

**CASE COMMENT**  
**Marshall Estate (Re), 2008 NSSC 93**

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On March 28, 2008 Justice Charles E. Haliburton delivered his follow up decision (“Marshall No. 2”) to *Re Marshall Estate*, 2006 NSSC 38 (“Marshall No. 1”) in connection with the rights of adopted persons to inherit from the estate of their natural parents. As I noted in my previous case comment on Marshall No. 1 in this publication, this issue had caused some uncertainty for estate planning and administration practitioners since an earlier 1993 decision.

In Marshall No. 2, Haliburton J. dealt with an application to have provisions of the *Intestate Succession Act*, RSNS 1989, c. 236, and the *Children and Family Services Act*, SNS 1990, c. 5, declared unconstitutional by violating the *Canadian Charter of Rights and Freedoms* (the “Charter”). In another well reasoned decision, Haliburton J. dismissed the Charter application.

Briefly, the facts in Marshall No. 1 involved a claim by Patricia Strong to inherit from the estate of her natural mother, Gladys Goldie Marshall, who had died in 2000 leaving two sisters and a number of nieces and nephews but no other natural or adopted children. Mrs. Strong had been placed for adoption by Ms. Marshall in 1952 and had been legally adopted at that time.

In Marshall No. 1, Haliburton J. analyzed a wide variety of decisions from across Canada and came to the conclusion that the effect of 1967 amendments to the *Adoption Act* which have now become part of the *Children and Family Services Act* terminated Mrs. Strong’s ability to inherit from Ms. Marshall’s estate. In Marshall No. 2, Mrs. Strong challenged the legislative provisions at issue on the basis that they contravene sections 7 and 15 of the Charter. Haliburton J. reviewed the reasons behind the 1967 amendments to the *Adoption Act* to assess the social context surrounding those changes. It appeared from material produced by the Attorney General of Nova Scotia in response to the application that the 1967 amendments were widely supported within the Bar, the judiciary and the community at large at that time.

Mrs. Strong’s application was brought under both sections 7 and 15 of the Charter. With respect to section 7, which provides Canadians with the right to “life, liberty and security of the person”, the Court first reiterated that the right to property (i.e. the right to a pecuniary inheritance) is not a right protected by the Charter. Mrs. Strong’s counsel put forward a rather innovative argument that the term “inherit” goes beyond inheritance of property to include inheritance of such things as “genetic traits, traditions, obviously mental and physical attributes and any other aspects of familial history about which one would presumably be aware if one were raised within the “natural family” and which would permit one to so organize one’s life as to advance ones [sic] own interests” (at para 27). Nevertheless, after analyzing [Supreme Court of Canada](#) case law on section 7, the Court concluded that section 7 does not extend in the manner put forward on behalf of the applicant.

With respect to section 15 of the Charter, the applicant argued that “adoptees” are an analogous group to those enumerated in section 15 of the Charter who are discriminated against compared with “natural children” who have not been adopted. After again analyzing relevant case law from the Supreme Court of Canada and other courts, Haliburton J. dismissed the application on the basis that no discrimination of the kind contemplated by section 15 applied, notwithstanding

that the legislation does create distinctions between adoptees and other natural children who remain heirs of the adoptee's natural parent. In reaching that conclusion, the Court was persuaded by the ameliorative purpose of the 1967 amendments presented in the background material provided by the Attorney General. Indeed, the purpose of the amendments was to improve the position of "adoptees" rather than discriminate against them.

By dismissing the Charter challenge in Marshall No. 2, the Court has ended any degree of uncertainty remaining after Marshall No. 1. Accordingly, estate planning and administration practitioners can continue to advise clients with certainty on the legal effect of adoption and the rights of the adopted child to inherit from the estate of the adoptive parent, but not the natural parent.