



Landmark Case

THE PARENTAL RIGHTS CASE

TROCIUK v. BRITISH COLUMBIA (ATTORNEY GENERAL)

Prepared for the Ontario Justice Education Network by Law Clerks of the Court of Appeal for Ontario

Trociuk v. British Columbia (A.G.)

Facts

Mr. Darrell Wayne Trociuk and Ms. Reni Ernst are from British Columbia. They are the parents of triplets born on January 29, 1996. They are not married to each other.

Shortly after the triplets were born, the mother, Ms. Ernst, filled out their birth registration forms on her own. On the forms, she listed the father of the children as “unacknowledged by the mother”. She also chose and registered the children’s surnames. She gave them her surname only, “Ernst”. The mother was allowed to do this under sections 3(1)(b) and 4(1)(a) of the *Vital Statistics Act* of British Columbia. These sections stated:

3 (1) Within 30 days after the birth of a child in British Columbia,

(b) the child’s mother, if the father is incapable or is unacknowledged by or unknown to the mother,

must complete and deliver to the district registrar a statement in the form required by the director respecting the birth.

4 (1) The surname of a child must be registered as follows:

(a) if only one parent completes the statement under section 3, the surname must be the one chosen by that parent;

Section 3(6)(b) of the *Vital Statistics Act* prevented the father, Mr. Trociuk, from altering the children’s birth registration forms. It stated:

3 (6) a statement completed by only one parent of the child or by a person who is not the child's parent is registered, the director must alter the registration of birth on application of any of the following persons:

(b) the child's mother, if the father is incapable or is unacknowledged by or unknown to the mother;

After the father and mother had separated, the father obtained a court order for supervised access to the children. He also wanted to have his identity included on the children's birth registration forms and wanted to change their surnames. The father twice asked the Director of Vital Statistics to amend the children's birth registration forms to acknowledge him as their father. Both requests were refused. He then applied to the British Columbia Supreme Court for an order compelling the Director of Vital Statistics to register him on the children's birth registration forms, to change the surnames of the children from "Ernst" to "Ernst-Trociuk", as well as a declaration that sections 3(1) and 3(6) of the *Vital Statistics Act* violated the equality guarantee in s. 15(1) of the *Charter of Rights and Freedoms*. The *Charter* is part of the Constitution of Canada. Section 15(1) of the *Charter* reads:

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.

Justice Collver, the British Columbia Supreme Court judge who heard the father's case, declined to issue the orders sought by the father. He also dismissed the father's *Charter* claim. Justice Collver decided not to deal directly with the question of whether the challenged sections of the *Vital Statistics Act* violated the *Charter's* equality guarantee. Instead, in his reasons for judgment, he decided that even if these sections did violate the equality guarantee, they could be justified as a reasonable limit on *Charter* rights as permitted by s. 1 of the *Charter*. Section 1 reads:

1. 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.

Appeal to the British Columbia Court of Appeal

The father was unhappy with this result and appealed the judgment to the British Columbia Court of Appeal. A panel of three judges heard the appeal. Two out of the three judges, Justices Southin and Newbury, ruled that the judgment of the British Columbia Supreme Court should be upheld. However, the other judge on the panel, Justice Prowse, disagreed with her colleagues on the *Charter* issue. Justice Prowse found that the challenged sections of the *Vital Statistics Act* did violate the equality guarantee in s. 15(1) of the *Charter* and could not be justified under s. 1.

Appeal to the Supreme Court of Canada

The father applied for "leave", (or permission) to appeal the judgment of the British Columbia Court of Appeal to the Supreme Court of Canada. The Supreme Court granted the father permission and his appeal was heard on December 4, 2002. The Supreme Court of Canada released its decision on

June 6, 2003. It reversed the decision of the British Columbia Court of Appeal and concluded that sections 3(1)(b) and 3(6)(b) of the *Vital Statistics Act* violated the *Charter*.

Justice Deschamps wrote the reasons for judgment on behalf of all nine judges of the Supreme Court. In her reasons, she first considered whether sections 3(1)(b) and 3(6)(b) of the *Vital Statistics Act* violated the equality guarantee in s. 15(1) of the *Charter*. In an earlier judgment, *Law v. Canada (Minister of Employment and Immigration)*, the Supreme Court had set out a three-part test for showing that a law (or a part of a law) violates s. 15(1) of the *Charter*. This case is often referred to as a precedent for cases involving s. 15 of the *Charter*.

- First, the person challenging the law (the “claimant”) must show that it clearly treats him or her differently than others on the basis of one or more personal characteristics.
- Second, the claimant must show that he or she is subject to this different treatment on the basis of one or more of the protected grounds listed in s. 15(1) (*i.e.* race, national or ethnic origin, colour, religion, sex, age or mental or physical disability) or on grounds very similar to those listed (*e.g.* sexual orientation).
- Third, the claimant must show that this different treatment is discriminatory within the meaning of the equality guarantee. Different treatment will be discriminatory when it has the effect of demeaning a claimant’s essential human dignity. The relevant point of view for assessing whether the challenged law demeans a claimant’s dignity is that of a reasonable person in circumstances similar to those of the claimant.

The Analysis of Facts

Justice Deschamps began her s. 15(1) analysis by noting that the challenged sections of the *Vital Statistics Act* treated fathers differently than mothers, because the sections allowed a father’s information to be permanently excluded from his children’s birth registration if the mother, for any or no reason, chose to list him as “unacknowledged” on the birth registration form. They also allowed a father to be excluded from the process of determining the surname of his child if he was “unacknowledged” by the mother. Justice Deschamps concluded that because only women can be mothers and men fathers, these sections treated parents differently and did so on the basis of sex, which is listed as a protected ground in s. 15(1). Because of this, Justice Deschamps found that the first two parts of the three-part test described above were met.

Justice Deschamps next considered whether the different treatment imposed on fathers by the challenged sections of the *Vital Statistics Act* amounted to discrimination.

She first dealt with the argument that the effect of this different treatment on the father was insignificant, so it could not amount to discrimination. Justice Deschamps rejected this argument, explaining that including one’s particulars on a birth registration form and helping to determine a child’s name were important ways to participate in the life of a child. A father who is arbitrarily excluded from these activities would reasonably feel that a significant interest of his had been affected.

Ruling under the Vital Statistics Act

Justice Deschamps then turned to the question of whether the different of the father would be understood by a reasonable person in the father’s position to demean or undermine his dignity.

The lawyer for the mother had argued that the father's claim under s. 15(1) of the *Charter* was "weakened" because he did not belong to a historically disadvantaged group. Justice Deschamps disagreed and held that even though the father did not belong to such a group, the challenged sections of the *Vital Statistics Act* still affected his dignity, because it would have been reasonable for him to understand that, by enacting these sections, the British Columbia legislature was sending a message that a father's relationship with his children was less worthy of respect than a mother's relationship with her children. Because a parent's relationship with his or her children is so central to a parent's identity, a reasonable person in the father's position would have understood this message to be a negative judgment of his worth as a human being.

Justice Deschamps also noted that under the *Vital Statistics Act*, there were three categories of fathers whose particulars are excluded from their children's birth registration forms: (1) those fathers who are arbitrarily unacknowledged; (2) those fathers who are unacknowledged for valid reasons (*e.g.* because of sexual assault or incest); and (3) those fathers who are incapable or unknown to the mother. Justice Deschamps concluded that a father who belonged in the first category would reasonably perceive that the British Columbia legislature considered his relationship with his children to be similar to the relationships of fathers in the other categories. Justice Deschamps considered such an association to be offensive. She also noted that since there was no way for fathers to alter the birth registration form in the event of unjustifiable exclusion, fathers who wanted to create a symbolic tie between themselves and their children could be confused with fathers who did not want their particulars included on their child's birth registration. Justice Deschamps considered such confusion to be disrespectful. In fact, she compared a father burdened with these unfair and offensive associations to a racial minority subjected to a stereotype because the personal characteristic, either sex or race, cannot be changed and is the cause of the association or stereotyping. This is the essence of discrimination.

Reasons for Unacknowledgment

Finally, Justice Deschamps dealt with the argument that in cases where a mother has good reasons for unacknowledging a father – for example, where she has become pregnant as a result of sexual assault or incest – allowing a father to dispute the unacknowledgement would be a serious attack on the interests of the mother and would not be in the best interests of the child. It could also discourage mothers from reporting births. Justice Deschamps concluded that a reasonable person in the father's position would feel that the British Columbia legislature could still have protected a mother from the unwanted disclosure of such a father's identity without exposing other fathers to the risk of arbitrary and permanent exclusion. (This possibility is discussed by Justice Deschamps in more detail in her s. 1 analysis.) A father would conclude that his interest in participating in his children's lives had been much too easily sacrificed in pursuit of this goal and that therefore his dignity had been harmed. Accordingly, Justice Deschamps concluded that the third and final element of the three-part test for proving a violation of s. 15(1) of the *Charter* had been met. The different treatment imposed on fathers by the challenged provisions of the *Vital Statistics Act* was discriminatory within the meaning of the equality guarantee. Justice Deschamps therefore held that these challenged sections violated s. 15(1) of the *Charter*.

Justice Deschamps then turned her attention to the question of whether these sections could be justified as a reasonable limit on *Charter* rights as permitted by s. 1 of the *Charter*. Specifically, she

focused on whether these sections impaired the rights of fathers as little as reasonably possible. This is an essential requirement for justification under s. 1. Justice Deschamps found that the risk of mothers falsifying birth records for fear of the negative effects associated with applications by fathers who have been justifiably unacknowledged (such as the unwanted disclosure of the fathers' identities or confrontation in court), could have been essentially eliminated by the British Columbia legislature. This could be done in ways that did not harm the interests of fathers who have been unjustifiably excluded. For example, the legislature could have provided that a judge sitting alone in his or her chambers would determine whether a father has been justifiably excluded, based solely on written evidence. Given possibilities like these, it was clear to Justice Deschamps that the challenged sections of the *Vital Statistics Act* did not impair the rights of fathers as little as reasonably possible. Therefore, they could not be justified as a reasonable limit under s. 1.

The Decision

In conclusion, the Majority held that sections 3(1)(b) and 3(6)(b) of the *Vital Statistics Act* violated the *Charter* and were therefore invalid. Justice Deschamps decided to delay the declaration of invalidity for a period of 12 months in order to give the British Columbia legislature time to fix the problems with the sections without harming mothers who would want to unacknowledge fathers for legitimate reasons. In her closing comments, Justice Deschamps emphasized that it was for the legislature – not the court – to devise a new system for unacknowledging fathers on birth registration forms that would satisfy the requirements of s. 15(1) of the *Charter*. However, she pointed out that such a system must account for the legitimate interests of the mother, the right of the father not to be discriminated against on the basis of his sex and the best interests of the child.



Case Summary Questions

1. What is the name of the statute that was at issue in this case?
2. What province enacted this statute?
3. Describe briefly what sections 3(1)(b) and 4(1)(a) of the *Vital Statistics Act* allow the mother in this case to do?
4. What was the effect of section 3(6)(b) of the *Vital Statistics Act* on the father in this case?
5. The father made an application to the British Columbia Supreme Court. What was this application for?
6. Justice Collver was the British Columbia Supreme Court judge who heard the father's case. What did he decide?
7. The father was unhappy with the judgment of the British Columbia Supreme Court and decided to appeal it to the British Columbia Court of Appeal. How many judges of the British Columbia Court of Appeal heard the appeal?
8. The Court of Appeal's decision was not unanimous. What did the majority of the judges on the panel decide?
9. What did the other judge (also known as the "dissenting" judge) on the panel decide?
10. What did the father do next?
11. Did the Supreme Court of Canada uphold or reverse the decision of the British Columbia Court of Appeal?
12. Who wrote the reasons for judgment on behalf of the Supreme Court of Canada?



Classroom Discussion Questions

1. Why do you think the BC government developed the *Vital Statistics Act* to include this provision? Whose interests was the government trying to protect?
2. What impact would this legislation have on children?
3. What kind of solution would you propose in response to the Supreme Court of Canada decision?



Trociuk v. British Columbia (A.G.): Worksheet 1

1. In *Law v. Canada*, the Supreme Court of Canada set out a three-part test for showing that a law violates the equality guarantee in s. 15(1) of the *Charter*. Describe the three parts of this test.
2. Justice Deschamps' s. 15(1) analysis focused on the third part of this test – whether the different treatment imposed on fathers by the challenged sections of the *Vital Statistics Act* amounted to discrimination. How did Justice Deschamps deal with the argument that the effect of this different treatment was insignificant and therefore could not be discriminatory?
3. How did Justice Deschamps deal with the mother's argument that the father's claim under s. 15(1) of the *Charter* was "weakened" because he did not belong to a historically disadvantaged group? Did the challenged sections of the *Vital Statistics Act* still affect his dignity? If so, how?
4. Do you agree with Justice Deschamps' reasoning on this point? Should the equality guarantee in s. 15(1) of the *Charter* protect all persons from discrimination or should its protection mainly be for those persons from historically disadvantaged groups? Why?
5. In the first part of her reasons for judgment, Justice Deschamps concluded that the challenged sections of the *Vital Statistics Act* violated s. 15(1) of the *Charter*. Justice Deschamps concluded that this infringement could not be justified under s. 1 because the sections did not impair the rights of fathers as little as reasonably possible. Why not?
6. Justice Deschamps concluded that the challenged sections of the *Vital Statistics Act* were unconstitutional and therefore invalid. Why did Justice Deschamps decide to delay the impact of the decision for 12 months?
7. One legal commentator has suggested that the Supreme Court did not go far enough in this case and should have considered whether the integrity of public records requires all known fathers to be identified on birth registration forms, even if they are not allowed any role in their child's life. If you were faced with this argument, what would you decide? Do you think that it is sometimes justifiable to completely exclude a father's identity from a child's birth registration? If so, when? If not, why not?
8. What about a child's surname (last name)? Do you think that a father should always be entitled to have his surname included as part of his child's surname, or do you think there are some circumstances where he should not be so entitled? Why?