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Court No: 26005

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK)

BETWEEN:

JEANNINE GODIN,

APPELLANT

AND:

MINISTER OF HEALTH AND COMMUNITY SERVICES, LAW SOCIETY OF NEW BRUNSWICK, LEGAL AID NEW BRUNSWICK, ATTORNEY GENERAL OF NEW BRUNSWICK and THE MINISTER OF JUSTICE,

RESPONDENTS

FACTUM OF THE APPELLANT

E. THOMAS CHRISTIE
CHRISTIE AND ASSOCIATES
500 Beaverbrook Court, Suite 301
Fredericton, N.B. E3B 5H4
Tel: 506-459-2383
Fax: 506-459-0007

Counsel for the Appellant

BRIAN A. CRANE, Q. C.
GOWLING, STRATHY & HENDERSON
2600 - 160 Elgin Street
Ottawa, Ontario. K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agent for the Appellant

BRUCE JUDAH, Q. C.
DEPT. OF JUSTICE, LEGAL SERVICES
670 King Street, P.O. Box 6000
Fredericton, N.B. E3B 5H1
Tel: 506-453-2514
Fax: 506-453-3275

Counsel for the Respondents, A.G. of New Brunswick and the Ministers of Justice and Health and Community Services

BRIAN A. CRANE, Q. C.
GOWLING, STRATHY & HENDERSON
2600 - 160 Elgin Street
Ottawa, Ontario. K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869

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500 Beaverbrook Court, Suite 301
Fredericton, N.B. E3B 5H4
Tel: 506-459-2383
Fax: 506-459-0007

Counsel for the Appellant

BRIAN A. CRANE, Q. C.
GOWLING, STRATHY & HENDERSON
2600 - 160 Elgin Street
Ottawa, Ontario. K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agent for the Appellant

BRUCE JUDAH, Q. C.
DEPT. OF JUSTICE, LEGAL SERVICES
670 King Street, P.O. Box 6000
Fredericton, N.B. E3B 5H1
Tel: 506-453-2514
Fax: 506-453-3275

Counsel for the Respondents, A.G. of New Brunswick and the Ministers of Justice and Health and Community Services

BRIAN A. CRANE, Q. C.
GOWLING, STRATHY & HENDERSON
2600 - 160 Elgin Street
Ottawa, Ontario. K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agent for the Respondents, A.G. of New Brunswick and the Ministers of Justice and Health and Community Services

GARY A. MILLER,
HANSON, HASHEY,
400 Phoenix Sq., P.O. Box 310
Fredericton, N.B. E3B 4Y9
Tel: 506-453-7771
Fax: 506-453-9600

Counsel for the Respondent,
Law Society of New Brunswick

BRIAN A. CRANE, Q. C.
GOWLING, STRATHY & HENDERSON
2600 - 160 Elgin Street
Ottawa, Ontario. K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869

Ottawa agent for the Respondent,
Law Society of New Brunswick

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PART I

FACTS

1. On April 29, 1994, Mr. Justice Logan made an order granting the Respondent Minister of Health and Community Services custody of the Appellant's children (Robin Wegg born March 22, 1987, Jasmine Vezina Born May 8, 1989, and Clayton Vezina born April 26, 1991) for a period of up to six months. At that hearing the present Appellant was not represented by counsel but did have the assistance of a friend who did not have any legal training.
(p. 86 *All page references are to the pages as set out in the Case on Appeal)

2. By Notice of Application served on the Appellant on October 24, 1994 and returnable on October 27, 1994 the present Respondent Minister of Health sought an extension of the order for a further period of up to six months.
(pp. 1, 12)

3. On October 27, 1994, at the initial appearance of the Appellant, Duty Counsel for the Appellant raised with the Court the Appellant's concern that, since she did not wish to consent to the custody application and would therefore require a full hearing, given the nature of the proceedings against her, counsel ought to be provided. The Court granted counsel's request for an opportunity to advance such a claim.
(pp.24-25)

4. The Appellant applied to Legal Aid New Brunswick, for legal aid on November 1, 1994 and was advised on November 2, 1994 that her application was denied on the grounds that the proceeding involved a custody application as opposed a guardianship application by the Minister of Health and Community Services for which limited legal aid was available.
(p. 23)

5. On November 2, 1994, Appellant's counsel filed with the Court a Notice of Motion with attached affidavit in support wherein the following relief was sought:

(i) The Minister be ordered to provide to the Appellant costs sufficient to cover reasonable fees and disbursements of a solicitor in order that she may retain and instruct counsel for the purposes of preparing for and representing her interests in these proceedings;

(ii) In the alternative, that Legal Aid New Brunswick provide to the Appellant services of a lawyer for the purposes of preparing for and representing her interests in these proceedings;

(iii) Further and in the alternative, that the Court advise the Attorney General for New Brunswick that counsel or a responsible person be made available to represent the interests of the Appellant;

(iv) A declaration that the rules or policies governing the distribution of Domestic Legal Aid, as it differentiates between legal aid provided for Applications for Guardianship Orders by the Minister for which legal aid is provided, and Applications by the Minister for Custody Orders or extensions of existing Orders for which legal aid is not provided are contrary to subsection 15(1) of the Canadian Charter of Rights and Freedoms. **[Subsequently the Motion was amended to include relief claimed for a violation of s. 7. of the Charter]**

(v) Such further and equitable relief as this Honourable Court deems just.

(pp. 7-8)

6. November 3, 1994 was set aside to here the Appellant's argument on that issue. It became apparent at that time that the issues emerging were complex and as a

result, the Minister of Justice-Attorney General sought, and was granted, an adjournment. Further, it was requested by Athey, J. that the parties present argument by way of written brief.
(p.119)

7. The week commencing December 12, 1994 was set by the Court for a hearing of the application for the extension of the custody order. It was expected that the Court would have had by then the opportunity to rule on the motion prior to the commencement of the custody hearing. However, during the week preceding the date set to commence the custody hearing, Madame Justice Athey advised all counsel that she would be unable to determine the issue of the Appellant's right to counsel prior to the date set for hearing the application.
(p. 119)

8. It was agreed by counsel then present that the best interests of the children would be served by proceeding with the custody hearing. Mr. Christie who had been appointed as Duty Counsel for the Appellant, and relieved of such a roll on November 8, 1994 by the same Department of Justice official responsible for the initial appointment, agreed to remain on the record as counsel for the Appellant on the understanding that since the Appellant would as a result be represented by counsel at the custody hearing, the parties would not argue that the issues raised in the motion had become moot.
(p. 25 and p. 86)

9. The custody hearing was held on December 19, 20, 21, 1994 and the decision granting the extension of the order was released on January 3, 1995. The Minister of Justice provided to the Minister of Health and Community Services the services of Crown Prosecutor Mr. Kevin Connell to conduct the hearing. Moreover, the Minister of Justice, at the request of the Court, provided the services of counsel,

Mr. Gerald Pugh to act on behalf of the children. A second respondent, Mr. Danny Vezina, was represented by counsel of his own choosing, Ms. Shannon Doran. Neither Mr. Pugh nor Ms. Doran participated in the issues raised by the within motion.

10. At the hearing of the custody application, the Respondent called testimony and presented affidavit evidence from fifteen persons, including expert witnesses with reports and assessments. The hearing was adversarial by its nature. The Appellant was not familiar with the Evidence Acts.

10 (p. 151)

11. In June of 1995, the children were returned to the care of the Appellant who is financially destitute and a recipient of welfare.
(p. 82.2 and p. 153)

12. In New Brunswick, domestic legal aid is provided within a program under the direction of the Minister of Justice. Until 1993 both criminal and domestic legal aid were administered jointly. However, a major restructuring of the legal aid programs occurred in the spring of 1993 and the administration of criminal legal aid and domestic legal aid fell under different
20 branches. Criminal legal aid came under the control of Legal Aid New Brunswick, an entity established pursuant to the Legal Aid Act and administered by the Law Society of New Brunswick, and domestic legal aid came under the direction of an enhanced support program offered by the Minister of Justice.
(pp.26-82)

13. On behalf of the Minister of Justice, the administration of domestic legal aid program falls within the responsibilities of the Executive Director of Court Services. The Province is divided into six regions each of which is staffed by a Regional Manager of Court Services who report to the Executive Director of Court Services. (Pp.26-82)

14. The program has as its basic tenants the following principles: (1) Everyone who needs a lawyer for the purposes of support orders is provided with the services of the Family Court Solicitor who is paid by the Minister of Justice to provide the legal services offered by the program. (2) If there are allegations of abuse, then a party will be able to utilize the services of the Family Court Solicitor for all legal matters that may arise between the two parties, including custody, support, and divorce proceedings.
(pp. 26-82)

15. However, to avoid any apprehension of bias in the Family Court Solicitor, who is paid by the Minister of Justice, where the issue is the application by the Minister of Health and Community Services for a permanent guardianship order, the provision of legal services is shifted to Legal Aid New Brunswick, an entity whose funding comes from the Minister of Justice, the Law Foundation of New Brunswick and the Law Society of New Brunswick. Upon application to Legal Aid New Brunswick, a respondent will be provided with a legal aid certificate which the respondent can then take to a solicitor of their choice and have the costs of representation covered up to a limit of $1,000.00

16. In an attempt to remain concise in this factum, the Appellant accepts the facts as it concerns the statutory framework and practice of the domestic legal aid plan operative within New Brunswick as set out by the trial judge and as accepted by the Court of Appeal of New Brunswick.
(pp. 86-92 and pp. 118-120)

17. It is further acknowledged that all Justices who have heard the matter to date have concluded that s. 7 of the *Canadian Charter of Rights and Freedoms* does not provide for a general right to state funded counsel, but rather such a right is based on the protection of fundamental fairness of procedure to be determined in the circumstances of each case.
(pp. 109, 116-117, 145)

18. Three justices of the five panel members of the Court of Appeal of New Brunswick held that the rights of a parent to raise her children are not subsumed within the interest protected by the *Charter*.
(p. 109)

19. Mr. Justice Bastarache, on behalf of himself and Mr. Justice Ryan, ruled that the rights of parents are included among the interests protected by s. 7 and that the failure to provide the relief sought by the Appellant in the present matter was contrary to the principles of fundamental justice within the meaning of s. 7 of the *Charter*.
10 (pp. 145, 154)

PART II. ISSUE

20. The following constitutional questions arising from this case were stated by the Chief Justice of Canada on the 9th day of April, 1998:

Question 1

> In the circumstances of this case, did the failure of the Legal Aid Act, R.S.N.B. 1973, c. L-2, or the government of New Brunswick under its Domestic Legal Aid Program, to provide legal aid to respondents in custody applications by the Minister of Health and Community Services under Part IV of the Family Services Act, R.S.N.B. 1973, c. F-2.2, constitute an infringement of s. 7 of the *Canadian Charter of Rights and Freedoms*?

Question 2

> If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

21. In the event this Honourable Court finds that the answer to Question 2 is No, then some determination of the appropriate remedy must be made.

PART III STATEMENT OF ARGUMENT

22. It is important to note in the present case that, unlike many disputes of a civil nature before the Court of Queen's Bench of New Brunswick, Family Division, the proceedings in this matter were initiated by the state through the Minister of Health and Community Services. Taking children from their lawful parents is, on its face, a most significant form of government intrusion. Albeit, many cases illustrate that the preservation of the best interests of the children require such action. However, one is forced to query whether the action of the state in a proceeding such as this ought to be held up to the overriding scrutiny of the *Charter*, in particular s. 7.

23. Throughout this process, it has been the central aim of the Appellant to make it clear to this Honourable Court and the Courts below that the arguments advanced are not intended to focus exclusively on the aims and wishes of the Appellant or her rights under the *Charter* as mother of the children at issue. Rather, the arguments are advanced for the primary purpose of ensuring that, through a process such as this, what truly is in the 'best interests of the children' will be determined, particularly where there are competing positions on what will achieve that common goal and one of those competing positions is being advanced by a parent.

24. It is submitted that a parents' right to have, nurture and raise children is at the core of our way of life. With parental rights to have children comes the corresponding duties to care for one's children in a manner that will foster the emerging dignity, self-respect and self-worth of both the children and parents. In order to do so, our system has evolved upon the premise that these duties as best encouraged by limiting the interference of the state and fostering privacy within the family unit. In fact, the intrusion of the state into the family circle has been aimed at developing programs and support mechanisms to bring about security of the family unit in an attempt to lift the society as a whole.

25. As set out in the Preamble to the *Family Services Act*, S.N.B. 1980, c. F-2.2 the basic and fundamental freedoms of children and families are intertwined and given the protection from the invasion of privacy and interference by the state.

> **WHEREAS it is recognized that the basic rights and fundamental freedoms of children and their families include a right to the least invasion of privacy and interference with freedom that is compatible with their own interests and those of their families and of society; and**
>
> **...**
>
> **WHEREAS it is recognized that the rights of children, families and individuals must be guaranteed by the rule of law and that the Province's intervention into the affairs of individuals and families so as to protect and affirm these rights must be governed by the rule of law; ...**

26. However, when well founded concerns arise as to whether the child is being adequately cared for or treated, government is empowered by the *Family Services Act* to intervene in the hopes of doing what is best for the child. This intervention can include removing the children from the care of the parent remembering at all times that such action must conform to what is determined to be in the best interest of the children.

27. This appeal focuses two parts: i) Does a parent's right to raise their children fall within the security and liberty interests as set out in s. 7 and; ii) Does the denial of the relief sought by the Appellant in the circumstances of this case amount to a process which does not conform with the
principles of fundamental justice?

28. Section 7 of the *Charter* provides as follows:

> **7. 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.**

29. It appears that the rights guaranteed by s. 7 comprises two components:

1. **The right to life, liberty and security of the person;**

2. **The right not to be deprived thereof except in accordance with the principles of fundamental justice.**

30. The Appellant's analysis will begin by establishing that the right to raise one's children is a protected right within s. 7.

10

31. It has been accepted by this Court that in order to preserve human dignity, foster self-worth and self-determination, we must be accorded a level of personal autonomy from the state sufficient to allow for individual decisions of a fundamental nature in our own lives.

R.(B.) v. C.A.S. of Metropolitan Toronto, [1995] 1 S.C.R. 315 and R. v. Morgentaler, [1988] 1 S.C.R. 30

32. To that end, a woman has a basic right to give birth to a child. It must therefore arise as a corollary to said right, that raising one's child, caring for and making fundamental
20 decisions affecting the child, is also accorded the same level of deference. To not recognize this logical extension of the right to bear a child is to leave a basic and fundamental tenet of our social system void. By definition, custody of one's child must also be seen as an essential tenet of our social system.

33. While we no longer hold to the view that children rank lower in a hierarchy to their parents, Blackstone in his Commentaries wrote that after the relationship between a wife and husband, the fundamentally profound relationship between parent and child must be recognized.

> **The next and the most universal relationship in nature, is**
> 30 **immediately derived from the preceding, being that between parent and child.**

Blackstone, Commentaries on the Laws of England, (Garland Publishing,

New York, 1978) at para. 446

34. For centuries the common law has recognized the nature of the parent-child relationship and that the appropriate place for the nurturing of that relationship is within the home. Thus, Mr. Justice Rand in Hepton v. Matt [1957] S.C.R. 606 writes at p. 607:

> **It is, I think, of utmost importance that questions involving custody of infants be approached with a clear view of the governing considerations. That view cannot be less than this: *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 that fundamental natural relationship be severed.**
>
> **-and-**
>
> **The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents; when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on the broadest social and national grounds, justified in displacing the parents and assuming their duties.**
>
> **This, in substance, is the rule of law established for centuries and in the light of which the common law Courts and the Court of Chancery, following their differing rules, dealt with custody. [emphasis added]**

35. The Appellant does not want to leave the impression that rights are asserted in a vacuum, but rather acknowledges the duties that arise in relation to those rights. Moreover, the Appellant does not challenge the duty and right of the state to intervene in the parent-child relationship when warranted in an attempt to protect the overriding interest being the protection of the interests of the child.

36. In R. v. Jones [1986] 2 S.C.R. 284, the Supreme Court had occasion to consider the issue of the scope of a s. 7 right as it related the right of a person to raise and educate their own children. Mr. Justice La Forest saw it unnecessary to speak directly to the issue since the Appellant in that case was dealing with a legislative provision that did not, in his view, violate the principles of fundamental justice. However, he did cite a passage from Meyer v. State of Nebraska, 262 U.S. 390 (1923) at page 301 where the following statement is set out:

> **While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without a doubt, it denotes not merely the freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the pursuit of happiness of freemen.**

37. Madame Justice Wilson writing a dissenting judgement in R. v. Jones *supra* did not agree that the legislative provisions at issue were in accord with the principles of fundamental justice. She does however, give consideration to the scope of the liberty interest involved where at p. 319 she writes:

> **I should perhaps make clear at this point that while I accept the appellant's submission that the liberty interest under s. 7 includes the right as a parent to bring up and educate one's children, I do not agree with him that it is a right to bring up and educate one's children "as one sees fit". I believe that is too extravagant a claim. He has the right, I believe, to raise his children in accordance with his conscientious beliefs. The relations of affection between an individual and his family and his assumption of duties and responsibilities toward them are central to the individual's sense of self and his place in the world. [emphasis added]**

38. Put simply, the Appellant herein asserts a right to bring up her children and this right is within the scope of the right to liberty set out in s. 7 of the *Charter*. The Appellant acknowledges that this right is not absolute and is subject to the type of considerations set out by Mr. Justice Rand. However, the Appellant submits her right cannot be usurped unless in accordance with the principles of fundamental justice. As Mr. Justice La Forest notes in R. v. Jones, the provinces are entitled to develop the administrative policies to advance its legitimate aims, but that structure, so far as it may conflict with the interests of an individual, must be in accordance with the principles if fundamental justice.

39. A recent affirmation of the principle that a parent's right raise their children is part of the protected liberty interest is s.7 was cited by Madame Justice Athey in the Court below where at p.98 of the Case on Appeal, she cites the following portions of the decision of LaForest, J. in B.(R.) v. Children's Aid Society of Metropolitan Toronto (1995) 1 S.C.R. 315 at pp. 370 and 372 respectively,

> **...the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent...**
>
> **This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified. In other words, parental decision-making must receive the protection of the Charter in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the Charter.**

40. In the present case, the Respondent Minister of Health and Community Services, in an attempt to secure the best interests of the children at issue, sought to interfere with the Appellant's liberty right in a severe fashion. Recognizing that the liberty interest of the Appellant was at stake Madame Justice Athey at p. 98 of the Case on Appeal asks;

> **The question then arises whether the deprivation is made in accordance with the principles of fundamental justice when such a parent who does not have the means to retain a lawyer wishes to do so.**

41. The Appellant submits that the right to security as contemplated by s. 7 plays an overlapping role with the notion of liberty. This Court has held that the right to security of the person is intimately linked to the concepts of dignity, autonomy and self-respect. Moreover, this Court has accepted that, in the criminal context, psychological stresses resulting from state action constitute a breach of the security of the person. A rupture of the parent-child relationship resulting from state apprehension of the children will invariably result in the psychological stresses akin to those observed in the criminal context. Not only will such stress impact on the parent, but undoubtedly in some manner impact upon the psychological stability of the child.

R. v. Morgentaler, *supra* at pp. 56-57
(per Dickson, C.J.C.)

42. Mr. Justice Bastarache, writing in dissent in the Court below, notes the role played by the various international treaties and declarations as aid to interpreting the scope of s. 7. This is because the norms found in these documents illustrate what is best about a society founded upon the freedom, democracy and the overall rule of law. In Slaight Communications v. Davidson [1989] 1 S.C.R. 1038 at pp. 1056 Dickson, C.J.C. notes,

> **The content of Canada's international human rights obligations is in my view an important indicia of the meaning of the "full benefit of the Charter's protection." I believe that the Charter should generally be presumed to provide protection, at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.**

43. Illustrative of this commitment is the Universal Declaration of Human Rights, signed December 10, 1948, G.A. Des. 217A (III), U.N. Doc. A/810 (1948), which notes in article 12,

> **No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attack upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.**

10 44. See also the citation by Mr. Justice Bastarache to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 at p. 129 of the Case on Appeal. It is also worth noting the importance placed upon the family in the preamble to the Canadian Bill of Rights, R.S.C. 1985, Appendix III.

Fundamental Justice

45. What constitutes the full scope of **fundamental justice** cannot, with finality, be determined. In our system of justice, such determinations are made within the adversarial system. This system of adjudicating disputes connotes two adversaries
20 waging battle on a playing field presided over by an impartial judge who determines the outcome. Courts are empowered with an inherent discretion to ensure that the resolution is arrived at within the bounds of procedural fairness. While debate exists as to whether such a system is appropriate for determining issues of custody and the like, it is the one we have and the Appellant submits that due to the serious nature of the issues decided, it is imperative that the procedure be fair and just.

46. At page 101 of the Case on Appeal, Madame Justice Athey notes that the hearing was estimated to last three days, and in fact did. She further describes the extent of
30 the evidence that was presented by the Minister of Health and Community Services (Minister of Health). Included were reports and viva voce evidence given by

experts retained by the Respondent Minister. The Minister of Health and Community Services was provided by the Minister of Justice with a Crown Prosecutor to present the case on behalf of his behalf. At the Court's request, the Minister of Justice retained the services of Mr. Gerald Pugh, Esq. to represent the children. The father of two of the children was able to retain his own counsel. The Appellant was left to fend for herself.

47. At page 101 of the Case on Appeal, Madame Justice Athey makes the following conclusion:

10

> **There has been no suggestion that Ms. Godin lacks the capacity to understand the allegations made by the Minister or that she is unable to communicate her position to the Court. In these circumstances I am not convinced that she is not able to adequately state her case or that provision of counsel to represent her is essential to a fair trial. I conclude therefore that her parental liberty interest will not be violated by the lack of state funded legal representation.**

20

48. With respect to the Court below, such a conclusion does not accord with the evidence of the Appellant cited by the learned judge of first instance at page 87 of the Case on Appeal. The Appellant's evidence, which was unchallenged, noted her concern that she could not adequately place her case before the Court. Moreover, Mr. Justice Bastarache at pp. 151-153 of the Case on Appeal recites portions of the original decision on custody pertaining to the evidence of psychologist Ms. Gibson which calls into question the ability of the Appellant to represent herself in the present matter. The evidence was accepted by Madame Justice Athey to justify removing the children from the home, but apparently not to establish the

30 Appellant's inability to adequately present the case she wished to present or challenge that of the Minister of Health.

49. In effect, the learned judge is saying that in a hearing such as this, the Appellant could adequately present her case against the resources, legal and otherwise, of the Minister of Health. Moreover, it begs the question, 'Why have legal aid programs at all?'. Surely, legal aid programs are intended to provide an essential service to those caught in the legal system who lack the resources to retain there own counsel.

50. The question also arises, based on Madame Justice Athey's conclusion, as to why the Minister of Health need counsel if a welfare mother, such as the Appellant, does not?

10

51. As noted at the outset of this argument, the child's perspective, the vindication of his/her rights relies profoundly upon the proceedings being fundamentally just. This is so because if the Appellant's abilities and skills to raise the children are to be fully and properly assessed in an adversarial setting, the parent's position must be meaningfully and effectively presented. Indeed without a full opportunity by the Appellant to be a meaningful participant, the children may in fact be deprived of a fair hearing into the best interests at stake.

52. The request of the Appellant for counsel must be kept in perspective. She did not
20 ask for funds to retain experts who may provide a different point of view than those retained by the Minister of Health. Nor was she asking for the resources to provide other professionals in the field of child care to present evidence as to why this family ought to have remained together. All she wanted was a lawyer to assist her in challenging witnesses and presenting before the Court law and argument as to why the best interest of the children would be served by remaining within the household.

53. One can scarcely imagine the emotional turmoil of a parent facing a second consecutive custody application knowing her children may be gone for a further six months. How

could she under the circumstances question the evidence offered by state funded experts? How could she properly examine and cross examine witnesses? How could she make reasonable and timely objections? How could she argue the relevant legislative provisions? How could she give an objective assessment of the arguments made by opposite counsel? How could she assist the judge?

54. To argue that fairness would prevail, in the circumstances of this case, where the Appellant faced a three day hearing over such an emotional issue as the custody of her children, and facing three barristers of experience with the resources of the Minister of Health and the Minister of Justice, is with respect, untenable.

55. Justice in our tradition, is dispensed by a court system which is founded upon the adversarial model. Our laws over the centuries have become so complex that the role of advocate developed to fulfil a representative function on behalf of litigants by people trained in the art of law and advocacy. As Sir Geoffery Cross and G. D. G. Hall write in their text The English Legal System (4th) (Butterworths, 1964), "Some care was taken to ensure that unqualified persons should not practice. Thus a statute in 1402, after lamenting that many attorneys were 'ignorant and not learned in the law,' required all candidates for inclusion on the roll be examined by the judges." The Appellant, being unable to retain legal counsel to represent her interests in keeping the family together, and the failure of the state to ensure that a basic level of legal representation is provided for her, would have been unable to be a meaningful participant in our justice system. If she could not be a meaningful participant in the legal system, why make her a party to the action or give her notice of the proceeding at all?

56. Put simply, the denial of legal aid to a parent such as the Appellant living in poverty renders illusory their participation in the process. Where the *Charter* creates rights to effective participation, they must be real in substance. In the absence of genuine

participatory rights, the law in general, and the "custody" application process in particular are brought into disrepute and tend to become meaningless. Not only is confidence lost in the legitimacy of the legal system, but the balanced determination of the child's best interests becomes doubtful. From both the parent and child's point of view, the process loses meaning.

57. As indicated earlier, it is not simply a question of fairness for the Appellant. Rather, the provision of counsel for the parent in this case is a prerequisite to ensuring that the best interests of the children are properly ascertained. Stated differently, in the absence of counsel for the Appellant, the process may take on the appearance of a one-sided proceeding wherein the state decides the best interest of the children.

58. Moreover, and perhaps most significantly, the Appellant's lack of legal representation would mean that the best interests of the children will be more difficult to discern, particulary when an adversarial model is the field on which these proceedings are played out. As we are all taught in law school, only through a system of competent adversaries, presenting to the Court a variety of points of view, challenging the evidence, and providing the Court with a thoughtful assessment of the myriad of legal precedents, will the finder of fact be able to assess fairly what may be opposing interests and make a determination as to what may be truly best for the children. Absent legal representation by the litigants in the present case, the Court would have been left to assess the evidence as presented in a manner which, by its nature perhaps more than by design, is biased in favour of the Minister of Health. The best interests of the children required that the Appellant be provided with legal services as an aid to providing a balanced picture of the evidence upon which the Court can adjudicate. The unspoken assumption of the Minister's that, `If the Minister thinks it is best, then it is', must be held up to scrutiny and in the end, that presumption may or may not be correct.

59. The words of Lord Denning can be used to supplement the importance of the role of counsel asserted by the Appellant. In Pett v. Greyhound Racing Association Ltd., [1968] 2 All E.R. 545 (C.A.) at 549 Lord Denning writes:

> **It is not every man who has the ability to defend himself on his own. He cannot bring out points in his own favour or weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting intelligence. He cannot examine or cross examine witnesses. ...I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitor.**

60. In Ref. Re s. 94(2) of Motor Vehicle Act (B.C.) [1985] 2 S.C.R. 486, Mr. Justice Lamer, as he then was, considers the content of `fundamental justice'. He writes at p. 503,

> **It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice". In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, *i.e.*, ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.**

61. And further, the learned Justice writes at p. 512,

> **Consequently, my conclusion may be summarized as follows:**
>
> **The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.**

> **Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.**
>
> **Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also in the other components of our legal system.**

62. In essence, the Appellant submits, Chief Justice Lamer is directing our attention to sections 8 to 14 of the *Charter* noting the fundamental principles that have been enshrined relating to the criminal justice system as means to see what types of fundamental principles might be at play in non-criminal proceedings. The basic tenets of our legal system as set out in ss. 8 to 14 are to be used as guideposts in determining what rights are contained within the phrase `principles of fundamental justice'. It is s. 10(b) which sets out in the criminal realm the right to retain and instruct counsel.

63. What is perhaps easily forgotten is that such a fundamental part of our judicial process, reliance on counsel, is something that the Minister of Justice was willing to provide to the Minister of Health in this case through his staff solicitors, but not willing to afford the same privilege to the Appellant who, had no means of providing counsel, even through the system of domestic legal aid. The Minister of Health, one may assume, has the resources to provide his own counsel, but relies instead on the counsel provided by the Minister of Justice to put forward his case. Surely, the very existence of legal aid programs at all confirms counsel's essential and fundamental role in an adversarial system.

64. In a document entitled Legal Aid and the Poor: A Report by the National Council of Welfare, Winter 1995, Minister of Supply and Services Canada, the authors set out the following observations at page 3:

> **For people who have no money to pay court fees or hire a legal expert to advise and represent them, the right to subsidized legal services is the most fundamental of all rights. What use is a Charter of Rights and Freedoms guaranteeing your right to life and liberty, freedom of speech or equality before the law, if you cannot defend yourself against unjust accusations or discriminatory treatment?**

65. Put simply, the denial of legal aid to a parent living in poverty renders illusory their participation in the process.

66. Perhaps most important on this point is the contents of the document marked as Exhibit "K" to the Affidavit of Mr. Carrier, Executive Director of the Law Society of New Brunswick. Exhibit "K" contains a report entitled A Proposed Model for "Domestic Legal Aid" prepared by the New Brunswick Department of Justice, Research and Planning November 9, 1994. The 4th page of text of that report found at page 67 of the Case on Appeal contains the following:

> **The selection of an appropriate domestic legal aid model depends on the choice of guiding principles for legal aid services in New Brunswick. The search for principles underlying the proposed model requires an identification of gaps or unmet needs.**
>
> **The equality rights in the Charter provide for equality "before and under the law" as well as "equal protection and equal benefit of the law", without "discrimination". This province is committed to the principle of access to justice. All individuals, regardless of economic means, must have the right to fair and equal access to the justice system.**

> **<u>While legal assistance is a right</u>, different clients may need different types and levels of services. Some legal services may be competently provided by persons who are not lawyers at all.**
>
> **<u>A fundamental principle of the common law system is the right to retain, instruct and have the assistance of legal counsel. The adversarial common law legal system works best when both sides have a lawyer.</u> [emphasis added]**

67. The Appellant could not state her case with any greater clarity than is stated in above quote which seems to track the very language of the *Charter*. As the exhibit note, the adversarial system works best when both sides have a lawyer. Can there be any type of proceeding wherein the system must be at its best than in proceedings such as this?

68. In the present case, the Appellant relies on social assistance to meet the economic needs of herself and family. The Minister of Health sought for a second time to remove her children from her home for a period of up to six months. If they had attempted at that stage to remove the children permanently through a guardianship order aid would have been provided.

69. It must be remembered that the Minister of Health had been successful earlier in obtaining a custody order. This was the Minister's second consecutive order totaling up to one year. In such situations, the reality of practice is that by the time the Minister of Health has been granted successive custody orders there is decreasing expectation of the children being reunited with the family. With each successful order, the next one becomes easier to get. This is recognized in a document prepared by the New Brunswick Department of Justice, Research and Planning section contained in the affidavit of Michel Carrier found at pp. 34-35 of the Case on Appeal:

> **A major concern raised repeatedly by lawyers was the lack of coverage for parents of children who are the subject of custody**

applications by the Province. The current coverage is limited only to guardianship applications, which is the final stage in the removal of children from the care of their parents. This was widely considered to be "too little, too late" and a waste of limited funds at that point. Without legal representation at the earlier custody hearings prior to the guardianship application, little effective assistance can be provided to the parties. At that point, the child may have been out of the home for up to eighteen (18) months.

10

...

CONCLUSION:

- The present family violence criteria for eligibility for legal aid as used at present is difficult to apply and confusing to both clients and the bar. It may result in inconsistent provision of legal aid services.

20

- Limiting legal aid to Guardianship Applications by the Province while excluding the initial custody applications is ineffective aid to the parents involved.

70. The Appellant is treated differently from others who are entitled to state funded counsel even in proceedings where the state is not a party. The Appellant is also treated differently by the Minister of Justice in comparison to the Minister of Health for whom counsel was provided.

71. The Minister of Justice in conjunction with the Law Society of New Brunswick
30 and Legal Aid New Brunswick has fashioned a mechanism for providing domestic legal aid to certain persons who request it. If a separating spouse comes to the Family Court Services seeking the aid of a lawyer for the purposes of support then that person is provided with the services of the Family Court Solicitor. If the separating spouse is the victim of abuse, the Family Court Solicitor again is available to provide legal representation for all phases of the legal proceedings including custody. If a parent is named a respondent in a Minister's application for

the permanent guardianship of their child, such a respondent is entitled to be granted a legal aid certificate issued by Legal Aid New Brunswick. If however, as in the present case, the Minister is seeking a six month custody order then there is no meaningful legal help available other than Duty Counsel provided under the domestic legal aid program supplied by the Minister of Justice.

72. What limited help is available in situations such as the present is the provision of duty counsel for the purposes of advising a respondent on the initial appearance where either the respondent consents to the application or a date for the hearing is set. Therein lies an irony in the provision of even that limited form of duty counsel assistance: the respondent parent is entitled to duty counsel for the initial appearance where she may at that stage consent to the application, but if she wishes to challenge the Minister's application and put the Minister's case to the test, she is left to fend for herself. In other words, in the Appellant's view, it is as if the Minister of Justice says `We will provide you with duty counsel if you intend to consent to the application, but if you challenge the application, you get nothing'.

73. That the system contains a gap cannot be disputed. The government may well argue that if they had the money they would have provided a solicitor to the Appellant in the present case. The reality is however, that the government has undertaken to offer a program of domestic legal aid, and they are in the position to provide the funding to offer that program in a manner which does not violate the Appellant's *Charter* rights.

74. But most important, the Appellant submits, is the fact that she is called upon to answer in a proceeding initiated by a Minister of the Crown and this places an onus upon the Crown to provide her with some means to have counsel represent her in response to the application. Quite simply justice requires it and so do the children at issue.

75. The parent in a proceeding such as this has an argument that, on its face, must be adequately placed before the court. The determination of the best interests of the children require it. This means more than a parent standing before a judge and asserting that they are competent as a parent. There ought to be, and in fact by implication is, a presumption that the best place for children to be in the home. To say to a welfare mother, who is dependent on the state for many of the necessities of life, that her children are to be taken from her and she can come to court on her own to challenge the Minister's claim calls into question the integrity of the justice system. The Appellant, in this case, and in others of like circumstance, must be able to be meaningful participants in the process.

10

76. The aim of the domestic legal aid program is the protection of legal rights, as it is also in criminal legal aid. The Appellant, because of an administrative decision denying coverage on Ministerial applications for custody while granting legal aid services to others, is not being given the opportunity to have her rights, and that of her family's, protected in a fashion consistent with the intents of the *Charter*.

77. The Nova Scotia Supreme Court Appeal Division in R. v. Rockwood (1989) 91 N.S.R. (2d) 305 (N.S.S.C.A.D.) discusses some of the *Charter* issues involved in the provision of criminal legal aid. The purposes behind criminal legal aid are
20 analogous to those involving the custody of children in that they both deal with basic notions of our society; integrity of the family and preservation of one's liberty and security. At page 308 Chipman, J.A., writing for the court, begins a discussion of legal aid in the context of whether a person is entitled to have the lawyer of their choice or be provided with competent counsel. The learned judge writes,

> **[13] It has been said that Legal Aid, in its broadest sense, has existed as long as the law itself. There is a long-standing tradition in the Bar of service given either without charge or for less than it is worth to those unable to pay or pay**
> 30 **adequately for a criminal defense. In particular, members of the Bar have responded, when called on by the court in the**

> **exercise of its inherent jurisdiction to do so, to defend indigents appearing without counsel. Such people have, over the years, been defended and defended well, often by inexperienced counsel. As the volume and complexity of the criminal litigation increased, this system was inadequate to deal with the need...**
>
> **[14] In response to this inadequacy, Legal Aid programs were established throughout Canada.**

10

78. Chipman, J.A. continues at paragraph 17 and quotes in part the following passage from R. v. Rowbotham, (1988) 25 O.A.C. 321 (C.A.); 41 C.C.C. (3d) 1 (C.A.) at p. 65,

> **In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases not**
20 **falling within provincial legal aid plans, ss. 7 and 11(d) of the Charter, which guarantees an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial. [original emphasis]**

79. The Appellant submits that even though she is not facing a criminal charge the principle of fairness and representation by counsel are recognized as essential
30 qualities of our legal system, and that the *Charter* can be the basis of the Appellant's prayer for relief. Removing children from a home is as much an affront to social dignity as being tried on a criminal charge filed by the state.

80. Unlike Rockwood, the Appellant in this matter was not looking to hire the lawyer of her choice and have the government cover the bill. All she prayed of the Court is that she be given a lawyer, or funds necessary to retain one, in order that the

government's intrusion into her family does not go unchallenged in furtherance of the best interests of her children and her own.

81. While the provision of legal aid in New Brunswick is covered in some degree by the Legal Aid Act it is not the Act which dictates who gets legal aid and who does not. That decision rests in the hands of the Department of Justice, Legal Aid New Brunswick and the Law Society of New Brunswick. It is not this Act that is being challenged, just the unfairness and the discriminatory nature of the administrative decision to provide legal aid services of some kind in most other domestic cases, but not the present.

82. The Appellant submits that in the circumstances of this case, the answer to the stated question 1 is in the affirmative.

If a *Charter* Violation Has Occurred, is it Justified Under s.1 of the *Charter*?

83. Section 1 of the *Charter* provides as follows:

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

84. The Appellant submits that three points arise for consideration in a s. 1 inquiry:

i. Are the limits prescribed by law?

ii. Are the limits reasonable?

iii. Can the limits imposed be justified in a free and democratic society?

85. An affirmative answer on all three points must be attained before a s. 1 argument succeeds. If a negative answer is given to one or more of the three points, s. 1 fails to provide the effect desired by the Respondent.

PRESCRIBED BY LAW

86. The Appellant submits that the limitation restricting the provision of legal aid to the Appellant is not a limit prescribed by law.

87. The determination of the scope of the provision of legal aid appear to be a matter more akin to an administrative decision than a limit prescribed by law. Reference to s. 12 of the Legal Aid Act makes clear the administrative power of the Provincial Director to determine what may or may not be covered. The Legal Aid Act authorizes the provision of such services, but does not expressly exclude the granting of legal aid to matters of Ministerial custody applications.

88. R. v. Therens, [1985] 1 S.C.R. 613 states, among other things, that the limit will be prescribed by law if it is *expressly* provided for in the statute or regulations, or as a consequence of the operational necessity of the statue the limit must be inferred.

89. It must first be noted that the limit, being the exclusion of aid in Ministerial custody applications, does not arise expressly. Does it arise by implication in the sense that such a limit is essential for the operational requirements of the system? The answer could be in the Respondents' favour if the conclusion was that to provide legal aid to the Appellant in this case would render the operation of the domestic legal aid regime impossible. Such a conclusion is, the Appellant submits, untenable.

90. The decision to deny legal aid or to provide some other form of legal representation was an administrative decision. Administrative decisions are not protected under s.1. Professor Joseph Magnet in his text Constitutional Law of

Canada: Charter of Rights and Freedoms (3d) Vol.2 at page 186 makes the following comments on this point. He writes,

> **Attention may profitably be concentrated on the words "prescribed by law". Taken as their widest to include texts of law (statutes, regulations, orders, etc.) and rules of the common law, still, the words have discernible boundaries. They do not include administrative acts. Section 1 guarantees Charter-protected freedoms subject *only* to limits "prescribed by law". It is difficult to resist the suggestion that administrative acts - for example, the failure of police to give a section 10(b) warning - can never limit Charter rights. On this argument, as against administrative action, Charter-protected freedom is absolute (see *R. v. Therens*, [1985] 1 S.C.R. 613). [underlined emphasis added]**

91. On the s. 1 argument as it relates specifically to the s. 7 guarantee, Lamer, J. as he then was, notes the following in Ref. Re s. 94(2) of the Motor Vehicle Act (B.C.) [1985] 2 S.C.R. 486 at 518,

> **But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. S. 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like. [emphasis added]**

92. The Appellant submits that the stigma attached to a criminal conviction or imprisonment is equally matched by the stigma of being declared an unfit parent as noted by Mr. Justice Bastarache at p. 153 of the Case on Appeal.

REASONABLE LIMITS

93. As a justification for denying the Appellant her relief, the Respondents argued below that with limited financial resources, some sacrifices must be made. The Appellant submits that her *Charter* rights are an example of those sacrifices. In Singh v. Canada (Min. of Employment and Immigration) [1985] 1 S.C.R. 177, Wilson, J., considers the issues of the procedures under the Immigration Act as those procedures relate to s. 7 rights. The Court concluded that the procedures under the Act were violative of s. 7 and then went on to consider s. 1. Concerning the cost of providing compliance with the principles of fundamental justice, Wilson, J. writes at p. 220,

> **Even if the cost of compliance with fundamental justice is a factor to which courts would give considerable weight, I am not satisfied that the Minister has demonstrated that this cost would be so prohibitive as to constitute a justification within the meaning of s. 1.**

94. Generally on the issue of cost as a justification for denying a *Charter* right, Wilson, J. in Singh *supra* makes the following comments of note at pp. 218-219,

> **It seems to me that it is important to bear in mind that the rights and freedoms set out in the *Charter* are fundamental to the political structure of Canada and are guaranteed by the *Charter* as part of the supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be "demonstrably justified in a free and democratic society" it is important to remember that courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*. The issue in the present case is not simply whether the procedures set out in the *Immigration Act, 1976* for the adjudication of refugee claims are reasonable to deprive the appellants of the right to life, liberty and security of the person by adopting a system for the adjudication of refugee status claims which does not accord with the principles of fundamental justice.**

> **Seen in this light I have considerable doubt that the type of utilitarian consideration brought forward by Mr. Bowie can constitute a justification for a limitation on the rights set out in the *Charter*. Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so. No doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice but such an argument, in my view, misses the point of the exercise under s. 1. The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles. Whatever standard of review eventually emerges under s.1, it seems to me that the basis of the justification for limitation of rights under s.7 must be more compelling than any advanced in these appeals. [emphasis added]**

95. Unconstitutional behaviour by the state should not be treated or subject to a lesser level of s. 1 scrutiny because of the potential implications for government spending. As Chief Justice Lamer states in Schacter v. Canada (Min. of Employment and Immigration), [1992] 2 S.C.R. 679 at p. 709,

> **This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1**

96. The fact of the matter is that for the poor in particular, the onus on the state to give meaning to one's *Charter* rights comes with implications for increased government spending.

97. It is submitted that in reviewing the policy and administrative decisions of the government, Courts ought to be cautious of deferring *per se* to decisions of a social policy nature. Rather, it is incumbent upon this Court to assess those decisions to determine whether policies to which Constitutional values attach have been given priority over ones that do

not. To fail to apply this type of analysis will be to effectively downgrade the enjoyment of *Charter* rights by persons such as the Appellant who are already disadvantaged and marginalized.

98. As stated by Madame Justice McLachlin in RJR-MacDonald v. Canada [1995] 3 S.C.R. 199 at para. 138,

> **Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.**

99. The real question ought not focus on the cost of compliance with *Charter* rights, but with the cost of noncompliance. In the present case the administration of justice is called into disrepute when the Minister of Health commences a legal proceeding against a person who is heavily dependent upon the government for many services provided to persons of the Appellant's financial means, but refuses to provide legal representation. The Minister of Justice leaves the Appellant legally helpless in the present case while providing legal services in this proceeding to other parties and in fact on a wider scale to parties involved in private disputes.

100. The second, and equally important cost of noncompliance, is that the Court is left to determine the best interests of the child in the absence of an assertive argument as to why the family ought to stay together.

101. The Ministers denial of the relief sought is not reasonable in a free and democratic society and cannot be justified.

102. Should the court come to the conclusion that the Appellant's rights as guaranteed by s. 7 of the Charter have been violated, then this court is obligated under ss. 24(1) of the *Charter* to fashion a remedy which addresses that violation. Subsection 24(1) provides as follows:

> **24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such a remedy as the court considers appropriate and just in the circumstances.**

103. The above remedial section of the *Charter* gives this Court a wide range of options which may be required in the Court's opinion to correct any infringed or denied right of the Appellant. Most significantly, it places a responsibility upon the court and it gives the court the jurisdiction and power to do what it sees as just in the present.

104. This factum has purposely not attempted to analyzed the reasons of Mr. Justice Bastarache in any detailed fashion. The reasons of the learned justice speak with clarity as to his position on behalf of the Court below. Furthermore, this factum has not attempted to dissect the reasons of the majority below as it is apparent they believed they were following the law at it stood at the time. The reality of this case is that at the end of the day, when all the facts and jurisprudence have been considered, the proposition advanced by the Appellant will stand for itself. If the *Charter* does not protect a parent from the

state taking his or her child without a process of fundamental fairness, what good are the sentiments set out in the *Charter*?

105. As to costs, the Appellant wishes to make reference to the disposition put forward by Mr. Justice Bastarache at p. 159 of the Case on Appeal. The Appellant also prays this Court consider the issues of costs taking into account the nature of the issue raised and the evidence set out in the affidavit found at pp.24-25 of the Case on Appeal.

106. The Appellant wishes to bring the Court's attention to the words of Chief Justice Lamer in Schacter *supra* at p.726,

> **Despite the fact that the respondent has lost in this Court, I do not feel it appropriate that he should bear the costs. He did win with respect to the s. 15 issue at trial and the subsequent litigation has, upon the concession of the appellants, centered only on choice of remedy. According to this concession, the respondent by his claim has brought a deficiency to the attention of Parliament which has since been remedied by the repeal and replacement of the impugned provision. He should not be penalized now because of a dispute solely with respect to remedy. I therefore award the respondent his solicitor-client costs.**

PART IV. ORDER SOUGHT

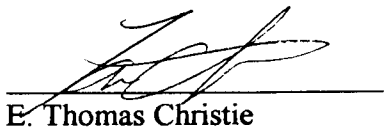
107. The Appellants seeks an order as follow:

i. A declaration that the refusal of the Respondents to provide legal representation to the Appellant was violative of her rights as guaranteed by the *Canadian Charter of Rights and Freedoms*; and

ii. That this Honourable Court, pursuant to s. 24(1) of the *Charter*, make such an order of payment costs to the Appellant by such of the Respondents as the Court deems just, sufficient to cover reasonable fees and disbursements of the Appellant before this Honourable Court and in the Courts below; and

iii. Such further order as this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Fredericton, N.B. this 1st of May, 1998.



E. Thomas Christie
Christie and Associates
Solicitors for the Appellant
Jeannine Godin

NOTICE TO THE RESPONDENT: Pursuant to subsection 44(1) of the *Rules of the Supreme Court of Canada*, this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said Rules, as the case may be.

PART V - TABLE OF AUTHORITIES

Court No. 26005

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK)

BETWEEN: **JEANNINE GODIN,**

APPELLANT

AND: **MINISTER OF HEALTH AND COMMUNITY SERVICES, LAW SOCIETY OF NEW BRUNSWICK, LEGAL AID NEW BRUNSWICK, ATTORNEY GENERAL OF NEW BRUNSWICK and THE MINISTER OF JUSTICE,**

RESPONDENTS

FACTUM OF THE ATTORNEY GENERAL OF NEW BRUNSWICK AND THE MINISTERS OF HEALTH AND COMMUNITY SERVICES AND JUSTICE RESPONDENTS

E. Thomas Christie
Christie and Associates
500 Beaverbrook Court, Suite 301
Fredericton, N.B. E3B 5H4
Tel: 506-459-2383
Fax: 506-459-0007
Counsel for the Appellant

Brian A. Crane, Q.C.
Gowling, Strathy & Henderson
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Appellant

Bruce Judah, Q.C.
Department of Justice, Legal Services
670 King Street, P.O. Box 6000
Fredericton, N.B. E3B 5H1
Tel: 506-453-2514
Fax: 506-453-3275
Counsel for the Respondents,
Attorney General of New Brunswick
And the Ministers of Health and
Community Services and Justice

Brian A. Crane, Q.C.
Gowling, Strathy & Henderson
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Respondents,
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Court No. 26005

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK)

BETWEEN:	**JEANNINE GODIN,**
	APPELLANT
AND:	**MINISTER OF HEALTH AND COMMUNITY SERVICES, LAW SOCIETY OF NEW BRUNSWICK, LEGAL AID NEW BRUNSWICK, ATTORNEY GENERAL OF NEW BRUNSWICK and THE MINISTER OF JUSTICE,**
	RESPONDENTS

FACTUM OF THE ATTORNEY GENERAL OF NEW BRUNSWICK AND THE MINISTERS OF HEALTH AND COMMUNITY SERVICES AND JUSTICE RESPONDENTS

E. Thomas Christie
Christie and Associates
500 Beaverbrook Court, Suite 301
Fredericton, N.B. E3B 5H4
Tel: 506-459-2383
Fax: 506-459-0007
Counsel for the Appellant

Brian A. Crane, Q.C.
Gowling, Strathy & Henderson
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Appellant

Bruce Judah, Q.C.
Department of Justice, Legal Services
670 King Street, P.O. Box 6000
Fredericton, N.B. E3B 5H1
Tel: 506-453-2514
Fax: 506-453-3275
Counsel for the Respondents,
Attorney General of New Brunswick
And the Ministers of Health and
Community Services and Justice

Brian A. Crane, Q.C.
Gowling, Strathy & Henderson
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Respondents,
Attorney General of New Brunswick
and the Minister of Health and
Community Services and Justice

Gary A. Miller
Cox, Hanson, O'Reilly, Matheson
400 Phoenix Sq., P.O. Box 310
Fredericton, N.B. E3B 4Y9
Tel: 506-453-7771
Fax: 506-453-9600
Counsel for the Respondents,
Law Society of New Brunswick
and Legal Aid New Brunswick

Brian A. Crane, Q.C.
Gowling, Strathy & Henderson
2600- 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Respondents,
Law Society of New Brunswick
and Legal Aid New Brunswick

George Copley
Ministry of Attorney General
Legal Services Branch
1001 Douglas Street, P.O. Box 9280
Stn. Prov. Govt.
Victoria, British Columbia V8V 1X4
Tel: 250-356-8875
Fax: 250-356-9153
Counsel for the Intervener,
Attorney General of British Columbia

V. Jennifer Mackinnon
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario K2P 08A
Tel: 613-236-9665
Fax: 613-235-4430
Ottawa Agent for the Intervener.
Attorney General of British
Columbia

Robert Maybank
Department of Justice, Constitutional Law
4th Floor, Bowker Building
9833-109th Street
Edmonton, Alberta T5K 2E8
Tel: 403-422-0500
Fax: 403-425-0307
Counsel for the Intervener,
Attorney General of Alberta

Brian A. Crane, Q.C.
Gowling, Strathy & Henderson
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Intervener,
Attorney General of Alberta

Heather Leonoff
Department of Justice, Constitutional Law
715-405 Broadway
Winnipeg, Manitoba R3C 3L6
Tel: 204-945-0716
Fax: 204-945-0053
Counsel for the Intervenor,
Attorney General of Manitoba

Brian A. Crane, Q.C.
Gowling, Strathy & Henderson
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Intervener.
Attorney General of Manitoba

Arne Peltz
Public Interest Law Center
402-294 Portage Avenue
Winnipeg, Manitoba R3C 0B9
Tel: 204-985-8540
Fax: 204-985-8544
Counsel for the Intervener,
Charter Committee on Poverty Issues

Henry Brown, Q.C.
Gowling Strathy & Henderson
2600- 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Intervener,
Charter Committee on Poverty Issues

W. Glen How, Q.C.
W. Glen How & Associates
Box 4100, Halton Hills
(Georgetown) Ontario L7G 4Y4
Tel: 904-873-4100
Fax: 905-873-4522
Counsel for the Intervener,
Watchtower Bible and Tract Society
of Canada

Eugene Meehan
Lang Michener
50 O'Connor Street, Suite 300
Ottawa, Ontario K1P 6L2
Tel: 613-232-7171
Fax: 613-231-3191
Ottawa Agents for the Intervener,
Watchtower Bible and Tract Society
of Canada

Carole Curtis and Anne Horsman
Women's Legal Education and
Action Fund
415 Yonge Street, Suite 1800
Toronto, Ontario, M5B 2E7
Tel: 416-595-7170
Counsel for the Interveners,
National Association of Women and the Law
Disabled Women's Network Canada,
and Women's Legal Education and
Action Fund

Carole Brown
Scott & Aylen
60 Queen Street
Ottawa, Ontario K1P 5Y7
Tel: 613-237-5160
Ottawa Agent for the Interveners,
National Association of Women and
the Law, Disabled Women's
Network Canada, and Women's
Legal Education and Action Fund

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PART I

FACTS

1. These respondents accept the appellant's account of the circumstances giving rise to this appeal but would further distill that account to the following:

a) The appellant is the mother of three children who were three, five and seven years of age when the respondent Minister of Health and Community Services (Health Minister) applied for and obtained an order for custody of the children in April, 1994 and an extension of that order in January, 1995 under Part IV of the *Family Services Act* of New Brunswick.

b) At the material time, the domestic legal aid program in New Brunswick did not provide legal aid to parents, such as the appellant, in custody applications initiated by the respondent Health Minister.

c) As of September 22, 1997, custodial parents in initial custody applications by the respondent Health Minister were entitled to apply for legal aid.

d) Notwithstanding the lack of legal aid, however, counsel for the appellant (who had been appointed duty counsel at the time of the second application by the respondent Health Minister) continued to appear for the appellant.

e) At all material times, the appellant's children were represented by counsel, as were the respondent Health Minister and the father of at least one of the appellant's children.

f) In June, 1995 the children were returned to the appellant.

PART II
ISSUES

2. The primary constitutional question raises for the first time before this Court the issue as to whether s. 7 of the *Charter* mandates the provision of state-funded counsel for indigent parents where a government seeks a judicial order suspending or terminating such parents' custody of their children.

3. It is the position of these respondents that this primary question should be answered in the negative:

a) The suspension or termination of parental rights under Part IV of the *Family Services Act* of New Brunswick can only be made in respect of children whose security and development is in danger;

b) The proceedings in which the issue arises is not an ordinary *lis* between parties but partakes of an administrative character where the paramount consideration is the welfare of the children; and

c) The process contemplated by the *Act* is carefully crafted and accords in every respect with the principles of fundamental justice.

4. Although the stated constitutional question uses the phrase "in the circumstances of this case", these respondents assume that this is not meant to limit the constitutional issue to the facts of this particular case and so avoid the larger issue described in paragraph 2 above.

5. If this Court concludes that the failure of the domestic legal aid program to provide legal aid to custodial parents in applications for temporary custody by the respondent Health Minister is offensive to s. 7 of the *Charter* and cannot be justified under s. 1, it is the position of these respondents that the appropriate remedy would be a

declaration of unconstitutionality and a direction that the respondents administer the domestic legal aid program in a manner consistent with the requirements of s.7 of the *Charter*. Further, it would be appropriate to suspend the effectiveness of the declaration for six months to enable the respondents to explore their options and to formulate an appropriate response.

PART III

ARGUMENT

Introduction

6. The appellant does not appear to contest the legitimacy of the principle that the state may intervene to protect children in certain circumstances. Indeed, she submits that the primary purpose or objective here is to accomplish what is in the best interests of her children. The appellant nevertheless contends that her liberty interests as a parent are unreasonably infringed by an adversarial process in which the government and her children are separately represented but in which she is not. Without such representation, she would not obtain a fair hearing.

Appellant's Factum, para. 23, 35

7. In these circumstances, the position of Justice Sopinka in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 207 is adopted: Unless the appellant can establish a breach of the principles of fundamental justice, it is unnecessary to determine whether a liberty interest under s. 7 was engaged.

1. Statutory Underpinning

(a) Legal Aid Act, R.S.N.B. 1973, c.L-2

8. The legal aid system in New Brunswick is outlined by Justices Athey and Bastarache in their respective reasons and by the appellant in her factum. As well, the respondents Law Society of New Brunswick and Legal Aid New Brunswick in their factum further elaborate and update the domestic legal aid program.

Case on Appeal, pp. 88-92 and 120
Appellant's Factum, para. 12-16

9. In sum, under the domestic legal aid program the following persons may receive legal aid:

a) Victims of spousal abuse;

b) Separating or divorcing couples;

c) Payers of child or spousal support;

d) Custodial parents in guardianship applications by the respondent Health Minister; and

e) Effective September 22, 1997, custodial parents in initial custody applications by the respondent Health Minister.

10. The first two categories are administered and funded by the respondent Minister of Justice under the authority of the *Legal Aid Act*, Part II; the others are administered by the respondent Law Society under s. 2 of the *Legal Aid Act*, with funding provided by the Law Foundation of New Brunswick.

Appendix, Tab A
Supplementary Case on Appeal – Affidavit of Michel Carrier, p. 72-74

(b) The Family Services Act, R.S.N.B. 1973, c.F-2.2

11. It is submitted that the statutory scheme under this *Act* is designed to support a family unit in difficulty and to protect the right of children to an acceptable quality of life. The *Act* provides various procedures for state intervention that accord with the principles of fundamental justice.

Appendix, Tab B

12. The overarching purpose and objective of this statutory regime is outlined in the preamble to which partial reference has been made by the appellant. A consideration of the preamble in its entirety, however, will not only indicate its broader reach, but the Legislature's careful balancing of the interests of the family unit and the wellbeing of children and their rights, *inter alia*, to special safeguards and assistance, by the state, if necessary.

Appendix, Tab B, p. 7, 8
Appellant's Factum, para. 25, 26, 35

13. In recognizing parental rights in relation to the care and supervision of their children, the preamble explicitly recognizes that children should only be removed from parental supervision "when all other measures are inappropriate...."

Appendix, Tab B, p. 7

14. In making the application that gave rise to this appeal, the Minister must satisfy the Court that it is in the best interests of the children to make the order requested. The *Act* defines the "best interests of the child" in s. 1 thereof and in s. 31(1) defines the circumstances in which the "security and development" of a child may be considered to be in danger. Section 53(2) provides that:

> The Court shall at all times place above all other considerations the best interests of the child.

Appendix, Tab B at p. 8, 30

15. Parts III and IV of the *Act* prescribe the options available to a Health Minister where it appears necessary for the state to intervene to protect children – options that involve both consensual and non-consensual parental responses. The orders for which the respondent Health Minister may apply are carefully crafted and adaptable to a variety of different situations. Interventions must be approved by the Family Division of the Court of Queens Bench after a process allowing for the presentation of evidence in which all parties including the children whose best interests are the court's primary concern, are represented. See, for example, sections 31, 32, 44, 46, 48, 51-58.

Appendix, Tab B

16. While these provisions are not limited to life-threatening situations, it is submitted that they encompass circumstances that justify state intervention to ensure the safety, development and wellbeing of a child. The words of Justice La Forest in *Children's Aid Society*, above, at para. 88, are apposite here:

> Although broad in scope, the [legislative regime] is compatible with a modern conception of life that embodies the notion of quality of life.

17. Further, applying the principles espoused by Justice La Forest in *Children's Aid Society*, above, it is submitted that the scheme prescribed by the *Family Services Act* accords with the principles of fundamental justice.

Children's Aid Society, above, at para. 90-94, 101, 102

2. Right to Counsel

18. The appellant contends that in the absence of state-funded counsel she was not a meaningful participant in the proceedings initiated by the respondent Health Minister to suspend or temporarily terminate the appellant's parental control over her children. Because the proceedings are adversarial in nature, they were, in the circumstances, fundamentally unjust and offensive to s. 7 of the *Charter*.

Appellant's Factum, para. 55, 58, 60, 65, 76, 81

19. Section 7 of the *Charter* provides as follows:

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

(a) Relationship with Other Charter Provisions

20. The analytic approach consistently taken by this Court in interpreting *Charter* rights is that a particular right must be placed in its proper historical context and understood in the light of the interests it was meant to protect. This approach was first articulated by Justice Dickson (as he then was) for the Court in *Hunter et al. v. Southam*, [1984] 2 S.C.R. 145 at p. 156:

> I begin with the obvious. The *Canadian Charter of Rights and Freedoms* is a purposive document. Its purpose is to guarantee and to protect, within the limits of reason, the

> enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; **it is not in itself an authorization for governmental action.**
>
> (Emphasis added)

21. Justice Dickson later expands on this approach in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344 when he states:

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. **At the same time it is important not to overshoot the actual purpose of the right or freedom in question,** but to recall that the *Charter* was not enacted in a vacuum ....
>
> (Emphasis added)

See also *R. v. Brydges*, [1990] 1 S.C.R. 190 at p. 202, 203.

22. Another example of this approach can be seen in the case of *R. v. Tran*, [1994] 2 S.C.R. 951 in which the Court commenced its analysis with an examination and review of how an accused's right to the services of an interpreter has historically been applied under the common law and statute, how it has been framed in International and European human rights instruments and the manner in which Americans courts have developed the right inferentially under the United States Constitution. This Court concluded that it was only by considering the legal historical context in which the right has evolved, combined with an examination of the language in which the right is articulated and its relationship to other provisions of the *Charter*, that the purposes of the right and the interests sought to be protected by it can be discerned and its scope begin to be defined.

23. Further, this Court has also made it clear that in interpreting the *Charter*, the package of rights and freedoms guaranteed therein must be seen as a cohesive system in which every component contributes to the meaning and objective of the whole and the whole in turn giving meaning to its parts. In other words, the courts must interpret each section in relation to other related provisions. Were it otherwise, an interpretation of one *Charter* right might imply a violation of another *Charter* right and such a result should be avoided.

R. v. Dubois, [1985] 2 S.C.R. 350 at p. 365.

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24. In discussing the concept of fundamental justice, including the notion of procedural fairness in the context of right to counsel, this Court has concluded that

(a) Save for the possibility of a residual protection of a right to counsel under s. 7 of the *Charter*, the only guarantee of a right to counsel explicitly provided by the *Charter* is s. 10(b) which confers the right on arrest or detention "to retain and instruct counsel without delay and to be informed of that right".

20 (b) The requirements of procedural fairness vary according to the nature of the particular proceedings, but at base, is the entitlement to a fair hearing.

Dehghani v. Canada (Minister of Employment and Immigration), [1993] 1 S.C.R. 1053 at 1075, 1076-1078

(b) Legal, Historical Context

25. Professor Peter Hogg, after a brief review of the *Canadian Bill of Rights*, various
30 international covenants, the jurisprudence of the United States Supreme Court and this Court, concludes that guarantees to state-funded counsel are essentially limited to the circumstance of a person accused of a serious offence attracting the risk of a substantial loss of personal liberty. In such a case, the crucial question is whether or not that person

would receive a fair hearing without counsel. In the final analysis, while it may be considered fruitless to list exhaustively the attributes of a fair trial, the question should be resolved by the trial judge who is best situated to consider the seriousness and complexity of the case, the risk faced by the particular accused person and that person's capacity to deal with the matter before the Court.

> Hogg, Peter W., *Constitutional Law of Canada*, 3rd Ed.
> Scarborough, Ont.: Carswell, 1992 (loose-leaf), Vol. 2 at p. 47-14, 15, 16.
>
> Appendix C
>
> See also *Dietrich v. R.* (1992) 177 C.L.R. 292 (High Court of Australia)

10

26. In the American jurisprudence, the concept of procedural fairness in relation to state-funded counsel flows out of the Sixth Amendment right ("in all criminal prosecutions...the right...to have the assistance of counsel for his defence.") and more significantly for our purposes, the Fourteenth Amendment ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law...."). These Amendments

> require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defence.

20

> *Scott v. Illinois*, (1978) 99 S.Ct. 1158 at 1162.
> Appendix C.

27. In *Santosky v. Kramer*, (1981) 102 S.Ct. 1388, a case which questioned the Fourth Amendment due process evidentiary requirement in proceedings brought in a family court to terminate parents' rights in their three children, the majority concluded that before a state may sever *completely and irrevocably* the rights of parents in their natural child, due process requires that the State support its allegations by at least "clear and convincing evidence" and that the question of fundamental fairness should be assessed on a case-by-case basis. They concluded, therefore, that such an issue must be determined by the trial court and returned the case to that court for its consideration.

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28. Although dissenting on the majority's analysis of the evidentiary requirement, Justice Rehnquist made the following significant observations:

> **State intervention in domestic relations has always been an unhappy but necessary feature of life in our organized society.** For all of our experience in this area, we have found no fully satisfactory solutions to the painful problem of child abuse and neglect. We have found, however, that leaving the States free to experiment with various remedies has produced novel approaches and promising progress.
>
> ...
>
> Due process of law is a flexible constitutional principle. The requirements which it imposes upon governmental actions vary with the situations to which it applies. As the Court previously has recognized, 'not all situations calling for...procedural safeguards call for the same kind of procedure....**The adequacy of a scheme of procedural protections cannot, therefore, be determined merely by the application of general principles unrelated to the peculiarities of the case at hand.**
>
> (Emphasis added)

Santosky v. Kramer, above, at p. 1404, 1406

29. In *Lassiter v. Department of Social Services*, (1980) 101A S.Ct. 2153, an indigent mother whose infant son was alleged to be a neglected child and had been transferred by the state court to the custody of the state department of social services, contended that because she was indigent, the due process clause of the Fourteenth Amendment required the state to provide counsel for her. The U.S. Supreme Court said no: the Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding. Further, the decision whether due process calls for the appointment of counsel is to be answered in the first instance by the trial court, subject to appellate review, thus confirming that the appropriate approach in such circumstances is a case by case analysis.

30. In delivering the opinion of the majority in *Lassiter*, Justice Stewart reviews a number of leading authorities propounding three elements to be balanced in deciding

what due process requires in a particular case: the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. He continues, at p. 2159, 2162:

> We must balance these elements against each other, and then set their net weight in the scales **against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.**
>
> ...
>
> [N]either can we say that the *Constitution* requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate ["due process is not so rigid as to require that the significant interests in formality, flexibility and economy must always be sacrificed,"] **and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.**
>
> (Emphasis added)

31. It is submitted that this in effect is what occurred in this case: Justice Athey, after examining the *Charter* issues raised, concludes as follows:

> It is, of course, desirable that all parents who face the possibility of losing their children either temporarily or permanently following state intervention have legal assistance if they wish. I am unable to conclude, however, that parents can never adequately state their case in the absence of counsel, that any presumption to that effect should exist, or that the representation of parents by counsel is always essential to a fair trial.

After referring to the nature of the evidence presented in support of the respondent Minister's application, Justice Athey continues:

> There has been no suggestion that Ms. Godin lacks the capacity to understand the allegations made by the Minister or that she is unable to communicate her position to the Court. In these circumstances I am not convinced that she is not able to adequately state her case or that provision of counsel to represent her is essential to a fair trial. I conclude,

therefore, that her parental liberty interest will not be violated by the lack of state-funded legal representation.

Case on Appeal, p. 100-101

(c) The Adversarial Model

(i) as an incident to criminal or civil proceedings

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32. The appellant argues that the adversarial model central to our system of justice demands state-funded representation where a party cannot afford legal counsel. In support of this contention the appellant relies upon the decisions of the Courts of Appeal of Nova Scotia and Ontario in *R. v. Rockwood* (1989), 91 N.S.R. (2d) 305 (N.S.C.A.) and *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).

Appellant's Factum at para. 77,78

33. It is submitted, however, that neither of these decisions provides support for the Appellant's contention in this appeal. On the contrary, these authorities support the central
20 finding of the learned judge of the Family Division in this case, namely, that the real issue is whether representation of the accused by counsel is essential to a fair trial.

Case on Appeal, p. 100
Rowbotham, above at p. 66;

34. As pointed out by the Court of Appeal of Ontario in *Rowbotham*, above, prior to the enshrinement of the legal rights provisions in the *Charter*, neither the common law nor Human Rights Codes developed a principle of state-funded legal representation in civil (or criminal) matters. Further, the Court (commencing at p. 61), makes it clear that traditionally, the provision of state-funded legal aid is provided within a narrow compass: A
30 court should only act to ensure that an accused has representation in exceptional circumstances such as those involving serious charges involving possible imprisonment, lengthy and complicated trials and where it has been demonstrated that the accused will not be able to receive a fair hearing in the absence of such representation.

35. In *R. v. Prosper* [1994] 3 S.C.R. 236, at 266-267, Chief Justice Lamer for the Court in reviewing the s. 10(b) right to counsel reminds us that the broader concept of a right to counsel where "the interests of justice so require" was explicitly drafted and rejected:

> In my opinion, it would be imprudent for this Court not to attribute any significance to the fact that this clause was not adopted. In light of the language of s.10 of the *Charter*, which on its face does not guarantee any substantive right to legal advice, and the legislative history of s.10, which reveals that the framers of the *Charter* decided not to incorporate into s.10 even a relatively limited substantive right to legal assistance (i.e., for those "without sufficient means" and "if the interests of justice so require"), it would be a very big step for this Court to interpret the *Charter* in a manner which imposes a positive constitutional obligation on governments. The fact that such an obligation would almost certainly interfere with governments' allocation of limited resources by requiring them to expend public funds on the provision of the service is, I might add, a further consideration which weighs upon this interpretation.

36. In sum, therefore, it is submitted that a review of the common law, the particular legislative history of the right to counsel and the rationale and principles underlying the provision of such representation, it is clear that the nature and quality of the procedural protections to be accorded the individual are not immutable; rather, they vary according to the context in which they are invoked. Thus, while it might be inappropriate for a court to proceed with a trial of an accused person without legal representation in one case, it may not necessarily be inappropriate in another. The central issue remains whether the hearing itself is fair and the interests of the parties, including the state interest, is well balanced.

(ii) in the context of the Family Court

37. It is submitted that the adversarial model has traditionally been modified in *parens patriae* proceedings as well as those of the Family Court in which the primary concern is to

determine if a child is in need of protection and what possible arrangements can be made for that child's future care and development.

38. The appellant places considerable stress upon the advantages of having counsel represent the appellant because of counsel's presumed knowledge of the rules of evidence, skill in cross-examination of witnesses and so forth.

Appellant's Factum, para. 58

39. It is respectfully submitted that this contention misses the point: The adjudicative procedures mandated by the *Family Services Act* are geared to respond to concerns that the security or development of a child may be in danger. The focus is not upon the parents, but at all times and above all other considerations, the best interests of the child.

Family Services Act, ss. 31(1), 51(1) and 53(2)

40. It is trite, but worth stating, that the adversarial model is not an end in itself, but a means to an end. Therefore, the nature of the particular proceedings in which it is exercised determines the "value" of that model. It is submitted that it would be erroneous to contend that because the Family Court inquiry in this case is judicial, all the ordinary principles of a judicial inquiry must be observed. As confirmed by Lord Devlin in *Official Solicitor to the Supreme Court v. K. and Another*, [1965] A.C. 201 at p. 240, 241:

> The jurisdiction regarding wards of court...is an ancient jurisdiction deriving from the prerogative of the Crown as *parens patriae*. **It is not based on the rights of parents, and its primary concern is not to ensure their rights but to ensure the welfare of the children.**
>
> ...
>
> [W]here, in any proceedings before any court, the custody or the upbringing of an infant is in question, the court in deciding that question shall regard the welfare of the infant as the first a paramount consideration. A ward of court case is **not, therefore, an ordinary *lis* between the parties but partakes of an administrative character**...

> In the ordinary *lis* between parties, the paramount purpose is that the parties should have their rights according to law, and in such cases the procedure, including the rules of evidence, is framed to serve that purpose. **However, where the paramount purpose is the welfare of the infant, the procedure and rules of evidence should serve and certainly not thwart that purpose.**
>
> (Emphasis added)

41. Similar sentiments have been expressed by courts in Canada. For example, in *D.R.H. v. Superintendent of Family and Child Services and Public Trustees,* [1984] 41 R.F.L. (2d) 337 (B.C.C.A.), the Court of Appeal of British Columbia reiterated the underlying assumptions of child protection statutes when Justice Hinkson stated at p. 340:

> The Act is intended to deal with children who are in need of protection. While the inquiry provided for by the Act is to be conducted upon the basis that it is a judicial proceeding, unlike some judicial proceedings **it is not an adversary proceeding and there is no *lis* before the court. It is an inquiry to determine whether a child is in need of protection and, as the statute directs, the safety and wellbeing of the child are the paramount considerations.**
>
> (Emphasis added)

New Brunswick (Minister of Health and Community Services) v. R.B., (1991) 113 N.B.R. (2d) 271 (Q.B.-Family Div.);

Re Hopkinson et al. And Superintendent of Family and Child Services et al., (1984) 14 D.L.R. (4th) 105 (B.C.C.A.);

G.(J.P.) v. British Columbia (Superintendent of Family and Child Service), 77 B.C.L.R. (2d) 204 (B.C.C.A.);

Re N.M.H. et al. v. Superintendent of Family and Child Service, (1984), 59 B.C.L.R. 359 (B.C.C.A.);

L.P. v. G.E., (1990) 108 A.R. 125 (P.C.-Family Div.)

42. The appellant contends that in such state intervention proceedings parental interests should be likened to those of accused persons facing serious and complex criminal or similar charges for whom our legal system has provided certain legal rights. It is submitted,

however, that this is simply erroneous. In examining the unique nature of child protection proceedings, Professor Rollie Thompson states:

> Despite these criminal overtones, the child protection proceeding does not simplistically replicate the clash of state and individual which underpins many of the procedural and evidentiary rules of the criminal prosecution, for at the centre of the child protection proceeding is the child, creating a third and dominant set of interests which molds every step in the structure of the proceeding. As in the adjudication of private custody disputes, the disposition of the custody of a child forces the proceeding to be prospective and predictive in orientation, focussing upon the "best interests" of the child with all the indeterminacy and value-laden choices that that legal standard entails.
>
> Thompson, D.A. Rollie, *"Taking Children and Facts Seriously: Evidence Law in Child Protection Proceedings, Part I,"* CJFL [1988, Vol. 7] at 11, 12

43. It is submitted that the principles of fundamental justice, including the right to state-funded counsel must be assessed in the context of the simpler adjudicative proceedings such as those giving rise to this appeal.

44. In this context, it is submitted that it should be recognized that the principles of fundamental justice (including those notions incidental to the adversarial system) should be applied to individual cases using the contextual approach proposed by Justice Wilson in *Edmonton Journal v. Alberta* (Attorney General) [1989] 2 S.C.R. 1326 at 1352-1356.

45. As with the freedom of expression values in conflict in *Edmonton Journal*, it is submitted here that the full adversarial model contended for by the appellant should be moderated in order to yield to the exigencies of the best interests of children in a process that is designed to protect them rather than pass judgment on parental performance in relation to their care and protection.

D.A. Rollie Thompson, above, at p. 24-28

46. Justice Lamer (as he then was) speaking for the majority of the Court in *Reference re s.94(2) of the Motor Vehicle Act* [1985] 2 S.C.R. 486 at 513 stated:

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.

47. In the final analysis, therefore, it is submitted that the Appellant's preoccupation with the adversarial contest ("adversaries waging battle on a playing field" – her Factum, para. 45) is both overblown and inappropriate to the inquiry contemplated by the *Family Services Act* and the *parens patriae* jurisdiction giving rise to this appeal.

48. While these respondents accept the general proposition adopted by the learned judge of the Family Division that when the state seeks to remove children from the care of their parents the parental interests are implicated, it must be recognized that the legislative objective is to place the child under protective care only where its security or development is endangered. Therefore, in carrying out the analysis in the context of the application under the *Family Services Act*, a fair balance must be struck between the interests of the state in protecting children of tender ages and the parental interests in relation to such children. In other words, the parents' rights however expansive cannot reduce or deny the first and paramount consideration, namely, the children's right to life and security.

> *Childrens Aid Society*, above, para. 210, 211, 214, 218-220
>
> *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at pp. 590-594;
>
> *Family Services Act*, s. 51(2).

49. Therefore, it is submitted that it is inappropriate to conclude that an application designed to ensure the safety and protection of children **necessarily** infringes the principles of fundamental justice where parents are not represented by state-funded counsel. The comments of Chief Justice Dickson in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 779 are pertinent:

> In interpreting and applying the *Charter*, I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

3. Justification Under Section 1 of the *Charter*

50. In the event this Court concludes that the legal aid regime does infringe s. 7 of the *Charter*, these Respondents would submit that the decision not to extend the domestic legal aid program to temporary custody applications constitutes a reasonable limit under s. 1 of the *Charter*. Section 1 provides:

> 1. 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.

51. The Court is familiar with the analytic framework for the s. 1 tests first set down in *R. v. Oakes*, [1986] 1 S.C.R. 103. Recently, in *Eldridge v. B.C. (Attorney General)*, [1997] 3 S.C.R. 624 at 684, Justice La Forest adopted the succinct restatement of that framework by Justice Iacobucci in *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 182:

> First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation; (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

52. In approaching the s. 1 analysis this Court has repeatedly affirmed that whereas the enshrined rights and freedoms must be interpreted in "a generous rather than a legalistic"

fashion (Dickson, J., as he then was, in *R. v. Big M Drug Mart Ltd.*, above, at p. 344), the protection accorded *Charter* guarantees can only be extended "within the limits of reason" (Dickson, J. in *Hunter v. Southam*, above, at p. 156; La Forest, J. in *Jones v. The Queen*, [1986] 2 S.C.R. 284 at p. 300).

53. In *R. v. Edwards Books and Art Ltd.*, above, at pp. 781-782 Chief Justice Dickson points out that

> A "reasonable limit" is one which, having regard to the principles enunciated in *Oakes*, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

54. In *Andrews*, above, at p. 184, Justice McIntyre suggested that the "pressing and substantial" test might be described as one of determining whether the limitation

> ... represents a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights.

55. Again, in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 990 Chief Justice Dickson states:

> Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades way without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the Court to second guess. That would only be to substitute one estimate for another.

56. This Court has again recently confirmed that in applying the *Oakes* test, close attention must be paid to the context in which the impugned legislative regime operates as

well as the balancing of competing interests in matters of social policy: the test must be applied flexibly and not formally or mechanically.

Eldridge v. B.C. (A.G.), above, at para. 85

57. In light of these principles, therefore, it is submitted that in limiting the provision of legal aid services in matters before the Court of Queen's Bench of New Brunswick to victims of family violence involved in private family litigation who meet the plans' financial means criteria and to respondents to applications by the respondent Health Minister for guardianship of children, such limitation being made in the context of conditions of considerable fiscal restraints, "a reasonable assessment as to where the line is most properly drawn" has been rationally authorized by the legislature. For the Court to substitute its decision would be inconsistent with these principles.

Legal Aid Act, s. 12(14);
Supplementary Case of Appeal: Affidavit of Michel Carrier, para. 8, Exhibit "J"

(a) Prescribed by Law

58. The words "prescribed by law" in s. 1 make it clear that an act that is not legislatively authorized cannot be justified under s. 1. The question is whether the legislature has provided an intelligible standard as distinct from an open unclear discretion whereby officials may do whatever seems best in a wide set of circumstances.

Hogg, above, at paragraph 35.7;
See also *Irwin Toy Limited v. A.G. Quebec (Attorney General)*, above, at pp. 982-983;
Canada (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892 at pp. 916, 955-956.

59. It is submitted, that in light of the statutory framework and practice in relation to the domestic legal aid program, one must conclude that the provision of legal aid under that aid program is authorized by the *Legal Aid Act* and from its operating requirements. The authority to administer the program in the manner in which it is in fact administered is not

left to mere administrative discretion, cannot be described as vague, undefined and totally discretionary. Rather, the program is ascertainable, understandable and has legal force.

> *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at p. 277; *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570 at pp. 585-586, 612-615.

60. In *R. v. Terrens*, [1985] 1 S.C.R. 613 at p. 645 Justice Le Dain, dissenting on a different issue, discusses this requirement of s. 1 and states:

> The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results **by necessary implication from the terms of a statute or regulation or from its operating requirements.**
>
> (Emphasis added)

(b) Pressing and Substantial Concerns

61. It is submitted that no one would deny that the provision of legal aid is a matter of substantial importance, particularly in the circumstances under which applications for the guardianship of children are made and in respect of cases involving family violence.

62. It is submitted, however, that by its very nature a legal aid regime must make distinctions and such distinctions or choices by a legislature, and those authorized to implement such regimes, do not detract from a scheme whose legislative objective is both remedial and supportive of the citizens' rights in an open, free and democratic society.

Andrews, above, at pp. 168, 194.

(c) Proportionality

63. In this part of the s. 1 inquiry, a critical balancing takes place. As explained by Justice La Forest in *Andrews*, above, at pp. 197-198, this aspect of the inquiry requires a

sensitive balancing of many factors. As the inquiry is designed to meet different situations, it must be applied "with flexibility and realism inherent in the word "reasonable" mandated by the Constitution":

> The analysis should be functional, focusing on the character of the classification in question, the Constitutional and societal importance of the interests adversely affected, the relative importance to the individuals affected of the benefit of which they are deprived, and the importance of the state interest.

10

64. Again, in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at pp. 1489-90, Justice La Forest defines the task:

> In the performance of the balancing task under s. 1, it seems to me, a mechanistic approach must be avoided. While the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature. As the Ontario Court of
20 Appeal put it in *Re Federal Republic of Germany and Rauca*, (1983), 4 C.C.C. (3d) 385 at p. 41: "In approaching the question objectively, it is recognized that the listed rights and freedoms are never absolute and that there are always qualifications and limitations to allow for the protection of other competing interest in a democratic society."
>
> See also *McKinney v. University of Guelph*, above, at pp. 280-281.

65. Applying these principles, it is submitted that the balance to be struck must relate to
30 the nature of the particular application made by the respondent Health Minister (the order is not a final order but a temporary extension of a previously made order) the fact that the application must be made in open court (a Superior Court of complete jurisdiction specializing in family matters) and the fact that the primary focus of the proceedings relates to the continuing best interests of the children (not so much to the other parties before the Court).

66. While financial considerations are invariable in the design of a legal aid program, it is also apparent on the face of the Affidavit of Michel Carrier that financial considerations alone were not involved here. Clearly, the respondent Minister of Justice had to consider which of the "disadvantaged groups" should attract the limited resources available. When a distinction must be made between an interim order and a final (guardianship) order, the decision to provide aid in relation to the latter only is neither arbitrary, unreasonable nor unfair. On the contrary, it strikes a reasonable balance between the important community interests at stake here.

10 67. This balancing process is exemplified in the decision in 1997 to extend the program to custodial parents in initial applications for temporary custody by the respondent Health Minister.

Appellant's Factum, p. 55, 56

(d) Rational Connection

68. Is the domestic legal aid scheme arbitrary, unfair or based on irrational considerations? At this stage of the inquiry the Court must determine whether the impugned
20 measures are carefully designed to achieve the legislative objective, that is, to protect those who are most in need of such representation while maintaining the financial capacity to provide some but not all parties with legal aid in certain circumstances as a means of meeting the overall legislative objective. The alternative may be not having legal aid at all. In other words, care must be taken not to upset or overthrow a measure that is rationally based and to end up with a situation where there are insufficient funds for the provision of those circumstances where *some* legal aid or assistance is more crucially required.

69. One is reminded of the caution expressed by Chief Justice Dickson in *R. v. Edwards Books and Art Ltd.*, above, at 779:

30 > In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll

> back legislation which has as its object the improvement of the condition of less advantaged persons.

70. Previously, in *Oakes*, above, at p. 136, Chief Justice Dickson stated:

> The rights and freedoms guaranteed by the *Charter* are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.

10

71. In the present circumstances, these Respondents can be expected to do no more than demonstrate that the regime is rationally based, is not arbitrary, unfair or provides for a discretion without clear coercive guidelines. The inquiry here is not unlike that in division of powers cases where those supporting the legislation need not establish that the impugned provisions are the best possible provisions that could be designed by a legislature but only that there is a rational basis for the challenged legislation.

> Hogg, above at para. 57.2(f).

72. It is submitted that the statutory framework and the practice of the domestic legal aid
20 program demonstrate clearly that the impugned regime meets this aspect of the test.

(e) Minimal Impairment

73. Having regard to the fact that the real purpose of the adjudicative procedure giving rise to this appeal is to assess the danger in which the children are alleged to be and whether the proposed temporary custody order sought by the respondent Health Minister would be in their best interests, it is submitted that in this context the need for state-funded representation of parents ought not to be considered essential. In the context
30 of the proceedings giving rise to this appeal it is the representation of the children that is crucial.

74. After reviewing the authorities, Chief Justice Lamer in *Chaulk*, above, at p. 1341 concluded that

> ... **Parliament is not required to search out and to adopt the absolutely least intrusive means of attaining its** objective. Furthermore, when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the "same" objective or would achieve the same objective as effectively. (Emphasis added)

75. This Court has also made it clear that the standard of proof in this inquiry is the civil standard, that is, proof on a balance on probabilities. In other words, the parties seeking to uphold the limit must demonstrate a degree of probability which is commensurate with the occasion or context. Chief Justice Dickson in *Irwin Toy*, above, at p. 993:

> What will be "as little as possible" will of course vary depending on the government objective and on the means available to achieve it. As the Chief Justice wrote in *Oakes, supra* at p. 139:
>
> Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.
>
> Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is struck.
>
> ...
>
> Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

76. It is submitted that the fiscal reality existing in December 1991, when the domestic legal aid program reverted back to the provision of certificates only for family violence and guardianship applications, provides the sound evidentiary basis for the limitations complained of by the Appellant in these proceedings. The means chosen were responsive

and proportional to the ends of providing *some* legal representation in the most important circumstances and impair guarantees of liberty and equality of other parties as little as possible in all the circumstances.

77. In other words, the balance struck between the rights of the particular individual and the competing societal interest in ensuring the best interest of the children results in only minimal temporary impairment to the Appellant.

(f) Overall Balance

78. The final aspect of the proportionality branch of the s. 1 inquiry asks whether the challenged legal aid regime accomplishes an overall balance between the effects of the measures and the important legislative objectives of the scheme.

79. It is trite but perhaps relevant at this stage of the inquiry to state that the very nature of a federation suggests that one can expect a variety of legislative solutions to a particular problem. In Canada there is a range of legislative responses to the concerns of state-funded legal representation. Given the financial considerations outlined in the material before the Court, it is submitted that such choices are appropriately left to the legislature of each province.

> *Re Southam Inc. v. The Queen* (1986), 26 D.L.R. (4th) 479 (Ont. CA.); leave to appeal to the S.C.C. refused).

80. The omission to provide the Appellant with state-funded legal representation is not a challenge to legislation that is too broad in scope; rather it is a challenge to a very particular distinction or limitation. In *McKinney v. University of Guelph*, above, the Court emphasized that when evaluating legislative measures that attempt to strike a balance between the claims of legitimate but competing social values, considerable flexibility must be accorded to the government to choose between various alternatives. In such a situation, since the Court cannot easily ascertain with certainty whether the least restrictive means have been chosen, it is appropriate to accord the government a measure of deference. This principle has been

consistently applied by the Supreme Court of Canada and is appropriate to the circumstances of this appeal.

Tétreault-Gadoury v. Canada (EIC), [1991] 2 S.C.R. 22 at pp. 43-44.

81. It is accordingly submitted that the impugned regime achieves an overall balance between the rights alleged to have been infringed and societal interests in protecting children. The provision of state-funded legal representation in the most urgent cases represents a legitimate exercise of legislative authority designed to uphold the fundamental principles underlying a free and democratic society.

10

4. Appropriate and Just Remedy

82. Section 24(1) of the *Charter* provides:

> 24.(1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

20 83. If the Court concludes that the domestic legal aid program offered by the Province is constitutionally unjustifiable under s. 7 in that it fails to provide legal aid to eligible custodial parents in applications by the respondent Health Minister under Part IV of the *Family Services Act*, it is submitted by these respondents that in light of this Court's decision in *Eldridge*, above, the appropriate remedy would be a declaration of that unconstitutionality along with a direction that the respondents administer the domestic legal aid program in a manner consistent with the principles of fundamental justice in accordance with s. 7 of the *Charter*.

84. Further, while it may be assumed that the respondents would move with dispatch to
30 repair the unconstitutionality of the present scheme and comply with this Court's directive, it would be appropriate to suspend the effectiveness of the declaration for six months to enable the respondents to formulate an appropriate response.

Eldridge v. British Columbia (A.G.), above, para. 95, 96

5. Conclusions

85. (1) The broad proposition that the appellant is entitled to state-funded legal representation on the ground of "unfairness" cannot be anchored either in the common law, international law, general constitutional principles or s. 7 of the *Charter*.

(2) The child protection proceeding giving rise to this appeal does not require the adversarial principles contended for by the appellant. The welfare of the children is the first and paramount consideration of the proceeding. Therefore, the children's right to life and security of the person cannot be reduced by any parental liberty however defined.

(3) The learned judge of the Family Division examined the issues raised by the appellant, assessed the appellant's capacity to deal with the matters of concern to the Family Court and made no palpable or overriding error which affected her assessment of those facts. The Court of Appeal of New Brunswick reviewed and accepted her decision and accordingly this Court should not substitute its assessment of the facts for that of the learned judge.

R. v. Van der Peet, [1996] 2 S.C.R. 507 at p. 564-566

(4) As stated by Justice La Forest in *Andrews*, above, a p. 194:

> [I]t bears repeating that considerations of institutional functions and resources should make courts extremely wary about questioning legislative and governmental choices in such areas.

(5) Any limitations placed upon the Appellant's interests in relation to her children by not providing her with state-funded counsel in the circumstances of applications by the respondent Health Minister under Part IV of the *Family Services Act* are minimal and are demonstrably justifiable in terms of s. 1 of the *Charter*.

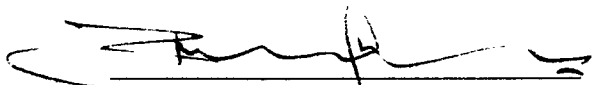
PART IV
DISPOSITION

86. These Respondents respectfully request that the appeal be dismissed and the constitutional questions answered as follows:

1) In the circumstances of this case, neither the failure of the *Legal Aid Act*, R.S.N.B. 1973, c.L-2, nor the government of New Brunswick under its domestic legal aid program, to provide legal aid to the appellant in the custody applications by the Minister of Health and Community Services under Part IV of the *Family Services Act*, R.S.N.B. 1973, c.F-2.2, constitute an infringement of s. 7 of the Canadian *Charter of Rights and Freedoms*.

2) In light of the answer to question 1, there is no reason to answer this question.

ALL of which is respectfully submitted this 17th day of September, 1998.



Bruce Judah of Counsel
Solicitor for the Attorney General,
Ministers of Justice and Health and
Community Services of the Province
Of New Brunswick, Respondents

TABLE OF AUTHORITIES

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AUTHORS CITED

FILE COPY: COPIE DOSSIER

Court No. 26005

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK)

BETWEEN:

JEANNINE GODIN,

APPELLANT

AND:

MINISTER OF HEALTH AND COMMUNITY SERVICES, LAW SOCIETY OF NEW BRUNSWICK, LEGAL AID NEW BRUNSWICK, ATTORNEY GENERAL OF NEW BRUNSWICK, and THE MINISTER OF JUSTICE

RESPONDENTS

FACTUM ON BEHALF OF THE RESPONDENTS, THE LAW SOCIETY OF NEW BRUNSWICK AND LEGAL AID NEW BRUNSWICK

GARY A. MILLER
Cox, Hanson, O'Reilly, Matheson
Suite 400, 371 Queen Street
Fredericton, N.B. E3B 4Y9
Tel: (506) 453-7771
Fax: (506) 453-9600
Counsel for the Respondents,
The Law Society of New Brunswick
and Legal Aid New Brunswick

Bruce Judah Q.C.
Department of Justice
P.O. Box 6000
Fredericton, N.B. E3B 5H1
Tel: (506) 453-2514
Fax: (506) 453-3275
Counsel for the Respondents,
Ministers of Justice and Health and
Community Services and the Attorney
General of New Brunswick

E. THOMAS CHRISTIE
Christie and Associates
500 Beaverbrook Court
Suite 301
Fredericton, N.B. E3B 5H4
Tel: (506) 459-2383
Fax: (506) 459-0007
Counsel for the Appellant,
Jeannine Godin

Brian A. Crane Q.C.
Gowling, Strathy & Henderson
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario
K1C 1C3
Tel: (613) 232-7019
Fax: (613) 563-9869
Ottawa Agents for the Appellant
and all the Respondents

Court No. 26005

IN THE SUPREME COURT OF CANADA

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BETWEEN:

JEANNINE GODIN,

APPELLANT

AND:

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GARY A. MILLER
Cox, Hanson, O'Reilly, Matheson
Suite 400, 371 Queen Street
Fredericton, N.B. E3B 4Y9
Tel: (506) 453-7771
Fax: (506) 453-9600
Counsel for the Respondents,
The Law Society of New Brunswick
and Legal Aid New Brunswick

E. THOMAS CHRISTIE
Christie and Associates
500 Beaverbrook Court
Suite 301
Fredericton, N.B. E3B 5H4
Tel: (506) 459-2383
Fax: (506) 459-0007
Counsel for the Appellant,
Jeannine Godin

Bruce Judah Q.C.
Department of Justice
P.O. Box 6000
Fredericton, N.B. E3B 5H1
Tel: (506) 453-2514
Fax: (506) 453-3275
Counsel for the Respondents,
Ministers of Justice and Health and
Community Services and the Attorney
General of New Brunswick

Brian A. Crane Q.C.
Gowling, Strathy & Henderson
Barristers and Solicitors
2600 - 160 Elgin Street
Ottawa, Ontario
K1C 1C3
Tel: (613) 232-7019
Fax: (613) 563-9869
Ottawa Agents for the Appellant
and all the Respondents

CONTENTS

PART I

Facts

1. The Domestic Legal Aid Program at the Time of the Present Case

1. The Respondents, the Law Society of New Brunswick and Legal Aid New Brunswick, (hereinafter sometimes jointly referred to as "the Law Society") accept the facts set out in the Appellant's Factum. In addition, the Law Society relies on the facts as set out in the Affidavit of Michel Carrier, sworn to on November 17, 1994. (Supplementary Case on Appeal, pp. 1-4 and Exhibits A-M and hereinafter referred to as the "Carrier Affidavit")

2. By virtue of a grant from the New Brunswick Law Foundation in June 1988, the Law Society implemented a scheme for Domestic Legal Aid and a limited duty counsel service in Family Court. Certificates were to be issued only in cases where applicants alleged physical abuse against spouses, parental sexual abuse, and "snatching" children from the de facto custodial parent. No certificates were to be issued to respondents to defend such allegations. (Carrier Affidavit, § 2)

3. In December 1988 the Law Foundation agreed with the request of the Law Society to expand the certificate program to include parents subject to guardianship applications, but not custodianship applications, by the Minister of Health and Community Services. (Carrier Affidavit, §'s 3-5)

4. In April 1989 the Province of New Brunswick agreed to match the Law Foundation grant and double the budget of the Domestic Legal Aid program to $500,000.00. Under this expanded program, certificates continued to be issued in guardianship applications by the Minister of Health and Community Services but not custodianship applications. (Carrier Affidavit, §'s 6-7)

5. Budgetary restraints necessitated a further reduction in Domestic Legal Aid services in December 1991 when the Law Society decided to limit certificates to family violence and guardianship applications. (Carrier Affidavit, § 8)

6. The major overhaul of Domestic Legal Aid in April 1993 significantly reduced the Law Society's involvement in the provision of Domestic Legal Aid. Since that time, and up until the hearing of the present case in the New Brunswick Court of Appeal, the only certificates which were provided were in cases of guardianship applications by the Minister of Health and Community Services or for variation of support applications in limited circumstances. All other aspects of Domestic Legal Aid were to be provided by the Minister of Justice under Part II of the *Legal Aid Act.*

7. With respect to paragraph 15 of the Appellant's Factum, the Law Society emphasizes two points. First, the memo from the Department of Justice to potential source referrals for Domestic Legal Aid regarding the overhaul referred to in the preceding paragraph included a "Fact Sheet on Domestic Legal Aid" which stated (Exhibit M to Carrier Affidavit, pp. 73 and 74 of the Supplementary Case on Appeal):

> To avoid any potential conflicts of interest for Family Solicitors, legal aid certificates will continue to be available in specific circumstances: To represent parents who are subjects of a "**guardianship application**" by the Minister of Health and Community Services and to represent payors who are seeking variations of support orders when they have been "**found unable to pay**" following an enforcement hearing. Duty Counsel will continue to be available to advise parents in a custody application by the Minister of Health and to respondents in other family matters.
>
> Parents who are Respondents in a Guardianship Application by the Minister of Health and Community Services should continue to to apply for legal aid certificates in the area Legal Aid office. Respondents in a Custody Application made by the Minister of Health and Community Services will continue to be provided with access to Duty Counsel at the hearing, and **should not** be referred to the Court Social Worker, or the local legal aid office.

Secondly, it is only in the sense that Legal Aid New Brunswick uses the same administrative staff for its limited Domestic Legal Aid program as the criminal Legal Aid program that the Minister of Justice can be said to fund the former. All certficates for domestic Legal Aid are funded by the Law Foundation with no contribution from government.

2. The Law Society's Domestic Legal Aid Pilot Project Since the Present Case

8. The Appellant has included an Appendix to her Factum entitled "Domestic Legal Aid Program, Chapter 3.0 Policies, Title: 3.5.1, Effective Date: September 22, 1997". (Appellant's Factum, pp. 55-6) It states that Legal Aid Certificates will be available to eligible parents for the first (sic "fist") custodianship hearing, but not subsequent ones, effective September 22, 1997. Several points are noteworthy about the inclusion of this document:

a. This policy change was effected subsequent to the decision of the New Brunswick Court of Appeal in the present case;

b. This policy change was obviously not part of the Case on Appeal nor was it the subject matter of an application for fresh evidence on the within appeal;

c. No reference to this policy change is included in either Parts I or III of the Appellant's Factum.

9. Notwithstanding the comments of the preceding paragraph, the Law Society takes no objection to the inclusion of the aforementioned "policy change" with respect to the availability of Legal Aid certificates for the first custodianship application by the Minister of Health and Community Services. Since this Honorable Court granted leave to appeal the issues of national importance raised on this appeal, it is our position that the Court should be made cognizant of the status quo with respect to Domestic Legal Aid in New Brunswick on the hearing of this appeal. To this end we submit the additional facts set out hereunder, with accompanying Appendices, on the current situation with respect to the availability of Legal Aid certificates for custodianship applications by the Minister of Health and Community Services.

10. Subsequent to the hearing of the present case before the New Brunswick Court of Appeal, and during the 1996-97 fiscal year, Legal Aid expenditures were significantly under budget and the Law Foundation approved $50,000 for custodianship applications. By letter dated May 2, 1997, the Provincial Director of Legal Aid requested the approval of the Law Foundation for an increase of $50,000 for such cases for the 1997-8 fiscal year. (Appendix "A")

11. By letter dated July 17, 1997, to the Provincial Director of Legal Aid, the Law Foundation approved the allocation of funds as requested but warned of the very uncertain future of the financial status of the Law Foundation if economic conditions did not become more favorable. (Appendix "B")

12. By letter dated September 17, 1997, to the Administrative Services Officers for Legal Aid, the Provincial Director of Legal Aid set out the expanded scope of the Domestic Legal Aid Program to include "first time" custodianship applications by the Minister of Health and Community Services. (Appendix "C")

13. It is in the above context that the "policy change" referred to in paragraph 8, above, was brought into effect and was forwarded by the Executive Director, Court Services Division, to the Regional Managers with her Inter-Office memo dated October 14, 1997 (Appendix "D") which in turn was forwarded by the Provincial Director of Legal Aid to the Legal Aid staff with his correspondence dated October 21, 1997. (Appendix "E")

14. By letter dated October 28, 1997, the Law Foundation informed the Provincial Director of Legal Aid of the substantial decline in revenue received by the Law Foundation in order that he might "reflect upon same in your financial planning and any future proposals for funding". (Appendix "F")

15 The Law Foundation's letter referred to above was forwarded to the Executive Director, Court Services, Department of Justice, by the Provincial Director of Legal Aid with his correspondence dated November 3, 1997, (Appendix "G"), which included the following paragraph:

> In addition to the provision of Variation of Support Orders and Permanent Guardianship Orders coverage under the Domestic Legal Aid Program, a number of additional **pilot program areas** have been introduced. These areas, in effect, expanded the scope of the Domestic Legal Aid Program offered by Legal Aid New Brunswick **with the resources provided by the New Brunswick Law Foundation.** It has always been understood that these pilot expansions would only be continued as long as the New Brunswick Law Foundation was able to commit the resources to

> fund the various components. As it now appears that this funding may be in jeopardy, you may wish to consider **whether or not the Department of Justice is able and willing to continue to fund these Program areas.** I do not want to signal any negative move at this time; only that, if revenues fall, the New Brunswick Law Foundation may have to curtail its funding of some or all of these areas. (Emphasis added)

16. The Executive Director, Court Services Division, replied to the Provincial Director of Legal Aid by letter dated January 8, 1998, (Appendix "H") in which she stated:

> At this time I would like to **acknowledge, with thanks, the financial support we have received from the Law Foundation for the Domestic Legal Aid Program** over the past years. Their commitment to the Program is appreciated and has been further demonstrated this year by their willingness to support pilot services areas which serve to enhance the delivery of Domestic Legal Aid services in New Brunswick. (Emphasis added)

17. By letter dated January 8, 1998, the Provincial Director of Legal Aid advised the Law Foundation of an improved forecast in expenditures for the 1997-8 fiscal year and requested approval of the enclosed proposed budget for 1998-9 which assumed a balance of $23,868 for the 1997-8 fiscal year end and a $200,000 grant from the Law Foundation for the 1998-9 fiscal year. (Appendix "I) The Law Foundation funding commitment to Domestic Legal Aid is stated in the "note" to the table enclosed with Appendix I:

> On September 8, 1995, the Board of Directors of the New Brunswick Law Foundation renewed its commitment to the Domestic Legal Aid Program. The new agreement covers the period from April 1, 1995 to March 31, 2000 and contains the following terms: Payment of 50% of the Foundation's funds available annually for grants OR $200,000 whichever is the lesser.

18. By letter dated March 4, 1998, to the Provincial Director of Legal Aid, theLaw Foundation advised that only $100,000 had been approved for the 1998-9 fiscal year, and $50,000 for the 1999-2000 fiscal year. No provision for funding was made beyond the year 1999-2000. (Appendix "J")

19. By letter dated March 31, 1998, to the Law Foundation, the Provincial Director of Legal Aid forwarded four options for consideration by the Law Foundation for the future delivery of Domestic Legal Aid given the decision of the Law Foundation to reduce the grant to Legal Aid. (Appendix "K")

20. This summary of the Law Society's Domestic Legal Aid Pilot Project brought in since the hearing of the present case before the New Brunswick Court of Appeal is current as of the writing of this Factum. As stated above, §9, it is included solely to ensure that this Honorable Court is aware of the status quo of the Domestic Legal Aid Program in New Brunswick on the hearing of this appeal. It is included, along with Appendices A to K, after consultation with, and with the agreement of, counsel for the Appellant and counsel for the Respondents, the Attorney General of New Brunswick, the Minister of Justice, and the Minister of Health and Community Services.

PART II

Issues

21. The constitutional questions stated by the Chief Justice in this case are:

1. In the circumstances of this case, did the failure of the *Legal Aid Act,* R.S.N.B. 1973, c. L-2, or the government of New Brunswick under its Domestic Legal Aid Program, to provide legal aid to respondents in custody applications by the Minister of Health and Community Services under Part IV of the *Family Services Act,* R.S.N.B. 1973, c. F-2.2 constitute an infringement of s. 7 of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

22. The position of the Respondents, the Law Society of New Brunswick and Legal Aid New Brunswick, with respect to the issues raised on this appeal is as follows:

a. The *Legal Aid Act* does not violate the rights under s. 7 of the Charter of respondents in custodianship applications by the Minister of Health and Community Services.

b. The refusal of Legal Aid New Brunswick to provide Legal Aid certificates to respondents in custodianship applications by the Minister of Health and Community Services does not violate the s. 7 rights of such respondents under the Charter because the Law Society is not subject to Charter scrutiny because (i) the Law Society is not "government" within the meaning of s. 32 of the Charter in these circumstances, and (ii) the actions of the Law Society in refusing such certificates cannot be characterized as a "governmental" activity within the meaning of s. 32.

c. If, in these circumstances, there is a breach of the Appellant's rights under s. 7 of the Charter, it is triggered because of the adversarial nature of the proceedings between a parent and the state where the state is attempting to remove children from the parents and any remedy available to the Appellant is against the state and not the Law Society.

PART III

Argument

1. Introduction

(a) The Statutory Scheme

23. Amendments to the *Legal Aid Act* in 1983 S.N.B. c.46, ss. 2 and 6 included the following current provisions:

> 3(4) The Provincial Director shall administer the plan in accordance with this Part and the regulations and policies established by the Law Society and, in accordance therewith, may direct the Area Directors concerning the performance of their duties.

12(14) Where the Law Society is of the opinion that the Legal Aid Fund is in danger of being depleted, it may, with the approval of the Minister, issue directions to the Provincial Director limiting the providing of legal aid in matters included in paragraphs (1)(c) - (g) and subsection (2).

24. The *Legal Aid Act* was further amended in 1993 S.N.B. c.21, s.20 to allow the Minister of Justice to establish and administer a program to provide Domestic Legal Aid by the addition of Part II which included:

24(1) Notwithstanding any other provision of this Act or the regulations, the Minister may establish and administer a program to provide legal aid for persons for proceedings and matters preliminary to anticipated proceedings.

(a) under the *Divorce Act*, (Canada),

(b) other than those covered in paragraphs 12(1)(a) to 12(1)(e), in the Court of Queen's Bench of New Brunswick, the Court of Divorce and Matrimonial Causes, the Supreme Court of Canada or the Federal Court of Canada, and

(c) of an appellate nature in respect of matters and proceedings described in paragraphs (a) and (b).

(2) The Minister may, for the purposes of subsection (1),

(a) employ persons to provide legal aid, or

(b) enter into contracts with persons for the provision of legal aid.

(3) Nothing in this section shall be construed so as to oblige the Minister to provide legal aid in respect of which no money has been appropriated by the Legislature.

(4) The Lieutenant-Governor in Council may make regulations respecting the provision of legal aid under this Part.

(b) The Development of the Domestic Legal Aid program

25. Prior to April 1993, the Law Society (through the generosity of the Law Foundation as well as a government contribution) provided a limited service in domestic legal aid. It was clear that this

was a limited service from its inception in 1988 (Carrier Affidavit, Exhibit "A", pp.5-8 Supplementary Case on Appeal). Equally clearly the Law Society considered the expansion of the program to include guardianship applications by the Minister of Health and Community Services and chose not to allocate scarce resources to custodianship applications (Exhibits "C", "D" and "E", pp. 11-13 Supplementary Case on Appeal). Guardianship applications survived the reduction to services in December 1991 (Exhibit "J", p. 22, Supplementary Case on Appeal) which remained the status quo until the overhaul in April 1993.

26. Given the limited financial resources to fund legal aid in New Brunswick, the Law Society of New Brunswick did not object in principle to the staff model for the delivery of domestic legal aid proposed by the Government in their report (Exhibit "K", pp. 23- 69, Supplementary Case on Appeal). However, at the March 8, 1994, meeting of Council, the Law Society also expressed concern about, inter alia, the "independence of staff lawyers" and reiterated its view that **social programs such as legal aid should be funded by government.** (Exhibit "L", pp. 70 - 71, Supplementary Case on Appeal)

27. The authors of the report that led to the new regime acknowledged some of the issues raised by the Appellant. It was noted in the "Program Scope" section of their report (Exhibit "K", pp.26-28, Supplementary Case on Appeal) that there was a major concern of lawyers that guardianship applications, but not custodianship applications, were covered. That section of the report concluded:

> Limiting aid to Guardianship Applications by the Province while excluding the initial custody applications is ineffective aid to the parents involved.

28. The program brought into effect with the addition of Part II of the *Legal Aid Act* is the one under attack on this Appeal. By virtue of the Law Foundation funding, the Law Society (Legal Aid New Brunswick) provides domestic legal aid for the limited matters referred to above. All other services are to be provided by the program established and administered by the Department of Justice.

2. Charter Scrutiny, The Legal Aid Act and The Law Society

29. The Law Society submits that the Appellant should not succeed against the Law Society in this Appeal for the following reasons. First, even if the Court finds in the circumstances of this case that the *Legal Aid Act* has infringed the Appellant's rights under s.7 of the *Charter,* then the appropriate remedy would be to find the offending sections of the Act to have no force or effect. Secondly, if the Court finds in the circumstances of this case that the government of New Brunswick under its Domestic Legal Aid Program has infringed s.7 of the *Charter* no remedy should be available against the Law Society because the Law Society is not within the scope of "government" for the purposes of this Appeal.

(a) The Legal Aid Act Does Not Infringe the Charter

30. Notwithstanding the first disjunction of Question 1 of the stated constitutional question (Did the failure of the *Legal Aid Act* to provide legal aid to respondents in custody applications constitute an infringement of s. 7 of the Charter?), the Appellant concedes at §81 of the Appellant's Factum (p. 28) that the constitutionality of the Act is not being challenged:

> It is not this Act that is being challenged, just the unfairness and the discriminatory nature of the decision to provide legal aid services of some kind in most other domestic cases, but not the present.

31. It is submitted that such a concession is supported by *Eldridge v.British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 where La Forest, J. stated at pp. 650-651:

> Assuming that the failure to provide sign language interpreters in medical settings violates s. 15(1) of the Charter in some circumstances, I do not see how the Medical and Health Care Services Act can be seen as mandating that result. The legislation simply does not, either expressly or by necessary implication, prohibit the Medical Services Commission from determining that sign language interpretation is a "medically required" service and hence a benefit under the Act .... The Act does not list those services that are to be considered benefits; instead, it delegates the power

> to make that determination to a subordinate authority. It is the decision of authority that is constitutionally suspect, not the statute itself.

32. Similarly, the *Legal Aid Act* does not, either expressly or by necessary implication, prohibit the provision of legal aid to respondents in custodianship applications by the Minister of Health and Community Services. Indeed, the Appellant concedes this in her argument under s. 1 of the *Charter* where she argues that the limit on the right to counsel is not prescribed by law because the *Act* does not expressly (§87, p. 29), or by necessary implication (§89, p. 29), preclude the granting of legal aid in such circumstances.

(b) The Application of the Charter to the Law Society and Legal Aid New Brunswick

33. The *Charter* is essentially an instrument for checking the powers of government over the individual. The scope of the *Charter's* application is set forth in s. 32(1):

> **32(1)** This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

34. In order for the Appellant to seek a remedy against the Law Society of New Brunswick, the actions of the Law Society which are being challenged would have to be classified as "governmental action" for the purposes of s. 32. The Respondent submits that the Law Society is not part of the government and its actions in the circumstances of this Appeal are the actions of a private entity and not subject to *Charter* scrutiny.

35. As La Forest, J. explained in *Eldridge v. British Columbia (Attorney General)*, above, there is no question that the *Charter* applies to provincial legislation. At p. 644, La Forest, J. enumerates the two ways in which it applies.

> First, legislation may be found to be unconstitutional on its face because it violates a Charter right and is not saved by s.1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the Constitution Act, 1982. Secondly, the Charter may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In that case, the legislation remains valid, but a remedy for the unconstitutional action may be sought pursuant to s.24(1) of the Charter.

36. The actions of the Law Society when exercising statutory authority under the *Legal Aid Act* must be distinguished from its private actions. The Respondent submits that the Law Society is not exercising its statutory authority under the *Legal Aid Act* when issuing legal aid certificates for guardianship orders.

37. It is first necessary to trace the sources of legal aid funding in order to illustrate how the Law Society's actions in the circumstances of this Appeal are not "governmental" for the purpose of any *Charter* remedy.

38. Under s. 7 of the *Legal Aid Act*, money is appropriated by the Legislature to establish a Legal Aid Fund for all money to be paid to the Law Society **by Part I** of the Act.

> **7(1)** The Law Society shall
>
> (*a*) establish in a chartered bank or federally incorporated trust company a fund to be known as the Legal Aid Fund into which shall be paid all money appropriated by the Legislature for legal aid and all money directed or

authorized to be paid to the Law Society **by this Part** and the regulations...

7(3) The money appropriated by the Legislature for the purposes of this Part shall be paid out of the Consolidated Fund.

39. Section 12(1) of the *Legal Aid Act* gives authority to the Provincial Director and the Law Society to determine what matters may be covered under the Act:

12(1) Subject to the directions of the Provincial Director and policies established by the Law Society, an area director may issue legal aid certificates authorizing legal aid for proceedings and matters preliminary to anticipated proceedings

(*a*) in respect of an offence under an Act of the Parliament of Canada or in respect of the *Extradition Act*, chapter E-21 of the Revised Statutes of Canada, 1970 or the *Fugitive Offenders Act* chapter F-32 of the Revised Statutes of Canada, 1970,

(*b*) in respect of an offence under an Act of the Legislature,

(*c*) before an administrative tribunal established by an Act of the Legislature or of the Parliament of Canada,

(*d*) in bankruptcy,

(*e*) under the *Divorce Act*, chapter D-8 of the Revised Statutes of Canada, 1970, or the *Divorce Act, 1985*, chapter 4 of the Statutes of Canada, 1986,

(*f*) other than those covered in paragraphs (a) to (e), in the Court of Queen's Bench of New Brunswick, the Court of Divorce and Matrimonial Causes, the Provincial Court, the Probate Court of New Brunswick, the Supreme Court of Canada or the Federal Court of Canada, and

(*g*) of an appellate nature in respect of matters and proceedings described in such of paragraphs (a) to (f) as are in force.

12(2) With the prior approval of the Provincial Director, an area director may, in his discretion, issue a legal aid certificate authorizing legal services, other than those associated with judicial and administrative proceedings, that are customarily within the scope of the professional duties of a barrister and

solicitor, including drawing documents, negotiating settlements and giving legal advice.

40. The Law Society is also expressly authorized by the Act to limit the provision of legal aid in all circumstances other than those itemized in paragraphs 12(1)(a) and (b) above. Such limitations are defined in s.12(14):

> **12(14)** Where the Law Society is of the opinion that the Legal Aid Fund is in danger of being depleted, it may, with the approval of the Minister, issue directions to the Provincial Director limiting the providing of legal aid in matters included in paragraphs (1)(c) to (g) and subsection (2).

41. The 1993 amendment, adding Part II to the *Legal Aid Act*, authorized the Minister of Justice to establish and administer a program to provide civil legal aid. The scope of that legal aid is set out in s. 24(1), cited above at §24, and reproduced here for convenience:

> 24(1) Notwithstanding any other provision of this Act or the regulations, the Minister may establish and administer a program to provide legal aid for persons for proceedings and matters preliminary to anticipated proceedings
>
> (*a*) under the *Divorce Act*, (Canada),
>
> (*b*) other than those covered in paragraphs 12(1)(a) to 12(1)(e), in the Court of Queen's Bench of New Brunswick, the Court of Divorce and Matrimonial Causes, the Supreme Court of Canada or the Federal Court of Canada, and
>
> (*c*) of an appellate nature in respect of matters and proceedings described in paragraphs (a) and (b).

42. As s. 24 (1) (b) makes clear, the Minister of Justice has the statutory authority to provide civil legal aid for, among other things, proceedings in the Court of Queen's Bench of New Brunswick, a category which would include both custody and guardianship applications by the Minister of Health and Community Services under Part IV of the *Family Services Act,* R.S.N.B. 1973, c. F-2.2.

43. The addition of Part II to the Act, combined with the inadequacy of monies within the Legal Aid Fund, has effectively resulted in the following situation:

1. Criminal legal aid is provided by the Law Society of New Brunswick through government funding under the plan name of Legal Aid New Brunswick, as authorized by Part I of the *Legal Aid Act.*

2. Civil legal aid is provided by the Minister of Justice according to ss. 23 and 24 of the *Legal Aid Act* with the Law Society partially, and voluntarily, filling in the gaps as funding from the Law Foundation permits.

44. The Minister, although empowered to do so under the *Legal Aid Act*, has chosen not to provide legal aid under Part II for custody or guardianship applications. Legal aid is not provided in guardianship applications by the Minister because of the possibility of a conflict of interest. The Law Society has partially filled this gap by funding legal aid certificates for guardianship applications, and subsequent to the hearing of this case before the New Brunswick Court of Appeal, a pilot project for custodianship applications. (§'s 8-19, above)

45. It is important to distinguish the Law Society's actions in providing legal aid certificates under the statutory authority of Part I of the *Legal Aid Act* from the Law Society's actions in providing legal aid for guardianship applications. In the former instance, the Law Society is acting under the delegated authority of the Act, it is distributing government money, and it is expressly permitted by the Act to limit the provision of legal aid to criminal proceedings.

46. On the other hand, the Law Society's actions in providing legal aid for guardianship applications is not undertaken because of any delegated governmental or statutory authority. The Law Society has recognized an existing need because the Minister has elected not to provide legal aid for guardianship applications due to a potential conflict of interest. The Law Society on its own initiative, and as a result of grants from the Law Foundation, has provided funding in those circumstances.

47. The mere fact that the Law Society, on its own initiative, has performed what may be termed a "public function" is not sufficient to bring it within the purview of "government" for the purposes of s.32 of the *Charter*. As La Forest, J. stated in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at 269, a public purpose test is inadequate and is simply not the test mandated by s.32. La Forest, J. approved the following passage from Wellington, "*The Constitution, the Labor Union and Governmental Action*"" (1961), 70 Yale L. J. 345, at 374, in relation to the United States Constitution:

> The easy conclusion, shared by too many "bold thinkers", that "whenever any organization or group performs a function of a sufficiently important public nature, it can be said to be performing a governmental function and thus should have its actions considered against the broad provisions of the Constitution" is wrong. Like most easy conclusions about most hard governmental problems it lacks the institutional feel. Perhaps there are private groups in society to which the Constitution should be applied. But one thing is clear: that conclusion should depend on more than an awareness that the group commands great power or performs a function of an important public nature.

48. La Forest, J. revisted this theme in *Eldrige* v. *British Columbia Attorney General,* above, at 660 - 661:

> Two important points must be made with respect to this principle. First, the mere fact that an entity performs what might loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32 of the Charter. Thus, with specific reference to the distinction between the applicability of the Charter, on the one hand, and the susceptibility of public bodies to judicial review, on the other, I stated as follows, at p. 268 of McKinney:
>
> > It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, **but this does not in itself make them part of government within the meaning of s. 32 of the Charter**....In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government , but that they are public decision-makers. [Emphasis added.]
>
> In order for the Charter to apply to a private entity, it must be found to be implementing a **specific** governmental policy or program. As I stated further on in McKinney, at p.269, "[a] public purpose test is simply inadequate" and "is simply not the test mandated by s. 32".

In the present case, the Law Society cannot be said to be implementing a specific government policy or program. It is simply attempting to provide some assistance, limited by the financial resources of the Law Foundation, to the inadequate Domestic Legal Aid program instituted by the government.

49. La Forest, J. continued as follows at pp. 661-662 of *Eldridge:*

> The second important point concerns the precise manner in which the Charter may be held to apply to a private entity. As the case law discussed above makes clear, the Charter may be found to apply to an entity on one of two bases. First, it may be determined that the entity itself is "government" for the purpose of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged Charter breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the Charter, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private". Second, an entity may be found to attract Charter scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act itself, rather than the quality of the actor. If the act is truly "governmental" in nature - for example, the implementation of a statutory scheme or a government program - the entity performing it will be subject to review under the Charter only in respect of that act, and not its other, private activities.

50. When the Law Society provides legal aid for guardianship orders it is not implementing a specific statutory scheme or a government program. The Law Society is not in any way following the dictates of the government in the providing this service. The Law Society acts purely on its own initiative and, in our submission, in the finest traditions of an independent bar. The Law Society's actions in these circumstances cannot be classified as "governmental"actions. The Law Society is a private entity undertaking a private action serving a public purpose when it provides legal aid certificates for guardianship orders. Although the Law Society may be providing a public benefit, its actions are not open to *Charter* scrutiny in these circumstances and a remedy against it under s.24 is not appropriate.

51. Having obtained a grant from the Law Foundation for that limited purpose, the Law Society has provided a limited Domestic Legal Aid program with scarce resources. There is nothing in the Appellant's Factum to support the position that any conduct of the Law Society or Legal Aid New Brunswick has violated s.7 of the Charter. Furthermore, no authority has been provided to support the position that this Court should order the Law Society of New Brunswick or Legal Aid New Brunswick to provide counsel under either s. 24(1) of the Charter or any common law power.

52. Even if it could be said (where it is the Respondent, the Minister of Health and Community Services who is initiating the proceeding) that the administration of the domestic legal aid program by the Government violates s.7 of the Charter, such a finding cannot be made against the Law Society or Legal Aid New Brunswick in these circumstances. A declaration here would in effect be punishing the Law Society for attempting to help alleviate a difficult situation in difficult fiscal times. In other words (and in the context of the alleged obligation of the Law Society to provide counsel), voluntarily becoming involved in such efforts (for which there is no legal obligation to even participate) cannot form the basis of charter violations which provide a remedy which, in effect, orders a greater contribution.

53. Having been served originally with the within Notice of Motion in the Court of Queen's Bench , the Law Society filed Michael Carrier's Affidavit to provide the Court with background material. The position of the Respondents, the Law Society of New Brunswick and Legal Aid New Brunswick, is simply that there are no Charter violations attributable to it in these proceedings and none of the relief requested against it is available at law.

54. Indeed, the whole analysis of s. 7 of the Charter, and the remedy available to the Applicant, contained in the dissent in the Court of Appeal of New Brunswick (Case on Appeal, pp.118-159) proceeds on the basis of a dispute between the citizen and the state. The dissent makes no finding against the Respondents, the Law Society of New Brunswick or Legal Aid New Brunswick. In short, if s. 7 is triggered in these circumstances it is because of the adversarial nature of the proceedings between a parent and the state in circumstances where the state is attempting to

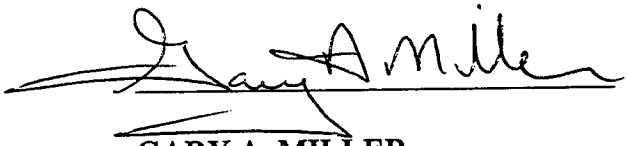
remove children from their parents. If there is a s. 7 violation in these circumstances, it is occasioned by the actions of the state and not the Respondents, the Law Society of New Brunswick and Legal Aid New Brunswick. If there is a remedy available to the Appellant in these circumstances, it is against the state and not the Respondents, the Law Society of New Brunswick and Legal Aid New Brunswick.

PART IV

Relief Requested

55. It is submitted that the Appeal against the Respondents, the Law Society of New Brunswick and Legal Aid New Brunswick, be dismissed.

ALL OF WHICH is respectfully submitted this 18th day of August, 1998.



GARY A. MILLER
Counsel for the Respondents,
the Law Society of New Brunswick
and Legal Aid New Brunswick

PART V

TABLE OF AUTHORITIES

FILE COPY: COPIE DOSSIER

Court No. 26005

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK)

BETWEEN:

JEANNINE GODIN,

Appellant

AND:

MINISTER OF HEALTH AND COMMUNITY SERVICES, LAW SOCIETY OF NEW BRUNSWICK, LEGAL AID NEW BRUNSWICK, ATTORNEY GENERAL OF NEW BRUNSWICK, and THE MINISTER OF JUSTICE

Respondents

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF MANITOBA

DEPARTMENT OF JUSTICE
Constitutional Law Branch
715 – 405 Broadway
Winnipeg MB R3C 3L6

Heather Leonoff, Q.C.
Tel: (204) 945-0679
Fax: (204) 945-0053

Counsel for the Intervener

GOWLING, STRATHY & HENDERSON
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa ON K1P 1C3

Henry S. Brown, Q.C.
Tel: (613) 232-1781
Fax: (613) 563-9869

Ottawa Agent for the Intervener

(For names and addresses of solicitors for the parties see inside following title page)

CHRISTIE & ASSOCIATES
500 Beaverbrook Court
Suite 301
Fredericton NB E3B 5H4

E. Thomas Christie
Tel: (506) 459-2383
Fax: (506) 459-0007

Counsel for the Appellant

GOWLING, STRATHY & HENDERSON
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa ON K1C 1C3

Brian A. Crane, Q.C.
Tel: (613) 232-7019
Fax: (613) 563-9869

Ottawa Agent for the Appellant
and all the Respondents

DEPARTMENT OF JUSTICE
PO Box 6000
Fredericton NB E3B 5H1

Bruce Judah, Q.C.
Tel: (506) 453-2514
Fax: (506) 453-3275

Counsel for the Respondents:
Attorney General of New Brunswick
Ministers of Justice and Health and
Community Services

COX, HANSON, O'REILLY, MATHESON
Suite 400, 372 Queen Street
Fredericton NB E3B 4Y9

Gary A. Miller
Tel: (506) 453-7771
Fax: (506) 453-9600

Counsel for the Respondents:
The Law Society of New Brunswick
and Legal Aid New Brunswick

MINISTRY OF ATTORNEY GENERAL
Legal Services Branch
1001 Douglas Street, PO Box 9280
Stn. Prov. Govt.
Victoria BC V8V 1X4

George Copley
Tel: (250) 356-8875
Fax: (250) 356-9153

Counsel for the Intervener
Attorney General of British Columbia

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa ON K2P 08A

V. Jennifer Mackinnon
Tel: (613) 236-9665
Fax: (613) 235-4430

Ottawa Agent for the Intervener
Attorney General of British Columbia

DEPARTMENT OF JUSTICE
Constitutional Law
4th Floor, Bowker Building
9833 – 109th Street
Edmonton AB T5K 2E8

Robert Maybank
Tel: (403) 422-0500
Fax: (403) 425-0307

Counsel for the Intervener
Attorney General of Alberta

GOWLING, STRATHY & HENDERSON
Barristers & Solicitors
22600 – 160 Elgin Street
Ottawa ON K1P 1C3

Brian A. Crane, Q.C.
Tel: (613) 233-1781
Fax: (613) 563-9869

Ottawa Agent for the Intervener
Attorney General of Alberta

PUBLIC INTEREST LAW CENTER
402 – 294 Portage Avenue
Winnipeg MB R3C OB9

Arne Peltz
Tel: (204) 985-8540
Fax: (204) 985-8544

Counsel for the Intervener
Charter Committee on Poverty Issues

GOWLING, STRATHY & HENDERSON
Barristers & Solicitors
2600 – 160 Elgin Street
Ottawa ON K1P 1C3

Henry Brown, Q.C.
Tel: (613) 233-1781
Fax: (613) 563-9869

Ottawa Agent for the Intervener
Charter Committee on Poverty Issues

W. GLEN HOW & ASSOCIATES
Box 4100, Halton Hills
(Georgetown) ON L7G 4Y4

W. Glen How, Q.C.
Tel: (904) 873-4100
Fax: (904) 873-4522

Counsel for the Intervener
Watchtower Bible and Tract Society
of Canada

LANG MICHENER
Barristers & Solicitors
50 O'Connor Street, Suite 300
Ottawa On K1P 6L2

Eugene Meehan
Tel: (613) 232-7171
Fax: (613) 231-3191

Ottawa Agents for the Intervener
Watchtower Bible and Tract
Society of Canada

WOMEN'S LEGAL EDUCATION AND
ACTION FUND
415 Yonge Street, Suite 1800
Toronto ON M5B 2E7

Carole Curtis and Anne Horsman
Tel: (416) 595-7170

Counsel for the Interveners
National Association of Women and the Law,
Disabled Women's Network Canada, and
Women's Legal Education and Action Fund

SCOTT & AYLEN
Barristers & Solicitors
60 Queen Street
Ottawa ON K1P 5Y7

Carole Brown
Tel: (613) 237-5160

Ottawa Agent for the Interveners,
National Association of Women
and the Law, Disabled Women's
Network Canada, and Women's
Legal Education and Action Fund

Court No. 26005

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL
FOR NEW BRUNSWICK)

BETWEEN:

JEANNINE GODIN,

Appellant

AND:

MINISTER OF HEALTH AND COMMUNITY SERVICES, LAW SOCIETY OF NEW BRUNSWICK, LEGAL AID NEW BRUNSWICK, ATTORNEY GENERAL OF NEW BRUNSWICK, and THE MINISTER OF JUSTICE

Respondents

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PART I

STATEMENT OF FACTS

1. The Intervener accepts the facts as set out by the parties.

PART II

POINTS IN ISSUE

Question 1:

In the circumstances of this case, did the failure of the *Legal Aid Act,* R.S.N.B. 1973, c.L-2, or the government of New Brunswick under its Domestic Legal Aid Program, to provide legal aid to respondents in custody applications by the Minister of Health and Community Services under Part IV of the *Family Services Act,* R.S.N.B. 1973, c.F-22, constitute an infringement of s.7 of the *Canadian Charter of Rights and Freedoms*?

The Intervener submits that a custody application by the Minister of Health and Community Services does not engage a parent's right to "life, liberty and security of the person" since the protection afforded by s.7 of the Charter does not include the right to parent one's child.

Further, there was no violation of the principles of fundamental justice since the trial judge determined that legal counsel was not necessary in order to ensure a fair trial.

Question 2:

If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s.1 of the *Canadian Charter of Rights and Freedoms*?

The Intervener submits that discretionary legislation is justified since it allows delegated decision-makers to balance individual interests and legitimate budgetary constraints. If an impecunious individual can establish a violation of s.7 of the Charter, then the court would have the power under s.24(1) of the Charter to override the delegated decision-maker and order that legal aid coverage be granted.

PART III

ARGUMENT

1. AN OVERVIEW OF THE LEGAL AID PLAN IN MANITOBA

1. The Legal Aid Services Society of Manitoba is a statutory entity created pursuant to *The Legal Aid Services Society of Manitoba Act,* R.S.M. 1987, c.L105 ("the *Act*"). Its major source of funding is the Government of Manitoba. Its current budget is approximately fifteen million dollars per annum.[1]

2. By virtue of s.3 (1) of the *Act,* The Legal Aid Services Society is empowered to provide legal aid to those who are eligible "in accordance with the regulations." In addition to detailing the need for financial eligibility, Manitoba Regulation L105-M.R. 225/91 provides that the granting of legal aid for civil matters is at the discretion of the area director. The relevant provision from the regulations reads as follows:

> 11(1) An area director **may** provide legal aid to a person who is eligible in respect of
>
> (b) in any civil proceeding . . .
>
> (emphasis added)

3. In the 1996-97 fiscal year, Legal Aid Manitoba issued 906 certificates to individuals in respect of child welfare matters. That number rose slightly to 1,032 in fiscal year 1997-98.[2]

4. Each certificate issued by legal aid for domestic matters (which includes child welfare matters) is subject to a provision in the Regulations which stipulates that counsel is not authorized to appear at the trial unless that appearance has been authorized in advance by the

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[1] Legal Aid Manitoba, Annual Report, 1997.
[2] *Ibid.;* Legal Aid Manitoba Certificates Report (1998).

area director.[3] In other words, counsel who receives a certificate to act on behalf a person in a domestic proceeding is authorized to provide whatever services are deemed necessary, up to, but not including the trial. Thus counsel may provide advice and assistance during docket appearances, may attend at any pre-trial conferences, may assist the client in attempting to negotiate a settlement, may assist the client in consenting to an order and may gather evidence for the purposes of trial. Counsel must, however, seek the permission of the area director to appear at the trial. Legal Aid refers to this process as Case Management.

5. In a Notice to the Legal Profession, dated February, 1998, Legal Aid explained the Case Management system:[4]

> Legal Aid announced a policy in the summer of 1996 that lawyers would be expected to seek authorization to go to trial on all domestic and civil matters before setting the matter down for hearing. . .
>
> The case manager who receives the authorization request needs to have enough information to make a proper decision. The requests (sic.) should include a description of the outstanding issues, the significance of those issues to the client, the position of both parties and the evidence that you will rely on to obtain a favourable outcome for your client.

6. If Legal Aid determines that there is a meaningful role for counsel at the trial, then the certificate will be extended to authorize the attendance of counsel. However, if it is determined that counsel is not necessary in the circumstances of the particular case, the certificate is terminated.

7. Section 22 of *The Legal Aid Services Society Act* further provides that Legal Aid may appoint duty counsel to attend any court "for the purpose of advising or representing any person in a civil matter". In accordance with this section, Legal Aid Manitoba does provide duty counsel on all child welfare dockets. Duty counsel will advise and assist any individual who requests help on a summary basis. If more extensive help is required, a

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[3] Regulation L-105 M.R. 225/91, Schedule 1, Part 4.
[4] Legal Aid Manitoba, Notice to the Profession, February 1998.

formal application requesting counsel must be filed and the individual must meet the financial eligibility guidelines.

2. THE RIGHT TO COUNSEL AT CHILD WELFARE HEARINGS

8. In Manitoba, *The Legal Aid Services Society Act* and Regulations provides, that the granting of legal aid in child welfare cases is at the discretion of the area director (*Act* s.3 (1); Reg. s.11(1)). In practice, any financially eligible parent involved in child welfare proceedings, will receive counsel of choice for all preliminary stages of the legal process. Counsel is provided for trial when the area director determines that there is a meaningful role for counsel to play.

9. The New Brunswick program for legal aid in child welfare matters is substantially different than that in Manitoba. The facta of the Appellant and Respondents detail the provisions that govern that program. The common element of both programs, however, is that there is no guaranteed right to counsel for financially eligible applicants at child welfare hearings.

i. Section 7 of the *Charter of Rights and Freedoms*

10. In paragraph 27 of her factum, the Appellant identified the issues raised by this appeal:

> Does a parent's right to raise their (sic) children fall within the security and liberty interests as set out in s.7;
>
> Does the denial of the relief sought by the Appellant in the circumstances of this case amount to a process which does not conform with the principles of fundamental justice?

11. The scope and meaning of s.7 of the *Charter* has not been definitively defined by this Court. The various approaches were discussed in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*[5], a case that dealt with the rights of parents to choose medical treatment for their child. Chief Justice Lamer indicated that he would define deprivation of liberty as involving an element of physical restraint and more particularly he concluded that s.7 did not include "the right of parents . . . to bring up or educate their children without undue interference by the state".[6] La Forest J. (L'Heureux-Dubé, Gonthier and McLachlin JJ. concurring) took a significantly more expansive view of s.7 and concluded that "[i]n a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance."[7] Under this view the right "to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care"[8] were determined to be part of the liberty interest of the parent. Iacobucci and Major JJ. adopted a third methodology. Rather than approaching the issue by considering what was included in s.7, their Lordships determined that certain matters were excluded from s.7 protection. More particularly, their Lordships concluded that s.7 did not include "[t]he exercise of parental beliefs that grossly invades the 'best interests of the child'. . ."[9] Justice Sopinka did not find it necessary to consider the scope of s.7.

12. The Intervener submits that regardless of which interpretation of the liberty interest ultimately prevails, a "parental right" should not be included within its ambit. It is submitted that the right to liberty should be restricted to protect the individual and should not be extended to protect actions and decisions taken with respect to another. In *R. v. Jones*,[10] Wilson J. described the concept of liberty in the following terms:

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[5] [1995] 1 S.C.R. 315.
[6] *Ibid.* at 330.
[7] *Ibid.* at 368.
[8] *Ibid.* at 370.
[9] *Ibid.* at 433.
[10] [1986] 2 S.C.R. 284 at 318.

> I believe that the framers of the Constitution in guaranteeing 'liberty' as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric- to be, in today's parlance, 'his own person' and accountable as such. John Stuart Mill described it as 'pursuing our own good in our own way'. This, he believed, we should be free to do *'so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it.'*
>
> (emphasis added)

13. Clearly this passage speaks to individual freedom of choice and personal autonomy, with the proviso that those choices do not have the potential to deprive others of their rights and freedoms. Similarly, Dickson J. (as he then was), in *R. v. Big M. Drug Mart Ltd.*[11], noted the importance of balancing the rights of the individual with the rights of others. He interpreted the word "freedom", albeit in the context of s.2(a) of the *Charter*, as follows:

> Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals *or the fundamental rights and freedoms of others,* no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> (emphasis added)

14. It is beyond controversy that no right in the *Charter* is absolute and while the *Charter* protects the rights and freedoms of the individual, that protection is always subject to respect for the rights and freedoms of others. It is submitted that the difficulty with elevating parental actions or decision-making to a constitutional right, is that *every* such action or decision impacts directly on another person. In *every* case that a parent sought to invoke s.7 of the *Charter* to immunize a course of conduct, the courts would be forced to consider the impact of that behaviour or decision on the rights of the child. La Forest J. recognized this in *B(R.).*[12] He indicated that "the balancing of the parents' and children's rights should be done in the course of determining whether the state interference conforms to the principles

[11] [1985] 1 S.C.R. 295 at 337.
[12] [1995] 1 S.C.R. 315.

of fundamental justice, rather than when defining the scope of the liberty interest."[13] The Intervener argues that it is more consistent with *Charter* values to focus on the rights of the child to life, liberty and security of the person rather than balancing competing interests.

15. The balancing of two parties' rights is not a foreign concept in *Charter* jurisprudence. It is, however, submitted that there is a substantial difference between the situation where rights come into conflict because of the particular context and the situation where a right, by its very definition, impacts on another. For example, the assertion by one party of his or her right to a fair trial *may* in certain situations impact on another person's right to privacy, but it is not inevitable. On the other hand, if s.7 is found to include a "parenting right", the right, by its definition, ***must*** impact on another. In the case at bar the Appellant asserts a right to "bring up her children".[14] This directly impacts on the right of her children to a safe and nurturing environment. In *B.(R.)*[15] the parents asserted a right to make medical decisions for their child, which directly impacted on the health and well-being of the child.

16. It is respectfully submitted that constitutionalizing a "parenting right" runs counter to the respect afforded the individual in the *Charter*. Further, it is inconsistent with the development of the common law that now recognizes the rights afforded to children and the *obligations* placed upon their parents. Madam Justice L'Heureux-Dubé traced the legal status of the child throughout the common law in *Young v. Young*.[16] Since the nineteenth century the focus has shifted from the rights of the parents to those of the child. Parents no longer possess their children but have obligations and responsibilities to them. Her Ladyship stated in *Young*:[17]

> The custodial parent is responsible for the care and up-bringing of the child, including decisions concerning the education, religion, health and well-being of the child. Parental authority rests with the custodial parent, not for his or her own benefit, but in order to enable that parent to discharge effectively the obligations and responsibilities owed to the child.

[13] *Ibid.* at 374.
[14] Factum of the Appellant, para.38.
[15] *Supra* note 12.
[16] [1993] 4 S.C.R. 3.
[17] *Ibid.* at 99.

17. In *Racine v. Woods*[18] Wilson J. expressed a similar position, stating:

> . . . it is the parental tie as a meaningful and positive force in the life of the child and not in the life of the parent that the court has to be concerned about. As has been emphasized many times in custody cases, a child is not a chattel in which its parents have a proprietary interest; it is a human being to whom they owe serious obligations.

18. As was noted by Dickson J. in *Big M. Drug Mart*[19] the *Charter* was not enacted in a vacuum or absent historical context. The recognition of the rights of children and the concurrent obligations of parents is an important development in the common law. It is submitted that this development should be reflected in interpreting the *Charter*.

19. If the *Charter* is interpreted in this way, then the focus shifts from the parent to the child. Therefore, the question posed by the Appellant; "Is a parent's right to raise his or her child protected by s.7?" would be answered in the negative. A parent does not have a right to raise a child. Rather, the parent has obligations and responsibilities to that child. Some of the responsibilities would include the obligation to make reasoned decisions about the education, health care and religious upbringing of the child. Another obligation would be to provide a safe and nurturing environment. However, these would not be rights protected by s.7. Rather, it is the position of the Intervener that the more appropriate approach is to define the scope of the child's own liberty and security interests. In light of the majority decision in *Rodriguez v. British Columbia,* [20] the child's security interest may very well include the right to a safe and nurturing environment. That issue, however, need not be addressed in the case at bar.

20. To summarize, therefore, it is the position of the Attorney General of Manitoba, that regardless of the scope of s.7 that ultimately prevails, it should not include a "parenting right." Rather, it is more consistent with *Charter* and common law values that the focus is on the rights of the child.

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[18] [1983] 2 S.C.R. 173 at 185.
[19] [1985] 1 S.C.R. 295.

ii. The Principles of Fundamental Justice

21. Assuming that the Court determines that the Appellant's liberty interest has been engaged, then it becomes necessary to determine whether the deprivation is in accordance with the principles of fundamental justice.

22. The Appellant asserts that, given her financial status, she has the right to state-funded legal counsel whenever the government seeks an order suspending or terminating her parental rights. It is the Appellant's position that she requires counsel at a child welfare hearing in order to effectively and meaningfully present her position as to what is in the best interests of her children. In his dissenting opinion Bastarache J.A. accepted that "s.7 requires the provision of paid counsel where it is necessary to guarantee a fair trial".[21] He determined that fairness dictated the need for counsel in the case at bar because:[22]

i. the proceedings are held in a court of law;

ii. the proceedings create a stigma similar to a finding of guilt in criminal proceedings;

iii. all other parties are represented by counsel;

iv. the procedure requires the adducing of evidence and the cross-examination of witnesses;

v. the interpretation of legislation is at issue;

vi. the rules of evidence apply;

vii. the matter is very emotional;

viii. there was evidence to the effect that the Appellant had difficulty coping with stressful situations.

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[20] [1993] 3 S.C.R. 519.
[21] Reasons for Decision of Bastarache J.A., Case on Appeal, p.145.
[22] *Ibid.* pages 153,154.

23. With the exception of the last point, all of the factors set out in the above list would apply to every child welfare proceeding. Though Justice Bastarache determined that state-funded counsel was not required in every case, it is submitted that the factors that he relied upon would result in counsel being appointed whenever the applicant demonstrated financial need.

24. Further, with the exception of the last point, the factors set out by Justice Bastarache would apply to every criminal case. Thus the implications of the dissenting judgment are far reaching and run contrary to the appellate level authorities that have consistently held that s.7 does not guarantee a right to state-funded counsel at a criminal trial.[23]

25. It is well accepted that the principles of fundamental justice reflect the basic tenets upon which our legal system is based. Further they are not immutable but vary according to the context in which they are invoked.[24] It is submitted that in the context of child welfare proceedings the principles of fundamental justice should be shaped by what is necessary to ensure a fair trial that can reasonably resolve the issue of what is in the best interests of the child. Thus, it should be up to the trial judge to determine whether or not this goal requires legal representation for the parent. State-funded counsel should be required only in those rare circumstances where counsel for the parent is necessary to facilitate a fair determination of what is in the best interests of a child.

26. Child welfare proceedings take place in the court setting. They are presided over by judges who are intimately familiar with the concepts of due process. The system has numerous safeguards and protections. It is submitted that judges are well placed to determine if counsel is essential to reaching a just decision as to what is in the best interests of a child.

27. In many circumstances trial judges will be satisfied that a proper decision can be made without counsel appearing on behalf of the parent. The child welfare agency's obligation is

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[23] See for example, *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont.C.A.); *R. v. Rockwood* (1989), 49 C.C.C.(3d) 129 (N.S.S.C.A.D.); *R. v. Savard* (1996), 106 C.C.C.(3d) 130 (Y.T.C.A.); *R. v. Rain,* (Oct.1, 1998), 9603-05585-A (Alta. C.A.).

to act in the best interests of children. Thus, trial judges should be confident that counsel appearing on behalf of that agency would fully and fairly canvass the evidence, including that which may assist the parent. The rules of evidence and procedure can be relaxed to facilitate the inquiry into what is in the child's best interests.[25] Further, the ultimate responsibility of the trial judge is to ensure that the process is fair. This includes providing reasonable assistance and guidance to an unrepresented party.[26]

28. In many child welfare cases there is no meaningful role for a parent's counsel to perform. For example:

i. The parent may be serving a lengthy period of incarceration and is therefore unable to offer a realistic plan for the child;

ii. The child may be old enough to express his or her opinion and may express a desire to become a ward of the state;

iii. The evidence that the parent is incapable of effective parenting may be overwhelming;

iv. The child may have been the subject of several temporary orders that were made with the expectation that the parent would undertake treatment and the parent has not followed through with the treatment plan;

v. The parent may be advocating the same position as another party who is already represented by counsel.

29. It is submitted that the provincial legal aid plans should have the discretion to set their own program criteria. Madam Justice L'Heureux-Dubé made the following comments in *R. v. Prosper:*[27]

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[24] *Reference Re Section 94(2) of the Motor Vehicle Act,* [1985] 2 S.C.R. 486; *R. v. Lyons,* [1987] 2 S.C.R. 309.

[25] See *Winnipeg Child and Family Services v. L.L.* (1995), 95 Man. R. (2d) 16 at 30,31 (C.A.) where the Manitoba Court of Appeal stated "the strict [evidentiary] tests applicable in criminal cases are somewhat relaxed where the protection of a child is at issue rather than the guilt of a person."

[26] *Mandel v. The Permanent* (1985), 7 O.A.C. 365 (Ont.Div.Crt.);*R. v. McGibbon* (1988), 45 C.C.C. (3d) 334 at 347 (Ont.C.A.).

[27] [1994] 3 S.C.R. 236 at 288.

> [T]he scope of services available through Legal Aid is generally not, in my opinion, for the courts to decide. The proper allocation of state resources is a matter for the legislature. In its choice of measures, given limited resources, a legislature may prefer to fund victims of crime rather than accused persons or vice versa – or may wish to reduce rather than increase Legal Aid funding. . . .

30. The Intervener submits that the factors outlined by Justice Bastarache to justify counsel in the case at bar are so broad that the practical result will be a rewriting of the statutes and policies that now govern legal aid in the various provinces and territories. At their core, the principles of fundamental justice guarantee the right to a fair trial.[28] However, fair trials can and do take place in the absence of counsel. It is submitted that the trial judge should have the power to appoint counsel in those rare cases where the trial judge concludes that his or her ability to decide what is in the best interests of the child is compromised by the lack of legal representation for the parent.

31. In the case at bar the trial judge concluded that the appointment of counsel was unnecessary to ensure a fair trial. It is submitted that she properly exercised her discretion and there is no basis to interfere with her ruling.

iii. Section 1 of the *Charter*

32. The New Brunswick *Legal Aid Act* contains two provisions that permit the granting of legal aid coverage. Section 12(1) vests discretion in the Provincial Director and s. 24(1) vests discretion in the Minister of Justice. Thus the *Act* neither expressly nor by implication prohibits the granting of legal aid to a parent who seeks to challenge an application for temporary custody brought by the Minister of Health and Community Services.

33. The decision as to what services to cover is made at an administrative level. Due to budgetary constraints both the Law Society of New Brunswick and the Minister determined

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[28] *Singh v. Minister of Employment and Immigration* [1985] 1 S.C.R. 177 at 212,213; *R. v. Lyons* [1987] 2 S.C.R. 309 at 361.

that legal aid coverage would not be granted for temporary custody applications in child welfare proceedings.[29]

34. This parallels the statutory scheme discussed in *Eldridge v. B.C.(A.G.)*.[30] In that case the relevant statute delegated the determination of what would qualify as insured medical services. As this Court noted in *Eldridge,* in such situations it is the decision of the delegated authority that is constitutionality suspect, not the statute itself. If performing a governmental function, the delegate is equally bound to comply with the *Charter* provisions.[31]

35. The analytical framework for determining whether a law constitutes a reasonable limit on a *Charter* right is set out in *R. v. Oakes*[32]. This Court has recently confirmed that the application of the *Oakes* test must be done with reference to the context in which the impugned legislation operates. Further, it is to be applied flexibly, not mechanically, so as to achieve a proper balance between individual rights and community needs.[33] In addition, as was stated in *Eldridge* :[34]

> It is also clear that while financial considerations alone may not justify *Charter* infringements, governments must be afforded wide latitude to determine the proper distribution of resources in society. This is especially true where Parliament, in providing specific social benefits, has to choose between disadvantaged groups.

36. It is submitted that when the *Legal Aid Act* of New Brunswick is considered in context, it is clear that there has been an attempt to supply the widest possible coverage within budgetary confines. Permissive legislation allows for flexibility. It is therefore submitted that the legislation is justified in a free and democratic society. However, if an impecunious individual can establish a right under s.7 of the *Charter,* then the trial judge would have the

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[29] Affidavit of Michael Carrier, Supplementary Case on Appeal, page 3, paragraph 8.
[30] [1997] 3 S.C.R. 624.
[31] *Slaight Communications v. Davidson,* [1989] 1 S.C.R. 1038; *Eldridge v. B.C.(A.G.),* [1997] 3 S.C.R.624.
[32] [1986] 1 S.C.R. 103.
[33] *R.J.R. MacDonald v. Canada,* [1995] 3 S.C.R. 199; *Ross v. School District No. 15,* [1996] 1 S.C.R. 826.
[34] [1997] 3 S.C.R. 624 at 685.

power to order the appointment of counsel. In such a situation there would be a finding that the delegated decision-maker had not complied with the *Charter* and the remedy, pursuant to s.24(1) of the *Charter* would be a direction to the legal aid administration to issue a certificate for legal aid coverage.

37. It is therefore submitted that the legislative scheme should be upheld with the proviso that the exercise of the discretion in individual cases is subject to court review.

PART IV

RELIEF CLAIMED

37. The Attorney General of Manitoba respectfully submits that this Court should answer the constitutional questions in the following manner:

Question 1:

The Appellant's s.7 rights were not "triggered" on the facts of the case, as her "liberty" interest does not include a right to parent her children.

Question 2:

The legislation is justified because it gives discretion to the delegate to provide services within necessary budgetary restraints. In cases where s.7 of the Charter applies, where the individual is impecunious and where counsel is necessary to ensure a fair trial, then the trial judge would have the right under s.24(1) of the Charter to direct that legal aid coverage be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Heather Leonoff

Counsel for the Intervener
The Attorney General of Manitoba

Dated at Winnipeg, Manitoba, this 13th day of October, 1998

PART V

TABLE OF AUTHORITIES

Paragraph Number

Cases:

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Texts, Articles and Reports:

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Court No. 26005

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF NEW BRUNSWICK)

BETWEEN:

JEANNINE GODIN

APPELLANT

AND:

**MINISTER OF HEALTH AND COMMUNITY SERVICES,
LAW SOCIETY OF NEW BRUNSWICK,
LEGAL AID NEW BRUNSWICK,
ATTORNEY GENERAL OF NEW BRUNSWICK, and
THE MINISTER OF JUSTICE**

RESPONDENTS

FACTUM OF THE INTERVENOR
THE ATTORNEY GENERAL OF BRITISH COLUMBIA

E. Thomas Christie
Christie and Associates
500 Beaverbrook Court, Suite 301
Fredericton, N.B. E3B 5H4
Tel: 506-459-2383
Fax: 506-459-0007
Counsel for the Appellant

Brian A. Crane, Q.C.
Gowling, Strathy & Henderson
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Appellant

Bruce Judah, Q.C.
Department of Justice, Legal Services
670 King Street, P.O. Box 6000
Fredericton, N.B. E3B 5H1
Tel: 506-453-2514
Fax: 506-453-3275
Counsel for the Respondents,
Attorney General of New Brunswick
and the Ministers of Health and
Community Services and Justice

Brian A. Crane, Q.C.
Gowling, Strathy & Henderson
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Respondents,
Attorney General of New Brunswick
and the Ministers of Health and
Community Services and Justice

Gary A. Miller
Cox, Hanson, O'Reilly, Matheson
400 Phoenix Sq., P.O. Box 310
Fredericton, N.B. E3B 4Y9
Tel: 506-453-7771
Fax: 506-453-9600
Counsel for the Respondents,
Law Society of New Brunswick
and Legal Aid New Brunswick

Brian A. Crane, Q.C.
Gowling, Strathy & Henderson
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Respondents,
Law Society of New Brunswick
and Legal Aid New Brunswick

George H. Copley, Q.C.
Ministry of Attorney General
Legal Services Branch
1001 Douglas Street, P.O. Box 9280
Stn. Provincial Government
Victoria, British Columbia V8W 9J7
Tel: 250-356-8875
Fax: 250-356-9154
Counsel for the Intervenor,
Attorney General of British Columbia

V. Jennifer Mackinnon
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario K2P 08A
Tel: 613-236-9665
Fax: 613-235-4430
Ottawa Agent for the Intervenor,
Attorney General of British Columbia

Robert Maybank
Department of Justice, Constitutional Law
4th Floor, Bowker Building
9833 - 109th Street
Edmonton, Alberta T5K 2E8
Tel: 403-422-0500
Fax: 403-425-0307
Counsel for the Intervenor,
Attorney General of Alberta

Brian A. Crane, Q.C.
Gowling, Strathy & Henderson
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Intervenor
Attorney General of Alberta

Heather Leonoff
Department of Justice, Constitutional Law
715 - 405 Broadway
Winnipeg, Manitoba R3C 3L6
Tel: 204-945-0716
Fax: 204-945-0053
Counsel for the Intervenor
Attorney General of Manitoba

Brian A. Crane, Q.C.
Gowling, Strathy & Henderson
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Intervenor
Attorney General of Manitoba

Arne Peltz
Public Interest Law Center
402 - 294 Portage Avenue
Winnipeg, Manitoba R3C 0B9
Tel: 204-985-8540
Fax: 204-985-8544
Counsel for the Intervenor
Charter Committee on Poverty Issues

Henry Brown, Q.C.
Gowling, Strathy & Henderson
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel: 613-233-1781
Fax: 613-563-9869
Ottawa Agent for the Intervenor
Charter Committee on Poverty Issues

W. Glen How, Q.C.
W. Glen How & Associates
Box 4100, Halton Hills
(Georgetown) Ontario L7G 4Y4
Tel: 904-873-4100
Fax: 904-873-4522
Counsel for the Intervenor
Watchtower Bible and Tract Society of Canada

Eugene Meehan
Lang Michener
50 O'Connor Street, Suite 300
Ottawa, Ontario K1P 6L2
Tel: 613-232-7171
Fax: 613-231-3191
Ottawa Agents for the Intervenor
Watchtower Bible and Tract Society of Canada

Carole Curtis and Anne Horsman
Women's Legal Education and Action Fund
415 Yonge Street, Suite 1800
Toronto, Ontario M5B 2E7
Tel: 416-595-7170
Counsel for the Intervenors,
National Association of Women and the Law, Disabled Women's Network Canada, and Women's Legal Education and Action Fund

Carole Brown
Scott & Aylen
60 Queen Street
Ottawa, Ontario K1P 5Y7
Tel: 613-237-5160
Ottawa Agent for the Intervenors
National Association of Women and the Law, Disabled Women's Network Canada, and Women's Legal Education and Action Fund

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PART I

STATEMENT OF FACTS

1. The Attorney General of British Columbia has intervened in this appeal in response to the constitutional questions stated by the Chief Justice on April 9, 1998.

2. For the purpose of making argument on the constitutional questions, the Attorney General of British Columbia adopts the Statement of Facts presented by the Respondents, the Attorney General of New Brunswick and the Ministers of Health and Community Services and Justice (the "Attorney General of New Brunswick") in their Factum at Paragraph 1.

PART II

POINTS IN ISSUE

3. The constitutional questions stated by the Chief Justice are as follows:

(a) In the circumstances of this case, did the failure of the *Legal Aid Act*, R.S.N.B. 1973, c. L-2, or the Government of New Brunswick under its Domestic Legal Aid Program, to provide legal aid to respondents in custody applications by the Minister of Health and Community Services under Part IV of the *Family Services Act*, R.S.N.B. 1973, c. F-2.2, constitute an infringement of s.7 of the *Canadian Charter of Rights and Freedoms*?

(b) If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s.1 of the *Canadian Charter of Rights and Freedoms*?

4. The Attorney General of British Columbia agrees with the Attorney General of New Brunswick that the primary question raised in this Court is whether s.7 of the *Charter* mandates the provision of state-funded counsel for indigent parents when government seeks a judicial order suspending or terminating those parents' custody of their children. It is the position of the Attorney General of British Columbia that this primary question should be answered in the negative.

5. The Attorney General of British Columbia also agrees with the Attorney General of New Brunswick that although the stated question uses the phrase "In the circumstances of this case", it is assumed that this is not meant to limit the constitutional issue to the facts of this particular case so as to avoid the larger issue described above in paragraph 4.

6. The Attorney General of British Columbia agrees with the Attorney General of New Brunswick that if there is a breach of s.7 of the *Charter* by the failure to provide legal aid to parents in applications where temporary custody is sought by the government, then this a reasonable limit justified under s.1 of the *Charter*.

PART III

ARGUMENT

A. The Approach to Section 7 does not Require the Court to Comment in this Case on the Scope of Liberty

7. The right guaranteed by s.7 of the *Charter* comprises two components (Appellant's Factum at para. 29):

> (a) the right to life, liberty and security of the person; and
> (b) the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. The onus is on the Appellant to establish a breach of s.7 of the *Charter* by proving that there has been an infringement or denial of each of these two components.

Re Pearlman v. Law Society of Manitoba, [1991] 2 S.C.R. 869 at 881

9. The Appellant "asserts a right to bring up her children and this right is within the scope of the right to liberty set out in s.7 of the *Charter*." (Appellant's Factum at para. 38) The Appellant also submits that "her right cannot be usurped unless in accordance with the principles of fundamental justice." (Appellant's Factum at para. 38)

10. This case can be decided without determining the first proposition set out in the previous paragraph -- whether the right to liberty in s.7 of the *Charter* includes a right to bring up children. The Attorney General of British Columbia submits that failure to provide state-funded legal counsel where there is an application for custody by the Minister of Health in accordance with the New Brunswick *Family Services Act* does not violate the principles of fundamental justice. If the Court agrees with that proposition then it is unnecessary for the Court to determine the difficult question of the scope of the protection of liberty under s.7 of the *Charter*. This was the analytical approach adopted by Sopinka J. in *B.(R.) v. Children's Aid Society* and Iacobucci J. on behalf of the Court in *Pearlman v. Manitoba Law Society*.

B.(R.) v. Children's Aid Society, [1995] 1 S.C.R. 315 at 428
Re Pearlman v. Manitoba Law Society, supra at 881-882

11. This approach is appropriate in this case because there is a fundamental disagreement among some members of this Court as to the scope and extent of the concept of "liberty", as evidenced by the judgments in *B.(R.) v. Children's Aid Society* and *Godbout v. Longueuil*.

> *B.(R.) v. Children's Aid Society, supra* at 340-341 and 368-371
> *Godbout v. Longueuil*, [1997] 3 S.C.R 844 at 855 and 892-893

12. If on the other hand, the Court decides that a failure to provide state-funded counsel in custody applications such as in this case does violate the principles of fundamental justice then it will be necessary to go on to determine the scope and extent of liberty contained in s.7 of the *Charter*. In that event, the Attorney General of British Columbia submits that the concept of liberty described by the Chief Justice in his reasons for judgment in *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code* should be preferred by the Court over the interpretation advanced by LaForest J. in *B.(R.) v. Children's Aid Society* and *Godbout v. Longueuil*.

> *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code*,
> [1990] 1 S.C.R. 1123 at 1173-1176

13. Liberty thus interpreted relates to its "essentially physical dimension" and its association primarily, but not exclusively, with the criminal justice system.

> *B.(R.) v. Children's Aid Society, supra* at 348

14. The majority of the New Brunswick Court of Appeal in this case adopted the Chief Justice's reasons in *B.(R.) v. Children's Aid Society* and stated:

> The Chief Justice, however, based his decision on the precise issue of whether the integrity of the family was a liberty interest protected by s.7 of the *Charter*. We believe that his clear and unequivocal reasons should be followed, at least until that court rules to the contrary.
>
> Case on Appeal at 110

B. The Appellant's Argument on the Principles of Fundamental Justice is not Limited to the Facts in this Case

15. The first constitutional question begins with the words "In the circumstances of this case", which might at first glance appear to be a limitation to the facts of the precise situation of the Appellant. The Appellant's argument on liberty, however, is not restricted to her own situation or the facts in her case. As noted above (paragraph 9), the Appellant asserts a broad and unqualified right to bring up her children and says this right is within the scope of the right to liberty in s.7 of the *Charter*. There is no attempt to restrict that right to the circumstances of this case or to tie it to facts unique to those of the Appellant's situation.

16. As well, when the Appellant turns to the principles of fundamental justice, she asserts a principle of fundamental justice that is not specifically tied to the "circumstances of this case" but rather states a principle as well of broad and general application. For instance, it is stated: "Put simply, the denial of legal aid to a parent such as the Appellant living in poverty renders illusory their [sic] participation in the process." (Appellant's Factum, para. 56; see also Appellant's Factum, paras. 32, 57 and 65)

17. The underlying principle relied upon by the Appellant is that Court proceedings must be fair and the participation of the parties in the process must be meaningful and not illusory. The Appellant's argument characterizes this principle to be of general application to any custody application where the government seeks to take a child away from his/her parent and that parent has been denied legal aid while living in poverty. Those circumstances, it is submitted, probably describe the majority of situations where the State (through the Minister of Health in New Brunswick or the Director of Child Protection in British Columbia) is attempting to obtain custody of a child. This case therefore has implications far beyond the Appellant's personal situation.

C. Principles of Fundamental Justice

1. The Meaning of the Principles of Fundamental Justice

18. The general analytical and interpretive approach of the Court was set out in *R. v. Big M Drug Mart* by Dickson J., as he then was:

> In my view this analysis (analysis of the purpose of the guarantee in the Charter) is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time, it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical context.
>
> *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 344

19. The principles of fundamental justice are to be are found in the basic legal tenets and principles of our judicial process, as well as within other components of our legal system. Examples of the principles of fundamental justice are found in ss. 8-14 of the *Charter*. These sections illustrate the meaning of the principles of fundamental justice in criminal or penal law. In analyzing whether any asserted right is a principle of fundamental justice the following observation of the Court in the *Reference Re Section 94(2) of the Motor Vehicle Act* is relevant:

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s.7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.

Reference Re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 at 513

20. It is well accepted that principles of fundamental justice include the concept of a procedurally fair hearing before an impartial decision-maker.

> We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures and as Frankfurter J. wrote in *McNabb v. U.S.* (1942), 3 U.S. 332 at p. 347 "the history of liberty has largely been the history of observance of procedural safeguards."
>
> *Reference Re s.94(2) of the Motor Vehicle Act, supra* at 512-513
> See also *Re Pearlman v. Manitoba Law Society, supra* at 882-883

21. The principles of fundamental justice also comprise elements beyond procedure which has been referred to as the substantive principles of fundamental justice. That aspect of those principles was before the Court in *Rodriguez v. Attorney General of British Columbia*. Sopinka J., speaking for the majority of the Court on this point, stated:

> Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required... **They must also, in my view, be legal principles.** (emphasis added)
>
> *Rodriguez v. Attorney General of British Columbia*, [1993] 3 S.C.R. 519 at 590-591

22. What the Appellant asserts primarily in this case is essentially a procedural principle of fundamental justice -- the right to a fair hearing. It is incontestable that such a principle of fundamental justice is included within s.7 of the *Charter*. What *is* contestable, and it is submitted untenable, is the Appellant's assertion that the provision of state-funded counsel is necessary to ensure the fair hearing of a trial. Were it otherwise, arguably, then all trials to date

where a liberty interest is involved, both civil and criminal, and where one or another party has not been represented by counsel have been unfair and in violation of s.7 of the *Charter*.

23. Insofar as the Appellant goes beyond the merely procedural in her argument and talks about other aspects of custody hearings in the family law context, then it may be fairly said that this is an argument based on substantive principles of fundamental justice. This latter argument has been answered by the Attorney General of New Brunswick and we adopt those submissions in their entirety. (Attorney General of New Brunswick's Factum, paras. 37-49)

24. Further, as to the substantive principles of fundamental justice, it is instructive to note that the Appellant has not been able to provide evidence or a single authority that says provision of state-funded counsel in the context of a child custody application by the state is a "principle(s) upon which there is some consensus that they are vital or fundamental to our societal notion of justice...".

Rodriguez v. Attorney General of British Columbia at 590

2. History, Jurisprudence and the Common Law Related to the Role of Counsel does not Support the Proposition that State-Funded Counsel is Essential to a Fair Hearing

25. It is not surprising that most if not all, the jurisprudence relating to state funding of counsel has arisen in the context of criminal law. This was specifically noted by Bastarache J. A. (as he was then) in dissent in the Court of Appeal below:

> In the context of cases outside of the area of the criminal law, there are very few precedents, probably because the number of situations is limited where liberty or security interest is involved and no legal aid is provided.
>
> Case on Appeal, at 145-146

26. Incarceration in a penal institute is a deprivation of liberty of the highest order. It is submitted that it is at least as serious a deprivation of liberty as the alleged deprivation of liberty resulting from losing custody of a child. One should expect, therefore, that the principles of fundamental justice in criminal and penal proceedings which result in incarceration would be as exacting, if not more so, than in family custody matters. Consequently, the jurisprudence in

criminal and penal matters is a useful guide to the legal tenets of our judicial system constituting what is procedurally fair and acceptable.

27. Courts have always had the inherent jurisdiction to ensure a fair trial:

> In the past when a trial judge thought that he could not secure a fair trial without counsel for the defense, he approached the Attorney General or the Bar. Under similar circumstances today, he might contact the Legal Aid Society. If a trial Judge concluded that he could not conduct a fair trial without defence counsel and his request for counsel were refused, he might be obliged to stop the proceedings until the difficulties had been overcome. Our law would not require him to continue a trial that could not be conducted properly.
>
> *Re Ewing and Kerney and the Queen* (1974), 18 C.C.C. (2nd) 356 (B.C.C.A.) at 365-366
> *R. v. Rowbotham* (1988), 41 C.C.C. (3rd) 1 (Ont. C.A.) at 70

28. The trial judge could also appoint counsel if that was necessary, but as observed by Wood J.A. (dissenting in the result but not on this point):

> While the common law has recognized the jurisdiction of a trial judge to order that counsel be appointed for an unrepresented accused where his or her trial would otherwise be rendered unfair, no authority binding on this court has gone so far as to recognize a jurisdiction to order that the Attorney General pay costs of such counsel...
>
> *Canada (Attorney General) v. Stuart* (1996), 106 C.C.C. (3rd) 130 (Y.T.C.A.) at 139
> See also *R. v. Robinson* (1989), 51 C.C.C.(3rd) 452 (Alta. C.A.) at 476-479 and 482

29. The common law never recognized a right to state-funded counsel in criminal or penal proceedings. *A fortiori* there was never a common law right to state-funded counsel in custody matters involving an application to the Court by the state to apprehend children for their welfare and in their best interests.

30. The Attorney General of British Columbia submits an important factor for the Court to keep in mind is the nature of the proceeding in which the Appellant claims a right to be

provided with state-funded counsel. The *Family Services Act*, R.S.N.B. 1973, c. F-2.2 contains a procedure for the Minister to obtain temporary or permanent custody/guardianship of a child where the child's security and development may be in danger but at all times the Court must give priority to one value: the best interest of the child (s. 53.2).

See also *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, Part 3.C, s.41, for example

31. The Attorney General of British Columbia agrees with the Attorney General of New Brunswick's submissions regarding the nature of Family Court (at paragraphs 37 to 49 of the Attorney General of New Brunswick's Factum). In particular, the Attorney General of British Columbia submits the Appellant has misconstrued the nature of custody applications under the *Family Services Act* and similar legislation (the legislation in British Columbia contains a similar best interest test when the government applies for custody of children). Emphasizing the adversarial nature of traditional trials fails to sufficiently acknowledge the significance of the *parens patriae* role of the Courts in these applications. In relation to the British Columbia legislation the Court of Appeal has noted the following about that legislation:

> The *Act* is intended to deal with children who are in need of protection. While the inquiry provided for by the *Act* is to be conducted upon the basis that it is a judicial proceeding, unlike some judicial proceedings it is not an adversary proceeding and there is no lis before the Court. It is an inquiry to determine whether a child is in need of protection and, as the statute directs, the safety and well-being of the child are the paramount considerations.
>
> *DRH v. Superintendent of Family Child Services and Public Trustee* (1984), 14 D.L.R. (4th) 105 at 108; leave to appeal to S.C.C. refused December 17, 1984 (B.C.C.A.)
> *Re NMH et al v. Superintendent of Family and Child Services* (1984), 59 B.C.L.R. 359 (B.C.C.A.) at 362
> *Superintendent of Family and Child Service v. G. (C.)*, [1989] 22 R.F.L. (3rd) 1 (B.C.C.A.) at 8

32. As discussed above the principles of fundamental justice are to be found in the framework of the judicial process. Undoubtedly, the Court sits at the centre of this process and is

indeed the most important player. When it is recognized that the Court has directed itself not to view a child custody application under state-apprehension legislation as a normal adversarial case the Attorney General of British Columbia submits that in itself goes a long way to ensure the proceeding will be fair. Because the Court is directed to place above everything else the best interest of the child, the Attorney General of British Columbia submits the Court will be correctly guided to that concern whether or not the parties before it are represented by counsel.

33. The Court took a similar approach in *Young v. Young* where a parent was unable to assert his *Charter* rights (in that case freedom of religion) so as to subject an order of the Court regarding custody to the *Charter*. Part of the Court's reasoning for disallowing reliance by that parent on the *Charter* was because the governing legislation in that case (the *Divorce Act*) incorporated a test to guide the Court in making an adjudication upon custody. That test was the same as applicable to these proceedings, basically, the best interest of the child. The Attorney General of British Columbia submits that *Young v. Young* represents the type of balancing of interests that must be addressed when the Court is engaged in an inquiry into the best interest of children in order to ensure that parental claims to their own *Charter* rights should not be given such importance so as to potentially prejudice or interfere with the important task before the Court. That balancing of interests is not adversarial in nature.

> *Young v. Young*, [1993] 4 S.C.R. 3 at 66-67

3. Section 7 of the *Charter* does not support a Right to Appointment of State-Funded Counsel in Criminal and Penal Matters and *A Fortiori*, Child Custody Matters

34. In *R. v. Prosper* the Chief Justice noted that s.10(b) of the *Charter* does not in express terms constitutionalize the right to free and immediate legal advice upon detention. The Chief Justice referred to the proceedings of the Special and Joint Committee of the Senate and House of Commons on the Constitution of Canada which considered and rejected adding a clause to s.10 of the *Charter* that would require funded counsel in the interests of justice. In this respect, the Chief Justice stated:

> The situation here is quite different: at issue is a specific clause which was proposed, considered and rejected by our elected representatives. In my opinion, it would be imprudent for this

> court not to attribute any significance to the fact that this clause was not adopted.
>
> *R. v. Prosper*, [1994] 3 S.C.R. 236 at 266-267

35. In our submission these comments are equally applicable to s.7 of the *Charter*. Section 7 is cast in general and untextured language providing a guarantee to the principles of fundamental justice. It is inconceivable that when the framers of the *Charter* specifically considered and rejected an express clause for the payment of counsel in a section guaranteeing legal advice upon detention or arrest they intended, however, that right would continue to subsist within the general rubric of "principles of fundamental justice". Put another way, if the principles of fundamental justice in s. 7 guarantee the right to state-funded counsel then the limitation found in s.10(b) is contrary to those principles because detention and arrest are deprivations of liberty. The right to state-funded counsel would be guaranteed by s.7 even though it was expressly excluded from s.10(b) of the *Charter*. The Attorney General of British Columbia submits such an interpretation of s. 7 is illogical, internally inconsistent and, therefore, should not be adopted.

36. Courts of appeal have uniformly rejected the proposition that the right to a fair trial guaranteed by the principles of fundamental justice under s.7 of the *Charter* requires state-funded counsel in all cases.

> *Canada (Attorney General) v. Stuart*, *supra* at 158-160
> *Re Baig and the Queen* (1990), 58 C.C.C.(3rd) 156 (B.C.C.A) at 160
> *R. v. Munroe* (1990), 59 C.C.C.(3rd) 446 (N.S.C.A) at 448
> *R. v. Robinson*, *supra* at 458 and 482
> *R. v. Rowbothom*, *supra* at 69-70
> *R. v. Johal* (July 16, 1998), unreported, Vancouver Registry No. CA021153 (B.C.C.A.)

37. In *Johal* the Respondents to a Crown appeal who were acquitted on a charge of murder at trial applied for increased funding for counsel to be paid by the Attorney General in an amount well above and beyond that paid by Legal Aid for the appeal. Rejecting that application, the Chief Justice stated:

> As a back-up to s.684 [of the *Criminal Code*] , counsel called *Charter* sections 7 and 24 in aid. In my respectful view, the focus at this stage should be on s.7 which, when applied to appeals, undoubtedly assures these respondents a fair and public

> hearing. In my view, notwithstanding the fact that these are Crown appeals against jury acquittals, neither these sections nor any other section of the *Charter*, provide for or require the provision of paid counsel on the scale requested by these respondents or on any other scale beyond what has been offered to them.
>
> *R. v. Johal* at para. 27

38. The principles of fundamental justice do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardians of the justice system. The judiciary as guardians of the justice system have not regarded the provision of state-funded counsel in every criminal or penal case to be a principle of fundamental justice. The principles of fundamental justice are not violated even though a person stands to lose his or her liberty for what could be a very long period of incarceration. In light of that history, it is submitted that it would be an unjustified leap of logic, therefore, to find that the provision of state-funded counsel is a principle of fundamental justice guaranteed and protected by s.7 of the *Charter* when a parent in judicial proceedings stands to lose custody of his or her child to the state.

4. State-Funded Legal Counsel is Not Necessary to Provide a Remedy

39. The Appellant argues that the remedy of the provision of state-funded counsel is necessary for a fair hearing to take place in Court on the custody application. (Appellant's Factum at paras. 52, 54, 56, 57, 58 and 65.)

40. As already noted, Courts of Appeal have rejected equating a fair trial with the provision of legal counsel in every case. The essence of the *Rowbotham* principle accepted by the Courts is that provision of legal counsel may be necessary for a fair trial in some cases (see cases cited above in paragraph 36), but is not necessary for a fair trial in all cases.

R. v. Rowbotham, supra at 69-70

41. Where a trial would be unfair and thus violate the principles of fundamental justice, an accused person is entitled to a remedy which is just and appropriate in the

circumstances under s.24(1) of the *Charter*. This does not mean the Court may order the State to fund counsel. Rather, in almost all cases where legal aid is not available and provision of legal counsel is essential to a fair trial, a stay of proceedings is the appropriate and just remedy under s. 24(1) of the *Charter*. That stay may be granted until funds sufficient to engage competent counsel (i.e. usually at the legal aid rate) are provided. Whether a stay is appropriate in child custody applications by the government will depend upon the balancing of interests described in paragraphs 31 to 33 of this Factum.

R. v. Rowbotham, supra at 70

42. In appeals under the *Criminal Code* where legal aid is not available and legal counsel is essential to the fairness of an appeal, s.684 of the *Code* provides the Court with the remedial authority to assign counsel to act on behalf of an accused. The Attorney General is required by the *Code* to pay the fees and disbursements of such appointed counsel.

43. A stay and s.684 of the *Criminal Code* are more than adequate to cover all cases where the state is seeking to incarcerate an accused or otherwise deprive a person of physical liberties (such as detention in a mental health institution or imposition of onerous terms restricting freedom of movement in a probation order).

44. Upon examining the converse situation to that in the previous paragraph, it is submitted that the Court also has authority to grant remedies when required for most conceivable situations where *Charter* rights have been violated. An example of a converse situation is where a person is already in prison and seeks to obtain his or her freedom by means of an application to the Court for a prerogative remedy. Another example of a converse situation is where a person detained in a mental health institution seeks their release by a prerogative remedy or by the statutory process under the mental health legislation.

45. In such situations legal aid is likely to be available to a person in prison seeking an early release where there is a reasonable likely of obtaining that release. As well, in British Columbia, at least, legal aid is available to persons who have been involuntarily committed under the *Mental Health Act* in a hospital or mental health institution.

McCorkell v. Director of Riverview Hospital Review Panel (1993), 81 B.C.L.R.(2nd) 273 (B.C.S.C.) at 275 and 301-302
Mental Health Act, R.S.B.C. 1996, c. 288, s.22

46. If some form of legal aid is not available in these situations the Court has available to it statutory and prerogative remedies such as orders akin to prohibition, *mandamus*, *habeus corpus*, *quo warranto* etc. It is submitted that these further remedies beyond simply granting a stay of proceeding are more than ample to give redress for any potential violation of a *Charter* right to a fair hearing.

47. For example, in *Canada (Attorney General) v. Stuart*, the Court held that it did not have the authority to order payment of counsel who had been appointed for an application to determine an accused's fitness to stand trial under then s.672.24 of the *Criminal Code*. The accused was already in custody, and so a stay of proceedings on the fitness hearing would not have been a just and appropriate remedy. Since that fitness hearing had already taken place with counsel present for the accused, it was not necessary for the Court to make any remedial order. However, Rowles J.A. observed:

> But that would not be a satisfactory *Charter* remedy (i.e. simply staying proceedings) should the accused remain in custody and be unable, without the assistance of counsel, to proceed with a fitness hearing or a judicial interim release hearing. That leaves the alternative of the court granting a temporary stay of proceedings and releasing the accused from custody.
>
> *Canada (Attorney General) v. Stuart, supra* at 160

48. It may be in certain cases that concern for the safety of individuals, the public or even the person who is presently in custody militates against immediately releasing an accused or detained person. In that instance, the Court has the jurisdiction and authority to delay the granting of a *Charter* remedy to allow the government or the Crown time to consider whether the public interest and public safety requires provision of counsel in the circumstances. If the government or Crown decides not to make arrangements to provide counsel (usually through the Legal Aid system) then the Court can proceed to grant whatever remedy is just and appropriate in the circumstances.

49. It is submitted that a Court can fit these kind of situations into the "existing jurisdictional scheme of the Courts" to provide a remedy, as contemplated by s. 24(1). There is no need therefore for special procedures as advocated by the Appellant (i.e., court orders for the provision of state-funded counsel) to give full and adequate effect to the fair hearing component of the principles of fundamental justice contained in s.7 of the *Charter*.

Mills v. The Queen, [1986] 1 S.C.R. 863 at 952-953 and 971-972

5. Ordering State-Funded Counsel Amounts to Legislation by the Courts and has Impermissible Budgetary Implications

50. There are two further reasons why it would inappropriate for the Court to recognize the provision of state-funded counsel as a principle of fundamental justice. First, in the context of this case, the Court would be creating a Legal Aid system which was not provided for by the Legislative Assembly. Second, recognition of the provision of state-funded counsel as a principle of fundamental justice would have profound budgetary implications and possibly result in the Courts making unconstitutional orders for payment out of the Consolidated Revenue Fund.

51. In *Schachter*, the Chief Justice on behalf of the Court discussed the principles for granting remedies where the legislative objective is clear, even though it may violate the Constitution and ultimately fail the test of reasonableness under s.1 of the *Charter*. He said the Court must respect that statement of legislative intent:

> Where the choice of means is unequivocal, to further objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain.
>
> *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 708-709
> See also *Reference Re Section 94(2) of the Motor Vehicle Act, supra* at 498-499

52. The majority in the Court of Appeal below saw the remedy being requested as amending the legislation:

> By allowing the appeal, we would, in our view, be making what is properly a legislative decision. Furthermore, we would be involving the courts in the task of both defining the scope of legal aid and of

administering it on an ad hoc basis - a task that the courts have heretofore refused.

Case on Appeal at 116

53. Once the Court acknowledges that provision of state-funded counsel to indigent persons or persons who have been denied legal aid is a principle of fundamental justice, that principle cannot be confined to child custody applications. A principle of fundamental justice once defined by the Courts is a "basic tenet" of our judicial system and therefore applicable whenever liberty is infringed or denied. This would occur in all criminal and quasi-criminal cases where incarceration in a penal institute is available as a sentence for commission of an offence, and so state-funded counsel would, it is submitted, be constitutionally required.

54. The Courts do not have authority to make orders which require payment out of the Consolidated Revenue Fund where there is no appropriation. Assuming for the moment that the Legislative Assembly has not passed a legal aid system which extends so far, and assuming that there is no appropriation voted by the Legislative Assembly, then it is submitted recognizing and ordering state-funded counsel as a principle of fundamental justice is clearly an impermissible judicial intrusion into the legislative sphere.

55. In *Auckland Harbour Board v. The King*, the Privy Council recognized that any payment out of the Consolidated Revenue Fund made without parliamentary authority is simply illegal and *ultra vires*. The majority in *Canada (Attorney Genera) v. Stuart* applied that principle to deny an order for payment of counsel:

> My opinion is that, in the absence of express language requiring government to pay counsel who represent an accused pursuant to an order made under s.672.24, the fundamental principle the courts have applied in regard to the expenditure of public funds, as set out in *Auckland Harbour Board v. The King*, *supra*, must be respected.
>
> *Auckland Harbour Board v. The King*, [1924] A.C. 318 (P.C.) at 326-327
> *Canada (Attorney General) v. Stuart*, *supra* at 160
> See also *Financial Administration Act*, R.S.B.C. 1996, c.138, s.21(1)

56. It is true that the Chief Justice for the Court in *Schachter* recognized that any remedy granted by a Court will have some budgetary repercussions whether it be a saving of money or an expenditure of money. However, with respect, in that case the Court did not turn its mind to the question of whether a Court can order payment out of the Consolidated Revenue Fund where there has not been an appropriation.

Schachter v. Canada, supra at 709

57. It may be that the reference to "budgetary repercussions" in *Schachter* simply confirms that there must be an appropriation since the government's budget legislation does create appropriations. Even then, however, the Court recognizes that its powers are limited and too extensive an impact mitigates against the availability of a remedy:

> In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy, it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.
>
> *Schachter v. Canada, supra* at 709-710

58. Such is the risk in this case. The intrusion into this sphere could be so substantial as to go beyond the actual statutory scheme set out in the *Legal Aid Act*. Or the intrusion may be so substantial that it goes beyond either the budgetary description in the appropriation for Legal Aid or the amount so appropriated. In each case, it is clear that such a remedy is not appropriate.

Legal Aid Act, R.S.N.B., 1973, c. L-2

59. As noted above, the budgetary implications of a conclusion that paid counsel is a principle of fundamental justice could well be "so substantial as to change the nature of the legislative scheme" because of its precedential effect. McClung J.A., speaking for the Court in *R. v. Robinson* recognized this aspect:

> Surely the tax-paying electorate of Canada through their elected representatives should be allowed to debate, reject or priorize the spending demands that would be unleashed by the success of these applications. The courts are hardly the best arbiters of the allocation of Canada's spending resources.

R. v. Robinson, supra at 487

60. As well, in *R. v. Robinson* the Court notes that judicial resources are not limitless. The fact that such resources are scarce is relevant to any determination of how far the Constitution can or should go in preserving and protecting a right to funded counsel in the pursuit of ensuring a right to a fair trial. That is, if an unlimited right to state-funded counsel should interfere with the right of access to the Courts, the latter must surely prevail.

R. v. Robinson, supra at 487

61. These two factors are vividly illustrated in the *Johal* case where counsel were estimating at the time their application was argued that the appeal would last 3 ½ to 4 months. Counsel had been offered but rejected fees in excess of $400,000.00 in total for all counsel for the duration of that appeal. The Chief Justice stated:

> I feel constrained to say, however, that I do not accept counsel's estimates of the time required for the hearing of this appeal, including the motion to adduce fresh evidence. The resources of the court are insufficient to accommodate the estimates mentioned by counsel, or anything close to them.

R. v. Johal, supra at para. 14

D. Section 1 of the *Charter*

63. The Attorney General of British Columbia adopts the submissions of the Attorney General of New Brunswick on s.1 of the *Charter* as set out at paras. 50-81 of his Factum.

PART IV

DISPOSITION

66. The Attorney General of British Columbia respectfully requests that the constitutional questions be answered as follows:

Question No. 1:	No, there is no infringement of s.7 of the *Charter*; and
Question No. 2:	In light of the answer to Question No. 1, there is no reason to answer this question. If it becomes necessary to answer this question, it should be answered Yes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

"Neena Sharma"

GEORGE H. COPLEY, Q.C.
NEENA SHARMA
Counsel for the Intervenor
The Attorney General of British Columbia

DATED this 19th day of October, 1998.

PART V

LIST OF AUTHORITIES

S.C.C. File No. 26005

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK)

BETWEEN:

JEANNINE GODIN

APPELLANT
(Respondent)

- and -

MINISTER OF HEALTH AND COMMUNITY SERVICES, LAW SOCIETY OF NEW BRUNSWICK, LEGAL AID NEW BRUNSWICK, ATTORNEY GENERAL OF NEW BRUNSWICK and THE MINISTER OF JUSTICE

RESPONDENTS
(Applicants)

- and -

WOMEN'S LEGAL EDUCATION AND ACTION FUND ET AL., CHARTER COMMITTEE ON POVERTY ISSUES, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF MANITOBA, WATCH TOWER BIBLE AND TRACT SOCIETY OF CANADA and ATTORNEY GENERAL OF ALBERTA

INTERVENERS

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF ALBERTA

ALBERTA JUSTICE
CONSTITUTIONAL LAW
Roderick Wiltshire
4th Floor, Bowker Building
9833 - 109 Street
Edmonton, Alberta T5K 2E8
Tel: (402) 422-0500
Fax: (403) 425-0307

Counsel for the Intervener
Attorney General of Alberta

GOWLINGS
Brian A. Crane, Q.C.
2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel: (613) 233-1781
Fax: (613) 563-9869

Ottawa Agent for the Intervener
Attorney General of Alberta

CHRISTIE AND ASSOCIATES
E. Thomas Christie
500 Beaverbrook Court, Suite 301
Fredericton, New Brunswick
E3B 5H4
Tel.: (506) 459-2383
Fax: (506) 459-007

Counsel for the Appellant

DEPARTMENT OF JUSTICE
LEGAL SERVICES
Bruce Judah, Q.C.
670 King Street, P.O. Box 6000
Fredericton, New Brunswick
E3B 5H1
Tel.: (506) 453-2514
Fax: (506) 453-3275

Counsel for the Respondents, Attorney General of New Brunswick, and the Ministers of Health and Community Services

HANSON, HASHEY
Gary A. Miller
400 Phoenix Square, P.O. Box 310
Fredericton, New Brunswick
E3B 4Y9
Tel.: (506) 453-7771
Fax: (506) 453-9600

Counsel for the Respondents Law Society of New Brunswick and Legal Aid New Brunswick

MINISTRY OF ATTORNEY GENERAL
LEGAL SERVICES BRANCH
George Copley
1001 Douglas Street, P.O. Box 9280
Stn. Provincial Government
Victoria, British Columbia V8V 1X4
Tel.: (250) 356-8875
Fax: (250) 356-9153

Counsel for the Intervener
Attorney General of British Columbia

GOWLINGS
Brian A. Crane, Q.C.
2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel.: (613) 233-1781
Fax: (613) 563-9869

Ottawa agents for the counsel for the Appellant

GOWLINGS
BRIAN A. Crane, Q.C.
2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel.: (613) 233-1781
Fax: (613) 563-9869

Ottawa agents for the counsel for the Respondents, Attorney General New Brunswick, and the Ministers of Health and Community Services

GOWLINGS
Brian A. Crane, Q.C.
2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3
Tel.: (613) 233-1781
Fax: (613) 563-9869

Ottawa agents for counsel for the Respondents Law Society of New Brunswick and Legal Aid New Brunswick

BURKE-ROBERTSON
V. Jennifer Mackinnon
70 Gloucester Street
Ottawa, Ontario K2P 08A
Tel.: (613) 236-9665
Fax: (613) 235-4430

Ottawa Agent for the Intervener
Attorney General of British Columbia

DEPARTMENT OF JUSTICE
CONSTITUTIONAL LAW
Heather Leonoff
715-405 Broadway
Winnipeg, Manitoba R3C 3L6
Tel.: (204) 945-0716
Fax: (204) 945-0053

Counsel for the Intervener
Attorney General of Manitoba

PUBLIC INTEREST LAW CENTER
Arne Peltz
402 - 294 Portage Avenue
Winnipeg, Manitoba R3C 0B9
Tel.: (204) 985-8540
Fax: (204) 985-8544

Counsel for the Intervener
Charter Committee on Poverty Issues

WOMEN'S LEGAL EDUCATION
AND ACTION FUND
Carole Curtis and Anne Horsman
415 Yonge Street, Suite 1800
Toronto, Ontario M5B 2E7
Tel.: (416) 595-7170

Counsel for the Interveners
National Association of Women and the Law
Disabled Women's Network Canada, and
Women's Legal Education and Action Fund

W. GLEN HOW & ASSOCIATES
W. Glen How, Q.C.
Box 4100
Georgetown, Ontario
L7G 4Y4
Tel.: (905) 873-4100
Fax: (905) 873-4522

Solicitors for the Intervener
Watch Tower Bible and Tract Society of Canada

GOWLINGS
Brian A. Crane, Q.C.
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel.: (613) 233-1781
Fax: (613) 563-9869

Ottawa Agent for the Intervener
Attorney General of Manitoba

GOWLINGS
Henry Brown, Q.C.
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
Tel.: (613) 233-1781
Fax: (613) 563-9869

Ottawa Agent for the Intervener
Charter Committee on Poverty Issues

SCOTT & AYLEN
Carole Brown
60 Queen Street
Ottawa, Ontario K1P 5Y7
Tel.: (613) 237-5160

Ottawa Agent for the Interveners
National Association of Women and
the Law, Disabled Women's Network
Canada, and Women's Legal Education
and Action Fund

LANG MICHENER
Eugene Meehan
300 - 50 O'Connor Street
Ottawa, Ontario
K1P 6L2
Tel.: (613) 232-7171
Fax: (613) 231-3191

Ottawa Agents for the Intervener
Watch Tower Bible and Tract
Society of Canada

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PART 1

STATEMENT OF FACTS

1. The Minister of Justice and Attorney General of Alberta has intervened in this appeal in response to the constitutional questions stated by the Chief Justice on April 9, 1998.

2. For the purpose of making argument on the constitutional questions, the Minister of Justice and Attorney General of Alberta accepts the facts as stated by parties to this Appeal.

PART II

STATEMENT OF THE ISSUES

3. The constitutional questions stated by the Chief Justice are as follows:

(a) In the circumstances of this case, did the failure of the *Legal Aid Act*, R.S.N.B. 1973, c. L-2, or the Government of New Brunswick under its Domestic Legal Aid Program, to provide legal aid to respondents in custody applications by the Minister of Health and Community Services under Part IV of the *Family Services Act,* R.S.N.B. 1973, c. F-2.2, constitute an infringement of s. 7 of the *Canadian Charter of Rights and Freedoms*?

(b) If the answer to question 1 is yes, is the infringement demonstrably justified in a free and democratic society pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

4. The Minister of Justice and Attorney General for Alberta says that the first of these questions should be answered in the negative:

(a) Even if the Appellant's care and control of her children is a liberty protected by Section 7 of the *Charter*, that liberty is not at issue in the circumstances of this case, and

(b) The Appellant's care and control of her children is not a liberty protected by Section 7 of the *Charter*.

5. The Minister of Justice and Attorney General for Alberta makes no submission on the second constitutional question stated by the Chief Justice.

PART III

ARGUMENT

(a) Even if the Appellant's care and control of her children is a liberty protected by Section 7 of the *Charter*, that liberty is not at issue in the circumstances of this case.

6. The Appellant asserts that her care and control of her children is a constitutionally protected liberty. In child protection proceedings the state invariably asserts that children's interests require interference with parents' care and control of their children. Although the Appellant now asks that she be afforded a procedural guarantee – state-funded counsel – in a child protection hearing, the issue of what parents' substantive rights are in child protection hearings cannot be avoided.

7. In particular, in order to determine whether the Appellant is entitled to the procedural protection that she seeks, it is necessary to consider when parents' substantive rights might be favoured over the interests of their children. The Respondent Attorney General of New Brunswick argues that because child protection hearings are directed to discover what is in the best interests of a child, parents' rights are not in issue: there is no *lis* between parents and the State, which can form the basis for the Appellant's claim to the very highest procedural protection that the legal process ever affords. If no substantive parental right is in issue in child protection proceedings, parents are merely persons who may be affected by the result of the hearing. They are not people whose legal rights – much less their constitutional rights – are at issue.

8. If a child's best interests require interference with parental care, is it ever possible that a parent's rights can alter what is to be done? The Attorney General for Alberta says that

attention to Canadian child protection legislation and Canadian courts' traditional view of the substantive content of parents' right to care and control of their children shows that:

(a) parents' rights, whether statutory or constitutional, do not lack substance; however

(b) parents' rights are not at issue in many child protection proceedings, including the hearing at issue in this appeal.

9. Canadian child protection legislation typically requires a court to consider two distinct issues before interfering with a parent's care. Courts are required to determine whether a child's parents are failing to protect the child from serious mental, physical or emotional harm. (This criterion is articulated differently in different provinces.) If a court is not satisfied that the child is (e.g.) "a child in need of protection" (Sask., Ont.) the child *must* be returned to his or her parents, and without conditions. Second, if (and only if) the parents' care is demonstrated to be seriously defective the court makes a remedial determination of what is in the child's interests, which may require state supervision, custody or guardianship.

Youth Protection Act, R.S.Q. Chap. P-34.1, Sections 38 and 38.1 (definition of security and development of child in danger), s. 47, s. 74-74.1, s. 74.2 (hearing where there is parental opposition to "urgent measures"), s. 91 (jurisdictional prerequisites to remedial orders).

Child Protection Act, R.S.O. 1990, Chap. C.11 Sections 37(2) (definition of child in need of protection), s. 40, s. 46, s. 47 (mandatory hearing after apprehension to determine if child in need of protection); s. 57 (jurisdictional prerequisites to remedial order in child's best interests).

Family Services Act, S.M. 1985-86, c. 8 - Chap. C80, Sections 17 (definition of "Child in need of protection"), s. 27(1) (mandatory application after apprehension to determine if child in need of protection), 38(1) (jurisdictional prerequisites to remedial orders)

Child and Family Service Act, S.S. c. C-7.2, Sections 11 (definition of "child in need of protection"), s. 17(3), s. 18(3), s. 22 (mandatory protection hearing), s. 36 (mandatory return of child if not in need of protection).

Child Welfare Act, S.A. Chap. C-8.1, Sections 1(2), 1(3) (definition of child in need of protective service), s. 19(1) (mandatory hearing), s. 26, s. 29 and s. 32 (jurisdictional prerequisites to remedial orders).

10. Whether or not parents' care and control of their children has constitutional protection, it is Alberta's view that the State properly interferes with parents' decisions regarding a child's upbringing only when serious defects in the care the parents provide are detected and, if disputed, proven to a court. In distinguishing between justifying State interference with parents' care and control of their children and determining how a child should be cared for once interference has been justified, Alberta's policy reflects the law's traditional view that:

> The right of a natural parent to the care and control of a child is basic. It is a right not easily displaced. Nothing less than cogent evidence of danger to the child's life or health is required before the court will deprive a parent of such care and control.
>
> *Children's Aid Society of Winnipeg v. M. and C.* (1980), 15 R.F.L. 185 (Man. C.A.) per Freedman C.J.M.
>
> (See, also: *Hepton v. Matt* [1957] S.C.R. 606, at 607 per Rand J.)

11. If the State satisfies a court that its apprehension of a child is justified, parents' rights are not in issue in remedial proceedings. As a result, the parents' participation in those

proceedings is of significance only insofar as they are able to aid the court in its attempts to advance their child's interests. Much as:

> ...the right to liberty embedded in s. 7 does not include a parent's right to deny a child medical treatment that has been adjudged necessary by a medical professional...,

when parents' *prima facie* right to care and control of their child has been defeated by serious defects in the care they provide, parental care and control is relevant only to the extent that it has implications for the child's best interests.

> *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at 430 per Iacobucci and Major J.J.

12. Thus, parental care and control of a child may come before a court in two ways, only one of which is a candidate for Section 7's constitutional requirement of fundamental justice. Parents may deny that their care of their child is seriously defective, saying that their *prima facie* right to care and control of their child is not defeated or displaced. Resolution of *this* dispute requires a determination of a parent's rights as against the State, whether those rights are recognized by the *Charter* or by statute only. Alternatively, parents may say, *even if* the care they provide has been seriously defective, the child should be under the parents' care (perhaps, with the assistance and supervision of a social service agency). In this latter case, the parents' care and control of the child is not before a court as a claim of right but only as a matter to be considered in determining the child's best interest.

13. Under Canadian child protection legislation, a hearing analogous to the child protection hearing in issue in this appeal (i.e. for an *extension* of a temporary guardianship order)

typically occurs only after it has been determined, at the time that the original temporary guardianship order was made, that a child is in genuine need of care that his or her parents do not provide. That is, the parents' *prima facie* right to care and control of their child has been defeated by an earlier finding of defective care. The issue addressed when an extension of temporary guardianship is sought is whether intervening events have altered what arrangements are in the child's best interests. As a result, the parents' interest in the care and control of their child is not in issue as a claim of right. Rather, *even if the court at such a hearing decides to end the State's temporary guardianship, and care and control of a child is returned to the parents unconditionally, this is properly done only if return of the child is in the child's interests.*

14. Should this Court decide that parents may be deprived of care and control of their children only in accordance with the principles of fundamental justice, Alberta asks that the Court attend to the distinction between the State's justification of its apprehension of a child, and the determination of an appropriate response to seriously defective parental care. Alberta holds that parents' right to fundamental justice in child protection proceedings - should such a constitutional right exist - is fully vindicated if a child's apprehension may be resisted and the State's justification is fairly reviewed promptly after the original apprehension.

15. The New Brunswick *Family Services Act* R.S.N.B. 1973, c. F-2.2 distinguishes these two issues less clearly than does the legislation of some other provinces. After a child is apprehended, at an "interim hearing" a court reviews whether the Minister had "reasonable grounds" for apprehending a child, and also whether "the child should remain in the protective care of the Minister." The court must decide both issues placing "above all other considerations the best interests of the child." Parents may demand a hearing to review their child's apprehension, but only to determine if the Minister had "reasonable grounds" for the apprehension. While we suspect that New Brunswick courts scrutinize the Minister's decision more carefully than the *Family Services Act* strictly requires, the New Brunswick *Family Services*

Act nowhere demands consideration of the possibility that the security or development of the child is not in fact in danger, notwithstanding that the Minister had reasonable grounds to apprehend.

> *Family Services Act* R.S.N.B. 1973, c. F-2.2 Sections 31(1) (definition of security and development of child in danger), 51 (mandatory hearing, interim hearing), S. 51.1 (parents' right to review hearing) s. 53 (best interests of child to govern all decisions), 55 (remedial powers).

16. In this case, the hearing for which the Appellant sought state-funded counsel addressed whether or not the Respondent Minister of Health and Community Services should be granted on *extension* of its custody of the Appellant's children for a further six months. The hearing was remedial, and directed to discovering what was in the children's best interests, rather than determining whether the State could properly interfere with the Appellant's care and control of her children. (We submit that Mr. Justice Logan, in granting the *original* custody order, concluded that the "security and development" of the Appellant's children were "in danger" referring, e.g., to one child having missed 111 ½ days of school in a single year.) For this reason Attorney General for Alberta says that the Appellant's rights were not in issue at the extension hearing that is the subject of this appeal, and that the argument of the Attorney General of New Brunswick referred to in paragraph 7 above is wholly apposite.

> Affidavit of Jeannine Godin, Exhibit A (Decision of Logan J.); Case on Appeal, pp. 14-20

17. Accordingly, the Attorney General for Alberta says that even if the Appellant's care and control of her children is protected by Section 7 of the *Charter*, her present claim to state-funded counsel must be rejected. Parental rights are not at issue in the circumstances of this case.

(b) The Appellant's care and control of her children is not a liberty protected by Section 7 of the *Charter*.

18. In support of its contention that Section 7 of the *Charter* does not protect the Appellant's care and control of her children, The Attorney General of Alberta wishes to elaborate upon views expressed by the Chief Justice regarding the scope of the liberty protected by Section 7:

> To summarize my opinion, I would simply say that extending the scope of the word "liberty" in s.7 to include any type of freedom other than that which is connected with the physical dimension of the word "liberty" would not only be contrary to the structure of the *Charter* and of the provision itself, but would also be contrary to the scheme, the context and the manifest purpose of s.7. Furthermore, it would have the effect of conferring *prima facie* constitutional protection on all eccentricities expressed by members of our society under the rubric of "liberty", in addition to taking away all legitimacy of purpose from other provisions of the *Charter* such as s.2 or s.6, for example, since they would be redundant. It seems apparent to me that this cannot be the purpose of s.7, or of the *Charter* itself, which is a constitutional instrument. It must also be clearly understood that this approach would inevitably lead to a situation where we would have government by judges. This is not the case at present, but I would emphasize again that it must not become the case.
>
> B.*(R.) v. Children's Aid Society of Metropolitan Toronto*, supra, at 348, per Lamer C.J.

19. In our submission there are two, and only two, notions that may be readily communicated by the use of the word "liberty". One is the notion familiarly referred to by lawyers as 'the liberty of the subject', which the Chief Justice describes as "the physical dimension of liberty", which may be infringed by punishment by imprisonment, restraining a mentally

disordered person, or isolating the contagious. The second is the notion, characteristic of the English legal tradition, that people may do *anything* that is not prohibited, and that our general freedom of action is subject only to the rule of laws "necessary for the general advantage of the public." Either of these readings could, absent authority, form the basis for an interpretation of "liberty" as it occurs in s.7 of the *Charter*, and properly claim a basis in the constitutional text.

Blackstone, Commentaries on the Laws of England, Bk. I, Ch. 1, pp. 121, 122 (1765, Oxford)

Bolling v. Sharpe (1953), 347 U.S. 498, at 499f.

Re Horsefield and Registrar of Motor Vehicles (1997), 34 O.R. (3d) 509 (Div. Ct.), at 523

20. The Attorney General for Alberta recognizes that the weight of authority holds that "liberty" as used in s.7 does not refer to Canadians' general freedom of action in conducting their affairs. Rather than use the notion of "fundamental justice" to mark the fact that Canadians' "natural liberty" is properly limited by the rule of laws of general application passed for public purposes, Canada's courts have held instead that s.7's notion of "liberty" is *itself* less than comprehensive. For example, there is now no constitutional need to consider whether legal constraints on Canadians' economic decisions are fundamentally just (unless, perhaps, those constraints threaten "security of the person").

Irwin Toy Ltd. v. Quebec (A.G.) [1989] 1 S.C.R. 927, at 1002-1004 per Dickson C.J.C.

21. Thus, at present, proposed readings of "liberty" that go beyond the liberty of the subject invariably import substantive criteria, which purport to characterise domains of human action that are sufficiently significant to warrant constitutional protection. For example:

"I do not agree with him that it is a right to bring up and educate one's children "as one sees fit". I believe that is too extravagant a claim. He has the right to raise his children in accordance with his conscientious beliefs. The relations of affection between an individual and his family and his assumption of duties and responsibilities toward them *are central to the individual's sense of self and his place in the world.*" (*R. v. Jones,* [1986] 2 S.C.R. 284, at 319 per Wilson J. (dissenting), emphasis added)

"Thus, an aspect of the *respect for human dignity* on which the *Charter* is founded is the right to make *fundamental personal decisions* without interference from the state. This right is a critical component of the right to liberty... . In my view, this right, properly construed, grants the individual a degree of autonomy in making *decisions of fundamental human importance.*" (*R. v. Morgantaler,* [1988] 1 S.C.R. 30, at 166, per Wilson J. emphasis added)

"On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of *fundamental personal importance.* In *R. v. Morgantaler* [citation] Wilson J. noted that the liberty interest was *rooted in the fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions going to the individual's fundamental being.*" *B.(R.) v. Children's Aid*, supra, at 368, per LaForest J. (emphasis added).

"I do not by any means regard this sphere of autonomy of autonomy as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea ... that individuals cannot in any organized society be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, *the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly or inherently personal such that, by their very nature, the implicate basic choices going to the core of what it means to enjoy individual dignity and independence.* As I have already explained, I took the view in *B.(R)* that parental decisions respecting medical care provided to their children fall within this narrow class of inherently personal matters. In my view, choosing where to establish one's home is, likewise, *a quintessentially private decision going to the very heart of personal or individual autonomy.*" *Godbout v. Lonqueiuil* [1997] 3 S.C.R. 844, at 895 per La Forest J. (emphasis added).

22. The spectre of "government by judges" arises in this circumstance because *no common notion of "liberty" refers to freedom of choice only in respect of the weightiest of our decisions and endeavours.* Still less does any common notion of "liberty" refer to freedom of choice in matters determined to be weighty by Canada's superior courts: the *point* of protecting people's general freedom of action (if that is what s. 7 does) is to leave judgements as to an action's significance up to *them*. If s.7 of the *Charter* is to be "interpreted" more broadly than the "liberty of the subject", yet subject to some other substantive criteria, *however* those substantive criteria are ultimately articulated, both their verbal characterization and their specification in particular cases will necessarily be wholly a matter of judicial invention.

23. In framing s.7 of the *Charter,* Parliament could have protected our liberties, e.g., in matters going essentially to an individual's fundamental being, but it did not. The Attorney General for Alberta submits that because 'the liberty of the subject'

(a) is readily intelligible in the context in which s.7 occurs, that of guaranteed Legal Rights;

(b) does not render substantive freedoms protected elsewhere in the *Charter* redundant;

(c) makes ready sense, when limited by "fundamental justice"; and

(d) does not require the courts to impose a meaning upon a term that already has one,

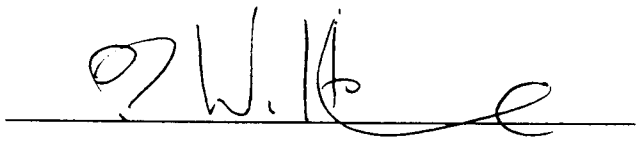
no current competing reading of "liberty" can claim to respect the constitutional text.

ORDER REQUESTED

1. The Attorney General for Alberta asks that the first constitutional question be answered : No.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Edmonton, in the Province of Alberta, this 27th day of October, A.D. 1998.



ROD WILTSHIRE
Counsel for the Intervener
the Attorney General of Alberta

PART V

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