NEW BRUNSWICK'S DOMESTIC LEGAL AID SYSTEM: *NEW BRUNSWICK (MINISTER OF HEALTH AND COMMUNITY SERVICES V. J.G.*

by
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INTRODUCTION

Legal aid across Canada, both criminal and civil, has been under attack in the last several years, consistent with the mood to cut back social services generally. In New Brunswick, civil legal aid has never had a high priority and, indeed, from 1988 to 1989, there was no civil legal aid at all. A domestic legal aid system was then re-established when the Law Foundation provided funds to the Law Society for a very limited domestic legal aid system. In 1989, the government contributed funds and finally in 1993, the existing system was put in place. Today the only civil legal aid in New Brunswick is domestic legal aid covering family matters.

While the prior system followed the judicare model, the current system is a staff model with provision for legal aid certificates in a very few circumstances, primarily to avoid conflict. The current system is almost entirely restricted to persons, mainly women, who have been abused, broadly defined, in their domestic relationships. Although the eligibility criteria refer to financial means, experience of abuse is in effect the determining eligibility criterion. Most applicants for domestic legal aid are women.

The current system is limited, but it can be presented as responding to the most "needy" women. It provides access to the legal system to those women who are in the most danger in their "intimate" relationships and for this reason the decision was made to allocate resources to some persons (in reality, women) facing domestic abuse and not to other women. Even if this were a legitimate way to allocate resources, however, the current program addresses abuse issues inconsistently. I explore these inconsistencies in this paper. In doing so, I discuss a recent (unsuccessful) challenge under the *Canadian Charter of Rights and Freedoms* to the failure of the domestic legal aid system in New Brunswick to provide legal aid to respondents in Ministerial custody applications.[1]

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1 *New Brunswick (Minister of Health and Community Services)* v. *J.G.* [1997] N.B.J. No. 138 (C.A.) (Q.L.) (hereinafter "appeal decision"); upholding (1995), 171 N.B.R. (2d) 185 (Q.B.) (hereinafter "trial decision"). The earlier decision in which Athey J. granted the Minister's request for an extension of the custody order against J.G. is found at (1995), 157 N.B.R. (2d) 169 (Q.B.).

THE NEW BRUNSWICK DOMESTIC LEGAL AID SYSTEM

Criminal legal aid in New Brunswick is provided through Legal Aid New Brunswick which is administered by the Law Society.[2] Domestic legal aid, on the other hand, is provided for through the Minister of Justice.[3] New Brunswick is divided into eight judicial districts; there is a legal aid solicitor in each district, either full or part-time. Court social workers who act as intake workers, perform (at least) paralegal services and serve as mediators. Officially, applicants for legal aid are required to attend at the legal aid office in the court house in the relevant judicial district, but screening is also done over the telephone.

The domestic legal aid plan covers interim orders for support, custody and exclusive possession of the matrimonial home; permanent orders for support and custody or access, as well as for variations of these orders; division of marital property in "non-complex cases"; and restraining orders. Legal aid for divorce is primarily available to couples whose relationship did not involve violence, who have access to mediation, but is also available to respondents in a divorce action who are already in the system. Parents involved in guardianship applications may obtain a certificate if they are financially eligible (limited to $1,000); there is no legal aid for parents who are respondents when the Minister of Health and Community Services is applying for custody, except for the assistance of duty counsel on the date of the first court appearance.

Apart from the general inadequate funding, a study carried out by The Women's Legal Education and Action Fund (New Brunswick) revealed the following major weaknesses in the New Brunswick system: the provision of services is fragmented; screening often appears to be carried out without adequate information and sometimes by inappropriate persons; the application of the abuse criterion is inconsistent and workers have insufficient training about abused women; mediation and consent orders are used even when women have been abused; there is inadequate assistance in obtaining restraining orders.[4]

Some of the women interviewed for the LEAF-NB study believed that they had been screened by the receptionist, not by a court social worker. Nine of the fifteen women who had been rejected by Domestic Legal Aid said that they had been rejected over the telephone by a receptionist. Regardless of who had rejected these women, it appears that the screening is not adequate in many cases to assess whether women have, in fact, experienced abuse.

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2 *Legal Aid Act*, [1973] R.S.N.B., c. L-2.

3 S.N.B. 1993, c.21 added Part II to the *Legal Aid Act* to permit the Minister of Justice to provide for a legal aid system with respect to divorce and other proceedings in the Court of Queen's Bench.

4 "Access to Justice in New Brunswick: The Adverse Impact of Domestic Legal Aid on Women" (LEAF-NB, September 1996)(on file with the author). The study involved interviews with fifteen court social workers, twenty-five private practitioners and, central to the study, twenty-seven women who had some contact with the domestic legal aid system; it also included a content analysis of legal aid court files in two judicial districts, Fredericton and Moncton.

Although the plan does define "abuse" or "violence" broadly to include emotional and financial abuse, it appears that not all social workers (or whoever is screening applicants) apply a broad definition. Some women in LEAF-NB's study said that they had been refused even though they had suffered or were suffering abuse because the abuse was not physical. Of the fifteen women rejected, twelve described their relationship as abusive. The reasons for rejection included that the abuse was not severe enough, that it was not physical abuse and that the screener had concluded that the woman was not in any immediate danger.

A number of private practitioners, court social workers and court solicitors interviewed in the LEAF-NB study believed that access to the system should not be restricted to those who are abused,[5] but that there should be some financial criterion reinstated. It appears that the financial criterion is actually applied only with respect to property distribution applications which are covered only when the marital assets do not exceed $20,000. The problem, of course, is that financial resources are determined on the basis of "family" resources; yet women may not have access to these resources, especially where women are abused.

Ninety-one per cent of the private practitioners interviewed for the LEAF-NB study said that they had referred clients to domestic legal aid, while nearly three-quarters of them had clients who requested services over and above those provided by the plan, most often division of property and divorce. One practitioner described the plan as "like putting a band-aid on a heart attack". Nevertheless, legal aid resources (in particular, the time and energy of the court solicitors) are used to pursue support for women who are on income assistance, thereby reimbursing the public purse.

Although it is commonly accepted today that mediation and consent orders are usually inappropriate in cases where one partner has abused the other, and although officially mediation is not supposed to be used under the legal aid system when abuse is involved, it appears that both mediation and consent orders are employed in these circumstances. The review of case files in Fredericton indicated that 64% of orders were consent orders (while only 7% of orders in Moncton were consent orders). Three consent orders involved two men who had been convicted of assault and one who had been charged for assault and whose case was pending.

The women interviewed indicated some difficulty in obtaining peace bonds and one who had been successful said that the Family Court solicitor had encouraged her to forfeit it "in order to get the papers signed". The review of court files indicated mixed success in obtaining bonds in Fredericton; there were no requests for peace bonds in Moncton, although, in fact, two were granted.

As indicated, the legal aid scheme provides that guardianship applications are covered by the plan to a maximum of $1,000, but that custody applications by the Minister are not except for duty counsel on an initial

5 At least one participant in the study felt that the plan is discriminatory in having an abuse criterion because it means that women will be more likely to receive legal aid for domestic matters than will men.

appearance. Eligibility is not dependent on experience of abuse in these cases. Nevertheless, the recent decisions in *New Brunswick (Minister of Health and Community Services)* v. *J.G.*[6] provide an opportunity to consider some of the difficulties with the plan more fully.

THE CASE OF J.G.

J.G. was faced with an application by the Minister of Health and Community Services of New Brunswick to extend a custody order which had previously been granted to the Minister with respect to her three children. A recipient of social assistance, Ms G. could not afford legal counsel and claimed that she had a right to counsel funded through the province's legal aid program. Ms G.'s challenge was based on sections 7 and 15 of the *Canadian Charter of Rights and Freedoms.*[7] She was unsuccessful at trial and at the Court of Appeal. There was a strong dissent at the Court of Appeal, however, which found a right in section 7 to funded counsel under the circumstances of this application: denial of counsel was a denial of a fair trial given the nature of the proceedings and Ms G.'s own circumstances.

Both the trial judge and the majority in the appellate court were clear that they believed that the legal aid plan was deficient, but that it was not the court's responsibility to tell the government how to expend its resources on legal aid: this was a policy matter, not a legal matter. Madam Justice Athey observed that the Province's stated commitment to equal access to the justice system "is not being adhered to in situations such as this where the family, the very fabric of our society, is in jeopardy of being torn apart after state intervention."[8] The majority in the Court of Appeal, in concluding that the applicant's argument would "unduly" enlarge the scope of section 7, beyond that given it by the Supreme Court of Canada, admitted that they had come to this conclusion "somewhat reluctantly because we might be appearing to endorse the very limited scope of the Province's domestic legal aid scheme"; nevertheless, "the extent of domestic legal aid is a legislative policy making function and not a *Charter* question".[9]

I first address the judicial treatment of Ms G.'s arguments under section 15.[10] The trial judge, Madam Justice Athey, found that the distinction between "Respondents to Ministerial applications for custody orders or extension of those orders and Respondents to Ministerial applications for guardianship orders" is not "based on an irrelevant personal characteristic which is either enumerated in s.15(1) or one analogous thereto" and therefore does not invoke section 15 of the *Charter.*[11] Neither the majority nor the minority

6 *Supra* note 1.

7 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act (1982)* (U.K.) 1982, c.11.

8 Trial decision, *supra* note 1, para 30.

9 Appeal decision, *supra* note 1, para. 7.

10 Subsection 15(1) of the *Charter* states: Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

11 Trial decision, *supra* note 1, para.15, citing the test articulated by McIntyre J. in

in the Court of Appeal believed that this distinction falls within the parameters of section 15.[12] Evidently, no attempt was made to argue that the distinction between respondents to Ministerial applications for custody orders and respondents to ministerial applications for guardianship orders has a disparate impact on the basis of a ground protected under section 15 (for example, that more women than men are respondents in custody applications, taking into account the greater likelihood that a mother would be a custodial parent than would a father). Short of a disparate impact, treating these aspects of the plan as if they were not part of a comprehensive plan with definite gendered characteristics, taking this distinction on its face and given the jurisprudence under section 15 the courts' conclusions about the application of section 15 *in isolation* are likely legally correct.

In light of the characterization of the section 15 issue, the decisions really revolve around the application of section 7 of the *Charter* to these circumstances.[13] Ms G.'s argument was that section 7's liberty interest encompasses a right in a parent to bring up her or his children and that lack of legal representation when that right is threatened is contrary to the principles of fundamental justice. Support for inclusion of parental decision-making in section 7's liberty interest is found in La Forest J.'s opinion in *B.(R.)* v. *Children's Aid Society of Metropolitan Toronto*.[14] La Forest J. stated that "[i]n a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance".[15] This included making decisions for one's children, although the parental role must be acknowledged as one of "privilege", not as a property interest in children. State intervention will thus occur only in "exceptional" circumstances; when it does, however, it must be seen as "limiting the constitutional rights of parents rather than vindicating constitutional rights of children".[16] The importance of a fair procedure was recognized in *Singh* v. *Minister of Employment and Immigration*.[17] Athey J. applied these principles to the specific circumstances of the case and of J.G. and found that J.G. could represent herself without there

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Andrews v. *Law Society (British Columbia)*, [1989] 1 S.C.R. 143 as discussed by La Forest J. in *Egan* v. *Canada*, [1995] 2 S.C.R. 513.

12 Appeal decision, *supra* note 1. The majority opinion, written by Hoyt C.J.N.B., Ayles and Turnbull JJ.A., does not consider section 15 except to say at para. 3 that "we agree with [Mr. Justice Bastarache's] disposition of the s.15 *Charter* argument". Mr. Justice Bastarache, in a dissent concurred in by Ryan J.A., held at para. 88 that "[i]t is clear that the distinction between indigent persons facing custody applications and indigent persons facing guardianship applications are not based on any particular personal characteristics. The trial Judge relied on La Forest, J.'s comments in *Egan* v. *Canada* ... and found no discrimination contrary to s.15 had been established. I find no error in that decision".

13 Section 7 of the *Charter* states: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

14 [1995] 1 S.C.R. 315. La Forest J.'s opinion was shared by three other judges. Athey J. referred to this opinion as representing the "majority of the Court which considered the point" in the *B.(R.)* decision.

15 *Ibid.*, para. 80.

16 *Ibid.*, para. 86.

17 [1985] 1 S.C.R. 177.

being a contravention of the requirement of fair procedure. The Minister anticipated a hearing of three days and presented fifteen affidavits including expert evidence. The Minister, of course, was represented by counsel, as were the children; these lawyers were funded by the state. The father also had counsel, paid for by him. Only Ms G., who had custody of the children, was unrepresented in court. The crux of Athey J.'s decision is as follows:

> There has been no suggestion that Ms G. lacks the capacity to understand the allegations made by the Minister or that she is unable to communicate her position to the Court. In these circumstances I am not convinced that she is not able to adequately state her case or that provision of counsel to represent her is essential to a fair trial. I conclude therefore that her parental liberty interest will not be violated by the lack of state funded legal representation.[18]

The majority in the Court of Appeal took a narrower view of the matter. They emphasised that La Forest J. had spoken for only four judges,[19] although they themselves were much taken with the view of only one judge, that of Chief Justice Lamer, who held that liberty has been defined narrowly to encompass only a physical dimension. Because the Chief Justice had "based his decision on the precise issue of whether the integrity of the family was a liberty interest protected by s.7 of the *Charter*", the majority believed that "his clear and unequivocal reasons should be followed".[20] *B.(R.)* was concerned with the right of parents to choose medical treatment for their child (specifically, that for religious reasons the child not be given a blood transfusion). The Chief Justice's explicit reasons (framed within a section 7 which is limited to the actions of law enforcement officials or the decision of judges and other adjudicators) were that "a parent's right 'to bring up' a child 'does not fall within the ambit of s.7' and ... 's.7 was not designed to protect even fundamental individual freedoms if those freedoms have no connection with the physical dimension of the concept of "liberty"'".[21]

The majority in the Court of Appeal also were influenced by the fact that

18 Trial decision, *supra* note 1, para. 22.

19 In addition to the Chief Justice's narrow interpretation of "liberty", one judge did not see the need to define the scope of the liberty interest and three judges specifically rejected the view articulated by La Forest J. (and consequently adopted by Athey J.). Both the majority and dissent in the Court of Appeal differ from Athey J.'s characterization of the La Forest J. opinion: Appeal decision, *supra* note 1, paras. 5 and 40. However, those judges in *B.(R.)* who reject the view do so because they would not recognize an expression of parental "liberty" *which would endanger a child* as even falling within section 7 at all: *supra* note 14, para.208. This is a very different position from there being no parental liberty encompassed by section 7 and certainly one at odds with the very broad scope given freedom of expression which at the first stage of analysis (what kind of expression does section 2(b) encompass) protects hate literature and commercial expression; the different treatment of these forms of expression compared to expression which promotes the democratic process, for example, occurs under section 1, not under the delineation of the right: *Quebec (A.G.)* v. *Irwin Toy*, [1989] 1 S.C.R. 927; *R.* v. *Keegstra*, [1990] 3 S.C.R. 697.

20 Appeal decision, *ibid.*, para. 5.

21 *Ibid.*

"entitlement to state funded counsel in criminal matters was specifically excluded from the *Charter*" and that to extend legal aid through section 7 to guardianship applications would be inconsistent with how criminal legal aid has been addressed.[22] The courts have not recognized a "right" to legal aid in criminal cases, but they have established a broad set of "surrounding" rights in connection with legal aid for criminally accused persons.[23] There remains a discretion in the court to ensure appointment of counsel even when an accused is turned down by legal aid.[24] Failure to provide legal aid may result in a stay of proceedings on the basis that the accused has been unable to mount a full defence consistent with the requirements of sections 7 and 11(d) of the *Charter*.[25] The significance the Supreme Court of Canada has placed on the provision of legal aid in criminal cases is indicated by the Court's decision in *R.* v. *Cobham*[26] in which the Court stated that since duty counsel and legal aid services are "an integral part of the practice of criminal law", the accused does not have to show that there is a system in place in order to raise a section 10(b) claim; the onus is on the party claiming that there is no system in place. A stay is not a remedy available in family case, of course, as the dissent in *J.G.* notes.

The majority opinion in the Court of Appeal relies on the view of the majority in the Supreme Court decision in *McKinney*[27] while the judiciary have an obligation to scrutinize legislative action for *Charter* compliance in the social area, they will exercise "greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty". The majority are correct that the courts' examination under section 1 will likely vary depending on whether social legislation or criminal law is involved.[28] It is worth observing, however, that this exercise of restraint in social matters and greater activism in criminal matters has the effect of granting greater judicial protection to persons accused of crimes and less to those whose concerns may be inadequate social assistance of various kinds; applied to legal aid, it also perpetuates the greater seriousness accorded matters viewed as public (criminal law) and those viewed as private (family matters, even when the state is involved). In addition, it very nearly approaches a "frozen" view of *Charter* interpretation, rather than the organic, evolving and contextual interpretation which is more appropriate in delineating *Charter* rights.

Bastarache J.A. wrote a strong dissent which relied heavily on analogizing ministerial applications for custody to criminal proceedings. Reviewing the case law on the liberty interest in section 7, his Lordship concluded that "[t]he largest extension of the traditional definition to date is the one that has occurred in family law cases [in which] the 'liberty' interest in question

22 Appeal decision, *supra* note 1, para. 4.
23 The case law is reviewed by Bastarache J.A. in his dissenting opinion in *J.G.*: appeal decision, *supra* note 1, paras. 58-71.
24 *R.* v. *Rowbotham et al* (1988), 25 O.A.C. 321 (C.A.).
25 *R.* v. *Brydges*, [1990] 1 S.C.R. 190.
26 [1994] 3 S.C.R. 360.
27 *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229.
28 *Irwin Toy*, *supra* note 18.

is akin to that found in the criminal law cases."[29] Bastarache J.A. attempted to work within the paradigm of criminal law since it is in this area that the Supreme Court has been more likely to find rights associated with legal assistance and upon which the liberty interest is grounded. In marked contrast to the view of the majority, his opinion also is premised on a pro-active role of the state in protecting constitutional values: "The *Charter* must limit the intrusion of the state in the lives of its citizens; it must also mandate its function in those limited cases where individuals can make legitimate claims against it in the name of liberty and human dignity".[30]

There is greater constitutional protection for persons accused of criminal offences than there is in relation to domestic matters,[31] including the provision of legal aid, for two major reasons: the first is that in 1982 there still was not the appreciation that there is even today that certain family matters should be in the public domain and the *Charter* incorporated existing common law protections for accused; the second is that government is obviously involved in criminal matters, but less obviously involved in family matters. Underlying common law and constitutional protections for accused is the idea that they face the power of the state and all the state's resources; family matters, on the other hand, are one individual against another. Mr. Justice Bastarache's analysis of the claim made by J.G. reflects his appreciation of this situation in his comparison between ministerial custody proceedings and criminal proceedings. These are proceedings, like criminal proceedings, in which the state brings its power to bear against the individual. One may well ask, "what are the unstated values of a society which regards the consequences of possible imprisonment for an accused charged with a property offence as more significant than the loss of custody of one's children in protection proceedings?".[32]

Section 7's liberty interest should be restricted, in Bastarache J.A.'s view, "to essential personal rights that are inherent to the individual and consistent with the essential values of our society",[33] a view reflective of the position taken by La Forest J. in *B.(R).*[34] In this instance, one of the values, as expressed in the *Family Services Act*, is the least intrusion by the state into the family "that is compatible with [the children's] own interests and those of their families and of society".[35] While the best interests of the child are the measurement under the legislation, not J.G.'s parental rights, Bastarache J.A. found that both the liberty interest of the mother and that of the children are involved. Since "the object of the hearing is an examination of her ability to fulfil her obligations as a parent fairness therefore requires that Ms G. not be deprived of her parental rights without the benefit of a

29 Appeal decision, supra note 1, para. 39.
30 *Ibid.*, para. 43.
31 It is perhaps not necessary to point out that someone accused of a domestic assault or murder in a domestic context will benefit from the rights granted an accused.
32 M.J. Mossman, "Gender Equality, Family Law and Access to Justice" (1994) 8 *Int'l. J. L. Family* 357, 366.
33 Appeal decision, *supra* note 1, para. 48.
34 *Supra* note 14.
35 Quoted by Bastarache J.A. in appeal decision, *supra* note 1, para. 48.

proceeding that is consistent with the principles of fundamental justice".[36]

Mr. Justice Bastarache's review of the case law confirms that "s.7 does not guarantee a general right to funded counsel [but it] requires the provision of paid counsel where it is necessary to guarantee a fair trial according to the principles of fundamental justice".[37] His Lordship points out that ministerial custody applications are adversarial in nature and, of particular significance, a finding of custody "will create a stigma similar to that of a finding of guilt in some criminal prosecutions".[38] The system itself requires that "[t]he adversaries must be equal or relatively equal before the tribunal. If they are not, the procedure is in danger of degenerating into one of moral ambivalence".[39]

THE COST OF REPRESENTATION MAY NOT BE ONLY FINANCIAL

There are a number of points which can be made about these analyses which involve the treatment of legal aid itself, but which also raise more general questions of interpretation.

Although not raised in the case, the different treatment of custody and guardianship applications under the legal aid plan reflects the view that guardianship orders are "permanent" and thus more "serious" than custody orders which are "temporary". Interim decisions establish the *status quo*: in family matters, gaining interim custody is extremely important because it is not desirable to uproot the children and stability may generally be said to be "in their best interests"; the amount awarded as interim support will have an impact on the final amount awarded. We might expect that having one's children taken into custody might well be a consideration in determining whether a guardianship order should be granted at a later date. Indeed, Ms G.'s affidavit in support of her motion for funded counsel, expresses her fear "that each time I am required by the Minister to come before the Court on a six months custody order without legal representation, and the Minister is successful in obtaining the order, it will be more difficult to ever get my children back.[40]

Indeed, it is worth noting in this context that interim custody and support are covered by the plan with respect to individual (rather than state) applications.

The majority reasons in *J.G.* in particular take a "categorization" approach to the "interests" reflected in section 7 and a narrow one at that: it is obvious that imprisonment engages the liberty interest, that endangerment engages the security interest and risk to life engages the right to life. Yet these interests are not always so easily separated from each other, nor are aspects of life so easily delineated. While it may be that the liberty interest

36 *Ibid.*, para. 52.
37 *Ibid.*, para. 71.
38 *Ibid.*, para. 83.
39 *Ibid.*
40 Trial decision, *supra* note 1, para. 4.

is primarily reflective of risk to physical well-being, this is not something that is restricted to the criminal context. In *Rodriguez* v. *British Columbia*, for example, Sopinka J., and five other judges concurring, stated that the prohibition against assisted suicide deprived Rodriguez "of autonomy over her person and cause[d] her physical pain and psychological stress in a manner which impinges on the security of her person. The appellant's security interest (*considered in the context of the life and liberty interest*) is, therefore, engaged."[41] *Rodriguez* might be said to involve a physical interest in the criminal context, but this would be a narrow characterization. It is a case about an individual's dignity, self-identity and self-determination, matters which do not fall easily into one of the categories alone. Two other judges in *Rodriguez* considered that the security interest "has one element of personal autonomy, protecting the dignity and privacy of individuals with respect to their own body";[42] yet "privacy" was seen as an element of the liberty interest in American jurisprudence, a view adopted by Wilson J. in the *Morgentaler* case, for example, although not generally accepted by other judges either in that case or in other case.[43]

But this categorization of legal interests has broader implications, even for how we see legal rights themselves. Legal rights are more than merely "legal rights"; it is through the legal system that we enforce other rights. For example, the right to pay equity is of limited value if it cannot be enforced through the courts. The right to prevent harassers stalking women means little if women cannot obtain restraining orders or if harassers are not prosecuted and convicted. Similarly, custody of children is a mixed blessing if the other parent is able to use the legal system to make life difficult or if the only way to get the support owed is through constantly going to court for it. The right on paper to take an employer or union to a pay equity tribunal to obtain a restraining order, or respond to recurring claims by the non-custodial parent or to bring an action to enforce support is necessary, but insufficient. Access to the legal system currently requires having the ability to speak the language of the system, to translate one's story into legal language, to know the extent of one's own rights and the extent of the rights of others. We train lawyers for about four and a half years after they obtain an undergraduate degree to prepare them to function in the legal system; yet the failure to provide legal aid to people who need it presupposes that a person "off the street" can, in effect, perform the role that highly trained lawyers can perform.

Of particular concern in *J.G.* is that while Mr. Justice Bastarache provides a cogent analysis of the section 7 liberty interest, as well as the meaning of

41 *Rodriguez* v. *British Columbia*, [1993] 3 S.C.R. 519, para. 18 [emphasis added].

42 *Ibid.*, para. 81 per McLachlin J. (L'Heureux-Dubé J. concurring). These references do not have specific relevance to the issues at stake in *J.G.*, nor, of course, are they presented as definitive. I cite them merely to show that these are difficult and abstract conceptual terms which should not be narrowly defined or the interests of autonomy, parental concerns or similar "rights" be too narrowly categorized before they can be granted constitutional recognition.

43 *Griswold et al* v. *Connecticut*, 381 U.S. 479 (1965); *Roe* v. *Wade*, 410 U.S. 113 (1973); *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30.

fundamental justice (which I have not addressed specifically here), his reasons ultimately rest on a very negative portrayal of Ms G. herself. His Lordship does address the "structural" or "institutional" aspects of the case which warrant granting legal representation in this case: the number of affidavits, the expert witnesses and the fact that both the state and the children are represented by lawyers (the latter only at the behest of Athey J.), for example. But Ms G.'s personal characteristics are also relevant. It is necessary for her to be portrayed in the worst possible light to warrant her requiring counsel — yet these same qualities will likely work against her in her defence against the custody application: she is shown to be unable to evaluate reality adequately at times, as having borderline delusional beliefs, as scoring high on scales measuring paranoid tendencies reflective of persons who mistrust the motives of others and who feel they are treated inequitably.[44] Mr. Justice Bastarache's findings, albeit in furtherance of his conclusion that J.G. should have legal representation, will be of little assistance on the merits of the case, that is, as to whether she should lose her children, even on a temporary basis.

This approach is similar to that employed to permit women a defence of battered wife's syndrome where a woman has killed her abusing partner.[45] While recognition of abused wife syndrome and its applicability to a self-defence plea was an important development, it is based on "learned helplessness" and emphasises women as victims.[46] In this case, *J.G.* is portrayed as a woman who is the subject of a negative psychological profile, as irrational and verging on paranoia, for the purpose of her obtaining legal aid; it appears she would otherwise not be eligible for legal aid merely because she cannot afford a lawyer and she risks losing her children. Yet raised on the substantive issue of whether there should be an order for ministerial custody of Ms G.'s children, these qualities would work against her. Similarly, in the broader context, the abuse criterion emphasises the woman as victim. It is an important criterion. Women who are abused must have access to the means necessary to leave the relationship without losing their legal rights on termination of the marriage. As effectively the only criterion, it tells women that the legal system is really available only to rich women or to women who are able to show that they are abused or victims. The woman who acts autonomously in order to prevent abuse or who seeks to leave for other reasons will not be reinforced. It is also inevitable that "abuse" will have to be defined broadly in order to ensure as wide an access as possible under this single criterion.

Finally, by isolating one part of the legal aid plan, the difficulties in the plan as a whole are hidden. These include the lower status given "family" problems in law and the gendered nature of the legal aid system, for example; indeed, these two difficulties are interrelated. These issues are addressed

44 Appeal decision, *supra* note 1, para. 80.

45 *R.* v. *Lavallee*, [1990] S.C.R. 852.

46 Christine Boyle considered the "learned helplessness" problem in her very thoughtful examination of the defence in "The Battered Wife Syndrome and Self-Defence: *Lavallee* v. *R.*" (1990) 9 *Can. J. Fam. L.* 171.

elsewhere;[47] it must be sufficient to point out here that as part of a gendered system of legal aid, the provisions relating to ministerial custody and guardianship applications assume some of these same patterns and must be assessed taking into account those patterns. This requires not treating section 15 and section 7 in isolation, but combining them to appreciate how the interpretation of section 7 may in itself be gendered if the liberty interest is interpreted too narrowly. It is, it might be argued, "gendered" to interpret section 7 to encompass only "public" matters, as Chief Justice Lamer and the majority in the New Brunswick Court of Appeal in *J.G.* would have it, and not "private" matters related to the family.

CONCLUSION

While the *J.G.* case is not in one sense reflective of the problems of the New Brunswick domestic legal plan as a whole, in another very important way it is. The majority decision in the Court of Appeal fails to appreciate that the gendered way in which we have historically treated "public" matters such as criminal law and "private" matters such as the family continues to permeate the current legal aid system. This lack of appreciation means that the majority sees its role more narrowly and defines the interests involved more narrowly than it might otherwise do and that is reflected in the dissent. At the same time, Ms G. would pay a rather high price for her "right" to legal representation even if the dissent were the majority: she would, it might be fair to say, have won the battle only to have it be the reason for her losing the war. She would gain the right, as do women in the broader legal aid scheme, because of her perceived "victimhood", not because of her strengths. She is entitled because as an individual she has been identified as having personal problems, not because of the structural deficiencies of the legal system or of the social services generally (and we can only speculate about the extent to which her experiences in those systems are related to her "psychological profile").

J.G. on its face concerns the distinction between the treatment of ministerial applications for custody and other matters covered by legal aid. The way in which the case was decided, however, and the underlying assumptions of the legal aid system reveal that the legal system still has a distance to travel before it fully includes women within its shelter.

47 See, for example, P. Hughes, "Domestic Legal Aid: A Claim to Equality" (1995) 2 *Rev. of Constitutional Studies* 203. I have also addressed the gendered nature of legal aid in a paper prepared as a background study of Ontario's legal aid system: P. Hughes, "The Gendered Nature of Legal Aid" *in* F. H. Zemans, P.J. Monahan and A. Thomas, eds., *A New Legal Aid Plan for Ontario: Background Papers* (Osgoode Hall Law School of York University Centre for Public Law and Public Policy, 1997) 29-53.