Date: 19980507
Docket: CA023817
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

B[redacted] S[redacted]

APPELLANT

AND:

DIRECTOR OF CHILD, FAMILY AND COMMUNITY SERVICES

RESPONDENT

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Lambert
The Honourable Madam Justice Rowles
The Honourable Madam Justice Prowse
The Honourable Mr. Justice Hall

C. Sicotte and P. Fleming	Counsel for the Appellant
F. G. Potts and R. N. Hamilton	Counsel for the Respondent
Place and Date of Hearing	Vancouver, British Columbia January 30, 1998
Place and Date of Judgment	Vancouver, British Columbia May 7, 1998

Written Reasons for the Majority by:
The Honourable Mr. Justice Lambert

Concurred in by:
The Honourable Chief Justice McEachern
The Honourable Mr. Justice Hall

Written Reasons Concurring in the Result by: (p.23, para.39)
The Honourable Madam Justice Prowse

Concurred in by:
The Honourable Madam Justice Rowles

Reasons for Judgment of the Honourable Mr. Justice Lambert:

THE REAL ISSUES

[1] The principal legal issue in this appeal relates to the relationship between s.2 and s.13 of the Child, Family and Community Service Act.

[2] One interpretation is that a child cannot be regarded as needing protection unless the child can be proven to fall within one of the lettered paragraphs of s-s.13(1). That interpretation consigns the guiding principles set out in s.2 to an exclusively interpretive role.

[3] The other interpretation is that the lettered paragraphs of s-s.13(1) list specific instances where a child must be regarded as needing protection, but if the child cannot be proven to fall within one of the lettered paragraphs of s-s.13(1), but can, nonetheless, be proven to need protection from abuse, neglect, harm or threat of harm, then s.2 sets out principles of positive law which are accorded paramount importance by the Act and which, without direct support from s-

s.13(1), can be used to grant protection to that child.

[4] For reasons which I will state under the heading "The Interpretation of Sections 2 and 13(1) of the Child, Family and Community Service Act" I consider that the second interpretation is the correct one.

[5] There are other legal issues relating to the manner of proving that a child is in need of protection. I will address those issues under the heading "Issues About Proof".

THE FORMAL ISSUES

[6] This is an appeal under s.82 of the Child, Family and Community Service Act from an order of Madam Justice Levine in the Supreme Court of British Columbia in which Madam Justice Levine dismissed Ms. S[redacted]'s appeal from an order of Judge Collings making a finding, for the purposes of s.40 of the Act, that R[redacted] S[redacted] was a child in need of protection. The appeal to this Court is limited to a question of law on which leave has been granted. Mr. Justice Macfarlane granted leave to appeal on the questions set out in the Notice of Application for Leave to Appeal. These are the questions:

1. The Honourable Madam Justice Levine erred in holding that the trial judge made no error in interpreting and applying the Child, Family and Community Service Act R.S.B.C. 1996 c.46 by following the approach set out in Superintendent v. G. (1989), 22 R.F.L. (3d) 1 (B.C.C.A.).

2. The Honourable Madam Justice Levine erred in holding that the trial judge found that R[redacted] S[redacted] had been harmed by her mother.

3. The Honourable Madam Justice Levine erred in holding that the trial judge committed no error when he distinguished B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 and failed to consider the constitutionally protected right to parent a child delineated therein by the Honourable Mr. Justice LaForest.

Counsel for the appellant abandoned the second question on being asked to explain the nature of the question of law. This appeal is therefore confined to the first and third questions. I propose to deal with them separately after setting out the facts and the judgments of Judge Collings and Madam Justice Levine as briefly as I can.

THE FACTS

[7] R[redacted] was born on 30 October, 1986. She had fetal alcohol syndrome, neo-natal abstinence syndrome, and cerebral palsy. She suffers from a mental disability and from global development delay. After being in several foster homes, R[redacted] came into foster care with Ms. S[redacted] in 1989. Ms. S[redacted] has been trained as a Teacher's Aid with a specialty of working with Special Needs Children. Ms. S[redacted] applied to adopt R[redacted] in 1990 and the adoption was completed in 1991. R[redacted] was taught by Ms. S[redacted], her new mother, to communicate using an unique sign language, a symbolic picture language, and a communication board. Ms. S[redacted] encouraged R[redacted]'s participation in horseback riding, swimming, bowling and Brownies.

[8] In November, 1994 R[redacted] developed feeding problems. From August, 1995 until June, 1996 R[redacted] spent most of her time in hospital. She underwent many medical and surgical procedures. She experienced infections, vomiting and diarrhea. From October, 1995 she was in B.C. Children's Hospital in Vancouver. She was being fed through a tube into her stomach and later through a second tube into her bowel. From January, 1996 to April 1996, R[redacted] was in Kamloops Hospital and for a short part of that time at home. But in April her doctor in Kamloops decided that she should be under the specialist care of the doctors and staff at B.C. Children's Hospital. During April, May and June, 1996, R[redacted] underwent constant medical and surgical procedures, but her infections, vomiting and diarrhea continued. A conflict developed between Ms. S[redacted] and the paediatrician in charge of R[redacted] case. The doctor believed

that R[redacted] might die if food was not introduced into her digestive tract. Ms. S[redacted] was concerned about the pain to which R[redacted] was being subjected. Some of the doctors involved with R[redacted]'s case suspected that R[redacted] might have been the victim of Munchausen's Syndrome by Proxy, a condition where someone is being hurt by someone else in order to attract some form of attention or concern.

[9] In July, 1996 an order was made that R[redacted] be given nourishment when Ms. S[redacted] was not present and after that order Ms. S[redacted] was excluded from the hospital. R[redacted] started to recover. By the end of July, 1996 she was taking some food orally and intravenous feeding was stopped. On 1 August, 1996 R[redacted] was formally removed from Ms. S[redacted]'s care by order under the Act. By the end of August R[redacted] was being fed without vomiting. She was discharged from hospital on 3 October, 1996 into foster care. By then she was taking all of her nourishment orally. She continued to take all her nourishment orally from then until March, 1997 when the hearing before Judge Collings was completed.

THE PROCEEDINGS

[10] A presentation hearing was conducted by Judge Martinson under s.35 of the Act in August and September, 1996. Judgment was given on 3 October, 1996. Judge Martinson decided there were reasonable grounds for believing that R[redacted] was in need of protection. She directed a protection hearing and she directed that the Director have interim custody.

[11] The protection hearing under s.40 of the Act started in November, 1996 before Judge Collings. It continued until March 1997. On 12 March, 1997 Judge Collings gave judgment. He decided that the central factor in the case "which overshadows all others, is the speed and completeness of R[redacted]'s recovery after B[redacted] S[redacted] was excluded." He said: "...I am convinced by the evidence of [three doctors] that interference with medical procedures, probably intentional, is the most likely cause of R[redacted]'s illness..." (my emphasis). I have emphasized the words "probably" and "most likely" to indicate the degree of probability which Judge Collings attached to those findings. Judge Collings concluded his reasons by setting out his decision in these terms:

I rule:

1) R[redacted] was still in the care of her mother while in the hospital.

2) She suffered harm while in that care.

3) There is no proof of a cause unrelated to her mother's care.

4) There is a reasonable apprehension that her mother may have been the cause of R[redacted]'s illnesses or some of them.

5) I therefore find R[redacted] to have been in need of protection on ground (a) of s.13.

. . .

Judge Collings concluded his rulings by making observations about the reasons of Mr. Justice Hinkson and Mr. Justice Locke in Superintendent of Family & Child Services v. C.G. and S.G. (1989), 22 R.F.L. (3d) 1 (B.C.C.A.) (the G. case). Judge Collings did not reach any final conclusion about whether the G. case was applicable under the new Act, since it was decided under the former Act, but he did say that if it was applicable the standards set in both the majority reasons of Mr. Justice Hinkson, and the concurring minority reasons of Mr. Justice Locke had both been met. Judge Collings made a protection order good for six months. It has since been extended to a hearing set for 1 June, 1998.

[12] An appeal was taken from Judge Collings' order by Ms. S[redacted]. A cross-appeal was taken by the Director, asking for a permanent order. The appeal and cross-appeal were heard by Madam Justice Levine under s.81 of the Act. Madam Justice Levine decided that Judge Collings was not incorrect in his conclusions that the G. case was still applicable under the new

Act and that under the G. case the need for protection was established. Madam Justice Levine concluded that Judge Collings' findings of fact, including particularly the conclusion that R[redacted] was in need of protection, could not be interfered with, and that Ms. S[redacted]'s appeal should be dismissed. Madam Justice Levine also dismissed the Director's cross-appeal. Before both Judge Collings and Madam Justice Levine arguments were advanced in relation to a liberty interest in parenting on the part of Ms. S[redacted]. The argument was based on the decision of the Supreme Court of Canada in B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315. Both Judge Collings and Madam Justice Levine decided that, on the facts of the case before them, the B.(R.) case had no application.

[13] This appeal is from the decision of Madam Justice Levine.

THE FORMER AND PRESENT STATUTORY PROVISIONS

[14] The former Act, the Family and Child Services Act, came into effect in 1980 and was in effect until it was replaced by the present Child, Family and Community Service Act on 29 January, 1996. For the purposes of this case the key sections of the former Act were the definition of the phrase "in need of protection", which guided the Superintendent and the judiciary in relation to the apprehension of children, and s.2 which stated the governing principle underlying the Act.

Interpretation

"in need of protection" means, in relation to a child, that he is

(a) abused or neglected so that his safety or well being is endangered,
(b) abandoned,
(c) deprived of necessary care through the death, absence or disability of his parent,
(d) deprived of necessary medical attention, or
(e) absent from his home in circumstances that endanger his safety or well being;

Principles

2. In the administration and interpretation of this Act the safety and well being of a child shall be the paramount considerations.

Of course, if a child were shown to be in need of protection then a protection order would be made.

[15] The new Act does not contain a definition, as such, of the phrase "in need of protection". Instead, it contains a statement of principles in s.2, coupled with an itemization of certain circumstances in which a child will be considered to need protection in s-s.13(1).

Guiding principles

2 This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:

(a) children are entitled to be protected from abuse, neglect and harm or threat of harm;

(b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;

(c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;

(d) the child's views should be taken into account when decisions relating to a child are made;

(e) kinship ties and a child's attachment to the extended family should be preserved if possible;

(f) the cultural identity of aboriginal children should be preserved;

(g) decisions relating to children should be made and implemented in a timely manner;

. . .

When protection is needed

13 (1) A child needs protection in the following circumstances:

(a) if the child has been, or is likely to be, physically harmed by the child's parent;

(b) if the child has been, or is likely to be, sexually abused or exploited by the child's parent;

(c) if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable to protect the child;

(d) if the child has been, or is likely to be, physically harmed because of neglect by the child's parent;

(e) if the child is emotionally harmed by the parent's conduct;

(f) if the child is deprived of necessary health care;

(g) if the child's development is likely to be seriously impaired by a treatable condition and the child's parent refuses to provide or consent to treatment;

(h) if the child's parent is unable or unwilling to care for the child and has not made adequate provision for the child's care;

(i) if the child is or has been absent from home in circumstances that endanger the child's safety or well-being;

(j) if the child's parent is dead and adequate provision has not been made for the child's care;

(k) if the child has been abandoned and adequate provision has not been made for the child's care;

(l) if the child is in the care of a director or another person by agreement and the child's parent is unwilling or unable to resume care when the agreement is no longer in force.

(2) For the purpose of subsection (1)(e), a child is emotionally harmed if the child demonstrates severe

(a) anxiety,
(b) depression,
(c) withdrawal, or
(d) self-destructive or aggressive behaviour.

(my emphasis)

It is particularly noteworthy that in many of the lettered paragraphs of s-s.13(1) it has to be shown not only that the child is subject to abuse, neglect, harm or threat of harm, but also that a particular identified person is the cause of the abuse, neglect, harm or threat of harm. It is the possibility that the first part of the test might be proved but the second half might not which creates the problem and which might in some cases result in leaving an abused child unprotected.

THE G. CASE

[16] In the G. case, (Superintendent v. G. (1989), 22 R.F.L. (3d) 1 (B.C.C.A.)), twins under six months old were examined in Children's Hospital. One had a cranial fracture and fourteen fractured ribs. The other had six fractured ribs. They had a half-sister aged five and they lived with their two parents. All three children were taken into care under the former Act. On the hearing before the Provincial Court judge a finding was made that the children were not in need of protection and they were ordered to be returned to their parents. An appeal to the County Court was dismissed. An appeal was taken to this Court. The appeal was allowed and an order was made that the Superintendent was to have custody of the three children.

[17] The majority judgment was given by Mr. Justice Hinkson. It was concurred in by Madam Justice Southin. It referred to the phrase "in need of protection" and to the definition which stated that a child was in need of protection if the child was "abused or neglected so that his safety or well-being is endangered". Mr. Justice Hinkson then said that the starting point must be a consideration of the safety and well-being of the child. It was not the function of the judge, on the basis of any standard of proof, to determine who had put the children in harm's way. The function of the judge was to decide whether, having regard to the safety and well-being of the child, the child should remain in the custody of its parents. Mr. Justice Hinkson decided that, on the evidence, if the hearing judge had considered the correct question, no other conclusion was possible than that the safety and well-being of the children required that they be placed in the custody of the Superintendent. Mr. Justice Hinkson put the approach to be taken under the former Act in this way, at p.8:

In approaching the resolution of this matter in that way the hearing judge misdirected himself. To begin with he was not conducting a trial which might lead to a finding of guilt of one or other of the parents with respect to the injuries suffered by the twins. Yet he considered that that was the issue before him and having heard the parents testify he was reluctant to find that either of them had abused the twins and caused the injuries which they had suffered. But that was not the nature of the inquiry to be conducted on the hearing; rather, the hearing judge was to consider the evidence led on the hearing and decide on the basis of that evidence whether having regard to the safety and wellbeing of these children they should remain in the custody of their parents or whether they should be temporarily placed in the custody of the superintendent.

(my emphasis)

[18] Mr. Justice Locke expressly agreed with Mr. Justice Hinkson. He went on to make a short observation about the Provincial Court judge having said that there was no real evidence about how the children's injuries occurred. Mr. Justice Locke then approved a passage from the reasons of Madam Justice Proudfoot in Superintendent of Fam. and Child Service

v. M. (B.), 28 R.F.L. (2d) 278 (B.C.S.C.), where she said:

While I say the test to be applied is, on the balance of probabilities, as to what is in the best interests of the child, no such test exists when we deal with the element of risk of injury. I am satisfied that a much lower test would be applicable when we are dealing with that aspect.

THE INTERPRETATION OF SECTIONS 2 AND 13(1) OF THE CHILD, FAMILY AND COMMUNITY SERVICE ACT

[19] As I indicated at the beginning of these reasons, I have concluded that a child may be in need of protection even if the precise circumstances described in one or other of the lettered paragraphs of s-s.13(1) have not been proven to the requisite standard, and, if the need of protection from abuse, neglect, harm or threat of harm is proven to the requisite standard, then s.2 provides a paramount principle of positive law to confirm the entitlement of that child to protection.

[20] There are three principal reasons why I have reached that conclusion and I will set them out.

[21] The first reason relates to the wording of the Act. Section 2 provides that children are entitled to be protected from abuse, neglect and harm or threat of harm. That is a clear statement of a legal right. So, in any case where the operation of s-s.13(1) did not have the effect of establishing the need for protection because of difficulty in identifying the perpetrator or potential perpetrator of the abuse, neglect, harm or threat of harm, or for any other reason, the paramount right created by positive law in s.2 will assure that the child is protected.

[22] The second reason also relates to the wording of the Act. Subsection 13(1) starts off: "A child needs protection in the following circumstances: ...". It does not say: "A child needs protection only in the following circumstances ...". I think the absence of the word "only" tends to confirm that s-s.13(1) is not purporting to create an exclusive list of circumstances where protection is needed, but rather is making the administration of the Act more straightforward and helpful by listing many of the most usual circumstances where protection will be needed. Those charged with the administration of the Act will be able in most cases to point to a particular and precise provision which they consider should be invoked in a particular case.

[23] The third reason relates to the legislative purpose of the Act. That purpose is to provide for the protection of every child who needs protection. No child should continue in a state of abuse, neglect, harm or threat of harm while administrators, lawyers and judges argue about which precise lettered compartment of s-s.13(1) the case comes within or indeed, whether it comes with any lettered compartment at all. There is a reason for the paramountcy of the principles set out in s.2. It is to ensure that the legislative purpose of the Act is not defeated by legal niceties such as those which have troubled the courts in the G. case and in this case.

[24] So my conclusion on the interpretation question is that s.2 of the Act sets out a paramount principle of positive law which confirms the entitlement of a child, as a matter of legislative enactment, to be protected from abuse, neglect, harm or threat of harm.

[25] I wish to add that my approach to the Act is not based on any view about whether the Act is intended to be less interventionist or more interventionist than its predecessor, or than the legislation in other jurisdictions. I have confined my interpretation to the wording of the Act and to the legislative purpose that seems to me to be clear from an examination of the provisions themselves.

ISSUES ABOUT PROOF

[26] I do not have any doubt that the burden of proof in child protection cases rests on the person who asserts the need for protection. Nor do I have any doubt that the standard of proof is the standard in civil cases, namely, the standard usually

called "the balance of probability". Sometimes, in applying that standard, the seriousness of the allegation being made is thought to require a higher and more particularized measure of confidence on the part of the decision maker that the balance of probability test has been met. But the test remains the same. The weight of the evidence must show that it is more probable than not that the assertion being made is correct.

[27] When the assertion being made is about a past event then the actual occurrence of that event must be shown by the weight of the evidence to have been more probable than not. That is the case with past abuse, neglect, or harm to a child.

[28] But where the assertion being made is that there is a risk that an event will occur in the future, then it is the risk of the future event and not the future event itself that must be shown by the weight of the evidence to be more probable than not. That is the case with consideration of a threat of future harm.

[29] The result is that in considering past abuse the degree of certainty that it has occurred will be more than is required in considering whether abuse will occur in the future. A ten percent risk of future abuse may meet the test of the risk being shown to exist on the balance of probabilities, whereas a ten percent assignment of the probability that the abuse had occurred in the past would not meet the balance of probability test.

[30] In assessing the risk of future harm, (which is called the threat of future harm in s.2), there is room for a variable assessment depending on the nature of the threatened harm which is in contemplation. A threat of harm through neglect of the child's hygiene might well have to be much more probable in order to meet the balance of probability test than a threat of serious permanent injury through physical or sexual abuse. Generally speaking, a risk sufficient to meet the test might well be described as a risk that constitutes "a real possibility".

[31] I have received a good deal of stimulation on this subject from the decision of the House of Lords in In Re H. and Others, [1996] A.C. 563. In that case five law lords reached considerable agreement with each other on some of the issues of proof under the English legislation but split 3-2 on one point about the balance of probability and split 3-2 in the result. I would be disinclined to adopt any particular approach that was presented in that case because the English legislation is markedly different in some important respects from our legislation. However, I wish to say that I would adopt the views expressed by all five law lords that the word "likely" has a primary meaning of "more probable than not", but a recognized secondary meaning of "a real possibility", and that the secondary meaning captures the intent of Parliament in the use of the word "likely" in relation to the possibility of a child suffering harm in the future.

[32] I believe that the approach I have adopted corresponds with the approach of Madam Justice Proudfoot in the passage from Superintendent v. M. (B) quoted with approval by Mr. Justice Locke in G.

CONCLUSION ON THE CONTINUING APPLICABILITY OF THE G. CASE

[33] So my conclusion with respect to the G. case is that it remains very closely applicable to the new Act just as it was applicable to the old Act. The reason for its continuing applicability lies in the close similarity between the definition in the old Act of "need for protection" if a child's safety or well-being is endangered, and the paramount requirement contained in s.2 of the new Act that the child is entitled to be protected from abuse, neglect, harm or threat of harm.

[34] The result is that in cases where the potential perpetrator of the harm to the child can not be identified with sufficient certainty to meet the precise requirements of a lettered paragraph of s-s.13(1) to the requisite standard of proof, the paramount provisions of s.2 can be invoked to ensure that the child obtains the protection from harm or threat of harm to which he or she is entitled.

THE FIRST ERROR ALLEGED BY THE APPELLANT

[35] The first ground of appeal on which leave was granted was stated in these terms:

> The Honourable Madam Justice Levine erred in holding that the trial judge made no error in interpreting and applying the Child, Family and Community Service Act R.S.B.C. 1996 c.46 by following the approach set out in Superintendent v. G. (1989), 22 R.F.L. (3d) 1 (B.C.C.A.).
>
> For the reasons I have given it is my opinion that Madam Justice Levine did not err in the manner alleged.

THE SECOND ERROR ALLEGED BY THE APPELLANT

[36] The second ground of appeal, (numbered 3 in the Notice of Application for Leave to Appeal and in the factum) is in these terms:

> The Honourable Madam Justice Levine erred in holding that the trial judge committed no error when he distinguished B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 and failed to consider the constitutionally protected right to parent a child delineated therein by the Honourable Mr. Justice LaForest.

[37] The constitutionally protected right to parent a child referred to in that statement of the point, is said to be an aspect of the liberty rights under s.7 of the Charter. The Supreme Court of Canada divided in the B.(R.) case on whether there was such a right. Four judges decided that there was, but that it was overridden in that case by the application of the principles of fundamental justice. Four judges decided in two separate sets of reasons that there was no such right. One judge decided that it was not necessary to decide whether there was such a right because the standard of fundamental justice had not been breached. All nine judges decided that if there was such a right it was overridden by the need for protection in that case. Similarly, in this case, it is my opinion that if there is such a right it would have no application to alter the decision that would otherwise be reached with respect to the need for protection. Since it is not necessary to prefer the reasons of any particular judge of the Supreme Court of Canada in the B.(R.) case in order to reach a conclusion in this case, I consider that it is undesirable for me to express any preference and I do not propose to do so.

DISPOSITION

[38] I would dismiss this appeal.

"The Honourable Mr. Justice Lambert"

I AGREE: "The Honourable Chief Justice McEachern"

I AGREE: "The Honourable Mr. Justice Hall"

Reasons for Judgment of the Honourable Madam Justice Prowse:

INTRODUCTION

[39] The principal issue on this appeal is whether the decision of this Court in Superintendent of Family and Child Services v.

G.(C.) (1989), 22 R.F.L. (3d) 1 (B.C.C.A.) (the "G." decision), decided under the predecessor to the Child, Family and Community Service Act, R.S.B.C. 1996, c. 46 (the "CFCSA" or the "Act") has any further application in protection proceedings since the CFCSA was proclaimed in force on January 29, 1996. In my view, for the reasons which follow, it does not.

[40] A second and related issue which arises on this appeal concerns the relationship between ss. 2 and 13 of the CFCSA. In summary, I am unable to agree with Mr. Justice Lambert that s. 2 of the CFCSA can be utilized to expand the category of circumstances in which a child may be found to be in need of protection. In my view, s. 13(1) was intended to, and does, set out all of the circumstances in which a child may be found to be in need of protection under the Act. Section 2 is, as it clearly states, a guide to the interpretation and administration of the Act as a whole, in accordance with the principles set out therein.

[41] Mr. Justice Lambert's interpretation of s. 2 is based on the assumption that there are circumstances in which a child could be regarded as being in need of protection which are not covered by one or more of the lettered paragraphs of s. 13(1). No such circumstances were identified by counsel, nor have I been able to identify any. It is unnecessary and potentially confusing, therefore, to attribute to s. 2 a "back-up" or "catch-all" function in relation to s. 13 which would effectively render s. 13(1) redundant. Nor, in my view, is such an interpretation justified on a plain reading of these sections taken in the context of the Act as a whole, its objects and the intention of the Legislature.

[42] I agree with Mr. Justice Lambert, however, that the appeal must be dismissed. I am satisfied that the findings of fact of the trial judge, upheld by Madam Justice Levine, can admit of no other conclusion than that R[redacted] was in need of protection within the meaning of s. 13(1)(a) of the CFCSA.

[43] I also agree with Mr. Justice Lambert that it is unnecessary to decide the s. 7 Charter argument in this case, since I have concluded that the standard of proof to be met under s. 13(1) of the CFCSA is proof on a balance of probabilities. I prefer, however, to state my own reasons with respect to the appropriate standard of proof.

[44] In these reasons, I will refer to the legislation preceding the enactment of the CFCSA, the Family and Child Service Act, S.B.C. 1980, c. 11, as "the former Act".

DECISIONS OF JUDGE COLLINGS AND MADAM JUSTICE LEVINE

[45] After making extensive findings of fact, Judge Collings concluded that R[redacted] was in need of protection under s. 13(1)(a) of the CFCSA. Madam Justice Levine accepted Judge Collings's findings of fact and upheld his decision, substantially for the reasons given by him. Both Judge Collings and Madam Justice Levine based their conclusions on the decision of this Court in G. Before reviewing their decisions, therefore, I will analyze the relevant provisions of the former Act and the CFCSA, and I will discuss the decision of this Court in G.

DISCUSSION OF THE ISSUES

(1) THE FORMER ACT, THE CFCSA AND THE DECISION IN G.

(a) Submissions of Counsel

[46] Counsel for Ms. S[redacted] submits that Levine J. erred in finding that the G. decision was binding upon her. He submits that s. 13(1)(a) of the CFCSA required the trial judge to find that R[redacted] had been harmed, or was likely to be harmed, by Ms. S[redacted] before he could find R[redacted] to be in need of protection. He submits that the standard of proof of past harm, and likely harm, is proof on a balance of probabilities.

[47] Counsel for Ms. S[redacted] also submits that a finding that Raquel was in need of protection under any lesser standard of proof would infringe Ms. S[redacted]'s liberty interest, which he referred to as her "right to parent", under s. 7 of the Charter. He submits that principles of fundamental justice

require that such an important right should not be interfered with except in accordance with the usual standard of proof in civil proceedings.

[48] Counsel for the Director, on the other hand, submits that Madam Justice Levine was correct in holding that the determination of when a child is in need of protection, including the applicable standard of proof under s. 13(1)(a) of the CFCSA, is governed by the G. decision.

[49] Counsel for the Director also submits that Madam Justice Levine was correct in rejecting the submission that Ms. S[redacted] had a right to parent under s. 7 of the Charter which had been breached by the application of a lower standard of proof than proof on a balance of probabilities. In the alternative, he submits that the evidence before the trial judge fully justified a finding, on a balance of probabilities, that R[redacted] had been harmed by Ms. S[redacted] and that she was likely to be harmed by Ms. S[redacted] in the future if left in her care.

(b) History of the CFCSA

[50] Before reviewing the specific provisions of the CFCSA which are engaged in this appeal, it is useful to place the CFCSA in its historical context. This enables one to better assess the extent to which the approach to protection and apprehension of children under the CFCSA and the former Act should be regarded as the same, or similar. The comparison is significant in this case because of the submission by counsel for Ms. S[redacted] that the G. decision, decided under the former Act, should not be applied under the CFCSA.

[51] A detailed history of the CFCSA is summarized in Volume 2 of the Report of the Gove Inquiry into Child Protection (the "Gove Report"). At p. 15 of that report, the more recent history of the CFCSA is described as follows:

> Shortly after coming to power in 1991, the NDP government appointed the Community Panel Family and Children's Services Legislation Review to solicit public opinion about child protection, and to make recommendations for changes to provincial legislation. An aboriginal committee undertook a similar process in aboriginal communities across the province. This public consultation was launched in response to criticism that the 1981 Family and Child Service Act was ineffective and overemphasized the apprehension of children, while ignoring preventive and family support services.
>
> (Emphasis added)

[52] This consultation process ultimately led to the preparation of a White Paper outlining a legislative framework for a new Act. As a result of further consultations, the CFCSA was introduced into the Legislature in June 1994. The introduction of this legislation coincided with the appointment of Judge Gove's inquiry into "the adequacy of the services, policies and practices of the ministry of Social Services" as they related to the tragic death of Matthew John Vaudreuil.

[53] The CFCSA was enacted January 29, 1996.

(c) Comparison between the Former Act and the CFCSA

(i) The Former Act

[54] The former Act (assented to August 22, 1980) consisted of 33 sections containing the "basics" of a child protection scheme. The underlying principle of the former Act was set out in s. 2 as follows:

> Principles
> 2. In the administration and interpretation of this Act the safety and well being of a child shall be the paramount considerations.

This provision was carried forward into the CFCSA, but the later statute also included a comprehensive list of principles to guide those administering and interpreting the legislation.

[55] The single most significant provision of the former Act, from a protection standpoint, was the definition of "in need of

protection" contained in s. 1:
Interpretation

. . .

"in need of protection" means, in relation to a child, that he is

(a) abused or neglected so that his safety or well being is endangered,

(b) abandoned,

(c) deprived of necessary care through the death, absence or disability of his parent,

(d) deprived of necessary medical attention, or

(e) absent from his home in circumstances that endanger his safety or well being;

(ii) The CFCSA

[56] The CFCSA contains 108 sections divided into nine parts. The relevant provisions, for our purposes, commence with the definition of "parent" in s. 1 of the Act:
"parent" means

(a) the mother of a child,

(b) the father of a child,
(c) a person to whom custody of a child has been granted by a court of competent jurisdiction or by an agreement, or

(d) a person with whom a child resides and who stands in place of the child's mother or father

but does not include a caregiver or director;

Caregiver, in turn, means:
. . . a person with whom a child is placed by a director and who, by agreement with the director, has assumed responsibility for the child's day-to-day care;

...

[57] Section 2 then sets forth the "guiding principles" underlying the CFCSA, as follows:
Guiding principles

2 This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:

(a) children are entitled to be protected from abuse, neglect and harm or threat of harm;

(b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;

(c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;

(d) the child's views should be taken into account when decisions relating to a child are made;

(e) kinship ties and a child's attachment to the extended family should be preserved if possible;

(f) the cultural identity of aboriginal

children should be preserved;

(g) decisions relating to children should be made and implemented in a timely manner.

[58] Section 4 of the CFCSA sets forth a detailed list of factors to be taken into account in determining the best interests of the child. These factors are to be taken into account under the CFCSA "Where there is a reference in this Act to the best interests of the child . . . ."

[59] Section 13 is found in Part 3 of the CFCSA, which is entitled "Child Protection". Section 13(1) sets out when a child is in need of protection, as follows:

When protection is needed

13 (1) A child needs protection in the following circumstances:

(a) if the child has been, or is likely to be, physically harmed by the child's parent;

(b) if the child has been, or is likely to be, sexually abused or exploited by the child's parent;

(c) if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable to protect the child;

(d) if the child has been, or is likely to be, physically harmed because of neglect by the child's parent;

(e) if the child is emotionally harmed by the parent's conduct;

(f) if the child is deprived of necessary health care;

(g) if the child's development is likely to be seriously impaired by a treatable condition and the child's parent refuses to provide or consent to treatment;

(h) if the child's parent is unable or unwilling to care for the child and has not made adequate provision for the child's care;

(i) if the child is or has been absent from home in circumstances that endanger the child's safety or well-being;

(j) if the child's parent is dead and adequate provision has not been made for the child's care;

(k) if the child has been abandoned and adequate provision has not been made for the child's care;

(l) if the child is in the care of a director or another person by agreement and the child's parent is unwilling or unable to resume care when the agreement is no longer in force.

(2) For the purpose of subsection (1)(e), a child is emotionally harmed if the child demonstrates severe

(a) anxiety,

(b) depression,

(c) withdrawal, or

(d) self-destructive or aggressive behaviour.

(Emphasis added)

[60] Thus, unlike the broadly worded definition of "in need of protection" contained in the former Act, s. 13(1) of the CFCSA sets out a detailed and comprehensive list of those situations in which a child will be considered to be in need of protection. It also more clearly directs its focus to both past and future harm to a child.

[61] Section 28 of the CFCSA provides that, where there is reason to believe that contact between a child and "another person" would cause the child to need protection, the Director may apply to a court for a "protective intervention order" to prevent contact between that person and the child.

[62] Section 29 enables the court, upon application, to authorize health care for a child in order to preserve the child's life or to prevent serious or permanent impairment of the child's health. In this case, an ex parte order was made pursuant to this section on July 8, 1996 and, on July 9, Ms. S[redacted] was ordered to leave the hospital where R[redacted] was undergoing treatment.

[63] Section 30 provides for the removal of a child without warrant where the director has reasonable grounds to believe that a child needs protection and that:

(a) the child's health or safety is in immediate danger, or

(b) no other less disruptive measure that is available is adequate to protect the child.

An order was made pursuant to this section on August 1, 1996. Thereafter, on October 3, 1996, an order was made following a presentation hearing under s. 35 of the CFCSA permitting the director to retain interim custody of R[redacted] pending a protection hearing, with supervised access to Ms. S[redacted].

[64] Section 40 of the CFCSA deals with protection hearings, at which the court must determine whether a child needs protection. If the court determines that a child does not need protection, the child must be returned to the parent apparently entitled to custody. If the court determines that the child needs protection, then it must proceed to the "disposition" stage (s. 41) to determine in whose custody the child should reside, and under what conditions. It is at this stage that the child's best interests become relevant and the factors set forth in s. 4 of the CFCSA must be considered. The best interests of the child are not relevant under s. 40, where the only issue the court must decide is whether the child needs protection.

[65] Finally, s. 99 provides that:

Nothing in this Act limits the parens patriae jurisdiction of the Supreme Court.

[66] The only other statutory reference of note is s. 52 of the Law and Equity Act, R.S.B.C. 1996, c. 253, which provides:

52 (1) In proceedings involving the guardianship, custody, access to or maintenance of a child the court must consider the best interests of the child.

(2) Subsection (1) does not apply in proceedings under the Child, Family and Community Service Act except as provided in that Act.

(Emphasis added)

(iii) Conclusion

[67] In my view, the history giving rise to the enactment of the CFCSA set forth in the Gove Report; the more comprehensive

statements of principle in s. 2 which emphasize both the entitlement of children to protection and the importance of the family unit; and the more precisely delineated definition of when a child needs protection under s. 13(1), lead to the conclusion that the Legislature intended the CFCSA to be less interventionist than the former Act, while preserving, as a paramount consideration, the safety and well-being of children.

[68] The critical question remains, however, whether the differences between the former Act and the CFCSA are such that the G. decision is no longer determinative of when a child is in need of protection and the standard of proof to be applied in making that decision.

(d) The G. Decision

[69] In G., five-month old twins were apprehended from the care of their parents pursuant to the former Act. One of the children was suffering from a head injury and both were suffering from numerous broken ribs, which injuries were four to six weeks old. At the protection hearing, the parents were unable to explain how the rib injuries occurred, although they did offer possible explanations, including an explanation that the injuries may have been caused by the actions of an older sibling. The medical evidence was that the injuries were unlikely to have been caused accidentally. The trial judge refused to make an order that the children were in need of protection, since he was unable to determine that the parents had caused the injuries.

[70] On appeal to this Court, Mr. Justice Hinkson, speaking for the majority, stated that the trial judge had erred in focusing on the culpability of the parents, rather than on the harm to the children. At p. 8 of the decision, Hinkson J.A. stated:

> In approaching the resolution of this matter in that way the hearing judge misdirected himself. To begin with he was not conducting a trial which might lead to a finding of guilt of one or other of the parents with respect to the injuries suffered by the twins. Yet he considered that that was the issue before him and having heard the parents testify he was reluctant to find that either of them had abused the twins and caused the injuries which they had suffered. But that was not the nature of the inquiry to be conducted on the hearing; rather, the hearing judge was to consider the evidence led on the hearing and decide on the basis of that evidence whether having regard to the safety and wellbeing of these children they should remain in the custody of their parents or whether they should be temporarily placed in the custody of the superintendent.

[71] Applying that analysis to the facts, Hinkson J.A. found that the only conclusion open to the hearing judge was that the safety and well-being of the children required that they be placed in the temporary custody of the superintendent.

[72] Mr. Justice Locke wrote separate concurring reasons. At p. 9 of his reasons, he adopted the following passage from the reasons of the trial judge in Supt. of Family & Child Service v. M.(B.), [1982] 4 W.W.R. 272 at 281 (B.C.S.C.), as setting forth the requisite standard of proof to be applied:

> While I say the test to be applied is, on the balance of probabilities, as to what is in the best interests of the child, no such test exists when we deal with the element of risk of injury. I am satisfied that a much lower test would be applicable when we are dealing with that aspect.

The majority did not specifically address the issue of the applicable standard of proof.

(e) Applicability of G. under the CFCSA

[73] Judge Collings and Madam Justice Levine concluded that the G. decision continued to apply under the CFCSA and that they were bound by it. In his reasons, Mr. Justice Lambert also accepts that the G. decision continues to apply under the CFCSA. With respect, I am unable to agree.

[74] As earlier noted, there is every indication that the CFCSA

was enacted in response to criticism that the former Act provided too interventionist a regime which left too much power and discretion in the hands of those interpreting and applying it. Among the significant changes to the legislation were the redefinition of the circumstances in which a child would be found to be in need of protection, together with a detailed list of principles to be applied in interpreting and administering the legislation. Those statements of principle emphasize not only the safety and well-being of children, but also that the primary responsibility for the safety and well-being of children rests with their parents, and that the family is the preferred environment for raising children. Thus, the concept of parental responsibility, and the consequences of failure to live up to that responsibility, are significant factors which underlie the protection provisions of the CFCSA. It is in this context that the protection provisions of the CFCSA must be construed.

[75] The definition of when a child is in need of protection under the former Act and the CFCSA are set out earlier in my reasons. As a matter of convenience, I will repeat the relevant provisions here.

[76] Under the former Act, "in need of protection" is defined as follows:

"in need of protection" means, in relation to a child, that he is

(a) abused or neglected so that his safety or well being is endangered,

(b) abandoned,

(c) deprived of necessary care through the death, absence or disability of his parent,

(d) deprived of necessary medical attention, or

(e) absent from his home in circumstances that endanger his safety or well being;

[77] Under the CFCSA, s. 13(1) defines when a child needs protection:

When protection is needed

13 (1) A child needs protection in the following circumstances:

(a) if the child has been, or is likely to be, physically harmed by the child's parent;

(b) if the child has been, or is likely to be, sexually abused or exploited by the child's parent;

(c) if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable to protect the child;

(d) if the child has been, or is likely to be, physically harmed because of neglect by the child's parent;

(e) if the child is emotionally harmed by the parent's conduct;

(f) if the child is deprived of necessary health care;

(g) if the child's development is likely to be seriously impaired by a treatable condition and the child's parent refused to provide or consent

to treatment;

(h) if the child's parent is unable or unwilling to care for the child and has not made adequate provision for the child's care;

(i) if the child is or has been absent from home in circumstances that endanger the child's safety or well-being;

(j) if the child's parent is dead and adequate provision has not been made for the child's care;

(k) if the child has been abandoned and adequate provision has not been made for the child's care;

(l) if the child is in the care of a director or another person by agreement and the child's parent is unwilling or unable to resume care when the agreement is no longer in force.

(2) For the purpose of subsection (1)(e), a child is emotionally harmed if the child demonstrates severe

(a) anxiety,

(b) depression,

(c) withdrawal, or

(d) self-destructive or aggressive behaviour.

(Emphasis added)

[78] In my view, the differences in the wording of these sections cannot be ignored. Under the definition section of the former Act, there was no requirement under 1(a), (b), (d) or (e) that the need of the child for protection be tied to any act or omission of the parent. That, in essence, is what this Court said in G.

[79] Under s. 13(1)(a) of the CFCSA, on the other hand, it is apparent that the harm referred to in that section is harm caused by the child's parent. Specific reference to parental failure giving rise to a child's need for protection is also found in s. 13(1)(b), (c), (d), (e), (g), (h) and (l).

[80] In my view, it is inescapable that, in order to find that a child is in need of protection under s. 13(1)(a), the court must find that the harm to the child, or the likelihood of harm, is caused by the child's parent. Under that subsection, it is not sufficient that the Court simply find that the child has been, or is likely to be, physically harmed.

[81] Judge Collings and Madam Justice Levine were clearly troubled by the problem presented by the wording of s. 13(1)(a), specifically by the inclusion of the words, "by the child's parent". In the result, they concluded that G. should be followed, unless and until it was distinguished by this Court.

[82] It is beyond dispute that s. 2 of both the former Act and of the CFCSA require that the "safety and well-being of children" be the paramount consideration in interpreting and administering the legislation. Section 2(a) of the CFCSA also provides, as a statement of general principle, that children are entitled to be protected from harm or threat of harm. However, I am unable to agree with Mr. Justice Lambert that the introductory words of s. 2, together with the wording of s. 2(a), can be elevated, in effect, to an overarching principle, or a "paramount principle of positive law", which would permit one to ignore or override the express and specific wording of s. 13(1) of the CFCSA. Those principles are to be used as guides for interpreting and administering the CFCSA, not as the

equivalent of a "notwithstanding clause" to defeat the express wording of a specific subsection.

[83] Nor am I persuaded that there is a "gap" or lacuna in the CFCSA which would require such an interpretation of these sections in order to ensure that children who are at risk are protected. The definition of "parent" in s. 1, when read together with s. 13(1), is broad enough to ensure that the state will be able to intervene where those primarily responsible for the care of children fail to live up to their responsibility by acts of omission or commission.

[84] As earlier stated, no set of circumstances has been identified in which a child could be regarded to be in need of protection which is not covered by s. 13(1) of the CFCSA, or elsewhere in the Act. For example, if circumstances such as those described in the G. case were to arise again, and the evidence did not permit a judge to conclude that the parents had inflicted the harm to the children, although the judge was satisfied that the harm was not accidentally caused, the judge would be entitled to find that the children were in need of protection pursuant to s. 13(1)(c) or (d) of the CFCSA. In other circumstances, if the harm were caused by someone with whom the parent was living, the court could make a "protective intervention order" under s. 28 to prohibit that person from living with, or having contact with, the child.

[85] In situations involving harm or potential harm to children which do not justify a finding that a child needs protection under s. 13(1), there are numerous provisions of the CFCSA enabling the provision of support services to assist parents who are having difficulties parenting for whatever reason.

[86] In his reasons, however, Mr. Justice Lambert concludes that, if the Legislature had intended s. 13(1) to be exhaustive of those circumstances in which a child needs protection, the opening words of that section would have read as follows:
A child needs protection only in the following circumstances: . . .

In my view, however, the plain meaning of the section as it presently stands is that a child needs protection in the circumstances set forth. The corollary to this proposition is that a child does not need protection from the type of harm contemplated by the Act unless one or more of the circumstances referred to in one of those subsections applies. Those subsections comprehensively cover acts of omission and commission by the "parent" as defined in s. 1.

[87] If the Legislature had intended s. 13(1) to represent only a partial list of the circumstances in which a child could be found to need protection, one would have expected it to use language to that effect. For example, the legislation could have provided that: "The circumstances in which a child needs protection include the following:", followed by the lettered subsections.

[88] To utilize the general principles set forth in s. 2 of the Act to expand the category of circumstances in which a child needs protection is to open the door to unlimited and non-circumscribed intervention in the family by the state. While one would not expect those entrusted with the difficult task of administering the Act to act precipitously, it is not difficult to conceive of circumstances in which public pressure, or a lack of institutional resources, could trigger the removal of children from their families, when less drastic means were available to protect both the children and the integrity of the family.

[89] Further, as earlier noted, the use of the guiding principles in s. 2 to effectively create an unspecified and unlimited list of circumstances in which a child could be found to need protection would be to render s. 13(1) redundant. Rather than clarifying the law, it would introduce uncertainty to it.

[90] In summary, given the significant differences in the wording of s. 13(1) of the CFCSA and the definition of "in need of protection" in the former Act, and for the other reasons to which I have referred, I conclude that the G. decision does not govern the determination of whether a child is in need of

protection under the CFCSA, but that this determination must be made on the basis of s. 13(1). I will discuss the consequences of this conclusion in relation to the facts of this case later in these reasons.

[91] I now turn to the question of the standard of proof to be applied in making the determination of whether a child needs protection within the meaning of s. 13(1).

(f) The Standard of Proof

[92] As earlier noted, the only judgment in the G. decision which addresses the standard of proof to be applied in making a determination of whether a child is in need of protection under the former Act is that of Locke J.A., quoted at para. 72 of these reasons. In my view, the quotation from the M.(B.) decision relied upon by Mr. Justice Locke does not accurately set forth the appropriate standard of proof to be applied under s. 40 of the CFCSA at a protection hearing. In particular, the quotation refers to the best interests of the child, which is not a consideration under s. 40 of the CFCSA, but only comes into play under s. 41 (the "disposition stage") once a court has determined that a child needs protection. The former Act did not clearly delineate between these two stages. Rather than risk any confusion as to the proper standard of proof to be applied under s. 40 of the CFCSA, therefore, I will analyze this issue without regard to the G. decision.

[93] I begin by stating, as a general principle of law, that there are only two standards of proof known to our law: the civil standard of proof on a balance of probabilities, and the criminal standard of proof beyond a reasonable doubt. (See, for example, Smith v. Smith, [1952] 2 S.C.R. 312, and Hanes v. Wawanesa Mutual Insurance Co., [1963] S.C.R. 154.) Is there any reason to modify the civil standard in cases involving the protection of children? In my view, there is not.

[94] I am guided in my analysis of this issue by the reasoning of the majority decision of the House of Lords in In re H. and Others (Minors), [1996] A.C. 563 (H.L.) ("H."), which was decided under the Children Act 1989 (U.K.), 1989, c. 41 (the "Children Act"). The counterpart to s. 13(1) of the CFCSA found in the Children Act has been construed by the House of Lords in a manner which is helpful to the discussion of the issues before us on this appeal. In particular, that decision deals with the meaning of the word "likely" when used in protection legislation and with the burden of proof to be applied in protection proceedings.

[95] The provisions of the Children Act which are relevant to this discussion are ss. 1 and 31, which provide as follows:

1."(1) When a court determines any question with respect to"

(a) the upbringing of a child; . . .

the child's welfare shall be the court's paramount consideration.

* * *

31."(1) On the application of any local authority or authorised person, the court may make an order"

(a) placing the child with respect to whom the application is made in the care of a designated local authority; or

(b) putting him under the supervision of a designated local authority or of a probation officer.

(2) A court may only make a care order or supervision order if it is satisfied"

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is

attributable to"

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child's being beyond parental control.

* * *

(9) In this section"

. . .

"harm" means ill-treatment or the impairment of health or development;

. . .

"health" means physical or mental health; and

"ill-treatment" includes sexual abuse and forms of ill-treatment which are not physical.

(10) Where the question of whether harm suffered by a child is significant turns on the child's health or development, his health or development shall be compared with that which could reasonably be expected of a similar child.

(Emphasis added)

[96] The Children Act refers to "significant harm", rather than simply "harm". I will return to the import of this wording in relation to the CFCSA later in these reasons.

[97] In H., four young girls were apprehended from their mother as a result of allegations of sexual abuse made by the eldest of them against the man with whom her mother was living. There were no allegations of abuse in relation to the three younger girls. The male in question was charged with, and ultimately acquitted of, four counts of rape in relation to the eldest girl. The local authority proceeded, nonetheless, with applications to have the three younger children declared in need of care.

[98] The trial judge in the care proceedings concluded that he could not be sure "to the requisite high standard of proof" that the eldest child's allegations were true. In the result, he dismissed the local authority's application for a care order. The Court of Appeal dismissed the local authority's appeal, as did the majority of the House of Lords.

[99] Lord Nicholls of Birkenhead wrote the majority decision in the House of Lords. He framed the issue on appeal as follows (p. 583): "This appeal concerns the need for the court to be `satisfied' that the child is suffering significant harm or is `likely' to do so." He then commenced an analysis of the phrase "likely to suffer harm". I note that the comparable wording of s. 13(1)(a) of the CFCSA is "likely to be physically harmed. . . ."

[100] Counsel for the mother in H. argued that the word "likely" meant "probable" and asked the court to find that an earlier decision of the Court of Appeal holding otherwise was wrong. Lord Nicholls rejected this submission. In so doing, he stated at pp. 584-5:

In everyday usage one meaning of the word likely, perhaps its primary meaning, is probable, in the sense of more likely than not. This is not its only meaning. If I am going walking on Kinder Scout and ask whether it is likely to rain, I am using likely in a different sense. I am inquiring whether there is a real risk of rain, a risk that ought not to be ignored. In which sense is likely being used in this subsection?

In section 31(2) Parliament has stated the prerequisites which must exist before the court has

power to make a care order. These prerequisites mark the boundary line drawn by Parliament between the differing interests. On one side are the interests of parents in caring for their own child, a course which prima facie is also in the interests of the child. On the other side there will be circumstances in which the interests of the child may dictate a need for his care to be entrusted to others. In section 31(2) Parliament has stated the minimum conditions which must be present before the court can look more widely at all the circumstances and decide whether the child's welfare requires that a local authority shall receive the child into their care and have parental responsibility for him. The court must be satisfied that the child is already suffering significant harm. Or the court must be satisfied that, looking ahead, although the child may not yet be suffering such harm, he or she is likely to do so in the future. The court may make a care order if, but only if, it is satisfied in one or other of these respects.

In this context Parliament cannot have been using likely in the sense of more likely than not. If the word likely were given this meaning, it would have the effect of leaving outside the scope of care and supervision orders cases where the court is satisfied there is a real possibility of significant harm to the child in the future but that possibility falls short of being more likely than not. Strictly, if this were the correct reading of the Act, a care or supervision order would not be available even in a case where the risk of significant harm is as likely as not. Nothing would suffice short of proof that the child will probably suffer significant harm.

The difficulty with this interpretation of section 31(2)(a) is that it would draw the boundary line at an altogether inapposite point. What is in issue is the prospect, or risk, of the child suffering significant harm. When exposed to this risk a child may need protection just as much when the risk is considered to be less than 50-50 as when the risk is of a higher order. Conversely, so far as the parents are concerned, there is no particular magic in a threshold test based on a probability of significant harm as distinct from a real possibility. It is otherwise if there is no real possibility. It is eminently understandable that Parliament should provide that where there is no real possibility of significant harm, parental responsibility should remain solely with the parents. That makes sense as a threshold in the interests of the parents and the child in a way that a higher threshold, based on probability, would not.

(Emphasis added)

[101] Lord Nicholls concluded, therefore, that "likely" was used in the sense of a "real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case."

[102] In my view, the word "likely" in s. 13(1)(a) bears a similar meaning. I am satisfied that the same considerations apply under s. 13 of the CFCSA as apply under s. 31 of the Children Act in that respect.

[103] In H., Lord Nicholls then went on to discuss the burden of proof. He noted that the court had to be "satisfied" that the criteria under s. 31 were met before it could make a care order. Under the CFCSA, the word "satisfied" is not expressly used, but I have little hesitation in finding that a child can only be found to be in need of protection under s. 13 if the court is satisfied that the criteria set forth in the various subsections are met. For that reason, I find the reasoning of Lord Nicholls in H. persuasive on this point.

[104] Lord Nicholls noted that the usual standard of proof in civil matters is the balance of probability, which he used interchangeably with the "preponderance of probability". He said that he could find no reason for concluding that the

burden should be different in family proceedings. He noted that, built into the civil standard of proof was what he referred to as a "generous degree of flexibility" depending on the seriousness of the allegation raised in the proceedings. In my view, this flexibility has been recognized in Canadian jurisprudence, as for example, in professional misconduct proceedings and proceedings alleging civil fraud. This flexibility is little more than a recognition that there are degrees of probability within the civil standard.

[105] In rejecting a third standard of proof, Lord Nicholls stated at p. 587:

> If the balance of probability standard were departed from, and a third standard were substituted in some civil cases, it would be necessary to identify what the standard is and when it applies. Herein lies a difficulty. If the standard were to be higher than the balance of probability but lower than the criminal standard of proof beyond reasonable doubt, what would it be? The only alternative which suggests itself is that the standard should be commensurate with the gravity of the allegation and the seriousness of the consequences. A formula to this effect has its attraction. But I doubt whether in practice it would add much to the present test in civil cases, and it would risk causing confusion and uncertainty. As at present advised I think it is better to stick to the existing, established law on this subject. I can see no compelling need for a change.

[106] I agree with this analysis. In my view, the current standard of proof offers sufficient certainty and flexibility in civil cases that it would be counter-productive and potentially confusing to adopt a third standard.

[107] In applying the civil standard to the facts before him, Lord Nicholls stated that the balance of probability applied to past or current harm. With respect to the likelihood of harm in the future, he stated at p. 588:

> The same approach applies to the second limb of section 31(2)(a). This is concerned with evaluating the risk of something happening in the future: aye or no, is there a real possibility that the child will suffer significant harm? Having heard and considered the evidence, and decided any disputed questions of relevant fact upon the balance of probability, the court must reach a decision on how highly it evaluates the risk of significant harm befalling the child, always remembering upon whom the burden of proof rests.
>
> (Emphasis added)

[108] I interpret these passages as being in accord with the analysis of this issue by Mr. Justice Lambert, particularly at paras. 26, 27, 28 and 30 of his reasons.

[109] As earlier noted, I differ from Mr. Justice Lambert in that I am satisfied that the past harm, and likelihood of future harm, must be causally connected to the child's parent under s. 13(1)(a) of the CFCSA for the reasons I have given at paras. 73 to 90 of these reasons.

[110] Before leaving this subject, I think it important to say a few words about the nature of the harm which must be established in order to justify a finding that a child is in need of protection within the meaning of s. 13. I remain concerned that interpreting the word "harm" too broadly may result in casting the protection net too widely, thus leading to the removal of children from the care of their parents in circumstances in which the appropriate course of action would be to offer the family support services.

[111] I cannot conceive that the Legislature intended the CFCSA to authorize the removal of children from their parents' care on the basis of any harm to those children, no matter how trifling or transitory the harm might be. I am of the view, therefore, that s. 13 must be interpreted as justifying a finding that a child is in need of protection only if the harm established is significant harm. By "significant", I mean harm that is more than trifling or transitory in nature; that is

substantial enough to warrant government intervention, rather than government assistance through the provision of support services. Inadequate diet or hygiene, for example, would not meet this threshold; the type of life-threatening harm found in this case, would.

[112] There will, of course, be gradations of harm falling between these extremes which will necessitate a judgment call on the part of the front-line workers, in the first instance, and judges at a later stage of the process. In many cases, the judgment call will be difficult. In that regard, I adopt the remarks of Lord Nicholls in the following passage from his reasons in H. at p. 592:

> I am very conscious of the difficulties confronting social workers and others in obtaining hard evidence, which will stand up when challenged in court, of the maltreatment meted out to children behind closed doors. Cruelty and physical abuse are notoriously difficult to prove. The task of social workers is usually anxious and often thankless. They are criticised for not having taken action in response to warning signs which are obvious enough when seen in the clear light of hindsight. Or they are criticised for making applications based on serious allegations which, in the event, are not established in court. Sometimes, whatever they do, they cannot do right.
>
> I am also conscious of the difficulties facing judges when there is conflicting testimony on serious allegations. On some occasions judges are left deeply anxious at the end of a case. There may be an understandable inclination to "play safe" in the interests of the child. Sometimes judges wish to safeguard a child whom they fear may be at risk without at the same time having to fasten a label of serious misconduct on to one of the parents.

[113] In summary, I conclude that the standard of proof which must be applied under the CFCSA, and, in particular, to justify a finding under s. 13 of the CFCSA that a child needs protection, is the civil standard of proof on a balance of probabilities. Thus, under s. 13(1)(a), the onus is on the director to prove, on a balance of probabilities, either that the child has been physically harmed by the child's parent in the past, or that there is a real risk that the child will be physically harmed by the child's parent in the future. The harm which must be established in either case is significant harm; that is, harm which is more than trifling or transitory in nature such as to justify intervention by apprehension, rather than by the provision of support services to the child and/or the family. As Mr. Justice Lambert has stated, the CFCSA requires that, in borderline cases, the paramount consideration must be the safety and well-being of the child and the right of the child to be protected from harm or the real risk of harm.

(g) Application of the Law to the Facts of this Case

(i) Findings of Judge Collings

[114] Since Judge Collings's findings of fact and analysis of those findings give rise to my conclusion that the standard of proof under s. 13(1)(a) of the CFCSA was met in this case, it is important to set out his findings and analysis in some detail.

[115] Judge Collings made the following preliminary observations arising from the evidence:

> Between August 24th, 1995 and April 18th, 1996 [R[redacted]] had by my count 8 infections (Mr. Hamilton's count is 14, but after a while it became uncertain what was a separate infection) of which at least 2 were infections of the blood stream, very serious stuff. This is a highly unusual number. It's hard to attribute all these to chance or human error in a supposedly sterile environment. Furthermore a whole battery of tests has failed to find a cause for the failure to digest and the infections to wit: [battery of tests listed] [Reasons, p. 8]

* * *

Following July 9th when B[redacted] S[redacted] left Children's Hospital R[redacted] enjoyed what I can only call a miraculous recovery from the medical point of view. . . .

The speed and completeness of this recovery are truly striking. [p. 10]

I add one thing about Ms. S[redacted]. She isn't a reliable witness. . . . When Ms. S[redacted]'s evidence contradicts that of other witnesses I shall tend to accept theirs. [p. 12]

* * *

The central fact in this case, which overshadows all others, is the speed and completeness of R[redacted]'s recovery after B[redacted] S[redacted] was excluded. The doctors naturally accepted this as cause and effect, i.e. that B[redacted] S[redacted] had harmed the child while she was in the hospital with her, that when she was excluded the harm ceased, and that cessation let [sic] to the recovery. [p. 13]

(Emphasis added)

[116] The trial judge made reference to the evidence before him indicating that Ms. S[redacted] was the cause of R[redacted]'s ongoing problems. In his reasons, he repeatedly emphasized the fact that there was no direct evidence in that regard. He was clearly troubled about the prospect of making a finding that Ms. S[redacted] was the cause of R[redacted]'s infections in the absence of direct evidence.

[117] At p. 13 of his reasons he stated as follows:

Beyond that circumstantial evidence, we have little besides speculation. What we have, I consider in point form:

1. The medical problems R[redacted] suffered from August, 1995 through July, 1996 were of three general types - vomiting, diarrhoea and infections - which combined to make her unable to digest food. These three problems could all have been caused by sabotage, fairly easily and without much risk of detection. But there is no direct evidence that they were.

2. If they were caused by sabotage, B[redacted] S[redacted] is the obvious suspect, having the physical opportunity and the medical knowledge. In fact she was the only constant person in attendance on R[redacted], the doctors and nurses coming and going. But there is no direct evidence linking her to any such sabotage.

3. R[redacted]'s quick and complete recovery was due to her successful refeeding in July, 1996.

(Emphasis added)

[118] The trial judge referred to various medical explanations which could account for the success of refeeding at this point, but he said they were all speculative. He then pointed to evidence which militated for and against a finding that Ms. S[redacted] had a motive to harm R[redacted], but noted that this evidence also remained in the realm of speculation. He remarked that the fact pattern fit cases of physical abuse, but again decried the presence of direct evidence in that regard. In so doing, however, he made the following significant comments, at p. 16 of his reasons:

But I'm convinced by the evidence of Drs. Hlady, Riddell and Israels that interference with medical procedures, probably intentional, is the most likely cause of R[redacted]'s illness and that brings it within the fact pattern [of abuse].

. . . Particularly convincing to me were the long series of serious infections in a supposedly

antiseptic environment, which ceased almost immediately after B[redacted] S[redacted]'s exclusion.

(Emphasis added)

[119] The trial judge went on to discuss the relevant authorities, with particular emphasis on the decision of this Court in G. At p. 19 of his reasons, he referred, with approval, to Judge Stansfield's summary of the ratio of the majority in G., found in Superintendent v. H.L. (17 February 1995), Kelowna 24861 (B.C. Prov. Ct.):

I understand the ratio of Mr. Justice Hinkson's decision to be that if a child has suffered harm while in the care of her parents, in the absence of proof of a cause unrelated to the parents' care, the hearing judge must protect against the reasonable apprehension that the parents may have been the cause of the injury. The child must in that circumstance be understood to be in need of protection, and the hearing judge must move to the second stage of the inquiry under section 13(1) [the disposition stage].

[120] In the result, Judge Collings concluded that the G. case was binding upon him. At pp. 20-21 of his decision, he expressed his overall conclusions as follows:

DECISION

I turn to Judge Stansfield's clear restatement of Hinkson J.A.'s decision in the G. case and I rule:

1) R[redacted] was still in the care of her mother while in the hospital.

2) She suffered harm while in that care.

3) There is no proof of a cause unrelated to her mother's care.

4) There is a reasonable apprehension that her mother may have been the cause of R[redacted]'s illnesses or some of them.

5) I therefore find R[redacted] to have been in need of protection on ground (a) of s. 13. I conceive that taking Hinkson J.A. literally, I may not need to, but I don't want to leave a loose end.

6) Alternatively, under the lowered standard of proof laid down by Locke J.A. [speaking for himself in G.] I find R[redacted] to have been in need of protection on the same grounds. I deliberately refrain from stating what my decision would have been had I had to decide on a balance of probabilities, or any higher standard. That would have placed me back in the dilemma from which the G. case delivered me.

(Emphasis added)

[121] It is important to note that Judge Collings interpreted the G. decision as not requiring him to find that the harm to R[redacted] was caused "by the parent", despite the wording of s. 13(1)(a) of the CFCSA. It was for this reason he felt it unnecessary to state what his decision would have been had he been required to find that the harm was caused by Ms. S[redacted] on a balance of probabilities. It is significant, in my view, that he did not say that he was not satisfied that the evidence fell short of such a finding, but, rather, that it was unnecessary for him to go that far, given his interpretation of the G. decision.

(ii) Findings Upheld on Appeal

[122] As earlier stated, Madam Justice Levine upheld the findings of fact and conclusions of the trial judge,

substantially for the reasons given by him and based on the authority of the G. decision.

(iii) Conclusion Based on the Findings

ÔÃÃÄ In my view, the findings of the trial judge, with particular emphasis on the highlighted extracts from those findings set forth in paras. 115 to 118 of these reasons, lead inexorably to the conclusion that R had been physically harmed by Ms. S.

[124] Although Judge Collings expressly declined to say what his conclusion would have been had he been required to make a decision on a balance of probabilities that Ms. S had caused the harm to R, I have little hesitation in concluding that the evidence satisfied that test. It is clear that Judge Collings was reluctant to come to such a conclusion on the basis of circumstantial evidence. He did not appear to give credence, however, to the right of a trial judge in a civil proceeding to find that allegations have been proved on a balance of probabilities based on reasonable inferences drawn from circumstantial evidence. Rather, he repeatedly referred to the absence of direct evidence as being an obstacle to the critical fact-finding process. While it is generally less difficult to found conclusions on direct evidence, there will be cases, as here, where the circumstantial evidence is sufficiently overwhelming to meet the burden of proving the disputed allegations of fact on a balance of probabilities.

[125] Thus, despite the fact that I have found that the G. decision does not set forth the appropriate analysis to be followed in making determinations under s. 13 of the CFCSA, I am satisfied that the conclusion reached by Judge Collings that R was in need of protection is fully supported by the evidence. It follows that I am satisfied that Madam Justice Levine was correct in upholding that conclusion on appeal.

[126] I would, therefore, dismiss this ground of appeal.

(2) APPLICATION OF S. 7 OF THE CHARTER

[127] The submission of counsel for Ms. S under s. 7 of the Charter proceeded on the basis that the trial judge had applied a lesser standard of proof than the balance of probabilities, that this contravened Ms. S's right to parent, and that it was not in accord with principles of fundamental justice. Given my conclusions that the appropriate standard of proof to be met under s. 13(1) is proof on a balance of probabilities, and that this standard was met on the facts of this case, the foundation for the s. 7 argument disappears. I would, therefore, leave for another day the interesting question of whether such a s. 7 right exists.

[128] I would dismiss this ground of appeal.

CONCLUSION

[129] I would dismiss the appeal.

[130] Since I have accepted the submission of counsel for Ms. S that the G. case should no longer be applied under the CFCSA, and since this decision is of significance far beyond the facts of this case, I am of the present view that each party should bear its own costs. In the event that the parties wish to make submissions with respect to costs, however, I would grant liberty to apply.

"The Honourable Madam Justice Prowse"

I AGREE: "The Honourable Madam Justice Rowles"