Court File No. 26005

IN THE SUPREME COURT OF CANADA

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

BETWEEN:

JEANNINE GODIN

APPELLANT
(Moving party),

- 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
(Respondents),

- and -

CHARTER COMMITTEE ON POVERTY ISSUES

INTERVENER.

FACTUM OF THE INTERVENER CHARTER COMMITTEE ON POVERTY ISSUES

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PART I - STATEMENT OF FACTS

1. The Charter Committee on Poverty Issues ("CCPI") is a national coalition of low income organizations and poverty law activists. CCPI adopts the Statement of Facts set out in the Appellant's Factum.

PART II - POINTS IN ISSUE

2. CCPI also adopts the Points in Issue set out in the Appellant's Factum.

PART III - ARGUMENT

3. It is hard to imagine anything more traumatic for a parent than forcibly removing a child from his or her custody. Nor can one imagine a more tragic miscarriage of justice than that visited on a child who is wrongly taken from his or her parent's care. CCPI submits that child protection proceedings violate both a parent and a child's right to liberty and security of the person under s. 7 of the *Charter* unless taken in accordance with the principles of fundamental justice.

4. In all proceedings involving the care and custody of a child, CCPI submits that fundamental justice demands that the parent be allowed to participate effectively. Due to the inherent complexity and seriousness of such proceedings, this is only possible if the parent has the right to be represented by counsel. If a parent cannot afford a lawyer, CCPI submits the State is constitutionally obliged to provide legal aid to allow the parent to retain counsel, as a requirement of fundamental justice.

A. The Right to Liberty and Security Under Section 7 of the *Charter*

5. This Court has held that the *Charter* must be interpreted in a purposive manner in order to promote the underlying values, commitments and aspirations of a free and democratic

Canadian society. CCPI submits that a purposive interpretation of s. 7 of the *Charter* must take into account the State's responsibility to protect and promote the dignity, autonomy, worth and welfare of every individual. Section 7 must, therefore, not only protect citizens against abuses of State power, it also requires governments to act affirmatively to support and expand individual rights by providing the means to exercise them. A purposive approach must also take into account Canada's international obligations which help define the scope of the rights contained in the *Charter*.

> *Hunter et al.* v. *Southam Inc*., [1984] 2 S.C.R. 145 at 155-156; *R.B. v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 367-69; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at 893, 895; *Schachter* v. *Canada*, [1992] 2 S.C.R. 679 at 721; M. Jackman, "The Protection of Welfare Rights Under the Charter " (1988) 20 *Ottawa L.R.* 257 at 265-66, 297-98; M.J. Mossman, "Toward A Comprehensive Legal Aid Program in Canada: Exploring the Issues " (May 1993) IV *Windsor Review of Legal and Social Issues* 1 at 25-27.

6. CCPI submits that s. 7 is violated where the State's actions, or failure to act, jeopardize a parent's ability to provide proper care for or retain custody of his or her children, or otherwise leads to results which are contrary to the best interests of the child. Similarly, s. 7 is violated where the State fails to provide necessary assistance to ensure that proceedings to determine the best interests of the child are fair, ensuring low income parents an equal opportunity to participate effectively.

(i) The right to liberty

7. This Court has held that "respect for the inherent dignity of the human person", "commitment to social justice and equality", and "faith in social and political institutions which enhance the participation of individuals and groups in society" are essential to a free and democratic society. These values are the "genesis of the rights and freedoms guaranteed by the *Charter*". In this light, CCPI submits that liberty must mean more than merely refraining from interference with an individual's physical person.

> *R. v. Oakes,* [1986] 1 S.C.R. 103 at 136; *R. v. Morgentaler,* [1988] 1 S.C.R. 30 at 163-171; *R.B. v. Children's Aid Society of Metropolitan Toronto, supra* at 362-374.

8. The ability to care for and ensure the well-being of those whom we love and who depend on us is essential to our sense of dignity and of self-worth. We cannot enjoy any true liberty if we are denied the ability to maintain intimate relationships with others. As Justice Wilson expressed in *R*. v. *Jones*: "The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world."

> *R*. v. *Jones*, [1986] 2 S.C.R. 284 at 319; D.A.R. Thompson, "Why Hasn't the Charter Mattered in Child Protection?" (1989) 8 *Can. J. Fam. L.* 133 at 155-58; P. Zylberberg, "Minimum Constitutional Guarantees in Child Protection Cases" (1991) 10 *Can. J. Fam. L.* 257 at 266.

9. In *R.B.,* Justice La Forest, on behalf of a plurality of this Court, held that the right to liberty includes "the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters." This decision was based on the premises that parents "are more likely to appreciate the best interests of their children", "the state is ill-equipped to make such decisions", and "individuals have a deep personal interest as parents in fostering the growth of their own children".

> *R.B.*, *supra* at 370, 372.

10. Clearly, the State also has a legitimate role and an obligation to protect vulnerable members of society, especially children. Therefore, in some circumstances, the State will be obliged to interfere with a parent's liberty interest in order to protect a child's welfare. However, as Justice La Forest noted, such action must accord with the principles of fundamental justice:

> ... 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*.
>
> *R.B., supra* at 372, 389-390

11. CCPI submits that child custody proceedings deprive a parent of the ability to care for his or her children, and to make fundamental decisions affecting their well-being. Removal of the child from the custody of his or her parent also infringes the child's liberty interests. Any decision to remove a child from the nurture and care of a parent must be subject to the strictest judicial scrutiny to ensure that the determination of the child's "best interests" is made without any influence arising from the disadvantaged status of a parent, and is in full accord with principles of fundamental justice.

> *R.B., supra*; N. Des Rosiers, "The Legal and Constitutional Requirements for Legal Aid", in *Report of the Ontario Legal Aid Review,* Vol. 2 (August 1997) 503 at 533; Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services,* Vol. 1 (August 1997) at 81

(ii) The right to security of the person

12. This Court has affirmed that the right to security of the person under s. 7 of the *Charter* requires more than the protection of one's physical security from arbitrary interference. It also protects an individual's psychological and emotional integrity.

> *Morgentaler, supra* at 55-56, 173; *R. v. Rodriguez*, [1993] 3 S.C.R. 519 at 586-589

13. Nothing can cause greater emotional and psychological stress for a parent than not being able to ensure the well-being of his or her child. Knowing that one can provide one's children with care and ensure that they are fed, clothed, housed and loved, and that their physical, psychological and social needs are being met, is essential to a parent's sense of personal security and well-being.

14. CCPI submits that the serious emotional and psychological stress caused by the loss of custody of a child infringes one's security of the person. Courts and academics alike have recognized that parents whose children are removed from their custody suffer tremendous psychological trauma. Studies show that women who have lost or even anticipate losing custody of a child suffer significant clinical symptoms of grief and mourning, including "preoccupation with the lost child(ren), sadness, rumination, and yearning for reunion", often lasting long after the separation.

A. Kovalesky and S. Flagler, "Child Placement Issues of Women With Addictions" (Sept./Oct. 1997) 26:5 JOGNN 585 at 588-589; T. Blanton and J. Deschner, "Biological Mothers' Grief: The Postadoptive Experience in Open Versus Confidential Adoption" (Nov.-Dec. 1990) LXIX, No. 6 *Child Welfare* 525 at 525, 532, 534; J. Lauderdale and J. Boyle, "Infant Relinquishment Through Adoption" (Fall 1994) 26:3 *IMAGE: Journal of Nursing Scholarship* 213

15. A decision to remove children from a parent's custody entails a judicial determination that a parent is unfit to raise them. Forced dissolution of the parent-child relationship has been called "one of the severest possible sanctions that can be taken against a parent" and "more terrifying than actual personal imprisonment". As the United States Supreme Court recognized in *Lassiter* v. *Department of Social Services*, "there can be few losses more grievous than the abrogation of parental rights."

Davis v. Page, 618 F.2d 374 (1981) at 379 and 714 F.2d 512 (1983) at 528-531; Notes, "Child Neglect: Due Process for the Parent" (1970) 70 *Columbia Law Review* 465 at 478-79; *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) at 40; B. Cosman and C. Rogerson, "Case Study in the Provision of Legal Aid: Family Law " *Report of the Ontario Legal Aid Review*, Vol. 2, *supra,* 773 at 828; "Indigent Rights to State Funding in Civil Actions" (1981-1982) 95 *Harvard Law Review* 132 at 138-139, 141; *Santosky et al. v. Kramer et al.*, 455 U.S. 745 (1982) at 758-760.

(iii) International Human Rights Law

16. The broad ambit of liberty and security interests protected in s. 7 and the concomitant governmental obligations to respect, protect and fulfill these rights should be interpreted consistently with international human rights law which is binding on Canada. Such law enunciates the values and principles which underlie the *Charter* itself. The *Charter* is the primary vehicle through which internationally recognized human rights norms achieve domestic effect. Canadian courts have been urged by at least one U.N. human rights treaty monitoring body to "continue to adopt a broad and expansive approach to the interpretation of sections 7 and 15 of the Charter in order to provide effective remedies to violations of social and economic rights."

Slaight Communications Inc. v. *Davidson*, [1989] 1 S.C.R. 1038 at 1056-1057; *R*. v. *Keegstra*, [1990] 3 S.C.R. 697 at 750; Committee on Economic, Social and Cultural

Rights, *Concluding Observations on Canada*, U.N. Doc. E/C.12/1993/5 (1993).

17. International human rights instruments ratified by Canada recognize the importance of family to an individual's psychological and emotional integrity. They recognize a broad array of positive governmental responsibilities to protect the family from arbitrary or unlawful interferences and to ensure that parents receive the support and resources necessary to provide adequately for their children. The obligation of the State to protect the best interests of children extends well beyond the obligation to intervene to remove a child from the custody of parents where necessary and includes the appropriate allocation of resources to support parents in the raising of children. Children can only be separated from parents if it is in their best interests.

Universal Declaration of Human Rights, U.N.G.A. Res. 217 (III), U.N. Doc. A/810, at 71 (1948), Articles 22, 23, 25 and 26; *International Covenant on Economic, Social and Cultural Rights*, (1976) 993 U.N.T.S. 3, Art. 2, 6, 9, 10, 11 and 12; *International Covenant on Civil and Political Rights* (1976) 999 U.N.T.S. 171, Art. 2, 17, 23; *Convention on the Rights of the Child*, U.N. Doc. A/44/89 (1989), Art. 2, 3, 5, 9, 16 ; *Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention)*, (1955) 213 U.N.T.S. 221, Art. 8; Mossman, *supra* at 41-42.

18. International law reinforces the notion that legal aid must be provided to parents in child protection proceedings. Parents are guaranteed the right to participate in such proceedings and States have an obligation to render appropriate assistance, "to the maximum extent of their available resources", for the implementation of the human rights conferred on children and parents.

Convention on the Rights of the Child, supra, Art. 2, 4, 9, 18, 27

19. The *International Covenant on Civil and Political Rights* (*ICCPR*) stipulates that individuals have the right to a fair hearing. This right extends to civil as well as criminal matters. In its fourth report to the Human Rights Committee under the *ICCPR*, Canada has acknowledged that the right to funded counsel may be necessary to ensure a fair trial as protected under ss. 7 and 11(d) of the *Charter* and noted that provincial programs normally cover legal aid in custody

proceedings.

> *International Covenant on Civil and Political Rights, supra*, Article 14; Canada, Department of Canadian Heritage, *The International Covenant on Civil and Political Rights: Fourth Report of Canada* (Ottawa: Public Works and Government Services Canada, 1997) at 28-29; *Human Rights in the Administration of Justice*, G.A. Res. 48/137, 48 U.N. GAOR Supp. (No. 49) at 256, U.N. Doc. A/48/49 (1994) par. 6.

20. The European Court of Human Rights has held that rights under the *European Convention* must be practical and effective, not merely theoretical. Therefore, although Article 6(3) of the *European Convention* is explicitly applicable only to criminal matters, it was held that the right to a fair hearing under Article 6(1) of the *European Convention* also places a positive obligation on the State to provide legal aid to an individual seeking a judicial separation because an unrepresented litigant could not be expected to adequately present her case in such complex proceedings. CCPI submits that this reasoning is even more applicable in the case at bar where the custody of children is at stake and where the State has itself initiated proceedings against an individual.

> *Airey v. Ireland* (1979), 2 E.H.R.R. 305; *European Convention, supra*, Art. 6

21. If the rights of disadvantaged families are to enjoy any effective protection under the *Charter*, it is imperative that this Court affirm the broad ambit of positive obligations on governments emanating from s. 7. The State's obligation to intervene to remove children from parental custody in particular circumstances must be placed within the context of broader obligations to provide necessary resources and support to disadvantaged families and communities to prevent the necessity of apprehension. Appropriate supports and resources for Aboriginal communities and for sole support and young families are particularly important in this regard.

22. CCPI submits that where, as in the present case, proceedings are initiated to remove a child from the custody of a parent, the positive obligations on the State extend to the provision of

necessary legal aid and other supports. Such supports are required to ensure that a proper and fair determination as to the child's best interests is made, without reliance on racial, cultural or class stereotypes, and without silencing the voice of low income parents - usually mothers.

B. The right to fundamental justice under Section 7

(i) The principles of fundamental justice

23. CCPI submits that the opportunity to participate effectively in decisions affecting one's life, liberty or personal security, is an integral aspect of the right to be treated in accordance with the principles of fundamental justice. The right to a fair hearing is a basic tenet of our judicial system.

> *Duke v. The Queen*, [1972] S.C.R. 917 at 923; *Cardinal v. Kent Institution,* [1985] 2 S.C.R. 653 at 661; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 603, 608-609; *R. v. Tran*, [1994] 2 S.C.R. 951 at 975

24. What is adequate for a fair hearing depends on the nature of the rights at stake and the particular procedural safeguard in question. The courts have been clear that in the criminal context, an accused has a constitutional right to be provided with counsel at State expense if, due to the complexity and seriousness of the case, legal representation is essential to achieve a fair trial. In *R. v. Rowbotham,* for example, the Ontario Court of Appeal accepted as "self-evident the proposition that a person charged with a serious offence is under a grave disadvantage if, for any reason, he is deprived of the assistance of competent counsel".

> *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.) at 62, 66-67; *Howard* v. *Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution*, [1984] 2 F.C. 642 at 663, 681-668 (appeal to S.C.C. quashed, [1987] 2 S.C.R. 687).

25. CCPI submits that fundamental justice similarly demands that the right to State-funded counsel be provided to a low income parent who is unable to afford a lawyer in order to ensure a fair hearing in child protection proceedings. Such proceedings are just as complex and

adversarial as serious criminal trials and involve an adjudication of equally fundamental rights.

Cosman and Rogerson, *supra* at 787-88, 817-20, 848-49; National Council of Welfare, *Legal Aid and the Poor* (Ottawa: Supply and Services Canada, 1995) at 10.

26. It is beyond dispute that child protection proceedings concern fundamentally important rights. The liberty and security interests of parents and their children are at stake. The integrity of the family unit depends on the outcome. As the United States Court of Appeals stated in *Davis v. Page*:

> ... a parent's interest in the custody of his or her child is among the most basic and fundamental of the liberties protected by the Constitution. Loss of a child is one of the severest possible sanctions that can be taken against a parent; it is a deprivation which can be equated with imposition of a fine or imprisonment through criminal proceedings. Indeed it is not unlikely that many parents would choose to serve a prison sentence rather than to lose the companionship and custody of their children. In addition the determination that a parent has abused or neglected a child may lead to criminal proceedings against the parent, and certainly carries with it a stigma which may be as traumatizing to the parent as imprisonment.

Davis v. Page, 618 F.2d 374 (1980)(U.S.C.A., 5th Cir.) at 379, later varied by 714 F.2d 512 (1983)(U.S.C.A., 5th Cir.) which confirmed the constitutional right to State-funded counsel but held that it must be considered on a case-by-case basis; Toronto Region Family Courts Committee, *Report of the Working Group on Unrepresented Litigants,* submission to the Ontario Legal Aid Review (March 1997) at 18; Cosman and Rogerson, *supra* at 828; *Report of the Ontario Legal Aid Review* (Vol. 1), *supra* at 81, 166-167; *Santosky, supra* at 758-759

(ii) The Unrepresented Parent in Child Protection Proceedings

27. Child protection is "an enormously complex" and "highly specialized area of law that requires more than the cursory advice that a duty counsel can provide". Invariably, expert evidence is adduced from social workers and other child care specialists and the proceedings raise "a host of difficult evidentiary issues, from whether a child can testify to whether a counsellor's notes can be examined". Unrepresented parents are simply not capable of effectively adducing all relevant evidence, cross-examining witnesses (especially experts) or presenting legal defences. In short, the "complexity of the proceedings demands that parties be represented by lawyers" to ensure a fair hearing.

Cosman and Rogerson, *supra* at 786-87, 817-20, 843-44, 848-49, 889; *Report of the*

Working Group on Unrepresented Litigants, *supra* at 11-13, 16, 17, 24-25; *Report of the Ontario Legal Aid Review* (Vol. 1), *supra* at 61-62, 166-167; N. Bala, "Mental Health Professionals in Child-Related Proceedings" (1995-6) 13 C.F.L.Q. 261 at 261-64, 273, 282, 290; *Children's Aid Society of Ottawa-Carleton v. M.T.*, [1995] O.J. No. 3879 (QL)(Ont. Gen. Div.) at paras. 70-96; *Lassiter, supra* at 30, 44-46; *Santosky, supra* at 763; *Davis v. Page*, 618 F.2d 374 (1980) at 380-382.

28. The Working Group On Unrepresented Litigants recently reported that there are serious problems for the administration of justice when individuals in child protection matters are unrepresented as a result of being denied legal aid. The Working Group concluded that "judges are simply not receiving information that is necessary to make proper decisions for the litigants and their children". Moreover, unrepresented parents "are not receiving the necessary legal advice to assist them in the reunification of their families or the resolution of their child's status". Such individuals often consent to orders that are inappropriate or unrealistic for them, simply out of ignorance and fear of what the outcome will be if they do not cooperate. The Working Group emphasized that:

> In matters involving institutional litigants, if a respondent does not appear or otherwise fails to put his or her position before the court competently, the state-funded institutions can obtain orders that have serious consequences, including ... taking away [a] child from a parent forever. It is absolutely imperative that people have proper legal representation to ensure their rights are protected.

Report of the Working Group on Unrepresented Litigants, *supra* at 11-12; Cosman and Rogerson, *supra* at 825-28; L.H. Pelton, "Whose Neglect? The State Intervenes" in *For Reasons of Poverty* (New York: Praeger, 1989) 47 at 48-49; *Report of the Ontario Legal Aid Review* (Vol. 1), *supra* at 170-171; *Powell v. State of Alabama*, 287 U.S. 45 (1932) at 59-61, 68-69.

29. In the child protection setting, like in the criminal law context, an extreme power imbalance exists between the State and a parent. As Professors Cosman and Rogerson explain:

> The complexity of the legal regime is compounded by the nature of the clientele. The parents in child protection cases are typically the most disadvantaged and vulnerable within the family law system, and clearly cannot fend for themselves. Many have substance abuse problems, and may suffer from mental disabilities or illnesses ... For these clients, lawyers play a significant role beyond representation in court hearings to ensure procedural fairness; over the past decade they have assumed an important role in

assisting parents in developing plans for the return of their children and in guiding them to outside agencies for assistance.
Cosman and Rogerson, *supra* at 787-788, 819; See also: *Report of the Working Group on Unrepresented Litigants*, *supra*; Notes, *Columbia Law Review*, *supra* at 475-77; Mossman, *supra* at 64; *Report of the Ontario Legal Aid Review* (Vol. 1), *supra* at 166-67

(iii) Fundamental justice and the "best interests of the child"

30. The Attorney General of New Brunswick argues that because child protection proceedings are primarily concerned with the best interests of the child, they are somehow of an "administrative" character and far less adversarial than ordinary disputes. CCPI submits that child protection proceedings are clearly adversarial and it is misleading to suggest, as the Attorney General does (Factum, paragraph 39), that the parents only play a minimal role in the proceedings. In fact, the children's best interests cannot be determined accurately without ensuring effective participation by the parents.

31. CCPI submits that it is primarily the parent-child relationship which is being assessed, and that this relationship cannot be fully and properly examined without the effective participation of parents. Effective representation is particularly important when parents are low income, and have other characteristics of disadvantage such as mental disability, or belong to racial or ethnic minorities. It is of fundamental importance in such cases, if a fair determination of the "best interest of the child" is to be made, for the parents to have a full opportunity to challenge any inadequate understanding of their unique circumstances arising from dominant patterns of systemic prejudice or assumptions made about the parenting skills of poor people.

32. Clearly, a fair hearing is essential not only to protect the constitutional rights of the parents, but also to ensure that an accurate decision is rendered with respect to the best interests of the child. Thus, the fact that the best interests of the child are at stake <u>strengthens</u> the argument that legal representation of the parent is critical. It is particularly crucial that the parent be represented at the first hearing "because if the child is placed in care, it may be very difficult to get the child back". It is not sufficient to permit legal representation only at later proceedings, when the State seeks permanent guardianship of the child, since by that point "the parents' legal

position has usually sunk beyond any hope of salvage".

Cosman and Rogerson, *supra* at 826-27; *Report of the Working Group on Unrepresented Litigants*, *supra* at 16; *Lassiter, supra* at 27-28, 44; *M.T., supra*; *Davis v. Page*, 618 F.2d 374 at 381 and 714 F.2d 512 at 528-31; Women's Access to Legal Justice Coalition, *Draft Report on The Impact of the Cuts to Legal Aid on Women in British Columbia* (Vancouver, Feb. 18, 1998) at 2; *Family Services Act*, S.N.B., 1980, c. F-2.2, Part IV.

33. CCPI submits that the risk of an inaccurate decision regarding the best interests of the child is greatly increased when a low income parent is unrepresented. In *Davis v. Page*, it was noted by the dissent that "unrepresented parents lose custody of their children significantly more often than parents represented by counsel". This increased risk is not only inequitable, but also highly detrimental to low income parents and their children.

Davis v. Page, 714 F.2d 512 (1983) at 531; Reasons for Decision of Court of Appeal (Bastarache J.A.), COA at 153-154; *Lassiter, supra*; Notes, *Columbia Law Review*, *supra* at 475-76; Cosman and Rogerson, *supra* at 825-27.

(iv) Equality Rights Considerations

34. This Court has stated that the equality guarantee in the *Charter* informs the content of all other *Charter* rights. In *Andrews,* Justice McIntyre stated that "[t]he section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*." In the present case, equality values have obvious application as this Court has before it a single mother, living in poverty, who is seeking fair and equal access to the justice system. Those affected by the denial of legal aid are invariably poor, usually women, and frequently young mothers, women of colour, First Nations women and women with physical or psychological disabilities

Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143 at 185; *Tran, supra* at 976; *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357; *Phillippines (Republic) v. Pacificador* (1993), 16 C.R.R. (2d) 209 (Ont. C.A.) at 312-314; *Report of the Ontario Legal Aid Review* (Vol. 1), *supra* at 80-82; Des Rosiers, *supra* at 511, 535; Mossman, *supra* at 25-27, 41-42; P. Hughes, "Domestic Legal Aid: A Claim to Equality" (1995) 2 *Review of Constitutional Studies* 203; National Council of Welfare, *supra,* at 9-14.

35. In *Rodriguez,* Justice McLachlin held that a legal regime in which the benefits and

protection of the law are unavailable to members of some disadvantaged groups for reasons unrelated to the overall objectives of the legislation is "arbitrary" and violates s. 7. In the broader social context of child apprehension proceedings, basic principles of human dignity and equality demand that low income parents be provided with legal aid to make their participation effective and meaningful.

Rodriguez, supra at 619-624

36. In *Eldridge,* this Court held that s. 15 of the *Charter* may require the State to implement programs which alleviate disadvantage even if such disadvantage may exist independently of State action. The failure to ensure that disadvantaged persons have the resources to take full advantage of benefits available to others "bespeaks a thin and impoverished vision of s. 15(1)" of the *Charter*. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at 677-682; B. Porter, "Beyond *Andrews*: Substantive Equality and Positive Obligations in *Eldridge* and *Vriend*" (1998) 9 *Constitutional Forum* 71.

37. CCPI respectfully submits that it would bespeak an equally thin and impoverished vision of s. 7 to suggest it does not impose a positive obligation on the State to ensure that disadvantaged members of society who cannot afford counsel receive equal access to a fair hearing, in proceedings which affect their liberty and security interests.

M.J. Mossman, *supra* at 25-27, 41-42, 57; Cosman and Rogerson, *supra* at 787

38. There is clear evidence that an overly large proportion of individuals subjected to child protection proceedings are low income and single mothers. Child welfare agencies estimate that 66-75% of all children under their care come from poor families even though such families constitute only about 20% of the population. In fact, "poverty is the single most prevalent characteristic of these families, who tend to be the poorest of the poor".

M. Callahan, "Feminist Approaches: Women Recreate Child Welfare" in B. Wharf (ed.) *Rethinking Child Welfare in Canada* (Toronto: McClelland & Stewart, 1993) 172 at 182-

83; L. Pelton, *supra* at 38, 50-52; Canadian Council on Social Development, *The Progress of Canada's Children, 1997* (1997) at 30; C. McKie, "An Overview of Lone Parenthood in Canada" in J. Hudson and B. Galaway (eds.) *Single Parent Families: Perspectives on Research and Policy* (Toronto: Thompson, 1993) 53 at 57-58, 60, 65-66; N. Trocmé *et al.*, "Child Abuse and Neglect in Ontario: Incidence and Characteristics" (May-June, 1995) Vol. LXXIV, # 3 *Child Welfare* 563 at 571-73; *Children Taken into Care*, Report for Manitoba Department of Community Services (Winnipeg: R. Sloan & Associates, 1989) at 27

39. Single mothers experience the highest level of poverty in Canada and face significant hurdles in providing basic necessities for their families. Apart from the material hardships, low income single mothers are also the object of prejudices and stereotypes which portray them as irresponsible parents and deficient in parenting skills. Such prejudices are reinforced for women with disabilities, women of colour, First Nations women and immigrant women. As the U.S. Supreme Court observed in *Santosky*, "because parents subject to termination proceedings are often poor, uneducated, or members of minority groups ... such proceedings are often vulnerable to judgments based on cultural or class bias". Legal representation in child custody matters is essential to begin to overcome the systemic inequalities which may lead to inappropriate determinations as to the child's best interest for children whose mothers are members of disadvantaged groups.

Santosky, supra at 763; See also Trocmé *et al.*, *supra* at 571; McKie, *supra* at 57-58, 60, 65-66; Pelton, *supra* at 50-52; *Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993), 101 D.L.R. (4th) 224 (N.S.C.A.); M. Jackman, "Women and the Canada Health and Social Transfer: Ensuring Gender Equality in Federal Welfare Reform, (1995) 8 *C.J.W.L.* 371 at 378-381.

40. The Federation of Law Societies of Canada states that "every person in Canada must have equal and fair access to justice" which should not be denied because of financial considerations. Further, legal aid services should include "advice and representation to those

whose life, liberty, livelihood or physical or mental security and safety are threatened." Similarly, the Canadian Bar Association has stated that "essential public legal service coverage for qualifying individuals must include ... child welfare matters where the state is involved as a party". The Report of the Ontario Legal Aid Review also concluded that:

> ... low-income people need access to legal representation when they come into contact with the kinds of legal regimes that intrude upon people's lives in some of the most extreme ways imaginable: involuntary treatment, incarceration, the apprehension of a child.
>
> *Report of the Ontario Legal Aid Review* (Vol. 1), *supra* at 59; Federation of Law Societies of Canada, *Statement of Principle on Legal Aid* (adopted in February 1994); Canadian Bar Association, *Charter of Public Legal Services* (Resolution 93-11-A; adopted 1993).

41. While CCPI submits that the involvement of the State as a party not should be a determining or limiting factor for eligibility for legal aid or to a finding of a s. 7 violation, there is a wide consensus, both within Canada and elsewhere that, at a minimum, legal aid must be granted in child protection cases. Legal aid is required because of the nature of the rights and interests at stake for both parents and children, the complexity of the proceedings, and the inequities for the poor and other disadvantaged groups if such assistance is not provided. To deny legal representation for poor parents in such proceedings is to demean and devalue their constitutional entitlement to liberty and security of the person.

(v) Principles of Fundamental Justice in the Present Case

42. CCPI submits that it was fundamentally unfair to force the Appellant to defend herself against the comparatively unlimited resources, expert evidence and legal arguments of the State, presented through its legal counsel in the present case. The Appellant was destitute and alone, facing three lawyers in a hearing which lasted three days. Fifteen affidavits were adduced into evidence. Moreover, she was facing the possible loss of custody of her children and could not possibly be expected to maintain the objectivity and composure necessary to adequately present an effective case in such an emotional matter. Confidence in the justice system is undermined

when the process is so fundamentally flawed. As Justice Bastarache aptly observed:

> Intervention here is compelling. The procedure here is founded on the adversarial system, as already stated. As such, it is based on the premise that the truth will emerge from the contest between the two adversaries where each presents its case before an impartial tribunal. Each side will do its best to establish its own case and to destroy the opponent's case. Out of this conflict, truth and justice will surface. Where, however, in fairness and in the circumstances of the case, one of the parties is incapable of self-representation, confidence in the system is threatened. The adversaries must be equal or relatively equal before the tribunal. If they are not, the procedure is in danger of degenerating into one of moral ambivalence.

> Reasons for Decision of Court of Appeal (Bastarache J.A.), COA at 151-154; Cosman and Rogerson, *supra* at 787, 848-849; Notes, *Columbia Law Review*, *supra* at 476; *Report of the Working Group on Unrepresented Litigants*, *supra* at 25; *M.T., supra.*

43. The Attorney General of New Brunswick asserts that the trial judge considered the evidence and held that legal counsel was not essential to a fair trial in this case (Factum, paragraph 31). With respect, CCPI submits the trial judge defined the right to a fair trial too narrowly. In particular, the trial judge failed to adequately take into account the complexity and adversarial nature of the proceedings, including the fact that the Appellant was not familiar with the rules of evidence, the legislation or the powers of the Minister or the Court.

44. The Appellant was acutely aware that she needed legal counsel in order to adequately present her case to the Court. At the hearing, she was subjected to a barrage of expert reports and assessments attacking her basic character, perception of reality, psychological make-up and stability, and child rearing skills, among other matters. The Appellant faced allegations that she was paranoid and had an excessive preoccupation with her powerlessness in dealing with government officials. Her interactions with social workers, counsellors, teachers, school officials, foster parents, and extended family members, were all subject to closest scrutiny.

> *New Brunswick (Minister of Health and Community Services) v. J.G.* (1995), 157 N.B.R. (2d) 169 (Q.B.)

45. Like many low income sole-support mothers, the Appellant was under tremendous social and financial stress and faced enormous difficulties in her efforts to support herself and her children on inadequate social assistance. Because of their reliance on public support programs,

low income sole support mothers are subject to constant oversight by social workers and other government officials. Their social and economic circumstances make them particularly vulnerable to child custody proceedings based on their inability to "cope", and on assessments of their unwillingness to "learn" or to "improve" their social and parenting behaviours. Without effective legal representation by counsel, such women are denied the fair and equal treatment upon which the legitimacy of the judicial system and child protection proceedings depend.

Report of the Ontario Legal Aid Review (Vol. 1), *supra* at 59

46. At an objective level, as Justice Bastarache concluded, it was fundamentally unjust for the Appellant to have to defend herself in legal proceedings on the crucial question of the custody of her children, against the weight of expert and other evidence put forward by the State, without the aid of a lawyer. At a subjective level, to force the Appellant into a proceeding in a court of law in which she was to be described, assessed and judged, not only in terms of her parental fitness but in terms of her basic character, her psychological make-up and her overall value as a member of society, without the aid of a lawyer, was to reinforce her sense of extreme injustice, of marginalization and of powerlessness. A decision-making process which engenders such feelings is clearly incompatible with the ideals of human dignity, equality and justice which s. 7 and the *Charter* as a whole are designed to safeguard.

Reasons for Decision of Court of Appeal (Bastarache J.A.), COA at 153-154

47. CCPI submits that the Respondents' refusal to provide the Appellant with State-funded legal counsel deprived her of her s. 7 rights to liberty and security of the person in a manner not in accordance with the principles of fundamental justice. As one commentator noted "it would be hard to think of a system of law which works more to the oppression of the poor" than the denial of legal aid to a low income parent in child protection proceedings.

Notes, *Columbia Law Review, supra* at 476; *Report of the Working Group on Unrepresented Litigants*, *supra* at 25

C. Section 1 of the *Charter*

48. This Court has emphasized that the government can never justify a *Charter* violation solely by reference to budgetary considerations or administrative convenience. The sole possible purpose of denying legal aid to low income parents in custody proceedings initiated by the State is to reduce spending. However, the rights at issue in this case are so fundamental that governments cannot justify denying s. 7 rights simply by claiming that it costs too much to respect them.

> *Eldridge, supra* at 685; *Re Provincial Court Judges,* 1997 3 S.C.R. 3 at 155-157; COA at 28; A. Scherer, "Gideon's Shelter" (1988) 23 Harv. C.R. - C.L. L. Rev. 557 at 576-577

49. Arguably, any cost savings the government may achieve by limiting expenditures on legal aid may be more than offset by the "significant cost consequences" for the administration of justice created when litigants are unrepresented. Professors Cosman and Rogerson observe that "the increasing numbers of unrepresented litigants have resulted in both more and lengthier trials". Judges in Ontario and B.C. have reported that trials take twice as long when litigants are unrepresented. Furthermore, the efficiencies offered by case management are lost and judges must "assume the inappropriate roles of intake worker, interviewer, lawyer and social worker".

> *Report of the Working Group on Unrepresented Litigants*, *supra* at 19; Cosman and Rogerson, *supra* at 828; Coalition for Access to Justice, *Proposal on the Impact of the Cuts to Legal Aid on the Disadvantaged in British Columbia* (Working Draft, Feb. 1998) at 4.

50. In any case, overall spending on legal aid in Canada amounts to only $17.90 per capita. This can be compared to $65.00 per capita spent on legal aid in England. The most recent data from the Canadian Centre for Justice Statistics illustrates that in 1994/95, all government spending on legal aid amounted to only 7% of total justice spending in Canada and justice expenditures were a relatively small share of total government spending. In fact, spending on legal aid in 1994/95 represented a mere 0.18% of all federal, provincial and territorial government spending in Canada.

> Canadian Centre for Justice Statistics, "Legal Aid in Canada: 1996-1997" (June 1998) *Juristat*, Vol. 18, No.10 (Statistics Canada-Catalogue 85-002-XPE) at 7; D. Crerar, "A Cross-Jurisdictional Study of Legal Aid" *Report of the Ontario Legal Aid Review*, Vol. 3,

supra, 1071 at 1124, 1148; National Legal Aid "Meeting Tomorrow's Needs With Yesterday's Budgets: The Undercapacity of Legal Aid in Australia" (July 1996) at 2; Canadian Centre for Justice Statistics, "Justice Spending in Canada" (Jan. 1997) *Juristat,* Vol. 17, No. 3 (Statistics Canada) at 1-3, 9; Statistics Canada, "Consolidated Federal, Provincial, Territorial and Local Government Expenditure Fiscal Years 1990/91 to 1994/95", *Public Sector Finance 1995-1996* (March 1996) at 168.

51. Moreover, spending on legal aid with respect to child protection matters represents a very small proportion of overall spending on legal aid. For example, from 1994 to 1996, child protection cases accounted for only 4 - 5% of all legal aid certificates granted in Ontario and only 6 - 8% of all spending on family law certificates. It is apparent that the expenditures on legal aid have not been significant relative to other government spending.

Cosman and Rogerson, *supra* at 786, fn #26, 889.

52. New Brunswick has the second lowest per capita spending on legal aid in Canada. In 1996-97, only 9% of all legal aid applications approved in New Brunswick were civil, compared to the average of 53% across Canada. The total fees and disbursements for child protection matters in particular accounted for only 1.6% of the total legal aid expenditures in New Brunswick. This illustrates that it would not be unduly onerous to force the Respondents to comply with their constitutional obligations.

"Legal Aid in Canada: 1996-1997" *Juristat, supra* at 8; Law Society of New Brunswick, *Annual Report of Legal Aid New Brunswick, 1996-1997* (July, 1997) at 21 and the attached audited financial statements.

53. In *Re Provincial Court Judges,* this Court held that governments could not justify interfering with the independence of the judiciary solely on the basis of financial considerations, even in difficult economic times. CCPI respectfully submits that in our adversarial system, when serious rights are at issue in complex proceedings, legal representation is just as critical to a fair adjudication as an independent judiciary. Simply put, s. 7 requires governments to allocate sufficient resources to ensure fair hearings in matters affecting one's liberty or security of the person.

Re Provincial Court Judges, supra; See also E. Raymer, "Family judges find themselves

dealing with fallout from legal aid cutbacks" (July 18, 1997) Vol. 17, No. 11 *The Lawyers Weekly* at 9-10.

54. CCPI submits that, even if some account may be taken of financial considerations under s. 1, the Respondents have failed to demonstrate that the Appellant's rights have been minimally impaired. CCPI submits that a categorical denial of legal aid to a poor parent, such as the Appellant, in cases where the State seeks custody of a child, does not minimally impair a parent's *Charter* rights. At a minimum, there must be a presumption that counsel is necessary for a fair hearing in such proceedings, which may be rebutted by the Respondents.

Re Provincial Court Judges, supra at 156-157; Des Rosiers, *supra* at 541-42.

55. In this case, s. 1 of the *Charter* cannot permit a government to escape its constitutional obligations under s. 7. In child protection matters, the cost of an unfair hearing in social and human terms is far greater than any potential budgetary savings. As the Canadian Bar Association argues:

> Legal aid is not an expensive social experiment, affordable only in times of economic growth. Rather, it is the expression of the basic, democratic principle of the protection of the rights of individuals against the overwhelming power of the state. As such, legal aid is essential in order to ensure equal access to justice in our society. Justice is indivisible; if it is not accessible to everyone then it does not exist.

F. Zemans, "Making the Justice System Balance" in A. Hutchinson (ed.) *Access to Civil Justice* (Toronto: Carswell, 1990) 237 at 249 citing the Canadian Bar Association National Legal Aid Liaison Committee, *The Provision of Legal Aid in Canada* (1985) at 1

D. Remedy

56. CCPI submits that, pursuant to s. 24(1) of the *Charter*, a just and appropriate remedy is a declaration that the failure to provide State-funded counsel to low income parents in child protection matters violates s. 7 of the *Charter,* and a direction to the Respondents to administer the *Legal Aid Act* in a manner consistent with the *Charter*. The Respondents can be left to choose from a myriad of options available to rectify the unconstitutionality of the current legal

aid system.

Eldridge, supra at 691-692.

57. CCPI submits that the remedy should be directed against all of the Respondents. The Respondents, Law Society of New Brunswick and Legal Aid New Brunswick assert that they are not subject to the *Charter* as they are acting in their private capacity. However, the *Charter* clearly applies to private entities which act in furtherance of a specific government program or policy. Governments cannot evade *Charter* responsibility simply by delegating the implementation of a legal aid program to another entity, as has been done in this case. It is submitted that the Respondents are merely the "vehicles the legislature has chosen to deliver this program".

Eldridge, supra at 661-666; *Legal Aid Act*, R.S.N.B. 1973, c. L-2; See also: Factum of the Attorney General of New Brunswick at paragraph 10

E. Conclusion

58. The State must ensure equal access to fundamental justice for all Canadians, including those living in poverty, when it deprives or threatens to deprive an individual of rights guaranteed under s. 7 of the *Charter*. Justice demands that parents not be subjected to the potential loss of custody of their children unless there is a fair hearing. In such matters, a fair hearing can only be assured if the parent is represented by counsel. If a parent cannot afford legal representation, fundamental justice and equality require the State to provide legal aid to that individual.

PART IV - ORDER SOUGHT

59. CCPI requests an order allowing the appeal and declaring that the failure to provide State-funded counsel to parents who cannot afford representation in child protection proceedings initiated by the State violates s. 7 of the *Charter* and that such violation is not justified by s. 1 of the *Charter*. CCPI further requests an order directing the Respondents to administer the legal aid

program in a manner consistent with s. 7 of the *Charter.*

ALL OF WHICH IS RESPECTFULLY SUBMITTED this day of October, 1998.

MARTHA JACKMAN	ARNE PELTZ	MICHAEL CONNER
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