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

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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)

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.

> *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.

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:

10

> 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)

20 *(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.

30 *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.

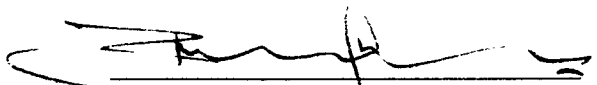

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TABLE OF AUTHORITIES

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AUTHORS CITED