S. 76 (3) *CHILD WELFARE ACT*, R.S.A. 1955, c. 39—COURT ORDER DISPENSING WITH CONSENT OF NATURAL PARENT IN ADOPTION PROCEEDINGS—GROUNDS FOR SUCH AN ORDER—*RE ADOPTION OF DAVID SNIDER* (1966), 56 W.W.R. 116.

The recent case of *Re Child Welfare Act: Re Adoption of David Snider*[1] should be of interest to the practitioner and the adopting parent alike. The District Court of Alberta held that where consent to an adoption has been freely given, and is later capriciously withheld, an order dispensing with consent, pursuant to s. 76(3) of the Child Welfare Act, R.S.A. 1955, c. 39, ought to be made. It is submitted that this decision reflects a greater willingness to be governed by considerations of the welfare of the child and the purposes of the Child Welfare Act than has hitherto been shown in Alberta courts. If, however, the principle of law for which this case stands is that the mere finding of a capricious withholding of consent once freely given, without regard to the conduct and character of the parent, is sufficient ground for dispensing with such consent, then it would appear that, though the case is consistent with the intent of the Child Welfare Act, it is inconsistent with previous law in Alberta. The purpose of this paper is to point out the need for a further amendment to the Child Welfare Act so as to bring the letter of the law in line with the aims of adoption and the policy of the courts.

Before dealing with the previous law in this area, it is necessary to restate the facts in *Re Adoption of David Snider*. The natural mother, Mary Adeen Snider, met the natural father, Jean Paul Ripond, in the summer of 1963 while they were both employed at the Banff Springs Hotel. An affair developed between them and continued until November, 1963, when they returned to Ontario. By this time Miss Snider was pregnant and decided to come to Calgary for the birth of the child. The child, David, was born on June 11, 1964, at which time Miss Snider was 22 years old. After some wavering, she placed the child in temporary wardship.

Repond had by this time resumed an interrupted courtship with Pauline Evans, who had been made aware of the existence, as well as the admitted paternity of the child. Repond and Miss Evans, intending to be married, contacted Miss Snider and it was agreed that Miss Snider would give the child up for adoption by the Reponds. To this end, on November 2, 1964, Miss Snider freely and voluntarily signed a surrender of custody and a consent to adoption on the usual forms provided by the Child Welfare Department. At this time Miss Snider thought it was best for the child to be with one natural parent than with strangers. The Reponds took custody of the child.

At the time of the surrender of the child, the Reponds promised to send Miss Snider a picture of the child each year on his birthday. On the child's first birthday a picture was sent, but it was never received by Miss Snider. In March, 1965, she received a letter from the Reponds indicating that there were to be no more pictures. Feeling that she had been wronged, Miss Snider, a few days before the probationary period of one year had expired, revoked her consent.

1 (1966) 56 WWR 116.

Patterson, D.C.J., on the basis that this was a capricious withholding of consent, dispensed with the consent, pursuant to s. 76(3) of the Child Welfare Act, R.S.A. 1955, c. 39, and granted the adoption. The learned judge said:

> It is my opinion she is trying to use the child, of whom she has never had custody, has hardly seen and clearly does not want herself, as a weapon against the Reponds. This is not a case of a mother of a child exercising her inalienable right to its custody—her sole desire is to take it from the Reponds and, as a last resort, to achieve this, will take it herself. . . .
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> The mother's actions are, in my opinion, governed by caprice and it is hard to think of a better word to describe them. She has never had the child herself—her only plans for it contemplated its placement in the Repond home; she withdrew her consent just as the adoption could have been completed; she has no plans now for the child but will make them as a last resort to prevent the adoption by Reponds.
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> I find Miss Snider's consent to the adoption, once freely given, is now being withheld capriciously. The order of adoption will be granted as prayed, and the consent of Miss Snider will be dispensed with for the above reasons, pursuant to sec. 76(3)(d) of the *Child Welfare Act*, RSA 1955, ch. 39.[2]

On grounds of public policy, Judge Patterson obviously made the right decision. To have decided otherwise would have been to undermine the whole scheme of adoption. As it was ably stated by C.P. Daniels in his article in the Canadian Bar Review:

> If adopting parents are to be expected to come forward and take a child into their homes in the hope and confidence that their love, care and attention for the child will be rewarded by an order under which the child can be adopted by them as their own, then it is only fair that once they have done so and have demonstrated themselves capable of fulfilling their part of the bargain, as it were, then a change of heart on the part of the natural parent should not effect their position.[3]

Before dealing with the view of the Courts regarding the rights of a natural parent to revoke his or her consent, it is perhaps timely to point out that, in Alberta, the question of dispensing with consent only arises in private (non ward) adoptions.[4] Where the child is a permanent ward of the Crown, the only guardian whose consent is required is the Director of Child Welfare.[5]

A child is made a permanent ward of the Province by one of two procedures: (1) surrender by "Consent and Indenture"; (2) court order for permanent wardship.

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2 *Id.*, at 118.

3 *Adoption—Consent of Natural Parents—Revocation* (1957), 35 Can. Bar Rev. 836, 838.

4 There are two kinds of private (non ward) adoptions:
(1) The procedure wherein an unmarried mother places her child with a specific couple for adoption;
(2) The procedure wherein a stepfather adopts a child born to his wife of a previous marriage, or one born to her illegitimately.
The following statistics, obtained from the Department of Child Welfare, will give the reader some idea of the scope of adoption in Alberta:

	1966	1965
Total No. of children placed for Adoption (wards)	1347	1361
Breakdown of Private Adoptions Finalized:		
Children born out of wedlock adopted by stepfather	180	185
Children born of a previous marriage adopted by step-parent	245	356
Child placed privately for adoption	88	109
Wards of another province, adopted in this province	10	7
	523	657

Children in care	*As of January 1, 1967*	*As of January 1, 1966*
Temporary Wards	1205	1210
Permanent Wards	3130	3052
Children placed view to adoption	1635	1369
Non-wards	55	34
	6025	5665

5 The Child Welfare Act, S.A. 1966, c. 13, s. 52(2).

The procedure for surrender by "Consent and Indenture" is the method used when an unmarried mother legally surrenders her infant for adoption. Under the 1955 Child Welfare Act,[6] section 51 gave authority to the superintendent to accept surrenders. The mother in effect divested herself of all parental interests in the child, and the superintendent became the sole legal guardian (sec. 22).[7] Under the new Child Welfare Act[8] section 30 has substantially the same effect:

> 30(1) Where a parent, by instrument of surrender acceptable to the Director, surrenders custody of a child to the Director for the purposes of adoption, the parent is not thereafter entitled, contrary to the terms of the instrument, to the custody of or the control or authority or any right to interfere with the child.
> (2) A surrender of custody of a child by an instrument as mentioned in subsection (1) given by a parent who is under twenty-one years of age is as valid and binding as if the parent had attained the age of twenty-one.
> (3) Where the custody of a child born out of wedlock is surrendered to the Director by an instrument as mentioned in subsection (1) and subsequently the parents of the child inter-marry, then for the purposes of this Act the instrument of surrender shall be deemed to have been executed by both parents and both parents are equally bound thereby.
> (4) Where the custody of a child is surrendered to the Director by an instrument as mentioned in subsection (1), the child becomes a permanent ward of the Crown.

This procedure is unique in Canada. In no other province can a child be made a permanent ward by this process.[9] This method of surrender has been tested by Alberta courts in at least three instances for constitutionality,[10] and in each case it has been upheld as a valid exercise of powers conferred by legislation.

Within thirty days from the making of an order for permanent wardship an appeal lies therefrom to a judge of the Supreme Court.[11] After that date, it would appear that the order is conclusive and cannot be set aside by subsequent proceedings.[12]

Miss Snider had signed the usual surrender of custody and consent to adoption forms provided by the Child Welfare Department, but, at the request of Miss Snider, the Department allowed the existing temporary wardship order to lapse and did not have the child made a permanent ward prior to its being handed over to the Reponds. Miss Snider desired the matter to be handled as a private adoption, and the Department acquiesed. Had the order for adoption been made immediately thereafter there would have been no problem, but as the case had been instituted by way of permanent wardship it appears that all the parties

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6 The Child Welfare Act, R.S.A. 1955, c. 39.
7 Bowker, *Supplementary Report on Adoption in Alberta* (1965), 33.
8 *Supra*, n. 3.
9 Bowker, *op. cit.*, n. 7.
10 *Schneider* v. *Supt. of Child Welfare* (unreported) 1954, Supreme Court Action No. 6840, judgment of H. J. Macdonald, J.; *Ziegler* v. *Supt. of Child Welfare* (unreported) 1958, Action No. 15144, judgment of Egbert, J.; *Dirk* v. *Supt. of Child Welfare* (unreported) 1964, Supreme Court Action No. 76592, judgment of Milvain, J.
11 *Supra*, n. 3, s. 27(1).
12 Some doubt is cast upon the conclusiveness of an order for Permanent Wardship by the recent case *In The Matter of Caia Lee Burns, an Infant; Kristina Una Margarita Worlds* v. *The Director of Child Welfare* (unreported) September, 1967, Calgary, Alberta, judgment of Mr. Justice Kirby. This was an application brought more than six months after the Order for Permanent Wardship for an Order of Habeas Corpus with Certiorari in aid to release the child Caia Lee Burns from the custody of The Director of Child Welfare. The Order for Permanent Wardship was upheld by Mr. Justice Kirby; however, it was pointed out by the learned judge, at page 8 of his judgment, that the court is not precluded from going behind an order on an application in habeas corpus with certiorari in aid and examining the record where the objection to the order is on the ground that the person making the order lacked jurisdiction or had lost jurisdiction for reasons not apparent on the face of the order. This means that the validity of an Order for Permanent Wardship may be raised long after the thirty day time limit under the Act. There is a six month time limit for certiorari (Rule 867) but no time limit for habeas corpus with certiorari in aid.

concerned had taken for granted the fact that a one year probationary period was required before the order for adoption could be made, as required by s. 54(1) of the Act. Since the one year probationary period may be dispensed with in private (non ward) adoptions when it appears to be in the best interests of the child or for any other good and sufficient reason it may be argued that since the Department (in not pursuing the matter to permanent wardship) had in effect converted the case to a private adoption for the purposes of allowing Miss Snider, *prima facie* at least, to claim custody of the child, it had also converted the case into a private adoption for the purposes of allowing the Reponds to obtain an order for adoption without waiting the one year period. However, this is hindsight. The Reponds had no idea that between the date they obtained custody of the child and the date the order for adoption was to be made Miss Snider would rescind her consent and claim custody of the child. The Department, moreover, had apparently no reason to believe that by not pursuing the matter to permanent wardship and thus returning to Miss Snider the residual rights to the custody of her child they would be jeopardizing the Reponds adoption. Regardless of what additional steps could have been taken prior to litigation to insure the Reponds an effective adoption they were not taken, and as a result Miss Snider was vested with all the rights ancilliary to a private adoption; including the right to change her mind.

To return to the problem of dispensing with consent, it is apparent that two issues must be settled: (1) whether, in Alberta, a natural parent may revoke his or her consent at any time up to the moment when the adoption order is made; and (2) on what grounds may a judge dispense with the consent required under the Child Welfare Act.

As to the first issue, Alberta courts appear to have followed the decision of the English Court of Appeal in *Re Hollyman*[13] and the decision of the Supreme Court of Canada in *Re Baby Duffell.*[14] These cases held that under the laws in force in England and Ontario the consent to adoption given by a natural parent could be withdrawn after placement of the child by the adopting agency and prior to the order for adoption. Chief Judge Buchanan of the Alberta District Court held in *Re Greenwood,*[15] following *Re Hollyman* and *Re Baby Duffell,* that:

> The English, Ontario and Alberta Acts being similar in all revelant respects, the consent required by sec. 90 of the Alberta Act, must be in existence at the moment the application for an adoption is heard by the Court. . . . The [present] application must be regarded as one in which the mother has refused her consent.[16]

A contrary sentiment has been expressed by the courts of British Columbia. To quote once more from C. P. Daniels' article in the Canadian Bar Review:

> In 1951 Manson, J. of the Supreme Court of British Columbia ruled in the case of *G.* v. *C.* that under the British Columbia Adoption Act as it existed prior to its recent re-enactment, consent once validly given could not be withdrawn. The learned judge felt that the various statutes enacted in British Columbia since the beginning of the century made it 'abundantly clear that the legislature is concerned primarily with the welfare of children and not primarily with the progressive right of parents to children.' He then went on to say: 'It is not to

13 [1945] 1 All E.R. 290.
14 [1950] S.C.R. 737.
15 (1956), 4 D.L.R. (2d) 711.
16 *Id.*, at 713. Buchanan, C. J. D. C., was referring to the Child Welfare Act S.A. 1944, c. 8 which is identical to s. 76 of the 1955 Act, *supra*. n. 4, and s. 52 of the 1966 Act, *supra;* n. 3.

> be forgotten that the decisions in England above referred to were all made long before England had an Adoption Act. Our *Adoption Act* antedates the English one some six years and, if I may say so, it was carefully drawn, with the full realization of its implications. I am satisfied that the legislature never contemplated the withdrawal of a consent of a parent, once given, and such consents are taken along after full explanation and assurance that they are voluntarily given. . . . Certainly the placing of a child for adoption under the provisions of the *Adoption Act* is not the same thing as the mere transfer of the custody of a child by a parent by private bargain with another, apart from the Act.[17]

The Alberta legislature has reflected the sentiments of Manson, J., in regard to ward adoptions by providing for surrender by "Consent and Indenture,"[18] but no such remedial provision has been placed in the recent Child Welfare Act as regards private (non ward) adoptions.

In British Columbia, a new Adoption Act was enacted in 1957, which included the following provision:

> No person who has given his consent to adoption, other than the child to be adopted, may revoke his consent unless it is shown to the Court's satisfaction that such revocation is in the best interests of the child.[19]

The effect of this provision is to eliminate, in cases where consents have initially been given, any consideration of parental rights.[20] As stated by Ruttan, J., of the Supreme Court of British Columbia in the recent case of *Re Roebuck Adoption*:

> When the case falls under subsec. (5) [of s. 8] there is no essential difference between the position of natural parents contesting the custody of a child and that of a natural parent contesting that right with a third person, to whose adoption of the child she has consented. The child's welfare, not the mother's wishes, is the sole determining factor.[21]

The above noted effect constitutes a significant alteration to the common law principles developed by the courts governing the dispensation of consents in adoption proceedings. These principles will be more fully dealt with later in this paper; for now it is sufficient to state that, though the effect of an order for adoption is to sever once and for all the very relationship of parent and child, yet the courts have been extremely solicitious of the natural rights of parents to the custody of their children and have sought to give effect to their wishes in adoption proceedings unless very serious and important reasons require that such wishes be disregarded. For anything less than parental misconduct the courts have been reluctant to dispense with the consent required under

17 *Op. cit. supra*, n. 3 at 836. The words of Manson, J., are from (1951) 2 W.W.R. (N.S.) 271, 283. The cases he refers to are *Reg* v. *Gynagall* [1893] 2 Q.B. 232; *Re Flynn* (1848) 64 E.R. 205; *Re McGrath* (1893) 1 Ch. 143. See the Adoption Act. R.S.B.C. 1948, c. 7, as am. S.B.C. 1953, c. 3, and S.B.C. 1956, c. 2.

18 *Supra*, n. 5, s. 30.

19 Adoption Act, S.B.C. 1957, c. 14, s. 8(5) now R.S.B.C. 1960, c. 4, s. 8(5).

20 *Re Roebuck Adoption* (1966), 57 W.W.R. 542, 550.

21 *Ibid.*

the Child Welfare Act.[22] The emphasis has been upon the conduct of the parent and not upon the welfare of the child, whereas in simple custody proceedings the welfare of the child is the sole determining factor.[23]

With the introduction of sec. 8(5) into the Adoption Act of British Columbia, the natural rights of parents need only be taken into consideration in that province in a situation where a consent has never been given. However, since there is no such provision in the Alberta Child Welfare Act in determining whether to dispense with the consent required under the act, the court must in all cases consider the natural rights of parents. This applies both in the situation where a consent has initially been given and is later withdrawn and in a situation where a consent has never been given.

Provisions similar to that introduced into the Adoption Act of British Columbia have been placed in the Child Welfare Acts of Manitoba, Ontario, and Newfoundland. In Manitoba, the Child Welfare Act, R.S.M. 1954, c. 355 has the following provision:

> 94(4) A consent given by a parent or guardian pursuant to subsection (2) may be withdrawn, by written notice to the director, at any time prior to the placement of the child for adoption with an applicant, but not thereafter.

The following provision is contained in the Child Welfare Act of Ontario:[24]

> 73(6) Where a consent required by this section has been given, it may be withdrawn by the person giving it only if, having regard to all the circumstances of the case, the Court is satisfied that it is in the best interests of the child that the consent be withdrawn.

The effect of the Ontario provision is the same as that of the amendment to the British Columbia Act previously discussed.

In The Adoption of Children Act of Newfoundland,[25] the following provisions may be found:

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22 See *Re Tonge and Cochrane* (1959), 16 D.L.R. (2d) 276 where the father had divorced the mother who was allowed to keep the custody of the child without an order to that effect. The mother had married the co-respondent (by whom she had had a child) and they petitioned to adopt the first child and the father petitioned for custody. McNair, C.J.N.B., held that different principles applied to adoptions and custody, that in the absence of a finding that the objecting parent has by moral turpitude or by an abdication of parental rights or authority forfeited his rights, his consent will not be dispensed with. The adoption was refused.
However, see *Re Application for Adoption* (1967), 64 DLR (2d) 528 (Nova Scotia) where the mother and her present husband petitioned to adopt the child, a boy of 8 years old, and this was opposed by the father, who, although divorced, had been given a right of access. However, the father had not visited the child in over a year and had been in arrears in maintenance payments for that period of time. O'Hearn, Co. Ct. J., in a very thorough judgment and while giving full effect to previous law, preferred to follow the lead of certain British Columbia Courts in putting primary emphasis upon the welfare of the child, even in adoption proceedings [see *Re W.* (1957), 13 D.L.R. (2d) 397 (Wilson, J.); *Re Freeman* (1960), 24 D.L.R. (2d) 728 (Ruttan, J.); *Re Sharp, Sharp* v. *Sharp* (1962), 36 D.L.R. (2d) 328; contra *Re Roebuck* (1966), 58 D.L.R. (2d) 716 (Ruttan, J.)] and dispensed with the consent of a parent not guilty of parental misconduct. O'Hearn, Co. Ct. J., says at 553: "I cannot find that the father has misconducted himself or that he has abandoned his rights of access, or custody, or in any way forfeited them. He has, at the most, let them lie fallow. On the other hand, I am convinced by the evidence, that it is in the child's interest that the adoption take place". However, it is apparent from the case that Mr. Justice O'Hearn preferred to treat the proceedings more akin to that of custody rather than adoption for he continues: "It should be stressed that this is not a case of a contest between natural parents and strangers, but a contest between natural parents themselves in the very unnatural situation created by divorce". For this reason, *Re Application for Adoption*, although a reflection of an enlightened attitude toward adoption, can not be read as laying down any new principles of law to other than adoption proceedings between natural parents. However, within the limits of its decision, this is a significant case in that it opens up a whole new area of attack for the Courts of Alberta, which, as appears from *Re Adoption of David Snider*, are more than anxious to depart from the restrictive principles laid down by previous Alberta Courts (see, in particular, *Hawkins* v. *Addison* (1955), 15 W.W.R. (N.S.) 18). See also *Re Baker* (1967) 63 D.L.R. (2d) 591 and *Re Baker* (1967) 59 W.W.R. 279.

23 *Re LeSieur* (1951) 2 D.L.R. 775, 781.

24 R.S.O. 1965, c. 14.

25 S. Nfld. 1964, No. 30.

> 7(6) A person giving a consent required under paragraph (b) or (c) of subsection (1) may within twenty-one days after the consent is given cancel it by a document in writing to that effect, but otherwise subject to subsection (7) the consent shall be irrevocable.
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> (7) The judge, if satisfied that it is in the best interests of the child, may by order cancel a consent referred to in subsection (6).

Of all these recent amendments, it is submitted that the Manitoba provision is to be preferred. It protects the aims of adoption by giving certainty to adopting parents, yet it allows the natural parents to change their minds prior to the placing of the child for adoption. A similar provision for Alberta is highly recommended.

As stated previously, under the present law in Alberta the dispensation of consent in private adoptions is governed by the common law whether a consent has initially been given or not. In both cases the rights of the natural parents must be taken into consideration. It is therefore timely to look at the grounds deemed sufficient by the courts to warrant a dispensing of consent.

The courts have always been zealous to protect the rights of parents and have dispensed with the required consent to adoption only in the rarest of circumstances. The most zealous have been the courts of Alberta. See, for example, the words of Porter, J.A., of the Supreme Court of Alberta in *Hawkins* v. *Addison*:

> The effect of an adoption order . . . [unlike a custody order which can be varied] is to sever forever the natural relationship and all legal rights of the parent to the child and of the child to the parent. . . . This process constitutes a grave invasion of the rights of parents and the destruction of the rights of children. . . . [Such a grave invasion] depends not on the 'welfare of the child' but on the strict wording of the statute, because apart from the statute no such right [or infringement] exists. . . . 'It will require very clear language indeed to cut down, let alone to destroy, a parent's right of such a high order as to have been regarded as 'sacred' by the law of this country for centuries so firmly that its principles have never been called in question.'[26]

This reluctance to infringe upon the natural rights of parents is also reflected in Porter's, J.A., interpretation of s. 90(3) of the Child Welfare Act, 1944, c. 8:

> Sec. 90(3) sets out that the consent of the guardian shall not be required if the parent comes within the provisions of (a), (b) and (c):
>
> '(a) he is found by the judge, upon evidence submitted to him, to be insane, incompetent or unfit to give such consent, or
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> '(b) he is undergoing a sentence for a term of which more than two years remain unexpired at the date of the filing of the petition, or
>
> '(c) being under a duty to provide proper care and maintenance for the child, he has neglected so to do.'
>
> Sec. 90(3)(d) sets forth that the consent of the guardian shall not be required if:
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> '(d) the judge, for reasons which appear to him sufficient deems it necessary or desirable to dispense with his consent.'
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> If it had been intended that par. (d) of subsec. (3) was to be interpreted without reference to pars. (a) (b) and (c), then it seems to me that the legislature would have left (d) out of sec. 90(3) and provided in subsec. (2) of sec. 90 that the consent of the child 'or of the guardian' shall not be required if the judge dispenses with it for reasons which he deems sufficient. . . . *It seems clear, having regard to the drafting of the section and to the law with respect to parents' rights to their child, that sec. 90(3)(d) was intended to be limited to cases of the kind set out in (a), (b) and (c), which, it is to be observed, include acts of gross moral turpitude and neglect of the kind which always entitled the court to interfere with the parents' rights.*[27]

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26 (1955), 15 W.W.R. (N.S.) 18.

27 See *supra*, n. 12. Section 90(3)(b) was deleted from the 1966 Child Welfare Act.

Regarding Porter's, J.A., interpretation of this section, Smith, J.A., of the Supreme Court of Alberta in *Re Alty's Adoption*[28] said:

> My view is that the words 'misconduct or dereliction of duty' are more apt to describe the type of conduct referred to in section 76(3) of *The Child Welfare Act* of this province, than 'gross moral turpitude.'

It is submitted that, because the court's discretion under this section involves substantive rights of the natural parents, the courts in Alberta have been correct in directing their inquiry to the natural parents' behavior rather than to the welfare of the child. Only if the parent has by his conduct acted in such an excessive manner as to forfeit his rights should the court ignore his wishes in adoption proceedings. As Rand, J., said in *Hepton* v. *Moat*:[29]

> . . . *prima facie* the natural parents are entitled to custody unless *by reason of some act, condition or circumstance affecting them* it is evident that the welfare of the child requires that fundamental natural relation be severed.

It is also important to keep in mind what Rand, J., says in *Martin* v. *Duffell*:[30]

> In the settled formula, the welfare of the infant is the controlling consideration; that is, the welfare as the court declares it; but in determining welfare, we must keep in mind what Bowen, L.J., in the case of *In re Algar-Ellis*, as quoted by Scrutton, L.J. in *In re J. M. Carroll*, says: . . . 'It must be the benefit of infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can'.

However, since the aims and purposes of the Child Welfare Act must also be taken into consideration, it is submitted that s. 52(4)(d) of the Act should not be so strictly construed as to warrant the application of the *ejusdem generis* rule, as was done by Porter, J.A., in *Hawkins* v. *Addison*.[31] There are undoubtedly certain situations which do not fit into subsections (a) (b) or (c) of section 52(4) and yet fall short of gross moral turpitude which, having regard to the welfare of the child, require the exercise of the court's discretion under s. 52(4)(d). Porter, J.A., is correct in stating that this is not an unlimited discretion. It must be exercised according to the aims of adoption, the purposes of the Child Welfare Act, the welfare of the child, and having regard to the traditional rights of parents. The legislature did not intend the courts to be unduly restricted, however. The purposes of the Child Welfare Act (viz. the proper care of children- by their parents if possible, by the Province if necessary) require a more liberal interpretation.

It is submitted that the proper governing principles are to be found in *Re Baby Duffell, Martin* v. *Duffell*.[32] In that case, Cartwright, J., of the Supreme Court of Canada correctly stated the law as follows:

> It is, I think, well settled that the mother of an illegitimate child has a right to its custody, and that, apart from statute, she can lose such right only by abandoning the child or so misconducting herself that in the opinion of the Court her character is such as to make it improper that the child should remain with her.[33]

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28 (1961), 34 W.W.R. 1, 13.
29 [1957] S.C.R. 606, 607 (italics added).
30 *Supra*, n. 14 at 747.
31 See: *Re W.* (1958), 13 D.L.R. (2d) 397, where Wilson, J., of the B.C.S.C. refused to apply the *ejusdem generis* rule because of the difference in language between the Alta. and B.C. Acts. He chose to follow the S.C. of C. in *Re Baby Duffell*. However, the B.C. Act appears to be closer to the Alta. Act than to the Ont. Act in *Re Baby Duffell*. Davey, J. A., (dissenting) in *Re Sharp Infants Adoption* (1962), 40 WWR 521, 532 said: "While I consider the 'ejusdem generis' principle is inapplicable, I do think the grounds specifically enumerated, as well as the drastic nature and serious consequences of an order dispensing with consent, show that consent should only be dispensed with for grave reasons."
32 *Supra*, n. 14 at 744 and 746 (italics added).
33 *Id.*, at 744.

He reiterated this later judgment when he said:

> In the present state of the law as I understand it, giving full effect to the existing legislation, the mother of an illegitimate child, who has not abandoned it, who is of good character and is able and willing to support it in satisfactory surroundings, is not to be deprived of her child merely because on a nice balancing of material and social advantages the Court is of opinion that the others, who wish to do so, could provide more advantageously for its upbringing. The wishes of the mother must, I think, be given effect unless *'very serious and important' reasons* require that, having regard to the child's welfare they must be disregarded.[34]

These "very serious and important" reasons relate back to what Cartwright, J., has said earlier in his judgment regarding the grounds by which a mother can lose the custody of her child—"by abandoning the child or so misconducting herself that in the opinion of the Court her character is such as to make it improper that the child should remain with her."[35] These statements by Cartwright, J., have been oft quoted as the ratio of *Re Baby Duffell*,[36] and should be considered by every judge before dispensing with the consent of a parent. It is submitted that Patterson, D.C.J., in *Re Adoption of David Snider* failed to give the above quotations proper consideration. This, it is submitted, is evidenced by his abridged quotation from *Re Baby Duffell*. The most important part of the quotation was omitted by Judge Patterson.

> In my opinion, this case comes at the opposite end of the spectrum from *Hawkins* v. *Addison* (1955) 15 W.W.R. 18 (Alta. C.A.), and other similar cases and is, in fact, the instance referred to by Cartwright, J. in *Re Baby Duffell*; *Martin* v. *Duffell* (1950) S.C.R. 737, affirming (1950) O.R. 35, when he says at pp. 745-6: 'The supposed danger of the purposes of *The Adoption Act* (R.S.O. 1937, c. 218, amended S.O. 1949, c. 1) being defeated by the construction which I think is the proper one is met to a limited extent by the provisions of section 3(d) of *The Adoption Act* which permits the Court to dispense with the consent of the parents of a child if, having regard to all the circumstances of the case, the Court is of opinion that such consent may properly be dispensed with (similar wording to our s. 76(3)(d)). This will be a safeguard in a case, for example, where consent voluntarily given at the commencement of the two year probationary period is sought to be capriciously withdrawn at its termination, *and there are in the Court's opinion matters of essential importance having regard to the Welfare of the infant which require that it be left with the foster parents.*'[37]

It is submitted that the quotation in full, read in light of the ratio of the case, indicates that a capricious withholding of consent must be coupled with some element of parental misconduct before the consent of the parent can be dispensed with. It is hard to believe that Cartwright, J., meant by this quotation that a capricious withholding itself is sufficient.

Some support for Judge Patterson's decision can be derived from the words of Porter, J.A., in *Hawkins* v. *Addison*:[38]

> No attempt was made in the proceedings to make an inquiry whatever about the appellant, his background, his present standing, his conduct, past or present, his pedigree and all of those relevant matters which must be weighed by any court exercising jurisdiction over children. There is no evidence of gross moral turpitude on the part of the father nor is there, as in the cases referred to, any evidence that there is any capricious interference or revocation by him of established arrangements for the care and upbringing of the child.

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34 *Id.*, at 746 (italics added).

35 *Ibid.*

36 *Ibid.* see for example *Re Roebuck Adoption*, *supra*, n. 19; *In re Adoption Act* (1962), 40 W.W.R. 160; *In Re Sharp Infants Adoption* (1962), 40 W.W.R. 521; *Re W., an Infant* (1964), 49 W.W.R. 181; *Re Alty's Adoption* (1961), 34 W.W.R. 1; *Re E.'s Adoption* (1961), 34 W.W.R. 433; *C.* v. *K.* (1959), 30 W.W.R. 310; *In Re Agar* [1958] S.C.R. 52; *In Re Cochrane and Cochrane* [1958] M.P.R. 40, 175; *Hepton* v. *Moat* [1957] S.C.R. 606.

37 *Supra*, n. 1, at 119. Italics not quoted by Patterson, D.C.J.

38 *Supra*, n. 22 at 31.

However, from Porter's, J.A., interpretation of s. 90(3)(d) and from his sentiments regarding the natural rights of parents, it is, *a fortiori*, difficult to believe that a capricious withholding alone, without inquiry into the qualities, character, personality or conduct of the parent, is sufficient ground for dispensing with the consent of such parent.

On the facts of *Re Adoption of David Snider*, there may be such sufficiently "serious and important" reasons as to warrant the dispensing of the consent of the natural mother, but such inquiry should be restricted to the conduct of the person in his capacity as a parent. There must be some element of parental misconduct or, in the words of Smith, J.A., in *Re Alty's Adoption*,[39] some element of "misconduct or dereliction of duty" present before the "sacred" rights of parents can be interferred with. Whether there are sufficient grounds in any case is a question of fact, but it appears to the writer difficult to believe that caprice alone can ever be a sufficient ground.

In the U.K., the new Adoption Act of 1950 (14 Geo. VI, c. 26, s. 3(1)(c)) gives the court power to dispense with a father's consent if it is satisfied "that his consent is unreasonably withheld." Jenkins, L.J., *In re Adoption Act, In re K (an Infant)*[40] said that this new section "notwithstanding its different language, has not altered the law in this respect." He then goes on to say:

> But, we ask ourselves, in what circumstances is a parent, not guilty of any such misconduct or dereliction of duty, to be held to have acted unreasonably in withholding his or her consent to an order the effect of which, if made, will be to extinguish once and for all his or her parental rights, duties and obligations in regard to the infant, and indeed the very relationship between them of parent and child, and to make the infant thenceforth the child of the adopters, in substitution for and to the utter exclusion of its natural parents? Prima facie it would seem to me eminently reasonable for any parent to withhold his or her consent to an order thus completely and irrevocably destroying the parental relationship. One can imagine cases short of such misconduct or dereliction of duty as mentioned in section 3(1)(a) in which a parent's withholding of consent to an adoption might properly be held to be unreasonable, but such cases must, in our view, be exceptional.[41]

The same can be said for a parent, not guilty of any misconduct or dereliction of duty, who is adjudged by the court to be capriciously withholding his or her consent. When is it caprice to wish the custody of one's own child? And who is to judge between sincere desire and vengeance? I for one would be very hesitant to make such a judgment especially when the retention or destruction of a parental relationship rests in the balance. It is because of such uncertainty in human emotion that the courts have been reluctant to dispense with the consent of a parent for any ground less than parental misconduct. It is on this basis that I feel that a finding of caprice alone is never sufficient.

This sentiment may appear to the reader inconsistent with previous statements in this paper regarding the need for an amendment to the Child Welfare Act to bring the law in line with the aims of adoption; on closer examination such is not the case. Though I favour legislation that advances the aims of adoption I feel that such advance should not be made at the expense of the traditional rights of parents. The problem that requires solving is the revocation of consent after children have

39 *Supra*, n. 36 at 13.
40 [1953] 1 Q.B. 117, 126.
41 *Id.*, at 129.

been placed for adoption. The solution is not in eroding the traditional protection of the natural rights of parents but in providing for a time after which a parent cannot exercise these rights. A proper balance of interests can be achieved by implementing the previously mentioned provision into our Child Welfare Act, whereby the consent of a parent may be withdrawn at any time prior to the placement of the child for adoption with an applicant, but not thereafter.

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ADMINISTRATOR AD LITEM—TRAPS AND PITFALLS—RULE 63 OF THE CONSOLIDATED RULES OF COURT

With the increasing incidence of litigation following death, there has been a pressing requirement for provision of a sueable defendant in cases where the person who might have caused the wrong is deceased without leaving a personal representative.

The unfortunate results of certain recent cases make it worthwhile to review the relevant rules, cases and legislation. Prior to the Amendments to the Fatal Accidents Act and the Trustee Act in 1960,[1] Rule 63 of The Consolidated Rules exclusively governed the appointment of administrators to represent a deceased in an action. It provides as follows:

> Where in any action or other proceedings commenced or intended to be commenced it is made to appear that a deceased person who was interested in the matters in question, or would, if living, have been for any reason a necessary party to such action or other proceeding, has no legal personal representative, the Court or Judge may by Order direct that the action or other proceeding may be commenced or continued in the absence of any person representing the estate of the deceased person or appoint some person to represent such estate for all the purposes of the action or other proceeding notwithstanding that the estate in question may have a substantial interest in the matters in question or that there may be active duties to be performed by the person so appointed or that he may represent interests adverse to the plaintiff or that there may be embrassed in the matter an administration of the estate whereof representation is sought or that the interest of the estate affected is the entire interest in the matters in question or that the person so appointed has no control over the assets of the estate; and the order made and all subsequent proceedings shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly appointed legal personal representative of such person and such legal personal representative had been a party to the action or other proceeding and had duly appeared therein.[2]

One would think that the very wide wording of the Rule would provide a safe procedure for nearly any such situation. However, the rule has been restrictively interpreted.

In the case of *Bodnaruk* v. *C.P.R.* in the Appellate Division of the Supreme Court of Alberta,[3] John and Michael Bodnaruk sued the C.P.R., claiming *inter alia* for damages under the provisions of The Trustee Act[4] and The Fatal Accidents Act[5] in respect of the death of

1 The Fatal Accidents Act, S.A. 1960, c. 311, s. 5A; The Trustee Act, S.A. 1960, c. 111, s. 33A.
2 Rules of the Supreme Court of Alberta, O.C. 1200/62.
3 [1947] 1 W.W.R. 279.
4 The Trustee Act, R.S.A. 1942, c. 215, s. 32.
5 The Fatal Accidents Act, R.S.A. 1942, c. 125, s. 4(2).