COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pratten v. British Columbia (Attorney General),* 2012 BCCA 480

Date: 20121127
Docket: CA039124

Between:

Olivia Pratten

Respondent / Appellant on Cross-Appeal (Plaintiff)

And

Attorney General of British Columbia

Appellant / Respondent on Cross-Appeal (Defendant)

And

College of Physicians and Surgeons of British Columbia

(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine
The Honourable Mr. Justice Frankel

On appeal from: Supreme Court of British Columbia, May 19, 2011, (*Pratten v. British Columbia (Attorney General)*, 2011 BCSC 656, Vancouver Registry No. S087449)

Counsel for the Appellant:	L. Greathead and B.A. Mackey
Counsel for the Respondent:	J.J. Arvay, Q.C., A.M. Latimer, and S. Hern
Place and Date of Hearing:	Vancouver, British Columbia February 14 and 15, 2012
Place and Date of Judgment:	Vancouver, British Columbia November 27, 2012

Written Reasons by:
The Honourable Mr. Justice Frankel

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Madam Justice Levine

Reasons for Judgment of the Honourable Mr. Justice Frankel:

INTRODUCTION

[1] The issue on this appeal is whether provincial legislation that provides mechanisms by which adult adopted children ("adoptee(s)") can obtain information about their biological parents is discriminatory and violates the provisions of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, because similar provisions have not been enacted for the benefit of adults conceived using sperm from an anonymous donor ("donor offspring").

[2] Olivia Pratten was conceived in 1982 using sperm from an anonymous donor. When her mother and father consented to the artificial insemination procedure they knew that the donor would remain anonymous.

[3] Ms. Pratten knows almost nothing about her biological father and feels that part of her identity is missing. The doctor who performed the insemination procedure no longer has any records relating to it, as those records were destroyed in a manner that complied with the rules of the College of Physicians and Surgeons of British Columbia. Those rules provide that a doctor is not obliged to keep records for a patient for more than six years from the last entry in them. The doctor was able to tell Ms. Pratten only that the donor was a Caucasian medical student, who had a stocky build, brown hair, blue eyes, and type "A" blood.

[4] Being of the view that the failure to enact legislation for the benefit of donor offspring is constitutionally impermissible, Ms. Pratten commenced an action in the Supreme Court of British Columbia seeking declaratory and other relief. More particularly, she claimed that by enacting legislation only for the benefit of adoptees, the Legislature impermissibly discriminated against donor offspring, contrary to s. 15(1) of the *Charter* (equality rights). She also claimed that the Legislature's failure to enact legislation to facilitate donor offspring obtaining information about

their biological origins violates a free-standing positive right guaranteed by s. 7 of the *Charter* (life, liberty and security of the person).

[5] Ms. Pratten's claim proceeded as a summary trial under Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. In comprehensive and detailed reasons for judgment Madam Justice Adair declared various provisions of the *Adoption Act*, R.S.B.C. 1996, c. 5, and the *Adoption Regulation*, B.C. Reg. 291/96, invalid on the basis that they violate s. 15(1) of the *Charter*. She dismissed the claim for a positive-rights declaration under s. 7 of the *Charter*. The judge granted a permanent injunction prohibiting the destruction, disposal, redaction, or transfer out of British Columbia of records containing information regarding artificial insemination procedures, including information regarding the identity and medical and/or social history of sperm donors. She suspended her declaration of invalidity for 15 months. That suspension was later extended by this Court to the date of the release of these reasons for judgment.

[6] The Attorney General of British Columbia appeals, contending that the trial judge erred in finding a violation of s. 15(1) of the *Charter*. By way of cross-appeal, Ms. Pratten contends that the judge erred in not declaring positive rights under s. 7.

[7] For the reasons that follow I would allow the appeal and dismiss the cross-appeal. In my view, the impugned provisions of the *Adoption Act* and *Adoption Regulation* are valid by virtue of s. 15(2) of the *Charter* (affirmative action). Further, s. 7 of the *Charter* does not guarantee a positive right "to know one's past".

THE LEGISLATION IN ISSUE

[8] The provisions declared invalid by the trial judge are set out in full in an appendix to these reasons. For present purposes, a summary will suffice. However, before providing that summary, I think it is helpful to understand that the *Act* recognizes four different types of adoptions:

(a) placement by the Provincial Director of Adoptions or an adoption agency ("placement by authority");

(b) placement by a birth parent or guardian with adoptive parents who are not relatives of the child ("direct placement");

(c) placement by a birth parent or guardian with a relative of the child; and

(d) application by an adult to the court to jointly become a parent of the child with the child's birth parent.

In all cases, adoption becomes effective only upon the issuance of a court order.

[9] The challenged provisions can be divided into three main areas:

(a) provisions relating to the collection and sharing of information on birth parents;

(b) provisions relating to the adoption order and registration of live birth; and

(c) provisions on disclosure.

[10] In many cases, either the Director or a society licenced as an adoption agency may perform certain duties. Where the Director and an adoption agency are both named in a provision, I will refer to them collectively as the "authority". Where only the Director may act, I will refer to the "Director" specifically. The sections referred to below are from the *Adoption Act*, unless stated to be from the *Adoption Regulation*.

[11] Collection and sharing of information provisions:

- s. 70.1: authorizes the Director to collect information necessary to enable the Director to exercise his or her powers or perform his or her duties.

- s. 8(1): where a child is being adopted through direct placement, this section requires the prospective adoptive parents to notify the authority before the child is brought into their home.

- s. 48(1): where a child who is not resident in British Columbia is brought into the province for adoption, this provision requires the prospective adoptive

parents to obtain the approval of the authority. Approval must be granted if conditions consistent with those for adoptions within British Columbia are met.

- ss. 6(1)(a) [placement by authority], 8(2)(a) [direct placement], and 48(2)(a) [child brought into British Columbia]: require the authority to provide information about adoption and alternatives to the birth parent or guardian (or in an international adoption, to ensure such information has been provided).

- ss. 6(1)(c) [placement by authority] and 8(2)(b) [direct placement]: require the authority to "obtain as much information as possible about the medical and social history of the child's biological family and preserve the information for the child".

- s. 48(3) [child brought into British Columbia]: requires the authority to preserve for the child whatever medical and social history has been collected.

- ss. 4(1)(a)-(c), (2) and (3) of the *Adoption Regulation*: require the authority to include in a written report certain information about the health, social, and family history of the birth parents for the purposes of ss. 6(1)(c), 8(2)(b), 48(2)(b) and (3) of the *Act*.

- s. 4(1)(d) of the *Adoption Regulation*: requires the authority to collect information about why the birth parents have decided to make an adoption plan.

- ss. 6(1)(d) [placement by authority], 8(2)(c), 9(b) [direct placement], and 48(2)(b) [child brought into British Columbia]: require the authority to give the prospective adoptive parents medical and social information about the child's biological family.

- s. 56: allows the Director to disclose to an adult adoptee any information in its records concerning the origin of that adult who was adopted under the *Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*, May 29, 1993, 1870 U.N.T.S. 167.

[12] Adoption order and birth registration provisions:

- s. 32(b): requires "the child's birth registration or ... satisfactory evidence of the facts relating to the child's birth" to be filed in court before an adoption order is made.

- ss. 63(1)(a) and (2): provide for disclosure to an adoptee of the adoptee's original birth certificate (with certain exceptions).

- ss. 65 and 66: provide exceptions to the disclosure right in s. 63. Where an adoptee was adopted prior to amendment of the *Adoption Act* in 1995, a birth parent may file a disclosure veto which prevents an adoptee from obtaining his or her original birth certificate until two years after the death of the birth parent. Where an adoptee was adopted under the current provisions, the birth parent may not veto disclosure of the original birth certificate, but may file a no-contact declaration and the adult adoptee will then be required to sign an undertaking promising not to contact that parent before the original birth certificate will be disclosed.

- s. 20 of the *Adoption Regulation*: allows others to file a veto or no-contact declaration on behalf of a birth parent or adoptee who is incapable of doing so.

- s. 21 of the *Adoption Regulation*: sets out the content of a no-contact undertaking.

- s. 67: sets out procedural requirements where an applicant requests disclosure of an adoptee's original birth certificate.

- s. 63(1)(b): provides for disclosure of the adoption order to an adoptee.

- s. 64: provides for disclosure of certain records to the birth parent of an adoptee (with certain exceptions).

[13] Disclosure provisions:

- s. 58: contains definitions of "adoptive parent", "original birth registration", and "record".
- s. 59: allows for the creation of an openness agreement between adoptive parents and relatives of the child.
- s. 60: creates a registry to facilitate the creation of openness agreements.
- s. 19 of the *Adoption Regulation*: establishes a post-adoption openness registry.
- s. 61: provides for disclosure of identifying information where necessary for the safety, health or well-being of a child.
- s. 62: provides for disclosure to the adoptive parents of an Aboriginal child of information regarding the child's Aboriginal heritage.
- s. 68: allows the Director to contact a birth parent, relative of a birth parent, or adoptee where there are "compelling circumstances affecting anyone's health and safety" to "share with or obtain from them any necessary information".
- s. 69: allows adoptees and relatives of adoptees to register with the Director and, where both have registered, allows the director to disclose identifying information to each of them.
- s. 22 of the *Adoption Regulation*: establishes a "passive reunion registry".
- s. 23 of the *Adoption Regulation*: establishes the requirements for a male person to qualify as a relative (i.e., birth father) under s. 69.
- s. 70: gives the Director a right to any information in the custody or control of a public body that is necessary for the purposes of the *Act*.

- ss. 71(1)(a), (8), and (10): provide that when an adoptee has obtained a birth certificate under s. 63, the adoptee may apply to the Director for assistance in locating a birth parent, adopted sibling, or birth sibling (if birth parent is dead) and the Director may facilitate communication or contact.

- ss. 71(7), (9), and (11): prevent the Director from assisting where a veto or no-contact declaration has been filed and from disclosing identifying information without consent.

- s. 24 of the *Adoption Regulation*: establishes the procedure for assistance applications.

- ss. 71(1)(b) and (2): allow a birth parent to apply to the Director for assistance in locating an adopted child.

- ss. 71(3) and (4): allow a child or grandchild of an adoptee to apply for assistance in locating birth relatives.

- ss. 71(5) and (6): allow a birth sibling of an adoptee to apply for assistance in locating the adoptee.

RELEVANT CONSTITUTIONAL PROVISIONS

[14] *Charter of Rights and Freedoms*:

> s. 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.
>
> ...
>
> s. 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> ...
>
> s. 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.

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[15] *Constitution Act, 1982*:

> s. 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

TRIAL JUDGE'S DECISION

(2011 BCSC 656, 22 B.C.L.R. (5th) 307)

Findings of Fact

[16] The parties placed their evidence before the trial judge by means of affidavits. That evidence consists mainly of opinions by experts. In her affidavit, Ms. Pratten describes her personal experiences, feelings, and concerns as a donor offspring. In addition, she tendered affidavits from several other donor offspring.

[17] After a review and discussion of the evidence, the trial judge summarized her findings and conclusions in para. 111 of her reasons. Those findings and conclusions have not been challenged on appeal. They are as follows:

> (a) donor offspring fear that their health can be compromised, and may be seriously compromised, by the lack of information about their donor. Based in particular on the evidence from Dr. Lauzon, these fears are justified. Even with the availability of genetic testing, a good old-fashioned family history is more predictive, and genetic testing is best interpreted in the context of a family history;
>
> (b) because of a lack of information, donor offspring can face delayed medical treatment, and an inability to have conditions that are inherited or genetic diagnosed and treated. On the other hand, with information, donor offspring (for example, Barry Stevens) can and do modify their own behaviour;
>
> (c) it is important, psychologically and medically, for donor offspring to have the ability to know identifying and non-identifying information about their donor, and their psychological and medical needs in that respect are substantially the same as adoptees;
>
> (d) for donor offspring, having information – both identifying and non-identifying – matters deeply, both to complete their personal identities and to alleviate the stress, anxiety and frustration caused by not knowing. Donor

> offspring demonstrate a strong commitment to searching for information about the other half of their genetic make-up;
>
> (e) donor offspring experience sadness, frustration, depression and anxiety – in other words, they suffer psychological and psychosocial difficulties – when they are unable to obtain information. They feel the effects both for themselves and, when they become parents, for their own children;
>
> (f) donor offspring commonly, and legitimately, fear inadvertent consanguinity. Without further biological testing, many do not have the information required to determine if another individual is a biological half-sibling;
>
> (g) the secrecy that often surrounds the process of conception, even when done with the best of intentions, can have devastating effects on donor offspring when the truth is revealed. Moreover, knowing the truth (that the other biological parent was a donor), but having no means to discover what the truth means for one's life, can be a significant source of anxiety, depression and frustration for donor offspring;
>
> (h) while recognizing that parents have an important and legitimate interest in deciding what their child will know and when she or he will know it, anonymity and secrecy tips the balance heavily in favour of donors and parents, and away from the best interests of donor offspring; and
>
> (i) donor offspring and adoptees experience similar struggles, and a similar sense of loss and incompleteness. However, donor offspring do not have the benefit of the kind of positive institutions and legislative support provided to and for adoptees in B.C.

Discrimination (*Charter*, s. 15 / s. 1)

[18] The trial judge found that the Legislature's failure to address the needs of donor offspring to obtain information about their biological fathers discriminates against them on the basis of the manner of their conception. She opined that this distinction creates a disadvantage by perpetuating prejudice or stereotyping against donor offspring. Further, she rejected the Attorney General's argument that the impugned provisions were a valid affirmative action program, permitted by s. 15(2) of the *Charter*. The judge summarized her conclusions as follows:

> [268] In summary, I conclude that the appropriate comparison at step one of the analysis under s. 15(1) is between adoptees and donor offspring. I conclude further that excluding donor offspring from the benefits and protections of the *Adoption Act* and *Adoption Regulation* creates a distinction between adoptees and donor offspring, and that distinction is based on an analogous ground, namely manner of conception. Except for s. 4(1)(e) to (h) of the *Regulation*, the omission of donor offspring from the provisions of the *Adoption Act* and *Adoption Regulation* set out in Schedule "A" is

> discriminatory. I conclude that the omission of donor offspring from s. 4(1)(e) to (h) of the *Regulation*, which concern information about a child already born, is not discriminatory. Section 15(2) has no application here because Ms. Pratten is not seeking to preclude the Province from enacting legislation to ameliorate the circumstances of adoptees. In context, the distinction made between adoptees and donor offspring creates a disadvantage to donor offspring by perpetuating stereotypes about donor offspring.

[19] The trial judge went on to hold, having regard to the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103, that the infringement of s. 15(1) was not justified under s. 1 of the *Charter*. More particularly, she rejected the Crown's submission that there is a pressing and substantial objective to the omission of donor offspring from adoption legislation: paras. 323 – 325.

Positive Rights (*Charter*, s. 7)

[20] The trial judge rejected Ms. Pratten's argument that s. 7 of the *Charter* confers positive rights to which governments are obliged to give effect. In so doing, she declined to apply the dissenting reasons of Madam Justice Arbour in *Gosselin v. Québec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429: In this regard, the trial judge said:

> [290] The potential implications of a free-standing constitutional right to know one's biological origins are uncertain and may be enormous. In my view, they go far beyond anything that might be required to address Ms. Pratten's complaints in this case, particularly given my conclusion that her rights under s. 15 have been breached. Courts in Ontario, in the context of adoption legislation, have rejected the proposition that there is a constitutionally-protected right to "know one's past." See *Marchand v. Ontario* (2006), 81 O.R. (3d) 172 (S.C.J.), aff'd 2007 ONCA 787, 88 O.R. (3d) 600, leave to appeal refused [2008] S.C.C.A. No. 37 and *Cheskes v. Ontario (Attorney General)* (2007), 87 O.R. (3d) 581, 288 D.L.R. (4th) 449 (S.C.J.), at paras. 115-116.

Negative Rights (*Charter*, s. 7)

[21] Lastly, the trial judge rejected Ms. Pratten's claim that British Columbia has deprived her of the right to liberty and security of the person by not disallowing the rules and bylaws of the College of Physicians and Surgeons that permit the

destruction of patient records. The judge did so on the basis that there was insufficient "state action" to support that claim: paras. 312 – 315.

Remedies

[22] Having found that the impugned provisions violate the *Charter*, the trial judge, acting in accordance with s. 52(1) of the *Constitution Act, 1982*, declared those provisions to be of no force or effect. However, she rejected Ms. Pratten's submission that she give specific directions with respect to the content of any new legislation that might be enacted in response to the declaration. The judge considered such directions to be neither appropriate nor necessary. Given the complexity of the subject matter, the judge suspended the declaration of invalidity for 15 months, to give the Legislature time to develop a suitable response: paras. 326 – 333.

[23] Lastly, the trial judge made permanent an interim injunction Ms. Pratten had earlier obtained to prohibit the destruction, disposal, redaction, or transfer out of British Columbia of records containing information regarding artificial insemination procedures: para. 334.

ANALYSIS

Breadth of the Challenge / Overreaching

[24] At the hearing of this appeal, the Court expressed its concern that some of the provisions declared invalid did not appear to confer any benefits on adoptees and that it was, therefore, difficult to understand how those provisions could be challenged on the basis they discriminate against donor offspring. In response, Ms. Pratten conceded she had overreached, and that she was not contesting the validity of those provisions that provide benefits to persons other than adoptees, such as parents (birth or adoptive).

[25] As the matter was not fully argued, and I am of the view that Ms. Pratten's challenge otherwise fails in its entirety, there is no need to discuss in detail which of

the impugned provisions do not confer benefits on adoptees. Suffice it to say that it appears to me that provisions that do no more than: (a) require information about adoption and alternatives to be provided to the birth parent or other guardian (s. 6(1)(a) of the *Act*); (b) require prospective adoptive parents of a direct placement to notify the authority of their intent to receive a child into their home (s. 8(1) of the *Act*); or (c) define terms (s. 58 of the *Act* and s. 23(1) of the *Regulation*), cannot be said to confer benefits on adoptees.

[26] The admittedly overbroad reach of the declaration of invalidity in this case underscores the need to carefully examine each provision being challenged to ensure that only those that in and of themselves violate a *Charter* protected right are declared invalid. Just because a particular section or subsection of a statute or regulation is held to be of no force and effect does not mean that related provisions are also constitutionally unsound.

Section 15 Appeal

[27] In challenging the declaration of invalidity the Attorney General submits that the trial judge erred in finding that:

i) The benefit sought by Ms. Pratten is prescribed by law as required by s. 15 of the *Charter*;

ii) Section 15(2) was not a defence to Ms. Pratten's claim;

iii) Ms. Pratten established that the challenged provisions of the *Adoption Act* were discriminatory contrary to s. 15(1); and

iv) The s. 1 defence was not established.

[28] As I am of the view that the impugned provisions are constitutionally supported by s. 15(2) of the *Charter*, there is no need for me to discuss the other grounds of appeal.

Adoption Legislation: A Brief History

[29] It is important to understand the context in which the impugned provisions came into existence. Accordingly, I will briefly review the evolution of adoption legislation in this Province.

[30] The *Adoption Act*, S.B.C. 1920, c. 2, was the first enactment. Its principal purpose was to provide for the welfare and development of children. By virtue of the *Act*, children who might otherwise have been raised parentless were integrated into and became members of a family unit. The *Act* established, for the first time, a legal parental relationship between a child and adult other than the child's birth parents. Except for certain situations that pre-dated the coming into force of that *Act*, a person wishing to adopt a child was required to apply to the Supreme Court of British Columbia for an adoption order. The effect of that order was to divest the natural parents of the child of all legal rights and obligations in relation to the child and transfer those rights and obligation to the adoptive parents.

[31] In 1935 the Superintendent of Neglected Children was given statutory authority to investigate, amongst other things, the circumstances, character, and fitness of applicants for adoption. The Superintendent's written report, with a recommendation for or against adoption, was filed with the Supreme Court: *An Act to amend and consolidate the Enactments respecting the Adoption of Children*, S.B.C. 1935, c. 2, s. 6.

[32] Since its early history, adoption legislation has provided for the safekeeping of adoption orders and the use of birth certificates in the adoption process. By 1927, the *Adoption Act* required that the application to the court be accompanied by a record of birth of the child made under the *Vital Statistics Act*, R.S.B.C. 1924, c. 268 (now R.S.B.C. 1996, c. 479). Further, the court was obligated to provide the Provincial Secretary with a copy of the birth certificate used in the adoption proceedings, together with the adoption order: *An Act to amend the Adoption Act*, S.B.C. 1927, c. 3, ss. 2, 3. By virtue of the 1935 amendments, the adoption order and other information were sent by the court to the Registrar of Births, Deaths, and Marriages: s. 13. The current *Act* retains this link between documents created in the court-ordered adoption process and the storage and maintenance of those documents by the Vital Statistics Agency: s. 45.

[33] Prior to November 1996, there were a number of provisions in various versions of the *Adoption Act* that required the court-ordered adoption process to be kept secret. Access to the court file was restricted. By 1968, information provided from the court to the Registrar of Births, Deaths, and Marriages was done on an anonymous basis, and all petitions for adoption and adoption orders referred only to the child's birth registration number: *Adoption (Amendment) Act*, S.B.C. 1968, c. 4, s. 5. The current *Adoption Act* continues to restrict access to the court file and to otherwise protect privacy interests: ss. 41 – 43. However, to give effect to changing social conditions, the Legislature amended the *Act* in 1996 to provide for open adoptions and granted adoptees, once they reach the age of majority (i.e., 19), qualified access to their adoption order and registration of birth. Some of those amendments are the subject matter of this appeal: *Adoption Act*, R.S.B.C. 1996, c. 5.

Are the Impugned Provisions Supported by s. 15(2)?

[34] In *R v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, the Supreme Court set out, for the first time, an independent role for s. 15(2) of the *Charter*: paras. 36 – 37. It had previously been thought that subs. (2) might serve as a guide for the discrimination analysis under subs. (1), rather than as an independent "saving" provision. The Supreme Court identified the essence of s. 15(2) as protecting "efforts by the state to develop and adopt remedial schemes designed to assist disadvantaged groups": para. 33. To meet the requirements of s. 15(2), the state must show that the program: (a) has an ameliorative or remedial purpose; and (b) targets a disadvantaged group identified by an enumerated or analogous ground: para. 41. In *Kapp*, a federal government program that granted three Aboriginal bands a limited exclusive right to fish for salmon commercially (i.e., to the exclusion of non-Aboriginal commercial fishers) was upheld under s. 15(2).

[35] An important procedural aspect of *Kapp* is the direction that when s. 15(2) is relied on by the state, the decision whether an impugned law, program, or activity is constitutional by reason of that provision is to be made before considering whether

that law, program, or activity is in fact discriminatory. Once the claimant shows a distinction on an enumerated or analogous ground, the next step will be a consideration of the applicability of s. 15(2): para. 40.

[36] In this case, the Attorney General accepts that "manner of conception" is a protected analogous ground under s. 15(1). However, she submits that the *Adoption Act* does not distinguish on that basis. In addition, Ms. Pratten puts forward "manner of disassociation" as another analogous ground. The Attorney General does not agree that this is a protected ground. In view of the conclusion I have reached with respect to s. 15(2), I need not resolve those issues. I will proceed on the basis that Ms. Pratten has demonstrated that the *Adoption Act* and *Adoption Regulation*, by not addressing the needs of donor offspring, has drawn a distinction based on an analogous ground.

[37] Based on the test formulated in *Kapp*, I am of the view that the impugned provisions qualify as an ameliorative program within the meaning of s. 15(2). The purpose of the *Adoption Act* as a whole is set out in s. 2, which reads:

> The purpose of the Act is to provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interests.

The purpose of the impugned provisions is to remedy the disadvantages created by the state-sanctioned dissociation of adoptees from their biological parents.

[38] Looking at the second branch of the test, it is clear for purposes of a *Charter* discussion, that adoptees may be disadvantaged in at least some of the terms identified in *Kapp*. The judge found that they are a group which has historically, if not currently, been subject to negative social characterization: *Kapp,* para. 55. Furthermore, being an adoptee has been recognized as an analogous ground: *Strong v. Marshall Estate*, 2009 NSCA 25, 309 D.L.R. (4th) 459 at para. 31.

[39] Section 15(2) was more recently considered by the Supreme Court in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham*, 2011 SCC 37, [2011] 2 S.C.R. 670, decided after the decision presently under appeal. In *Cunningham*,

the Court upheld the exclusion of persons who voluntarily registered as status Indians under the *Indian Act*, R.S.C. 1985, c. I-5, from participating under the terms of the *Métis Settlements Act*, R.S.A., 2000, c. M-14. In discussing how s. 15(2) is to be applied, McLachlin C.J. stated:

> [44] ... To establish [whether a distinction is saved by s. 15(2)], the government must show that the program is a genuinely ameliorative program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality: *Kapp*, at para. 41. There must be a correlation between the program and the disadvantage suffered by the target group: *Kapp*, at para. 49. Courts must examine the program to determine whether, on the evidence, the declared purpose is genuine; a naked declaration of an ameliorative purpose will not attract s. 15(2) protection against a claim of discrimination: *Kapp*, at para. 49.
>
> [45] If these conditions are met, s. 15(2) protects all distinctions drawn on enumerated or analogous grounds that "serve and are necessary to" the ameliorative purpose: *Kapp*, at para. 52. In this phrase, "necessary" should not be understood as requiring proof that the exclusion is essential to realizing the object of the ameliorative program. What is required is that the impugned distinction in a general sense serves or advances the object of the program, thus supporting the overall s. 15 goal of substantive equality. A purposive approach to s. 15(2) focussed on substantive equality suggests that distinctions that might otherwise be claimed to be discriminatory are permitted, to the extent that they go no further than is justified by the object of the ameliorative program. To be protected, the distinction must in a real sense serve or advance the ameliorative goal, consistent with s. 15's purpose of promoting substantive equality.
>
> [Emphasis added.]

[40] Ms. Pratten says that the distinction between adoptees and donor offspring does not serve the purpose of the program. Indeed, she says that the distinction undermines that purpose, which she identifies (and the trial judge accepted) as one designed to remedy harm caused to adoptees from alienation "by whatever means" from a biological parent (see para. 230 of the trial judgment). With respect, I do not see that description as accurate.

[41] The Legislature has made a decision to recognize and regulate adoption to provide adoptees with new and permanent family ties. That process involves changing the legal status of an adoptee. A consequence of that change is that adoptees are alienated from their biological origins and face barriers in accessing information about their origins. The purpose of impugned provisions is to reduce

those barriers while maintaining the essentially socially beneficial stance of the legislation. Given that purpose, it cannot be said that excluding persons whose legal status has never changed goes "further than is justified by the object of the ameliorative program".

[42] In my view, it is open to the Legislature to provide adoptees with the means of accessing information about their biological origins without being obligated to provide comparable benefits to other persons seeking such information. Apt in this regard is the following statement from *Cunningham* (at para. 41):

> Section 15(2) affirms that governments may not be able to help all members of a disadvantaged group at the same time, and should be permitted to set priorities. If governments are obliged to benefit all disadvantaged people (or all subsets of disadvantaged people) equally, they may be precluded from using targeted programs to achieve specific goals relating to specific groups. The cost of identical treatment for all would be loss of real opportunities to lessen disadvantage and prejudice.

[43] I would, accordingly, uphold the impugned provisions on the basis that they fall within the scope of s. 15(2) of the *Charter*.

Section 7 Cross-Appeal

[44] Ms. Pratten submits that the trial judge erred in failing to find that s. 7 of the *Charter*: (a) encompasses a free-standing right to know one's biological origins; and (b) imposes a positive duty on the state to enact legislation to give effect to that right. Her contention that s. 7 imposes positive duties on the state rests on the dissenting reasons for judgment of Arbour J. in *Gosselin*. In her reasons, Arbour J. adopted the analytical framework set out in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, a case dealing with s. 2(d) of the *Charter* (freedom of association).

[45] Ms. Pratten further submits that if s. 7 affords donor offspring more benefits than those currently afforded adoptees under the *Adoption Act* and *Adoption Regulation*, then she seeks those additional benefits. As a remedy, she seeks a compulsory declaration compelling the Legislature to enact a scheme for the benefit of donor offspring. What form that scheme would take, or how it would reconcile the

privacy interests of anonymous sperm donors and others whose privacy would be affected, is not addressed in Ms. Pratten's written or oral submissions.

[46] The positive rights theory advocated by Ms. Pratten necessitates a departure from established s. 7 jurisprudence. That jurisprudence requires a claimant to prove two things: (a) that the state has deprived him or her of the right to life, liberty, or security of the person; and (b) that the deprivation is contrary to an identified principle of fundamental justice. In order for a principle to qualify as a principle of fundamental justice there must be "significant societal consensus that it is fundamental to the way in which the legal system ought to fairly operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person": *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 113.

[47] The positive rights theory requires a new interpretation to be given to s. 7. Under that theory s. 7 would encompass two rights. The first is a positive right to life, liberty, and security of the person qualified only by what can be justified under s. 1 of the *Charter*. The second is the presently recognized right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice.

[48] Ms. Pratten acknowledges that there is no precedent for the recognition of positive rights within s. 7 and that such recognition would have broad implications. However, she submits this is an appropriate case in which to do so because it is one "where the duty on the state is so minimal and involves virtually no expenditure of resources". I do not agree. For one thing, the rights in s. 7 are guaranteed to "everyone". Accordingly, recognition of what can be called the right "to know one's past" would have implications reaching well beyond adoptees and donor offspring. Further, it is pure speculation to suggest that only minimal resources would be needed to give effect to such a right.

[49] Ms. Pratten accepts that for her claim to succeed, she must satisfy the three criteria set out at para. 365 of *Gosselin*:

> 1. The claim must be grounded in a fundamental *Charter* right or freedom rather than in access to a particular statutory regime (*Dunmore* at para. 24).
>
> 2. The proper evidentiary foundation must be provided, before creating a positive obligation under the *Charter*, by demonstrating that exclusion from the regime constitutes a substantial interference with the exercise and fulfillment of a protected right (*Dunmore* at para. 25).
>
> 3. It must be determined whether the state can truly be held accountable for the inability to exercise the right or freedom in question (*Dunmore* at para. 26).

[50] As I will explain, the contention that s. 7 guarantees the right "to know one's past" fails at the first criterion. However desirable it may be that persons have access to information about their biological origins, Ms. Pratten has not established that such access has been recognized as so "fundamental" that it is entitled to independent constitutionally protected status under the *Charter*.

[51] In attempting to establish a fundamental right to know one's biological origins, Ms. Pratten relies on a case from England, an international treaty to which Canada is not a party, and a United Nations convention to which Canada is a party. In my view, these do not support the proposition that there is a fundamental legal right "to know one's past". Indeed, as the Attorney General points out, what Ms. Pratten seeks is far more extensive than what is enjoyed by most people in Canada and would result in state intrusion into the lives of many. There are many non-donor offspring who do not know their family history or the identity of their biological father because of decisions taken by others, or because of the circumstances of their conception. For example, there is presently no law that compels a biological parent to share with a child whatever medical, social, or cultural information he or she may have concerning the other biological parent.

[52] It is significant that the right "to know one's past" was found not to be a principle of fundamental justice within s. 7 of the *Charter* in *Marchand v. Ontario*, 2007 ONCA 787, 288 D.L.R. (4th) 762, aff'g (2006), 81 O.R. (3d) 172 (S.C.J.), leave ref'd [2008] 1 S.C.R. ix (*sub nom. Infant Number 10968*). In that case, Ms. Marchand, an adoptee, wanted to know the identity of her biological father. The

man named by Ms. Marchand's biological mother as her father on the original birth registration denied paternity and refused to consent to the disclosure of his name. In an effort to gain access to that information, Ms. Marchand challenged the legislation denying her access on the basis that it violated her rights to liberty and security of the person under s. 7 of the *Charter*. That challenge was rejected by a judge of the Ontario Superior Court of Justice and Ms. Marchand appealed. In dismissing that appeal, the Court of Appeal (at para. 12) agreed with the following statement by the judge that the denial of access did not engage a principle of fundamental justice:

> A principle of fundamental justice must fulfil the following criteria:
>
> 1. It must be a legal principle that provides meaningful content for the s. 7 guarantee while avoiding adjudication of public policy matters;
> 2. There must be a significant societal consensus that the principle is "vital or fundamental to our societal notion of justice"; and
> 3. The principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results.
>
> (See: *Canadian Foundation for Children* at paras. 8-11 and *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 113.)
>
> The unconditional disclosure of identifying personal information of third parties, even if they are birth parents of the claimant, without regard to the privacy and confidentiality interests of the persons identified and without regard to any serious harm that might result from disclosure, fails to meet the above criteria. It is not a principle that is vital or fundamental to our societal notion of justice. It is instead a proposition of public policy that continues to be vigorously debated.
>
> [Emphasis added.]

See also: *Cheskes v. Ontario (Attorney General)* (2007), 288 D.L.R. (4th) 449 at para. 116 (Ont. S.C.J.).

[53] In support of her contention that the right to know one's biological origins is a fundamental constitutional right, Ms. Pratten cites *Rose v. Secretary of State for Health*, [2002] EWHC 1593 (Admin), [2002] 3 FCR 731. In that case, two offspring of anonymous donors brought an action against the Secretary of State challenging his failure to promulgate regulations that would facilitate their obtaining information about their biological fathers. In a preliminary ruling, a judge of the Queen's Bench Division held that Art. 8(1) of the European *Convention for the Protection of Human*

Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 222 [*E.C.H.R.*] was engaged because it encompasses the right of an individual to obtain information about his or her biological origins. Article 8 provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
>
> [Emphasis added.]

However, the judge did not decide whether the Secretary of State's inaction constituted a violation of Art. 8.

[54] What is noteworthy about the decision in *Rose* is that it does not rest on Art. 5(1) of the *E.C.H.R.* which partially mirrors s. 7 of the *Charter*. Article 5(1) reads, in part:

> Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ...

[55] Not only is *Rose* based on wording that has no equivalent in the *Charter*, it is based on a legal instrument that has no application to Canada. It is a regional treaty, entered into by the member states of the Council of Europe. The decision cannot be read as providing support for the proposition that the right "to know one's past" is generally accepted as being of fundamental importance.

[56] Ms. Pratten also relies on the *United Nations Convention on the Rights of the Child*, November 20, 1989, 1577 U.N.T.S. 3 [*C.R.C.*], which Canada has ratified. Article 8 of the *C.R.C.* reads:

> 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

> 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

[57] I do not read this provision as imposing on States Parties an obligation to provide mechanisms to enable donor offspring to obtain the personal information of third parties who are not their legal parents. Parenthetically, I note that British Columbia, which constitutionally has legislative jurisdiction over adoption, is not a party to the *C.R.C.*

[58] The history of Art. 8 is noteworthy. Its inclusion in the *C.R.C.* was proposed by a delegate from Argentina to deal with children who had been abducted from their parents and later renamed and registered as the children of either the abductors or third parties: Summary Record of the 54th Meeting of the Commission on Human Rights, U.N. Document E/CN.4/1985/SR.54.

[59] That neither Art. 8 nor any other provisions of the *C.R.C.* is viewed internationally as supporting the right "to know one's past" is further evinced by the observations of the United Nations Committee on Human Rights of the Child. That Committee is an independent body that monitors the implementation of the *C.R.C.* by States Parties. In its "Concluding observations" issued on October 9, 2002, in response to a report submitted by the United Kingdom, the Committee stated (U.N. Document CRC/C/15/Add.188):

> **3. Civil rights and freedoms**
>
> **Name and nationality and preservation of identity**
>
> 31. While noting the recent Adoption and Children Bill (2002), the Committee is concerned that children born out of wedlock, adopted children, or children born in the context of a medically assisted fertilization do not have the right to know the identity of their biological parents.
>
> 32. **In light of articles 3 and 7 of the Convention, the Committee recommends that the State party take all necessary measures to allow all children, irrespective of the circumstances of their birth, and adopted children to obtain information on the identity of their parents, to the extent possible.**
>
> [Emphasis in original.]

[60] The articles of the *C.R.C.* referred to by the Committee read as follows:

> Article 3
>
> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.
>
> ...
>
> Article 7
>
> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
>
> 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

[61] Two things are noteworthy about the Committee's observations. The first is that no mention is made of Art. 8. The second is that the language of the recommendation does not reflect the view that access to information regarding biological origin is guaranteed by the Convention. In addition, in *Marchand* (Ont. S.C.J.) Madam Justice Frank opined that the provisions of the *C.R.C.* do not support the proposition that the right to "liberty" in s. 7 of the *Charter* includes "a right to unfettered access to the identifying personal information of third parties who are not the legal parents of the child": para. 115.

[62] Assuming that s. 7 of the *Charter* is capable of guaranteeing positive rights, and accepting that there has been movement in Canada and elsewhere toward more openness with respect to the type of information Ms. Pratten seeks, I am not

persuaded that the right "to know one's past" is of such fundamental importance that it is entitled to free-standing constitutional recognition.

DISPOSITION

[63] I would allow the Attorney General's appeal and dismiss Ms. Pratten's cross-appeal. In the result, I would set aside the trial judge's formal order of May 19, 2011 (entered February 14, 2012).

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Madam Justice Levine"

Appendix

Adoption Act, R.S.B.C. 1996, c. 5

Before placement by a director or an adoption agency

6(1) Before placing a child for adoption, a director or an adoption agency must

(a) provide information about adoption and the alternatives to adoption to the birth parent or other guardian requesting placement,

. . .

(c) obtain as much information as possible about the medical and social history of the child's biological family and preserve the information for the child,

(d) give the prospective adoptive parents information about the medical and social history of the child's biological family,

Before a direct placement

8(1) As soon as possible before a direct placement, the prospective adoptive parents must notify a director or an adoption agency, in accordance with the regulations, of their intent to receive a child in their home for adoption.

(2) As soon as possible after being notified under subsection (1), a director or the adoption agency must

(a) provide information about adoption and the alternatives to adoption to the birth parent or other guardian proposing to place the child,

(b) obtain as much information as possible about the medical and social history of the child's biological family and preserve the information for the child,

(c) give the prospective adoptive parents information about the medical and social history of the child's biological family,

. . .

Conditions on direct placement

9 Prospective adoptive parents may receive a child by direct placement but only if, before the child is received in their home,

. . .

(b) the prospective adoptive parents receive a copy of information about the medical and social history of the child's biological family,

. . .

Required documents

32 Before an adoption order is made, the following documents must be filed with the court:

. . .

(b) the child's birth registration or, if it cannot be obtained, satisfactory evidence of the facts relating to the child's birth;

. . .

Before a child is brought into British Columbia for adoption

48(1) Before a child who is not a resident of British Columbia is brought into the Province for adoption, the prospective adoptive parents must obtain the approval of a director or an adoption agency.

(2) The director or the adoption agency must grant approval if

(a) the birth parent or other guardian placing the child for adoption has been provided with information about adoption and the alternatives to adoption,

(b) the prospective adoptive parents have been provided with information about the medical and social history of the child's biological family,

. . .

(3) The director or the adoption agency must preserve for the child any information obtained about the medical and social history of the child's biological family.

. . .

Disclosure of information

56 Subject to the regulations, the Provincial director may disclose to an adult who, as a child, was adopted in accordance with the Convention any information in the Provincial director's records concerning the adult's origin.

. . .

Definitions

58 In this Part:

"adoptive parent" means a person who adopted a child under this Act or any predecessor to this Act;

"original birth registration" means

(a) a registration maintained under section 13(a) of the *Vital Statistics Act*, or

(b) a registration showing the name of the birth parent and containing a notation of the adoption and any change of name consequent to the adoption;

"record" has the same meaning as in the *Freedom of Information and Protection of Privacy Act*.

Openness agreements

59(1) For the purpose of facilitating communication or maintaining relationships, an openness agreement may be made by a prospective adoptive parent or an adoptive parent of the child and any of the following:

(a) a relative of the child;

(b) any other person who has established a relationship with the child;

(c) a prospective adoptive parent or an adoptive parent of a sibling of the child.

(2) An openness agreement

(a) may only be made after consent to the adoption is given by the birth parent or other guardian who placed or requested that the child be placed for adoption, and

(b) may include a process to resolve disputes arising under the agreement or with respect to matters associated with it.

(3) If the child is of sufficient maturity, the child's views must be considered before the agreement is made.

Post-adoption openness

60(1) Any of the following may, in accordance with the regulations, register with the Provincial director to indicate their interest in making openness agreements:

(a) an adoptive parent of a child under 19 years of age;

(b) a relative of an adopted child under 19 years of age.

(2) If an adoptive parent of a child under 19 years of age and a relative of the child have both registered under this section, the Provincial director

(a) may assist them in reaching an openness agreement and may facilitate the exchange of non-identifying information, and

(b) must, if they wish to exchange identifying information, disclose to each the identifying information provided by the other.

(3) Subsection (2) applies also if an adoptive parent of a child under 19 years of age and an adoptive parent of a sibling of that child have registered under this section.

Disclosure in the interest of a child

61 A director may disclose identifying information to a person if the disclosure is necessary

(a) for the safety, health or well-being of a child, or

(b) for the purpose of allowing a child to receive a benefit.

Disclosure when an aboriginal child is under 19

62(1) A director or an adoption agency may, in a child's best interests, disclose to a prospective adoptive parent or an adoptive parent of an aboriginal child any of the following:

(a) the name and location of an Indian band, if the child is registered or entitled to be registered as a member of the band;

(b) the name and location of an aboriginal community, if the child is an aboriginal child and a birth parent of the child identified that community;

(c) the location of the Nisga'a Lisims Government, if the child is a Nisga'a child;

(d) the name and location of the treaty first nation, if the child is a treaty first nation child.

(2) A director may, in a child's best interests and with the written consent of the child's adoptive parents, disclose identifying information so that an aboriginal child can be contacted by the following:

(a) if the child is registered or entitled to be registered as a member of an Indian band, by a designated representative of the band;

(a.1) if the child is a Nisga'a child, by a designated representative of the Nisga'a Lisims Government;

(a.2) if the child is a treaty first nation child, by a designated representative of the treaty first nation;

(b) if the child is not a treaty first nation child and is neither registered nor entitled to be registered as a member of an Indian band, by a designated representative of an aboriginal community that has been identified

(i) by the child, if 12 years of age or over, or

(ii) by a birth parent of the child, if the child is under 12 years of age.

(3) In exercising his or her power under subsection (2), the director may dispense with any consent required by this section if the adoption has broken down or it is not practical to obtain consent.

Disclosure to adopted person 19 or over

63(1) An adopted person 19 years of age or over may apply to the chief executive officer for a copy of the following:

(a) the adopted person's original birth registration;

(b) the adoption order;

(c) if the adoption occurred under a law of a treaty first nation and a notice has been provided by the treaty first nation under section 12.1 of the *Vital Statistics Act* in respect of that adoption, that notice.

(2) When an applicant complies with section 67, the chief executive officer must give the applicant a copy of the requested records unless

(a) a disclosure veto has been filed under section 65, or

(b) a no-contact declaration has been filed under section 66 and the applicant has not signed the undertaking referred to in that section.

Disclosure to birth parent when adopted person is 19 or over

64(1) If an adopted person is 19 years of age or over, a birth parent named on the adopted person's original birth registration may apply to the chief executive officer for a copy of one or more of the following:

(a) the original birth registration with a notation of the adoption and any change of name consequent to the adoption;

(b) the birth registration that under section 12 of the *Vital Statistics Act* was substituted for the adopted person's original birth registration;

(c) the adoption order;

(d) if the adoption occurred under a law of a treaty first nation and a notice has been provided by the treaty first nation under section 12.1 of the *Vital Statistics Act* in respect of that adoption, that notice.

(2) When an applicant complies with section 67, the chief executive officer must give the applicant a copy of the requested records unless

(a) a disclosure veto has been filed under section 65, or

(b) a no-contact declaration has been filed under section 66 and the applicant has not signed the undertaking referred to in that section.

(3) Before giving the applicant a copy of the requested record, the chief executive officer must delete the adoptive parents' identifying information.

Disclosure veto and statement

65(1) Either of the following may apply to the chief executive officer to file a written veto prohibiting the disclosure of a birth registration or other record under section 63 or 64:

(a) an adopted person who is 18 years of age or over and was adopted under any predecessor to this Act;

(b) a birth parent named on the original birth registration of an adopted person referred to in paragraph (a).

(2) When an applicant complies with section 67 (a), the chief executive officer must file the disclosure veto.

(3) A person who files a disclosure veto may file with it a written statement that includes any of the following:

(a) the reasons for wishing not to disclose any identifying information;

(b) in the case of a birth parent, a brief summary of any available information about the medical and social history of the birth parents and their families;

(c) any other relevant non-identifying information.

(4) When a person applying for a copy of a record is informed that a disclosure veto has been filed, the chief executive officer must give the person the non-identifying information in any written statement filed with the disclosure veto.

(5) A person who files a disclosure veto may cancel the veto at any time by notifying, in writing, the chief executive officer.

(6) Unless cancelled under subsection (5), a disclosure veto continues in effect until 2 years after the death of the person who filed the veto.

(7) While a disclosure veto is in effect, the chief executive officer must not disclose any information that is in a record applied for under section 63 or 64 and that relates to the person who filed the veto.

No-contact declaration and statement

66(1) A birth parent who is named in an original birth registration and who wishes not to be contacted by the person named as the child in the registration may apply to the chief executive officer to file a written no-contact declaration.

(2) An adopted person 18 years of age or over who wishes not to be contacted by a birth parent named on a birth registration may apply to the chief executive officer to file a written no-contact declaration.

(3) When an applicant under subsection (1) or (2) complies with section 67(a), the chief executive officer must file the no-contact declaration.

(4) The chief executive officer must not give a person to whom a no-contact declaration relates a copy of a birth registration or other record naming the person who filed the declaration unless the person applying has signed an undertaking in the prescribed form.

(5) A person who is named in a no-contact declaration and has signed an undertaking under subsection (4) must not

(a) knowingly contact or attempt to contact the person who filed the declaration,

(b) procure another person to contact the person who filed the declaration,

(c) use information obtained under this Act to intimidate or harass the person who filed the declaration, or

(d) procure another person to intimidate or harass, by the use of information obtained under this Act, the person who filed the declaration.

(6) A person who files a no-contact declaration may file with it a written statement that includes any of the following:

(a) the reasons for wishing not to be contacted;

(b) in the case of a birth parent, a brief summary of any available information about the medical and social history of the birth parents and their families;

(c) any other relevant non-identifying information.

(7) When a person to whom a no-contact declaration relates is given a copy of a birth registration under section 63 or 64, the chief executive officer must give the person applying the information in any written statement filed with the declaration.

(8) A person who files a no-contact declaration may cancel the declaration at any time by notifying, in writing, the chief executive officer.

Applicant must comply with *Vital Statistics Act*

67 A person who applies to the chief executive officer under this Part must

(a) supply any proof of identity required by the chief executive officer, and

(b) if the application is for a copy of a record, pay the fee required under the *Vital Statistics Act*.

Contact by a director

68 In compelling circumstances affecting anyone's health or safety, a director may contact any of the following to share with or obtain from them any necessary information:

(a) a birth parent;

(b) if the birth parent is not available, a relative of the birth parent;

(c) an adopted person 19 years of age or over.

Mutual exchange of identifying information

69(1) Any of the following may, in accordance with the regulations, register with the Provincial director to exchange identifying information:

(a) an adopted person 19 years of age or over;

(b) an adult relative of an adopted person 19 years of age or over.

(2) If an adopted person 19 years of age or over and a relative of the adopted person have both registered under this section, the Provincial director must notify each of them and disclose the identifying information provided by the other.

Director's right to information

70(1) A director has the right to any information that

(a) is in the custody or control of a public body as defined in the *Freedom of Information and Protection of Privacy Act*, and

(b) is necessary to enable a director or an adoption agency to locate a person for the purposes of this Act or is necessary for the health or safety of an adopted person.

(2) A public body that has custody or control of information to which a director is entitled under subsection (1) must disclose that information to the director on request.

(3) This section applies despite the *Freedom of Information and Protection of Privacy Act* or any other enactment.

(4) If requested by a director, a CFCSA director must disclose to the director any information that

(a) is obtained under that Act, and

(b) is necessary to enable the director or an adoption agency to exercise the powers or perform the duties or functions given to them under Parts 2, 3 and 4 and sections 61 and 62 of this Act.

(5) In subsection (4), "CFCSA director" means a director designated under section 91 of the *Child, Family and Community Service Act*.

Director's authority to collect information

70.1 A director may collect from a person any information that is necessary to enable the director to exercise his or her powers or perform his or her duties or functions under this Act.

Search and reunion services

71(1) An adult who has obtained a record under section 63 or 64 or who was adopted under a law of a treaty first nation apply to the Provincial director for assistance in locating any of the following:

(a) if the applicant is an adopted person,

(i) a birth parent of the applicant,

(ii) an adult adopted sibling of the applicant, or

(iii) if a birth parent of the applicant is dead, an adult birth sibling of the applicant;

(b) if the applicant is a birth parent, an adult adopted child of the applicant.

(2) A birth parent who signed a consent to the adoption of a child may apply to the Provincial director for assistance in locating the child, if the child is 19 years of age or over.

(3) After the death of an adult who, as a child, was adopted under this Act, any predecessor to this Act or a law of a treaty first nation, any of the following may apply to the Provincial director:

(a) an adult child or adult grandchild of the deceased;

(b) if a child of the deceased is under 19 years of age, the child's surviving parent or guardian.

(4) An applicant under subsection (3) must provide a copy of the deceased's death certificate and may apply for assistance in locating

(a) a birth parent of the deceased,

(b) an adult adopted sibling of the deceased, or

(c) if the deceased's birth parent is dead, an adult birth sibling of the deceased.

(5) After the death of a birth parent whose child, who is an adult, was adopted under this Act, any predecessor to this Act or a law of a treaty first nation, another adult child of the deceased may apply to the Provincial director for assistance in locating the applicant's adopted birth sibling.

(6) An applicant under subsection (5) must provide a copy of the deceased's death certificate.

(7) No one is entitled to assistance under this section in locating a person who has filed a disclosure veto or a no-contact declaration.

(8) Subject to the regulations, the Provincial director may provide the assistance requested by an applicant under subsections (1) to (6).

(9) If a person located by the Provincial director wishes not to be contacted by an applicant, the Provincial director must not disclose any information identifying the name or location of the person.

(10) If a person located by the Provincial director wishes to be contacted by an applicant, the Provincial director may assist them to meet or to communicate.

(11) The Provincial director must inform an applicant if the person whom the applicant requested assistance in locating wishes not to be contacted, is dead or cannot be located.

***Adoption Regulation*, B.C. Reg. 291/96**

Birth family medical and social history report

4(1) For the purposes of sections 6(1)(c) and 8(2)(b) of the Act, a director or the administrator must, with respect to a child to be placed for adoption, obtain information about the medical and social history of the child and the child's biological family that includes, as practicable, all of the following:

(a) a physical description of the birth mother and birth father, and information about

(i) the personality and personal interests of each of them,

(ii) their cultural, racial and linguistic heritage, and

(iii) their religious and spiritual values and beliefs;

(b) a detailed health history of the birth mother and birth father, including

(i) the lifestyle of the birth parents respecting usage of tobacco, alcohol and prescription and non-prescription drugs,

(ii) prenatal information respecting the birth mother, and

(iii) any medical condition and other health information about the biological relatives of the birth parents that may be relevant to the child;

(c) a detailed social history of the birth mother and birth father, including

(i) the relationship between the birth parents,

(ii) details about any other child born to either of them,

(iii) educational background and, if applicable, future educational plans,

(iv) particulars respecting past, present and future employment, and

(v) family background information about the mother and father (both by birth and adoption) and the sisters and brothers (both by birth and adoption) of each birth parent;

(d) the reason why the birth parents have decided to make an adoption plan for the child;

(e) a physical description of the child, and information about

(i) the personality, behaviour and personal interests of the child, and

(ii) the cultural, racial, linguistic and religious heritage of the child;

(f) a detailed health history of the child, including

(i) the birth medical,

(ii) a history of the physical growth and development of the child,

(iii) the results of any past medical reports from a health care provider about the child's physical and mental health, and

(iv) the results of a current medical report about the child's physical and mental health;

(g) a detailed social history of the child's life experiences, including

(i) where the child has lived, who parented the child and the period of time the child lived with each of those persons,

(ii) the child's relationship with birth family, caregivers and peers, and

(iii) the child's educational background and current level of education;

(h) the child's understanding and views about an adoption plan for the child.

(2) For the purpose of section 48(2)(b) and (3) of the Act, the information about the medical and social history of the child and the child's biological family must include those matters in subsection (1) as are reasonably practicable.

(3) The information required by this section must be in the form of a written report.

. . .

Post-adoption openness registry

19(1) A registry is established to be known as the post-adoption openness registry.

(2) A person referred to in section 60(1) of the Act may, on application to the Provincial director in the form and manner specified by the Provincial director, register on the post-adoption openness registry an interest in making an openness agreement to facilitate communication or establish a relationship.

(3) The application for registration under subsection (2) must be accompanied by

(a) a copy of the birth certificate, or other identifying documentation acceptable to the Provincial director, of the person making the application, and

(b) any other information required by the Provincial director for the purpose of ascertaining the applicant's identity and relationship to the party with whom the applicant wishes to exchange information.

(4) The Provincial director may examine the application that is submitted

(a) to ensure that the requirements of subsection (3) are met and the information provided in the application is, in the opinion of the Provincial director, complete, and

(b) to determine whether

(i) there is a record on file relating to the adopted person,

(ii) the applicant was involved in a British Columbia adoption for which a director has a record, and

(iii) the applicant is eligible to register on the post-adoption openness registry.

(5) On acceptance of the application for registration, the Provincial director must

(a) record the information provided on the post-adoption openness registry, and

(b) notify the applicant that the registration has been recorded.

(6) The registration under subsection (5) is effective on the date of recording.

(7) A person who is registered on the post-adoption openness registry must notify the Provincial director of any change of name or address recorded on the registry.

(8) On being satisfied

(a) that a transcription error or an omission exists with respect to information submitted to the post-adoption openness registry, and

(b) about the true facts to be recorded,

the Provincial director may correct the error or add the omitted information.

(9) A registration under this section is valid until one of the following occurs:

(a) the receipt by the Provincial director of a written notice of cancellation of registration sent to the Provincial director by the applicant;

(b) all requested matches have been met;

(c) the adopted person, whose adoptive parent has registered under this section, reaches the age of 18 years and files a disclosure veto or a no-contact declaration;

(d) the adopted person, whose adoptive parent has registered under this section, reaches the age of 19 years.

(10) If a registration is cancelled or is no longer valid under subsection (9), the Provincial director must promptly remove from the post-adoption openness registry all information received under this section.

Incapacity of adopted person or birth parent to file veto or no-contact declaration

20 If an adopted person or birth parent is incapable of filing a veto under section 65 of the Act or a no-contact declaration under section 66 of the Act, the veto or no-contact declaration may be filed by the following persons:

(a) on behalf of an adopted person who does not have a committee, by the adopted person's parent or guardian if the parent or guardian has provided the Chief Executive Officer of Vital Statistics with an affidavit of 2 medical practitioners setting forth their opinion that the adopted person is incapable of managing his or her affairs by reason of

(i) mental infirmity arising from disease, age or otherwise,

(ii) a genetic condition or hereditary condition, or

(iii) disorder or disability of mind arising from the use of drugs;

(b) on behalf of an adopted person who has a committee, by the adopted person's committee;

(c) on behalf of a birth parent who has a committee, by the birth parent's committee.

Form of undertaking

21 For the purpose of section 66(4) of the Act, a person who requests information from the Chief Executive Officer of Vital Statistics about a person to whom a no-contact declaration relates must, on a form provided by the Chief Executive Officer of Vital Statistics, undertake not to do any of the following:

(a) knowingly contact or attempt to contact the person who filed the no-contact declaration;

(b) procure another person to contact the person who filed the no-contact declaration;

(c) use information obtained under the Act to intimidate or harass the person who filed the no-contact declaration;

(d) procure another person to intimidate or harass, by the use of information obtained under the Act, the person who filed the no-contact declaration.

Passive reunion registry

22(1) A registry is established to be known as the passive reunion registry.

(2) A person referred to in section 69 of the Act may, on application to the Provincial director in the form and manner specified by the Provincial director, register on the passive reunion registry an interest in exchanging identifying information with a specified party.

(3) The application for registration under subsection (2) must be accompanied by

(a) a copy of the birth certificate, or other identifying information acceptable to the Provincial director, of the person making the application,

(b) an application fee of $25 payable to the minister responsible for the *Financial* Administration *Act*, and

(c) any other information required by the Provincial director for the purpose of ascertaining the applicant's identity and relationship to the party with whom the applicant wishes to exchange identifying information.

(4) The Provincial director may examine the application that is submitted

(a) to ensure that the requirements of subsection (3) are met and the information provided in the application is, in the opinion of the Provincial director, complete, and

(b) to determine whether

(i) there is a record on file relating to the adopted person,

(ii) the applicant was involved in a British Columbia adoption for which a director has a record, and

(iii) the applicant is eligible to register on the passive reunion registry.

(5) On acceptance of the application for registration, the Provincial director must

(a) record the information provided on the passive reunion registry, and

(b) notify the applicant that the registration has been recorded.

(6) The registration under subsection (5) is effective on the date of recording.

(7) A person who is registered on the passive reunion registry must notify the Provincial director of any change of name or address recorded on the registry.

(8) On being satisfied

(a) that a transcription error or an omission exists with respect to information submitted to the passive reunion registry, and

(b) about the true facts to be recorded,

the Provincial director may correct the error or add the omitted information.

(9) A registration under this section is valid until one of the following occurs:

(a) the receipt by the Provincial director of a written notice of cancellation of registration sent to the Provincial director by the applicant;

(b) all requested matches have been met.

(10) If a registration is cancelled or is no longer valid under subsection (9), the Provincial director must promptly remove from the passive reunion registry all information received under this section.

Eligibility to register for the exchange of identifying information

23 For the purpose of section 69(1)(b) of the Act, an adult relative of an adopted person includes the following persons:

(a) a male person who has signed an acknowledgment of paternity;

(b) a male person who has signed an unmarried parents agreement;

(c) a male person who was interviewed by a social worker and verbally acknowledged paternity;

(d) a male person who is, in the opinion of the Provincial director, clearly identified on the record as the birth father.

Assistance in locating an adopted person, birth parent or sibling

24(1) An adult person referred to in section 71 of the Act may, on application to the Provincial director in the form and manner specified by the Provincial director, apply for assistance in locating a birth parent, an adult adopted sibling, an adult birth sibling or an adult adopted child.

(2) The application under subsection (1) must be accompanied by

(a) a copy of the record obtained under section 63 or 64 of the Act or the consent referred to in section 71(2) of the Act,

(b) a copy of the birth certificate, or other identifying information acceptable to the Provincial director, of the person making the application,

(c) an application fee of $25 payable to the minister responsible for the *Financial* Administration *Act* and

(d) any other information required by the Provincial director for the purpose of ascertaining the applicant's identity and relationship to the party whom the applicant wishes to locate.

(3) The Provincial director may examine the application that is submitted to ensure that the requirements of subsection (2) are met and that the information provided in the application is, in the opinion of the Provincial director, complete.

(4) A person who has applied for a search under this section must notify the Provincial director of any change of name or address on record.

(5) Before the Provincial director begins action to locate a person, a person who has applied for a search under this section must pay a fee of

(a) $250 for assistance in locating the first person, and

(b) $180 for assistance in locating a second or subsequent person.

(6) An application for a search under this section remains in effect until one of the following occurs:

(a) the receipt by the Provincial director of a written notice of cancellation of the application sent to the Provincial director by the applicant;

(b) all requested searches have been undertaken.

(7) An applicant need not provide the fee referred to in subsection (2)(c) if the applicant has applied for registration on the passive reunion registry under section 22 and has paid the fee referred to in subsection (3)(b) of that section.