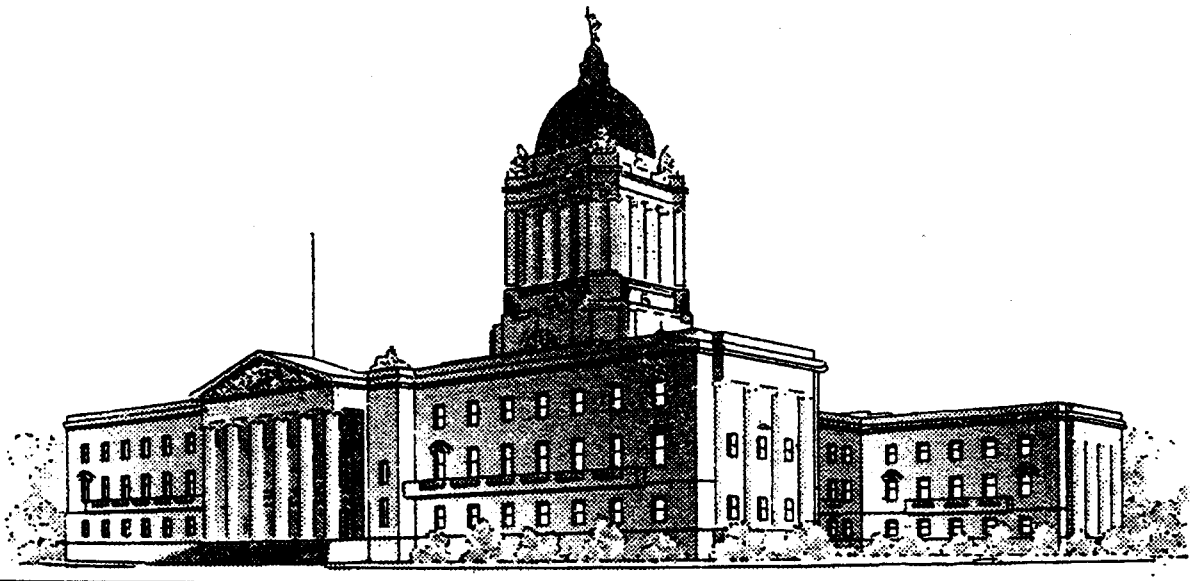
First Session - Thirty-Sixth Legislature

of the

Legislative Assembly of Manitoba

Standing Committee on Law Amendments

Chairperson
Mr. David Newman
Constituency of Riel



Vol. XLV No. 5 - 10 a.m., Monday, October 30, 1995

ISSN 0713-9586

MANITOBA LEGISLATIVE ASSEMBLY
Thirty-Sixth Legislature

Members, Constituencies and Political Affiliation

Name	Constituency	Party
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LEGISLATIVE ASSEMBLY OF MANITOBA
THE STANDING COMMITTEE ON LAW AMENDMENTS

Monday, October 30, 1995

TIME – 10 a.m.

LOCATION – Winnipeg, Manitoba

CHAIRPERSON – Mr. David Newman (Riel)

ATTENDANCE - 11 – QUORUM - 6

Members of the Committee present:

Hon. Messrs. Downey, McCrae, Hon. Mrs. Mitchelson, Hon. Mrs. Vodrey

Ms. Barrett, Ms. Cerilli, Messrs. Martindale, Newman, Radcliffe, Sale, Sveinson

WITNESSES:

Bill 20–The Child and Family Services Amendment Act

Mr. Donald Kirkland, Jehovah's Witnesses
Mr. Allan Ludkiewicz, Jehovah's Witnesses

MATTERS UNDER DISCUSSION:

Bill 19, The Intercountry Adoption (Hague Convention) and Consequential Amendments Act
Bill 20, The Child and Family Services Amendment Act
Bill 23, The Health Services Insurance Amendment Act
Bill 32, The Proceedings Against the Crown Amendment Act

* * *

Mr. Chairperson: Good morning. Will the Standing Committee on Law Amendments please come to order. This morning the committee will be considering Bill 19, The Intercountry Adoption (Hague Convention) and Consequential Amendments Act; Bill 20, The Child and Family Services Amendment Act; Bill 23, The Health Services Insurance Amendment Act; and Bill 32, The Proceedings Against the Crown Amendment Act.

To date, we have had several presenters registered to speak to the bills referred to for this morning. I will now read aloud the names of the persons who have preregistered.

With respect to Bill 20, The Child and Family Services Amendment Act, Allan Ludkiewicz and Donald Kirkland, and I believe they are from out of town; under Bill 23, The Health Services Insurance Amendment Act, we have Marlene Vieno, a private citizen, registered, who I understand phoned the Clerk's Office this morning indicating she would not be in attendance and John Laplume, the Manitoba Medical Association.

Those are all of the registered presenters. If there are any other persons in attendance today who would like to speak to one of the bills referred to and whose name does not appear on the list of presenters, would you please register now with the Chamber branch personnel at the table at the rear of the room, and your name will be added to the list.

In addition, I would like to remind those presenters wishing to hand out written copies of their briefs to the committee that 15 copies, that is, 15 copies are required. If assistance in making the required number of copies is needed, please contact either the Chamber branch personnel or the Clerk Assistant, and the copies will be made for you.

Did the committee wish to establish any time limit on presentations heard this morning? It appears the unanimous view on this is that there be no time limits, so it is so ordered. We do have the out-of-town presenters registered to speak with respect to Bill 20. Is it the will of the committee to have those presenters proceed first?

Ms. Becky Barrett (Wellington): I would suggest that we hear all the presenters on the bills before we deal with each bill individually clause by clause.

Mr. Chairperson: Is that the will of the committee? [agreed]

In terms of sitting this morning, any indication of how late we should sit this morning at this point?

Ms. Barrett: May I suggest that we hear the presentations and then, as a committee, see where we are as far as time is concerned and make a determination at that point?

Mr. Chairperson: Does that make sense to the committee? [agreed] We will re-examine it later.

Bill 20–The Child and Family Services Amendment Act

Mr. Chairperson: I would then like to call initially on Mr. Allan Ludkiewicz and Donald Kirkland. Would you please come forward to make your presentation to the committee? Do you have written copies of your brief for distribution?

Mr. Donald Kirkland (Jehovah's Witnesses): Yes, we do, Mr. Chairman. They are being distributed now.

Mr. Chairperson: Okay, they are being distributed now.

Mr. Kirkland: Mr. Chairman and honourable members of the committee, good morning.

Mr. Chairperson: Perhaps–just one moment. Could you introduce yourself, sir?

Mr. Kirkland: Yes, I was about to do that.

Mr. Chairperson: Okay.

Mr. Kirkland: I am Don Kirkland with the law firm W. Glen How & Associates, and I am from Georgetown, Ontario. I will let Mr. Ludkiewicz introduce himself.

Mr. Allan Ludkiewicz (Jehovah's Witnesses): My name is Allan Ludkiewicz. I just want to correct something. I am not from out of town. I have practised law across the country for over 20 years, but I have lived in Winnipeg all my life.

Mr. Chairperson: Thank you for that clarification. The reason why I will from time to time interrupt is to make sure that the Hansard recording does identify the speaker, so please do not be offended if I do that. It is just to make sure that you are given proper credit for what you say, not credit for what someone else is saying, maybe to your dismay. Please present your presentation.

Mr. Kirkland: Again, we thank the committee very much for hearing us this morning. I express the regrets of Glen How, Q.C. and his associate, John Burns, who otherwise would have been here, but they have been called away on some urgent matters to Singapore dealing with human rights and constitutional issues in that island state, city state, so they have asked me to appear on their behalf.

I would like to say first–and if I may I will take the time to discuss the information in the presentation that has been handed out to you. I would like to say at the outset that we recognize that the state has a legitimate interest in protecting children when their life or health is at risk. We realize that the state also then has the right and the duty to intervene when needed to protect the child.

The purpose of Bill 20 is to bring The Child and Family Services Act into compliance with the Canadian Charter of Rights and Freedoms and the recent decision of the Supreme Court of Canada in the case B. (R.) versus the Children's Aid Society of Metropolitan Toronto, and this is where Glen How & Associates come in. They were counsel for the parents in that case, which went to the Supreme Court of Canada.

So the information we are presenting to you is from that perspective and deals very much with the points made by the majority judgment of the Supreme Court in that case on constitutional issues and conformity to constitutional freedoms that were expounded upon in the majority judgment.

* (1010)

So, to give you the setting, the Supreme Court case was about responsible parental decision making, medical alternatives and medical authority. In the words of the majority judgment of the court, it raised the more general question of the right of parents to rear their children without undue interference by the state. The questions before the court were: Do parents have a right to choose among medical alternatives? If the parents disagree with a doctor's proposed treatment, when and in what circumstances can state officials properly intervene?

It was the Ontario act existing in 1983 which was subject to the scrutiny of the court in this case. The case itself involved a premature baby girl born in 1983. Her parents were Jehovah's Witnesses, and they agreed to the medical treatment being proposed by the attending physicians with one exception. They did not want blood transfusions administered to their daughter. They wanted the best medical treatment for their child. At the time, they asked for alternatives to be used on both religious and medical reasons. They objected to a blood transfusion for their daughter. The doctors went to court through the state agency requesting an emergency court order, and the judge gave control then to the Children's Aid Society of Metropolitan Toronto.

No blood was given to the baby until three weeks later, and then only in preparation for an eye examination and possible eye surgery. So the parents then objected all the way to the Supreme Court. Now, the Supreme Court, on the basis of the Ontario legislation, dismissed the parents' appeal, but they went beyond that.

So, in considering bringing the provisions of Bill 20 into conformity with this Supreme Court judgment and the Canadian Charter, we have to look beyond the mere fact that the case was dismissed and look at the guidelines which the justices very carefully laid down for consideration of judges and legislative bodies such as yourself. So, in considering Bill 20, does the Constitution protect parental decision making? That was addressed by the court. If the state seeks to intervene in parental decision making, what procedures should be adopted to provide parents and children with fundamental justice?

The majority of five to four justices held in the Supreme Court decision that the Charter right through freedom of religion, Section 2(a), and the right to liberty, Section 7, protects parents and parental choices in the medical treatment of their children. That is the first thing. Secondly, the burden on the state is to prove its intervention is necessary. So, to use the words of the majority decision written by Justice La Forest, it is not enough to intervene simply because a professional thinks it is necessary to do so. Further, when the state does intervene, parents are entitled to a full and fair hearing in court.

State intervention must be in accord with the principles of fundamental justice, and you will note in the written presentation–we refer to tab 2, which is a case comment by Professor Rollie Thompson, who is one of Canada's foremost writers. He is a law professor at Dalhousie Law School on constitutional rights in child-family legislation and court actions, and he noted in his comment that he considered this a landmark decision in that it spelled out constitutional rights which apply to child protection legislation.

So does Bill 20 meet the constitutional requirements that have been identified in this recent case of the Supreme Court? The need is obvious. As the Constitution Act of 1982 says, the Constitution is the supreme law of the land, and any provision–I will read it. It says: "The Constitution of Canada"–you will notice on page 2, reference to Section 52(1) of the Constitution Act–"is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

So, wisely, now is the time to look at the question, not wait until a possibility of a constitutional challenge, for which any legislation would not survive in the extent to which any of the provisions of that legislation may not meet the requirements of the Constitution.

So three points we would like to address this morning: (1) parents must have a clear right to a full and fair hearing in court when the state seeks to

override their decision making in the medical treatment of their child; (2) the burden on the state must be to demonstrate necessity for the proposed treatment; and, (3) the legislation must not discriminate against mature minors.

You will notice on page 3–and we begin to take these points for consideration one at a time.

Point I. There must be a clear right to a judicial hearing. Subsection 25(3) of the bill reads: "An agency may apply to court," and then goes on to prescribe the forms and other procedures. It may have been the intent here, we do not know for sure, that it was binding on the agency to apply to court, but we suggest to you that the wording is vague in that respect. So that "may apply to court" is not sufficient when it comes to authorizing medical treatment on a child when either the child or the parents refuse to consent to that treatment.

The Supreme Court does not leave to the state agency the discretion of whether to go to court or not, and we refer you to the constitutional rights set out in the Charter, and that where Charter rights are infringed upon–and the Supreme Court made that very clear that the Charter rights under Sections 7 and 2(a) were infringed upon in the case of B. (R.). But then the state agency must go to court and have a full and fair hearing of the issue for the state to justifiably intervene.

Justice La Forest held in the majority decision that there was this infringement of the parents' rights, and then he went on to say, as you will note in the middle of page 3, quoting from the majority judgment, page 3 of our written presentation: The Ontario Child Welfare Act makes provision for notice to be given, for evidence to be called, for time limits to be imposed upon Crown wardship and other orders, as well as for procedural protections to be afforded to the parents.

Please turn, if you would, to tab 2, where we have Professor Thompson's case comment, and it just helps us summarize what the decision calls for. This is on page 348 of his case comment under tab 2. Helpfully, he summarizes for us what Justice La Forest in the majority decision said was involved in the full and fair hearing. In paragraph 2 on page 348, beginning: "Second, the procedural content of s.7's guarantees in protection matters has been fleshed out by La Forest J.: notice, adversarial hearing before a judge, access to information, rights of representation, burden of proof upon agency, heightened standard of proof, circumscribed wardship order and full status review."

That is what the Supreme Court said the Constitution sets as the parents being entitled to before a state agency can intervene in their decision making with respect to medical treatment for their child. Justice La Forest made that clear back on page 3 of our submission. We are at the bottom at that page. He tied together the procedural protections required by fundamental justice under the Charter: That such procedures must have effect before, and not following the action invasive of the parents' rights, seems to me to be essential and to be clearly required by ss. 1 and 7.

* (1020)

The parents' constitutional right to refuse or consent to medical treatments for their child cannot be set aside except by court action which conforms to the principles of fundamental justice.

You will find on page 4 of our submission, the application which Justice La Forest made of these principles, and they were summarized also by Professor Thompson's comment. We stress it is a constitutional right of parents, and for your own reading you can read the wording in the act, Re Education Act (Ontario) and Minority Language Rights (1984), in which the point is made that Legislatures are to set reasonably clear and specific standards in circumstances where the grant of an unfettered discretion leads to arbitrary, discriminatory or other unconstitutional restrictions upon guaranteed rights or impose unnecessary inhibition upon the exercise of constitutional rights. So the point is made that state agencies are not left to unfettered discretion, and then this judgment makes the sobering point that Legislatures can address that matter.

So our request of you is that the words in subsection 25.(3) "may apply to court" should be changed to read "must apply to court" before authorization for treatment can be given against the wishes of the parents. The

court must hear the matter according to the principles of fundamental justice.

Point II. Burden on the State is demonstrated necessity, not "best interests." Subsection 25(7) of the bill goes on to say that the treatment may be authorized according to "the treatment that the court considers to be in the best interests of the child," and that sounds adequate. The term "best interests," on the surface, sounds very good.

I will not go into the extensive debate that is going on in legal and judicial circles throughout North America, I know for sure, and probably in other areas of the world, about the suitability of "best interests" as a legal test.

Sufficient to say, it is too loose a standard in determining whether a treatment is going to be imposed on a child when the parents do not want that treatment. More scrutiny is required, and so said the majority decision in B. (R.).

Justice La Forest gave this proper burden on the state, as you will note at the bottom of page 4 of our submission: I would be very much concerned if a medical professional were able to override the parent's views without demonstrating that necessity. In other words, a doctor cannot just say a treatment is needed, he or she must prove the treatment is needed in a specific case.

Fundamental justice under the Charter demands that court proceedings be a matter of substance and not merely form. So the burden on the state is subject to critical review of expert opinion, and usually this expert opinion is what is presented in cases such as this. A doctor, considered an expert, says that a certain treatment that he or she proposes is necessary, but the scrutiny of the court requires a critical review of that opinion, including contrary or alternative expert opinion in medical treatment cases.

As the Ontario legislation provided for such a court hearing, the Supreme Court noted the hearing is adversarial, so that a debate on the medical questions can be presented. For a doctor to say the treatment is needed is not enough; the court must allow for a debate and so decide on a proper burden of proof.

La Forest pointed to the need for this scrutiny. He said: The concern voiced by the parents in the present appeal raises the more general question of the appropriateness of proceeding with treatments for which the medical benefits are highly questionable. He was talking specifically about the facts in B.(R). This appeal does remind us, however, of the necessity of proceeding with care when overriding parental refusal. So consider for a moment the fallibility of medical opinion underscores the need.

Shortly after, the Supreme Court gave its decision, Justice Horace Krever, appointed by the federal government to be the commissioner for Canada's Commission of Inquiry on the Blood System of Canada, released his interim report. Perhaps some of you have had a chance to study it or honourable ministers might have had your officials review it for you. Justice Krever, among many other things, stresses the importance of informed consent in the administration of blood transfusions, but he issues this sobering observation, based on an international committee of experts, which he engaged to give him a thorough study on a subject, and so page 5.

The quotation from the interim report says, and these are the words then of Justice Krever: Some physicians continue to administer blood reflexively, without properly assessing in each particular case whether the benefits of the transfusion outweigh the risks. Even when it is addressed, the risk/benefit ratio is sometimes not considered as knowledgeably or scientifically for a transfusion as for other forms of therapy. A safety audit committee stated in its report that a substantial proportion of red blood cell transfusions are unnecessary.

The Supreme Court statement about the appropriateness of proceeding with treatments for which the medical benefits are highly questionable is something that all parents identify with when they are faced with when a doctor proposes a certain treatment for your child. Well, responsible parents want to know something about the treatment, and for them to disagree

with what is being proposed and to request alternatives is not an unreasonable position. The Supreme Court decision says, then, if the state seeks to intervene in that, they have a heavy onus; there is a heavy burden on the state to prove necessity.

In this particular area of blood transfusion therapy, we have just read the words of Justice Krever. Now evidence before the Krever commission has gone on to show in one medical centre, 53 percent of the red cell transfusions were deemed unnecessary. We have read the headlines about the dangers of blood, the tragedies of victims of tainted blood products and transfusions.

Well, Justice Krever listened very carefully to all of these first-person accounts that were presented to him. He has seen that institutionally there is also reflexive action among doctors. Then he goes on to note there does not appear to be agreement among physicians about when to transfuse red blood cells, platelets, plasma and other blood products, and there has been relatively little scientific study of the indications used to determine the need for transfusion of blood components and blood products.

He noted also blood transfusion exposes the patient to a multitude of risks, and those risks and the consequence of them have been headline news. So that for informed people, the days when blood transfusions were accepted without question are over.

* (1030)

Adults and parents with children have a constitutional right to say, well, doctor, is there not an alternative that can be used? That reality, coupled with the constitutional standard of fundamental justice, argues there must be strict scrutiny over a state agency's claim in a medical treatment case.

Common law also supports that there is massive burden on the state, and I use that as a word from a judgment that is here in your reference, tab 4, a massive burden on the state in common law cases of this sort. In Children's Aid Society of Metropolitan Toronto v. F.(R)–and you will find that reported on tab 4–the court dismissed the wardship application because the state did not meet its burden.

Simply, the facts of the case here for you in our written presentation beginning on page 6, a little girl, aged four years of age, was suffering from postoperative bleeding following removal of her tonsils and adenoids. She also had a medical condition called Von Willebrand's disease, which is a blood disorder that can interfere with blood clotting. Understandably, the doctors treating her were concerned; so were the parents. The parents were Jehovah's Witnesses, and they requested that the doctors administer nonblood medical management in the treatment of their girl. They did. The doctors did and it was working. They managed the girl's postoperative bleeding with packing and using a drug called DDAVP, which is commonly used to avoid the need for blood transfusions. However, they predicted a 30 to 40 percent probability of further emergency bleed.

On that basis, since the parents said, no, we want you to stay the course, continue to administer nonblood management in the treatment of our daughter, it is working, but they said there is a probability in their opinion of a 30 percent to 40 percent chance of further bleed. So they went to court. They said we will use the alternatives, but we want the state to intervene and impose its authority on decision making in the treatment of the child. Typical of cases of this sort, the case went to court just after midnight on a Sunday night, and the Children's Aid Society applied for temporary wardship under the Child and Family Services Act of Ontario.

The judge heard the case sufficiently to dismiss the application, and in his judgment he says the court held the burden on the CAS is massive. The state must prove a substantial risk that is of real worth and importance, apparent on the evidence, not elusive, fanciful or speculative. Then I leave it for you to read other portions that we have cited here as he went on to give the reasons for his judgment.

So he noted that we are not dealing with best interest in these cases as a vague general term. We are dealing with risk, the real chance of danger to the child. In this case, the judge was not satisfied that the state

had demonstrated that necessity, so the application was dismissed. The nonblood medical management continued. The little girl, of course, did just fine. She was dismissed from hospital without any further difficulty, but think for a moment what it did to that family. Think what it did to the parents. The judge himself acknowledged in his decision that this state intervention cannot be just left without strict scrutiny of the courts, and he gave that scrutiny on that occasion.

So the Supreme Court decision in B. (R.) sets out the vital role of the court. Parental decision making must receive the protection of the Charter in order for state interference to be properly monitored by the courts and be permitted only when it conforms to the values underlying the Charter. So we request that the statement in subsection 25(7), "best interests," should be changed to read "treatment that the court finds to be necessary, and no alternative medical management is available."

If I may, just for a moment, I would like to just acquaint the committee with what happens in these situations, such as we have just reported, where parents who are Jehovah's Witnesses are in the hospital with their child and the question comes up in that a doctor thinks a blood transfusion is necessary. The parents say, we ask you to use alternative nonblood medical management. These parents have an international network of support available to them and to the treating physicians.

Around the world there are more than 6,000 trained professionals within their church organization who are specially trained to assist parents and to bring training physicians into contact with specialists who are well familiar with treating the whole range of medical cases nonblood medical management. Well, how many doctors are we talking about? Currently, around the world, there are more than 60,000 doctors of all specialties who have indicated their readiness to be available to consult with medical teams when an issue of alternatives to blood transfusion comes up in the treatment of adults and children.

In North America, there are more than 25,000 doctors, and they are available. They have said they are not Jehovah's Witnesses. I make that clear also. These are people like Denton Cooley [phonetic], the eminent heart surgeon from Texas. They are world names as well as people. I do not suggest that the people in Winnipeg are not world names as well, but I am saying that these physicians range from the finest institutes in the world to hospitals in cities such as Winnipeg, where their concern is to deliver the best medical care for patients. Now, they have become experienced in use of alternative nonblood medical management, and it is within the mainstream of modern medicine. I stress that too. We are talking about alternative medical treatments within the mainstream of modern medicine.

As the Supreme Court noted, there are differing opinions among doctors in a given case as to how to proceed, but there are valid medical opinions and experience to proceed with nonblood therapy. Now, parents who are Jehovah's Witnesses have that accessible to them. There are more than 100 medical centres in the world that have nonblood medical management programs in their centres where, as a matter of course to any patient, whether of a religious objection to blood transfusion or someone who says, I do not want a blood transfusion for medical reasons, can be assured of nonblood medical management.

These again range from some of the finest health centres in North America and Europe to programs within a hospital where, say, a certain wing or ward of the hospital, it is known that the patient there can be treated. Well, there is extensive experience. This experience, medically speaking, has built up over many years. Justice Krever has noted in his report, there is a wealth of alternatives to blood transfusions. Patients are faced with choices. Justice Krever devoted an entire chapter in his report to the patient's right to decide. In his recommendations, he said that there is an obligation for doctors to present to their patients their proposed treatment, their alternatives–he was speaking specifically about blood–and then that the patient makes the decision.

Well, parents have that constitutional right to make the decision, and we would like you to please appreciate that when parents who are Jehovah's Witnesses say we do not want a blood transfusion for a child, what they are saying is, please, get on and treat

our child with the best medical treatment available. There are alternatives to blood transfusions, and they have available to them and the treating physicians have available to them consultation with medical experts if necessary. This is available 24 hours a day anywhere in North America and throughout most of the world.

So that is the practical reality of what we are talking about. So, when a matter comes to court, the court has the responsibility to hold a state agency to the heavy onus that is on it to prove necessity, to demonstrate necessity. As case law has shown, that means consideration of the alternatives, and as Justice Krever has said as well. We can expect to hear more from Justice Krever at the time of his final report.

* (1040)

Now may we please address our last point in our submission on page 7, Point III, Legislation must not discriminate against mature minors under 16 years of age. Legislations have made adjustments by dropping from the age of majority and out of consideration for what they recognize are people 16 years or over who could make their own decisions. Well, that is a step in the right direction, but the Supreme Court and the Constitution say: You cannot discriminate against a mature minor by setting an arbitrary age. So the sections we have identified, subsections 25(2), 25(3)(b)(ii) and 25(8), all speak about 16 years of age as being the age at which a child can make his own decision, but below that, there is no such thing as a mature minor. That is the effect really of the bill the way it is written.

The question arises, should someone else be giving consent for medical treatment when the child is mature and capable of giving his own consent or refusal to consent? As we have said, the subsections identified set the age of consent at an arbitrary 16 years and older. Well, in so doing, the bill arbitrarily disregards mature minors less than 16 years of age. That is discriminatory, and it is a violation of the Charter of Rights, 15(1), which guarantees that no one is to be discriminated against on the basis of age alone.

Section 15(1) is reproduced for you on our page 7. If you want to cross out tab 3, tab 3 does not reproduce that particular section of the Constitution. It does reproduce for you the other sections that we have referred to elsewhere, but Section 15(1) is here on page 7. Justice La Forest in the majority decision of the Supreme Court took note of that, and in the majority judgment he suggested a mature child could assert a right under the Charter. You find his statement toward the bottom of page 7: While it may be conceivable to ground a claim on a child's own freedom of religion, the child must be old enough to entertain some religious beliefs in order to do so.

Common law supports this view. We cite for you the case of L.D.K., who happened to be a little 12-year-old girl just outside of Winnipeg, and this case goes back to 1985 and the little girl was suffering from what proved to be a terminal and very severe form of leukemia. So she ended up in the Hospital for Sick Children in Toronto; 12 years of age, she herself said, I do not want a blood transfusion. She based it on her religious conscience, and if you read the transcript of her testimony, you will see that this little girl was also well aware of the medical risks of the proposed treatment and the consequence of the severity of her own illness.

The court held–and this is a quotation from the judgment–that given the intelligence, state of mind and position taken by L., she ought to have been consulted before being transfused. I should explain she was given a transfusion against her parents' wishes, against her own wishes. She was not even consulted. The attending medical staff walked in and gave her a blood transfusion over her protests. The court found, since she was not consulted about that treatment that was imposed on her, that she had been discriminated against on the basis of her religion and her age, pursuant to Section 15(1) of the Charter and that her s.7 right to the security of her person had been violated.

Well, what kind of a child are we talking about here? Turn please to tab 5 on page 171. Now this is the observation of the judge in that case, in the second paragraph from the bottom on page 171 under tab 5.

In his judgment, Judge Main says: Who is L.D.K. and who are the members of the family? L. has a brother, whose name I believe is C. He is five years of

age. I am satisfied that his family is a warm and close-knit unit. L.'s parents are both loving and concerned individuals. L. is a beautiful, extremely intelligent, articulate, courteous, sensitive, and, most importantly, a courageous person. She has wisdom and maturity well beyond her years and I think it would be safe to say that she has all the positive attributes that any parent would want in a child. She has a well thought out, firm and clear religious belief. In my view, no amount of counselling from whatever source or pressure from her parents or anyone else, including an order of this court, would shake or alter her religious beliefs.

The judges, we have explained, ruled that, on the basis of that sort of mature minor, she had a constitutional right to a security of her person and also a right under freedom of religion, and so he ordered that the girl could make her own decisions as to whether she would receive blood transfusions.

We give for your reference to other cases continuing on page 8 of our submission, the case in Walker in New Brunswick, a recent case in New Brunswick Court of Appeal about a 15-year-old boy to be a mature minor. Similarly, in Newfoundland, in 1993, another 15-year-old boy, also one of Jehovah's Witnesses, refused blood treatment. In his case, the Supreme Court of Newfoundland dismissed the director's application for wardship. These cases are available to you under tab 6 and tab 7.

The Province of Ontario has codified the common law principle of a mature minor's right to choose medical treatment. The Ontario Consent to Treatment Act of 1992, provisions of which are reproduced for you at pages 8 and 9 of our submission, specifically eliminates any discrimination against a person, a patient in the cases we are talking about, on the basis of age alone. Interestingly also, at the top of page 9, in our quotation from the regulation section of that Ontario legislation, it notes also: A health practitioner shall not presume that a person is incapable with respect to a proposed treatment based solely on (d) a request for alternative treatment; or (e) the person's age.

So the point we stress, it is not an arbitrary age; it is capacity that determines whether a patient, even a minor, has the constitutional right to make his or her own decision in the treatment they are willing to accept. So capacity cannot be determined solely on the person's age, nor can a mature minor be denied the right to request alternative medical treatment instead of what a particular health practitioner wants him or her to have.

The proposed amendments in the bill before you, we caution, will allow The Child and Family Services Act to be used as a tool to force unwanted treatment on mature minors under the age of 16.

The common law test also, and we have referred in our references to that, is competency or capacity, not an arbitrary age limit. Does the patient have the ability to understand the medical condition, the nature of the proposed treatment, its risks and potential benefits? You will find, if you wish to make a note, under our tab 6–that is the case re Walker–on page 382 of that judgment, you find a well thought out description of a test of competency.

So subsections of Bill 20, which arbitrarily set a patient's capacity at 16 years of age or older, we respectfully submit, should be changed. Otherwise, leaving an arbitrary age in the legislation would discriminate against mature young persons in Manitoba; however, if you do leave room to recognize a mature minor's right to refuse or consent to medical treatment, this would be in agreement with common law and comply with the Charter.

* (1050)

In conclusion, responsible parents make decisions about the best medical treatment for their children, and they want the best medical treatment for their children. When they bring their children to hospital, they are asking for medical treatment. They want to be involved in the decision making. They expect the doctors to provide the best medical treatment and to respect their wishes. Now the publicity about blood transfusions and the hazards of blood transfusions put many parents in a position, hey, they do not want a blood transfusion for their child if an alternative can be used.

In most situations, a number of alternatives can be used adequately to care for the parents. In his interim report, Justice Krever devotes a full chapter, as I said, to the patient's right to decide, and therein–and I do, by the way, have a copy of that report for the committee, if you wish it. We also have a copy of the full decision of the Supreme Court of Canada in B. (R.), if the committee wishes to retain that copy.

In that case, parents wanted the medical alternatives to be used. They had religious and medical reasons for their choice, and they proposed guidelines reproduced on page 10 from Justice La Forest's decision. In a true emergency situation, a child is not at risk when it comes to medical treatment.

In a true emergency situation, common law gives the doctor the right to treat, and these parents recognized that. When a state agency or state authority is now brought to bear, to intervene in parental decision making, then, as the Supreme Court said, that is now curtailing constitutional rights of the parents, and that can be done only in harmony with the principles of fundamental justice.

Therefore, where a state agency is brought to intervene, as the parents point out in their guidelines, there would need to be a court order; there would have to be opportunity to present evidence, cross-examine, full disclosure and so on, as we have demonstrated in some of the cases that are in our submission.

Now Justice La Forest commented about the Ontario statute in place at the time. In fact, those guidelines proposed by the parents, in substance, were contemplated by the legislative scheme. So we are urging you to ensure that such guidelines are contemplated in substance by the legislative scheme of Bill 20. That could be done by ensuring that parents have the right to full and fair hearing in court when the state seeks to intervene in parental decision making about the medical treatment of their child.

The state has the heavy burden of demonstrating necessity for the proposed treatment. In addition, the proposed legislation must conform to the constitutional rights of mature minors, not discriminate by setting an arbitrary age for capacity to consent.

Thank you very much, Mr. Chairman and committee members.

Mr. Chairperson: Thank you very much, Mr. Donald Kirkland, for your very detailed and excellent presentation. Did Mr. Ludkiewicz wish to make any presentation at this stage?

Mr. Ludkiewicz: No, I have nothing further to add. If there were questions or anything, Mr. Kirkland and I would try to entertain them.

Mr. Chairperson: Okay, well, if you would just stay by the podium, now is your chance, committee members, to pose questions to the presenters. Are there questions?

Mr. Doug Martindale (Burrows): I would like to thank the presenters very much for a very interesting and comprehensive brief. I do not often wish that I was a lawyer, but this is one of the occasions that I do. I would hope that the constitutional and legal arguments that you bring forward would cause the lawyers who are on the committee today to ask some penetrating questions.

I am interested in your references to the Krever inquiry because I made references obliquely, I guess, to the Krever inquiry in debate stage at second reading of this bill. I am wondering if you think that, because of the religious views of Jehovah's Witnesses, lives were saved in the early 1980s.

Mr. Kirkland: We can only say that none of Jehovah's Witnesses contracted AIDS or hepatitis from the use of blood products. There has been much agonizing, as you know, on the part of witnesses and their representatives before Justice Krever, and the whole country really has been agonizing over what happened.

Our position, religiously speaking, is that instruction that comes from God is for our own good. So we did not know, in the early days of the use of blood transfusions, the extent of the hazards, but, personally and as a religious community, we are certainly thankful

that we held to our position, which was a matter of religious conviction and, in time, was vindicated really by the medical evidence.

We are also very appreciative of medical teams who, in treating both our adult and child patients, instead of rushing to a state agency to impose treatment, said there must be a way we can handle these cases. As a result, there is now a great wealth of proven, effective alternatives that can be used in nonblood management.

Mr. Martindale: You have anticipated my next questions which are: Do you think the medical community has learned from your religious beliefs and medical alternatives so that now medicine is less intrusive and looks for other alternatives? In fact, do you think they use other alternatives more commonly now as a result?

Mr. Kirkland: Yes. The medical writers have said that very thing, and they expressed their thanks to the community of Jehovah's Witnesses who have, because of their stand, required of the medical community to take a closer look at the whole matter. So the simple answer to your question is yes, and the establishment of nonblood medical programs in the hospitals on this continent and elsewhere is another indication of the direction in which the medical community is moving.

I hesitate to quote from some of the experts who testified before Justice Krever because they are not necessarily our view of how the future will unfold, but more and more experts are saying we will see the day when blood transfusions are just not a standard medical treatment. I think all patients stand to benefit from that.

Mr. Martindale: Just one more question about medical procedures. What kinds of medical procedures are relevant here besides blood transfusions?

Mr. Kirkland: In this manual–I did not refer to this in my presentation. This is a manual called Family Care and Medical Management for Jehovah's Witnesses. Our hospital liaison committees, who work co-operatively with child protection agencies, doctors and parents to help ensure nonblood medical management for patients who make that request, have provided to child protection agencies, hospitals, medical teams, this manual which contains an extensive section on medical research and alternatives, and they are listed there.

To be specific, I think I will turn to another folder. This is a folder which is presented at medical conferences. I might add, there are numerous medical conferences internationally on nonblood medical management. They are beginning to increase.

However, from Jehovah's Witnesses and from medical authorities–and we constantly survey some 4,000 medical journals internationally for medical developments in the area of nonblood management. Now here is one sheet that has proved very useful to treating physicians, and on the back there are some 60 references of some of the main alternative approaches available.

The first major category is in surgical care for patients, surgical devices and techniques that are especially effective in arresting internal bleeding. These come into sometimes equipment, electrocautery, laser surgery, argon beam coagulator. I will not go through the whole list, but there are a number of surgical techniques available to minimize blood loss.

* (1100)

Techniques and devices to control external bleeding and shock, and these are listed here. Operative and anesthetic techniques to limit blood loss–now these are more than just the technical instruments that are used but management approaches such as hypervelemic chemodilution, interoperative blood salvage. Sometimes you may hear the expression, autolycus blood or autologous blood transfusions, meaning the patient's own blood, while surgical techniques are such that during spillage in operations the blood can be salvaged and be put right back into the patient's circulatory system, which is a matter of conscience to Jehovah's Witnesses. It has been used very successfully in treating them.

Then there are pharmacological agents. There are other volume expanders; there are hemostatic agents

that control bleeding. They are all listed here in the technical listings. There are other therapeutic agents that manage conditions such as severe anemia. I have not given you a lot of detail, but I hope I demonstrate that there are many.

Mr. Martindale: I would like to ask some questions now about the legal aspects of your presentation. Even if you are opposed to any body having authority for emergency medical treatment–and maybe that is an assumption; you might want to correct that–do you think that giving authority to the courts instead of a Child and Family Services agency is an improvement?

Mr. Ludkiewicz: Are you talking about an emergency situation? The thrust of the presentation here was on nonemergency. The Supreme Court recognized the common law right of a doctor to treat in a true emergency situation without any court order, but that has to be a true emergency. For example, the Health Sciences Centre children's part might have four or five true emergencies a year. Those would not necessarily be Jehovah's Witnesses because they are not that large a percentage of the population. That is not what is being advocated here. That common law right exists for the doctors.

Mr. Martindale: Well, if I could rephrase the question, do you think that this amendment is an improvement in that there is a requirement to go to court as opposed to giving the agency the authority?

Mr. Kirkland: Yes, we do. First, in the emergency situation, to state again, we recognize that common law gives doctors the authority to treat in a true emergency. That is also subject to review. Now, going to court then is an improvement in that it requires fundamental justice in severely restricting constitutional rights that parents have. That is to be determined in a court of law. It is only with the strict scrutiny of the courts which the Supreme Court decision has called upon that you can have the full and fair disclosure, the opportunity for the doctors who are proposing blood therapy to present their evidence, the parents to have medical experts–and I have noted that there are many medical experts who are quite prepared to say, we can treat differently.

So there is an advantage in the process. There must be procedural protection. The unfettered discretion of the state agency is not adequate procedural protection under the Constitution. In reality what happens, and the case before the Supreme Court indicated that, an emergency was claimed. The judge at the time, back in 1983, heard a doctor say there is an emergency. He granted the court order. There was no emergency. Three weeks later, a blood transfusion was administered in preparation for an eye exam under general anesthetic.

Now that the Supreme Court has said parents must have a full and fair court hearing, you cannot issue an order until the principles of fundamental justice have been satisfied. If the child is truly in extremis, if there is a true emergency, the doctors have the common law power to go ahead and administer, in this case, a blood transfusion, if it is a true emergency. But, once you invoke the state, you must give–so we are saying, if I might suggest from your perspective, but I do not want to attribute a viewpoint to you, if it is a concern of yours, the child is not at risk under the common law if blood transfusion is truly needed in an emergency. The doctors can treat. We acknowledge that fact.

However, when treating physicians–and I speak from experience. I have been in the hospital liaison committee program of Jehovah's Witnesses for more than 20 years. Until I became associated with Glen How & Associates, I was the co-ordinator of the hospital liaison committee in Ottawa. In reality, when physicians and state agencies realize that going to court includes a full and fair procedure, what is their reaction likely to be? I can verify it is–well, just a minute. If it is not as simple as getting a judge to rubber-stamp a doctor's request conveyed through a social worker, maybe we had better stop and think about this.

If also the doctor is now in the position, when you appear before a court, you must be prepared to demonstrate necessity, not just claim. It has to be more than speculative. It must be substantive so that a judge can determine and be prepared for cross-examination for parents to bring in their witnesses and so on.

So, in a practical sense, not only is it correct under the constitution, but in helping parents, doctors,

children, social workers, it is a great improvement because the focus is on solution. That is the role of the hospital liaison committees in supporting doctors and families. Our focus is on solving these situations, not going to court and putting parents through the trauma of, under many legislations, being declared unfit parents. Of course, then, as well, legislators and state agencies and judges are beginning to realize that the family that has to live with the consequences of state-imposed treatment against their wishes and in violation of their religious conscience, it is like a rape victim. It is a grievous assault on the individual.

We support the families in the sense that great spiritual damage has been done to them. But with the analogy of a bodily assault such as rape, you can help people overcome the trauma they have experienced, but no one can erase the scar that will always be there.

So in the broad picture as well as in the constitutional focus of this, it is a great improvement. In reality, it serves medical staff as well as parents well.

Mr. Martindale: I would like to move now to the last page of your brief, page 10. You say that you want guidelines, the guidelines, I guess, you are referring to, the Supreme Court decision, to be in the legislative scheme of Bill 20. My first question would be, are you referring to the content of the bill itself or to the guidelines or, sorry, regulations that may go with this?

Mr. Kirkland: Well, we are leaving that very much to your discretion, but I should try to answer your question.

We do not expect that the guidelines as written are going to appear in the legislation. Many provinces are incorporating these guidelines into at least their policy instructions to state agencies. What we understand the Supreme Court to be saying is that the legislative scheme must not prevent guidelines such as these being applied to a situation.

So we are not proposing exactly what wording you use, but we say please do not leave provisions in the legislation that would prevent guidelines such as these either being put into practice or if the child protection agency wishes to incorporate such guidelines into their policy directives. I am not sure exactly what you envisage in regulations, but we are not specifying exactly where.

Our plea is, do not prevent such guidelines from being used by the parties involved in a real life situation through a legislative impediment.

Mr. Martindale: I am assuming that your brief is summed up with the three points here, so I would like to ask questions about each one of them.

Your brief says, parents have the right to a full and fair hearing in court when the state seeks to intervene in parental decision making about the medical treatment of their child. Do you think that Bill 20 incorporates this recommendation?

Mr. Ludkiewicz: As Mr. Kirkland pointed out, that may not have been the intent of the draftsman, but the word "may," the permissive word "may" was put in. We are asking that the word be changed to "shall." It makes it mandatory that there be the hearing that has been prescribed by the Supreme Court of Canada in accordance with the Charter, so that there is no room for doubt there.

Mr. Martindale: We will be asking questions of the minister about that recommendation later.

Number 2, the state has the heavy burden of demonstrating the necessity for the proposed treatment.

* (1110)

Do you believe that is in the bill?

Mr. Kirkland: No, in that currently the bill says it is left to best interests. Our position is that that is too vague. The Supreme Court has said, demonstrated necessity.

A Chief Justice of the Ontario Court Family Division has written at some length, and this best interest as I alluded to is a debate in the realm of legal thinkers, but as he said, strictly speaking, best interests is not a legal term.

I do not mean to debate that, but he was conveying the thought that it is just too vague.

So the Supreme Court has said also that the burden is demonstrated necessity, and therefore we say that is better than leaving it, best interests. It is too vague.

Mr. Martindale: The third item is, the proposed legislation must conform to the constitutional rights of mature minors and not discriminate by setting an arbitrary age for capacity to consent.

Do you believe that that is in Bill 20?

Mr. Ludkiewicz: No, the way that the legislation reads right now, it does not distinguish between a newborn and somebody who is 15 years and 11 months, 364 days old. They are treated exactly the same.

That is why we are requesting that no arbitrary age appear, but the capacity should be the test, capacity of the individual, as Mr. Kirkland referred to the episode involving the 12-year-old of Winnipeg that the court found she did have the capacity to make her own decision. That is where we say that it should not contain the arbitrary age.

Mr. Martindale: You have mentioned the Charter of Rights and Freedoms quite a few times. In this particular instance, would you think it would also be a violation of The Manitoba Human Rights Act?

Mr. Ludkiewicz: I should know the answer to this, I work in the–the intent of human rights legislation is to prevent discrimination in certain proscribed areas, and the activities dealt with are set out in the legislation itself. The proscribed areas vary from province to province and federally, and they are the types of discrimination that cannot be done, but we are talking about a treatment order here.

I do not think this is the place to bring in The Manitoba Human Rights Act.

Mr. Martindale: Might one of your clients go to court to challenge the constitutionality of Bill 20 or The Child and Family Services Act as amended by Bill 20?

Mr. Kirkland: That would be dependent on a specific case and could only be answered should such a case arise, but we have flagged in our presentation that the Constitution certainly does allow for, and I believe also tab 2–I need to be sure of that. Tab 3 does note, Section 24(1) of the Charter under Enforcement: "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed on or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

So that provision is there; whether it happens would depend on a specific case.

Mr. Mike Radcliffe (River Heights): Mr. Kirkland, does your client adopt the comments of Mr. Justice La Forest which are contained on page 10 of your brief? I think you had alluded to your client's position overall, but just for clarity I was wondering.

Mr. Kirkland: Yes, Justice La Forest in fact notes that those guidelines were proposed by the parents. Justice La Forest acknowledges them and then said that in fact those guidelines were contemplated by the legislative scheme of the Ontario act, so the clients accept those guidelines.

Mr. Radcliffe: Mr. Kirkland, the language in this particular bill is, as I think one of you styled, permissive, but would you agree with me that the procedural strictures of fundamental justice are in no way impeded or ruled out by the language of this bill?

Mr. Kirkland: They would be ruled out if "may go to court" means it is left to the discretion of the state agency, the child protection agency, whether they should apply to the court for a treatment order. We are saying that that is open to interpretation, therefore, better to say, "must apply." Then it is up to the courts to give the surveillance of fundamental justice.

Mr. Radcliffe: Mr. Kirkland, I was addressing my mind, though, to the procedural issues of fundamental justice of due notice and objective tests and the other elements of the process that were outlined in your brief.

Is it your position that this bill does not permit the application of those tests of process of fundamental justice?

Mr. Kirkland: It does not permit the courts to scrutinize, as the Supreme Court has said should be done, if a state official has the discretion to say, I am not going to court.

Mr. Radcliffe: Would you agree with me, sir, that your clients or your prospective clients would always, though, have the opportunity of resorting to injunctive relief if in fact the agency did not resort to the authority which was based in here of resorting to the court?

Mr. Kirkland: Justice La Forest and the majority noted that the scrutiny of the court, going to court must precede the intervention of the state in ordering treatment, and the context, I believe, is that this would be a violation of Charter rights if that happens, so you would be opening a further challenge to the constitutionality.

So I come back again to "may." If it means discretion, it is too broad, that before treatment is ordered according to the judgment of the Supreme Court in order to ensure justifiable restriction of the constitutional rights, the state must apply to the court. Fundamental justice will then be determined and supervised by the courts.

Mr. Radcliffe: But, sir, do you agree with me that a parent–in a situation in which we are discussing–still has the right of resorting to injunctive relief prior to the administration of the care that is envisaged in this act and pursuant to the rules and process that you have described and advocated?

Mr. Ludkiewicz: Let me just speak from experience. I have probably been involved in about 30 injunction proceedings in my career in various settings. I do not think an injunction procedure is the vehicle to be challenging this. It is discretionary on the part of the judge. He is faced with a statute. He may not want to decide. The Supreme Court was very clear that there had to be this hearing process and there would be this hearing process if the agency was required to go to court before it could administer the requested treatment.

Mr. Radcliffe: Mr. Kirkland and Mr. Ludkiewicz, would you consider that demonstrated necessity might in fact be the essential ingredient in best interest as has been interpreted by the Supreme Court of Canada, which would be a binding precedent on our local courts?

Mr. Kirkland: Perhaps Mr. Ludkiewicz would have a comment. I note that the Supreme Court chose not best interests but said demonstrated necessity.

Mr. Ludkiewicz: I think too much can be hidden behind that rubric best interests of the child. There is just too much leeway there. That is why Mr. Justice La Forest said necessity. The medical professional has to justify that particular treatment.

* (1120)

Mr. Chairperson: Any further questions?

Mr. Kirkland: Mr. Chairman, if it is useful to your committee in its considerations, we do have a copy of this Family Care Medical Management volume which includes both ethic and legal precedents, as well as the extensive medical research information that I mentioned. So I merely say, at your pleasure, we would be happy to leave a copy if you so wish.

Mr. Chairperson: My suggestion would be–and that is very graciously accepted–if you want to leave that with the Chamber staff at the back of the room, or it looks like the Clerk is coming forward. Thank you very much for a very thoughtful presentation and for being so responsive and comprehensive in your responses to questions. I now, pursuant to our agreement at the outset of this committee, would like to thank you, by the way, for your presentation, but would like to now call on the next presenter who is listed.

I guess we should call for Marlene Vieno, who indicated she would not be here. Is Marlene Vieno present? She is the individual who indicated she would not be, and apparently she is not.

May I now call on Mr. John Laplume representing the Manitoba Medical Association with respect to Bill 23, The Health Services Insurance Amendment Act. Is Mr. Laplume here? It is confirmed that Mr. John Laplume is not present. That is all of the listed presenters.

I will now canvass the audience one last time to see if there are any other persons in attendance wishing to speak to one of the bills that is before the committee this morning. Is there anyone else who wishes to make a representation?

If not, seeing there are none, did the committee wish to proceed with clause-by-clause consideration of the bills starting with Bill 20? Is that the wish of the committee? Is that the wish then of the committee starting with Bill 20, The Child and Family Services Amendment Act?

Does the minister responsible have a brief opening statement?

Hon. Bonnie Mitchelson (Minister of Family Services): Mr. Chairperson, I think I am just open to questions from members of the committee as we go clause by clause or before we–

Mr. Chairperson: I thank the minister. I understand the official opposition critic does have some questions– not an opening statement, but questions. You may put your questions, Mr. Martindale.

Mr. Martindale: Mr. Chairperson, I have some questions beginning with the use of the word "may" as opposed to the word "shall," and since the minister has reams of legal counsel available, she should be able to answer this question. I assume it is something that you have already carefully considered, so perhaps the minister could explain to me why the act uses the word "may" instead of the recommendation from the presenters to use the word "shall"?

Mrs. Mitchelson: I guess this is consistent with the rest of the legislation and that this part cannot be taken out of context with the rest of the legislation. It indicates that the agency has no power to authorize any medical examination or medical treatment without a court order, and subsection 25(3) that we are talking about simply authorizes the agency to apply for a court order, and "may" is enabling only.

Ms. Barrett: So if there is an nonemergency situation and the parents of an under-16-year-old or an over-16-year-old minor say, no, I do not want or we do not want medical treatment, the agency under Bill 20 has the right to make that decision as to whether they will ask for a court order, but should the agency decide not to go to court the decision of the parents and/or the child would remain sacrosanct? Is that correct?

Mrs. Mitchelson: That is correct. The agency may from time to time agree with the parent's decision for treatment, and there would be no necessity to go to court. We do not want to have to go to court in every case to uphold an agreement between the parent or the family and the agency. The only time we would want to go to court is when there is a difference between what the agency and the parent feels is the best treatment for the child.

Ms. Barrett: When there is a disagreement, then according to Bill 20, the agency must go to court. So in effect, according to my hearing of what you are saying, the first area of concern that was raised by the presenters is clarified and should be acceptable to them because it does give the authority to the parents or the adult minor child or whatever it is, and the agency must go to court, unlike now where the agency can make a determination without going to court?

Mrs. Mitchelson: That is correct.

Mr. Martindale: The presenters have recommended that the state has the heavy burden of demonstrating necessity for the proposed treatment. Could the minister tell us if this amendment takes into account demonstrating necessity for the proposed treatment?

Mrs. Mitchelson: It is my understanding that the court would look at what is in the best interests of the child. The court would take into consideration the necessity

of the treatment in the context of what was in the best interests of the child.

Mr. Martindale: Well, I am wondering if these are two different issues since the presenters also raised questions about the wording "in the best interests of the child."

Why would you not want to use or incorporate "demonstrating necessity" since I believe this language is based on the Supreme Court decision?

* (1130)

Mrs. Mitchelson: Our legal counsel tells us that the Supreme Court used and supported the best interests test, and they can use necessity as a criterion. But the best interests test is consistent with the terminology right throughout the legislation when we look at child protection legislation and what is in the best interests of the child.

Mr. Martindale: Has the minister considered that there might be a court challenge based on constitutional rights?

Mrs. Mitchelson: I guess there always could be.

Mr. Martindale: Well, why would you want to pass legislation without considering the possibility that there could be a constitutional challenge? Surely, you would want to write the legislation in such a way that you would minimize the opportunity for somebody to litigate, would you not?

Mrs. Mitchelson: I guess, my understanding is that the reason we are amending the legislation is because of a constitutional challenge that has indicated that there was a necessity for our legislation to conform, to the best of our ability, with the ruling that was handed down by the Supreme Court.

So we believe that we have made the changes that would make our legislation consistent, and, hopefully, it is the best it can possibly be to withstand a future constitutional challenge.

So we believe we have taken the steps to amend the legislation in a responsible way to meet the decision that was handed down.

Mr. Martindale: Yes, I understand that this amendment is because of the Supreme Court decision, and that is why you have introduced it. But did you say just a minute ago that you have considered, or written it in such a way, that you hope to minimize a constitutional challenge?

Mrs. Mitchelson: We would hope that the amendments that have been made would withstand a constitutional challenge, but that never precludes someone challenging.

Mr. Chairperson: There being apparently no further questions, may we now proceed to consider the bill clause by clause.

During the consideration of the bill, the title and preamble are postponed until all other clauses have been considered in their proper order by the committee.

Referring to Bill 20, of course, Clause 1 pass–pass.

Shall Clause 2 pass?

It looks like we have an amendment being circulated with respect to Section 2. Do you have a motion to make, honourable minister?

Mrs. Mitchelson: I move

THAT the proposed subsection 25(3) as set out in section 2 of the Bill, be amended in the part preceding clause (a) by striking out ", on a form which may be prescribed,".

[French version]

Il est proposé que le paragraphe 25(3) figurant à l'article 2 du projet de loi soit amendé par suppression de ", au moyen de la formule qui peut être prescrite,".

I move it in both English and French.

Motion presented.

Mr. Chairperson: Is there any discussion on the amendment?

Mr. Martindale: Could the minister explain the reason for the amendment?

Mrs. Mitchelson: Both amendments are related in that after consultation with the courts and the legal community, there was some sense that in a true emergency situation, if there was a prescribed form and a formal hearing process, that might preclude us from dealing with the best interests of the child and having that medical treatment move ahead on a timely basis.

Therefore, consultation with the court, with the possibility of a form being filled out after, I think, will be more appropriate. That was a concern that was raised, and I think this amendment addresses that.

Mr. Chairperson: Any further discussion on the amendment? Shall the amendment pass?

Some Honourable Members: Pass.

Mr. Chairperson: The amendment is accordingly passed. Shall Clause 2 as amended pass?

There is another amendment proposed to Clause 2.

Mrs. Mitchelson: I move

THAT section 2 of the Bill be amended by adding the following after the proposed subsection 25(5):

If court documents not filed before hearing
25(5.1) A judge may hear an application referred to in subsection (3) even though the agency has not filed documents initiating the application in the court if

(a) the judge is satisfied that the life or health of the child would be seriously and imminently endangered by waiting for the necessary court documents to be filed before the application is heard; and

(b) the agency undertakes to file the necessary documents in the court within 24 hours after the hearing.

[French version]

Il est proposé que l'article 2 du projet de loi soit amendé par adjonction, après le paragraphe 25(5), de ce qui suit:

Dépôt de documents judiciares après l'audience
25(5.1) Un juge peut entrendre la demande visée au paragraphe (3) même si l'office n'a pas déposé devant le tribunal les documents introductifs d'instance, si:

a) d'une part, le juge est convaincu que le fait d'attendre que les documents judiciares nécessaires soient déposés avant d'entendre la demande causerait un danger grave et imminent pour la vie ou la santé de l'enfant;

b) d'autre part, l'office s'engage à déposer les documents nécessaires devant le tribunal dans les 24 heures suivant la tenue de l'audience.

Motion presented.

Mr. Chairperson: Discussion on the amendment?

Mrs. Mitchelson: Excuse me, that is in English and French.

Mr. Chairperson: That is moved by the honourable Minister Mrs. Mitchelson in English and French.

Ms. Barrett: My understanding from the discussion, and maybe I misinterpreted what I heard, is that this bill deals with nonemergency kinds of–it does deal with emergencies as well as nonemergencies.

I guess my only concern would be that the parents or the adult minor, the sixteen-year-old would–[interjection] the mature minor, thank you–not have access to all the documentation prior to the court hearing. Does this take away any of their ability to have as much information as they need in order to make presentation before the court, or their lawyers, for that matter?

* (1140)

Mrs. Mitchelson: The intent of this amendment is in the case where it is a matter of life and death, if, in fact, we had to wait for the documentation, the child would die as a result, so it is an emergent situation, a life-and-death situation where this amendment would be used.

Mr. Martindale: I would like to ask the minister why we are getting this amendment at this time. Was it because of a submission or a legal counsel recommendation? It seems like an important amendment.

Mrs. Mitchelson: It was only after consultation with the courts that we could make this amendment. We did not have the ability before we introduced the legislation to consult with the courts, because there was a court case pending.

Mr. Martindale: Could the minister explain to me what difference it makes whether or not the bill is introduced as to your ability to consult the courts?

Mr. Chairperson: Mr. Radcliffe has a response to that question.

Mr. Radcliffe: Well, with the indulgence of Madam Minister, the court authorities, the judicial system in this province would not consider a matter of interpretative legislation while a similar matter was being considered before the courts because that would be looked upon as either a conflict or interference with the judicial process, and so it would be very inappropriate for the department to present or request any opinion while the matter was being actively considered and debated before our court system.

Mr. Chairperson: Honourable minister, did you want to comment on that opinion?

Mrs. Mitchelson: That was very clear to me, Mr. Chairperson.

Mr. Martindale: But once the bill, this bill, in particular, Bill 20, had been introduced, then I assume the courts were assured that the Legislature was going to act on it, and so there was no implication of interference or impropriety, so then the courts were consulted and gave this advice which resulted in this amendment. Is that right?

Mrs. Mitchelson: That is correct.

Mr. Chairperson: Any further discussion on the amendment? If not, the question has been called. Shall the amendment pass–pass.

Clause 2 as amended–pass; Clause 3–pass.

Another amendment is being circulated. Honourable minister, you have a motion?

Mrs. Mitchelson: I move

THAT Legislative Counsel be authorized to change all section numbers and internal references necessary to carry out the amendments adopted by this committee.

[French version]

Il est proposé que le conseiller législatif soit autorisé à modifier les numéros d'article et les renvois internes de façon à donner effet aux amendements adoptés par le Comité.

Mr. Chairperson: Any discussion on the amendment? Shall the amendment pass–pass; preamble–pass; title–pass. Bill as amended be reported.

Bill 19.

Mr. Radcliffe: I believe at the outset of the presentations from the public we were going to adjourn the decision of how late we would sit, and we have now actually exceeded that point in the presentations from the committee. Could we perhaps review that position at this time?

Mr. Chairperson: The wish appears to be to keep going. Would it be wise to review where we are at at 25 minutes after 12?

An Honourable Member: Agreed.

Mr. Chairperson: Okay, so ordered.

Ms. Barrett: On Bill 19, I am wondering if we could, unless–

Mr. Chairperson: Maybe just defer your comment for a moment on the–

Ms. Barrett: Certainly. Absolutely.

Mr. Chairperson: –wise guidance from the Clerk's Office beside me.

Bill 19–The Intercountry Adoption (Hague Convention) and Consequential Amendments Act

Mr. Chairperson: On Bill 19, The Intercountry Adoption (Hague Convention) and Consequential Amendments Act, does the minister responsible have a brief opening statement?

Hon. Bonnie Mitchelson (Minister of Family Services): Mr. Chairperson, I think at second reading just last week I had the ability to make all the comments I wanted to make.

Mr. Doug Martindale (Burrows): I just want to go on record at committee stage saying that our caucus supports this bill and we are pleased to see that Manitoba is one of the provinces making these changes. I think, if I am correct, only three provinces were needed and there has been at least two that have already approved it, possibly–now the minister says there is already three. We commend the minister for introducing this bill even though it was not absolutely necessary.

Mr. Chairperson: Ms. Barrett, you had a comment to make.

Ms. Becky Barrett (Wellington): Mr. Chair, I am wondering if the committee could look at this bill in blocks of clauses.

Mr. Chairperson: Okay. Should we go page by page? Does that make sense? Okay. The bill will be considered in blocks. During the consideration of the bill, the title, preamble and schedule are postponed until all others clauses have been considered in their proper order by the committee.

Clauses 1(1) through Clause 2–pass; Clause 3(1) through 9(2)–pass; Clauses 9(3) through Clause 11–pass; schedule–pass; preamble–pass; title–pass. Bill be reported.

Bill 23–The Health Services Insurance Amendment Act

Mr. Chairperson: Bill 23, The Health Services Insurance Amendment Act. The honourable Minister Mitchelson is now being replaced by the Honourable Mr. McCrae, Minister of Health, by my side here. Does the minister responsible have a brief opening statement?

* (1150)

Hon. James McCrae (Minister of Health): Mr. Chairperson, I think it would be sufficient for me to say that we did make an explanation of this bill at second reading stage, and many of the provisions of this bill are either of a housekeeping nature or to make our legislation consistent with our current practices. I think that would suffice.

Mr. Chairperson: Does the critic from the official opposition have any observations to make initially?

Ms. Becky Barrett (Wellington): Yes, and I will be very brief. I spoke on this bill in the House, I believe, last week. I just wanted to state that we have some major concerns with particularly Section 10, the whole issue of permitting the personal care homes to hold funds in trust for residents, and major concerns that this will allow–because we do not have the regulations, and we do not know how it is going to play out–for the further privatization of personal care homes and in other areas that we have spoken on. So we will be voting against this legislation.

Mr. Chairperson: Thank you, Ms. Barrett. Any further? We will then proceed with the bill clause by clause. During consideration of the bill, the title and preamble are postponed until all other clauses have been considered in their proper order by the committee.

Clause 1–pass; Clause 2–pass; Clause 3–pass; Clause 4–pass; Clause 5–pass; Clause 6–pass; Clause 7–pass; Clause 8–pass; Clause 9–pass.

Shall Clause 10 pass?

Some Honourable Members: Pass.

Some Honourable Members: No.

Voice Vote

Ms. Barrett: Yeas and Nays, Mr. Chairman.

Mr. Chairperson: All those in favour, say yea.

Some Honourable Members: Yea.

Mr. Chairperson: All those opposed, say nay.

Some Honourable Members: Nay.

Mr. Chairperson: The Yeas have it.

Formal Vote

Ms. Barrett: A recorded vote, please.

A COUNT-OUT VOTE was taken, the result being as follows: Yeas 6, Nays 4.

Mr. Chairperson: Clause 10–pass; Clause 11–pass; Clause 12–pass; preamble–pass; title–pass.

Shall the bill be reported?

Some Honourable Members: Pass.

Ms. Barrett: No.

Mr. Chairperson: The bill shall be reported. On division?

Ms. Barrett: On division, Mr. Chair.

Bill 32–The Proceedings Against the Crown Amendment Act

Mr. Chairperson: The Minister of Health (Mr. McCrae) is now being replaced by the honourable Minister of Justice (Mrs. Vodrey) by my side. Does the minister responsible have a brief opening statement?

Hon. Rosemary Vodrey (Minister of Justice and Attorney General): Yes. The Proceedings Against the Crown Amendment Act is required to permit the enforcement of awards of costs made against the government under the agreement on internal trade.

The dispute resolution procedures included in the agreement permit a dispute resolution panel to award costs payable by a government to a private person in a dispute. For this purpose the agreement requires each government to amend its laws to permit a panel award of cost to be enforceable in the same manner as a court award of cost. This bill addresses this requirement.

Mr. Chairperson: I thank the minister. Does the critic from the official opposition have any opening statement? No opening statement.

The bill will be considered clause by clause. During consideration of the bill, the title and preamble are postponed until all other clauses have been considered in their proper order by the committee.

Shall Clause 1 pass? I am sorry. Mr. Sale had a question in relation to Clause 1.

Mr. Tim Sale (Crescentwood): Mr. Chairperson, through you to the minister, I am not sure whether the minister has had the benefit of the material which was circulated from British Columbia to the Minister of Industry, Trade and Tourism (Mr. Downey).

Could the minister indicate what the government's response to the four questions asked in opinion (a) of the letter from Mr. John Manley dated June 23, 1995, has been? I believe these are important questions and bear on the need for this clause and the appropriateness of entering into this legislation in the first place.

Mrs. Vodrey: My understanding is that the question deals with the federal legislation. The provincial government has indicated that they view there are some ambiguities, but I am advised that this piece of legislation does not deal with the issue raised by the member in his question.

Mr. Chairperson: Mr. Sale.

Mr. Sale: I would be happy to defer to the Minister of Trade.

Hon. James Downey (Minister of Industry, Trade and Tourism): All I would add, Mr. Chairman, is, in support of my colleague the Attorney General, basically what we are asking for here is to accommodate an agreement that was signed and agreed to by all provinces and the Territories last July by the Prime Minister and all the provinces and the Territories to accommodate an agreement that was made as it relates to the payment of compensation when in fact a hearing goes before the dispute mechanism, and basically has no bearing on the federal government legislation that has been passed or is being proposed to be passed.

Mr. Sale: I understand the minister's point in this regard. Our concern in opposition is that this entire agreement is taking on life, which according to the legal opinions in opinion (a) and opinion (b) which I tabled in the House last week, may well lead to problematic interpretations of the role of provinces in regard to their sovereign right under Section 92 of the Constitution to regulate internal trade within the provinces in spite of the fact that this is an agreement on interprovincial trade.

I know that Manitoba governments, both New Democratic and Conservative, have consistently taken a position that having a recognition of the rights of provinces to regulate trade is an important right.

There seems to be at least some opinion that the framers of this agreement on internal trade, with the best of intentions in the world, may have moved in some directions which could weaken provincial powers. It seems to me that it is really richly symbolic that this is the day that Quebec is voting on a referendum on something which could fundamentally change the nature of the Canadian Constitution and certainly the economic union.

I have asked in the House and I will ask again today, with great respect, that the minister and the government consider delaying consideration of this legislation until the intent of Bill C-88 is clear, if indeed it even is brought before the federal House in the wake of the referendum, whether it will be continued or not, and to then, if it seems wise to the government, reintroduce this at a future sitting and it could be as soon as the spring sitting of the House.

* (1200)

I would say to the minister, there is simply no possibility that this legislation is going to be required for, I would suggest, a period of years, probably at minimum a year, but much more likely years because the agreement on internal trade is so general and so unspecific that the possibility of successful actions being finally brought to the point where judgments have been entered is very remote.

I would also note that, as far as I know, we are the first province to bring compliance legislation like this into effect, so no other provinces–or, at least so far as I know, no other provinces–seem to feel any great urgency on this matter. I believe the only other statute that we have been able to find that bears on this is Alberta's Bill 34, which is currently before their House and which is a statute compliance, statute amendment act type of legislation.

I would ask the minister whether she has considered the wisdom of delaying implementing this legislation until C-88's future can be clarified and until in fact the nature of the constitutional dilemmas that are upon us have more chance to be clarified.

Mr. Downey: Mr. Chairman, I would yield to the Minister Attorney General if she would like to speak, but I would like to make a couple of comments.

I think the member for Crescentwood is trying to build in a lot more than should be built into the discussion and the debate at this particular time on this amendment.

We in Manitoba, the Premier (Mr. Filmon) and the government of Manitoba, have felt very strongly about moving forward on the internal trade agreement of which I stated a year ago in July that the Prime Minister and the Premiers of all provinces and the territories, the Leaders of those governments, have agreed to an internal trade agreement. We believed–and Manitoba is the co-chair, along with the

federal minister, Mr. Manley–strongly that it was our intent to clearly demonstrate how supportive we were of it.

The amendment that we are talking about today has no impact on the federal government's bill that is before the House of Commons. I desperately hope that the people of Quebec today vote no. I think we should–both the former government that signed the agreement on internal trade and the current government have spoken very strongly about the need for an internal trade agreement, so to change our thinking or to send some message contrary to what is taking place at this particular time, I think this would be the day not to do that.

I think we should proceed to say that, if a person or persons, a company goes before the trade dispute mechanism, the costs incurred in that, that the courts will in fact support the payment to those individuals for going before the dispute-settling mechanism. That was agreed to by all provinces and the federal government.

This is not a controversial amendment. This is a supportive amendment to make sure that any individual who feels they are being unfairly treated under the internal trade agreement and they have to go before the dispute-settling mechanism, because of other actions of government or/and other individuals, that they are paid for the costs of which are incurred in going before that panel.

I think it is fair and acceptable and should be moved on at this particular time to demonstrate to the rest of Canada that we are sincere about what we are trying to do with our internal trade agreement and protect the resources of people who feel they are being unjustly treated under the internal trade agreement, that they have that payment made on their behalf and it is enforced by the courts.

Mrs. Vodrey: Mr. Chair, I do not really have any further comments to add following my colleague the Minister of Industry and Trade other than just to say again, as I said in my opening remarks, that the bill does not address the issue of enforcing substantive decisions of a panel. It allows for the enforcement of award of cost, things such as the cost of a hearing and that may be against the government, so I think my colleague has indicated the position of this government and also the leadership role we have taken as co-chair.

Mr. Sale: I just have one other comment, Mr. Chairperson, and that is that the dispute panels do not exist. The mechanisms for dealing with this whole matter do not exist yet. The whole process of doing this is, as I think the minister has rightly identified at this point, largely symbolic and has no real meaning in that other provinces have not moved either to implement this.

So I think that it is not wise to put into the force of Manitoba law an ability to award costs when at least some scholars, including the ones I cited in the House, Trebilcock and Schwanen and the legal counsel for British Columbia, suggest that there are serious problems with this treaty process, which may, by virtue of all of the little pieces, land us in a situation where provinces lose the ability to regulate their own affairs, as Section 92 provides for, even though the agreement itself says very clearly that nothing in the agreement shall in any way abrogate from the constitutional powers.

The suggestion of legal counsel is that may not defend the provincial right from erosion through successive court challenges, and I see this as unseemly haste and not at all required in the circumstances.

Mr. Downey: I do not want to prolong the debate, Mr. Chair, but I do think it is important to note that there were 10 Premiers, a Prime Minister and the Leaders of two territories who signed an agreement by which this was agreed to by all those parties.

What we are living up to is that agreement that has been signed, and I would like to proceed with it to clearly indicate that we were sitting at the negotiating and bargaining table with the true meaning of proceeding on internal trade and sending that message to the people of Canada.

Mr. Chairperson: Was there more discussion?

Clause 1–pass, on division; Clause 2–pass; Clause 3–pass; preamble–pass; title–pass.

Bill be reported, on division.

The time is now 12:08. What is the will of the committee?

Some Honourable Members: Committee rise.

Mr. Chairperson: The committee shall rise.

COMMITTEE ROSE AT: 12:08 p.m.