

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE NEW BRUNSWICK COURT OF APPEAL)

BETWEEN;

████████████████████

APPELLANT

AND;

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

RESPONDENTS

**FACTUM OF THE INTERVENER
THE WOMEN'S LEGAL EDUCATION AND ACTION FUND,
THE NATIONAL ASSOCIATION OF WOMEN AND THE LAW
AND THE DISABLED WOMEN'S NETWORK CANADA**

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THE NATIONAL ASSOCIATION OF WOMEN AND THE LAW
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30 **PART I: FACTS**

1. The Women's Legal Education and Action Fund, the National Association of Women and the Law, and the Disabled Women's Network Canada (the Coalition) adopt the facts as set out in paragraphs 1 to 17 of the Appellant's factum. The Coalition relies in particular on the following facts of the case:

40 (a) The Appellant was facing a state-initiated proceeding seeking an order removing her three children from her care, and placing them in temporary wardship with the Minister of Health and Community Services (the Minister of Health).

(b) The first order placing the children in temporary wardship for 6 months was made on 29 April 1994. The hearing lasted two days, and the Appellant was not represented by counsel, assisted only by a friend who had no legal training. The children were 7, 4 and 3 years old at the time the order was made.

(c) The Minister of Health sought an extension of the first order (for a further six months) on 27 Oct. 1994. Thomas Christie (Christie), acting as duty counsel, appeared on behalf of the Appellant, and raised with the court the Appellant's need for funded counsel, given the nature of the proceedings brought against her. The hearing for the extension of the first order was adjourned.

10 (d) The Appellant applied for legal aid on 1 Nov. 1994. The Appellant's financial eligibility for legal aid was never in dispute as she was receiving social assistance throughout the wardship proceedings. The application was denied on the basis that legal aid representation was only available for permanent wardship hearings.

(e) On 3 Nov. 1994, the court heard the Appellant's motion for state funded legal representation for the temporary wardship proceedings. Christie represented the Appellant as duty counsel on this motion. On 8 Nov. 1994, Christie was told that his retainer as duty counsel was finished. Christie continued to represent the Appellant on the temporary wardship proceedings for free, on the understanding that the parties would not later argue that the issues raised in the motion were moot.

20 (f) The hearing for an extension of the temporary wardship order was in December 1994, and took 3 days. The Minister of Health relied on the evidence of 15 witnesses (through affidavit evidence and oral cross-examination). The evidence involved expert witnesses, including at least one psychological report and a sociological report.

(g) All of the parties except the Appellant were represented by counsel provided by the state or paid for personally by the party. The Minister of Health was represented. At the request of the court, the Minister of Justice provided counsel for the children. The father of one of the children was represented by counsel paid by him.

30 (h) The Appellant understood that she was a party in this case only because the Minister of Health believed she could not adequately care for her children. She feared that her lack of legal representation would result in the court deciding the matter without her having a fair opportunity to challenge the Minister's claims.

(i) An extension of the temporary wardship order was granted on 3 Jan. 1995. The children remained in temporary wardship until they were returned to the Appellant's care in June 1995.

40 Case on Appeal, at 2 (original Notice of Application to Extend Custody Order, 19 Oct. 1994); 24-25, (Affidavit of Thomas Christie sworn 10 Nov. 1994); 82.1, 82.2 (Affidavit of Sherry Taylor sworn 4 Jan. 1996); 86, 87, 100 (Reasons for Decision on Motion, Athey, J.C.Q.B., 15 Dec.1995); 118, 119, 151, 153, 154 (Dissenting Reasons of Court of Appeal, 14 Mar. 1997, Bastarache, J.)

PART II: ISSUES

2. The issues in this appeal are:

(a) whether the refusal to provide legal aid or state funded legal representation to the Appellant in a proceeding instituted by the state to take temporary wardship of her three children was a contravention of the Appellant's rights as guaranteed by ss. 7, 15 and 28 of the *Canadian Charter of Rights and Freedoms* (the *Charter*); and

(b) if so, whether such contravention was justified under s. 1 of the *Charter*.

PART III: ARGUMENT

A. Summary of the Coalition's Argument

3. The Coalition submits that:

(a) temporary wardship proceedings engage the liberty and security interests of care-giving parents;

(b) fundamental justice requires that care-giving parents have the opportunity for meaningful participation in temporary wardship proceedings in order to ensure a fair hearing;

(c) such participation can only be achieved through effective legal representation;

(d) women require state funding in order to obtain effective legal representation in temporary wardship proceedings; and

(e) the failure to provide legal aid or state funded legal representation to care-giving parents in temporary wardship proceedings compromises the rights of women contrary to ss. 7, 15 and 28 of the *Charter*, and cannot be justified under s.1 of the *Charter*.

B. Context

1. Women as Primary Care-Givers

4. Historically, men and women have assumed gendered familial roles. Women traditionally assumed and often continue to assume the responsibility for the bulk of unpaid labour, including the major burden of child care, whether in marital or non-marital relationships, whether in intact relationships or following break-down or separation, and regardless of paid employment.

Moge v. Moge, [1992] 3 S.C.R. 813, at 861, L'Heureux-Dube, J.

Young v. Young, [1993] 4 S.C.R. 3, at 49, L'Heureux-Dube, J.
Shelagh Day and Gwen Brodsky, *Women and the Equality Deficit: The Impact of
Restructuring Canada's Social Programs*. Cat. no. SW21-32/1998E. Ottawa: Status
of Women Canada. 1998. at 6, 7

5. When parents separate, mothers overwhelmingly retain custody of their children. For most women, assuming primary care-giving responsibilities after separation simply continues the responsibilities held by them prior to the separation.

10 *Young v. Young*, *supra* at 49-50, L'Heureux-Dube, J.
Donna S. Lero & Karen L. Johnson, *110 Canadian Statistics on Work & Family*. Ottawa:
Canadian Advisory Council on the Status of Women. April 1994. at 5

2. Family Law Legal Aid

a. Legal Aid

20 6. The provision of legal aid, by means of a statutory or regulatory device, to individuals who are poor has been part of the judicial landscape of Canada since the late 1960's. Legal aid legislation is the recognition of the right of the poor to equal access to justice.

Legal Aid and the Poor: A Report by the National Council on Welfare. Ottawa: The
National Council on Welfare. Winter 1995. at 1
Dieter Hoehne, *Legal Aid in Canada*. Queenston, Ontario: Edwin Mellen Press. 1989. at
2, 23-71

30 7. All provinces and territories have a civil or family law legal aid program, and there is a variety of service delivery systems. There are three main models of delivery of legal aid services, namely, the *judicare* model, the staff model and the community clinic system. However, every province and territory has designed its own delivery system, all of which are, in some form, a combination of the different models.

Supplementary Case on Appeal, at 36 (Affidavit of Michel Carrier sworn 17 Nov.1994
(Carrier Affidavit), ex K)
Legal Aid and the Poor, *supra* at 17, 23-24

40 8. All provincial and territorial legal aid programs operate on the basis of financial eligibility criteria. Entitlement based on categories of funded legal issues is also a major feature of legal aid plans in Canada. Most provincial legal aid schemes distinguish between categories of legal issues for which the provision of legal aid is mandatory, and those categories in which legal aid may be provided in the discretion of the legal aid administrators. This results in a wide disparity in the

legal aid coverage provided in each jurisdiction. There is also a wide disparity in the amount of funding which is committed to family law legal aid in each province.

Mary Jane Mossman, "Gender Equality and Legal Services: A Research Agenda for Institutional Change" (1993), 15 *Sydney Law Review* 30, at 41
Supplementary Case on Appeal, at 46-48 (Carrier Affidavit, ex. K)
Legal Aid and the Poor, *supra* at 18

10 9. The provision of legal aid in family law proceedings has been characterized nationally by a lack of proper and adequate funding.

Mary Jane Mossman, "Gender Equality, Family Law and Access to Justice" (1994), 8
International Journal of Law and the Family 357
Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability*. Ottawa: Canadian Bar Association. 1993. at 208

b. Family Law Legal Aid in New Brunswick

20 10. The New Brunswick family law legal aid program is providing less assistance per capita than most other Canadian jurisdictions. Family law legal aid in New Brunswick provides representation by a staff lawyer in the areas of support, custody, some division of property, interim relief, division of marital property in "non-complex" cases, as well as in divorce in certain circumstances.

Supplementary Case on Appeal, at 29, 73 (Carrier Affidavit, exs. K, M)

30 11. At the time this case arose, family law legal aid was also available for cases involving spousal abuse and to parents involved in permanent (but not temporary) wardship applications. The legal aid certificate granted in these cases was limited to \$1,000.00 for fees and disbursements.

Supplementary Case on Appeal, at 73 (Carrier Affidavit, ex. M)
Patricia Hughes, "New Brunswick's Domestic Legal Aid System: *New Brunswick (Minister of Health and Community Services) v. J.G.*" (1998), 16 *Windsor Yearbook of Access to Justice* 240 at 241

40 12. Since the *Godin* case was heard in the New Brunswick Court of Appeal, the policy was changed to provide legal aid certificates to eligible parents for the first temporary wardship hearing. Subsequent temporary wardship hearings remain unfunded. Legal aid was not and is still not available for appeals in wardship cases.

Appellant's Factum, at 55

Respondent's Factum, The Law Society of New Brunswick and Legal Aid New Brunswick,
at 3-6, paras. 8-20

13. Duty counsel is also available to provide "legal information" to respondents in Family Court proceedings involving the crown prosecutor, that is, support applications, judicial enforcement hearings and child protection cases. In wardship proceedings, duty counsel do not marshal evidence, cross-examine witnesses or make legal argument.

10 Supplementary Case on Appeal, at 58 (Carrier Affidavit, ex. K)

c. Who is the Family Law Legal Aid Client?

14. The family law legal aid client is most likely a woman and poor. In absolute terms, more women than men are poor in Canada, and among the poor, sole support mothers, aboriginal women, elderly women and women with disabilities are the very poorest. The family law legal aid client is frequently a sole support mother of limited social and financial resources. She has generally been the primary care-giver of children. If she has been in the paid work force, it has been in low-paying or part-time work, due to maternity gaps or child care responsibilities and the gendered structure of the labour market.

Legal Aid and the Poor, supra at 10

Shelagh Day and Gwen Brodsky, *supra* at 6, 7

Brenda Cossman & Carol Rogerson, "Case Study in the Provision of Legal Aid: Family Law", *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*, Toronto: Province of Ontario. Sept. 1997. 773 at 817-820

30 Patricia Hughes, "The Gendered Nature of Legal Aid", in Frederick H. Zernans & Patrick J. Monahan, *From Crisis to Reform: A New Legal Aid Plan for Ontario: Background Papers*. North York, Ont.: York University Centre for Public Law and Public Policy. 1997. 29 at 36-37

15. The family law legal aid client may also be a victim of assault or abuse by her partner or she may be a member of a minority group with limited knowledge of English or French. Family law legal aid clients cover a wide cross-section of our social landscape; they are aboriginal women, women with disabilities, women with mental health problems, and women with limited education, but foremost they are women who are poor.

40 *Legal Aid and the Poor, supra* at 12-14

16. The family law legal aid client may also be a woman whose children are now grown but who assumed the traditional role of full-time care-giver and homemaker. She generally has no significant experience in the paid work force, whatever training she may have had is obsolete and as a result, there is little likelihood, given her age, that she will ever become financially self-sufficient.

Legal Aid and the Poor, supra at 10, 12

3. Wardship Proceedings

17. Wardship proceedings are among the most intrusive action the state can take against a parent. The result of the state action is the removal of children from their family, either temporarily or permanently.

B.(R.) v. The Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, at 370-371, LaForest, J.

Colene Flynn, "In Search of Greater Procedural Justice: Rethinking *Lassiter v. Department of Social Services*" (1996), 11 *Wisconsin Women's Law Journal* 327

Brenda Cossman & Carol Rogerson, *supra* at 848-849

18. To the care-giving parent, the wardship hearing takes place in an "artificial environment ... subject to rules and procedures that are often unintelligible to family and child, and in which one observes persons who, in the midst of the worst crisis of their lives, are functioning in ways that may only vaguely resemble their normal behaviour".

George M. Thomson, "Judging Judiciously in Child Protection Cases", in Rosalie S. Abella & Claire L'Heureux-Dube, eds., *Family Law: Dimensions of Justice*, Toronto: Butterworths. 1983. at 231

a. Who are the Respondents in Wardship Proceedings?

19. While both parents are nominally respondents in wardship proceedings, many fathers are either absent or voluntarily take no part in the proceeding. As a result, the mother, as the primary care-giver or the sole custodial parent, is the only participating respondent in the majority of these proceedings.

Karen Swift, "Contradictions in Child Welfare: Neglect and Responsibility", in C. Bains, P. Evans & S. Neysmith, eds., *Women's Caring*, Toronto: McClelland & Stewart. 1991. at 242-243, 256, 257, 261

Judith Mosoff, "'A Jury Dressed in Medical White and Judicial Black'; Mothers with Mental Health Histories in Child Welfare and Custody ", in Susan Boyd, ed., *Challenging the*

10 20. The mother who is the respondent in a wardship proceeding will already have experienced a disproportionate amount of state involvement in and documentation of her life. Women's social and economic circumstances make it more likely that they will need to rely on income support and other welfare-related programs and services at some point in their lives. She may even have been subjected to supervision orders in the past, or be "known" to social services and child protection agencies. She is someone who is particularly vulnerable in her interactions with the state. All of this information, some of which is extraneous, becomes part of the case she has to meet in wardship proceedings.

Karen Swift, *supra* at 243 244, 250, 256, 258, 266

George Thomson, *supra* at 228

Santosky et al. v. Kramer, Commissioner, Ulster County Department of Social Services (1982), 455 U.S. 745 (U.S.S.C.) at 763

20 Philip Zylberberg, "Minimum Constitutional Guarantees in Child Protection Cases" (1992), 10 *Canadian Journal of Family Law* 257 at 278

Case on Appeal, at 103 (Reasons for Decision on Motion, Athey, J.C.Q.B., 1 Dec. 1995)

Brenda Cossman & Carol Rogerson, *supra* at 787

Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services, Toronto: Province of Ontario. Sept. 1997. at 59, 166-167

30 21. The reality beneath the surface for many mothers responding to wardship proceedings is a life of violence and abuse by fathers, husbands and lovers. Random examples of ongoing violence are provided by the state as background information, or are relied upon as the reason for state intervention.

Karen Swift, *supra* at 250

b. "The Best Interests of the Child": A Disputed Notion

40 22. The wardship proceeding permits the state to question the right of the care-giving parent to raise her children. The intervention of the state gives rise to an examination by the court of the competing values of the state and the primary care-giver, in the process of determining the best interests of particular children.

23. The definition of best interests is not finite, specific or immutable; rather it is a much disputed concept, determined and applied on a case-by-case basis. In its submissions to the court, the state defines best interests in a particular way, which may be very different from the way in which the

care-giving parent understands and defines best interests for a particular child. Also, the state defines best interests in a way which devalues the relationship between the child and the primary care-giver.

24. To support its case, the state relies on the opinions of professionals, trained to apply theoretical models of care-giving usually based on white, affluent, middle-class, dominant norms modelled on intact families. These professionals (e.g., social workers, public health nurses, psychologists, psychiatrists), whose life experiences differ dramatically from those of the care-giving parent, construct models of "acceptable" child care for the court. These models are not neutral, are not an exact science and change over time. Nonetheless these models are routinely accepted as expert evidence, and applied by judges.

George Thomson, *supra* at 213, 214, 215, 219, 220-221, 225, 226, 229-230, 236
Santosky v. Kramer, *supra* at 763
Judith Mosoff, *supra* at 230, 233, 234
Karen Swift, *supra* at 247, 249-250, 260
Nicholas Bala, "Mental Health Professional in Child-Related Proceedings:
Understanding the Ambivalence of the Judiciary" (1995-96), 13 *Canadian
Family Law Quarterly* 261 at 262-264, 282-283

25. Models of acceptable child care based on dominant culture and middle class norms are relied upon by the state to cast parents who do not fit within such norms as "bad" and therefore not deserving of having custody of their children. The most dramatic example of this can be seen in the Aboriginal context where the child welfare system replaced the residential school system in removing Indian children from their homes on the basis of this social construction.

Karen Swift, *supra* at 249-250, 260-261
George Thomson, *supra* at 229
A.C. Hamilton and S.M. Sinclair, *Report of the Aboriginal Justice Inquiry of Manitoba. Winnipeg: Province of Manitoba. 1991. at 509-511*
M. Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993), 18 *Queen's L.J.* 306 at 324-328
John Dewar, "Indigenous Children and Family Law" (1997), 19 *Adelaide Law Review* 217 at 221-222

c. The Nature of the Proceedings

26. In wardship proceedings, the respondent is facing the resources of the state, which is caught in a conflicting statutory obligation to do all in its power to return a child to the care of the

parents, while at the same time actively gathering evidence against that parent to support the state's possible application for permanent wardship.

10 The state's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given (wardship) proceeding. The state's (lawyer) usually will be expert on the issues contested and the procedures employed at the fact-finding hearing, and enjoys full access to all public records concerning the family. The state may call on experts in family relations, psychology and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional case-workers whom the state has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the state even has the power to shape the historical events that form the basis for (wardship).

Santosky v. Kramer, supra at 763
Philip Zylberberg, *supra* at 278
Judith Mosoff, *supra* at 241

20 i. The Process is Adversarial

27. The fact-finding process pits the state directly against the care-giving parent; the state alleges that the parent is at fault, and seeks a judicial determination that the parent is unfit to raise her own child.

Judith Mosoff, *supra* at 228
Santosky v. Kramer, supra at 759-760

30 28. In wardship matters, both judges and those who appear in court may experience understandable uncertainty about the role of the judge. While the judge may be called upon to function as a decision-maker, a symbolic representative of the state, an investigator, a parent and a therapist, in fact, the common law traditions, the procedures, the rules of evidence applied and the legal representation of the state make it an adversarial process. The process may look like an inquiry, but it is adversarial.

40 George Thomson, *supra* at 215
Brenda Cossman & Carol Rogerson, *supra* at 786-788, 848-849

ii. The Path to Permanent Wardship

29. Consents or agreements between the state and parents, which are often steps in the process towards permanent wardship, are themselves problematic, as they are frequently secured in circumstances which raise questions about the nature of the "consent": lack of counsel; differences

in sophistication; fear of the authorities; and the use of subtle forms of coercion. While the care-giver often "agrees" to these arrangements because she needs assistance, she is not advised that she will be under close scrutiny and that all information gathered may be used against her in subsequent proceedings. Since these consents take place before court proceedings are started, there is no judicial scrutiny. In addition, her failure to meet the performance expectations included as "conditions" in the agreement will be used by the state as evidence against the care-giving parent in wardship proceedings.

10

Philip Zylberberg, *supra* at 279
Brenda Cossman & Carol Rogerson, *supra* at 827

30. A temporary wardship order is often the first step in an inexorable march to permanent wardship. A temporary wardship establishes both a legal and *de facto* status quo, during which children develop social ties and bonds which courts are reluctant to disrupt, preferring continuity over a return to their family.

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George Thomson, *supra* at 233
Brenda Cossman & Carol Rogerson, *supra* at 827

31. In addition, each successive proceeding results in an accumulation of evidence against the care-giving parent. Section 9 of the *Family Services Act* allows the court to read into evidence, or take into consideration any evidence taken on any previous proceeding, if that evidence is informative in any way as to the overall development of the child or the parent, and "*if it is relevant to any matter under consideration by the court*" (emphasis added). Thus, each time the state is successful in obtaining a temporary wardship order, it will become more and more difficult to get the children back.

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Family Services Act, R.S.N.B., c. F-2.2, s. 9
Case on Appeal, at 87 (Reasons for Decision on Motion, Athey, J.C.Q.B., 15 Dec. 1995)

C. The Proper Analytical Framework under s. 7 of the *Charter*

32. Given that the state has decided to provide legal aid, it must do so in a constitutionally permissible manner. The failure to take constitutionally protected rights into account when determining legal aid coverage attracts *Charter* scrutiny. The Coalition adopts the submissions of the Charter Committee on Poverty Issues on the application of the *Charter*.

40

1. General *Charter* Interpretation

33. The *Charter* must be interpreted in a purposive manner in order to secure the full benefit of its protection. Rights recognized under the *Charter* are to be understood in terms of the interests they are meant to protect.

10 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 331, 344, Dickson, J.
Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, at 175, McIntyre, J.
B.(R.) v. C.A.S. (Metro Toronto), *supra* at 389, LaForest, J., 433, Iacobucci and Major, JJ.

34. *Charter* rights are not to be interpreted in a mechanistic, formulaic or restrictive manner, but are to be given a fair, large and liberal construction. Moreover, they must be capable of growth and development over time to meet new social, political and historical realities.

Hunter v. Southam Inc., [1984] 2 S.C.R.145, at 155-157, Dickson, J.

20 35. All government action must comply with the *Charter*. The determination of whether such action is consistent with the *Charter* is a contextual exercise which requires contemplation of the larger social, political and legal framework within which the government operates.

R. v. Turpin, [1989] 1 S.C.R. 1296, at 1331, Wilson, J.
Eldridge v. British Columbia (Attorney-General), [1997] 3 S.C.R. 624, at 688, LaForest, J.

2. The Need to Interpret S. 7 in a Manner Consistent with S. 15

30 36. At the heart of section 15 is the recognition of the equal human worth and dignity of all individuals. As such, s. 15 serves two distinct purposes. First, it "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration". Second, it has a large remedial component, in that "it instantiates a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society".

40 *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at 535, 536, Cory, J.
Eldridge v. British Columbia (Attorney General), *supra* at 667, LaForest, J.

37. "The s. 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*". As a result, the concepts of "life, liberty and security of the person" and "fundamental justice" under s. 7 of the *Charter* must be interpreted in a manner which is consistent with the above-stated purposes of s. 15.

Andrews v. Law Society of British Columbia, *supra* at 185, McIntyre, J.
Godbout v. Longueuil (City), [1997] 3 S.C.R. 844, at 890, LaForest, J.

10 38. In particular, this Court must ensure that women, when confronted with the power of state action, benefit equally from the protection of s. 7, consistent with the requirements of s. 15. "Women's needs and aspirations are only now (beginning to be) translated into protected rights". As with s. 15, the main consideration for the court when determining a *Charter* infringement under s. 7 is the effect of the state action on the individual claiming the right.

Andrews v. Law Society of British Columbia, *supra* at 165, 174, 182, McIntyre, J.
Eldridge v. British Columbia (Attorney-General), *supra* at 671, 680, LaForest, J.
Vriend v. Alberta, *supra* at 543, Cory, J.
R. v. Morgentaler, [1988] 1 S.C.R. 30, at 172, Wilson, J.

20 39. The interpretation of s. 7 and the perspective brought to s. 7 jurisprudence have occurred predominately in the criminal law context. As a result, the definitions and the jurisprudence around "life, liberty and security of the person" have insufficiently considered interests beyond this context.

Patricia Hughes, "New Brunswick's Domestic Legal Aid System", *supra* at 248-249

30 40. In criminal law, the s. 7 right to life, liberty and security of the person was initially narrowly construed to mean freedom from incarceration or physical restraint. Section 7 rights have been expanded, both within the criminal law context and beyond it, to include the notions of "the psychological integrity of the individual", basic "human dignity", "personal autonomy", "freedom from state-imposed psychological and emotional stress", and "autonomy in making decisions of fundamental personal importance".

40 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R.1123, at 1177-1178, Lamer, J.
R. v. Morgentaler, *supra* at 166, 171, 173, Wilson, J.
Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at 512, Lamer, J.
Mills v. The Queen, [1986] 1 S.C.R. 863, at 919-920, Lamer, J.
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Rodriguez v. British Columbia (Attorney-General), [1993] 3 S.C.R. 519, at 587-588, Sopinka, J., 617, 618, McLachlin, J., 630, Cory, J.
B.(R.) v. C.A.S. (Metro Toronto), *supra* at 389, LaForest, J.
Godbout v. Longueuil, *supra* at 893, LaForest, J.

41. Implicit in recent s. 7 jurisprudence is a consideration of s. 15 interests. However, the Coalition submits that the interpretation of s. 7 must explicitly take into account s. 15 rights, and in particular, must consider the experiences of those subject to discrimination in our society. The interpretation of s. 7 cannot proceed on the assumption that all rights-holders are historically, socially and economically similarly situated. Rather s. 7, like s. 15, must be interpreted in a way that explicitly takes into account the differences which exist among rights claimants.

10 *B.(R.) v. C.A.S. (Metro Toronto)*, *supra* at 364, 368, 371, LaForest, J.

Godbout v. Longueuil, *supra* at 893, LaForest, J.

Report of the Ontario Legal Aid Review, *supra* at 81

Nathalie Des Rosiers, "The Legal and Constitutional Requirements for Legal Aid", *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*, Toronto: Province of Ontario. Sept. 1997. 503 at 529-539

Patricia Hughes, "Domestic Legal Aid: A Claim to Equality" (1995), 2 *Review of Constitutional Studies* 203 at 207-208

20 **D. Application of the Analytical Framework to Wardship Proceedings**

20 **1. Section 7 Interests in Wardship Proceedings**

20 **a. Life, Liberty and Security of the Person**

42. In defining and interpreting the "the right to life, liberty and security of the person", it is necessary to examine both the meaning of the individual interests and the interests as a whole. The interests are interconnected and inform each other. At the heart of each interest is the notion of human dignity and personhood in its fullest sense. Each interest on its own and in relation to the others must be read with this purpose in mind.

30 *R. v. Morgentaler*, *supra* at 175, Wilson, J.

R. v. Lyons, [1987] 2 S.C.R. 309, at 326, LaForest, J.

Rodriguez v. British Columbia (Attorney General), *supra* at 584, Sopinka, J.

43. In the context of wardship proceedings, the s. 7 interests become apparent when one examines the role of the responding parent, usually the mother. The mother has a profound bond with her child. This relationship is often the most fundamental aspect of her identity and self-definition. A threat to that personal autonomy jeopardizes her sense of human dignity and personhood.

40 Philip Zylberberg, *supra* at 263

Lassiter v. Dept. of Social Services of Durham County (1981), 101 S.Ct. 2153 at 2165

44. The consequences of removing the child from the care of the mother are profound; the life of the mother and the life of the child are changed forever, in a dramatic and irreparable way. Thus wardship proceedings, like imprisonment, deportation and committal under mental health legislation, by their very nature, engage s. 7 rights, in that the mother and child are compelled by the state to separate.

Karen Swift, *supra* at 251

Report of the Ontario Legal Aid Review, supra at 81

Nathalie Des Rosiers, *supra* at 529, 530, 532, 533, 534

R. v. Jones, supra at 525-526, Wilson, J.

B.(R.) v. C.A.S. (Metro Toronto), supra at 370-371, LaForest, J.

Case on Appeal, at 127-128, 132, 133, 134-135 (Dissenting Reasons of Court of Appeal, 14 Mar. 1997, Bastarache, J.)

b. Fundamental Justice

45. It is implicit in the wording of s. 7 that the state may deprive an individual of the right to life, liberty and security of the person, but that such deprivation must be done in accordance with the principles of fundamental justice. It is *not* the position of the Coalition that the state has no right to interfere in the family. It *is* the position of the Coalition that the care-giving parent has the right to participate in and contribute to decisions which will have a fundamental effect on the family.

46. The principles of fundamental justice are "the basic tenets of our legal system whose function is to ensure that state intrusions on life, liberty and security of the person are effected in a manner which comports with our historic, and evolving notions of fairness and justice". Like other guarantees in the *Charter*, the principles of fundamental justice vary according to the particular context surrounding the s. 7 right.

Rodriguez v. British Columbia (Attorney General), supra at 607, Sopinka, J., 619, 621,
McLachlin, J.

Re B.C. Motor Vehicle Act, supra at 503, 512-513, Lamer, J.

R. v. Morgentaler, supra at 70, Dickson, C.J.

Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869 at 884,
Iacobucci, J.

B.(R.) v. C.A.S. (Metro Toronto), supra at 362, 363, LaForest, J.

Godbout v. Longueuil, supra at 898-899, LaForest, J.

47. Equality is one of the basic tenets of our legal system. At the very least, fundamental justice from an equality perspective means the right to have actual and equal participation in decision-making processes which affect your life, that is, your autonomy, dignity, essential social

relationships, and status. At its core, fundamental justice entails the right to be heard in such vital processes.

In order to be heard in court, an individual must actively participate in the court process. ... participation is a critical element necessary for procedural due process. ...A live body in the courtroom is not enough. Litigants must have an "opportunity to be heard at a *meaningful time* and in a *meaningful manner*".

10 Colene Flynn, *supra* at 328, 330-31, 337

Patricia Hughes, "The Gendered Nature of Legal Aid", *supra* at 30-31

48. In temporary wardship proceedings, the principles of fundamental justice from an equality perspective require that parents, particularly primary care-givers, have the right to meaningful participation and the assurance of a fair hearing. A just decision can only be reached through fair consideration of all pertinent facts.

20 Colene Flynn, *supra* at 341

Santosky v. Kramer, supra at 761

49. In order to ensure meaningful participation, primary care-givers must have effective legal representation. Legal representation is critical because of the complexity of the proceedings. Wardship proceedings can involve up to thirty witnesses and may take two weeks of trial time.

Factum of the Respondent, Law Society of New Brunswick, Appendix K

30 50. Legal representation is critical in wardship proceedings because there is an imbalance of power between the state and the individual and the consequences of the state's action are severe, in some cases irreparable.

Colene Flynn, *supra* at 332, 333

David Dyzenhaus, "Normative Justifications for the Provision of Legal Aid", *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*, Toronto: Province of Ontario. Sept. 1997. 475 at 498

Case on Appeal, at 154 (Dissenting Reasons of Court of Appeal, 14 Mar.1997, Bastarache, J.)

40 51. The need for effective legal representation becomes even more apparent when one considers the tasks which must be undertaken by the primary care-giver in order to challenge the state's case. She must be able to cross-examine experts, dispel many of the myths and stereotypes underlying the state's evidence, address any judicial assumptions based on cultural or class biases and put forward her own perspective as to what is in her child's best interests, all of which must be done at

the very worst period of her life and at a time when she may be functioning in ways that only vaguely resemble her normal behaviour.

Colene Flynn, *supra* at 341
George Thomson, *supra* at 231-232

10 52. Primary care-givers are unable to perform these tasks in the context of temporary wardship proceedings without effective legal representation. Effective legal representation is required to ensure that the court considers all of the pertinent facts, provides a fair hearing and as a result, renders a just decision.

20 53. This Court's decision in *R. v. Prosper*, [1994] 3 S.C.R. 236 can be distinguished from the case at bar in three ways. Firstly, fewer resources available at the early stages of criminal proceedings do not result in the same irreparable disadvantage that exists in wardship proceedings. Secondly, criminal cases are subject to procedural protections and guarantees not available in wardship proceedings, for example, the exclusion of evidence at trial under s. 24(2) of the *Charter*. Thirdly, the accused in criminal proceedings has the benefit of the presumption of innocence, unavailable to the parents in wardship proceedings.

Philip Zylberberg, *supra* at 280
Brenda Cossman & Carol Rogerson, *supra* at 787-788, 848-849
Report of the Ontario Legal Aid Review, *supra* at 59, 166-167
Case on Appeal, at 143 (Dissenting Reasons of Court of Appeal, 14 Mar.1997,
Bastarache, J.)

30 54. With the higher burden of proof in criminal cases (proof beyond a reasonable doubt), the exclusion of evidence can have a dramatic impact on outcome. While the burden of proof in wardship cases is technically the civil standard (the balance of probabilities), due to the best interests over-ride and the specific provisions of governing legislation, less stringent rules of evidence are applied. Not only does the burden of proof in wardship cases vary widely from that in criminal cases, but in addition, it is an easier burden for the state to satisfy, due to less stringent rules of evidence.

40 *Family Services Act*, R.S.N.B., c. F-2.2, s. 9

55. In order for the care-giving parent to participate in a manner consistent with the principles of fundamental justice, it is necessary that effective legal representation be available from the

beginning of the state's involvement with the parent, that is, before any consents are signed, or at the time of the first removal of the children by the state.

Philip Zylberberg, *supra* at 279

E. Breach of ss. 7 and 15

10 56. The failure to ensure effective state funded legal representation for care-giving parents responding to temporary wardship proceedings contravenes ss. 7 and 15 of the *Charter*.

57. Temporary wardship proceedings engage the right to liberty and security of the care-giving parent and as such, the principles of fundamental justice require meaningful participation in such proceedings. Meaningful participation in the adversarial system requires effective legal representation.

Nathalie Des Rosiers, *supra* at 529, 530, 532, 533

Brenda Cossman & Carol Rogerson, *supra* at 787-788, 817-820, 848-849

20 58. Canadian governments have determined that equal access to justice and meaningful participation in the judicial process may require state funded legal representation. However, in determining the allocation of limited financial resources, governments have assumed that individuals forced into the judicial system are a homogenous group, unaffected by discrimination based on race, gender, disability, sexual orientation, etc. In determining the coverage offered through legal aid or state funded legal representation, governments have failed to take into account these various forms of discrimination and their effect on an individual's ability to access justice.

Patricia Hughes, "The Gendered Nature of Legal Aid", *supra* at 30-35

Patricia Hughes, "Domestic Legal Aid: A Claim to Equality" (1995), 2 *Review of Constitutional Studies* 203 at 206-207

40 59. The legal circumstances of the Appellant fall into an ineligible category. The decision to exclude coverage was an arbitrary one; in essence, it was no decision at all. In fact, the entire class of applicants was arbitrarily excluded from coverage. A decision to exclude certain categories as ineligible is permissible in certain circumstances. However, in the formulation of those categories, constitutionally protected interests must be taken into account.

60. The denial of state funded legal representation in these circumstances is discriminatory in that it has a disproportionate impact on women. The primary care-giver is usually a woman, and it is

women who require legal aid or state funded legal representation in family law matters. Women generally, and particularly women whose children are removed by the state, cannot afford to hire a lawyer from their own resources.

61. The decision to deny legal aid or state funded legal representation to the Appellant in these circumstances contravenes her s. 7 rights, as read through s. 15, because it fails to acknowledge that there are s. 7 interests at stake.

10

F. Section 1

62. In applying the s. 1 test, "the objective relevant to the s. 1 analysis is the objective of the infringing measure", not the objective of the legislation as a whole. An approach which focuses on the objectives of the entire legislation, especially in the context of benefit conferring legislation, would always result in the first part of the s. 1 test being met. Moreover, such an approach is inappropriate because it obscures the real constitutional issue at stake.

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RJR-MacDonald Inc. v. Canada (Attorney-General), [1995] 3 S.C.R. 199, at 327,
McLachlin, J., 268, LaForest, J. (dissenting)
Vriend v. Alberta, *supra* at 555, Iacobucci, J.

63. In the case at bar, the Respondents have failed to establish that the *denial* of legal aid or state funded legal representation in temporary wardship proceedings is pressing and substantial. Rather, the Respondents have attempted to justify the legal aid system as a whole.

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64. The Respondents rely on "fiscal reality" in attempting to justify the s. 7 infringement. Although it is conceded that the Respondents may face difficult choices in the allocation of scarce resources, the Respondents have failed to establish that the decision to deny state funded legal representation in temporary wardship proceedings was a necessary decision in the context of the legal aid funding available.

Eldridge v. British Columbia (Attorney-General), *supra* at 686, La Forest, J.

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65. Instead, the decisions made by the Respondents to provide family law legal aid coverage were arbitrary and irrational. Examples of the arbitrariness of these decisions include the decision to provide duty counsel, the decision to cover support orders when such orders can be used to reduce social assistance payments, and after 1 Sept. 1997, the decision to provide legal aid for the first temporary wardship hearing. The arbitrariness of the decisions regarding legal aid coverage is

further demonstrated by the fact that the Law Society of New Brunswick has the discretion to remove family law legal aid completely while maintaining coverage for criminal legal aid.

Legal Aid Act, R.S.N.B. 1973, c. 1-2, s. 12 (14)
Factum of the Law Society of New Brunswick, Appendix K

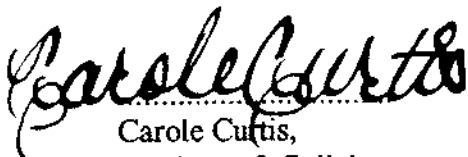
10 66. There is no rational basis for the denial of legal aid or state funded legal representation in temporary wardship proceedings. The decision to deny coverage was arbitrary and constitutes a complete impairment of the s. 7 rights of care-giving parents.

PART IV: ORDER SOUGHT

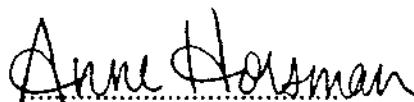
20 67. The Coalition asks that the appeal be allowed and a declaration issued that the failure to provide effective state funded legal representation to care-giving parents responding to temporary wardship proceedings contravenes ss. 7, 15 and 28 of the *Charter*, and that such contravention is not justified under s. 1. The Coalition further asks that an order be issued directing the Respondents to provide effective legal representation to care-giving parents throughout temporary wardship proceedings, from the beginning of the individual's involvement with the state.

All of which is respectfully submitted on behalf of the Coalition.

Dated 19 Oct. 1998 at Toronto, Ontario, and Moncton, New Brunswick.

30 

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