Court File No. 31955

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA)

BETWEEN:

A.C., A.C. and A.C

Appellants (Appellants)

- and -

DIRECTOR OF CHILD AND FAMILY SERVICES

Respondent (Respondent)

- and -

ATTORNEY GENERAL OF MANITOBA , ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF ALBERTA, and ATTORNEY GENERAL OF BRITISH COLUMBIA

Interveners

RESPONDENT'S FACTUM

FILED BY THE RESPONDENT DIRECTOR OF CHILD AND FAMILY SERVICES

(Pursuant Rule 42 of *Rules of the Supreme Court of Canada*)

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PART I – STATEMENT OF FACTS

A. Overview

i. Introduction

1. The issue in this appeal is whether the actions of the Respondent Director of Child and Family Services (the "Director") in apprehending fourteen-year-old A.C. (the "Child") and obtaining a treatment order contrary to her wishes under s. 25 of *The Child and Family Services Act*, S.M. 1985-86, c. 8 (the "*CFSA*"), unjustifiably infringed the Child's rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

2. In considering this issue, this Honourable Court will not need to adjudicate over a medical dispute or, otherwise, adjudicate over disputed and untested evidence. Nor will this Honourable Court need to adjudicate over the common law principle of *parens patriae.* The *CFSA* is not a codification of the court's inherent jurisdiction. Rather, the *CFSA* represents a complete legislative code that preempts the court's *parens patriae* jurisdiction, and from which the Manitoba Legislature expressly excluded a "mature minor" exception for children under the age of sixteen.

3. The issue on appeal turns entirely upon the nature of an emergency hearing under the *CFSA*.

4. On early Sunday morning of April 16, 2006 the Director, acting upon the advice of the Child's medical practitioners, apprehended the Child in order to hold an emergency hearing under the *CFSA*. Kaufman J. was faced with the task of determining whether medical treatment should be ordered for a fourteen-year-old girl in a medical emergency.

The Child and her parents had refused critical medical treatments, which treatments, according to her doctor, would likely save the Child from death or serious injury.

5. Satisfied the Child was in imminent danger and that it was in the Child's best interests, Kaufman J. pronounced a treatment order pursuant to s. 25 of the *CFSA*, allowing qualified medical personnel to administer blood and/or blood by-products. Days later the emergency was over and therefore the apprehension was withdrawn on May 1, 2006. The Child was released from hospital on or about May 4, 2006.

6. The Director at all times acted in accordance with its statutory duty and in accordance with the best interests of the Child.

7. It is self-evident that exigent circumstances will not always afford the luxury of complex capacity assessments before the Director or a court is allowed to act in the best interests of children. It is for that reason that the Manitoba Legislature has set an appropriate age limit under which a child is not deemed to be capable of making life and death decisions for herself and thus allowing for the Director and the courts to act when every minute counts.

ii. The Facts of This Case Remain in Dispute

8. For the purposes of this Appeal the only relevant facts of this case are those as found by Kaufman J. at the emergency hearing of April 16, 2006.

B. Supporting Facts

i. The Hearing Before Kaufman J.

9. The Director's involvement in this case began on Sunday, April 16, 2006. Acting on the advice of the Child's doctors, and having verified that the Child's parents would not

consent to the indicated medical treatment, the Director apprehended the Child at approximately 2:00 a.m. At approximately 8:00 am, an emergency, short-notice hearing was held before Justice Kaufman pursuant to s. 25 of the *CFSA*.

Transcript of Proceedings before Justice Kaufman (April 16, 2006) **[Appellants' Record ("AR") Tab 28, pp. 166-168, 186-188]**

10. Counsel for the Winnipeg Regional Health Authority provided notice of the hearing to the Child's parents and their lawyer. It remains a matter of contest as to whether the Child was notified or whether the Child was physically capable of attending at the hearing.

Transcript of Proceedings before Justice Kaufman (April 16, 2006) **[AR, Tab 28, pp. 166-168, 172, 186]**

11. In attendance at the hearing were counsel for the Director (at the Law Courts Building at 408 York Avenue, in Winnipeg) counsel for the Winnipeg Regional Health Authority, and [redacted], the Child's father, via teleconference from the Health Sciences Centre; and Mr. Allan Ludkiewicz, first via teleconference from his car and then later in person at the Health Science Centre. Mr. Ludkiewicz indicated that he was acting as agent for *W. Glen How & Associates* who had been retained some hours earlier by the parents. It remains unclear why the Child did not retain *W. Glen How & Associates* until well after the emergency hearing, whether that was due to the Child's medical condition at the time of the emergency hearing, or for some other reason.

Transcript of Proceedings before Justice Kaufman (April 16, 2006) **[AR, Tab 28, p. 172, 175, 185, 194]**

12. Evidence was given at the emergency hearing on behalf of the Director by Audrey Lumsden, a social worker employed by Winnipeg Child and Family Services and Dr. Stanley Lipnowski, the Child's attending physician. Dr. Lipnowski gave evidence of the urgency of the situation as follows, *inter alia*

> Q. ...is the child's like [sic] or health endangered, in your opinion, if there's a delay in proceeding with a blood transfusion?
>
> A. Correct.
>
> Q. And is that risk or danger to the child's life or health, from your expert opinion, something that is of an urgent matter?
>
> A. Yes, it is.

Transcript of Proceedings before Justice Kaufman (April 16, 2006) **[AR, Tab 28, pp. 187, 189, 191]**

13. Evidence was given at the emergency hearing on behalf of the Appellants by A.C. , the Child's father. In addition, Mr. Ludkiewicz advised the Court that the Child had been assessed to be competent to make treatment decisions, and that she did not consent to blood transfusions. Mr. Ludkiewicz also attempted to adduce evidence from a Mr. Berkers [phonetic], whom he described as a "hospital consultant", which evidence was not admitted.

Transcript of Proceedings before Justice Kaufman (April 16, 2006) **[AR, Tab 6, p. 178, 199, 202]**

14. As regarding nature of the emergency hearing, Mr. Ludkiewicz agreed that he could "follow along" with the evidence on his cell-phone and confirmed his understanding that emergency hearings were "done on a short leave basis." Notwithstanding the nature of the proceedings, and contrary to the Appellants contention that the hearing was "essentially *ex parte*" Mr. Ludkiewicz made lengthy submissions before the court and was able to cross-examine the Director's witnesses, including the Child's doctor.

Transcript of Proceedings before Justice Kaufman (April 16, 2006) **[AR, Tab 28, p. 179, 186]**

15. Satisfied that the Child was "in immediate danger", Justice Kaufman pronounced a treatment order, authorizing the treating medical personnel to administer a blood transfusion and/or blood products as were medically indicated.

Transcript of Proceedings before Justice Kaufman (April 16, 2006) **[AR, Tab 28, p. 206-207]**
Corrected Order of Kaufman J. (April 16, 2006) **[AR, Tab 9, p. 90]**

ii. Post-Hearing Procedures

16. Pursuant to section 27(1) of the *CFSA*, the Director filed a Petition and Notice of Hearing on April 21, 2006. However, when it became apparent that the treatments were successful and the Child was recovering, the application for apprehension was withdrawn at a child-protection docket on May 1, 2006. Concurrently, counsel for the Applicants served the Director with motions materials at the said docket appearance. On June 28, 2006, Goldberg J. made a ruling on a preliminary point of law in respect of the Applicants' motion, which the Applicants then appealed, and which forms the basis of the Appellants' Application for Leave to Appeal in this Court's file no. 32508.

Petition and Notice of Motion (April 21, 2006) **[AR, Tab 11, p. 98]**
Order of Senior Master Lee (May1, 2006) **[AR, Tab 13, p. 107]**
Order of Goldberg J. (June 28, 2006) **[AR, Tab 17, p. 131]**

17. There were a number of interlocutory motions brought in the Court of Appeal:

- On May 30, 2006, the Appellants brought a motion to expedite the appeal and for the disclosure of the Director's records. The motion for disclosure was granted and the motion to expedite was dismissed by order of Monnin J.A., dated May 30, 2006.
- On July 7, 2006, the Director brought a motion to expunge evidence in the Appellants' Appeal Book and for disclosure of the Child's healthcare information. The motion to expunge was granted in part by order of Monnin J.A., dated July 20, 2006, wherein he expunged all materials not "relative to the proceedings" before Kaufman J., save for the Child's affidavit of April 30, 2006. The motion for disclosure was adjourned.

- Concurrently, on July 7, 2006, the Appellants brought a motion to have the appeals of Kaufman J. and Goldberg J. heard together. The motion was dismissed by order of Monnin J.A.
- On July 28, 2006, the Appellants brought a motion for fresh evidence, returnable before the panel hearing the appeal. The motion was subsequently abandoned at the hearing of the appeal.
- On August 2, 2006, the Appellants brought a motion to have the appeals of Kaufman J. and Goldberg J. heard together. The motion was dismissed by order of Freedman J.A., dated August 15, 2006.
- On August 8, 2006, in response to the motion for new evidence, the Director returned its motion for further medical information and for case management. By order of Freedman J.A., dated August 15, 2006, the motion for further medical information was adjourned to be heard by the panel hearing the appeal. The motion for case management was dismissed because it was unlikely "to be very effective if all parties are not supportive of the idea."
- On September 7, 2006, at the Director abandoned its motion for further health care information, as that motion was unnecessary to address the pure question of law upon which the Court of Appeal proceeded.
- After the release of the Court of Appeal's decision on the appeal, on May 6, 2006, the Appellants brought a motion for rehearing of the appeal. The motion was dismissed by order of the Court of Appeal, dated May 14, 2007.

Order of Monnin J.A. (May 30, 2006) **[AR, Tab 16, p. 128]**
Reasons for Judgment of Monnin J.A. **[AR, Tab 4, p. 14]**
Reasons for Judgment of the Court of Appeal (February 5, 2007), paras. 20 and 21 **[AR, Tab 7, p. 31]**
Reasons for Judgment of Freedman J.A. (August 15, 2006) **[AR, Tab 5, p. 22]**
Reasons for Judgment of the Court of Appeal (May 14, 2006) **[AR, Tab 8, p. 80]**

iii. Decision on Appeal

18. The Court of Appeal proceeded as did Kaufman J.: assuming without deciding that the Child had capacity, was the court bound by the wishes of the Child in deciding whether to issue a treatment order under s. 25 of the *CFSA*? In dismissing the appeal, Steel J.A. answered this question in the negative:

> Analyzing these distinctions in a contextual manner, there is a valid correspondence between the differential treatment and increased vulnerability and varying maturity of minors in a child protection situation.

Reasons for Judgment of the Court of Appeal (February 5, 2007), paras. 4 **[AR, Tab 7, p. 31]**

iv. Proceedings in this Court

19. The Appellants applied for leave to appeal in this Court on July 12, 2007. A number of interlocutory motions have since followed:

- On August 17, 2007, the Director filed a motion to expunge materials filed in support of the application for leave to appeal. The motion was granted in part by order of Binnie J.S.C.C., dated September 12, 2007.
- On November 16, 2007, the Appellants filed a motion to state constitutional questions. By order of McLachlin C.J.C., dated December 13, 2007, the form of questions submitted by the Appellants were rejected in favour of the form of questions submitted by the Director.
- On February 11, 2008, the Appellants filed a motion to adduce new evidence. The motion was dismissed by order of Binnie J.S.C.C., dated March 4, 2008.
- On March 4, 2008, the Director filed a motion to expunge materials from the Appellants' Record. The Motion was granted by order of Binnie J.S.C.C., dated March 28, 2008.

- The Appellants have also sought leave to appeal to this Court in respect of a procedural matter arising out of events transpiring after Kaufman J.'s treatment order was carried out. That appeal remains pending.

Order of Binnie J.S.C.C. (September 12, 2007) **[AR, Tab 24, p. 155]**
Order of McLachlin C.J.C. (December 12, 2007) **[AR, Tab 27, p. 161]**
Order of Binnie J.S.C.C. (March 4, 2008) **[Respondent's Record "RR", Tab 1]**
Order of Binnie J.S.C.C. (March 28, 2008) **[RR, Tab 2]**
SCC File No. 32508

PART II – STATEMENT OF QUESTIONS IN ISSUE

ISSUE ONE: **Did the Director Have Jurisdiction to Apprehend the Child for the Purposes of Obtaining a Treatment Order?**

20. It is respectfully submitted that the issues as set out by the Appellants do not adequately address the statutory framework under which the Director is obligated to act in matters of child protection. The Director does not act in a vacuum, nor is it up to the Director to question its mandate under the *CFSA*. Addressing the question of whether the *CFSA* ss. 25(8) and 25(9) supercede the common law principle of "mature minor" requires a wider, contextual approach.

ISSUE TWO: **Did the Treatment Order Issued by Kaufman J. Under s. 25 of the *CFSA* Unjustifiably Infringe the Child's Rights Under the *Charter*, ss. 2(a), 7, and 15(1)?**

21. The Director fully adopts the arguments of the Attorney General of Manitoba on this issue.

PART III – STATEMENT OF ARGUMENT

ISSUE ONE: Did the Director Have Jurisdiction to Apprehend the Child for the Purposes of Obtaining a Treatment Order?

A. The Statutory Framework

i. The CFSA and the Director's Mandate to Protect Children

22. The Appellants continue to take issue with the fact that the apprehension was "warrantless", even as this Court has held such apprehensions to be constitutional. In that vein, notably absent from the Appellants' factum is any mention of the statutory duty imposed upon the Director to protect children from harm. The best interests of children is the cornerstone of the *CFSA* and no other interests supercede the Director's duty to act in fulfilling its mandate under the *CFSA*. This principle is expressly set out in the preamble of the *CFSA* and has been embraced by this Honourable Court:

> The Legislative Assembly of Manitoba herby declared that the fundamental principles guiding the provision of services to children and families are:
>
> 1. The best interests of children are a fundamental responsibility.

The Child and Family Services Act, S.M. 1985-86, c. 8

> ¶80 ...child protection legislation "is about protecting children from harm; it is a child welfare statute and not a parents' rights statute". While parents' and children's rights and responsibilities must be balanced together with the children's right to life and health and the state's duty to protect children, the underlying policy and philosophy must be kept in mind when interpreting it and its constitutional validity.

Winnipeg Child and Family Services v. K.L.W. [2000] 2. S.C.R. 519 **[Respondent's Book of Authorities "RBA", Tab 10]**

23. The Director's jurisdiction to act derives from the *CFSA*:

> *Child in need of protection*
> 17(1) For the purposes of this Act, a child is in need of protection where the life, health or emotional well-being of the child is endangered by the act or omission of a person.
>
> *Illustrations of a child in need*
> 17(2) Without restricting the generality of the subsection (1), a child is in need of protection where the child
>
> ...
>
> (b) is in the care, custody, control or charge of a person
>
> ...
>
> (iii) who neglects or refuses to provide or obtain proper medical or other remedial treatment necessary for the health or well-being of the child or who refuses to permit such care or treatment to be provided to the child when the care or treatment is recommended by a duly qualified medical practitioner.
>
> ...
>
> *Apprehension of a child in need of protection*
> 21(1) The director, a representative of an agency or a peace officer who on reasonable and probable grounds believes that a child is in need of protection, may apprehend the child without warrant and take the child to a place of safety where child may be detained for examination and temporary care and be dealt with in accordance with the provisions of the Part.
>
> ...
>
> *Care while under apprehension*
> 25(1) Where a child has been apprehended, an agency
> (a) is responsible for the child's care, maintenance, education and well-being;
> (b) may authorize a medical examination of the child where the consent of a parent or guardian would otherwise be required; and
> (c) may authorize the provision of medical or dental treatment for the child if
>
> (i) the treatment is recommended by a duly qualified medical practitioner or dentist,
> (ii) the consent of a parent or guardian of the child would otherwise be required, and
> (iii) no parent or guardian of the child is available to consent to the treatment. [emphasis added]

The Child and Family Services Act, S.M. 1985-86, c. 8

24. As it pertains to the Director then, the only question when faced with the situation concerning the Child was whether there were reasonable grounds to apprehend for the purposes of obtaining a treatment order. The Director was faced with a circumstance in which both the Child and her parents were refusing a medical procedure, which in the opinion of the Child's physician, placed the Child's health and life at risk. For obvious reasons, there is no requirement under the *CFSA* that the Director second guess the opinion of qualified medical personnel, or explore unconventional medical alternatives before proceeding to obtain a treatment order. The determination of whether there exists a need for urgent medical treatment is the purpose of the emergency hearing under s.25(3).

The Child and Family Services Act, S.M. 1985-86, c. 8

25. This Court in *KLW* has occasion to address the constitutionality of the *CFSA*, and the need for the need for the Director to act on an urgent basis:

> ¶102 Aside from the evidentiary difficulties and the time pressures, it is also important to recognize that the state must be able to take preventative action to protect children...[t]his means that the state should not always be required to wait until a child has been seriously harmed before being allowed to intervene.

Winnipeg Child and Family Services v. K.L.W. [2000] 2. S.C.R. 519 **[RBA, Tab 10]**

ii. The Practical Considerations

26. The legislature and this Court have recognized the practical difficulties in balancing the interests of children and the interests of the state in protecting children in exigent circumstances:

> ¶103 Given the state's duty to protect a child at risk of serious harm, as well as the child's compelling interest in being so protected, immediate apprehension may be appropriate in such

> circumstances, even though there might be some dispute as the whether the danger or harm is "imminent".

Winnipeg Child and Family Services v. K.L.W. [2000] 2. S.C.R. 519 **[RBA, Tab 10]**

27. On the ground, a number of practical difficulties manifest, including:

- Cases involving refusal of required medical treatment represent a very small percentage of the number of apprehensions in any given year. The complexity of the issues involved require the Director to strike a very fine balance between attempting to cause as little disruption to the family (recognizing that the sole purpose for apprehension is seeking medical treatment), while at the same time continuing to act in the best interests of the child.
- The Director is not typically involved in these cases until the emergency is well at hand; the Director is at the mercy of hospital staff as to when it becomes involved in a case, and usually only becomes involved when the matter has become urgent.
- As in the present case, these matters do not typically arise during "business hours", which leaves the parties to scramble to arrange an emergency hearing. This factor is further compounded when the emergency occurs in rural areas, where the proximity of the parties, counsel for the parties and the court becomes ever more distant.
- There are a number of competing interests: the doctor's interest in treating his or her patient, the hospital's interest in not becoming the subject of a lawsuit, the Director's interest in protecting the well-being of the child, and the child and/or her parents' sensibilities toward a particular manner of treatment – all of which have to be balanced within a matter of moments.

- The question of capacity has been recognized to be larger than simply a determination of intelligence and does not necessarily lend itself to a "check-list" approach:

> In conclusion, it is clear the mature minor rule has been firmly entrenched in Canadian common law. There are, however, some aspects of the rule that need further clarification. For example, maturity may involve more than an intellectual appreciation of the nature and risks of the medical treatment *pre se*. The court may also consider ethical, emotional maturity, particularly in difficult and controversial area such as contraceptive treatment, abortion and the treatment of sexually-transmitted disease...[the welfare principle] will arise when mature minors refuse life-saving treatment when the chances of success are good...

Manitoba Law Reform Commission, *Minors' Consent to Health Care* (Manitoba: Queen's Printer, 1995) **[Appellants' Book of Authorities "ABA", Vol. III, Tab. 68, p. 13]**

- Similarly, in this context, it is not always clear that the refusal for consent to treatment is informed and is made autonomously (more will be said about this below):

> ¶76 ...when a patient looks death in the face, the patient can change his or her mind...B.H. has not been allowed to look death in the face. Because of incorrect information and the behaviour of some around her, she now believes that she will not die if she does not have transfusions...
>
> ¶78 I am told that B.H. wanted to testify before me. I read her affidavits and viewed her video. Can I now or could I, if she did testify, rely on the evidence coming from a free, informed will? I could not, not after the pressures and influences that have been brought to bear on her in the last few weeks to maintain her position on blood transfusions...

B.H. (Next friend of) v. Alberta (Director of Child Welfare), [2002] A.J. No. 518; aff'm [2002] A.J. No. 568 (ABCA); leave to appeal to SCC dismissed [2002] SCCA No. 196 **[RBA, Tab 1]**

28. Emergency proceedings under the *CFSA* are not ideal situations that fit neatly into the adversarial model. For that reason, the *CFSA* carves out certain procedural

exceptions such as, *inter alia*: short notice, delayed filing of documents and hearings *via* teleconference.

The Child and Family Services Act, S.M. 1985-86, c. 8, s. 25

29. The model advocated by the Appellants is artificial. Implied is that every situation involving a child's consent to treatment can be either fortuitously addressed just prior to a medical event, or by having a full trial of the issues with the indicated treatment remains in escrow. On the contrary, however, and by definition, emergency circumstances will not allow for a "wait and see" approach as advocated by Mr. Ludkiewicz at the emergency hearing.

Transcript of Proceedings before Justice Kaufman (April 16, 2006) **[AR, Tab 28, p. 183]**

30. The Manitoba legislature is not unique in carving out exceptions for emergency situations. The approach in Ontario, for example, much lauded by the Appellants, also makes an exception where emergency circumstances require immediate action. The *Health Care Consent Act* of Ontario does not recognize, in emergency situations, health care directives made by children under the age of 16:

> No treatment contrary to wishes
> 26. A health practitioner shall not administer a treatment under section 25 if the health practitioner has reasonable grounds to believe that the person, while capable and after attaining 16 years of age, expressed a wish applicable to the circumstances to refuse consent to the treatment.

Health Care Consent Act, S.O. 1996 c. 2, s. 25(3) **[ABA, Vol. II, Tab 51, p. 17]**

31. In contrast, the model advocated by the Appellants does not allow for situations in which exigent circumstance will require action before a full trial of the issues can be held. What this may illustrate is the sharp divide between divergent perceptions of what constitutes the best interests of a child.

Affidavit of A.C. (April 30, 2006), para. 9 **[AR, Tab 29, p. 211]**

32. The approach advocated for by the Director, on the other hand, is

> ¶38...consistent with society's historical interest in preserving the life and well-being of minors. Further, it is consistent with Canada's obligations under the U.N. Convention on the Rights of the Child to make the best interests of the child a primary consideration in decisions affecting children, while allowing a child capable of forming an opinion the right to express it, and the right for that opinion to be given due weight in accordance with the age and maturity of the child: 20 November 1989, 1577 U.N.T.S. 3, C.T.S. 1992 No. 3, Articles 3(1) and 12.
>
> ¶39 It follows that in child welfare proceedings, a mature minor's wishes respecting medical treatment will not be dispositive of the issue, but rather will be one factor to be considered in determination of their best interests. The weight given to a child's opinion will depend on numerous factors, including the child's age, maturity and understanding of the treatment in issue, and the degree of risk, complexity and seriousness inherent in the treatment...the final determination will always be based on an assessment of the best interests of the child. [emphasis added]

U.(C.) (Next friend of) v. Alberta (Director of Child Welfare), 2003 ABCA 66 **[RBA, Tab 3]**

33. It is respectfully submitted that the Director at all times acted within its jurisdiction and within the constitutionally sanctioned parameters of its mandate. The Director apprehended the Child upon "reasonable and probable grounds" that the Child was at serious risk of harm in the absence of intervention, and took action accordingly.

B. The *CFSA* Supersedes Courts' *Parens Patriae* Jurisdiction

i. "Capacity" Is Not Readily Ascertained

34. While Kaufman J. assumed, without deciding, that the Child had capacity, there remain a number of factual disputes, which disputes demonstrate that the issue of capacity is informed by a number of factors and not as easily ascertained as the Appellants hope to demonstrate. For example:

- It remains unclear as to the nature of the Child's "capacity report", by whom it was conducted and how critically it was approached;
- It remains unclear whether the "assessment" would have yielded different results if it had been conducted on April 16, 2006, when the Child was faced with *actual* harm;
- It remains unclear whether the Child would have been in any condition, medically, to be "assessed" on April 16, 2006;
- It remains unclear as to whether the medical information used by the Child to formulate her position is credible;
- In particular, it remains unclear as to the credentials of the Ms. Susan Kenny of the "Blood Conservation Program"; and
- It remains unclear who was present, and for what purpose, when the Child made her decision to refuse medical treatment; and, the extent to which the Child may have been influenced in her decision.

Affidavit of A.C. (April 30, 2006), paras. 15, 16, 18 **[AR, Tab, 29 pp. 213, 214]**
Medical Research Services, *Family Care & Medical Management of Jehovah's Witnesses* (Georgetown, Ontario) **[RBA, Tab 16]**

35. As identified by the Manitoba Law Reform Commission, capacity is about more than intelligence. It involves "ethical, emotional maturity"; in short, wisdom and a sense of judgment. Moreover, capacity, however defined, is by no means the only factor governing one's ability to make an informed healthcare decision. As important is whether the choice is made *voluntarily* and whether it is, in fact, an *informed* decision:

> ...competence alone is not a sufficient condition for valid consent. Even if conscious and alert, and with sufficient cognitive function and maturity to comprehend and appreciated information, a patient may still be unable legally to give or refuse consent. If a patient is not in a position to accept or

> reject the proposal. Patients need reliable information. They also need the third element of consent: voluntariness. It may be difficult to accept a treatment option if that particular choice will lead to a loss of important relationships. To give or refuse consent to medical treatment, the law requires not just decision making competence but also accurate information and lack of coercion.

Guichon, Juliet and Ian Mitchell, "Medical emergencies in children of orthodox Jehovah's Witness families: Three legal cases, ethical issues and proposals for management", *Paediatric Child Health* Vol. 11, No.10 (December 2006), p. 657 **[RBA, Tab 13]**

36. In a resent case involving co-counsel for the Appellants, the Alberta Court of Appeal dismissed a motion to strike pleadings grounded in misrepresentation where it was alleged that a child who had refused medical treatment did so on the basis that she received deficient medical information from, *inter alia*, her lawyers and representatives of her church:

> ¶37 ...It is not at all clear to what extent a religious adherent can convince another person to take actions for religious reasons that will cause him or her bodily harm or even death, even it the religious belief is sincerely held. Assume, as an example, that a religious adherent persuades a third party diabetic that he or she should stop taking insulin, and that divine intervention will cure him or her. Assume further that the diabetic follows this advice and dies as a result. Can it be said that the estate of the deceased would have no cause of action against the religious adherent?

Hughes (Estate) v. Hughes, 2007 ABCA 277**[RBA, Tab 6]**

37. Counsel for the Appellants nevertheless continue to argue (as they have in a number of cases) that if there is an indication of capacity, no matter the evidentiary concerns, the "mature minor" rule at common law should govern. In reply, the Director respectfully submits that child welfare legislation is not merely an extension of courts' *parens patriae* jurisdiction but provides a complete and comprehensive scheme governing child protection proceedings, and one that is not subservient to courts' *parens patriae*

jurisdiction. Recognizing that the judgment required to make life and death decisions only comes with age, the legislature has drawn an age appropriate distinction in the context of child protection proceedings.

Appellants' Memorandum of Argument, at paras. 47

ii. A Brief History of Child Welfare Legislation

38. While *parens patriae* enjoys a long-standing and illustrious tradition in Canadian caselaw, it did not conceive child welfare legislation. On the contrary, the earliest inceptions of child welfare legislation in the Canada were merely an attempt to provide "Children's Aid Societies" (most often religious orders) with "legal powers, including the right to remove neglected or abused children from their homes and become legal guardians for such children." The early incarnations bear noting:

> ...most of the judges who sat in the Family Courts and dealt with this type of case lacked legal training, and lawyers rarely appeared in these proceedings...[t]here was no thought given to notions of children's rights, and children were not overtly involved in the child welfare proceedings...

Bala, Nicholas, *et al* (eds.), "Child Welfare Law in Canada: An Introduction", *Canadian Child Welfare Law: Children, Families and the State (2nd Edition)* (Toronto: Thompson Educational Publishing, 2004), p. 3 **[RBA, Tab 12]**

39. In Manitoba, the earliest inceptions of child welfare legislations were "merely 'borrowed' from Ontario legislation and established a child protection system based upon the Ontario model". It was recognized that

> ...government authority was necessary to permit intervention with uncooperative families, and that government support was needed to facilitate and encourage the efforts of public-spirited citizens. In an innocent blend of private "doing" and public "enabling," the 1898 Child Protection Act added two new types of organizations to the private orphanages and child-caring institutions already in the field—the ostensibly private Children's Aid Societies (C.A.S.'s) which were imbued with public authority, and the purely public or government office of

> the Superintendent of Neglected and Dependent Children (S.N.C.).

Hurl, Lorna., "The Politics of Child Welfare in Manitoba, 1922-1924", *Manitoba Historical Society*", (Spring 1984; No.7) < http://www.mhs.mb.ca/docs/mb_history/07/childwelfare.shtml> **[RBA, Tab 14]**

40. As it has evolved, the *CFSA* governs a number of issues not addressed at common law, such as, *inter alia*:

> ¶6 ...the identification of children in need of protection, investigations concerning children, required reporting of the results of the investigation, police intervention, apprehensions, child protection hearings, child protection orders, and guardianship.

And to this list can be added, among other things: adoption, permanent wardship, parental rights subsequent to permanent wardship, the establishment of the Office of the Children's Advocate, etc.

M.S. (litigation guardian of) v. Child and Family Services of Western Manitoba, 2005 MBCA 11 **[RBA, Tab 7]**
Bala, Nicholas, *et al* (eds.), *supra*, **[RBA, Tab 12]**
The Child and Family Services Act, S.M. 1985-86, c. 8

41. It has become a matter of trite law that courts' *parens patriae* jurisdiction exists, not as an overarching jurisdiction, but as jurisdiction existing alongside the legislative regime:

> ¶16 The jurisdiction of the Queen's Bench in protection cases has two sources. There is the ancient jurisdiction, parens patriae, exercised by it on behalf of the sovereign, and there is the modern jurisdiction, shared to an extent with Provincial Court, which is derived from statute.

Winnipeg Child and Family Services v. L.L. (Man. C.A.), [1994] M.J. No. 251 **[RBA, Tab 11]**

42. As well, the extent of courts' *parens patriae* jurisdiction is also by now well established:

> ¶41 It is important to remember that the exercise of the parens patriae jurisdiction by the court is not the exercise of the power of judicial override. By judicial override, I mean the power to disregard legislation, if the need arises in matters involving children. Parens patriae is generally viewed as being

> part of the inherent power of the court. Therefore, just as inherent power cannot be exercised in contravention of any statutory provision...neither can parens patriae.
>
> ...
>
> ¶42 Parens patriae jurisdiction of the court is ousted when the legislation assumes this jurisdiction.

M.S. (litigation guardian of) v. Child and Family Services of Western Manitoba, 2005 MBCA 11 **[RBA, Tab 7]**

iii. Parens Patriae Is Only Triggered When There is a Gap in the Legislation

43. Courts' *Parens patriae* jurisdiction is only triggered when there is a "gap" in the legislation. In this case, contrary to the Appellants' arguments, there is no such gap:

> ¶48 ...The [*CFSA*] does not replace the common law authority of a doctor to act upon the directions of a minor if the doctor believes the minor is capable of making mature decisions in his or her best interests The legislation (sec. 25) comes into play for a child under 16, only when a parent refuses treatment and the medical practitioner is not prepared to rely on the instructions of the child. The Act then allows the court to determine whether treatment is in the child's best interest, but taking into consideration the child's wishes.

Kennett Estate v. Manitoba (Attorney General), [1998] M.J. No. 337 **[RBA, Tab 5]**
See also: *Beson v. Newfoundland (Director of Child Welfare)*, [1982] 2 S.C.R. 716 **[RBA, Tab 2]**

44. While the Child's "wishes" should inform the proceedings, they are not dispositive of the question of whether a treatment order should issue. Reviewing similar legislation, the Alberta Court of Appeal in *U.(C).* held that:

> ¶37 ...if a child is capable of forming an opinion, he or she is entitled to express that opinion, and the decision maker is to take that opinion into consideration. In this way the legislative scheme expressly addressed the extend to which a child falling within the purview of the Act may have input into decisions affecting him or her. It does not grant an exception with respect to mature minors. We agree with the Queen's Bench judge that the CWA provides a complete code respecting this issue. Continued application of the mature minor rule would be inconsistent the express provision of that code.
>
> ...
>
> ¶44 ...the Court must do what is in the best interest of the Child...

U.(C.) (Next friend of) v. Alberta (Director of Child Welfare), 2003 ABCA 66 **[RBA, Tab 3]**

45. In the present case, there can be no doubt that the Child's wishes were acknowledged and were considered by Kaufman J. at the emergency hearing. Both through her father and through her family's counsel, the Child's views were express (which is to say nothing of the Child's affidavit of April 30, 2006, which forms part of the Record). It is respectfully submitted that the treatment order fell, appropriately, within the confines of the governing provisions of s. 25 of the *CFSA*.

Transcript of Proceedings before Justice Kaufman (April 16, 2006) **[AR, Tab 28, pp. 178, 199, 202]**

C. There is No Inconsistency Between the Manitoba Statutes

i. Legislature Expressly Excludes a "Mature Minor" Exception in the CFSA

46. Whether there ought to be a "mature minor" exception in the *CFSA* is, of course, the subject of the Appellants' *Charter* argument, and which will be dealt with in greater detail in the factum of the Attorney General of Manitoba. There can be no doubt, however, that there is no "mature minor" exception in the *CFSA*. There is nothing ambiguous about the delineation between a child over the age of 16 and a child under the age of 16 in s. 25 of the *CFSA*. The former is deemed capable of making treatment decisions (rebuttable on evidence to the contrary), while the treatment decisions of the later, even if she is capable, will not be dispositive. The Appellants ask this Court to draw a different distinction, and to do so not by looking at the legislative intent of the *CFSA* but the legislative intent behind two other Manitoba statutes: *The Health Care Directives Act* ("*HDCA*") and *The Mental Health Act* ("*MHA*").

The Child and Family Services Act, S.M. 1985-86, c. 8, s. 25
Appellants' Memorandum of Argument, at paras. 50 – 57

47. This argument is disingenuous at best. The Appellants are well aware of the legislative intent behind the amendments to s. 25 of the *CFSA* as their present counsel appeared at, and made lengthy submission before, the Standing Committee when the amendments to the *CFSA* were being debated. The same argument that is being advanced here was made before the committee:

> **Mr. Martindale:** The third item is, the proposed legislation must conform to the constitutional rights of mature minors and not discriminate by setting an arbitrary age for capacity to consent. Do you believe that that is in Bill 20?
>
> **Mr. Ludkiewicz:** No, the way that the legislation reads right now, it does not distinguish between a newborn and somebody who is 15 years and 11 months, 364 days old. They are treated exactly the same. That is why we are requesting that no arbitrary age appear, but the capacity (sic) should be the test, capacity of the individual... [emphasis added]

Manitoba, Legislative Assembly, Standing Committee on Law Amendments (*Hansard*), Vol. XLV, No. 5 (October 30, 1995), p. 15 **[RBA, Tab 15]**

48. It appears that at that time Mr. Ludkiewicz recognized that there was no "mature minor" provision in the *CFSA*, but now argues that the opposite is the case. In any event, the Manitoba Legislature did not accept this argument and chose, rather, to include an appropriate age distinction:

> Again, the act does not recognize the concept of a mature minor under 16. It provides for an appropriate hearing to take place before any order shall be made and the court may order any medical examination or medical or dental treatment that it considers to be in the best interests of the child.

Manitoba Law Reform Commission, *Minors' Consent to Health Care* (Manitoba: Queen's Printer, 1995) **[ABA, Vol. III, Tab. 68, p. 10]**

49. Given as much, the Appellants' précis of the common law as it concerns the common law "mature minor" rule, while informative, is irrelevant:

> ¶62 Regarding Van Mol, I find that that decision is also of limited assistance to the appellants. While it confirms the common law rule regarding mature minors, it in no way addresses the authority of child welfare authorities to intervene on a child's behalf. Further, the Court there specifically rejected the appellants' submission here that the Court's parens patriae jurisdiction must fall away, in the face of a mature minor who seeks to exercise his rights to refuse treatment.

S.J.B. (Litigation Gaurdian of) v. British Columbia (Director of Child, Family and Community Service), 2005 BCSC 573 **[RBA, Tab 9]**

50. Moreover, a few distinctions need also be drawn with respect to the cases relied upon by the Appellants. First, regarding the *Van Mol* decision, that decision did not deal with a child refusing potentially life saving treatment, nor did that case arise in the context of an emergency hearing. Had that been the case, the British Columbia child welfare legislation would undoubtedly have been triggered, resulting in a much different analysis.

Appellants Factum, para. 39

51. Second, even at common law not all medical treatments are considered equal. The *Gillick* decision, for example, also cited by the Appellants, dealt with the right of a minor to be instructed on contraception without parental consent. In that case the court itself drew a distinction between trivial medical procedures (medical advice) and more serious concerns. In any event, as found by the Manitoba Law Reform Commission:

> [The welfare principle] will arise when mature minors refuse life-saving treatment when the chances of success are good and the treatment is supported by parents and the medical professionals...
> Hard cases such as these have recently led English courts to retreat to some extent from the views of the House of Lords in *Gillick*.

Manitoba Law Reform Commission, *Minors' Consent to Health Care* (Manitoba: Queen's Printer, 1995) **[ABA, Vol. III, Tab. 68, p. 7]**
Appellants' Factum, para. 41

52. Finally, it is important to note that the present case is not about a parent's right to override treatment decisions or, by extension, courts' *parens patriae* jurisdiction. Rather, this case is about the right of the state to pass laws aimed at promoting the well-being and the best interests of children, in broader context of society's "interest in the sanctity of life and, in particular, in preserving the life and health of the child".

Appellants' Factum, para. 40
Reasons for Judgment of the Court of Appeal (February 5, 2007), paras. 54 **[AR, Tab 7, p. 31]**

53. The authority of the state to legislate for the protection of children is well established:

> ¶33...While a court may be unable to exercise it *parens patriae* jurisdiction with respect to a mature minor who is no longer in need of protection from the court, the provincial legislature may enact laws with respect to such a person to the same extent it may legislate with respect to its adult subjects.

U.(C.) (Next friend of) v. Alberta (Director of Child Welfare), 2003 ABCA 66 **[RBA, Tab 3]**
Convention on the Rights of the Child, General Assembly, UN, Res. 44/25, November 20, 1989 **[RBA, Tab 16]**

ii. The HCDA and the MHA Are Aimed at Specific Purposes

54. The Appellants' analysis of amendments made to the *HCDA* and the *MHA* provides little guidance for this Court. Both statutes are aimed at governing a specific cohort and neither statute supercedes the *CFSA* as it concerns children in need of protection.

Appellants Factum, paras. 50 – 60

55. Beginning with the *MHA*, it is factually wrong that if the Child had suffered from a "'mental disorder' when hospitalized...the *MHA* would govern." This argument again fails to distinguish between the types of treatment governed. *The Mental Health Act* seeks to govern precisely that, mental health, not potentially life threatening procedures. Secondly, and in that vein, even if the Child *was* mentally ill, and refusing indicated medical treatment

such as to put her life in danger, the *MHA* would not have governed, the *CFSA* would have governed.

Appellants' Factum, para. 58
Reasons for Judgment of the Court of Appeal (February 5, 2007), para. 48 **[AR, Tab 7, p. 31]**

56. Reliance on the *HCDA* fares no better:

> ¶ 47 ...There is nothing in the *HCDA* that would indicate it applies to a wardship proceeding where a child has been apprehended. Different considerations arise in that context, although a health care directive could be considered evidence of the child's wishes and considered by the court in determining whether an order should issue under s. 25(8), as was done by the judge in this case.

Reasons for Judgment of the Court of Appeal (February 5, 2007), paras. 20 and 21 **[AR, Tab 7, p. 31]**

57. There can be little doubt that, even if the Child had been incapacitated at the time of the emergency hearing, the *CFSA* would have been triggered in the face of the Child refusing potentially life saving treatment (even if that refusal was only through her Health Care Directive). A court, in that situation, would still be left with the evidentiary difficulties of having to determine if, at the time of the making of the Health Care Directive, a child had capacity. As discussed above, in the context of an emergency hearing, that sort of inquiry is seldom possible.

58. As discussed above, the *Health Care Consent Act* of Ontario appears to make a similar exception (see para. 30). The Ontario Court of Appeal has observed, contrary to what to the Appellant's argue, the relationship between the *Health Care Consent Act* of Ontario and the *Child and Family Services Act* of Ontario is not clear cut:

> ¶31 ...We also did not hear argument on the difficult question that would follow on the question that would follow concerning the relationship between s. 62 of the Act [allowing the Society to consent to medical treatment of a Society ward] and the *Health Care Consent Act*...[emphasis added]

Health Care Consent Act, S.O. 1996 c. 2, s. 26 **[ABA, Vol. II, Tab 51, p. 17]**
British Columbia (Director of Child, Family and Community Services) v. Bahris (Litigation Guardian of), (2006) 270 DLR (4th) 536 (Ont. C.A.), para. 31 **[ABA, Vol. II, Tab 7]**

59. Similarly, the Ontario Superior Court in *Durham*, in balancing between Ontario's *Education Act* and *Child and Family Services Act* held:

> ¶36 In many respects, I do not find there is a conflict between the CFSA and the Education Act. The CFSA is legislation of specific intent to address children at risk regardless of what other legislation may be involved...The Ontario Court of Appeal...indicated in that the Child Welfare Act (now the CFSA) was paramount and that children who are in need of protection are to be dealt with under the CFSA...

Durham Children's Aid Society v. P. (B.), 278 D.L.R. (4th) 262 **[RBA, Tab 4]**

iii. Court of Appeal Was Correct in its Contextual Analysis of the CFSA

60. It is respectfully submitted that the *CFSA* provides a complete, code respecting children's interests and, further, that the Manitoba Court of Appeal appropriately recognized the intent of the Manitoba legislature:

> ¶ 50 Reading s. 25(8) together with s. 25(9), in the context of the whole *CFSA*, it seems clear that the legislature did direct its mind to the question of a mature minor. The language is plain. It decided to provide for a modified mature minor rule where the treatment decisions of those 16 and over with capacity would be respected. For those under 16, with or without capacity, the court would decide based on the best interests test. That does not mean that the child's wishes and capacity are not considered when ascertaining what is in the child's best interests, but they are not determinative factors.

Reasons for Judgment of the Court of Appeal (February 5, 2007), paras. 20 and 21 **[AR, Tab 7, p. 31]**

ISSUE TWO: Did the Treatment Order Issued by Kaufman J. Under s. 25 of the *CFSA* Unjustifiably Infringe the Child's Rights Under the *Charter*, ss. 2(a), 7, and 15(1)?

61. The Director adopts and relies upon the submissions of the Attorney General of Manitoba defending the constitutionality of the impugned provisions, and adds the following, general comments as this issue touches upon the Director's duty to act.

A. The State is Morally Obligated to Protect the Health and Safety of Children

i. Society Has an Overriding Interest in Preserving the Life of Children

62. As held by the Court of Appeal:

> ¶54...The state has an interest in the sanctity of life and, in particular, in preserving the life and health of the child. The cases relied on by the appellants to establish the common law concept of the mature minor do not consider children in need of protective services as a result of their refusal to undergo recommended life-saving medical treatment.

Reasons for Judgment of the Court of Appeal (February 5, 2007), paras. 4 **[AR, Tab 7, p. 31]**

63. Child welfare legislation throughout Canada recognizes that the best interests of children, namely the health and well being of children, is of a paramount concern. This is consistent with Canada's obligations under the *U.N. Convention on the Rights of the Child*:

> *Article 3*
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision. [emphasis added]

United Nations: *Convention on the Rights of the Child,* General Assembly, UN, Res. 44/25, November 20, 1989 **[RBA, Tab 17]**

64. In a world of poverty, deprecation and disease, the "welfare principle" as it concerns children, is irrevocably stitched into the fabric of social mores, which mores are in turn reflected by legislation and by the common-law. Preserving the sanctity of children is, and ought to be, self-evident:

> ...[A]llowing the minor to refuse treatment now does not allow for later consent – he will not live long enough.
>
> To prevent these harmful and irreversible decisions, even minors considered mature under the informed consent decision-making model should not be treated exactly the same as adults. A safety net should be created to accommodate the state's interest in preventing children from dying unnecessarily.
>
> Such a safety net also would further the state's interest in protecting the unrealized potential of children in our society. One aspect of this "hope" interest is that the state invests resources and energy into children with the expectation that they will live to become healthy and productive adults. When a child dies, that state's expectation cannot be realized.

Rasato, Jennifer L. "The Ultimate Test For of Autonomy: Should Minors Have a Right to Make Decision Regarding Life Sustaining Treatment?" *Rutgers Law Review,* Vol. 49, No. 1 (Fall, 1996) **[ABA, Vol. IV, Tab 93, para. *70]**

ii. Constitutionality Does Not Require Uniformity Among the Provinces

65. It has by now been firmly established that the "responsibility of the state for the care of people in distress (including neglected children and deserted wives) and for the proper education and training of youth, rests upon the province." As a function of history, this has resulted in all twelve Provinces and Territories (as well as Nunavut) having passed comprehensive child welfare legislation addressing the state's obligation to protect the needs and rights of children, while at the same time recognizing regional and cultural diversity.

Reference re: Adoption Act (Ontario), [1938] S.C.R. 398 **[RBA, Tab 8]**

66. In fulfilling its obligation to act in the best interests of children, the Manitoba legislature, after careful consideration of the issues, has struck a balance between what it deems to be the appropriate age of autonomy and the Director's right to override that autonomy, in the interest of preserving life. Whether other jurisdictions, through their own democratic process, have chosen a slightly different approach, does not make the approach taken by the Manitoba legislature arbitrary.

Manitoba, Legislative Assembly, Standing Committee on Law Amendments (*Hansard*), Vol. XLV, No. 5 (October 30, 1995), pp. 18-22 **[RBA, Tab 15]**
Appellants' Factum, at paras. 54, 72, 73, 75, 77, 78, 82, 83, 84, 94, 106

iii. Legislation Routinely Differentiates Based on Age

67. Many rights are routinely denied to persons who might otherwise be deemed mature minors. Legislative distinctions based on age are neither novel nor unconstitutional. As held by the Alberta Court of Appeal:

> ¶34 Legislative provisions are frequently aimed specifically at minors, including mature minors. Under the Minors' Property Act, R.S.A. 2000, c. M-18, a court order is required for sale of a minor's property. And while consent of a minor over the age of 14 is generally required for such a sale, the court may dispense with such consent: s. 3. Under the Marriage Act, R.S.A. c. M-5, s. 17-19, a minor under the age of 16 may not marry, unless female and shown to be pregnant, or the mother of a live child. Further, minors 16 and over require parental consent for marriage, although this may be dispensed with on court order. Under the Motor Vehicle Administration Act, R.S.A. 2000, c. M-23 , s. 11, a minor under age 16 may not obtain an operator's licence, and those between ages 16 and 18 may only do so with parental consent, subject to a few exceptions. Under the Election Act, R.S.A. 2000, c. E-1, s. 16, minors are ineligible to vote. These are just a few examples of the legislature exercising its general power to legislate with respect to mature minors.

To this list can be added, *inter alia*, the right to have consensual sex and the right to purchase alcohol or tobacco, all of which again underscore the legislative intent to protect the health and safety of minors, no matter how mature.

U.(C.) (Next friend of) v. Alberta (Director of Child Welfare), 2003 ABCA 66 **[RBA, Tab 3]**
Criminal Code, R.S., 1985, c. C-46, s. 151
The Liquor Control Act, R.S.M. 1988, c. L160
Tobacco Act, R.S. 1997, c.13

iv. Urgency Informs the Duty to Act

68. The *CFSA* recognizes that no imperatives supercede the Director's duty to act in the best interest of children. This duty is only amplified in the context of an emergency hearing in which health and safety become matters of grave and urgent concern. It is respectfully submitted that the Court of Appeal was correct in its analysis of what ought to inform the Director's mandate:

> ¶79 ...First, a fixed age has been chosen as the dividing line for other purposes regarding children and fundamental life choices. We do not allow children, whether they are mature minors or not, to determine whether to attend school, to determine where to live when their parents divorce (although their wishes may be considered) or to decide to marry. Second, the requirement for an individual assessment in the case of a child under 16 may not adequately protect children in an emergency situation where a court must consider a wide variety of variables, including the different physical, emotional and intellectual maturity of each child in a time-limited situation. Third, the level for intervention is life threatening. In this type of situation, the state has chosen a measured policy which allows for less discretion on the part of younger teenagers and more discretion on the part of older teenagers. [emphasis added]

Reasons for Judgment of the Court of Appeal (February 5, 2007) **[AR Tab 7, p. 31]**

PART IV- SUBMISSIONS ON COSTS

69. It is respectfully submitted that the impugned provisions of the *CFSA* are constitutional and have already been determined to be so by this Honourable Court. In the circumstances, the Director seeks its costs, both here and in the courts below.

70. It is further submitted that the course of this litigation both in the Court of Appeal and in this Court has been complicated by the continuous attempts by the Appellants to broaden the scope the Appeal beyond the issues agreed to by the Appellants in the Court of Appeal and the issues on Appeal as set out by this Court. This has greatly increased the cost to the Respondent, and in its submission, is conduct for which the Appellants must take responsibility.

PART V – ORDER SOUGHT

71. The Director requests that this Court issue an Order:

a) Dismissing the appeal; and

b) Awarding the Director costs both here and in the courts below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this __ day of April, 2008.

Norm Cuddy / Alfred Thiessen
Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES