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, MANITOBA, and NEWFOUNDLAND

Interveners.

APPELLANTS' FACTUM

W. GLEN HOW & ASSOCIATES
Box 4100, Halton Hills (Georgetown)
Ontario L7G 4Y4
Tel: (416) 873-4100
Fax: (416) 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

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, MANITOBA, and NEWFOUNDLAND

Interveners.

APPELLANTS' FACTUM

W. GLEN HOW & ASSOCIATES
Box 4100, Halton Hills (Georgetown)
Ontario L7G 4Y4
Tel: (416) 873-4100
Fax: (416) 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

Heather L. Katarynych
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 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

Gowling, Strathy & Henderson
2600 - 160 Elgin Street
Box 466, Stn. D
Ottawa, Ontario
K1P 1C3
Tel: (613) 232-1781
Fax: (613) 563-9869

Henry S. Brown, Q.C.
Ottawa Agent for Intervener Attorney General of Manitoba

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

TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

PART III
ARGUMENT

TABLE OF CONTENTS (cont.)

LIST OF ABBREVIATIONS

Appellants	Richard B. and Beena B. (parents of Sheena B.)
C.A.S.	Children's Aid Society of Metropolitan Toronto
COA	Case on Appeal
H.S.C.	[Toronto] Hospital for Sick Children
J.B.A.	Joint Book of Authorities
ln.	line
Tab C-1	Cases
Tab A-1	Authors

EXPERT WITNESSES REFERRED TO IN THIS FACTUM

Called by Appellants

(1988) Hearing in District Court

Abenhaim, Dr. Lucien
(AIDS & epidemiology)

Furman, Dr. Eric
(pediatric anesthesiology)

McCormick, Dr. Andrew
(pediatric ophthalmology)

Scherz, Dr. Robert (pediatrics)

Spence, Dr. Richard
(surgery, blood & blood alternatives)

Spitzer, Dr. Walter O. (clinical epidemiology)

Guillemin, Professor Jeanne
(medical sociology)

Called by Respondents

(1983) Hearing in Provincial Ct.

Morin, Dr. Donald
(pediatric ophthalmology)

Pape, Dr. Karen (neonatology)

Perlman, Dr. Max (neonatology)

Swyer, Dr. Paul (neonatology)

(1988) Hearing in District Court

Andrew-O'Brodovich, Dr. Maureen
(pediatric hematology)

Johnson, Dr. Gary
(pediatric anesthesiology)

Morin, Dr. Donald
(pediatric ophthalmology)

Sinclair, Dr. John (neonatology)

Steward, Dr. David
(pediatric anesthesiology)

PART I

STATEMENT OF FACTS

A. Parents Request Medical Alternatives to Blood Products

1. Appellants Richard and Beena are parents. During the 1983 hospital care of their infant daughter, Sheena, they were found to be "fine, upstanding persons who care very much for their daughter." As Jehovah's Witnesses, they regard accepting transfusion of blood products as a grievous violation of God's law, leading to loss of Jehovah God's favour. Administration of blood products against their wishes is taken as a defilement of their child. They consented to all other treatment for Sheena and requested medical alternatives to the use of blood products. They also wanted to avoid hazards of blood products, such as HIV.

Reference: Reasons for Judgment of Main P.J. (August 19, 1983) (Case on Appeal (COA) Vol. VII, p. 115);
Exhibit #57 (COA Vol. VI, p. 1121);
Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1260);
Evidence of B. Bryenton (COA Vol. I, p. 99, ln. 10);
Evidence of Dr. K. Pape (COA Vol. I, p. 154, ln. 20-30).

B. Sheena's Medical History During July 1983

2. Sheena was born on June 25, 1983, at Etobicoke General Hospital, approximately four weeks premature. Her birthweight was 6 pounds, 6 ounces (2900 grams). She had various ailments requiring medical attention. She was transferred to the neonatal intensive care unit at Hospital for Sick Children (H.S.C.) in Toronto.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1260, ln. 20-30);
Reasons for Judgment of Whealy D.C.J. (COA Vol. VII, p. 1229, ln. 40).

3. Sheena progressed during July 1983 and survived a number of crises using well-established medical practices that proved to be effective alternatives to blood products.

Reference: Reasons for Judgment of Main P.J. (August 19, 1983) (COA Vol. VII, p. 1155, ln. 12-20);
Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1262, ln. 10-20).

PART I -- STATEMENT OF FACTS

C. Apprehension and Short Notice of Hearing on Sunday, July 31, 1983

4. On Sunday, July 31, between 10:00 and 11:00 a.m., the attending neonatologists, Drs. K. Pape and M. Perlman decided to pursue a Children's Aid Society (C.A.S.) wardship order allowing them to administer blood products. In Dr. Perlman's opinion, Sheena had anemia and might require blood products to treat potentially life-threatening congestive heart failure. Mr. B. Marynick of the C.A.S. apprehended Sheena at 12:00 noon after talking to Drs. Pape and Perlman. He had not talked to the parents.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1261, ln. 40);
Evidence of Dr. Perlman (COA Vol. I, p. 71, ln. 25-30);
Evidence of B. Marynick (COA Vol. I, p. 89, ln. 15; p. 90, ln. 20 - p. 91, ln. 5);
Statutory Declaration of Dr. Pape (COA Vol. VI, p. 1012);
Statutory Declaration of Dr. Perlman (COA Vol. VI, p. 1011).

5. Shortly thereafter, the parents arrived at H.S.C. Dr. Perlman told them that Sheena needed a blood transfusion. He gave them five minutes to make a decision, told them the C.A.S. and their lawyer were present and "the judge was on his way." Mr. Marynick notified them that he already had apprehended Sheena. This was the first time the parents were told of the morning's events. Richard B., the father, then telephoned legal counsel.

Reference: Evidence of B. Bryenton (COA Vol. III, p. 498, ln. 25 - p. 502, ln. 10);
Evidence of B. Marynick (COA Vol. I, p. 89, ln. 21-29; p. 91, ln. 1-5).

6. Mr. Marynick was acting pursuant to the *Child Welfare Act*, R.S.O. 1980, c. 66, ss. 19(1)(b)(ix), 21(1)(a), 27(1)(a).

Reference: Appendix B, pp. 3-5

PART I – STATEMENT OF FACTS

D. Emergency Hearing Before Main P.J. on Sunday, July 31, 1983 — Wardship Ordered

7. The hearing started at 2:00 p.m. Parents' counsel requested an adjournment due to the short notice. Judge Main heard evidence of Dr. Perlman, denied the adjournment, and ordered temporary wardship. The Court of Appeal found:

> The July 31 hearing was precipitated by the view of the attending neonatologist, Dr. Perlman, that Sheena might require a blood transfusion in order to treat potentially life-threatening congestive heart failure. The 72-hour wardship was granted on the basis of the evidence of Dr. Perlman that a transfusion might be necessary . . .

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1261, ln. 38-42);
Reasons for Judgment of Main P.J. (August 19, 1983) (COA Vol. VII, p. 1150, ln. 15);
Reasons for Judgment of Main P.J. (July 31, 1983) (COA Vol. VII, p. 1146, ln. 20-28);
Ruling by Main P.J. (COA Vol. I, p. 79, ln. 26);
Child Welfare Act, R.S.O. 1980, c. 66, ss. 19(1)(b)(ix), 28(1), (12), 30(1)2, 41 (Appendix B, pp. 3, 6, 8, 9, 12).

E. Wardship Extended on August 3 — No Blood Products Given

8. On August 3 Dr. Perlman told a status-review hearing before Judge Main that there had been no emergency and no blood products had been given. Dr. Perlman, however, sought to extend wardship to cover the possibility of an emergency. The hearing adjourned with wardship extended to August 18.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1262, ln. 10);
Evidence of Dr. M. Perlman (COA Vol. I, p. 108, ln. 20-30);
Child Welfare Act, R.S.O. 1980, c. 66, s. 37(1), (6) (Appendix B, pp. 9, 12).

F. Wardship Extended on August 18, 19 — No Blood Products Given Yet

9. When the status-review hearing resumed on August 18, almost three weeks after Sheena was made a ward of the C.A.S., blood products still had not been given. The reason: "Dr. Pape said that the situation had not reached the point that the risk posed by Sheena's condition outweighed the risk of blood transfusion and the need to defer to the

PART I – STATEMENT OF FACTS

parents' religious beliefs." Dr. Pape also described Sheena as "100% better." Dr. P. Swyer, another attending neonatologist, agreed Sheena was "consistently improving," but he and Dr. Pape still wanted authority to give blood products on the possibility of an emergency.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1262, ln. 18-20);
Evidence of Dr. K. Pape (COA Vol. I, p. 155, ln. 25-29; p. 192, ln. 5);
Evidence of Dr. P. Swyer (COA Vol. II, p. 221, ln. 21 - p. 224, ln. 30).

10. Judge Main found Sheena "has made progress." He also found that the "opinions of pending crises" were "possibilities. . . . They are not probabilities."

Reference: Reasons for Judgment of Main P.J. (August 19, 1983) (COA Vol. VII, p. 1154, ln. 28 - p. 1155, ln. 1)

11. The status-review hearing continued on Friday, August 19. Counsel for the Official Guardian abruptly introduced a new witness, Dr. Donald Morin, head of ophthalmology at H.S.C. Counsel told the court: "I've spoken exactly four words to the man [Dr. Morin], so this may be a surprise for all." Dr. Morin suspected Sheena had infantile glaucoma. He wanted to examine her eyes under general anesthesia, preferably within one week. He claimed that blood products were needed to prepare her for general anesthesia.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1262, ln. 25-35);
Evidence of Dr. D. Morin (COA Vol. II, p. 269, ln. 10-14; p. 277, ln. 8).

12. Judge Main again extended wardship on the basis of the possibility of an emergency, this time for 21 days.

Reference: Reasons for Judgment of Main P.J. (August 19, 1983) (COA Vol. VII, p. 1154, ln. 28; p. 1163, ln. 5);
Child Welfare Act, R.S.O. 1980, c. 66, s. 30(1)2, 37(1) (Appendix B, p. 9).

PART I – STATEMENT OF FACTS

G. Blood Products Given on August 23, 1983, for Eye Examination Under Anesthesia

13. On Tuesday, August 23, blood products were given in preparation for general anesthesia. On August 24, Dr. Morin examined Sheena under general anesthesia and performed surgery on both eyes.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1262, ln. 40-45);
Evidence of Dr. A. McCormick (COA Vol. II, p. 378, ln. 25).

H. Never an Emergency Need for Blood Products

14. There was never an emergency need for blood products in treating Sheena. Dr. Perlman claimed in court on July 31 that blood products might be needed to treat congestive heart failure. At the appeal hearing in 1988 however, Dr. Pape admitted that prior to the initial wardship hearing in 1983, Dr. Perlman had obtained the opinion of a cardiologist, Dr. Benson. The cardiologist had found "no evidence of congestive heart failure." This opinion was not disclosed to Judge Main nor to parents' counsel on July 31. Following the initial wardship hearing, Drs. Pape and Perlman decided to rely on the cardiologist's opinion and not give blood products.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1262, ln. 10; p. 1266, ln. 40; p. 1277, ln. 40 - p. 1278, ln. 20);
Evidence of Dr. K. Pape (COA Vol. III, pp. 586-587; Vol. IV, p. 662, ln. 25 - p. 666, ln. 16).

15. Respondents have contended that the cardiologist's opinion was not available to Dr. Perlman in advance of the hearing on July 31. Dr. Perlman was present in court in 1988 but was not called to either contradict or explain Dr. Pape's admission. The Court of Appeal found Dr. Perlman "failed to disclose" the cardiologist's opinion.

Reference: Opening (1988 Hearing) (COA Vol. II, p. 284, ln. 10-15);
Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1278, ln. 12).

PART I -- STATEMENT OF FACTS

16. Sheena contined to improve between July 31 and August 19 with treatment using alternatives to blood products. Dr. Swyer described her as "consistently improving."

Reference: Reasons for Judgment of Main P.J. (August 19, 1983) (COA Vol. VII, p. 1155, ln. 12-20);

Evidence of Dr. P. Swyer (COA Vol. II, p. 224, ln. 20-30).

17. The Court of Appeal found that after the blood transfusion on August 23 "[h]er condition improved in several respects after the transfusion, although Whealy D.C.J. found that it is uncertain whether she would have so recovered in any event."

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1262, ln. 45)

I. Summary of Events -- June 25, 1983, to August 24, 1983

18.

a.	June 25	Sheena is born.
b.	July 31	Emergency hearing; wardship order issued; -cardiologist consult not disclosed; -no blood products given.
c.	August 3	Status-review; wardship order extended. -no blood products given.
d.	August 18	Status review; -no blood products given.
e.	August 19	Status review; -Dr. Morin wants to do eye examination under general anesthesia; -wardship order again extended.
f.	August 23	Three weeks and two days after initial wardship order blood products given to prepare for general anesthesia.
g.	August 24	Eye examination and surgery under anesthesia.

PART I – STATEMENT OF FACTS

J. History of Proceedings

Date	Court	Proceeding/Order
July 31, 1983	Main P.J.	Wardship to C.A.S.; *Charter* issue severed.
August 3, 1983	Main P.J.	Status-review; wardship extended.
August 16, 1983		Parents file Notice of Constitutional Question on Attorney General.
August 18, 19, 1983	Main P.J.	Status-review; wardship extended.
September 1, 1983		Status-review adjourned.
September 7, 1983	District Court	Parents file appeal of wardship orders.
September 15, 1983	Walmsley P.J.	Status-review; wardship terminated; parents' motion for *Charter* declaration dismissed.
October 13, 1983	District Court	Parents file appeal of dismissal of *Charter* motion.
July 17, 1985	Webb D.C.J.	C.A.S. motion granted to dismiss all appeals as moot.
August 14, 1985	Court of Appeal	Parents file appeal of Order of Webb D.C.J.
January 25, 1988	Court of Appeal	Parents' appeal allowed; appeal on merits referred back to District Court.
November 14-18, 21-25, 28-29, December 2, 5-7, 12-16, 19, 1988	Whealy D.C.J.	Appeal hearing on merits.
February 10, 1989	Whealy D.C.J.	Parents' appeal dismissed.
June 9, 1989	Whealy D.C.J.	Costs to parents (party and party basis) to be paid by Attorney General.
March 10, 1989	Court of Appeal	Parents file appeal on merits.

PART I – STATEMENT OF FACTS

Date	Court	Proceeding/Order
June 19, 1989		Attorney General files appeal on costs.
April 21-24, 1992	Court of Appeal	Appeal hearing.
September 15, 1992	Court of Appeal	Appeal and cross-appeal dismissed.

K. Expert Opinion before Whealy D.C.J. in 1988

19. At the appeal hearing in 1988 medical experts testified about:

(a) alternatives to blood products for general anesthesia;

(b) alternatives to blood products in the non-surgical management;

(c) the urgency of the eye examination under general anesthesia, followed by eye surgery.

Reference: Reasons of Judgment for Tarnopolsky J.A. (COA Vol. VII, p. 1263, ln. 35 - p. 1267, ln. 20)

L. Alternatives to Blood Products for General Anesthesia

20. In 1988 the parents called Dr. Eric Furman, an expert in pediatric anesthesia, a member of the Committee on Transfusion Medicine for the American Society of Anesthesiologists, Director of Anesthesiology at Cook-Fort Worth Children's Medical Center in Texas, and past Chairman of the Anesthesia Section for the American Academy of Pediatrics. He has lectured at H.S.C. and for a time was on staff there.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1254; p. 1265, ln. 21); Evidence of Dr. E. Furman (COA Vol. II, pp. 285, 288, 290, 291, 293).

21. Dr. Furman testified that Sheena could have been safely put under general anesthesia without blood products. Sheena had acclimated to anemia and had sufficient oxygen-carrying capacity in her blood. She could also be given oxygen under anesthesia, which would be a safer alternative than giving blood. Blood products would needlessly increase the risks:

PART I – STATEMENT OF FACTS

> I don't believe that Sheena being a Jehovah's Witness has any bearing on how I would have treated her at that time. I would not have wanted to give her blood, I would not have given her blood, and I don't believe that blood was necessary for that procedure at that time.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1265, ln. 25);
Evidence of Dr. E. Furman (COA Vol. II, p. 311, ln. 25 - p. 312, ln. 20; pp. 296-299, 324-325, 348-349).

22. The parents also called Dr. Richard Spence, Associate Professor of Surgery at the Robert Wood Johnson Medical School in Camden, New Jersey. He is an expert in surgery, blood, and blood alternatives, and consults with neonatologists:

> For that setting, or a situation similar to it, blood transfusion would not even have been an issue, it wouldn't have been considered as necessary. . . . There is no basis whatsoever, in my mind, to transfuse a patient for an examination under anesthesia or for a goniotomy [the surgery performed on Sheena].

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1267, ln. 10);
Evidence of Dr. R. Spence (COA Vol. V, pp. 973-975; p. 993, ln. 20 - p. 996, ln. 20).

23. The Attorney General called Dr. David Steward, Anaesthetist-in-Chief at British Columbia Children's Hospital, and Dr. Gary Johnson, Chief of Anaesthesia at Children's Hospital of Eastern Ontario. Dr. Steward, who was Chief of Anesthesia at H.S.C. in 1983, had recommended blood products for Sheena. In their opinion, blood products were appropriate to reduce the risk of congestive heart failure. Dr. Steward admitted, however, the cardiologists had found no evidence of congestive heart failure between August 3 and August 23, 1983.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1264, ln. 41 - p. 1265, ln. 5);
Evidence of Dr. D. Steward (COA Vol. IV, p. 805, ln. 10-25).

24. Whealy D.C.J. preferred the opinions of Drs. Steward and Johnson as to the appropriateness of blood products for general anesthesia. He made no reference to the cardiologists' findings, nor did he address the alternative described as safer by Dr. Furman.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1264, ln. 45);
Reasons for Judgment of Whealy D.C.J. (COA Vol. VII, pp. 1229-1232).

PART I – STATEMENT OF FACTS

M. Need Questioned for Eye Examination Under General Anesthesia and Eye Surgery

25. Dr. Andrew McCormick, an expert in pediatric ophthalmology from British Columbia Children's Hospital, was called by the parents in 1988. He is a diagnostician, with a special focus on premature infants in the neonatal intensive care unit. He has lectured at both H.S.C. and McMaster Medical Centre in Hamilton.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1263, ln. 35); Evidence of Dr. A. McCormick (COA Vol. II, pp. 366-372, 406-407).

26. Dr. McCormick saw no urgent need for the 1983 eye examination under general anesthesia, nor did he see any need for subsequent eye surgery. He also disagreed with Dr. Morin's diagnosis of glaucoma. He would have recommended "watchful waiting." Dr. Morin defended his opinion before Whealy D.C.J. Judge Whealy preferred Dr. Morin's opinion.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1263, ln. 40 - p. 1264, ln. 30);

Evidence of Dr. A. McCormick (COA Vol. II, p. 385, ln. 14-25; pp. 404-406, 386-387, 373-375, 378-381, 383).

N. Alternatives to Blood Products in the Non-surgical Management

27. In 1988 the parents called Dr. Robert Scherz, an expert in pediatrics. He testified that nonblood management was appropriate and effective for Sheena.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1266, ln. 42);

Evidence of Dr. R. Scherz (COA Vol. III, p. 423, ln. 20 - p. 424, ln. 25; p. 429, ln. 1-25.

28. The Attorney General called Dr. John Sinclair, an expert in neonatology, and Dr. Maureen Andrew-O'Brodovich, an expert in pediatric hematology. Their evidence showed that in treating Sheena's condition the alternatives to blood products proved to be viable. Nevertheless, they would have recommended blood products. Whealy D.C.J. preferred the opinions of Drs. Sinclair and Andrew-O'Brodovich.

PART I – STATEMENT OF FACTS

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1266, ln. 10-40);
Evidence of Dr. Sinclair (COA Vol. IV, p. 751, ln. 14 - p. 753, ln. 25);
Evidence of Dr. Andrew-O'Brodovich (COA Vol. V, p. 879, ln. 20 - p. 880, ln. 20).

O. Risks from Blood Products in 1983

29. In 1988 the parents called Dr. Lucien Abenhaim from McGill University, an epidemiologist in the field of AIDS in Canada. He testified before Whealy D.C.J. about the risks to patients receiving blood in 1983:

> What I can say is that people receiving transfusions of blood, at that time, were at a substanstial risk of contracting AIDS and, of course, other viral diseases, or infection, as well, like hepatitis, non-A non-B hepatitis, like infection with cytomegalovirus, or CMV, and many other viruses.
> . . . in the first trimester of 1983, the Red Cross had published a note, a memorandum, where they said that there were evidences that AIDS could be transmitted by blood transfusion, but most doctors didn't take this warning into account, and this is certainly one of the reasons why the epidemic has developed so much by blood transfusions.

Reference: Evidence of Dr. L. Abenhaim (COA Vol. III, p. 526, ln. 5-20; p. 527, ln. 25; p. 528, ln. 10-18; p. 533, ln. 10-25; p. 534, ln. 8-25);

Exhibit #2: *Report of The [United States] Presidential Commission on the Human Immuno-deficiency Virus Epidemic* (June 24, 1988) (COA Vol. VI, p. 1041);

Exhibit #4: Kasprisin, D.O. & Luban, N.L.C. eds. *Pediatric Transfusion Medicine* (Florida: CRC Press, Inc., 1987) Vol. II, c. 6, "Adverse Reactions to Blood and Blood Products" (COA Vol. VI, p. 1051);

Exhibit #16: Noble, R.C. et al. "Posttransfusion Hepatitis A in a Neonatal Intensive Care Unit" (November 16, 1984) 252 JAMA (No. 19) 2711 (COA Vol. VI, p. 1071);

Exhibit #31: McCarthy, V.P. et al. "Transfusion-Associated HIV Infection in a Neonate from a Sero- Negative Donor" (November 1987) 141 *Am J Dis Child* (No. 11) 1145 (COA Vol. VI, p. 1106).

30. In 1983 Dr. Pape testified that the parents were knowledgeable about such risks and did not want to expose their daughter to them.

Reference: Evidence of Dr. K. Pape (COA Vol. I, p. 154, ln. 20-30)

PART I – STATEMENT OF FACTS

31. In 1988 the parents called Dr. Walter Spitzer, expert in clinical epidemiology, Chairman of the Department of Epidemiology at McGill University and a National Health Scientist in Canada. He showed the parents' concerns were valid:

> [T]he body of evidence says there are risks there that haven't been adequately quantified, benefits about which we are uncertain, and it points to the need to look at the risks and benefits in a much more rigorous manner.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1264, ln. 20); Evidence of Dr. W.O. Spitzer (COA Vol. III, p. 437; p. 465, ln. 20-24).

32. Dr. Spitzer added:

> I, in the case of Sheena, if that had been my child, for the same reasons that I personally today, 1988, and even in 1983 would be very loathe to have a blood transfusion for anything, I think I can, I know the evidence, I know the epidemiology of it better than most. I would have been inclined to ask that she not be transfused, not on religious grounds, I'm not a Jehovah's Witness, but on medical grounds, on grounds of having assessed the risks and assessed the benefits.

Reference: Evidence of Dr. W.O. Spitzer (COA Vol. III, p. 463, ln. 29 - p. 464, in. 15)

33. Appellants invite this Honourable Court to take judicial notice of events in 1993:

a. A parliamentary standing committee noted in May 1993:

> The HIV/AIDS tragedy that struck more than 1,000 hemophiliacs and blood-transfused persons in the 1980s has done more than destroy lives and families. It has raised serious questions about how, and how effectively and safely, the Canadian Blood System is run.

Reference: Report of the Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women, *Tragedy and Challenge: Canada's Blood System and HIV* (May 1993) House of Commons, Issue No. 19 at 22 (Joint Book of Authorities ("J.B.A.") Tab A-1);

Canadian Health Facilities Law Guide, "Canadian Blood System Coming Under Microscope" (June 18, 1993) No. 118 at p. 4; "Inquiry into Blood Supply Expected to Begin This Fall" (July 19, 1993) No. 119 at p. 2 (J.B.A. Tab A-1).

PART I – STATEMENT OF FACTS

b. On April 16, 1993, H.S.C. began notifying families of children who received blood transfusions between 1980 and 1985 that the children may have been given HIV-tainted blood. Sheena was transfused at H.S.C. on August 23, 1983.

Reference: [Toronto] Hospital for Sick Children, "I think my child received blood: what do I do now?" (April 16, 1993) Volume 10, special issue *This Week*; "Parents call HSC for details on HIV Information Project" (April 22, 1993) Vol. 10, No. 16 *This Week* (J.B.A. Tab A-2)

P. Variations in Medical Diagnosis and Treatment

34. Dr. Spitzer pinpointed the reasons for wide-ranging variations in medical diagnosis and treatment:

(a) there is "incredible fallibility" in the "observation powers and the opinion of doctors in general";

(b) much of medicine involves personal preferences or peer pressure, which is unsubstantiated by science;

(c) doctors report impressions rather than observations;

(d) many long-standing mainstream practices have not been tested as to their effectiveness.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1264, ln. 20-25);

Evidence of Dr. W.O. Spitzer (COA Vol. III, p. 437; p. 449, ln. 10; p. 441, ln. 9-12; p. 445, ln. 30 - 447, ln. 12; p. 457, ln. 30 - p. 458, ln. 10);

Office of Technology Assessment, Congress of the United States, *Assessing The Efficacy and Safety of Medical Technologies* (September 1978) (COA Vol. VI, p. 1031; p. 1035, ln. 40- p. 1036);

Evidence of Dr. D. Morin (COA Vol. V, p. 841, ln. 1-14);

Exhibit #47, Tab 6: Morin & Coughlin, "Corneal Changes in Primary Congenital Glaucoma" (COA Vol. VI, p. 1115, ln. 40);

Exhibit #47, Tab 2: Morin et al. "Primary Congenital Glaucoma–A Survey" *Canad. J. Ophthal.* 9:17, 1974 (COA Vol. VI, p. 1113, ln. 30).

35. Evidence before the District Court showed the same reasons and variations among doctors in the use of blood products. Dr. Eric Furman testified:

PART I – STATEMENT OF FACTS

> Transfusion medicine is under flux. There are no good scientific valid studies to validate any particular level, and even in the last year, with a great deal of discussion, presidential commissions, consensus, conferences going on, in the last year, three different numbers have been issued by the respected authorities in these topics, which are instantly accepted as the new numbers. Nobody really knows at this time. It's in a state of flux.

He supported his opinion with reference to *Pediatric Transfusion Medicine* (1987), identified as an authoritative text.

Reference: Evidence of Dr. E. Furman (COA Vol. II, p. 313, ln. 15-25; p. 334, ln. 15 - p. 337, ln. 10);

Kasprisin, D.O. & Luban, N.L.C. eds. *Pediatric Transfusion Medicine* (Florida: CRC Press, Inc., 1987) Vol. II, c. 6, "Adverse Reactions to Blood and Blood Products" (COA Vol. VI, pp. 1047-1048).

36. Dr. Eric Furman agreed with the following observation made in a 1987 survey of blood-transfusion practices:

> This survey confirms the existence of wide variations in transfusion practices among members of the ASA [American Society of Anesthesiologists]. It would appear that many transfusion practices are based on habit rather than scientific data.

Reference: Exhibit #3: Stehling, L.C. et al. "A Survey of Transfusion Practices Among Anesthesiologists" (1987) 52 Vox Sang 60 (COA Vol. VI, p. 1045, ln. 35);

Evidence of Dr. E. Furman (COA Vol. II, pp. 328-329);

Evidence of Dr. G. Johnson (COA Vol. V, pp. 962-964);

Evidence of Dr. R. Spence (COA Vol. V, pp. 979-981, 984-991).

37. Drs. Furman and Steward agreed with the following observation by Dr. Howard Zauder, past president of the American Society of Anesthesiologists, expressed at a National Institutes of Health conference on transfusion medicine in 1988:

> The etiology of the requirement that a patient have 10 grams of hemoglobin (Hgb) prior to receiving an anesthetic is cloaked in tradition, shrouded in obscurity, and unsubstantiated by clinical or experimental evidence. Until recent years, it remained a standard of anesthetic practice. . . . Anesthesiologists and surgeons are not alone in promulgating this myth.

Reference: Exhibit #5 (COA Vol. VI, pp. 1068-1069);

Evidence of Dr. E. Furman (COA Vol. II, p. 332, ln. 20 - p. 334, ln. 15);

Evidence of Dr. D. Steward (COA Vol. IV, pp. 814-815).

PART II

POINTS IN ISSUE

ISSUE ONE: Compelling need for clear guidelines when the state seeks to override parental health-care choices.

ISSUE TWO: Parents deprived of the liberty to care for their daughter by state action violating principles of fundamental justice as guaranteed under s. 7 of the *Charter*.

ISSUE THREE: Parents lose right to care for their daughter because they choose medical treatment consistent with their religious conscience, a fundamental freedom protected by s. 2(a) of the *Charter*.

ISSUE FOUR: State infringement of appellants' rights under ss. 7 and 2(a) was not demonstrably justified under s. 1.

PART III

ARGUMENT

ISSUE ONE: **Compelling need for clear guidelines when the state seeks to override parental health-care choices**

A. Summary of Issue One Argument

38. The facts in Sheena's case strike at the core of the problem. On a Sunday afternoon in July, a doctor told her parents she needed blood products. He was moving to take custody of Sheena. They had five minutes to decide what they wanted to do. Their daughter had just been apprehended by the C.A.S. The wardship hearing began within two hours. The doctor testified, claiming there was an emergency and Sheena might require blood products. The parents lost custody of their baby. Three days passed. There was no emergency. No blood products were given. Wardship was extended to keep the option open. Two more weeks passed. Still no emergency, and no blood products. Sheena was improving. Wardship was extended a second time. Only then, three weeks and two days after wardship was granted for the alleged emergency, blood products were given for a non-emergency eye examination under general anesthesia.

39. Judge Main, in a subsequent case, criticized the current process pursuant to s. 37(2)(e) of the *Child and Family Services Act*:

> 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.

To date, no "appropriate change" has been made.

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

Child and Family Services Act, R.S.O. 1990, c. C.11, s. 37(2)(e) (Appendix B, p. 13).

PART III – ARGUMENT
Issue One

40. Decent, loving parents suffer the trauma of being branded unfit to care for someone nearest and dearest to them. They are forced to submit to what for them is a violation of their child despite available medical alternatives. They and their child must live with the aftermath of the trauma and with anxiety over known risks—like the dreaded AIDS—to which their child may have been exposed.

41. The potential consequences for doctors, parents and, most of all, the child argue that fundamental justice must apply in handling these cases. Mr. Justice Tarnopolsky of the Court of Appeal underscored the importance of the issue before this Honourable Court when he stated the resort to wardship of children whose parents refuse blood transfusions on religious grounds is of "national importance" and "international significance."

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1289, ln. 15);

Knoppers, B.M. ed. *Canadian Child Health Law* (Toronto: Thompson Educational Publishing, Inc., 1992) at 169 (J.B.A. Tab A-3);

McAninch, W.S., "A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court" [1987] 55 *Cincinnati L.R.* 997 at 1061, 1062 (J.B.A. Tab A-4).

42. The Honourable Madame Justice McLachlin noted in her 1991 Cambridge Lecture that the question is vital to a broader concern:

> 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.

Reference: McLachlin, Madame Justice Beverley, "Who Owns Our Kids? Education, Health And Religion In A Multicultural Society" (July 1991) Cambridge Lectures at 20 (J.B.A. Tab A-5);

Vorys, Y.V. "The Outer Limits of Parental Autonomy: Withholding Medical Treatment from Children" 42 *Ohio State L.J.* 813 at 820 (1981) (J.B.A. Tab A-6);

DiPietro, M. "Fact Finding Faith" 3 *J. Contemporary Health Law and Policy* 185 at 201 (1987) (J.B.A. Tab A-7).

PART III – ARGUMENT
Issue One

B. Options Before This Honourable Court

43. This Honourable Court has at least three options:

a. Deny the parents' appeal. This would maintain the *status quo* wherein, as stated by Judge Main, "the present vehicle of summary-like proceedings is totally inadequate and unacceptable to do justice."

b. Read in to existing legislation guidelines that spell out how the principles of fundamental justice apply when the state seeks to override parental health-care choices.

Reference: *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 37(2)(e), together with procedures in ss. 40(1), 47(1), 51, 57(1)(2), (2), 62(1), (2), (3) (Appendix B, pp. 13, 14, 16)

Appellants propose the following guidelines:

Medical Emergency: No Hearing Necessary

Doctor administers necessary emergency treatment without court order where:

(i) delay probably results in death/serious bodily harm;

(ii) no alternative medical management available;

(iii) no other doctor available to provide alternative medical care; and

(iv) independent opinion supports emergency medical treatment.

No Medical Emergency: Hearing Necessary

Doctor administers medical treatment with a court order where:

(i) proposed medical treatment is necessary;

(ii) no alternative medical management available;

(iii) no other doctor available to provide alternative medical care;

(iv) 48 hours notice given to parents with full disclosure, including contrary medical opinion(s) if any; and

(v) only medical treatment decided necessary by court.

PART III – ARGUMENT
Issue One

Applying these guidelines would strike an appropriate balance. They are presented in detail in Appendix C.

c. Strike down s. 19(1)(b)(ix), together with the powers in ss. 30(1)2 and 41 and the procedures in ss. 21, 27, 28(1), (10) and (12), of the *Child Welfare Act*, R.S.O. 1980, c. 66, a statute that was repealed in 1985 and replaced by the *Child and Family Services Act, 1984*, S.O. 1984, c. 55.

44. Appellants ask this Honourable Court to adopt option "b." above. There is precedent to support such remedy. In *R. v. Swain*, Lamer C.J. held that the Court had power to "reformulate a common law rule so that it will not conflict with the principles of fundamental justice." Common law should authorize a doctor to treat an infant in a medical emergency without parental consent. In *Schacter v. Canada*, Lamer C.J. held that it would be appropriate to read in to legislation where there was no conflict with the legislative objective and means. Guidelines proposed by appellants are consistent with the legislative objective (the welfare of the child) and the means (a fair judicial hearing).

Reference: *Reibl v. Hughes*, [1980] 2 S.C.R. 880 at 890 (J.B.A. Tab C-2);
R. v. Salituro, [1991] 3 S.C.R. 654 at 670 (J.B.A. Tab C-3);
R. v. Swain, [1991] 1 S.C.R. 933 at 978 (J.B.A. Tab C-4);
Schachter v. Canada, [1992] 2 S.C.R. 679 at 718 (J.B.A. Tab C-5);
Picard, E.I. *Legal Liability of Doctors and Hospitals in Canada*, 2d ed. (Carswell, 1984) at 45 points to the "realistic approach" in common law authority for a doctor to treat in emergency (J.B.A. Tab A-8);
Knoppers, *supra*, at 233, 234, shows no need for court order in medical emergency in Québec (J.B.A. Tab A-3).

45. Such a declaration by this Court would provide clear principles applicable uniformly across the country by which health-care professionals, parents, state agencies, and courts can deal with these difficult issues in a manner that is adequate and acceptable to do justice. Precedent for a practical declaration of principle is found in *Mahe v. Alberta*.

Reference: *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at 394 (J.B.A. Tab C-6)

PART III – ARGUMENT
Issue One

C. Value of Proposed Guidelines in Sheena's Case

46. The proposed guidelines are practical and workable. They balance the interests of all parties. Apply these guidelines to the case of Sheena:

a. Drs. Perlman and Pape did not need C.A.S. intervention to cover possibilities. Had an emergency developed, they could have acted.

b. The parents would have had ample time for full answer and defence at the initial wardship hearing.

c. This case would never have come to this Honourable Court.

D. Broader Value of Proposed Guidelines

47. Every day across Canada parents seek treatment for their children in hospitals. The uncertainties of medical practice require parents to make choices. The law imposes a duty on doctors to inform parents of alternatives and treatment options. Parents must exercise discretion and choose.

48. This Honourable Court observed in *LaPointe v. Hôpital Le Gardeur* that there are a "number of available methods of treatment from which medical professionals must at times choose," even in "the face of competing theories." A United States President's Commission recognized: "More commonly, there will be a range of medically acceptable responses" and "a comparison of several treatment options," including "alternative treatments."

Reference: *LaPointe v. Hôpital Le Gardeur*, [1992] 1 S.C.R. 351 at 363 (J.B.A. Tab C-7);
U.S. President's Commission for the Study of Ethical Problems in Medicine, *Making Health Care Decisions* (October 1982) Vol. 1 at 76 (J.B.A. Tab A-9).

49. The *Report of the [United States] Presidential Commission on HIV* (1988) noted that risks from blood products argue for the choice of alternatives. The Commission recommended:

PART III -- ARGUMENT
Issue One

> Informed consent for transfusion of blood or its components should include an explanation of the risks involved with the transfusion of blood and its components, including the possibility of HIV infection, and information about appropriate alternatives to homologous blood transfusion therapy. . . .
>
> In health care facilities, all reasonable strategies to avoid homologous transfusion (blood from others) should be implemented . . .

Dr. Abenhaim testified that this recommendation "makes good sense and good practice in Canada."

Reference: Exhibit #2: *Report of the [United States] Presidential Commission on HIV* (1988) p. 79, Recommendations 6-22, 6-26 (COA Vol. VI, pp. 1037, 1042);

Evidence of Dr. L. Abenhaim (COA Vol. III, p. 543, ln. 20 - p. 544, ln. 20);

See also:
Office of Technology Assessment Task Force (OTA), *Blood Technologies, Services, and Issues* (J.B. Lippincott Co., 1988) at 124, 127, 129 (J.B.A. Tab A-10);

Jenner, R.K. "Transfusion-Associated AIDS and Medical Liability" (May 1991) *TRIAL* 26 at 30, 32 (J.B.A. Tab A-11).

50. There is a need for clear guidelines as to when the state will override parental discretion in health-care choices. Otherwise, as in Sheena's case, the

> requisite of parental consent to medical care for children becomes meaningless if refusal to consent automatically triggers state inquiry or a finding of neglect.

Reference: Goldstein, J. "Medical Care for the Child at Risk: On State Supervention of Parental Autonomy" 86 *Yale L.J.* 645 at 651 (1977) (J.B.A. Tab A-12)

51. Guidelines proposed by the appellants would ensure "the rights of the child and parents as well as the interests of the state . . . [are] delicately balanced."

Reference: *Children's Aid Society of Metropolitan Toronto v. F. (R.),* at 535 (J.B.A. Tab C-1)

PART III – ARGUMENT

ISSUE TWO: **Parents deprived of the liberty to care for their daughter by state action violating principles of fundamental justice as guaranteed under s. 7 of the *Charter*.**

A. Summary of Section 7 Argument

52. The s. 7 right to liberty included the right of Sheena's parents to care for her and her reciprocal right to be cared for by loving and responsible parents. The parents sought medical treatment to protect Sheena's life and security. Their choice of nonblood medical management was supported by expert medical opinion.

53. The state deprived Sheena and her parents of these rights by action which violated principles of fundamental justice. The state proceeded without full disclosure and timely notice. It denied the parents' right to full answer and defence.

54. The situation did not justify this breach of traditional rules of fairness. There was no emergency need for blood products on July 31 or at any time.

B. State Action Contrary to Principles of Fundamental Justice

(1) No timely and prior notice on July 31, 1993

55. The Court of Appeal found that the very short notice and procedure in the initial wardship proceeding on July 31 put the parents "at a clear disadvantage in terms of the information available to them." The evidence shows that there was no timely and prior notice. In *Lakeside Hutterite Colony v. Hofer*, McLachlin J. (in dissent) quoted from *Administrative Law: A Treatise* in explaining the purpose of notice:

> The right of a person to present a defence against a decision affecting his rights or interests necessarily implies that the person receive prior notice of the facts on which the decision is based.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1278);
Lakeside Hutterite Colony v. Hofer, [1992] 3 S.C.R. 165 at 228 (J.B.A. Tab C-8).

PART III – ARGUMENT
Issue Two

(2) No disclosure of contrary opinion on July 31, 1983

56. The Court of Appeal found that Dr. Perlman's failure to disclose the contrary opinion of the cardiologist, Dr. Benson, was unfair: "The appellants were disadvantaged in their ability to obtain evidence to refute the testimony of Dr. Perlman." On July 31 the case turned on the issue as to whether Sheena might need blood products to cure congestive heart failure. The cardiologist found "no evidence of congestive heart failure." Dr. Pape later admitted before the District Court that she and Dr. Perlman relied on this opinion and did not give blood products.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1278, ln. 1-28);
Evidence of Dr. K. Pape (COA Vol. III, p. 586, ln. 19 - p. 587, ln. 24).

57. The Court of Appeal concluded that the requirements of fundmental justice were satisfied because experienced counsel "was permitted to cross-examine all of the witnesses called by the C.A.S." The hearing was called on short notice before Judge Main on a Sunday afternoon in July. There was no opportunity for counsel to review evidence and prepare. The only medical witness (also the moving party) failed to disclose vital contrary evidence. This is not fundamental justice.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1279, ln. 40);
Singh et al. v. M.E.I., [1985] 1 S.C.R. 177 at 212, 213 (J.B.A. Tab C-9).

58. In *R. v. Stinchcombe*, Sopinka J. noted that in civil proceedings "justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met."

Reference: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 *per* Sopinka J. at 332, 336 (J.B.A. Tab C-10);

See also: *Children's Aid Society of Metropolitan Toronto v. F. (R.), supra*, at 535 (J.B.A. Tab C-1);

DiPietro, *supra*, at 188, 189, 201 (J.B.A. Tab A-7);

Note, "Compulsory Medical Treatment: The State's Interest Re-evaluated" 51 *Minnesota L. Rev.* 293 (1966) (J.B.A. Tab A-13);

PART III -- ARGUMENT
Issue Two

Thompson, Rollie D.A. "The Charter and Child Protection: The Need for a Strategy" (1986) 5 *Can. J. Fam. L.* 55 at 68 (J.B.A. Tab A-14);

Thompson, D.A. Rollie "Taking Children And Facts Seriously: Evidence Law in Child Protection Proceedings -- Part I" (1988) 7 *Can. J. Fam. L.* 11 at 309 (J.B.A. Tab A-15).

59. Full prehearing disclosure, including contrary opinions, also serves to check any inclination by a doctor "to package and present the facts" in a way that leaves the court with no real choice.

Reference: U.S. President's Commission, *supra*, at 66-67, 129 (J.B.A. Tab A-9)

(3) Critical error in the Court of Appeal's s. 7 analysis

60. The Court of Appeal stated: "It is clear from the nature of the proceedings in this case that, if the claims of the applicant are assumed to be correct, an emergency existed [on July 31, 1983]." Based on this unproved assumption rather than fact, the Court of Appeal got its analysis off on the wrong foot.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1279, ln. 1)

61. It then held there was no violation of fundamental justice because it accepted the assumption that there was an emergency need for blood products.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1280, ln. 1)

62. The facts show the contrary. No blood was given, and Sheena improved. There was no emergency need for blood products at any time.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1262, ln. 12; p. 1266, ln. 40)

63. Before the state can intervene, it must prove (not assume) the child's welfare is jeopardized by the action of the parents. Justification for state intervention must be established on a high degree of probability considering, in particular, the particular nature and consequences of intervention.

Reference: Bala & Redfearn, "Family Law and the 'Liberty' Interest: Sec. 7 of the Canadian Charter of Rights" (1983) 15 *Ottawa Law Rev.* 274 at 308, fn. 114 (J.B.A. Tab A-16)

PART III – ARGUMENT
Issue Two

(4) No timely and prior notice of a new case introduced on August 19, 1983, by the Official Guardian

64. On August 19, counsel for the Official Guardian introduced the eye surgeon, Dr. Morin: "I've spoken exactly four words to the man, so this may be a surprise for all." There was no opportunity for counsel to answer Dr. Morin's new case. Judge Main extended wardship on August 19, permitting blood products and eye surgery.

Reference: Evidence of Dr. D. Morin (COA Vol. II, p. 269, ln. 10-14);

Reasons for Judgment of Main P.J. (August 19, 1983) (COA Vol. VII, p. 1164, ln. 25).

C. Both Child and Parents Were Deprived of the Right to Liberty

65. The above state actions, pursuant to the *Child Welfare Act*, R.S.O. 1980, c. 66, ss. 19(1)(b)(ix), 21(1)(a), 27(1)(a), 28(12)(a), were arbitrary and unnecessary. They impaired the liberty interests of both child and parent.

66. Professor Joseph Goldstein of Yale University showed:

> The right to family privacy and parental autonomy, as well as the reciprocal liberty interest of parent and child in the familial bond between them, need no greater justification than that they comport with each state's fundamental constitutional commitment to individual freedom and human dignity.

Reference: Goldstein, *supra*, at 649 (J.B.A. Tab A-12);

See also Knoppers, *supra*, at 171 where parental health-care choices may come within a "zone of privacy." (J.B.A. Tab A-3);

Evidence of Dr. E.-H. Kluge (COA Vol. V, pp. 968-969).

67. The *Canadian Charter of Rights and Freedoms* is a "commitment to individual freedom and human dignity." The "reciprocal liberty interest of parent and child" is found in the words that "everyone has the right to life, liberty and security of the person."

Reference: *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136 (J.B.A. Tab C-11);

Re T and Catholic Children's Aid Society (1984), 46 O.R. (2d) 347 at 357, 358 (Ont. Prov. Ct.) (J.B.A. Tab C-12);

Thompson, D.A. Rollie "Why Hasn't the Charter Mattered in Child Protection?" (1989) 8 *Can. J. Fam. L.* 133 at 155, 157 (J.B.A. Tab A-17);

PART III – ARGUMENT
Issue Two

Hughes, K.A. & Andrews, H.T.G. "Children's and Family Rights and the Role of the State in Custody and Child Protection Matters" in Abella, R.S. & Rothman, M.L. eds. *Justice Beyond Orwell* (Les Éditions Yvon Blais Inc., 1985) at 371, 372 (J.B.A. Tab A-18);

Zylberberg, Philip "Minimum Constitutional Guarantees in Child Protection Cases" (1992) 10 *Can. J. Fam. L.* 257 at 264, 265 (J.B.A. Tab A-19).

68. In *Parham v. J.R.*, Burger C.J., for the United States Supreme Court, showed that constitutional protection of family autonomy includes parental choices of medical treatment. He noted with approval the above article by Professor Goldstein.

Reference: *Parham v. J.R.*, 442 U.S. 584 at 603, 604 (1979) *per* Burger C.J. (J.B.A. Tab C-13);

See also: *Matter of Hofbauer*, 393 N.E.2d 1009 at 1013-1014 (1979) (J.B.A. Tab C-14);

Weber v. Stony Brook Hospital, 467 N.Y.S.2d 685 at 687 (1983) (J.B.A. Tab C-15);

In Re Henry Green, 12 Crime & Delinquency 377 at 384 (1966) (J.B.A. Tab C-16);

Vorys, *supra*, at 828 (J.B.A. Tab A-6).

69. The Court has a broader interest in protecting family autonomy as a constitutional value:

> Family autonomy also serves our democratic society's collective interest in fostering social pluralism. While the state has a legitimate police power interest in promoting the inculcation of basic social values in its citizens, the Constitution strictly limits state power to impose on its citizens any *particular* view of what moral, religious, or ethical values are orthodox. Crucial decisions about childbearing and childrearing are thus allocated to the family in part because majoritarian control of this process would allow the state impermissibly to standardize its citizens.

Reference: Note, "Developments in the Law — The Constitution and the Family" 93 *Harvard L. Rev.* 1156 at 1215 (April 1980) (J.B.A. Tab A-20)

70. Canadian tradition and the *Charter* reflect a similar commitment. Section 27 of the *Charter* is designed to check state efforts to "standardize its citizens" and its families. Apropos are the comments of Justice Brandeis (dissenting):

> The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding.

Reference: *Olmstead v. United States*, 277 U.S. 438 at 479 (1928) (J.B.A. Tab C-17);

See also: Rand, Ivan C. "The Role of an Independent Judiciary in Preserving Freedom" (1951) Vol. IX *Univ. of Toronto L.J.* 1 at 13 (J.B.A. Tab A-21).

PART III – ARGUMENT
Issue Two

D. Common Law Presumes Parental Autonomy

71. In *Re B.C. Motor Vehicle Act*, Lamer J. (as he then was) noted that s. 7 content may be drawn from "presumptions of the common law." It has long been a rule of common law that "as *parens patriae* the Sovereign is the constitutional guardian of children . . . The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents." In *Parham v. J.R., supra*, Burger C.J. described the "starting point" for the law's concept of the family:

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Reference: *Parham v. J.R., supra*, at 602 *per* Burger C.J. (J.B.A. Tab C-13);

Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at 503 (J.B.A. Tab C-18);

Hepton v. Maat, [1957] S.C.R. 606 at 607 (J.B.A. Tab C-19);

Bala & Redfearn, *supra*, at 278-81 for discussion of the common law (J.B.A. Tab A-16).

72. In this case, the parents sought medical treatment for Sheena. They had her best interests at heart. From Sheena's birth, they were prepared "to consult with the doctors, to be concerned and to give their opinions." They were at H.S.C. daily. The mother was expressing her milk to feed Sheena. Dr. Pape described them as parents having "an outstanding record."

Reference: Reasons for Judgment of Main P.J. (August 19, 1983) (COA Vol. VII, p. 1151, ln. 1-10; p. 1159, ln. 30 - p. 1160, ln. 5);

Evidence of Dr. K. Pape (COA Vol. IV, p. 635, ln. 20-25);

Evidence of B. Bryenton (COA Vol. III, p. 504, ln. 10-15; Vol. II, p. 280, ln. 5).

PART III – ARGUMENT
Issue Two

E. Parental Participation Is Essential to Quality Medical Care of Children

73. Appellants led evidence before the District Court from Professor Jeanne Guillemin, who has researched the sociology of neonatology in North America and Great Britain. She participated in the development of guidelines regarding neonatal intensive care for the World Health Organization.

Reference: Evidence of J. Guillemin (COA Vol. III, pp. 467-476)

74. Professor Guillemin's research, published in the book *Mixed Blessings–Intensive Care for Newborns*, was filed as an exhibit. Dr. Pape, an expert for the C.A.S., described the research as "very important." An editorial by a neonatologist in the *Journal of the American Medical Association* recommended it to professionals, as well as to legislators.

Reference: Evidence of Dr. K. Pape (COA Vol. IV, pp. 655-657);

Exhibit #29(b): Book Review by Dr. J.E. Hodgman (May 8, 1987) *JAMA* Vol. 257:2500 (COA Vol. VI, p. 1097).

75. Professor Guillemin's research showed:

a. Parents play a vital role in ensuring continuity of care in a hospital setting.

Reference: Evidence of J. Guillemin (COA Vol. III, p. 496-497)

b. Parents, who have only one patient, their infant, can be a check on clinical mistakes, can humanize and personalize the care of the newborn.

Reference: Evidence of J. Guillemin (COA Vol. III, pp. 489-490, 496-497; Vol. VI, pp. 1080, 1082)

c. Parents can help check paternalistic decision-making by physicians.

Reference: Evidence of J. Guillemin (COA Vol. III, p. 495)

d. Personal and religious values of physicians can bias their medical opinions.

Reference: Exhibit #30: Todres & Guillemin et al. "Life-Sustaining Therapy for Newborns -- A Questionnaire Survey in the State of Massachusetts" (May 1988) 81 *Pediatrics* 643 (COA Vol. VI, p. 1102, ln. 30)

PART III – ARGUMENT
Issue Two

76. The United States President's Commission for the Study of Ethical Problems in Medicine defined shared decision-making and noted:

> Shared decisionmaking requires that a practitioner seek not only to understand each patient's needs and develop reasonable alternatives to meet those needs but also to present the alternatives in a way that enables patients to choose one they prefer.

Reference: U.S. President's Commission, *supra*, at 44, 127 (J.B.A. Tab A-9)

77. Professor Goldstein shows the value of checks and balances to restrain state officers from imposing their personal health-care preferences:

> As *parens patriae* the state is too crude an instrument to become an adequate substitute for parents. . . . State statutes then must be revised to hold in check, not release, the rescue fantasies of those it empowers to intrude, and thus to safeguard families from state-sponsored interruptions of ongoing family relationships by well-intentioned people who "know" what is "best" and who wish to impose their personal health-care preferences on others. . . . No one has a greater right or responsibility and no one can be presumed to be in a better position, and thus better equipped, than a child's parents to decide what course to pursue if the medical experts cannot agree or, assuming their agreement, if there is no general agreement in society that the outcome of treatment is clearly preferred to the outcome of no treatment. Put somewhat more starkly, how can parents in such situations give the wrong answer since there is no way of knowing the right answer? [emphasis added]

Reference: Goldstein, *supra*, at 650-651, 654-655 (J.B.A. Tab A-12)

F. *Charter* Principles Developed by Supreme Court of Canada Extend to Family Autonomy

78. In Reference Re *Criminal Code* (Man.), Lamer J. (as he then was) stated that the liberty interest of s. 7 would be applicable where there was a state restriction of a liberty interest within the traditional domain of the judiciary. The check on state efforts to regulate and control family privacy falls within the traditional domain of the judiciary. It is a liberty interest protected by s. 7. It has been part of "the rule of law established for centuries."

PART III – ARGUMENT
Issue Two

Reference: Reference Re *Criminal Code* (Man.), [1990] 1 S.C.R. 1123 at 1173-78 (J.B.A. Tab C-20);

Hepton v. Maat, supra, at 608 (J.B.A. Tab C-19).

79. Individual justices of this Honourable Court have considered the *Charter* as providing protection of "family, social life" or "activities integral to a marriage . . . such as . . . raising children together." Parental health-care choices are integral to child-rearing.

Reference: Reference Re *Criminal Code* (Man.), *supra,* at 1174 (Justice Lamer, concurring) (J.B.A. Tab C-20);

Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 at 362 (Dickson C.J. in dissent; see also McIntyre J. for majority at 406) (J.B.A. Tab C-21);

See also *Jones v. The Queen,* [1986] 2 S.C.R. 284 at 320 (Wilson J. in dissent) (J.B.A. Tab C-22);

Zylberberg, *supra,* at 271 (J.B.A. Tab A-19).

G. Declarations of Rights Show Commitment to Family Autonomy

80. The *Canadian Bill of Rights* expressly identifies the importance of "the family in a society of free men and free institutions."

Reference: *Canadian Bill of Rights,* 1960 (Can.), c. 44 (R.S.C. 1970, Appendix III) as amended by 1970-71-72, c. 38, s. 29; 1985, c. 26, s. 105, Preamble (Appendix B, p. 17);

Bala & Redfearn, *supra,* at 278 (J.B.A. Tab A-16).

81. In *Re B.C. Motor Vehicle Act, supra,* Lamer J. (as he then was) noted the s. 7 values may be drawn from principles that have "found expression in the international conventions on human rights." These show commitment to family autonomy. The International Covenant on Civil and Political Rights, 1966, which has been ratified by the Canadian Government with the unanimous agreement of the provinces, provides:

> *Article 23*
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Reference: International Covenant on Civil and Political Rights, 1966; see Brownlie, ed. *Basic Documents on Human Rights* 2d ed. (Oxford: Clarendon Press, 1981) at 136 (Appendix B, p. 20);

PART III – ARGUMENT
Issue Two

Re B.C. Motor Vehicle Act, supra, at 503 (J.B.A. Tab C-18);

Re Public Service Employee Relations Act, supra, at 348, 350 (Dickson C.J. dissent) (J.B.A. Tab C-21).

82. Other declarations contain similar protection.

10 Reference: European Social Charter, 1961, Part I(16); see Brownlie, ed. *supra*, at 302 (Appendix B, p. 19);

American Declaration of the Rights and Duties of Man, 1948, Articles V, VI; see Brownlie, ed. *supra*, at 383 (Appendix B, p. 18);

[U.N.] Convention on the Rights of the Child (in force for Canada January 12, 1992), Preamble, Articles 3, 5, 16 (Appendix B, p. 21);

See Zylberberg, *supra*, at 271-275 for discussion of application of European Convention on Human Rights and s. 7 of the *Charter*. (J.B.A. Tab A-19).

20

83. Statements of principle governing provincial legislation and empowering courts to check state control of families show commitment to family autonomy as a fundamental value in Canadian society. As noted by Dickson C.J. in *R. v. Oakes*, such underlying values and principles of a free and democratic society are the genesis of rights protected by the *Charter*.

30

Reference: *R. v. Oakes, supra*, at 136 (J.B.A. Tab C-11);

Child and Family Services Act, R.S.O. 1990, c. C.11, s. 1(b) (Appendix B, p. 24);

Child Welfare Act, S.A. 1984, c. C-8.1, as amended 1989, s. 2(a) and (c) (Appendix B, p. 22);

The Child and Family Services Act, R.S.M. 1987, c. C80, as amended, preamble points 2, 3; see also ss. 4-8 (Appendix B, p. 22);

Family Services Act, S.N.B. 1980, c. F-2.2, as amended, preamble (Appendix B, p. 23);

40

Family and Child Services Act, R.S.P.E.I. 1988, Cap. F-2, s. 1.(1)(d)(viii) (Appendix B, p. 25);

Youth Protection Act, R.S.Q. 1977, c. P-34.1, s. 4 (Appendix B, p. 26);

The Child and Family Services Act, S.S. 1989, c. C-7.2, s. 3 (Appendix B, p. 26).

50

PART III – ARGUMENT

ISSUE THREE: **Parents lose right to care for their daughter because they choose medical treatment consistent with their religious conscience, a fundamental freedom protected by s. 2(a) of the *Charter*.**

A. Summary of Section 2(a) Argument

84. The parents chose medical alternatives to blood products. Expert opinion supported their choice. The parents were motivated by concern for their daughter, as well as a desire to act consistently with their religious conscience. They lost the right to care for Sheena in harmony with their religious conscience and to protect her from a violation of God's law and defilement of her body.

B. The Court of Appeal Found an Infringement of s. 2(a)

85. The Court found there was an infringement of s. 2(a):

> In this case, the effect of the impugned legislation in the case before this court is clear. . . . Undoubtedly, an effect of the *Child Welfare Act* in this case is to coerce the appellants not to manifest their views by controlling the treatment provided to the child.

The Court then considered reasonable limits pursuant to s. 1.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1282, ln. 1-5; p. 1284, ln. 1, 23)

86. This effect is widespread. Tarnopolsky J.A. observed "the resort to wardships of children whose parents refuse blood transfusion on religious grounds" is an issue of "national importance" and "international signficance." Constitutional evidence, case law and commentators point to the adverse effect on families who seek medical alternatives to blood products for religious reasons. Professor D. Gibson cited these cases as an example of "adverse effect discrimination."

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1289, ln. 15);

Gibson, D. *The Law of the Charter: Equality Rights* (Carswell, 1990) at 125 (J.B.A. Tab A-22);

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

PART III – ARGUMENT
Issue Three

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

Letter from counsel for Attorney General of Ontario, dated November 10, 1988, admitting majority of cases under *Child Welfare Act*, R.S.O. 1980, c. 66, s. 19(1)(b)(ix), involve parents who object to blood transfusions (COA Vol. VI, p. 1144, ln. 30);

Memorandum from Ontario Ministry of Attorney General and Office of the Official Guardian Re: Emergency Medical Apprehensions (November 1984) (COA Vol. VI, p. 1143);

Children's Aid Society of Metropolitan Toronto v. F.(M.) (1993), 99 D.L.R. (4th) 378 (Ont. Div. Ct.). (J.B.A. Tab C-23);

Re Children's Aid Society and Burrell (1986), 56 O.R. (2d) 40 (Ont. U.F. Ct.) (J.B.A. Tab C-24);

Re L.D.K. (1985), 48 R.F.L. (2d) 164 (Ont. Prov. Ct.) (J.B.A. Tab C-25);

Verdict of Coroner's Jury into the Death of Baby Leah Turnbull (September 13, 1986) Pembroke, Ontario (J.B.A. Tab C-26);

M. v. Dir. of Child Welfare [Alta.] (1986), 4 R.F.L. (3d) 363 (J.B.A. Tab C-27);

Re Wintersgill and Minister of Social Services (1981), 131 D.L.R. (3d) 184, 25 R.F.L. (2d) 395 (Sask. U.F.C.) (J.B.A. Tab C-28);

Kennett v. Health Sciences Centre (1991), 83 D.L.R. (4th) 744 (Man. C.A.) (J.B.A. Tab C-29);

RE C.P.L. (1988), 70 Nfld. & P.E.I.R. and 215 A.P.R. 287 (Nfld. U.F.C.) [On appeal to the Nfld. C.A.] (J.B.A. Tab C-30);

Ratcliffe, R. "The New Finding" (March 22, 1986) Canadian Bar Association-Ontario, Continuing Legal Education at 6 (J.B.A. Tab A-23).

87. The Court of Appeal's holding is consistent with the rights of all Canadians who choose medical care for themselves and their children compatible with their religious conscience:

a. Health care providers and administrators should actively seek to adapt their decisions and services to the religious and cultural preferences of clients. The beliefs and the culture of health care workers should not take precedence. Religious beliefs may alter diet (Jewish, Moslem, Seventh Day Adventist), days of work (Jewish, Seventh Day Adventists) or dress at work. Autopsies, organ donation, circumcision and the disposal of amputated limbs may have restrictions or protocols. Rituals vary at birth and at death (Roman Catholic, Episcopalian, Eastern Orthodox). Blood transfusions and use of blood products may be prohibited (Jehovah's Witnesses).

Reference: Sutherland & Fulton, *Health Care in Canada: A Description and Analysis of Canadian Health Services* (The Health Group, 1990) at 112 (J.B.A. Tab A-24)

PART III – ARGUMENT
Issue Three

b. Ontario legislation on compulsory immunization provides for an exemption where a parent files a statement of conscience or religious belief.

Reference: *Immunization of School Pupils Act*, S.O. 1982, c. 41, ss. 1(ma), 2a(3) (Appendix B, p. 29);

There is a similar provision in New York; see Besharov, Douglas J. "State Intervention to Protect Children: New York's Definitions of 'Child Abuse' and 'Child Neglect'" 26 *N.Y. Law School L. Rev.* 723 at 746 (1981) (J.B.A. Tab A-25);

See also Goldstein, *supra*, at 655 (J.B.A. Tab A-12).

ISSUE FOUR: State infringement of appellants' rights under ss. 7 and 2(a) was not demonstrably justified under s. 1.

A. Summary of Section 1 Argument

88. The state did not meet the burden of proof under s. 1. It did not establish on a preponderance of probability that blood products were necessary or the only way to treat Sheena's condition. Expert medical opinion supported the parents' choice of alternatives to blood products.

B. Appellants Agree That the Legislative Objective Was of Pressing and Substantial Concern

89. The Court of Appeal held that the legislation satisfied the first step of the s. 1 test: "The objective of saving the life or health of a child is a pressing and substantial concern." Appellants agree.

Reference: Reasons for Judgment of Tarnopolsky J.A. (COA Vol. VII, p. 1285, in. 25)

90. Appellants are aggrieved not by the "law-in-books" but by the "law-in-action." They point to Judge Main's criticism in 1988: "[T]he present vehicle of summary-like proceedings is totally inadequate and unacceptable to do justice to the extremely difficult issues raised."

PART III – ARGUMENT
Issue Four

Reference: Llewellyn, K.N. *Jurisprudence: Realism in Theory and Practice* (University of Chicago Press, 1962) at p. 7 and reference to Dean Roscoe Pound (J.B.A. Tab A-26);
Children's Aid Society of Metropolitan Toronto v. F. (R.), supra, at 535 (J.B.A. Tab C-1).

C. The State Did Not Meet the Burden of Proof Under Section 1

91. In Sheena's case, Judge Main found there was no probable need for blood products. There was only a possibility. He found Sheena had progressed with alternatives to blood products. There also was expert opinion before the District Court that there were alternatives to blood products for the general anesthesia for the eye examination.

Reference: Reasons for Judgment of Main P.J. (August 19, 1983) (COA Vol. VII, p. 1154, ln. 28-30)

92. In *R. v. Oakes,* Dickson C.J. stated the standard of proof under s. 1 was "proof by a preponderance of probability," not possibility. This "test must be applied rigorously."

Reference: *R. v. Oakes, supra,* at 137 (J.B.A. Tab C-11)

93. The prediction of a possibility is nothing more than speculation and guesswork. Speculation and guesswork are not a basis for a s. 1 limit on a *Charter* right. Mere possibility denies parents a defence since it is impossible for anyone to prove a possibility cannot happen. It does not prove a medical need, nor that the parents' choice of alternatives to blood products was "clearly wrong." It is not a demonstrably justified limit on a *Charter* right.

Reference: *Couture-Jacquet v. Montreal Children's Hospital* (1986), 28 D.L.R. (4th) 22 at 31 (Qué. C.A.) (J.B.A. Tab C-31);
Bala & Redfearn, *supra,* at 307, 308 (J.B.A. Tab A-16);
Goldstein, *supra,* at 653 (J.B.A. Tab A-12);
See Zylberberg, *supra,* at 278 (J.B.A. Tab A-19).

PART III – ARGUMENT
Issue Four

94. There was also evidence in Sheena's case of variations in medical opinion and ways to treat. In *Lapointe v. Hôpital Le Gardeur, supra,* this Court adopted:

> [TRANSLATION] The courts do not have jurisdiction to settle scientific disputes or to choose among divergent opinions of physicians on certain subjects. They may only make a finding of fault where a violation of universally accepted rules of medicine has occurred. The courts should not involve themselves in controversial questions of assessment having to do with diagnosis or the treatment of preference.

Reference: *Lapointe v. Hôpital Le Gardeur, supra,* at 363 quoting André Nadeau in "La responsabilité médicale" (1946), 6 *R. du B.* 153 at 155 (J.B.A. Tab C-7)

95. Case law supports the reasonableness of requiring the state to prove more than a possibility. In *Matter of Hofbauer,* the New York Court of Appeals held the state did not meet its burden where parents chose an alternative treatment that "has not been totally rejected by all responsible medical authority."

Reference: *Matter of Hofbauer, supra,* at 1014 (1979) (J.B.A. Tab C-14);

Vorys, *supra,* at 828 (J.B.A. Tab A-6);

Besharov, *supra,* at 747 (J.B.A. Tab A-25).

96. In *Matter of Hofbauer,* the New York Court of Appeals showed why:

> This inquiry cannot be posed in terms of whether the parent has made a "right" or a "wrong" decision, for the present state of the practice of medicine, despite its vast advances, very seldom permits such definitive conclusions. Nor can a court assume the role of a surrogate parent and establish as the objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided, for such standard is fraught with subjectivity.

Reference: *Matter of Hofbauer, supra,* at 1014 (1979) (J.B.A. Tab C-14);

Knoppers, *supra,* at 171 (J.B.A. Tab A-3);

As to the extent of divergent opinions among doctors and medical uncertainty, see: Lidz, C.W. et al. "Informed Consent and the Structure of Medical Care" Appendix C in Vol. 2 of President's Commission for the Study of Ethical Problems in Medicine, *Making Health Care Decisions* (October 1982) at 374 (J.B.A. Tab A-27);

Havighurst, Clark C. "Practical Guidelines as Legal Standards Governing Physician Liability" 54 *Law and Contemporary Problems* 87 at 88, 89 (1991) (J.B.A. Tab A-28);

PART III – ARGUMENT
Issue Four

Eddy, D.M. & Billings, J. "The Quality of Medical Evidence: Implications for Quality of Care" (Spring 1988) *Health Affairs* 19 at 20 (J.B.A. Tab A-29);

Rachlis & Kushner, *SECOND OPINION What's Wrong with Canada's Health Care System* (Toronto: Harper & Collins, 1989) at 49, 81 (J.B.A. Tab A-30).

97. Guidelines proposed by appellants at page 18, *supra*, are consistent with the proper *Charter* standard of proof under s. 1.

D. In a Medical Emergency a Hurried and Summary Hearing Is Neither Rational Nor Least Restrictive

98. Judge Main, who has sat on these cases, showed the procedure was not rational nor a least restrictive means: "A hurriedly convened child protection hearing is no substitute for competent life-saving medical intervention." It does not permit "the rights of the child and parents, as well as the interests of the state . . . to be delicately balanced."

Reference: *Children's Aid Society of Metropolitan Toronto v. F. (R.), supra*, at 534 (J.B.A. Tab C-1);

DiPietro, *supra*, at 189, 201 (J.B.A. Tab A-7).

99. The guidelines proposed by appellants are a practical and sensible remedy by which to strike a reasonable balance.

PART IV

ORDER REQUESTED

100. This Court is asked to order and declare:

a. THAT pursuant to the *Constitution Act, 1982*, s. 52(1), and the *Canadian Charter of Rights and Freedoms*, ss. 2(a), 7 and 24(1), the following guidelines set out the rights and duties when there is a disagreement between parents and the attending physician as to necessary medical treatment for an infant:

Medical Emergency: No Hearing Necessary

Doctor administers necessary emergency treatment without court order where:

(i) delay probably results in death/serious bodily harm;

(ii) no alternative medical management available;

(iii) no other doctor available to provide alternative medical care; and

(iv) independent opinion supports medical emergency treatment.

No Medical Emergency: Hearing Necessary

Doctor administers medical treatment with a court order where:

(i) proposed medical treatment is necessary;

(ii) no alternative medical management available;

(iii) no other doctor available to provide alternative medical care;

(iv) 48 hours notice given to parents with full disclosure, including contrary medical opinion(s) if any; and

(v) only medical treatment decided necessary by court.

b. THAT the constitutional questions as posed by The Right Honourable Chief Justice A. Lamer P.C. be answered as follows:

PART IV – ORDER REQUESTED

1. Does the *Child Welfare Act*, R.S.O. 1980, c. 66, s. 19(1)(b)(ix), together with the powers in ss. 30(1)2 and 41 and the procedures in ss. 21, 27, 28(1), (10) and (12), deny parents a right to choose medical treatment for their infants, contrary to s. 7 of the Canadian Charter of Rights and Freedoms?

Answer: Yes.

2. If the answer to question 1 is in the affirmative, is s. 19(1)(b)(ix), together with the powers in ss. 30(1)2 and 41 and the procedures in ss. 21, 27, 28(1), (10) and (12) of the *Child Welfare Act*, R.S.O. 1980, c. 66, justified as reasonable limits by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer: No.

3. Does the *Child Welfare Act*, R.S.O. 1980, c. 66, s. 19(1)(b)(ix), together with the powers in ss. 30(1)2 and 41 and the procedures in ss. 21, 27, 28(1), (10) and (12), infringe the appellants' freedom of religion as guaranteed under s. 2(a) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

4. If the answer to question 3 is in the affirmative, is s. 19(1)(b)(ix), together with the powers in ss. 30(1)2 and 41 and the procedures in ss. 21, 27, 28(1), (10) and (12) of the *Child Welfare Act*, R.S.O. 1980, c. 66, justified as reasonable limits by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore not inconsistent with the *Constitution Act, 1982*?

Answer: No.

c. THAT the infant Sheena B. was not a child in need of protection under the *Child Welfare Act*, R.S.O. 1980, c. 66, s. 19(1)(b)(ix);

d. THAT the Order of the Court of Appeal for Ontario be reversed, save in the matter of costs;

e. THAT costs be granted to appellants throughout;

or such further order as this Honourable Court may deem appropriate.

Dated at Halton Hills, this 29th day of July, 1992.

PART IV – ORDER REQUESTED

Respectfully submitted,

W. Glen How, Q.C.

John M. Burns

Solicitors for Appellants Richard B. and Beena B.

NOTICE TO THE RESPONDENT: Pursuant to subsection 44(1) of the ***Rules of the Supreme Court of Canada,*** this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said Rules, as the case may be.

PART V

TABLE OF AUTHORITIES

PART V -- TABLE OF AUTHORITIES

Cases (cont.):

PART V -- TABLE OF AUTHORITIES

PART V -- TABLE OF AUTHORITIES

Authors (cont):