school officials can censor articles written for a student paper supported by the school and prepared as part of the journalism class curriculum. In *Hazelwood*, the school principal intended to remove two pages from the six-page school newspaper immediately before the printing deadline. The two articles that the principal removed discussed teenage pregnancy and the effect of divorce on high school students. The principal said he thought that the material was inappropriate for some young high school students. In addition, although neither article mentioned the sources used, the principal felt that students might recognize the people described in the articles. The Court held that the newspaper was not a public forum because it was sponsored by the school and published by students in journalism class. Because the newspaper was not considered a public forum, the state had to show that the removal of articles was reasonable given the articles' content and the concern that students could identify the people in the article.

The Court did not use *Tinker* reasoning. Instead, the Court distinguished *Hazelwood* from *Tinker*, stating that the issue in *Tinker* was whether schools had to tolerate the free speech of students; in *Hazelwood*, the Court stated that the issue was whether schools had to provide a forum for students' free speech.<sup>73</sup> The distinction appears flawed because the pages removed in *Hazelwood* already had been approved by the journalism teacher and were ready to go to press. In this regard, the principal's actions clearly involved censorship.

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70. 457 U.S. 853 (1982).

71. The books removed included: ANONYMOUS, *GO ASK ALICE* (1971); E. CLEAVER, *SOUL ON ICE* (1968); B. MALAMUD, *THE FIXER* (1966); D. MORRIS, *THE NAKED APE: A ZOOLOGIST'S STUDY OF THE HUMAN ANIMAL* (1967); K. VONNEGUT, *SLAUGHTERHOUSE-FIVE: THE CHILDREN'S CRUSADE* (1969); R. WRIGHT, *BLACK BOY* (1937).

72. 108 S. Ct. 562 (1988).

73. *Id.* at 569-71.

Overall, the Court has recognized that students have freedom of speech and expression rights under the first amendment. However, the recent cases of *Bethel* and *Hazelwood* suggest that the current Court is moving away from the standards specified in *Tinker*. Rather than judging students' conduct in school based on the disruption it causes, the Court has focused on ensuring that schools indoctrinate children into becoming "good citizens." This change in the standard used to test the constitutionality of infringements on students' rights has restricted the first amendment rights of high school students.

## 2. *Freedom of Speech and Expression in Canada*

Section 2(b) of the Charter explicitly protects one's freedom of thought, belief, opinion, and expression.<sup>74</sup> However, because of the rency of the Charter, as previously mentioned, appellate courts have provided little direction on section 2 of the Charter with respect to children's intellectual rights. Three pre-Charter cases help to determine the current state of children's intellectual rights with respect to freedom of expression.

Similar to the United States case of *West Virginia State Board of Education v. Barnette*,<sup>75</sup> Canadian courts have addressed the issue of whether Jehovah's Witness children may refuse to participate in patriotic exercises which included saluting the Canadian flag. In *Ruman v. Board of Trustees*,<sup>76</sup> the Supreme Court of Alberta upheld the school's dismissal of Jehovah's Witness children who refused to participate in patriotic exercises. By contrast, in *Donald v. Hamilton Board of Education*,<sup>77</sup> the Ontario Court of Appeals declared the expulsion of Jehovah's Witness children who refused to salute the Canadian flag to be illegal. The Supreme Court of Canada has never decided this issue; therefore, the status of the issue remains unclear. Certainly, the Charter will play a vital role in any future supreme court decisions because this issue clearly involves not only one's freedom of expression, but also one's religious liberties.

Before the Charter, Canadian courts placed little relevance on the free expression rights of children. One case addressing the issue of students' free expression rights, *Ward v. Blaine Lake School Board*,<sup>78</sup> upheld a school rule regulating the length of boys' hair.

Courts may place little weight on Charter provisions protecting rights of free expression in future cases similar to *Ward*. One reason is the courts' traditional view that school officials should be granted deference. For example, in one case a court upheld the suspension of

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74. CAN. CONST. § 2, *supra* note 5.

75. 319 U.S. 624 (1943).

76. [1943] 3 W.W.R. 340 (Alta. S.C.).

77. [1945] 3 D.L.R. 424 (Ont. C.A.).

78. 20 D.L.R. (3d) 651 (Sask. Q.B. 1971).

a student for wearing blue jeans and a T-shirt to school, stating that "[i]t would be just as senseless to create a school system without the power of disciplining the students, as it would be to build a schoolhouse without doors through which to enter it."<sup>79</sup> Certainly, if courts maintain and further this attitude, much will be done to stifle free expression rights that children otherwise would realize.

In the United States several courts have decided cases on the removal of textbooks and library books from schools. In contrast, these issues typically have been resolved at school board meetings in Canada.<sup>80</sup> However, this issue may be ripe for a Charter-related decision because of the freedom of expression and opinion issue.

### C. Freedom of Peaceful Assembly and Association

#### 1. *Freedom of Association in United States Schools*

Like freedom of expression, freedom of association protections arise from the first amendment. Courts have provided guidance for interpreting the extent to which students' freedom of association is protected. Generally, cases have afforded greater protection to freedom of association and assembly for university students than for public school students. Again, courts have relied on the "substantial disruption" test established by the Supreme Court in *Tinker*.<sup>81</sup> Under *Tinker*, the school must demonstrate that disruption is likely to occur because of the assembly or association. As a result, the particular facts of the case become crucial. The courts have allowed minority groups such as "Students for a Democratic Society"<sup>82</sup> and gays<sup>83</sup> to meet and hold rallies that include "filthy speech" on campuses.<sup>84</sup>

Another important freedom of association issue involves groups allowed to hold meetings in the school, either during or outside of school hours. Again, the Supreme Court has not specifically addressed this issue regarding elementary and secondary school students. However, the Supreme Court in *Widmar v. Vincent*<sup>85</sup> prevented a university from excluding religious group meetings on campus. The Court concluded the university's action of singling out religious groups for exclusion constituted content-based discrimination violating the students' freedom of speech. The Court emphasized the level of ma-

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79. *Choukalos v. Board of Trustees*, unreported decision cited in A. MACKAY, *supra* note 34, at 302.

80. Mackay, *Schools, Censorship and Free Expression: Old Issues in a New Context*, 2 CAN. SCHOOL EXEC. 6, 7 (1983).

81. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969).

82. *Healy v. James*, 408 U.S. 169 (1972).

83. *Gay Lib. v. University of Mo.*, 558 F.2d 848 (8th Cir. 1977).

84. *Goldberg v. Regents of the Univ. of Cal.*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967).

85. 454 U.S. 263 (1981).



turity of college students; therefore, it is very difficult to determine the outcome of a similar case involving younger students.

In 1984, Congress passed the Equal Access Act,<sup>86</sup> which requires that a public school permitting any noncurricular student group to meet in the school must allow all student groups to meet regardless of the religious, political, or philosophical content of their speech or activities. So far, the Supreme Court has not decided an Equal Access Act case.

## 2. *Freedom of Association in Canadian Schools*

Sections 2(c) and 2(d) of the Charter specifically provide for freedom of peaceful assembly and freedom of association in Canada.<sup>87</sup> Because no means for bringing such cases existed before the Charter, no specific cases have addressed the issue of freedom of association and students. In *Regina v. Burko*,<sup>88</sup> some Ontario university students were convicted of trespassing for distributing newspapers in their former school. Unfortunately, the court restricted the opinion to the trespass issue and did not consider the students' right to association. While *Regina* has been characterized as a freedom of association case, it also may be considered a freedom of expression case. Again, however, the narrow ruling of the court provides no insight into the issue of intellectual rights.

In 1971, the New Brunswick Minister of Education sent a memorandum to school boards and principals in New Brunswick. The memorandum was written with legal advice from the federal minister of justice and stated that schools could ban political clubs from meeting in the schools even if the clubs met outside regular school hours.<sup>89</sup>

## D. Conclusions

Case law indicates there are many differences between Canadian laws and laws in the United States regarding children's fundamental freedoms and intellectual rights. The law in the United States seems more settled than that in Canada. Although the United States courts have not established crystal-clear guidelines in every situation, the courts have established a trend, which to some extent, respects and guards the intellectual rights of children. The situation in Canada, by contrast, is unsettled. With the implementation of the new Charter, however, courts have the potential to challenge current beliefs and practices regarding the intellectual rights of children.

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86. 20 U.S.C. § 4071 (1984).

87. CAN. CONST. § 2(c), (d).

88. 3 D.L.R. (3d) 330 (Ont. Mag. Ct. 1968).

89. Kerr, *Constitutional Law - Political Rights and High School Political Clubs*, 50 CAN. B. REV. 347 (1972).

#### IV. THE IMPACT OF THE CHARTER OF RIGHTS AND FREEDOMS ON THE INTELLECTUAL RIGHTS OF CHILDREN IN CANADA

This section explores the potential for the significant changes anticipated in children's intellectual rights as a result of the Charter. As previously mentioned, section 15(1) of the Charter<sup>90</sup> provides that everyone "is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . . based on . . . age . . ." <sup>91</sup> This means that children of all ages ostensibly have the same rights as adults. However, the Charter places two explicit restrictions on these rights. First, section 1 of the Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>92</sup> Second, section 15(2) of the Charter explicitly states that "[s]ubsection (1) [Equality Rights Section] does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of . . . age . . ." <sup>93</sup> Thus, the apparent broad guarantees of fundamental rights may be severely restricted.

Although the "reasonable limits" clause<sup>94</sup> appears ambiguous and somewhat arbitrary, Professor Conklin,<sup>95</sup> in a careful analysis of the clause in light of the entire constitutional context, concludes that the clause implies a strict level of scrutiny. Therefore, the courts ought not restrict one's fundamental rights guaranteed by the Charter without carefully and cautiously scrutinizing the reasons for doing so. Professor Conklin's analysis is important for children's intellectual rights because children's rights customarily have been restricted and it will be difficult to persuade courts that often no legitimate reason exists for limiting the rights of children.

Another serious infringement on the rights of children may occur because of the "amelioration of conditions" provision of Section 15(2).<sup>96</sup> The statement seems appropriate because courts, legislatures, and school boards often say they restrict the rights of young people for their own good. Just as with the reasonable limits restriction, courts must carefully consider the reasons for restricting children's rights. Courts may wish to consider the results of empirical studies investigat-

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90. CAN. CONST. § 15(1).

91. *Id.*

92. CAN. CONST. § 1.

93. CAN. CONST. § 15(2).

94. CAN. CONST. § 1.

95. Conklin, *Interpreting and Applying the Limitations Clause: An Analysis of Section 1*, 4 SUP. CT. L. REV. 75 (1982).

96. CAN. CONST. § 15(2).

ing children's abilities to determine whether legitimate reasons exist for differentially restricting the rights of children.

#### A. Empirical Evidence Regarding the Development of Rational Thinking in Children

In the intellectual rights area, the skill of primary concern is the ability to think rationally. Many assume that youth is equated with irrationality: the younger the person, the more irrational he or she is presumed to be. If this presumption was true, it would seem logical, and reasonable, to limit the rights of young people to protect them from their irrational selves, and from others who may wish to corrupt them. Indeed, many people think of young people as being impressionable and incapable of independent thinking and reasoning. This section challenges the validity of these beliefs in light of relevant empirical evidence. While some young children are certainly less rational than adults, the level of rationality of most adolescents does not differ significantly from that of adults.

The information reviewed in this section is discussed in some detail by Professor Moshman.<sup>97</sup> Rationality has been defined as "the self-reflective, intentional, and appropriate coordination and use of genuine reasons in generating and justifying beliefs and behavior."<sup>98</sup> From this definition, one who is capable of rationality may be safely afforded such intellectual rights as discussed throughout this Comment. However, one who is incapable of rationality may legitimately have one's intellectual rights restricted, both for one's own benefit, and for the good of society. If children are found to be irrational, courts may, even using a strict scrutiny analysis, find compelling grounds to reasonably abridge their rights. However, if evidence can be found to show that children are rational, courts may not reasonably restrict their rights. The following section reviews some relevant research findings to demonstrate that children may well be more rational than traditionally believed. The development of rationality in three areas will be discussed in the following three sections: deductive reasoning, inductive reasoning, and moral reasoning.

##### 1. *Deductive Reasoning*

Deductive reasoning concerns the ability to properly deduce a conclusion from a set of premises. The development of deductive reasoning may be discussed in four stages. The first stage consists of content through the use of inference and is typical of preschoolers. In this stage, children focus on content rather than on the actual process of

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97. D. MOSHMAN, *supra* note 1.

98. Moshman & Hoover, *Rationality as a Goal of Psychotherapy*, 3 J. COGNITIVE PSYCHOTHERAPY 31, 33 (1989).

making inferences. In this sense, children in the first stage may use inference without being capable of thinking about inference.<sup>99</sup>

The second stage is typical of elementary school children and consists of reflection on inference from the perspective of logical form. In this stage, children can think about the process of inference and understand the distinction between premises and conclusions. Children in this stage can make appropriate inferences, yet they cannot understand how people make inferences without perceptual stimuli.<sup>100</sup>

The third stage is characterized by reasoning that involves reflection of form from the viewpoint of logic. People in the third stage, which begins to appear in children about age eleven, can understand logical form and distinguish logical form from empirical truth. In this sense, people in the third stage can focus on the logical inferences made without being confused by the content of those inferences. Stage-three reasoning is common in adolescents and adults.<sup>101</sup>

The final stage is attained by few people and involves a reflection on logic itself. People who reach this stage of deductive reasoning can reflect on the explicit formalization of logical systems and on their relations with each other and with natural languages.<sup>102</sup>

Overall, research concerning deductive reasoning indicates that deductive rationality is present in many elementary-age children. Further, adolescents and adults are not distinguishable on the basis of their capacity for deductive reasoning.

## 2. *Inductive Reasoning*

As Moshman suggests, inductive reasoning covers an even broader domain than deductive reasoning, including forming generalizations, dealing with uncertainties and probabilities, testing hypotheses, and understanding the nature of and relationship between reality and knowledge.<sup>103</sup> One might argue that people incapable of inductive reasoning must be protected from the ideas and influences of others because they will be unable to differentiate facts from opinions and they may be unable to comprehend the nature of knowledge. However, there would be no need to "protect" one from exposure to diverse facts or opinions if one is capable of inductive reasoning because such an abridgement of one's intellectual rights simply is not justified. Like deductive reasoning, inductive reasoning may be thought of in four stages.

The first stage of inductive reasoning is marked by a focus on con-

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99. D. MOSHMAN, *supra* note 1, at 67-68.

100. *Id.* at 68-69.

101. *Id.* at 69-72.

102. *Id.* at 72.

103. *Id.* at 73.

tent. Just as in the first stage of deductive reasoning, preschool-age children can employ inductive reasoning in some situations; however, they tend to rely on the content of reasoning rather than on the process of reasoning.<sup>104</sup>

Stage two is characterized by an ability to distinguish knowledge and appearance from reality. This stage of inductive reasoning is typical in elementary school children. Children in this stage appreciate their own subjectivity and realize that ideas must be supported by reason. Children can implicitly employ their own theories to form and test their world. However, they typically are unaware of theories as theories and they lack clear understanding of the nature of theory. Their process of testing and modifying theories is random and unsystematic.<sup>105</sup>

By the time one reaches the third stage of inductive reasoning, one can comprehend and employ explicit theories. People in this stage understand that theories differ from general data insofar as theories exist on a plane of possibilities, not realities. People who employ stage-three inductive reasoning can comprehend the explicit nature of theories and understand the differences, and interrelations, between data and theories. Most adults use stage-three inductive reasoning. However, just as with deductive reasoning, no significant differences appear in the inductive reasoning abilities of adolescents and adults.<sup>106</sup>

Also, like the fourth stage of deductive reasoning, few people attain the fourth level of inductive reasoning. Those who do can think explicitly about the metatheoretical assumptions that underlie their theories, and the process by which they test those theories. The overall research concerning inductive reasoning indicates that most adults employ either stage-two or stage-three inductive reasoning. Further, no significant differences exist between the ability of adolescents and adults to attain the third stage of inductive reasoning.<sup>107</sup>

### 3. *Moral Reasoning*

One reason that the Supreme Court, at least implicitly, has provided for abridging the intellectual rights of young people is that it believes that many young people are morally confused and impressionable. For example, Chief Justice Burger in *Bethel School District v. Fraser* called Fraser a "confused boy,"<sup>108</sup> labeled his clever speech "obscene,"<sup>109</sup> and suggested that the school could restrict Fraser's right to free speech to inculcate "the habits and manners of civil-

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104. *Id.* at 73-74.

105. *Id.* at 74-75.

106. *Id.* at 75-77.

107. *Id.* at 77.

108. *Bethel School Dist. v. Fraser*, 106 S. Ct. 3159, 3165 (1986).

109. *Id.* at 3163.

ity."<sup>110</sup> Is it really true that children, or in this case, high school students, are incapable of the level of moral reasoning that would enable them to comprehend and rationally develop their own set of moral standards? In short, the answer is no, which suggests that any abridgement of their intellectual rights based on such grounds is unjustifiable.

The noted developmental psychologist Jean Piaget investigated the ability of children to reason about moral dilemmas.<sup>111</sup> Piaget's results indicated that while the specific moral beliefs of young children and older children may not differ, older children are able to employ more sophisticated methods of moral reasoning than younger children.<sup>112</sup>

Another noted psychologist, Lawrence Kohlberg, developed a theory of moral development based on several years of research and experience.<sup>113</sup> He found that, as in the development of deductive and inductive reasoning, many adolescents do not differ significantly from the average adult in their ability to reason morally. Kohlberg found that even elementary school children are capable, to some extent, of moral reasoning, although he believed that moral reasoning continues to develop into early adulthood.<sup>114</sup>

The above discussion of the empirical evidence regarding the development of rationality indicates that restrictions on intellectual rights may often be justified for preschoolers. However, the restriction of the intellectual rights of elementary school children could only be justified under certain circumstances. More importantly, however, the data strongly suggest that it may never be justifiable to restrict the intellectual rights of adolescents based on an argument of irrationality. This is important because most children's intellectual rights cases, many of which were discussed in earlier sections of this Comment, involve adolescents rather than young children. Accordingly, this discussion seriously questions any restriction of the intellectual rights of adolescents.

#### B. Implications of Empirical Evidence of Rationality to the Provisions of the Charter of Rights and Freedoms

As previously discussed, the Charter guarantees fundamental rights, including several intellectual rights, within reasonable limits.<sup>115</sup> Further, the Charter specifically prohibits age discrimination except where such discrimination is necessary to ameliorate the condi-

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110. *Id.* at 3164.

111. J. PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1965).

112. D. MOSHMAN, *supra* note 1, at 79.

113. L. KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT* (1984).

114. D. MOSHMAN, *supra* note 1, at 79.

115. *Supra* notes 5, 19 and accompanying text.

tions of the disadvantaged or, in this case, the young.<sup>116</sup> As is readily apparent from the previous discussion of the development of rationality, many of the traditional reasons that courts have used to restrict children's intellectual rights are unfounded. Indeed, adolescents do not appear to differ significantly from adults with regard to their ability to employ rationality. Canadian courts should employ a strict level of scrutiny when considering an abridgement of the intellectual rights of adolescents. The courts should limit the intellectual rights of children only when compelling reasons exist. These compelling reasons should not be based on incorrect traditional assumptions that children are irrational, simply by virtue of their youth. In most cases, any abridgement of the intellectual rights of adolescents will be unconstitutional.

The empirical evidence involving the development of rationality in elementary school children is less clear. In some situations, the rationality of these children does not differ significantly from that of adults. However, in other situations significant differences exist between the rationality of children and adults. The standard of scrutiny for reviewing situations involving abridgement of the intellectual rights of elementary school children need not be as strict as for adolescents. However, the level of scrutiny still must be strict enough to force courts to review each case carefully to ensure that children's intellectual rights are not unjustifiably being abridged.

Empirical evidence on the development of rationality in preschoolers suggests that a restriction of their intellectual rights often may be justifiable. However, as a requirement of the Charter, courts must ensure that any abridgement of the intellectual rights of preschoolers is within the reasonable limits prescribed by the constitution or would be necessary to ameliorate the conditions of the children. The standard of scrutiny may be lower than that used for elementary school children or adolescents, but still must be strict enough to ensure that any abridgement of their rights is constitutional. Thus, courts should use a standard requiring careful analysis of the facts of each case.

## V. CONCLUSIONS

Based on the information discussed in this Comment, the Canadian Charter of Rights and Freedoms should offer a new range of protections for the intellectual rights of children. Indeed, as is obvious from many of the cases discussed, courts in Canada and the United States often justifiably abridge the rights of children. Many of the decisions discussed from United States courts have shown a trend toward supporting, or at least considering, the intellectual rights of children. In

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116. *Supra* note 6 and accompanying text.

this sense, Canadian courts can learn much from following the example of some of the United States cases discussed.<sup>117</sup> The Charter provides specific guarantees for children and holds much promise for ensuring that their intellectual rights are not abridged. Ironically, just as the Supreme Court of the United States may be restricting children's intellectual rights,<sup>118</sup> Canadian courts are in a position to begin expanding the intellectual rights of children. Courts should study the type of empirical evidence provided in this Comment to determine whether the traditional reasons for abridging children's rights are justifiable. The Charter holds the potential to help courts reject traditional reasons for abridging children's rights: Can the Charter help us learn from our mistakes?

*James R.P. Ogloff '89*

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117. Somewhat ironically, however, the United States Supreme Court's recent decision in *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988), appears to have taken a step back from supporting the intellectual rights of children.

118. *E.g.*, the "distraction" standard employed by the United States Supreme Court in *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), has been consistently restricted in the recent cases of *Bethel School Dist. v. Fraser*, 106 S. Ct. 3159 (1986), and *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988).