

**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.,  
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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**

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**FACTUM OF THE INTERVENER  
THE ATTORNEY GENERAL OF ALBERTA**

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**PART 1**

**STATEMENT OF FACTS**

1  
2  
3  
4 1. The Minister of Justice and Attorney General of Alberta has intervened in this  
5 appeal in response to the constitutional questions stated by the Chief Justice on April 9, 1998.

6  
7 2. For the purpose of making argument on the constitutional questions, the Minister  
8 of Justice and Attorney General of Alberta accepts the facts as stated by parties to this Appeal.  
9

**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.

1  
2 **PART III**

3 **ARGUMENT**

4  
5 (a) **Even if the Appellant's care and control of her children is a liberty protected by**  
6 **Section 7 of the *Charter*, that liberty is not at issue in the circumstances of this case.**  
7

8  
9 6. The Appellant asserts that her care and control of her children is a constitutionally  
10 protected liberty. In child protection proceedings the state invariably asserts that children's  
11 interests require interference with parents' care and control of their children. Although the  
12 Appellant now asks that she be afforded a procedural guarantee – state-funded counsel – in a child  
13 protection hearing, the issue of what parents' substantive rights are in child protection hearings  
14 cannot be avoided.

15 7. In particular, in order to determine whether the Appellant is entitled to the  
16 procedural protection that she seeks, it is necessary to consider when parents' substantive rights  
17 might be favoured over the interests of their children. The Respondent Attorney General of New  
18 Brunswick argues that because child protection hearings are directed to discover what is in the best  
19 interests of a child, parents' rights are not in issue: there is no *lis* between parents and the State,  
20 which can form the basis for the Appellant's claim to the very highest procedural protection that  
21 the legal process ever affords. If no substantive parental right is in issue in child protection  
22 proceedings, parents are merely persons who may be affected by the result of the hearing. They  
23 are not people whose legal rights – much less their constitutional rights – are at issue.

24 8. If a child's best interests require interference with parental care, is it ever possible  
25 that a parent's rights can alter what is to be done? The Attorney General for Alberta says that

1 attention to Canadian child protection legislation and Canadian courts' traditional view of the  
2 substantive content of parents' right to care and control of their children shows that:

3 (a) parents' rights, whether statutory or constitutional, do not lack  
4 substance; however

5 (b) parents' rights are not at issue in many child protection  
6 proceedings, including the hearing at issue in this appeal.

7 9. Canadian child protection legislation typically requires a court to consider two  
8 distinct issues before interfering with a parent's care. Courts are required to determine whether  
9 a child's parents are failing to protect the child from serious mental, physical or emotional harm.  
10 (This criterion is articulated differently in different provinces.) If a court is not satisfied that the  
11 child is (e.g.) "a child in need of protection" (Sask., Ont.) the child *must* be returned to his or her  
12 parents, and without conditions. Second, if (and only if) the parents' care is demonstrated to be  
13 seriously defective the court makes a remedial determination of what is in the child's interests,  
14 which may require state supervision, custody or guardianship.

15 *Youth Protection Act*, R.S.Q. Chap. P-34.1, Sections 38 and 38.1  
16 (definition of security and development of child in danger), s. 47,  
17 s. 74-74.1, s. 74.2 (hearing where there is parental opposition to  
18 "urgent measures"), s. 91 (jurisdictional prerequisites to remedial  
19 orders).

20  
21 *Child Protection Act*, R.S.O. 1990, Chap. C.11 Sections 37(2)  
22 (definition of child in need of protection), s. 40, s. 46, s. 47  
23 (mandatory hearing after apprehension to determine if child in need  
24 of protection); s. 57 (jurisdictional prerequisites to remedial order  
25 in child's best interests).



1 *Family Services Act*, S.M. 1985-86, c. 8 - Chap. C80, Sections 17  
2 (definition of "Child in need of protection"), s. 27(1) (mandatory  
3 application after apprehension to determine if child in need of  
4 protection), 38(1) (jurisdictional prerequisites to remedial orders)

5  
6 *Child and Family Service Act*, S.S. c. C-7.2, Sections 11 (definition  
7 of "child in need of protection"), s. 17(3), s. 18(3), s. 22  
8 (mandatory protection hearing), s. 36 (mandatory return of child if  
9 not in need of protection).

10  
11 *Child Welfare Act*, S.A. Chap. C-8.1, Sections 1(2), 1(3) (definition  
12 of child in need of protective service), s. 19(1) (mandatory hearing),  
13 s. 26, s. 29 and s. 32 (jurisdictional prerequisites to remedial  
14 orders).

15  
16 10. Whether or not parents' care and control of their children has constitutional  
17 protection, it is Alberta's view that the State properly interferes with parents' decisions regarding  
18 a child's upbringing only when serious defects in the care the parents provide are detected and,  
19 if disputed, proven to a court. In distinguishing between justifying State interference with parents'  
20 care and control of their children and determining how a child should be cared for once  
21 interference has been justified, Alberta's policy reflects the law's traditional view that:

22 The right of a natural parent to the care and control of a child is  
23 basic. It is a right not easily displaced. Nothing less than cogent  
24 evidence of danger to the child's life or health is required before the  
25 court will deprive a parent of such care and control.

26 *Children's Aid Society of Winnipeg v. M. and C.* (1980), 15 R.F.L.  
27 185 (Man. C.A.) per Freedman C.J.M.

28 (See, also: *Hepton v. Matt* [1957] S.C.R. 606, at 607 per Rand J.)  
29

30 11. If the State satisfies a court that its apprehension of a child is justified, parents'  
31 rights are not in issue in remedial proceedings. As a result, the parents' participation in those

1 proceedings is of significance only insofar as they are able to aid the court in its attempts to  
2 advance their child's interests. Much as:

3 ...the right to liberty embedded in s. 7 does not include a parent's  
4 right to deny a child medical treatment that has been adjudged  
5 necessary by a medical professional...,  
6

7 when parents' *prima facie* right to care and control of their child has been defeated by serious  
8 defects in the care they provide, parental care and control is relevant only to the extent that it has  
9 implications for the child's best interests.

10 *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995]  
11 1 S.C.R. 315, at 430 per Iacobucci and Major J.J.

12  
13  
14 12. Thus, parental care and control of a child may come before a court in two ways,  
15 only one of which is a candidate for Section 7's constitutional requirement of fundamental justice.  
16 Parents may deny that their care of their child is seriously defective, saying that their *prima facie*  
17 right to care and control of their child is not defeated or displaced. Resolution of *this* dispute  
18 requires a determination of a parent's rights as against the State, whether those rights are  
19 recognized by the *Charter* or by statute only. Alternatively, parents may say, *even if* the care they  
20 provide has been seriously defective, the child should be under the parents' care (perhaps, with  
21 the assistance and supervision of a social service agency). In this latter case, the parents' care and  
22 control of the child is not before a court as a claim of right but only as a matter to be considered  
23 in determining the child's best interest.

24 13. Under Canadian child protection legislation, a hearing analogous to the child  
25 protection hearing in issue in this appeal (i.e. for an *extension* of a temporary guardianship order)

1 typically occurs only after it has been determined, at the time that the original temporary  
2 guardianship order was made, that a child is in genuine need of care that his or her parents do not  
3 provide. That is, the parents' *prima facie* right to care and control of their child has been defeated  
4 by an earlier finding of defective care. The issue addressed when an extension of temporary  
5 guardianship is sought is whether intervening events have altered what arrangements are in the  
6 child's best interests. As a result, the parents' interest in the care and control of their child is not  
7 in issue as a claim of right. Rather, *even if the court at such a hearing decides to end the State's*  
8 *temporary guardianship, and care and control of a child is returned to the parents*  
9 *unconditionally, this is properly done only if return of the child is in the child's interests.*

10 14. Should this Court decide that parents may be deprived of care and control of their  
11 children only in accordance with the principles of fundamental justice, Alberta asks that the Court  
12 attend to the distinction between the State's justification of its apprehension of a child, and the  
13 determination of an appropriate response to seriously defective parental care. Alberta holds that  
14 parents' right to fundamental justice in child protection proceedings - should such a constitutional  
15 right exist - is fully vindicated if a child's apprehension may be resisted and the State's justification  
16 is fairly reviewed promptly after the original apprehension.

17 15. The New Brunswick *Family Services Act* R.S.N.B. 1973, c. F-2.2 distinguishes  
18 these two issues less clearly than does the legislation of some other provinces. After a child is  
19 apprehended, at an "interim hearing" a court reviews whether the Minister had "reasonable  
20 grounds" for apprehending a child, and also whether "the child should remain in the protective  
21 care of the Minister." The court must decide both issues placing "above all other considerations  
22 the best interests of the child." Parents may demand a hearing to review their child's  
23 apprehension, but only to determine if the Minister had "reasonable grounds" for the  
24 apprehension. While we suspect that New Brunswick courts scrutinize the Minister's decision  
25 more carefully than the *Family Services Act* strictly requires, the New Brunswick *Family Services*

1 Act nowhere demands consideration of the possibility that the security or development of the child  
2 is not in fact in danger, notwithstanding that the Minister had reasonable grounds to apprehend.

3 *Family Services Act* R.S.N.B. 1973, c. F-2.2 Sections 31(1)  
4 (definition of security and development of child in danger), 51  
5 (mandatory hearing, interim hearing), S. 51.1 (parents' right to  
6 review hearing) s. 53 (best interests of child to govern all  
7 decisions), 55 (remedial powers).

8  
9 16. In this case, the hearing for which the Appellant sought state-funded counsel  
10 addressed whether or not the Respondent Minister of Health and Community Services should be  
11 granted on *extension* of its custody of the Appellant's children for a further six months. The  
12 hearing was remedial, and directed to discovering what was in the children's best interests, rather  
13 than determining whether the State could properly interfere with the Appellant's care and control  
14 of her children. (We submit that Mr. Justice Logan, in granting the *original* custody order,  
15 concluded that the "security and development" of the Appellant's children were "in danger"  
16 referring, e.g., to one child having missed 111 ½ days of school in a single year.) For this reason  
17 Attorney General for Alberta says that the Appellant's rights were not in issue at the extension  
18 hearing that is the subject of this appeal, and that the argument of the Attorney General of New  
19 Brunswick referred to in paragraph 7 above is wholly apposite.

20 Affidavit of Jeannine Godin, Exhibit A (Decision of Logan J.); Case  
21 on Appeal, pp. 14-20

22  
23 17. Accordingly, the Attorney General for Alberta says that even if the Appellant's care  
24 and control of her children is protected by Section 7 of the *Charter*, her present claim to state-  
25 funded counsel must be rejected. Parental rights are not at issue in the circumstances of this case.

1 (b) The Appellant's care and control of her children is not a liberty protected by Section  
2 7 of the *Charter*.

3  
4 18. In support of its contention that Section 7 of the *Charter* does not protect the  
5 Appellant's care and control of her children, The Attorney General of Alberta wishes to elaborate  
6 upon views expressed by the Chief Justice regarding the scope of the liberty protected by Section  
7 7:

8 To summarize my opinion, I would simply say that extending the  
9 scope of the word "liberty" in s.7 to include any type of freedom  
10 other than that which is connected with the physical dimension of  
11 the word "liberty" would not only be contrary to the structure of the  
12 *Charter* and of the provision itself, but would also be contrary to the  
13 scheme, the context and the manifest purpose of s.7. Furthermore,  
14 it would have the effect of conferring *prima facie* constitutional  
15 protection on all eccentricities expressed by members of our society  
16 under the rubric of "liberty", in addition to taking away all  
17 legitimacy of purpose from other provisions of the *Charter* such as  
18 s.2 or s.6, for example, since they would be redundant. It seems  
19 apparent to me that this cannot be the purpose of s.7, or of the  
20 *Charter* itself, which is a constitutional instrument. It must also be  
21 clearly understood that this approach would inevitably lead to a  
22 situation where we would have government by judges. This is not  
23 the case at present, but I would emphasize again that it must not  
24 become the case.

25  
26 B.(R.) v. *Children's Aid Society of Metropolitan Toronto*, supra, at  
27 348, per Lamer C.J.

28  
29 19. In our submission there are two, and only two, notions that may be readily  
30 communicated by the use of the word "liberty". One is the notion familiarly referred to by  
31 lawyers as 'the liberty of the subject', which the Chief Justice describes as "the physical dimension  
32 of liberty", which may be infringed by punishment by imprisonment, restraining a mentally

1       disordered person, or isolating the contagious. The second is the notion, characteristic of the  
2       English legal tradition, that people may do *anything* that is not prohibited, and that our general  
3       freedom of action is subject only to the rule of laws "necessary for the general advantage of the  
4       public." Either of these readings could, absent authority, form the basis for an interpretation of  
5       "liberty" as it occurs in s.7 of the *Charter*, and properly claim a basis in the constitutional text.

6                     Blackstone, *Commentaries on the Laws of England*, Bk. I, Ch. 1,  
7                     pp. 121, 122 (1765, Oxford)

8                     *Bolling v. Sharpe* (1953), 347 U.S. 498, at 499f.

9                     *Re Horsefield and Registrar of Motor Vehicles* (1997), 34 O.R. (3d)  
10                    509 (Div. Ct.), at 523

11  
12       20.           The Attorney General for Alberta recognizes that the weight of authority holds that  
13       "liberty" as used in s.7 does not refer to Canadians' general freedom of action in conducting their  
14       affairs. Rather than use the notion of "fundamental justice" to mark the fact that Canadians'  
15       "natural liberty" is properly limited by the rule of laws of general application passed for public  
16       purposes, Canada's courts have held instead that s.7's notion of "liberty" is *itself* less than  
17       comprehensive. For example, there is now no constitutional need to consider whether legal  
18       constraints on Canadians' economic decisions are fundamentally just (unless, perhaps, those  
19       constraints threaten "security of the person").

20                    *Irwin Toy Ltd. v. Quebec (A.G.)* [1989] 1 S.C.R. 927, at 1002-1004  
21                    per Dickson C.J.C.

22  
23       21.           Thus, at present, proposed readings of "liberty" that go beyond the liberty of the  
24       subject invariably import substantive criteria, which purport to characterise domains of human  
25       action that are sufficiently significant to warrant constitutional protection. For example:

1 "I do not agree with him that it is a right to bring up and educate  
2 one's children "as one sees fit". I believe that is too extravagant a  
3 claim. He has the right to raise his children in accordance with his  
4 conscientious beliefs. The relations of affection between an  
5 individual and his family and his assumption of duties and  
6 responsibilities toward them *are central to the individual's sense of*  
7 *self and his place in the world.*" (*R. v. Jones*, [1986] 2 S.C.R. 284,  
8 at 319 per Wilson J. (dissenting), emphasis added)

9 "Thus, an aspect of the *respect for human dignity* on which the  
10 *Charter* is founded is the right to make *fundamental personal*  
11 *decisions* without interference from the state. This right is a critical  
12 component of the right to liberty... . In my view, this right,  
13 properly construed, grants the individual a degree of autonomy in  
14 making *decisions of fundamental human importance.*" (*R. v.*  
15 *Morgantaler*, [1988] 1 S.C.R. 30, at 166, per Wilson J. emphasis  
16 added)

17 "On the other hand, liberty does not mean mere freedom from  
18 physical restraint. In a free and democratic society, the individual  
19 must be left room for personal autonomy to live his or her own life  
20 and to make decisions that are of *fundamental personal importance.*  
21 In *R. v. Morgantaler* [citation] Wilson J. noted that the liberty  
22 interest was *rooted in the fundamental concepts of human dignity,*  
23 *personal autonomy, privacy and choice in decisions going to the*  
24 *individual's fundamental being.*" *B.(R.) v. Children's Aid*, supra,  
25 at 368, per LaForest J. (emphasis added).

26 "I do not by any means regard this sphere of autonomy of autonomy  
27 as to encompass any and all decisions that individuals might make  
28 in conducting their affairs. Indeed, such a view would run contrary  
29 to the basic idea ... that individuals cannot in any organized society  
30 be guaranteed an unbridled freedom to do whatever they please.  
31 Moreover, I do not even consider that the sphere of autonomy  
32 includes within its scope every matter that might, however vaguely,  
33 be described as "private". Rather, as I see it, *the autonomy*  
34 *protected by the s. 7 right to liberty encompasses only those matters*  
35 *that can properly or inherently personal such that, by their very*  
36 *nature, the implicate basic choices going to the core of what it*  
37 *means to enjoy individual dignity and independence.* As I have  
38 already explained, I took the view in *B.(R)* that parental decisions  
39 respecting medical care provided to their children fall within this  
40 narrow class of inherently personal matters. In my view, choosing  
41 where to establish one's home is, likewise, *a quintessentially private*  
42 *decision going to the very heart of personal or individual*  
43 *autonomy.*" *Godbout v. Lonqueiuil* [1997] 3 S.C.R. 844, at 895 per  
44 La Forest J. (emphasis added).

1       22.           The spectre of “government by judges” arises in this circumstance because *no*  
2       *common notion of “liberty” refers to freedom of choice only in respect of the weightiest of our*  
3       *decisions and endeavours.* Still less does any common notion of “liberty” refer to freedom of  
4       choice in matters determined to be weighty by Canada’s superior courts: the *point* of protecting  
5       people’s general freedom of action (if that is what s. 7 does) is to leave judgements as to an  
6       action’s significance up to *them.* If s.7 of the *Charter* is to be “interpreted” more broadly than  
7       the “liberty of the subject”, yet subject to some other substantive criteria, *however* those  
8       substantive criteria are ultimately articulated, both their verbal characterization and their  
9       specification in particular cases will necessarily be wholly a matter of judicial invention.

10       23.           In framing s.7 of the *Charter*, Parliament could have protected our liberties, e.g.,  
11       in matters going essentially to an individual’s fundamental being, but it did not. The Attorney  
12       General for Alberta submits that because ‘the liberty of the subject’

13                   (a) is readily intelligible in the context in which s.7 occurs, that  
14                   of guaranteed Legal Rights;

15                   (b) does not render substantive freedoms protected elsewhere in  
16                   the *Charter* redundant;

17                   (c) makes ready sense, when limited by “fundamental justice”;  
18                   and

19                   (d) does not require the courts to impose a meaning upon a term  
20                   that already has one,



1 no current competing reading of "liberty" can claim to respect the constitutional text.

2

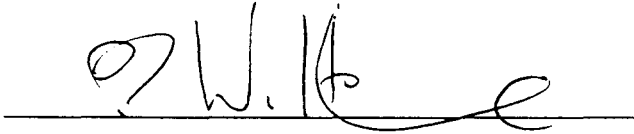
**ORDER REQUESTED**

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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 27<sup>th</sup> day of October, A.D. 1998.



ROD WILTSHIRE  
Counsel for the Intervener  
the Attorney General of Alberta

**PART V**  
**LIST OF AUTHORITIES**

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<i>Children's Aid Society of Winnipeg v. M. and C.</i> (1980), 15 R.F.L. 185 (Man. C.A.) . . . . .	5
<i>Godbout v. Lonqueiuil</i> [1997] 3 S.C.R. 844 . . . . .	11
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<i>Irwin Toy Ltd. v. Quebec (A.G.)</i> , [1989] 1 S.C.R. 927 . . . . .	10
<i>Morgantaler, R. v.</i> [1988] 1 S.C.R. 30 . . . . .	11
<i>Re Horsefield and Registrar of Motor Vehicles</i> (1997), 34 O.R. (3d) 509 . . . . .	10

## APPENDICES

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<i>Child Protection Act</i> , R.S.O. 1990, Chap. C.11 Sections 37(2), 40, 46, 47, 57 . . . . .	B
<i>Child Welfare Act</i> , S.A. Chap. C-8.1, Sections 1(2), 1(3), 19(1), 26, 29, 32 . . . . .	C
<i>Family Services Act</i> , S.M. 1985-86, c. 8 - Cap. C80, Sections 17, 27(1), 38(1) . . . . .	D
<i>Family Services Act</i> R.S.N.B. 1973, c. F-2.2 Sections 31(1), 51, 51.1, 53, 55 . . . . .	E
<i>Youth Protection Act</i> , R.S.Q. Chap. P-34.1, Sections 38, 38.1, 47, 74, 74.1, 74.2, 91 . . . . .	F