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APPENDIX OF CASES CITED

R. B. v. Children's Aid Society of Metropolitan Toronto (1995) 1 S.C.R. 315 (S.C.C.)

D.(M.) v. Director of Child Welfare Alberta (1992) 42 R.F.L. 306 (Alta. C.A.)

W. R. v. Alberta (Director of Child Welfare) 2001 A.B.Q.B. 869 Judgment released 15 October 2001

Winnipeg Child and Family Services v. K.L.W. (2000) 2 S.C.R. 519 (S.C.C.)

New Brunswick (Minister of Health and Community Services) v. G. (J.) (1999) 3 S.C.R. 46 (S.C.C.)

Blencoe v. British Columbia Human Rights Commission (2000) S.C.C. 44 (S.C.C.)

C.A.S. of Huron County v. R.B. and J.B., unreported decision of Ontario Provincial – Family Division, Madame Justice E. Schnall, October 12, 1999

Catholic Children's Aid Society of Metroplitan Toronto v. D.(A.) (1994), 1 R.F.L. (4th) 268 (Ont. Gen. Div.)

**IN THE MATTER OF *The Child and Family Services Act,*
R.S.O. 1990, c. C.11**

IN THE MATTER OF

Jacob F., born May 22, 1987
Wilhelm F., born November 28, 1988
Anna F., born November 28, 1988
Diedrich F., born November 13, 1989
Margaret F., born March 10, 1991
Juan F., born February 3, 1993
Trudy F., born January 20, 1995,
children apparently in need of protection.

FAMILY AND CHILDREN'S SERVICES OF ST. THOMAS AND ELGIN
(Applicant)

- AND -

WILHELM F. and ANNA F.
(Respondents)

D E C I S I O N O N V O I R D I R E

Proceedings heard on May 27, 28, 29, 30, 2002;
June 4, 5, 6, 11, 13, 14, 18, 20, 26, 27, 2002;
July 2, 15, 18, 2002
Ruling on voir dire released October 9, 2002
Decision released February 27, 2003

Appearances:

A. Mamo	Counsel for the Applicant Society
D. Kilpatrick	Counsel for the Children
V. Wise	Counsel for the Respondent Mother, Anna F.
M. Menear	Counsel for the Respondent Father, Wilhelm F.

Schnall, J.:

1. INTRODUCTION

The focus of this hearing is the well-being of seven children, in the context of a protection hearing under the provisions of The Child and Family Services Act. R.S.O. 1990, as amended.

The case acquired a level of notoriety in the various media, since July 2001, when the seven children were apprehended by the local child protection agency, under circumstances reviewed below.

The children remained in the temporary care of the Society for approximately 22 days. Their return to their parents was eventually negotiated in terms set out, on consent, in an Interim Supervision Order, further referred to below.

The children have remained in the interim care of their parents, under Society supervision, to date.

Since July 2001, this case has continued to attract media attention as it proceeded through the court process. At times attention was generated by actions of the parents in giving interviews, and at times by the Pastor of the Church to which they belong, known as The Church of God of Aylmer, all while the court case was developing.

At times, this case has been referred to as "the spanking case", or "the Church of God" case. Neither sobriquet accurately reflects the real issues of the case, outlined below.

The Society's application is for a finding that the children are in need of protection, pursuant to

section 37(2)(a) and (b) of the Act. The parties have agreed that "harm" would include emotional, as well as physical harm, for the purposes of this case.

2. PROCEDURAL OVERVIEW

Counsel for the parents have approached this case from a "Charter rights" perspective.

They filed a Notice of Charter Question. They seek a ruling that the parents' charter rights have been breached. The remedy they seek is to have evidence excluded; in the alternative, to have the protection application stayed.

A protection hearing is a bifurcated process: the "finding" stage and the "disposition" stage.

Because of the parents' motion for relief under the Charter, much of the evidence was impugned and subject to scrutiny and challenge within the framework of the constitutional issues raised. For this reason, all counsel agreed, and I ruled, that the evidence in the "finding" stage of the hearing would be taken in the context of a voir dire, at the end of which I would be required to determine if the parents' rights had been breached, and if so, what remedy should follow, and what, if any, evidence should be excluded.

All counsel further agreed that whatever evidence was ruled admissible at the conclusion of the voir dire would be applied to, and form part of, the evidence of the hearing as a whole.

All counsel reserved their rights to present additional evidence in the "finding" stage of the hearing, depending on the Ruling on the voir dire.

Because of this agreement as to process, it is necessary to make more detailed findings of fact at this stage, at the conclusion of the voir dire, than would usually be done where such findings of fact generally are not made until the end of the "finding" stage of the hearing.

Prior to the commencement of the hearing, the Society and the parents became tangled in procedural issues, as to the parents not filing appropriate documents and resisting information-gathering by the Society, as provided for by Rules of the court.

Eventually the case came on for hearing, with the children still in the care of the parents, subject to the Society's supervision.

The first few days of the schedule set for the hearing were derailed, as the court was involved in dealing with various motions by media representatives relating to publication bans, and extent of coverage.

Eventually, the hearing of evidence on the substantive issues began at the end of May 2002, with the commencement of the voir dire very shortly after.

The matter was heard over 18 days, into mid-July, 2002, when the submissions were concluded on July 18th, 2002.

The Ruling, in summary form, was released on October, 2002.

3. STATUTES AND REGULATIONS

A number of sections of the relevant statute, of the Constitution Act, and of Regulations made under the Courts of Justice Act, were referred to by

counsel. For ease of reference, they are set out here with a shortened name.

The proceedings were commenced under the Ontario child welfare statute, The Child and Family Services Act, R.S.O. 1990, c. C.11, (the Act).

Proceedings in the family and child protection jurisdiction of the Ontario Court of Justice are governed by the Family Law Rules, O.Reg. 114/99, (the Rules).

The charter arguments and questions raised by the parents are founded by reference to sections 7, 8, 9, and 10, of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982(U.K.), 1982, c.11, (the charter).

The remedies they seek are pursuant to section 24(1) and (2) of the charter.

The Society brought its application under section 40(1) of the Act.

There are four ways in which proceedings for the protection of a child can be commenced. Three are relevant here.

The Society can bring the application under section 40(1).

The Society can apply to a Justice of the Peace for a warrant of apprehension, based on a sworn affidavit, pursuant to section 40(2).

The Society can apprehend the child without a warrant, pursuant to section 40(7).

The Society effected a warrantless apprehension.

The wording of sub-sections 40(2) and (7) is particularly relevant in these proceedings and is reproduced here:

"40(7) A child protection worker who believes on reasonable and probable grounds that,

- (a) a child is in need of protection; and
 - (b) there would be a substantial risk to the child's health or safety during the time necessary to bring the matter on for hearing under subsection 47(1) or obtain a warrant under subsection (2),
- may without a warrant bring the child to a place of safety."

Police assistance in an apprehension is available to the child protection worker pursuant to section 40(8) of the Act.

4. THE ISSUES

4.1 The constitutional issues raised by the parents.

1. Were the parents' rights under sections 7 and 8 of the charter, and the mother's rights under sections 9 and 10 of the charter, violated by the manner in which the Society obtained the evidence?
2. Would the admission of the evidence bring the administration of justice into disrepute, under section 24(2) of the charter?
3. Would the admission of the evidence at the hearing of the application violate the

parents' constitutional rights under sections 7 and 8 of the charter?

4. If so, should the evidence be excluded under section 24(2) of the charter?
5. Are other forms of relief appropriate under section 24(1) of the charter?

The impugned evidence includes verbal information given by the mother to the child protection worker, and to the Deputy Chief of Police; the verbal information given by the children to the worker and police at the home; the videotaped statements of the children following the apprehension; the contents of the Answer; the contents of the parents' Response to the Society's Request to Admit; the answers given by the parents in the questioning under affirmation, pursuant to Rule 20(3); and the evidence given by the parents at the voir dire stage of the hearing.

4.2 The statement of the issues by the Society.

The constitutional issues raised by the parents may be re-stated in the following terms, as questions, that will have to be answered at the end of the voir dire:

1. Was the apprehension of the children by the Society lawful?
2. When is the appropriate time for the parents to object to the apprehension once it has been effected: at the time of the first return of these proceedings, even at the adjournment hearing under section 51 of the Act? During the course of the hearing before the presiding judge?

3. Is there a consequential relationship between the apprehension and the application? If the apprehension were found to be unlawful on any grounds, or to have been effected in such a way as to have offended the principles of fundamental justice, would this taint the application to such an extent that these proceedings should be terminated, the application dismissed, or stayed? Is the application independent of the apprehension? Can the Society proceed on its application regardless of the 'status' of the apprehension?
4. Does the Society, through its child protection workers, have the right to question parents during the course of its investigation of alleged abuse?
5. Are the parents who are being questioned by the Society in its investigation compelled to answer those questions, in the sense that their failure or refusal to answer will attract an adverse inference against them?

This question might be posed in terms of the parents' 'right to remain silent' without their silence being negatively construed against them.
6. Is the Society empowered to interview the children during the investigation? Is the Society required to obtain the parents' permission to interview the children in the course of the investigation? And further, does permission have to be obtained from the parents for the Society to be able to interview the children after the apprehension and commencement of the application?
7. Are the parents bound by the Rules of this court, once the application has been commenced?

Put another way, do the parents have a right not to be compelled by the Rules to file documentation that will 'incriminate them', such as a substantive Answer or a Response to a Request to Admit? Do they have a right not to answer questions put to them in 'questioning under oath or affirmation', as provided under Rule 20(3) when their answers would tend to 'incriminate' them?

8. Are any statements or admissions made by the parents and children after the apprehension, or indeed at any time since the involvement of the Society, admissible in evidence at the hearing of the protection application?

4.3 The position of the parents.

They seek a ruling that all the evidence which was obtained by the child protection worker prior to the apprehension be excluded because statements by the mother were obtained by coercion of the mother; that the entry into the home by the worker and police was unlawful; that the parents' and children's rights were violated by the examination and interviewing of the children without the parents' consent; that the Society should not have proceeded with an apprehension, and certainly not with a warrantless apprehension; that the apprehension was unlawful, and thus all the evidence obtained subsequently should also be excluded; that the parents ought not to be compelled to incriminate themselves by complying with Rules of the court that require them to file documentation and answer questions.

In summary, the parents seek to exclude all the evidence heard on the voir dire, with the exception of what transpired on October 19, 2000; the evidence of the worker about Ministry directives

and manuals and the Risk Assessment Model; and the evidence of the Society's executive director, Mr. Steven Bailey about the history of the development of the child welfare legislation in Ontario and specifically the 1999 amendments to that legislation.

4.4 What the parents are not seeking.

While the parents are asserting that they should not have to comply with the Rules of the court once the Application is commenced, they are not challenging the validity of the Regulation nor any of the Rules.

They are not seeking a remedy under section 52 of the `charter`, to strike down any regulation or statute, nor any section of a statute.

Although the parents may not agree that this would be an accurate re-framing of their case, it is possible to encapsulate the cornerstone issue of this case in the following terms:

Where parents assert their rights and freedoms under the `charter`, and those rights and freedoms come into conflict with the rights of children to be protected, whose rights are to be paramount?

In child welfare cases, should the child's right to be protected ever be relegated to second place, after the parents' rights, or what has been referred to by Mr. Mamo as 'parental autonomy'?

If there is to be a balancing of interests among the parents' interests in being able to raise the children without State intrusion, a community's interests in maintaining the integrity of families, and the children's interests in being raised in a safe, non-abusive environment, can any interests be

allowed to outweigh the best interests of the children? The children's interests may include remaining with the parents, but with acceptable standards of discipline.

Notably, counsel for the parents did not argue that this was a case about the parents' rights to exercise their religion, unfettered by standards imposed by the Society.

Nor did the parents' counsel argue that this was a case about the use of corporal punishment and the degree of societal tolerance of physical discipline.

Nevertheless, the evidence of the parents and that of their Pastor brought into consideration the strict teachings of their religion to which the parents devoutly adhere. It is their firm adherence to these biblical directives and the lifestyle, based on religious beliefs, that brought them to the attention of the Society in the first place.

Specifically, their belief that God will heal all wounds and that traditional medical attention ought not be sought, caused the anonymous contact to report to the Society in October 2000, that the child, Juan's injury was not receiving medical attention.

In spite of the family's co-operation with the Society's recommendations on, and after October 19th, 2000, it was the same set of beliefs, now demonstrated much more vehemently and overtly, that fuelled the confrontation between the Society and the F. family

4.5 The position of the Society.

The position of the Society is that the apprehension without a warrant was necessary; that it was lawful under the circumstances; that an application is independent of the apprehension; and that there were no violations of the parents' rights, nor those of the children, such as to give rise to exclusion of the impugned evidence, nor to any other remedy under section 24 of the charter.

4.6 The position of the children's lawyer.

The position of counsel for the seven children is that there may have been hasty action by the Society in apprehending the children and that the parents' section 7 rights were violated.

The Society ought not to have proceeded with the apprehension. It should have arranged for dialogue with the family and the Church representatives, or at least obtained a warrant.

Regardless of any violations, however, Mr. Kilpatrick submits that none of the impugned evidence should be excluded, but all of it should be admitted so that the court will have all relevant information available to it.

5. FACTUAL BACKGROUND AND OVERVIEW

5.1 Brief factual overview

In October 2000, an anonymous source notifies the Society that an injured child of the F. family is not receiving medical attention. The Society attends to the situation.

In the spring of 2001, the file is still open and requires follow-up.

Another child protection worker has taken over the file to complete a follow-up as to medical care and physical discipline information.

She attends at the F. family home, receives information, and eventually returns with police.

The children are eventually interviewed and examined. Information is received but no marks are seen. The children are apprehended without a warrant under very chaotic, distressing circumstances.

The parents, members of the Church of God of Aylmer refuse to promise to stop hitting the children, because of their religious beliefs.

At an adjournment hearing on July 9, 2001, the court orders that the children are to remain in the care of the Society.

They remain in the Society's temporary care for 22 days.

On July 26, the children are returned home to the parents under supervision of the Society, under an Interim Order which includes terms that the parents are not to hit the children, or physically discipline them, nor let anyone else physically discipline them.

The Society in turn undertakes to become more informed about the practices and culture of the Church of God.

Within a couple of days of the apprehension, affiliates of the Church of God in other provinces, establish a web site inviting and encouraging contact with these children, and setting up a defence fund.

The children's faces, names, dates of birth and pictures of the apprehension are posted on the site.

The Church of God, led by its Pastor, ensures that the case remains high profile by enlisting and encouraging media exposure.

By December 2001, the father gives a television interview recanting the parents' undertaking not to physically discipline the children, because this is contrary to their religious beliefs, and they are concerned about being ostracized from the rest of their community.

The hearing commences in May 2002, with the children still in the parents' care, subject to Society supervision.

5.2 The family

The parents at the time of the hearing are Wilhelm F., age 34, and his wife, Anna F., age 34. They were both born in Mexico.

They are the biological parents of the seven children whose names and dates of birth are listed in the heading of these reasons. The children were also born in Mexico.

The entire family emigrated to the Town of Aylmer, Ontario, from Mexico in 1999.

The family continues to reside in Aylmer, which is within the jurisdiction of the Family and Children's Services of St. Thomas and Elgin, (the Society).

The parents' first language is Low German. The father speaks and understands English reasonably well, the mother much less so.

They required court interpreters throughout the hearing, although occasionally both parents responded to English questions in English.

Aylmer and its environs is home to a number of Mennonite residents, among whom are members of the Church of God of Aylmer.

The family belongs to this Church of God congregation. The family members are strong believers in their faith. They believe without question in the strict views held by their congregation, and in how they interpret the Bible.

This family came to Ontario, specifically to Aylmer, in the search of a better life for themselves and their children.

The children attend a school run by the Church of God. Their upbringing at home is based on learning to be obedient, and to follow the teachings of the Bible, as directed by the Pastor.

5.3 The Church of God

This congregation numbers some 200 persons, and is led by Pastor Henry Hildebrandt.

The members of this faith are taught from a very early age not to question the directives and beliefs of their Church.

Many of the Church members come from communities in Mexico where literacy is not encouraged, teachers are not encouraged to improve their own skills, and children are required to start work at an early age, sacrificing possibilities of education.

Life for a community such as this in Mexico was very difficult. Some communities eschew the use of modern developments, such as the use of tractors, and rubber tires. The Aylmer community is more progressive, having access to vehicles and computers.

Members of this congregation are generally considered to be industrious, hardworking people who value traditional family life with traditional family roles.

The Pastor is the leader of the community's life and standards.

Henry Hildebrant is the self-named Pastor of the Church of God of Aylmer. He is a youthful, energetic, dynamic individual, fluent in English. He is articulate and personable. It is obvious that he exerts great control over a community that appears to be limited in its interaction with the greater community surrounding it. He is familiar with lawyers and the court process. He is a licensed real estate agent.

Members of the congregation generally have little exposure to the larger community in which they live. For example, when the children were temporarily placed in foster homes, they were very distressed by being exposed to the different culture, including different attire, smoking, drinking of alcohol, and television.

5.4 Prior involvement of the Society with this family.

This family first came to the attention of the Society on October 19, 2000 as a result of an anonymous contact, who gave information that one of the children had suffered an injury and that the

parents were not providing appropriate medical treatment.

The worker who attended was invited in to the home by the parents, who co-operated fully in allowing the child to be examined.

The worker determined that the child, Juan, had been burned by a pot of scalding coffee that had been accidentally knocked off the kitchen table, onto his hip and thigh area.

Following the advice of another member of the congregation, the parents had treated the wound with a mixture of sterile water and a small amount of bleach/chlorine, and with Vaseline and Vitamin E cream.

The worker readily determined that the child needed immediate medical attention.

The parents complied quickly and took him to the hospital.

The seriousness of this inadequately treated wound can be determined from the numerous medical attendances that were necessary for the child.

Although it was determined that plastic surgery would not be needed, the child had to be taken for seven medical attendances before there was confidence that the wound was healing properly.

The same worker had also noted a bruising next to the burn.

The father indicated that the child refused to sit still when the parents cleaned the wound with the water/bleach mixture.

The father said that he had struck Juan with his hand because he squirmed while the dressing was being changed. This resulted in the bruise that was seen by the worker several days later.

The worker informed the parents that a strike, which left bruising, was not an acceptable form of discipline.

The file was left open and required follow-up before it could be closed.

6. DISCUSSION OF EVIDENCE

Shelley West is employed by the Society as a child protection worker. She holds a Masters degree in Social Work.

She had previous experience in related work, including an internship with this Society.

She had been employed for two months with this Society when, on May 1, 2001, she takes over responsibility for a large case load, including the file of this family. The file is still open, and requires follow-up.

She telephones the family on June 1st, 2001 and speaks to Jacob, the oldest child. She is told that the family is about to leave for a church-related camp in Ohio for 10 to 12 days.

She is also told that the family does not want to talk about the 'spanking' and that the parents are wishing not to speak with her without their Pastor being present, or she recalls, without her first speaking with him.

Ms. West requests Jacob to give her card, left previously by another worker, to the Pastor to contact her upon the family's return.

She receives no communication from the Pastor, nor the family after their anticipated return from Ohio.

Ms. West consults with her supervisor, Dawn Clarkson; because of the absence of communication from the family and Pastor, there is a perception that the family is not co-operating. The perception is incorrect, in fact, because the evidence ultimately bears out that Jacob told the Pastor Ms. West had called, but he did not give the Pastor her card; nor did he tell the Pastor to call her.

Ms. West is unaware of this at the time.

She and Ms. Clarkson decide that Ms. West will attend at the family residence unannounced. She does so on July 4th, 2001 with an interpreter from the Mennonite Central Committee, Elsie Siemens. It is about 11:30 a.m. and no one is at home.

Shortly after, the mother arrives with the seven children, and in the course of some questions from Ms. West, and through the interpreter, says that she and the father use physical discipline with the children; that they use whatever object may be available, and, pointing to a bush, she indicates something similar to a stick but one with no leaves. She says that the Bible directs them to do so. When asked when were the children last disciplined she says that it was a week ago but when asked which child was hit, the mother refuses to speak further with Ms. West.

Ms. West indicates she wishes to speak with the children. The mother wants the father to be present, and declines Ms. West's suggestion that he be called at work. The mother says his boss doesn't like it. A

child is asked to call the Pastor but apparently, he is also working.

Ms. West wants to deal with the matter that afternoon; in cross-examination she indicates that she did not want to wait until after five o'clock that day, 'for personal reasons'.

She suggests that the mother set up an appointment to meet with her next week, and that either the father or Pastor could be able to attend then.

These attempts to schedule an appointment are not productive, and it is evident that Ms. West finds the mother difficult to deal with and concludes there is reticence on the mother's part.

She informs the mother that she will leave, but will return in an hour, and that she is needing to talk to the children.

Throughout this exchange, the mother is speaking through the interpreter.

Ms. West's evidence, and I accept it, is that she hoped to return, and be able to talk to the children, and that the Pastor would facilitate the matter, or that the mother would agree. Apprehending the children was not in her mind at that time.

When she leaves, Ms. West goes to the Mennonite Central committee offices, and telephones the Pastor, but is unable to reach him.

She calls the Society, and in the absence of her supervisor Dawn Clarkson, she speaks with another supervisor Sheena Ewan.

Ms. Ewan suggests that she solicit the assistance of the Aylmer police to interview the children. Ms. Ewan

also suggests that the children could be apprehended in order to be interviewed, if Ms. West is unable to talk to them at the home.

Ms. West testified that the decision to apprehend children must be made by the supervisor, not by the child protection worker. At that time there is no discussion with Ms. Ewan about court orders or obtaining a warrant; Ms. West was still hopeful that she would be able to meet with the mother and talk to the children.

Ms. West then meets with Deputy Chief of Police Andre Reymer (I will refer to him as D.C. Reymer) to request his assistance in interviewing the children. There is a protocol in place between the Society and local police forces.

Ms. West, D.C. Reymer, and Ms. Siemens attend at the F. family home, at about 12:58 pm.

The Pastor had been and gone. The doors and screens are locked. Their knocking on the doors is not answered.

Eventually, there is a response, and some of the children are in the doorway. They speak with the children, with the interpreter present.

The family does not want Ms. West and D.C. Reymer to go in, and they do not enter.

Pastor Hildebrandt is called for by D.C. Reymer. He arrives about ten minutes later. In the meanwhile, the mother approaches and stands behind the children in the doorway, while Ms. West, D.C. Reymer and Ms. Siemens remain outside.

No further conversation takes place while they wait.

Specifically, I note that no one asks the mother or the children any further questions.

The Pastor arrives, together with a number of members of the Church of God congregation. (The Pastor refers to the members as 'congregants', and so will I).

Ms. West introduces herself, and indicates that she wishes to talk with the children.

The Pastor refuses to allow it. He tells Ms. West that she should return to her office, and review the notes in the other file, and she will see that the Society has been aware of the Church's practice of disciplining children with objects. He tells her that it is the practice of the Church to physically discipline children, and that objects are used, including a rod, as the Bible directs.

He is told by D.C. Reymer, and it is confirmed by Ms. West that she could get a court order to interview the children. The Pastor responds, "We will not obey a court order. We obey the laws of God, not the law of man."

Ms. West testifies that Pastor Hildebrandt explained to her what the Church's practice is in terms of disciplining the children: that objects are used, instead of the hand, because the hand is an instrument of love, and should not be used to physically discipline the children. She is also told that children are not disciplined out of anger, and that spanking is used as a last resort. He also tells her that disciplining is done to correct the behaviour of children; it is done in a separate room, away from the other children, over the clothing; that although it must hurt, there is no intention to harm the child, and that the Church does not condone child abuse.

Pastor Hildebrandt also tells Ms. West that the Church's right to teach and practice physical discipline with its children is so important to the Church members that they would rather go to jail or leave the jurisdiction than have their rights interfered with.

Ms. West indicates to him that she still wishes to speak to these children and the mother, as each family must be assessed differently.

At times, it appears that the Pastor is making decisions, when speaking to Ms. West; at other times, he returns to the house, apparently speaks to the mother, and then returns outside to speak again to Ms. West and D.C. Reymer. It is Ms. West's impression that he speaks for the family.

After further discussion, the mother's response to the request to enter the home and examine the children is, "If it must be, it must be".

After further discussion, the Pastor asks whether the Society would close its file on this family if Ms. West is allowed to interview and examine the children. Ms. West correctly, is not prepared to make any commitments.

While Ms. West and the Pastor are speaking in the driveway area, additional congregants continue to arrive. Soon, their numbers increase from about 15 or 20, to over thirty, according to some estimates.

Eventually, a compromise is achieved. The mother and Pastor allow the children to be interviewed and examined, provided that the boys are dealt with by D.C. Reymer, and the girls by Ms. West. The mother would be present when the girls are examined.

They enter the home, and the mother leads Ms. West to a bedroom. She brings the girls in one at a time. She remains near, or inside the doorway. Ms. Siemens remains until the end of Trudy's interview.

First Ms. West interviews Anna, then Margaret, then the youngest, Trudy.

She sees no marks on any of the girls.

She is told by Anna what objects are used, and that sometimes marks (stripes) are left. Objects include the wire handle of a fly-swatter, electrical cords from an appliance, a belt, and a stick.

The children are unable to say exactly when the last child was disciplined. They say it was probably Margaret, in June. Anna says she cannot say how frequently a spanking is administered.

No one can say how long the marks last.

Ms. West is told that the spanking hurts, and that they cry, and that sometimes it hurts for several days.

Anna shows Ms. West the kind of electrical cord, attached to a small appliance, that is used to hit the children, on their buttocks and the top of their legs. She says that this sometimes leaves 'stripes'. She says that she is not hit as often as the younger children any more.

I conclude from this evidence that Ms. West found out enough information, even before talking to D.C. Reymer, who interviewed the boys, that she had reasonable and probable grounds to believe that the children were being physically disciplined, that objects were used, and that marks were left, lasting various periods of time.

I find it irrelevant that she also was told that the children receive an explanation beforehand as to the reasons for the discipline about to be levied, that afterward, they receive hugs, and that sometimes the hitting is followed by praying.

While this may go to indicating the parents' love for their children, there were sufficient other examples in the evidence to demonstrate that the hand has indeed been used; that a child was disciplined with an object when the child was in the bath too long; and that a child was disciplined with an object when she left the house with messy hair.

The evidence discloses that sometimes no alternative methods were attempted; no nurturing or praying behaviour followed.

Ms. West was already aware of the practice among members of the Aylmer Church of God, of physically disciplining children with a rod. She had information about a previous involvement by the Society with this family, in October 2000. She knew about the disappearance of another Church of God family from the jurisdiction.

Other members of the congregation continue to arrive. Soon there are enough people at the home, inside and out, that police officers who had first arrived to assist with the children, retreat and call for backup.

The Pastor encourages the congregants to prevent the removal of the children and directs the children to resist.

The children are removed from the home, carried out resisting, struggling and crying as the congregants create barriers, trying to hold onto the children, praying, and crying. The congregants are hostile, shouting and yelling at the Society workers and police.

The children are separated and taken to three foster homes where the custom and culture are foreign to the children.

The children are distressed by their environments.

The Society moves them to more appropriate foster placements.

The parents refuse to promise not to hit the children.

The parents give interviews, and are being photographed by the media.

Pastor Hildebrandt promotes and encourages the involvement of the press and photo and television media.

7. THE CHARTER ARGUMENT AND SUBMISSIONS BY COUNSEL FOR THE PARENTS

7.1 Applicability of *Charter* Argument in child protection proceedings

Discussion of the constitutional arguments

For ease of reference, cases referred to by a short name with full citations in the attached appendix.

The area of child welfare law does not lie comfortably with the overlay of a constitutional analysis.

In the past, courts have been reluctant to accede to *charter* arguments in the area of child welfare cases. More recently, constitutional issues have been raised in such cases, with increasing success, and with the recognition that in the right set of factual circumstances, the *charter* analysis is appropriate and

necessary. For example, *New Brunswick v. G(J); Winnipeg CAS*.

The greatest challenge in dealing with the overlay, is to create a balance between different sets of rights. Parents have section 7 rights to liberty and security of the person.

Section 7: Everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Children have similar rights to security of the person. These rights include the court being able to make a decision that accords with the "best interests of the child".

That is a major hurdle for the parents in the case at bar to overcome.

Protection of the individual from interference by the State is obvious and easily recognizable in the sphere of criminal law.

The reasons for this are listed under heading 16, as are my comments on why child welfare cases do not fit comfortably within the criminal law/constitutional law analysis.

There is a challenge in performing a Charter-based analysis in a child protection case; there are compelling sets of rights to be weighed. How does one distinguish the scenario of provisions that protect the individual's rights against the State from the scenario of trying to protect a family unit's rights against the State, when the family unit is made up of two distinct components in child welfare proceedings whose interests may not always be parallel. The two components are the children as the subject of an application, and the

parents who are enjoined in an adversarial process with the children's aid agency.

Not only must that distinction be recognized, but an express effort is required to balance the interests in these scenarios.

In effect, this may mean having to balance the rights of the children against those of the parents: that may result from the situation where parents seek a ruling that their rights to make all decisions for their children without State interference (ie the family unit against the State), should be considered paramount. Such a ruling may conflict with what is actually best for the children, as determined by the court, in terms of the children being protected from abuse at the hands of their parents.

The courts have recognized that a Children's Aid agency is an agent of the State. As that concept was not in issue, I do not propose to refer to the case law on the point.

Similarly, it is not necessary for me to review in great detail the cases that hold that Charter arguments can be raised appropriately in child welfare proceedings.

The evolution of the case law in that regard was not an easy one. I refer to the 1995 Supreme Court of Canada decision in *R.B. v. Children's Aid Society of Metropolitan Toronto*, where in paragraph 1, Lamer C.J.C., opposed the concept of including parental rights in section 7, whereas the decision of La Forest, J., in paragraph 85, supported it.

Four years later, in the Supreme Court of Canada decision in *New Brunswick (Minister of Health) v. G(J)*, Lamer, C.J.C., has moved to a recognition that the rights of both the parent and the child to security of

the person under section 7 of the charter are engaged when the State commences a child protection proceeding.

A year later, in *Winnipeg C.F.S. v. W. (K.L.)*, Madam Justice L'Heureux-Dube recognizes that while an apprehension is likely to have a profound impact on the psychological and emotional well-being of both the parents and the child, the child has a fundamental right to life and health. The child has a right to be protected, even when that is protection from the parent. She determines that where there is a contest between protection of the child's right to life and security of the person and the parents' rights to freedom from state intervention, the rights of the child must take priority.

She also recognizes that while the child's rights must be given priority, there may be an infringement on the rights of the parents. This can only be considered acceptable if this infringement has occurred without violation of the principles of fundamental justice.

In the *Winnipeg* case, she holds that because there is a post-apprehension review of the decision of the Society to apprehend the child (similar in procedure to section 51 of the Act) and so long as the delay between the apprehension and the post-apprehension review is limited, that the separation of child from parents is not unduly extended, there is no affront to the principles of fundamental justice.

It is interesting to note that L'Heureux-Dube in *Winnipeg* does not refer to the interests of the child as "the best interests of the child", but rather as the child's interest in life and health. It is only a small distinction in the context of the case at bar.

Again, it is important to note that the parents in the case before me did not seek to challenge the validity of any statute or regulation.

The parents start from the position that the Society in this case used bad judgment and overstepped its authority in an effort to exercise power and control over the parents, by interfering in the parent-child relationship. This manifested itself in the hasty and unnecessary apprehension of the seven children on July 4th, 2001.

The parents therefore say that this unwarranted interference by the State must have consequences, as available under section 24(1) and (2) of the charter. All counsel at bar agree that the actions by a Society, such as apprehension of children, can cause significant distress to the parents.

In some instances, a parent's loss of parental status, in having a child removed, results in a stigma and can have a profound effect on the parents' views of themselves and their place in their community.

Certainly, the parents felt the pressure to conform to the expectations of this Church and congregation.

Ms. Wise points out that the parents are not seeking to defend their actions of disciplining the children in the fashion they did.

They are not seeking a religious exemption to be able to defend their practice of striking their children.

I agree fully with the concept that parents have a presumptive right to care for and raise their children. This right includes the right to determine discipline, and make decisions regarding, for example, education and religion for their children. Parents are deemed to know what is best for their children, partly because

they, more than anyone else, know the children. All counsel before me acknowledge and accept that concept.

The State should not presume to interfere with this parent-child relationship, which is recognized by society as the most important relationship, unless that interference is in accordance with the principles of fundamental justice.

Where it is unquestioned that parents must have the liberty to exercise their parental decision-making without undue State interference, Ms. Wise points out that the parents are not seeking a finding that the Society interfered with their liberty interest on those grounds - rather, she argues that their liberty interests were infringed by the Society's actions, what the Society did and the manner in which it was done: in questioning the children at the house on July 4th, and interviewing the children at the police station three days later, on both occasions without the parents' consent.

She contends that when children are removed from their parents' custody by the State, their rights to security of the person under section 7 are infringed, unless the removal is done in accordance with the principles of fundamental justice.

I agree with that analysis.

I do not disagree with the submissions by Ms. Wise, which are based on the dissenting judgment written by Madam Justice Arbour, in the *Winnipeg* case. Her judgment refers to general principles which hold true in almost all cases.

These include the fact that apprehensions can have drastic results for a family, that they ought to be a measure of last resort.

She refers to the recognition that is paid by La Forest, J., to the significance that child-rearing is to a parent, in *B.(R.) v. Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315, at paragraph 83. She notes similarly that Bastarache, J., at paragraph 86, in the *Blencoe* case affirmed the parental interest in raising a child as a basic and compelling part of individual autonomy and dignity.

I agree with these comments as far as they go. Ms. Wise's colleagues would also agree, yet come to a different conclusion where I adopt the majority position as to use of warrantless apprehensions.

It is possible for me to agree with these aspects of Justice Arbour's analysis, yet
As stated by the Alberta Court of Appeal in *T. v. Alberta (Director of Child Welfare)* (2000), 188 D.L.R. (4th) 603, at paragraph 14, child protection legislation "is about protecting children from harm; it is a child welfare statute and not a parents' rights statute."

7.2 Compellability and compliance with the Rules

At the same time, however, the parents argue that they ought not to be compelled to provide an Answer, nor give answers under oath.

My view of this position is that it would severely limit the ability of the courts to monitor a Society's conduct if the full story were not presented to the court in the form of evidence and in compliance with the Rules.

If parents give information to a Society worker, that information should be relied on by the Society in its investigation because the parents are usually the best source of information about a child. This information

is necessary and must be admissible in evidence at a hearing.

A parent's refusal to provide information or answer questions by a Society worker may well arouse a worker's suspicion or increase a worker's concern.

This is not unreasonable. A parent's refusal to provide the worker with access to a child may be an attempt to prevent viewing signs of physical abuse.

The parents also argued that they ought not to be compelled to give evidence at the hearing.

The courts have recognized the extreme importance of ensuring that parents could effectively participate in child protection proceedings. The *New Brunswick v. G(J)* case is one of the most recent examples of this principle.

Obviously, if the Society were to present evidence that fell short of providing even a *prima facie* case in support of its application for a finding of protection, the responding parents could move for a dismissal of the case, without having to testify.

Such is not the case here, nor is it likely to be in most protection proceedings.

It is incumbent on the parents to testify, if they wish the court to know their position and to provide evidence that only they, as parents, are uniquely qualified to give.

Again the yardstick must be the court's ability to have the relevant evidence before it, to make a decision in the best interests of the child.

The parents' conduct may fall short of conduct that would support a criminal charge yet give rise to a protection application.

Parents could remain silent by choice or be precluded from participating for failure to file a substantive Answer. The court would have only the Society's evidence upon which to make a determination as to the need for a finding of protection.

Ms. Wise suggests that the provisions of section 13 of the *charter*, the right against self-incrimination, should be available to the parents.

On the other hand, a parent is compellable if summoned as a witness in child protection proceedings. The Society can call parents as witnesses.

Parents may then seek protection from the court such that the evidence they give at a child protection hearing cannot be used against them in subsequent criminal proceedings.

A witness in a civil proceeding is not excused from answering questions. The statutory provisions in Ontario Evidence Act section 9, and Canada Evidence Act section 5, provide protection to witnesses who give evidence against themselves. The evidentiary provisions provide immunity to those witnesses from having their answers used against them in subsequent proceedings.

Section 13 cannot be a shield behind which a parent can hide, when the primary focus must be the health, safety and welfare of children

Confessions

In arguing that any statements made by the mother to Ms. West before the apprehension should be excluded, Ms. Wise refers to the extent of reliability of what she suggests are "confessions" and the inherent danger of admitting such evidence if there has been a `CHARTER` rights violation. She submits that the same safeguards effected to ensure reliability of confessions must be put in place in child welfare proceedings.

The underpinning of the confessions rule is to protect against the conviction of the innocent.

This rule does not apply in child protection proceedings. These are not confessions to crimes. These are not prosecutions of the parents; rather, they are hearings to determine what is best for the child. One purpose of a hearing is to assess parenting ability, to determine if the child would be at risk if returned to that parent.

An admission by parents that they hit their child and leave marks, if true, cannot be ignored by the court, but must be considered.

I follow the decision in the `HAYWOOD SECURITIES` case at page 19, that it is not a principle of fundamental justice that a person is not a compellable witness. In civil proceeding, the witness is compellable. The purpose of the compulsion is not to incriminate the witness but to produce evidence, which must be given if the public interest is to be served. Certainly in child welfare proceedings, the public interest includes the well-being of infants.

I adopt the decisions cited to me by Mr. Mamo that the provisions of section 9 of the `ONTARIO EVIDENCE`

Act regarding compellability do not contravene a person's section 7 rights.

I am not detailing these cases here. I have reviewed these as listed on page 78, volume I of the transcript of the Society's submissions made July 18, 2002.

The cases on this point to which I was referred by parents' counsel do not assist the parents.

The CAS of Huron County v. B. decision is distinguished below. The other cases are all criminal law cases.

Compliance with the Rules:

Pleadings in child protection cases are governed by Rule 10(1) of the Rules.

The parents initially filed an Answer, pleading that they were choosing not to provide information and asserting their Charter rights against "self incrimination". I find that unacceptable.

An Answer that discloses no information fails to provide the basis upon which the parents' position is based, and fails to reveal the nature of the evidence that the parents might call.

Although some leeway might be given respondents in child protection proceedings to present evidence that may not be squarely within the framework of their pleadings, a total failure or refusal by respondents to file a substantive pleading might foreclose their opportunity to call their own evidence. Consideration should be given to strike such an Answer.

Again, the court's ability to make the best possible decision for the benefit of the child will be prejudiced.

They were directed to file a more complete and particularized Answer to the Society's application. The Society, and the court, must be apprised of the parents' position and have the pleadings upon which the parents would be relying.

The parents' position is that they ought not to be compelled to comply with the Rules that require them to answer questions

Rule 20(3), dealing with out-of-court information gathering by questioning of parties under oath/affirmation, specifically refers to child welfare proceedings. In such proceedings, the entitlement to ask questions under that Rule is as of right. In other proceedings Rule 20(4), a party must obtain an order to question other parties, unless they consent.

Prior to the hearing, objections by the parents arose about circumstances of how Rule 20(3) would be implemented. It is unnecessary for me to review the details of that part of the proceedings, which ultimately resulted in an Order being made in December 2001, for the parents to attend and answer questions.

Their appeal of that decision was not proceeded with, as alternative, more acceptable arrangements were negotiated in order that the questioning could take place, yet still over the protests of the parents as to their charter rights.

The parents do not challenge the constitutional validity of the Regulations, nor of any of the Rules. I conclude that the legislators must have

intended for parties in child welfare proceedings to provide all information possible, relevant to the proceedings, and that compelling parties to attend and answer questions does not violate any of their `charter` rights.

I come to the same conclusion with respect to the necessity of the parents filing a substantive Answer (Rule 10(1)) and a Response to the Request to Admit (Rule 22(2)). There is no breach of their `charter` rights if they are compelled to file a document, the contents of which would tend, in their words, to 'incriminate them'.

Their terminology in this is difficult. It suggests criminal proceedings. It seems to me that a more apt term would be that the contents would conceivably have a negative impact on their interests and on their potential success in the case while providing information that might assist the Society in its proceedings.

Ultimately, however, that information is needed to enable the court to make the best decision in the interests of the children and in many cases suit the parents' interests also, in having the family reunited, though perhaps under terms of a Supervision Order. Again, I hold that the ability of the court to have all relevant information before it, is crucial.

A full examination of all the evidence might result in a finding that the children are not in need of protection.

The provisions of the Rules referred to have a secondary purpose, in addition to the gathering of information.

They are intended to narrow the issues, to streamline proceedings by using court time to deal only with the contentious issues, and enabling each party to know what case it has to meet, and thus what witnesses it must call.

To do otherwise, and hold that there is no obligation nor compulsion on parties to comply with these Rules, would result in all matters going to a hearing, and huge court backlogs. This would be contrary to the public interest.

If the parents are not obliged to comply with the Rules by filing a substantive Answer, and submitting to questioning under affirmation, the Society would be unable to prepare its case effectively, nor determine which witnesses are necessary.

The court would be unable to delineate the triable issues, nor be in a position to attempt to assist the parties in arriving at an early resolution that would serve to benefit and protect the children.

I do not agree that importing criminal law principles is the solution.

Case law in child welfare matters already exists to provide ample legal recourse to adopt some of the principles underlying the charter, to specific fact situations in child welfare proceedings.

7.3 The Society must act in accordance with the principles of fundamental justice.

"...The principles of fundamental justice in child protection proceedings are both substantive and procedural. The State may only relieve a parent of custody when it is necessary to protect the best interests of the child, and provided that there is

a fair procedure for making this determination" (Lamer, C.J.C., in *New Brunswick*, paragraph 70).

How can the court determine if these principles were violated if it does not have all the evidence before it?

I find that the parents' section 7 rights were not triggered until the actual apprehension.

The section 7 right being asserted by the parents in this context is their right to parent their children, and not to have them removed from their care.

Having found that the parents' section 7 rights are triggered by the apprehension follow the analysis employed by Justice L'Heureux-Dube in the *Winnipeg* case to determine whether the triggering of the section 7 right constitutes a violation under the *Charter*, and if so whether it conforms to the principles of fundamental justice.

She sets out the balancing of three factors in that analysis: the first of these is the seriousness of the interests at stake; in the case at bar, that would involve finding out if the children are harmed and the extent of the harm, as opposed to the interest of the parents in being able to discipline their children without State interference.

The second factor is the practical difficulties associated with the law in question; in the case at bar, this means the difficulties of a child protection worker attempting to do her job in conducting an investigation. If the Society were unable to conduct an investigation, it would be unable to determine if a child was being harmed. That entails too great a risk.

Finally, one must weigh the risks and benefits of the law. Clearly, no matter how traumatic an apprehension

may be to the parents and children, the benefit in being able to protect children from harm outweighs the parents' interest in being able to raise their children and not have them removed.

Just as in the `winnipeg` case, I find that the parents' section 7 rights were triggered by the apprehension, but that in balancing the three factors outlined above, I can conclude that this was done in accordance with the principles of fundamental justice.

It is important also to note in that regard, that the apprehension in any given case may be very short in nature. Children might be returned to their caregivers promptly, as soon as the Society determines that they are not being harmed and that there is no real risk of harm.

No matter what, however, the actions of the Society in apprehending the children have to undergo judicial review unless the children are returned to the parents within five days of the apprehension, according to section 46 of the `Act`.

This constitutes safeguards for the parents, and children, that there is a form of judicial review within a short period of time.

In the case at bar, there was an 'adjournment hearing', before Justice O'Dea on July 9th, pursuant to section 51 of the `Act`, and the court made a temporary order maintaining the children in the care of the Society. The parents raised no `Charter` issues at that time; the court reviewed the situation and found that there was a risk of harm to the children, in accordance with section 51(3) of the `Act`.

The principles of fundamental justice require that there be a fair hearing.

Once the matter proceeds as an application, all parties, and the children, have competent counsel to represent them, to make submissions, cross-examine witnesses, and present their cases so that the parents can effectively participate, to the extent they wish to, in the proceedings. The requirements set out by the *New Brunswick* case are satisfied.

Thus, I am of the view that there has been no breach of the parents' section 7 rights that has not been in accordance with the substantive and procedural requirements of the principles of fundamental justice.

8. THE APPREHENSION

8.1 The apprehension was a warrantless apprehension.

The apprehension must, in the first stage of the analysis, have been necessary.

To begin with, however, the child protection worker must have some reasonable basis upon which to base a decision to ask questions or begin an investigation. It cannot be a blind shot in the dark. Ms. West had that basis, based on the information in the file that required follow-up.

Ms. West had reasonable grounds to believe that the children were being hit with objects by their parents, and that marks, including bruises and "stripes" were left. This information came partly from the mother and partly from the girls. She did not coerce either the mother or the girls to provide the information; she held out no threats, no promises.

She was aware that another family of the Aylmer Church of God congregation had left the

jurisdiction under a cloak of secrecy, with speed, after the Society became involved with them, and they were in the midst of court proceedings.

She was concerned that if she left without the F. family children, these children might also leave by the 'back door', with the assistance of the Church, and be lost to the ability of the Society to monitor their welfare. This would likely constitute serious harm to the children.

8.2 Under what circumstances can a warrantless apprehension be effected?

Section 40(7) of the Act reproduced above provides for an apprehension to be effected without a warrant. The worker must believe that there would be **substantial** risk to the child during time it would take to get a warrant.

A warrant must be applied for on the basis of the worker's sworn affidavit. A Justice of the Peace would have to be located. Aylmer is not a court site. Ms. West testified that it was her understanding that there was not a Justice of the Peace regularly available in the St. Thomas courthouse.

I follow the majority decision of the Supreme Court of Canada in *Winnipeg* case that a warrantless apprehension is available to a Society in non-emergency circumstances.

The role of a child protection worker is very difficult. A worker, on site, does not have the luxury of time to determine the degree of emergency. There is risk and difficulty in trying to discern between an emergency and a non-emergency situation, while a child's health or safety may be at stake.

L'Heureux-Dube, J., in *Winnipeg* recognizes that while there is an important need to protect the children from abuse, there must also be procedural fairness.

Because of the profound impact of an apprehension on children and parents, she determines that the emergency threshold is not an appropriate minimum threshold, but that there must be a 'situation of harm, or a risk of serious harm', in order to justify removal of children from parents when section 7 rights are concerned.

The ability of the parties to have a post-apprehension hearing within a short period of time provides the necessary safeguards. At the post-apprehension hearing, the parents can challenge the apprehension on the basis that the situation was not one of harm, or risk of serious harm, and if successful in that regard, can allege a breach of their section 7 rights, and seek to have the children returned to them.

The five days after apprehension provided in the Ontario legislation, would appear to be within the reasonable time frame contemplated by Justice L'Heureux-Dube, in *Winnipeg*.

8.3 The evidence relating to the apprehension.

The fact of the warrantless apprehension and the circumstances leading up to it are significant aspects of the parents' case within the context of the *Charter* Challenge. I will therefore review the evidence in more detail.

The chaos on July 4th

I find as a fact that the chaotic, distressful environment at the family's home at the time of the removal of the children, was caused - indeed, was orchestrated - by Pastor Hildebrandt.

He admitted in his evidence that he wanted to gain media attention, because he felt that it was the only way he could protect his congregation, to gain attention and sway public opinion to the side of the members.

He had already had the experience of having one of the families of his congregation, Mr. and Mrs. B. and their children involved with the Society. In fact, that family had consented to an Interim Supervision Order. They then fled from the jurisdiction.

I find that Pastor Hildebrandt had colluded with that family in assisting them to flee from the jurisdiction.

He admitted in testimony that he knew all along where they were; that he was in contact with them; that he attended at court on the return date and informed the court that the B. family had left and gone home; that he had arranged for them to attend with a lawyer and sign a Power of Attorney appointing him; that he used that Power of Attorney to sell their home on their behalf after they fled from the jurisdiction.

Now that a second member family was involved with the Society, the Pastor decided to use a different strategy, and involve the media before the court could be involved. He said "It was the only way to get help".

The circumstances of what happened speak for themselves. Members of the Church began to arrive; within a short period of time, there were 35 to 50, or more, congregants gathered, with more arriving. They knelt and loudly prayed, some cried. Even the children of the Church congregation were involved.

One witness estimated there to be over a hundred persons gathered at one point. That is a very large number, given that the entire congregation at that time numbered some 200 people.

These events took place on a weekday, yet within minutes, people who should have been at work had gathered at the F. residence, to lend their support and to pray. Oddly enough, the father was not called home. He did not arrive until the children were in cars. It is not unreasonable to speculate on Mr. Mamo's theory that the father's absence was arranged by the Pastor.

Pastor Hildebrandt arranged for the media to be contacted.

He saw this as the perfect photo opportunity for his congregation to make a statement and enlist public support.

In fact, he requested Deputy Chief Reymer to delay the actual removal of the children until the media representatives could arrive to take pictures or film the incident.

The media did not arrive on time, but pictures were taken by the Pastor's son, who then gave them to the newspaper and television media. They were published the next day with an interview with the Pastor.

The entire "scene" at the family's home when the police and Society workers were removing the children, was orchestrated by the Pastor and the Church of God congregation for its own purposes.

The F. family children and their parents became his tools in this endeavour.

He encouraged the congregants to resist the removal. They obstructed passage of the police inside the home. They clung to the children, and forced the police and workers to have to physically take the children from them.

I find as a fact that the actions of the Pastor, and of the congregants with his encouragement, created the chaotic situation, severely exacerbating the very stressful situation for the mother and especially the children, and gave little if any thought to the well-being of the children during the course of this orchestrated event. Even more distressing is the fact that once he had created this very distressing event, and saw the distress it was causing the children, he did nothing to stop it.

He, and he alone, had the power over the congregants and the family, to put a stop to the situation.

Suffice it to note at this time that the resistance of the Church of God congregants ought not to be taken into account as to whether or not the warrantless apprehension was appropriate or hasty.

What might have been a more reasonable response, short of apprehension?

It might be said that as the number of persons continued to increase, the level of distress of the Pastor and congregants continued to rise, the need for more police to remove children and provide back-up for other police became apparent, that Ms. West ought to have pulled back out of the situation and made arrangements to discuss matters with the parents and the Pastor, in a calmer, more rational environment.

She was a social worker who, after only two months of experience in this job, found herself in a uniquely stressful situation, a set of circumstances that many very experienced social workers have never been exposed to, let alone had to decide and handle without more experienced personnel on hand. As I discuss below, she made the right decision, in law.

8.4 Did Ms. West have reasonable and probable grounds to believe that the children were in need of protection?

To answer this question, one has to determine the extent of her knowledge and information on July 4th.

What did she know?

She knew that the children were hit with objects, as a form of discipline.

She knew that the objects used were a switch, according to the mother; a belt, the wire handle of a flyswatter, electrical cords from household appliances, and wire hangers, according to some of the girls.

She knew that the children were struck on the buttocks and the tops of the thighs.

She knew that sometimes, the hitting left a bruise or a mark, referred to by some of the children as stripes.

She knew about the recency of hitting, that one of the children, Trudy, had been hit about a week to ten days prior to the apprehension.

What she did not know was whether Trudy sustained any bruising on that particular occasion. She also did not know how long ago it was that any child had received a bruise as a result of being disciplined with an object; how frequently such hitting and bruising occurred; and, how serious the bruising was, in other words, how long a bruise lasted. On the last point, she only knew, from what the girls said, that it might be from a day to a week. She also knew that Juan's bruise, in October, 2000, lasted at least several days.

On July 4th, when she examined the girls, there were no bruises to be seen. This could mean that the children had not been hit within the last several days. It could also mean that it would have been too late for the prevention of any hitting that might have occurred earlier, with the bruising already healed. Any visible bruising would simply have confirmed only the recency of inappropriate hitting with objects, or conceivably, with a hand, as had occurred to Juan in October 2000.

As this evidence was given at the hearing, by both Ms. West and the mother, it appeared that this was present, on-going conduct; this was not conduct from the past that had been discontinued. The mother did not say 'the children had been hit with a switch (or other objects) but we no longer do that.' On the contrary, she admitted that physical discipline had occurred a week before.

It was certainly open for Ms. West to believe that the conduct was continuing.

Obviously, it need not be conduct that is exhibited daily in order for there to be reasonable and probable grounds to believe that the children were in need of protection.

I find that Ms. West had reasonable and probable grounds to believe that the children were in need of protection, on July 4th.

8.5 Did she have reasonable and probable grounds to believe that they were at substantial risk of harm if there were a delay in obtaining a warrant, such as to justify the decision to apprehend without a warrant?

I answer this question in the affirmative.

Ms Wise suggests that the test is whether the delay would result in 'imminent risk of serious harm, or immediate danger'. I do not agree that this is the standard. I do not interpret 'substantial' to have that meaning. The threshold of the test is discussed below.

Ms Wise suggests that there is no evidence to support the need for the apprehension. She points to the evidence of the Society worker, Brian Flint, called by Ms. West to assist with transportation, who asked "do we still have to do this?"

There was one attempt by Pastor Hildebrandt to consider an alternative. He asked Ms. West, "What if they (the parents) promise not to hit the children?" To this, Ms. West responded, "It's too late".

There was no explanation given by Ms. West at the time. At the hearing, as to why it was 'too late', Ms. West testified that she did not think a warrant would be available that quickly; she was of the opinion that something had to be done right then because of her prior knowledge about the first family who had fled, and her concern that these children would also be removed while she took steps to obtain a warrant to be obtained.

8.6 Are the Apprehension and the Application independent of one another?

Section 51 of the Act provides for an adjournment hearing following an apprehension, to determine in whose custody the children will be, and under what circumstances, pending the actual hearing for a final order, or finding of protection.

Indeed, children have been returned to parents shortly after an apprehension where circumstances demonstrate that they are no longer at risk; for example, when a mother's abusive partner is incarcerated for a period of time, and the children are returned to the care of their mother.

At the next level of involvement, children may be returned to their parent following an apprehension, when the risk of harm to them is one that can be monitored by the Society under an Interim Supervision Order.

It may be, in some cases, with the benefit of hindsight and further investigation that within a short period of time after an apprehension, the children can be returned to their caretaker parent from whom they had been removed, either subject to a Supervision Order, or no further intervention by the Society.

Even when an apprehension may have been hastily implemented, under circumstances that appeared appropriate at the time, and either with or without a warrant, and the children are returned to the parents an application may need to proceed to determine how best the children can be protected in the future, once a finding is made.

If the court were to accede to the parents' arguments in the case before me, the consequence

would be the inability of the court to consider all the facts and determine what would be in the children's best interests, or necessary to protect them.

Granting to the parents so-called protection under the charter would thus effectively breach the children's rights to be protected.

I acknowledge the philosophical argument within the constitutional analysis, that the State ought not to be intervening in parent-child relationships in order to protect the children's charter rights. It may be argued that the State would be usurping the role of the parents by doing so. Therein lies one of the difficulties in trying to formulate an appropriate construct for a charter-based analysis in child welfare cases. If the parents have the sole right to protect their children's charter rights, what happens when the parents' interests conflict with those of the child, such as in neglect, or abuse situations?

If the court is unable to hear evidence about what happened, how it happened, why it happened, it would not be acting in the best interests of the children, and thus the Society's actions would be seen as a breach of the children's rights to security of the person.

The parents' rights under the charter should not be allowed to supercede the children's rights. Not in this case.

I leave it to subsequent courts to make that determination in the future, with other cases, on different facts.

The process of an application is independent of the process of an apprehension.

An apprehension and an application are two separate proceedings. The ability to proceed with an application is independent of the validity of an apprehension.

This view is supported by the decision of the Alberta Queen's Bench, in *G.A. v. The Director of Child Welfare*, 2002 ABQB 212, at paragraph 7 of that case.

Further, to paraphrase Justice L'Heureux-Dube, at paragraph 79 of the *Winnipeg* case, an 'apprehension is an interim child protection measure'. It involves the physical removal of a child from the care of his or her parents, on a temporary basis.

It is considered a tool. Even if the process of an apprehension is found to be defective in some way, this does not effect the validity of an application.

In the case before me, after the apprehension, the Society continued its investigation. It conducted interviews of the children. Further information was obtained about the methods that were used to discipline the children with objects.

Even so, the children could have been returned home prior to the expiration of five days, had the Society and parents been able to reach an agreement. Whether or not the apprehension is deemed to be valid, the Society cannot abandon its mandate in the face of the information that it had and fail to continue its investigation or start an application. This would be true whether or not the children remained in Society care or were returned to their home.

In concluding that the court's ability to make a determination as to whether or not a child should

be found to be in need of protection is not dependent on the validity of the apprehension, I have adopted the views expressed in two cases to which Mr. Mamo referred me.

In the case of *D.M. v. Director of Child Welfare, Alberta*, the court expresses the opinion that a child ought not to be deprived of the benefit of child welfare legislation because of erroneous actions by a worker employed by the Society.

To adapt that reasoning to the facts before me, in the context of the parents' position, would mean that if a court found children to be in need of protection following the first stage of the hearing but determined that the apprehension had been unlawful, all the evidence that supported making the finding would have to be excluded.

In the absence of any other evidence, the court would have to dismiss the application.

That would lead to an absurd result, leaving a child who would otherwise have been found to be in need of protection without the benefit and protection of the child welfare statute, and in the vulnerable position of potential future risk, without intervention or supervision by the Society.

The decision of the Saskatchewan court in *Minister of Social Services v. C.*, at page 418 is particularly compelling and I quote the salient passage here:

"Little would be accomplished by an inquiry, once the hearing has been commenced, as to whether it appears to an officer that the child was in need of protection or that there were reasonable and probable grounds for believing so. Nor is such an inquiry a prerequisite for a

hearing to be commenced under Section 21. Part one of the Family Services Act is for the protection of the children. A child should not be deprived of the benefits of the Act by error on the part of an officer of the department."

The fact that the Saskatchewan statute is based on that province's Summary Convictions Act would certainly create a more compelling invitation to conclude that criminal principles should be imported into child welfare proceedings, more so than does our legislation.

However, the court said, at page 419, "This provides for procedure only. It does not import criminal principles into the proceeding. It is not a criminal law proceeding."

8.7 The timing of raising the issue of an improper apprehension.

In the Winnipeg case, the court recognized that an apprehension effected without a warrant may be justified if the parent has an opportunity to seek a post-apprehension hearing without delay.

The time to dispute the legality, constitutionality or validity of an apprehension would appear to be at a "post-apprehension hearing", held under section 51 of the Act shortly after the children were removed from the parents.

The parents did not do this. In fact, they had not even filed their Answer until well past the time limit provided for by the Rules and did not challenge the apprehension until well after the children had been returned home and after a temporary supervision order had been consented to.

The issue of the apprehension is moot after an application has been commenced, let alone partway through the hearing itself.

The parents' counsel argue that charter issues are complicated and complex, and that much preparation is involved to get a matter ready for hearing, and thus it could not have been done earlier.

I am not unsympathetic to this position. It is the exception, rather than the rule, that the parties are ready to proceed with substantive arguments and completed documents on the date of the post-apprehension hearing.

However, this issue was not even raised in the three weeks, approximately, that transpired between the apprehension and the Interim Order returning the children to their parents under supervision.

Ms. Wise suggests that the parents would have been unable to effectively raise the issue because they did not yet have counsel. Although this is most commonly the case, it was not necessary to raise all the allegations that have been raised on behalf of the parents in the Notice of Charter Question, in order to challenge the apprehension itself.

The test at a post-apprehension hearing, following a warrantless apprehension, is whether there is "serious harm or risk of serious harm to the children." (Winnipeg).

That test is closer to the threshold set out in the previous section 51(3) of the Ontario Act, prior to the 1999 amendments, that is 'substantial risk', which refers to an "actual, real and not illusory risk, not a speculative chance but a real chance of danger to the child's health and safety." (Catholic Children's Aid Society of Metropolitan Toronto v.

D. (A.) (1994), 1 R.F.L. (4th) 268 (Ont. Gen. Div.)).

This would have been an easier challenge for the parents to win in challenging the apprehension, because the Society would have had a higher threshold to meet, "... serious harm or risk of serious harm", compared to the wording and the test in section 51(3) of the Act where the Court must be satisfied that there are "reasonable grounds to believe that there is a risk that the child is likely to suffer harm."

Section 46 of the Act provides that within five days after the apprehension the child shall be returned to the parents or returned to them with a temporary care agreement (voluntary agreement) or the matter is to be brought before the court for hearing under section 47(1).

If the matter is not ready to proceed with a hearing on the first return date, it may be adjourned and the court would hold an "apprehension hearing" or adjournment hearing under section 51.

I do not propose to review the provisions except to note in section 51(3) the test to be applied if the court is considering an order placing the child with someone other than the last caregiver(parent) or keeping the child in temporary care of the Society pending the adjournment. The wording of the test now is "...where a court is satisfied that reasonable grounds exist to believe there is a risk that the child is likely to suffer harm that cannot be protected against by a less intrusive order."

As I noted above, the term "substantial risk" in section 51(3) was replaced by the word "risk" by the 1999 amendments.

The threshold for the test has thus been lowered. However the wording in section 40(7)(warrantless apprehension) has not been amended. It continues to require the higher threshold, that the worker must have a belief that there will be a substantial risk.

The significance of the wording change will be considered below.

9. WAS THERE A BREACH OF THE PARENTS' SECTION 8 RIGHTS?

Section 8 of the charter provides protection against unreasonable search and seizure.

It was also clear from the evidence, and I find as a fact, that Ms. West indicated that she wanted to talk to the children. It was within her mandate to investigate by talking to the children.

I find as a fact that Pastor Hildebrandt and the mother knew what Ms. West wanted to do, and consented to Ms. West talking to, and examining the children for marks.

In fact, consensual arrangements were made, as a compromise, such that the girls would be seen by Ms. West, and the boys by Deputy Chief Reymer; that the children would not be required to disrobe entirely, just draw down clothing to reveal areas where they would have been hit; and that the mother would be present.

There was consent to enter the home, and to speak to and examine the children. I rule that there was no breach to the parents' section 8 rights.

10. WAS THERE A BREACH OF SECTION 9 OR 10(B) RIGHTS?

The parents argue that they, and in particular the mother, were not advised of their right to counsel, nor cautioned about giving an incriminating statement before answering Ms. West's questions.

They therefore claim that their rights under s. 10(b) of the `charter` were violated.

There is no doubt any longer that child protection proceedings engage section 7 rights of the `charter`. Do they also engage section 10(b) rights?

Do parents' rights under the `charter` extend so far as to require that a child protection worker, sent to investigate child abuse, would be required to inform parents of their right to instruct and retain counsel right away?

Would this obligation be extended, as in criminal law, to provide a toll-free number for a Legal Aid lawyer? Would this then be extended further to require the province to establish such a panel of lawyers? The delay would be exacerbated for a parent who did not speak English.

This would mean that if a parent chose to speak to a lawyer after being informed of her rights to counsel, a child who is at grave risk, would be obliged to wait until his or her parent contacted a lawyer, and then received advice about what to do.

Irreparable harm may be done to the child in the meanwhile.

In impaired driving cases, there is often a concern about the timeliness of providing a breath sample, in order that the presumption in the `Criminal Code`

affording an evidentiary short cut to the prosecution, might be exercised.

In child protection proceedings, there would be no similar reason to set a statutory time limit as to a reasonable period for a parent to consult her lawyer while a child protection worker waited and was unable to speak with or observe the child.

Ms. West did what her job required her to do. When she went to the home, she received new disclosure from the mother, indicating that the children are still being hit with objects, such as a stick, Ms. West is mandated to proceed with an investigation. That investigation involves speaking to the children and asking them questions.

The yardstick, again, must be the extent to which the ability of the court is enhanced, or restricted, to make a decision that would be in the child's best interests.

The court is entitled to have all the relevant evidence before it. This should include all statements made by parents to Society workers.

The parents argue that their consent was not obtained before the Society asked questions of the children, neither at the home, nor after the apprehension when the children were videotaped.

To suggest that a care-giver or parent must give consent before the Society is able to ask questions of the of the children who are in the person's care, when there are allegations that that person has abused the children, is absurd. It is preposterous to suggest that in a case where a parent is sexually abusing his or her young child, the parent must give consent before the Society can to speak to that child.

That argument also fails to support the parents' position that the videotapes of the children's interviews ought to be excluded.

It is note-worthy that the parents did not dispute the contents of the tapes. There was no suggestion at all that what the children said was not accurate or truthful. The parents concede the truth of the allegations.

Finally, I note that section 10(b) rights are not triggered until there is a detention. The mother was not detained at any time. Therefore neither section 9 nor section 10(b) rights were violated.

11. SIGNIFICANCE OF THE EVIDENCE REGARDING THE AMENDMENTS TO THE ACT

Ms. Wise suggests that even though the definition of child in need of protection was changed to reflect a lower threshold, that is reasonable risk of harm, the wording in s. 40(7) did not change, and remains as 'substantial risk'.

The fact that the amended Act contains the same wording in the warrantless apprehension provisions, means that the legislature intended for the threshold to be maintained at the same high level as it was before the amendments, while other definitions were amended to lower the threshold.

Ms. Wise suggests that the Society would have been unsuccessful in obtaining a warrant on this higher threshold. The "horrific scene" that evolved on July 4, at the site of the apprehension would have been avoided.

I have already made a finding as to who was responsible for that scene. The suggestion, however, implies that Ms. West intentionally avoided considering obtaining a warrant in case she were unsuccessful.

I reject that suggestion outright.

12. THE SIGNIFICANCE OF THE STATE OF THE FILE

The evidence as to policies of how files are kept and records made was useful, but it is not necessary for me to review it.

After October 2000, the worker having carriage of the file, Ms. Schneider-Campbell left the agency.

Ms. West inherited this file, along with a large caseload of other files when the previous worker left. There was some inconsistency in the paperwork in the file.

A concern as to physical discipline was noted yet there was an indication that closing the file would simply be a formality.

The argument raised on behalf of the parents, that if the file had been properly closed before it was transferred to Ms. West from her predecessor, none of these matters would have taken place, is a specious argument. The "what if" argument simply is irrelevant. Moreover its underpinnings are not solid.

It was not simply a matter of an "x" in the wrong place, and that only paper-work needed to be completed.

Exhibit 5 contains the records of the October 2000 incident. The paper-work indicates that the worker noted that the child continued to be in need of

protection, that there was significant follow-up needed, including a report from Dr. Black that had not yet been received; and further consultation with the manager was required.

The occurrence records also note concerns "...that the family under the direction of the Pastor, are reluctant to meet", and the concern about the strong beliefs of the Church in using physical discipline.

Ms. West's involvement ostensibly commenced when she had to take steps to close the file.

This required a follow up as to Juan's burn, and the concern about the physical discipline.

One month delay

I am not persuaded that the delay of one month between when Ms. West took over the file on May 1, 2001, and then took any steps on it is relevant to the issues I have to decide.

Her work-load was sizeable. There was nothing to indicate that this was a critical file. Follow-up was needed, as Ms. West identified, both to ascertain Juan's burn recovery and the use of physical discipline by the parents. And that is what Ms. West did.

13. THE RISK ASSESSMENT MANAGEMENT MODEL

I do not propose to review the evidence of the executive director, Steven Bailey, about the historical development of the Act and amendments.

The Society provided very detailed evidence, through Ms. West, as to the development of the Model, its ratings, how it is used by the social

workers, and what the various levels, or assessment ratings mean.

The evidence is that after receiving the information that the parents continued to use objects to strike the children, this file was re-assessed to a rating, of "1-1-A risk".

This rating encompasses injuries that run a spectrum from long-bone fractures and brain injuries, to the other extreme, of bruises.

This rating leaves a significant amount of scope to determine whether a situation is an extremely serious matter, or not.

In other words, the assessment rating does not necessarily mean that it is extremely serious.

On the other hand, the screening tool requires that cases with an assessment rating of 1-1-A mandate the Society to attend to, and see the children, within 12 hours.

14. DISCUSSION OF THE EVIDENCE OF THE CHILDREN BEING STRUCK

14.1 Language and terminology

The development of this case underscored the importance of using proper terminology.

This difficulty was exacerbated by the fact that the parents spoke Low German, and their evidence, and the evidence of all witnesses had to be translated by interpreters into English.

The words "hit", "strike", "spank", "discipline", have different meanings for different people. The word "spank", in particular, evokes different

images for different people. Some consider it one hit with an open hand administered to a child's buttocks with an open hand. There is diversity of opinion as to whether it includes the use of an object, instead of an open hand, bare buttocks as opposed to clothing, one hit or more, with or without marks being left.

The 1982 version of The Concise Oxford Dictionary defines 'spank' as: a slap, a blow with open hand on buttocks.

In the translation of the evidence, the words were being used interchangeably by the interpreters. I requested that the interpreter and the respective witnesses advise which words had which meanings in English so that there would be a commonality in the questions and respective answers.

14.2 The book of teachings, "Mommy, Daddy We Will see Jesus"

The Society presented on the voir dire this book, which allegedly contains some of the teachings of this Church.

Pastor Hildebrandt admitted that a book similar to the one in court was available and sold to members of the congregation in the past, but was not presently available. He stopped short of admitting that the copy in court was an exact copy.

His reticence does not dissuade me from concluding, on a balance of probabilities, that this copy is identical, if not the same copy, that had been given to Brian Flint, on behalf of the Society, by Pastor Hildebrandt when the first family became involved with the Society.

This book clearly provides, that physical punishment of children with the use of an object is not only encouraged, but directed. It suggests physical discipline for children as young as one year.

It is difficult to believe the parents' testimony that they were not familiar with this book, or certainly, at a minimum, its teachings.

Mr. Kilpatrick suggests that there is a problem with an analysis that says it may be acceptable to strike a child with a hand as long as there is reasonable force, but it is not acceptable to strike a child with an object, even if only reasonable force is used. He notes that the Church of God members strike the children with objects and that they rely on their religious faith in doing so.

14.3 The mother's evidence

Firstly, the mother denied that she was following the teaching of the Bible in adopting this form of discipline. She testified that she was acting on her own decision, having decided that the children should be disciplined with objects.

Her testimony in that regard stands in stark contrast to the evidence of the Pastor, the documents filed, and even the videotaped statements of one of the children, and is not believable.

Where her evidence differs from the other evidence in that regard, I prefer the evidence of the Pastor and others, that the parents of Church of God families strike their children with objects as a form of discipline and to teach them to be obedient because they believe that they are so instructed by the Bible.

I will review the evidence of the children, on tape, below.

The decision whether to exclude evidence cannot rest solely on the quality and nature of the evidence itself, but rather on the conduct or nature of the actions taken by the Society that day.

Hindsight cannot be allowed to play the role of sole arbiter in determining the admissibility of the evidence that was obtained by the actions of the Society.

If the subject children had been found to be covered in welts and bruises, there would have been a far more muted response in the indignation of the Pastor, or indeed the other congregants who were called to the home to protest the removal of the children.

It is very unlikely that the Pastor would have orchestrated the media attention that ultimately resulted. The parents could hardly then be seen as taking a stand to protect their rights, and their children's charter rights to security and privacy.

In other words, the same test must be applied in determining admissibility of evidence if there are visible marks of abuse or if the only information is that the children are struck with a variety of objects and bruises are left, but there are no physical signs of bruises to be seen on that particular day.

Of what significance is the statement "What if they promise not to hit?"

The timing of that statement is significant.

The fact that it is posed as a question, rather than a statement, is also significant.

The fact that it appeared to come solely from the Pastor is also to be taken into account in determining its significance at the time the apprehension was in progress.

Pastor Hildebrandt did not approach the mother with that suggestion.

In fact, in her cross-examination, the mother expressed disbelief that the Pastor would even have made that suggestion, because it is so antithetical to their strongly held belief that the Bible instructs them to hit the children with objects.

I cannot speculate what the result might have been, had the Pastor and the mother approached Ms. West together, during the turmoil of the apprehension and said, "The mother has agreed not to hit the children until we can all meet and discuss these matters rationally."

Although I cannot speculate, I can conclude, based on the evidence of subsequent events, that such a statement would simply not have been made.

It is evident that the Church would not support the parents in such a promise, nor would the parents have made such a promise.

The fact that three weeks elapsed, with the children in temporary care, before the parents consented to an Order that they would not physically discipline the children is reflective of the parents' very firm resistance to agree to something that was not in accord with their religious beliefs.

The children were apprehended on July 4th, meetings were held on July 6 and 7th with the Society, and no such offer was made.

The matter first was in court on July 9th, and no offer was made by or on behalf of the parents to make such a promise so that the children could be sent home, until a further hearing.

Indeed, no such promise was made until negotiations on July 26th proved successful, a Temporary Order was made to return the children to their home, subject to strict terms of supervision, one of which was that the parents would not subject the children to corporal punishment.

In the meanwhile, on July 6 or 7th, the Pastor is arranging for media pictures to be taken of the unhappy parents in their empty home. A web-site is promptly created, within a matter of a couple of days after the apprehension, providing the pictures, names, ages, and email addresses of the children, so that supporters can contact them with encouragement.

None of this can be construed as forming a basis to believe that on July 4th, the mother, let alone the Pastor, would have agreed that the children would not be hit.

By the time that statement was made by the Pastor at the family's home, he had already told Ms. West, that the talking was over, that she would not be allowed to talk further with the mother. He said to Ms. West, "You don't talk any more, " and "We're not talking any more".

He had also reminded Ms. West and Deputy Chief Reymer that another family (the B's) had already fled from the jurisdiction.

By this time, Ms. West had information that gave her the reasonable and probable grounds, and that the congregation, and therefore this family, had the ability to remove the children very quickly.

The evidence of the next-door neighbour

The evidence of Mr. Ernest T. is that he lives next door, is about 67 years of age, and saw a major commotion going on next door, when police were carrying a boy out of the house, and another a girl, and putting them into police cruisers.

Mr. T. started to cry when he gave his evidence. He said he did not know the parents, only the children. Obviously, seeing the children being carried out and crying out for help would have been distressful to this well-meaning gentleman.

His evidence, however, is not particularly effective, when contrasted to his demeanour in the photographs taken of the scene and apprehension by the Pastor's son, Herbert. They were filed as Exhibit 47.

They show Mr. T. non-challantly watering his lawn, adjusting the hose, and pulling up weeds, as the children were being carried out of their home.

There was not a hint of concern or distress demonstrated on his part in the pictures.

The videotaped interviews of the children

After the apprehension, all seven children were interviewed by D.C. Reymer, and a Society worker, on

July, 7, 2001. The interviews were video/audio taped. They were played as evidence on the voir dire, and transcripts were filed.

Jacob said that Margaret and Trudy get spanked. He said the older that the children get, the less they are spanked.

Spankings are administered when the children are "unobedient". He gave examples of 'breaking the rules', playing in the street, and "John (Juan) got spanked a few times in a month."

He described that sometimes John would cry after. Spankings are given on the bum, so it 'wouldn't hurt the bones'; sometimes red stripes are left, but he did not know for how long they stayed.

He said that sometimes spankings are given with a stick. His mother administers most of the spankings, especially to the little children.

He himself had not been spanked for a long time 'because he was good'.

He last received a spanking in mid-August, 2000. He recalled that date because he had done a bad thing by drawing a bad picture. He had felt so badly that he was unable to sleep. Eventually, he told his father; he was asked if he wanted a spanking. Although he did not really want a spanking, he asked for it, and felt less bad afterward.

He knew that if he got a spanking, he would remember not to do the bad thing again.

His father "... spanked me, ... a few strikes. I think it was with a wire .. wires with plastic and some yellow cord like (he pointed to the telephone cord on the wall)."

He was struck three times on the bum and afterward he felt better, and gave his dad a hug. Although it hurt very much at the time, he said he did not feel it the next day. He said "... it wouldn't hurt anymore, but I might have a few stripes on but I am used to it. In Mexico, I got spanked about every day." He said, "... and then, sometimes if I did something, like without knowing, he just hit me a little."

He said that sometimes his father would hit him with his hand when he was talking loudly, or "talking bad" to his brother, or sitting on the desk. This sometimes left red marks which went away quickly.

"The little brothers and sisters got spanked with a little rod ... like a stick without leaves."

He said that sometimes, the children were given a number of chances, before they were spanked. Sometimes, the spanking was preceded by talking.

Jacob said that he had seen the other children get hit on the hand and that red marks were left. He had not seen marks anywhere else on the others.

He said that his mother did not like to do the spankings. He did not blame his parents for doing the spankings. He said he did not feel bad about his parents doing the spanking because he knew that some children got mad when it was a little clap, so ".. I wouldn't tell my dad to spank me with just a little .. clap because that might never break my will."

Jacob asked D.C.Reymer why the children were removed from the home. Following the explanation about being spanked with objects, Jacob said "That is no reason."

His best guess recollection was that spankings occur perhaps two or three times a month.

He said that John (Juan) and Trudy get spanked the most.

I do not propose to review the interviews of all the other children in the same detail.

The summary of the contents of their interviews is that the children are 'spanked' with various objects: a belt, the wire handle of a fly-swatter, electrical cords of appliances, a stick without leaves, a 'spanking rod' which is like a twisted wire.

They are hit on the top of the legs, where it stings, and on the buttocks (bum).

Sometimes there are red stripes as a result. Their respective recollections were that the mark sometimes goes away quickly, other times it is there for several days.

Sometimes they get hit with a hand. They are hit if they are disobedient. The 'spanking' is intended to break their will and to help them remember not to do the bad thing again..

Older children get 'spanked' less often than the younger ones. The most recent incident may have been a week or ten days before.

When they get spanked, they have to say they will obey.

The mother is not angry when she spanks them, and spansks them because that is what the Bible says to do.

Anna was spanked because she went outside with her hair not neat, after she was told not to go out.

Anna said that her father knew there was a law in Canada not to spank children, so he tried other ways, such as not allowing them to do things they liked, but

when he saw that it did not work, the spankings resumed.

Diedrich got spanked for being in the bath-tub too long, and for being 'unobedient'. His mother tells them that the Bible says it has to be done (the spanking) with a rod.

One of the boys expressed extreme distress, believing he would be responsible for his parents not going to God if they could not spank him.

15. THE EVIDENCE OF ELSIE SIEMENS

Ms. Siemens first became involved in this case when the Society asked her to interpret for the mother, on July 4th.

Ms. Siemens is a resident of Saskatchewan and she and her husband were living in Ontario at the time, fulfilling a commitment to help new-comers learn how to assimilate to the Canadian culture at the Mennonite Central Committee.

She helped with making referrals for housing, doctors' appointments, banking skills, and so on. Frequently, she was asked to interpret for members of this community as she herself spoke English fluently, as well as Low German.

She was the interpreter brought in by the Society on July 4th, and was involved in both attendances by the Society at the parents' home that day.

She was present in the bedroom when Ms. West was talking to, and examining the girls, and interpreted for some of the girls, and for the mother.

She described Ms. West talking to the girls in a very hard, aggressive tone.

She found Ms. West's demeanour and her conduct to be unacceptable. She gave an example of how Ms. West sat on the edge of the bed, in a cross-legged position when talking to the girls.

I found Ms. Siemen's evidence totally unreliable and discount it completely.

It became readily apparent that she was a most biased witness. Her responses to questions put to her on cross-examination bordered on vitriolic.

After July 4th, 2001, Ms. Siemens discontinued her services on behalf of the Society. It is obvious that Ms. Siemens wants to be seen as aligned with the Church and totally disassociated from the Society.

The mother's evidence in fact reflected conduct on the part of Ms. West that I conclude was an attempt to make the girls feel relaxed with her. Rather than looming above them, she chose to sit on the edge of the bed and have the child sit beside her in a non-intimidating fashion. I note also that there was no chair in the bedroom.

The mother found Ms. West's position on the bed objectionable. The culture of this community would find such behaviour from a stranger unacceptable.

This evidence underscores the necessity for social workers to be culturally sensitive to the members of the community with which they are working.

To categorize Ms. West's conduct in the home, talking to the girls and examining them for any bruises or marks, as aggressive and abusive, far

over-steps the mark, and as I indicated above, I attach no reliability to Ms. Siemen's evidence.

16. DISCUSSION OF THE APPLICABILITY OF THE CRIMINAL LAW MODEL

The parents' counsel note, as does Professor Bala, with whom I agree, that it is difficult to categorize the nature of child protection proceedings.

The rationale is therefore there, Ms. Wise argues, for the importing of some criminal law concepts and principles and protections into this legislation.

The foundation, upon which these arguments are made, is not solid. The over-arching approach and tone of the argument is that the State is investigating wrongdoing, and thus is acting against the parent whom it wants to find committed the wrongdoing.

I view it as being more correct to consider that the Society is working for children, not against parents.

The parents, through their counsel, do not subscribe to that view.

The `charter`-based analysis that the parents' counsel urge upon me in order to have evidence excluded is a criminal law model.

There are several reasons why a criminal law model is not appropriate to child welfare proceedings.

They have some characteristics of both civil and criminal law.

In some respects, they are administrative in nature.

They certainly are adversarial in nature.

The greater resources of the State (no longer 'limitless resources' as described in previous years) far outweigh the resources of an individual or family when the State seeks to intervene in family life, or remove children from parents.

Moreover, a criminal law model deals with matters that have happened. In other words, an offence has been committed and the State is interested in bringing the offending individual to justice.

Child welfare proceedings, by their very nature, are not interested in punishing a parent for past deeds, but to deal with present risk and prevention of future harm from befalling a child.

They are prospective in nature, not retrospective.

In *W.R. v. Alberta*, the court said, in paragraph 237. " ...the Society does not have to wait until there are provable injuries to a child before intervening."

Even criminal proceedings to obtain a search warrant, for example, before an information is laid, are not intended to prevent the commission of a crime. They are intended to garner information or evidence so that prosecution of a crime can occur.

One can readily compare and contrast criminal law proceedings and child welfare proceedings, extrapolating from the same set of facts:

Assuming a scenario where parents strike their child, resulting in injury.

A criminal charge of assault is laid. The child is the victim.

The parents are the accused, alleged perpetrators of the offence; they are the focus of the proceedings.

The child does not have his or her own counsel.

The State must prove the case against the parents. The fundamental principle of "innocent until proven guilty" prevails.

If found guilty, the parents are 'punished'.

The community, represented by the judge expresses its repudiation of such actions against children.

In gathering prosecution evidence, the police must adhere to the `charter`.

The parents have rights to instruct and consult counsel without delay.

If the police fail to inform the accused parents of their various rights, any evidence obtained may be subject to potential exclusion under section 24(s) of the `charter`.

This is to protect the parents, because they are the accused.

This does nothing to protect the children.

The proceedings deal with offences that have already occurred.

The evidentiary onus is on the Crown, on a test of the evidence beyond a reasonable doubt.

Evidence of the past conduct of the parents will certainly be deemed inadmissible in almost all cases.

The proceedings are held in the form of a trial, not a hearing.

The interests of the State are pitted against those of the individual accused.

However, in child protection proceedings, the children are both the victims and the focus of the proceedings. The parents may be perpetrators of harm to the children, but they are not accused individuals.

The concept of 'self-incrimination' ought therefore not to apply.

The court is entitled to consider the past conduct of the parents.

The proceedings are to focus on the children and prevention of harm to the children, not on punishment of anyone, including parents.

The proceedings deal with present and future risk of harm.

The children are entitled to have their own lawyer.

The legislation encourages the participation of the parents. It requires parents who wish to have the children placed with them to file a plan of care.

It provides that, after a finding is made, if the parents do not co-operate with a court-ordered assessment, the court may draw a negative inference against them. Again, this is focussed on the prevention of harm to the children, and the

interests of the children have to take priority to those of the parents.

The court must have all relevant information before it, to be able to make the best decision in the interests of the children.

The onus is on the State (the Society) to satisfy the court that the evidence supports a finding of need of protection.

The parents do not have to participate. They may well sit back and do nothing, but in contested proceedings where the parents are opposed to the Society's position, they will be, and should be, precluded from participating in the proceedings unless they file an Answer on the merits. The matter will then proceed as an uncontested hearing. That is neither a satisfactory nor desirable for the court to be able to effectively address the best interests of the children.

The court requires evidence of where the children are best placed, and if the parents provide no information, it is difficult for a court to dispose of the matter by placing the children back with the parents.

In recognition of the concept that the court is entitled to have all relevant evidence before it, Section 49 of the Act provides that the court can, on its own initiative, require attendance of witnesses or productions. This by far exceeds the scope of judicial involvement in criminal law proceedings.

Mr. Mamo argues that criminal law cases ought not to apply.

It is tautological to argue that criminal law principles do not apply, because child welfare cases are civil cases. I am of the view that they should occupy a category of their own, as an amalgam of various models of analysis.

Ms. Wise argues that some of the criminal law concepts should be imported into child welfare cases because these are not cases purely civil in nature, and protection against heavy-handed, unlawful, overbearing actions by the State is necessary.

I do not agree that importing criminal law principles is the solution to provide ample legal recourse to adapt some of the principles underlying the charter to specific fact situations in child welfare proceedings.

Mr. Mamo refers to the *New Brunswick* case in his argument that the parents are required to participate. He suggests that parents must participate, and must participate effectively: that they must call witnesses, adduce evidence, cross-examine witnesses, make arguments and submissions.

I agree that the court in that case emphasises the importance of the evidence that the parents provide, but I do not agree that the case says that the parents **must** participate.

The wording needs to be placed in context, and I suggest, is more properly read as 'in order for the parent to be able to participate effectively (given the complexity of evidentiary issues), she must be enabled to do so, and thus have counsel to represent her.'

The failure of the Attorney General to enable her to retain counsel infringes on her section 7 Charter rights.

There is a distinction between saying that parents must participate by presenting their case and saying that parents **must** present their case.

The case does not say that parents are required to participate in every case.

I interpret that case to say that because much of the information that the court requires to make a proper adjudication in the best interests of the child can only come from the parents, they have to have counsel provided to represent them.

There is certainly a distinction in saying parents must present their case and saying that the parents must be **enabled** to present the evidence.

The parents' counsel might say that if criminal concepts such as confessions, self-incrimination, non-compellability, refusal to disclose are not yet incorporated into child protection legislation, they should be.

I adopt the views and decision of Madame Justice L'Heureux-Dube, in *Winnipeg*, that the analyses undertaken in a criminal law context are not to be imported into child protection proceedings.

One has to consider the practical ramifications if such a development were to occur in the law of child welfare.

As I indicated above, every case would likely end up as a hearing. The rights of the parents would assume greater priority over the rights of the child.

As Mr. Mamo put it, parents' autonomy to raise their children at whatever standard of discipline, care or nurturance that parents thought was appropriate would relegate the children back into the category of property of the parent, ignoring the children's rights to security of the person.

17. THE CHILDREN'S RIGHTS

The children also have a right to have their section 7 rights to security of the person protected.

If the State cannot intervene to protect children from their parents, no one else can.

Inaction by the State, in not investigating, in not taking intrusive action when mandated, in not following up after allegations are found to be true - those inactions could be more harmful to children, even devastating, than the conduct of the Society that the parents complain of today.

18. CASE LAW

In *New Brunswick v. G(J)*, the court recognized that if the mother's constitutional rights were allowed to be breached, and she were to approach the trial without counsel, the court would be unable to have before it the properly prepared and advocated case on behalf of the mother, and this would pose an "unacceptable risk of error in determining the children's best interests."

In *Winnipeg v. W. (K.L.)*, the court (L'Heureux-Dube) recognized that society's interest in protecting children from abuse was paramount to all other interests.

She suggested that paying allegiance to this paramount interest could limit or breach other charter interests, such as the parent's interest

and therefore the process must be in accord with principles of fundamental justice.

The court further held that the concern as to a child's welfare could not tolerate delays while a distinction between 'emergency' and non-emergency' status was determined; the fairness of the process was therefore addressed and acknowledged by the holding of an interim judicial hearing, (or under Ontario statute, the section 51 'show cause' hearing.)

She further drew the distinction between interests being addressed in criminal matters compared to child protection matters, noting that '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.' (Winnipeg paragraphs 124-125).

It is not a viable analysis to argue that by limiting the parents' rights, the State is protecting the children's constitutional rights. Rather, the state may be curtailing or limiting a parent's rights, or even the child's rights, to protect the child's health and welfare.

The facts of this case are readily distinguishable from those in *CAS Huron County v. B*, an unreported decision of Schnall, J., to which parents' counsel referred me.

In that case, the court ruled that the CAS was not entitled to an order authorising the Health Unit and a utilities company to enter the home on behalf of the CAS when the court had already made rulings on other motions limiting the CAS access to the home, against the family's wishes.

I noted in that case, that child welfare proceedings are similar to criminal law proceedings because the CAS is the agent of the State and that parents' refusal to allow entry was not unreasonable in those circumstances, when the CAS no longer had grounds, having found the anonymous information false.

The `winnipeg` case is somewhat different from Ontario law, because of the language of the legislation.

Section 21(1) of the Manitoba statute provides for a warrantless apprehension, that the Society need only have reasonable and probable grounds to believe that a child is in need of protection.

Where the use of force is required with a warrantless apprehension, for example to enter a home, section 21(3) provides that the society must have reasonable and probable grounds to believe that the child is in immediate danger.

The Ontario legislation, section 40(7) provides that for a warrantless apprehension, the society must have reasonable and probable grounds to believe that the child is in need of protection, and have reasonable and probable grounds to believe that there would be a substantial, or serious risk of harm to the child if there were to be a delay in bringing the child to safety, for example, the time required to obtain a warrant.

In Ontario, if the Society can meet the grounds for a warrantless apprehension, then the use of force, for example to enter a residence with police, flows automatically (section 40(8)).

The `Winnipeg` case purports to ask a two-question analysis: was there a section 7 infringement, and if so, was it in accordance with principles of

natural justice? In adopting this analysis, Madam Justice L'Heureux-Dube says that there must be a contextual analysis undertaken, ie., what is the paramount purpose of the legislation, in conjunction with the other purposes set out in the legislation?

In the case before me, it must be noted that the parents are not challenging the constitutionality of the legislation in section 40(7). Rather, they are challenging the actions of the State in apprehending the children without a warrant.

I find that the parents' section 7 rights are not triggered until there is an actual apprehension.

The section 7 right being asserted by the parents in this context is their right to parent their children, and not to have them removed from their care.

I find that section 7 rights are triggered by the apprehension and I must then follow the analysis employed by Justice L'Heureux-Dube in the *Winnipeg* case, where she sets out the balancing of three factors, to determine whether the triggering of the section 7 right constitutes a violation under the *Charter*, and if so whether it conforms to the principles of fundamental justice.

She holds that there are three factors to be balanced: the first of these is the seriousness of the interests at stake; in the case at bar, that would involve finding out if the children are harmed and the extent of the harm, as opposed to the interest of the parents in being able to discipline their children without State interference.

The second factor is the practical difficulties associated with the law in question; in the case at bar, this means the difficulties of a child protection

worker attempting to do her job in conducting an investigation. If the Society were unable to conduct an investigation, it would be unable to determine if a child was being harmed. That entails too great a risk.

Finally, one must weigh the risks and benefits of the law. Clearly, no matter how traumatic an apprehension may be to the parents and children, the benefit in being able to protect children from harm outweighs the parents' interest in being able to raise their children and not have them removed.

Just as in the *Winnipeg* case, I find in the case at bar that the parents' section 7 rights were triggered by the apprehension, but that in balancing the three factors outlined above, I can conclude that this was done in accordance with the principles of fundamental justice.

It is important also to note that the apprehension in any given case may be very short in nature. Children might be returned to their caregivers promptly, as soon as the Society determines that they are not being harmed.

No matter what, however, the actions of the Society in apprehending the children have to undergo judicial review unless the children are returned to the parents within five days of the apprehension.

This constitutes safeguards for the parents, and children, that there is a form of judicial review within a short period of time.

In the case at bar, there was an 'adjournment hearing', before Justice O'Dea on July 9th, pursuant to section 51 of the Act, and the court made a temporary order maintaining the children in the care of the Society.

The parents raised no charter issues at that time; the court reviewed the situation and found that there was a risk of harm to the children, in accordance with section 51(3).

Once the matter proceeds as an application, all parties, and the children, have competent counsel to represent them, to make submissions, cross-examine witnesses, and present their cases so that the parents can effectively participate, to the extent they wish to, in the proceedings. The requirements set out by the *New Brunswick* case are satisfied, and there is thus no breach of the parents' section 7 rights.

Thus, I am of the view that there has been no breach of the parents' section 7 rights that has not been in accordance with the substantive and procedural requirements of the principles of fundamental justice.

19. THE SECTION 1 ANALYSIS

It is not necessary for me to deal with a section 1 analysis in this case.

First, the parents have not challenged the constitutional validity of any of the sections of the Acts or any Rules.

Nevertheless, a section 1 analysis might be necessary, and is available in those cases where there has been a violation of a person's charter rights, without a challenge to the validity of the legislation; for example, the *New Brunswick* case. The court can consider whether the effects of a charter right breach are saved by section 1, as being justified in a free and democratic society.

Were I to be wrong in my decision, and another court were to determine that the parents' charter rights

under Section 7 had been violated, I would have determined that the violation is saved under section 1 of the charter.

I adopt the view that a contextual analysis is critical in determining the purpose, or objective of the legislation, and then determining whether the means used by the Society in attempting to achieve those objectives are sufficiently closely related to that valid objective to be justified in a free and democratic society.

20. RELIEF CLAIMED UNDER SECTION 24

20.1 Stay of proceedings as a remedy

It is premature for me to make any comments, about the parents' claim for a stay of the proceedings, pursuant to section 24(1) of the charter, at this stage, which is only the conclusion of the voir dire.

The imposition of a stay of the proceedings at this time, would mean that the children would be left in the care of their parents without any involvement, let alone supervision, by the Society.

I cannot effect such a result until I can determine whether or not the children are in need of protection.

20.2 Exclusion of evidence

In considering the remedy sought under section 24(2), I have found no breaches of any of the parents' rights that would support exclusion of any of the impugned evidence.

Were I to be wrong in that decision, I would have held that excluding the evidence would bring the administration of justice into disrepute.

Where parents admit to striking the children, where children on the videotapes make statements about being hit that the parents concede are true, I cannot find that the administration of justice would be brought into disrepute if I were to include that evidence.

Inclusion of that evidence, together with the contents of the parents' Answer, Response to Request to Admit, and their answers to questions under Rule 20(3), would not render the trial unfair.

Under both heads of relief claimed, under section 24(1) and (2), to allow the claims of the parents and either order a stay, or exclude the evidence would result in punishing the children for the misdeeds of the Society or the child protection worker.

In child protection proceedings, the children are the innocent focus of the hearing; they cannot be used as pawns in a procedural gambit between the parents and the Society that could result in harm accruing to them.

21. CONCLUSIONS

Ms. West was competent and capable though relatively inexperienced in July 2001.

The apprehension was very traumatic to the parents and the children.

I have determined that the parents' section 7 rights were engaged when the children were apprehended. I have determined that Ms. West had reasonable and probable grounds to believe that the children were in need of protection, and that there would be a substantial risk to the children's health or safety

during the time it would take for her to try to obtain a warrant.

I do not conclude that Ms. West acted in a heavy-handed or egregious fashion by effecting an apprehension without a warrant, because she was concerned that she would be unsuccessful in obtaining a warrant on the grounds she had.

There is no evidence at all of such an intention on her part.

She is not to be faulted for taking the action she did. It might have been preferable for a more senior person with higher authority to attend at the home, but the crisis was developing as a result of the actions of the Pastor and the congregants.

It is mere speculation to consider whether another person with higher authority would have done the same thing as did Ms. West. Ms. Ewan, a supervisor, gave approval to the apprehension, over the telephone.

On the only reliable evidence that I have, I can find no indication that Ms. West acted in anything but a professional manner. Although some of her actions obviously offended the standards of conduct that the mother and Ms. Siemens felt were appropriate, this was not done in an intentional or malicious way.

The Pastor has to take personal responsibility for the degree of distress caused to the children. He could have stopped the chaos and encouraged a calm approach and response, but he did not. He could have contacted a much more senior person at the Society. Instead, he called the media.

Ms. West had reasonable and probable grounds to believe there was a substantial risk to the children's health and safety.

She had grounds to believe that the children would be removed from the community and possibly the country, as had another Church of God family.

The community, the Church, and the Pastor all had the means, capabilities and motivation to assist the family to leave very quickly. If the children fled to Mexico, they would be beyond the jurisdiction of the Society and beyond its capabilities to protect the children.

Ms. West had consent to enter the home.

The Society is empowered to speak to the children and examine them, where there are allegations of abuse.

The Society does not require the parents' consent to examine and interview the children.

It is a judgment call on the part of the child protection worker as to the extent of action she should take, or not take. Children's Aid Societies are often criticized for not intervening sooner, or more intensively.

A situation can arise where there is not enough time to sit calmly and discuss and consult. Such a situation arose when Ms. West, who had attended at the residence to talk to the parents and be able to close a file, found herself in the midst of a volatile situation, orchestrated by the Pastor of the Church of God, under circumstances which led her to believe that the children may be at risk, because their removal from their home, or even the Society's jurisdiction, could be accomplished quickly and effectively by the Church of God community.

She had to prevent that from happening.

The questions posed in the first part of these reasons, can now be answered as follows:

The apprehension was lawful.

Ms. West effected a warrantless apprehension, as she had reasonable and probable grounds to believe that the children were in need of protection, pursuant to section 40(7) and there was a substantial risk to the children's health and safety: they were being hit (disciplined) with objects that left marks and the parents refused to promise to stop this conduct.

She believed that she did not have time to obtain a warrant. There was no evidence that she attempted to do so. She gave an acceptable explanation.

A supervisor made the decision that an apprehension might be necessary.

The time for parents to object as to the unlawful status of apprehension is as soon as reasonably possible after the apprehension.

I emphasize that the sooner the issue is raised, the more likely the chance of having the children returned.

Nevertheless, whether the unlawfulness of the apprehension is challenged immediately after it occurs or not until the hearing, the status of the apprehension is not a bar to the Society proceeding with the application.

I am not unmindful of the obstacles faced by families who become involved in child protection proceedings.

There are financial obstacles to retaining counsel and emotional factors may be peaking at the time the Society is getting involved.

The test however, at the apprehension hearing is at a lower threshold than the test for at the hearing finding children in need of protection.

In other words, if parents succeed at the apprehension hearing in having the children returned to them, it is unlikely that the Society would bring an application where the finding of risk of harm requires a higher standard.

The Society can proceed with a protection application, whether or not the apprehension was found to be lawful.

The application and the apprehension are independent of one another.

Where allegations of abuse or neglect are made, the Society is empowered to ask questions of the parents in the course of its investigation.

Parents are not obliged to answer the questions during the investigation, but the Society must have reasonable and probable grounds to believe that there is a risk of harm, or the children have been harmed, in order to begin its investigation.

Under the circumstances, it is not unreasonable for the Society to draw a negative inference in the investigation if the parents choose not to answer.

The Society is not required to obtain the parents' consent to speak to the children in the course of the investigation.

To hold otherwise, would significantly impair the Society's ability to gather information to determine if an apprehension is necessary, or whether even any intervention is necessary.

The court is entitled to have before it all available, relevant information. This concept requires that parents be compellable to file documents and answer questions as required by the Rules of the Court.

The parents are compellable to answer questions at the hearing, again the purpose being to provide relevant and necessary information to the court. The process should focus on obtaining relevant evidence, to focus on what the children need, not what the parents want.

A parent can invoke protection in the Ontario Evidence Act, such that 'incriminating' answers given by the parent as evidence cannot be used against them in subsequent proceedings.

There were no violations of the parents', nor the children's rights that would result in exclusion of the evidence.

Exclusion of this evidence, admissions that the children are struck with objects, and marks are left would bring the administration of justice into disrepute.

Mr. and Mrs. F. are clearly and undoubtedly parents who cherish and love their children dearly. There is absolutely no doubt in my mind as I come to that conclusion.

Their love and concern and personal pain were evident as they watched videotaped interviews of

their children; as they spoke with pride of their children's good behaviour and accomplishments.

The fact that the parents believe that they strike their children out of love, and that they are obliged to do so because of the teachings of the Bible as interpreted by their Church, does not detract from the view that excessive force cannot be condoned, under any circumstances. Application of force to a child that leaves a mark is unacceptable.

It is very significant to note the evidence of the Pastor, who clearly indicated that leaving marks or bruises when disciplining the children, was not allowed. The Pastor indicated that he did not know that marks were left on the F. children.

The rights of the parents cannot be elevated to be paramount to the rights of the children.

Where the needs and interests of the children to be safeguarded from abuse of any form come into potential conflict with the rights of the parents to freedom of security of the person and to privacy, the children must come first.

Those rights and freedoms are unequivocally engaged when the Society, as a delegate of the State intervenes in their affairs, and certainly when their children are removed from their care.

In this case, the infringement occurred in accordance with the principles of fundamental justice as much as is possibly contemplated within the paramount purpose of the Act, having also in mind the other purposes as set out in the Act.

There is no obligation on the Society to advise a parent of their "right to counsel" under the

circumstances of the child protection investigation.

Moreover, that right does not arise unless there is a 'detention' of the parent.

There was no detention of either parent in the circumstances of this case.

Counsel arguing the charter issues was unable to provide any evidence whatsoever, in response to my repeated requests for the identification of such evidence, that would form the basis for that argument, that the parents, at least the mother with whom Ms. West had most of her interaction, ought to have been advised that she should talk to a lawyer before there was any further questioning.

On a practical analysis of that argument, the unacceptable consequence of Ms. Wise's argument would be a situation where a child is within a home, unavailable to the Society to interview, or even intervene, while the child is potentially at risk, until the parent has a chance to telephone a lawyer, perhaps not be able to contact one who speaks a language other than English, as in this case, and then wait while the parent obtains legal advice.

Ms. Wise's argument on "right to counsel" would have to be equally applicable to a case where a child is lying bound and gagged in a locked room while the parent is obtaining legal advice, having been informed by a Society worker that that is her/his right, just as in the case before me, where there was information that the children were being struck with objects, and in the past, marks had been left by hitting with an open hand.

The same analysis applies to answer the parents' argument that the Society must not be allowed to speak to children without the parents' consent.

For that argument to prevail, it must be applicable in all circumstances, in order for parents to exercise those 'rights.'

No community, or society, could reasonably agree with the concept that a parent who sexually abuses or physically mistreats a child should be entitled to give his/her consent to the interviewing, or examination of the child by a member of a Children's Aid Society. That would be sheer nonsense.

22. FINDINGS

I find no breaches of section 7 rights as any violations were in accord with the principles of fundamental justice.

I find no breaches of any rights under sections 8, 9, or 10(b) of the Charter.

23. RULING

The ruling on the voir dire was released to all counsel on October 10, 2002. I ruled that all the impugned evidence was to be admitted.

The parents' Motion to Exclude Evidence is dismissed.

The issue of costs remains to be addressed at the conclusion of the proceedings.

DATED February 27, 2003

Justice E. Schnall