IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Marshall Estate (Re), 2008 NSSC 93

Date: 20080328
Docket: Probate No. 4506
Registry: Annapolis

Between:

IN THE ESTATE OF Gladys Goldie Marshall,
late of Church Road, Clarence, in the County of
Annapolis and Province of Nova Scotia, deceased

Judge:	The Honourable Justice Charles E. Haliburton
Heard:	December 7, 2007 in Annapolis Royal, Nova Scotia
Written Decision:	March 28, 2008
Counsel:	W. Bruce Gillis, Q.C., for the Estate G. Bernard Conway, for Patricia Strong, Potential Heir Eric O. Sturk, for Heirs at Law Louise Walsh Poirier, Q.C. for the Attorney General of Nova Scotia

By the Court:

[1] In a decision dated August 31, 2006 I ruled that when a child is adopted in Nova Scotia the right to inherit from the natural parent or parents on an intestacy is terminated. This was not the case historically. However, a change in the laws relating to adoption was put in place by amendments to the ***Adoption Act*** by c.2 of the ***Statutes of Nova Scotia***, 1967. Sections 10 and 12 of that Act have been carried forward under the ***Children and Family Services Act***, S.N.S. 1990 c. 5 as presently in force.

[2] The right to inherit from one's natural parents had been continued by the various statutes until 1967 when that right was terminated. Thereafter, by statute, the adopted person would have no further connection to, or rights regarding, the natural family whatsoever.

[3] This present application challenges the result of that legislation and seeks to have the applicable provisions struck down as contrary to the provisions of the ***Charter of Rights and Freedoms***, specifically Sections 7 and 15.

HISTORY

[4] Before dealing specifically with the issues raised on this hearing, it will be useful to consider what prompted the change from the former law. The Attorney General on this application has produced a significant amount of

interesting material reflecting the thinking which prevailed in 1967 when this change was made.

[5] I adopt the submissions made on behalf of the Attorney General as accurately reflecting the history of adoptions in this province. The first ***Adoption Act*** was apparently passed by the legislature in 1896 and the relevant provisions in that and succeeding acts

> "effectively provided that under an adoption order **except as regards succession to property**, [my emphasis] all legal consequences of the natural relation of child and parent terminated as between the person adopted and his natural parents and their kindred (except as regards marriage, incest and cohabitation), and thenceforth existed between the child adopted and the adopting parents and their kindred . . ."

[6] In so far as succession to property was concerned, from 1896 to 1967 the adopted person possessed the same rights to succession to property. They would succeed to the property of their adopting parents as if born in lawful wedlock and stood equal in rights to the legal descendants of the adopting parents, but not to other kindred of the adopting parents. At the same time, the statutes specifically preserved the right of the adopted person to inherit from his or her natural parents and kindred. Conversely, if the adopted person died any property acquired by gift or inheritance from the adopting parent was distributed to persons entitled in the adopting family while any

property received by gift or inheritance from a natural parent was distributed as if no adoption had ever occurred.

[7] Significantly property and inheritance rights vis a vis the birth family were not affected by adoption under that regime.

[8] The regime changed as a result of ***An Act to Revise Chapter 4 of the Revised Statutes, 1954, the Adoption Act,*** enacted by S.N.S. 1967, c.2. (I quote from the Brief of the Attorney General):

> "- by providing in s.10(1), that an adopted child becomes the child of adopting parents for all purposes as if born in lawful wedlock to the adopting parent and (*except* for a situation irrelevant here) ceases to be the child of the person who was the parent before the adoption order was made, and that person ceases to be the parent of the adopted person, and
> - by providing in s.10(2) and (3), that the relationship, to one another, of all persons including the adopted person, the adopting parents, the kindred of the adopting parents, the parents before the adoption order and the kindred of the parents before the adoption order, is to be determined according to s.10(1)(*except* for purposes of the laws relating to incest, and prohibited degrees of marriage which exist but for s.10), and
> - by providing in s. 12 that s.10 applies to all adoption orders made in Nova Scotia whether before or after the 1967 amendments, but not so as to divest any interest in property vested at the time the 1967 amendments came into force on August 1, 1967
> - (by not re-enacting a provision which had been contained in the adoption legislation consistently *since* 1896 stating that:) "No person shall lose their right to inherit"."

[9] This wording has carried forward essentially unchanged and is now embodied in the ***Children and Family Services Act***, S.N.S. 1990 c.5 sections 80 and 82 which read as follows:

80(1) For all purposes, upon the adoption order being made,
(a) the adopted person becomes the child of the adopting parents and the adopting parents become the father and mother of the adopted person as if the adopted person had been born in lawful wedlock to the adopting parents; and
(b) except as provided in subsection (4) of the Section 72, the adopted person ceases to be the child of the persons who were the adopted person's father and mother before the adoption order was made and those persons cease to be the parents of the adopted person, and any care and custody or right of custody of the adopted person ceases.

80(2) The relationship to one another of all persons, whether the adopted person, the adopting parents, the kindred of the adopting parents, the father and mother before the making of the adoption order, the kindred of those parents and the father and mother or any other person, shall be determined in accordance with subsection (1).

82 Sections 80 and 81 apply to all orders for adoption made in the Province, whether before, on or after the first day of August, 1967, but not so as to divest any interest in property that has vested on or before the first day of August, 1967. 1990, c.5, s.82.

WHY DID THE LEGISLATURE CHANGE THE LAW?

[10] The Materials filed provide extensive evidence of the legislature's purpose and of the social context surrounding these changes. The evidence supports the proposition that the legislators had a clear understanding of the import of the legislation, it's impact on inheritance or succession, and accepted the

view of experts that it would advance the interests of adopted persons. I am advised the amendment was introduced in the legislative session of 1966, was "hoisted", and subsequently reintroduced and passed in the session of 1967. Appendix B to the Affidavit of Gordon D. Hebb, Q.C., Chief Legislative Counsel of Nova Scotia, is a copy of the explanatory notes furnished to the legislature in connection with Bill 23 containing the amendments in question. It describes Clause 10:

> "This clause deals with the effect of an adoption order and incorporates a substantial change. Under the present Act an adopted child is explicitly excluded from collateral inheritance through his adopting parents but retains his right to inheritance from his natural parents or kindred. This clause would in effect place the adopted child in the same position in all respects as the natural child of the adopting parents and would terminate his legal relationship with his natural parents or kindred."

[11] Attached to the Affidavit of Mr. Hebb as Appendix C is a draft of the proposed ***Adoption Act***. P.J.T. O'Hearn was a highly respected County Court Judge and had been a prominent member of the legal community in Nova Scotia for a number of years. His draft statute was essentially the same as that adopted and he attached explanatory notes. His notes referring to s.10 include the following:

> Section 10 makes a change (that) . . . is in substance the same provision that is in effect in British Columbia and Ontario. This change has been recommended by the Brief of the Department of Welfare, by the various Welfare bodies in the Province and by the Nova Scotia Barristers' Society for many years.

> Under the present Nova Scotia legislation an adopted child is **almost** the child of his adoptive parents for all purposes, but he is explicitly excluded from collateral inheritance. And on the other hand he retains his right of inheritance from his natural parents or kindred. **Each of these provisions serves to create a difference between the adoptive child and the natural child which is condemned universally by professional sociologists. The right of inheritance from natural parents is a chimera. The deprivation of inheritance from collaterals can be a real cause of division but the real evil of the present law is that it may require the renewal of relationships that it is the purpose of the legislation in general to sever and keep severed and this can have quite a traumatic effect on the personality of the individual involved. It also complicates the laws of property and inheritance for no useful purpose.**

[12] Appendix D to Mr. Hebb's Affidavit is an unsigned submission from the file of the Legislative Counsel purporting to be submitted by a group "widely representative of religious and social organizations in the province". Taken at face value this submission supports the comments of Judge O'Hearn that various organizations and churches supportive of social and family services were aware of the proposed changes and urging that they be adopted. The submission refers to articles by a Dr. Gilbert D. Kennedy in the Canadian Bar Review of 1955, which had reviewed adoption law in Canada and the Commonwealth and particularly with respect to the present focus of this application with respect to the "loss of rights". These proponents say

> "In almost all adoptions the child moves to a better and more prosperous home with much better prospects of leaving him some inheritance. The remote chance of a lucky inheritance is of no weight against the serious need for him to be identified with his adoptive family."

[13] The Nova Scotia Barristers' Society beginning 1960 had passed resolutions urging changes in the ***Adoption Act*** "to provide that an adopted child be considered a child for the adoptive parent for all purposes" and ultimately the minutes of a meeting of the Bar Council March 31, 1967 include this quote:

"Mr. Malachi Jones reported the ***Adoption Act*** was passed in the form recommended by the Barristers' Society".

ISSUES:

[14] On this application I am asked to decide issues as follows:

(i) whether a declaration shall issue that "section 80(1)"(a) and (b) of the ***Children and Family Services Act***, S.N.S. 1990, c.5, discriminates against Patricia Marie Ann Strong, being a member of a class of persons (i.e., adoptees), whose rights as a lawful lineal descendent under the ***Intestate Succession Act***, R.S.N.S. 1989, c.236, are denied as a result of the operation of section 80(1)(a) and (b) of the ***Children and Family Services Act***, *supra*, therefore violates section 15(1) of the ***Charter of Rights and Freedoms***:

(ii) whether a declaration shall issue that "section 80(1)(a)" and (b) of the ***Children and Family Services Act,*** *supra,* deprives Patricia Marie Ann Strong of her right to life, liberty and security of the person in a manner contrary to the principles of fundamental justice by terminating her right to inherit as a lawful lineal descendent under the ***Intestate Succession Act,*** *supra*, and that section 80(1)(a) and (b) of the ***Children and Family Services Act***, *supra*, therefore violates section 7 of the ***Charter of Rights and Freedoms***;

(iii) whether a declaration shall issue that "section 82" of the ***Children and Family Services Act***, *supra*, discriminates against Patricia Marie Ann Strong, being a member of a class of persons (i.e., adoptees), whose rights as a lawful lineal descendent under the ***Intestate Succession Act***, R.S.N.S. 1989, c.236, are denied as a result of the operation of section 82 of the ***Children and Family Services Act***, *supra*, and that section 82 of the ***Children and Family Services Act***, *supra*, therefore violates section 15(1) of the ***Charter of Rights and Freedoms***;

(iv) whether a declaration shall issue that "section 82" of the ***Children and Family Services Act***, *supra*, deprives Patricia Marie Ann Strong of her right to life, liberty and security of the person in a manner contrary to the principles of fundamental justice by terminating her right to inherit as a lawful lineal descendent pursuant to the ***Intestate Succession Act***, *supra*, and that section 82 of the ***Children and Family Services Act***, *supra*, therefore violates section 7 of the ***Charter of Rights and Freedoms***;

(v) whether a declaration shall issue pursuant to section 52(1) of the ***Constitution Act 1982***, U.K. 1982, c. 11, that the definition of "issue" as found in section 2(b) of the ***Intestate Succession Act***, *supra*, shall be read as including all lawful lineal descendants of the ancestor, including but not limited to, children of the ancestor who have been adopted by a person other than the ancestor.

DISCUSSON:

[15] The ***Charter of Rights*** and the impairment of the rights of some particular applicant before the court most often arises in criminal matters or at least matters in which an individual is pitted against "the Crown". This is not one of those cases. There is no proceeding against Patricia Strong nor has the

Crown (government) any particular interest in the outcome of this proceeding except only the integrity of the legislative provisions in question.

[16] There is another genre of cases where persons or classes of persons claim the protection of the charter. These are cases where by reason of statute or traditional law, an applicant may be found to be the victim of discriminatory rules; and thus entitled to recognition of a charter right without the state being directly involved. Such cases have been found to exist in relation to sexual orientation.

[17] It is contended on behalf of Patricia Marie Ann Strong that this is one of those cases, that she is discriminated against because she is an adopted person. It is claimed that the effect of that "adoption" has diminished her rights contrary to Sections 7 and 15 of the Charter and that it diminishes the rights of other adopted persons. The remedy claimed would be to read some words into the definition of "issue" as found in Section 2(b) of the ***Intestate Succession Act***, R.S.N.S. 1989 c. 236, words which would include children of the ancestor who have been adopted by a person other than the ancestor. Words with a similar effect would necessarily be read into the "Adoption" provisions as well.

[18] I may say at the outset that I do not find the arguments for discrimination to be valid. Nor have I been persuaded that, except with regard to property, the interests of Ms. Strong would be advanced by a decision favourabe to her circumstance. The issues, when examined, primarily incorporate a property interest, that is, the right to inherit property upon intestacy. All parties have accepted that property interests are not protected by the Charter.

[19] It has been argued on Ms. Strong's behalf however that there is an "**informational right**" which she has lost as a result of this adoption and as a result of her severance from her natural family; that the effect of the ***Adoption Act*** has greater scope than necessary; that she is deprived of the right to personal information about her birth family which distinguishes her and other adopted persons from larger society, attaching a stigma to that status. She is, it is argued, deprived of obtaining *knowledge* about herself and her genetic/medical background, thereby depriving her of the ability to appropriately plan her life activities. A property interest in Ms. Strong would be created if the remedy of "reading in" were achieved on the basis of impairment of the "informational" right claimed.

[20] The position advanced on behalf of Ms. Strong was refined in correspondence exchanged between counsel and ultimately restated in the following form:

> ". . . the issue . . . before the court is whether ss.80(1)(a) and (b) and 82 of the ***CFSA*** operate to foreclose Ms. Strong's rights to inherit (in the broad sense) from her mother, including medical information and, in this case, property under the ***Intestate Succession Act***. (and)
>
> . . . violate the s. 7 protected right to life, because this legislation "impairs the ability of adoptees to obtain information (i.e. medical history of the adoptee's genetic family) that would be necessary to ensure an adoptee receives necessary medical treatment to continue with his or her life . . . to manage her life . . . (violating her right to security of the person by) erecting a wall between (the adoptee) and her right to learn of her family history, including accessing records and evaluate herself in that context.

STANDING:

[21] The Attorney General argues that, the applicant must first establish they have an adequate interest in the subject matter to entitle them to "standing" in the proceeding. Much of the time spent in argument over this matter related to this issue and whether Ms. Strong could establish either *private interest standing* or *public interest standing*.

[22] I find instructive the following quotation from ***Administrative Law*** (5th ed., Clarendon Press Oxford):

> It has always been an important limitation on the availability of remedies that they are awarded only to litigants who have sufficient *locus standi*, or standing. The law starts from the position that remedies are correlative with rights, and that only those whose own rights are at stake are eligible to be awarded remedies. No one else will have the necessary standing before the court.
>
> In private law that principle can be applied with some strictness. But in public law it is inadequate, for it ignores the dimension of the public interest. Where some particular person is the object of administrative action, that person is naturally entitled to dispute its legality and other persons are not. But public authorities have many powers and duties which affect the public generally rather than particular individuals . . . If no one has standing to call it to account, it can disregard the law with impunity.

[23] Public interest standing was an issue addressed in the decision of our Court of Appeal in *Inshore Fishermen's Bonafide Defense Fund Assn. V. Canada (Attorney General) NSCA [1994] N.S.J.No. 331.* Hallet J.A. in delivering the decision of the court discussed the principles of public interest standing saying:

> ¶18 (1) Persons or organizations seeking public interest standing must prove
>
> (a) that the claim raises justiciable issues and in particular that there is a serious issue as to the validity of legislation or the validity of a public act exercised by a statutory authority, the latter because the public has an interest in ensuring that public officials act in accordance with statutory authority (Canadian Council of Churches paras. 29 & 33);
>
> (b) that the challenger is affected directly or has a genuine interest in the validity of the legislation or the public act in issue; and

> (c) that there is no other reasonable or effective manner in which the issue may be brought before the court.

[24] A determination that Ms. Strong is without standing would conclude this matter. If I were to decide that she does not qualify as a litigant in the proceeding, then there would be nothing to decide. I cannot follow that course. There is a valid argument to be made that she does have public interest standing according to the criteria enumerated above in the Inshore Fisherman's Case. There is, in my view, a justiciable issue to be decided. She is affected directly by the sections of the ***Children and Family Services Act*** which are challenged; and I know of no more reasonable or effective manner to get the matter before the court than the present circumstances present. From a private interest standpoint she does have her own special interest to protect and is before the court essentially as a private litigant. Finally there is the point that it seems to have been at the instance of the court, or at least with the courts approval, that this litigation was initiated. It would seem to me to be most perverse to now say that Ms. Strong does not possess sufficient standing to require the court to deal with the substance of the claim.

[25] A concern has been expressed in some of the cases I have reviewed that a statutory provision ought not to be invalidated where the participants in the

litigation were without sufficient resources or sufficient interest to effectively prosecute the matter, and in the absence of any real adversarial contest to be resolved. I have no sense that the participation of the several parties in this proceeding should raise any concern in that respect. The Attorney General has participated from the outset, and the competing beneficiaries have filed extensive materials.

PROPERTY:

[26] As noted earlier, all parties agree that the right to property is not a right protected by the ***Charter***. The framers of the ***Charter*** specifically excluded that concept. To the extent then that property, or the inheritance of property, is the subject matter raised by the issues enumerated above there can be no ***Charter*** breach whether or not this court were to find "discrimination" and "unequal" treatment.

[27] The argument on behalf of Ms. Strong with respect to the wording of the issues is that the word "inherit" is not restricted to the inheritance of property. Counsel pleads for a wider interpretation which would refer to inheriting such things as genetic traits, traditions, obviously mental and physical attributes and any other aspects of familial history about which one

would presumably be aware if one were raised within the "natural family" and which would permit one to so organize one's life as to advance ones own interests.

[28] It is proposed that the impugned sections breach Ms. Strong's s.7 ***Charter*** rights in three ways:

> (a) the Applicant's s.7 ***Charter*** right to security of the person is breached by severing the right to inherit as a lawful lineal descendent pursuant to the ***Intestate Succession Act***, and,
> (b) the s.7 ***Charter*** right to life of the Applicant or any other adopted person is breached by severing the ability of adoptees to obtain information, specifically, medical history of the adoptee's genetic family that would be necessary to ensure the adoptee receives necessary medical treatment to continue with his/her life, and
> (c) the Applicant's s.7 ***Charter*** right to security of the person is breached by severing all rights she would have to her biological mother's estate, effectively erecting a wall between her, or any other adoptee, and her right to learn of her family history, including accessing records, and to evaluate herself in that context, and impairing her right to manage her life.

[29] In addition, it is argued that the change in the law effective in 1967 had in fact **retroactive** application to Ms. Strong, thereby removing rights that she theretofore had by virtue of the previous law.

[30] While it is not claimed that the ***Charter*** protects property rights, I think it useful to reproduce certain of the comments contained in the brief from the Attorney General. Quoting from the text by Peter Hogg, ***Constitutional Law of Canada, 5th ed. Supplemented,*** that an economic role is incompatible

with the setting of s.7 in the legal rights portion of the ***Charter***, which the

Supreme Court of Canada has relied on as controlling the scope of s.7.

Hogg states at pp.47-10 and 47-11:

> The framers of Canada's ***Charter of Rights*** deliberately omitted any reference to property in s.7 . . . These departures from the American model, as well as the replacement of "due process" with "fundamental justice" . . . were intended to banish *Lochner* from Canada. The product is a s.7 in which liberty must be interpreted as not including property, as not including freedom of contract, and, in short, as not including economic liberty.
>
> Another reason for caution in the definition of liberty is the placement of s.7 within the ***Charter of Rights***. Section 7 leads off a group of sections (**ss.7 to 14**) entitled "Legal Rights". These provisions **are mainly addressed to the rights of individuals in the criminal justice system: search, seizure, detention, arrest, trial, testimony and imprisonment are the concerns of ss.8 to 14.** It seems reasonable to conclude, as Lamer J. has done, . . . that "the restrictions on liberty and security of the person that s.7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration".

And at pp. 47-17 and 47-18, Hogg states:

> 47.9 Property
> Section 7 protects "life, liberty and security of the person". **The omission of property from s. 7 was a striking and deliberate departure from the constitutional texts that provided the models for s. 7.** The due process clauses in the fifth and fourteenth amendments of the Constitution of the United States protect "**life, liberty and property**". And the due process clause in s.1(a) of the ***Canadian Bill of Rights*** protects "life, liberty, security of the person **and enjoyment of property**".

Thus Hogg concludes that:

> Section 7 provides no guarantee of compensation or even a fair procedure for the taking of property by government.

DISCRIMINATION

[31] In *Gosselin v. Quebec* (2002), 4 S.C.R. 429, the appellant claimed the social assistance policies of the province discriminated against her on the basis of age under the regime established by the province. Persons under 30 received only one third of the benefits payable to those over 30 unless they participated in one of several offered education or work experience programs. McLachlin C.J. speaking for the Court included the following comments:

Para. 76:

> . . . The factual record is insufficient to support (a) claim (that the applicant had been deprived of a protected right by s.7). Nevertheless, I will examine these three elements.

Para. 77:

> . . . the dominant strand of jurisprudence on s.7 sees its purpose as guarding against **certain kinds** of deprivation of life, liberty and security of the person, namely, those "that occur as a result of an individuals interaction with the justice system and its administration" . . . "the justice system and its administration refers to" **the state's conduct in the course of enforcing and securing compliance with the law** . . . **s.7 does not protect against** all measures that might in some way impinge on life, liberty or security **but only against those that can be attributed to state action implicating the administration of justice.**

Para. 80:

> Can s.7 apply to protect rights or interests wholly unconnected to the administration of justice? The question remains unanswered . . . Dixon C.J. entertained (without deciding on) the possibility that the right to security of the person extends "to protect either interests central to personal autonomy, such as a right to privacy" (but) left open the question of whether s.7 could operate to protect "economic rights fundamental to human survival". Some cases while on their facts involving the administration of justice have described the rights protected by s.7 without explicitly linking them to the administration of justice.

Para. 81:

> Even if s.7 could be read to encompass economic rights a further hurdle emerges. Section 7 speaks of the rights not to be deprived of life, liberty and security of the person except in accordance with the principals of fundamental justice. Nothing in the jurisdprudence thus far suggests that s.7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather s.7 has been interpreted as restricting the states ability to deprive people of these. Such a deprivation does not exist in the case at bar.

[32] To acceed to the proposition that Ms. Strong as an adopted person has been deprived of any rights guaranteed by s.7 would exceed the limits of those rights heretofore defined by the Supreme Court of Canada. There is perhaps an arguable case with respect to the retroactive effect of the legislation and whether that could bring this application within the context of a conflict between a person and the "administration of justice". But, on the other hand, as in *Gosselin* there is no factual basis for finding that Ms. Strong has

been deprived of the "knowledge" inheritance she seeks, about which more later.

SECTION 15 - EQUALITY RIGHTS:

[33] 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, **without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.**

[34] The position of the applicant with respect to the alleged breach of s.15 rights has been elaborated in the brief of December 14, 2005:

> The Applicant is discriminated against on the basis she is an adopted child, that "adoptees" are an analogous group protected from discrimination by s.15(1) of the ***Charter*** . . .; the benefit alleged to be denied to the Applicant by the impugned provisions is the right to inherit under the ***Intestate Succession Act*** as a lawful lineal descendent; and the comparator group with whom the Applicant compares herself (when alleging she is discriminated against while the comparator group is not), is "natural children (children who have not been adopted)".

[35] The cases hold that the Applicant has the onus of establishing an infringement of equality rights through reference to one or more contextual factors. Iacobucci J. in his decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, para.88(1) explains why a purposive and contextual approach is preferred: . . . "in order to permit the realization of the strong remedial purpose of the equality

guarantee and to avoid the pitfalls of the formalistic or mechanical approach."

[36] *Law* is another case where there was a distinction drawn in social benefits payable to a person entitled. In this case once again, the issue was the Claimant's age. The social benefit arose under the Canada Pension Plan where widows under 45 years received a lesser benefit based on age. The court produced certain guidelines at para.88 including these comments:

Para. 88:

> (2) The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues:
>
> (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
>
> (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
>
> (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.
>
> The first issue is concerned with the question of whether the law causes differential treatment. The second and third issues are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).
>
> (3) Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

(4) In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

(5) The existence of a conflict between the purpose or effect of an impugned law and the purpose of s. 15(1) is essential in order to found a discrimination claim. The determination of whether such a conflict exists is to be made through an analysis of the full context surrounding the claim and the claimant.

(9) Some important contextual factors influencing the determination of whether s.15(1) has been infringed are, among others:

> (C) The ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society. An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the ***Charter*** will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. This factor is more relevant where the s. 15(1) claim is brought by a more advantaged member of society.

[37] At Para. 43 of *Law* Iacobucci had referred to the history of the courts interpretation citing among others *Hunter v. Southam Inc.* 1984 2 SCR 145;

> . . . La Forest J., concurring with respect to the proper approach to s. 15(1), stated that the equality guarantee was designed to prevent the imposition of differential treatment that was likely to "inhibit the sense of those who are discriminated against that Canadian society is not free or democratic as far as they are concerned", and that was likely to decrease their "confidence that they can freely and without obstruction by the state pursue their and their families' hopes and expectations of vocational and personal development" . . .
>
> As discussed above, Wilson J. focused upon issues of powerlessness and vulnerability within Canadian society and emphasized the importance of examining the surrounding social, political, and legal context in order to determine whether discrimination exists within the meaning of s. 15(1).

[38] Other comments strike a chord in my thinking in the present case. At Para. 72 he writes:

> . . . An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the Charter will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the

> different circumstances experienced by the disadvantaged group being targeted by the legislation . . .

And again at Para. 74:

> . . . Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects "a basic aspect of full membership in Canadian society", or "constitute[s] a complete non-recognition of a particular group".

[39] In applying the concepts outlined in *Law v. Canada* (supra) to the application before me I have found the comments of Dea J. in *McNeil v. MacDougall*, [1999] A.B.Q.B. 945 to be relevant and helpful. The factual circumstances provide an interesting counterpoint to the facts in the present case. The situation there was that Cathy MacDougall claimed a right to inherit from her (adoptive) mother on an intestacy. Her problem was that she had not been formally adopted as no adoption order had been granted pursuant to the ***Statute*** in Alberta but she had in fact been raised as the child of her adoptive mother who apparently died leaving one natural son who claimed the entire estate.

[40] In reaching his conclusions Dea J. quoted extensively from Justice Iacobucci's decision in *Law* and I find it convenient to insert his quotations at this juncture. At Para.43 he discussed the "approach" of Iacobucci J. In the context of

the case he was then determining. He observed that Iacabucci J.

> . . . Iacobucci J.(Law: Para.88(10)) makes an important point about the ability of courts to take judicial notice and to adopt a logically reasoned approach when determining if discriminatory effects do in fact exist such that it is not necessary for the claimant to adduce social science or other evidence to prove the discrimination. The Respondent here has led no evidence whatsoever about how the differential treatment of defacto and *dejure* adoptees infringes s.15(1) other than that the failure of the ***Child Welfare Act*** to include the defacto adoptees in its deeming provisions prevents her from taking under the ***Intestates Successions Act***. At Para. 88 Iacobucci J. says . . . (my emphasis)
>
> > *(10) Although the s.15(1) claimant bears the onus of establishing an infringement of his or her equality rights in a purposive sense through reference of one or more contextual factors,* ***it is not necessarily the case that the claimant must adduce evidence in order to show a violation of human dignity or freedom. Frequently where differential treatment is based on one or more enumerated or analogous grounds, this will be sufficient to found an infringement of s.15(1) . . .***
> >
> > (my emphasis)

[41] Para. 47 Dea J. Goes on to say:

> > Differential treatment is not always discriminatory. It is important to not trivialize the ***Charter*** by calling all distinctions discriminatory. The discrimination must be on the basis of an enumerated or analogous ground and it must harm the claimant. Accordingly the next two aspects of the tripartite test require differential treatment be based on a prohibited ground, and that it actually discriminates by imposing a burden or withholding a benefit from the claimant in a manner which reflects stereotypes or presumed characteristics or promotes **the view that the claimant is less worthy than others in society**.

[42] In his assessment of whether a claimant's newly postulated analogous ground should be recognized Dea J. Again quoted from *Law* (at Para. 43)

> . . . Where a party brings a discrimination claim on the basis of a newly postulated analogous ground, or on the basis of a combination of different grounds, this part of the discrimination inquiry must focus upon the issue of whether and why a ground or confluence of grounds is analogous to those listed in s.15(1) . . .**a ground or grounds will not be considered analogous under s.15(1) unless it can be shown that differential treatment premised on the ground or grounds has the potential to bring into play human dignity**. (my emphasis)

[43] Then applying the principals to his case Dea J. Continued

> I am not persuaded by the evidence or the arguments that either the purpose of s.65(1) of the Child Welfare Act or its effect violates human dignity in the sense described in *Law v. Canada*, (supra) sufficient to accord de facto adoptees protection under an analogous ground . . . In short, it is the condition of the individual rather than the status of being or not being adopted which may found the basis of some stigma. . . (Para. 50) . . .It is also appropriate to bear in mind that remedial statutes such as the ***Legitimacy Act*** R.S.A. 1980, c. L-11 and other legislation have been **enacted to address unfairness** . . . (Para. 51) . . . It is critical, in order not to trivialize the Charter while ensuring that all individuals contemplated by s.15(1) find proper protection, to understand clearly the fundamental purpose of the Charter's equality guarantee . . . (then quoting again from <u>*Law*</u>)

> *All of these statements share several key elements.* ***It may be said that the purpose of s.15(1) is to prevent the violation of essential human dignity and freedom through imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of***

> ***perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society . . .*** (my emphasis)

[44] At Para. 52 of his decision Justice Dea refers to what he interprets as an essential point. Without a conflict between this purpose and the deeming provisions of the ***Child Welfare Act***, the Respondent's claim cannot succeed. This requirement is stated by Iacobucci J.

> *Since the beginning of its s.15(1) jurisprudence, this Court has recognized* ***the existence of a conflict between an impugned law and the purpose of s.15(1) is essential in order to found a discrimination claim****.*

[45] Our own Court of Appeal has adopted this same philosophy which is expressed in *Bauman v. Nova Scotia (Attorney General)*, 2001 N.S.J. 115 Docket CAA 165426. The comments of Bateman J.A. incorporate this quotation from Iacobucci's decision in *Law*:

> Para. 51
> . . . the purpose of s.15(1) is to prevent the **violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice**, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristics, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. Alternatively, differential treatment will not likely constitute discrimination within the purpose of s.15(1) where it does not violate the human dignity or

freedom of a person or group in this way, **and in particular where the differential treatment also assists in ameliorating the position** of the disadvantaged within Canadian society.

MY CONCLUSION

[46] Applying this philosophy to the present case brings us to what seems to be the ultimate question:

Can it be said that the ss. 80 and 82 of the ***Children's and Family Services Act*** removing a child from one family and placing it in another thereby terminating all rights, duties and relationships between the natural family and instituting all such rights between the child and the adoptive family violates the essential human dignity and freedom of the child through the imposition of disadvantage, stereotyping or political or social prejudice? Do these statutory provisions in some way undermine or diminish the purpose of s.15(1) to ensure that the law conforms to a society in which all persons enjoy equal recognition as human beings and as members of Canadian society, equally capable and equally deserving of concern, respect or consideration? Do these provisions in purpose or effect devalue these children as human beings or as members of Canadian society?

[47] I do not find that the kind of discrimination contemplated by s.15(1) as interpreted by the Supreme Court of Canada exists in this case. As Bateman J. observes in *Bauman*, "discrimination has at its root prejudice, stereotype or devaluation of the group or individual in society's eyes . . ." If indeed there is discrimination affecting the rights of Ms. Strong, it is not based on stereotype or a stereotypical application of some presumed characteristics.

FAILURE TO DISCHARGE ONUS AND LACK OF FACTS:

[48] Aside from the inheritance of property, the applicant claims the loss of access to genetic information and medical records. The Attorney General has responded with the suggestion that if there is such a loss of "informational" rights, then the application should have implicated the ***Adoption Information Act*** N.S.

Statutes 1996 Ch. 3. This is a relatively new statute and concept.

[49] It must be acknowledged that social attitudes have moved on since 1967 when the changes to the laws relating to adoption were made. People now speak of **open adoptions** and preserving connections between the adopted child and the natural family; or initiating investigations under the ***Adoption Information Act*** or otherwise with respect to family origins and related information. In the application before me I do not recall any suggestion from counsel that social values are now different than they were in 1967. However, even if that argument had been made it is not within my province to change the law. If current philosophy is the reverse of that which it was 40 years ago, then one could speculate that reversing the legislation and reinstituting the regime which existed before 1967 would have a much

greater adverse impact on adoptees (in a financial sense) than has the present regime.

[50] As to an adopted person being deprived of access to familial information of their birth family, that is surely a matter of simply having knowledge of the fact of one's adoption and the identity of the birth family. While I do not have the benefit of submissions from counsel on this point, it appears that Sections 80 and 82 of the ***Children's and Family Services Act*** have absolutely no impact whether positively or negatively in that regard. An adopted person and indeed the birth family, now have been accorded rights under the ***Adoptions Information Act*** to obtain "identifying information" if the respondent parties are disposed to co-operate.

[51] There is no evidence before the court, whatsoever, that Ms. Strong either took or attempted any action to obtain information about her birth family.

[52] As a result of the argument advanced that Ms. Strong was deprived of medical information about her birth mother so that she could better organize her lifestyle, I was curious to know whether such rights exist for anyone. Counsel did not identify any such right, although complaining that she had, by having been adopted, lost such a right. In fact, the Supreme Court of Canada dealt with the question of ownership and access to medical records

in *McInerney v. MacDonald* [1992] 2 S.C.R. 138. It appears from a brief review of that decision that even the patient whose record it is, does not have an absolute right to all information in their file. Although the general rule is enunciated in the headnote as follows:

> In the absence of legislation, a patient is entitled, upon request, to examine and copy all information in medical records which the physician considered in administering advice or treatment . . . the physical medical records of the patient belong to the physician.

[53] The fact is physicians have a duty of confidentiality. Patients consult their doctors on the understanding that their medical records and the state of their health will not be disclosed to others. The ***Hospitals Act*** R.S.N.S. 1989 c.208 provides for confidentiality, establishes circumstances in which medical information on a person may be released, and restricts the release of any personal information by a medical doctor. The ***Medical Act*** R.S.N.S. 1995-96 c.10 likewise imposes an obligation of confidentiality on doctors. Section 50 in part says:

> Every person involved in the administration of this Act, and any member of the Council, or a committee of Council or the College, shall maintain confidentiality with respect to all medical information that comes to that persons knowledge regarding patients . . .

[54] It is my understanding that the code of ethics of the Canadian Medical Association and the Nova Scotia College of Physicians and Surgeons would

also demand confidentiality. The concept that this relationship should exist between a

physician and patient is ancient and appears to find its roots in the Oath of Hippocrates which includes the pledge to "keep secret and never reveal all that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men which ought not to be spread abroad".

[55] I conclude that the position Ms. Strong finds herself in is little different from that of any other person in terms of accessing the medical or health records of the members of her natural family. Without the consent of the patient, or possibly a court order, the medical doctor is obliged to keep such information confidential.

[56] It follows that the application of Ms. Strong will fail. I do not find that the impugned ss.80 and 82 of the ***Children and Family Services Act*** abridge or limit any right which she may have under the ***Charter of Rights and Freedoms*** specifically under ss.7 and 15. There is no abrogation of rights under these sections. As emphasized in the cases the objective of the impugned language is an important consideration. The objective of these provisions was to rectify perceived difficulties with the Adoption laws previously in effect. As full members of their adoptive families they would

no longer be differentiated in any legal sense from other members of that family. Any right to inherit property became co-extensive with and undistinguishable from their new sibblings. Discrimination and inequality within that family were ended.

[57] While it is true that adoption separates a person from knowledge of and participation in the affairs of their birth family that is compensated by the new relationships. The loss of "knowledge" is more imagined than real. The knowledge loss claimed for Ms. Strong is medical history and genetic information. No evidence has been produced as to any deprivation beyond the obvious, and with respect to actual medical records there is no established differentiation between adoptive and natural descendants. I will hear the parties as to cost, if necessary.

Haliburton J.