File No. 23298

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

IN THE MATTER OF the custody and apprehension of Sheena B., an infant

BETWEEN:

RICHARD B. and BEENA B.,

Appellants (Respondents)

- and -

CHILDREN'S AID SOCIETY OF METROPOLITAN TORONTO,

Respondent (Applicant)

- and -

THE OFFICIAL GUARDIAN, for SHEENA B., an infant,

Respondent (Intervener)

- and -

THE ATTORNEY GENERAL OF ONTARIO,

Respondent/Cross-Appellant (Intervener)

- and -

THE ATTORNEYS GENERAL OF CANADA, BRITISH COLUMBIA, NEWFOUNDLAND, and QUÉBEC,

Interveners.

APPELLANTS' FACTUM IN REPLY TO CROSS-APPEAL

W. GLEN HOW & ASSOCIATES
Box 4100, Halton Hills (Georgetown)
Ontario L7G 4Y4
Tel: (905) 873-4100
Fax: (905) 873-4522

W. Glen How, Q.C.
John M. Burns
Solicitors for Appellants

LANG MICHENER
Suite 300
50 O'Connor Street
Ottawa, Ontario
K1P 6L2
Tel: (613) 232-7171
Fax: (613) 231-3191

Ottawa Agent for Appellants

CHILDREN'S AID SOCIETY OF METROPOLITAN TORONTO
33 Charles Street East
Toronto, Ontario
M4Y 1R9
Tel: (416) 924-4646
Fax: (416) 324-2485

Alexander Duncan
Solicitor for Respondent Children's Aid Society of Metropolitan Toronto

Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Tel: (613) 236-9665
Fax: (613) 235-4430

Robert Houston
Ottawa Agent for Respondent Children's Aid Society of Metropolitan Toronto

OFFICE OF THE OFFICIAL GUARDIAN
14th Floor
393 University Avenue
Toronto, Ontario
M5G 1W9
Tel: (416) 314-8000
Fax: (416) 314-8050

Debra Paulseth
Solicitor for Respondent Official Guardian

Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Tel: (613) 236-9665
Fax: (613) 235-4430

Robert Houston
Ottawa Agent for Respondent Official Guardian

MINISTRY OF THE ATTORNEY GENERAL
Constitutional Law & Policy
720 Bay Street, 7th Floor
Toronto, Ontario
M5G 2K1
Tel: (416) 326-4137
Fax: (416) 326-4015

Janet E. Minor
Robert E. Charney
Solicitors for Respondent/Cross-Appellant Attorney General of Ontario

Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Tel: (613) 236-9665
Fax: (613) 235-4430

Robert Houston
Ottawa Agent for Respondent/Cross-Appellant Attorney General of Ontario

Deputy Attorney General of Canada
Department of Justice
Justice Building
Kent & Wellington Streets
Ottawa, Ontario
K1A 0H8
Tel: (613) 957-4222

John C. Tait, Q.C.
Solicitor for Intervener Attorney General
of Canada

Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430

William G. Burke-Robertson, Q.C.
Ottawa Agent for Intervener Attorney
General of British Columbia

Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2
Tel: (613) 236-9665
Fax: (613) 235-4430

Robert E. Houston, Q.C.
Ottawa Agent for Intervener Attorney
General of Newfoundland

NOEL, BERTHIAUME & AUBRY
111, rue Champlain
Hull (Québec)
J8X 3R1
Tél: (819) 771-7393
Fax: (819) 771-5397

Me Sylvie Roussel
Correspondante du Procureur général du
Québec

TABLE OF CONTENTS

PART I
STATEMENT OF FACTS

Page

A. Appellants' position with respect to facts set out in Respondents' Factum on Cross-Appeal 1

B. Additional Facts Relied Upon by Appellants 1

PART II
POINTS IN ISSUE 2

PART III
ARGUMENT

A. The District Court Balanced the Interests of the Parties Consistent with Its Discretion 2

B. This Costs Award Will Not Open the Floodgates 4

C. The Appeal Serves a Vital Public Interest 5

D. Appellants Have Turned to the Courts After Being Turned Away by the Legislature 6

Table of Authorities 9

APPENDIX

APPELLANTS' FACTUM IN REPLY ON CROSS-APPEAL

A. Appellants' Position with Respect to Facts Set Out in Respondents' Factum on Cross-Appeal

1. Appellants accept as correct the facts set out in paragraphs 1 to 5 on pages 64 and 65 of Respondent's Factum on Cross Appeal.

Reference: Respondents' Factum, pp. 64-65

B. Additional Facts Relied Upon by Appellants

2. With reference to the unusual background of this case, appellants rely on admissions of the respondents in Respondents' Factum On Appeal, and in particular the following:

> The Respondents accept as correct the facts set out in paragraphs 1-3, 6-13, 16-20, 23, 25, 28 and 30 of the Appellants' Factum.

Reference: Respondents' Factum on Appeal, p. 2, par. 2

3. On August 16, 1983, appellants first served the Attorneys General of Ontario and Canada with Notice of Constitutional Question in Provincial Court, and on May 31, 1985, appellants again served similar notice on the Attorneys General of Ontario and Canada in District Court.

Reference: Case on Appeal ("COA") Vol. I, pp. 10, 27

4. On September 22, 1988, appellants offered to settle. They proposed guidelines that would best meet the needs of infants where there is a medical emergency and where there is no medical emergency. The Attorney General of Ontario rejected the offer without discussion.

Reference: Reasons for Judgment of Whealy D.C.J. (COA Vol. VII, p. 1250, line 40); Appendix to this Factum, pp. 1-8.

PART II -- POINTS IN ISSUE

5. The District Court awarded costs against the Attorney General consistent with its discretion pursuant to Rule 57.01(1) and (2) of *The Rules Of Civil Procedure.*

PART III -- ARGUMENT

A. The District Court Balanced the Interests of the Parties Consistent with Its Discretion

6. Rule 57.01(1) and (2) does not restrict an award of costs against a successful respondent to cases where there is serious misconduct by that respondent. The court has discretion to consider, "in addition to the result in the proceeding," a range of factors, including "the importance of the issues" and "any other matter relevant to the question of costs":

> *Factors in Discretion*
> 57.01(1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,
> (a) the amount claimed and the amount recovered in the proceeding;
> (b) the apportionment of liability;
> (c) the complexity of the proceeding;
> (d) the importance of the issues;
> (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
> (f) whether any step in the proceeding was,
> (i) improper, vexatious or unnecessary, or
> (ii) taken through negligence, mistake or excessive caution;
> (g) a party's denial of or refusal to admit anything that should have been admitted;
> (h) whether it is appropriate to award any costs or more than one set of costs where a party,
> (i) commenced separate proceedings for claims that should have been made in one proceeding, or
> (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and

PART III -- ARGUMENT

> (i) any other matter relevant to the question of costs. [emphasis added]
>
> *Costs Against Successful Party*
> (2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

7. Watson and McGowan's *Ontario Supreme and District Court Practice* (1988) notes about this rule:

> Rule 57.01(2) "overrules" some former case law by specifically providing that the court may order costs against a successful party in a proper case.

Reference: Watson & McGowan, "Rules of Civil Procedure" in *Ontario Supreme and District Court Practice* (1988) at 592 (Appendix, p. 10)

8. There is authority, also within the Supreme Court of Canada, for an award of costs against a successful litigant even where there is no serious misconduct. In *Law Society of Upper Canada v. Skapinker,* Estey J. did so in light of "this most unusual background, and balancing the interests of the parties as best one can in these circumstances . . . " [emphasis added]

Reference: *Law Society of Upper Canada v. Skapinker,* [1984] 1 S.C.R. 357 at 384; See also *Schachter v. Canada,* [1992] 2 S.C.R. 679 at 726.

9. In the instant case, the Court of Appeal found the District Court had considered the importance of the issues, the unusual background of the case, and balanced the interests of the parties appropriately:

(a) The District Court found the case "proceeded in a most unusual fashion and laborious manner" where "a first level appeal from a decision of a trial judge has gone this circuitous route and ended up with the appeal being transformed into what amounts to retrial on fresh evidence." [emphasis added]

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1289)

PART III -- ARGUMENT

(b) State-triggered "wardships of children whose parents refuse blood transfusions on religious grounds" and the related *Charter* issues are of "province-wide importance," "national importance" and "international significance."

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1289)

(c) The Court of Appeal had ordered in 1988 that this appeal be heard.

Reference: Reasons for Judgment of Whealy D.C.J. (COA Vol. VII, p. 1247)

10. The District Court also found that the Attorney General and the Official Guardian "fully participated" in the District Court hearing. The parents thus had to mount a defence against three different arms of the state, each represented by counsel with standing to fully participate.

Reference: Reasons for Judgment of Whealy D.C.J. (COA Vol. VII, p. 1247)

B. This Costs Award Will Not Open the Floodgates

11. Contrary to the argument of the Attorney General, this costs award does not encourage such awards in "marginal applications," nor does it apply to "virtually every *Charter* challenge." Tarnopolsky and Goodman JJ. found the appeal was not "marginal, even in the appeal to this court." Goodman J. found this case came within that class of "exceptional cases" where such award was proper. Whealy D.C.J. found the case "unusual" and was "not aware of any case" which had taken a like "circuitous route."

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, pp. 1289, 1290); Reasons for Judgment of Goodman J. (COA Vol. VII, p. 1290).

12. Appellants conducted a computer search of available reported and unreported *Charter* cases in Ontario since the costs award by Whealy D.C.J. on June 9, 1989. They have found no similar awards in Ontario against the Attorney General in *Charter* cases.

PART III -- ARGUMENT

13. This order does not open the floodgates. The Court's discretion over costs always remains a powerful check to discourage non-meritorious litigation.

Reference: Macleod-Rogers, B., "Remedies (and Costs) in Constitutional Litigation" *Law Society of Upper Canada, Continuing Legal Education* (Toronto--October 23, 1990; Ottawa--December 8, 1990) at p. J-21 (Joint Book of Authorities, Tab A-31)

C. The Appeal Serves a Vital Public Interest

14. Appellants have no personal financial interest in the outcome. The Court of Appeal observed: "No authority provides a clear guideline as to how the principles of fundamental justice apply to this case." This appeal responds to such need to the benefit of all children, parents, health-care professionals and child-welfare agencies in Ontario.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1273)

15. In her 1991 Cambridge Lecture, The Honourable Madame Justice McLachlin noted:

> We should strive in Canada to develop clear principles applicable uniformly across the country so that the Canadian public knows where parents' rights end [and] the state's begin. [emphasis added]

Reference: McLachlin, Madame Justice Beverley, "Who Owns Our Kids? Education, Health And Religion In A Multicultural Society" (July 1991) Cambridge Lectures (Joint Book of Authorities, Tab A-5)

16. Others have identified the public need. Main P.C.J. in a subsequent and similar case under the *Child and Family Services Act, 1984* urged:

> In short, the present vehicle of summary-like proceedings is totally inadequate and unacceptable to do justice to the extremely difficult issues raised. I urge that serious thought be given as soon as possible to examination of and appropriate change to the formal conduct of these hearings.

Reference: *Children's Aid Society of Metropolitan Toronto v. F. (R.)* (1988), 66 O.R. (2d) 528 at 535 (Joint Book of Authorities, Tab C-1)

PART III -- ARGUMENT

D. Appellants Have Turned to the Courts After Being Turned Away by the Legislature

17. Constitutional evidence shows that the impugned legislation, in practice, has an adverse effect on parents who refuse blood transfusions on religious grounds. On September 25, 1978, Judge G. Thomson, Associate Deputy Minister of Children's Services, told the Ontario Standing Social Development Committee relative to s. 19(1)(b)(ix) of the *Child Welfare Act*:

> The only situation in which that section is presently used or has been used relates to blood transfusion cases and the child is alleged to be at serious risk and there's no consent to the blood transfusions for religious reasons.

Reference: Minutes of the [Ontario] Standing Social Development Committee, Children's Services (September 25, 1978) (COA Vol. VI, p. 1125, ln. 40)

18. On February 10, 1982, Bernd Walter, for the Office of the Associate Deputy Minister of Community and Social Services, directed a "Memorandum to All Program Supervisors and Children's Aid Societies." It is aimed at parents who will not consent to blood transfusions on religious grounds. It spells out the government policy pursuant to s. 19(1)(b)(ix) of the *Child Welfare Act*. All public officials, including police, hospitals and judges, are to join in expediting apprehension of children under this policy.

Reference: Memorandum from Community and Social Services of Ontario Re: Apprehension of Children (February 10, 1982) (COA Vol. VI, p. 1132, ln. 30)

19. The Attorney General of Ontario has admitted that the majority of cases decided pursuant to s. 19(1)(b)(ix) of the *Child Welfare Act* were cases in which parents refused to consent to blood transfusions.

Reference: Letter from counsel for Attorney General of Ontario, dated November 10, 1988 (COA Vol. VI, p. 1144, ln. 30)

20. In 1984, counsel for appellants took the problem to the Ontario Government. Submissions were made at the occasion of drafting the *Child and Family Services Act, 1984,* S.O. 1984, c. 55, as amended. The Minutes of the Proceedings of the Ontario Standing Committee on Social Development show:

PART III -- ARGUMENT

> **Mr. Shymko:** In other words, we as a committee do not accept the arguments of the Jehovah's Witnesses. I just wondered whether or not that is--
>
> **Mr. R. F. Johnston:** There are two things. Number one--
>
> **Mr. Shymko:** It seemed convincing to me for a while.
>
> **Mr. Kerr:** They do not vote. Why worry?
>
> **Mr. Shymko:** That is right.

Reference: Ontario Standing Committee on Social Development, Excerpts of Minutes (February 29, 1984) at p. 12 (Joint Book of Authorities, Tab A-32)

21. The Court of Appeal for Ontario in 1988 found that the relevant provisions of the *Child and Family Services Act, 1984,* S.O. 1984, c. 55, as amended, were, arguably, "substantially similar in effect." The decision of Main P.C.J. in *Children's Aid Society of Metropolitan Toronto v. F. (R.), supra,* shows the legislature did not address the defects.

Reference: Reasons for Judgment of Grange J. (COA Vol. VII, p. 1182)

22. On September 22, 1988, appellants offered to settle this appeal by proposing guidelines. The Attorney General rejected the offer. Appellants, as members of a discrete and insular minority, have thus turned to the courts in order to remedy a vital public-law issue, an issue involving the interests of children and families throughout Ontario. No other avenue was open to them to achieve justice. In the circumstances, the order awarding costs was eminently proper.

Reference: Appendix, pp. 3-6

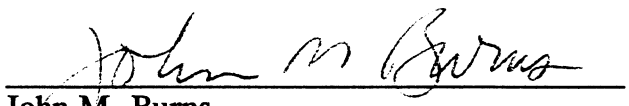
23. For the above reasons, the cross-appeal by the Attorney General should be dismissed.

Dated at Halton Hills, this 3rd day of November, 1993.

Respectfully submitted,

W. Glen How, Q.C.

PART III -- ARGUMENT



John M. Burns

Solicitors for Respondents in Cross-Appeal Richard B. and Beena B.

PART III -- ARGUMENT

TABLE OF AUTHORITIES

	Factum Page	Tab
(See Joint Book of Authorities)		
Authors:		
Macleod-Rogers, B. "Remedies (and Costs) in Constitutional Litigation" *Law Society of Upper Canada, Continuing Legal Education* (Toronto--October 23, 1990; Ottawa--December 8, 1990) at p. J-21	5	A-31
McLachlin, Madame Justice Beverley, "Who Owns Our Kids? Education, Health And Religion In A Multicultural Society" (July 1991) Cambridge Lectures	6	A-5
Ontario Standing Committee on Social Development, Excerpts of Minutes (February 29, 1984) at p. 12	8	A-32
Cases:		
Children's Aid Society of Metropolitan Toronto v. F. (R.) (1988), 66 O.R. (2d) 528	6	C-1
Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357	3	
Schachter v. Canada, [1992] 2 S.C.R. 679	3	