APPLICATIONS FOR STATE-FUNDED COUNSEL	New	Office of the Attorney General / Family Crown Services	Policy 19
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APPLICATIONS FOR STATE-FUNDED COUNSEL

1. Introduction

In *New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G.]* [1], commonly referred to as the *"G."* decision, the Supreme Court of Canada held that any child protection litigation which could potentially deprive a parent of the custody, care and control of his child constitutes a potential infringement of section 7 of the *Canadian Charter of Rights and Freedoms*.

In order for this potential breach to be in accordance with the principles of fundamental justice, the parent must be guaranteed the right to a fair hearing. For such hearing to be fair, the parent must have the opportunity to present his or her case effectively. While a parent need not always be represented by legal counsel in order to ensure a fair hearing, in certain circumstances, depending on the seriousness of the interests at stake, the complexity of the proceedings and the capacity of the parent, the state may be required to provide an indigent parent with state-funded counsel.

The "G." hearing is designed to determine whether the court should order the appointment of state-funded counsel for a parent who is unable to self-represent, who does not have the financial means to retain counsel, who has been refused legal aid and who has exhausted the legal aid appeal process.

2. Pre-hearing procedure on "G." applications

Due to the potential for a perceived conflict of interest, it would be both unseemly and inappropriate for the Minister of Social Development, being the applicant in a child protection case, or his legal counsel, to take a position with respect to the request for state-funded counsel for a respondent parent.

Yet there may be legitimate grounds for opposing the appointment of state-funded counsel. For example, the respondent may not meet the definition of "parent" found in section 1 of the *Family Services Act.*

[1] [1999] 3 S.C.R. 46 (S.C.C.)

In these circumstances, Crown Counsel employed by Legal Services may act on behalf of the Minister of Justice and Office of the Attorney General to oppose the appointment of state-funded counsel.

In cases where the court has indicated that it will schedule a "G" hearing, Family Crown Counsel shall immediately e-mail the following information to the Director of the Litigation Practice Group in the Legal Services Branch of the Office of the Attorney General:

(a) the date, time and place of the "G" hearing;
(b) the pleadings, including the Court File Number and style and cause of the matter;
(c) the name of the party seeking appointment of state-funded counsel;
(d) the nature and length of the relationship of the party to the child; and
(e) any exceptional circumstances.

Legal Services will determine whether the Minister of Justice and Office of the Attorney General wishes to oppose the appointment of state-funded counsel and will inform Family Crown Services of the decision and whether Crown Counsel from Legal Services will be in attendance at the "G" hearing.

Legal Services may also choose to forward a formal letter to Family Crown Counsel for presentation to the court, setting out the position taken by the Minister of Justice and Office of the Attorney General.

3. Procedure on *"G."* hearings

Family Crown Counsel shall inform the court of the nature of the evidence to be adduced at trial. This is necessary to assist the court to determine whether the "parent" may be able to self-represent. Some courts want to receive a witness list or at least the number of lay and expert witnesses to be called as well as the general nature of the expert evidence to be adduced.

If the Minister of Justice and Public Safety, Office of the Attorney General chooses to oppose the appointment of state-funded counsel, Legal Services will take carriage of the matter throughout the "G" hearing. Once the hearing is complete, the matter will be returned to the Family Crown Counsel from whom it had been received.

If the Minister of Justice and Public Safety, Office of the Attorney General chooses not to oppose the appointment of state-funded counsel, Family Crown Counsel:

(a) shall provide the court with any letter received from Legal Services outlining the decision of the Minister of Justice and Public Safety, Office of the Attorney General not to intervene. Family Crown Counsel shall also question the party seeking appointment of counsel regarding the requisite criteria set out below;
(b) shall assist, as needed, in the examination of witnesses to ensure that sufficient evidence is before the court to permit the presiding justice to consider the criteria for the appointment of state-funded counsel; and
(c) shall not take a position on behalf of the Minister of Social Development.

3.1 Criteria to be examined at the "G." hearing

The "G." decision of the Supreme Court of Canada sets out the criteria which a court must consider on an application for state-funded counsel in a ministerial child protection case.

CRITERION 1:

There must have been a denial of Legal Aid with the denial being upheld on appeal.

CRITERION 2:

The court must consider the seriousness of the interests, the complexity of the proceedings and the characteristics of the parent affected.

The following are the criteria for each of these considerations:

a) SERIOUSNESS OF INTEREST

The court must consider the overall context and seriousness of losing the ability to care for and guide the development of one's child or children.

The "seriousness of interest" factor references the parent "losing the ability to care for …the child". As such, the New Brunswick Court of Appeal in *The Province of New Brunswick v. C.M. and P.M. [2012]*, held that the parent requesting state-funded counsel must have had custody of the child at the time of apprehension. The court further stated that it is only in very limited and exceptional circumstances that a parent seeking state-funded counsel would be granted same if he or she did not have physical custody of the child at the time of apprehension.

In *The Minister of Social Development (The Minister of Justice and Office of the Attorney General and Attorney General) v. L.N. and S.A. [2013],* Madam Justice Brigitte Robichaud of the Court of Queen's Bench of New Brunswick, Family Division, held that whether or not a parent would fall under these limited and exceptional circumstances would depend on many factors such as:

- Did the parent exercise psychological custody of the child?
- Did the parent financially contribute toward the care of the child?
- Was there a recent history of having exercised a meaningful and profound parental role with respect to the child?
- Did the parent have day-to-day involvement in child-rearing, important decisions involving the child's life, etc.?
- Did the parent suffer a profound psychological impact as a result of the apprehension of the child?

b) COMPLEXITY

i. The more complex the proceedings, the more difficult it will be for the parent to participate effectively in the proceedings without counsel;
ii. The length of the proceedings would be consistent with a greater complexity;
iii. The type of evidence presented must be considered;
iv. The number of witnesses will have an impact; and
v. The general complexity and technicality of proceedings is also relevant.

c) CHARACTERISTICS OF PARENT AFFECTED TO BE TAKEN INTO ACCOUNT

i. The parent's educational level;
ii. The parent's linguistic abilities;
iii. The facility of the parent to communicate;
iv. The age of the parent; and
v. Similar indicators.

Considering all of the above noted factors, the Supreme Court of Canada was of the view that it would be rare to deny a request for state-funded counsel in ministerial child protection cases that could deprive the custodial parent of custody.

It should be noted that the New Brunswick Court of Appeal significantly restricted the granting of state-funded counsel in *Province of New Brunswick, as represented by the Minister of Justice v. J.F.*, 2021 NBCA 61. In its ruling, the Court of Appeal stated that there must be clear evidence of an actual custodial relationship at the time the child was placed into protective care or that a parent has been denied his or her custodial care of a child through no fault of their own under exceptional circumstances.

4. Related documents

Canadian Charter of Rights and Freedoms
Family Services Act, S.N.B. 1980, c. F-2.2