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

K.L.W. *Appellant*

v.

Winnipeg Child and Family Services *Respondent*

and

The Attorney General of Quebec, the Attorney General of Manitoba and the Attorney General of British Columbia *Interveners*

Indexed as: Winnipeg Child and Family Services *v.* K.L.W.

Neutral citation: 2000 SCC 48.

File No.: 26779.

2000: February 25; 2000: October 13.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Major, Bastarache, Binnie and Arbour JJ.

on appeal from the court of appeal for manitoba

Constitutional law — Charter of Rights — Security of person — Fundamental justice — Child protection — Apprehension of child — Provincial legislation providing state with power to apprehend child without prior judicial

authorization in "non-emergency" situations based on reasonable and probable grounds that child in need of protection — Whether apprehension of child infringing parental right to security of person — If so, whether infringement contrary to principles of fundamental justice — Whether prior judicial authorization of apprehension in "non-emergency" situations needed to comply with principles of fundamental justice — Whether fair and prompt post-apprehension hearing needed to comply with principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Child and Family Services Act, S.M. 1985-86, c. 8, s. 21(1).

Constitutional law — Charter of Rights — Fundamental justice — Child protection — Apprehension of child — Post-apprehension hearing — Six-month delay between apprehension of child and child protection hearing — Whether delay in post-apprehension child protection hearing infringing parental rights under s. 7 of Canadian Charter of Rights and Freedoms.

Family law — Child protection — Apprehension of child — Provincial legislation providing state with power to apprehend child without prior judicial authorization in "non-emergency" situations based on reasonable and probable grounds that child in need of protection — Whether apprehension of child without prior authorization in non-emergency situations constitutional — Canadian Charter of Rights and Freedoms, s. 7 — Child and Family Services Act, S.M. 1985-86, c. 8, s. 21(1).

The appellant is the mother of five children. In 1993, she signed a Voluntary Placement Agreement to place her two oldest children into the care of the respondent agency. The children were later returned to the appellant but were subsequently apprehended by the agency on several occasions from 1994 to 1996 on

the basis that the appellant was intoxicated, neglecting her children or in contact with former abusive partners. In February 1996, the agency started proceedings seeking an order for the permanent guardianship of the two children. In July 1996, the appellant informed the agency that she was expecting a third child and approximately two weeks before the expected birth date, she agreed to enter a residential facility designed to assist pregnant women. Before the appellant could enter the residential facility, she gave birth to her third child in hospital. Pursuant to s. 21(1) of the Manitoba *Child and Family Services Act*, the agency apprehended the appellant's one-day-old child.

The appellant immediately sought an injunction to restrain the agency from apprehending the child and a declaration that Part III of the Act is unconstitutional. The appellant claimed that the warrantless apprehension of her child in a non-emergency situation infringed her rights under s. 7 of the *Canadian Charter of Rights and Freedoms* in a manner that was not in accordance with the principles of fundamental justice. She also claimed damages under s. 24(1) of the *Charter*. A motion for interim relief was brought before the Court of Queen's Bench but was adjourned to allow the agency an opportunity to respond. The appellant unsuccessfully sought a mandatory injunction requiring the agency to return the child to her. At her request, the lawsuit was consolidated with the child protection proceedings initiated by the agency with respect to her first two children. The agency then served the appellant with a petition and notice of hearing to determine whether the infant child was in need of protection. After a number of adjournments and pre-trial conferences, the child protection hearing was held approximately six months after the child's apprehension. The trial judge dismissed the constitutional challenge under s. 7 of the *Charter* and ordered that the agency be appointed permanent guardian of all three children. The Manitoba Court of Appeal upheld the trial judge's decision. The issue in this appeal is whether the principles of fundamental justice applicable in

the child protection context require prior judicial authorization of apprehensions in "non-emergency" situations.

Held (McLachlin C.J. and Arbour J. dissenting): The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier, Major, Bastarache and Binnie JJ.: The s. 7 analysis is a contextual one and, while parents' and children's rights and responsibilities must be balanced together with children's right to life and health and the state's responsibility to protect children, the underlying philosophy and policy of the legislation must be kept in mind when interpreting it and determining its constitutional validity.

Since s. 21(1) of *The Child and Family Services Act* provides for the apprehension of a child from parental care, it contemplates an infringement of the right to security of the person which can only be carried out in accordance with the principles of fundamental justice. In determining what the principles of fundamental justice require with respect to the threshold for apprehension without prior judicial authorization, it is necessary to balance the following factors: (1) the seriousness of the interests at stake; (2) the difficulties associated with distinguishing emergency from non-emergency child protection situations; and (3) an assessment of the risks to children associated with adopting an "emergency" threshold, as opposed to the benefits of prior judicial authorization.

The interests at stake in cases of apprehension are of the highest order, given the impact that state action involving the separation of parents and children may have on all of their lives. From the child's perspective, state action in the form of

apprehension seeks to ensure the protection, and indeed the very survival, of another interest of fundamental importance: the child's life and health. Given that children are highly vulnerable members of our society, and given society's interest in protecting them from harm, fair process in the child protection context must reflect the fact that children's lives and health may need to be given priority where the protection of these interests diverges from the protection of parents' rights to freedom from state intervention. The interests at stake in the child protection context dictate a somewhat different balancing analysis from that undertaken with respect to the accused's s. 7 and s. 8 *Charter* rights in the criminal context. Moreover, the state's protective purpose in apprehending a child is clearly distinguishable from the state's punitive purpose in the criminal context. These distinctions should make courts reluctant to import procedural protections developed in the criminal context into the child protection context.

In determining the appropriate threshold for apprehension without prior judicial authorization, a number of factors specific to the child protection context must be considered, including the evidentiary difficulties and time pressures associated with child protection situations. The state must be able to take preventive action to protect children and should not always be required to wait until a child has been seriously harmed before being able to intervene. Requiring prior judicial authorization in "non-emergency" situations, assuming that they can be distinguished from "emergency" situations may impede pro-active intervention by placing the burden on the state to justify intervention in situations of arguably "non-imminent", yet serious, danger to the child. These factors point to serious harm, or risk of serious harm as an appropriate threshold for apprehension without prior judicial authorization. Adopting an "emergency" threshold as the constitutional minimum for apprehension without

prior judicial authorization would risk allowing significant danger to children's lives and health.

The inappropriateness of an "emergency" threshold for apprehension without prior judicial authorization is further supported by an assessment of the risks to children associated with adopting an "emergency" threshold, as opposed to the benefits of prior judicial authorization. If court supervision occurs post-apprehension, the risk of a wrongful infringement of rights lies with both parents and children. In contrast, if a prior judicial authorization of apprehension is required in so-called "non-emergency" situations, the risk inherent in the process of obtaining such authorization would fall primarily on the child, who should never be placed in such jeopardy. A wrongful apprehension does not give rise to the same risk of serious, and potentially even fatal, harm to a child, as would an inability on the part of the state to intervene promptly when a child is at risk of serious harm. Even in situations of non-imminent danger, the risks posed to the child's life and health by the delays associated with a prior hearing, compounded by the evidentiary difficulties, more than outweigh the benefits of a hearing. They render prior notice and a hearing unfeasible with respect to apprehension in the child protection context. Furthermore, while there may be valid policy justifications for requiring *ex parte* authorization for apprehensions in so-called "non-emergency" child protection situations, for the purposes of the s. 7 constitutional analysis, the procedural protections against state interference provided by prior *ex parte* authorization do not enhance the fairness of the apprehension process sufficiently to outweigh the countervailing interests of, and potential risks to, a child who may be in need of the state's protection.

In sum, the "emergency" threshold is not the appropriate minimum s. 7 threshold for apprehension without prior judicial authorization. Rather, where a

statute provides that apprehension may occur without prior judicial authorization in situations of serious harm or risk of serious harm to the child, the statute will not necessarily offend the principles of fundamental justice. Determining whether a specific statute establishes such a minimum threshold will require an examination of the relevant provisions in their legislative context.

While the infringement of a parent's right to security of the person caused by the interim removal of his or her child through apprehension in situations of harm or risk of serious harm to the child does not require prior judicial authorization, the seriousness of the interests at stake demands that the resulting disruption of the parent-child relationship be minimized as much as possible by a fair and prompt post-apprehension hearing. This is the minimum procedural protection mandated by the principles of fundamental justice in the child protection context.

Section 21(1) of *The Child and Family Services Act*, evaluated in its social and legislative context, is constitutional. When read as a whole, the Act provides for apprehension as a measure of last resort in cases where child protection authorities have reasonable and probable grounds to believe that the child is at risk of serious harm. The Act's provisions also conform to the requirement for a fair and prompt post-apprehension hearing. Finally, the delays of the post-apprehension child protection hearing did not violate the appellant's s. 7 *Charter* rights. The six-month delay prior to the hearing to determine whether the child was in need of protection appears, on its face, to be highly unreasonable, particularly in the case of a newborn child. Much of the delay in this case, however, was attributable to the failure of the appellant's counsel to appear at a case conference. In addition, the appellant's motion to consolidate proceedings and difficulties in assembling counsel for all interested parties explain a good deal of the delay. In any event, the appellant suffered no

prejudice due to the delay in the protection proceedings. Her challenge of the agency's apprehension by prerogative writ was disposed of within 10 days of the apprehension and resulted in a finding that the child was in need of protection.

Per McLachlin C.J. and Arbour J. (dissenting): The appellant's security of the person was infringed by the warrantless apprehension of her infant and the apprehension was not carried out in accordance with the principles of fundamental justice. Prior judicial authorization for the non-emergency apprehension of children in need of protection is constitutionally necessary, in order to protect both parents and children from unreasonable state interference with their security of the person.

The principles of fundamental justice have both a substantive and a procedural component. To satisfy the substantive content of fundamental justice in the child protection context, the apprehension of a child by a state agency requires an evaluation of the best interests of the child, in addition to the apprehending party having reasonable and probable grounds for believing the child is in need of protection. Procedural fairness is also included in the principles of fundamental justice. Both the parent's interest in raising his or her child free from unwarranted state intrusion and the child's right to have his or her interests protected must be considered when determining whether or not a warrantless apprehension is consistent with the principles of fundamental justice. However, when they appear to conflict, these interests must be balanced against each other and against the interest of society in the child protection context. While the child's interest in being protected from harm is of great significance, it is equally important to recognize the child's interest in remaining with his or her parents and that harm may come to the child from precipitous and misguided state interference. Removing children from their parents' care may have profoundly detrimental consequences for the child. There is a strong interest in

democratic societies to ensure that state actors cannot remove children from their parents' care without legal grounds to do so.

A prompt, post-apprehension hearing on its own is not sufficient to make the warrantless, non-emergency apprehension of a child constitutional under s. 7 of the *Charter*. Where such fundamental interests as the right to raise one's own child and the continuity of family relationships are at stake, the principles of fundamental justice require that the person who authorizes the apprehension of the child must make that decision on an impartial basis, which requires that the person who decides to apprehend cannot be in the position of both investigator and adjudicator. The procedural safeguards developed under s. 8 of the *Charter* for the protection of the individual's right to be free from unwarranted state intrusion provide useful guidance in determining what constitutes principles of fundamental justice in the child protection context: where state action impinges on the *Charter*-protected rights of individuals, procedural safeguards must be in place to ensure that the state action is well-founded and assessed by an independent arbiter. Under Part III of *The Child and Family Services Act*, the director or a representative of the agency, as well as a peace officer, is empowered to act as both investigator of whether a child is in need of protection and adjudicator of whether or not the need for protection has risen to the level where the child must be removed from his or her parent's care. The conflation of these two roles within the same agency seriously undermines the ability of these investigators to act impartially and, consequently, risks the possibility that the statutory requirement of reasonable and probable grounds will be diluted, possibly to the extent that children may be apprehended on the basis of suspicion.

Before the state can act to apprehend a child in a non-emergency situation, it must apply to the court for a warrant, and may do so on an *ex parte* basis if notice

is not desirable. An *ex parte* application to an independent and impartial judicial officer for a warrant authorizing the agency to apprehend the child is an important procedural safeguard in the context of non-emergency apprehension and would provide some assurance to families experiencing a dramatic disruption to their lives at the hands of the state that this disruption is being conducted in a manner that is procedurally fair and constitutionally sound. An independent judicial scrutiny of the appropriateness of the apprehension will also serve to ensure that child protection agencies act on reasonable and probable grounds that they can articulate, before initiating an apprehension in a non-emergency situation. Furthermore, an impartial review would ensure that apprehension remains a measure of last resort. In this case, an *ex parte* application would have been possible without creating an unacceptable risk to the infant. There was ample time for the agency to seek a prior judicial authorization of the apprehension, with no risk to the infant, who during this time was in hospital where he and his mother were under medical supervision.

Finally, it is possible to distinguish between child protection emergencies and non-emergencies and to provide for measures that would obviate the risks to children associated with obtaining prior judicial authorization in non-exigent circumstances. While "emergency" may be a standard of some fluidity, courts have interpreted terms such as "substantial risk of harm" with enough consistency to provide guidance to both agencies and families. Many provinces do require prior judicial authorization for the removal of a child from the parent's care, except in emergency situations.

Section 21(1) of the Act violates s. 7 of the *Charter* and is not justified under s. 1 of the *Charter*. Section 21(1) should be modified to replace the words

"without a warrant" with the words "with a warrant". The appellant's requests for damages and a declaration of invalidity of Part III of the Act are inappropriate.

Cases Cited

By L'Heureux-Dubé J.

Referred to: *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *R. v. Beare*, [1988] 2 S.C.R. 387; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *R. v. Mills*, [1999] 3 S.C.R. 668; *Chiarelli v. Canada (Minister of Employment and Immigration*, [1992] 1 S.C.R. 711; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *King v. Low*, [1985] 1 S.C.R. 87; *Hepton v. Maat*, [1957] S.C.R. 606; *T. v. Alberta (Director of Child Welfare)* (2000), 188 D.L.R. (4th) 603; *C. (J.M.N.) v. Winnipeg Child & Family Services (Central)* (1997), 33 R.F.L. (4th) 175; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44; *Wallis v. Spencer*, 202 F.3d 1126 (2000); *Dietz v. Damas*, 932 F.Supp. 431 (1996); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. O'Connor*, [1995] 4 S.C.R. 411; *Gareau v. British Columbia (Superintendent of Family and Child Services)* (1986), 5 B.C.L.R. (2d) 352, aff'd (1989), 38 B.C.L.R. (2d) 215; *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563; *Young v. Young*, [1993] 4 S.C.R. 3; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141; *S. (B.) v.*

British Columbia (Director of Child, Family and Community Service) (1998), 38 R.F.L. (4th) 138; *Miller v. City of Philadelphia*, 174 F.3d 368 (1999); *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165; *Re Agar, McNeilly v. Agar*, [1958] S.C.R. 52; *R. v. Jones*, [1986] 2 S.C.R. 284; *R. v. Harrer*, [1995] 3 S.C.R. 562; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Family and Children's Services of Kings County v. E.D.* (1988), 86 N.S.R. (2d) 205; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

By Arbour J. (dissenting)

New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *S. (B.) v. British Columbia (Director of Child, Family and Community Service)* (1998), 38 R.F.L. (4th) 138; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 24(1).

Child and Family Services Act, R.S.O. 1990, c. C.11, ss. 40(2), (7).

Child and Family Services Act, S.M. 1985-86, c. 8, Declaration of Principles, ss. 4, 7, 9, Parts II, III, ss. 2(1) [am. 1992, c. 28, s. 3], 4(1)(d), (e), 17 [am. 1986-87, c. 19, s. 8; rep. & sub. 1989-90, c. 3, s. 3; am. 1997, c. 47, s. 131], 21(1), (2), (3), 24, 26(3), 27(1), 29(1) [rep. & sub. 1997, c. 48, s. 16], (2), 30 to 37, 45(3) [rep. & sub. 1997, c. 48, s. 23].

Child and Family Services Act, S.S. 1989-90, c. C-7.2, s. 17.

Child, Family and Community Service Act, R.S.B.C. 1996, c. 46, ss. 19, 27(1), 30.

Child Welfare Act, S.A. 1984, c. C-8.1, ss. 2, 17.

Child, Youth and Family Services Act, S.N. 1998, c. C-12.1, ss. 23(1), (3), 25.

Children's Act, R.S.Y. 1986, c. 22, s. 119(1), (3), (4).

Children and Family Services Act, S.N.S. 1990, c. 5, ss. 33, 34(1), (3).

Civil Code of Québec, S.Q. 1991, c. 64, Book 1.

Constitution Act, 1982, s. 52.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3, Art. 3(1).

Family and Child Services Act, R.S.P.E.I. 1988, c. F-2, s. 15(1) [rep. & sub. 1990, c. 14, s. 7].

Family Services Act, S.N.B. 1980, c. F-2.2, s. 33(1), (2).

Youth Protection Act, R.S.Q., c. P-34.1, ss. 3, 35.3, 45, 46.

Authors Cited

Bala, Nicholas. "An Introduction to Child Protection Problems". In Nicholas Bala, Joseph P. Hornick and Robin Vogl, eds., *Canadian Child Welfare Law: Children, Families and the State*. Toronto: Thompson Educational Publishing, 1991, 1.

Bala, Nicholas. "Reforming Ontario's *Child and Family Services Act*: Is the Pendulum Swinging Back Too Far?" (1999-2000), 17 *C.F.L.Q.* 121.

Barnhorst, Dick, and Bernd Walter. "Child Protection Legislation in Canada". In Nicholas Bala, Joseph P. Hornick and Robin Vogl, eds., *Canadian Child Welfare*

Law: Children, Families and the State. Toronto: Thompson Educational Publishing, 1991, 17.

Bernstein, Marvin M., Lynn M. Kirwin and Helen Bernstein. *Child Protection Law in Canada*. Toronto: Carswell, 1990 (loose-leaf updated 2000, release 1).

British Columbia. Ministry of Social Services. Gove Inquiry into Child Protection. *Report of the Gove Inquiry into Child Protection in British Columbia*. Vancouver: The Inquiry, 1995.

Canada. Law Commission. *Restoring Dignity: Responding to Child Abuse in Canadian Institutions.* Ottawa: Law Commission of Canada, 2000.

Canada. Statistics Canada. *Family Violence in Canada: A Statistical Profile 2000.* Ottawa: Canadian Centre for Justice Statistics, 2000.

Fodden, Simon R. *Family Law.* Toronto: Irwin Law, 1999.

Fortin, Jane. *Children's Rights and the Developing Law.* London: Butterworths, 1998.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 2. Scarborough, Ont.: Carswell, 1992 (loose-leaf updated 1999, release 1).

La protection de l'enfant: évolution. Sherbrooke: Éditions Revue de Droit Université de Sherbrooke, 1999.

MacMillan, H. L., et al. "Prevalence of Child Physical and Sexual Abuse in the Community: Results From the Ontario Health Supplement" (1997), 278 *JAMA* 131.

Manitoba. Family Services. Child and Family Services Act Review Committee. *Report of the Child and Family Services Act Review Committee on the Community Consultation Process.* Winnipeg: The Ministry, 1997.

Manitoba. Family Services. *Third Annual Report of the Children's Advocate, 1995/96*. Winnipeg: The Ministry, 1996.

Ontario Association of Children's Aid Societies. *Ontario Child Mortality Task Force – Final Report*. Special edition supplement to the Journal of the Ontario Association of Children's Aid Societies, July 1997.

Ontario. Panel of Experts on Child Protection. *Protecting Vulnerable Children: Report of the Panel of Experts on Child Protection.* By Mary Jane Hatton. Toronto: Ministry of Community and Social Services, 1998.

Rycus, Judith S., Ronald C. Hughes and Jewell K. Garrison. *Child Protective Services: A Training Curriculum*, vol. 1. Washington: Child Welfare League of America, 1989.

Steinhauer, Paul D. *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care*. Toronto: University of Toronto Press, 1991.

Vogl, Robin. "Initial Involvement". In Nicholas Bala, Joseph P. Hornick and Robin Vogl, eds., *Canadian Child Welfare Law: Children, Families and the State*. Toronto: Thompson Educational Publishing, 1991, 33.

Wissow, L. S. "Current Concepts: Child Abuse and Neglect" (1995), 332 *New Eng. J. Med.* 1425.

APPEAL from a judgment of the Manitoba Court of Appeal (1998), 126 Man. R. (2d) 315, 167 W.A.C. 315, 41 R.F.L. (4th) 291, [1998] M.J. No. 254 (QL), dismissing an appeal from a decision of Stefanson J. Appeal dismissed, McLachlin C.J. and Arbour J. dissenting.

R. Ian Histed, for the appellant.

Norm Cuddy, *Michael Thomson* and *Myfanwy Bowman*, for the respondent.

Dominique Jobin and *Gilles Laporte*, for the intervener the Attorney General of Quebec.

Shawn Greenberg, for the intervener the Attorney General of Manitoba.

George H. Copley, Q.C., for the intervener the Attorney General of British Columbia.

The reasons of McLachlin C.J. and Arbour J. were delivered by

ARBOUR J. (dissenting) —

I. Introduction

1 Section 21(1) of *The Child and Family Services Act*, S.M. 1985-86, c. 8, provides for the warrantless apprehension of a child by the director, a representative of a Child and Family Services agency, or a peace officer, who has reasonable and probable grounds to believe that a child is in need of protection. The appellant, K.L.W., whose newborn son was apprehended under this provision in hospital, challenges its constitutionality on the grounds that it violates her right not to be deprived of her liberty or security of the person, except in accordance with the principles of fundamental justice, as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*.

2 My colleague, Justice L'Heureux-Dubé, has found that the impugned provision does not violate s. 7. Although the appellant's s. 7 right to security of the person is infringed by s. 21(1), L'Heureux-Dubé J. concludes that the law accords with the principles of fundamental justice because procedural fairness is satisfied by a prompt, post-apprehension judicial review: see s. 27(1) of the Act. In addition, when balancing the various interests at stake in the child protection context, she places pre-eminent importance on society's interest in protecting children from harm, due to the difficulty and risk of distinguishing, in her view, between emergency and non-emergency situations in child protection.

3 In contrast to my colleague, I believe that it is possible to distinguish between child protection emergencies and non-emergencies and to provide for measures that would obviate the risks to children associated with obtaining prior judicial authorization in non-exigent circumstances. Furthermore, I differ from L'Heureux-Dubé J. in that I believe this Court's jurisprudence under s. 8 of the *Charter* does provide useful guidance for articulating a constitutionally valid procedural standard for non-exigent child apprehension

under s. 7. I do not agree that an *ex parte* warrant would provide "only a limited enhancement of the fairness of the apprehension process" (para. 113). In my view, prior judicial authorization for the non-emergency apprehension of children in need of protection is constitutionally necessary, in order to protect both parents and children from unreasonable state interference with their security of the person.

II. Analysis

4 The facts, relevant statutory provisions and history of the case in the courts below are set out in the reasons of my colleague. Rather than repeat them here, I will refer to these aspects of the case as needed in the course of my analysis.

A. *The Interest Protected*

5 It is common ground that the removal of a child from a parent's custody by the state infringes the parent's right to security of the person, as protected by s. 7. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, Lamer C.J. recognized that a parent's psychological integrity is seriously affected by the state's decision to remove a child from the parent's care, at para. 61:

> Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As 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.

The significance of child-rearing to a parent was also recognized by La Forest J. in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 83,

who observed that "the parental interest in bringing up, nurturing and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society". Similarly, Bastarache J. recently affirmed the parental interest in raising a child as a basic and compelling part of individual autonomy and dignity: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at para. 86.

6 Thus, it is certainly consistent with this Court's previous s. 7 jurisprudence to conclude that the appellant's security of the person was infringed by the warrantless apprehension of her infant. What remains to be determined is whether the apprehension was carried out in accordance with the principles of fundamental justice.

B. *The Principles of Fundamental Justice*

(1) The Substantive Content of Fundamental Justice

7 In *G. (J.)*, *supra*, at para. 70, Lamer C.J. held that the principles of fundamental justice have both a substantive and a procedural component in the child protection context:

> The state may only relieve a parent of custody when it is necessary to protect the best interests of the child, provided that there is a fair procedure for making this determination.

While the arguments of all parties on this appeal have focused largely on the procedural content of the principles of fundamental justice, it is interesting to note that s. 2(1) of the Manitoba Act provides that the best interests of the child shall be the paramount consideration in all proceedings under the Act affecting a child, "other than proceedings to determine whether a child is in need of protection" (emphasis added). This would

seem to run contrary to this Court's holding in *G. (J.), supra*, as well as Art. 3(1) of the UN *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, to which Canada is a signatory:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

8 Child welfare legislation in other provinces echoes the UN Convention. For example, Alberta's *Child Welfare Act*, S.A. 1984, c. C-8.1, s. 2, requires that any authority or any decision relating to a child in need of protection must be undertaken in the best interests of the child. As well, Quebec's *Youth Protection Act*, R.S.Q., c. P-34.1, s. 3, provides that all decisions made under the Act will consider the interests and rights of the child. And in a somewhat contradictory message to parents, the Manitoba Act provides as one of its fundamental principles, that "[d]ecisions to remove or place children should be based on the best interests of the child and not on the basis of the family's financial status", in direct contrast to s. 2(1), discussed above.

9 I would suggest, therefore, that to satisfy the substantive content of the principles of fundamental justice in the child protection context, the apprehension of a child by a state agency requires an evaluation of the best interests of the child, in addition to the apprehending party having reasonable and probable grounds for believing the child is in need of protection.

(2) <u>The Procedural Content of Fundamental Justice</u>

10 The principles of fundamental justice also include procedural fairness: *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 882,

per Iacobucci J.; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 212-13, *per* Wilson J. In *Singh*, Beetz J. remarked at p. 229, that the "most important factors in determining the procedural content of fundamental justice in a given case are the nature of the legal rights at issue and the severity of the consequences to the individuals concerned". Five years later, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 459, Wilson J. stated that s. 7 "must be interpreted purposively, bearing in mind the interests it was designed to protect". Similarly, in *Pearlman*, *supra*, at p. 884, Iacobucci J. noted that this Court has frequently asserted the need to interpret the principles of fundamental justice within the "specific context in which s. 7 is being asserted", citing, among others, *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361, *per* La Forest J., and *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, *per* L'Heureux-Dubé J.

11 Consequently, we need to consider all the interests affected when determining whether or not the warrantless apprehension provided for in s. 21(1) is consistent with the principles of fundamental justice. The central concerns in the case before us are the parent's interest in raising his or her child free from unwarranted state intrusion and the child's right to have his or her best interests protected. However, when they appear to conflict, these interests must be balanced against each other and against the interest of society in the child protection context.

12 In my view, not only should the Court recognize the child's interest in being protected from harm, but we must also recognize the interest of a child in being nurtured and brought up by his or her parent. While the appellant's apprehended child was not independently represented on the appeal, nonetheless, arguments relating to a child's

interest in being protected against undue state interference in the parent-child relationship were made in the appellant's written submissions, at paras. 73-76.

13 My colleague, L'Heureux-Dubé J., has emphasized in her reasons the importance of the child's interest in being protected from harm (paras. 73-75). Although I, too, acknowledge the great significance of this aspect of the child's interest, it is equally important to recognize the child's interest in remaining with his or her parents and that harm may come to the child from precipitous and misguided state interference. Lamer C.J. explicitly recognized the child's security interest where the parent's custody of the child is removed by the state in *G. (J.), supra*, at para. 76:

> Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship. [Emphasis added.]

14 If we fail to give sufficient weight to this aspect of the child's security interest, we may also fail to recognize that removing children from their parents' care may have profoundly detrimental consequences for the child. Professor Nicholas Bala makes this point in "Reforming Ontario's *Child and Family Services Act*: Is the Pendulum Swinging Back Too Far?" (1999-2000), 17 *C.F.L.Q.* 121, noting that children are not always placed in a foster care environment that is better than the care the child would have received in the home. Further, his comments at pp. 169-71 of the same article speak directly to the concerns I have with the disposition of the current appeal:

> In the rush to "increase" protection, I worry that we may lose sight of important concerns about over-intervention that the reforms of the 1970s and 80s were intended to address. Recently a number of Ontario Children's Aid Societies have responded to the increased awareness of abuse and coroners' reports by being more aggressive about interpreting the 1984 *Child and*

> *Family Services Act* to emphasize child safety (citing Henry Hess, "Foster care overflows to college dorm" *The Globe & Mail* (19 June 1998) A1). This has already resulted in substantially more children coming into care in some agencies, straining foster care resources. It also illustrates that agency practices and interpretations play a very large role in how any legislative scheme is actually implemented, and raises questions about whether dramatic legislative reforms are needed.
>
> ...
>
> We must respond to the inadequacies of the child welfare system, including those in legislation and the court system, hopefully to achieve the best balance possible and not to "overeact". Unnecessarily intrusive intervention can be harmful to children, disrupting their relationships with primary caregivers, family, friends and schools, and resulting in a series of placements in foster homes and other facilities that may be less than ideal. While the recent inquiries have focused on situations where agencies have failed to intervene aggressively enough, there are also cases in which inexperienced and inadequately supervised child protection workers have been inappropriately aggressive and made unfounded allegations of parental abuse. (See *e.g. B. (D.) v. Children's Aid Society of Durham (Region)* (1996), 136 D.L.R. (4th) 297, 30 C.C.L.T. (2d) 310 (Ont. C.A.).)

15 Just as the child's interests encompass both the interest in being protected from harm and the interest in a continuing parental relationship, we cannot construe society's interest in the context of this appeal as limited only to protecting children from harm, the obvious and overriding purpose of *The Child and Family Services Act*. I agree that the state's *parens patriae* jurisdiction over children, exercised on its behalf by the court and child welfare agencies, is well-established in the civil, common and statutory law (*per* L'Heureux-Dubé J., at para. 75). Yet, there is an equally strong interest in democratic societies in ensuring that state actors cannot remove children from their parents' care without legal grounds to do so. Section 7 requires that this dramatic form of state intervention only take place in accordance with the principles of fundamental justice, and that, in turn, requires that all the various interests at stake be fairly balanced in the context of the case at hand.

16 Unlike my colleague, L'Heureux-Dubé J., I do not believe that a prompt, post-apprehension hearing on its own is sufficient to make the warrantless, non-emergency apprehension of a child constitutional under s. 7. Rather, I believe that an *ex parte* warrant authorizing the agency to apprehend the child is an important procedural safeguard in the context of non-emergency apprehension, for several reasons.

(a) *Reasonable Grounds Reviewed by an Independent and Impartial Judicial Officer*

17 In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503, this Court held that the "principles of fundamental justice are to be found in the basic tenets of our legal system". As Iacobucci J. noted in *Pearlman*, *supra*, at p. 882, "included in these fundamental principles is the concept of a procedurally fair hearing before an impartial decision-maker" (emphasis deleted). And in *G. (J.)*, *supra*, at para. 72, Lamer C.J. held that in the child protection context, a "fair procedure for determining whether a custody order should be extended requires a fair hearing before a neutral and impartial arbiter". The impartiality requirement has often been expressed in Latin by the principle *nemo debet esse judex in propria causa*: no one ought to be a judge in his or her own cause.

18 In the case at bar, the appellant argued that procedural fairness under s. 7 requires a full hearing prior to a non-exigent apprehension, or, in the alternative, at least an *ex parte* warrant. The decision to apprehend a child is not conclusive, in the sense that the ultimate custody of the child remains uncertain until the hearing following the apprehension. Consequently, the decision to apprehend or remove a child from the parent's care is distinguishable from the decision to remove entirely, even on a temporary basis, custody of the child; the latter issue was at stake in *G. (J.)*, *supra*. Nonetheless, the

executed decision to apprehend can be very traumatic and disruptive for both the parent and the child, and begins a process, without notice, that will separate the parent and child for an indeterminate period of time, depending on the timing and outcome of the post-apprehension hearing. That intervention also creates a new "status quo" that a court may subsequently be reluctant to reverse, so as to avoid further disruption to the child's environment. Clearly, the decision maker who authorizes the apprehension has a power that infringes the security of the person of both parent and child. This power held by a decision maker will engage the rules of procedural fairness under s. 7: see Peter W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 44-60.

19 In my opinion, where such fundamental interests as the right to raise one's own child and the continuity of family relationships are at stake, the principles of fundamental justice require that the person who authorizes the apprehension of the child must make that decision on an impartial basis. In other words, the person who decides to apprehend cannot be in the position of both investigator and adjudicator. On this point, I find that the foundational jurisprudence for s. 8 of the *Charter*, this Court's decision in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, to be very instructive.

20 In that case, ss. 10(1) and 10(3) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, were challenged under s. 8 of the *Charter* on the basis that they infringed the right to be secure against unreasonable search and seizure. Essentially, the Director or an authorized representative of the Combines Investigation Branch was empowered to enter any premises to search for evidence of a breach of the Act, with the approval of a member of the Restrictive Trade Practices Commission. Dickson J. (as he was then) found that the purpose of s. 8 was "to protect individuals from unjustified state intrusions upon their privacy": *Hunter*, *supra*, at p. 160. Thus, it was important that unjustified state searches be prevented before they happen, which could only be accomplished by a

system of prior authorization: p. 160. Dickson J. concluded at p. 164 that the investigatory functions of the Commission or its members

> ill-accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state. A member of the [Commission] passing on the appropriateness of a proposed search under the [Act] is caught by the maxim *nemo judex in sua causa.* He simply cannot be the impartial arbiter necessary to grant an effective authorization.

21 From the point of view of this appeal, two of the *Hunter* requirements for a constitutionally valid search and seizure are particularly relevant to the child apprehension situation: (a) a prior authorization by an entirely neutral and impartial arbiter, who is capable of acting judicially in balancing the interests of the state against those of the individual and (b) that the impartial arbiter be satisfied that the person seeking authorization has reasonable grounds, established under oath, to believe that an offence has been committed: as summarized in *Thomson Newspapers*, *supra*, at p. 499, *per* Wilson J. Underlying these two criteria are important principles of fundamental justice that are, in my view, as pressing in the s. 7 context as they are in s. 8: that where state action impinges on the *Charter*-protected rights of individuals, procedural safeguards must be in place to ensure that the state action is well-founded and assessed by an independent arbiter who is not herself implicated in the merits of the case.

22 Before applying these criteria to the facts of this case, I would comment briefly on the appropriateness of importing these s. 8 principles into the s. 7 analysis of what constitutes principles of fundamental justice in the child protection context. L'Heureux-Dubé J. finds that the appellant's attempt to import the s. 8 right to privacy into the s. 7 analysis is inapplicable in the child protection context since the parent's privacy interest is subsumed within the right to security of the person (see paras. 97-98). My approach is not to import the s. 8 right to privacy into s. 7, *per se*, and give it some

kind of pre-eminence in the balancing of interests at stake, but rather to look at the procedural safeguards developed in the s. 8 jurisprudence for the protection of the individual's right to be free from unwarranted state intrusion.

23 Applying the two *Hunter* criteria discussed above to child apprehension, it becomes apparent that the director or a representative of the Child and Family Services agency, as well as a peace officer, is empowered under Part III of the Act generally, and under s. 21(1) specifically, to act as both investigator of whether a child is in need of protection and adjudicator of whether or not the need for protection has risen to the level where the child must be removed from his or her parent's care. The conflation of these two roles within the same agency seriously undermines the ability of these investigators to act impartially and, consequently, risks the possibility that the statutory requirement of reasonable and probable grounds will be diluted — possibly to the extent that children may be apprehended on the basis of suspicion. Indeed, during oral submissions before us, counsel for the respondent, the Winnipeg Child and Family Services, conceded that, as a matter of practice, the decision to apprehend a child is sometimes made on the basis of suspicion that a child is in need of protection, rather than on reasonable and probable grounds. This failure to adhere to statutory requirements reinforces, in my view, the desirability of prior judicial review in non-emergency cases.

24 My colleague, L'Heureux-Dubé J. has suggested that an *ex parte* judicial review would be essentially futile, if not meaningless, since the authorizing judge would tend to defer to the expertise of the agency (see para. 113). Even though I believe that on an *ex parte* application, a judge may have little choice but to defer somewhat to the presentation of the case made by the applying agency, any concerns that the judge may have about the appropriateness of the initiative may result in further information being requested. In addition, if the concerns are profound enough, and the child is not at any

immediate risk of harm, the matter might be adjourned for an adversarial hearing. An independent judicial scrutiny of the appropriateness of the apprehension will also serve to ensure that child protection agencies act on reasonable and probable grounds, grounds that they can articulate, before initiating an apprehension in a non-emergency situation.

25 In this case, the respondent acknowledged that

> [i]n non-emergency situations, if a decision is made to apprehend a child, it is because minimum goals have not been achieved. Conversations with the parents about what expectations needed to be met would have occurred. After that had not worked, then an apprehension would occur.
>
> (Respondent's factum, para. 95, citing the evidence of James Keith Cooper, appellant's record, vol. II, at pp. 354-55.)

26 This would appear to be a departure, in practice, from the overarching principles of the Act, which state that families are "entitled to receive preventive and supportive services directed to preserving the family unit": principle 7. However, these comments about the approach of the respondent to child apprehension serve to illustrate the benefits that would be achieved by an impartial review of an application: at the very least, it would ensure that apprehension remains a measure of last resort.

27 Given that this Court has recognized in *G. (J.), supra*, at para. 72, that a fair hearing before a neutral and impartial arbiter is constitutionally necessary before the state can remove a child from his or her parent's custody, it seems entirely consistent to rule in this same context that before the state can act to apprehend a child in a non-emergency situation, the agency or a peace officer must apply to the court for a warrant, and may do so on an *ex parte* basis if notice is not desirable, in order to satisfy the principles of fundamental justice. This extension of our holding in *G. (J.)* is also called for by the internal inconsistencies of the Act itself, as I point out in the following section.

(b) *The Legislative Context*

28 Viewed in its entirety, Part III of the Act seems to offer greater procedural protection to the manner in which the state interferes with parental custody than to the appropriateness of the intervention itself. For ease of reference, I set out the relevant sections of the Act:

> **17(1)** For purposes of this Act, a child is in need of protection where the life, health or emotional well-being of the child is endangered by the act or omission of a person.
>
> **21(1)** The director, a representative of an agency or a peace officer who on reasonable and probable grounds believes that a child is in need of protection, may apprehend the child without a warrant and take the child to a place of safety where the child may be detained for examination and temporary care and be dealt with in accordance with the provisions of this Part.
>
> **21(2)** The director, a representative of an agency or a peace officer who on reasonable and probable grounds believes
>
> (a) that a child is in immediate danger; or
>
> (b) that a child who is unable to look after and care for himself or herself has been left without any responsible person to care for him or her;
>
> may, without warrant and by force if necessary, enter any premises to investigate the matter and if the child appears to be in need of protection shall
>
> (c) apprehend the child and take the child to a place of safety; or
>
> (d) take such other steps as are necessary to protect the child.
>
> **21(3)** On application, a judge, master, magistrate or justice of the peace who is satisfied that there are reasonable and probable grounds for believing there is a child who is in need of protection, may issue a warrant authorizing an agency or a peace officer
>
> (a) to enter, by force if necessary, a building or other place specified in the warrant and search for the child; and

> (b) if the child appears to be in need of protection,
>
> > (i) to apprehend the child and to take the child to a place of safety, or
> >
> > (ii) to take such other steps as are necessary to protect the child.

29 First, I note that s. 21(3) requires prior judicial authorization, in the form of a warrant, to permit entry to a building or other place to search for a child in need of protection. The alternative method of legal forced entry to apprehend a child in need of protection is contained in s. 21(2), which provides for apprehension without warrant in case of emergency. Emergency is then further defined to refer to cases where (a) a child in immediate danger or, (b) a child who is unable to look after and care for himself or herself has been left without any responsible person to care for him or her. By logical inference then, s. 21(3) applies to non-emergency situations where the child believed to be in need of protection is located within a building or other place, to which the agency representative or peace officer has been denied access. In contrast, s. 21(1) provides for the warrantless apprehension of a child in need of protection in what we must also logically infer, by reference to subss. (2) and (3), are non-emergency situations where the child is located outside the home, for instance at school, or on the street, or as in this case, in a hospital.

30 I find it difficult to conceive that physical entry into a building or place (for the purpose of apprehending a child) deserves greater procedural protection from mistaken or inappropriate state action than the actual apprehension and removal of the child from the parent's care. This is not to suggest that the appropriate course is to remove the requirement for a warrant when a home has to be entered to apprehend a child. Rather, it is to illustrate the anomalous nature of the legislative scheme that would have required application for a judicially authorized warrant had the appellant given birth

to her child at home rather than at the hospital. In other words, the scheme, as it stands now, places what appears to be an arbitrary emphasis on where the child is located, rather than on the urgency of the need for protection and on the importance of using apprehension as a measure of last resort.

(c) *The Risk to Children of Distinguishing Between Emergency and Non-Emergency Cases*

31 All parties concede the constitutional validity of the warrantless apprehension of children in emergency situations. Indeed, several provincial child protection statutes provide for this, with varying definitions of emergency. I have just referred to the Manitoba Act's provision for a warrrantless, forced entry into premises where a child is in "immediate danger" or has been left without the care of a responsible person and is unable to care for him- or herself, this latter requirement inferring a risk of immediate danger: s. 21(2). The immediate danger justification for a warrantless apprehension is also used in British Columbia's *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, ss. 27(1) and 30(1); in the Yukon's *Children's Act*, R.S.Y. 1986, c. 22, s. 119(1); and in Nova Scotia's *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 34(3), the term "immediate jeopardy" is used.

32 Alberta provides for a warrantless apprehension where "the life or health of the child would be seriously and imminently endangered as a result of the time required to obtain an order": *Child Welfare Act*, S.A. 1984, c. C-8.1, s. 17(1.3); see also ss. 17(9) and 17(10). Similar words are used to justify a warrantless apprehension in New Brunswick: *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 33(2). This echoes Ontario's provision for a warrantless apprehension in circumstances where "there would be a substantial risk to the child's health or safety during the time necessary to ... obtain a

warrant under subsection (2)": *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 40(7). Quebec is also concerned that the prior judicial authorization not imperil the child's safety, and waives that requirement where delay would compromise the "security of a child": *Youth Protection Act*, ss. 35.3 and 45-46.

33 Newfoundland's recently enacted *Child, Youth and Family Services Act*, S.N. 1998, c. C-12.1, stipulates that a warrant to remove a child must be obtained, unless "an immediate risk to the child's health and safety" would result "if no action were taken during the time required to obtain a warrant": s. 23(3). Saskatchewan's warrantless apprehension also suggests an emergency criterion by requiring that the child be "at risk of incurring serious harm", although apprehension is obviously a last resort, since the provision stipulates that it can occur only where "no other arrangements are practicable": *The Child and Family Services Act*, S.S. 1989-90, c. C-7.2, s. 17(1).

34 In contrast to the Manitoba Act, several provinces do require a warrant, most often available on the basis of an *ex parte* application, to apprehend a child in non-emergency situations: Alberta, *Child Welfare Act*, s. 17; Nova Scotia, *Children and Family Services Act*, s. 34(1); Ontario, *Child and Family Services Act*, s. 40(2); New Brunswick, *Family Services Act*, s. 33(1); Quebec, *Youth Protection Act*, s. 35.3; Newfoundland, *Child, Youth and Family Services Act*, s. 23(1); Prince Edward Island, *Family and Child Services Act*, R.S.P.E.I. 1988, c. F-2, s. 15(1); and the Yukon, *Children's Act*, s. 119(3) and (4).

35 Without passing judgment on the constitutionality of these various provisions under s. 7 of the *Charter*, I cite them to indicate that many provinces do require prior judicial authorization for the removal of a child from the parent's care, except in emergency situations where the delay associated with obtaining the warrant poses an

unacceptable risk to the child, at which point the agency or peace officer may proceed without a warrant. L'Heureux-Dubé J.'s reasons suggest that the distinction between emergency and non-emergency situations is so difficult to make with any degree of accuracy, that even an *ex parte* application would cause an unacceptable delay. I cannot agree and believe that the factual situation of this case provides a good example of where an *ex parte* application would have been possible without creating an unacceptable risk to the infant.

36 The appellant was a client of the respondent agency for some time prior to the birth of her infant. Her two older children were often in and out of foster care, largely due to the appellant's alcohol abuse. The agency was first informed of the appellant's pregnancy in July, some four months prior to the infant's birth and subsequent apprehension in hospital. During the months before the baby was born, the appellant and the respondent discussed a plan for her to enter a residential facility, which would provide programming and support on parenting and life-skills. The appellant resisted the plan to enter the residential facility, fearing that the consequent loss of her two-bedroom apartment would jeopardize her efforts to gain permanent guardianship of her two older children. To a certain extent her fears were realized, since the trial judge later interpreted her resistance as placing a priority on her apartment over her rehabilitation: Stefanson J., Manitoba Queen's Bench, File No. CP 93-01-05907, June 24, 1997, at p. 9.

37 The appellant finally agreed to enter the residential facility on October 23, 1996 and her infant was born, in hospital, the following day. However, by then the facility was no longer an option in the respondent's view, partly because it was not a "locked" facility, thus the appellant's abusive partner would have access to the infant (Stefanson J., at pp. 9-10), even though there was no evidence that either of the appellant's two older children had been physically abused. On October 25, the infant was

apprehended on the basis of a faxed order from the agency to the hospital staff and taken from his mother and the hospital on October 28.

38 What is apparent to me from this brief review of the time line leading up to the infant's apprehension is that, even if we only focus on the four or five days of intense decision-making around the time of the infant's birth, there was ample time for the respondent to seek a prior judicial authorization of the apprehension, with no risk to the infant, who during this time was in hospital where he and his mother were under medical supervision. As I have pointed out earlier, it is quite illogical that s. 21(3) would have required a warrant, had the appellant given birth at home, but none was required while the appellant remained in hospital.

39 In any event, the risk of a non-emergency situation escalating into an emergency where the child's life and health are in immediate danger, and which could be exacerbated by the delay involved in obtaining a warrant for apprehension, can be addressed by measures providing for "tele-warrants", which are applied for by telephone on information sworn under oath, such as already exist in some provinces. See, for example, Alberta's *Child Welfare Act*, s. 17(2); British Columbia's *Child, Family and Community Service Act*, s. 19; and Newfoundland's *Child, Youth and Family Services Act*, s. 25. Moreover, as we have already seen, if the agency concludes that a situation has become an emergency with risk of immediate harm, the agency has the statutory authority to apprehend a child without a warrant: *infra*, at paras. 28-29.

40 While "emergency" may be a standard of some fluidity, courts have interpreted terms such as "substantial risk of harm" with enough consistency to provide guidance to both agencies and families. For example, in *S. (B.) v. British Columbia (Director of Child, Family and Community Service)* (1998), 38 R.F.L. (4th) 138

(B.C.C.A.), at para. 111, it was made clear that a significant risk of harm was more than transitory in nature. When *bona fide* reasonable and probable grounds are asserted to justify action in emergency cases, courts can be trusted to endorse a generous view of what constitutes an emergency justifying action without prior judicial authorization.

41 I recognize that the Ontario Panel of Experts on Child Protection has recommended clarifying or abolishing the warrant requirements in Ontario. However, Professor Bala, *supra*, at pp. 140-41, has pointed out that there were no representatives or advocates for children or for parents on that panel, which also did not hold public hearings before making its recommendations. Be that as it may, the question before us is one of legal requirement as well as social policy. An *ex parte* application to an independent and impartial judicial officer would provide some assurance to families experiencing a dramatic disruption to their lives at the hands of the state that this disruption is being conducted in a manner that is procedurally fair and constitutionally sound.

C. *Section 1*

42 Having found that s. 21(1) of the Manitoba Act violates s. 7, I note that the respondent and the intervener, the Attorney General for Manitoba, have conceded that there would be no justification for the breach under s. 1 of the *Charter*. Lamer C.J. made this very point in *G. (J.)*, *supra*, where he stated, at para. 99, that s. 7 violations are not easily saved by s. 1. Referring to his earlier reasons in *Re B.C. Motor Vehicle Act*, *supra*, at p. 518, Lamer C.J. reiterated: "Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like".

III. Conclusion and Remedy

43 The appellant sought damages, and a declaration of invalidity of Part III of *The Child and Family Services Act.* In my view, both remedies are inappropriate. The claim for damages is clearly unfounded. In *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 720, this Court suggested than an individual remedy under s. 24(1) will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982* as the striking down of the impugned legislation will be "the end of the matter" and no retroactive s. 24 remedy will be available. This point was reaffirmed in *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347. Even if this Court were to find that an individual remedy is available to the plaintiff, it is very difficult to value the breach of the appellant's procedural right in terms of putting her in the position she would have occupied had there been no wrong (*Schachter, supra*, at p. 725). Assuming that there had been a pre-authorization requirement, a court would likely have authorized the apprehension of the child based on the evidence the social worker would have presented. This is reinforced by the findings made by the courts subsequent to the apprehension. While I do not wish to minimize the trauma and pain which the appellant has experienced in this case, it does not seem to warrant an award of general damages. In addition, there is no evidence of any high-handedness or malice on the part of the agency.

44 Rather than declare all of Part III of the Act invalid, the respondent and the Attorney General of Manitoba argue that s. 21(1) should be severed from Part III and only that section should be invalidated. I am concerned that striking down s. 21(1) may leave a legislative vacuum between the power to apprehend without warrant in cases of emergency (s. 21(2)) and the authority to issue a warrant to apprehend a child in a building or place (s. 21(3)). For greater certainty, it is in my view preferable to modify

s. 21(1) to replace the words "without a warrant" with the words "with a warrant". The effect of that modification of the language of the statute is virtually identical to striking down the provision, except that it leaves no ambiguity about the authority to apprehend with a warrant in non-emergency situations.

45 For these reasons, I would allow the appeal and answer the constitutional questions as follows:

1. Is s. 21(1) of *The Child and Family Services Act*, S.M. 1985-86, c. C-80, as amended, in whole or in part inconsistent with, or does it infringe or deny rights guaranteed by, s. 7 of the *Canadian Charter of Rights and Freedoms*?

   Yes.

2. If the answer to this question is yes, is s. 21(1) of *The Child and Family Services Act*, S.M. 1985-1986, c. C-80, as amended, demonstrably justified pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

   No.

The judgment of L'Heureux-Dubé, Gonthier, Major, Bastarache and Binnie JJ. was delivered[*] by

46 L'HEUREUX-DUBÉ J. – The apprehension of children by child protection authorities requires highly particularized decisions in difficult circumstances for everyone involved. As this Court has already observed, child protection involves state intervention in complex and interdependent relationships. These family situations often lack clear heros or villains: *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925, at para. 5.

---

[*] See Erratum [2000] 2 S.C.R. iv

47 It is within this very specific context that the appellant, K.L.W., challenges the constitutionality of child apprehensions that are based on Part III of the Manitoba *Child and Family Services Act*, S.M. 1985-86, c. 8 ("Act"). In particular, she alleges that the state's power pursuant to s. 21(1) to apprehend a child based "on reasonable and probable grounds . . . that a child is in need of protection", without prior judicial authorization in "non-emergency" situations, violates s. 7 of the *Canadian Charter of Rights and Freedoms*. The appellant's constitutional challenge to apprehension pursuant to s. 21(1) is inextricably linked to the statutory provisions in Part III governing the post-apprehension hearing process.

48 The issues raised by the challenge to the Act require the Court to undertake a delicate and contextual balancing under s. 7 of the following principles and interests: parents' and children's right to freedom from unjustified state intrusion into their lives; the requirements of fair procedure; children's life and health; and the state's duty and power to protect children from serious harm. Children's interests appear on both sides of this balancing scale.

I. Factual Background

49 Given the publication ban in effect as to their identity, the appellant's children have been given pseudonyms. For ease of reference, the factual background is divided into "pre-apprehension" and "post-apprehension" periods in relation to the apprehension of the appellant's third child, John, by the Winnipeg Child and Family Services ("agency").

A. *Pre-apprehension*

50 K.L.W., the appellant, has not had an easy life. She ran away from an abusive home as a teenager. She began to have substance abuse problems and became involved in a number of apparently abusive relationships. She is now the mother of five children. The appellant's first child, Jane, was born in 1988, when the appellant was 18 years old. The second, Chris, was born in 1991. The third child, John, was born in 1996. Her two youngest children, who are not the subject of these proceedings, were conceived with John's father, D.F., with whom the appellant now appears to be in a stable relationship.

51 There was no evidence that the appellant or her partners ever physically assaulted her children. By her own admission, however, the appellant was unable to give her first two children the care needed during their early years, primarily due to her alcoholism. The appellant became a client of the respondent agency, beginning in 1993 when she signed a Voluntary Placement Agreement putting Jane and Chris into its care. Both children were later returned to the appellant, to whom the agency provided part-time help in the home from a social worker. However, the children were subsequently apprehended on several occasions from 1994 to 1996, on the basis that K.L.W. was intoxicated, neglecting her children, or in contact with former abusive partners. In February 1996, the agency started proceedings seeking an order for the permanent guardianship of Jane and Chris.

52 In July 1996, K.L.W. informed the agency that she was expecting a third child. In response to this new development, the agency made arrangements for K.L.W. to move into a residential facility designed to assist pregnant women and young mothers with parenting, life-skills and personal problems. K.L.W. refused to move, fearing that

she would lose her two-bedroom apartment, and that the loss of her apartment would prejudice her challenge to the agency's efforts to gain permanent guardianship of Jane and Chris.

53 On October 23, 1996, approximately two weeks before the expected birth date of the appellant's third child, K.L.W. changed her mind and agreed to enter the facility. On October 24, the appellant gave birth to John two weeks prematurely. On October 25, the agency apprehended John by instructing the hospital not to discharge the appellant with her child.

B. *Post-apprehension*

54 The appellant and child remained in hospital over the weekend. On October 28, the agency determined that K.L.W. could no longer be accommodated at the residential facility. The child was discharged from hospital and placed in a foster home, under the agency's supervision. K.L.W. and John's father were each offered an hour's visit per week at the agency office.

55 Because issues of timing and delay are relevant to the s. 7 analysis, it is necessary to set out the procedural history of this case in some detail, beginning with interlocutory proceedings brought by the appellant outside of the Act's framework. On October 28, the day her child was removed from her care, the appellant filed a statement of claim seeking an injunction to restrain the agency from apprehending John on an interlocutory and final basis, as well as a declaration pursuant to s. 52(1) of the *Constitution Act, 1982* that Part III of the Act is unconstitutional. The appellant also claimed damages under s. 24(1) of the *Charter* for infringement of her s. 7 rights.

56 The appellant's motion for interim relief was brought before the Court of Queen's Bench on October 28. Hirschfield J. ordered it adjourned to November 6, to allow the agency an opportunity to respond. On October 31, the appellant filed a Notice of Motion, returnable November 5, seeking a mandatory injunction requiring the agency to return John and requesting that her lawsuit be consolidated with the child protection proceeding initiated by the agency with respect to her first two children, Jane and Chris, for which the trial was scheduled to begin in January 1997.

57 On November 5, on the basis of affidavit evidence presented by both parties, Goodman J. denied the appellant's motion for a mandatory injunction for the return of John. Goodman J. did not decide the constitutional issue. He consolidated the appellant's and the agency's actions with respect to all three children as requested by the appellant, and ordered one additional hour of access for the appellant to John on a bi-weekly basis.

58 On November 1, pursuant to s. 30(1) of the Act, the agency served the appellant with a petition and notice of hearing, returnable November 22, to determine whether John was in need of protection. On November 22, the parties appeared before Master Lee with respect to the agency's application. The hearing was adjourned to a pre-trial conference on November 26. On December 9, Mercier A.C.J.Q.B. rescheduled the trial set to proceed in January to April 21, 1997. Two more pre-trial conferences took place, on February 7 and on April 11.

59 There was, therefore, a delay of approximately six months between John's apprehension and his child protection hearing. From April 21 to May 6, Stefanson J.

presided over the trial to determine whether John and the other two children were in need of protection and whether the agency should succeed in its application for permanent guardianship of the children. He also heard arguments on the constitutional issues raised by the appellant. On May 6, Stefanson J. dismissed the constitutional challenge and on June 24, he ordered that the agency be appointed permanent guardian of Jane, Chris and John.

60 The appellant appealed both decisions. The Manitoba Court of Appeal dismissed the appeal on May 13, 1998. On October 8, 1998, this Court granted leave to appeal ([1998] 2 S.C.R. viii) the decision on the constitutional validity of s. 21(1) of the Act.

61 After the dismissal of her appeal by the Court of Appeal, the appellant applied to the Manitoba Court of Queen's Bench pursuant to s. 45(3) of the Act for an order terminating the orders for permanent guardianship of her three children. In April 1999, Stefanson J. found that the appellant had made significant improvements in her life since the trial and ordered that John be returned to her. He found that the older two children were still in need of protection and refused to terminate their permanent guardianship orders. This decision is not at issue in this appeal.

II. Relevant Constitutional and Statutory Provisions

62 *Constitution Act, 1982*

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Canadian Charter of Rights and Freedoms

7. 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.

8. Everyone has the right to be secure against unreasonable search or seizure.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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

Part III

Child Protection

17(1) For the purposes of this Act, a child is in need of protection where the life, health or emotional well-being of the child is endangered by the act or omission of a person.

17(2) Without restricting the generality of subsection (1), a child is in need of protection where the child

(a) is without adequate care, supervision or control;

(b) is in the care, custody, control or charge of a person

(i) who is unable or unwilling to provide adequate care, supervision or control of the child, or

(ii) whose conduct endangers or might endanger the life, health or emotional well-being of the child, or

(iii) who neglects or refuses to provide or obtain proper medical or other remedial care or treatment necessary for the health or well-being of the child or who refuses to permit such care or treatment to be provided to the child when the care or treatment is recommended by a duly qualified medical practitioner;

(c) is abused or is in danger of being abused;

(d) is beyond the control of a person who has the care, custody, control or charge of the child;

(e) is likely to suffer harm or injury due to the behaviour, condition, domestic environment or associations of the child or of a person having care, custody, control or charge of the child;

(f) is subjected to aggression or sexual harassment that endangers the life, health or emotional well-being of the child;

(g) being under the age of 12 years, is left unattended and without reasonable provision being made for the supervision and safety of the child; or

(h) is the subject, or is about to become the subject, of an unlawful adoption under *The Adoption Act* or of a sale under section 84.

21(1) The director, a representative of an agency or a peace officer who on reasonable and probable grounds believes that a child is in need of protection, may apprehend the child without a warrant and take the child to a place of safety where the child may be detained for examination and temporary care and be dealt with in accordance with the provisions of this Part.

21(2) The director, a representative of an agency or a peace officer who on reasonable and probable grounds believes

(a) that a child is in immediate danger; or

(b) that a child who is unable to look after and care for himself or herself has been left without any responsible person to care for him or her;

may, without warrant and by force if necessary, enter any premises to investigate the matter and if the child appears to be in need of protection shall

(c) apprehend the child and take the child to a place of safety; or

(d) take such other steps as are necessary to protect the child.

21(3) On application, a judge, master, magistrate or justice of the peace who is satisfied that there are reasonable and probable grounds for believing there is a child who is in need of protection, may issue a warrant authorizing an agency or a peace officer

> (a) to enter, by force if necessary, a building or other place specified in the warrant and search for the child; and
>
> (b) if the child appears to be in need of protection,
>
> (i) to apprehend the child and to take the child to a place of safety, or
>
> (ii) to take such other steps as are necessary to protect the child.

> **27(1)** The agency shall, within 4 juridical days after the day of apprehension or within such further period as a judge, master, magistrate or justice of the peace on application may allow, make an application for a hearing to determine whether the child is in need of protection.

> **29(1)** An application under subsection 27(1) shall be returnable within seven juridical days of being filed, or, where there is no sitting of the court in which the application was filed in that period, on the date of the next sitting of the court, or within such further period as a judge, master, magistrate or justice of the peace may, on application, allow.

Prior to the statute's amendment, s. 29(1) provided that:

> **29(1)** An application under subsection 27(1) shall be returnable within 30 days of being filed or within such further period as a judge, master, magistrate or justice of the peace may, on application, allow.

III. Judgments

A. *Manitoba Court of Queen's Bench*

63 In dismissing the appellant's constitutional challenge to s. 21(1) of the Act, Stefanson J. noted that this Court's decision in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, did not decide that the warrantless apprehension of a child in a non-emergency situation violates s. 7. He added that *B. (R.)*

concluded that the absence of "immediate judicial review" of the apprehension does not violate s. 7. He found, based on the evidence before him, that the Manitoba courts place the "highest priority" on child protection cases. In addition, he observed that in this case, judicial review occurred within ten days of the child's apprehension because the appellant's counsel sought an injunction shortly after the apprehension. There was, therefore, a "speedy judicial review", even if it was not based on the procedure set out in the Act.

64 In a second set of reasons released on June 24, 1997, Stefanson J. dealt with the merits of the agency's application for permanent guardianship orders with respect to Jane, Chris and John. He reviewed the evidence presented by the agency, K.L.W. and two of the three fathers of the children in question. Much of the evidence related to K.L.W.'s history of alcoholism and her involvement in abusive relationships, including that with John's father, D.F., who had a criminal record that included a conviction for assaulting the appellant in March 1996. The trial judge noted the appellant's and D.F.'s failure to disclose to the agency and others their ongoing personal relationship. He also considered the appellant's neglect of her children due to her problems with alcohol and her difficulties interacting with her children, particularly with Jane and Chris, who had behavioural problems and special needs. He noted that Jane and Chris seemed to be doing well in their foster placements. Finally, he considered the evidence of two doctors, one of whom suggested that Chris and John be returned to K.L.W. after another six months in the agency's custody. The trial judge observed, however, that the doctor's opinion was based in part on the misleading statements of K.L.W. and D.F. to the effect that they were no longer in a relationship.

65 Stefanson J. found that the three children were in need of protection. He concluded that it was in the best interests of all three of the children to appoint the agency as their permanent guardian. He emphasized K.L.W.'s failure to deal with her "deep-rooted psychological problems" and found that her "tragic history of selecting physically abusive partners" outweighed the progress she had made in controlling her alcohol addiction over the year prior to the trial, as well as evidence of her successful enrollment in programs to help her with parenting skills and with her own history as a victim of abuse.

B. *Manitoba Court of Appeal* (1998), 126 Man. R. (2d) 315

66 In addition to her appeal of the merits of the trial judge's decisions, the appellant sought to have fresh evidence admitted regarding her efforts to get her life in order since the trial. In a brief unanimous judgment, Huband J.A. dismissed the application to admit fresh evidence on the basis that s. 45(3) of the Act was the appropriate mechanism for reviewing a permanent order of guardianship based on fresh evidence. At the time, s. 45(3) of the Act read as follows:

> **45(3)** Where more than 1 year has elapsed since an order of permanent guardianship was pronounced, and the child has not been placed for adoption, the parents may apply to court for an order that the guardianship be terminated.

67 Huband J.A. went on to hold that the trial judge made no demonstrable error in coming to the conclusion that the children were in need of protection and to uphold the permanent guardianship orders. Finally, he held that the appellant's constitutional arguments failed in light of this Court's decision in *B. (R.), supra*, which he suggested, at para. 5, stood for the following proposition:

> ... s. 7 of the [*Charter*] is indeed engaged, but ... legislation accords with the principles of fundamental justice, even though there is no prior notice or judicial review of the decision to apprehend, so long as the subsequent proceedings are fair.

IV. Issues

68 Lamer C.J. stated the following constitutional questions:

> 3. Is s. 21(1) of *The Child and Family Services Act*, S.M. 1985-86, c. C-80, as amended, in whole or in part inconsistent with, or does it infringe or deny rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?
>
> 4. If the answer to this question is yes, is s. 21(1) of *The Child and Family Services Act*, S.M. 1985-86, c. C-80, as amended, demonstrably justified pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

The following additional issue is also before us:

> Did the Court of Appeal err in law in refusing the appellant's application to adduce fresh evidence?

69 I note that, since the appeal, s. 45(3) has been amended (S.M. 1997, c. 48, s. 23) to state that:

> **45(3)** The parents of a child with respect to whom an order of permanent guardianship has been made may apply to court for an order that the guardianship be terminated if
>
> (a) the child has not been placed for adoption; and
>
> (b) one year has elapsed since the expiry of the parents' right to appeal from the guardianship order or, if an appeal was taken, since the appeal was finally disposed of.

In light of the conclusions reached below on the constitutional issue, and given the subsequent legislative amendments, it is not necessary for this Court to decide this issue.

V. Analysis

70 Section 7 of the *Charter* requires the following two-step analysis to determine whether legislation or other state action infringes a protected *Charter* right: (1) Is there an infringement of the right to "life, liberty and security of the person"? (2) If so, is the infringement contrary to the principles of fundamental justice? See *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 584; *R. v. Beare*, [1988] 2 S.C.R. 387, at p. 401; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 53; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 212.

71 The s. 7 analysis must be a contextual one: *R. v. Mills*, [1999] 3 S.C.R. 668; *Chiarelli v. Canada (Minister of Employment and Immigration*, [1992] 1 S.C.R. 711; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779. In order to understand the s. 7 rights and the principles of fundamental justice at stake in this appeal, it is first necessary to outline briefly the social and legislative context in which the impugned provisions of the Manitoba *Child and Family Services Act* operate, before undertaking the s. 7 analysis.

A. *Context and Legislative Framework*

(1) Social Context

72 The mutual bond of love and support between parents and their children is a crucial one and deserves great respect. Unnecessary disruptions of this bond by the state

have the potential to cause significant trauma to both the parent and the child. Parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit. Indeed, no one would dispute the fact that the task of raising a child can be difficult, especially when parents experience the types of personal, social and economic problems faced by the appellant in this case. A proper description of the general context of this case cannot ignore the frequent occurrence of child protection proceedings involving already disadvantaged members of society such as single-parent families, aboriginal families and disabled parents: see *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at paras. 113-15, *per* L'Heureux-Dubé J.; Manitoba Family Services, *Third Annual Report of the Children's Advocate, 1995/96*, at p. 13.

73 It must also be recognized that children are vulnerable and depend on their parents or other caregivers for the necessities of life, as well as for their physical, emotional and intellectual development and well-being. Thus, protecting children from harm has become a universally accepted goal: see the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, now ratified by 191 states, including Canada.

74 Although Canada does not yet have a national database for child protection statistics, it is clear that the family does not always provide a safe environment for children: see Statistics Canada, *Family Violence in Canada: A Statistical Profile 2000*, at pp. 31 ff.; H. L. MacMillan et al., "Prevalence of Child Physical and Sexual Abuse in the Community: Results From the Ontario Health Supplement" (1997), 278 *JAMA* 131. Tragedies in Ontario and British Columbia in which children have died due to abuse and neglect in the home have led to recent reviews of the state of child protection and child welfare in those provinces: Ontario Association of Children's Aid Societies, *Ontario*

Child Mortality Task Force – Final Report (1997); Ontario Panel of Experts on Child Protection, *Protecting Vulnerable Children* (1998) ("Ontario Panel Report"); Ministry of Social Services of British Columbia, *Report of the Gove Inquiry into Child Protection in British Columbia* (1995). On the negative long-term effects of childhood abuse and neglect, see: L. S. Wissow, "Child Abuse and Neglect" (1995), 332 *New Engl. J. Med.* 1425; Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (2000), at pp. 44-46.

75 Because children are vulnerable and cannot exercise their rights independently, particularly at a young age, and because child abuse and neglect have long-term effects that impact negatively both on the individual child and on society, the state has assumed both the duty and the power to intervene to protect children's welfare. This responsibility finds expression in the *parens patriae* jurisdiction of the common law courts: see generally *G. (J.)*, *supra*, at paras. 69-70; *G. (D.F.)*, *supra*, at para. 56; *B. (R.)*, *supra*, at para. 88; *King v. Low*, [1985] 1 S.C.R. 87; *Hepton v. Maat*, [1957] S.C.R. 606, at p. 607. It is also found in Book 1 of the *Civil Code of Québec*, S.Q. 1991, c. 64, and in every provincial and territorial child protection statute. For a summary of provincial and territorial child protection legislation, see M. M. Bernstein, L. M. Kirwin and H. Bernstein, *Child Protection Law in Canada* (loose-leaf).

(2) Legislative Context

76 Canadian child protection law has undergone a significant evolution over the past decades. This evolution reflects a variety of policy shifts and orientations, as society has sought the most appropriate means of protecting children from harm. Over the last 40 years or so, society has become much more aware of problems such as battered child

syndrome and child sexual abuse, leading to calls for greater preventive intervention and protection. At the same time, Canadian law has increasingly emphasized individual rights to protection against state intervention. This has led, somewhat paradoxically, both to greater scope for state intervention in the lives of families for the purpose of protecting children, and to greater emphasis on court-enforced procedural protections from such intervention: N. Bala, "An Introduction to Child Protection Problems", in N. Bala, J. P. Hornick and R. Vogl, *Canadian Child Welfare Law*: *Children, Families and the State* (1991), 1; S. R. Fodden, *Family Law* (1999), at pp. 120-21; *La protection de l'enfant: évolution* (1999). For an exploration of the even more dramatic shift in English child protection law over the past decades, see: J. Fortin, *Children's Rights and the Developing Law* (1998), at pp. 366-67.

77 One of the ways in which legislatures have sought to respond to concerns about excessive intrusion into family life has been to provide for a range of possible measures, from least to most disruptive, by which the state, acting through child protection authorities, may intervene to protect a child from harm: see R. Vogl, "Initial Involvement", in Bala, Hornick and Vogl, *supra*, 33, at pp. 33 ff. Within this legislative framework, the least disruptive measures include support services provided to parents in the home and voluntary placements with a child protection agency.

78 The most disruptive form of intervention is a court order giving the agency temporary or permanent guardianship of a child. Particularly in the case of a permanent order, this may sever legal ties between parent and child forever. To make such an order, a court must find that the child is in need of protection within the meaning of the applicable statute. In addition, the court must find that the "best interests of the child" dictate a temporary or permanent transfer of guardianship. As Lamer C.J. observed in *G.*

(J.), *supra*, at para. 76: "Few state actions can have a more profound effect on the lives of both parent and child."

79 Apprehension is an interim child protection measure. Where it involves the physical removal of a child from his or her parents' care, it is also one of the most disruptive forms of intervention undertaken to protect children. It has the potential to lead to a relatively lengthy separation of parents and children, in cases where the child is held in the agency's care pending the disposition of a child protection hearing and the hearing is delayed for any reason: D. Barnhorst and B. Walter, "Child Protection Legislation in Canada", in Bala, Hornick and Vogl, *supra*, 17, at p. 25.

80 Ultimately, however, as the Alberta Court of Appeal recently observed in *T. v. Alberta (Director of Child Welfare)* (2000), 188 D.L.R. (4th) 603, at para. 14, child protection legislation "is about protecting children from harm; it is a child welfare statute and not a parents' rights statute". While parents' and children's rights and responsibilities must be balanced together with children's right to life and health and the state's responsibility to protect children, the underlying philosophy and policy of the legislation must be kept in mind when interpreting it and determining its constitutional validity.

(3) Legislative Framework of the Manitoba Act

81 In terms of its overarching framework, the Act specifies in s. 2(1) that the best interests of the child shall be "the paramount consideration" in all proceedings affecting a child, "other than proceedings to determine whether a child is in need of protection" (emphasis added). Article 3(1) of the UN *Convention on the Rights of the Child*, to which Canada is a signatory, requires that: "In all actions concerning children, whether

undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". In light of the *Convention*'s wording, the Manitoba provision is understandable, since in the setting of protection proceedings the best interests of the child are reduced from being the paramount consideration to being a primary consideration. This avoids establishing a higher threshold than even the *Convention* requires, for situations in which time can be of the essence. Precluding the exclusive use of the abstract concept of "best interests" in protection proceedings allows attention to be given as well to the Act's other, more concrete, criteria for determining when a child is in need of protection.

82 Part II of the Act sets out less disruptive types of services that child protection authorities may provide to families, generally with the consent of parents, including: counselling, guidance, the provision of homemaker or day care services, and voluntary placement agreements.

83 Part III of the Act governs child protection proceedings with respect to a "child in need of protection" as defined in s. 17. Part III provides for apprehension based on "reasonable and probable grounds [to] believ[e] that [the] child is in need of protection" in s. 21(1). Apprehension is subject to a prior warrant requirement for entry into a building or other place when there is no "immediate danger" to a child and no lack of responsible care for a vulnerable child: see ss. 21(2) and 21(3). Part III then sets out the notice and hearing requirements with which the agency must comply, after apprehension, in order to obtain a judicial determination of whether a child is in need of protection, and if so, whether the child requires the agency's supervision or guardianship pursuant to a court order. The evidence in this case supports the proposition that in

Manitoba the apprehension of a child is a last resort. The respondent agency's Director is mandated by the Act's s. 4(1) to:

> (d) ensure the development and establishment of standards of services and practices and procedures to be followed where services are provided to children and families;

and

> (e) ensure that agencies are providing the standard of services and are following the procedures and practices established pursuant to clause (d) and by the provisions of this Act and the regulations....

Several aspects of the agency's practices and procedures suggest that apprehension is carefully considered and that taking a child away from his or her family is a last resort. First, the phrase "last resort" is contained in the Training Manual for agency workers: J. S. Rycus, R. C. Hughes and J. K. Garrison, *Child Protective Services: A Training Curriculum*, vol. 1 (1989), at p. 132. Second, the agency regularly cooperates with parents to establish goals for them to achieve in order to avoid apprehension. Third, there is a kinship program designed to recruit family members to care for children in need of protection. The evidence indicates that apprehensions occur in only 14 percent of the agency's cases. If one takes into account the figure that at least 50 percent of these apprehensions are classified by the agency to be emergencies, then the number of apprehensions like the one at issue in this case is revealed to be less than 7 percent of all the agency's cases. The agency's practices and procedures mandate that these apprehension decisions be last resorts. If these protocols are not followed, the courts can then intervene to impose appropriate sanctions in order to deter the agency from failing to meet either the legislation's standards or those the Act requires the agency to set for itself: see for example *C. (J.M.N.) v. Winnipeg Child & Family Services (Central)* (1997), 33 R.F.L. (4th) 175 (Man. Q.B.).

84 With this context and legislative framework in mind, I now turn to the constitutionality of the impugned provisions under s. 7 of the *Charter*.

B. *Infringement of the Section 7 Right to Security of the Person*

85 At the first stage of the s. 7 analysis, the appellant submits that the apprehension of a child infringes parental rights to liberty and security of the person and, therefore, triggers the application of s. 7. In *G. (J.), supra*, at para. 58, this Court held that legal proceedings to extend a custody order in the child protection context triggered the application of s. 7 of the *Charter*. The Court found that the deprivation of custody infringed the parent's right to security of the person. Lamer C.J. observed that this Court has determined that the s. 7 right to security of the person extends beyond physical deprivations of security of the person to protect the "psychological integrity of the individual": *G. (J.), supra*, at para. 58; see more generally *Rodriguez, supra*, at pp. 587-88, *per* Sopinka J.; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.),* [1990] 1 S.C.R. 1123, at p. 1177, *per* Lamer J.; *Morgentaler, supra*, at p. 173, *per* Wilson J. Where the deprivation is not physical, the "impugned state action must have a serious and profound effect on a person's psychological integrity", assessed objectively, in order to constitute an impairment of the s. 7 right: *G. (J.), supra*, at para. 60.

86 Lamer C.J. reasoned in *G. (J.), supra*, at para. 61, that "state removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent", given the distress arising from the breaking of the bond between parent and child, the "gross intrusion into a private and intimate sphere" caused by direct state interference with the parent-child

relationship through inspection and review, and the potential stigmatization of the parent as "unfit" when relieved of custody; see also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, at paras. 55-57. Thus, he found an infringement of the parent's right to security of the person within the meaning of s. 7.

87 Similarly, the removal of a child from parental care by way of apprehension may give rise to great emotional and psychological distress for parents and constitutes a serious intrusion into the family sphere. Since s. 21(1) of the Act provides for the apprehension of a child from parental care, it contemplates an infringement of the right to security of the person which can only be carried out in accordance with the principles of fundamental justice. Given this conclusion, there is no need to consider whether the statute also infringes a parental liberty right.

C. *Prior Judicial Authorization of Apprehension and the Principles of Fundamental Justice*

88 Having found that apprehension impairs the parents' right to security of the person, I now turn to the question squarely raised in this appeal: do the principles of fundamental justice applicable in the child protection context require prior judicial authorization of apprehensions in "non-emergency" situations?

89 The appellant concedes that in "emergency" situations, the principles of fundamental justice dictate that a hearing occur subsequent to the child's removal. This concession is clearly based on the recognition that in cases of imminent danger, the child's right to life and health, and the state's duty to intervene to protect that right, are so compelling as to justify *post facto* assessment of state action: *B. (R.), supra*, at para. 92; see also *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000), at pp. 1136-37; *Dietz v.*

Damas, 932 F.Supp. 431 (E.D.N.Y. 1996), at p. 444. For this reason, no provincial or territorial child protection legislation requires any form of notice or prior judicial authorization of apprehension in "emergency" situations.

90 Accordingly, we are dealing in this appeal only with what the appellant has termed "non-emergency" child protection situations. The appellant submits that there must be notice to the parents and an *inter partes* hearing prior to a "non-emergency" apprehension. In the alternative, she submits that prior *ex parte* authorization is required with respect to "non-emergency" apprehensions. The respondent agency and provincial interveners submit, for their part, that a prompt post-apprehension protection hearing may conform to the principles of fundamental justice in a broader range of child protection situations than emergencies alone.

91 Before proceeding to analyse these submissions, I note that all of the parties to this appeal, as well as the courts below, relied to a significant extent on La Forest J.'s reasons in *B. (R.)*, *supra*, for guidance on these issues. In that appeal, La Forest J. considered the right under s. 7 to a fair hearing prior to state interference in parents' choice of medical treatment for their child. The Ontario child protection agency had apprehended a child without a warrant, pursuant to s. 19(1)(*b*)(ix) of the Ontario *Child Welfare Act*, R.S.O. 1980, c. 66 (now repealed). The agency then sought a temporary wardship order to allow the agency to substitute its consent to life-saving medical treatment for the child, since the parents refused to consent. The parents challenged the fairness of the hearing with respect to the wardship order, rather than the fairness of the apprehension.

92 In upholding the constitutionality of the impugned provisions, La Forest J. focussed on the statutory notice requirement for the wardship hearing and on the adversarial nature of the proceedings. He did not consider the fairness of the apprehension *per se*. Moreover, the apprehension in that case occurred in what La Forest J. recognized as an "emergency" situation, broadly defined. Thus, the question decided then was quite different from the one raised by the present appeal. Contrary to the findings of the Court of Appeal in this case, this Court did not reach any conclusion in *B. (R.)*, *supra*, on the specific issue of whether prior judicial authorization of apprehension in "non-emergency" situations is required for compliance with the principles of fundamental justice.

93 Many of the general principles La Forest J. enunciated remain relevant, however, and were approved by this Court in *G. (J.)*, *supra*. In *B. (R.)*, *supra*, at para. 88, cited with approval by Lamer C.J. in *G. (J.)*, *supra*, at para. 70, La Forest J. stated that there are two fundamental principles at stake in the child protection context:

> The protection of a child's right to life and to health, when it becomes necessary to do so, is a basic tenet of our legal system, and legislation to that end accords with the principles of fundamental justice, so long, of course, as it also meets the requirements of fair procedure.

It remains, therefore, for this Court to determine what the principles of fundamental justice require with respect to the threshold for apprehension without prior judicial authorization. In doing so, it is necessary to balance the following factors: (1) the seriousness of the interests at stake; (2) the difficulties associated with distinguishing emergency from non-emergency child protection situations; and (3) an assessment of the risks to children associated with adopting an "emergency" threshold, as opposed to the benefits of prior judicial authorization.

(1) Interests at Stake

94 As in *G. (J.), supra,* the interests at stake in cases of apprehension are of the highest order, given the impact that state action involving the separation of parents and children may have on all of their lives, and particularly on their psychological and emotional well-being. From the child's perspective, state action in the form of apprehension seeks to ensure the protection, and indeed the very survival, of another interest of fundamental importance: the child's life and health. Given that children are highly vulnerable members of our society, and given society's interest in protecting them from harm, fair process in the child protection context must reflect the fact that children's lives and health may need to be given priority where the protection of these interests diverges from the protection of parents' rights to freedom from state intervention.

95 The appellant sought to introduce into the s. 7 analysis a s. 8 *Charter* argument on the reasonable expectation of privacy. This was done with a view to importing into the child protection context the rationale, developed in the criminal context, for requiring prior *ex parte* authorization, where feasible, as preventive protection against the infringement of privacy interests: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

96 This Court has suggested in cases such as *Beare, supra,* at p. 412, *per* La Forest J., and *Mills, supra,* at para. 62, *per* McLachlin and Iacobucci JJ., that the principles of fundamental justice include a right to privacy given its great value to society: see also *R. v. O'Connor,* [1995] 4 S.C.R. 411, at para. 110, *per* L'Heureux-Dubé J. In particular, this Court has recognized that it may be necessary, in certain contexts,

to balance one individual's right to privacy against another individual's competing rights and interests: *Mills*, *supra*; *O'Connor*, *supra*.

97 This line of reasoning is not directly applicable, however, in the context of this appeal. In the child protection context, both parents' and children's privacy interests are better viewed as being included within the fundamental right at stake: the right to security of the person: see *G. (J.)*, *supra*, at paras. 61-62. The privacy interest underlies and informs the content of this right. It does not, however, provide an appropriate basis for importing a s. 8 analysis to determine, under the s. 7 balancing of principles of fundamental justice, what procedural protections are required against state intrusion in the form of apprehension.

98 To summarize, the interests at stake in the child protection context dictate a somewhat different balancing analysis from that undertaken with respect to the accused's s. 7 and s. 8 rights in the criminal context. Moreover, the state's protective purpose in apprehending a child is clearly distinguishable from the state's punitive purpose in the criminal context, namely that of seeing that justice is done with respect to a criminal act. These distinctions should make courts reluctant to import procedural protections developed in the criminal context into the child protection context. On the importance of distinguishing between criminal and non-criminal contexts with respect to s. 7 analysis; see *Blencoe*, *supra*, at para. 92.

(2) Emergency vs. Non-Emergency Distinction in the Child Protection Context

99 There are a number of factors specific to the child protection context that must be considered in determining the appropriate threshold for apprehension without

prior judicial authorization. These factors include: the evidentiary difficulties and time pressures associated with child protection situations; and the need for preventive as well as protective state intervention with respect to children. The factors point to several difficulties associated with establishing an "emergency" threshold for the apprehension of a child. I emphasize that these difficulties are related primarily to the effective protection of children's lives and health, rather than to considerations of administrative convenience.

100 The evidentiary difficulties particular to the child protection context arise out of the fact that child protection authorities are almost always concerned with situations taking place within the intimacy of private homes. The following passage from Southin J.'s (as she then was) insightful decision in *Gareau v. British Columbia (Superintendent of Family and Child Services)* (1986), 5 B.C.L.R. (2d) 352 (S.C.), at p. 360, aff'd (1989), 38 B.C.L.R. (2d) 215 (C.A.), describes the problems this causes for child protection authorities carrying out their mandate:

> Social workers must make difficult choices when determining what to do about a child allegedly in danger. From time to time, we read of a child who dies because he was physically maltreated. The ministry is sometimes blamed for not having done enough. A child may have physical injuries. The ministry investigates. The parent says the child fell. The physicians say that perhaps the injuries came from a fall and perhaps they came from a beating. The evidence is inconclusive and the child is not apprehended. It was a beating. The child who is neglected may or may not tell the truth. He stays in the home and is abused further. The ministry can do little as it has insufficient evidence.

(See also: *Director of Child Welfare, supra*, at para. 18.) As this passage reveals, child protection workers are inevitably called upon to make highly time-sensitive decisions in situations in which it is often difficult, if not impossible, to determine whether a child is at risk of imminent harm, or at risk of non-imminent but serious harm, while the child remains in the parents' care. The challenging task facing child protection workers was

also recognized by Lord Nicholls in his speech for the majority in *In re H. (Minors) (Sexual Abuse: Standard of Proof)*, [1996] A.C. 563 (H.L.), at p. 592:

> I am very conscious of the difficulties confronting social workers and others in obtaining hard evidence, which will stand up when challenged in court, of the maltreatment meted out to children behind closed doors. Cruelty and physical abuse are notoriously difficult to prove. The task of social workers is usually anxious and often thankless. They are criticised for not having taken action in response to warning signs which are obvious enough when seen in the clear light of hindsight. Or they are criticised for making applications based on serious allegations which, in the event, are not established in court. Sometimes, whatever they do, they cannot do right.

101 My colleague Madam Justice Arbour writes at para. 38 that

> even if we only focus on the four or five days of intense decision-making around the time of the infant's birth, there was ample time for the respondent to seek a prior judicial authorization of the apprehension, with no risk to the infant, who during this time was in hospital where he and his mother were under medical supervision.

I disagree with this characterization. In my view, this case illustrates very well how time-sensitive apprehension decisions can be. Far from having four or five days to decide, the agency had to act on Friday October 25, 1996 after the baby's birth the night before. If the apprehension had not been accomplished immediately, the mother would have been free to leave the hospital with the baby. The reason the social worker needed to intervene so quickly was because the appellant "had a history of drug and alcohol abuse. We weren't sure exactly how long it had been since she had been sober". In preparing for the apprehension, the agency could not have anticipated that the child would be born two weeks ahead of its due date. The agency's attempt to place the appellant into a residential facility immediately upon her October 23, 1996 request, two months after her refusal to go, shows that the agency used apprehension as a last resort. Only after the birth of her child and the resulting impossibility of the appellant's staying safely at the residential facility — because of minimal supervision and the threat posed by her abusive partner

— did the agency finally decide to apprehend. At this stage immediate action was imperative since the appellant's discharge from the hospital could have taken place at any moment, subject only to her own volition. Even if counsel's estimate at oral argument that it would take 20 hours to prepare affidavits for an *ex parte* warrant application is high, the time pressures of that Friday would have caused the type of *ex parte* proceeding proposed by Madam Justice Arbour to impose a risk of serious harm on the baby.

102 Aside from evidentiary difficulties and time pressures, it is also important to recognize that the state must be able to take preventive action to protect children: *Young v. Young*, [1993] 4 S.C.R. 3, at pp. 83-85, *per* L'Heureux-Dubé J.; *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141, at p. 178, *per* L'Heureux-Dubé J. This means that the state should not always be required to wait until a child has been seriously harmed before being allowed to intervene. Requiring prior judicial authorization in "non-emergency" situations, assuming that they can be distinguished, may impede pro-active intervention by placing the burden on the state to justify intervention in situations of arguably "non-imminent", yet serious, danger to the child.

103 Some of the difficulties associated with the emergency standard are illustrated by s. 17(2)(a) of the Manitoba *Child and Family Services Act*, which defines "child in need of protection" to include situations in which a child is "without adequate care, supervision or control". While this term is broad, it contemplates situations of serious risk of harm to children, including, for example, those in which they are found alone in the street without anyone to care for them, or in which they are with adults who are unable to provide adequate care because they are intoxicated. Given the state's duty to protect a child at risk of serious harm, as well as the child's compelling interest in being

so protected, immediate apprehension may be appropriate in such circumstances, even though there might be some dispute as to whether the danger of harm is "imminent".

104 All of these factors point to serious harm or risk of serious harm as an appropriate threshold for apprehension without prior judicial authorization. I recognize that with respect to prior *ex parte* authorization, several child protection statutes in Canada distinguish between situations of "imminent danger", sometimes also expressed in terms of situations in which "substantial risk" would be posed to the child if prior judicial authorization were sought, and other child protection situations: see, e.g., Alberta *Child Welfare Act*, S.A. 1984, c. C-8.1, s. 17(9); Ontario *Child and Family Services Act*, R.S.O. 1990, c. C.11, s. 40(7). The Manitoba Act itself makes a similar distinction in s. 21(2), with respect to entry into premises to search for a child in situations of "immediate danger". Section 21(2) goes on to include situations in which "a child who is unable to look after and care for himself or herself has been left without any responsible person to care for him or her". No statute defines the term "emergency", however, and many statutes qualify the notion of immediate danger by adding words to the effect that "no other less disruptive measure that is available is adequate to protect the child": see *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, s. 30; *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 33; *The Child and Family Services Act*, S.S. 1989-90, c. C-7.2, s. 17.

105 In addition to these considerations, a recent report by a panel of experts in Ontario acknowledges that practices among Ontario agencies and courts diverge significantly as to when a warrant is sought and granted prior to apprehension. According to the panel, "[t]he process required to obtain a warrant in some jurisdictions can lead to unnecessary delay in early decisive intervention": Ontario Panel Report,

supra, at p. 40. Consequently, the panel recommended "that the requirement to obtain a warrant to apprehend a child be eliminated": Ontario Panel Report, at p. 41. Madam Justice Arbour writes at para. 41 that she "recognize[s] that the Ontario Panel of Experts on Child Protection has recommended clarifying or abolishing the warrant requirements in Ontario. However, Professor Bala ... has pointed out that there were no representatives or advocates for children or for parents on that panel...". This creates an incomplete impression since, to quote Professor Bala in full: "The Ontario Panel members included two Family Law judges, a police detective, a school principal, two doctors, and two social work professionals. All the Panel members had experience with child abuse and neglect issues, but there were no representatives or advocates for children or for parents involved with Children's Aid Societies on the Panel" (N. Bala, "Reforming Ontario's *Child and Family Services Act*: Is the Pendulum Swinging Back Too Far?" (1999-2000), 17 *C.F.L.Q.* 121, at pp. 140-41 (emphasis added)).

106 The legislative practice in other provinces and territories is neither consistent nor determinative. In my view, however, it tends to confirm the conclusion that adopting an "emergency" threshold as the constitutional minimum for apprehension without prior judicial authorization risks allowing significant danger to children's lives and health. Madam Justice Arbour refers at para. 40 to *S. (B.) v. British Columbia (Director of Child, Family and Community Service)* (1998), 38 R.F.L. (4th) 138 (B.C.C.A.), for the proposition that "courts have interpreted terms such as 'substantial risk of harm' with enough consistency to provide guidance to both agencies and families. For example, in *S. (B.)* ... at para. 111, it was made clear that a significant risk of harm was more than transitory in nature". The relevant paragraph in that decision appears in the reasons of Prowse J.A., joined by Rowles J.A., concurring in the result. Interestingly, the majority reasons of Lambert J.A. contain a passage that would support the position that the

emergency/non-emergency distinction is both difficult and risky to make. He criticized the potential for "legal niceties" to defeat the legislative purpose of the British Columbia *Child, Family and Community Service Act*, which is "to provide for the protection of *every* child who needs protection. No child should continue in a state of abuse, neglect, harm or threat of harm while administrators, lawyers and judges argue about which precise compartment of s-s.13(1) [delineating when a child needs protection] the case comes within or indeed, whether it comes with[in] any lettered compartment at all" (para. 23 (emphasis in original)).

(3) Assessment of the Risks and Benefits of an "Emergency" Threshold

107 My conclusion regarding the inappropriateness of an "emergency" threshold for apprehension without prior judicial authorization is further supported by an assessment of the risks to children associated with adopting an "emergency" threshold, as opposed to the benefits of prior judicial authorization. Section 7 requires this balancing in the child protection context, given that the protection of the child as a vulnerable human being is a basic tenet of our legal system that must be weighed against the requirements of procedural fairness: see para. 93.

108 Child protection authorities may err, of course, in their assessment of whether a child is in need of protection through apprehension, and they may intervene unnecessarily. If court supervision occurs post-apprehension, this risk of a wrongful infringement of rights lies with both parents and children. They may be subjected to the trauma of separation and unjustified state interference in their family lives. This may have a significant impact on both the parents' and the child's emotional well-being. It also affects their underlying dignity and privacy interests.

109 In contrast, if this Court were to find that prior judicial authorization of apprehension is required in so-called "non-emergency" situations, the risk inherent in the process of obtaining such authorization would fall primarily on the child. This risk can result from delays related to the need to gather proof of reasonable and probable grounds that the child is in need of protection, whether in the form of an affidavit or of testimony and documentary evidence. While the delays associated with prior *ex parte* authorization are not as significant as those associated with a prior hearing, they would still leave children at risk of serious, or even life-threatening, harm for at least a number of hours, or even days. A child should never be placed in such jeopardy.

110 Moreover, a requirement to obtain prior judicial authorization in such situations will tend to divert the resources of the child protection authorities away from their duty to protect children at risk of serious harm, toward the process of obtaining prior judicial determinations of whether a child is in need of protection or not: see Manitoba, *Report of the Child and Family Services Act Review Committee on the Community Consultation Process* (1997), at p. 15.

111 It is also clear that a wrongful apprehension does not give rise to the same risk of serious, and potentially even fatal, harm to a child, as would an inability on the part of the state to intervene promptly when a child is at risk of serious harm.

112 These risks must be weighed against the benefits associated with prior judicial authorization of apprehension in terms of procedural fairness. Prior notice and a hearing would provide parents and children with significant protection against wrongful apprehensions, as they would be able to present their arguments and evidence to the court

as to why a child is not in need of protection. In my view, however, even in situations of non-imminent danger, the risks posed to the child's life and health by the delays associated with a prior hearing, compounded by the evidentiary difficulties outlined above, more than outweigh the benefits of a hearing. The risks render prior notice and a hearing unfeasible with respect to apprehension in the child protection context.

113 In *ex parte* proceedings, the court relies on affidavit evidence prepared by a child protection worker in determining whether a child should be apprehended. While a review of this information by the court will provide some protection against unjustified apprehensions, courts will tend to defer to the agency's assessment of the situation given the highly particularized nature of child protection proceedings and the highly compelling purpose for state action in this context. This deference will be all the more warranted when the child protection worker's assessment has already been subject to an internal review process within the agency. Thus, an *ex parte* authorization requirement provides only a limited enhancement of the fairness of the apprehension process. Neither the parents nor the child have any input into the decision. The appellant herself concedes this point to some extent, since her principal argument is that the principles of fundamental justice require notice and a hearing prior to apprehension, rather than an *ex parte* authorization.

114 Madam Justice Arbour believes that s. 7 does require an *ex parte* warrant procedure in this type of case. She writes at para. 24 that "any concerns that the judge may have about the appropriateness of the initiative may result in <u>further information being requested</u>" (emphasis added). This comment points to the acute risk of delay that requiring a prior *ex parte* warrant would occasion. To meet the evidentiary threshold for a warrant, agency workers would have to assume a third role in addition to the two

identified by Madam Justice Arbour (at para. 23). They would not only have to make the difficult, but only interim, decisions of "whether a child is in need of protection" and "whether or not the need for protection has risen to the level where the child must be removed from his or her parent's care", but they would also have to weigh time pressures against the need to provide enough information to the judge to avoid judicial delays. The full 79 paragraphs of the appellant's case history submitted by the respondent agency to this Court may not all be needed for a judge to grant an *ex parte* warrant. Yet agency workers could not, in good conscience, save precious time by submitting only a small fraction of this information to the judge and thereby inadvertently put a child at risk of serious harm through judicial delay. Requiring an *ex parte* proceeding creates a double bind: the more time the agency spends on its affidavits, the greater the risk to the child. The less time the agency spends on them, the greater the risk that the judge will require "further information". Again, the child unacceptably bears the increased risk.

115 Madam Justice Arbour adds at para. 41 that: "An *ex parte* application to an independent and impartial judicial officer would provide some assurance to families experiencing a dramatic disruption to their lives at the hands of the state that this disruption is being conducted in a manner that is procedurally fair and constitutionally sound" (emphasis added). Although Madam Justice Arbour argues at para. 17 on behalf of the *nemo debet esse judex in propria causa* principle (no one ought to be a judge in his or her own cause), she does not consider how minimal the assurance would be for families denied the opportunity to be heard in the *ex parte* proceeding. In the *ex parte* procedure, another fundamental principle, *audi alteram partem* (hear the other side), cannot, by definition, be respected. Indeed, some case law suggests that far from being given "some assurance" by an *ex parte* proceeding, families can be deeply frustrated and angered by knowing that a judicial deliberation is taking place, or has taken place, from

which they are, properly, excluded. For example, the facts of a recent Alberta Court of Appeal case, *Director of Child Welfare*, *supra*, concern a mother who was in a courthouse with her counsel and was excluded from an *ex parte* proceeding concerning the apprehension of her baby son. See also *Miller v. City of Philadelphia*, 174 F.3d 368 (3rd Cir. 1999), where a mother and her attorney, despite being on site and available, were denied participation in an emergency hearing that led to the removal of two of her children.

116 I acknowledge that there may be valid policy justifications for requiring prior *ex parte* authorization for apprehensions in so-called "non-emergency" child protection situations. I find for the purposes of the s. 7 constitutional analysis, however, that the procedural protections against state interference provided by prior *ex parte* authorization do not enhance the fairness of the apprehension process sufficiently to outweigh the countervailing interests of, and potential risks to, a child who may be in need of the state's protection. Rather, the balancing of risks and benefits suggests that while the trauma of an unjustified separation of parent and child cannot be fully redressed by a post-apprehension hearing, the infringement will be adequately reduced when the hearing is both prompt and fair. Pending the hearing, the child will be in a safe environment, thereby minimizing the risk of harm. At the hearing, the court will determine, based on a more complete record and in an adversarial forum, whether the child is in need of protection and in need of some form of state supervision or guardianship, or whether the child should be returned to the parents' care.

(4) Conclusions on Prior Judicial Authorization and Application to the Impugned Provisions

117 Apprehension should be used only as a measure of last resort where no less disruptive means are available. For the reasons set out above, I find that the appropriate minimum s. 7 threshold for apprehension without prior judicial authorization is not the "emergency" threshold. Rather the constitutional standard may be expressed as follows: where a statute provides that apprehension may occur without prior judicial authorization in situations of serious harm or risk of serious harm to the child, the statute will not necessarily offend the principles of fundamental justice. Determining whether a specific statute establishes such a minimum threshold will require an examination of the relevant provisions in their legislative context: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *B. (R.)*, *supra*, at para. 90.

118 I come now to the impugned s. 21(1) of the Act, which establishes (as it established at the time of the apprehension of the appellant's child, John) that apprehension must be based on "reasonable and probable grounds" for believing "that a child is in need of protection". The statutory definition of "child in need of protection" is found at s. 17 of the Act and reads as follows:

> **17(1)** For the purposes of this Act, a child is in need of protection where the life, health or emotional well-being of the child is endangered by the act or omission of a person.
>
> **17(2)** Without restricting the generality of subsection (1), a child is in need of protection where the child
>
> (a) is without adequate care, supervision or control;
>
> (b) is in the care, custody, control or charge of a person
>
> (i) who is unable or unwilling to provide adequate care, supervision or control of the child, or
>
> (ii) whose conduct endangers or might endanger the life, health or emotional well-being of the child, or

> (iii) who neglects or refuses to provide or obtain proper medical or other remedial care or treatment necessary for the health or well-being of the child or who refuses to permit such care or treatment to be provided to the child when the care or treatment is recommended by a duly qualified medical practitioner;
>
> (c) is abused or is in danger of being abused;
>
> (d) is beyond the control of a person who has the care, custody, control or charge of the child;
>
> (e) is likely to suffer harm or injury due to the behaviour, condition, domestic environment or associations of the child or of a person having care, custody, control or charge of the child;
>
> (f) is subjected to aggression or sexual harassment that endangers the life, health or emotional well-being of the child;
>
> (g) being under the age of 12 years, is left unattended and without reasonable provision being made for the supervision and safety of the child; or
>
> (h) is the subject, or is about to become the subject, of an unlawful adoption under *The Adoption Act* or of a sale under section 84.

119 The definition of "child in need of protection" found in s. 17 clearly encompasses situations that do not involve imminent danger to the child, including those in which the child is "without adequate care, supervision or control". I do not find, however, that the statutory definition is vague or overbroad. The definition of "child in need of protection" uses clear terms, and is limited to situations involving a risk of harm to a child's life, health or emotional well-being.

120 Moreover, the threshold for apprehension in s. 21(1) must be read in its legislative context. The Declaration of Principles in the Act recognizes that:

> 4. Families and children have the right to the least interference with their affairs to the extent compatible with the best interests of children and the responsibilities of society.

To this end, Part II of the Act sets out a number of less intrusive services and consensual measures that the agency is authorized to provide in lower-risk situations, without having to resort to apprehension. In addition, Part III provides for investigation by the agency when it receives a report that a child may be in need of protection, and obliges the agency to report on the findings of its investigation. Section 26(3) provides for a "deemed apprehension" under which child protection authorities may leave a child the agency believes to be in need of protection in his or her parents' care, pending the child protection hearing. Thus, the removal of a child from his or her home is not a necessary condition for initiating child protection proceedings.

121 When read as a whole, therefore, the Act provides for apprehension as a measure of last resort in cases where child protection authorities have reasonable and probable grounds to believe that the child is at risk of serious harm. Given the above conclusions, the fact that the impugned s. 21(1) does not establish an "emergency" threshold for apprehension without prior judicial authorization does not offend the principles of fundamental justice, subject to the conclusions below regarding the need for a fair and prompt post-apprehension hearing.

D. *Post-Apprehension Hearing and the Principles of Fundamental Justice*

122 While the infringement of a parent's right to security of the person caused by the interim removal of his or her child through apprehension in situations of harm or risk of serious harm to the child does not require prior judicial authorization for the reasons outlined above, the seriousness of the interests at stake demands that the resulting disruption of the parent-child relationship be minimized as much as possible by a fair and prompt post-apprehension hearing.

123 In order to be fair, the hearing must involve reasonable notice with particulars to the parents, as well as an opportunity for them to participate meaningfully in the proceedings: see *G. (J.)*, *supra*, at para. 73; *B. (R.)*, *supra*, at para. 92. The Manitoba Act clearly meets the notice and hearing requirements: ss. 24 and 30-37.

124 The child's need for continuity in relationships provides the most compelling basis for requiring a prompt post-apprehension hearing: see ss. 2(1)(a), (d) and (g) of the Act; *Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)*, [1994] 2 S.C.R. 165, at pp. 205 and 206; *Young*, *supra*, at p. 41; *Re Agar, McNeilly v. Agar*, [1958] S.C.R. 52, at p. 54; P. D. Steinhauer, *The Least Detrimental Alternative: A Systematic Guide to Case Planning and Decision Making for Children in Care* (1991), at pp. 13 ff.

125 While a two-week delay between the removal of a child and, at a minimum, an interim child protection hearing, would seem to lie at the outside limit of what is constitutionally acceptable, it does not seem advisable in this case to state a precise constitutional standard for delays in the child protection context. There may be several means by which constitutionally-sufficient safeguards could be implemented. As this Court recognized in *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 304, the principles of fundamental justice do not require total uniformity among provinces and territories; they must be given some flexibility in designing administrative regimes in light of the particular needs of their respective communities.

126 Turning to the impugned Act's provisions governing post-apprehension delays, s. 27(1) requires the agency to make an application for a hearing to determine whether the child is in need of protection within four juridical days of the apprehension.

At the time of trial, under s. 29(1), this application was returnable within 30 juridical days of being filed. This provision was amended in 1997 by S.M. 1997, c. 48, s. 16. Section 29(1) now states that the application is returnable within seven juridical days of being filed. The constitutional question at issue in this case refers to the validity of this seven-day delay. The validity of the 30-day delay will be considered below, however, with respect to any violation which may have taken place respecting the appellant's individual rights under the former provision.

127 In my view, the amended provisions achieve a constitutional balance between the need for interim measures to protect a child at risk of serious harm, and the requirement for an expedited post-apprehension hearing process. The four-day period to file an application for a child protection hearing and the seven-day period for the return of the application are not unreasonable as maximum delays, given the notification and preparation that must occur prior to the hearing.

128 Under this legislative scheme, no additional delays should generally be tolerated if the parents are ready for a hearing on the date the application is returnable. The respondent agency gave evidence, however, that parents do not often insist on a hearing immediately following the return date for the application, even when the apprehension is contested: see also Ontario Panel Report, *supra*, at p. 41. This may be because they cannot be found, or because they seek additional time to put their lives in order before having the court determine whether their child is in need of protection. In such cases, the court's power to adjourn the hearing, upon application under s. 29(2), provides a necessary measure of flexibility given these realities of the child protection context.

129 I note in passing that parents are not limited to the proceedings prescribed by statute to challenge the agency's decision to apprehend. As illustrated by the facts of this case, parents may bring an action by prerogative writ for the return of their child in cases where they want immediate judicial review of the agency's decision to apprehend, rather than waiting for the child protection hearing provided by statute. This option imposes on parents the burden of initiating the proceeding and it is not relevant to the determination that the Act's statutory delays are constitutionally valid. It is nevertheless an important complement to a statutory regime that will almost inevitably lead to somewhat lengthier maximum delays than will be desirable in certain cases. The trial judge observed, based on the record before him, that Manitoba courts do everything in their power to expedite this type of proceeding. This is as it should be, particularly given the children's interests at stake.

E. *Conclusions on the Constitutional Validity of the Act*

130 This Court recognized in *R. v. Harrer*, [1995] 3 S.C.R. 562, at para. 14, that s. 7 involves "a delicate balancing to achieve a just accommodation between the interests of the individual and those of the state in providing a fair and workable system of justice". See also *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 539. In addition, this Court has observed that s. 7 does not guarantee the "most equitable process of all": *B. (R.)*, *supra*, at para. 101; *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 362. Rather, s. 7 "dictates a threshold below which state intervention will not be tolerated": *B. (R.)*, at para. 101.

131 The apprehension of children constitutes a significant state intrusion into the family. Less disruptive means of dealing with parenting issues are to be preferred as a

matter of policy whenever possible. As set out above, however, provided that the threshold for apprehension is, at a minimum, that of a risk of serious harm to the child, the need for swift and preventive state action to protect a child's life or health in such situations dictates that a fair and prompt post-apprehension hearing is the minimum procedural protection mandated by the principles of fundamental justice in the child protection context.

132 As concluded above, the Act's provisions conform to these principles. The appellant submits, however, that even if the provisions are valid on their face, the Act should be held unconstitutional because it tolerates delays beyond the deadlines prescribed by statute, due to the absence of explicit sanctions for failing to meet those deadlines. As a preliminary comment, I note that the absence of express statutory sanctions does not mean that the provisions are unenforceable, since courts may lose jurisdiction if time limits are not complied with: see, e.g., *Family and Children's Services of Kings County v. E.D.* (1988), 86 N.S.R. (2d) 205 (C.A.). Be that as it may, the appellant's argument cannot succeed in this case, for the Act clearly stipulates the deadlines to be observed. This does not preclude a claim for an individual remedy under s. 24(1) of the *Charter*, of course, if a person's rights are violated due to the conduct of the state in administering the statute.

133 In conclusion, without deciding that the Act's provisions constitute a precise constitutional standard, I find that s. 21(1) of the Act, evaluated in its social and legislative context, is not so manifestly unfair as to violate the principles of fundamental justice and is, therefore, constitutional. Thus, there is no need to consider arguments relating to s. 1 of the *Charter*.

F. *Individual Remedy Under Section 24(1) of the Charter*

134 Although the appellant challenged the constitutional validity of the Act and sought a declaration of invalidity pursuant to s. 52 of the *Constitution Act, 1982*, she also requested relief pursuant to s. 24(1) of the *Charter* for the violation of her individual s. 7 rights, due to the conduct of the agency with respect to her third child, John. Given the conclusion that s. 21(1) of the statute is constitutionally valid, and given that I am ruling on the constitutional validity of the statutory delay provisions as amended, rather than those in effect at the time of the initial proceedings, there is no need to consider the issue of whether an individual remedy under s. 24(1) is available in conjunction with a declaration of invalidity pursuant to s. 52: *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 720.

135 The principles of fundamental justice applicable to the appellant's individual claim are the same as those applicable to the Act. The appellant's right to security of the person was infringed by the state's apprehension of her one-day-old child, John. As her child was apprehended on the basis of the constitutionally valid threshold set out in s. 21(1), the question is whether the delays of the post-apprehension child protection hearing violated the appellant's s. 7 rights.

136 The six-month delay prior to the hearing to determine whether John was in need of protection appears, on its face, to be highly unreasonable, particularly in the case of a newborn child. The 30-day maximum delay for the return of the application as provided for under the Act at the time of the apprehension clearly contributed in part to the delay in this case. According to the record before this Court, the requirement of a pre-trial conference before hearings in the Winnipeg courts also contributed to some

degree. Had the delay been solely attributable to these causes, it would have constituted an unacceptable violation of the appellant's *Charter* rights.

137 Much of the delay in this case, however, and specifically the re-scheduling of the protection hearing from January to April 1997, was attributable to the failure of the appellant's counsel to appear at the case conference in December 1996. In addition, the appellant's motion, heard within 10 days of the apprehension, in early November 1996, to consolidate the protection proceedings with respect to John and those relating to her other children, as well as the difficulties associated with assembling counsel for all interested parties involved in these proceedings, explain a good deal of the delay prior to the hearing.

138 In any event, the record indicates that the appellant suffered no prejudice due to the delay in the protection proceedings. The appellant challenged the agency's apprehension of John by prerogative writ. Her challenge to the apprehension was heard in an adversarial forum, based on evidence from both parties, and disposed of within 10 days of the apprehension based on a finding that John was in need of protection.

139 For these reasons, I find that there was no violation of the appellant's individual s. 7 rights and no possibility of a remedy under s. 24(1) of the *Charter*.

VI. Disposition

140 For the foregoing reasons, I would dismiss the appeal and answer the constitutional questions in the following manner:

1. Is s. 21(1) of *The Child and Family Services Act*, S.M. 1985-86, c. C-80,

as amended, in whole or in part inconsistent with, or does it infringe or deny rights guaranteed by, s. 7 of the *Canadian Charter of Rights and Freedoms*?

No.

2. If the answer to this question is yes, is s. 21(1) of *The Child and Family Services Act*, S.M. 1985-86, c. C-80, as amended, demonstrably justified pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

In light of the answer to the first question, this question does not arise.

141 I would make no order as to costs in this Court.

Appeal dismissed, MCLACHLIN C.J. *and* ARBOUR J. *dissenting*.

Solicitor for the appellant: Downtown Legal Action, Winnipeg.

Solicitors for the respondent: Scurfield Tapper Cuddy, Winnipeg.

Solicitor for the intervener the Attorney General of Quebec: The Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Solicitor of the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.