The Top Five 2008

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Canada (Justice) v. *Khadr*, 2008 SCC 28

http://scc.lexum.org/en/2008/2008scc28/2008scc28.html

In a 2007 decision, R. v Hape, the Supreme Court significantly restricted the application of the Charter outside Canada. Khadr is important because it recognized and applied an important exception to Hape. In it, the Supreme Court held that the Charter could be applied outside of Canada because the United States was in breach of international law. Khadr is the latest in a series of cases to address the application of the Charter to the actions of Canadian officials abroad.

Date released: May 23, 2008

S. 32(1) of the *Charter* states:

> This *Charter* applies
>
> a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Although the above passage makes it clear that the *Charter* applies everywhere in Canada, its application to Canadians abroad is often a point of contention. There have been several important Supreme Court decisions that have surrounded the applicability of *Charter* rights to Canadians outside of Canada.

In *R.* v. *Harrer*, [1995] 3 S.C.R. 562 Heidi M. Harrer, a Canadian, was questioned by American authorities in the United States about her boyfriend's escape from custody in Vancouver while awaiting extradition to the United States. The American police did not caution her about her right to counsel in accordance with Canadian standards. When she returned to Canada, Harrer was charged with assisting her boyfriend escape. The Supreme Court found that the admission of the statements she had made to the American police did not violate her right to counsel under s. 10 b) of the *Charter*. The *Charter* did not apply to the actions of the U.S. officials, who were not acting on behalf of any Canadian government but rather were conducting their own investigation.

In *R.* v. *Cook*, [1998] 2 S.C.R. 597 Deltonia R. Cook was arrested in the United States by U.S. authorities following a murder committed in Canada. The American police read him his Miranda rights and he asked to see a lawyer. Before he was able to do so, he was turned over to Canadian authorities for questioning. The Canadian authorities did not inform him of his right to counsel until after they had asked him a number of questions. Cook sought to have his answers to those questions excluded under s.10 (b) of the *Charter*. The Supreme Court found that, though the general rule in international law is that a country's laws do not apply outside its territory, the *Charter* could apply to acts of Canadian officials outside Canada where:

1. the impugned acts fall within the scope of s.32(1) of the *Charter* for Canadian law enforcement authorities engaged in government action and,
2. the imposition of *Charter* standards will not conflict with the concurrent territorial jurisdiction of the foreign state.

The Supreme Court found the *Charter* applied to the Canadian detectives in Cook because they were conducting their own independent investigation of a Canadian citizen for a crime committed in Canada in which the U.S. authorities played no substantial part. Applying the *Charter* to the Canadian police did not interfere with American sovereignty. The Court excluded the statements Cook made to the Canadian police.

Cook was the law until the Court formulated a more restrictive test in the 2007 case of *R.* v. *Hape* [2007] 2 S.C.R 292. Hape was a Canadian businessman who had an office in the Turks and Caicos. The RCMP began investigating him for money laundering in Canada and then conducted a clandestine entry and search of his office in the Turks and Caicos with the cooperation of the Turks and Caicos police. The police did not obtain a Canadian search warrant. At his trial Hape argued that the evidence from the search should be excluded because he had been subjected to an unreasonable search and seizure.

In *Hape*, the Supreme Court abandoned the Cook test, observing that generally the application of the *Charter* outside Canada would interfere with another country's sovereignty. Comity between nations means that one country should not interfere with another's country's sovereignty within its territory. The Court ruled that in order to apply the *Charter* to a Canadian state actor outside Canada, there must be an exception to the principle of sovereignty that would justify the application of the *Charter* to the activities of the state actor in the territory of another state.

In *Hape* the Court saw no exception to the principle of sovereignty that would permit the application of the *Charter*. The *Charter* did not apply to the RCMP's search in the Turks & Caicos.

The Facts of *Canada (Justice)* v. *Khadr*

Omar Khadr is the 15 year old Canadian citizen who the American armed forces took prisoner on July 27, 2002 in Afghanistan, as part of military action taken against the Taliban and Al Qaeda after the September 11, 2001 attacks in New York City and Washington. He was 15 years old when he was brought to Guantanamo Bay Prison Camp. Mr. Khadr is currently facing charges of murder and conspiracy to commit terrorism, which are being tried by a U.S. Military Commission at Guantanamo Bay.

On several occasions in 2003 Canadian Security and Intelligence Service (CSIS) agents interviewed Mr. Khadr at Guantanamo Bay for intelligence and law enforcement purposes. The CSIS agents shared the product of these interviews with U.S. authorities.

After formal charges were laid against Mr. Khadr in November 2005, he sought disclosure from the Canadian government of the records of these interviews and all other documents in its possession relevant to the charges against him, invoking *R.* v. *Stinchcombe*. *Stinchcombe* is the landmark, 1991 Supreme Court decision that states principles of fundamental justice impose a duty on the prosecuting Crown to provide disclosure of relevant information in its possession to the accused whose liberty is in jeopardy. Failure to comply with this need for disclosure may constitute a violation of s.7 of the *Charter*.

The Canadian Government and its officers formally refused Mr. Khadr's request for disclosure in January, 2006. The case then wound its way up to the Supreme Court. Before the Supreme Court, the Canadian government's main argument was that, as indicated by the *Hape* decision, the *Charter* did not apply to the acts of the CSIS agents operating in the U.S.

The Decision

In May of 2008 the Supreme Court decided unanimously that the *Charter* did apply and ordered the Minister of Justice to provide disclosure. The Court found that the process at Guantanamo Bay did not comply with either U.S. domestic law or with international law. Based on this finding the Court applied an important exception to *Hape*: the principles of international law and comity of nations cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. Examples of such international obligations include Canada's commitment to the four Geneva Conventions of 1965, international agreements that, among other things, dictate specific procedural conduct in accordance with the laws of war.

In its reasoning the Court relied on two decisions of the United States Supreme Court: *Rasul* v. *Bush,* 542 U.S. 466 (2004) and *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006).

The Canadian Supreme Court noted that in both cases the U.S. Supreme Court had held the operations at Guantanamo Bay to be in violation of the Geneva Conventions and domestic U.S. law. Relying on these decisions the Canadian Supreme Court concluded that "...the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law."

The Court ordered that the Canadian government produce all documents and materials that may be relevant to Mr. Khadr's case to a designated Federal Court judge. That judge will in turn review these materials in accordance with s.38 of the *Canada Evidence Act* and ensure that the disclosure of any materials will not, among other things, compromise national security.

Discussion Issues

1. Do you think the *Charter* should always apply to the activities of Canadian government officials exercising official functions outside Canada?

2. Should Canadian police carry out or participate in a search that is legal in the foreign country where an investigation is being carried out if a similar search would not be legal in Canada?

3. Do you agree with the *Hape/Khadr* test or do you think the more appropriate test is that stated in the earlier *Cook* decision? Do you see as the difference between the two tests?

4. Should the Supreme Court of Canada have pronounced upon the legality of the proceedings happening at Guantanamo Bay itself rather than deferring to the two U.S. Supreme Court decisions? What if there had been no such decisions by the U.S. Supreme Court to adopt?

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R. v. *A.M.,* 2008 SCC 19 & *R.* v. *Kang-Brown*, 2008 SCC 18

http://scc.lexum.org/en/2008/2008scc19/2008scc19.html
http://scc.lexum.org/en/2008/2008scc18/2008scc18.html

Section 8 of the Charter guarantees everyone freedom from unreasonable search or seizure. A police officer, acting without a warrant, must have reasonable and probable grounds for the search. Evidence obtained by an unreasonable search in violation of s. 8 may be excluded under s. 24(2) of the Charter. The Supreme Court excluded evidence of drugs found in a high school student's backpack by a police sniffer dog. In a companion case the Supreme Court excluded drugs found in passenger's bag at a bus depot.

Date released: April 25, 2008

The Facts of *R. v. A.M.*

St. Patrick's High School in Sarnia had a zero tolerance policy for possession and consumption of drugs and alcohol. The principal of the school advised the Youth Bureau of Sarnia Police Services that if the police ever had sniffer dogs available to bring into the school to search for drugs, they were welcome to do so. On November 7, 2002, three police officers accepted his invitation and took their police dog, Chief, to the school. Chief was trained to detect drugs. Neither the principal nor the police had any suspicion that any particular student had drugs, though the principal said that it was pretty safe to assume that drugs were in the school. The principal used the school's public address system to tell students that the police were on the premises and that they had to stay in their classes until the search had been conducted. The police then walked Chief around the school.

Chief reacted to one of several backpacks that had been left unattended in the gymnasium by biting at it. Without obtaining a warrant, the police opened the backpack. Inside they found 10 bags of marijuana, a bag containing approximately ten magic mushrooms (psilocybin), a bag containing a pipe, a lighter, rolling papers and a roach clip. The back pack also had the student's wallet that enabled the police to identify A.M. as the owner. He was charged with possession of narcotics for the purposed of trafficking.

At trial, A.M. brought an application for exclusion of the evidence, arguing that his rights under s. 8 of the *Charter* had been violated. The trial judge allowed the application, finding two unreasonable searches: the search conducted with the sniffer dog and the search of the backpack. He excluded the evidence and acquitted the accused. The Court of Appeal and the Supreme Court of Canada upheld the acquittal.

The Supreme Court's analysis of this case is mainly set out in a companion case, *R. v. Kang-Brown*, released the same day.

The Facts of *R.* v. *Kang-Brown*

The facts in *Kang- Brown* are similar. The RCMP found drugs after they had a sniffer dog sniff the bag of a passenger in the Calgary Greyhound bus terminal. The police first made eye contact and had a short conversation with Kang-Brown before having the sniffer dog search his bag.

The Decisions

The Court, split 6-3, found that the police use of a sniffer dog in both cases violated s. 8 and should be excluded. The Court was deeply divided and there were four sets of reasons in each decision making the application of these judgments in future *Charter* cases, difficult.

Four judges – LeBel J., (Fish, Abella and Charron JJ concurring)- held that there is no common law power to use sniffer dogs in bus depots and in schools unless the police meet the existing and well-established standard of having reasonable and probable grounds or have obtained a search warrant. The courts should not create a new more intrusive power of search and seizure. That should be left to Parliament to set up and justify under a proper statutory framework.

Four judges - McLachlin C.J., Binnie, Deschamps and Rothstein JJ. - held that the police have a common law power to conduct a warrantless search using sniffer dogs on the basis of individualized reasonable suspicion. This standard complies with section 8 although it is less than "reasonable and probable grounds". However these four judges split on the application of that principle to the facts.

Binnie J. (McLachlin C.J. concurring) found the police in each of the two cases did not have individualized reasonable suspicion and the evidence should be excluded under s. 24(2).

Deschamps J. (Rothstein JJ. Concurring) found the individualized suspicion standard was met in *Kang-Brown*, and that there was no unconstitutional search in *A.M.* because there the privacy interest in the unattended backpack was slight and the search not intrusive. There no violation of s. 8 in either case.

Bastarache J. agreed (with McLachlin C.J., Binnie, Deschamps and Rothstein JJ.) that individualized suspicion is enough to support the use of a sniffer dog, but went further. He expressed the view that a generalized reasonable suspicion standard will sometimes be sufficient. In *Kang-Brown* it would have been equally permissible for the police to use sniffer dogs to search the luggage of all of the passengers at the bus depot that day, if they had had a reasonable suspicion that drug activity might be occurring at the terminal. A random sniffer-dog search in a school is reasonable where it is based on a generalized reasonable suspicion of drug activity at the school, providing a reasonably informed student is aware of the possibility of random searches involving the use of dogs. Schools are unique environments and a lower standard is appropriate given the importance of preventing and deterring the presence of drugs in schools to protect children; the highly regulated nature of the school environment; the reduced expectation of privacy students have while at school; and the minimal intrusion caused by a sniffer dog.

It seems that five judges approved of a reasonable suspicion standard for the use of dog sniffers on buses and in schools but there is no clear agreement as to what that standard means. One of those five, Justice Bastarache, has since retired.

Discussion Issues

1. McLachlin C.J., Binnie, LeBel, Fish, Abella and Charron agreed that students should expect a reasonable degree of privacy in their personal belongings. Bastarache J. thought that this expectation should be diminished in a school environment while Deschamps and Rothstein JJ. thought that students should not have any such expectation while at school. What degree of expectation of privacy do you think students are entitled to have at school in their lockers, their backpacks and their pockets?

2. Does the presence of drugs in school change your answer to the first question? Does it make a difference if there is a reasonable suspicion of presence of drugs or there are reasonable grounds for believing that they are present? How would you define the difference between these two standards?

3. How would suspected weapons at school affect your assessment of the privacy entitlements of students and the standard of knowledge required to justify a search?

4. In the 2004 case of *R. v. Tessling* the RCMP used an airplane equipped with a Forward Looking Infra-Red ("FLIR") camera to record images of thermal energy or heat radiating from buildings. Based on the results of the FLIR image coupled with information supplied by two informants, the RCMP were able to obtain a search warrant for Tessling's home. (Buildings used as marijuana grow operations are "hot" because of the grow lamps used.) Inside Tessling's residence, the RCMP found a large quantity of marijuana and several guns. The Supreme Court held that the RCMP's use of FLIR technology did not violate Tessling's constitutional right to be free from unreasonable search and seizure. FLIR technology measures crude heat emission from houses and cannot determine the nature of the source of heat within the building or "see" through the external walls.

5. What explains the different result from the use of FLIR and sniffer dogs? Do you agree that a police dog's sniff is more intrusive to an individual's privacy? What if FLIR technology becomes more sophisticated and is able to reveal core biographical details, lifestyles or private choices?

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R. v. Singh, [2007] 3 S.C.R. 405, 2007 SCC 48

http://scc.lexum.org/en/2007/2007scc48/2007scc48.html

In this case, the Supreme Court confirmed that the s. 7 right to silence does not oblige police to stop questioning a suspect who clearly asserts the right to silence. Police may use legitimate means of persuasion to try to obtain a statement from a detainee who has asserted a choice to remain silent.

Date released: November 1, 2007

The Facts

Several shots were fired outside a Vancouver bar and a man was killed. There was no physical evidence linking the accused to the shooting, but the doorman and another eyewitness implicated Singh as the shooter. He was arrested for murder, properly cautioned and advised of his right to counsel, and he privately consulted with counsel. The police interviewed him on videotape and he told them he did not want to talk about the incident, that he knew nothing about it, and that he wished to return to his cell. On each occasion, the officer persisted in questioning him and confronting him with incriminating evidence. The officer testified that he intended to put the police case before Singh in an attempt to get him to confess "no matter what". Singh did not confess but made incriminating statements, admitting that he had been in the pub on the night of the shooting and identifying himself in pictures taken from video surveillance inside the pub in question and another pub. Singh had asserted his right to silence 18 times before making these admissions. At trial, Singh challenged the admissibility of the statements. He did not contest that he made the statements voluntarily but argued that the s. 7 right to silence required the police to stop trying to obtain admissions once he had asserted his right to silence.

The Decision

The Supreme Court dismissed Singh's appeal by a 5-4 majority.

Charron J. (McLachlin C.J., Bastarache, Deschamps, Rothstein JJ. concurring) held that there is considerable overlap between the question whether Singh had made the statements voluntarily and the question whether there was a breach of his pre-trial right to silence under s. 7 of the *Charter*. The s. 7 right to silence does not oblige police to stop questioning a suspect who clearly asserts the right to silence. Police may use legitimate means of persuasion to try to obtain a statement from a detainee who has asserted a choice to remain silent. An accused can change his or her mind about speaking to the police. The number of times the accused asserts his or her right

to silence is part of the assessment of all of the circumstances, but is not in itself determinative. The ultimate question is whether the accused exercised free will by choosing to make a statement.

Fish J. (Binnie, LeBel, Abella JJ. concurring) held that an incriminating statement may be voluntary and yet be obtained by state action that infringes s. 7 of the *Charter*. Section 7 is infringed where a police interrogator undermines a detainee's freedom to choose whether to make a statement or not. Detainees left alone to face interrogators who persistently ignore their assertions of the right to silence and their pleas for respite were bound to feel that their constitutional right to silence has no practical effect and that they have no choice but to answer. The accused's repeated assertions of his right to silence demonstrated convincingly that he had chosen not to talk to police about the incident that led to his arrest. The interrogator systematically disregarded the accused's wish to remain silent, implicitly communicating the message that continued resistance was futile. The accused's right to silence was violated and he was conscripted to provide evidence against himself and, therefore, his admissions should have been excluded in accordance with s. 24(2) of the *Charter*.

Discussion Issues

1. Having watched a lot of American T.V. are you surprised that in Canada the police may continue to question suspects after they claim their right to silence?

2. Do you agree with the majority or the minority? Explain.

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Hill v. Hamilton-Wentworth Regional Police Services Board, [2007] 3 S.C.R. 129, 2007 SCC 41

http://scc.lexum.org/en/2007/2007scc41/2007scc41.html

In this case, the Supreme Court of Canada decided that the tort of negligent investigation exists in Canada. Prior to this decision an individual could sue the police only for malicious prosecution. Malicious prosecution is much more difficult to establish.

Date released: October 4, 2007

The Facts

There were 10 robberies of banks, trust companies and credit unions in Hamilton. The policed suspected Hill, an Aboriginal man. The police had a Crime Stoppers tip, a police officer's photo identification of him, eyewitness identifications, a potential sighting of him near the site of one of the robberies, and witness statements that the robber was Aboriginal. During their investigation, the police released Hill's photo to the media. They also asked witnesses to identify the robber from a photo lineup of 12 persons. Of these 12, Hill was the only Aboriginal person. The police, however, also had information that two Hispanic men, one of whom looked like Hill, were the robbers. Two similar robberies occurred while Hill was in custody. Hill was charged with 10 counts of robbery but 9 charges were withdrawn before trial. Trial proceeded on the remaining charge because two bank tellers remained steadfast in their identifications of Hill. Both tellers had a photo of Hill that had been published in a newspaper on their desks, and had been interviewed together, instead of individually. Hill was convicted at trial and sentenced to three years in prison, but that decision was overturned on appeal and a new trial ordered. At the new trial Hill was found not guilty. He had spent more than 20 months in jail.

Hill then brought a civil action against the Police Service Board for a number of torts, including malicious prosecution and negligent investigation.

Hill's action for *malicious prosecution* could not succeed as the tort of malicious prosecution requires:

1. proof that the impugned prosecution was initiated by the defendant;
2. that it was terminated in favour of the plaintiff;
3. that it was instituted without reasonable and probable grounds;

4. and that the defendant acted out of malice or for a primary purpose other than that of carrying the law into effect.

Hill could not establish the third and fourth criteria.

The Court of Appeal unanimously confirmed the existence of the tort of negligent investigation. However, it divided 3-2 on the facts. The majority held that Hill had established that the police investigators had failed to meet the standard of care of a reasonable police officer in the circumstances. The dissenting two judges found that the police had conducted their investigation with tunnel vision and their use of a photo lineup in which Hill was the only aboriginal person.

Hill's appeal to the Supreme Court was limited to the finding that the police had not been negligent. The police cross-appealed to argue there was no tort of negligent investigation. By a 6-3 majority, the Supreme Court recognized the tort of negligent investigation but dismissed Hill's appeal on the facts.

The Decision

Chief Justice McLachlin (Binnie, LeBel, Deschamps, Fish and Abella JJ. concurring) held that the police are not immune from liability under the law of negligence. They owe a duty of care to suspects. The conduct of police officers during an investigation should be measured against the standard of how a reasonable officer would have acted in the circumstances. When police officers fail to meet this standard of reasonableness, they may be accountable for harm resulting to a suspect. McLachlin J. held that no other tort provides an adequate remedy for negligent police investigations. The tort is consistent with the values of the *Charter* and fosters the public's interest in responding to failures of the justice system.

However on the facts, the Chief Justice held that the police conduct in relation to Hill, considered in light of police practices in 1995, met the standard of a reasonable officer in similar circumstances. The trial judge had found that the photo lineup's racial composition was not structurally biased and did not lead to unfairness. Hill had not established that the police, in this instance, had acted with tunnel vision.

Charron J. (Bastarache and Rothstein JJ. concurring), were of the view that the tort of negligent investigation should not be recognized in Canada. The imposition on the police of a private duty to take reasonable care not to harm the individual would inevitably pull the police away from targeting that individual as a suspect. They said that that police discretion must be exercised solely to advance the public interest, not out of a fear of civil liability.

Discussion Issues

1. Do you think it was fair that Hill was the only Aboriginal person in the photo lineup? If so would you require photo lineups to be composed only of persons of the same ethnic origin as the suspect? Can you answer this question without seeing the photo lineup?
2. Do you think that fear of being sued might affect what police officers assess as reasonable and probable grounds, and influence them to refrain from carrying out their duty to the public? The majority did not attach importance to this concern because there was no proof that it was well founded. If you think the concern is real, how would you go about establishing it?

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A.A. v. *B.B.,* 2007 ONCA 2

http://www.canlii.org/en/on/onca/doc/2007/2007onca2/2007onca2.html

The Ontario Court of Appeal declared that both partners in a lesbian relationship were mothers of a child. This resulted in the child having three parents.

Date released: January 2, 2007

The Facts

A.A. and C.C. were two women who had been in a stable same-sex union since 1990. In 1999, they decided to start a family with the assistance of their friend B.B. B.B impregnated C.C. The two women were to be the primary caregivers of the child, but they believed it would be in the child's best interests that B.B. remain involved in the child's life. D.D. was born in 2001. He refers to A.A. and C.C. as his mothers. In 2003, A.A. applied for a declaration that, like B.B. and C.C., she was D.D.'s parent, specifically his mother. The application judge found that he did not have jurisdiction to make the declaration sought, either under the *Children's Law Reform Act*, or through exercise of a court's inherent *parens patriae* jurisdiction. He therefore dismissed the application. A.A. appealed the decision, arguing that the court did have jurisdiction and as well alleging a violation of her rights to equality and fundamental justice under ss. 15 and 7 of the *Canadian Charter of Rights and Freedoms.*

The Ontario government did not oppose the application or take a position on the appeal. The Court appointed an *amicus curiae* who supported the appeal. The Children's' Lawyer, acting for D.D., also supported the appeal as did several intervenors, such as the Family Service Association of Toronto. Another intervenor, the Alliance for Marriage and Family, opposed the appeal.

The Decision

In a unanimous decision, the Ontario Court of Appeal reversed the decision of the Trial Judge and declared that A.A. was a mother of D.D. Justice Rosenberg, writing for the panel agreed that the judge could not make the declaration applying the *Children's Law Reform Act*. That *Act,* and all other relevant legislation, contemplated that a child has one mother and one father. For example, s. 12(2) of the *Children's' Law Reform Act* provides that:

> Two persons may file in the office of the Registrar General a statutory declaration, in the form prescribed by the regulations, jointly affirming that they are the father and mother of a child.Justice Rosenberg also found the applicants could not rely on the *Charter* on appeal as they had not raised it in the court below.

However, Justice Rosenberg found the court could make the declaration using its *parens patriae* jurisdiction. *Parens patriae*, Latin for "father of his country," is an ancient doctrine that the Crown is the ultimate guardian of all persons under a disability, especially children. The Crown's *parens patriae* power was vested in the courts centuries ago. It is an overriding power the courts have to rescue a child in danger or fill in gaps in the law, in the best interests of a child.

Here, the Court held that it was in the best interests of D.D. that a declaration of parentage be made. As the Children's' Lawyer stressed, a declaration of parentage is of great importance to the child, as well as to the parent, in that:

1. it allows the parent to fully participate in the child's life;
2. the declared parent has to consent to any future adoption;
3. the declaration determines lineage;
4. the declaration ensures that the child will inherit on intestacy;
5. the declared parent may obtain an OHIP card, a social insurance number, airline tickets and passports for the child;
6. the child of a Canadian citizen is a Canadian citizen, even if born outside of Canada
7. the declared parent may register the child in school; and,
8. the declared parent may assert her rights under various laws such as the *Health Care Consent Act*.

Justice Rosenberg noted that "Perhaps one of the greatest fears faced by lesbian mothers is the death of the birth mother. Without a declaration of parentage or some other order, the surviving partner would be unable to make decisions for their minor child, such as critical decisions about health care". If both of D.D.'s biological parents were to die, A.A. would be unable to make critical decisions for her child.

Justice Rosenberg found that there was a legislative gap in this case. The *Children's Law Reform Act's* purpose was to provide an equality in status to children born out of and in wedlock. The *Act*, though, was a product of its times when "[t]he possibility of legally and socially recognized same-sex unions and the implications of advances in reproductive technology were not on the radar scheme". Therefore it had not addressed the equality of status of children with two parents of the same sex, who were as much the child's parents as adopting parents or "natural" parents. It was contrary to D.D.'s best interests that he was deprived of the legal recognition of the parentage of one of his mothers. The Court could use its *parens patriae* jurisdiction to fill the legislative gap. On January 2, 2007 the Court declared that A.A. was also the mother of D.D.

The Attorney General of Ontario did not appeal the decision of the Ontario Court of Appeal to the Supreme Court. The intervenor, the Alliance for Family and Marriage, applied to the Supreme Court to be added as a party so that it could seek leave to appeal to the Supreme Court. The Supreme Court found the Alliance did not have standing to be added as a party in order to qualify to apply for leave to appeal. This ended the case.

Discussion Issues

1. Do you think the Court should have left this social policy to the legislature?

2. Do you agree with the result of the Court's decision? If you do not agree, do you object to the recognition of three parents or of two mothers-i.e. would you recognize the two partners of a same sex couple as the two parents of a child? If you do not agree, would it affect your opinion if A.A.'s egg had been fertilized by B.B. outside the womb and then carried to term by C.C.? Would it affect your decision if C.C. were terminally ill and C.C.'s parents intended to take custody of D.D. upon her death?

3. Could A.A. and C.C. apply to jointly adopt D.D.? What affect would an adoption order have had on B.B.?

4. The Court, in its reasons, referred to "a child born into a relationship of two mothers, two fathers or as in this case two mothers and one father...". How broadly do you think the decision could be applied?