Bill C-38:
Redefining Parenthood and Ignoring Children

by

*Jane Adolphe**
Associate Professor of Law
Ave Maria School of Law, Ann Arbor, MI

March 7, 2005

Introduction

Bill C-38 redefines marriage and amends Clause 10 of the Income Tax Act to read "legal parent" instead of "natural parent" (or even its synonym "biological parent"). The purpose of this paper is to explore what this will mean for parenthood using Canadian adoption laws as a case study. To this end, the paper is divided into two parts.

Part I will explore the underlying assumptions of Canadian society. It highlights the fact that the foundation of society is based on the natural family, a principle that has been affirmed and reaffirmed in international law. Natural/biological parenthood is central to the cultural, social and legal reality of the natural family. The central idea is that children are better off with their own biological mother and father in a married relationship.

Part II stresses how adoption laws reflect legal support for natural parenthood and inevitably privileges this family form and opposite sex relationships. It also traces how developments in adoption law have attempted to remedy the unnatural separation between biology and bond that occurs when the family breaks down or children are born out of wedlock. In this regard, it reviews trends which assist children to reunite with their natural parents.

In brief, according to Bill C-38 and a novel application of adult "equality rights" arguments, this primordial mode of parenthood must be abolished along with the natural family. The idea is to replace this natural unit, presently a fundamental anchor of Canadian law, with a foundation based solely on adult relationships, as informed by same-sex experience, which renders the couple alone with their rights devoid of any reference to the rights and best interests of children. This in turn promotes the further separation of biology and the parental bond and legitimizes the trend towards multiple parents; all in the name of placing same-sex couples and opposite sex couples on the same *par;* and all without a serious legal analysis of the rights of children, a question fundamental for the future evolution of Canadian society.

Unfortunately, it is beyond the scope of this study to treat other areas pertaining to parenthood and children: child custody, child welfare, child support, and parentage laws. Like the adoption system, these laws are premised upon the natural family and they are therefore laws of an exceptional nature put in place as a response to its breakdown. Consequently, a rejection of the natural family as a fundamental legal category means a rewriting of these laws as well.

I: Universal Approach: The Natural Family – Favoring Biology and Bond in the same Person(s)

Canadian family law is founded on the notion that the natural family (often referred to as the nuclear family) based on marriage between one man and one woman is the fundamental unit of society. The understanding is that we are born male and female endowed with intelligence, free will and a conscience to do good and avoid evil (freedom of conscience as well as religion are highlighted in art. 2 (a) of the Charter of Human Rights and Freedoms). The man and woman naturally understand that marriage is a good and freely choose it.

The marriage union is the beginning point for the delineation of the important bonds which mark a person's identity. Such bonds are founded in biology and establish life-determining genealogical relationships. The man and woman become husband and wife, and then, the husband and wife become mother and father and their children become sons/daughters and brothers/sisters and niece/nephews and cousins and so forth. Further, the parents have duties/rights towards their children in regard to their nurturing, protection and education. The children, in return, have a right/duty to be nurtured, protected and nurtured and duty/right to obey their parents and to care for them in their old age.

The State's role is to act for the common good which is integrally bound up with individual human flourishing. Marriage is a human good which is the foundation of the family, itself, a good for the individual and society and therefore worthy of protection, promotion and support by the State. The liberal State must always act in accordance with the principle of subsidiarity and respect the integrity, autonomy and privacy of the family unit. The underlying idea is that the family is the best environment for children and parents better care for children than strangers. Social scientific research on child well-being, abuse, and kin altruism provide a strong evidentiary basis for this claim. Legal policies and practices regarding the relationship between the State and the family have continually addressed the tension between familiar interventionist and non-interventionist strategies.

These principles are not unique to Canadian law; they are universal features of most legal systems and affirmed in international law. For example, according to art. 1 of the 1948 Universal Declaration of Human Rights: "All human beings are

born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood." From this article, using one's reason and human experience, one can reasonably argue the human person is born male or female and that this sexual complementarity allows couples to come together in marriage to form a family, the natural and basic cell of society, which is entitled to special protection by the State.[1] This human drama is presented in logical sequence in art. 16 of the *UDHR*:

(1) "Men and women of full age, without any limitation due to race, nationality or religion," have the right to marry.
(2) Entrance into marriage is with the "free and full consent of the intending spouses."
(3) Marriage is the basis of the family, "the natural and fundamental group unit of society, and is entitled to protection by society and the State."

In specific regard to parenthood, art. 26 reaffirms the natural family and the notion of natural parenthood in acknowledging that "Parents have a prior right to choose the kind of education that shall be given to their children." In addition, art. 25 gives prominence to the essential bond between mother and child when it declares "motherhood and childhood are entitled to special care and assistance."

Both the 1966 International Covenant on Civil and Political Rights (ICCPR)[2] – and its first Optional Protocol, and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[3] which set up monitoring committees and special procedures for securing compliance, have been assumed and accepted by State Parties with their signature and ratification.[4] Together with the UDHR, they make up the International Bill of Human Rights. The ICCPR (152 State Parties) and the ICESCR (149 State parties) are legally binding treaties.[5] They have re-affirmed the principle of the natural family and bind the State Parties in their obligations to each other, usually after they have signed and ratified the agreements. Article 23 (1) of the ICCPR expressly repeats art. 16 (3) of the UDHR in declaring "the family is the natural and fundamental group unit of society and is entitled to protection by society and the State." [6] Art 10 (1) of the ICESCR takes article 16 of the UDHR a step further, in providing that States must ensure "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."[7] There are many other binding treaties that also proclaim the natural family and its need for protection and assistance by the State.[8] The repeated reaffirmation of this original UDHR family language suggests that it has been elevated to a binding principle of customary international law and is therefore binding on Canada.[9] Lastly, like the UDHR parent-child themes have been picked up in the 1966 International Covenants. Art. 18 (4) of the ICCPR provides that State Parties "undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions." Similarly, ICESCR

states in Article 10 (2) that “special protection and assistance” should be given to mothers before and after childbirth.

The aforementioned principles have also been proclaimed in the 1989 Convention on the Rights of the Child (CRC), ratified by 192 State Parties. It reaffirms the centrality of the natural family founded on marriage in preambular para. 3 when it incorporates the UDHR and International Covenants on Human Rights, which are said to proclaim and agree that “everyone is entitled to all the rights and freedoms set forth therein . . . .” Moreover, there are numerous provisions which recognize the fundamental importance of the family and the communitarian perspective of children’s rights which treat children as part of a social fabric, born into a social context known as the family, where the value of relationships must be balanced with individual rights and duties.[10] For example, preambular para. 5 reads: “[T]he family is the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children. Preambular 6 states: “…the child . . . should grow up in a family environment . . .” Similarly, art. 8 provides that the child has a right “to preserve his or her identity including… family relations.” Moreover, art 16 states: “A child shall not be subjected to arbitrary or unlawful interference with his or her . . . family.” Finally, art. 20 reads that where separation of the child from his or her family is required either temporarily or permanently, an alternative family environment setting shall be sought by the State.

The CRC is very aggressive about promoting a healthy parent-child relationship through invocation of children’s rights with the assistance by State intervention, a fact which has been the subject of much debate.[11] However, it nonetheless affirms a key principle well known to many States, namely, the best interests of the child standard embodied in art. 40. This article is very explicit in acknowledging that the rights of the child must be seen within the family context and balanced with those of the parents when it requires that the standard “tak[e] into account the rights and duties of…parent[s].” Moreover, the familial context and parental rights are once again emphasized in art. 5 which highlights that State Parties must “respect the responsibilities, rights, and duties of parents” in guiding and directing the child’s development. Lastly, art. 18 (2) admonishes States to appreciate that “the primary responsibility for the upbringing and development of the child,” lies with parents or legal guardians, and to take on the important task of rendering “appropriate assistance to parents.”

II: Bill C-38: The New Adoptive Family - Favoring Biology and Bond in Different Person(s)

The replacement of “natural parent” with “legal parent” gives the State far more authority to determine and pick parents. It also frees parenthood from its natural dyadic character and opens the door to multiple parenting. If parenthood is freed from its anchor in biology, how can the courts resist the drift towards “the more

the merrier." If two parents are better than one, then shouldn't three be better than two? "Legal parent" becomes an umbrella notion for various subsets of parents, all stakeholders with no preference for one individual or set: natural/biological parents; adoptive parents; step parents; grandparents; social parents; psychological parents; intentional parents, gestational parent; sperm donor parent; egg donor parent and so forth. With the redefinition of marriage and the separation between biology and bond, the trend toward multiple parents is legitimized.

Adoption laws, previously an exception to the natural family and natural parenthood, now become a discrete set of rules unmoored from their foundation. This translates into a rejection of the general principles that biology and relationship ought to be in the same two persons and that a child ought to have one set of parents. The end result is that natural or biological parents become just one of many stakeholders in a child's life based on the idea that it takes a village to raise a child.[12] This is a marked departure from the principle that primary care rests with the natural family (including the extended family) with assistance and support from others based on the principle of subsidiarity (e.g. religious communities, neighbors, friends, and State). These dramatic changes are driven by a rhetoric of adult rights, spearheaded by the needs of same-sex couples, without any serious discussion about whether this is good for children.

Why is this so? How is this so?

As previously noted, the adoption system has been developed as an exception to the natural family. The underlying assumption is that biological parents are more likely to better care for their own children. Therefore, before adoption is possible, parental consent is required and the prospective new parents must meet requisite standards of fitness. Since, it is better for children to be raised in stable, two parent, married families, preference has been given to placing children in this environment.

As a consequence, the rights of the biological parents are terminated and the child's relationship to the new parents is "as if the adopted child had been born to the adoptive parent."[13] This rule, however, is subject to certain exceptions where the natural parents and adoptive parents are related and in the best interests of the child. [14] For example, in the case of step-parent adoptions where the natural parent has remarried, adoption law has been amended to permit the step-parent to adopt without having to terminate the parental rights of the natural parent who he or she has married.

Adoption legislation was further amended in some provinces when the terms "spouse" and "parent" were redefined to permit same-sex cohabiting couples to adopt as a unit in cases where the homosexual or lesbian partner wished to adopt the biological child of his or her partner.[15] This was largely in response to the Ontario provincial court decision *K and B,*[16] a seminal case because it made

important factual findings about same-sex relationships and parenting, and has been referred to, considered, and applied in various jurisdictions.[17] In that case, the Court found that the definition of spouse under the Act operated to deny lesbian couples' protected equality rights under s. 15 (1) of the Charter and could not be saved by s. 1.[18] In particular, the applicants were denied the benefit of applying to adopt a child on the basis of sexual orientation[19] The Court held that the same-sex relationships, including parenting, were virtually identical to those of the opposite sex.[20] To make this finding the court held that each of the lesbian couples had been "living together in committed relationships for varying lengths of time," [21] which "might be termed 'conjugal,' in that they ha[d] all the characteristics of a relationship formalized by marriage."[22] Further, the Court heard from expert testimony that went unchallenged that "[h]omosexual individuals do not exhibit higher levels of psychopathology than do heterosexual individuals" in that "there is no good evidence to suggest that homosexual individuals are less healthy psychologically and therefore less able to be emotionally available to their children."[23] There was no consideration of the rights of the child: the right to be connected to their biological parents, the right to be in a parental arrangement that maximizes kin altruism, the right to sex-inclusive parenting, and so on.

Since the decision of *K and B*, the narrow range of expert evidence which the judgment cited has been seriously challenged.[24] Furthermore, many agree that the court is not the proper arena to address and evaluate such complex issues. The issue of empirical data has renewed concern when one considers the rights of children and the correlative duty of Parliament, which has the care over the common good of society - inclusive of all children. And inclusive of that care is free and open dialogue on important issues affecting children. In particular, Parliament should address a number of questions that were not addressed in the same-sex marriage adoption cases but have been raised in the scientific community. [25] Yet, *K and B* together with the same-sex cases effectively shut down the possibility of free and open debate on the matter.

It is noteworthy, that application of *K and B* has not been universal. Other provinces, licensees, and agencies accept applications by "gays" and "lesbians" provided they describe themselves as single. Bill C-38 would effectively end all debate of the aforementioned issues and preclude provinces from denying "gays" and "lesbians" the right to apply as a unit. This would be a fundamental change. Mary Jane Mossman argues that even when legislation permits application as an individual the agencies frequently find them unfit or unsuitable to become adoptive parents.[26]

Also worthy of consideration is the fact that adoption by single heterosexual parents is already a departure from the general norm that children should be placed in married homes. In the State of Utah, in response to the overwhelming data showing that children are most likely to be abused by a non-biologically related partner living with the child's biological parent, adoption laws were

amended to exclude persons, who are cohabitating but not legally married, from adopting.[27]

Having to terminate natural parental rights before the adoption is finalized logically leads to closed hearings and the sealing of records to ensure that 1) the child has a "sense of security and loyalty" with his new parents and in return he gives the new parents his loyalty; 2) parents have a sense of security that "a natural parent [will not] interfere with the affection of the child, or their authority over him"; and 3) parents are available for adoption, which would be diminished if natural parents were "permitted to regain contact with adopted children."[28] There has been a push, however, for more open policies to adoption as a result of the lobbying efforts of many natural parents and adult adoptees which has been resisted by many natural and adoptive parents. In response, some provinces have enacted legislation that permits the release of birth and adoption information and facilitates continued contact, however, always subject to a disclosure veto or contact veto by the natural parents.[29] Some jurisdictions now have an "open adoption" option whereby a natural parent (or parents), usually the biological mother, can put her child up for adoption with the understanding that she will maintain an ongoing contact and relationship with the child even though the adoptive parents are the legal parents. This new development acknowledges the importance of biology and bond in one person(s) and highlights the exceptional or alternative character of the adoption system in relation to the natural family. Yet, attempts to remedy an exceptional situation can be misread to mean that there is nothing wrong with families with two or more parents.[30]

This trend for openness in adoption is inconsistent with efforts to insure confidentiality for sperm donors in the realm of reproductive assisted technology.[31] The question raised is whether children should know their biological parents in this context as well. Again, while the importance of the principle of biology and bond is reaffirmed, its application in the context of assisted reproduction could be interpreted as sending the message that having multiple parents and redefining the family is not harmful to children. Bill C-38 promotes an increased use of reproductive technology which comes hand in glove with the redefinition of marriage to include same-sex couples.

In recognition of the biological differences between men and women, provincial laws treat a biological father as a parent only if he demonstrates "the minimal interest in the consequences of his sexual activity" and goes beyond the mere "casual fornicator."[32] The courts have held that a woman who is impregnated, and carries the child to term has demonstrated her responsibility by physical necessity.[33] Provincial laws often exclude biological fathers unless they marry or cohabitate with the mother or otherwise acknowledge parenthood and demonstrate responsibility for the child. However, problems arise when a father does not know about the child until the adoption proceedings are under way or after the order of adoption has been made; courts have, nonetheless, excluded the father.[34] Again, to remedy the unfortunate situation of birth out of wedlock, laws

have been developed to ensure that natural fathers do not irresponsibly and maliciously stop the adoption process. So the natural father, when he amounts to a "casual fornicator," is excluded from the process.

The present question is whether these laws, which exclude the father, should be reconsidered in light of the recent Supreme Court of Canada decision *Trociuk v. British of Columbia*.[35] In that case, the Court reaffirmed the importance of biology in holding sections of the B.C. Vital Statistics Act unconstitutional as being in breach of s. 15 (1) of the Charter and an unjustified limitation under s. 1. That Act provided a mother the absolute discretion to un-acknowledge the estranged father of her triplets by registering the children's names under her surname. The Court, in upholding the rights of the father, held that the "birth registration evidences biological ties between parent and child, and including one's particulars on the registration is a means' of affirming these ties."[36] The exception to the general rule, namely, excluding biological fathers, is one which will be turned on its head under the new Bill C-38 regime. By way of example, were the legislature to take up the *Trociuk* issue, instead of crafting legislation in a way that reaffirms the importance of biology and bond, it is foreseeable that legislation could be grounded upon an ideology of multiple parenthood (e.g. granting visitation rights with the adopted child because multiple parents are considered good for children).

Conclusions

A Yale legal scholar and noted same-sex advocate, William Eskridge, Jr. has rightly noted that reconstructing the law according to the gay experience involves the reconfiguration of family de-emphasizing blood, gender, and kinship ties and emphasizing the value of interpersonal commitment.[37] In our legal culture the linchpin of family law has been the marriage between a man and a woman who have children through procreative sex. Gay experience delinks family from gender, blood, and kinship. They are families of choice and relatively ungendered who raise children that are biologically unrelated to one or both parents, and often form no more than a shadowy connection to the larger kinship groups.

In this paper, Part I discussed the universal foundation of society, namely the natural family based on marriage. It is a model which favors biology and bond in the same persons as being good for children. Part II explored the implications of Bill C-38 and has argued that natural parenthood must and will be abolished along with the natural family. Further, principles of family law will be reconfigured on adult relationships, as informed by the gay culture, without any authentic discussion about what this will mean for children. A key characteristic of the new family will be the further separation of biology and the parental bond and a continued legitimization of a trend towards multiple parents**.** In the end, Bill C-38 promotes an increase in alternative relationships with multiple parents in various family forms all of which will undoubtedly compound the complexity and risk in

children's lives. This fact is noted by the Canadian Province of Quebec when its government states:

> "The number of single-parent families in Quebec has risen over the past 35 years, and now accounts for 20 percent of all families; blended families represent 10 percent of all Quebec's families. These changes in family structure and composition are generating new needs. The increase in the number of children living in a single-parent family… is characterized by lower labour force activity and higher poverty . . . "[38]

Similarly, a 1998 report by the Federal Government entitled "For the Sake of the Children," found notable increases in children's school and personal difficulties: drug use and delinquency; depression, aggression and social withdrawal; fear of abandonment; emotional difficulties; and child poverty. This was only after an exhaustive review of research studies dealing with the effect of separation and divorce on children, and the creation of alternative family forms.[39] These findings are consistent with a growing body of social scientific evidence on the topic of marriage and children.[40]

---

[1] Emphasis added. To suggest that the UDHR is an appropriate point of encounter is not to ignore contentious issues within the international human rights arena, including the basic questions concerning human rights (What are they? What is their origin? Do they have limits?) which frequently involve differences pertaining to understandings of man and society, opportunistic interpretations of various rights, practical problems in application, and so forth. As Mary Ann Glendon notes, the UDHR founders anticipated these problems and deliberately grounded the document in an ultimate value: human dignity. They then integrated certain limitations in the document, which was itself to be read as an integral whole. Glendon argues that many people do not understand the UDHR, which has been erroneously interpreted as a list of unrelated rights, something that was never intended. She traces its history in an effort to show the original beauty of the Declaration as envisioned by civil law jurist Rene Cassin. She explains: "Cassin often compared the Declaration to the portico of a temple. (He had no illusions that the document could be anything more than an entryway to a future where human rights would be respected). He saw the Preamble, with its eight "whereas" clauses, as the courtyard steps moving by degrees from the recognition of human dignity to the unity of the human family to the aspiration for peace on earth. The general principles of dignity, liberty, equality, and fraternity, proclaimed in Articles 1 and 2, are the portico's foundation blocks. The facade consists of four equal columns crowned by a pediment. The four pillars are: the personal liberties (Article 3 through 11); the rights of the individual in relation to others and to various groups (Article 12 through 17); the spiritual, public and political liberties (Article 18 through 21); and the economic, social and cultural rights (Articles 22 and 27). The pediment is composed of the three concluding articles, 28 through 30, which establish a range of connections between the individual and society." Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 NOTRE DAME L. REV 1153 (1998), at 1163. For a more in-depth study of the history of the UDHR, *see also* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001).

[2] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 24, 1976).

[3] International Covenant On Economic, Social and Cultural Rights, Dec. 16, 1966, 933 U.N.T.S 3 (entered into force Jan.3 , 1976).

[4] ICCPR and ICESCR both entered into force in 1976. As of June 09, 2004, the Covenants have 152 and 149 State Parties, respectively. OFFICE OF THE UN COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATION OF PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (2004), *available at* http://www.unhchr.ch/pdf/report.pdf (last visited Aug. 18, 2004).

[5] For the status of the two Covenants see: OFFICE OF THE UN COMMISSIONER FOR HUMAN RIGHTS, STATUS OF RATIFICATION OF PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES (2004), *available at* http://www.unhchr.ch/pdf/report.pdf (last visited Aug. 18, 2004).

[6] Art. 23 of the ICCPR reads in full: 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. 2. The right of men and women of marriageable age to marry and to found a family shall be recognized. 3. No marriage shall be entered into without the free and full consent of the intending spouses. 4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 24, 1976).

[7] Art. 10 of the ICESCR reads in full: States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. 2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. 3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law. International Covenant On Economic, Social and Cultural Rights, Dec. 16, 1966, 933 U.N.T.S 3 (entered into force Jan.3 , 1976).

[8] For example, art. 17 of the 1969 American Convention on Human Rights adopts the exact language of article 16 (3) of the UDHR. (American Convention on Human Rights, Nov. 22, 1969, art. 17, 1144 U.N.T.S. 123); Art. 15 of the 1988 "Protocol of San Salvador" to the American Human Rights Convention expands on art. 16 (3) and reads: "The family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions." Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov 17, 1988, art. 15, O.A.S. Treaty Series No. 69) Art. 18 of the 1981 African Charter goes even further in recognizing the pedagogical value of the family when it states: 1) "The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals. 2) The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community." African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986)). Finally, art. 18 (entitled "Protection of the Family") of the 1990 "African Charter on the Rights and Welfare of the Child," provides: "The family shall be the natural unit and basis of society. It shall enjoy the protection and support of the State for its establishment and development." African Charter on the Rights and Welfare of the Child, 1990, art.18, O.A.U. Doc. CAB/LEG/24.9/49 (entered into force Nov. 29, 1999)).

[9] See the full argument by Jane Adolphe, *Securing a Future for Children: The International Obligation to Protect and Assist the Natural Family, presented at the European Regional Dialogue*, Geneva, Switzerland, August 2004 (forthcoming publication on file with author).

[10] Finally, children's rights are no longer defined exclusively as involving care and protection, but on a more controversial note, include political and civil rights, such as art. 13 (freedom of expression), art. 14 (freedom of religion), art. 15 (freedom of assembly), and art. 16 (right to privacy). Undoubtedly, these provisions would require State assistance and intervention if they are directed against the parents as opposed to the State itself or third parties. Hence, due to fear that an overly individualistic interpretation of these rights might unduly increase State intervention into family life, obscure the centrality of the family, and undermine parental duties and rights, many States have entered reservations. Indeed, such a radical interpretation of these "adult-like" rights has often and unfortunately been promoted in recommendations given by the Committee on the Rights of the Child to State Parties. However, such interpretations need not be accepted by State parties, who remain the final interpreters of the document. A more consistent interpretation of the CRC, however, commencing with the preamble that recognizes a communitarian perspective of children's rights, clearly views children as members of a family. They are not isolated persons - this means that any interpretation of "adult-like" rights must be read in light of and appropriately balanced with familial relationships and parental rights and responsibilities.

[11] For a critique of this approach and the Convention itself *see* Jane Adolphe, A Light to the Nations: The Holy See and the Convention on the Rights of the Child (2002) (self published Ph.D dissertation, Pontificia Università della Santa Croce, Rome) (on file with author and the University).

[12] See for example HILARY RODHAM CLINTON, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US (1990).

[13] See for example, sec. 158 of Ontario's Child and Family Services Act.

[14] See discussion by MARY JANE MOSSMAN, FAMILIES AND THE LAW IN CANADA: CASES AND COMMENTARY (2004) 159 (cf. Catholic Children's Aid Society v. T.S. (1989) 20 RFL (3d) 337; 60 OR (2d) (CA); Nouveau-Brunswick (Ministre de la Santé & des Services Communautaires) c. L (M), [1998] 2 SCR 534; (1998) 165 DLR (4th) 58 (SCC); Re S. (D.M.) (1992) 98 Sask R. 226 (Q.B.); and R. (S.) v. R. (M.) (1998) 43 RFL (4th) 116 (Ont. CA) and Annotation).

[15] See for example the discussion of the legislation in British Columbia and Ontario by Martha A. McCarthy, *Family Law for Same Sex Couples: Chart(er)ing the Course*, 15 CAN. J. FAM. L. 101 (1998)

[16] [1995] 125 D.L.R. (4th) 653; 15 R.F.L. (4th) 129 (Ont. Prov. Ct.).

[17] Most notably, it has been referred to in the Ontario Appellate decision of M v. H, [1996] 31 O.R. (3d) 417, and the lower court decision, Halpern v. Toronto Clerk, [2000] 51 O.R. (3d) 742.

[18] K and B (Re), [1995] 125 D.L.R. (4th) at 653; 15 R.F.L. (4th) at 129. In that case, four lesbian couples filed joint applications for adoption and challenged the constitutional validity of the definition of "spouse" under the Ontario Child and Family Services Act. All of the children had been conceived through artificial insemination during the existing relationships, that is, one of the partners was the birth mother of the children or child in question in each adoption application (three lesbian couples sought to apply for adoption of two children while the fourth couple sought to adopt one child).

[19] Under the s. 1 analysis, the Court held there was no rational connection between prohibiting a same-sex couple from applying to adopt and the objective of the Act, namely the best interests of the child; the Court found that the effects of the provision prohibiting same-sex couples from applying to adopt were disproportionate to the objective of the Act since there was no evidence that "adoption of children by homosexual partners could never be in the child's best interest." *Id*. at 160, 167.

[20] Concerning the ability of homosexuals to parent children, the Court gave "great weight" to the affidavit evidence of three experts (a sociology professor, psychologist, and psychiatrist), and then made several important findings. It held that "there is no reason to believe the sexual orientation of the parents will be an

indicator of the sexual orientation of the children in their care," and that there is no "evidence that the homosexual orientation of the parents, especially lesbian mothers, will produce any significantly greater incidence of psychiatric disturbance, or emotional or behavioural problems, or intellectual impairment than is seen in the population of children raised by heterosexual parents." *Id*. at 68. Other important fact findings included: (1) "the traditional family... is now a minority"; (2) "there is no reason to conclude that alteration of the family structure itself is detrimental to child development"; (3) "the most important element in the healthy development of a child is a stable, consistent, warm, and responsive relationship between a child and his or her care-giver"; (4) "[d]espite stereotypical beliefs to the contrary, there is no evidence to support the suggestion that most gay men and lesbians have unstable or dysfunctional relationships"; (5) there is "no indication that the possible stigma or harassment to which children of gay or lesbian parents may be exposed is necessarily worse than other possible forms of... stigma"; and, (6) "same-sex couples should be treated in the same manner as are opposite-sex common law couples with regard to the issue of adoption." *Id*. at 50-75.

[21] *Id*. at 24

[22] *Id*. Each of the couples have cohabited together continuously and exclusively for lengthy periods, ranging from six to thirteen years; their financial affairs are interconnected; they share household expenses, have joint bank accounts and in some cases, they own property together in joint tenancy; they share the housekeeping burdens to the extent that they are able in light of their respective careers and employments; the individual partners share a committed sexual relationship. Most importantly, they all share equally the joys and burdens of child rearing.

[23] *Id*. at 60.

[24] See *infra* note 25

[25] See Jane Adolphe, *The Case Against Same-Sex Marriage in Canada: Legal and Policy Considerations*, 18 BYU J. PUBLIC LAW 479 at 533-538 and footnotes

[26] MOSSMAN, *supra* note 14, 188 (cf. Benjamin Freeman, P.J. Taylor, Thomas Wonnacott, and Katherine Hill, *Criteria for Parenting in Canada: A Comparative Survey of Adoption and Artificial Insemination* (1988) 3 CANADIAN FAMILY LAW QUARTERLY 35)

[27] Utah Parties to Adoption Law UTAH CODE ANN. § 78-30-1 (2000); See section (3)(b), which is the 2000 amendment (2000 Utah Laws c. 208, § 5) (3)(a): "A child may be adopted by: (ii) any single adult, except as provided in Subsection (3)(b)…. A child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state. For purposes of this Subsection (3)(b), "cohabiting" means residing with another person and being involved in a sexual relationship with that person; *see also* a good review about the changes to the legislation by Scott H. Clark, *Married Person Favored As Adoptive Parents: The Utah Perspective* 15 J. LAW & FAM. STUD. 203 (2003)

[28] See for example the discussion in R.J.L. c. Children's Aid Society of Metropolitan Toronto, [1976] OJ no. 138 (HCJ) (QL) paras. 9-10.

[29] See discussion by MOSSMAN, *supra* note 14, at 161.

[30] The argument has been made by Katrysha Bracco, *Patriarchy and the Law of Adoption: Beneath the Best Interests of the Child* (1997), 35 ALBERTA LAW REVIEW 1035.

[31] See Josephine Reeves, *The Deviant Mother and Child: The Development of Adoption as an Instrument of Social Control*, (1993) 20 JOURNAL OF LAW AND SOCIETY 412.

[32] See for example, Re Attorney General of Ontario and Nevins, (1988) 64 O.R. (2d) 311; 13 RFL (3d) 113 (HCJ) where the court upheld the constitutionality of the section which treated fathers different from

mothers. The court held that it breached the equality guarantee provide for in s. 15 (1) of the Charter but was justified under s. 1.

[33] *Id*, at 316-317.

[34] See for example, Re T and Children's Aid Society and Family Services of Colchester County (1992), 92 DLR (4th) 289 (CA) which reversed the lower court decision requiring the father's consent based on its *parens patria* jurisdiction. The Court of Appeal concluded that the legislature had clearly decided to exclude the father's consent.

[35] Trociuk v. British Columbia (Attorney General) 2002 S.C.C. 34.

[36] *Id*.

[37] Daniel Cere, *Redefining Marriage? A Case for Caution*, at http://www.marriageinstitute.ca/images/cere.pdf (last visited March 4, 2005) (cf. WILLIAM N. ESKRIDGE JR., GAYLAW: CHALLENGING APARTHEID IN THE CLOSET 11 (1999)).

[38] CANADA'S SECOND REPORT ON THE CONVENTION ON THE RIGHTS OF THE CHILD, QUEBEC'S REPORT 8, *available at* http://www.pch.gc.ca/progs/pdp-hrp/docs/crc-2001/intro_e.cfm (last visited Aug. 10, 2004).

[39] REPORT OF THE SPECIAL JOINT COMMITTEE ON CHILD CUSTODY AND ACCESS, PARLIAMENT OF CANADA, FOR THE SAKE OF THE CHILDREN 3 (1998), *available at* http://www.parl.gc.ca/InfoComDoc/36/1/SJCA/Studies/Reports/sjcarp02-e.htm (last visited Aug. 10, 2004). [Hereinafter For the Sake of the Children]. *Id.* at 10-3.

[40] *See for e.g*. the work of Maggie Gallagher at the Institute for Marriage and Public Policy Institute for Marriage and Public Policy, *at* http://www.marriagedebate.com (last visited March 7, 2005); *see also* Institute for American Values, *at* http://www.americanvalues.org (last visited March 7, 2005); Family Research Council, *at* http://www.frc.org (last visted March 7, 2005).