New Brunswick (Minister of Health and Community Services) v. G.(J.): En Route to More Equitable Access to the Legal System

Patricia Hughes
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PATRICIA HUGHES

I. INTRODUCTION

In G.(J.), the Supreme Court of Canada established that parents are constitutionally entitled to legal representation in child protection proceedings if legal representation is necessary for a fair proceeding. On the one hand, it contains the potential for greater access to the legal system by individuals seeking legal aid in civil cases. On the other hand, the (then) Chief Justice's own summary reflects the limits of the decision:

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When government action triggers a hearing in which the interests protected by s.72 of the Canadian Charter of Rights and Freedoms are engaged, it is under an obligation to do whatever is required to ensure that the hearing be fair. In some circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the parent, the government may be required to provide an indigent parent with state-funded counsel. Where the government fails to discharge its constitutional obligation, a judge has the power to order the government to provide a parent with state-funded counsel under s.24(1) of the Charter through whatever means the government wishes, be it through the Attorney General’s budget, the consolidated funds of the province, or the budget of the legal aid system, if one is in place.3

In short, if an interest is protected by section 7 – and this is determined by a rather torturous parsing exercise – then perhaps someone involved in a civil matter which involves direct government intervention will be entitled to legal representation at the hearing.

Although all the judges agreed that parental rights are protected by section 7 and that under certain circumstances, parents subject to child protection applications are entitled to legal aid, they divided to some extent in their reasons and, perhaps more importantly, in their perceptions of impact of the decision.4 The majority of judges, in an opinion written by Lamer C.J., while acknowledging the legitimacy of Ms G.’s claim, frame their reasons narrowly, particularly in contrast with those underlying the minority opinion.5

G.(J.) reinforces the individualized approach to determining entitlement to legal counsel which ignores the crucial role law plays as a system which includes some people and excludes others in Canada. Gaining access to the legal system in order to enforce rights is, I suggest, one indicium of contemporary citizenship. Law is pervasive in Canadian society and those who can mediate the structure of legal rules and policies which govern the distribution of goods and benefits and the web of rights and obligations which govern the relations between government and citizens and citizen and citizen are at a significant advantage.

2. Section 7 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.” In earlier cases, while some judges made a determination about the meaning of these sections, these determinations were not necessary to the decisions because the majority of judges concluded that any infringement of the right was in accordance with the principles of fundamental justice. The most significant of these cases is B.(R.) v. Children’s Aid Society of Metropolitan Toronto, which features prominently in G.(J.) at all levels: [1995] 1 S.C.R. 315. It is discussed below.

3. S.C.C. decision, supra note 1, at 131.

4. The Charter violation arises from the actions of a delegated decision-maker, the Law Society, which used its discretion to not fund custody applications, even though the Legal Aid Act did not expressly exclude provision of counsel in these cases: ibid. at 158.

5. The majority reasons were those of the Chief Justice and Cory, Major, Gonthier, Binnie JJ and McLachlin J (as she then was). In addition, a minority of judges, L'Heureux-Dubé, Gonthier JJ. and McLachlin JJ. considered section 15’s application to the circumstances raised by these facts.
We cannot ignore, however, that J.G.'s success in her challenge to one self-contained aspect of New Brunswick's legal aid plan has resulted in restrictions on the capacity of government to define the scope of its provision of non-criminal legal aid services. As a result, constitutionally there are some civil matters (child protection applications, at least) for which governments must provide counsel, where criteria derived from the criminal cases are satisfied. In other words, there is not an "absolute" right to counsel, even if the applicant satisfies financial criteria for legal aid; rather the trial judge will decide whether a parent requires legal representation in order to have a fair hearing.

After outlining the factual and statutory framework of the case, I discuss the reasoning in some detail, particularly the approach to section 7. I compare the model developed by the Court to determine when indigent parents are entitled to legal representation to that applied in the criminal cases. This leads me to a consideration of the implications of the decision's utility in extending the entitlement to legal counsel in the civil context; in short, this portion of the discussion considers the parameters of the constitutionalization of the right to civil legal aid. Finally, I suggest an alternative method of interpretation of section 7 of the Charter and an alternative approach to the characterization of legal representation as a means of access to the legal system.

II. THE CONTEXT

A. J.G.'s Experience

J.G. is the mother of three children, living in New Brunswick. The Minister of Health and Community Services had obtained a six month custody order for her children at the end of April 1994 (the children having been placed in care in November 1993) and in October 1994 was seeking an extension of the order for another six months. Ms G.'s friend had helped her during the two-day hearing into the first application for custody. This time she wanted a lawyer to represent her in the hearing, but when she applied to New Brunswick's legal aid program, she was rejected because the New Brunswick plan did not provide legal aid for parents subject to custody applications by the Minister, regardless of the parent's financial need. It offered only the advice of duty counsel prior to going into court. The father of one of the children was able to hire a lawyer to present his views; the children also had a lawyer (appointed at the direction of the trial judge) to represent their interests directly; and, of course, the Minister's case was presented by a lawyer. Ordinarily, someone in Ms G.'s position would be without equivalent representation at a hearing where the Minister sought to take custody of her children, even though she was the parent with whom the children lived. In this instance, however, the lawyer who had been duty counsel, Thomas Christie, acted pro bono for Ms G. in the custody hearing, without prejudice to her challenge.

6. In a different way, this is also the effect of the Winters decision released by the Court a few days after G.(J.). A case of statutory interpretation rather than constitutional standards, it nevertheless also restricted the ability of government to decide exactly who should receive legal aid under what circumstances. Winters v. Legal Services Society (British Columbia) (1999), 177 D.L.R. (4th) 94 (S.C.C.).

7. Mr. Christie continued to act for J.G. at each level. J.G. was awarded solicitor-client costs by the Supreme Court, with respect to proceedings in that Court and the courts below.
to the plan. The trial judge, Athey J., extended the order as requested by the Minister. By the time the Court of Appeal heard the case in May 1996, Ms G. had once again gained custody of her children: they had been returned to her in June 1995.

For Ms G., the hearing to deal with the extension of custody held dire implications. She was aware that the Minister’s success in this temporary wardship application could have serious ramifications for any future guardianship application and the potential for permanent separation from her children. As she said in her affidavit on her motion for counsel, “since I am only a party because the Minister feels I cannot provide adequately for my children, my lack of legal representation will result in the Court deciding the matter without my having a fair opportunity to challenge the Minister’s claims.”

B. Child Protection and Legal Aid: The Legislative Schemes

1. Child Protection

The authority of the Minister of Health and Community Services to seek custody or guardianship of children, found in New Brunswick’s Family Services Act, is circumscribed by procedural safeguards: the parent is to be told immediately about the action and the reasons for it; the Minister must decide whether to release the child, make an agreement about the child’s care with the parent or apply for an order within a specified time; and a hearing is to be held and an order issued within particular time limits. Subsection 53(2) of the Family Services Act directs the judge “at all times [to] place above all other considerations the best interests of the child.” The judge may transfer “the custody, care and control of the child to the Minister for a period of up to six months” and may extend an order “for additional periods of up to six months each, up to a maximum of twenty-four consecutive months.” Thus a parent could lose her children for up to two years without having had a proper opportunity to defend herself against the claims made by the Minister about her capacities as a parent or to present the reasons she believed that the children’s best interests lay with staying with her.

2. Legal Aid

Legal aid in New Brunswick is provided through a combination of certificates, staff solicitors and duty counsel. It has, as the majority of the New Brunswick Court of Appeal commented, “very limited scope.” The trial judge was more direct:

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8. In addition to her Charter challenge to the plan, Ms G. also unsuccessfully sought an order directing the Minister to provide her with sufficient funds to cover reasonable fees and disbursements of counsel with respect to the custody hearing.

9. Trial decision, supra note 1, at 276.


11. See in particular sections 51 to 54 of ibid. Although there was no challenge to the Family Services Act, the majority in the New Brunswick Court of Appeal decided that “the provisions of the Family Services Act when complied with, as was done in this case, ‘ensure reasonable compliance with constitutional standards’ and therefore warrant our deference:’” Appeal decision, supra note 1, at 358.

12. Family Services Act, supra note 10, ss.55(1),(2).

13. Appeal decision, supra note 1, at 356. They believed, however, that it was not their function to
It has been my observation from hearing child protection applications and from reading reported decisions that numerous Respondents in such proceedings face many challenges: poverty, single parenthood, economic and social disadvantage and limited education. I have also observed that some of these parents have themselves been the victims of abuse or neglect or have not had role models in their youth.

In its Proposed Model for Domestic Legal Aid, November 9, 1992, Research and Planning Branch, New Brunswick Department of Justice said: “This province is committed to the principle of access to justice. All individuals, regardless of economic means, must have the right to fair and equal access to the justice system.” In my view this policy statement 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.

One lawyer interviewed in a study of New Brunswick’s legal aid system described the plan as “like putting a band-aid on a heart attack” and another commented that “[w]e’re subsidizing a substandard practice of law [which] creates more apprehension and disrespect for the law among the public.”

The Law Society has the authority to establish and administer a legal aid plan (called Legal Aid New Brunswick). Section 12 of the Act lists the proceedings and preliminary matters for which legal aid certificates may be issued; these include federal and provincial offences, matters before federal and provincial administrative tribunals, bankruptcy, matters under the Divorce Act and matters before New Brunswick and federal courts, including appeals of any matters which could originally be covered by legal aid. As a matter of practice, only persons charged with a criminal offence (federal or provincial) will receive legal aid under this component of the plan.

address this question: “the extent of domestic legal aid is a legislative policy making function and not a Charter question,” subject to appropriate monitoring by the courts; this monitoring may be more stringent in criminal justice matters than in cases involving social legislation: ibid., citing McKinney v. University of Guelph, [1990] 3 S.C.R. 229 and RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, per La Forest J. in each case. The distinction between criminal and social matters was made in Irwin Toy where it related to the level of scrutiny under section 1: Attorney General of Quebec v. Irwin Toy, [1989] 1 S.C.R. 927. Among other comments by judges of the Supreme Court on the proper judicial role, the majority cite L’Heureux-Dubé J. in R. v. Prosper, [1994] 3 S.C.R. 236: “[T]he scope of services available through Legal Aid is generally not, in my opinion, for the courts to decide. The proper allocation of state resources is a matter for the legislature. In its choice of measures, given limited resources, a legislature may prefer to fund victims of crime rather than accused persons or vice versa – or may wish to reduce rather than increase Legal Aid funding … ”

14. Trial decision, supra note 1, at 284.
15. LEAF-NB, Access to Justice in New Brunswick: The Adverse Impact of Domestic Legal Aid on Women (September 1996) 24. The author had a role in the production of this study.
16. Legal Aid Act, R.S.N.B., c. L-2, s.2.
17. Certain conditions must be met: for example, the area director cannot issue a certificate for a summary offence unless there is “a likelihood of imprisonment or loss of means of earning a livelihood upon conviction,” mitigation of penalty is possible or “because of extraordinary circumstances, it is in the interests of justice that the applicant be represented by counsel.” Also see section 38 of Regulation 84-112 under the Legal Aid Act (O.C.84-497).
Despite the ostensibly broad provisions of the Legal Aid Act, as already indicated, the only civil matters for which legal aid is available in New Brunswick are those related to the family, primarily private custody, support and limited property applications and child protection applications by the Minister of Health and Community Services. As of 1993, the Minister of Justice began to administer the domestic legal aid program through a staff model. Since 1991, the major criterion in private family cases has been whether the applicant has experienced violence in the domestic relationship; the exception is that anyone requiring assistance for support orders can obtain it from the Family Solicitor. While financial eligibility is formally a criterion, in practice it appears not to be an issue and, in fact, some lawyers have said that they would prefer that the financial criterion be reimposed. Applicants are screened by the Court Social Worker. The Family Solicitor gives advice and represents the applicant in court with respect to interim and regular applications for support or custody, exclusive possession of the matrimonial home and restraining orders. Although it is possible to obtain assistance for division of property, this will occur only when the application is “routine.” In addition, where there is no violence involved, the Court Social Workers may mediate separation or divorce (and write an agreement where appropriate for review by the Family Solicitor) and in these cases, the Family Solicitor may also represent one of the partners in a support application. Persons who need representation to defend themselves in an enforcement hearing for non-payment of support will be able to obtain a legal aid certificate if they meet the financial criteria and in these cases, the recipient spouse or parent will be able to obtain assistance from the Family Solicitor. In private family matters, therefore, there is a minimal service which means that often the issues relating to family breakup will have to be treated separately because some are covered by legal aid and some are not.

With the exception of “payors” of support, these matters are dealt with through the heavily-burdened staff lawyer system, with the assistance of the Court Social Worker. In order to avoid conflict, however, legal aid in guardianship applications has been provided by Legal Aid New Brunswick which provides certificates to eligible parents. Until shortly prior to the Supreme Court’s granting of leave in G.(J.), the provision of legal aid in child protection cases was limited to guardianship applications and was not available for custody applications, for which the only assistance was duty counsel advice prior to the hearing. Coverage for Ministerial custody applications was excluded pursuant to the Law Society’s discretion to remove specified kinds of claims from coverage under the plan, as permitted under subsection 12(14) of the Legal Aid Act. The legal aid plan now makes funded counsel available for a first custody

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18. The Law Society may appoint lawyers to provide legal aid “on terms approved by the Minister [of Justice]:” s.4.1, Legal Aid Act, supra note 16.


20. The plan sets up both criminal and civil duty counsel panels. Under section 58 of the Legal Aid Act, duty counsel are available in each judicial area (there are eight) and anyone charged with an offence, wanting bail or prior to an appeal may seek their advice, even if they have not been issued a certificate.

21. Subsection 12 (14) reads: “Where the Law Society is of the opinion that the Legal Aid Fund is in
application, but not for subsequent applications. Since Ms G. was in fact the respondent in an application for an extension of a custody order, she would not have been eligible for state-funded counsel even under the new arrangements.

III. A STEP AT A TIME: NOT TOO Far AND NOT TOO FAST

A. There’s Moot … and There’s Moot

Not only had Athey J. determined the custody application before she decided the motion to appoint counsel, but also J.G. had been represented by a lawyer at the custody hearing. In short, the issue was moot. As Lamer C.J. said, when the case reached the Supreme Court, there was “no ‘live controversy,’” “[t]he tangible and concrete dispute has disappeared, and the issue has become academic.”

Athey J. decided the motion to appoint counsel because the parties had agreed it “would not be considered moot.” By the time it reached the Court of Appeal in May 1996, Ms G.’s children had been returned to her, but the Court exercised its discretion to hear the appeal because of “the importance of the issue.”

The Supreme Court considered the mootness issue more fully. As Lamer C.J. explained, a well-developed case on this issue was unlikely to come before them again, since it is in the nature of the circumstances that a parent denied legal aid would be unable to hire counsel to raise the Charter issue on appeal; given the slow pace of the legal system, most cases would be moot before they could reach the highest level; and finally the Court was dealing with a “real” issue and not an abstract issue (there were real facts and there had been a real dispute).

Furthermore, Lamer C.J. characterized the case as being of national importance and said that it was desirable to provide guidelines for the future. Because of the Court’s willingness to hear a “moot” case, and particularly because of its recognition of the implications of its decision for the future, one had reason to expect a broader analysis of the nature of constitutional domestic or civil legal aid obligations than the Court actually developed.

B. The Scope of Section 7: Painful Parsing

The interpretation given to section 7 by the Supreme Court advances both the recognition of parental rights and availability of legal aid. Nevertheless, it reflects the
on-going conflict between a liberal and relatively strict interpretation of the section. J.G. argued that section 7 includes the right of a parent to bring up her children and that deprivation of her children without her having a fair opportunity to make her case would be a breach of the principles of fundamental justice; in order to have a fair opportunity to make her case, she needs legal representation and since she cannot afford a lawyer, she requires state-funded counsel. The lower courts, relying in different ways with different results on B.(R.) v. Children's Aid Society of Metropolitan Toronto, address this issue as a liberty interest; at the Supreme Court, however, the case was decided on the basis of the security interest.

Athey J., relying on La Forest J.'s comments in B.(R.), concludes that "[i]t is thus arguable that when the state removes children from the care of their parents, the parents' liberty interest is implicated." Therefore, removal of a child from a parent who does not have a lawyer at the protection proceedings might constitute a breach of the principles of fundamental justice, but not necessarily, depending on the circumstances. Ms G., she concluded, was capable of stating her case adequately: "[t]here 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."

The majority in the Court of Appeal took a cautious approach to section 7, preferring to follow the opinion of Lamer C.J. because he "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." They concluded, therefore, "that his clear and unequivocal reasons should be followed, at least until that Court rules to the contrary." As a result, they held that the liberty interest does not encompass parental rights in child protection proceedings.

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27. Trial decision, supra note 1, at 281. B.(R.) concerned whether a child could be given medical treatment against the wishes of her parents, Jehovah's Witnesses. La Forest J. spoke for himself and three other judges in finding that parental rights were encompassed by the liberty interest, but that there had been compliance with the principles of fundamental justice; three judges held that while liberty might include the right of parents to make certain kinds of decisions for their children, it did not encompass the right to withhold necessary medical treatment (that is, the right to endanger their children); Lamer C.J. stated that the liberty interest did not encompass parental rights of any kind; and Sopinka J. declined to address the liberty issue because he also concluded that the principles of fundamental justice had been met: supra note 2.

28. Trial decision, ibid. at 282.

29. Ibid. at 283. Lamer C.J. stated that Athey J. had applied too low a standard by, in effect, applying the test for determining competence to stand trial: S.C.C. decision, supra note 1, at 154.

30. They also referred to two other Supreme Court decisions in support of this position: one in which L’Heureux-Dubé J., for a unanimous Court, held that a claim for damages for wrongful death is effectively a claim that the Charter protects "the right to maintain and continue a parent-child relationship" which does not fall within the liberty interest: August v. Gosset, [1996] 3 S.C.R. 268; and the second in which La Forest J. stated, again for a unanimous Court, that section 7's liberty interest arises only when there is a possibility of imprisonment: R. v. Richard, [1996] 3 S.C.R. 525. Although they refer to this point, they do not make anything of the fact that L’Heureux-Dubé J. was distinguishing this claim from "a right to make decisions concerning her son's education and health," not treating the two as synonymous. The issue in Richard was whether an automatic conviction for failure to pay a traffic ticket attracted the liberty interest; the Court held it did not because the penalty
Rather than emphasize that one judge, albeit the Chief Justice, denied a parental liberty interest, as did the majority, Bastarache J.A. (as he then was\(^3\)), dissenting in the Court of Appeal, emphasized that “[n]o clear majority exists on the question of the applicability of s.7 to parental control” and proceeded to fill the vacuum.\(^3\) While concluding that it is unlikely that “liberty” in section 7 will be broadly interpreted, he observed that the broadest interpretation it has been given has occurred in family law cases and “in those cases, the ‘liberty’ interest in question is akin to that found in criminal law cases.” In these cases, children are detained by the state, a situation which “is as valid an exception to the general application of s.7 to the criminal law as those ... cited by Lamer, C.J. in \(B.(R.)\) ... referring to the civil processes for restraining mentally disordered persons or isolating contagious persons.”\(^3\)

In essence, this is the approach taken by the Supreme Court of Canada, except that Lamer C.J. finds the right in security of the person and not in the liberty component of section 7. Because his analysis is premised on his consideration of section 7 in \(B.(R.)\) and on an avoidance of the confusion in that decision, it is worth a short detour to examine that case in order to obtain a better understanding of the thinking in \(G.(J.)\).

\(B.(R.)\) was not about legal aid, but about the right of parents to decide whether their child should receive medical treatment considered necessary to the child’s health and even survival. Baby Sheena, born prematurely, received medical treatment with the consent of her parents, Jehovah’s Witnesses. When the attending doctors concluded that Sheena required a blood transfusion, possibly to save her life, her parents objected and the Children’s Aid Society of Metropolitan Toronto obtained a 72-hour wardship, subsequently extended for 21 days after the opportunity for a full hearing. Eventually Sheena did have a blood transfusion.\(^3\) Although all the judges held that the intervention contravened neither freedom of religion nor section 7, they disagreed on where the parental interest was located, if at all.

In \(B.(R.)\), the Chief Justice took a deferential approach: while agreeing that the Charter must be given a large and liberal interpretation, he said that “[t]he flexibility of the principles it expresses does not give us authority to distort their true meaning and purpose, nor to manufacture a constitutional law that goes beyond the manifest intention of its framers.”\(^3\)

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\(^{31}\) By the time the Supreme Court heard the appeal from the Court of Appeal’s decision, Mr. Justice Bastarache had been appointed to the highest court. He did not, of course, sit on \(G.(J.)\).

\(^{32}\) Appeal decision, supra note 1 at 368.

\(^{33}\) Ibid. at 365.

\(^{34}\) Sheena’s parents did not actually object to the intervention in principle, but to the procedure by which it occurred; they unsuccessfully proposed a process which they believed would conform to Charter requirements.

\(^{35}\) \(B.(R.)\), supra note 2 at 337. In contrast, in \(Re B.C. Motor Vehicle Act\), decided before \(B.(R.)\), the Chief Justice interpreted section 7 to encompass substantive due process, despite the manifest intention of the framers as revealed in the Proceedings of the Special Joint Committee of the Senate and
It is important to appreciate that conclusions about the meaning of life, liberty and security of the person are a consequence of how section 7 is read as a whole. Lamer C.J. describes the relationship between the first and second part of the section thusly:

... [O]n the one hand, s.7 means that the protection afforded to [life, liberty and security of the person] is not absolute; the state may limit them as long as it does so in accordance with the principles of fundamental justice. On the other hand, the connection drawn between the principles of fundamental justice and the protected rights must be an indication of the nature and scope of the rights protected. The liberty in question must therefore be one that may be limited through the operation of some mechanism that involves and actively engages the principles of fundamental justice. Principles of fundamental justice pertain to the justice system. They are designed to govern both the means by which one may be brought before the judicial system and the conduct of judges and other actors once the individual is brought within it. Apart from a situation in which the state engages the judicial system, it is difficult to think of an application for the principles of fundamental justice.

It is this approach which leads Sopinka J. in B.(R.) to refer to whether a deprivation is in accordance with the principles of fundamental justice as “the threshold requirement.”

In short, Lamer C.J. limits the interests protected by section 7 by the qualifying clause, rather than identifying the interest and then ensuring that any deprivation is consistent with the principles of fundamental justice which have also been separately defined. Thus “the type of liberty s.7 refers to must be the liberty that may taken away or limited by a court or by another agency on which the state confers a coercive power to enforce its laws.” More narrowly, indeed, “the subject matter of s.7 must be the conduct of the state when the state calls on law enforcement officials to enforce and secure obedience to the law, or invokes the law to deprive a person of liberty through judges, magistrates, ministers, board members, etc.” Liberty, then, contains a “physical dimension” and does not protect “even fundamental freedoms if those freedoms have no connection with the physical dimension of the concept of ‘liberty.’” On this view, most commonly liberty can be asserted by an individual who is potentially subject to imprisonment under the criminal justice regime, but it may also include restraint of a mentally disordered person or isolation of a contagious person under civil processes. The rights of the House of Commons on the Constitution to limit it to procedural due process: [1985] 2 S.C.R. 486, at 513; similarly, in the Provincial Judges Reference, decided after B.(R.), he extended the foundational principle of judicial independence to civil provincial courts in the face of minimal historical and written authority, thus earning a sharp rebuke from La Forest J.: [1997] 3 S.C.R. 3, at 172–175.

36. B.(R.), ibid. at 339. The determination of the content of “the principles of fundamental justice” is one properly belonging to the judiciary, for “[i]t is the judges who invented and developed the concept of ‘fundamental justice.’”

37. Ibid. at 428. La Forest J., on the other hand, says that the meaning of the section 7 interests might affect the content of the principles of fundamental justice: ibid. at 363.

38. Ibid. at 341. He refers to the connection between section 7 and sections 8 to 14 and the common heading “Legal Rights” in support of this position.
guaranteed by section 7, connected to each other, refer to the individual "as a corporeal entity, as opposed to the person's spirit, aspirations, conscience, beliefs, personality or, more generally, the expression or realization of what makes up the person's non-corporeal identity."39 Liberty as it refers to a person's non-corporeal identity is protected by section 2,40 where it refers to "the ability of every individual to choose, act or 'be' as he or she sees fit, free of any constraints."41 It might be observed, however, that despite this approach to liberty, in G.(J.) the Chief Justice acknowledges, somewhat reluctantly, that violations of fundamental freedoms under section 2 can result in a violation of security of the person.42

Lamer C.J. thus concluded in B.(R.) that, while "parental liberty" might be important as part of "the more general concept of the autonomy or integrity of the family unit, "the liberty interest protected by s.7 ... includes neither the right of parents to choose (or refuse) medical treatment for their children nor, more generally, the right to bring up or educate their children without undue interference by the state."43 He rejected the broad meaning given to "liberty" which had been advanced by Wilson J. in R. v. Jones and R. v. Morgentaler in which she relied both on the American jurisprudence and on general comments by Dickson C.J. about the importance of individual autonomy and conscience.44 Finding the American jurisprudence of limited applicability in the Canadian context, Lamer C.J. maintained that one could not transfer Dickson C.J.'s comments, which were about interpreting the Charter as a whole, without consideration for context; he pointed out that in both Jones and Morgentaler "the factual context ... was one in which the state was interfering in individual and personal choices in order to turn particular behaviour into a criminal offence."45

39. Ibid. at 346-47.
40. Lamer C.J. states, in fact, that he would have been "much more receptive" to the parents' arguments (and his colleagues' reasons) had they relied on freedom of conscience for protection of parental rights: ibid. at 350.
41. Ibid. at 342; also see 336.
42. S.C.C. decision, supra note 1 at 147.
43. B.(R.), supra note 2 at 330.
44. Ibid. at 332-335. Jones refused to send his children to school, educating them and other children in a church basement without obtaining an exemption under the Alberta School Act. He was charged with truancy with carried a potential penalty of imprisonment. The majority of the Supreme Court held that, assuming that liberty included the right of parents to decide how to educate their children, the relevant provisions were consistent with the principles of fundamental justice; only Wilson J. actually decided that liberty did include that right: R. v. Jones, [1986] 2 S.C.R. 284. Morgentaler was charged with performing an abortion contrary to section 251 of the Criminal Code and argued, in his defence, that section 251 contravened women's rights under section 7 of the Charter: R. v. Morgentaler, [1988] 1 S.C.R. 30. The majority of the Supreme Court struck down section 251 on the basis that it contravened the security of the person and was not in accordance with the principles of fundamental justice. Only Wilson J. held that section 251 also contravened the liberty interest which included the right of individuals to make important decisions affecting their lives free from intervention by the state.
45. B.(R.), ibid. at 335.
In *B.(R.)*, La Forest J. wrote for himself and Gonthier and McLachlin JJ. (as she then was); L'Heureux-Dubé J. concurred with these reasons. While liberty is not absolute (it does not mean “unconstrained freedom”), he said, it is not limited to physical movement or addresses only the right to be free from physical restraint: “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.” In La Forest J.’s view, it is “plain” that “the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent,” since “[t]he common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being.” Recognition of parental rights derives both from the belief that they are more likely to know what is in their children’s best interests and from the fact that the state “is ill-equipped to make such decisions itself.” Even so, there are socially acceptable standards which parents must meet and when they do not, the state may intervene, subject to monitoring by the courts and conformity “to the values underlying the Charter,” including the requirements of fair procedure. State intervention, permitted by the principles of fundamental justice, limits the rights of the parents; it is not to vindicate the constitutional rights of children. L'Heureux-Dubé J. applies these comments in *G.(J.)*.

Iacobucci and Major JJ., who wrote joint reasons for themselves and Cory J., took a much different approach. They treated child protection as a constitutional right of the child to life and security and not merely a limit on parental rights, at least in the context of necessary medical treatment. They concluded that “an exercise of parental liberty which seriously endangers the survival of the child [falls] outside s.7.” Parents should not be allowed to endanger their child subject only to whether there has been compliance with procedural requirements.

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46. L'Heureux-Dubé J. wrote separate reasons because she dissented on the cross-appeal which involved the question of whether the District Court judge had erred in awarding costs against the Attorney General of Ontario who had intervened in the case to support the legislative provisions.

47. *B.(R.)*, *supra* note 2 at 368.


50. S.C.C. decision, *supra* note 1 at 166.

51. The remaining judge, Sopinka J., agreed with La Forest J., except that he did not consider it necessary to determine whether there was an infringement of the liberty interest since “the threshold requirement of a breach of the principles of fundamental justice was not met.” *B.(R.)*, *supra* note 2 at 428.

52. *Ibid.* at 430. The provision at issue was section 19(1)(b)(ix), *Child Welfare Act*, R.S.O. 1980, c.66 (repealed by the time of the hearing) which defined “a child in need of protection” in part as “a child where the person in whose charge the child is neglects or refuses to provide or obtain proper medical, surgical or other recognized remedial care or treatment necessary for the child’s health or well-being, or refuses to permit such care or treatment to be supplied to the child when it is recommended by a legally qualified medical practitioner, or otherwise fails to protect the child adequately.”


54. Iacobucci and Major JJ. explain that the conflicting interests are not between an individual and the
After B.(R.), therefore, there is a "stand-off" between whether parental rights (or some exercise of them) fall within the liberty interest or not. Apart from a passing reference by Iacobucci and Major JJ., security was not considered as a home for parental rights. Thus security of the person provided a vehicle for a "fresh start" on the question, particularly since all Ms G. was asking was to be able to give her side of the story in an effective way.

Security of the person, the Supreme Court of Canada has said, encompasses "personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity ... at least to the extent of freedom from criminal prohibitions which interfere with these."55 Lamer C.J. says in G.(B.), "[f]or a restriction of security of the person to be made out ... the impugned state action must have a serious and profound effect on a person's psychological integrity."56 The effects "need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety." The removal of a child from his or her parent's care can have a profound psychological impact on both the parent and the child.57 The parent-child cases are thus akin to other interests such as a claim to assisted suicide or civil committal to a mental institution.58 In all these cases the individual's interaction with the justice system has the potential to undermine her or his psychological integrity.

The Chief Justice identifies a number of ways in which a parent may experience stress when the state takes her child into care: "the loss of companionship of the child," the "gross intrusion into a private and intimate sphere" through the inspection and review in which the state engages and the stigmatization resulting from state intervention. Indeed, "[a]s an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct."59 The parent in child custody cases is...
being judged "unfit."\textsuperscript{60} The proceedings themselves are a source of stress, since they are "effectively adversarial" and require the parent to make her case in a legal manner in what may be "a foreign environment, and under significant emotional strain."\textsuperscript{61} The kind of stress experienced by a parent in these circumstances is similar to that felt by an accused whose trial has been unduly delayed.\textsuperscript{62} Thus where the state initiates child protection proceedings, the parents' section 7 security rights are invoked.

The question to be considered, therefore, is whether the lack of legal representation at the custody hearing is in accordance with the principles of fundamental justice: are child custody proceedings in which the parent is not represented by legal counsel fair?\textsuperscript{63} For the hearing to be fair, "the parent must have an opportunity to present his or her case effectively" in order to ensure that necessary information about the child's home life which is relevant to determining the best interests of the child is before the judge. Whether legal counsel is necessary to allow the parent to present her case will depend on the circumstances of the case and the parent. Thus the Chief Justice emphasizes that "[i]n the circumstances of this case, the appellant's right to a fair hearing required that she be represented by counsel."\textsuperscript{64} Accordingly, there is an infringement of section 7 which the Court holds is not justified under section 1.\textsuperscript{65} Where the conditions are satisfied, therefore, the trial judge should order that the government provide the parent with state-funded legal counsel.

C. Entitlement to Counsel: Following the Criminal Model

The Court's experience with the circumstances under which counsel should be funded by the state has been in the criminal sphere and that is where Lamer C.J. finds the remedy for Ms G. In addition, the Court is concerned to ensure that the right to counsel of parents in these cases is not more than the rights of accused. The Court has consistently held that the Charter does not guarantee an absolute right to state-funded legal counsel in the criminal context; this decision is consistent with that position. Neither section 10 (guaranteeing a right to counsel) nor section 7 of the Charter includes an absolute right to state-funded legal counsel, but "a limited right to

\textsuperscript{60} This distinguishes the custody cases from at least some other cases in which there is state involvement in the parent-child relationship, such as when a child is sentenced to jail, conscripted into the army or shot by a police officer. These actions do not "usurp[] the parental role" or "pry[] into the intimacies of the relationship." A police officer shot Ms August's son in August v. Gosset, supra note 30.

\textsuperscript{61} S.C.C. decision, supra note 1 at 152-53.


\textsuperscript{63} There was no dispute in this case that there are circumstances when the best interests of child, their health and safety, may warrant their removal from their parents by the state.

\textsuperscript{64} S.C.C. decision, supra note 1 at 151 [emphasis in original].

\textsuperscript{65} The government's justification, the saving of money, is insufficient to satisfy section 1 since the Chief Justice considers the savings to be minimal and outweighed by the parent's right to a fair hearing. As the Chief Justice points out, section 1 of the Charter will save infringements of section 7 only in unusual ("exceptional") cases, not only because the interests at stake are "very significant" and unlikely to be outweighed by competing social interests, but also because a violation of the principles of fundamental justice will rarely be considered a reasonable limit: ibid. at 159.
state-funded counsel arises under s. 7 to ensure a fair hearing in the circumstances" outlined by the Chief Justice in this case.66 These factors — the seriousness of the issue, complexity of the case and the capacity of the individual to participate meaningfully in the hearing — are similar to those identified by the lower courts in finding a limited right to state-funded counsel in criminal cases.67

This constitutional entitlement to state-funded counsel does not require the government to establish a new plan, for it may only be in "rare" cases that counsel will have to be funded. To direct the government to change the plan would be inappropriately intrusive. Rather, it will be the responsibility of the trial judge, as in the criminal cases,68 to decide whether the parent or parents need legal representation for a fair hearing of the state's application to remove their children, subject to the guidelines set down by the Chief Justice.

Judges are to consider "the seriousness of the interests at stake, the complexity of the proceedings, and the capacities of the appellant."69 In this case, the Minister was seeking to extend the original six month order and thus the already extensive separation of mother and children (the Chief Justice recognizes here that the longer the separation, the less likely the parent will regain custody), the complexity of the hearing (with 15 affidavits, including two expert reports) and the fact that the father of one of the children was represented by counsel, the children had counsel and of course the state had counsel. J.G. was not equipped to respond to the demands of these circumstances: "[i]n proceedings as serious and complex as these, an unrepresented parent will ordinarily need to possess superior, intelligence or education, communication skills, composure, and familiarity with the legal system in order to effectively present his or her case," characteristics J.G. did not possess.70 Nor is it sufficient that the parent can understand the allegations or communicate her position to the court. This was the standard applied by the trial judge and it was explicitly rejected by the Chief Justice in favour of a standard which requires that "the parent must be able to participate meaningfully at the hearing."71 Ordinarily, deference would be shown to a judge's conclusion about whether a parent needed counsel for a fair hearing because the judge is better able to assess the complexity of the proceedings and the capacity of the parent; furthermore, "[e]ven if the parent is in need of some assistance, the judge may feel

66. Ibid. at 162.
68. There is a difference between child protection and criminal cases, of course, in that a stay of proceedings or exclusion of evidence is possible in criminal cases where the individual does not have a lawyer, the first to give the accused a chance to retain counsel and the second to deal with the consequences following a lack of legal advice.
69. S.C.C. decision, supra note 1 at 151-52.
70. Ibid. at 153.
71. Ibid. at 154.
that he or she can intervene sufficiently to ensure the fairness of the hearing.”

The circumstances of this case being “unusual,” however, the Chief Justice is prepared not to give deference to the trial judge’s determination.

Lamer C.J. set out the process to be followed when a parent seeks state-funded counsel. The judge must ask the parent whether she or he has applied for legal aid or other assistance and where the parent has not done so, must adjourn the proceedings, where the best interests of the children are not put at risk, to permit the parent to make application for legal aid. Then the judge should consider whether the parent can receive a fair hearing, taking into account “the seriousness of the interests at stake, the complexities of the proceedings, and the capacities of the parent,” as well as his or her “ability to assist the parent within the limits of the judicial role.” If the judge “is not satisfied” that the parent cannot receive a fair hearing and there is no other way to provide counsel, “the judge should order the government to provide the parent with state-funded counsel under s. 24(1) of the Charter.” The government can then decide how it wants to provide counsel; it does not have to be through the legal aid plan.

IV. BETTER HALF A LOAF ...?

In the immediate, the benefit of G.(J.) will lie in how judges exercise their judgement in ordering state-funded counsel in child protection cases. Lamer C.J. and L’Heureux-Dubé J. view the anticipated impact of the G.(J.) decision differently. Lamer C.J. suggests that the case in which a judge will order state-funded counsel may be “rare,” while L’Heureux-Dubé J. believes that “the right to funded counsel in child protection hearings, when a parent cannot afford a lawyer and the parent is not covered by the legal aid scheme, will not infrequently be invoked.” She pointedly asserts that “trial judges should not, in my view, consider the issue from the starting point that counsel will be necessary to ensure a fair hearing only in rare cases.”

One reason for their different expectations, despite the subject matter of this case, is the Chief Justice’s view that “permanent guardianship applications are more serious than temporary custody applications” and “[t]herefore counsel will more likely be necessary in guardianship applications than custody applications.” L’Heureux-Dubé J., in con-

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72. Ibid.
73. First, the Chief Justice points out that the trial judge did not have the benefit of “these reasons” (and therefore applied too low a standard, akin to that applied to whether an accused is competent to stand trial); second, she decided the issue after the hearing and may have been unduly influenced by the participation of counsel since the proceedings may have gone more smoothly than they would have had J.G. not had counsel, thus masking the complexity of the hearing and any limitations J.G. might have had in representing herself: ibid. at 154.
74. Ibid. at 150-61.
75. Ibid. at 156.
76. Ibid. at 102, 167.
77. Ibid. at 169.
78. Ibid. at 155. He finds support for this view in the fact that the New Brunswick plan made this distinction.
En Route to More Equitable Access to the Legal System

Contrast, recognizes that "temporary applications are often part of a process that leads to permanent ones, and it is necessary to consider the seriousness of the proceeding in relation to both the short-term and long-term interests of the parents affected." The Chief Justice's comments in this instance are not conducive to the proper standard being applied by trial judges in future cases. If G.(J.) is to have any real effect, trial judges and reviewing courts must understand that temporary orders are in many ways as significant as permanent orders: they may set a new "base line" for the assumptions about the parent's capacity to act appropriately towards their children; they can have the kind of demoralizing impact on a parent which results in a self-fulfilling prophecy with respect to the parent's conduct; and they further increase the alienation from the legal system and "the authorities" which a parent who, as all judges acknowledge, may be among those persons with the least understanding of or the most unhappy contacts with the legal system, already feels.

The case does not provide a great deal of guidance for trial judges, despite its reliance on the indicia in criminal cases, and it will be important to remember the vulnerability of parents who have been "accused," as it may seem to them, of being unfit. Both Lamer C.J. and L'Heureux-Dubé J. observe that child protection proceedings are more often brought against persons who are the most disadvantaged, financially and in other ways. L'Heureux-Dubé J. cautions that in determining whether a parent is able to represent herself, "the focus should be on the parent's education level, linguistic abilities, facility in communicating, age, and similar indicators," factors which "will [not] have considerable effects on the determination of the ultimate result of the Minister's application." It will be necessary that parents unable to afford counsel be aware of the relevant criteria; women's help groups can help to transmit this information to their clients, for example; another source is public legal education services. The second step in the G.(J.) type cases will be to challenge to a judge's refusal to order state-funded legal aid on the basis of an inappropriate consideration of the criteria, recognizing that the appellate courts are likely to grant some deference to the trial judge's determination of this matter. Monitoring of "J.G. orders" will be necessary to ensure that the entitlement guaranteed by G.(J.) is realized.

While G.(J.) itself is about state-funded counsel, governments are left to decide how they will provide this service. Coupled with the apparently acceptable "legal services" standard in Winters, released a few days after G.(J.), it might be tempting for governments to widen the availability of their plans (this will depend on the plan, few being as limited as New Brunswick's), while providing something less than counsel representation at the hearing. Winters was a penitentiary inmate who faced the possibility of up to 30 days in solitary confinement as the outcome of a disciplinary hearing for assault in the prison. Cory J., speaking for himself alone, maintained that

79. Ibid. at 155 and 168, respectively.
80. Ibid. at 156 and 165, respectively.
81. Ibid. at 169.
82. Winters, supra note 6.
Winters was entitled to a publicly-funded lawyer, while Binnie J., writing for the majority of the Court, was of the view that something less than that might satisfy the requirements of the legislation. The *Legal Services Society Act* stated only that the Legal Services Society would provide in the specified cases, “services ordinarily provided by a lawyer,” which did not necessarily mean legal representation.83

This approach, open to the Court in *Winters* because of the wording of the relevant statute, reflects the approach taken in *Rowbotham*, the case usually considered to be the defining case with respect to the entitlement to state-funded counsel by criminal accused. In *Rowbotham*, the Court held that the accused seeking state-funded counsel (not Rowbotham, in fact, but a woman named Laura Kononow) did not require legal counsel at all times during the trial. The case involved multiple defendants and many days of hearing; the evidence against Kononow was a relatively small part of it and therefore the Court stated that while she was entitled to state-funded counsel, it would be only for the portions of the trial she really needed counsel to attend, similar to the common practice in complex trials with privately-funded counsel.84 Governments, and not only judges, therefore will have to be monitored in order to ensure that the kind of services they provide are consistent with the intent of *G.(J.)*.

Somewhat more broadly, *G.(J.*) constitutionalizes a qualified entitlement to legal aid in analogous cases beyond the criminal sphere, an important advance. Despite the focus on child protection proceedings, rather than a broader consideration of civil legal aid, it should be possible to apply the same principles to other civil contexts, even if on a case by case basis. Legal aid across the country varies in coverage; it is the *principles* established in *G.(J.*) that give it the national importance to which Lamer C.J. referred, not the specific coverage of child protection proceedings. This possibility is reinforced by *Winters*, even though it did not raise a constitutional argument, but was concerned “merely” with whether the wording of the *Legal Services Society Act* mandated the provision of legal assistance in his case.85 The Legal Services Society had argued that disciplinary proceedings were “internal” and not civil (and that solitary confinement was not “confinement” since Winters had already lost his liberty). The Society’s argument that disciplinary hearings were not civil proceedings was rejected by both Cory J., for himself, and Binnie J., who wrote the majority reasons and they also agreed that given the psychological impact of solitary confinement, the inmate was entitled to legal services to ensure a fair hearing.

Although in a sense it can be read as holding the government to its own standards, *Winters* can also be said to stand with *G.(J.*) in restricting the scope of government to define entitlement to state-funded counsel.86 Given the analysis, in fact, which uses

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83. *Ibid.* at 103. Binnie J. did say that in cases where solitary confinement was a “plausible risk,” legal counsel was probably required: *ibid.* at 107.

84. *Rowbotham, supra* note 66, at 68.

85. The Act stated that services would be provided “a qualifying individual who ... may be imprisoned or confined through civil proceedings:” *Legal Services Society Act, R.S.B.C. 1979, c.227, s.3(2)(b).*

86. Binnie J. does say that if the government does not want to provide services to inmates facing disciplinary proceedings, it can amend the legislation to say so: *Winters, supra* note 6, at 104. But
language similar to that used in *G.(J.)*, this is probably the kind of proceeding which would benefit from the holding in *G.(J.)*. Although Lamer C.J. says that he is concerned only with child protection proceedings, inevitably the case will be used to extend the availability of legal aid to other civil cases in which a security interest, or any section 7 interest, is at stake. It will require some nudging, however, to progress from the cases in which there is state intervention to those in which the state's failure to provide a means to enforce rights sustains a claim to legal representation. Most likely, it will be necessary to establish a broader interpretation of liberty, as well as a greater appreciation of the systemic nature of law.

With *G.(J.)*, the debate about the parental-child relationship has shifted from the liberty interest to the security interest under section 7. The issue, therefore, is not whether there is some "right" of autonomous decision-making in parents in relation to their children, but whether the removal of children from their parents by the state undermines the parents' and children's psychological integrity. This parsing of section 7 is difficult for litigants, since the reality is that many interests may be said to affect both liberty and security, given the way in which security has been defined. It may be, however, that the insistence in "slotting" an interest into the pigeon-holes of life, liberty and security is less important than how the judges view the relationship between the two parts of the section, since this influences how the interests will be read.

Lamer C.J.'s early comments on section 7 dismissed the concerns which had been expressed that "all but a narrow construction of s. 7 will inexorably lead the courts to 'question the wisdom of enactments,' to adjudicate upon the merits of public policy." Perhaps it is the Chief Justice's own background in criminal law which led him to emphasize the second part of section 7, rather than the first; regardless, from the beginning he has stressed that "principles of fundamental justice" must be given a broad interpretation (to include substantive content), but has resiled from a generous and liberal interpretation of the first part of section 7. No doubt this is meant to balance the impact of section 7; Lamer C.J. has expressed a fear that the result of too generous an interpretation of section 7 (particularly of the liberty interest) would mean that it protected "all eccentricities expressed by members of our society," among which judges would have to choose those which are "fundamental;" he felt that "this approach would inevitably lead to a situation where we would have government by judges" which "must not become the case." "Principles of fundamental justice" has thus served as the dam against an overwhelming flood of interests that the Chief Justice feared might otherwise be held to come within section 7.

presumably the first thing such an inmate in Winters' position (facing solitary confinement) would do would be to cite *G.(J.)* for the proposition that he or she was entitled to legal services (or even legal counsel) because of the psychological stress resulting from the penalty of solitary confinement.

87. S.C.C. decision, *supra* note 1 at 152.
88. *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, *supra* note 34 at 497.
89. *B.(R.)*, *supra* note 2 at 348, see also *supra* note 35.
The Court's reluctance to require government to take positive action to protect interests, rather than merely refrain from acting in a manner intrusive of protected interests has been another reason for the restrained interpretation of the first part of section 7. Yet it has been willing to break with this principle at times, including in the legal aid cases themselves, to ensure conformity with principles of fundamental justice. They have done so in cases involving section 15, as well, for example in Eldridge\(^9\) and Vriend.\(^9\) In these cases, the Court has not merely prohibited governments from acting unconstitutionally, they have required them to take action. Thus requiring government to act is within the permissible range of remedies.\(^9\)

V. IT'S TIME FOR A NEW APPROACH TO SECTION 7

I suggest that it is time to reconsider the approach to section 7 applied in G.(J.) and to develop one which acknowledges the contextual and substantive nature of "principles of fundamental justice." This approach would start with the meaning given to the interests protected by section 7 and view the principles of fundamental justice clause as an internal qualifier of their exercise. The initial focus should be on the interests which require interpretation as a freestanding exercise; their meaning should be filtered through section 15 in order to ensure that the interests are reflective of all communities in Canada. It is only after the rights have been established that the issue of qualification arise. There are two limits on section 7 rights: the first is internal (individuals have a right to liberty, but can be deprived of it as long as the government can show that the deprivation is consistent with the principles of fundamental justice) and the second is external, section 1 of the Charter (any deprivation on liberty which is in accordance with the principles of fundamental justice must be justified as a reasonable limit in a democratic society). This is not to say that the inherent or internal limit is not part of the definition of the right; the right is not liberty, but not to be deprived of liberty except in accordance with the principles of fundamental justice (just as the right under section 8 is not the right to be free from seizure, but from unreasonable seizure).

How would this apply in the case of legal aid? In G.(J.), legal aid is important as a means of meeting the requirements of fundamental justice: the principles of fundamental justice require that persons subject to court proceedings (in certain instances of state intervention, at least) have the opportunity to make their own case before the body adjudicating on their situation. Accused have the right to a lawyer to defend themselves, those who face involuntary committal to mental facilities have a right to a lawyer to explain why they should not be committed, parents faced with removal of their children in child protection proceedings are entitled to a lawyer to tell the judge

92. Bastarache J.A. makes this point, saying that the Charter "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" in order to realize the full meaning of the phrase "fundamental justice" in section 7: Appeal decision, supra note 1 at 366.
why they should not lose custody of their children and why the best interests of their children require that they remain with them, their parents — as long as they cannot pay for a lawyer themselves, their case is sufficiently complex, the consequences are sufficiently serious and they are sufficiently incapable of making their case themselves.

But it is also possible to see access to the legal system as an interest in itself if we understand that access to the legal system is the way in which the rights we have — and by which we are in large measure defined — are realized. The scope of the section 7 rights is amenable to extension in a manner consistent with significant Canadian values and organizing principles, an argument made in relation to social and economic rights. Access to the legal system, in a country governed by the rule of law theoretically and by a panoply of laws in fact, ought to have recognition as an independent interest.

We define rights in part by enforceability: where there is a right, there is a remedy — and there must also be a means to acquire that remedy. Citizenship, I suggest, is measured in significant part by our capacity to obtain remedies for harms done to us, to guard against overzealous government intervention and to vindicate our definition of self. Where, for example, an individual requires access to the legal system to realize the rights the law has given to her, lack of meaningful access is a contravention of the promise inherent in the rights. The promise is not of a particular outcome, but of the possibility of the outcome. We are, in a sense, not merely flesh and blood and possessors of emotions and cognitive functions, but also a bundle of legal "rights" or interests to be asserted as necessary to maintain or enhance our participation in a society of other legally identified beings and to be reconciled with assertions of their interests by others. I do not say that this is a good thing necessarily — to be defined in part as a bundle of rights — but it is an important thing. It is particularly significant when we realize not only that individuals who cannot afford legal services are also often highly reliant on the governmental provision of goods and services, but that many areas of life are administered through government and other bureaucracies.

In this light, access to the legal system is properly characterized as a systemic matter and not merely one which may be a problem for individuals. As with any right or interest, some individuals will need to claim it more than others, but it is, I would suggest fundamental to our existence as citizens (in the broad sense of the term). Once lack of access is seen as a systemic "problem," it is more likely that it will be understood that it requires a systemic solution. This does not automatically mean a particular form of legal aid, but legal access programs which deliver a variety of services as appropriate.

A broader recognition of access to the legal system as a constitutionalized right will, of course, mean a significant extension of state-funded services. But it remains within

93. This argument has been made to support the applicability of sections 7 and 15 of the Charter in Canada's realization of the obligations incurred under international covenants: M. Jackman, "From National Standards to Justiciable Rights: Enforcing International Social and Economic Guarantees through Charter of Rights Review," (1999) 14 J.L. & Soc. Pol'y. 69.
the Court's jurisdiction to ensure that more equitable access to the legal system does not necessarily mean an entirely tax-funded legal aid system. On the other hand, it has been suggested that the risk of cases such as G.(J.) which constitutionalize entitlement to state-funded counsel on a separate rights basis is that only constitutionalized entitlements will be funded. A piecemeal diminution of legal services on this basis is incompatible with a recognition of access itself as the section 7 interest, although it may be that the obligation to provide access to the legal system can be best attained through creative and comprehensive services, not necessarily through traditional understandings of representation.

Whatever the merits of the comprehensive approach, the approach in G.(J.) itself will require those who cannot afford legal representation to vindicate their rights to engage the legal system just to establish that they have a right to engage the legal system with the necessary tools, someone familiar with its workings. As Lamer C.J. said, under the circumstances, these are the cases that will rarely get to court. Ms G. was able to vindicate her rights because her lawyer was prepared to work pro bono. It is unfortunate that the Court was rather parsimonious with respect to the kinds of interests that would attract the protection of section 7 and, in turn, would be deemed appropriate for legal aid. There is no doubt that the Court was cognizant that its decision does require government to expend more funds on legal aid (assuming that governments do not take the approach of robbing Peter to pay Paul); it has attempted to minimize that burden. The result, however, is that the burden continues to be on those least able to bear it, those subject to the kinds of proceedings the Court has held attract section 7 protection.

There are many kinds of benefits and proceedings related to the provision and denial of those benefits which attract the question: can this landscape be adequately traversed by someone lacking knowledge of the substantive provisions which grant entitlement and unskilled in navigating the procedural requirements. I suggest that it is part of the substantive enjoyment of rights that one be able to access them. In order to vindicate the section 7 interests as they arise in the myriad of benefit systems which characterizes the modern state, it is often necessary to engage the legal system. The fact that these benefits are often directed at persons who are most vulnerable and marginalized, merely confirms the need for someone to mediate the system. While not all aspects or steps in the system will require legal assistance, when the legal system itself is the forum, the individual often requires legal assistance to make a case for receipt of a benefit, to challenge denial of one or to defend her or himself against loss of benefits already gained. In this sense, the capacity to "make real" the paper entitlement is an integral part of the entitlement to the benefit.  

94. This point was made by Aneurin Thomas at the Osgoode Seminar on Legal Aid. It is an important one and deserves a great deal more consideration than I can give it here. I merely mention it in connection with my argument about a more comprehensive constitutionalization of access to the legal system.

95. Cf. the Supreme Court's conclusion in Eldridge that sign language interpretation is an integral part of
Consider the myriad of administrative regimes which govern benefits which are either directed at the more disadvantaged members of Canadian society or which more disadvantaged members are more likely to invoke. Some of these involve detailed rules governing eligibility and cut-off, along with extensive procedural arrangements: employment insurance is an example. The claimants in other regimes are by definition likely to be unfamiliar not only with the specific regime, but also with the underlying cultural assumptions; this will be the case with immigration proceedings. Women who enter Canada as dependents of their husbands may find themselves particularly disadvantaged in vindicating their position if they need to leave an abusive situation. Domestic workers whose sponsoring employer treats them badly or no longer wishes to employ them may well have low education levels and English or French language skills inadequate for dealing with the legal system. Social assistance claimants as a group may well share the characteristics of Ms G. which led the Court to conclude she could not adequately represent herself, as might the single mother refused subsidized housing. Some claimants, such as those whose claim to social assistance is based on a disability, may be faced with complex medical evidence to which they must respond.

All these examples in some way invoke section 7’s security interest: all of them have the potential to threaten the claimant’s autonomy and psychological integrity when the state invokes the judicial or administrative system to cut off benefits. The principles articulated in *G. (J.)* are directly applicable to these cases. I would argue that the state’s involvement in determining claims is equally important. In all these cases, the modern state establishes either specialized regimes for the distribution of benefits which we have defined as necessary to an adequate existence, that is, aspects of our existence which go to the heart of section 7’s security interest: for example, housing or financial support for those not in a position to earn an income from work, either permanently or temporarily. For claimants to engage on an equal footing with these specialized regimes, to understand how decisions are made and the patterns of the giving and taking away of benefits, some kind of legal representation may often be necessary.

Similarly, the modern state has delegated to the private sector the opportunity to benefit from the provision of services to particularly vulnerable citizens; thus tenants of boarding houses are often “vulnerable adults,” those who are poor or “frail,” those with physical or psychological disabilities, those who are “developmentally delayed” or have Alzheimer’s disease and the elderly.6 In these cases, consistency with the principles of fundamental justice, one can argue, requires that the vulnerable must have meaningful access to legal protection, if they are to defend their interests against those to whom the state has granted the opportunity to profit from their vulnerability.

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the provision of health services, not an adjunct or separate service: *supra* note 89.

6. See E. Mahoney, “Disabling Tenants’ Rights” (1997) 25 *Osgoode Hall L.J.* 711; Mahoney considers the case of a group of “vulnerable adults” who were “relocated” by the landlady of their boarding house and were more or less prohibited from exercising rights under the *Tenant Protection Act*, S.O. 1997, c.24 because they had no legal representation.
VI. CONCLUSION

J.G. was, it must be said, asking for very little: only the chance to explain as effectively as she could why she should be able to keep her children. But the legal system requires that she do that in a certain way in a certain environment. Legal counsel mediates Ms G’s story and the legal structure into which it must fit. On its face, Ms G. and others in her position will be entitled to that interpreter of the law and of the norms of the system which will decide such an important aspect of their life. Even so, one is left thinking that the Court missed an opportunity in G.(J.) to say more about the need for civil legal aid. Nevertheless, any legal aid plan which does not fund legal representation for child protection proceedings of any kind or for similar kinds of claims will be vulnerable to challenge. The parameters of this case can be pushed to cover civil proceedings in which any state action can be identified, now that the main step has been taken. This is welcome because it does constitutionalize the entitlement to legal counsel beyond the criminal context. At the same time, the approach taken in G.(J.) suggests that any further development will be on a slow and individual case by case basis. Consequently, G.(J.) also suggests that it time for the Court to reconsider its approach to section 7 and to develop an interpretation more in keeping with the liberal and generous interpretation appropriate for the Charter.