2000 **SFH C08641 & SFH C 08642**

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

[Cite as S.C.M. and N.J.C., 2001 NSSF 24]

IN THE APPLICATION OF: **S.C.M. and N.J. C.** to adopt the person whose birth is registered as Registration No. 1999-02-004200 by the Registrar General for the Province of Nova Scotia

- under -

THE CHILDREN AND FAMILY SERVICES ACT, being Chapter 5 of the Statutes of Nova Scotia, 1990

- AND -

IN THE APPLICATION OF: **S.C.M. and N.J.C.** to adopt the person whose birth is registered as Registration No. 94-02-006955 by the Registrar General for the Province of Nova Scotia

- under -

THE CHILDREN AND FAMILY SERVICES ACT, being Chapter 5 of the Statutes of Nova Scotia, 1990

Revised Decision: The text of the original decision has been revised to remove personal identifying information of the parties on August 29, 2008.

DECISION

HEARD BEFORE: The Honourable Justice Deborah Gass
Justice of the Supreme Court (Family Division)

PLACE HEARD: Supreme Court (Family Division)
P.O.Box 8988, Station "A"
3380 Devonshire Avenue
Halifax, NS B3K 5M6

DECISION: (orally) May 3, 2001

WRITTEN DECISION: June 28, 2001

COUNSEL: Lara Morris, counsel for S.C.M. and N.J.C.
Catherine Lunn, Counsel on behalf of the Minister of Justice

This is an application by S.C.M. and N.J.C. to adopt two children, T. and C. One of the Applicants is the biological mother of both children.

FACTS:

Both of the Applicants are women. They have been together in a conjugal relationship since June 1987. They entered into a ceremony of commitment [in 1991].

Wanting to have a family together, they agreed that one of them would become pregnant by an anonymous sperm donor. Their daughter was born [in 1994]. They decided to have a second child by the same anonymous donor and their son was born [in 1999].

On October 27, 2000, The Applicants applied jointly to adopt both children under the *Children and Family Services Act*, S.N.S. 1990, C. 5 as amended. They were advised that the *Act*, hereinafter referred to as the *CFSA* prohibits two unmarried persons from jointly applying to adopt.

Who may adopt is set out in s. 72 of the *Act*.

> 71(1) A person of the age of majority may, in the manner herein provided, adopt as that person's child another person younger than that person where
>
> (a) the applicant resides or is domiciled in the Province; or

(b) the person proposed to be adopted was born, resides or is domiciled in the Province or is a child in care.

(2) Subject to this Section, if the applicant has a husband or wife, who is over the age of majority and is of sound mind, the husband or wife shall join in the application.

(3) If the husband or wife of the applicant is the father or mother of the person proposed to be adopted, although not over the age of majority, he or she may join in the application.

(4) The husband or wife of the applicant if he or she is also the legitimate parent of the person proposed to be adopted, need not join in the application, and in that case the relationship of such husband or wife or of his or her kindred with the person proposed to be adopted continues and is in no way altered by any order for adoption made in favour of the applicant, who becomes the other parent of the person proposed to be adopted by such an order.

The definitions relevant to adoption proceedings are found in s. 67 of the *Act*.

67(1) In this section and section 68 to 87,

> (a) “adopting parent” means a person who has filed a notice of proposed adoption or has commenced an application for adoption;
>
> (b) “adoption parent” means a person who has acquired the legal status of parent of a child by virtue of an order for adoption;
>
> (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;
>
> (d) “father” of a child means the biological father of the child except where the child is adopted and in such case means, subject to subsection (4) of Section 72, the father by adoption;
>
> (e) “mother” means the biological mother of the child except where the child is adopted and in such case means, subject to subsection (4) of Section 72, the mother by adoption;

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> (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,
> >
> > (v) an individual who, under a written agreement or a court order, is required to provide support for the child or has a right of access to the child and has, at any time during the two years before proceedings for adoption are commenced, provided support for the child or exercised a right of access,
> >
> > (vi) 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.

The effect of an adoption order is set out in s. 80.

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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 has been born in lawful wedlock to the adopting parents; and

(b) except as provided in subsection (4) of 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.

(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).

(3) Subsections (1) and (2) do not apply for the purpose of the laws relating to incest and prohibited degrees of kindred for marriage to remove any person from a relationship in consanguinity that, but for this Section, would have existed.

(4) In any enactment, conveyance, trust, settlement, devise, bequest or other instrument, "child" or "issue" or the equivalent of either includes an adopted child unless the contrary plainly appears by the terms of the enactment or instrument. 1990, c. 5, s. 80

Section 65 of the Regulations pursuant to s. 99 of the *Children and Family Services Act* define who stands in loco parentis to a child as provided in s. 67 (1) (f) (iv):

65. For the purposes of subclause (iv) of clause (f) of subsection (1) of Section 67 of the Act, an individual stands in *loco parentis* to a child when the individual

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> (a) cohabits with a member of the opposite sex who is the father or mother of the child and who has the care of that child;
>
> (b) contributes to the financial support of the child; and
>
> (c) behaves towards the child as if the child was the son or daughter of the individual.

Thus where an unmarried couple living in a common-law relationship seeks to establish a legal relationship for both "parents" with a child through adoption, they are prevented from doing so, as only one of them may become the parent. In this instance, therefore, if the non biological parent applies to adopt, then the biological mother's legal relationship with the child is severed.

In response to this application, the Minister of Community Services and the Attorney General of Nova Scotia, advised the Applicants on April 11, 2001 that they were not opposing the application nor were they consenting to the disposition of the matter.

ISSUES:

1) Does ss. 72 (2), (3), (4) and s. 80 of the *Children and Family Services Act* and s. 65 of the regulations pursuant to s. 99 of the Act, infringe the Applicants' equality rights guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms,* Section 1, Part 1 of the *Constitution Act*, 1982, (the "Charter") ?

2) Is such an infringement justified under s. 1 of the Charter?

3) If it is concluded that there is an infringement and it is not justified, what is the remedy?

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THE LAW:

The relevant portions of the *Children and Family Services Act and Regulations* are outlined above.

The relevant sections of the *Charter and the Constitution Act* are:

Section 15.(1) of the *Charter*

> 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.

Section 1. of the *Charter*

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the right and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Sections 24.(1) and 32.(1) of the *Charter*

> 24.(1) Anyone whose rights and freedoms, as guaranteed by this Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> 32.(1) This Charter applies
>
> > (a) to the Parliament and Government of Canada in respect of all matters within the authority of Parliament including all matters

> relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Section 52.(1) of the *Constitution Act*

> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> (2) The Constitution of Canada includes
>
> (a) the *Canada Act 1982*, including this Act;
> (b) the Acts and orders referred to in the schedule; and
> (c) any amendment to any Act or order referred to in paragraph (a) or (b)

1) SECTION 15 OF THE CHARTER:

Charter jurisprudence is summarized by Iacobucci J. in *Law* v. *Canada (Minister of Employment and Immigration)* (1999), 170 D.L.R. (4th) 1 (S.C.C.) at pp. 37 - 41.

The headnote to the decision provides an excellent comprehensive outline of the decision at pp. 2 - 3:

> Analysis under s. 15(1) of the Charter should not be confined to a fixed formula. It should take a purposeful and contextual approach. The court should make three broad inquiries. First, does the law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or fail to take into account the claimant's already disadvantaged position within Canadian society

resulting in substantially different treatment between the claimant and others on the basis of one or more personal characteristics? Second, was the claimant subject to differential treatment on the basis of an enumerated or analogous ground? Third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) in remedying such ills as prejudice, stereotyping and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

The analysis of each element should be made in a purposive and contextualized manner. 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. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment.

In order to determine whether the fundamental purpose of s. 15 is brought into play, it is necessary to engage in a comparative analysis. The purpose and effect of the legislation, other contextual factors, and biological, historical, and sociological similarities or dissimilarities are relevant to determining the appropriate comparator. Usually the claimant may choose the person, group or groups to which he or she wishes to be compared, although within the scope of the grounds pleaded, the court may refine the comparison.

The issues must be approached from the perspective of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant. The "reasonable

person" concept must be understood in context so as not to subvert the purpose of s. 15(1). There were four relevant contextual factors to consider in this case: (A) Pre-existing disadvantage was probably the most compelling factor favouring a conclusion of differential treatment. Where the claimant was already subject to unfair treatment, it was logical to assume that further differential treatment would contribute to the perpetuation of unfair treatment and have a more severe impact. There was no evidential or legal presumption that proof of historical disadvantage did truly affect the dignity of the person. However, any demonstration that a legislative provision had the effect of promoting the stereotypical view that the individual was less capable, or less worthy of recognition as a human being or *[page3]* member of Canadian society, would suffice to establish a violation of s. 15(1). (B) It will be easier to establish discrimination to the extent the impugned legislation fails to take into account a claimant's actual situation, and more difficult to the extent that the legislation recognizes and takes into account the claimant's actual needs, capacities and circumstances. (C) Laws with an ameliorative purpose that corresponds to the purpose of s. 15(1) will not usually violate the dignity of more advantaged individuals. Under inclusive ameliorative legislation that excludes members of a historically disadvantaged group will rarely escape the charge of discrimination. (D) The more severe and localized the consequences on the affected group, the more likely that the distinction is discriminatory.

Although such information is of assistance when available, the claimant is not required to adduce data or social science evidence not generally available to show a violation of dignity. Frequently, the courts may rely on judicial notice and logical reasoning to determine whether s. 15(1) has been violated. Nor is a claimant required to prove matters that cannot reasonably be expected to be within his or her knowledge. For example, the claimant need not demonstrate a discriminatory legislative purpose. The onus may be satisfied by showing a discriminatory effect.

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> In this case, the questioned law does draw a distinction on the basis of one or more personal characteristics. The distinction was correctly argued as on the basis of age alone, and age is an enumerated ground under s. 15(1). Even if it had been accurate to describe the distinction as based on the intersection of several grounds such as age, disability, and responsibility for dependent children, a combination of factors could in an appropriate case be understood to constitute an analogous ground. Adults under age 45 have not routinely been subjected to the sorts of discrimination faced by some of Canada's discrete and insular minorities. The purpose of the impugned provisions was not to remedy the immediate financial needs of widows and widowers, but their longer-term basic needs. The court was entitled to take judicial notice that as one grows older, it becomes increasingly difficult to find and maintain employment. The disadvantage imposed on younger widows and widowers is unlikely to be a substantive disadvantage in the long term. The differential treatment did not promote the notion they were less capable or less deserving of concern, respect and consideration, or less worthy of recognition or value as human beings or members of Canadian society. The legislation did not stereotype, exclude or devalue adults under 45. The law has an ameliorative purpose for older surviving spouses, which accords with the fundamental purpose of s. 15(1). In the absence of other factors suggesting a violation of dignity, Parliament was entitled to premise remedial legislation upon informed generalizations that may not correspond perfectly with the long-term needs of all surviving spouses.

In this case, does the impugned law draw a distinction between the Applicants and others on the basis of one or more personal characteristics? The answer is an unequivocal “yes”.

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Only married couples can jointly apply to adopt. Thus persons such as the Applicants are unable to adopt children conceived by their partners and born into the relationship. While the law applies to all non-married couples, whether heterosexual or of the same sex, there is a clear distinction in that gay and lesbian couples are not legally permitted to marry. Thus the legislative requirement that only married persons may jointly adopt, results in discrimination, not just on the basis of marital status but also of sexual orientation.

By now it is well settled law that unmarried persons in relationships analogous to marriage are treated differently based on marital status and sexual orientation.

> *Miron* v. *Trudel* (1995), 124 D.L.R. (4th) 693 (S.C.C.) per McLachlin J. at pp. 746-752; and per L'Heureux-Dubé, J. at p. 726
>
> *Walsh* v. *Bona* [2000] N.S.J. No. 117 (N.S.C.A.) at pp. 8-10
>
> *Vriend* v. *Alberta* (1998), 156 D.L.R. (4th) 385 (S.C.C.) at p. 424
>
> *M.* v. *H*. (1999), 171 D.L.R. (4th) 577 (S.C.C.) at p. 617
>
> *Egan* v. *Canada* (1995), 124 D.L.R. (4th) 609 (S.C.C.) per L'Heureux-Dubé, J. at pp. 648-649; and per Cory, J. at pp. 673-676

It has also been established that sexual orientation is a personal characteristic and one of the manifestations of human sexuality is entering into a committed relationship with another person. *Egan* (supra).

It is clear from the facts that differential treatment discriminates

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> "...by imposing a burden upon or withholding a benefit from the Applicants 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 Applicants are less capable or worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration?"

Law (supra) at p. 38.

This is a young, professional couple who are well established in a stable and committed relationship of 14 years. They are both employed, are active and involved members of their community, and their children enjoy a secure and nurturing family environment. However, their relationship with their children in this family unit is not legally recognized. The non biological parent, who is in every sense the psychological parent may not adopt the children without severing their legal relationship with the biological parent. They are essentially told that this familial relationship is not worthy of legal recognition because of the parents' sexual orientation. (Expert report of Dr. Blye Frank pp. 2 - 6)

There are no legal means whereby the non-biological parent can achieve the same legal status with the permanency of an adoption order, together with its rights and responsibilities.

In *Law* (supra) at p. 24, Iacobucci J. speaks of human dignity.

> .... Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is

> harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?"

In *M.* v. *H*. (supra) Cory J. at p. 621 addresses the societal significance of excluding same-sex partners from eligibility for spousal support.

> The societal significance of the benefit conferred by the statute cannot be overemphasized. The exclusion of same-sex partners from the benefits of s. 29 of the *FLA* promotes the view that M. and individuals in same-sex relationships generally, are less worthy of recognition and protection. It implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. As the intervener EGALE submitted, such exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.

These words resonate with meaning when applied as well to one's ability to parent and form a permanent, irreversible legal relationship with the biological offspring of one's same-sex partner.

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Thus it is clear on a factual and legal foundation that the impugned law violates the Applicants' rights and freedoms under s. 15.(1) of the *Charter.*

Therefore, based on a reading of the application, the supporting affidavits and documentation, including the expert reports of Dr. Susan Bradley and Dr. Blye Frank, it is clear that while one parent is the biological parent, the other is, in all respects, the spouse of that parent and the psychological parent to these two children. Thus I conclude that the law prohibiting them from jointly adopting their children violates their rights and freedoms under s. 15.(1) of the *Charter*.

2) SECTION 1 OF THE CHARTER:

Once it has been established that the impugned legislation infringes the *Charter*, the onus then shifts to the party seeking to uphold the legislation, to prove that such infringement is demonstrably justified in a free and democratic society.

Because the Government is not opposing the application, it has not justified the discrimination.

In *Vriend* v. *Alberta* (supra) Iacobucci J. stated at p. 430:

> It was recently restated in *Egan* supra at para. 182, which was quoted with approval in *Eldridge* (supra) at para. 84:
>
> > A limitation to a constitutional guarantee will be sustained when two conditions are met. First,

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> the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justifiable in a free and democratic society. In order to satisfy the second requirement, three criteria must be satisfied: (1) the rights violation must be rationally connected to the aim of the legislation: (2) the impugned provision must minimally impair the *Charter* guarantee; and (3) there must be a proportionality between the effect of the measure and its objective so that the attainment of the legislative goal is not outweighed by the abridgement of the right. In all s. 1 cases the burden of proof is with the government to show on a balance of probabilities that the violation is justifiable.

The objectives of the *Children and Family Services Act* are set out in s. 2:

> 2 (1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.
>
> (2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interests of the child. 1990, c. 5, s.2.

The best interests of the child are the paramount consideration in determining whether or not to make an order for the adoption of the child.

The relevant circumstances to be considered are enumerated in s. 3(2) of the Act:

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(a) the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family;

(b) the child's relationships with relatives;

(c) the importance of continuity in the child's care and the possible effect on the child of the disruption of that continuity;

(d) the bonding that exists between the child and the child's parent or guardian;

(e) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs;

(f) the child's physical, mental and emotional level of development;

(g) the child's cultural, racial and linguistic heritage;

(h) the religious faith, if any, in which the child is being raised;

....

(j) the child's views and wishes, if they can be reasonably ascertained;

(k) the effect on the child of delay in the disposition of the case;

...

(n) any other relevant circumstances

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S. 3 (3) specifically addresses the best interests of the child in relation to adoption in conjunction with s. 78 (1)(c).

> 3 (3) Where a person is directed pursuant to this Act in respect of a proposed adoption to make an order or determination in the best interests of a child, the person shall take into consideration those of the circumstances enumerated in subsection (2) that are relevant, except clauses (i), (l) and (m) thereof. 1990, c.5, s. 3.
>
> 78 (1) Where the court is satisfied
>
> (a) as to the ages and identifies 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.

In *Catholic Children's Aid Society of Metropolitan Toronto* v. *C.M.* (1994), 113 D.L.R. (4th) 321 (S.C.C.), the Court recognized the importance of keeping the family unit together for the well being and best interests of children.

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This is also reflected in the preamble to the *Children and Family Services Act* and its purpose.

> WHEREAS the family exists as the basic unit of society, and its well-being is inseparable from the common well-being;
>
> AND WHEREAS children are entitled to protection from abuse and neglect;
>
> AND WHEREAS the rights of children are enjoyed either personally or with their family;
>
> AND WHEREAS children have basic rights and foundamental freedoms no less than those of adults and a right to special safeguards and assistance in the preservation of those rights and freedoms;
>
> ....

Adoption is an integral part of the purpose and objectives of the *Children and Family Services Act*, emphasizing the integrity of the family and the importance for a child of a secure place as a member of a family.

Family is an essential and primary component of a healthy, free and democratic society. Families are to be encouraged, strengthened and supported by the community, Adoption is a positive act in furtherance of these principles. Prohibiting a joint adoption where all the evidence indicates these adults are providing optimum care and love in a nurturing, secure and stable environment, defeats the very purpose of the legislation.

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There is no prohibition against a single gay or lesbian person adopting a child. There can be no justification under the Act for prohibiting a same-sex couple who meet all the criteria (except for their marital status) from doing so as well.

The evolution of the law, the evolution of the concept of “family” and the importance of family to children and society, all conspire to support the contention that this exclusion is unjustified.

The Court had before it the report of Dr. Susan Bradley, an expert in the field of child psychiatry and gender identity, from the Toronto Hospital for Sick Children, University of Toronto and the Clarke Institute of Psychiatry.

She describes the changing face of the family from the traditional father, (at work) mother (at home) to the many configurations witnessed today. In the ongoing quest to ensure the healthy development of children, research indicates that the most important element for them is a stable, consistent, warm and responsive relationship between a child and his or her care giver (Bradley report p. 1) and that a parent’s capacity to support and be emotionally available to a child is enhanced in the context of a supportive relationship. Factors that contribute to a couple’s successful relationship appear to be similar in both homosexual and heterosexual relationships. She concludes her report by saying that, “... children raised by gay or lesbian parents should not be expected to differ substantively in any respect of their development .... gay and lesbian persons have the same capacity to care for children as do heterosexual persons.” (p.5)

Therefore I conclude that there is no justification for depriving these children of their right to be part of a legally recognized family relationship because of their parents’ sexual orientation.

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REMEDY:

Section 52 of the *Charter* (supra) mandates the striking of any legislation that is inconsistent with the *Charter*, but only "to the extent of the inconsistency".

Schacter v. *Canada* (1992), 93 D.L.R. (4th) 1 (S.C.C.) is the landmark decision on constitutional remedies. In exercising its authority, the Court must respect the role of the Legislature and effect a remedy that avoids undue intrusion into the legislative sphere.

Lamer, C.J. (as he then was) stated at p. 11:

> .... Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the Charter extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [Charter] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

He explained the doctrine of severance or "reading in" and "reading down" at p. 11:

> .... The courts have always struck down laws only to the extent of the inconsistency using of the doctrine of severance or "reading down". Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statue or provision violates the Constitution, it is common sense that only the offending portion should be

> declared to be of no force or effect, and the rest should be spared.

Care must be taken not to invoke a remedy of striking down the impugned provisions which would result in all joint adoptions being prohibited. This would grossly offend the principles of the *Children and Family Services Act* and seriously undermine the rights of children. The Court must balance respect for the role of the legislature with respect for the purpose of the Charter.

In this case, “reading in” would minimize interference with the role of the legislature, respect the principles of the *Children and Family Services Act*, and give effect to the Charter.

The Supreme Court of Canada in *M.* v. *H.* (supra) recognized conjugal relationships as including same sex couples.

Recent provincial legislation has been enacted to include same-sex couples as common-law partners. The *Children and Family Services Act* was not included.

The Nova Scotia Court of Appeal in *Walsh* v. *Bona* (supra) held that it was for the legislature to define with precision, common-law relationships in the provisions of the *Matrimonial Property Act*. The result is that a category of common-law partner has been established to include same-sex and opposite-sex couples who are living together in a common-law relationship. The duration of required cohabitation varies from a minimum of one year to a minimum of two years depending on the legislation.

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The Court will defer to the legislature to define the duration of the relationship. It is sufficient to read in "common-law partners" in order to enable both unmarried and married partners to jointly apply for adoption. Whether it is defined as a minimum of one year or two years, this couple qualify as they have been together for 14 years. In any event, in an adoption application, the Court must be satisfied on the evidence before it, that all the criteria have been met and that the adoption is in the best interests of the child.

Therefore the remedy will be the severance of the impugned portions of the legislation and reading in as follows: (the "read in" portions are in bold type; the severed portions are shaded)

Interpretation of Section 67 to 87

67 (1) In this Section and Section 68 to 87,

(a) "adopting parent" means a person who has filed a notice of proposed adoption or has commenced an application for adoption;

(b) "adoptive parent" means a person who has acquired the legal status of parent of a child by virtue of an order for adoption;

(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:

(ca) common-law partner means an individual who has cohabited with another individual in a conjugal relationship;

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(d) “father” of a child means the biological father of the child except where the child is adopted and in such case means, subject to subsection (4) of Section 72, the father by adoption;

(e) “mother” means the biological mother of the child except where the child is adopted and in such case means, subject to subsection (4) of Section 72, the mother by adoption;

(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,

(v) an individual who, under a written agreement or a court order, is required to provide support for the child or has a right of access to the child and has, at any time during the two years before proceedings for adoption are commenced, provided support for the child or exercised a right of access,

(vi) 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.

Right to adopt

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72 (1) A person of the age of majority may, in the manner herein provided, adopt as that person's child another person younger than that person where

(a) the applicant resides or is domiciled in the Province; or

(b) the person proposed to be adopted was born, resides or is domiciled in the Province, or is a child in care.

Spouse **or common-law partner** of applicant as co-applicant

(2) Subject to this Section, if the applicant has a husband or wife **or common-law partner**, who is over the age of majority and is of sound mind, the husband or wife **or common-law partner** shall join in the application **unless the applicant is separated from the husband or wife or common-law partner**.

Spouse **or common-law partner** of applicant is father or mother

(3) If the husband or wife **or common-law partner** of the applicant is the father or mother of the person proposed to be adopted, although not over the age of majority, he or she may join in the application.

Legitimate parent

(4) The husband or wife **or common-law partner** of the applicant if he or she is also the legitimate parent of the person proposed to be adopted, need not join in the application, and in that case the relationship of such husband or wife **or common-law partner** or of his or her kindred with the person proposed to be adopted continues and is in no way altered by any order for adoption made in favour of the applicant, who becomes the other parent of the person proposed to be adopted by such an order.

Effect of death of one applicant

(5) Where one of the applicants for an adoption dies after notice of the proposed adoption has been given to the Minister, the surviving applicant may proceed with the application and an order for adoption by the surviving applicant alone may be made.

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Consenting person as adopting parent

(6) A person whose consent to an adoption is required by this Act is not prohibited from becoming a father or mother by adoption of the person in respect of whom the person has given consent to adopt. 1990, c. 5, s. 72.

Effect of adoption order

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~~ **parents** 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 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.

Relationships

(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).

Subsections (1) and (2) do not apply

incest and prohibited degrees of kindred for marriage to remove any person from a relationship in consanguinity that, but for this Section, would have existed.

"Child" or "Issue"

(4) In any enactment, conveyance, trust, settlement, devise, bequest or other instrument, "child" or ":issue" or the equivalent of either includes an adopted child unless the contrary plainly appears by the terms of the enactment or instrument. 1990, c. 5, s. 80.

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REGULATIONS
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65. For the purposes of subclause (iv) of clause (f) of subsection (1) of Section 67 of the Act, an individual stands in loco parentis to a child when the individual

(a) cohabits with a ~~member of the opposite sex~~ **common-law partner** who is the father or mother of the child and who has the care of that child;

(b) contributes to the financial support of the child; and

(c) behaves towards the child as if the child was the son or daughter of the individual.

CONCLUSION:

On June 4, 2001 following the decision rendered orally on May 3, 2001, the application of S.C.M. and N.J.C. to adopt T. and C. was granted.

The Court acknowledges with thanks the thorough and extensive briefs counsel filed in this proceeding.

COSTS:

The Applicants began their application in October 2000. On November 1, 2000, Bill C-75, *The Law Reform (2000) Act*, was introduced and by November 30, 2000, it had gone through third reading. This Act was to amend provincial statutes by establishing the category of common-law partner, including same sex couples. This action was the result of the decisions in *M.* v. *H.* and *Walsh* v. *Bona*.

The Crown initially opposed the application, notwithstanding changes in the law were in progress. As late as February 2000, there was no concession on whether the

legislation was discriminatory, requiring the Applicants to obtain expert evidence. The Crown continued to oppose the application up to April 11, 2001 at which time the Applicants were advised the Crown was taking no position on s. 15 and s. 1 of the Charter, seeking only to be heard on the issue of remedy.

It was therefore necessary for the Applicants to argue all the points and thus they had to prepare a full case, although in the final analysis they were essentially in agreement on the remedy.

On the other hand, a trial that was originally set for two days, was significantly shortened and the Crown assisted the process in cooperatively formulating the suggested remedy.

I am urged to treat the matter more as akin to a contested chambers application since it was disposed of in less than a day and did not involve a trial.

Costs are in the discretion of the Court (Rule 63) and traditionally follow the event.

Where the matter involves a non monetary issue, the complexity and importance of the issue are factors to be considered.

I conclude that this was an unusual application, involving significant research. It was complex and important, not just to the Applicants, but to the community. The total cost of $11,174.60 is surprisingly low considering the work involved. The research contribution of some Dalhousie Law students assisted in reducing the expense.

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Considering the evolution of the law before and during this application together with the fact that the Applicants were in a position of having to prepare for a full hearing on the Charter issue, it is my conclusion that an award of costs is appropriate. Some of the costs incurred are attributable to the adoption application itself and would have been incurred in any event.

The Applicants shall have their costs in the amount of $8,000.00.

Deborah Gass, J.

DG/ng