NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Community Services) v. Nova Scotia (Attorney General)*, 2017 NSCA 73

Date: 20170331
Docket: CA 460500
Registry: Halifax

Between:

Minister of Community Services, M.A.C., and M.C.O.

Appellants

v.

The Attorney General of Nova Scotia

Respondent

Restriction on Publication: s. 94(1) *Children and Family Services Act*

Judges:	Beveridge, Farrar and Bourgeois, JJ.A.
Appeal Heard:	March 30, 2017, in Halifax, Nova Scotia
Written Release	August 23, 2017
Held:	Appeal allowed, per reasons for judgment of the Court
Counsel:	Peter C. McVey, Q.C., for the appellant Minister Judith Schoen, for the appellants M.A.C. and M.C.O. Debbie Brown, for the respondent (watching brief)

Restriction on publication: Pursuant to s. 94(1) *Children and Family Services Act*, S.N.S. 1990, c. 5.

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

SECTION 94(1) PROVIDES:

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

By the Court:

[1] At the heart of this matter is a very young child, O.R. She was born in March 2016. Her biological mother entered into an agreement with the Minister of Community Services ("the Minister") placing her in the Minister's care as permitted under the *Children and Family Services Act* (the *CFSA*).

[2] On the same day, the Minister placed O.R. with a couple, M.A.C. and M.C.O., for the purpose of adoption. In due course, and with the consent of the Minister, M.A.C. and M.C.O. filed an Application for Adoption with the Nova Scotia Supreme Court (Family Division).

[3] The application came before Associate Chief Justice Lawrence O'Neil on October 14, 2016. The adoption was not granted. Rather, the hearing judge raised concerns regarding the lack of notice given to O.R.'s biological father and invited submissions on this issue, including eventually from the Minister.

[4] The Minister accepted the court's invitation and provided a detailed written response, followed by further oral submissions. On February 2, 2017, the hearing judge released a written decision in which he, on his own motion, concluded it was appropriate to refer a number of constitutional questions to himself for determination.

[5] The Minister, joined by M.A.C. and M.C.O., appealed to this Court, challenging the appropriateness of the hearing judge's referral. The respondent Attorney General has taken no position on the appeal.

[6] At the conclusion of the hearing, this Court was satisfied that the hearing judge erred in law and, further, had caused a patent injustice to M.A.C., M.C.O. and the child, O.R. The order for adoption was issued, with a promise of written reasons to follow. These are those reasons. For clarity, we will refer to the appellant Minister as simply the Minister. We will refer to the appellants M.A.C. and M.C.O. either by their initials, or as "the appellants".

Procedural Background

[7] It is useful to outline the procedural history of this matter. In doing so, we will cross-reference the relevant provisions of the *CFSA*. It has long been recognized that the provisions contained in the *CFSA* constitute a complete

statutory code regarding adoption in this province (*D.T. (Re)*, [1992] N.S.J. No. 289). Much more will be said about *D.T.* in due course. For now, we turn to the narrative.

[8] As noted above, the child was born in March 2016. On March 30, 2016, her biological mother entered into an adoption agreement with the Minister pursuant to s. 68 of the *CFSA*. The agreement is in the form prescribed by regulation. The biological mother also swore a statutory declaration that same day, the contents of which complied with the direction contained in the *Civil Procedure Rules*.

[9] Section 68 provided:

> 68(1) A **parent** of a child may enter into an adoption agreement with a child-placing agency whereby the child is voluntarily given up to the child-placing agency for the purpose of adoption.
>
> . . .
>
> (3) A child shall not be placed in a home for the purpose of adoption pursuant to an adoption agreement unless and until every **parent** of the child has entered into such an agreement.
>
> . . .
>
> (8) Where a **parent** has entered into an adoption agreement, the child-placing agency shall, where the **parent's** whereabouts are known to the agency, advise the **parent** when the child has been placed in a home for the purpose of adoption or provide such information upon request by a **parent**.
>
> . . .
>
> (10) Where a **parent** has entered into an agreement pursuant to subsection (1), the child-placing agency has all the rights, powers and responsibilities of that **parent** so long as the adoption agreement continues in force. (Emphasis added)

[10] Clearly, the meaning of "parent" is significant. (The definition of "parent" has recently been amended. The definition which is outlined at this juncture has been replaced, but is that which was in effect at the time of the adoption application.) The legislature gave "parent" a specific meaning in the context of adoption. Section 67(1)(f) provided:

> 67(1) In this Section and Sections 68 to 87,
>
> . . .
>
> (f) "parent" of a child means
>
> (i) the mother of the child,

> (ii) the father of the child where the child is a legitimate or legitimated child,
>
> (iii) an individual having custody of the child,
>
> (iv) an individual who, during the twelve months before proceedings for adoption are commenced, has stood in loco parentis to the child'
>
> (iv) an individual who has acknowledged paternity of the child and who
>
> (A) has an application before a court respecting custody, support or access for the child at the time proceedings for adoption are commenced, or
>
> (B) has provided support for or has exercised access to the child at any time during the two years before proceedings for adoption are commenced,
>
> but does not include a foster parent.

[11] The biological mother's statutory declaration sets out the factual circumstances relating to the child's parentage. Based on her sworn declaration, the child's biological father did not fall within the definition of "parent". The biological mother was the only "parent" for the purposes of s. 68. As such, she was the only "parent" that entered into the adoption agreement (s. 68(1)) and the only "parent" required to be provided with notice when the child was placed in a home for the purpose of adoption (s. 68(8)). We pause here to add that the record shows the biological mother had the benefit of independent legal advice in relation to the execution of the adoption agreement and statutory declaration.

[12] The record shows that the child was placed in a home for the purpose of adoption on March 30, 2016 and that the biological mother was notified of that placement. At that point in time, the Minister had "all the rights, powers and responsibilities" of a parent (s. 68(10)) in relation to the child. It is also clear that upon execution of the adoption agreement, O.R. had become a "child in care", defined in s. 67(1)(c) as follows:

> (c) "child in care" means a child in respect of whom there exists an order for permanent care and custody or a child in respect of whom there exists an adoption agreement;

[13] Upon placement of the child with them, the appellants served the Minister with a Notice of Proposed Adoption. Pursuant to s. 67(2), the provision of notice served to commence the "proceedings for adoption". The child remained with the

appellants, it being their intent, and the Minister's, that the placement would eventually proceed to adoption.

[14] On August 17, 2016, the appellants filed an Application for Adoption with Consents in the Supreme Court (Family Division). Section 73 of the *CFSA* mandates that an "application for adoption shall be made to the court". The judges of the Supreme Court have fleshed out the procedural requirements for an adoption application in *Civil Procedure Rule* 61. There is no question that the appellants complied fully with the requirements of the Rule, including preparing their supporting documentation in the form prescribed.

[15] The issue of who must consent on an application for adoption was addressed by the legislature. The relevant portions of s. 74 provide:

> 74 (1) Where the person proposed to be adopted is twelve years of age or more and of sound mind, no order for the person's adoption shall be made without the person's written consent.
>
> . . .
>
> (3) Where the person proposed to be adopted is under the age of majority and **is not a child in care**, no order for the child's adoption shall be made, except as herein provided, without the written consent to adoption of the child's parents which consent may not be revoked unless the court is satisfied that the revocation is in the best interests of the child.
>
> . . .
>
> (7) No order for the adoption of a child in care of the Minister shall be made without the written consent of the Minister and no order for the adoption of a child in care of an agency shall be made without the written consent of the agency or the Minister.
>
> (8) Subject to subsection (1) and pursuant to subsection (7), **where a child proposed to be adopted is a child in care, the written consent of the agency or the Minister is the only consent required.**
>
> (9) Where a child has been given up for the purpose of adoption pursuant to Section 68, the child-placing agency to which the child has been given is entitled, while the agreement is in force, to give any consent that otherwise may be given by or is required from a person executing the agreement, and, while the agreement is in force, **the person executing the agreement is not required or entitled to give any such consent**. (Emphasis added)

[16] O.R. was a "child in care". As such, based on the above provisions, the only consent required in relation to the adoption application was that of the Minister

(which had been provided). According to the clear wording of the legislation, neither a biological mother nor biological father of a "child in care" is required to give consent to an adoption (s. 74(8)).

[17] In the present case, neither biological parent was given notice of the adoption application. This was entirely consistent with the nature of notice required under the statutory scheme. Before leaving the statutory provisions relating to adoption, we note one final provision:

> 78(1) Where the court is satisfied
>
> (a) as to the ages and identities of the parties;
>
> (b) that every person **whose consent is necessary** and has not been dispensed with has given consent freely, understanding its nature and effect and, in the case of a parent, understanding that its effect is to deprive the parent permanently of all parental rights; and
>
> (c) that the adoption is proper and in the best interests of the person to be adopted,
>
> the court **shall** make an order granting the application to adopt. (Emphasis added)

[18] The adoption application was scheduled for October 14, 2016. Ms. Schoen appeared for the appellants, having filed her supporting documentation in advance of the application. As the Minister had filed written consent to the application, counsel did not appear on her behalf. The order was not granted.

[19] From a review of the transcript, it is quite clear that the hearing judge's concern related to the absence of consent from the biological father. He noted that in all other respects, the materials in support of the application appeared to be "fine". The hearing judge expressed concern that if the order were granted, it may not be "secure", meaning it could be subject to future challenge by the biological father. He explained his concerns to the appellants as follows:

> **THE COURT:** Good Morning. My name is Justice O'Neil and I … adoptions are happy times, especially … we get to see beautiful kids and beautiful people and happy families. We often don't get to see that in our courtrooms.
>
> There's … I alerted your lawyer, Ms. Schoen, to an issue which is a technical issue. The work that was provided to the Court by Ms. Schoen is fine. All that paperwork is fine. The material that came from the government office, I have a question about. And it's a very technical question and I really struggled with how to deal with it because I know people were here and it's disappointing. I don't want to create anxiety in anybody's mind.

But it’s a technical issue that … from the government paperwork and, as I say, nothing to do with the work of Ms. Schoen or … and I had to make a decision whether to proceed anyway and issue the order today or … and risk something happening down the road where another Court might say, I shouldn’t have proceeded until I had certain information, or whether to have this conversation and issue the order later, I hope. I’m not anticipating that there’s … but, as I say, I need this question answered.

And this is … an agreement like this is not something we see a lot here. A lot of the adoptions we do are through the Department of Community Services and private adoptions. But this is … there’s an agreement with the government by the mother. So that’s what … I just need to get an answer to be confident that … and if additional information is needed, we can put it in the file and proceed, so … I’m thinking … I’m only talking maybe a week or ten days when you can come back in. And it’s … as I say, as disappointed as you might be to have to come back, I’d rather have the matter tidied up now than your having something happen down the road.

UNIDENTIFIED VOICE: Can we ask what the nature of … I know it’s technical, but could you elaborate a little bit more about what the question is?

THE COURT: Certainly. Ms. Schoen, you’re fine with me doing that?

MS. SCHOEN: Yes, absolutely.

THE COURT: Yeah.

MS. SCHOEN: Because I would tell them, anyway.

THE COURT: Sure. Yeah. No, no, just as a courtesy. The forms that the government use don’t make any reference to the biological father. And I’m sure it’s a standard form they use. They didn’t include … the forms say “Father Not Identified.” They don’t say, “Father Unknown” or “Father Consented” or anything of that nature.

And in these types of proceedings, when they … if anything like this is ever going to be set aside, it would be on the basis of due process, which means people who should have known things that were happening were never told. So I’m sure there’s an answer to that. There may be just some information. And I would just like to have that tidied up because if we do an adoption order and then it’s challenged on the basis of due process, that challenge might be successful.

And I did some inquiries, I told your lawyer, with my colleagues on the issue … on the legal issue. There’s some case law which I will read and I’d just like to make sure that it’s … the thing about … is that there’s no technical problem. The thing about adoptions is they’re final. And so we’re … the technical issues are really important. A lot of cases, you can fix it later or whatever. But adoptions, as you both know, are final and they sever the

> relationship of others to the child in a legal sense as parents. You become parents with all of those rights, et cetera.
>
> And I know it's a little disappointing, but … and … but that's where we are. Are there any other questions? I don't mind being … I'll respond to them as well as I can. I would ask you not to get anxious about this, because I know you're disappointed, as I am, but …

[20] The hearing judge then explained to the appellants what would transpire next:

> **<u>THE COURT</u>:** Yes. And so I will do additional research to satisfy myself (a) that either my concern is not warranted, it's been addressed by other case law. And there is … I have some cases. Or (b) there is … here's the answer. It might be something as simple as the Minister … or the mother … biological mother saying, I don't know who the father is, or, you know. Or the Minister might say, The father let us know, or the Minister might say, Look, this is the form we always use, and whatever. But … and Ms. … I think these are the same questions Ms. Schoen will be considering.
>
> I'm not saying there's a problem. All I'm saying is I want to make sure there's no problem. I want the order to be solid as well as I can. And if I have a question, I feel I have to answer it. And it's a very technical one. And this … so, unfortunately, I guess in some respects the easy thing for me to do would have been to just sign the order. But I just wanted to be … and as safe as possible. Right?

[21] The hearing judge assured the appellants that the matter could be returned to court quickly once the "technical issue" was addressed. That is not what happened.

The appellants' response to application judge's concerns

[22] On October 17, 2016, the appellants, through their counsel, wrote to the court in an attempt to address the "technical issue". In Ms. Schoen's letter, she provided the definitions of "child in care" and "parent" as outlined above. She further highlighted s. 68(1) respecting adoption agreements, as well as the need for only ministerial consent as referenced in s. 74(8). Ms. Schoen further alerted the hearing judge to the existence of case law from this Court which specifically addressed the role of biological fathers within the legislated adoption regime. She asserted that the factual circumstances in the present application mirrored that which existed in *D.T.*, where this Court found that the legislature had specifically

contemplated biological fathers who did not fall within the definition of "parent", were not entitled to notice of, or participation in, adoption proceedings.

[23] Ms. Schoen concluded her correspondence with a request that the adoption order be granted.

The November decision

[24] The adoption order was not issued, nor was the matter placed back on the docket for a timely determination. Instead the hearing judge issued a written decision on November 2, 2016 (2016 NSSC 296). After reviewing the background and statutory provisions, the hearing judge identified the "issue" as being:

> [12] The issue for the court at this juncture of the process is whether notice of this proceeding must be provided to the child's father or whether these circumstances require an explanation for why notice to the father has or has not been provided. Notice of this proceeding would, at a minimum, provide an opportunity for a father to establish that he is a parent. Is it illogical to assert that a father who may not be aware his child has been born is not a parent because he has not paid child support or visited the child, for example? Is this circular reasoning?

[25] He proceeded to explain:

> [13] The Applicants must be confident the order of adoption they seek will be secure. The court explained its concern in this respect when they appeared.
>
> [14] If the court were to concern itself solely with what appears to be the established practice associated with adoption agreements pursuant to s. 68 of the *CFSA*, then there is no need for the Applicants to be concerned that their adoption order might not be secure. However, not all established administrative practices survive scrutiny once subject to over sight.
>
> [15] The issue of notice of child protection matters was commented upon by me in a recent decision, *Nova Scotia (Community Services) v. K.C-S. and C.T.*, 2016 NSSC 280. Justice Gregan also discussed the notice requirements of the CFSA in *Re: Adoption of I.F.M.*, 2016 NSSC 83.
>
> [16] Whether a parent must receive notice of a legal proceeding that may impact on a father or mother's parental rights is a basic question, which in my view needs to be addressed. The court is aware of the decision of our Court of Appeal in *T.(D.) Re:* [1992] N.S.J. 289.
>
> [17] Jurisprudence and societal attitudes about the rights and responsibilities of biological parents have been evolving.

[26] The decision concludes with the hearing judge inviting the Minister "to answer the question(s) raised in paragraph 12".

The Minister's response

[27] The Minister responded to the hearing judge's invitation in two ways. On December 1, 2016, Ms. Mary Craig, the Minister's Manager of Adoption Services, wrote to the court indicating counsel (Mr. McVey) would be requesting a hearing in order to fully respond to the issue identified by the court. Additionally, Ms. Craig advised she had reviewed the adoption file and confirmed that prior to entering into the adoption agreement with the biological mother:

- all of the Minister's policies were followed;
- proper questions had been asked of the birth mother, and responses received;
- all of the required consents had been received.

[28] On December 2, 2016, the Minister's counsel filed extensive written submissions (61 pages supported by 75 cited authorities) which responded to the questions posed by the hearing judge in his November 2nd decision. In addition to the written submissions, counsel requested a further hearing.

[29] In her factum, the Minister accurately summarizes the contents of the written submissions made to the hearing judge:

> 52. On December 2, 2016, the Minister filed Submissions addressing all of the following:
>
> a. The evidence before the hearing judge;
>
> b. The Issue raised by the hearing judge;
>
> c. The two binding decisions on point, which answer the Issues posed;
>
> d. The facts, issues and outcome at each level in both *Re DT* and *Re DFT*;
>
> e. The law governing the power of the Court of Appeal to revisit a panel decision;
>
> f. The doctrine of *stare decisis*, as a full answer to his identified Issue;
>
> g. The societal values that lie behind the doctrine of *stare decisis*;

h. The *Bedford/Carter* test for a trial court to reconsider a settled ruling;

i. Why the *Bedford/Carter* test is not met on the facts of this proceeding;

j. The four Supreme Court (Family Division) decisions, in which judges on their own motion have directed "notice to fathers" despite the evidence and the *Act*'s definition;

k. Statutory interpretation of the legislation on the issue of notice to fathers, addressing interpretative principles, purposes, legislative history and related legislation, before submitting that the two binding decisions are correct in law;

l. The definition of "parent" for adoption, including as recently amended by the Legislature, **removing** any distinction between married and unmarried parents, and legitimate and illegitimate children, amendments now in force;

m. The errors in principle in the decisions of the judges on their own motion in the recent Supreme Court (Family Division) decisions, in which judges concluded:

> i "natural justice" and "the duty of fairness" require notice to fathers;
>
> ii. the Court's *Rules* or inherent jurisdiction allow it to order notice; and/or
>
> iii. the *Charter* may be used interpretively to require notice to fathers;

n. An Ontario appeal decision, reversing an adoption judge who commenced a Constitutional Question on his own motion, a case cited by this Court in *Re DT*;

o. The absence of any **direct** *Charter* challenge raised by any litigant, noting a father could come forward in the future in another case, as occurred in the past in *Re DT*, and offering leading case citations that might be considered in that future case;

p. The principle that, "such complex questions are best resolved in a matter with a person actually posing the questions to the Court, in an adversarial context, demanding an answer", adding, "this is not that case, and this is not that time";

q. A submission that no further inquiry, explanation or answer is required of the Minister in such a proceeding, as this is not what the Legislature intended;

r. Explaining how a biological father can bring himself within the definition of "parent" regarding a newborn child, without "illogic" or "circular reasoning";

s. The context in which she determines who must consent to a Section 68 Agreement, and the benefits of the statute as drafted over any court process;

t. A submission that it would be an error of law to challenge, without foundation, or to reject the uncontradicted evidence placed before an adoption hearing judge on the issue of parentage of the child, citing an Ontario appeal decision on point;

> u. The limited, "change of status" role of a judge at the hearing under this legislation.
>
> 53. The Minister concluded her written Submission by thanking the Court, asking that her Recommendation be considered, and requesting a ruling on the Adoption Applicants' application, submitting as the Minister that she could see no legal impediment to an Order. (Emphasis in original)

[30] As requested by the Minister, a hearing was scheduled for January 10, 2017. On the day before, the hearing judge emailed counsel advising he was considering making a constitutional reference:

> I have had the opportunity to study the material provided by you and thank you for the same. I note from Mr. McVey's submission he is not authorized to speak to certain constitutional questions that may be alive in this matter. For that reason, I propose to provide formal notice of the same as contemplated by s. 10 of the Constitutional Questions Act, RSNS 1989, c. 89 and consistent with R 31.19 or an analogous direction.
>
> I will hear you tomorrow on this proposed course of action if you wish to make a submission in opposition to proceeding in this way. If tomorrow is too early for you to be prepared to do so I will provide additional time. Should I then decide to provide notice I suggest all arguments be on the same day. For rescheduling purposes I will free time on my docket to hear the matter when all counsel are prepared and available should the matter not proceed tomorrow. Subject to the foregoing I do not anticipate a significant delay.
>
> Finally if you know you will not be opposing notice to the Attorney General please advise today. This will impact on preparation for tomorrow's appearance. Please have your calendars available tomorrow for reference if necessary.

The January 10, 2017 hearing

[31] The hearing proceeded on January 10, 2017 with the parties responding to the newly raised issue. On behalf of the appellants, Ms. Schoen urged the court, should it not be deterred from making a constitutional reference, to "leave her clients out of it" by granting the adoption which, in all respects, complied with the existing statutory requirements and judge-made rules. She stressed to the court that based on the long-standing statutory scheme, what ought to have been a simple application, had become unnecessarily expensive and anxiety provoking for her clients.

[32] In his submissions, counsel for the Minister provided a multi-pronged explanation as to why the court ought not to make the constitutional reference.

This included not only a review of the principles contained in the earlier written submissions, notably the existence of binding appellate authority, but also that the issues being considered were, based on Supreme Court of Canada jurisprudence, moot. Counsel urged the court to be mindful of the lack, in the circumstances of this case, of a proper evidentiary record relating to the *Charter* issues being raised by the hearing judge. Counsel also raised concern with respect to the delay a constitutional reference would create and, in particular, the impact on O.R.

[33] The hearing judge reserved his decision, notifying the parties via email on January 17, 2017, that he would be making a constitutional reference. His reasons were contained in a written decision released February 2, 2017 (2017 NSSC 27), and in which he posed the following questions:

> **Legal Rights**
>
> [22] Is the distinction between the biological mother and the biological father when defining 'parent' a violation of the child's constitutionally enshrined legal rights; the right to life, liberty and security of the person as guaranteed by s.7 of the *Charter of Rights and Freedoms*?
>
> [23] Is the distinction between the biological mother and the biological father when defining ‘parent’ a violation of the father's constitutionally enshrined legal rights; the right to life, liberty and security of the person as guaranteed by s.7 of the *Charter of Rights and Freedoms*?
>
> **Equality Rights**
>
> [24] Is the distinction between legitimate and illegitimate children a violation of the child's constitutionally enshrined equality rights? Does the distinction offend the child's right to equality before and under law and equal protection and benefit of the law as guaranteed by the *Charter of Rights and Freedoms*?
>
> [25] Is the distinction between the fathers of legitimate and the fathers of illegitimate children a breach of the equality rights guaranteed by s.15 of the *Charter of Rights and Freedoms*? Does the distinction offend the father's right to equality before and under the law and equal protection and benefit of the law?

[34] In addition to the above *Charter*-based questions, the hearing judge, without specifying a mechanism as to how they were to be resolved, posed a series of additional non-constitutional questions:

> [26] Is there an obligation on the Minister to provide an opportunity for a person 'possibly aggrieved' (see the language of s.83(1) of the *CFSA*) to make the case that she/he is a parent?

> [27] Is there an obligation on the Minister? the Court? or both? to inquire whether notice of the proposed agreement to place a child for adoption has been provided to a 'possibly aggrieved' individual?
>
> [28] Is there an obligation on the Court to require sworn evidence that notice of the application to adopt has been given to a possibly aggrieved individual?

[35] It is clear that it was the hearing judge's intention that his written reasons constitute the entire notice to the Attorney General. He said as much:

> [38] The foregoing is notice of Constitutional Questions to the Attorney General of Nova Scotia as contemplated by legislation and the Rules of the Court.
>
> [39] A copy of this decision will be entrusted to Mr. McVey for deliver to Mr. Edward Gores, Q.C., counsel for the Attorney General. The Court scheduling office will be in communication with all counsel to schedule a Conference at which time filing deadlines and a plan forward will be confirmed.

Issues

[36] On February 17, 2017, the Minister and appellants filed a joint Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) in which they set out the following grounds:

> (1) In relation to the Appellants, M.A.C. and M.C.O., the learned hearing judge erred in law or erred in principle and caused a patent injustice, by refusing to grant an Adoption Order in accordance with Sections 67 to 87 of the *Children and Family Services Act* and *Civil Procedure Rule* 61, an Order lawfully requested by the Appellants, M.A.C. and M.C.O., recommended by the Appellant, the Minister of Community Services, and consented to by the child's sole parent and guardian at law, the Appellant, the Minister of Community Services; and
>
> (2) In relation to the Appellants, M.A.C. and M.C.O., and the Appellant, the Minister of Community Services, the learned hearing judge erred in principle and caused a patent injustice by providing notice on his own motion of certain constitutional questions under the *Constitutional Questions Act*, R.S.N.S. 1989, c. 89, s. 10:
>
> > a. Without first distinguishing binding authority directly on point, identifying any new legal issue raised in this adoption proceeding, or identifying any change in circumstances or in the evidence that might fundamentally shift the parameters of the debate, respecting the definition of "parent" in Section 67(1) of the *Children and Family Services Act*; and

b. Without first considering or applying, as requested by the Appellant, the Minister of Community Services, the legal principle of mootness, and further by compelling in the absence of any interested person, a moot hearing on the constitutionality of the definition of "parent" in Section 67(1) of the *Children and Family Services Act* repealed by S.N.S. 2015, c. 37, s. 54, coming into force on March 1, 2017 as a result of Nova Scotia O.I.C. 2016-310.

[37] In her factum, the Minister helpfully restates the issues before this Court as follows:

> Q1: Did the hearing judge err in legal principle by commencing a constitutional question on his own motion, including without addressing the binding precedent on point, the *Bedford/Carter* threshold for reconsideration of binding precedent, the evidential and legal requirements of *Charter* litigation and/or the judicial doctrine of mootness?
>
> Q2: Did the hearing judge cause a patent or obvious injustice to the Adoption Applicants, M.A.C. and M.C.O., by his refusal to grant an Adoption Order on the basis of their application and evidence, and the Minister's consent and recommendation, placed before the Court and moved for by the Applicants on October 14, 2016, October 17, 2016 and January 10, 2017?
>
> Q3: If the hearing judge did so err, in one respect or the other or in both respects, what relief can and should this Honourable Court grant in the circumstances?

Standard of Review

[38] The standard of review is not contentious. The hearing judge's decision to make a constitutional reference was a discretionary one. As such, it is afforded deference. This Court will only intervene "if we are persuaded that wrong principles of law have been applied, or that failing to intervene would produce an obvious injustice". (See *Aliant Inc. v. Ellph.com Solutions Inc.*, 2012 NSCA 89, at paras. 27 – 28.)

Analysis

Did the hearing judge err in legal principle?

[39] We are satisfied that the hearing judge erred in legal principle when forging ahead with a self-directed constitutional reference. With respect, it was inappropriate and ill-conceived. The hearing judge was provided with the correct

legal principles and authorities which ought to have informed his decision. In our respectful view, he ignored these and the practical consequences of his decision.

[40] We agree with the Minister that the hearing judge erred in three material and inter-related respects:

- Without undertaking a *Bedford/Carter* analysis, he failed to follow binding authority from this Court;
- He gave no consideration to whether the issues being raised in the reference were moot, as argued by the parties before him; and
- He failed to consider whether the case before him was suitable for the type of *Charter* litigation he was initiating.

[41] We turn to the binding authority. In her October 17, 2016 letter, Ms. Schoen impressed upon the hearing judge the significance of this Court's decision in *D.T.* She submitted, correctly, that it was not only binding, but fully answered the hearing judge's concern with respect to the lack of consent from the biological father. Mr. McVey repeated this message, expanding upon it significantly in his December 2, 2016 written submissions.

[42] *D.T.* addressed squarely the definition of "parent" in s. 67 of the *CFSA*, and the exclusion therefrom of certain biological fathers. There, a biological father became aware of the existence of a child only after it had been placed for adoption. The biological mother had entered into an adoption agreement with the Minister, and although she identified him as the biological father in her statutory declaration, the Minister did not contact him. As such, he was not a party to the agreement, nor had he received notice of the placement for adoption. He found out about the child's existence from a third party, after the placement. He immediately sought to become involved with the child, making it clear he wished to be granted custody.

[43] Before the lower court, the father made a number of arguments including that the legislation, specifically s. 67, contained a "gap" and that biological fathers in his circumstances had been overlooked by the Legislature when drafting the definition of "parent". He also submitted that the definition of "parent" infringed his s. 15 *Charter* rights.

[44] The lower court judge rejected the father's argument that the definition of "parent" infringed his *Charter* rights, but did find a "gap" in the legislation permitting the court's exercise of its *parens patriae* jurisdiction. Exercising this

jurisdiction, the lower court determined it was in the best interest of the child to permit the biological father to present an application for custody. On appeal, this Court upheld the constitutionality of s. 67, and set aside the lower court's determination that the father ought to have a custody hearing.

[45] Several excerpts from the Court's reasons are particularly helpful. Justice Chipman wrote:

> The current **duty of notification to and obtaining consent** of a biological father is premised on an acknowledgment of paternity by him by standing *in loco parentis* to the child (s. 67(1)(f)(iv)), providing or seeking to provide support or custody of the child (s. 67(1)(f)(iii)(v)(vi)) or by exercising to seeking to exercise access to the child prior to commencement of the adoption proceedings (s. 67(1)(f)(v)(vi)). **These criteria or factors upon which the current definition of "parent" is founded are not unreasonable or unfair** and appear consistent with the thinking of knowledgeable people on the subject of adoption in the 1990's.
>
> **Thus the Legislature has clearly turned its mind to the whole group of fathers of children born out of wedlock and decided some action vis-a-vis the child beyond mere participation in the act of conception was necessary before giving entitlement to participate in the adoption process.** I find it inconceivable that the Legislature which is taken to know the law "simply forgot" about fathers in the position of D.T. - those who never took a step to recognize interest in or responsibility for their children. The history of the adoption legislation in Nova Scotia refutes this conclusion. …
>
> . . .
>
> Such biological fathers as D.T. were clearly in contemplation of the Legislature as being, **as a matter of policy, inappropriate persons to play a part in the adoption process involving their children**. …
>
> . . .
>
> In *Re Adoption of Child of D.F.T. and D.M.T.* (1978), 30 N.S.R. (2d) 468, this court considered the definition of "parent" in s. 2(w) of the former *Children's Services Act*, S.N.S. 1976, c. 8. That definition is not identical to that in the Act, but is sufficiently similar to render a comparison useful. In that case, this court held that the natural father of the illegitimate child was not a parent under the section, entitled to notice of an adoption application. At p. 474, Macdonald, J.A. speaking for the court said:
>
>> ". . . it is my opinion that the word 'parent' in the *Children's Services Act* (which incidentally was enacted subsequent to all those cases that I mentioned) is restricted to those persons specifically referred to in Section 2(w) of the Act. It is my further opinion that the natural father in the present case does not fall within such definition and that consequently he

> is not entitled to notice of the proposed application for the adoption of his illegitimate child."

He continued at p. 475:

> " I would refer again to Section 16(3) of the Act [wherein consent of a parent of a legitimate child is required in adoption proceedings] and express the opinion that the putative father in this case, not in my view being a parent within Section 2(w) of the Act, **was not a person whose consent to the adoption was required and further that there was not discretion vested by the Act in the trial judge to direct that he be given notice of the application to adopt his illegitimate child**."

To find a gap in the Act so as to permit the operation of the *parens patriae* jurisdiction was to ignore the effect of this court's decisions in *D.F.T. and D.M.T.*, *supra*, and in *Family and Children Services of Kings County and D.F. v. T.G.S.C.* (1985), 49 R.F.L. (2d) 99. **Strong policy considerations demand that we recognize the adoption legislation as a complete code and that collateral proceedings taken to interfere with the process of adoption be discouraged. Adoptive parents must have confidence in the system, which confidence includes freedom from fear of such attacks. A consideration of the entire scheme of the legislation, as well as its predecessor legislation leads to the conclusion that the adoption provisions in the Act constitute a complete and comprehensive code respecting adoption matters.** Mr. Justice Hall erred in finding a gap in this legislative scheme.

. . .

The adoption legislation is geared to the importance of establishing early bonding of an unwanted child with the adoptive parents. The importance of this early bonding without disruption has been emphasized in the opinions of the experts which are in the record. While recognizing the importance of proceeding expeditiously the statute has, at the same time, placed safeguards for the protection of the interests of those parties most closely associated with the child. **The paramount consideration in all proceedings under the Act is the best interests of the child. The courts must discourage attempts to disrupt or circumvent the statutory provisions which, in view of the machinery contained in them for the protection of all interests considered worthy by the Legislature, should be respected.** (Emphasis added)

[46] This Court has determined that biological fathers who do not fall within the definition of “parent” in s. 67, are not entitled to notice, nor is their consent required for the purposes of adoption. Further, after a thoroughly argued appeal, including an evidentiary record, that provision survived a constitutional challenge. The reasons in *D.T.* fully addressed the hearing judge’s “technical issue” regarding the biological father’s involvement. The legislation did not change from the time

of this Court's decision in *D.T.*, nor has the decision been called into question by subsequent decisions of this Court or the Supreme Court of Canada.

[47] Despite both the Minister and the appellants submitting *D.T.* was binding on him and dispositive of the issue raised, the hearing judge gave it scant consideration. In the decision under appeal, *D.T.* is not referenced at all. In his earlier decision, the hearing judge does reference *D.T.* Set out earlier herein, the hearing judge's analysis is repeated:

> [14] If the court were to concern itself solely with what appears to be the established practice associated with adoption agreements pursuant to s. 68 of the *CFSA*, then there is no need for the Applicants to be concerned that their adoption order might not be secure. However, not all established administrative practices survive scrutiny once subject to over sight.
>
> [15] The issue of notice of child protection matters was commented upon by me in a recent decision, *Nova Scotia (Community Services) v. K.C-S. and C.T.*, 2016 NSSC 280. Justice Gregan also discussed the notice requirements of the CFSA in *Re: Adoption of I.F.M.*, 2016 NSSC 83.
>
> [16] Whether a parent must receive notice of a legal proceeding that may impact on a father or mother's parental rights is a basic question, which in my view needs to be addressed. The court is aware of the decision of our Court of Appeal in *T.(D.) Re:* [1992] N.S.J. 289.
>
> [17] Jurisprudence and societal attitudes about the rights and responsibilities of biological parents have been evolving.
>
> [18] The discussion of Justice Dunlop in *Manitoba (Director of Child and Family Services) v. H.H. and C.G.*, 2016 NBQB 138 is a helpful review of the constitutional rights that are often in jeopardy when the state is involved in a process that will result in the diminution or elimination of parental rights.

[48] In her December 2, 2016 submissions, the Minister set out the importance of the principle of *stare decisis*; provided the requirements articulated by the Supreme Court of Canada for a trial judge to depart from binding authority, and thoroughly set out why *D.T.* prevailed over the cases referenced by the hearing judge. None of this found its way into the decision under appeal.

[49] In *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.*, (2005), 76 O.R. (3d) 161 (C.A.), Laskin, J.A. nicely sets out the nature and importance of this principle:

> [119] The values underlying the principle of *stare decisis* are well known: consistency, certainty, predictability and sound judicial administration. Adherence

> to precedent promotes these values. The more willing a court is to abandon its own previous judgments, the greater the prospect for confusion and uncertainty. "Consistency", wrote Lord Scarman, "is necessary to certainty -- one of the great objectives of law": see *Farrell v. Alexander*, [1976] 1 All E.R. 129, [1977] A.C. 59 (H.L.), at p. 147 All E.R. People should be able to know the law so that they can conduct themselves in accordance with it.
>
> [120] Adherence to precedent also enhances the legitimacy and acceptability of judge-made law, and by so doing enhances the appearance of justice. Moreover, courts could not function if established principles of law could be reconsidered in every subsequent case. Justice Cardozo put it this way in his brilliant lectures on The Nature of the Judicial Process (New Haven: Yale University Press, 1960) at p. 149:
>
> > [T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.

[50] We are satisfied that the principle of *stare decisis* required the hearing judge to follow this Court's direction in *D.T.* in two respects: firstly, by respecting this Court's direction that the legislative provisions regarding adoption constituted a complete statutory code, prohibiting judicial intervention based on common-law authority; and secondly, that the definition of "parent" did not infringe s. 15 of the *Charter*.

[51] We do agree with the hearing judge that jurisprudence and societal attitudes can change over time. This will, on occasion, lead to courts declining to follow established and previously binding authority. The Minister recognized this too, and set out, for the hearing judge's benefit, the process mandated by the Supreme Court of Canada for just such occurrences.

[52] Two recent decisions of the Supreme Court (*Canada (Attorney General) v. Bedford*, 2013 SCC 72 and *Carter v. Canada (Attorney General)*, 2015 SCC 5) have given rise to the *Bedford/Carter* test – an analytical framework for when courts may reconsider binding decisions.

[53] In *Carter*, the Supreme Court reconsidered its previous ruling on the legality of assisted suicide (*Rodriguez v. British Columbia (Attorney General*), [1993] 3 S.C.R. 519), and came to a different conclusion. With respect to varying from binding authority, the Court wrote:

> [43] Canada and Ontario argue that the trial judge was bound by *Rodriguez* and not entitled to revisit the constitutionality of the legislation prohibiting assisted suicide. Ontario goes so far as to argue that "vertical *stare decisis*" is a *constitutional* principle that requires all lower courts to rigidly follow this Court's *Charter* precedents unless and until this Court sets them aside.
>
> [44] The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. **Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 42).**
>
> [45] Both conditions were met in this case. The trial judge explained her decision to revisit *Rodriguez* by noting the changes in both the legal framework for s. 7 and the evidence on controlling the risk of abuse associated with assisted suicide.
>
> [46] The argument before the trial judge involved a different legal conception of s. 7 than that prevailing when *Rodriguez* was decided. In particular, the law relating to the principles of overbreadth and gross disproportionality had materially advanced since *Rodriguez*. …
>
> [47] The matrix of legislative and social facts in this case also differed from the evidence before the Court in *Rodriguez*. The majority in *Rodriguez* relied on evidence of (1) the widespread acceptance of a moral or ethical distinction between passive and active euthanasia (pp. 605-7); (2) the lack of any "halfway measure" that could protect the vulnerable (pp. 613-14); and (3) the "substantial consensus" in Western countries that a blanket prohibition is necessary to protect against the slippery slope (pp. 601-6 and 613). **The record before the trial judge in this case contained evidence that, if accepted, was capable of undermining each of these conclusions (see *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at para. 136, per Rothstein J.).** (Emphasis added)

[54] In the present case, the hearing judge failed to undertake the type of analysis required of him. There was no new legal issue raised by the parties. The legal issue raised by the hearing judge – whether a biological father who does not meet the definition of "parent" must consent to an adoption – is the exact issue determined in *D.T.* In my view, the hearing judge's identification of the constitutional questions relating to s. 7 of the *Charter* (*D.T.* only dealt with an allegation of a s. 15 breach), does not serve to identify, without further analysis, a new legal issue. No party raised a s. 7 argument. No party indicated the nature of evidence that would be called in pursuing such an argument. The hearing judge provided no analysis as to how there may be a s. 7 argument to be advanced. Such

hypothetical musing on the part of the hearing judge does not, in our view, justify turning a blind eye to the principle of *stare decisis*. As will be seen, these concerns also relate to the principle of mootness and the requirements for constitutional challenges.

[55] Further, the hearing judge did not articulate what change in circumstances or what evidence he considered which satisfied him that there was a fundamental shift in the parameters of the debate. His vague reference to the evolution of jurisprudence and societal attitudes is insufficient. Further, his reliance on non-binding case authorities of questionable relevance or accuracy did not serve to displace his obligation to follow *D.T.*

[56] We turn now to the Minister's argument relating to mootness. At the January 10, 2017 hearing, the Minister argued that a constitutional reference was inappropriate as the matter was moot. The hearing judge was provided with the seminal decision from the Supreme Court of Canada, *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, the reasons being described as "the most comprehensive treatment of mootness in Canadian law" (Lorne Sossin, "Mootness, Ripeness and the Evolution of Justiciability" in *Annual Review of Civil Litigation, 2012* (Carswell; Toronto, 2012). Based on the principles articulated in *Borowski*, the Minister argued that the hearing judge ought to decline to make a constitutional reference.

[57] The hearing judge failed to consider *Borowski*, or the issue of mootness at all. It is difficult to see how his discretionary decision can be afforded deference, when a relevant legal issue brought to his attention, was effectively ignored. As will become apparent, the issues being considered by the hearing judge were undoubtedly moot. He was obligated to undertake an analysis as to whether he should proceed in light of that fact. He did not.

[58] By way of background, Mr. Borowski was an anti-abortion activist who had taken aim at certain provisions in the *Criminal Code* which permitted therapeutic abortions in proscribed circumstances. He argued the provisions breached the s. 7 *Charter* rights of the fetus. By the time the matter found its way to the Supreme Court of Canada, the provisions in question had been struck down in *R. v. Morgentaler*, [1988] 1 S.C.R. 30. Given that development, the Supreme Court heard preliminary argument as to whether Mr. Borowski's appeal was moot and, if so, whether the issues he raised ought to be adjudicated in any event. The resulting

decision sets out principles applicable not only to appellate courts, but those of first instance.

[59] Writing for the Court, Sopinka, J. stated:

> 15 The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. **The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision**. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that **no present live controversy exists which affects the rights of the parties,** the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> 16 The approach in recent cases involves a two-step analysis. First it is necessary to determine whether **the required tangible and concrete dispute** has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, **I consider that a case is moot if it fails to meet the "live controversy" test.** A court may nonetheless elect to address a moot issue if the circumstances warrant. (Emphasis added)

[60] Particularly relevant to the case at hand was the Court’s view that the stating of a constitutional question could not serve as an independent basis for transforming an otherwise moot matter into a live one which ought to be heard (para. 27).

[61] Having acknowledged a discretion to hear a moot matter, the Court examined the rationales behind the doctrine of mootness, providing guidance as to when it should be exercised. Identifying three rationales, Sopinka, J. wrote as to the first:

> 31 The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. **The requirement of an adversarial context is a fundamental tenet of our legal**

> **system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.** It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary adversarial relationships will nevertheless prevail. For example, although the litigant bringing the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context. This was one of the factors which played a role in the exercise of this Court's discretion in *Vic Restaurant Inc. v. City of Montreal*, *supra*. The restaurant, for which a renewal of permits to sell liquor and operate a restaurant was sought, had been sold and therefore no mandamus for a licence could be given. Nevertheless, there were prosecutions outstanding against the appellant for violation of the municipal by-law which was the subject of the legal challenge. Determination of the validity of this by-law was a collateral consequence which provided the appellant with a necessary interest which otherwise would have been lacking. (Emphasis added)

[62] The second rationale, one based in the effective administration of justice, was described as follows:

> 34 The second broad rationale on which the mootness doctrine is based is the concern for judicial economy. (See: Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide", *Charter Litigation*.) **It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants.** The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.
>
> 35 The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision **will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action**. The influence of this factor along with that of the first factor referred to above is evident in *Vic Restaurant Inc. v. City of Montreal*, *supra*.
>
> 36 **Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly**. This was the situation in *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, *supra*. The issue was the validity of an interlocutory injunction prohibiting certain strike action. By the time the case reached this Court the strike had been settled. This is the usual result of the operation of a temporary injunction in labour cases. If the point was ever to be

> tested, it almost had to be in a case that was moot. Accordingly, this Court exercised its discretion to hear the case. To the same effect are *Le Syndicat des Employés du Transport de Montréal v. Attorney General of Quebec*, [1970] S.C.R. 713, and *Wood, Wire and Metal Lathers' Int. Union v. United Brotherhood of Carpenters and Joiners of America*, [1973] S.C.R. 756. **The mere fact, however, that a case raising the same point is likely to recur even frequently should not by itself be a reason for hearing an appeal which is moot. It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.**
>
> 37 There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest. The economics of judicial involvement are weighed against the social cost of continued uncertainty in the law. See *Minister of Manpower and Immigration v. Hardayal*, [1978] 1 S.C.R. 470, and Kates and Barker, *supra*, at pp. 1429-1431. Locke J. alluded to this in *Vic Restaurant Inc. v. City of Montreal*, *supra*, at p. 91: "The question, as I have said, is one of general public interest to municipal institutions throughout Canada." (Emphasis added)

[63] The third rationale directly considers the appropriateness of judicial intervention:

> 40 The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. **The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.** This need to maintain some flexibility in this regard has been more clearly identified in the United States where mootness is one aspect of a larger concept of justiciability. (See: Kates and Barker, "Mootness in Judicial Proceedings: Toward a Coherent Theory", *supra*, and Tribe, *American Constitutional Law* (2nd ed. 1988), at p. 67.) (Emphasis added)

[64] In the present case, there was no live controversy. The parties before the hearing judge were entirely in agreement. No party was before the court raising an issue with respect to the proper involvement of the biological father, nor the constitutionality of the legislation. No party, or would-be intervenor, was suggesting that there was a reason to have the issues identified by the hearing judge resolved. There was no reason articulated by the hearing judge why, in the absence of a hint of a live dispute, he deemed it appropriate to pose a reference to himself questioning the constitutionality of the statutory provisions deemed appropriate by the Legislature.

[65] We also agree with the Minister that the issue of mootness was further compounded by virtue of the recent legislative changes to the definition of "parent" which served to remove the distinction between legitimate and illegitimate children within s. 67 of the *CFSA*. As such, the "Equality Rights" questions posed by the hearing judge, based on the now obsolete definition, have no useful purpose in being answered.

[66] Considering the rationales articulated in *Borowski*, we can see no compelling reason why the constitutional reference posed by the hearing judge ought to proceed. Here, there is no adversarial context. Who will put forward the position of the unknown biological father or his child? Who will present the necessary evidence upon which a Court could find a real, as opposed to a hypothetical, *Charter* breach? Quite simply, the matter is not one where the issues will be "well and fully argued by parties who have a stake in the outcome".

[67] The lack of an adversarial context informs the second rationale. The courts are full of live controversies, with real issues impacting upon the lives of real litigants. It is hardly a secret that the administration of justice is often criticized for backlogs and delay. Before adding a time consuming constitutional reference to the docket, it is "preferable to wait and determine the point in a genuine adversarial context".

[68] Finally, there is nothing on the present record which would, in our view, justify a judge-initiated intrusion into the proper role of the Legislature. The issues raised by the hearing judge were moot. They were not triggered by a litigant with a real, or even potential, argument that the legislation constituted an infringement on their rights. The concerns raised were those solely of the hearing judge. They were entirely hypothetical. With respect, it was not his function to question the constitutionality of the statutory product of legislative decision-making.

[69] We turn now to the final error alleged by the Minister – that the hearing judge failed to consider whether the case before him was suitable for *Charter* litigation. There is no question that, in appropriate circumstances, a trial judge may not only have the ability to raise *Charter* issues on his own motion, but may be obligated to do so. This Court in *R. v. Travers*, 2001 NSCA 71, considered when that duty arises. Writing for the Court, Justice Oland said:

> 34 However, I am of the view that the appropriate approach is that in *R. v. Arbour* (1990), 4 C.R.R. (2d) 369 (Ont. C.A.) which held that, in certain

> circumstances, trial judges have a duty to raise *Charter* issues on their own motion. . . .
>
> 37 In *R. v. Boire et. al.* (1991), 66 C.C.C. (3d) 216, one of the issues considered by the Quebec Court of Appeal was whether, in the absence of a formal application, a court of appeal is entitled to itself raise the violation of a *Charter* right. At p. 223, Brossard, J.A. commented that, considering that the *Charter* constitutes the most fundamental law in respect of human rights and in particular of accused in penal matters, he found it difficult to see how it could be argued that a court would not be entitled, in certain circumstances and subject to certain conditions, to itself consider its provisions **when confronted with a flagrant violation of the *Charter***. He continued by quoting Ewaschuk, J. who wrote in *R. v. Boron* (1983), 8 C.C.C. (3d) 25 at pp. 32-3, 3 D.L.R. (4th) 238, 36 C.R. (3d) 329 (Ont. H.C.):
>
>> *...Trial judge raising the issue*
>>
>> ...a penal prosecution is based on the adversary system which requires party presentation of evidence and not active participation by a trial judge. **Active participation often bespeaks the taking of sides, i.e., the appearance of partiality, which should be most assiduously avoided**. Assuming the goal of a penal prosecution is to do justice to both accused and Crown, justice is best achieved by the non-involvement of the trial judge in the presentation of evidence or the raising of legal issues. *However, to do justice in the particular case, judicial intervention, rare though it should be, may be warranted in penal proceedings.*
>
> 38 I do not suggest that the merest intimation of a possible *Charter* infringement will found a duty upon a trial judge to enter immediately upon an inquiry where none of the parties before him has raised this argument. However, and without attempting to fully delineate the point at which the duty arises, **where there is strong evidence of a *prima facie* case of breach of a *Charter* right relevant to the proceeding, a judge has a responsibility to raise the issue, invite submissions and, if appropriate, to conduct an exclusionary hearing in order to protect the integrity of the judicial process.** (Emphasis added)

(See also *R. v. Richards*, 2017 ONCA 424, at para. 113)

[70] Clearly, the rationale in *Travers* does not apply to the matter at hand. As this was not a penal proceeding, the protection of an accused's liberty interests were not a central concern. Here, there was no party at all who was raising any type of possible argument that they had, or would suffer, harm due to a suspected *Charter* infringement. Further, there was a complete absence of any evidence of a *Charter* breach, let alone "strong evidence of a *prima facie* case" that the

legislative provisions called into question by the hearing judge were problematic. To the contrary, the hearing judge was provided with authority from this Court demonstrating the definition of "parent" had already successfully survived a constitutional challenge. The situation facing the hearing judge fell far short of one where he was obligated to raise the *Charter* issues he did.

[71] Even if it were accepted the hearing judge, although not obligated to do so, was entitled to raise constitutional issues on his own motion, the Minister says the nature of *Charter* litigation itself made it inappropriate for him to do so. The lack of a real litigant raising a real allegation of a *Charter* breach with supporting evidence is, as it was for the mootness issue, central to this concern. It is helpful to review what the Supreme Court of Canada has said is essential for the type of constitutional arguments which will arise in light of the issues formulated by the hearing judge.

[72] Since the early days of *Charter* litigation, the Supreme Court has underscored the importance of an adequate factual basis in the determination of a claimed infringement. In *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, Justice Cory wrote:

> 8 *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.
>
> 9 ***Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions**. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. ***Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.** (Emphasis added)

[73] What type of facts would be required in relation to the constitutional questions posed by the hearing judge? In a series of decisions, the Supreme Court has articulated the scope of the protections afforded in s. 7. In *Gosselin c. Québec (Procureur general)*, 2002 SCC 84, Chief Justice McLachlin wrote:

> 206 The protection provided for by s. 7's right to life, liberty and security of the person is reflective of our country's traditional and long-held concern that persons should, in general, be free from the constraints of the state and be treated with dignity and respect. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Dickson C.J. held that security of the person is implicated in the case of "state interference with bodily integrity and serious state-imposed psychological stress" (p. 56).
>
> 207 In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 60, Lamer C.J. held that, for a restriction of the right to security of the person to be made out:
>
>> ... the impugned state action must have a serious and profound **effect on a person's** psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.
>
> . . .
>
> 209 The requirement that the violation of **a person's** rights under s. 7 must emanate from a particular state action can be found in the wording of the section itself. Section 7 does not grant a right to security of the person, full stop. Rather, the right is protected only insofar **as the claimant is deprived** of the right to security of the person by the state, in a manner that is contrary to the principles of fundamental justice. The nature of the required nexus between the right and a particular state action has evolved over time. (Emphasis added)

[74] Who is the claimant in the present instance? Who did the hearing judge anticipate would provide the factual background to establish a "serious and profound effect" on their psychological integrity? Without a real litigant, advancing an asserted deprivation of liberty, it is difficult to see how the hearing judge anticipated he could meaningfully answer the s. 7 questions he posed for himself. *Charter* cases clearly have broad ramifications and, as such, should not be decided in a factual vacuum.

[75] It is clear that s. 15 claims also require evidence. The nature of such claims have been recently discussed in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30. Writing for the Court, Justice Abella noted:

[16] The approach to s. 15 was most recently set out in *Quebec (Attorney General) v. A*, [2013] 1 S.C.R. 61, at paras. 319-47. It clarifies that s. 15(1) of the *Charter* requires a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage **on the claimant** *because of his or her membership in an enumerated or analogous group*": para. 331 (emphasis added).

[17] This Court has repeatedly confirmed that s. 15 protects substantive equality: *Quebec v. A*, at para. 325; *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, at para. 2; *R. v. Kapp*, [2008] 2 S.C.R. 483, at para. 16; *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. It is an approach which recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages. As McIntyre J. observed in *Andrews*, such an approach rests on the idea that not every difference in treatment will necessarily result in inequality and that identical treatment may frequently produce serious inequality: p. 164.

. . .

[19] The first part of the s. 15 analysis therefore asks whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Limiting claims to enumerated or analogous grounds, which "stand as constant markers of suspect decision making or potential discrimination", screens out those claims "having nothing to do with substantive equality and helps keep the focus on equality for groups that are disadvantaged in the larger social and economic context": *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, at para. 8; Lynn Smith and William Black, "The Equality Rights" (2013), 62 S.C.L.R. (2d) 301, at p. 336. Claimants may frame their claim in terms of one protected ground or several, depending on the conduct at issue and how it interacts with the disadvantage imposed on members of the claimant's group: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 37.

[20] The second part of the analysis focuses on arbitrary - or discriminatory - disadvantage, that is, whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage:

> The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. [*Quebec v. A*, at para. 332]

[21] To establish a *prima facie* violation of s. 15(1), **the claimant** must therefore demonstrate that the law at issue has a disproportionate effect on **the**

> **claimant** based on his or her membership in an enumerated or analogous group. At the second stage of the analysis, the specific evidence required will vary depending on the context of the claim, but "**evidence that goes to establishing a claimant's historical position of disadvantage**" will be relevant: *Withler*, at para. 38; *Quebec v. A*, at para. 327. (Emphasis added)

[76] The same concerns identified before apply. Who is the claimant in the present instance? Who will marshal the evidence to establish that unmarried biological fathers or their children fall within an enumerated or analogous group? Who will establish that the definition of "parent", or other aspects of the legislation of concern to the hearing judge, has a disproportionate effect on them as opposed to others? At the second stage of the analysis, who will provide the evidence of the specific needs and imposed burdens of the non-existent claimant? Harkening back to mootness, one can see the importance in the context of *Charter* litigation of the existence of a live controversy with real litigants capable of providing a meaningful factual basis for adjudication.

[77] In our view, it is clear that the hearing judge did not turn his mind to the requirements of meaningful constitutional litigation. At best, should the reference proceed, he would be answering the questions he posed in the abstract. *Charter* determinations based on hypothetical scenarios are to be avoided.

Did the hearing judge cause a patent injustice to the Appellants and the child O.R.?

[78] There is no question that in making their Application for Adoption, the appellants complied with all of the necessary requirements. They complied with the legislative provisions. They complied with the Rules as set out by the Judges of the Supreme Court. They did everything right. Yet their requests for an adoption order made October 14, 2016, October 17, 2016 and January 10, 2017 went unanswered.

[79] The appellants and, more importantly, O.R., found themselves caught up in a judge-made vortex of uncertainty and delay. As the reasons above hopefully make clear, there was no good reason for the hearing judge to subject these would-be parents and their child to unnecessary turmoil. Counsel for the appellants characterized the hearing judge's handling of their application as like responding to "a moving target". That is an apt description.

[80] We also agree entirely with the sentiments expressed by the Minister in her factum:

> 190. The Minister submits the evolving nature of the judge's "concerns" have caused delay.
>
> 191. The hearing judge said initially that he was prepared to grant an Order within a week to ten days of October 14, 2016, if additional law were brought to his attention.
>
> 192. Rather than follow-through with that commitment to the parties before him, he cancelled the next court appearance and released a written decision, and did so without distinguishing that "additional case law", once it had been given to him by the Adoption Applicants.
>
> 193. As will appear from the File of the Court below, court appearances were set for October 14, 2016, November 2, 2016, January 4, 2017 and January 10, 2017, but only two proceeded.
>
> 194. More than seven months after filing an entirely proper adoption application, there is still no "end" in sight for the Adoption Applicants. The tunnel has only grown longer and darker.
>
> 195. Almost **one-half** of a young child's life has passed in the context of uncertainty and caregiver anxiety, caused solely by a hearing judge's unilateral "concerns", not founded in law.

[81] As demonstrated in their affidavit filed in this Court, the stress and anxiety caused to the appellants was real. Given this Court's disposition, hopefully some of that will be alleviated. What the appellants will be unable to recoup is the time and monetary cost of responding to how the hearing judge chose to manage their application.

[82] We are satisfied the appellants and O.R. have suffered a patent injustice.

What is an appropriate remedy?

[83] The Minister argued that if this Court found solely an error of law, without a patent injustice, that the appropriate remedy would be to return the Application for Adoption to the court below for determination. We agree that such would be the expected course of action.

[84] However, it was also argued that in the face of a patent injustice, this Court's options in terms of remedy are broader. Specifically, and given the nature of the

record here, the appellants and the Minister both submitted it was open to this Court to grant the application for adoption.

[85] We agree that in the very exceptional circumstances of this matter, it is appropriate for the appeal not only to be allowed, but that an order for adoption to be issued forthwith. We reach this conclusion on two primary bases. Firstly, it is clear that in all respects, the appellants' application was in appropriate form and met all the requirements imposed by the Legislature and the Supreme Court. The hearing judge himself said the application was "fine" subject to his concerns being addressed. As it turns out, his concerns were unfounded. The appellants were entitled to an order for adoption on October 14, 2016, when they first appeared before the hearing judge.

[86] Secondly, there has been a patent injustice. To send the matter back for another determination would only add to the delay, expense and uncertainty already experienced by the appellants. They and the child O.R. deserve to move on in the building of their family, with the immediate certainty an order for adoption from this Court will provide. They have been through enough.

Disposition

[87] At the conclusion of the hearing, we allowed the appeal and issued the order for adoption.

Bourgeois, J.A.

Concurred in :

Beveridge, J.A.

Farrar, J.A.