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Court File No. 25823 ✓

**IN THE SUPREME COURT OF CANADA
(Appealed from the Federal Court of Appeal)**

BETWEEN:

MAVIS BAKER

Appellant

-and-

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

**FACTUM OF
THE CANADIAN FOUNDATION FOR CHILDREN, YOUTH & THE LAW,
DEFENCE FOR CHILDREN INTERNATIONAL-CANADA, and
CANADIAN COUNCIL FOR REFUGEES**

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10 Part I: Facts

1. The Intervenor accept the facts as set out by the Appellant and emphasize the following: the children sought but never received independent standing and representation in these proceedings; the children seek to preserve two, well-integrated family units, in Canada, including a father/father figure and mother who do not cohabit and their siblings who do not all cohabit. Further, The children were assessed to determine whether or not it was in their best interests to remain in Canada with their family or to go to Jamaica or be separated from family members. Paul deposed that he wished to maintain the status quo and the father of twins deposes that they wish to maintain the current family contact. The psychologist determined that the children's best interests were served by remaining in Canada pursuant to the current arrangement and that the deportation of the mother
20 would cause trauma, harm and hardship to the children and would detrimentally affect their emotional and cognitive development.

-Appellants Record, vol. II, Affidavit of Jean Barber, pp 251-303.

Part II: Points In Issue

2. The Intervenor, The Canadian Foundation For Children, Youth and the Law, Defence for Children International and the Canadian Council for Refugees are Intervenor in these proceedings in order to address the law and the stated question from the standpoint of children and youth.

Part III: Law and Argument

30 3. The Intervenor submit that the Respondent is bound to interpret and apply the *Immigration Act* in a manner consistent with the United Nations's *Convention on The Rights of The Child* and the *Charter*. The Intervenor submit that direct reliance can be placed on the *Convention* but have set out their arguments within a *Charter* framework on the basis that the *Convention* has been implicitly incorporated by the *Charter*. Even in the absence of a finding of implicit incorporation, general principles of constitutional interpretation require that *Convention* obligations be a relevant and persuasive factor in *Charter* interpretation. The *Charter* "should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified." The jurisprudence of both international and regional human rights tribunals is part of the context which can be used to interpret the human rights
40 treaties to which Canada has acceded. Thus the *Convention*, related human rights jurisprudence and the *Charter* inform the content of Canadian law and should guide in the interpretation of the *Immigration Act*.

-Reference *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, at p.350 (per dissenting opinion of Chief Justice Dickson).

-*Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038, at 1056-57

-UNICEF, The United Nations Convention on the Rights of the Child: A Practical Guide to its Use in Canadian Courts, July 1998 (publishing pending)

-Anne Bayefsky: International Human Rights Law, Use in Canadian Charter of Rights and Freedoms Litigation (Toronto and Vancouver: Butterworth's Canada Ltd. 1992) at 33-49.

-Vienna Convention on the Law of Treaties, UNGA, CTS 1980/37, Arts. 31, 32.

4. The Interveners submit that Canadian children of potential deportees like Paul Brown, Desmond, Peter and Patricia Robinson have rights under the *Convention*, as incorporated by the *Charter*, which must be complied with by Immigration officials conducting humanitarian and compassionate reviews. It is submitted that the recognition of children as independent rights bearers with rights separate and apart from their parents is integral to a legally sound analysis. To say that the parent can put forward the child's case is to ignore the child as an individual and legal entity and to fly in the face of *Convention*, the *Charter* and the principles of natural and fundamental justice. It is submitted that an interpretation of the *Immigration Act* which is consistent with these principles would entail the duty to enquire as to the existence of children and implementation of the rights associated with party status (i.e. notice; independent representation; the right to be present at any hearing and to present a case and the right to receive reasons). The legal test under consideration would be that of the best interests of the child, as the primary consideration, taking into account and giving due weight to the views and wishes of the child. Under the best interests test and pursuant to the language of the *Convention*, separation from the family unit would only occur if necessary in the best interests of the child or if the child so wished. A presumption of family integrity exists which could only be rebutted in the best interests of the child.

5. Further, where an entrenched right is at odds with a government objective as here, the rights of the individual child would trump those of the government unless there were clear evidence of harm to the child or the state. As the parents view of their child's best interests is not always dispositive, the law has recognized the important role of the independent, public state actor. As independent arbiter of the child's best interests the decision maker must make the determination on a case by case basis within the overriding framework of "best interests". For children incapable of expressing views and wishes, the parent would generally be in the best position to put forward the case for the child and to receive notice on the child's behalf. For incapable children, the role of the decision maker in accessing information on best wishes through the parent or otherwise would be enhanced.

-*Eaton v. Brant County Board of Education* [1997] 1 S.C.R. at 277, 278, 279.

-United Nations Children's Fund (UNICEF), Implementation Handbook for the Convention on the Rights of the Child (Geneva: UNICEF, 1998) at 121.

THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

6. The UN *Convention on the Rights of the Child (Convention)* is an international legal document that sets minimum standards for the civil, political, social and cultural rights of children. The UN Working Group responsible for drafting the convention consisted of 42 countries and completed the final draft over a period of 10 years. Before signing the UN *Convention on the Rights of the Child*, Canada engaged in extensive consultations with the provinces and no province objected to the signing.¹ Canada was assisted in its consultations from 1982 to 1988 by a federal-provincial working group. To date 190 countries have ratified the Convention. Canada ratified the UN *Convention on the Rights of the Child* on 11 December, 1991.

10 -Sylvia Fanjoy & Susan Sullivan. Canada and the UN Convention on the Rights of the Child: Developing a Monitoring Framework. (Ottawa: Mutual/Hading Imaging Technology, 1997), p.3.
-¹First Report of Canada UN Doc. CRC/C/11/Add.3 at 71 (Alberta expressed concerns but felt its legislation was in compliance with the Convention).

7. In Australia, (unlike Canada) the states did not undergo reviews of existing legislation to determine compliance with the *Convention* prior to ratification. The Australian Law Reform Commission noted that a fractured approach to children's issues in the federal system does not serve the interests of children.

-Australian Law Reform Commission, Seen and Heard: priority for children in the legal process (1997): Australia, Alken Press, at 78; 79-81.

20 8. The dominant language in the Convention is that of rights. Children are recognized not as extensions of the family unit, but as independent rights-bearers who have a right to be heard.
-Stephen J. Toope. "The Convention on the Rights of the Child: Implications for Canada" in Children's Rights: A Comparative Perspective. Michael Freeman (ed). at 47.

9. The Committee on the Rights of the Child which oversees the *Convention* emphasized that in interpreting the Convention regard must be had to its general principles. The Committee recognizes four of the Convention's articles as general principles which inform all of the rights contained therein: [non-discrimination (article 2)]; The child's best interests must be a primary consideration in any action taken concerning the child (article 3); The child's maximum survival and
30 development must be ensured (article 6); and any child that is capable of forming an opinion must have an opportunity to express that opinion, and to have it taken into account, in any matter or procedure affecting the child (article 12)].

-Rachel Hodgkin & Peter Newell for UNICEF. Implementation Handbook for the Convention on the Rights of the Child. (New York: UNICEF House, 1998): at 6.

10. The range of protections afforded to children in the *Convention* are diverse and include entitlements to basic needs, protection from harm and due process rights. It is submitted that the scope of the *Convention* demands recognition of each child as an autonomous, participating being who has special needs and requires that special measures be taken to ensure that rights and needs are met.

-T. Hammerberg, "The UN Convention on the Rights of the Child - and How to Make it Work" *Human Rights Quarterly*, 12, p. 97 at 100.

Provisions Affecting Immigration/Deportation Proceedings

11. It is submitted that the following articles of the *Convention* are particularly relevant to the
10 case at hand: Article 2(2): Non-Discrimination; Article 3(1): Best Interests of the Child; Article 7 (Care of family); Article 8: Preservation of Identity; Article 9(1): Separation from Parents; Article 10 (family reunification); Article 12(1): Respect for the views of the child; Article 16 (non-interference with family). Other substantive rights (articles 23-39) such as the right to an adequate education (Article 28) and standard of living (Article 27) may also be engaged.

Reference may be had to Schedule A: Summary of Relevant Articles of the Convention.

Article 2(2): (Non-Discrimination)

12. The first paragraph of article 2 sets out the fundamental obligations of States Parties in relation to the rights outlined in the remainder of the *Convention* - to 'respect and ensure' all the rights in the *Convention* to all children in their jurisdiction without discrimination of *any kind* in a
20 proactive manner in terms of all measures relating to children.

-UNICEF, *Implementation Handbook supra* at p. 19, 22.

13. While the drafters of the *Convention* failed to define the term 'discrimination', the Human Rights Committee has issued a General Comment proposing a definition of discrimination.

-UNICEF *Indementation Handbook supra* at p. 21-22.

-Human Rights Committee, General Comment 18 HRI/Gen/11 Rev. 2, p. 26.

Article 3(1): (Best Interests of the Child)

14. The principle of "best interests of the child" is one of the general principles which applies to
30 all of the rights espoused by the *Convention*. It has also been explicitly referenced in a number of articles.

-UNICEF, *Implementation Handbook supra*, p. 37.

15. The concept of 'best interests' has not been rigidly defined. After its review of the first reports of various countries, the Committee on the Rights of the Child issued the following guide lines on interpretation:

- I. The *Convention* should be considered as a whole, emphasizing the interrelationships between articles 3, 2, 6, and 12 which have all been elevated to the status of general principles;
- II. The principles of non-discrimination, maximum survival and development and respect for the views of the child must all be relevant to determine the best interests of a child in a particular situation;
- III. Consideration of best interests must embrace short and long term considerations for the child.

40

- IV. Any interpretation of best interests must be consistent with the spirit of the Convention, and in particular with its emphasis on the child as an individual with views and feelings of his or her own, and the child as the bearer of civil and political rights as well as special protections;
- V. States cannot interpret best interests in an overly culturally relativist way and cannot use their interpretation of 'best interests' to deny rights now guaranteed to children by the Convention.
- UNICEF, *Implementation Handbook*, supra at p. 40.

Best Interests as a Primary Consideration

16. The Federal Court of Appeal draws a distinction between actions which "concern" children and those which "affect" them. The Respondent has conceded that the actions in question "affect" children
- 10 pursuant to section 12 of the *Convention*. The Court below held that because deportation is not an action "concerning" children, the best interests standard does not apply. This assertion was supported by a comparison of articles 3(1) and 12(2) and the fact that the *Convention* itself utilizes different words in these articles. It is respectfully submitted that this conclusion defies plain language, the principles of statutory interpretation and is unsupported by any of the leading authorities regarding the *Convention*. The proceeding in issue is an application for permanent residence by a custodial and access parent in order that she may care for and maintain her relationship with her Canadian children. Such an application can only be understood as a measure for care and protection of these children, within the ambit of article 3. In all cases where a parent makes such an application, the fate of *both*
- 20 unconstitutional result that if the Appellant's children were Jamaican born and made a joint "H&C" application, then the interests of the children would be primary; whereas for Canadian born children their interests would not be primary.

Concise Oxford Dictionary (1964) Oxford: Oxford University Press at 250 "concern": relate to, affect, interest oneself. Rogets Thesaurus (3rd) (1998) New York: Random House at 121 "concern": affect, touch bear upon, involve, be relevant to, relate to.

17. The wording of article 3(1) indicates that the "best interests of the child" is the starting point of the analysis as the primary consideration. In any given case, other factors may come into play but in all cases, it must be demonstrated that the child's interests have been explored and given due
- 30 weight.

-UNICEF, *Implementation Handbook*, supra at p. 40.

18. While the working group engaged in discussions on this issue, it is submitted that the intention behind the use of 'primary', rather than paramount was not to weaken the principle but to provide the flexibility needed to give priority to other interests when the circumstances so dictated, as in 'extreme' cases.

-Detrick, Sharon, ed. The UN Convention on the Rights of the Child: A Guide to the "Travaux Préparatoires," Netherlands: Kluwer Academic Publishers, 1992), p. xvii.

- 40 "The use of the word 'primary' should not be interpreted in any way as a dilution of the over-all principle that actions should always be taken in the best interests of the child and the taking in to account of the child's rights. On the contrary, the travaux preparatoires reveal the unanimous support for this principle."

Article 8: (Preservation of Identity):

19. It is submitted that:
The concept of the child's 'national identity' can involve identity acquired through residence as well as through birth or parentage, which renders equally questionable legislation that does not allow children to acquire full nationality from significant periods of residence, *and those States that, by deporting parents, prevent children from enjoying their national identity acquired from place of birth or residence.* [emphasis added]
-UNICEF, *Implementation Handbook, supra*, at page 112.
20. The qualifier 'without unlawful interference' in article 8 suggests that the child's right to preservation of identity can be lawfully violated. It is submitted that such violation would have to comply with the letter and the spirit of the Convention and with other instruments.
-UNICEF, *Implementation Handbook, supra* at p. 114.
21. The Implementation Checklist set out in the UNICEF Implementation Handbook as a
20 guideline for the determination of whether or not a country is complying with article 8 includes consideration of whether or not children are able to live with their parents in the state of the child's nationality.
-UNICEF, *Implementation Handbook, supra* at pp 116-117.
- Article 9(1): (Separation From Parents):**
22. The article affirms children's rights to maintain relations and contact with both parents, and places a duty on the State to inform parent and child of the whereabouts of either if the State has caused their separation.
-UNICEF, *Implementation Handbook, supra* at p. 119.
- 30 23. Two essential principles related to children's rights are enshrined in article 9:
1. That children should not be separated from their parents unless it is necessary for their best interests; and
2. All procedures to separate children from their parents on the ground that it is in the former's best interests must be fair.
24. It is significant that the Committee member from Japan entered a reservation in relation to article 9(1) upon acceptance of the final draft of the Convention: "The government of Japan declares that paragraph 1 of article 9 of the Convention on the Rights of the Child be interpreted not to apply to a case where a child is separated from his or her parents as a result of deportation in accordance with its immigration law." Despite discussions regarding this use by the working group,
40 Canada did not so reserve. Canada did reserve with respect to articles 21 and 31 of the *Convention*.
-*Convention on The Rights of the Child, UN Doc. CRC/C/1/Rev.5*, p. 22.
-UNICEF, *Implementation Handbook, supra* at pp. 122-123.

25. A Committee member declared in relation to the issues of immigration control and deportation:

Under article 9, States Parties should ensure that there would be no separation unless it was in the best interests of the child concerned and determined by competent authorities subject to judicial review. Concern had been expressed at how a child's best interests were taken into consideration when decisions to deport parents were made. Were family values taken into account by decision makers? Article 9 also referred to the need for judicial proceedings to give all interested parties the right and opportunity to be heard. It was unclear when and how a child could make his or her views known and with what legal support. Article 12(2) established the right of children to be heard in any administrative and judicial proceedings.

10

-Committee on the Rights of the Child, Ninth Session, June 1, 1995. CRC/C/SR.216, at paras. 28-29.

26. It is submitted that Article 9 expresses a fundamental principle that extends to all circumstances which may bring about the separation of child from one or both of his or her parents. It is submitted that the plain language of the article renders it applicable to all children and parents: aliens and citizens alike; that the language does not exclude application of the article to deportation or other immigration proceedings and that the test is one of "necessity" with reference to the best

20 interests of the child.

-Eliahu Frank Abram, "The Child's Right to Family Unity in International Immigration Law (Oct. 1995) Law & Policy Vol. 17, No. 4, 397 at 418-420.

27. The fundamental importance of the family to society is widely recognized in domestic and international law. Government actions which displace one member of the family have an indirect but no less serious impact on the other members of that family. The deportation of an immigrant parent will result in either the separation of that parent from their Canadian born children or, alternatively, result in the deportation of these children from the country of their origin. This problem has become

30 the focus of recent academic literature under the heading of "constructive deportation." Several authors have considered the impact of removal orders on non-immigrant children in the context of a domestic, regional and international human rights analysis.

-Nuala Mole, "Constructive Deportation and the European Convention" (1995) E.H.R.L.R. Launch Issue, 63.

-Giovanni Wolf, "Preserving Family Unity: The Rights of Children to Maintain the Companionship of their Parent and Remain in their Country of Birth" (1996) 4 Global Legal Studies 207;

-Eliahu Frank Abram, *supra*

-Daniela Bassan, "The Canadian Charter and Public International Law: Redefining the State's Power to Deport Aliens" (1996) 34:3 Osgoode Hall L.J. 583;

40 -Geraldine Van Bueren, "Protecting Children's Rights in Europe—A Test Case Strategy" (1996) 2 E.H.R.L.R. 171;

-David Feldman, "The Developing Scope of Article 8 of the European Convention on Human Rights" (1997) 3 E.H.R.L.R. 265

28. The negative impact of such orders on non-immigrant children is significantly compounded when their immigrant parents are separated. Deportation of one parent, as in the present case, has the inescapable effect of denying that child contact with at least one of his or her parents. In such

circumstances, the deportation order directly interferes with the child's right to family unity or companionship of both parents. As one author observed in the context of Article 8 of the *European Convention on Human Rights*.

-David Feldman, *supra* at 268.

Article 10(1) Family Reunification

29. Article 10(1) places a duty on states, when considering applications for family reunification, to take into consideration the best interests of the child. In accordance with the *Convention*, an application by a child or his or her parent for family reunification should be dealt with 'in a positive, humane and expeditious manner'. It is submitted that the family reunification right articulated in the text of article 10(1) flows from and supplements the child's right to have his or her family life protected and respected by the state. Children have the presumptive right not to be separated from their family against their will and conversely, in cases of separation, to be reunited expeditiously. While article 10(1) does not directly address the right of children or their parents to 'remain' for the purposes of family reunification, by implication, since a deported parent would at once be in position to wish to re-enter the country, these cases can be assumed to be covered by this article. It is submitted that a purposive approach to interpreting the protection afforded to family life in the *Convention* would require that consideration be given to the inter-related rights articulated in the Preamble as well as articles 7(1), 8(1), 9(1), 10(1) and 16 and supports the conclusion that in cases where the separation of a child from his or her family is not in his or her best interests, the state is under a positive and very high obligation to ensure that the child is cared for by his or her family, including both custodial and non-custodial parents as well as siblings, in the state in which the child resides.

-UNICEF, *Implementation Handbook*, *supra*, p. 132.

Canada's First Report: 1994

30. The first report outlines measures adopted prior to 31 December 1992 by all governments in Canada to implement the *Convention* and relevant case law. In its report, Canada stated that the values confirmed by the *Convention* have been fundamental elements of Canadian social policy, and domestic legislation.

-First Report of Canada, UN Doc. CRC/C/11/Add.3.

31. The Canadian delegation explained to the Committee the federal nature of Canada and that:
1. [Since](sic) the convention was not self-executing the courts could, and did, refer to the Convention;
 2. There had never been a statute incorporating the Convention into domestic law. As a result an individual could not directly invoke the Convention in the Canadian courts. However, one could refer to the Convention as an aid to

interpret the Canadian Charter of Rights and Freedoms.

-*First Report, supra* at para. 28.

32. In response to questions put to the Canadian delegation by the Committee concerning article 4 which obliges States Parties to undertake "all appropriate legislative, administrative and other measures to implement the *Convention*", the delegate advised that she thought it unlikely that the new provisions would be enacted in that manner; but as a matter of general doctrine, domestic legislation was being interpreted by the courts in a manner consistent with the *Convention*.

-Committee on the Rights of the Child, Ninth Session, May 24, 1995, CRC/C/SR. 214 pp. 12.

10 Concluding Observations of the Committee

33. In its report in response to Canada's First Report, the Committee expressed grave concern with Canada's failure to adequately integrate the *Convention* into domestic practice. Reference was made to articles dealing with non-discrimination, the best interests of the child and respect for the views of the child. Specific mention was made of the "insufficient measures aimed at family reunification" and cases involving the separation of Canadian-born children from their families as a result of a parental deportation order.

-Concluding observations of the: Committee on the Rights of the Child; Canada, CRC/9th Session May 1995, CRC/C/15. Add.37 at paragraphs 11, 13, 21, 23.

20 34. The Committee noted that despite the federal nature of Canada, Canada is *still bound to observe fully the obligations assumed upon ratification of the Convention*. The Committee stated that "solutions should also be sought to avoid expulsions causing separation of families, in the spirit of article 9 of the Convention".

-Concluding Observations, *supra* at paras 9, 20, 24.

Incorporation of the Convention into Canadian Law by way of the Charter (in the context of Children's Rights)

35. The Supreme Court of Canada has relied on the *Convention* as have other levels of Courts. The *Convention* has been utilized as a guide to interpreting legislation, the *Charter* and the
30 common law.

-*P. (D.)*, *supra* at 180.

-*Young v. Young*, *supra* at 75.

-*Gordon v. Goertz*, *supra* at 76.

-*W. (V.) v. S. (D.)*, *supra* at 76.

-*R. v. L. (D.O.)*, *supra* at 465.

-*Eaton*, *supra* at 277-78.

-*Francis v. Eve*, [1986] 2 S.C.R. 388 at 426.

-*Sahota v. Canada (M.E.I.)*, [1994] 80 F.T.R. 241 at 242-243.

-*R. v. H. (A.)* (1993), 12 O.R. (3d) 634 (C.A.) at 367.

40 -*Mohamed v. Metropolitan Toronto*, *supra* at 22.

-*Re M.*, unreported decision of Immigration and Refugee Board, 15 January 1997.

-*R. v. K. J.*, unreported Decision of the Ontario Court, Provincial Division, March 31, 1998

-UNICEF, Practical Guide, *supra* at 35-39.

36. It is submitted that section 7 of the Charter is one appropriate framework within which to address the rights of the children as it addresses due process issues and incorporates other provisions of the Charter as principles of fundamental justice. It is respectfully submitted that sections 7, 6, and 15 of the Charter encompass the relevant articles of the Convention, as set out below.

37. It is submitted that consequences of the current application of the Immigration Act are consequences to the children. Regardless of whether or not the parents or the children proffer the arguments on behalf of the children, the rights of the children are affected and the outcome concerns them. These illegal consequences, then, cannot be sanctioned on the basis that they involve someone

10 other than the principle party's rights.

-R. v. Big M. Drug Mart [1985] 1 S.C.R. 295 at 314, 315.
-Benner v. Canada [1995] 1 S.C.R. 359 at 393-400

38. In Francis, the Ontario Court General Division accepted jurisdiction over the application of the children of a potential deportee (relying on its parens patriae powers) and considered the rights of the children under the rubric of section 7 of the Charter. In that context, the Court also considered the section 6 Charter rights of the Canadian born children, to remain in Canada.

-Francis v. M.E.I., supra

20

SECTION 7 OF THE CHARTER

The Scope and applicability of s. 7

39. The scope of the life, liberty and security interests in section 7 of the Charter are not limited to the physical deprivation of liberty and can include deprivation of psychological and emotional integrity and personal autonomy. It is submitted that children have a public, constitutionally protected, section 7 interest in their psychological and emotional integrity, in having their basic needs such as education and adequate standard of living met, and in the preservation of their family, including their right to receive care and guidance from their parents.

30 -R. v. Morgentaler [1988] 1 S.C.R. 30 at 55-56, 166, 167.
-R. v. Jones [1986] 2 S.C.R. 284 at 318-319.
-B. (R) v. Children's Aid Society [1995] 1 S.C.R. 315 at 368.

40. Section 7 of the Charter provides that such substantive rights cannot be taken away from an individual, except in accordance with the principles of fundamental justice. It is submitted that these principles include the principles of natural justice the law regarding standing and in particular the rights associated with party status, as well as the principle of consideration of the best interests and wishes of the child. It is also well-established that section 7 Charter rights can be informed by rights contained in other provisions of the Charter and that other Charter provisions constitute

principles of fundamental justice. Specifically, it is submitted that section 6 rights inform the section 7 rights of the children and that the equality rights contained in section 15 are principles of fundamental justice.

-Eaton, *supra*

-R. v. O'Connor [1995] 4 S.C.R. 411 at 483.

Liberty Interest of the Children (Articles 16 and 12 of the Convention)

41. It is submitted that the right to remain in Canada and to make choices about where one
10 resides is a liberty issue for the children. It is submitted that the choices open to parents and children are not genuine choices at all. The results of the implementation of the *Immigration Act* is to limit the autonomy of the children and affect their emotional and psychological integrity.

42. In *Francis*, the court held that:

If government action compels the girls to leave Canada against their will, this deprives them of their liberty to enjoy and exercise their right to stay in Canada and this contravenes their section 7 right to liberty and security of the person.

-*Francis, supra*, at 5, 6

-Reference may also be had to: *Morgentaler, supra* at 62-63, 92-93;

20 -R. v. *Big M Drug Mart* *supra* at 321.

Section 6 of the Charter/Section 2(a) of the Bill of Rights (Article 8 of the Convention)

43. It is submitted that section 6 and section of the *Charter* and section 2(a) of the Bill of Rights inform the security and liberty interests of the children protected by section 7 of the *Charter*. These provisions also stand alone as supporting rights violations.

-*Francis, supra*

-R. v. O'Connor *supra* at 483-487; (s. 8 rights informed s. 7 rights).

44. In *Francis*, the Court gave weight to the section 6 rights of the children, in the context
30 of the section 7 analysis. The Court accepted that the forced removal of the mother amounted to constructive dismissal of the children.

That the children have an absolute right to stay in Canada is clear from s.6(1) of the *Charter*. Is the deportation of the mother, having regard of the dependency and age of the children, government action which *de facto* deports or exiles the children?

-*Francis, supra* at 5, 6.

-*Big M, supra* at 321.

-*contra: Parsons v. Styger* (1989), 67 O.R. (2d) 1 at 10 (Ont. Sup. Ct.)

Security Interests of the Children

40 **The Child's Right to Preservation of The Family** (Preamble and Articles 6-10 and 16 of the Convention)

45. It is submitted that the child's right to preservation of the family is a security of the person interest which is fundamental to the physical and emotional well-being and development of children in our society. To remove a child from the family is a source of psychological harm.

The sibling relationship is also integral to the family and hence, protected.

- Steinhauer, The Least Detrimental Alternative, 1991. (Toronto: University of Toronto Press) at Chapter 2.
- Thompson v. Thompson* [1994] S.C.R. 551 at 59.
- Mills v. R.* [1986] 1 S.C.R. 863 at 919-920.
- R. v. O'Connor*, *supra* at 482.
- James v. James* (1983) 25 Sask R.186 (Sask Q.B.).
- C.G.W. v. M. J.* (1981) 34 O.R. (2d) 44 (Ont C.A.).
- Jones, "Do Siblings Possess Constitutional Rights?" 1993 Cornell Law Review, vol 78, p. 1186.

10 46. In *B (R) v. CAS*, eight of the nine justices in their minority judgments recognized a constitutionally protected, and thus public, right of family integrity, (subject only to state interference on the basis of measurable grounds such as the best interests of the child to be addressed below). It is submitted that the corollary to the parental right to care for the child, is the right of the child to be cared for by his or her parents. Justices Cory, Iacobucci and Major, approached the analysis from the standpoint of the section 7 rights of the child to life, liberty and security of the person which rights were firmly established as opposed to the parental right to make medical decisions for a child.

-*B(R) v. Children's Aid Society* [1995] 1 S.C.R. 315 at 431-434.

47. The *Augustus* case, relied upon by the Respondent, was decided in the context of a civil action involving the death of the 19 year old son of the appellant, with whom she had not lived for
20 some time. The Court was not faced with acting in a proactive manner where the well-being of a minor child was at issue. Unfortunately, nothing that the Court could have done could have re-instated or preserved the family bond. The Court referred to the fact that "well-being" of a child was not before them as an issue. In cases in which a decision-maker is faced with severing an all-important and existing family relationship, the law has evolved in a different manner.

48. The emotional and psychological importance of sustaining family continuity and integrity for children has been consistently emphasized by this Honourable Court in the family law context.

- Gordon v. Goertz* [1996] 2 S.C.R. 27 at 61,62-63.
- Catholic Children's Aid Society of Metropolitan Toronto v. C.M.* [1994] 2 S.C.R. 165 at 202.
- Young v. Young* [1993] 4 S.C.R. 3 at 42.
- King v. Low* [1985] 1 S.C.R. 87 at 103-105.

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49. At common law, a presumption of family integrity exists in terms of care and control of the child. It is assumed that the family will stay intact and the parents enjoy custody, and its attendant obligations.

-*Hewer v. Bryant* [1970] 1 Q.B. 357.

50. The starting point under various pieces of legislation is one of a presumption of family integrity. Under our custody legislation, parents have the right to custody over their children. Children have a right to support and necessities from their parents as evidenced by support legislation

40 and the Criminal Code.

- Divorce Act, R.S.C. 1985 c.3.
- Child and Family Services Act, R.S.O. 1990, c. C-11, ss.1, 37, 57.

-Children's Law Reform Act, R.S.O. 1990, c. C-12, s.20.

-Family Law Act, R.S.O. 1990, c. F-3, s.3.

-Criminal Code, R.S.C. 1985, c.C.46, as amended, s.280-286, s. 215.

51. Protection of the family unit, and, in particular, the protection of children consistent with their best interests, are recognized internationally as fundamental human rights. Article 23(1) of the *International Covenant on Civil and Political Rights* provides that the family is the "natural and fundamental group unit of society and the State." Article 10(1) of the *International Covenant on Economic, Social and Cultural Rights* further requires "the widest possible protection and assistance" for the family, particularly while it is responsible for the care and education of dependent children.

- 10 The entitlement of children to the care of the family is one of the most widely accepted rights of the child. The United Nations Human Rights Committee underscores the prohibition on arbitrary interference with the family and states that the term "family" should be given a broad interpretation to include "all those comprising family as understood in the society of the state party concerned". Other international instruments reflect in similar fashion the fundamental importance of the family and the obligation of states to safeguard the interests of the family.

Reference may be had to schedule B; International Human Rights Instruments: Family Integrity

52. A series of European cases have considered family protection in relation to an alien family member. These cases support the principle that maintaining the integrity of a family unit can prevail over a state interest in expulsion in a variety of immigration situations.

- 20 -*Bevrehab v Netherlands*, (3/1987/126/177), ECHR, Strasbourg, June 21, 1988.
-*Djeroud v France*, (34/1990/225/289), ECHR, Strasbourg, January 23, 1991.
-*Mostaqim v Belgium*, (31/1989/191/291), ECHR, Strasbourg, February 18, 1991.
-*Beljoudi v France*, (55/1990/246), ECHR, Strasbourg, March 26, 1992.
-*Nasri v France*, (1995) 21 E.H.R.R. 458.

53. In considering the protection afforded to family life under art. 8 of the *European Convention*, the European Court has been guided by the best interests of the child in cases involving interference with the respect for family life specifically where that interference involves minors. In *X, Y and Z v. United Kingdom*, the Court stated that the "community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the
30 forefront."

-*X, Y and Z v. United Kingdom* (1997) 24 E.H.R.R. 143 at 170 (para. 47)

54. The European Court has referred to art. 7 of the *Convention on the Rights of the Child* in holding that where there exists family ties between parent and child, the State is obliged to act in a manner "calculated to enable that tie to be developed" and, furthermore, that "the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life even when the relationship between parents has broken down." Respect for family within the meaning of Article 8 implies that contact between the parent and child is of fundamental importance and that cohabitation

between the parents or between parent and child are not preconditions for family life. Other cases considering the interpretation of article 8 have given significant, if not decisive, weight to the interests of the child.

-*Keegan v. Ireland* (1994) 18 E.H.R.R. 342 at 362.

-*Thorbergsson v. Iceland* (1994) 18 E.H.R.R. CD 205.

-*Asplund v. Sweden* (1994) 18 E.H.R.R. CD111 at 113.

55. In the context of immigration and the applicability of Article 8, the European Commission
10 on Human Rights has articulated a number of important factors to consider in assessing the circumstances pursuant to which the right to family overrides that of the State's interest in denying residence to a non-citizen. In *PP and Others v. United Kingdom*, the Commission considered, *inter alia*, the extent to which as a result of the deportation order, family life is effectively ruptured and whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them. Where there has been clear evidence of the viability of the family developing its life elsewhere, some cases suggest that deference should be given to the state's authority to regulate its own immigration. Such cases are to be distinguished from the present case, where it would be patently unreasonable to require the children and one citizen parent, who is not in a spousal relationship with the appellant, to follow the deported parent to a country where they have no existing
20 links.

-*PP and Other v. United Kingdom* (1996) 21 E.H.R.R. CD81 at CD 84;

-*Jasmine Sorabjee v. United Kingdom*, App. No. 23938 (1996) 2 E.H.R.L.R. 216.

56. The Respondent includes within the list of factors "mitigating in favour of a negative decision" in this case, the Appellant's conviction for assault. It is submitted that the record is unclear as to whether a criminal conviction was actually entered. The Appellant answered "yes" to the question in her initial "H & C" application regarding whether she had been convicted or charged with any crime but the notes of Immigration officer Lorenz indicate that she was found unfit to stand trial and that the charges were quashed. To the extent that the Appellant may have had any "potential for
30 violence", subsequent psychiatric treatment together with the full support and involvement of the Children's Aid Society, a public agency whose mandate includes the direct supervision of families at risk, was persuasive evidence of the Appellant's rehabilitation. It is inappropriate to equate the present case with the criminality cases relied upon by the Respondent.

-Appellant's Record, Vol. 2, pp. 340, 346.; Affidavit of Jean Barber, Appellants Record, Vol. 2, pp 251-252.

-Respondent's Record, pp. 23, 40, 61.

57. In any event, both international and regional human rights tribunals have held that when criminality is raised as a justification for an interference in the unity of a family, the competing interests must be balanced. In that regard, tribunals have consistently concluded that only serious

criminality of a type which constitutes a threat to national security or public order would justify such an interference. Serious criminality would include, for example, a long and continuous criminal record or a record of particularly dangerous offences, without convincing evidence of rehabilitation. It is submitted that in no circumstances does the Appellant's record come close to this standard. Furthermore, in all cases the scope of the state's rights and obligations must be examined with reference to the particular facts of the case and a clear recognition that human rights standards exist to protect the entire community, even those members whose activities may be subject to social or legal disapprobation. It is submitted that a child-centred approach should be adopted which would place a presumptive onus on the state to justify any incursion on the needs and interests of the child in

10 preserving their family.

-*Stewart v. Canada* (Human Rights Committee, Comm. No. 538/1993, November 8, 1996), paras. 12, 10.

-*Boughanemi v. France* (ECHR, No. 22070/93, April 24, 1996, 22 E.H.R.R. 228) at 247-248.

-*Ahmut v. Netherlands* (ECHR, No. 73/1995/579/665, November 28, 1996), para. 68.

-*Dalia v. France* (ECHR, No. 154/1996/773/974, February 19, 1998), paras. 52-54.

-*The Chahal Family v. United Kingdom* (European Commission of Human Rights, App. No.22414/93, 20 E.H.R.R. C.D. 19) paras. 130-140.

58. With respect to the applicability of the *Convention on the Rights of the Child* specifically, the New Zealand Court of Appeal accepted in *Tavita*, that a fact situation similar to that raised in the
20 within application necessitates a balancing procedure between the state interest in removing a non-citizen parent and rights guaranteed to a citizen child under the *Convention*. In this procedure "the basic rights of the family and the child are the starting point." The court also noted that the submission that treaties should play no part in the proceedings was "an unattractive prospect, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing."

-*Tavita v. Minister of Immigration* (1993), 2 NZLR 257 at 265-266 (N.Z.C.A.).

Section 7: Principles of Fundamental Justice

59. A deprivation of one of the rights of children discussed above can only occur in accordance with the principles of fundamental justice. It is submitted that these principles include:
30

1. The right to be heard, including the right to have one's views and wishes given due weight.
2. Consideration of the best interests of the particular child as the primary consideration
3. The right to be free from discriminatory treatment.

The Right To Be Heard (Articles 12 and 4 of the Convention)

60. The right to be heard in proceedings which may have an impact upon one's life is a well-established principle of natural justice. The right to be heard can entail differing levels of participation. It is submitted that in this instance, given the fundamental consequences faced by the children, this right includes the right to notice, to independent representation, to be present and present one's case and the right to have one's views and wishes given due weight.

40 -*Singh v. Canada* (M.E.I.) [1985], 1 S.C.R. 177 at 215-214.

-Ministry for Immigration and Ethnic Affairs v Teoh, (1994) 128 ALR 353 (H.C. of A.) at 365.

61. Standing for children in Canadian law is analyzed on the basis of these same principles, on a constitutional basis (as in "O'Connor" applications) and as mandated by the *Convention*. It is submitted that to base standing on artificial distinctions between whether or not matters "affect" or "concern" children as submitted by the Respondent and as held in Courts below, is to apply an unconstitutional analysis which ignores effects. Standing has been granted to children in proceedings involving the privacy of their records as victims in criminal prosecutions and in other proceedings in which legislation is silent on their participation, including in the social assistance and custody contexts.

- 10 *-R. v. Barbosa* (1994), 92 C.C.C.(3d) 131 (Ont.Ct.Gen.Div.) (child victim witness) ("O'Connor" application)
-Hagan v. Hagan, Unreported Decision of Ontario Court, General Division: D92605/81.(custody case)
-Social Assistance Review Board Decision No.L1224-35(January, 1994)(standing given to daughter in mother's family benefits appeal)

62. In every province except for Saskatchewan and Prince Edward Island, an entitlement or mechanism for appointing counsel for the child is enshrined in family law proceedings. With respect to the deprivation of liberty of children in the mental health context, the majority of provinces and the territories make provision for due process rights for the child.

-Reference may be had to: Wilson, Children and The Law, Appendices 8 and 11 at Schedule C herein.

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63. The importance of giving children a voice in proceedings that may affect them is demonstrated by the law of evidence, which has established special rules and methods to facilitate children's testimony.

- R. v. C.C.F.* [1997] 3 S.C.R. 1183.
-R. v. Khan [1990] 2 S.C.R. 531.
-R. v. B. (K.G.) [1993] 1 S.C.R. 740

64. Various pieces of provincial legislation have provided for the consideration of the wishes of the child when determining outcomes that affect him or her. For example, under the *Child and Family Services Act* in Ontario, the provisions requiring the consent of a 12 year old to a voluntary agreement and to a "consensual" protection order reflect the significant weight to be given to the wishes of the child who can "veto" state involvement in terms of "care and control" of the child.

-Reference may be had to: Schedule D: Standing/Views and Wishes: A Summary of Relevant Legislation.

65. International human rights instruments also support the fundamental entitlement of all individuals, including children to have their views and wishes taken into account.

- Reference may be had to: Schedule E: International Instruments: Views and Wishes*
-Stephen J. Toope, "The Convention on the Rights of the Child: Implications for Canada" in Children's Rights: A Comparative Perspective, ed. Michael Freeman, at 47.

- 40 66. The *Convention* cites both judicial and administrative proceedings as examples. As one authority notes, the child may be a main actor in the proceeding or merely in a secondary role. In either event, article 12 mandates that the views of the child be heard. The more important the decision

is for the future or status of the child, the more precise and forceful the procedural provisions ought to be to ensure the views of the child be both communicated and heard.

-Marie-Francoise Lucker-Babel, "The Right of the Child to Express Views and To Be Heard: An attempt to interpret Article 12 of the UN Convention on the Rights of the Child

67. In *Teoh*, the High Court of Australia held that the existence of a legitimate expectation that the minister's delegate would act in a particular, namely in conformity with the *Convention on the Rights of the Child* (ratified by the Australian government), did not compel the delegate to act in that way. However, if the delegate proposed to make a decision which did not accord with the principle that the best interests of the children were the primary consideration, procedural fairness required the
10 delegate to give the children notice and an adequate opportunity of presenting a case against the taking of such a course.

-*Minister for Immigration and Ethnic Affairs v. Teoh*, supra

68. Further, the common law does not fix an age at which one can consent to medical treatment or be emancipated from parental care and control but rather, recognizes the evolving maturity of each individual child.

-*Johnston v. Wellesley Hospital* (1971), 2 O.R. 103 (Ont. H.C.J.)

-*Health Care Consent Act*, [1996] S.O. c. 2, s. 4 (incorporates the common law position)

-*Hewer v. Bryant* [1969] 3 All E.R. 578 (C.A.), at 582, 585, 588,

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Best Interests of The Child (Articles 3,7,8 9,10, 12 and 4 of the Convention)

69. It is submitted that the principle of considering the "best interests of the child" in any intervention involving children is a principle of fundamental justice in our society. The Supreme Court has accepted the value of the "best interests of the child" test in a variety of contexts, including family law, child custody, education, and in the interpretation of the Quebec *Civil Code*. The universal acceptance of this principle was emphasized by Justice L'Heureux-Dube in *Young v. Young*, with reference to the *Convention*.

-*Young v. Young* [1993] 4 S.C.R. 3 at 75,109. [test not constitutionally vague: at 25, 71, 74-75, 109, 121]

-*S.(L.) v. S.(C.)* [1997] 3 S.C.R. 1003.

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-*Eaton v. Brant County Board of Education*, supra

-*Gordon v. Goertz* [1996], supra at 42-43,61,62-63,68.

-*W.(V.) v. S.(D.)* [1996] 2 S.C.R. 108 at 152-156.

-*Catholic Children's Aid Society of Metropolitan Toronto v. C.M.* [1994] 2 S.C.R. 165 at 191,196,202.

-*P.(D.) v. S.(C.)* [1993] 4 S.C.R. 141 at 174. [test not constitutionally vague: at 180]

-*C.(G.) v. V.F.(T.)* [1987] 2 S.C.R. 244 at 269-270,272.

-*King v. Low* supra at 103-105.

70. Most recently, the Supreme Court has imputed the principle of the best interests of the child into the context of the Ontario *Education Act*. When deciding on the placement for exceptional
40 children, Justice Sopinka held that it must be determined that "...the form of accommodation is in the child's best interests."

-*Eaton*, supra at 277, 278, 279.

71. Like the *Education Act*, the *Immigration Act* is silent in terms of the standard to be applied and the factors to be considered by the decision-maker. It is respectfully submitted that the present appeal is analogous to the *Eaton* case and that a similar obligation to consider the best interests of the child are as implicit in Canada for immigration officials as they are for education officials.

72. It is submitted that consideration of the views and wishes of the child and giving these wishes their due weight, as discussed above in the context of the right to be heard, is also an integral facet of the best interests test.

-*Eaton, supra* at 277

10 73. The "best interests of the child" test has been incorporated into various provincial and federal statutes dealing with child custody and family law and has been applied by courts across Canada. It is also included in Guidelines on Child Refugee Claimants, issued by the Chairperson of the Immigration and Refugee Board.

-Reference may be had to: Schedule F: Best Interests (Provincial/Federal Legislation).

-Guidelines issued by the Chairperson pursuant to section 65(3) of the *Immigration Act*, Guideline 3, Child Refugee Claimants: Procedural and Evidentiary Issues, August 26, 1996, p.3.

74. Further, the principle of *parens patriae* which permits courts, at common law, to exercise authority over the best interests of children, further supports the acceptance of the principle as one

20 of fundamental justice.

-*Harper v. Canada (Attorney General)*, unreported judgment of the Ontario Court of Appeal, June 25, 1997

-*Francis v. Eve* [1986] 2 S.C.R. 388 at 426.

-*Nunez (Litigation Guardian of) v. Canada (Solicitor General)*, unreported judgment of the British Columbia Court of Appeal.

-*Dumas v. Dumas*, (1992) 10 O.R. (3d) 20 (Ont High Court Justice) at 2.

75. Traditionally, the factors to be considered when addressing best interest include an array of considerations, including risk of harm to the child, the views and wishes of the child, family bonds, educational opportunities, standard of care and of living and emotional and psychological needs of

30 the child.

Reference maybe had to: *Eaton, supra* at 275-276 and to sources at para. 69 above.

76. New draft guidelines concerning "H & C" decision-making specifically note that "separation of a parent from his or her child could create a hardship that may warrant granting a visa exemption". A number of factors are listed as relevant to the determination, including the age and needs of the child as well as custody arrangements and the exercise of visitation rights.

This section concludes with the statement "The main concern should be the welfare of the child".

It is submitted that these statements constitute an explicit recognition that the current *Immigration Act*, Regulations and their interpretive guidelines give inadequate attention to the best interests of

40 children affected by removal proceedings.

S. 15 OF THE CHARTER

77. It is submitted that Section 15(1) of the *Charter* can provide guidance to the Court in isolation or as a principle of fundamental justice under section 7. It is submitted that in making a determination to remove the mother from Canada, the Minister has infringed upon the children's equality rights in that they are denied equality under the law on the basis of family status. They are subject to discriminatory treatment which is not meted out to other dependent Canadian-born children whose parents have an immigration status which prevents their removal from the

10 country. Further, if one accepts the reasoning of the court below, the Jamaican born children would have standing at an "H & C" while Canadian children would not. These distinctions in no way relate to the children's personal merits or capacities. The treatment of these children is inconsistent with any other state action that provides for a right to remain in Canada and for appropriate due process in matters where the impact of a decision may cause a child to be separated from his or her parents or to leave his or her country of origin.

-*Re F.L.; N.M. v. B.C.* (1986), 10 B.C.L.R. (2d) 234 at 243-244. (B.C. Sup.Ct.).

-*Milne v. Albert* (1990), 75 R.F.L. (3d) 389, 3 C.R.R. (2d) 94 (Alta.Q.B.).

-*Re Nolan and Newfoundland* (1995), 127 D.L.R. (4th) 694 at 704-706 (Newf.S.C.).

-*Benner v. Canada* [1997] 1 S.C.R. 358 at 398-403.

20 78. In *York Condominium*, a human rights case, the Ontario Divisional Court found adult-only housing discriminatory on the basis of family status. Excluding children from the housing units would have had the effect of requiring families to split up or live elsewhere. The court analyzed the right in question from the standpoint of the child.

-*York Condominium Corporation No. 216 v. Dudnik* (1991) 3 O.R. (3d) 360 at 367-368.

Balancing of Interests

79. Pursuant to a child-centred analysis, there is no absolute presumption that parents will act in the best interests of the child. It is the recognition of the child as an individual as well as the potential for conflict or parental self-interest or lack of expertise that necessitate the involvement

30 of the state/court as arbiter of the child's interests, *as an individual*. It is the decision-maker who must ensure that the best interests of the child are addressed and turn its mind to determining these interests. Similarly, regardless of the test, a child who is granted standing is entitled to have his or her interests weighed on an individual basis. It is submitted that since "best interests" is a primary consideration, the decision maker should turn its mind to whether or not separation from the parents is "necessary" and that the wishes of the child must influence what is "best".

-*B. (R)*, *supra* at 431-434.

-*A. (L.L.) v. B. (A)* [1995] 4 S.C.R. 537 at 584, 585.

-*Eaton*, *supra* at 277-279

80. In some instances, for example, where individual bodily integrity of the child (liberty and security of the person) is concerned, such as in the area of medical treatment, there is strong recognition of the paramountcy of the child's wishes over those of the parents --even if it means taking the child into care is necessary to facilitate these wishes.

-*Peel CAS v. P.S and C.S.* Unreported judgment of the Ontario Court, Provincial Division, released July 26th, 1991

81. Respect for the wishes of the child has also overridden the state's interest in treating the child. Justice Wells found the 15 year old boy capable of expressing a cogent view with respect to his refusal of blood products; that the test was what was in the boy's best interests and that his best interests would be "manifestly and in a very real sense adversely affected..." by countering his views.

-*Re: A.Y.*, Unreported decision of the Supreme court of Newfoundland, July 29th, 1993, Justice Wells), at 13.

SECTION 1 OF THE CHARTER

82. It is submitted that the Respondent has failed to adduce any evidence of a pressing and substantial objective which would justify the violation of citizen children's rights to have their best interests considered, to participate and to have due weight given to their views and wishes. Further, the Respondent has failed to otherwise justify it's actions and practices pursuant to section 1 of the *Charter*.

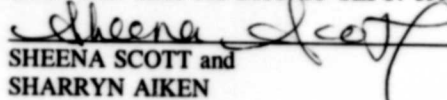
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Part IV: Order Requested

83. These Intervenors respectfully request that this Honourable Court interpret the *Immigration Act* in a manner consistent with the principles submitted herein, in the best interests of children.

84. These Intervenors seek no costs and respectfully request that there be no costs ordered as against these Intervenors.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 3rd DAY OF SEPT. 1998 BY:


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**PART V:
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SCHEDULE A: SUMMARY OF RELEVANT PROVISIONS OF THE CONVENTION

- The preamble: which recognizes that "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."
- Article 2: which guarantees the rights within the Convention to all children without discrimination, including that based on the status of their parents.
- Article 3: which requires that "in all actions concerning children [in courts or administrative bodies] the best interests of the child shall be a primary consideration."
- Article 4: which instructs state parties to take all appropriate measures to implement the convention.
- Article 7: which recognizes a child's right to "know and be cared for by his or her parents."
- Article 8: which recognizes the right of the child to protection of his or her family relations. It also protects the child's right to its nationality, which would be threatened by removal from the country.
- Article 9: which protects children against separation from their parents except when "such separation is necessary for the best interests of the child."
- Article 10: which recognizes the importance of the family unit as expressed through a commitment to family reunification.
- Article 16: which recognizes a child's right not to be subjected to unlawful interference with the family.
- Article 12: which recognizes the right of the child who is capable of forming his or her own views "the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child," a rule which applies in particular to "any judicial and administrative proceedings affecting the child."
- Article 24: which gives the child the right to the highest attainable standards of health.
- Article 27: which recognizes the right of the child to a standard of living adequate to meet physical and emotional needs.
- Article 28: which bestows the right to adequate education.

United Nations Convention on the Rights of the Child U.N. Doc A/RES/44/25. concluded November 20, 1989; entry into force September 2, 1990; in force for Canada December 13, 1991.

Schedule B: International Human Rights Instruments/Family Integrity

Universal Declaration of Human Rights, 1948, UNGA Res. 217A (III), Art. 25.

United Nations Human Rights Committee, *General Comments*, Geneva, CCPR/C/21Rev.1, May 19, 1989, Comments 15, 16, 17.

Declaration of the Rights of the Child, UNGA Res. 1386(XIV), Nov. 20, 1959, Princ. 1, 6, 7 and 8;

International Covenant on Civil and Political Rights, [1976] C.T.S. 47, Art. 17, 23, 24.1.

International Covenant on Economic, Social and Cultural Rights, [1976] C.T.S. 46, Arts. 10, 12;

Convention on the Rights of the Child, [1992] C.T.S. 3, Art. 5, 9, 10, 16.

American Convention on Human Rights, 1969, OAS Off. Rec., OEA/Ser. K/XVI/1.1, Art. 19.

American Declaration on the Rights and Duties of Man, 1948, OAS Res. XXX Arts. V, VI.

European Convention on Human Rights and Fundamental Freedoms, 1950, Council of Europe Treaty Series, No.5, Art. 8.

The *Hague Convention* which has been incorporated into Ontario law through the *Children's Law Reform Act* rigorously protects the child's right to be with the custodial parent, in the country of origin. The exceptions to the prohibition of removing the child relate to safety concerns and the wishes of a mature minor.

Children's Law Reform Act, R.S.O. 1990 c.12 s.46.

SCHEDULE C: WILSON, CHILDREN AND THE LAW

(Due Process/Representation Mental Health/Family Proceedings)

APP.11

WILSON ON CHILDREN AND THE LAW

**APPENDIX ELEVEN: TABLE OF PROVINCIAL AND TERRITORIAL LEGISLATION
CONCERNING MENTAL HEALTH COMMITMENT OF CHILDREN**

Province/Statute	Due Process
Alberta Child Welfare Act, S.A. 1984, c. C-8.1.	s. 41(5) requirement for hearing within 10 days as to justification for commitment.
British Columbia Mental Health Act, R.S.B.C. 1996, c. 288.	s. 20 a parent or guardian may admit a child to a mental health facility without his or her consent. s. 21 a young person is entitled to a hearing under s. 25. s. 25(1) where admission is involuntary, person admitted is entitled to receive a hearing no earlier than 30 days from the date of admission to determine if he should be detained.
Manitoba Mental Health Act, R.S.M. 1987, c. M1110 as amended.	
New Brunswick Mental Health Act, R.S.N.B. 1973, c. M-10 amended by An Act to Amend the Mental Health Act, S.N.B. 1989, c. 23.	s. 32(1.1)(a) Review board shall conduct an inquiry within five days where involuntary patient or person on his behalf applies for an inquiry (s. 31). s. 32(1.1)(b) Review board shall conduct an inquiry within ten days where there is no application for review by the patient or someone on his behalf.
Newfoundland Mental Health Act, R.S.N. 1990, c. M-9.	s. 16(1) a patient within a treatment facility may apply for a discharge by filing an application for review. Time period not stipulated.
Northwest Territories Mental Health Act, R.S.N.W.T. 1988, c. M-10.	s. 9(5) where an application is made for a person to undergo a psychiatric assessment, the justice or judge shall conduct a hearing and hear evidence concerning the alleged mental disorder, testimony of the applicant and the subject of the application where practicable. s. 9(8) a psychiatric assessment must be done within seven days of the date of the order.
Nova Scotia Children and Family Services Act, S.N.S. 1990, c. 5.	See Regulations N.S. Reg. 183/91 for provisions re commitment and due process.
Ontario Child and Family Services Act, R.S.O. 1990, c. C.11, as amended by S.O. 1996, c. 2, s. 62; Mental Health Act, R.S.O. 1990, c. M.7 as amended by the Consent and Capacity Statute Law Amendment Act, 1992, S.O. 1992, c. 32; and S.O. 1996, c. 2, s. 72.	Where involuntarily committed, right to a hearing before a review Board. Where placed as an informal or voluntary patient in a facility that is NOT under the auspices of the Child and Family Services Act (i.e. s. Mental Health Act schedule facility) there is for a child 12 years or older and under 16 years, a deemed application to a review board after six months and nothing prevents an earlier application.
Province/Statute	Due Process
Prince Edward Island Family and Child Services Act, R.S.P.E.I. 1988, c. F-2. Mental Health Act, R.S.P.E.I. 1988, c. M-6.	Family and Child Services Act s. 26(2) requirement for hearing within 21 days from the time an application has been made by Director to place uncontrollable child in residential or training facility. Mental Health Act s. 25(1) an involuntary patient or a person on his behalf may apply for review of his case. s. 26(1) Review board shall conduct an inquiry within 14 days of receiving application and may hold a hearing.
Quebec Civil Code of Quebec, S.Q. 1991, c. 64.	s. 28 a judgment ordering a person's confinement with a view to his undergoing psychiatric examination also orders that a report be made to the court within 7 days. ss. 26, 31 No person shall be confined without his consent. If the person is under 14 years of age or is incapable of giving his consent, the information is given to the person who is authorized to give consent to care of his behalf.
Saskatchewan Dependent Adults Act, S.S. 1989-90, c. D-25.1.	This Act starts at age 16. Prior to age 16 common law rules apply about parental authority or alternatively a person can be taken into care by the Department of Social Services.
Yukon Mental Health Act, R.S.Y. 1986, c. 115.	s. 2(3) any decision with respect to a person's committal may be appealed to the Supreme Court within 60 days of the decision. s. 9(2) Mental Health Review Board shall review the circumstances of all committals at intervals of not more than 60 days after the committal of that person.

APPENDIX EIGHT: TABLE OF PROVINCIAL AND TERRITORIAL LEGISLATION CONCERNING LEGAL REPRESENTATION FOR THE CHILD IN PRIVATE CUSTODY AND STATE CHILD PROTECTION PROCEEDINGS

Province/Statute	Proceeding	Provision
Alberta Child Welfare Act, S.A. 1984, c. C-8.1.	Child Welfare.	s. 78(1) court may direct that child be represented by a lawyer if the child, guardian or a director requests one or the court is satisfied that the interests or views of the child would not otherwise be adequately represented.
British Columbia Family Relations Act, R.S.B.C. 1996, c. 128.	Guardianship, custody, access, delinquency.	s. 2 court may appoint a Family Advocate to intervene at any stage and act as counsel for the child.
Manitoba Child and Family Services Act, S.M. 1985-86, c. 8.	Child protection.	s. 34(2) a judge or master may order that legal counsel be appointed to represent the interests of the child and, if the child is 12 years of age or older, may order that the child have the right to instruct the legal counsel (see s. 34(3) for factors affecting need for counsel for child).
New Brunswick The Child and Family Services and Family Relations Act, S.N.B. 1980, c. C-2.1 retitled Family Services Act, S.N.B. 1980, c. F-2.2.	Custody.	s. 7 Minister may appoint counsel to assist in the representation of the interests and concerns of the child or court may order child to be represented.
Newfoundland Children's Law Act, R.S.N. 1990, c. C-13.	Custody.	s. 71(2) judge may interview child to determine his or her views and preferences; s. 71(4) the child is entitled to be advised and to have counsel present during the interview.
Northwest Territories Domestic Relations Act, R.S.N.W.T. 1988, c. D-8.	Custody.	s. 27(3) a child may apply for the court's decision with respect to his or her custody without a next friend.
Nova Scotia Children and Family Services Act, S.N.S. 1990, c. 5.	Child Welfare.	see Nova Scotia Regulation 183/91 for provisions re child representation.
Province/Statute	Proceeding	Provision
Ontario Child and Family Services Act, R.S.O. 1990, c. C.11.	Child protection	s. 38(1) a child may have legal representation. s. 38(2) where a child does not have legal representation the court shall determine whether legal representation is desirable to protect the child's interests.
Prince Edward Island Family and Child Services Act, R.S.P.E.I. 1988, c. F-2.	The child is not entitled to legal representation unless the court exercises its <i>parens patriae</i> jurisdiction (it has done so).	None.
Quebec Code of Civil Procedure, R.S.Q. 1977, c. C-25 as amended by Reform of the Civil Code, S.Q. 1992, c. 57.	Any civil proceeding	s. 394.1 where, in a proceeding, the judge or the court finds that the interest of a child is at stake and it is necessary for the safeguard of that interest that the child be represented, he or it may adjourn the hearing of the application until an attorney is appointed to represent the child... s. 394.2 to ensure proper representation of the child, the judge must, in all cases where the interest of the child is opposed to that of the parental authority or that of the child's tutor and in those where the child is unable to determine his own interest, appoint a tutor ad hoc to the child.
Saskatchewan Family Services Act, R.S.S. 1978, c. F-7.	Child Welfare.	No provision for representation of child s. 23. Minister may engage counsel to represent officer and parent of the child.
Yukon Territory Children's Act, R.S.Y.T. 1986, c. 22.	Custody, access, guardianship, adoption, child protection.	s. 167(2) Official Guardian has exclusive right to determine whether any child requires separate representation by a lawyer or any other person (see s. 167(5) for factors considered).

**SCHEDULE D: STANDING/ VIEWS AND WISHES:
A SUMMARY OF RELEVANT LEGISLATION**

Child Welfare Act, Statutes of Alberta, 1984, cC-8.1, section 2(d): capable child is entitled to express opinion and to have it considered in matters that affect child.

The Family Maintenance Act, R.S.M. 1987, c. F.20, as amended, section 2 (2): determination of best interests of the child to include views and preferences of child where child understand nature of proceedings and it would not be harmful.

Family Services Act, S.N.B. 1980, c > F-22, as amended, section 1 (b): the best interests of the child includes consideration of the views and preferences of child where they can be reasonably ascertained.

Children and Family Services Act, S.N.S., 1990, as amended, section 2(2) (j): determination of best interests in child protection, secure treatment and other matters under the Act, to include consideration of child's views and wishes if they can be reasonably ascertained.

The Children's Commission Act, S.B.C. 1997, c. 11, s. 3(1) (d): guiding principles include "the importance of providing children and their families with opportunities to participate in making decisions that affect them."

Child and Family Services Act, R.S.O., *supra*, at preamble, ss. 57, 107, 29(2)(b), 27(6), 37.2(l)

Custody Jurisdiction and Enforcement Act, R.S.P.E.I. 1988, c C-33, s. 8(1): in custody/access proceedings, court to take into account views and preferences of child to the extent that child can express them.

Civil Code of Quebec, S.Q. 1991, c. 64, as amended, Art. 34: "The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it."

Children's Law Act, S.S. 1990, c. -8.1, section 8(a) (vii): determination of best interests includes consideration of wishes of child, to the extent the court considers appropriate, with regard to the age and maturity of the child.

Children's Act, R.S.Y. 1986, c. 22, s. 30(1)(b): reasonably ascertainable views and wishes of child to be considered vis a vis custody and access.

Child Welfare Act, R.S.N. (newfoundland) 1990, c. C-13, as amended, section 4(2): in child protection matters, views and preferences which can be reasonably ascertained constitute a consideration with respect to the best interests of the child.

Domestic Relations Act, R.S.N.W.T. 1988, c. D-8, section 32 (2): Court may consult the wishes of the child.

SCHEDULE E: INTERNATIONAL INSTRUMENTS: VIEWS AND WISHES

-*United Nations Convention on the Rights of the Child*, at article 12.

-*International Covenant on Economic, Social and Cultural Rights*, 1966, article 1, "self determination".

-*The Declaration of the Rights of the Child* (1959) UNGA Res. 1386 (XIV), Nov. 20, 1959, Princ. 6,7; preamble.

-*The Universal Declaration of Human Rights* (1948) UNGA Res. 217A (III), Dec 10, 1948 at articles 1,3,6,7

-*Convention on the Civil Aspects of International Child Abduction*, *supra*, at Article 15.

SCHEDULE F: BEST INTERESTS (PROVINCIAL/FEDERAL LEGISLATION)

- Child Welfare Act*, R.S.N. 1990, c.C.12, ss.4(1),4(2),36.
- Family and Child Services Act*, R.S.P.E.I 1988, c.F-2, ss.1(d),2.
- Child and Family Services Act*, S.N.S. 1990, c.5, ss.2(1),2(2),3(2).
- Family Services Act*, S.N.B. 1980, c.F-2.2, ss.1,51(3),62(3).
- Youth Protection Act*, R.S.Q. 1977, c.P-34.1.
- Child and Family Services Act*, S.M. 1985-86, c.8 (C.C.S.M. C80), s.2(1).
- The Child and Family Services Act*, S.S. 1989-1990, c.C-7.2, ss.4,32(1).
- Child Welfare Act*, S.A. 1984, c.C-8.1, s.2 [amended S.A. 1988, c.15, s.3].
- Child, Family and Community Services Act*, R.S.B.C. 1996, c.46, s.4.
- Child Welfare Act*, R.S.N.W.T. 1988, c.C-6, ss.19(2),19(3).
- Children's Act*, R.S.Y. 1986, c.22, s.30.
- Family Law Act*, R.S.O., c.F.3, s.56.
- Child and Family Services Act*, R.S.O., c.C.11, ss.37,136.
- Children's Law Reform Act*, R.S.O., c.C.12, ss.24(2),56(1).
- Divorce Act*, R.S.C., c.3 (2nd Supp), ss.16(8),16(10),17(5),17(9).

File No. 25823

MAVIS BAKER and THE MINISTER OF CITIZENSHIP & IMMIGRATION

Appellant

Respondent

IN THE SUPREME COURT OF CANADA
(Appealed from the Court of Appeal)

FACTUM OF THE CANADIAN FOUNDATION FOR
CHILDREN, YOUTH & THE LAW, DEFENCE FOR
CHILDREN INTERNATIONAL-CANADA and
CANADIAN COUNCIL FOR REFUGEES

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Applicant.*

Service of a True Copy hereof admitted
this... day of Sept. 19. 98
TORY, TORY, DESLAURIERS & BINNINGTON
SOLICITORS FOR

*per
John Jany
Charter Committee a
Barry Ksawo*

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DEPUTY ATTORNEY GENERAL
DEPARTMENT OF JUSTICE
[Signature]

*Service of a true copy
accepted this 4th day
of Sept 198-
Jay Mishra
Counsel for the Appellant.
Dated 4/9/98*