

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR 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

RESPONDENTS

**FACTUM ON BEHALF OF THE RESPONDENTS, THE LAW SOCIETY
OF NEW BRUNSWICK AND LEGAL AID NEW BRUNSWICK**

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CONTENTS

	Page
PART I	FACTS 1
	1. The Domestic Legal Aid Program at the Time of the Present Case 1
	2. The Law Society's Domestic Legal Aid Pilot Project Since the Present Case 3
PART II	ISSUES 6
PART III	ARGUMENT 7
	1. Introduction 7
	(a) The Statutory Scheme 7
	(b) The Development of the Domestic Legal Aid Program 8
	2. Charter Scrutiny, The Legal Aid Act and The Law Society 10
	(a) The Legal Aid Act Does Not Infringe The Charter 11
	(b) The Application of the Charter to the Law Society and Legal Aid New Brunswick 12
PART IV	RELIEF REQUESTED 19
PART V	TABLE OF AUTHORITIES 20
APPENDIX 1	RELEVANT SECTIONS OF THE LEGAL AID ACT 21
 APPENDICES OF CORRESPONDENCE ON DOMESTIC LEGAL AID SINCE THE HEARING OF THE PRESENT CASE BEFORE THE COURT OF APPEAL 23	
A.	May 2, 1997 Provincial Director Legal Aid to Law Foundation with Enclosure 23
B.	July 7, 1997 Law Foundation to Provincial Director Legal Aid 26
C.	Sept 17, 1997 Provincial Director Legal Aid to Legal Aid Staff 28

D.	Oct 14, 1997	Department of Justice to Regional Managers with Enclosure	29
E.	Oct 21, 1997	Provincial Director Legal Aid to Legal Aid Staff	33
F.	Oct 28, 1997	Law Foundation to Provincial Director Legal Aid	34
G.	Nov 3, 1997	Provincial Director Legal Aid to Department of Justice	36
H.	Jan 8, 1998	Department of Justice To Provincial Director Legal Aid	38
I.	Jan 8, 1998	Provincial Director Legal Aid to Law Foundation with Enclosure	39
J.	Mar 4, 1998	Law Foundation to Provincial Director Legal Aid	41
K.	Mar 31, 1998	Provincial Director Legal Aid to Law Foundation with Enclosures	43

PART I

Facts

1. The Domestic Legal Aid Program at the Time of the Present Case

1. The Respondents, the Law Society of New Brunswick and Legal Aid New Brunswick, (hereinafter sometimes jointly referred to as “the Law Society”) accept the facts set out in the Appellant’s Factum. In addition, the Law Society relies on the facts as set out in the Affidavit of Michel Carrier, sworn to on November 17, 1994. (Supplementary Case on Appeal, pp. 1-4 and Exhibits A-M and hereinafter referred to as the “Carrier Affidavit”)

2. By virtue of a grant from the New Brunswick Law Foundation in June 1988, the Law Society implemented a scheme for Domestic Legal Aid and a limited duty counsel service in Family Court. Certificates were to be issued only in cases where applicants alleged physical abuse against spouses, parental sexual abuse, and “snatching” children from the de facto custodial parent. No certificates were to be issued to respondents to defend such allegations. (Carrier Affidavit, § 2)

3. In December 1988 the Law Foundation agreed with the request of the Law Society to expand the certificate program to include parents subject to guardianship applications, but not custodianship applications, by the Minister of Health and Community Services. (Carrier Affidavit, §’s 3-5)

4. In April 1989 the Province of New Brunswick agreed to match the Law Foundation grant and double the budget of the Domestic Legal Aid program to \$500,000.00. Under this expanded program, certificates continued to be issued in guardianship applications by the Minister of Health and Community Services but not custodianship applications. (Carrier Affidavit, §’s 6-7)

5. Budgetary restraints necessitated a further reduction in Domestic Legal Aid services in December 1991 when the Law Society decided to limit certificates to family violence and guardianship applications. (Carrier Affidavit, § 8)

6. The major overhaul of Domestic Legal Aid in April 1993 significantly reduced the Law Society's involvement in the provision of Domestic Legal Aid. Since that time, and up until the hearing of the present case in the New Brunswick Court of Appeal, the only certificates which were provided were in cases of guardianship applications by the Minister of Health and Community Services or for variation of support applications in limited circumstances. All other aspects of Domestic Legal Aid were to be provided by the Minister of Justice under Part II of the *Legal Aid Act*.

7. With respect to paragraph 15 of the Appellant's Factum, the Law Society emphasizes two points. First, the memo from the Department of Justice to potential source referrals for Domestic Legal Aid regarding the overhaul referred to in the preceding paragraph included a "Fact Sheet on Domestic Legal Aid" which stated (Exhibit M to Carrier Affidavit, pp. 73 and 74 of the Supplementary Case on Appeal):

To avoid any potential conflicts of interest for Family Solicitors, legal aid certificates will continue to be available in specific circumstances: To represent parents who are subjects of a **"guardianship application"** by the Minister of Health and Community Services and to represent payors who are seeking variations of support orders when they have been **"found unable to pay"** following an enforcement hearing. Duty Counsel will continue to be available to advise parents in a custody application by the Minister of Health and to respondents in other family matters.

Parents who are Respondents in a Guardianship Application by the Minister of Health and Community Services should continue to apply for legal aid certificates in the area Legal Aid office. Respondents in a Custody Application made by the Minister of Health and Community Services will continue to be provided with access to Duty Counsel at the hearing, and **should not** be referred to the Court Social Worker, or the local legal aid office.

Secondly, it is only in the sense that Legal Aid New Brunswick uses the same administrative staff for its limited Domestic Legal Aid program as the criminal Legal Aid program that the Minister of Justice can be said to fund the former. All certificates for domestic Legal Aid are funded by the Law Foundation with no contribution from government.

2. The Law Society's Domestic Legal Aid Pilot Project Since the Present Case

8. The Appellant has included an Appendix to her Factum entitled "Domestic Legal Aid Program, Chapter 3.0 Policies, Title: 3.5.1, Effective Date: September 22, 1997". (Appellant's Factum, pp. 55-6) It states that Legal Aid Certificates will be available to eligible parents for the first (sic "fist") custodianship hearing, but not subsequent ones, effective September 22, 1997.

Several points are noteworthy about the inclusion of this document:

- a. This policy change was effected subsequent to the decision of the New Brunswick Court of Appeal in the present case;
- b. This policy change was obviously not part of the Case on Appeal nor was it the subject matter of an application for fresh evidence on the within appeal;
- c. No reference to this policy change is included in either Parts I or III of the Appellant's Factum.

9. Notwithstanding the comments of the preceding paragraph, the Law Society takes no objection to the inclusion of the aforementioned "policy change" with respect to the availability of Legal Aid certificates for the first custodianship application by the Minister of Health and Community Services. Since this Honorable Court granted leave to appeal the issues of national importance raised on this appeal, it is our position that the Court should be made cognizant of the status quo with respect to Domestic Legal Aid in New Brunswick on the hearing of this appeal. To this end we submit the additional facts set out hereunder, with accompanying Appendices, on the current situation with respect to the availability of Legal Aid certificates for custodianship applications by the Minister of Health and Community Services.

10. Subsequent to the hearing of the present case before the New Brunswick Court of Appeal, and during the 1996-97 fiscal year, Legal Aid expenditures were significantly under budget and the Law Foundation approved \$50,000 for custodianship applications. By letter dated May 2, 1997, the Provincial Director of Legal Aid requested the approval of the Law Foundation for an increase of \$50,000 for such cases for the 1997-8 fiscal year. (Appendix "A")

11. By letter dated July 17, 1997, to the Provincial Director of Legal Aid, the Law Foundation approved the allocation of funds as requested but warned of the very uncertain future of the financial status of the Law Foundation if economic conditions did not become more favorable. (Appendix "B")

5 12. By letter dated September 17, 1997, to the Administrative Services Officers for Legal Aid, the Provincial Director of Legal Aid set out the expanded scope of the Domestic Legal Aid Program to include "first time" custodianship applications by the Minister of Health and Community Services. (Appendix "C")

10 13. It is in the above context that the "policy change" referred to in paragraph 8, above, was brought into effect and was forwarded by the Executive Director, Court Services Division, to the Regional Managers with her Inter-Office memo dated October 14, 1997 (Appendix "D") which in turn was forwarded by the Provincial Director of Legal Aid to the Legal Aid staff with his correspondence dated October 21, 1997. (Appendix "E")

15 14. By letter dated October 28, 1997, the Law Foundation informed the Provincial Director of Legal Aid of the substantial decline in revenue received by the Law Foundation in order that he might "reflect upon same in your financial planning and any future proposals for funding". (Appendix "F")

15 20 The Law Foundation's letter referred to above was forwarded to the Executive Director, Court Services, Department of Justice, by the Provincial Director of Legal Aid with his correspondence dated November 3, 1997, (Appendix "G"), which included the following paragraph:

25 In addition to the provision of Variation of Support Orders and Permanent Guardianship Orders coverage under the Domestic Legal Aid Program, a number of additional **pilot program areas** have been introduced. These areas, in effect, expanded the scope of the Domestic Legal Aid Program offered by Legal Aid New Brunswick **with the resources provided by the New Brunswick Law Foundation**. It has always been understood that these pilot expansions would only be continued as long as the New Brunswick Law Foundation was able to commit the resources to

5 fund the various components. As it now appears that this funding may be in jeopardy, you may wish to consider **whether or not the Department of Justice is able and willing to continue to fund these Program areas**. I do not want to signal any negative move at this time; only that, if revenues fall, the New Brunswick Law Foundation may have to curtail its funding of some or all of these areas. (Emphasis added)

16. The Executive Director, Court Services Division, replied to the Provincial Director of Legal Aid by letter dated January 8, 1998, (Appendix "H") in which she stated:

10 At this time I would like to **acknowledge, with thanks, the financial support we have received from the Law Foundation for the Domestic Legal Aid Program** over the past years. Their commitment to the Program is appreciated and has been further demonstrated this year by their willingness to support pilot services areas which serve to enhance the delivery of Domestic Legal Aid services in New Brunswick. (Emphasis added)

15 17. By letter dated January 8, 1998, the Provincial Director of Legal Aid advised the Law Foundation of an improved forecast in expenditures for the 1997-8 fiscal year and requested approval of the enclosed proposed budget for 1998-9 which assumed a balance of \$23,868 for the 1997-8 fiscal year end and a \$200,000 grant from the Law Foundation for the 1998-9 fiscal year. (Appendix "I") The Law Foundation funding commitment to Domestic Legal Aid is stated in the
20 "note" to the table enclosed with Appendix I:

25 On September 8, 1995, the Board of Directors of the New Brunswick Law Foundation renewed its commitment to the Domestic Legal Aid Program. The new agreement covers the period from April 1, 1995 to March 31, 2000 and contains the following terms: Payment of 50% of the Foundation's funds available annually for grants OR \$200,000 whichever is the lesser.

18. By letter dated March 4, 1998, to the Provincial Director of Legal Aid, the Law Foundation advised that only \$100,000 had been approved for the 1998-9 fiscal year, and \$50,000 for the 1999-2000 fiscal year. No provision for funding was made beyond the year 1999-2000. (Appendix "J")

19. By letter dated March 31, 1998, to the Law Foundation, the Provincial Director of Legal Aid forwarded four options for consideration by the Law Foundation for the future delivery of Domestic Legal Aid given the decision of the Law Foundation to reduce the grant to Legal Aid. (Appendix “K”)

5 20. This summary of the Law Society’s Domestic Legal Aid Pilot Project brought in since the hearing of the present case before the New Brunswick Court of Appeal is current as of the writing of this Factum. As stated above, §9, it is included solely to ensure that this Honorable Court is aware of the status quo of the Domestic Legal Aid Program in New Brunswick on the hearing of this appeal. It is included, along with Appendices A to K, after consultation with, and with the agreement
10 of, counsel for the Appellant and counsel for the Respondents, the Attorney General of New Brunswick, the Minister of Justice, and the Minister of Health and Community Services.

PART II

Issues

15 21. The constitutional questions stated by the Chief Justice in this case are:

1. 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*?
20
2. 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*?
25

22. The position of the Respondents, the Law Society of New Brunswick and Legal Aid New Brunswick, with respect to the issues raised on this appeal is as follows:

- a. The *Legal Aid Act* does not violate the rights under s. 7 of the Charter of respondents in custodianship applications by the Minister of Health and Community Services.
- b. The refusal of Legal Aid New Brunswick to provide Legal Aid certificates to respondents in custodianship applications by the Minister of Health and Community Services does not violate the s. 7 rights of such respondents under the Charter because the Law Society is not subject to Charter scrutiny because (i) the Law Society is not “government” within the meaning of s. 32 of the Charter in these circumstances, and (ii) the actions of the Law Society in refusing such certificates cannot be characterized as a “governmental” activity within the meaning of s. 32.
- c. If, in these circumstances, there is a breach of the Appellant’s rights under s. 7 of the Charter, it is triggered because of the adversarial nature of the proceedings between a parent and the state where the state is attempting to remove children from the parents and any remedy available to the Appellant is against the state and not the Law Society.

PART III

Argument

1. Introduction

(a) The Statutory Scheme

23. Amendments to the *Legal Aid Act* in 1983 S.N.B. c.46, ss. 2 and 6 included the following current provisions:

3(4) The Provincial Director shall administer the plan in accordance with this Part and the regulations and policies established by the Law Society and, in accordance therewith, may direct the Area Directors concerning the performance of their duties.

12(14) Where the Law Society is of the opinion that the Legal Aid Fund is in danger of being depleted, it may, with the approval of the Minister, issue directions to the Provincial Director limiting the providing of legal aid in matters included in paragraphs (1)(c) - (g) and subsection (2).

5

24. The *Legal Aid Act* was further amended in 1993 S.N.B. c.21, s.20 to allow the Minister of Justice to establish and administer a program to provide Domestic Legal Aid by the addition of Part II which included:

10

24(1) Notwithstanding any other provision of this Act or the regulations, the Minister may establish and administer a program to provide legal aid for persons for proceedings and matters preliminary to anticipated proceedings.

(a) under the *Divorce Act*, (Canada),

15

(b) other than those covered in paragraphs 12(1)(a) to 12(1)(e), in the Court of Queen's Bench of New Brunswick, the Court of Divorce and Matrimonial Causes, the Supreme Court of Canada or the Federal Court of Canada, and

20

(c) of an appellate nature in respect of matters and proceedings described in paragraphs (a) and (b).

(2) The Minister may, for the purposes of subsection (1),

25

(a) employ persons to provide legal aid, or

(b) enter into contracts with persons for the provision of legal aid.

30

(3) Nothing in this section shall be construed so as to oblige the Minister to provide legal aid in respect of which no money has been appropriated by the Legislature.

(4) The Lieutenant-Governor in Council may make regulations respecting the provision of legal aid under this Part.

35

(b) The Development of the Domestic Legal Aid program

25. Prior to April 1993, the Law Society (through the generosity of the Law Foundation as well as a government contribution) provided a limited service in domestic legal aid. It was clear that this

was a limited service from its inception in 1988 (Carrier Affidavit, Exhibit "A", pp.5-8 Supplementary Case on Appeal). Equally clearly the Law Society considered the expansion of the program to include guardianship applications by the Minister of Health and Community Services and chose not to allocate scarce resources to custodianship applications (Exhibits "C", "D" and "E", pp. 11-13 Supplementary Case on Appeal). Guardianship applications survived the reduction to services in December 1991 (Exhibit "J", p. 22, Supplementary Case on Appeal) which remained the status quo until the overhaul in April 1993.

26. Given the limited financial resources to fund legal aid in New Brunswick, the Law Society of New Brunswick did not object in principle to the staff model for the delivery of domestic legal aid proposed by the Government in their report (Exhibit "K", pp. 23- 69, Supplementary Case on Appeal). However, at the March 8, 1994, meeting of Council, the Law Society also expressed concern about, inter alia, the "independence of staff lawyers" and reiterated its view that **social programs such as legal aid should be funded by government.** (Exhibit "L", pp. 70 - 71, Supplementary Case on Appeal)

27. The authors of the report that led to the new regime acknowledged some of the issues raised by the Appellant. It was noted in the "Program Scope" section of their report (Exhibit "K", pp.26-28, Supplementary Case on Appeal) that there was a major concern of lawyers that guardianship applications, but not custodianship applications, were covered. That section of the report concluded:

Limiting aid to Guardianship Applications by the Province while excluding the initial custody applications is ineffective aid to the parents involved.

28. The program brought into effect with the addition of Part II of the *Legal Aid Act* is the one under attack on this Appeal. By virtue of the Law Foundation funding, the Law Society (Legal Aid New Brunswick) provides domestic legal aid for the limited matters referred to above. All other services are to be provided by the program established and administered by the Department of Justice.

2. Charter Scrutiny, The Legal Aid Act and The Law Society

29. The Law Society submits that the Appellant should not succeed against the Law Society in this Appeal for the following reasons. First, even if the Court finds in the circumstances of this case that the *Legal Aid Act* has infringed the Appellant's rights under s.7 of the *Charter*, then the appropriate remedy would be to find the offending sections of the Act to have no force or effect. Secondly, if the Court finds in the circumstances of this case that the government of New Brunswick under its Domestic Legal Aid Program has infringed s.7 of the *Charter* no remedy should be available against the Law Society because the Law Society is not within the scope of "government" for the purposes of this Appeal.

(a) The Legal Aid Act Does Not Infringe the Charter

30. Notwithstanding the first disjunction of Question 1 of the stated constitutional question (Did the failure of the *Legal Aid Act* to provide legal aid to respondents in custody applications constitute an infringement of s. 7 of the Charter?), the Appellant concedes at §81 of the Appellant's Factum (p. 28) that the constitutionality of the Act is not being challenged:

It is not this Act that is being challenged, just the unfairness and the discriminatory nature of the decision to provide legal aid services of some kind in most other domestic cases, but not the present.

31. It is submitted that such a concession is supported by *Eldridge v. British*

Columbia (Attorney General), [1997] 3 S.C.R. 624 where La Forest, J. stated at pp. 650-651:

Assuming that the failure to provide sign language interpreters in medical settings violates s. 15(1) of the Charter in some circumstances, I do not see how the Medical and Health Care Services Act can be seen as mandating that result. The legislation simply does not, either expressly or by necessary implication, prohibit the Medical Services Commission from determining that sign language interpretation is a "medically required" service and hence a benefit under the Act The Act does not list those services that are to be considered benefits; instead, it delegates the power

to make that determination to a subordinate authority. It is the decision of authority that is constitutionally suspect, not the statute itself.

32. Similarly, the *Legal Aid Act* does not, either expressly or by necessary implication, prohibit the provision of legal aid to respondents in custodianship applications by the Minister of Health and Community Services. Indeed, the Appellant concedes this in her argument under s. 1 of the *Charter* where she argues that the limit on the right to counsel is not prescribed by law because the *Act* does not expressly (§87, p. 29), or by necessary implication (§89, p. 29), preclude the granting of legal aid in such circumstances.

(b) The Application of the Charter to the Law Society and Legal Aid New Brunswick

33. The *Charter* is essentially an instrument for checking the powers of government over the individual. The scope of the *Charter's* application is set forth in s. 32(1):

32(1) This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

34. In order for the Appellant to seek a remedy against the Law Society of New Brunswick, the actions of the Law Society which are being challenged would have to be classified as “governmental action” for the purposes of s. 32. The Respondent submits that the Law Society is not part of the government and its actions in the circumstances of this Appeal are the actions of a private entity and not subject to *Charter* scrutiny.

35. As La Forest, J. explained in *Eldridge v. British Columbia (Attorney General)*, above, there is no question that the *Charter* applies to provincial legislation. At p. 644, La Forest, J. enumerates the two ways in which it applies.

5 First, legislation may be found to be unconstitutional on its face because it violates a Charter right and is not saved by s.1. In such cases, the legislation will be invalid and the Court compelled to declare it of no force or effect pursuant to s. 52(1) of the Constitution Act, 1982. Secondly, the Charter may be infringed, not by the legislation itself, but by the actions of a delegated decision-maker in applying it. In that case, the legislation remains valid, but
10 a remedy for the unconstitutional action may be sought pursuant to s.24(1) of the Charter.

36. The actions of the Law Society when exercising statutory authority under the *Legal Aid Act* must be distinguished from its private actions. The Respondent submits that the Law Society is not exercising its statutory authority under the *Legal Aid Act* when issuing legal aid certificates for
15 guardianship orders.

37. It is first necessary to trace the sources of legal aid funding in order to illustrate how the Law Society's actions in the circumstances of this Appeal are not "governmental" for the purpose of any *Charter* remedy.

38. Under s. 7 of the *Legal Aid Act*, money is appropriated by the Legislature to establish a
20 Legal Aid Fund for all money to be paid to the Law Society by **Part I** of the Act.

7(1) The Law Society shall

(a) establish in a chartered bank or federally incorporated trust company a fund to be known as the Legal Aid Fund into which shall be paid all money appropriated by the Legislature for legal aid and all money directed or

authorized to be paid to the Law Society by this Part and the regulations...

7(3) The money appropriated by the Legislature for the purposes of this Part shall be paid out of the Consolidated Fund.

39. Section 12(1) of the *Legal Aid Act* gives authority to the Provincial Director and the Law

5 Society to determine what matters may be covered under the Act:

12(1) Subject to the directions of the Provincial Director and policies established by the Law Society, an area director may issue legal aid certificates authorizing legal aid for proceedings and matters preliminary to anticipated proceedings

10 (a) in respect of an offence under an Act of the Parliament of Canada or in respect of the *Extradition Act*, chapter E-21 of the Revised Statutes of Canada, 1970 or the *Fugitive Offenders Act* chapter F-32 of the Revised Statutes of Canada, 1970,

(b) in respect of an offence under an Act of the Legislature,

15 (c) before an administrative tribunal established by an Act of the Legislature or of the Parliament of Canada,

(d) in bankruptcy,

(e) under the *Divorce Act*, chapter D-8 of the Revised Statutes of Canada, 1970, or the *Divorce Act, 1985*, chapter 4 of the Statutes of Canada, 1986,

20 (f) other than those covered in paragraphs (a) to (e), in the Court of Queen's Bench of New Brunswick, the Court of Divorce and Matrimonial Causes, the Provincial Court, the Probate Court of New Brunswick, the Supreme Court of Canada or the Federal Court of Canada, and

25 (g) of an appellate nature in respect of matters and proceedings described in such of paragraphs (a) to (f) as are in force.

12(2) With the prior approval of the Provincial Director, an area director may, in his discretion, issue a legal aid certificate authorizing legal services, other than those associated with judicial and administrative proceedings, that are customarily within the scope of the professional duties of a barrister and

solicitor, including drawing documents, negotiating settlements and giving legal advice.

40. The Law Society is also expressly authorized by the Act to limit the provision of legal aid in all circumstances other than those itemized in paragraphs 12(1)(a) and (b) above. Such limitations are defined in s.12(14):

5 **12(14)** Where the Law Society is of the opinion that the Legal Aid Fund is in danger of being depleted, it may, with the approval of the Minister, issue directions to the Provincial Director limiting the providing of legal aid in matters included in paragraphs (1)(c) to (g) and subsection (2).

10 41. The 1993 amendment, adding Part II to the *Legal Aid Act*, authorized the Minister of Justice to establish and administer a program to provide civil legal aid. The scope of that legal aid is set out in s. 24(1), cited above at §24, and reproduced here for convenience:

15 **24(1)** Notwithstanding any other provision of this Act or the regulations, the Minister may establish and administer a program to provide legal aid for persons for proceedings and matters preliminary to anticipated proceedings

 (a) under the *Divorce Act*, (Canada),

 (b) other than those covered in paragraphs 12(1)(a) to 12(1)(e), in the Court of Queen's Bench of New Brunswick, the Court of Divorce and Matrimonial Causes, the Supreme Court of Canada or the Federal Court of Canada, and

 (c) of an appellate nature in respect of matters and proceedings described in paragraphs (a) and (b).

20 42. As s. 24 (1) (b) makes clear, the Minister of Justice has the statutory authority to provide civil legal aid for, among other things, proceedings in the Court of Queen's Bench of New Brunswick, a category which would include both custody and guardianship 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.

43. The addition of Part II to the Act, combined with the inadequacy of monies within the Legal Aid Fund, has effectively resulted in the following situation:

1. Criminal legal aid is provided by the Law Society of New Brunswick through government funding under the plan name of Legal Aid New Brunswick, as authorized by Part I of the *Legal Aid Act*.
2. Civil legal aid is provided by the Minister of Justice according to ss. 23 and 24 of the *Legal Aid Act* with the Law Society partially, and voluntarily, filling in the gaps as funding from the Law Foundation permits.

44. The Minister, although empowered to do so under the *Legal Aid Act*, has chosen not to provide legal aid under Part II for custody or guardianship applications. Legal aid is not provided in guardianship applications by the Minister because of the possibility of a conflict of interest. The Law Society has partially filled this gap by funding legal aid certificates for guardianship applications, and subsequent to the hearing of this case before the New Brunswick Court of Appeal, a pilot project for custodianship applications. (§'s 8-19, above)

45. It is important to distinguish the Law Society's actions in providing legal aid certificates under the statutory authority of Part I of the *Legal Aid Act* from the Law Society's actions in providing legal aid for guardianship applications. In the former instance, the Law Society is acting under the delegated authority of the Act, it is distributing government money, and it is expressly permitted by the Act to limit the provision of legal aid to criminal proceedings.

46. On the other hand, the Law Society's actions in providing legal aid for guardianship applications is not undertaken because of any delegated governmental or statutory authority. The Law Society has recognized an existing need because the Minister has elected not to provide legal aid for guardianship applications due to a potential conflict of interest. The Law Society on its own initiative, and as a result of grants from the Law Foundation, has provided funding in those circumstances.

47. The mere fact that the Law Society, on its own initiative, has performed what may be termed a “public function” is not sufficient to bring it within the purview of “government” for the purposes of s.32 of the *Charter*. As La Forest, J. stated in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at 269, a public purpose test is inadequate and is simply not the test mandated by s.32.

5 La Forest, J. approved the following passage from Wellington, “*The Constitution, the Labor Union and Governmental Action*” (1961), 70 Yale L. J. 345, at 374, in relation to the United States Constitution:

10 The easy conclusion, shared by too many “bold thinkers”, that “whenever any organization or group performs a function of a sufficiently important public nature, it can be said to be performing a governmental function and thus should have its actions considered against the broad provisions of the Constitution” is wrong. Like most easy conclusions about most hard governmental problems it lacks the institutional feel. Perhaps there are private groups in society to which the Constitution should be applied. But one thing is clear: that conclusion should depend on more than an awareness that the group commands great power or performs a function of an important public nature.

15

48. La Forest, J. revisited this theme in *Eldridge v. British Columbia Attorney General*, above, at 660 - 661:

20 Two important points must be made with respect to this principle. First, the mere fact that an entity performs what might loosely be termed a “public function”, or the fact that a particular activity may be described as “public” in nature, will not be sufficient to bring it within the purview of “government” for the purposes of s. 32 of the Charter. Thus, with specific reference to the distinction between the applicability of the Charter, on the one hand, and the susceptibility of public bodies to judicial review, on the other, I stated as follows, at p. 268 of *McKinney*:

25 It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, **but this does not in itself make them part of government within the meaning of s. 32 of the Charter....**In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers. [Emphasis added.]

30

In order for the Charter to apply to a private entity, it must be found to be implementing a **specific** governmental policy or program. As I stated further on in *McKinney*, at p.269, “[a] public purpose test is simply inadequate” and “is simply not the test mandated by s. 32”.

35

In the present case, the Law Society cannot be said to be implementing a specific government policy or program. It is simply attempting to provide some assistance, limited by the financial resources of the Law Foundation, to the inadequate Domestic Legal Aid program instituted by the government.

49. La Forest, J. continued as follows at pp. 661-662 of *Eldridge*:

5 The second important point concerns the precise manner in which the
Charter may be held to apply to a private entity. As the case law discussed
above makes clear, the Charter may be found to apply to an entity on one of
10 two bases. First, it may be determined that the entity itself is “government”
for the purpose of s. 32. This involves an inquiry into whether the entity
whose actions have given rise to the alleged Charter breach can, either by its
very nature or in virtue of the degree of governmental control exercised over
it, properly be characterized as “government” within the meaning of s. 32(1).
15 In such cases, all of the activities of the entity will be subject to the Charter,
regardless of whether the activity in which it is engaged could, if performed
by a non-governmental actor, correctly be described as “private”. Second, an
entity may be found to attract Charter scrutiny with respect to a particular
activity that can be ascribed to government. This demands an investigation
20 not into the nature of the entity whose activity is impugned but rather into the
nature of the activity itself. In such cases, in other words, one must scrutinize
the quality of the act itself, rather than the quality of the actor. If the act is
truly “governmental” in nature - for example, the implementation of a
statutory scheme or a government program - the entity performing it will be
subject to review under the Charter only in respect of that act, and not its
other, private activities.

25 50. When the Law Society provides legal aid for guardianship orders it is not implementing
a specific statutory scheme or a government program. The Law Society is not in any way following
the dictates of the government in the providing this service. The Law Society acts purely on its own
initiative and, in our submission, in the finest traditions of an independent bar. The Law Society’s
actions in these circumstances cannot be classified as “governmental” actions. The Law Society is
30 a private entity undertaking a private action serving a public purpose when it provides legal aid
certificates for guardianship orders. Although the Law Society may be providing a public benefit,
its actions are not open to *Charter* scrutiny in these circumstances and a remedy against it under s.24
is not appropriate.

51. Having obtained a grant from the Law Foundation for that limited purpose, the Law Society has provided a limited Domestic Legal Aid program with scarce resources. There is nothing in the Appellant's Factum to support the position that any conduct of the Law Society or Legal Aid New Brunswick has violated s.7 of the Charter. Furthermore, no authority has been provided to support the position that this Court should order the Law Society of New Brunswick or Legal Aid New Brunswick to provide counsel under either s. 24(1) of the Charter or any common law power.

52. Even if it could be said (where it is the Respondent, the Minister of Health and Community Services who is initiating the proceeding) that the administration of the domestic legal aid program by the Government violates s.7 of the Charter, such a finding cannot be made against the Law Society or Legal Aid New Brunswick in these circumstances. A declaration here would in effect be punishing the Law Society for attempting to help alleviate a difficult situation in difficult fiscal times. In other words (and in the context of the alleged obligation of the Law Society to provide counsel), voluntarily becoming involved in such efforts (for which there is no legal obligation to even participate) cannot form the basis of charter violations which provide a remedy which, in effect, orders a greater contribution.

53. Having been served originally with the within Notice of Motion in the Court of Queen's Bench, the Law Society filed Michael Carrier's Affidavit to provide the Court with background material. The position of the Respondents, the Law Society of New Brunswick and Legal Aid New Brunswick, is simply that there are no Charter violations attributable to it in these proceedings and none of the relief requested against it is available at law.

54. Indeed, the whole analysis of s. 7 of the Charter, and the remedy available to the Applicant, contained in the dissent in the Court of Appeal of New Brunswick (Case on Appeal, pp.118-159) proceeds on the basis of a dispute between the citizen and the state. The dissent makes no finding against the Respondents, the Law Society of New Brunswick or Legal Aid New Brunswick. In short, if s. 7 is triggered in these circumstances it is because of the adversarial nature of the proceedings between a parent and the state in circumstances where the state is attempting to

remove children from their parents. If there is a s. 7 violation in these circumstances, it is occasioned by the actions of the state and not the Respondents, the Law Society of New Brunswick and Legal Aid New Brunswick. If there is a remedy available to the Appellant in these circumstances, it is against the state and not the Respondents, the Law Society of New Brunswick and Legal Aid New Brunswick.

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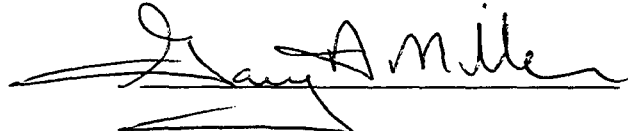
PART IV

Relief Requested

55. It is submitted that the Appeal against the Respondents, the Law Society of New Brunswick and Legal Aid New Brunswick, be dismissed.

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ALL OF WHICH is respectfully submitted this 18th day of August, 1998.



GARY A. MILLER

Counsel for the Respondents,
the Law Society of New Brunswick
and Legal Aid New Brunswick

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PART V

TABLE OF AUTHORITIES

	Page
<i>Eldridge v British Columbia (Attorney General)</i> , [1997] 3 SCR 624	11,12-13,17-18
<i>McKinney v. University of Guelph</i> , [1990] 3 SCR 229	16-17