CITATION: S.M. (Re), 2018 ONSC 5145
COURT FILE NO.: A45/16
DATE: September 18, 2018

ONTARIO

SUPERIOR COURT OF JUSTICE
FAMILY COURT

B E T W E E N:	)	
	)	
S.M. and K.L.	)	Marta Siemiarczuk for the applicants
	)	
	)	
	)	
Applicants	)	
	)	
- and -	)	
	)	
	)	
The Attorney General of Ontario	)	Courtney Harris and Jennifer Luong
	)	
	)	
	)	
Intervener	)	
	)	
	)	
	)	**HEARD:** March 29, 2018

MITROW J.

INTRODUCTION

[1] This joint adoption application by the applicants to adopt a Crown ward placed with them by the Children's Aid Society of London and Middlesex ("the Society") raises a constitutional issue. These reasons deal only with the constitutional issue which was argued just prior to the repeal of the *Child and Family Services Act*, R.S.O. 1990, c. C.11 [as amended] ("*CFSA*").

[2] The applicants are two women who live together but who are not spouses of one another. The governing legislation restricts a joint adoption application by two individuals to those individuals "who are spouses of one another."

[3] The applicants submit that this legislative requirement is discriminatory; that it infringes their rights guaranteed under s. 15 of the *Canadian Charter of Rights and Freedoms* ("the *Charter*")[1] on the basis of marital status and that this infringement is not saved by section 1 of the *Charter*.

[4] The applicants seek a declaration that the words "who are spouses of one another" that are contained in the governing legislation are of no force and effect in respect of an adoption where a child has been placed for adoption by a society or licensee.

[5] The Attorney General of Ontario has intervened and submits that, while unusual, that this is an appropriate case in which to make a concession of constitutional invalidity that is not saved by s. 1 of the *Charter*. The Attorney General of Ontario concurs with the relief sought by the applicants.

[6] The applicants and the Attorney General of Ontario concur that the declaration sought is not binding on the court. In the *Law of Declaratory Judgments*[2], the author states that while parties may by consent agree to admit all evidence submitted, and may make admissions of all points of fact in issue, that they cannot seek a declaration simply by consent, but rather "the court must play an active role in considering the evidence and formulating the judgment" and that the "importance of a binding declaration of rights dictates the necessity that the court cannot dispose of the claim in a summary manner."

[7] For reasons that follow, a declaration is made as sought by the applicants.

APPLICANTS' BACKGROUND

[8] The applicants commenced a joint adoption application in respect of the child S.H. ("the child") by way of application issued in December 2016 pursuant to the *CFSA*.

[9] Three days after the child's birth in May 2015, the child, after apprehension, was placed with the applicants by the Society. The applicants had been approved as foster parents.

[10] The applicant, S.M. ("M."), was born in 1986 and the applicant, K.L. ("L."), was born in 1985.

[11] The applicants met over 12 years ago while the applicant L. was attending university. The applicants soon became good friends.

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[1] *Constitution Act, 1982*, being Sched. B to the *Canada Act, 1982* (U.K.), 1982, c 11

[2] Lazar Sarna, *The Law of Declaratory Judgments*, 3rd ed. (Toronto: Thomson Carswell, 2007) at page 98, citing *Fisher v. Albert* (1921), 50 OLR 68 (Ont. H.C.) at 75; *Montgomery v. Marshall*, [1955] 3 DLR 521 (Man. C.A.) at 525

[12] The applicant L. completed three years of undergraduate studies in university and then attended a chiropractic college, completing her certification four years later.

[13] The applicant M. attended university for a period of two years and then college for one year, obtaining a certificate in athletic therapy.

[14] The applicants travelled for several years and thereafter returned to Canada. After their travel, the applicants settled in London where they began to live together in their home purchased by the applicant M. The applicant M. elected to focus on building a career working with children and she currently works caring for children in the applicants' home.

[15] The applicant L. has a home-based chiropractic clinic.

[16] On May 12, 2016, S.H. was made a Crown ward pursuant to a final order.

[17] In June 2016, L.Q., who is a half-sibling to the child S.H., was placed in the home of the applicants as a foster child. The child L.Q. was born in May 2016 and was apprehended seven days later by the Windsor-Essex Children's Aid Society. Following discharge from hospital in late May 2016, the child L.Q. was placed in two foster homes before being placed with the applicants. The child L.Q. was made a Crown ward of the Windsor-Essex Children's Aid Society by final order dated April 4, 2017.

[18] The evidence supports a finding that the applicants live as a family with their two foster children. Although the applicant M. purchased the home, the evidence is that the applicant L. shared in all aspects of living costs, including mortgage, groceries and utilities. The applicants also share a car loan.

[19] The applicants' evidence also indicated that, in March 2017, they were intending to move to a larger home and they expected to have both of their names on title for their new home.

[20] The applicants share equally in all chores around the home and they share in the parenting of the children.

[21] It is the applicants' evidence that they attend church with both children together as a family and that they share the same morals, values and faith.

[22] The applicants depose that they are committed to the family that they have created and that they do not share similar relationships with anyone else.

[23] Although the applicants describe themselves and the children living as a family, the applicants characterize their personal relationship as "platonic friends." The applicants do not have a conjugal relationship and consequently, as discussed in more detail below, the applicants for that reason are not spouses as defined in the relevant legislation.

[24] The Society supports the adoption of the subject child S.H. by the applicants. Further, there is evidence from the Society that both the Society and the Windsor-Essex Children's Aid

Society are in support of the adoption of the child L.Q. by the applicants. That adoption would proceed by way of a separate application. The case at bar does not involve the child L.Q.

[25] Although all the requisite documentation had been filed for the adoption application for the child S.H. pursuant to the *CFSA*, while that *Act* was still in force, the adoption application could not move forward pending a decision on the constitutional issue.

THE IMPUGNED LEGISLATION

[26] Subsequent to the commencement of the adoption application by the applicants, the *CFSA* was repealed effective April 30, 2018 and replaced by the *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 ("*CYFSA*").

[27] The application was commenced under s. 146(1)(a) of the *CFSA*. Section 146(4) of that *Act* identified the persons who were able to make an application for adoption under s. 146.

[28] In the *CYFSA*, s. 146 of the *CFSA* was replaced by s. 199. Section 199(1) of the *CYFSA* is virtually identical to the provisions of s. 146(1) of the *CFSA* (except for some inconsequential difference in wording in that portion of subsection 146(1) that forms the preamble to clauses (a) and (b)); also, s. 199(4) of the *CYFSA* is identical to the previous s. 146(4) of the *CFSA*.

[29] Given that the present application was in progress under the *CFSA* when that legislation was repealed and replaced by the *CYFSA*, the transition provisions contained in a regulation enacted under the *CYFSA* are relevant.

[30] The transition provisions are contained in Ontario Regulation 157/18 enacted pursuant to the *CYFSA*. Section 40 of the regulation deals with adoption applications:

> An application made under section 146 of the old Act in respect of which the court has not made an order before the day this section comes into force is continued as an application under section 199 of the Act.

[31] Sections 199(1) and (4) of the *CYFSA* are reproduced below:

> 199(1) The court may make an order for the adoption of a child who is younger than 16, or is 16 or older but has not withdrawn from parental control, and,
>
> (a) has been placed for adoption by a society or licensee; or
>
> (b) has been placed for adoption by a person other than a society or licensee and has resided with the applicant for at least two years,
>
> in the child's best interests, on the application of the person with whom the child is placed.
>
> ...

(4) An application under this section may only be made,

(a) by one individual; or

(b) jointly, by two individuals *who are spouses of one another*. [my emphasis]

[32] The definition of spouse is contained in s. 179(1) of the *CYFSA*:

"spouse" has the same meaning as in Parts I and II of the *Human Rights Code*.

[33] It is noted that the *CFSA* contained the identical definition of "spouse" in s. 136(1) of that *Act*.

[34] The definition of spouse in the *Human Rights Code*, R.S.O. 1990, c. H.19 is contained in s. 10(1):

"spouse" means the person to whom a person is married or *with whom the person is living in a conjugal relationship outside marriage*. [my emphasis]

[35] At the time that the constitutional issue was argued, the *CFSA* was in force. Hence, the applicants and the Attorney General of Ontario requested that the court make a declaration of constitutional invalidity with respect to s. 146(4)(b) of the *CFSA* and also s. 199(4)(b) of the *CYFSA*. Relief was sought with respect to the *CYFSA* because its proclamation date was imminent and the arguments in favour of constitutional invalidity were identical to the arguments being made under the *CFSA*.

[36] Initially, I was inclined somewhat to the view that it may not be necessary to make a declaration as to invalidity in relation to s. 146(4)(b) of the *CFSA* on the basis that that legislation is no longer in force and the proceeding commenced by the applicants is deemed continued under s. 199 of the *CYFSA*.

[37] This point was not addressed specifically by counsel. Accordingly, out of an abundance of caution, the declaration made below includes the *CFSA*. However, the analysis in these reasons proceeds generally from the perspective of the *CYFSA* and that analysis applies equally to the *CFSA*.

[38] The concession made by the Attorney General of Ontario as to constitutional invalidity relates only to an adoption application commenced under s. 199(1)(a) of the *CYFSA* (or an application commenced under s. 146(1)(a) of the *CFSA*) – that is, an adoption application in respect of children who have been placed for adoption by a society or licensee.

[39] The position of the Attorney General of Ontario is that adoption applications under s. 199(1)(a) of the *CYFSA* and s. 146(1)(a) of the *CFSA* are "public adoptions" where a child is placed for adoption by a society, and are "private adoptions" where a child is placed for adoption by a licensee.

[40] These public and private adoptions are subject to oversight and supervision by authorities, including societies and adoption agencies.

[41] However, unlike public and private adoptions under s. 199(1)(a) of the *CYFSA*, which require a child to be "placed" for adoption, sections 199(2) and (3)[3], permit "family" and "adult adoption" where no formal adoption placement is required and where there is no oversight by any authorities.

[42] The case at bar does not engage either family adoption or an adult adoption; accordingly, the submissions of the Attorney General of Ontario were limited to public or private adoption under s. 199(1)(a) and its equivalent s. 146(1)(a) of the *CFSA*.

[43] In these reasons, reference to "impugned legislation" means s. 199(4)(b) of the *CYFSA* and includes s. 146(4)(b) of the *CFSA*.

THE LEGISLATIVE FRAMEWORK AND APPROVAL PROCESS

A. Evidence Filed by the Attorney General of Ontario

[44] The evidence filed by the Attorney General of Ontario consisted of the affidavit of Peter Kiatipis, who is the Director of the Child Welfare Secretariat of the Ministry of Children and Youth Services ("Kiatipis affidavit"). This evidence provided information that included strategies implemented by the government designed to promote the objective to place more children and youth who are Crown wards for adoption; further, there was evidence regarding procedures and tools to supervise the adoption process.

[45] The discussion in these reasons regarding the Kiatipis affidavit refers to "Crown wards" (rather than the current term child "in extended society care" used in the *CYFSA*) as the affidavit was prepared while the *CFSA* was still in force.

[46] The government has a recent history of enacting legislation that included the objective of increasing the adoption rates of Crown wards.

[47] For example, the *Child and Family Services Statute Amendment Act, 2006*, S.O. 2006, c. 5 contained measures to increase adoption rates, including: (a) providing that existing access orders to a child terminate when a child is made a Crown ward; (b) requiring a court, prior to making an access order to a Crown ward to be satisfied that the order would not impair the child's opportunities for adoption; and (c) permitting open adoption agreements to allow children to be adopted while maintaining ties with the birth family and others.

[48] Further, adoption processes were simplified for prospective adoption parents and a standardized home study tool was implemented.

[49] In the Kiatipis affidavit, research was cited supporting conclusions in relation to adopted children: that adopted children were more likely to complete high school and twice as likely to

[3] The corresponding sections in the *CFSA* are sections 146(2) and (3).

enroll in post-secondary education; and that adopted children were more likely to enter the workforce as young adults and have higher incomes.

[50] Statistics cited by the government in early 2011 indicated that at any given time: there were 18,000 children and youth receiving services from Children's Aid Societies; that approximately 9,000 of those children and youth were Crown wards; and that only ten percent of children who were Crown wards were adopted each year.

[51] In 2011, legislation was enacted, *Building Families and Supporting Youth to be Successful Act, 2011*, S.O. 2011, c. 12, to promote further the objective of improving adoption rates for Crown wards. This legislation included provisions for openness orders and openness agreements to allow children to maintain contact with members of their birth family or others. Another change included providing subsidies for eligible families who adopt or gain legal custody of a Crown ward.

[52] Further legislative changes in Ontario in 2015 increased financial support to adoptive parents and also expanded some subsidy programs by extending the age of eligibility.

[53] In October 2016, further supports were initiated for adoptive families, including expanding the eligibility for adopted Crown wards between the ages of 18 and 24 to access grant programs in relation to post-secondary education costs and drug and dental benefits.

[54] The foregoing summary demonstrates a public policy objective under the umbrella of the *CFSA*, now *CYFSA*, to increase adoption rates for Crown wards and to enhance and expand funding and services for Crown wards.

[55] Statistics gathered by the government indicated that in April 2012 there were 7,712 Crown wards in care. That number continued to fall on a monthly, almost linear, basis such that by December 2017 there were 4,778 Crown wards in care. These statistics would suggest an increase in the adoption rates for Crown wards.

[56] In relation to the constitutional issue in this case, the evidence filed by the Attorney General of Ontario demonstrates that the overall policy and objective of the government is to promote the adoption of, and increase the adoption rates of, Crown wards. As discussed in more detail below, the impugned legislation has the effect of reducing the pool of joint applicants who wish to adopt a Crown ward.

[57] The Kiatipis affidavit also provided evidence regarding the method of oversight in relation to public and private adoptions.

[58] All public adoptions are arranged and supervised by Children's Aid Societies. Various standardized tools are used as part of the assessment process.

[59] Two of the tools employed are a "SAFE" (Structured Analysis, Family Evaluation) home study and a training program known as "PRIDE" (Parent Resources for Information, Development and Education). All public and private adoptive parents and all individuals who

wish to foster children through a society must complete the SAFE home study and the PRIDE program.

[60] SAFE is a standardized assessment used by Children's Aid Societies to prepare a home study of prospective adoptive parents. Topics include various areas such as personality, skills and motivation to adopt. As part of the home study, individuals must provide documents, including a financial statement, reference letters, medical reports, a police records check and child welfare clearances.

[61] Only a Children's Aid Society worker or Ministry-approved adoption practitioner can complete a SAFE home study. The SAFE home study process spans a period of four to six months and includes between four to six interviews.

[62] The Kiatipis affidavit describes the PRIDE program as a 27 hour training program to educate families interested in kinship care, fostering and adoption. The PRIDE curriculum includes a number of topics: adoption and child welfare laws and processes; attachment as a central issue in all adoptions; impacts of adoption on family members; child management and development; and an overview of issues specific to the needs of adopted children and the importance of connections and continuity for children. This is not an exhaustive list.

[63] PRIDE training must be completed by all potential Children's Aid Society foster parents and adoptive parents in order to be eligible to foster or adopt a child. The training is completed either through a Children's Aid Society or through a private PRIDE trainer.

[64] The foregoing evidence demonstrates that prospective adoptive parents, whether individual or joint, are subjected to a rigorous screening process to ensure that they are capable and ready to meet the needs of adoptive children and that they are able to provide those children with stable and loving homes.

B. Legislative Provisions – *Child, Youth and Family Services Act, 2017* ("*CYFSA*")

[65] The discussion in this section relates to the current *CYFSA* and, unless otherwise indicated, all reference to sections are in relation to the *CYFSA*.

[66] The "paramount purpose" of the *Act* is "to promote the best interests, protection and well-being of children": s. 1(1).

[67] In relation to a child in extended society care (formerly Crown ward under the *CFSA*), the society has a statutory obligation to assist a child in being placed with a family through various means, including adoption. Section 112 provides:

> 112 Where a child is in extended society care under an order made under paragraph 3 of subsection 101 (1) or clause 116 (1) (c), the society shall make all reasonable efforts to assist the child to develop a positive, secure and enduring relationship within a family through one of the following:
>
> 1. An adoption.

2. A custody order under subsection 116 (1).

3. In the case of a First Nations, Inuk or Métis child,

i. a plan for customary care,

ii. an adoption, or
iii. a custody order under subsection 116 (1).

[68] Part VIII of the *CYFSA* deals with adoption and adoption licensing.

[69] Under this Part, where the court is required to make a decision in the best interests of a child, the court is required to consider a number of factors set out in s. 179(2):

> 179(2) Where a person is directed in this Part to make an order or determination in the best interests of a child, the person shall,
>
> (a) consider the child's views and wishes, given due weight in accordance with the child's age and maturity, unless they cannot be ascertained;
>
> (b) in the case of a First Nations, Inuk or Métis child, consider the importance, in recognition of the uniqueness of First Nations, Inuit and Métis cultures, heritages and traditions, of preserving the child's cultural identity and connection to community, in addition to the considerations under clauses (a) and (c); and
>
> (c) consider any other circumstance of the case that the person considers relevant, including,
>
> (i) the child's physical, mental and emotional needs, and the appropriate care or treatment to meet those needs,
>
> (ii) the child's physical, mental and emotional level of development,
>
> (iii) the child's race, ancestry, place of origin, colour, ethnic origin, citizenship, family diversity, disability, creed, sex, sexual orientation, gender identity and gender expression,
>
> (iv) the child's cultural and linguistic heritage,
>
> (v) the importance for the child's development of a positive relationship with a parent and a secure place as a member of a family,
>
> (vi) the child's relationships and emotional ties to a parent, sibling, relative, other member of the child's extended family or member of the child's community,

> (vii) the importance of continuity in the child's care and the possible effect on the child of disruption of that continuity, and
>
> (viii) the effects on the child of delay in the disposition of the case.

[70] The factors set out in clauses (v) and (vii) are particularly germane in the case at bar. In relation to the child S.H. at the adoption hearing, it will be necessary to consider the extent of the development of positive relationships that the child has with both applicants; and clause (vii) requires the court to consider the length of time that S.H. has been with the applicants and any possible effect on the child if that continuity of care is disrupted.

[71] In relation to a child in extended society care, nothing in the *Act* prohibits a society from planning for the adoption of the child in respect of whom there is an access order in effect under Part V (child protection): s. 185(1). This permits a society to begin its adoption planning process immediately on the making of an order placing the child in extended society care.

[72] Section 191(1) may be regarded as a section that is complementary to s. 185(1), as the former provides that where a child is placed for adoption by a society or licensee, then every order respecting access to the child is terminated, including an access order made under Part V (child protection) in respect of a child who is in extended society care.

[73] The aforesaid are some provisions in the *CYFSA* that codify and promote the obligation of a Children's Aid Society to plan for and ensure that children in extended society care are placed with adoptive families and that the children are adopted.

[74] Regulations enacted under the *CYFSA*[4] promote the objectives of the *Act* in relation to the assessment process, the placement of children in extended society care in adoptive homes and in ensuring that the adoption can be completed.

SECTION 15(1) OF THE *CHARTER*

[75] Section 15(1) of the *Charter* states:

> 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.

A. The Test for Violation of s. 15(1) of the *Charter*

[4] Ontario Regulation 156/18 in relation to an adoption licensee – sections 66-77; and Ontario Regulation 155/18 dealing with various matters in relation to adoptions, including openness, consents to adoption, placement of children, home studies and visits, and adoption licensing: sections 90-112.

[76] In *Droit de la famille - 091768*, 2013 SCC 5, at paras. 185, 324 and 418 [hereinafter *Quebec (Attorney General) v. A.*] the Supreme Court of Canada articulated the following two-part test in determining whether there is a violation of s. 15(1) of the *Charter*:

> (1) Does the law create a distinction based on an enumerated or analogous ground?
>
> (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

(See also *R. v. Kapp*, 2008 SCC 41, at para. 17; *Withler v. Canada (Attorney General)*, 2011 SCC 12, at para. 30.)

B. Step One: Does the law create a distinction based on an enumerated or analogous ground?

i) Is there a distinction?

[77] The legislation permits two individuals to apply jointly to adopt a child placed in their care by a society (or licensee), if the two individuals are either married, or not married but living in a conjugal relationship.

[78] Despite being the *de facto* parents of the subject child S.H., who was placed with the applicants three days after the child's birth, and who has resided with the applicants for over three years, the applicants cannot jointly adopt S.H. because, although they live together, they do not have a "conjugal relationship" and therefore are not "spouses" as required by the legislation.

[79] In order to come within the purview of the legislation, the applicants would need to marry each other or commence a conjugal relationship with each other.

[80] I find that there is a distinction created by the legislation – it is direct and patent.

ii) Is the distinction based on an analogous ground?

[81] The distinction is not based on an enumerated ground in s. 15(1); hence it becomes necessary to consider whether the distinction is based on an analogous ground.

[82] The applicants and Attorney General of Ontario submit that the distinction is based on the analogous ground of marital status. Reliance is placed on *Miron v. Trudel*, [1995] 2 S.C.R. 418. The issue in *Miron* was whether the exclusion of unmarried partners from certain accident benefits under the Ontario Standard Automobile Policy available to married partners violated the s. 15 equality guarantee.

[83] In *Miron*, marital status was found to constitute an analogous ground of discrimination within the ambit of s. 15(1): paras. 2, 160.

[84] The discussion by McLachlin J. (as she then was) in *Miron*, relating to analogous grounds included the following:

a) The grounds of discrimination are not closed, at para. 157:

> … But the categories are not closed, as s. 15(1) recognizes. Analogous grounds of discrimination may be recognized. Logic suggests that in determining whether a particular group characteristic is an analogous ground, the fundamental consideration is whether the characteristic may serve as an irrelevant basis of exclusion and a denial of essential human dignity in the human rights tradition. In other words, may it serve as a basis for unequal treatment based on stereotypical attributes ascribed to the group, rather than on the true worth and ability or circumstances of the individual? An affirmative answer to this question indicates that the characteristic may be used in a manner which is violative of human dignity and freedom.

b) In relation to distinctions based on personal characteristics, at para. 158:

> … Another indicator is a distinction made on the basis of a personal characteristic; as McIntyre J. stated in *Andrews*, "[d]istinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed" (at pp. 174-175). [The reference to "*Andrews*" being *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.] …

c) At para. 159:

> … For example, analogous grounds cannot be confined to historically disadvantaged groups; if the *Charter* is to remain relevant to future generations, it must retain a capacity to recognize new grounds of discrimination. …

d) In relation specifically to marital status, at para. 161:

> First, discrimination on the basis of marital status touches the essential dignity and worth of the individual in the same way as other recognized grounds of discrimination violative of fundamental human rights norms. Specifically, it touches the individual's freedom to live life with the mate of one's choice in the fashion of one's choice. This is a matter of defining importance to individuals. It is not a matter which should be excluded from *Charter* consideration on the ground that its recognition would trivialize the equality guarantee.

[85] The distinction also can be viewed from a perspective that the applicants are two "single" individuals, living together, as a family but not in a conjugal relationship.

[86] The Attorney General of Ontario submits that there is some support in the jurisprudence that a distinction between individuals who are single and those who are spouses is a distinction based on marital status.

[87] In *Falkiner v. Ontario (Director of Income Maintenance, Ministry of Community & Social Services)*, 2002 CarswellOnt 1558 (Ont. C.A.), the issue was whether the definition of "spouse" in a regulation enacted pursuant to the *Family Benefits Act*, R.S.O. 1990, c. F.2 infringed s. 15 rights of the parties in that case. The parties included unmarried women, who had a dependent child or children and each of whom was living in a "try-on" relationship with a male for a period of less than one year. As a result of changes to the definition of "spouse," each woman, who had been receiving social assistance as a single mother, was reclassified as a "spouse" and lost her eligibility to receive family benefits as a sole support parent: para. 4, *Falkiner*.

[88] The Court of Appeal for Ontario found that the women involved in that case "and singles like them" were subjected to differential treatment on grounds that included marital status. The court stated, in part at para. 80:

> … Thus, while married people on social assistance receive benefits in accordance with a benefit unit that reflects their actual economic position, the definition of spouse puts *the respondents and singles like them* into a benefit unit that does not accurately reflect their economic situation. *This comparison establishes that the definition treats the respondents differentially on the basis of their marital status*. [my emphasis]

[89] *Chambers v. Saskatchewan (Department of Social Services)*, 1988 CarswellSask 300 (Sask. C.A.) was a case that involved the Saskatchewan Human Rights Code ("SHRC"). The issue was whether the appellant had faced discrimination on the basis of "marital status" which was one of the enumerated grounds in the SHRC. The appellant was a single childless male on social assistance. He lived with his sister, who also received social assistance as a single childless adult in the same amount as the appellant. The facts showed that, in contrast, a childless married couple on social assistance received more money per person in monthly social assistance than each of the appellant and his sister. The Saskatchewan Court of Appeal concluded that the lesser amount of financial assistance received by the appellant as compared to a childless married person constituted discrimination based on marital status.

[90] In the case at bar, the distinction is based on the applicants' personal characteristics – they are viewed as two "single" individuals and not spouses. This, I find, is a distinction based on marital status much like the conclusions reached in *Falkiner* and *Chambers*.

[91] There is also merit in the applicants' submission regarding the distinction being based on "spousal status." I would regard spousal status as being included in, and subsumed by, the ground of marital status.

[92] I conclude step one of the s. 15 analysis and find that the legislation creates a distinction based on the analogous ground of marital status.

C. Step Two: Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

[93] The approach to, and focus of, s. 15 was discussed in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 ("*Taypotat*") by Abella J. in a unanimous decision:

a) The *Charter* requires a flexible and contextual inquiry as to whether a distinction perpetrates arbitrary disadvantage. Abella J. states at para. 16 [emphasis in the original]:

> The approach to s. 15 was most recently set out in *Droit de la famille - 091768*, [2013] 1 S.C.R. 61 (S.C.C.) [hereinafter *Quebec (Attorney General) v. A.*], at paras. 319-47. It clarifies that s. 15(1) of the *Charter* requires a "flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his or her membership in an enumerated or analogous group*": para. 331 (emphasis added).

b) Section 15 protects substantive equality. Not every difference in treatment will result in inequality. Abella J. states at para. 17:

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

c) The focus of s. 15 is on laws that draw discriminatory distinctions. The s. 15 analysis is concerned with social and economic context in which the inequality claim arises and the effects on the claimant group. Abella J. states at para. 18 [emphasis in the original]:

> The focus of s. 15 is therefore on laws that draw *discriminatory* distinctions — that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group: *Andrews*, at pp. 174-75; *Quebec (Attorney General) v. A.*, at para. 331. The s. 15(1) analysis is accordingly concerned with the social and economic context in which a claim of inequality arises, and with the effects of

> the challenged law or action on the claimant group: *Quebec (Attorney General) v. A.*, at para. 331.

[94] In *Quebec (Attorney General) v. A., supra*, matters to consider were identified when conducting a contextual analysis as to what constitutes discrimination. McLachlin C.J.C. stated, at para. 418:

> … While the promotion or the perpetuation of prejudice, on the one hand, and false stereotyping, on the other, are useful guides, what constitutes discrimination requires a contextual analysis, taking into account matters such as *pre-existing disadvantage of the claimant group, the degree of correspondence between the differential treatment and the claimant group's reality, the ameliorative impact or purpose of the law, and the nature of the interests affected*: *Withler*, at para. 38; *Kapp*, at para. 19. [my emphasis]

[95] As discussed in *Taypotat*, the focus is on laws that draw discriminatory distinctions. The *Charter* protects substantive equality. The effect of the challenged law on the claimant group must be examined.

[96] Accordingly, I consider the matters identified by McLachlin C.J.C. in *Quebec (Attorney General) v. A.*

[97] Considering "any pre-existing disadvantage," viewed from the perspective of applicants, as two single unmarried people comprising a family and wishing to adopt, there is some evidence of historic disadvantage. The statutory history as submitted by the Attorney General of Ontario includes the following:

a) In 1921[5], the right to adopt applied to "a person of full age" and if the applicant was married, then the spouse "shall join" in the application and upon adoption the child became the child of both spouses.

b) In 1927, legislation was amended[6] to permit a joint adoption application by "a husband and wife" but "save as aforesaid" an adoption order could not be made for the adoption of a child by more than one person.

c) The 1937 adoption legislation[7] contained no material changes as to who could apply for adoption; however, in 1949[8], while the right to bring a joint adoption application continued to be limited to married persons, new restrictions were imposed prohibiting an individual from adopting a child if he or she was unmarried, a widow, a widower or a divorced person "unless the court is satisfied that there are special circumstances that

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[5] *An Act Respecting the Adoption of Children*, S.O. 1921, c. 55, s. 3
[6] *The Adoption Act*, S.O. 1927, c. 53, s. 2(3); *Adoption Act*, R.S.O. 1927, c. 189, s. 1(3)
[7] *The Adoption Act*, R.S.O. 1937, c. 218, s. 2(2)
[8] *An Act to Amend the Adoption Act*, S.O. 1949, c. 1, s. 3

justify, as an exceptional measure, the making of an adoption order." (Also, the legislation prohibited a male individual from adopting a female child.)

d) For over three decades thereafter, joint adoption applications continued to be restricted to married individuals and the restrictions as to individuals continued.

e) In 1982, the government released a study[9] as part of a comprehensive project to reform legislation relating to children services, including adoption. It was acknowledged that there should be a broader range of individuals who could apply to adopt children. The government response was to enact legislation which became the first *Child and Family Services Act.*[10] That *Act* contained a new provision that an adoption order was to be made in the best interests of the child, but contained identical wording to the impugned legislation requiring joint applicants to be spouses of one another. This new legislation contained no provisions requiring individuals who were unmarried, widowed or divorced to demonstrate special circumstances to adopt a child.

f) Notably, I accept the submission of the Attorney General of Ontario that the Consultation Paper did not consider or address that non-spousal couples may wish to adopt or that the definition of "spouse" may pose a barrier to those couples.

g) In 1999, the government enacted an omnibus bill amending numerous pieces of legislation to comply with *M. v. H.*, [1999] 2 S.C.R. 3. This Supreme Court of Canada decision ruled unconstitutional the spousal support provision in the *Family Law Act,* R.S.O. 1990, c. F.3 insofar as it withheld spousal support rights from partners in same-sex relationships. This omnibus bill amended the *Child and Family Services Act* to expand the right to adopt to "any other individuals that the court may allow, having regard to the best interests of the child."[11]

h) The result of this amendment in 1999 was that non-spousal couples could apply jointly to adopt a child, but the right to do so required court approval. Although *Hansard* [12] from 1999 suggests that this amendment was intended to give same-sex conjugal partners the same rights as opposite-sex conjugal partners to apply jointly for adoption, the wording of this new legislation was wide enough to allow non-conjugal couples, whether same-sex or opposite-sex, to submit a joint adoption application.

i) In 2005, the 1999 amendment to the *Child and Family Services Act* was repealed when numerous Ontario statutes were amended to remove the opposite sex requirement in the definition of spouse.[13]

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[9] The Ministry of Social Services, *The Children's Act: Consultation Paper* (Queen's Printer for Ontario, October 1982) [The Children's Act: A Consultation Paper]
[10] *An Act Respecting the Protection and Wellbeing of Children and Their Families*, S.O. 1984, c. 55
[11] *An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.*, S.O. 1999, c. 6, s. 6
[12] Ontario, Legislative Assembly, *Second reading of Bill 5, An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.*, 37th Parl, Sess 1 (27 October 1999)
[13] *An Act to amend various statutes in respect of spousal relationships*, S.O. 2005, c. 5, s. 7(1)

[98] The foregoing demonstrates that, except for the period 1999 to 2005, that in Ontario two individuals living in a non-spousal relationship were precluded from bringing a joint adoption application. This reflects some measure of historical disadvantage.

[99] Continuing with the contextual analysis, I consider "the degree of correspondence between the differential treatment and the claimant group's reality."

[100] Differential treatment creates a significant impact on the applicants' reality.

[101] The applicants have chosen, in a free and democratic society, to live together as a family with emotional and financial interdependence. They both sought to open their home to the most vulnerable in our society – children who are in need of protection. The applicants applied for and were approved to be foster parents. The subject child S.H. knows the applicants as her only parents. The applicants, not unlike other long-term foster parents, now seek to adopt S.H., with the support and recommendation of the Society. However, they cannot do so.

[102] Why? The answer: their relationship is platonic; it is not conjugal. They are not "spouses."

[103] While it may be argued that limiting joint applications to spouses will enhance the prospect of securing prospective adoptive parents who are in committed and stable relationships, it does not follow that those attributes would be absent when two individuals are in a long-term familial non-spousal relationship.

[104] The absolute exclusion of non-spousal couples from joint adoption is arbitrary and is based on irrelevant personal characteristics, bereft of any merit-based assessment.

[105] The distinction created by the impugned legislation foments the stereotypic dogma that only traditional families with two "spouses" are able to apply for joint adoption. I agree with the submission of the Attorney General of Ontario that the "prohibition also perpetuates and reinforces the pejorative view that families must match a specific model in order to be appropriate adoptive homes for children and youth."[14]

[106] The exclusion of the applicants is "at the front door." They cannot even apply. As discussed earlier, public and private adoptions under s. 199(1)(a) of the *CYFSA* are subjected to institutional oversight, including individual assessments and home studies. Further, the court can only make an adoption order if it is in the child's best interests.

[107] The "front door" exclusion of non-spousal joint applicants without any opportunity for an assessment of their suitability as adoptive parents underscores the exclusion's arbitrariness.

[108] Having regard to the "ameliorative impact or purpose of the law," the purpose and focus of the *CYFSA* was discussed earlier. The legislative history suggests that married couples, and later unmarried spouses, who wished to adopt jointly, were not a disadvantaged group in respect of whom the legislation can be considered ameliorative.

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[14] Factum of the Attorney General of Ontario, at paragraph 83.

[109] In relation to the adoption of children placed in extended society care (formerly Crown wards), the provisions of the *CYFSA* seek to place those children in suitable permanent and stable homes. The evidence filed by the Attorney General of Ontario suggests that many children in extended care remain in the care of societies. The impugned legislation, rather than having an ameliorative effect, worsens the prospect for children to be adopted because it lessens the pool of prospective adoptive parents willing to make the crucial decision to adopt a child and give that child a loving home.

[110] Further, consideration must be given to the potential negative consequences to the subject child S.H. and to children who may be in a similar situation. This court routinely presides over cases where infant children are placed with foster parents who have expressed the desire to adopt the child should the child become available for adoption.

[111] In the case at bar, both applicants are unable to adopt the child S.H. If each applicant brought her own individual adoption application, the result would be that an adoption order made on the second application would in effect nullify the first adoption order and the applicant in the first adoption order would cease to be a parent of the child, and the child would cease to be a child of the first adoption applicant. This results from s. 217(2) of the *CYFSA*:

> 217(2) For all purposes of law, as of the date of the making of an adoption order,
>
> (a) the adopted child becomes the child of the adoptive parent and the adoptive parent becomes the parent of the adopted child; and
>
> (b) the adopted child ceases to be the child of the person who was the adopted child's parent before the adoption order was made and that person ceases to be the parent of the adopted child, except where the person is the spouse of the adoptive parent.

[112] If the child S.H. is to remain in the applicants' home on a permanent basis pursuant to an adoption order, then only one of the applicants can be the adoptive parent. It would not be in S.H.'s best interests to deprive S.H. of the opportunity to be adopted by both applicants who have been the *de facto* caregiving parents of S.H. for all of S.H's life.

[113] In relation to "the nature of the interests affected," limiting joint adoption applications to couples who are spouses creates significant repercussions for couples living in a non-spousal relationship.

[114] From the perspective of the couple, they cannot both adopt a child. From the child's perspective, the "family circle" is never closed. The child cannot have two legal parents. The security and psychological benefit to a child to be adopted and to be recognized in law as a child of both parents is denied to a child placed with a couple living in a non-spousal relationship.

[115] In *Trociuk v. British Columbia (Attorney General)*, 2003 SCC 34, the issue was whether the provisions in the *Vital Statistic Act* permitting the mother to permanently remove the father's

particulars from the birth registration were unconstitutional on the basis of a violation of the father's s. 15 equality rights. The Supreme Court of Canada found the provisions to be unconstitutional. In doing so, the importance of family and an individual's self-worth were discussed at para. 15:

> 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* (1994), [1995] 1 S.C.R. 315 (S.C.C.), at para. 85, La Forest 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 (S.C.C.), 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."

[116] The inability of both partners in a non-spousal relationship to adopt a child they have been parenting can create an adverse psychological impact on all members of the family. Ultimately, no demonstrable benefit can emerge from legislation proscribing joint adoption applications by two individuals living in a non-spousal relationship.

[117] I find that the distinction creates a disadvantage by perpetuating prejudice and stereotyping.

[118] I find that the impugned legislation discriminates against the applicants' rights guaranteed by s. 15 of the *Charter* on the basis of marital status.

IS THE BREACH OF S. 15 JUSTIFIED UNDER S. 1 OF THE *CHARTER*?

[119] Having found that the impugned legislation infringes the right to equality under s. 15 of the *Charter*, the impugned legislation may be constitutionally valid if it is justified under s. 1 of the *Charter*.

[120] Section 1 of the *Charter* states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights 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.

The Test under Section 1 of the *Charter*

[121] In *Quebec (Attorney General) v. A., supra*, McLachlin C.J.C., at para. 434, summarized the test in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). The state bears the burden of establishing justification on the balance of probabilities and the state must demonstrate:

1) a sufficiently important objective to justify an infringement of a *Charter* right;

2) a rational connection between that objective and the means chosen by the state;

3) that the means are minimally impairing of the right at issue; and

4) that the measure's effects on the *Charter*-protected right are proportionate to the state objective.

i) A Sufficiently Important Objective

[122] At this stage of the s. 1 assessment, Iacobacci J., for the majority, stated in *Vriend v. Alberta*, [1988] 1 S.C.R. 493 (S.C.C.), at para. 109:

> … In my view, where, as here, a law has been found to violate the *Charter* owing to under inclusion, the legislation as a whole, the impugned provisions, and the omission itself are all properly considered.

[123] The important purpose of the legislation as a whole has been discussed previously. Focusing specifically on the impugned provisions, the requirement for joint applicants to be spouses speaks to the objective of the stability of the homes in which adoptive children are placed.

[124] I find that the objective is sufficiently important to justify the infringement of a *Charter* right.

ii) Rational Connection

[125] McLachlin C.J.C., for the majority, in *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37, explained at para. 48:

> … To establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), at para. 153. The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so.

[126] This imposes a requirement to demonstrate that prohibiting non-spousal couples from jointly adopting a child promotes or is "causally connected" to the objective of ensuring that children are placed with adoptive parents who have a stable relationship. This must be demonstrated on the basis of "reason or logic." I find that the rational connection test is not satisfied.

[127] The limitation is being imposed arbitrarily. While joint applicants who are spouses may have a stable relationship, that is not always the case. The exclusion of non-spousal couples is indicative of a presumption that they do not or are not likely to have stable relationships.

[128] Further, as discussed earlier, the prohibition is absolute, with no assessment process. The means chosen by the government can exclude well qualified couples who are not in a

spousal relationship from being considered as joint prospective adoptive parents. This reduces the number of individuals who can adopt children and detracts from the overall goal of the legislation.

iii) Minimal Impairment

[129] The nature of the inquiry at this stage was discussed by McLachlin C.J.C. in *Hutterian Brethren, supra*, at para. 53:

> 53 The question at this stage of the s.1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.

[130] The impairment in the case at bar cannot be described as minimal. It is a complete exclusion of couples in non-spousal relationships.

[131] The limitation is not minimally impairing considering the extensive state-initiated assessment process designed to evaluate the suitability of all prospective adoptive parents, whether individual or joint, in relation to children placed for adoption by societies or licencees. This fulsome evaluation process would suggest that the legislative goals are achievable without having to infringe *Charter* rights.

[132] Finally, the role of the court is to ensure that an adoption order is made in a child's best interests. This court oversight supports a conclusion that the *Charter* infringement is not necessary and that the impairment is not minimal.

iv) Proportionality

[133] In considering proportionality, McLachlin C.J.C. in *Quebec (Attorney General) v. A., supra*, stated at para. 448:

> 448 Ultimately, the infringement of a protected right must be proportionate to the benefits of pursuing the state objective, having regard to the impact of the law on the exercise of the right and the broader public benefits it seeks to achieve.

[134] The proportionality analysis includes an assessment as to whether the benefits which accrue from the limitation are proportional to its deleterious effects: *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (S.C.C.), at para. 125.

[135] I find that the benefits or salutary effects accruing from the limitation are minimal to non-existent. No societal benefit is achieved by preventing non-spousal couples from submitting a joint adoption application.

[136] In contrast, the deleterious effects of the infringement on the right of non-spousal couple is substantial. They both cannot achieve legal status as parents of an adoptive child, and this denial, legal and symbolic from the perspective of both the non-spousal couple and the child, is harmful and outweighs any benefit accruing from the legislative limitation.

[137] I concur with the following submission of the Attorney General of Ontario[15]:

> Broader public benefits do not weigh in favour of justification of the impugned measure as a reasonable limit. In fact, the opposite is true in this case. There are thousands of children and youth in Ontario who are in need of permanent, safe, nurturing and loving homes but there were 800 public adoptions last year. Statutorily restricting who can jointly apply to adopt these children and youth on the basis of marital status lessens the chances of a permanent family for Crown wards.

v) Conclusion Regarding s. 1 of the *Charter*

[138] I find that the infringement of the applicants' section 15 *Charter* right is not saved by s. 1 of the *Charter*. The impugned legislation is not a reasonable limit on the applicants' section 15 *Charter* right.

REMEDY

[139] Section 52(1) of the *Constitution Act, 1982*[16] provides:

> 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.

[140] In *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.), the Supreme Court of Canada stated at para. 25:

> A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". 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. ...

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[15] Factum of the Attorney General of Ontario, at paragraph 133.
[16] *Ibid*, footnote 1

[141] In relation to the doctrine of severance or “reading down,” the Supreme Court of Canada stated:

> The flexibility of the language of s. 52 is not a new development in Canadian constitutional law. 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 statute 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.

Schachter, supra, at para. 26

[142] I agree with the submissions of the applicants and Attorney General of Ontario that the proper remedy is severance. The words “who are spouses of one another” in s. 199(4)(b) of the *CYFSA* should be declared to be of no force or effect.

[143] This severance or “reading down” complies with the directive in *Schachter, supra*, that the striking down of any law that is inconsistent with the provisions of the *Constitution* must be only “to the extent of the inconsistency.”

CONCLUSION

[144] By reason of the foregoing, the hearing of the adoption application may proceed. Despite the fact that the adoption hearing will be more than 12 months after the application was signed, I am satisfied that in the circumstances it is just to extend the 12 month time limit: s. 204(3) *CYFSA*.

[145] The applicants’ counsel should contact the trial coordinator to schedule a hearing before me. If the related adoption application for the child L.Q. is ready to proceed, then that matter may be placed before me at the same time.

[146] The orders sought by the Attorney General of Ontario and the applicants did not include costs. I concur that this is not a proper case for costs.

[147] Finally, I express my appreciation to all counsel for their significant efforts and able assistance in the thorough presentation of this case.

ORDER

[148] This court declares that the words “who are spouses of one another” in clause 199(4)(b) of the *Child, Youth and Family Services Act, 2017* are of no force and effect in respect of adoptions under clause 199(1)(a) of that *Act*.

[149] This court declares that the words "who are spouses of one another" in clause 146(4)(b) of the *Child and Family Services Act* are of no force and effect in respect of adoptions under clause 146(1)(a) of that *Act*.

"Justice Victor Mitrow"
Justice Victor Mitrow

Released: September 18, 2018

CITATION: S.M. (Re), 2018 ONSC 5145
COURT FILE NO.: A45/16
DATE: September 18, 2018

ONTARIO

SUPERIOR COURT OF JUSTICE
FAMILY COURT

B E T W E E N:

S.M. and K.L.

Applicants

- and -

The Attorney General of Ontario

Intervener

REASONS FOR JUDGMENT

MITROW J.

Released: September 18, 2018