

PROVINCE OF NEW BRUNSWICK



Labour and Employment Board

HR-004-03

IN THE MATTER OF THE *HUMAN RIGHTS ACT* R.S.N.B., c. H-11

AND IN THE MATTER OF A COMPLAINT

AND IN THE MATTER OF A BOARD OF INQUIRY

BETWEEN:

A.A., B.B. and C.C.

Complainants,

- and -

The New Brunswick Human Rights Commission

- and -

The Department of Family and Community Services and
The Department of Health and Wellness

Respondents.

BEFORE: G. L. Bladon
Vice-Chairperson

APPEARANCES:

For the Complainants:	<i>Arlene Glencross</i>
For the Respondents:	<i>Clyde Spinney, Q.C.</i>
For the Human Rights Commission:	<i>Christian Whalen</i>

DATE OF HEARING: April 15, 2004

DATE OF DECISION: July 28, 2004

Introduction

1. On November 13, 2002, A.A. filed a complaint with the New Brunswick Human Rights Commission (HRC) alleging that the New Brunswick Department of Family and Community Services (FCS), through its administration of the *Family Services Act* (Adoption), and the Department of Health and Wellness (DHW), through the administration of the *Vital Statistics Act* (Birth Registration), had discriminated against her because of her sexual orientation and marital status contrary to section 5(1) of the *Human Rights Act* (the Act). Section 5(1) of the Act provides:

No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall

- (a) deny any person or class of persons any accommodation, services or facilities available to the public, or
- (b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public,

because of ... martial status [or] sexual orientation..."

B.B. and C.C. were added as parties to the complaint on consent at the opening of the hearing.

2. Following an investigation, the HRC recommended to the Minister of the Department of Training and Employment Development that a Board of Inquiry be appointed to hear this complaint. On August 6, 2003, the Minister referred the complaint to the Labour and Employment Board pursuant to section 20 of the Act. The complaint was heard by the Board on April 15, 2004, following a pre-hearing conference on January 20, 2004 and the receipt of pre-hearing briefs from the parties on April 8, 2004. Post hearing briefs were delivered on April 30, 2004. For reasons which follow, the Board

finds that the Respondents discriminated against A.A. and B.B. contrary to section 5(1) of the Act. A.A. and B.B. are entitled to compensatory damages accordingly.

Factual Background

3. This matter proceeded on an agreed Statement of Facts. A brief summary follows: In August 1998, A.A. met her same sex life partner B.B. A close relationship developed. They began living together in December 1998. In August 1999, they purchased a house in the Moncton area. They decided to expand their family in December 1999. A.A. and B.B. agreed that B.B. would become pregnant through artificial insemination by an unknown donor. At the initial consultation at the fertility clinic A.A. signed, as required, a document “that indicated that she would be responsible financially and otherwise for the child that would be born through this process”.

4. To secure the family, A.A. and B.B. had wills and reciprocal powers of attorney prepared to provide them with the protections received by legally married couples. A.A. listed B.B. “as a beneficiary on her pension”.

5. On November 29, 2001 B.B. gave birth to a baby girl C.C.

6. Before leaving the hospital, A.A. and B.B. completed the New Brunswick Birth Registration Form on which they indicated that C.C. would take A.A.’s surname. A.A. and B.B. had earlier decided that this would indicate A.A.’s role as a parent. On December 29, 2001, the DHW responded to the Birth Registration Form by letter which reads in part:

This letter is to advise that there are currently no provisions within the *Vital Statistics Act* which permits the registration of a newborn child to two parents of the same gender. Current legislation is intended to reflect the biological facts of a birth event and is structured for the registration of a child to the biological mother alone or to the biological mother and father. Therefore, we were required to remove the name of the non-biological parent from the birth record in order to finalize registration.

We also noted your request for your daughter's surname to be registered as *A*. Since it was necessary to register the child as being born to *B.B.* also, it was also necessary to register the child in the surname *B*. However, please note the surname of the child may be changed under the provisions of the Change of Name Act. Should you wish to proceed with a change of name, please advise and we will forward the required forms. The cost of changing the surname under the Change of Name Act would be \$150. This would include the \$125.00 fee for a change of surname and \$25.00 for a certified copy of the birth certificate which is also required to process an application for a change of surname.

We regret not being able to register the birth of your child as requested on the Registration of Birth form.”

7. In February 2002 *A.A.* applied to adopt *C.C.* by completing the provincial Intent to Adopt Form. FCS responded by letter dated February 18, 2002 which again reads in part:

“In accordance with Section 79(6) of the Family Services Act, the Minister has no involvement in a spousal adoption.

I would be remiss however if I did not point out that the Adoption legislation in New Brunswick defines “spouse” as “a person who is married to another person by virtue of a legally constituted marriage”. Applicants must submit a copy of their marriage certificates.

Common law, a relationship that is not solemnized by a religious or civil ceremony is not considered a legally constituted marriage for the purposes of adoption.

Section 66 of the *Family Services Act* states:

“Any adult

(a) either alone, if not married, or jointly with his spouse, may adopt a child;”

Obviously, there are implications to the natural parent of the child if *A.A.* adopts the child as a single person, *B.B.* would be divesting her parental rights.”

8. As a consequence, this complaint alleging discrimination contrary to section 5(1) of the *Human Rights Act* was filed.

The Issues:

- 1) Did the Department of Family and Community Services discriminate against the complainants in its application of section 66 and related provisions of the *Family Services Act* in refusing to permit A.A. and B.B. from jointly adopting C.C.?
- 2) Did the Department of Health and Wellness discriminate against the complainants in its applications of sections 8 and 9 of the *Vital Statistics Act* by refusing
 - (a) to record A.A.'s name as a parent on C.C.'s birth registration form, and
 - (b) to permit C.C. to take A.A.'s surname?
- 3) If the complaints of discrimination are upheld, what is the appropriate remedy?

Position of the Parties

The Human Rights Commission

9. The Human Rights Commission [whose submissions were adopted in full by the Complainants] submits that human rights legislation enjoys a quasi-constitutional status because of its social significance. It is therefore to be given a broad and liberal interpretation in order to achieve its purpose which is to affirm and give effect to the principle that all persons are free and equal in dignity and human rights. See *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536 at para. 12; *Robichaud v. Canada (Treasury Board)*, [1987] 2. S.C.R. 84 at para. 8; *Attis v. New Brunswick School District No. 15* (1991), 15 CHRR D/339 (N.B. Bd. Inq.) at para. 57; Ruth Sullivan, ed. *Driedger on the Construction of Statutes*, 34d ed. (Toronto: Butterworths, 1994) at page 383; and *Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 17.

10. Discrimination is a distinction, which need not be intentional, based on personal characteristics which disadvantage or limit access of the complainants to opportunities, benefits and advantages available to other members of society. Such discrimination is a violation of human freedom and dignity or self-worth and self-esteem. See *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at para. 37; *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.*, (*supra*), at paras. 12, 14 and 18; *C.N.R. v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 at para. 34; *Parcels v. Red Deer General and Auxiliary Hospital and Nursing Home Dist. No. 15* (1991), 15 CHRR D/257 (Alta. Bd. Inq.) at para 417; A. Hunter, *Human Rights Legislation in Canada: Its Origin, Development and Interpretation*, (1976), 15 U.W.O.L. Reports at 33 quoted in *Gadowsky v. Two Hills (County) School Committee No. 21* (1980), 1 CHRR D/184 (Alta. Q.B.); and *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at paras. 51 and 53.

11. The three-part test for discrimination set out in *Law v. Canada (supra)* is the appropriate analytical approach to the issue: i.e.

- (a) Does the law impose differential treatment between the claimant and others?
- (b) Is marital status or sexual orientation the basis of the difference?
- (c) Does the law have a purpose or effect that is discriminatory within the meaning of the equality guarantee and thereby constitutes an affront to human dignity?

12. The Human Rights Commission submits that the application of section 66 of the *Family Services Act* and subsection 3(10) of *Regulation 85-14* prevents “a homosexual

partner from adopting her spouse's child by way of spousal adoption as can husband or wife". This difference in treatment is based on A.A.'s marital status and sexual orientation which section 5(1) of the *Human Rights Act* prohibits. Further, the distinction is discriminatory within the equality provisions of the Act as it reflects the "stereotypical application of presumed group or personal characteristics, and has the effect of perpetuating or promoting the view that the complainant is less capable or less worthy of recognition or value as a human being or as a member of Canadian society". See *Re A* [1999] A.J. No. 1349 (ABQB); *Re C.E.G.* (No. 2), [1995] O.J. No. 4073; *Re K.* [1995] 23 O.R. (3d) 679 (Ont. Prov. Div.); and *Re M.* (S.C.) [2001] 202 D.L.R. (4th) 172 (N.S.S.C.).

13. The Human Rights Commission says that the application of sections 8 & 9 of the *Vital Statistics Act* by the DHW in refusing to register the child C.C. with A.A.'s surname and to register A.A. as a parent of the child on the Birth Registration Form is discriminatory and contrary to section 5(1) of the *Human Rights Act*. The particulars of the husband of a child born to a married woman are recorded as the father regardless of the father's biological paternity, yet the non-biological same sex parent cannot be registered at birth as the child's parent and further, the non-biological parent is denied participation in naming the child. Both the refusal to record A.A. on the Birth Registration form and the refusal to permit the child to take A.A.'s surname constitute discrimination based on sexual orientation and marital status "which perpetuates the view that the complainant or women like her are less worthy of recognition as human beings". See *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835, paras. 15-17; *Gill v. British Columbia (Ministry of Health) (No. 1)* (2001), 40 CHRR D/321, and *Nicholas Toonen v. Australia Communication* No. 488/1992, UNHRC.

14. International Law and Human Rights Law considerations should inform the interpretation of the New Brunswick *Human Rights Act* as the legislation is presumed to respect the values and principles enshrined in international law, customary and conventional. See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 70 and 71. Further the complainant's right to form a family guaranteed by article 16 of the Universal Declaration of Human Rights, article 23 of the International Convention on Civil and Political Rights and Article 10 of the International Covenant on Social Economic and Cultural Rights and which constitute norms of international law "have the force of international treaty law binding on Canada and the Province of New Brunswick". These provisions are consistent with the New Brunswick discrimination prohibition and should be extended to homosexual couples.

15. The Human Rights Commission argues further that the distinction in the denial of adoption and birth registration services to A.A. constitutes a violation of her privacy and liberty interests as those rights are guaranteed by sections 7 and 8 of the *Canadian Charter of Rights and Freedoms*. See *Canada (Combines Investigation Acts, Director of Investigations and Research) v. Southam Inc.*, [1984] 2 SCR 145; *R. v. Dyment* (1988), 89 N.R. 249 (S.C.C.); and *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paras. 110-119.

16. The stated objective of the *Family Services Act* to promote the best interests of the child is better served by the recognition of the *de facto* parental relationship between A.A. and B.B. and the acceptance of the Birth Registration Form presented by A.A. and B.B. thereby permitting the spousal adoption to proceed.

17. The Human Rights Commission seeks:

(a) A declaration finding the Department of Health and Wellness and the Department of Family and Community Services to have discriminated against the complainants in denying them the opportunity to proceed with a spousal adoption, in refusing to register A.A. as a parent on her daughter's birth certificate and to record the child's surname as her own in accordance with her wishes and those of her partner, the birth mother;

(b) An order directing the Department of Health and Wellness and the Department of Family and Community Services to cease discriminating against same sex parents in similar situations; and

(c) Compensatory damages for each party to these proceedings. The Human Rights Commission submits in particular that the discrimination is a violation of A.A.'s equality rights and an affront to her privacy and liberty to affirm her distinctiveness and claim the child C.C. as her own.

See *Re K.* (*supra*); *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at p. 782 and p. 795-96; *Cameron v. Nel-Gor Castle Nursing Home and Nelson* (1984), 5, CHRR D/2170 (Ont. Bd. Inq.) at para. 18526; *Moffat v. Kinark Child and Family Services (No. 5)* (1999), 36 CHRR D/346 (Ont. Bd. Inq.) at para. 102; *Christie v. Halifax Student Housing Society* (1999), 36 CHRR D/341; *Gwinner v. Alberta v. Minister of Human Resources and Employment* (2000), 44 CHRR D/52; *Menghani v. Canada (Employment and Immigration Comm.)* (1992), 17 CHRR D/236.

The Respondent's Position

18. The Respondent submits that section 5(1) of the *Human Rights Act* prohibits discrimination in the provision of "services ..." which, it submits, does not include birth

registration and adoption as those terms are defined in the context of this legislation. See *Gay Alliance Towards Equality v. Vancouver Sun*, [1979] 2 S.C.R. 435; and *School District No. 15 v. N.B. (Board of Inquiry)* (1989), 100 N.B.R. (2d) 181.

19. In the alternative, the Respondent concedes that while birth registration might be a service, adoption is a private matter between two individuals in which the Minister of Family and Community Services has no involvement and therefore cannot be said to have acted in a discriminatory way – see *Anderson v. M.N.R.*, [1947] D.L.R. 262 at p. 280.

20. The primary argument advanced by the Respondent is the characterization of this complaint as being an attack on the constitutionality of the impugned provisions of the *Family Services Act* and the *Vital Statistics Act*. The Respondent argues that this Board of Inquiry is without jurisdiction to undertake such an inquiry which is reserved for courts of superior jurisdiction. See the *Judicature Act* 1973, c. J-2; *Re K. (supra)*, *W.X. v. Y.Z.* (2000), NBJ No. 331, *Cooper v. Canada (HRC)*, [1996] 3 SCR 854; *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504; *Mooring v. Canada*, [1996] 1 S.C.R. 75; and *Hoddinott v. Nickerson & Underhill* (1983), 46 N.B.R. (2d) 340 at pp. 346-347.

21. Similarly the portion of the complaint alleging violations of section 15 of the *Canadian Charter of Rights and Freedoms* bearing on equality must be dismissed as being beyond the jurisdiction of this Board.

22. The constitutionality issue with respect to adoption and the *Family Services Act* aside, the Respondent says the provision of advice concerning some “apparent limitations of the legislation” cannot constitute an act of discrimination and the Complainant has therefore failed in establishing a *prima facie* case in this regard.

23. Assuming birth registration to be a service and again apart from any constitutional issue, the question is confined to the administration of the *Vital Statistics Act*. The Respondent argues that the statute contains a complex set of the rules for the regulation of the surname of a child. There is no provision applicable to an unmarried woman “that permits the child’s surname to be registered in the family name of the ‘life partner’ of the child’s mother, where that partner is not the child’s father ... no exceptions are made for the mother’s life partner regardless of whether that partner is male or female”. Hence there cannot be said to be discrimination based on sexual orientation.

24. The purpose, at least in part, of the *Vital Statistics Act* is to record the true paternity of the child and ensure the accurate registration of the birth particulars of children which includes the identity of the natural or biological parents. The term “father” must be given its normal meaning absent an express definition within the legislation. The purpose of the statute “should not be artificially stretched in a contrived manner so as to apply to or include persons who are not fathers, regardless of whether it may be seen as politically correct or socially equitable to do... As all partners of unmarried mothers are in the same position if they are not the natural father of the child in question, whether that partner is male, female, gay or lesbian”, it cannot be said that

the legislation is discriminatory either on the basis of gender, sexual orientation or marital status.

25. Finally the Respondent submits that the presumption of heterosexual marriage, which is said to underlie the *Vital Statistics Act*, bears on whether the legislation itself is discriminatory which is a matter for a Superior Court.

Reasons for Decision

26. At the outset the respondent argues that “services” within the context of section 5(1) do not extend to birth registration and adoption. “Services” were defined in *Gay Alliance and Vancouver Sun (supra)* by Martland, J. (speaking for the majority in 1979). He expressed the opinion that “the general purpose of section 5(1) was to prevent discrimination against individuals or groups of individuals in respect to the provision of certain things available generally to the public. His review of the civil rights jurisprudence in the United States indicated that “services” “refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities”, and he refused to extend the term to include the acceptance of advertising by a newspaper. It was on this basis that the respondent says that it cannot be given a more broad application to the circumstances of this case.

27. The *Interpretation Act*, in section 17, mandates a fair, large and liberal construction and interpretation as best ensures the attainment of the object of the

legislation. The purpose of human rights legislation is reflected in the preamble to the Act:

“WHEREAS recognition of the fundamental principle that all persons are equal in dignity and human rights without regard to race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation or sex, is a governing principle sanctioned by the laws of New Brunswick; and

WHEREAS ignorance, forgetfulness, or contempt of the rights of others are often the causes of public miseries and social disadvantage; and

WHEREAS people and institutions remain free only when freedom is founded upon respect for moral spiritual values and the rule of law; and

WHEREAS it is recognized that human rights must be guaranteed by the rule of law, and that these principles have been confirmed in New Brunswick by a number of enactments of this Legislature.”

In addressing the construction of human rights legislation, the Supreme Court of Canada held in *Ontario (Human Rights Commission) v. Simpsons Sears Ltd.* (*supra*) at para. 12.

“It is not, in my view, a sound approach to say that [page 547] according to established rules of construction no broader meaning can be given to the [Ontario Human Rights] Code than the narrowest interpretation of the words employed. The accepted rules of construction are flexible enough to enable the Court to recognize in the construction of a human rights code the special nature and purpose of the enactment (see Lamer J. in *Insurance Corporation of British Columbia v. Heerspink* [1982] 2 S.C.R. 145, at pp. 157-58), and give to it an interpretation which will advance its broad purposes. Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary – and it is for the courts to seek out its purpose and give it effect. The Code aims at the removal of discrimination.”

The issue was succinctly put by LaForest J. in the subsequent decision of the Supreme Court of Canada in *Robichaud v. Canada (Treasury Board)* [1987] 2 F.C.R. 84 at para. 8:

“The Act must be so interpreted as to advance the broad policy considerations underlying it. The task should not be approached in an niggardly fashion but in a manner befitting the special nature of the legislation.”

A broader approach to the meaning of “services” is found in *Insurance Corporation of British Columbia and Heerspink* [1982] 2 S.C.R. 145 where the issuing of a fire insurance policy was found to be a service within the meaning of section 3(1) of the British Columbia *Human Rights Code*.

28. The nature of the service in issue here under the *Vital Statistics Act* is the mandatory registration of a birth – sections 5,6 & 7. It is – as it purports to be – the formal recognition of the individual’s birth into the world. Adoption, private or otherwise, under the *Family Services Act* is the somewhat complex process whereby parent/child relationships are permanently established and recorded. Both birth registration and adoption are available to the public. To suggest that these life-affirming processes are not “services” so as to be beyond the reach of human rights legislation strains credulity. In *U.B.C. v. Berg*, [1993] 2 S.C.R. 353, the complainant alleged that the University had discriminated against her by failing to provide her with a rating sheet completed by a faculty member required for academic advancement in an internship and for refusing to give her a key to a university building which were generally available to graduate students. The court found that this conduct was captured by “services” within section 3(1) of the British Columbia *Human Rights Code*. In doing so it noted with approval the view of Linden J.A. in *A.G. (Canada) v. Rosin* (1991) 1 F.C. 391 at page 398 on the difference in language among the various provincial human rights statutes:

“The essential aim of the wording is to forbid discrimination by enterprises which purport to serve the public”.

And further in *U.B.C. v. Berg (supra)*, Justice Lamer, writing for the majority, expressly limited the meaning of services articulated in *Gay Alliance* to the facts of that particular case – para. 46.

29. A more comprehensive definition of “services” is also found in *Gill v. British Columbia (supra)* where the British Columbia Vital Statistics Agency’s refusal to register

the same sex partner of a birth mother as a parent of the child was scrutinized under the British Columbia *Human Rights Code*. In *Bewley v. Ontario (Ministry of Consumer and Commercial Relations)* (1997), 31 CHRR D/218, the refusal of the Registrar General to allow a lesbian to change her name to that which incorporated the name of her same sex partner was found to be discriminatory under the Ontario Human Rights legislation. Similarly issues surrounding adoption were canvassed in the context of human rights legislation in Alberta and British Columbia. See *Pringle v. Alberta Municipal Affairs* (2003), 48 CHRR D/111 and *Murphy v. British Columbia (Ministry for Children and Families)* (1999), 35 CHRR D/318. Consequently, the issues here - birth registration and adoption - must be said to fall within the meaning of “services” in section 5(1) of the New Brunswick *Human Rights Act*.

Discrimination

30. Has the Respondent discriminated against the complainant in the provision of birth registration and adoption services? Discrimination is not defined in the New Brunswick *Human Rights Act*; however, the meaning of discrimination in relation to human rights has been addressed by the Supreme Court of Canada. In 1989 the court said in *Law Society of British Columbia v. Andrews (supra)* at para. 37:

“...Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.”

31. Then in 1999, when concerned with the equality provisions in section 15 of the *Charter*, the Supreme Court of Canada noted in *Law v. Canada (Minister of Employment and Immigration)* (*supra*) at para. 51:

“It may be said that 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 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 of the enumerated or analogous grounds, and where the differential treatment reflects 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.

...

What is human dignity? There could be different conceptions of what human dignity means. For the purposes of analysis under s. 15 (1) of the *Charter*, however, the jurisprudence of this Court reflects a specific *albeit* non-exhaustive, definition. ... Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and physiological 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?”

32. Discrimination within section 5 of the New Brunswick *Human Rights Act* must then be taken to mean, in summary, a distinction based upon the prohibited grounds set out in the legislation between an individual or groups, intentional or not, that results in some type of harm or prejudice or the imposition of burdens or the withholding of benefits and which, in turn, results in a violation of human dignity or freedom.

33. In *Law v. Canada (supra)* the court developed a three-part test for discrimination in the context of section 15 of the *Charter*. This test however is appropriate to human rights complaints in that the legal principles bearing on discrimination must be common

to both the public and private sectors. Cited in *Ontario (Human Rights Commission) and Ontario (Ministry of Health)* (1994) 21 CHRR D/259 [Ont. CA.], W. S. Tarnopolsky stated in *Discrimination and the Law*, looseleaf, (Toronto): R. DeBoo, 1985 at p. 4.8:

“...principles of constitutional paramountcy and *in pari materia* operate jointly to homogenize the interpretation of anti-discrimination language in human rights codes with that of s. 15(1). If not a “mirror”, *Charter* jurisprudence may fairly be described as a “template” for decision-making under other anti-discrimination statutes”. See *Gwinner v. Alberta (Ministry of Human Resources and Employment)* (2002), 44 CHRR D/52”.

34. The test in *Law* requires the claimant alleging discrimination to show that:

- (1) The law imposes differential treatment between the claimant and others;
- (2) One of the enumerated grounds (in this instance marital status and sexual orientation) is the basis for the distinction, and
- (3) The law has the purpose or effect that is discriminatory within the equality guarantee, i.e. constitutes an affront to human dignity.

35. As counsel for the HRC pointed out: the issues in this case are not novel.

Vital Statistics Act

36. When C.C. was born, both A.A. and B.B. completed a Birth Registration Form indicating A.A. as a parent and B.B. as the mother of C.C. The registration form further listed C.C.’s surname as A. The DHW refused to register A.A. as a parent of the child as “there are currently no provisions within the *Vital Statistics Act* which permits the registration of a newborn child to two parents of the same gender.” It rejected A.A.’s surname for C.C. saying: “Since it was necessary to register the child as being born to B.B. also, it was also necessary to register the child in the surname of B.”

37. The legislation underlying the respondent’s position is contained in sections 1, 7.5, 8(1), 8 (1.1), and 9 of the *Vital Statistics Act*. There is indeed no provision

permitting a child born to an unmarried mother to take the surname of the mother's same sex partner. The Act does provide that where a child is born to a married woman, the particulars of the husband shall be given as father.

38. The respondent submits the purpose of the legislation is to provide "an official registration of birth" and if A.A. is not the mother or father of the child, she is not entitled to register C.C.'s birth under section 7(5) of the *Vital Statistics Act* which provides:

"Within fourteen days after the birth of a child in any other case, a birth registration form provided by the Registrar General shall be completed and filed for the purpose of registering the birth of the child with the Registrar General

- (a) by the father and the mother,
- (b) by the mother, where the father is unknown, unwilling or unable,
- (c) by the father, where the mother is unable,
- (d) where the father is unknown, unwilling or unable and the mother is unable, by the persons standing in place of the parents, or
- (e) if there is no father or mother or other person whose duty it is to register the birth, by the occupier of the dwelling in which the child was born, if the occupier has knowledge of the birth, or by a person, other than a medical practitioner present at the birth."

Children born to unmarried mothers must take the surname or maiden surname of the mother subject to exceptions which do not apply here. The respondent argues that the legislation is not discriminatory because the life partner of the unmarried mother is excluded from naming the child whether that partner is male or female. This is consistent with the purpose of the Act, which, the respondent says, is "to ensure an accurate registration of birth particulars to children, including the identity of their natural or biological parents, or their mother or father." The difficulty with respondent's argument lies in the fact that the legislation permits registration of the husband of the married birth

mother as father without regard to actual biological paternity and proceeds on a presumption of paternity. Consequently, the premise that the sole purpose of the legislation is to provide an accurate birth record is undermined. On this point, the British Columbia Human Rights Tribunal in *Gill (supra)*, which involved an identical issue, made this observation at paragraph 74:

“Based on the legislative history and on case authority, I accept that the primary purpose of Vital Statistics is to gather and record facts about important events in the lives of British Columbians. However, there is nothing in the current *Act*, or any of the earlier versions of the legislation, that suggests that another purpose is to collect biological or genetic information about the parents of a child. Although there is nothing in the *Act* that prevents the Director from obtaining that information, there is no evidence that the biological or genetic information collected by the Director is accurate or complete. Mr. Moncour agreed that Vital Statistics does not know whether males who identify themselves as fathers are in fact the genetic parents of the child, nor, indeed, whether the woman who gives birth is genetically related to the child. Furthermore, the Director has not attempted to obtain accurate biological or genetic information as that relates to children born as a result of various forms of reproductive technologies, although those technologies have existed for over twenty years.”

The Board found in the British Columbia *Vital Statistics Act* to contravene its *Human Rights Code* concluding at paragraph 79 *et seq.*

“When the partner of the mother is not a biological parent of the child, Vital Statistics will only register that parent if an adoption order under the provisions of the *Adoption Act*, R.S.B.C. 1996, c. 5 has been obtained. Although this is theoretically the case whether the partner is the same or the opposite sex as the mother, in practice only same-sex partners of mothers are questioned as to their biological relationship with the child. Opposite-sex partners of women giving birth are not similarly questioned.

[80] Furthermore, women who give birth to a child born using a donor egg are registered as mothers without question. Similarly, men who self-identify as fathers are able to register themselves as such on the Birth Registration forms. Neither parent is required to adopt, or resort to the Court, to establish the parent-child relationship.

[81] With the advent of various forms of reproductive technology, it is possible for a child to have legal social parents, biological parents, and a birth mother who is neither a legal social or biological mother. It is evident that the Birth Registration regime established by Vital Statistics has not kept up with reproductive technologies. The same-sex partner of the biological mother of a child is denied the presumptive proof of her relationship to the child, including the right to register her child in school, to obtain airline tickets and passports for her child, as well as denying her the ability to assert her child’s rights with respect to a myriad of other laws, from the *BC Benefits (Child Care Subsidy) Act* [R.S.B.C. 1996, c. 26] to the *Young Offenders Act* [R.S.B.C. 1996, c. 494], unless and until she resorts to the adoption process.

[82] In my view, Vital Statistics has denied same-sex couples the right to register a birth in the same way that opposite-sex couples do, based on the Director’s definition of

“father”, as well as its practice of allowing males to register as fathers without any inquiry into a biological relationship with a child. The process of registering births, upon which birth certificates are based, is based solely on a heterosexual view of the family. Because the complainants are women living in same-sex relationships who have a child together, they can only establish families through the adoption process. This differential treatment to access to a process that confers a benefit offends the principles of equality on the bases of sexual orientation, family status and sex.

[83] I conclude that Vital Statistics has denied the complainants access to the benefit of verification and documentation of parent/child relationships available to others without the necessity of the adoption procedure, and has thus contravened s. 8 of the *Code*. I find that Vital Statistics has discriminated against Ms. Gill and Ms. Popoff on the basis of sex, sexual orientation and family status.”

39. The reasoning in *Gill* has direct application to the circumstances in this case.

Further, the importance of participation in the birth registration process for a parent was described by Deschamps J. in *Trociuk v. British Columbia (A.G.)*(*supra*) at paras. 15-17:

“[15] Parents have a significant interest in meaningfully participating in the lives of their children. In *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 85, LaForest J. wrote that “individuals have a deep personal interest as parents in fostering the growth of their own children”. In a similar vein, Wilson J. in *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 319, wrote: “The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual’s sense of self and of his place in the world.”

40. Consequently, I conclude that the complainants here have been discriminated against contrary to section 5(1) of the *Human Rights Act* by the rejection of the Birth Registration Form submitted listing A.A. as a parent and showing C.C.’s surname as A.

Adoption

41. A.A. applied to adopt C.C. in February 2002. The relevant provisions of the *Family Services Act* provide:

1. “spouse” means a person who is married to another persons by virtue of a legally constituted marriage, except where otherwise defined in this Act.

66. “Subject to the provisions of this part, any adult a) either alone, if not married, or jointly with his spouse, may adopt a child; and b) when adopting a child of his spouse, may do so without his spouse joining in the application.”

The FCS responded saying that spousal adoption was not available to A.A. as she was not a spouse within the meaning of the Act, and an adoption by A. under section 66 (a) would necessitate B.B. surrendering her parental rights. The HRC and the complainants submit that the denial of adoption services is a difference in treatment based on marital status and sexual orientation. This difference in treatment implies that A.A. is less worthy as a human being and thereby constitutes an insult to A.A.'s human dignity. This issue was considered in the context of section 15(1) of the *Charter* by Nevins J. in *Re K. (supra)*. The facts concerned an adoption application by the same-sex partner of the birth mother. He examined the adequacy and effects of homosexual parenting and in summarizing the evidence, he set out the conclusion of Doctor Susan Bradley, the Psychiatrist in Chief at the Hospital for Sick Children in Toronto and a Consultant Psychiatrist with the Clarke Institute of Psychiatry where, for over twenty years, she has been involved in the Child and Adolescent Gender Identity Program.

“Based on my academic and clinical work in this area of child psychiatry, it is my opinion that same-sex couples should generally be treated in the same manner as opposite sex common-law couples with regard to the issue of adoption of children. Having regard to matters related to healthy child development, it is my view that sexual orientation of a person should not, in itself, be grounds for excluding a person for consideration as an adoptive parent.

This conclusion is based on my knowledge of child development and the aspects of parenting which are essential to healthy child development, as well as the literature which does not demonstrate a deleterious impact on children raised by gay or lesbian parents. In fact, all studies concluded to date show remarkable similarity in child development patterns of children whose parents are gay or lesbian compared to children whose parents are heterosexual.

...It is reasonable to conclude that children raised by gay or lesbian parents should not be expected to differ substantially in any respect of their development. Therefore, it is my opinion that gay and lesbians persons have the same capacity to care for children as do heterosexual persons.”

42. Nevins J., noting that the concept of adoption is a unique creature of statute that has been referred to as “the most significant procedure which can arise within the legal

system”, went on to subject the Ontario legislation to the analysis set out in *Law v. Canada*. He concluded at page 18:

“From a legal perspective, therefore adoption is a unique conglomerate of rights and privileges that cannot be replicated through any other combination of orders or processes. To deny an individual or group the right to apply to adopt clearly “imposes a disadvantage” and has the effect of “withholding access benefits and advantages available to others”.

What is even more inimical is that the group that is being considered namely homosexual couples living in a conjugal relationship, are denied opportunities, benefits, and advantages that are not only available to the rest of the population, but are available to individual homosexual persons, that is, the right to apply for adoption and have their application considered in the context of whether it would be in the best interests of the child. Put in its simplest terms, because of section 136 the applicants are denied their “day in court” for no other reason than the fact that they are homosexual. I cannot imagine a more blatant example of discrimination.”

43. There is no substantial distinction between the Ontario legislation and the corresponding provisions of the New Brunswick *Family Services Act*. The same issue came before the Nova Scotia Supreme Court in *Re S.C.M. et al.*, [2001] 202 DLR (4th) 172 in the context of the adoption scheme in Nova Scotia. At page 9 Gass, J. stated:

“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”.

Only married couples can jointly apply to adopt. 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 or 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.”

It follows then that the denial of spousal adoption services to A.A. and B.B. constitutes discrimination within section 5 (1) of the New Brunswick *Human Rights Act*.

The jurisdictional issue

44. The main thrust of the Respondent's argument may be simply stated: To the extent that the facts in this case reflect discrimination, the source of that discrimination lies in the legislation and any challenge to that legislation "is solely a matter for a superior court", and not an inquiry under the *Human Rights Act*.

45. It is important to appreciate at the outset that the Human Rights Commission and the Complainants do not ask this Board of Inquiry to declare the impugned legislation unconstitutional which seems to be the focus of the Respondent's submission. The relief sought is 1) a declaration that the Complainants have been the subject of discrimination in violation of the *Human Rights Act*, 2) an Order directing the Respondent to cease discriminating against similarly situated persons and 3) damages. The question, then, is the Board's jurisdiction where other provincial legislation is in conflict with the *Human Rights Act*.

46. The issue was addressed in the federal context in *Druken v. AG (Can)* (1988), CHRR D/5359. The question was, having found certain provisions of the *Unemployment Insurance Act* and its Regulations discriminatory, could the Human Rights Tribunal make general declarations as the validity of other legislation and award damages.

47. The answer begins with the nature of human rights legislation. It was expressed succinctly by Lamer J. in *Insurance Corp. of B.C. v. Heerspink*, [1982] 2 SCR 145:

"When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind

that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises.

As a result, the legal proposition *generalia specialibus non derogant* cannot be applied to such a code. Indeed the Human Rights Code, when in conflict with “particular and specific legislation”, is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.

Furthermore, as it is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.

Therefore, whilst agreeing with my brother Ritchie that “the two statutory enactments under review can stand together as there is no direct conflict between them”, I should add that were there such a conflict, the Code would govern.”

48. The Federal Court of Appeal in *Druken* answered the argument limiting the jurisdiction of a Human Rights Tribunal in this way:

“40152 In arguing that the Tribunal erred in ordering the CEIC to cease applying the impugned provisions, the Attorney General relies on the proposition that such a tribunal has no jurisdiction to make general declarations as to the validity of legislation. The principle was well stated by MacFarlane, J.A., of the British Columbia Court of Appeal in *Re Schewchuck and Ricard* (1986) D.L.R. (4th) 429 at 439 ff.

It is clear that the power to make general declarations that enactments of Parliament or of the Legislature are invalid is a high constitutional power which flows from the inherent jurisdiction of the superior courts.

But it is equally clear that if a person is before a court upon a charge, complaint or other proceeding properly within the jurisdiction of that court then the court is competent to decide that the law upon which the charge, complaint or proceeding is based is of no force and effect by reason of the provisions of the *Canadian Charter of Rights and Freedoms*, and to dismiss the charge, complaint or proceeding. The making of a declaration that the law in question is of no force and effect, in that context, is nothing more than a decision of a legal question properly before the court. It does not trench upon the exclusive right of the superior courts to grant prerogative relief including general declarations.

That may equally be said of a human rights tribunal which finds legislation to mandate an unjustified discriminatory practice or to have been implicitly repealed by the enactment of the *Human Rights Act*.”

49. In my view that is the end of the issue. A Board of Inquiry under the New Brunswick legislation has jurisdiction, having found discrimination in the delivery of services which flow directly from the legislation, to make a declaration that the

legislation is discriminatory and to order the relevant authority to cease applying the impugned provisions. (See *Anvari v. Canada (CEIC) (1991)*, 14 CHRR D-292). Furthermore a declaration of discrimination and an order to cease the offending conduct falls precisely within the remedial jurisdiction of the Board as set out in section 20(6.2)

(a) of the Act:

20(6.2) Where, at the conclusion of an inquiry, the Board finds, on a balance of probabilities, that a violation of this Act has occurred, it may order any party found to have violated the Act

(a) to do, or refrain from doing, any act or acts so as to affect compliance with the Act.

Damages

50. The Board's jurisdiction to award damages is found in section 20(6.2) which permits the Board having found a violation of the Act:

(f) to compensate any party adversely affected by the violation for any consequent emotional suffering, including that resulting from injury to dignity, feelings or self respect, in such amount as the Board considers just and appropriate .

51. The damage award is expressly intended to be compensatory and not to include an element of punishment as the Human Rights Commission seems to submit by reference to the Province's reluctance to respond positively to the interim order of Guerette J. in *WX v. YZ* [2000] NBJ No. 331. In that case Justice Guerette found that the spousal support provisions of the *Family Service Act* applied to same-sex couples following the decision of the Supreme Court of Canada in *M v. H* [1999] 2 SCR 3. In the course of that proceeding an undertaking was given to Justice Guerette that "the Government of New Brunswick was planning to amend the legislation to conform with the decision of the Supreme Court in *M v. H* and that possibly this could be done within six months."

The Human Rights Commission says the government has not complied with its undertaking thereby necessitating this proceeding. While the Human Rights Commission's submission may have some merit, it is not a factor within the scope of section 20 (6.2)(f).

52. The complainant A.A. unquestionably suffered an insult to her dignity by the refusal to allow her to be registered as a parent of her child and to participate in the naming of the child. In this respect, the observations of Deschamps J. in *Trochiuk (supra)* are apt :

[16] Including one's particulars on a birth registration is an important means of participating in the life of a child. A birth registration is not only an instrument of prompt recording. It evidences the biological ties between parent and child, and including one's particulars on the registration is a means of affirming these ties. Such ties do not exhaustively define the parent-child relationship. However, they are a significant feature of that relationship for many in our society, and affirming them is a significant means by which some parents participate in a child's life. The significance of this affirmation is not only subjectively perceived. The legislature of British Columbia has attached important consequences to the presence of a father's particulars on his child's birth registration. It has decided that where a father's particulars are included on the birth registration, his consent is always required for his child's adoption. However, where his particulars are not included, a father must fulfill at least one of an alternative set of conditions. As Prowse J.A. notes, ss. 13(1)(c) and 13(2)(a) of the *Adoption Act*, R.S.B.C. 1996, c. 5, provide that a "father who is named on the birth registration must be given notice of the proposed adoption of his child. He may, or may not, qualify for notice apart from registration" (para. 141).

[17] Contribution to the process of determining a child's surname is another significant mode of participation in the life of a child. For many in our society, the act of naming a child holds great significance. As Prowse J.A. notes, naming is often the occasion for celebration and the surname itself symbolizes, for many, familial bonds across generations (paras. 138-39)."

53. Given that the Birth Registration Form was signed jointly by A.A. and B.B., B.B. too sustained an affront to her dignity and self-esteem by the Respondent's refusal to register C.C. as requested.

54. Similarly the discriminatory action concerning the efforts to adopt C.C. by A.A. and B.B. reflects a difference in treatment based on marital status implying that same-sex couples are less worthy of consideration as adoptive parents than heterosexual couples with the resulting injury to their self-esteem.

55. The only direct evidence led on the damage issue is found in a letter written by A.A. and B.B. and attached to the complaint forwarded to the Human Rights Commission on July 12, 2002 and filed as an exhibit in these proceedings. The relevant parts of that letter read:

“On Christmas Eve we received a letter from the Department of Vital Statistics regarding [C.C.’s] name and birth certificate. They refused to register me as a parent on the birth certificate stating that a birth certificate represents biological facts and that I had no biological connection to the child. Further, they refused to register her under [A] as I am not recognized as a parent so therefore she cannot have my last name. They registered her under [B’s’] last name but indicated that if we wanted to pay a fee we could apply for a name change but there was not guarantee that they would do it....

There are several areas of concern for a parent who is not legally recognized as such. One of our main concerns is being able to spend quality time with our child via parental leave. As you know these challenges take time and as I have been denied the right to parental leave. I am missing that crucial time with my child. No matter the results of a court challenge, we will not be able to get that time back. Without the right to adopt [C], our relationship as parent/child is left unrecognized and we are both left without protection. In the event that I pass away, she is not entitled to my property, death benefits, etc. without taxation. In the event that [B], her legally recognized parent, passes away, I do not have legal grounds to maintain her in my custody. Simply taking her to the doctor/hospital is more stressful than for a recognized parent as I have to be concerned with whether or not the hospital will recognize my role, whether or not I will be allowed visitation rights and whether or not I can make decisions regarding her health care. These are just a few of the issues and concerns that we deal with on a daily basis.”

56. The approach to the quantum of damage in human rights matters was articulated in *Cameron v. Nel-Gor Castle Nursing Home and Nelson (supra)* at para. 18525 *et seq*:

“18525 There is a presumption in favour of the making of an award of special and general damages in human rights cases.

Therefore, I think that a presumption in favour of awarding both special and general amages should be made by Boards of Inquiry. Compensatory awards should not be completely discretionary. (*Rosanna Torres v. Royalty Kitchenware Limited* (1982) 3 C.H.R.R. D/858 at D/869).

Since Parliament has indicated the desirability of compensating financial losses resulting from discrimination practices, it seems only reasonable, in view of the philosophy underlying the legislation, that this should be the norm, applicable except if some good reason for not awarding compensation can be proven. (*Foreman v. Via. Rail*, 1 C.H.R.R. D/233, 235, cited with approval under the Ontario Code in *Rosanna Torres v. Royalty Kitchenware Limited*, (1982) 3 C.H.R.R. D/858 at D/869.)

18526 Although damage awards in human rights cases historically were small in size, they have become progressively more substantial in recent years. It is now a principle of human rights damage assessments that damage awards ought not to be minimal, but ought to provide true compensation other than in exceptional circumstances, for two reasons. First, it is necessary to do this to meet the objective of restitution, as set forth above. Second, it is necessary to give true compensation to a complainant to meet the broader policy objectives of the *Code*: It is important that damage awards not trivialize or diminish respect for the public policy declared in the *Human Rights Code*.

18527 The objective to be achieved by an award of monetary compensation under the Code is restitution, that is, the eradication of the harmful effects of a respondent's actions on the complainant, and the placing of a complainant in the same position in which she would have been, had her human rights not been infringed by the respondent."

Compensatory awards resulting from discriminatory conduct vary widely in Canada from \$1500 in *Christie v. Halifax Student Housing Society* (1999), 36 CHRR at D/341 (NS Bd. Inq.) to \$10,000 in *Moffat v. Kinark Child and Family Services* (No. 5) (1999), 36 CHRR D/346 (Ont. Bd. Inq.) where the complainant was the victim of discrimination in the workplace because of his sexual orientation.

57. The evidence suggests that A.A.'s dignity was more adversely affected than that of B.B. She is therefore awarded \$7,500 pursuant to section 20(6.2) (f). B.B. is awarded \$5,000. There was no evidence to suggest C.C. was adversely affected nor, given her age, is that a reasonable inference.

58. In summary, the Board:

- 1) Declares that the Respondents violated section 5(1) of the *Human Rights Act* in the delivery of birth registration and adoption services to A.A. and B.B.;

- 2) Orders that the Respondents refrain from discriminating against other persons similarly situated to A.A. and B.B.;
- 3) Orders the Respondent pay compensation to A.A. in the sum of \$7,500;
- 4) Orders the Respondent pay compensation to B.B. in the sum of \$5,000.

59. The Board expresses its appreciation to counsel for the efficient presentation of the issues in this case and the comprehensive briefs submitted in support of their respective positions.

60. On consent of the parties, there will be a Confidentiality Order to preserve the anonymity of the complainants.

Dated at Fredericton, New Brunswick, this day of July, 2004.

.....
G. L. BLADON
VICE-CHAIRPERSON
LABOUR AND EMPLOYMENT BOARD