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Progress Up North

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By ARTHUR S. LEONARD | The Supreme Court of Canada has issued two important pro-gay decisions, one upholding the use of children's books depicting lesbian and gay families in public school kindergarten classes, and the other implicitly bolstering the status of lesbian and gay registered partnerships in a ruling on a property distribution dispute. The book case, Chamberlain v. Board of Trustees of School District No. 36 (Surrey), issued on December 20, highlights the commitment to equality and respect for family diversity that has come to characterize public education in many parts of Canada in a ruling interpreting the British Columbia School Act. The Act sets up a system by which there is an approved list of books to be used in the schools, but teachers can request approval of supplementary materials. The ministry of education has issued guidelines to govern curricular planning that include a section on "gender equity" that specifically "incorporates a consideration of … sexual orientation," among other factors. The case arose in 1996 when James Chamberlain, a kindergarten teacher, asked for approval to use three books in his class, all of which depicted same-sex partners raising children. His principal had instructed him that he could not use the books unless they were approved by the elected School Board. After much debate, which focused on the potential controversy between parents whose own religious and moral views disapproved of homosexuality and same-sex parents who were raising children, but paid no attention to mandates in the education law emphasizing tolerance, respect, inclusion, and diversity, the board passed a resolution rejecting the books. Chamberlain brought the matter to court, where his position was upheld by the British Columbia Supreme Court, but then reversed by the Canadian Court of Appeal. The Supreme Court sided with the British Columbia high court in a lengthy decision by Chief Justice Beverley McLachlin, which held that the local school board's decision was unreasonable in light of the policies expressed by the Schools Act. McLachlin pointed out three errors in the local board's decision. First, it violated the principle that curricular decisions in the schools were supposed to be based on principles of secularism and tolerance, and not to cater to the religious views of some parents at the expense of others. Second, the decision failed to consider the needs of same-sex families to have their kindergarten-age children receive appropriate instruction about their families' place in Canadian society. Third, the decision ignored the specific curriculum criteria of the School Act which state "that children at the K-1 level should be able to discuss their family models, whatever these may be, and that all children should be made aware of the diversity of family models that exist in our society." The Court also rejected the Board's argument that such materials were not age-appropriate for kindergartners. "Tolerance is always age-appropriate," insisted McLachlin. The other decision, Attorney General of Nova Scotia v. Susan Walsh and Wayne Bona, issued on December 19, arose from a dispute about property division after the break-up of Walsh and Bona's ten-year relationship. The couple lived together and had two children, owning a home as joint tenants. After the break-up, Bona sought to retain their house and surrounding property, while Walsh took the children and sought money for their support. When the parties couldn't work out their differences, Walsh went to court, seeking a declaration that under the Matrimonial Property Act she was entitled to the presumption that there be an equal division of the property between them. Walsh's claim was rejected by the trial judge, but that decision was set aside on appeal, and the case went up to the Supreme Court, where the specific question posed was whether excluding unmarried partners from the benefits of the Matrimonial Property Act violated constitutional guarantees of non-discrimination and respect for individual rights. Recent Canadian court decisions have found that because same-sex couples were not given the right to marry, their constitutional rights were violated by not treating them as spouses for purposes of family law. In response, the government, at both provincial and federal levels, set up registered partnership schemes that extend many of the rights of marital partners, including recognition under the Matrimonial Property Act. The Supreme Court's opinion sided with the trial judge in this case, finding that excluding unmarried cohabiting opposite-sex couples from this presumption was not discriminatory and did not affect "the dignity of these persons." Writing for the Court, Justice Michel Bastarache insisted that unregistered, unmarried partners who were otherwise capable of conferring legal status on their relationship but had chosen not to do so were clearly distinguishable in a relevant way from the couples to whom they were being compared in this analysis.

They had not undertaken the obligations of joint responsibility in the financial realm, when they had an opportunity to do so. The opinion is carefully written to have no reference or consequence for same-sex couples, who as yet have no choice to marry but do have the right to register.