

MARRIAGE: WHY THE CHARTER IS FAILING CHILDREN

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Pierre Trudeau introduced the Charter of Rights and Freedoms to protect individual rights and minorities. Later, sexual orientation was added by the courts to the list of groups needing protection. Woefully, children, the most vulnerable group in society, were ignored. This was not an omission by design or malevolence, but simply because it was considered a given that children would always benefit from the protection of the law.

Today, sexual orientation, which the framers of the Charter specifically refused to include, now trumps children's rights.

When judges ruled that gays and lesbians were discriminated against because they were prevented from marrying, they focused on adults' Charter rights. The Supreme Court did not even mention children in its judgment. In so doing, the courts, and now Parliament, are failing children.

How can this be? Article 7 of the United Nations Convention on the Rights of the Child states that the child "*shall have... as far as possible, the right to know and be cared for by his or her parents*".

Marriage is now "the lawful union of two persons to the exclusion of all others" (Civil Marriage Act, 2005). How does a family composed of two mothers or two fathers to the exclusion of at least one biological parent guarantee this right? How does one answer the child raised by two married women who asks: "Who is my father? Why can't I have a father? Why did the law allow this?"

Article 3 of the same U.N. convention states that "In all actions concerning children, whether undertaken by ... courts of law ... or legislative bodies, *the best interests of the child shall be a primary consideration.*"

How do we square this with research, for example, that concludes that "mothers help teens from falling victim to anxiety and depression" while "fathers help keep adolescents from turning belligerent and defiant" (The Family in America, New Research, November 2005)?

What consideration did our government give to the welfare of children in the debate over marriage? We all heard our Prime Minister talk about the Charter rights of gays and lesbians. When did he ever talk about the best interests of children? Can Parliament seriously say that it placed children's welfare foremost?

Not only is Canada a signatory to the UN Convention on the Rights of the child, the vast majority of Canadians agrees with these common sense principles. So does the vast majority of humanity, both past and present.

A recent family court case in Québec illustrates how children's rights and interests will be further confounded. Two married lesbians asked a male homosexual friend to inseminate one of them. A child was born and given a birth certificate with two mothers and no father.

Shortly thereafter, the natural mother sought for divorce. The non-biological "mother" sued to be recognized as the child's mother with visitation rights. The natural mother strongly opposes this. To complicate matters, the man who sired the child also sued for recognition as the biological father with visiting rights.

Whatever the outcome, this child will be forced to endure complicated fractured family environments with a confusion of visiting rights, financial obligations and emotional insecurity.

By addressing a presumed discrimination towards one minority, a very vocal one, same sex marriage creates a new class of citizens for whom discrimination is entirely legal: children who are deprived of either a father or a mother.

Parliament needs to restore and strengthen the former definition of marriage as a protector of children's rights and best interests. This will no doubt be challenged again in the courts under the Charter, with similarly narrow rulings ignoring the fate of children.

When the Charter was adopted, it included a notwithstanding clause whose precise purpose is to override narrow court decisions which may not be in the public interest.

Clearly, in order to protect children's rights, the notwithstanding clause must be used, if necessary. And yet, because the notwithstanding must be renewed every five years, a more permanent solution is required.

Since the Charter is a constitutional issue, only a constitutional amendment can resolve the problem permanently. As in other jurisdictions, the constitution needs to be amended to enshrine the most fundamental institution in society: child friendly, monogamous, heterosexual marriage.

One final question begs an answer. Why are all the passionate champions of Charter rights so utterly silent about the violation of the rights and best interests of children? Could it be that some citizens are more equal than others?