

Court No. 26005

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

BETWEEN:

JEANNINE GODIN,

Appellant

AND:

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

Respondents

**FACTUM OF THE INTERVENER
THE ATTORNEY GENERAL OF MANITOBA**

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(iv)

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PART I

STATEMENT OF FACTS

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

PART II

POINTS IN ISSUE

Question 1:

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

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

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

Question 2:

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

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

PART III

ARGUMENT

1. AN OVERVIEW OF THE LEGAL AID PLAN IN MANITOBA

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

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

11(1) An area director may provide legal aid to a person who is eligible in respect of

(b) in any civil proceeding . . .

(emphasis added)

3. In the 1996-97 fiscal year, Legal Aid Manitoba issued 906 certificates to individuals in respect of child welfare matters. That number rose slightly to 1,032 in fiscal year 1997-98.²

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

¹ Legal Aid Manitoba, *Annual Report*, 1997.

² *Ibid.*; *Legal Aid Manitoba Certificates Report* (1998).

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

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

Legal Aid announced a policy in the summer of 1996 that lawyers would be expected to seek authorization to go to trial on all domestic and civil matters before setting the matter down for hearing. . .

The case manager who receives the authorization request needs to have enough information to make a proper decision. The requests (sic.) should include a description of the outstanding issues, the significance of those issues to the client, the position of both parties and the evidence that you will rely on to obtain a favourable outcome for your client.

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

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

³ Regulation L-105 M.R. 225/91, Schedule 1, Part 4.

⁴ Legal Aid Manitoba, Notice to the Profession, February 1998.

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

2. THE RIGHT TO COUNSEL AT CHILD WELFARE HEARINGS

8. In Manitoba, *The Legal Aid Services Society Act* and Regulations provides, that the granting of legal aid in child welfare cases is at the discretion of the area director (*Act* s.3 (1); Reg. s.11(1)). In practice, any financially eligible parent involved in child welfare proceedings, will receive counsel of choice for all preliminary stages of the legal process. Counsel is provided for trial when the area director determines that there is a meaningful role for counsel to play.
9. The New Brunswick program for legal aid in child welfare matters is substantially different than that in Manitoba. The facts of the Appellant and Respondents detail the provisions that govern that program. The common element of both programs, however, is that there is no guaranteed right to counsel for financially eligible applicants at child welfare hearings.

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

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

Does a parent's right to raise their (sic) children fall within the security and liberty interests as set out in s.7;

Does the denial of the relief sought by the Appellant in the circumstances of this case amount to a process which does not conform with the principles of fundamental justice?

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

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

⁵ [1995] 1 S.C.R. 315.

⁶ *Ibid.* at 330.

⁷ *Ibid.* at 368.

⁸ *Ibid.* at 370.

⁹ *Ibid.* at 433.

¹⁰ [1986] 2 S.C.R. 284 at 318.

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

(emphasis added)

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

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

(emphasis added)

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

¹¹ [1985] 1 S.C.R. 295 at 337.

¹² [1995] 1 S.C.R. 315.

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

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

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

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

¹³ *Ibid.* at 374.

¹⁴ Factum of the Appellant, para.38.

¹⁵ *Supra* note 12.

¹⁶ [1993] 4 S.C.R. 3.

¹⁷ *Ibid.* at 99.

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

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

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

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

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

¹⁸ [1983] 2 S.C.R. 173 at 185.

¹⁹ [1985] 1 S.C.R. 295.

ii. The Principles of Fundamental Justice

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

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

- i. the proceedings are held in a court of law;
- ii. the proceedings create a stigma similar to a finding of guilt in criminal proceedings;
- iii. all other parties are represented by counsel;
- iv. the procedure requires the adducing of evidence and the cross-examination of witnesses;
- v. the interpretation of legislation is at issue;
- vi. the rules of evidence apply;
- vii. the matter is very emotional;
- viii. there was evidence to the effect that the Appellant had difficulty coping with stressful situations.

²⁰ [1993] 3 S.C.R. 519.

²¹ Reasons for Decision of Bastarache J.A., Case on Appeal, p.145.

²² *Ibid.* pages 153,154.

23. With the exception of the last point, all of the factors set out in the above list would apply to every child welfare proceeding. Though Justice Bastarache determined that state-funded counsel was not required in every case, it is submitted that the factors that he relied upon would result in counsel being appointed whenever the applicant demonstrated financial need.
24. Further, with the exception of the last point, the factors set out by Justice Bastarache would apply to every criminal case. Thus the implications of the dissenting judgment are far reaching and run contrary to the appellate level authorities that have consistently held that s.7 does not guarantee a right to state-funded counsel at a criminal trial.²³
25. It is well accepted that the principles of fundamental justice reflect the basic tenets upon which our legal system is based. Further they are not immutable but vary according to the context in which they are invoked.²⁴ It is submitted that in the context of child welfare proceedings the principles of fundamental justice should be shaped by what is necessary to ensure a fair trial that can reasonably resolve the issue of what is in the best interests of the child. Thus, it should be up to the trial judge to determine whether or not this goal requires legal representation for the parent. State-funded counsel should be required only in those rare circumstances where counsel for the parent is necessary to facilitate a fair determination of what is in the best interests of a child.
26. Child welfare proceedings take place in the court setting. They are presided over by judges who are intimately familiar with the concepts of due process. The system has numerous safeguards and protections. It is submitted that judges are well placed to determine if counsel is essential to reaching a just decision as to what is in the best interests of a child.
27. In many circumstances trial judges will be satisfied that a proper decision can be made without counsel appearing on behalf of the parent. The child welfare agency's obligation is

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

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

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

- i. The parent may be serving a lengthy period of incarceration and is therefore unable to offer a realistic plan for the child;
- ii. The child may be old enough to express his or her opinion and may express a desire to become a ward of the state;
- iii. The evidence that the parent is incapable of effective parenting may be overwhelming;
- iv. The child may have been the subject of several temporary orders that were made with the expectation that the parent would undertake treatment and the parent has not followed through with the treatment plan;
- v. The parent may be advocating the same position as another party who is already represented by counsel.

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

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

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

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

²⁷ [1994] 3 S.C.R. 236 at 288.

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

- 5
30. The Intervener submits that the factors outlined by Justice Bastarache to justify counsel in the case at bar are so broad that the practical result will be a rewriting of the statutes and policies that now govern legal aid in the various provinces and territories. At their core, the principles of fundamental justice guarantee the right to a fair trial.²⁸ However, fair trials can and do take place in the absence of counsel. It is submitted that the trial judge should have the power to appoint counsel in those rare cases where the trial judge concludes that his or her ability to decide what is in the best interests of the child is compromised by the lack of legal representation for the parent.
- 10
31. In the case at bar the trial judge concluded that the appointment of counsel was unnecessary to ensure a fair trial. It is submitted that she properly exercised her discretion and there is no basis to interfere with her ruling.
- 15

iii. Section 1 of the *Charter*

- 20
32. The New Brunswick *Legal Aid Act* contains two provisions that permit the granting of legal aid coverage. Section 12(1) vests discretion in the Provincial Director and s. 24(1) vests discretion in the Minister of Justice. Thus the *Act* neither expressly nor by implication prohibits the granting of legal aid to a parent who seeks to challenge an application for temporary custody brought by the Minister of Health and Community Services.
- 25
33. The decision as to what services to cover is made at an administrative level. Due to budgetary constraints both the Law Society of New Brunswick and the Minister determined

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

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

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

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

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

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

²⁹ Affidavit of Michael Carrier, Supplementary Case on Appeal, page 3, paragraph 8.

³⁰ [1997] 3 S.C.R. 624.

³¹ *Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038; *Eldridge v. B.C.(A.G.)*, [1997] 3 S.C.R. 624.

³² [1986] 1 S.C.R. 103.

³³ *R.J.R. MacDonald v. Canada*, [1995] 3 S.C.R. 199; *Ross v. School District No. 15*, [1996] 1 S.C.R. 826.

³⁴ [1997] 3 S.C.R. 624 at 685.

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

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

PART IV

RELIEF CLAIMED

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

Question 1:

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

15 Question 2:

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Cather Lemoff

25 Counsel for the Intervener
The Attorney General of Manitoba

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

PART V

TABLE OF AUTHORITIES

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