Court No. 26005

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF NEW BRUNSWICK)

BETWEEN:

JEANNINE GODIN

APPELLANT

AND:

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

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PART I

STATEMENT OF FACTS

1. The Attorney General of British Columbia has intervened in this appeal in response to the constitutional questions stated by the Chief Justice on April 9, 1998.

2. For the purpose of making argument on the constitutional questions, the Attorney General of British Columbia adopts the Statement of Facts presented by the Respondents, the Attorney General of New Brunswick and the Ministers of Health and Community Services and Justice (the "Attorney General of New Brunswick") in their Factum at Paragraph 1.

PART II

POINTS IN ISSUE

3. The constitutional questions stated by the Chief Justice are as follows:

(a) In the circumstances of this case, did the failure of the *Legal Aid Act*, R.S.N.B. 1973, c. L-2, or the Government of New Brunswick under its Domestic Legal Aid Program, to provide legal aid to respondents in custody applications by the Minister of Health and Community Services under Part IV of the *Family Services Act*, R.S.N.B. 1973, c. F-2.2, constitute an infringement of s.7 of the *Canadian Charter of Rights and Freedoms*?

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

4. The Attorney General of British Columbia agrees with the Attorney General of New Brunswick that the primary question raised in this Court is whether s.7 of the *Charter* mandates the provision of state-funded counsel for indigent parents when government seeks a judicial order suspending or terminating those parents' custody of their children. It is the position of the Attorney General of British Columbia that this primary question should be answered in the negative.

5. The Attorney General of British Columbia also agrees with the Attorney General of New Brunswick that although the stated question uses the phrase "In the circumstances of this case", it is assumed that this is not meant to limit the constitutional issue to the facts of this particular case so as to avoid the larger issue described above in paragraph 4.

6. The Attorney General of British Columbia agrees with the Attorney General of New Brunswick that if there is a breach of s.7 of the *Charter* by the failure to provide legal aid to parents in applications where temporary custody is sought by the government, then this a reasonable limit justified under s.1 of the *Charter*.

PART III

ARGUMENT

A. The Approach to Section 7 does not Require the Court to Comment in this Case on the Scope of Liberty

7. The right guaranteed by s.7 of the *Charter* comprises two components (Appellant's Factum at para. 29):

> (a) the right to life, liberty and security of the person; and
> (b) the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. The onus is on the Appellant to establish a breach of s.7 of the *Charter* by proving that there has been an infringement or denial of each of these two components.

Re Pearlman v. Law Society of Manitoba, [1991] 2 S.C.R. 869 at 881

9. The Appellant "asserts a right to bring up her children and this right is within the scope of the right to liberty set out in s.7 of the *Charter*." (Appellant's Factum at para. 38) The Appellant also submits that "her right cannot be usurped unless in accordance with the principles of fundamental justice." (Appellant's Factum at para. 38)

10. This case can be decided without determining the first proposition set out in the previous paragraph -- whether the right to liberty in s.7 of the *Charter* includes a right to bring up children. The Attorney General of British Columbia submits that failure to provide state-funded legal counsel where there is an application for custody by the Minister of Health in accordance with the New Brunswick *Family Services Act* does not violate the principles of fundamental justice. If the Court agrees with that proposition then it is unnecessary for the Court to determine the difficult question of the scope of the protection of liberty under s.7 of the *Charter*. This was the analytical approach adopted by Sopinka J. in *B.(R.) v. Children's Aid Society* and Iacobucci J. on behalf of the Court in *Pearlman v. Manitoba Law Society*.

B.(R.) v. Children's Aid Society, [1995] 1 S.C.R. 315 at 428
Re Pearlman v. Manitoba Law Society, supra at 881-882

11. This approach is appropriate in this case because there is a fundamental disagreement among some members of this Court as to the scope and extent of the concept of "liberty", as evidenced by the judgments in *B.(R.) v. Children's Aid Society* and *Godbout v. Longueuil*.

> *B.(R.) v. Children's Aid Society, supra* at 340-341 and 368-371
> *Godbout v. Longueuil*, [1997] 3 S.C.R 844 at 855 and 892-893

12. If on the other hand, the Court decides that a failure to provide state-funded counsel in custody applications such as in this case does violate the principles of fundamental justice then it will be necessary to go on to determine the scope and extent of liberty contained in s.7 of the *Charter*. In that event, the Attorney General of British Columbia submits that the concept of liberty described by the Chief Justice in his reasons for judgment in *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code* should be preferred by the Court over the interpretation advanced by LaForest J. in *B.(R.) v. Children's Aid Society* and *Godbout v. Longueuil*.

> *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code*,
> [1990] 1 S.C.R. 1123 at 1173-1176

13. Liberty thus interpreted relates to its "essentially physical dimension" and its association primarily, but not exclusively, with the criminal justice system.

> *B.(R.) v. Children's Aid Society, supra* at 348

14. The majority of the New Brunswick Court of Appeal in this case adopted the Chief Justice's reasons in *B.(R.) v. Children's Aid Society* and stated:

> The Chief Justice, however, 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*. We believe that his clear and unequivocal reasons should be followed, at least until that court rules to the contrary.
>
> Case on Appeal at 110

B. The Appellant's Argument on the Principles of Fundamental Justice is not Limited to the Facts in this Case

15. The first constitutional question begins with the words "In the circumstances of this case", which might at first glance appear to be a limitation to the facts of the precise situation of the Appellant. The Appellant's argument on liberty, however, is not restricted to her own situation or the facts in her case. As noted above (paragraph 9), the Appellant asserts a broad and unqualified right to bring up her children and says this right is within the scope of the right to liberty in s.7 of the *Charter*. There is no attempt to restrict that right to the circumstances of this case or to tie it to facts unique to those of the Appellant's situation.

16. As well, when the Appellant turns to the principles of fundamental justice, she asserts a principle of fundamental justice that is not specifically tied to the "circumstances of this case" but rather states a principle as well of broad and general application. For instance, it is stated: "Put simply, the denial of legal aid to a parent such as the Appellant living in poverty renders illusory their [sic] participation in the process." (Appellant's Factum, para. 56; see also Appellant's Factum, paras. 32, 57 and 65)

17. The underlying principle relied upon by the Appellant is that Court proceedings must be fair and the participation of the parties in the process must be meaningful and not illusory. The Appellant's argument characterizes this principle to be of general application to any custody application where the government seeks to take a child away from his/her parent and that parent has been denied legal aid while living in poverty. Those circumstances, it is submitted, probably describe the majority of situations where the State (through the Minister of Health in New Brunswick or the Director of Child Protection in British Columbia) is attempting to obtain custody of a child. This case therefore has implications far beyond the Appellant's personal situation.

C. Principles of Fundamental Justice

1. The Meaning of the Principles of Fundamental Justice

18. The general analytical and interpretive approach of the Court was set out in *R. v. Big M Drug Mart* by Dickson J., as he then was:

> In my view this analysis (analysis of the purpose of the guarantee in the Charter) is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time, it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this court's decision in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical context.
>
> *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 344

19. The principles of fundamental justice are to be are found in the basic legal tenets and principles of our judicial process, as well as within other components of our legal system. Examples of the principles of fundamental justice are found in ss. 8-14 of the *Charter*. These sections illustrate the meaning of the principles of fundamental justice in criminal or penal law. In analyzing whether any asserted right is a principle of fundamental justice the following observation of the Court in the *Reference Re Section 94(2) of the Motor Vehicle Act* is relevant:

> Whether any given principle may be said to be a principle of fundamental justice within the meaning of s.7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves.

Reference Re Section 94(2) of the Motor Vehicle Act,
[1985] 2 S.C.R. 486 at 513

20. It is well accepted that principles of fundamental justice include the concept of a procedurally fair hearing before an impartial decision-maker.

> We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures and as Frankfurter J. wrote in *McNabb v. U.S.* (1942), 3 U.S. 332 at p. 347 "the history of liberty has largely been the history of observance of procedural safeguards."
>
> *Reference Re s.94(2) of the Motor Vehicle Act, supra* at 512-513
> See also *Re Pearlman v. Manitoba Law Society, supra* at 882-883

21. The principles of fundamental justice also comprise elements beyond procedure which has been referred to as the substantive principles of fundamental justice. That aspect of those principles was before the Court in *Rodriguez v. Attorney General of British Columbia*. Sopinka J., speaking for the majority of the Court on this point, stated:

> Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required... **They must also, in my view, be legal principles.** (emphasis added)
>
> *Rodriguez v. Attorney General of British Columbia*, [1993] 3 S.C.R. 519 at 590-591

22. What the Appellant asserts primarily in this case is essentially a procedural principle of fundamental justice -- the right to a fair hearing. It is incontestable that such a principle of fundamental justice is included within s.7 of the *Charter*. What *is* contestable, and it is submitted untenable, is the Appellant's assertion that the provision of state-funded counsel is necessary to ensure the fair hearing of a trial. Were it otherwise, arguably, then all trials to date

where a liberty interest is involved, both civil and criminal, and where one or another party has not been represented by counsel have been unfair and in violation of s.7 of the *Charter*.

23. Insofar as the Appellant goes beyond the merely procedural in her argument and talks about other aspects of custody hearings in the family law context, then it may be fairly said that this is an argument based on substantive principles of fundamental justice. This latter argument has been answered by the Attorney General of New Brunswick and we adopt those submissions in their entirety. (Attorney General of New Brunswick's Factum, paras. 37-49)

24. Further, as to the substantive principles of fundamental justice, it is instructive to note that the Appellant has not been able to provide evidence or a single authority that says provision of state-funded counsel in the context of a child custody application by the state is a "principle(s) upon which there is some consensus that they are vital or fundamental to our societal notion of justice...".

Rodriguez v. Attorney General of British Columbia at 590

2. History, Jurisprudence and the Common Law Related to the Role of Counsel does not Support the Proposition that State-Funded Counsel is Essential to a Fair Hearing

25. It is not surprising that most if not all, the jurisprudence relating to state funding of counsel has arisen in the context of criminal law. This was specifically noted by Bastarache J. A. (as he was then) in dissent in the Court of Appeal below:

> In the context of cases outside of the area of the criminal law, there are very few precedents, probably because the number of situations is limited where liberty or security interest is involved and no legal aid is provided.
>
> Case on Appeal, at 145-146

26. Incarceration in a penal institute is a deprivation of liberty of the highest order. It is submitted that it is at least as serious a deprivation of liberty as the alleged deprivation of liberty resulting from losing custody of a child. One should expect, therefore, that the principles of fundamental justice in criminal and penal proceedings which result in incarceration would be as exacting, if not more so, than in family custody matters. Consequently, the jurisprudence in

criminal and penal matters is a useful guide to the legal tenets of our judicial system constituting what is procedurally fair and acceptable.

27. Courts have always had the inherent jurisdiction to ensure a fair trial:

> In the past when a trial judge thought that he could not secure a fair trial without counsel for the defense, he approached the Attorney General or the Bar. Under similar circumstances today, he might contact the Legal Aid Society. If a trial Judge concluded that he could not conduct a fair trial without defence counsel and his request for counsel were refused, he might be obliged to stop the proceedings until the difficulties had been overcome. Our law would not require him to continue a trial that could not be conducted properly.
>
> *Re Ewing and Kerney and the Queen* (1974), 18 C.C.C. (2nd) 356 (B.C.C.A.) at 365-366
> *R. v. Rowbotham* (1988), 41 C.C.C. (3rd) 1 (Ont. C.A.) at 70

28. The trial judge could also appoint counsel if that was necessary, but as observed by Wood J.A. (dissenting in the result but not on this point):

> While the common law has recognized the jurisdiction of a trial judge to order that counsel be appointed for an unrepresented accused where his or her trial would otherwise be rendered unfair, no authority binding on this court has gone so far as to recognize a jurisdiction to order that the Attorney General pay costs of such counsel...
>
> *Canada (Attorney General) v. Stuart* (1996), 106 C.C.C. (3rd) 130 (Y.T.C.A.) at 139
> See also *R. v. Robinson* (1989), 51 C.C.C.(3rd) 452 (Alta. C.A.) at 476-479 and 482

29. The common law never recognized a right to state-funded counsel in criminal or penal proceedings. *A fortiori* there was never a common law right to state-funded counsel in custody matters involving an application to the Court by the state to apprehend children for their welfare and in their best interests.

30. The Attorney General of British Columbia submits an important factor for the Court to keep in mind is the nature of the proceeding in which the Appellant claims a right to be

provided with state-funded counsel. The *Family Services Act*, R.S.N.B. 1973, c. F-2.2 contains a procedure for the Minister to obtain temporary or permanent custody/guardianship of a child where the child's security and development may be in danger but at all times the Court must give priority to one value: the best interest of the child (s. 53.2).

See also *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, Part 3.C, s.41, for example

31. The Attorney General of British Columbia agrees with the Attorney General of New Brunswick's submissions regarding the nature of Family Court (at paragraphs 37 to 49 of the Attorney General of New Brunswick's Factum). In particular, the Attorney General of British Columbia submits the Appellant has misconstrued the nature of custody applications under the *Family Services Act* and similar legislation (the legislation in British Columbia contains a similar best interest test when the government applies for custody of children). Emphasizing the adversarial nature of traditional trials fails to sufficiently acknowledge the significance of the *parens patriae* role of the Courts in these applications. In relation to the British Columbia legislation the Court of Appeal has noted the following about that legislation:

> The *Act* is intended to deal with children who are in need of protection. While the inquiry provided for by the *Act* is to be conducted upon the basis that it is a judicial proceeding, unlike some judicial proceedings it is not an adversary proceeding and there is no lis before the Court. It is an inquiry to determine whether a child is in need of protection and, as the statute directs, the safety and well-being of the child are the paramount considerations.
>
> *DRH v. Superintendent of Family Child Services and Public Trustee* (1984), 14 D.L.R. (4th) 105 at 108; leave to appeal to S.C.C. refused December 17, 1984 (B.C.C.A.)
> *Re NMH et al v. Superintendent of Family and Child Services* (1984), 59 B.C.L.R. 359 (B.C.C.A.) at 362
> *Superintendent of Family and Child Service v. G. (C.)*, [1989] 22 R.F.L. (3rd) 1 (B.C.C.A.) at 8

32. As discussed above the principles of fundamental justice are to be found in the framework of the judicial process. Undoubtedly, the Court sits at the centre of this process and is

indeed the most important player. When it is recognized that the Court has directed itself not to view a child custody application under state-apprehension legislation as a normal adversarial case the Attorney General of British Columbia submits that in itself goes a long way to ensure the proceeding will be fair. Because the Court is directed to place above everything else the best interest of the child, the Attorney General of British Columbia submits the Court will be correctly guided to that concern whether or not the parties before it are represented by counsel.

33. The Court took a similar approach in *Young v. Young* where a parent was unable to assert his *Charter* rights (in that case freedom of religion) so as to subject an order of the Court regarding custody to the *Charter*. Part of the Court's reasoning for disallowing reliance by that parent on the *Charter* was because the governing legislation in that case (the *Divorce Act*) incorporated a test to guide the Court in making an adjudication upon custody. That test was the same as applicable to these proceedings, basically, the best interest of the child. The Attorney General of British Columbia submits that *Young v. Young* represents the type of balancing of interests that must be addressed when the Court is engaged in an inquiry into the best interest of children in order to ensure that parental claims to their own *Charter* rights should not be given such importance so as to potentially prejudice or interfere with the important task before the Court. That balancing of interests is not adversarial in nature.

> *Young v. Young*, [1993] 4 S.C.R. 3 at 66-67

3. Section 7 of the *Charter* does not support a Right to Appointment of State-Funded Counsel in Criminal and Penal Matters and *A Fortiori*, Child Custody Matters

34. In *R. v. Prosper* the Chief Justice noted that s.10(b) of the *Charter* does not in express terms constitutionalize the right to free and immediate legal advice upon detention. The Chief Justice referred to the proceedings of the Special and Joint Committee of the Senate and House of Commons on the Constitution of Canada which considered and rejected adding a clause to s.10 of the *Charter* that would require funded counsel in the interests of justice. In this respect, the Chief Justice stated:

> The situation here is quite different: at issue is a specific clause which was proposed, considered and rejected by our elected representatives. In my opinion, it would be imprudent for this

> court not to attribute any significance to the fact that this clause was not adopted.
>
> *R. v. Prosper*, [1994] 3 S.C.R. 236 at 266-267

35. In our submission these comments are equally applicable to s.7 of the *Charter*. Section 7 is cast in general and untextured language providing a guarantee to the principles of fundamental justice. It is inconceivable that when the framers of the *Charter* specifically considered and rejected an express clause for the payment of counsel in a section guaranteeing legal advice upon detention or arrest they intended, however, that right would continue to subsist within the general rubric of "principles of fundamental justice". Put another way, if the principles of fundamental justice in s. 7 guarantee the right to state-funded counsel then the limitation found in s.10(b) is contrary to those principles because detention and arrest are deprivations of liberty. The right to state-funded counsel would be guaranteed by s.7 even though it was expressly excluded from s.10(b) of the *Charter*. The Attorney General of British Columbia submits such an interpretation of s. 7 is illogical, internally inconsistent and, therefore, should not be adopted.

36. Courts of appeal have uniformly rejected the proposition that the right to a fair trial guaranteed by the principles of fundamental justice under s.7 of the *Charter* requires state-funded counsel in all cases.

> *Canada (Attorney General) v. Stuart*, *supra* at 158-160
> *Re Baig and the Queen* (1990), 58 C.C.C.(3rd) 156 (B.C.C.A) at 160
> *R. v. Munroe* (1990), 59 C.C.C.(3rd) 446 (N.S.C.A) at 448
> *R. v. Robinson*, *supra* at 458 and 482
> *R. v. Rowbothom*, *supra* at 69-70
> *R. v. Johal* (July 16, 1998), unreported, Vancouver Registry No. CA021153 (B.C.C.A.)

37. In *Johal* the Respondents to a Crown appeal who were acquitted on a charge of murder at trial applied for increased funding for counsel to be paid by the Attorney General in an amount well above and beyond that paid by Legal Aid for the appeal. Rejecting that application, the Chief Justice stated:

> As a back-up to s.684 [of the *Criminal Code*] , counsel called *Charter* sections 7 and 24 in aid. In my respectful view, the focus at this stage should be on s.7 which, when applied to appeals, undoubtedly assures these respondents a fair and public

> hearing. In my view, notwithstanding the fact that these are Crown appeals against jury acquittals, neither these sections nor any other section of the *Charter*, provide for or require the provision of paid counsel on the scale requested by these respondents or on any other scale beyond what has been offered to them.
>
> *R. v. Johal* at para. 27

38. The principles of fundamental justice do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardians of the justice system. The judiciary as guardians of the justice system have not regarded the provision of state-funded counsel in every criminal or penal case to be a principle of fundamental justice. The principles of fundamental justice are not violated even though a person stands to lose his or her liberty for what could be a very long period of incarceration. In light of that history, it is submitted that it would be an unjustified leap of logic, therefore, to find that the provision of state-funded counsel is a principle of fundamental justice guaranteed and protected by s.7 of the *Charter* when a parent in judicial proceedings stands to lose custody of his or her child to the state.

4. State-Funded Legal Counsel is Not Necessary to Provide a Remedy

39. The Appellant argues that the remedy of the provision of state-funded counsel is necessary for a fair hearing to take place in Court on the custody application. (Appellant's Factum at paras. 52, 54, 56, 57, 58 and 65.)

40. As already noted, Courts of Appeal have rejected equating a fair trial with the provision of legal counsel in every case. The essence of the *Rowbotham* principle accepted by the Courts is that provision of legal counsel may be necessary for a fair trial in some cases (see cases cited above in paragraph 36), but is not necessary for a fair trial in all cases.

R. v. Rowbotham, supra at 69-70

41. Where a trial would be unfair and thus violate the principles of fundamental justice, an accused person is entitled to a remedy which is just and appropriate in the

circumstances under s.24(1) of the *Charter*. This does not mean the Court may order the State to fund counsel. Rather, in almost all cases where legal aid is not available and provision of legal counsel is essential to a fair trial, a stay of proceedings is the appropriate and just remedy under s. 24(1) of the *Charter*. That stay may be granted until funds sufficient to engage competent counsel (i.e. usually at the legal aid rate) are provided. Whether a stay is appropriate in child custody applications by the government will depend upon the balancing of interests described in paragraphs 31 to 33 of this Factum.

R. v. Rowbotham, supra at 70

42. In appeals under the *Criminal Code* where legal aid is not available and legal counsel is essential to the fairness of an appeal, s.684 of the *Code* provides the Court with the remedial authority to assign counsel to act on behalf of an accused. The Attorney General is required by the *Code* to pay the fees and disbursements of such appointed counsel.

43. A stay and s.684 of the *Criminal Code* are more than adequate to cover all cases where the state is seeking to incarcerate an accused or otherwise deprive a person of physical liberties (such as detention in a mental health institution or imposition of onerous terms restricting freedom of movement in a probation order).

44. Upon examining the converse situation to that in the previous paragraph, it is submitted that the Court also has authority to grant remedies when required for most conceivable situations where *Charter* rights have been violated. An example of a converse situation is where a person is already in prison and seeks to obtain his or her freedom by means of an application to the Court for a prerogative remedy. Another example of a converse situation is where a person detained in a mental health institution seeks their release by a prerogative remedy or by the statutory process under the mental health legislation.

45. In such situations legal aid is likely to be available to a person in prison seeking an early release where there is a reasonable likely of obtaining that release. As well, in British Columbia, at least, legal aid is available to persons who have been involuntarily committed under the *Mental Health Act* in a hospital or mental health institution.

McCorkell v. Director of Riverview Hospital Review Panel (1993), 81 B.C.L.R.(2nd) 273 (B.C.S.C.) at 275 and 301-302
Mental Health Act, R.S.B.C. 1996, c. 288, s.22

46. If some form of legal aid is not available in these situations the Court has available to it statutory and prerogative remedies such as orders akin to prohibition, *mandamus*, *habeus corpus*, *quo warranto* etc. It is submitted that these further remedies beyond simply granting a stay of proceeding are more than ample to give redress for any potential violation of a *Charter* right to a fair hearing.

47. For example, in *Canada (Attorney General) v. Stuart*, the Court held that it did not have the authority to order payment of counsel who had been appointed for an application to determine an accused's fitness to stand trial under then s.672.24 of the *Criminal Code*. The accused was already in custody, and so a stay of proceedings on the fitness hearing would not have been a just and appropriate remedy. Since that fitness hearing had already taken place with counsel present for the accused, it was not necessary for the Court to make any remedial order. However, Rowles J.A. observed:

> But that would not be a satisfactory *Charter* remedy (i.e. simply staying proceedings) should the accused remain in custody and be unable, without the assistance of counsel, to proceed with a fitness hearing or a judicial interim release hearing. That leaves the alternative of the court granting a temporary stay of proceedings and releasing the accused from custody.
>
> *Canada (Attorney General) v. Stuart, supra* at 160

48. It may be in certain cases that concern for the safety of individuals, the public or even the person who is presently in custody militates against immediately releasing an accused or detained person. In that instance, the Court has the jurisdiction and authority to delay the granting of a *Charter* remedy to allow the government or the Crown time to consider whether the public interest and public safety requires provision of counsel in the circumstances. If the government or Crown decides not to make arrangements to provide counsel (usually through the Legal Aid system) then the Court can proceed to grant whatever remedy is just and appropriate in the circumstances.

49. It is submitted that a Court can fit these kind of situations into the "existing jurisdictional scheme of the Courts" to provide a remedy, as contemplated by s. 24(1). There is no need therefore for special procedures as advocated by the Appellant (i.e., court orders for the provision of state-funded counsel) to give full and adequate effect to the fair hearing component of the principles of fundamental justice contained in s.7 of the *Charter*.

Mills v. The Queen, [1986] 1 S.C.R. 863 at 952-953 and 971-972

5. Ordering State-Funded Counsel Amounts to Legislation by the Courts and has Impermissible Budgetary Implications

50. There are two further reasons why it would inappropriate for the Court to recognize the provision of state-funded counsel as a principle of fundamental justice. First, in the context of this case, the Court would be creating a Legal Aid system which was not provided for by the Legislative Assembly. Second, recognition of the provision of state-funded counsel as a principle of fundamental justice would have profound budgetary implications and possibly result in the Courts making unconstitutional orders for payment out of the Consolidated Revenue Fund.

51. In *Schachter*, the Chief Justice on behalf of the Court discussed the principles for granting remedies where the legislative objective is clear, even though it may violate the Constitution and ultimately fail the test of reasonableness under s.1 of the *Charter*. He said the Court must respect that statement of legislative intent:

> Where the choice of means is unequivocal, to further objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain.
>
> *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 708-709
> See also *Reference Re Section 94(2) of the Motor Vehicle Act, supra* at 498-499

52. The majority in the Court of Appeal below saw the remedy being requested as amending the legislation:

> By allowing the appeal, we would, in our view, be making what is properly a legislative decision. Furthermore, we would be involving the courts in the task of both defining the scope of legal aid and of

> administering it on an ad hoc basis - a task that the courts have heretofore refused.
>
> Case on Appeal at 116

53. Once the Court acknowledges that provision of state-funded counsel to indigent persons or persons who have been denied legal aid is a principle of fundamental justice, that principle cannot be confined to child custody applications. A principle of fundamental justice once defined by the Courts is a "basic tenet" of our judicial system and therefore applicable whenever liberty is infringed or denied. This would occur in all criminal and quasi-criminal cases where incarceration in a penal institute is available as a sentence for commission of an offence, and so state-funded counsel would, it is submitted, be constitutionally required.

54. The Courts do not have authority to make orders which require payment out of the Consolidated Revenue Fund where there is no appropriation. Assuming for the moment that the Legislative Assembly has not passed a legal aid system which extends so far, and assuming that there is no appropriation voted by the Legislative Assembly, then it is submitted recognizing and ordering state-funded counsel as a principle of fundamental justice is clearly an impermissible judicial intrusion into the legislative sphere.

55. In *Auckland Harbour Board v. The King*, the Privy Council recognized that any payment out of the Consolidated Revenue Fund made without parliamentary authority is simply illegal and *ultra vires*. The majority in *Canada (Attorney Genera) v. Stuart* applied that principle to deny an order for payment of counsel:

> My opinion is that, in the absence of express language requiring government to pay counsel who represent an accused pursuant to an order made under s.672.24, the fundamental principle the courts have applied in regard to the expenditure of public funds, as set out in *Auckland Harbour Board v. The King*, *supra*, must be respected.
>
> *Auckland Harbour Board v. The King*, [1924] A.C. 318 (P.C.) at 326-327
> *Canada (Attorney General) v. Stuart, supra* at 160
> See also *Financial Administration Act*, R.S.B.C. 1996, c.138, s.21(1)

56. It is true that the Chief Justice for the Court in *Schachter* recognized that any remedy granted by a Court will have some budgetary repercussions whether it be a saving of money or an expenditure of money. However, with respect, in that case the Court did not turn its mind to the question of whether a Court can order payment out of the Consolidated Revenue Fund where there has not been an appropriation.

Schachter v. Canada, supra at 709

57. It may be that the reference to "budgetary repercussions" in *Schachter* simply confirms that there must be an appropriation since the government's budget legislation does create appropriations. Even then, however, the Court recognizes that its powers are limited and too extensive an impact mitigates against the availability of a remedy:

> In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy, it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.

Schachter v. Canada, supra at 709-710

58. Such is the risk in this case. The intrusion into this sphere could be so substantial as to go beyond the actual statutory scheme set out in the *Legal Aid Act*. Or the intrusion may be so substantial that it goes beyond either the budgetary description in the appropriation for Legal Aid or the amount so appropriated. In each case, it is clear that such a remedy is not appropriate.

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

59. As noted above, the budgetary implications of a conclusion that paid counsel is a principle of fundamental justice could well be "so substantial as to change the nature of the legislative scheme" because of its precedential effect. McClung J.A., speaking for the Court in *R. v. Robinson* recognized this aspect:

> Surely the tax-paying electorate of Canada through their elected representatives should be allowed to debate, reject or priorize the spending demands that would be unleashed by the success of these applications. The courts are hardly the best arbiters of the allocation of Canada's spending resources.

R. v. Robinson, supra at 487

60. As well, in *R. v. Robinson* the Court notes that judicial resources are not limitless. The fact that such resources are scarce is relevant to any determination of how far the Constitution can or should go in preserving and protecting a right to funded counsel in the pursuit of ensuring a right to a fair trial. That is, if an unlimited right to state-funded counsel should interfere with the right of access to the Courts, the latter must surely prevail.

R. v. Robinson, supra at 487

61. These two factors are vividly illustrated in the *Johal* case where counsel were estimating at the time their application was argued that the appeal would last 3 ½ to 4 months. Counsel had been offered but rejected fees in excess of $400,000.00 in total for all counsel for the duration of that appeal. The Chief Justice stated:

> I feel constrained to say, however, that I do not accept counsel's estimates of the time required for the hearing of this appeal, including the motion to adduce fresh evidence. The resources of the court are insufficient to accommodate the estimates mentioned by counsel, or anything close to them.

R. v. Johal, supra at para. 14

D. Section 1 of the *Charter*

63. The Attorney General of British Columbia adopts the submissions of the Attorney General of New Brunswick on s.1 of the *Charter* as set out at paras. 50-81 of his Factum.

PART IV

DISPOSITION

66. The Attorney General of British Columbia respectfully requests that the constitutional questions be answered as follows:

Question No. 1:	No, there is no infringement of s.7 of the *Charter*; and
Question No. 2:	In light of the answer to Question No. 1, there is no reason to answer this question. If it becomes necessary to answer this question, it should be answered Yes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

"Neena Sharma"

GEORGE H. COPLEY, Q.C.
NEENA SHARMA
Counsel for the Intervenor
The Attorney General of British Columbia

DATED this 19th day of October, 1998.

PART V

LIST OF AUTHORITIES